CASE OF NEALON AND HALLAM v. THE UNITED KINGDOM:

Article 6(2) and the presumption of innocence in wrongful conviction compensation proceedings: nothing but semantics?

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Introduction

The case of *Nealon and Hallam v. the United Kingdom* concerned a joint application from two individuals who were denied compensation for their wrongful convictions under the statutory scheme in England and Wales. The applicants argued s.133(1ZA) of the Criminal Justice Act 1988, as amended by the Anti-Social Behaviour, Crime and Policing Act 2014 (hereafter: s.133(1ZA)), was incompatible with Article 6 (2) of the European Convention on Human Rights (ECHR) and the presumption of innocence. The 2014 Act redefined a miscarriage of justice for the purposes of receiving compensation so applicants must show that a 'new or newly-discovered fact', which led to the quashing of their conviction, proved 'beyond reasonable doubt' they did not commit the offence. This long-awaited judgment will be of significant disappointment to miscarriage of justice victims and campaigners in England and Wales where concern has long arisen over the restrictiveness of the statutory scheme. The decision of the majority has arguably reduced protection for the presumption of innocence in Article 6 (2) to a primarily semantic exercise. Conversely, the dissenting opinion showed the potential for a different outcome which could have restored the compensation system for victims of miscarriages of justice in England and Wales to a much fairer position.

Summary of the facts

The first applicant, Victor Nealon, was convicted of rape in 1997 and served 17 years in prison before his conviction was quashed. The case was referred by the Criminal Cases Review Commission (hereafter: CCRC) in 2012 after analysis of the victim's clothing revealed DNA from an unknown male. Whilst the Court of Appeal (CA) concluded this undermined the safety of the conviction, they said it did not 'demolish' the prosecution's case.

The second applicant, Sam Hallam, was convicted of murder, conspiracy to commit grievous-bodily harm, and violent disorder, and served seven years in prison before his conviction was quashed. The CCRC referred his case in 2011 after evidence was discovered on the applicant's phone which supported his alibi for the offence. Again, whilst the CA found this undermined the safety of the conviction, it declined to comment on whether the new evidence rendered the applicant innocent on the facts.

Both applicants were refused compensation for their wrongful convictions under the statutory scheme in s.133(1ZA). They challenged this decision through Judicial Review to the High Court arguing that s.133(1ZA) was incompatible with Article 6 (2) of the ECHR by requiring them to prove their innocence. The court dismissed their claims firstly following the Supreme

Court in R v Adams (FC) v Secretary of State for Justice [2011] UKSC 18, which held Article 6 (2) had no bearing on compensation proceedings. If Article 6 (2) did apply, there was no breach because s.133(1ZA) only required the Justice Secretary to be satisfied of the link between the new fact and the applicant's innocence, but not of their innocence in the wider sense.

The applicants eventually appealed the decision up to the Supreme Court in 2019. The judges decided by majority of 4:3 that Article 6 (2) was applicable to compensation proceedings but by 5:2 that s.133(1ZA) was not incompatible with the presumption of innocence. The Supreme Court judges have been described as 'not talking with one voice' (Duffy, 2019) with different reasoning given for reaching their conclusions. However, Lord Mance, who gave the leading judgment, argued the current state of ECHR case law was not 'coherent or settled' (para 73) on the relevant points, expressing hope the Court may find s.133(1ZA) compatible with Article 6 (2) provided the decision on compensation did not suggest the defendant should have been convicted of the offence (para 79).

Arguments made by respective parties to the Grand Chamber

The applicants argued s.133(1ZA) violated the presumption of innocence. They highlighted the GC's comment in *Allen v. United Kingdom* that 'above all' it was important the applicant had not been required to demonstrate her innocence (at para 133), emphasising that s.133(1ZA) now requires applicants to do exactly that. Focus in compensation decisions on the new/newly-discovered fact from appeal proceedings was problematic because refusal undermined the factual foundation of their acquittal and raised suspicion about their innocence. The applicants also stressed, following *Hammern v. Norway*, it was insufficient for the Justice Secretary to caveat their decision with assurances it did not undermine the applicant's innocence because, whilst language was critical, its context was important to ensure Article 6 (2) was practical and effective.

The government argued in response that Article 6 (2) only went as far as to prevent a public authority from suggesting an acquitted person should have been convicted of the offence. The test in s.133(1ZA) did not require an applicant to prove their innocence in a general sense, as of concern in *Allen*, but only focused on whether the new/newly-discovered fact(s) proved the applicant did not commit the offence beyond reasonable doubt. The government also emphasised that in *Allen,* the GC said there was 'nothing intrinsically objectionable' about a Contracting State having a restrictive definition of a miscarriage of justice to draw a legitimate policy line between those entitled to compensation out of a wider class of successful appellants.

A UK-based charity, JUSTICE, submitted a third-party intervention highlighting how neighbouring jurisdictions to England and Wales, such as Scotland and Ireland, did not require proof of innocence for compensation to be granted, and many other ECHR signatory States found compensation to be automatic following the quashing of a conviction. JUSTICE also emphasised the negative impact of wrongful conviction and the potential importance of compensation to address some of these issues.

Summary of the Court's reasoning

The GC decided in the majority (12:5) that whilst Article 6 (2) did apply to compensation proceedings following acquittal, s.133(1ZA) did not breach the presumption of innocence.

The GC followed its reasoning in *Allen* that Article 6 (2) applies to compensation proceedings due to the close connection between these and the criminal appeal hearing, which triggers the application process. Additionally, compensation proceedings require consideration of the new/newly-discovered fact that led to the quashing of the conviction through evaluation of the evidence in the case in order to assess whether this showed beyond reasonable doubt the applicant did not commit the offence (para 127-129).

The majority concluded the statutory scheme in s.133(1ZA) did not breach the presumption of innocence. Article 6 (2) had two aspects, with the first being a procedural guarantee for trial proceedings, and the second, relevant here, its role to protect individuals who have been acquitted of a criminal charge/had criminal proceedings discontinued 'from being treated by public officials and authorities as though they were in fact guilty of the offence' (para 171). The majority stipulated that a breach would only arise where refusal of compensation had the effect of imputing criminal liability to the applicants, which was not the case for s.133(1ZA) (para 170).

Key to their decision was that s.133(1ZA) required the Justice Secretary to consider whether the new/newly-discovered fact showed beyond reasonable doubt the applicant did not commit the offence, which is distinct from deciding whether the applicants were guilty of the criminal offence, or whether criminal proceedings should have been decided differently. A refusal of compensation only meant it could not be shown to the very high standard of proof, beyond reasonable doubt, that the new/newly-discovered fact proved the appellant did not commit the offence, which is not tantamount to a positive finding that the applicant did commit the offence (para 180).

The majority also emphasised that Article 6 (2) does not guarantee a right to compensation for a wrongful conviction. The UK had not ratified Article 3 (Protocol 7). Nevertheless, whilst this provides a right to compensation for a 'miscarriage of justice,' respondent States could decide how to define this for these purposes. This allowed them to draw 'a legitimate policy line' as to who should be eligible for compensation out of the wider class of people who have their convictions quashed on appeal (para 172).

Finally, whilst the majority acknowledged the devastating impact of wrongful conviction, their only role was to decide whether s.133(1ZA) breached Article 6 (2) and not to determine how States should translate their 'moral obligation' to the wrongly convicted in material terms.

Five judges gave a joint dissenting opinion. Whilst they agreed with the majority that Article 6 (2) was applicable to compensation proceedings, they found s.133(1ZA) to be incompatible with the presumption of innocence. The reasoning of the dissenting opinion will be considered below in commentary.

Commentary

First, the UK Supreme Court criticised Strasbourg for allowing case law surrounding the scope and applicability of Article 6 (2) to compensation proceedings to descend into 'hopeless and

probably irretrievable confusion' (per Lord Wilson para 85). So, has the GC decision in *Hallam and Nealon* cleared this up?

The latest decision should settle debate around the applicability of Article 6 (2) to compensation proceedings following acquittal. The GC clarified the 'necessary link' between compensation proceedings and the conclusion of criminal proceedings meant Article 6 (2) was clearly applicable. The Court also eradicated the previous distinction between Article 6 (2)'s applicability to discontinuance of criminal proceedings and those following acquittal. It would now apply with the same effect in both instances, and a breach of Article 6 (2) would only arise where the decision and reasoning of domestic courts/other authorities amounts to 'the imputation of criminal liability to the applicant' (paragraph 168).

Nevertheless, whilst the GC has potentially succeeded in bringing more clarity to the case law, its conclusion about the scope of Article 6 (2) is disappointing. The majority's decision has arguably reduced the protection of the presumption of innocence in Article 6 (2) post-acquittal/discontinuance to nothing but a semantic exercise. The dissenting judges criticised the majority for rendering the protection in Article 6 (2) to becoming only 'theoretical and illusory' (para 9) through their implication that Convention compliance arises purely by ensuring that 'no wording to the effect the applicant is guilty or not innocent' is included in the decision.

To this effect, a particularly questionable point in the majority judgment is their comment at paragraph 179, commending avoidance of the term 'innocent' in s.133(1ZA) in preference for requiring the new/newly-discovered fact to show the defendant 'did not commit the offence'. Whilst acknowledging this did not 'significantly alter the meaning,' they consider the current term preferable to 'innocence' which had troubled the Court in previous judgments (e.g., *Allen*, *ALF v. UK*). Such comments only reinforce concerns that the latest decision has reduced protection for the presumption of innocence in Article 6 (2) to an exercise of caution in linguistics, as, in practice, proving the defendant 'did not commit the offence' cannot be meaningfully distinguished from having to prove their 'innocence'.

The majority judgment can also be criticised for accepting the government's argument that s.133(1ZA) did not require the Justice Secretary to comment on the applicant's wider innocence, but only on 'whether the new or newly-discovered fact showed beyond reasonable doubt that the applicant did not commit the offence in question' (para 180). First, in accepting this reasoning, the majority appears to somewhat contradict their earlier point in paragraph 128 where they justify the applicability of Article 6 (2) to compensation proceedings by stressing that it requires an 'evaluation of the evidence' insofar 'as necessary' to assess the impact of the new fact and whether it proves the applicant did not commit the offence. Second, as highlighted by Lord Reed in his dissenting judgment in the UK Supreme Court (para 84), there is arguably no realistic distinction to be drawn between assessing the impact of the new/newly-discovered fact on the applicant's innocence and assessing their innocence in a wider sense, because 'significance of a new piece of evidence can only be assessed in the context of the evidence as a whole'. Furthermore, Lord Reed emphasised that where the Justice Secretary decides the new/newly-discovered fact which led to the quashing of the conviction does not establish innocence beyond reasonable doubt, they directly cast 'doubt' on the applicant's innocence and undermine the acquittal (para 84).

Conversely, the dissenting judges should be commended for their focus on the practical effect of the statutory test in s.133(1ZA). They emphasised how s.133(1ZA) required reassessment of whether the applicant may have committed the offence after the conclusion of the appeal. Applicants had to prove their innocence in relation to the criminal law by way of the new/newly-discovered fact. Furthermore, the process involved a 'classic shifting of the burden of proof' by starting with the presumption that the person *did* commit the offence, which can only be rebutted if the applicant can show beyond all reasonable doubt they did not commit it (para 5). The minority also followed *Hammern* in deciding that caveats in compensation decision letters were insufficient to prevent a breach of Article 6 (2) because what mattered was the substantive test applied (para 7). Such reasoning provides strong support for concluding that s.133(1ZA) does breach Article 6 (2) in this regard.

It is disappointing, but perhaps not surprising, that Strasbourg has attempted to tread carefully in determining when a domestic compensation scheme for the wrongly convicted might breach the presumption of innocence. Strasbourg has clearly sought to give a wide leeway to signatory States in deciding how to define a miscarriage of justice for the purposes of compensation. However, potential concern may arise over whether this judgment gives other signatory States licence to restrict compensation to an extremely narrow category of applicants without concern this will breach Article 6 (2), provided the test used does not explicitly require an applicant to prove their 'innocence.'

It is difficult to conceive of any statutory test that could be more restrictive in practical effect than s.133(1ZA). The dissenting judges acknowledged that only around 3% of applicants for compensation for a wrongful conviction are successful, and that between 2017 and 2022 only 13 out of 346 applications were granted. The restrictive nature of the compensation test has attracted much academic discussion and criticism from wider campaigners (see for example, the Justice Gap). Notably, whilst the majority stopped short of criticising the test in s.133(1ZA) by emphasising it was not their job to comment on the 'moral obligation' owed by signatory States to the wrongly convicted, the inclusion of this point might indicate consensus that the practical effect of the test is morally questionable. The dissenting judges also highlighted at paragraph 8 that, whilst England and Wales responded to *Allen* by making the test for compensation 'even more difficult', the majority of Contracting States provide for strict State liability for a miscarriage of justice.

Arguably, the compensation regime for victims of miscarriages of justice in England and Wales has long been too restrictive, even prior to 2014. Since *R. v. Secretary of State for the Home Department ex parte Mullen* [2004] UKHL 18, it has been held that an applicant would not receive compensation where their conviction has been quashed purely on the basis that something went 'seriously wrong in the investigation of the offence or the conduct of the trial' (as per *R v Adams (FC) v Secretary of State for Justice* [2011] UKSC 18). Yet, there seems no justifiable reason why such applicants should be excluded when the State or prosecuting authorities have directly acted in contravention of the defendant's rights. Furthermore, in requiring applicants to show they did not commit the offence, the test is out-of-step with criminal proceedings where the CA is never required to comment or assess the applicant's factual innocence, but only to comment on the conviction's safety.

Going forward, we must hope the GC judgment in *Hallam and Nealon* does not lead to a wider trend amongst Contracting States to follow in the footsteps of England and Wales. Ultimately,

it will be down to individual States to ensure their moral obligation to victims of miscarriages of justice is fulfilled in an equitable way. In England and Wales, campaigners must focus on reforming the statutory test at a national level, but Strasbourg's latest decision has made it clear this can no longer be driven by arguments surrounding the impact on the presumption of innocence and potential incompatibility with Article 6 (2).