

Compensation for Miscarriages of Justice

Some initial thoughts

1. The Criminal Justice Act 1988 s.133 provides for compensation –

133 - Compensation for miscarriages of justice.

- (1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.
- (2)
- (2A)
- (3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State.
- (4) If the Secretary of State determines that there is a right to such compensation, the amount of the compensation shall be assessed by an assessor appointed by the Secretary of State.
- (4A) Section 133A applies in relation to the assessment of the amount of the compensation.
- (5) In this section "reversed" shall be construed as referring to a conviction having been quashed—
 - (a) on an appeal out of time; or
 - (b) on a reference—
 - (i) under the Criminal Appeal Act 1995; or
 - (ii)
- (5A) But in a case where—
 - (a) a person's conviction for an offence is quashed on an appeal out of time, and
 - (b) the person is to be subject to a retrial,the conviction is not to be treated for the purposes of this section as "reversed" unless and until the person is acquitted of all offences at the retrial or the prosecution indicates that it has decided not to proceed with the retrial.
- (5B) In subsection (5A) above any reference to a retrial includes a reference to proceedings held following the remission of a matter to a magistrates' court by the Crown Court under section 48(2)(b) of the Senior Courts Act 1981.
- (6) For the purposes of this section and section 133A a person suffers punishment as a result of a conviction when sentence is passed on him for the offence of which he was convicted.
- (7)

2. Section 133 therefore requires that:

- (a). there is a new or newly discovered fact;
- (b). showing beyond reasonable doubt;
- (c). that a miscarriage of justice has occurred.

3. In the Supreme Court decision in *R. (on the application of Adams) v Secretary of State for Justice* [2011] UKSC 18, it was decided that the circumstances in which a conviction could be quashed on the basis of fresh evidence could be divided into four categories:
 - (i). where the fresh evidence clearly showed that the defendant was innocent;
 - (ii). where the fresh evidence was such that, had it been available at the time of the trial, no reasonable jury could properly have convicted;
 - (iii). where the fresh evidence rendered the conviction unsafe because, had it been available at the time of the trial, a reasonable jury might or might not have convicted;
 - (iv). where something had gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of somebody who should not have been convicted.
4. The Court determined that category (i). and (ii). cases clearly fell within s.133 but did not provide the exclusive definition of "miscarriage of justice" for the purposes of that section. Category (iii). and (iv). cases did not fall within s.133.
5. In the more recent Supreme Court decision in *R. (on the application of Ali & others) v Secretary of State for Justice* [2013] 2 All E.R. 1055 (the so-called "Barry George" case) the Supreme Court decided that in claims for compensation under s.133 brought by persons whose convictions had been quashed, a useful formulation for identifying whether the claim fell within category 2 identified in *ex parte Adams* was:

"...has the claimant established, beyond reasonable doubt, that no reasonable jury or magistrates properly directed as to the law could convict on the evidence now to be considered?"

6. The Court in *ex parte Ali & others* affirmed the principle that the Home Secretary is the person who applies the test and is subject to an application for Judicial Review where the applicant is aggrieved at the decision not to compensate. The Court also confirmed the test as being: a miscarriage of justice has occurred only where no jury could properly have convicted on the evidence and added this rider:

“.....where a weak case was advanced by the Crown, and there would have been a high chance of acquittal, it might still have been open to the jury properly to convict and accordingly there is no miscarriage even if the Court of Appeal quash the conviction.”

Initial opinion

7. I do not think that any of our cases fall within the scope of s.133 for the following reasons:
- i. None of our cases fall within ss.133(5)(a) or (b) as none has appealed out-of-time (sub-s.(5)(a)), indeed none have appealed at all; and none are references to the Court of Appeal or High Court (for Magistrates' Court convictions) by the CCRC (sub-s.(5)(b));
 - ii. The disclosure material is not, in my view, “...*fresh evidence [which] clearly showed that the defendant was innocent*” (*ex parte Adam* category (i). – see para.3 above);
 - iii. The disclosure material is not, in my view, “...*fresh evidence.....such that.....no reasonable jury could properly have convicted*” (*ex parte Adam* category (ii). – see para.3 above);
 - iv. Rather, the Second Sight Interim report and Helen Rose material is material which *may* have assisted a defendant in preparing his case on Horizon issues but which, equally, a jury may have convicted even had they known of the reports.

8. I rather think that, at its highest, the reports may have weakened our case against a particular defendant and the reasoning of the Supreme Court in *ex parte Ali & others* bites: “..... *there would have been a high chance of acquittal, it might still have been open to the jury properly to convict and accordingly there is no miscarriage even if the Court of Appeal quash the conviction.*”

9. My initial view therefore is that no compensation would be payable under s.133 CJA 1988 where a defendant successfully appeals against his conviction. Whether POL takes the view that they should make any *ex gratia* compensation payments is a matter for them alone and I make no comment on the matter.

10. It is worth pointing out however that my view as to the prospects of success of any individual defendant on appeal remains unchanged: I have yet to identify any case where the issues are so clear cut as guarantee success on appeal. Even then, I do not believe that any of our cases would be caught by the s.133/ *ex parte Adams / ex parte Ali & others* principles.

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