

# Not innocent enough: State compensation for miscarriages of justice in England and Wales

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## Abstract

*This article discusses the changing landscape of statutory compensation for victims of miscarriages of justice in England and Wales, in light of the recent legislative challenge, R (Hallam & Nealon) v Secretary of State for Justice. We argue that the Supreme Court's limited interpretation of the application of the presumption of innocence beyond criminal proceedings, and its conclusion that the statutory wording in section 133 of the Criminal Justice Act 1988 is compatible with article 6(2), places a near impossible burden on applicants for statutory compensation that is impractical and denies protection to those who have been let down by the State.*

## Introduction

While the International Covenant on Civil and Political Rights 1966 (ICCPR) provides a right to compensation for the wrongfully convicted, recourse to compensation has slowly diminished in England and Wales following recent changes in legislation and case law. Since the ex gratia compensation scheme was abolished in 2006, only the statutory provision under section 133 of the Criminal Justice Act 1988 (“section 133”) remains. Case law and subsequent legislative amendments have restricted eligibility for compensation to increase consistency in decision making and ensure that compensation is only payable “where the Secretary of State is satisfied that the applicant was innocent of the offence for which they were convicted.”<sup>1</sup> As a result, there has been a significant decline in the number of applications approved for compensation where a person has experienced a miscarriage of justice in England and Wales.

Section 175 of the Anti-social Behaviour, Crime and Policing Act 2014 amended section 133, introducing section 133(IZA) which now provides that compensation be granted “if and only if the new or newly discovered fact shows *beyond reasonable doubt* that the person

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<sup>1</sup> This was the Government's rationale when conducting the Impact Assessment in the final stage of the Anti-social Behaviour, Crime and Policing Bill, see <https://www.parliament.uk/documents/impact-assessments/IA13-17.pdf>.

*did not commit the offence*” (emphasis added). The new provision provides what is known colloquially as the “innocence test”.<sup>2</sup> It has resulted in the denial of compensation to most of those whose convictions are overturned by the Court of Appeal Criminal Division (CACD), even after a referral from the Criminal Cases Review Commission (CCRC).<sup>3</sup> Human rights groups and lawyers alike have criticised the reform for making an award of compensation almost impossible to achieve.<sup>4</sup>

*R (Hallam & Nealon) v Secretary of State for Justice*<sup>5</sup> (*Hallam*) is the latest in a long and confusing line of domestic and European Court of Human Rights (ECtHR) case law<sup>6</sup> which has considered the extent to which the presumption of innocence applies beyond criminal proceedings and specifically whether it applies to applications for compensation made under section 133. It provided the first opportunity for the courts in England and Wales to consider section 133 since it was amended by section 175. The central issue in the case was whether the newly formed test requiring an applicant to prove that they did not commit the offence – a test very different from that applied by the CACD in quashing a conviction – was compatible with the right to a presumption of innocence contained in article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The Supreme Court concluded that while article 6(2) could apply to applications for compensation eligibility in cases of miscarriages of justice, it was not automatically breached by way of the wording of section 133 (IZA). Further, the majority agreed that while there may be cases in which refusal of compensation infringes article 6(2) (discussed further below), this was not so in the specific cases of Hallam and Nealon. The Supreme Court found that a declaration of incompatibility under the Human Rights Act 1998 was inappropriate in this case.

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<sup>2</sup> See for example S. Barton, ‘The flaws in the ‘Innocence Test’, *The Justice Gap*, 23 January 2015, <<https://www.thejusticegap.com/flaws-innocence-test/>>.

<sup>3</sup> The Criminal Cases Review Commission reviews cases which have failed at appeal but where the applicant believes that there has been a wrongful conviction and, if it determines there is a “real possibility” the CACD would find the conviction to be unsafe, refers the case back to the CACD. See <https://ccrc.gov.uk/> and for a discussion of CCRC decision making see, C. Hoyle and M. Sato (2019) *Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission*, Oxford University Press.

<sup>4</sup> See for example JUSTICE Report, ‘Supporting Exonerees; Ensuring accessible, consistent and continuing support’, 17 April 2018.

<sup>5</sup> *R (on the application of Hallam) v Secretary of State for Justice; R (on the application of Nealon) v Secretary of State for Justice* [2019] UKSC 2.

<sup>6</sup> Including *R (on the application of Mullen) v Secretary of State for the Home Department* [2004] UKHL 18, [2004] 2 WLR 1140; *R (on the application of Allen) v Secretary of State for Justice* [2008] EWCA Civ 808, [2009] 2 All E.R. 1; *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC; *R (Ali and others) v Secretary of State for Justice* [2013] EWHC 72 (Admin) and *Allen v United Kingdom* (2542409/9) (2016) 63 EHRR 10, [2013] 7 WLUK 424.

While the *Hallam* decision may appear logical as a matter of strict legal theory, it suggests that it demonstrates a lack of understanding of the lived experiences of individuals who have been wrongfully convicted in cases where the criminal justice safety nets have failed. Inevitably it places an unreachable burden on an applicant to provide significantly more exculpatory evidence than they were required to provide when appealing their criminal conviction.

In this article we raise a number of points in relation to the changing landscape of statutory compensation for miscarriages of justice in England and Wales, in light of the recent legislative challenge in *Hallam*. The paper begins with an introduction to the statutory scheme for compensation under section 133. We briefly summarise the jurisprudence that developed the definition for “miscarriages of justice” that is now entrenched in section 133(IZA), before turning our attention to *Hallam*. We critique this judgment in three main ways. First, the Court’s interpretation of the application of the presumption of innocence beyond criminal proceedings is limited, and conducted with the civil courts in mind but with little practical thought to its application to decisions made by the executive. Secondly, by taking this limited interpretation of the presumption of innocence, and confirming it applies to section 133 but only in this limited sense, the Court has imposed an almost impossible burden on applicants in a non-judicial, non-transparent process. Finally, the Court’s approach has little regard for how section 133(IZA) is to be satisfied in practice, and the implications it has on people who have been wrongfully convicted. To support these claims, we rely on application data and qualitative interviews with people who have been wrongfully convicted,<sup>7</sup> as well as lawyers who have assisted with compensation applications.

Our focus is on those victims of miscarriages of justice at the extreme end of the scale; that is, individuals who have been convicted in the Crown Court, had one or a number of unsuccessful appeals, and had their conviction quashed only after a referral from the CCRC or an appeal out of time – people for whom the criminal justice safety nets have failed repeatedly until the very last time. *Hallam* and *Nealon* both fall into this category. These cases are rare; while the CACD is statutorily obliged to hear every appeal referred by the CCRC, the Commission refers only between 1 and 3% of the cases it reviews each year, a very small

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<sup>7</sup> Data was gathered from qualitative interviews with wrongfully convicted persons (who had their convictions quashed after their rights to direct appeal had been exhausted) and case files of over 60 clients of the Miscarriages of Justice Support Service (MJSS), a not-for-profit organisation that provides support to the wrongly convicted.

proportion of the approximately 1,400 applications it receives annually.<sup>8</sup> In 2017 – 2018, the CACD heard six CCRC referrals, with a “success rate” for quashing a conviction or amending a sentence of 66.7%.<sup>9</sup> If those at this extreme end are not considered eligible for compensation, there is little hope for others claiming compensation for a miscarriage of justice in any other circumstance.

### **The statutory compensation scheme for victims of miscarriages of justice**

The right to compensation for a wrongful conviction is entrenched in article 14(6) of the ICCPR and ratified in the European Convention of Human Rights and domestic legislation. Article 14(6) provides for the right to compensation if a person has been convicted and had that conviction reversed or been pardoned, where:

... a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.<sup>10</sup>

A strict reading of article 14(6) suggests that the right to compensation should be extended to all individuals who have had their convictions quashed because of a newly discovered fact. However, article 14(6) does not define “miscarriage of justice”, leaving the scope of eligibility for compensation to domestic discretion.

Eligibility for compensation after a quashed conviction is not automatic in England and Wales, where there is merely a right to *apply* for compensation after a conviction has been quashed. The burden rests on the person who has suffered the miscarriage of justice to request compensation from the State and to prove it is deserved.

The statutory scheme in England and Wales is provided by section 133 of the Criminal Justice Act 1988, which ratifies article 14(6) of the ICCPR.<sup>11</sup> Those who may apply for compensation for a miscarriage of justice must to do so within two years of having their

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<sup>8</sup> Criminal Cases Review Commission: Annual Report and Accounts 2017/2018, 16 -18.

<sup>9</sup> Criminal Cases Review Commission: Annual Report and Accounts, 2017/2018, 19.

<sup>10</sup> International Covenant on Civil and Political Rights, article 14(6).

<sup>11</sup> Initially, compensation for the wrongfully convicted in England and Wales was provided through both a discretionary scheme and a statutory scheme, but now only the latter exists. See S Lipscombe and J Beard, ‘Miscarriages of justice: compensation schemes’ *House of Commons, Home Affairs* SN/HA/2131, 6 March 2015 <<http://researchbriefings.files.parliament.uk/documents/SN02131/SN02131.pdf>>; H Quirk, and M Requa, ‘The Supreme Court on Compensation for Miscarriages of Justice: is it better that ten innocents are denied compensation than one guilty person receives it?’ (2012) *The Modern Law Review* 75(3) 399.

conviction “reversed” or having been granted a Free Pardon.<sup>12</sup> The meaning of “reversed”, for the purposes of applying for compensation, includes a conviction that has been quashed:

- on an appeal out of time without retrial;
- on an appeal out of time with a retrial granted, but the applicant was acquitted of all offences at the retrial or the prosecution indicated that it has decided not to proceed with the retrial;
- after referral to the Court of Appeal by the Criminal Cases Review Commission under section 9 of the Criminal Appeal Act 1995;
- on appeal under Section 7 of the Terrorism Act 2000; or
- on appeal under Schedule 3 to the Terrorism Prevention and Investigation Act 2011.<sup>13</sup>

In England and Wales, the decision on eligibility for, and determination of, compensation in these circumstances is via a non-judicial process: it is not considered or determined by a court but rather a public official (the Secretary of State, who determines eligibility, and the Independent Assessor, who decides on the amount of compensation if the applicant is deemed eligible).<sup>14</sup> The determination of compensation sits wholly outside the criminal justice system, and is not a claim made in a civil court, but rather an application to the executive for an “act of grace”. Decisions about eligibility for the statutory compensation scheme are based on the CACD judgment, the grounds of appeal, the CCRC’s Statement of Reasons for the referral to the CACD (if the case had been referred by the CCRC) and other relevant case documents,<sup>15</sup> although there is no way to know how the Secretary of State makes their decision or what exactly is taken into account.

The non-judicial nature of the statutory compensation scheme raises issues of accountability. Decisions made by the Secretary of State are not publicly available, eliminating the opportunity for precedent; no reasons are required to be given for eligibility decisions or determination of the compensation amount. Applicants must often rely on anecdotal information to shape their applications. Applicants can be, but do not have to be, legally

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<sup>12</sup> Criminal Justice and Immigration Act 2008, s 61. A conviction quashed within 28 days is no longer within the scope of section 133, thus narrowing the scope for eligibility for compensation when compared to the discretionary scheme, under which an applicant could, in exceptional circumstances, still be eligible for compensation following the reversal of a conviction made within the usual time limit of 28 days. See S Lipscombe and J Beard, ‘Miscarriages of justice: compensation schemes’ *House of Commons, Home Affairs* SN/HA/2131, 6 March 2015.

<sup>13</sup> Application for compensation for miscarriage of justice: Annex A (4) <https://hmctsformfinder.s3.amazonaws.com/forms/guidance/index.htm#jump-3>.

<sup>14</sup> The current Independent Assessor (as of May 2019) is Dame Linda Dobbs DBE, a former judge of the High Court; see Ministry of Justice Press Release (2016) *New Independent Assessor for Miscarriages of Justice*, 8 April [<https://www.gov.uk/government/news/new-independent-assessor-of-compensation-for-miscarriages-of-justice>].

<sup>15</sup> The list of documents required in support of an application for compensation is outlined here: <https://www.gov.uk/claim-compensation-for-miscarriage-of-justice>.

represented. There are no rules of evidence, despite the test requiring a criminal standard of proof, nor are there procedural safeguards that would usually be applied in a courtroom. Its highly discretionary nature and lack of transparency creates the opportunity for gross arbitrariness.<sup>16</sup> Dioso-Villa describes compensation, clemency and pardon as “lawful lawlessness”; policy mechanisms written into the law but operating outside of it, on different principles.<sup>17</sup> These safeguards, intended to catch and repair errors in the system, effectively operate on moral rather than legal grounds, which leads to an absence of accountability, transparency or regulation.

### **Why compensate?**

It is worth outlining why victims of wrongful convictions are (or at least should be) compensated, particularly when we consider the implications of imposing such a narrow test to obtain this form of redress.

The first and arguably most important aim of financial compensation for a miscarriage of justice is to compensate for what has been lost. Our data<sup>18</sup> showed that by the time a conviction is quashed by the CACD, there has been a significant accumulation of financial costs to the wrongfully convicted. Money has been spent on legal fees, innocence campaigns and providing financial support to families while the wrongfully convicted person languishes in prison unable to earn a proper salary. Some of those in our database had to sell their homes to fund their appeals. Very many were homeless upon release from prison, without funds to rent or purchase a home; in debt to families, friends and banks. Almost all lost their jobs following their wrongful conviction. Those who were convicted of serious offences were then released from prison immediately after their conviction was quashed, with little more than the £46 discharge grant.<sup>19</sup> Given this accumulating disadvantage, compensation can be viewed as a means of financially restoring some of what has been lost, as described by one of the compensation lawyers that we interviewed:

... [it’s] a question of compensating somebody not for the sake of compensating them, but for giving them something back for the life that has been taken and drained from them over that

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<sup>16</sup> S Roberts (2003) ‘Unsafe Convictions: Defining and Compensating Miscarriages of Justice’ *Modern Law Review*, 66(3), 451.

<sup>17</sup> R Dioso-Villa (2014) ‘Out of Grace: Inequity in Post-exoneration remedies for wrongful conviction’ *UNSW Law Journal* 37(1), 370.

<sup>18</sup> Clients within their remit are only those in the most extreme circumstances.

<sup>19</sup> Ministry of Justice National Offender Management Service, ‘Discharge’ PSI 72/2011 (last updated 29 December 2015) 9 <[https://www.justice.gov.uk%2Fdownloads%2Foffenders%2Fpsipso%2Fpsi-2011%2Fpsi-72-2011.doc&usg=AOvVaw09RAvsnUvECdNJAHHt\\_P6e](https://www.justice.gov.uk%2Fdownloads%2Foffenders%2Fpsipso%2Fpsi-2011%2Fpsi-72-2011.doc&usg=AOvVaw09RAvsnUvECdNJAHHt_P6e)>.

period of incarceration ... there's been a major detriment to health physically, mentally, and some get to a point where they just can't take it anymore.<sup>20</sup>

Furthermore, our interviews showed that compensation can help those exonerated to find appropriate housing and subsist while they try to re-enter the workforce.<sup>21</sup> We have previously argued<sup>22</sup> that the wrongfully convicted need help to rebuild their social capital. Compensation can help with that process; it can support those who need to rebuild their identities, not only in providing material comforts, but also in acknowledging that they are deserving of an apology and not guilty of the offence for which they were convicted.

It is important to understand the relationship between compensation and apologies. The rarity of explicit apologies made by the Government<sup>23</sup> leaves compensation as the only mechanism for communicating an apology when a conviction is quashed by the CACD. As Dame Ruth Runciman<sup>24</sup> explained, “the payment of compensation is the closest [the victims] will come to receiving an apology from the State”.<sup>25</sup> This view was reflected in our interviews with victims of wrongful conviction and their families, with one person describing compensation as a “sorry payment”.<sup>26</sup>

Clearly, compensation not only assists with addressing the practical needs of the wrongfully convicted; as Campbell and Denov point out, it is sought by victims of miscarriages of justice “more for its symbolic rather than its actual value.”<sup>27</sup> An award after a successful application can constitute a public declaration that the shame imputed<sup>28</sup> upon the individual in conviction and sentencing was attributed in error. As the ECtHR acknowledged in *Allen*, “what is also at stake once the criminal proceedings have concluded is the person’s reputation and the way in which the person is perceived by the public”.<sup>28</sup> Compensation is seen as a way to address this

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<sup>20</sup> Interview with Lawyer F.

<sup>21</sup> L Tilt and C Hoyle (2018) ‘The Benefits of Social Capital for the Wrongfully Convicted: Considering the Promise of a Resettlement Model’ *The Howard Journal of Crime and Justice* 57(4) 495-517.

<sup>22</sup> L Tilt and C Hoyle (2018) ‘The Benefits of Social Capital for the Wrongfully Convicted: Considering the Promise of a Resettlement Model’ *The Howard Journal of Crime and Justice* 57(4) 495-517.

<sup>23</sup> The only apology provided by the UK Government was by Tony Blair in 2005, who apologised to the Guildford Four and Maguire Seven, stating that “I recognise the trauma that the conviction caused the Conlon and Maguire families and the stigma which wrongly attaches to them to this day. I am very sorry that they were subject to such an ordeal and such an injustice... They deserve to be completely and publicly exonerated”. See ‘Apology by Tony Blair, then Prime Minister, to Guildford Four and Maguire Seven for the miscarriage suffered by them’ (9 February 2005) <<http://cain.ulst.ac.uk/issues/politics/docs/pmo/tb090205.htm>>.

<sup>24</sup> Chairman of the Miscarriages of Justice Support Service.

<sup>25</sup> R Runciman, ‘Anti-Social Behaviour Bill briefing’ The Justice Gap (8 November 2013) <<https://www.thejusticegap.com/anti-social-behaviour-bill-briefing/>>.

<sup>26</sup> Interview with Ralph (pseudonym).

<sup>27</sup> K Campbell and M Denov (2004) ‘The Burden of Innocence: Coping with a Wrongful Imprisonment’ *Canadian Journal of Criminology and Criminal Justice* 46(2) 155.

<sup>28</sup> *Allen v United Kingdom* (2542409/9) (2016) 63 EHRR 10, [2013] 7 WLUK 424 at [94].

damage that has been caused by a wrongful conviction to a person's reputation and identity. As well as a "sorry payment", it can be a mitigating force against the stigma that results from a conviction; a stigma that can remain even after a conviction is quashed.<sup>29</sup> Compensation can be seen to symbolise public accountability for the harm caused, or can act as a form of apology for what has happened.<sup>30</sup> One family member we interviewed (whose brother did not receive compensation, despite having his conviction quashed) described why his brother would have wanted compensation and how it could have represented an acknowledgment of wrongdoing:

Compensation would at least show that this country knows they did wrong ... not just the police, the entire justice system ... that says this was wrong and therefore ... this case should not have been taken.<sup>31</sup>

It is important to keep these rationales in mind when we consider the now heavily restricted access to compensation that imposes an almost impossible burden on those who seek it.

### **Criteria for eligibility under section 133(IZA): the meaning of a "miscarriage of justice" for the purposes of compensation**

As noted above, Article 14(6) leaves the meaning of "miscarriages of justice" to the discretion of the State, meaning that each jurisdiction can determine in what circumstances an individual would be eligible to obtain compensation in this context. When applying for compensation for a miscarriage of justice in England and Wales, the applicant must satisfy the requirement under section 133 which states that:

...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.<sup>32</sup>

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<sup>29</sup> See L Tilt (2018) 'The aftermath of wrongful convictions: addressing the needs of the wrongfully convicted in England and Wales', DPhil thesis, available at <https://ora.ox.ac.uk/objects/uuid:5f380086-a17a-4ab6-85cf-3874620ce24e>.

<sup>30</sup> As noted by participants in K Campbell and M Denov, 'The Burden of Innocence: Coping with a Wrongful Imprisonment' (2004) *Canadian Journal of Criminology and Criminal Justice* 46(2) 156. Similarly, in Jenkin's study, the wrongfully convicted expressed their desire for their wrongful conviction to be acknowledged by the State: S Jenkins (2013) 'Miscarriages of Justice and the Discourse of Innocence: Perspectives from Appellants, Campaigners, Journalists and Legal Practitioners' *Journal of Law and Society* 40(3) 349.

<sup>31</sup> Interview with Graham (pseudonym).

<sup>32</sup> Criminal Justice Act 1988, s133(1).

This is very similar wording to article 14(6) – noted in our introduction above - with the important exception that the new or newly discovered fact must show “beyond reasonable doubt” – rather than “conclusively” – that there has been a miscarriage of justice (although these were held in *Allen v UK* to be synonymous).<sup>33</sup> Section 133 also similarly did not define ‘miscarriage of justice’, which was left to judicial interpretation. Prior to the introduction of section 133(IZA), definitions were developed through a series of cases brought before the courts, culminating in the Supreme Court judgment in *Adams*.<sup>34</sup>

According to Lord Phillips in *Adams*, the aim of section 133 was to ensure that while individuals should be entitled to compensation if convicted for crimes they did not commit, it should not be allowed for those convicted of crimes they did commit but whose conviction was nevertheless considered to be unsafe:

[Section 133] is to provide entitlement to compensation to a person who has been convicted and punished for a crime that he did not commit. But there is a subsidiary object of the section. This is that compensation should not be paid to a person who has been convicted and punished for a crime that he did commit. The problem with achieving both objects is that the quashing of a conviction does not of itself prove that the person whose conviction has been quashed did not commit the crime of which he was convicted.<sup>35</sup>

As the quashing of a conviction does not necessarily mean the person did not commit the crime (a conviction can be quashed, for example, based on the denial of a fair trial but the defendant may still be factually guilty), simply being exonerated cannot give rise to an automatic right to compensation.<sup>36</sup> In *Adams*, Lord Phillips identified four main categories of potential miscarriages of justice which can result in the quashing of a conviction:

- (1) cases where the fresh evidence shows clearly that the defendant is innocent of the crime of which he was convicted;
- (2) cases where the fresh evidence so undermines the evidence against the defendant that no conviction could possibly be based upon it;
- (3) cases where the fresh evidence renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant; and

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<sup>33</sup> *Allen v United Kingdom* (2542409/9) (2016) 63 EHRR 10, [2013] 7 WLUK 424 at [128].

<sup>34</sup> [2011] UKSC 18.

<sup>35</sup> *R (Adams) v Secretary of State for Justice* [2011] UKSC 18 at [37].

<sup>36</sup> H Quirk and M Requa (2012) ‘The Supreme Court on Compensation for Miscarriages of Justice: Is it better that ten innocents are denied compensation than one guilty person receives it?’ *The Modern Law Review* 75(3) 390.

(4) cases where something has gone seriously wrong in the investigation of the offence of the conduct of the trial, resulting in the conviction of someone who should not have been convicted.

The Court held by a majority that “miscarriages of justice” for the purpose of section 133 referred to all cases that fell within category (2). It also therefore included – although was not limited to – cases that fell within category (1).<sup>37</sup>

In *R (Ali & Ors) v Secretary of State for Justice*,<sup>38</sup> the High Court reconsidered the definition of “miscarriages of justice” for the purpose of section 133 in five leading cases: Ismail Ali, Barry George, Kevin Dennis, Justin Turnbridge and Ian Lawless. It was concerned with a lack of clarity in the *Adams* decision distinguishing between the different categories of miscarriages of justice, and instead proposed a new definition which the High Court believed to be synonymous, but clearer for lawyers and the Secretary of State:

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?<sup>39</sup>

Based on this definition, the Court dismissed all applications for compensation except that of Ian Lawless and ordered the Secretary of State for Justice to reconsider his decision to refuse compensation in that case.

In the light of these judicial attempts at defining “miscarriage of justice”, section 175 of the Anti-Social Behaviour, Crime and Policing Act 2014, outlined above, came into force on 13 March 2014. It inserted subsection 1ZA into section 133 of the 1998 Act, defining a miscarriage of justice for the purposes of the Act as:

...if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence...<sup>40</sup>

This was clearly a much more limited definition than that proposed by the Court in *Ali & Ors*. A 2013 Ministry of Justice Impact Assessment suggested that the likely effect of this provision was to ensure that compensation was only given to those who could clearly demonstrate they were innocent. Further, the amendment to the legislation was aimed at reducing the burden on taxpayers and “unnecessary and expensive legal challenges to government decisions to refuse

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<sup>37</sup> *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48 at [55].

<sup>38</sup> [2013] EWHC 72 (Admin).

<sup>39</sup> *R (on the application of Ali & Ors) v Secretary of State for Justice* [2013] EWHC 72 (Admin) at [41].

<sup>40</sup> Criminal Justice Act 2003, s133(1ZA).

compensation”.<sup>41</sup> It may have in fact done the opposite, given the lengthy appeals of Nealon and Hallam<sup>42</sup> described below. The assessment further stated:

By confirming a relatively narrow definition, the provision seeks to generate a more predictable and consistent approach to identifying cases where a miscarriage of justice has taken place. A clear definition enshrined in statute would make it easier for meritorious claimants to claim, and would make decisions on eligibility more transparent, and less likely to be the subject of legal challenge.<sup>43</sup>

While the definition might appear narrow and concise, we believe it to be unfair in practice, given how heavily it restricts access to compensation. One only has to look at the debates in Parliament prior to the introduction of section 133(IZA) to know that the definition of a “miscarriage of justice” is conflated with the need to prove innocence.<sup>44</sup> As we will discuss further below, following this amendment to section 133, those who have had convictions overturned by the CACD – even after a referral from the CCRC - are not usually “innocent enough” to receive compensation. The latest challenge in *Hallam* has only confirmed this.

### **The recent challenge: *Hallam***

Sam Hallam was given a life sentence at 17 years of age in 2005 for a gang-related murder; he had his conviction quashed by the CACD after a referral by the CCRC in 2012. No forensic evidence linked him to the crime and his conviction rested substantially on witness identification evidence, however there was also no evidence to support his alibi. Hallam’s mobile phone was later found not to have been examined at the time of his prosecution; it emerged that it contained photographs which undermined the likelihood that his alibi was fabricated. In other words, Hallam’s phone contained photographs that support his claim that he was not at the scene of the crime at the time of the murder, but elsewhere. The CACD found that cumulatively, these factors were sufficient to render the conviction unsafe. The Crown

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<sup>41</sup> Ministry of Justice, ‘Impact Assessment: Clarifying the circumstances under which compensation is payable for Miscarriages of Justice (England and Wales)’ 9 May 2013, 7.

<sup>42</sup>*R (on the applications of Nealon and Hallam) v The Secretary of State for Justice* [2015] EWHC 1565 (Admin).

<sup>43</sup> Ministry of Justice, *Impact Assessment: Clarifying the circumstances under which compensation is payable for Miscarriages of Justice (England and Wales)* 9 May 2013, 2.

<sup>44</sup> See for example Hansard (HC) 4 February 2014, vol 575, available at <https://hansard.parliament.uk/Commons/2014-02-04/debates/14020474000002/Anti-SocialBehaviourCrimeAndPolicingBill?highlight=compensation%20miscarriage%20justice#contribution-14020475000001>.

Prosecution Service (CPS) did not seek to uphold the conviction or conduct a retrial in his case.<sup>45</sup>

Victor Nealon was convicted of attempted rape in 1997 and spent 17 years in prison before his conviction was quashed. His conviction rested upon identification evidence, but DNA testing was not undertaken at the time of the attack. Later, when DNA tests were carried out on the victim's clothing and revealed DNA of an unknown individual (and none that could be attributed to Nealon), the CCRC referred the case to the CACD. The Court concluded that the new DNA evidence rendered the conviction unsafe, because a jury may have decided the case differently based on this fresh evidence. However, it acknowledged that this evidence was not conclusive, and it was possible that no DNA was transferred from the attacker to the victim's clothing.

Both Hallam and Nealon applied to the Secretary of State for compensation. Both had their applications rejected because their cases they did not satisfy the test under section 133 as amended. They sought a declaration of incompatibility with article 6(2). This was rejected in the Divisional Court which held that it was bound by the previous Supreme Court decisions of *Adams*<sup>46</sup> and *Allen*<sup>47</sup> that article 6(2) did not apply to determinations of compensation eligibility in this context (despite the ECtHR deciding the contrary in *Allen v UK*).<sup>48</sup> The Court of Appeal agreed, considering it too was bound by the decisions of *Adams* and *Allen* that article 6(2) was not applicable to section 133. However, the Court went on to note that, if it had not been bound by *Adams*, it would have followed the judgment of *Allen v UK*.<sup>49</sup>

The central issue in the Hallam and Nealon appeal was whether the provisions of section 133 as amended were compatible with the presumption of innocence protected under article 6(2). The Supreme Court had three questions to consider:

1. Does the right to a presumption of innocence enshrined in article 6(2) apply beyond criminal proceedings to decisions on applications for compensation under section 133 (that is, should the court depart from what was decided in *Adams*)?

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<sup>45</sup> *R v Hallam (Sam)* [2012] EWCA Crim 1158, [2012] 5 WLUK 518. For discussion see C Hoyle, 'Compensating Injustice: The Perils of the Innocence Discourse' in J Hunter, P Roberts, S NM Young, and D Dixon (eds), *The Integrity of Criminal Process: From Theory into Practice* (Oxford, Hart Publishing, 2016).

<sup>46</sup> *R (on the application of Adams) v Secretary of State for Justice* [2011] UKSC 18, [2012] 1 AC 48.

<sup>47</sup> *R (on the application of Allen) v Secretary of State for Justice* [2008] EWCA Civ 808, [2009] 2 All E.R. 1.

<sup>48</sup> *R (on the application of Adams) v Secretary of State for Justice* [2009] EWHC 156 (Admin).

<sup>49</sup> *Allen v United Kingdom* (2542409/9) (2016) 63 EHRR 10, [2013] 7 WLUK 424.

2. If so, is the definition of “miscarriages of justice” in section 133(IZA) incompatible with article 6(2)?
3. Were the decisions made by the Secretary of State in relation to the cases of Hallam and Nealon incompatible with article 6(2) (even if the wording of section 133 is not)?

We consider each of these questions, and critique the Court’s response, in turn below.

***Does the presumption of innocence extend beyond the criminal trial to applications for compensation for a miscarriage of justice?***

The presumption of innocence is enshrined in article 6(2) of the European Convention on Human Rights:

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

This right has both a narrow and wide interpretation. In its narrow sense, it generally ensures a defendant at trial does not have to prove their innocence, but rather, the prosecution must prove their guilt beyond reasonable doubt.<sup>50</sup> More widely, it has also been interpreted as requiring an accused person to be treated as innocent not just at trial, but at all stages of the pre-conviction and post-acquittal process.<sup>51</sup> This includes a “reputational aspect”, such as prohibiting a public figure from making statements as to guilt prior to arrest and trial, or not requiring a defendant to pay costs after being acquitted.<sup>52</sup>

While the presumption of innocence is widely accepted to be a fundamental principle of law and essential to the fairness of the criminal process,<sup>53</sup> interference with it has been considered compatible if proportionate and necessary in a democratic society.<sup>54</sup> However, academics have criticised the threats posed to this right: Ashworth, for example, has described

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<sup>50</sup> However, “the mere fact that the burden of proof falls entirely on the prosecution for all elements of an offence does not in and of itself entail that there is no interference with the presumption of innocence”: see V Tadros and S Tierney (2004) ‘The Presumption of Innocence and the Human Rights Act’ *Modern Law Review* 406. Tadros and Tierney also argue that the presumption of innocence “affects the substance of the criminal law” as interference should take the purpose of the criminal offence into account: Tadros and S Tierney (2004) ‘The Presumption of Innocence and the Human Rights Act’ *Modern Law Review* 415-416.

<sup>51</sup> See A Ashworth (2006) ‘Four Threats to the Presumption of Innocence’ *International Journal of Evidence* 10(4) 243 – 244.

<sup>52</sup> See S. Trechsel, *Human Rights in Criminal Proceedings* (Oxford University Press: Oxford, 2005) 178–91.

<sup>53</sup> For more on the rationale behind the presumption of innocence, see A Ashworth (2006) ‘Four Threats to the Presumption of Innocence’ *International Journal of Evidence* 10(4).

<sup>54</sup> *R v Lambert* [2002] 2 AC 545 HL. For discussion and critique see V Tadros and S Tierney (2004) ‘The Presumption of Innocence and the Human Rights Act’ *Modern Law Review* 402 – 434.

the use of civil and hybrid proceedings as a potential “evasion” of the presumption of innocence (amongst other threats),<sup>55</sup> while Tadros has argued that the right is “inviolable”.<sup>56</sup>

In construing the application of article 6(2) to section 133 decisions, the Supreme Court in *Hallam* was required under the Human Rights Act to “take into account” any relevant case law of the ECtHR.<sup>57</sup> *Allen v UK*<sup>58</sup> was the most relevant. Contrary to the decisions made by the Supreme Court in *Adams* and *Allen*, the ECtHR held in *Allen v UK* that article 6(2) *does* apply outside criminal proceedings and extends to decisions made under section 133. The Court in *Allen* noted that the presumption of innocence had two aspects; firstly, it safeguards “the right to be presumed innocent until proven guilty according to law” within the context of a criminal trial; secondly, it “protect[s] individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged”.<sup>59</sup> It was the second aspect that was said to be related to compensation decisions where a conviction had been quashed and thus the aspect at play in *Allen v UK*. In light of this ECtHR case, Lord Mance and Lady Hale in *Hallam* agreed that, as Hale put it, “all the arguments deployed by the majority in *Adams* in holding that article 6(2) was simply not engaged in section 133 cases have been comprehensively rejected by the Strasbourg court”<sup>60</sup> – notably in *Allen v UK* - and that article 6(2) does in fact apply to decisions regarding compensation for miscarriages of justice under section 133.

But what, exactly, does it mean for the right to a presumption of innocence to apply in these non-judicial proceedings? The ECtHR in *Allen v UK* framed it as “protection to ensure respect for the acquittal or the discontinuation decision”. Lord Phillips in *Gale*<sup>61</sup> was of the view that:

all the cases establish is that article 6(2) prohibits a public authority from suggesting that an acquitted defendant should have been convicted on the application of the criminal standard of proof...<sup>62</sup>

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<sup>55</sup> A Ashworth (2006) ‘Four Threats to the Presumption of Innocence’ *International Journal of Evidence* 10(4) 243 – 244.

<sup>56</sup> V Tadros (2007) ‘Rethinking the presumption of innocence’ *Criminal Law and Philosophy* 1:193-213.

<sup>57</sup> *R (on the application of Hallam) v Secretary of State for Justice; R (on the application of Nealon) v Secretary of State for Justice* [2019] UKSC 2 at [35].

<sup>58</sup> *Allen v United Kingdom* (2542409/9) (2016) 63 EHRR 10, [2013] 7 WLUK 424.

<sup>59</sup> As above at [94].

<sup>60</sup> *R (on the application of Hallam) v Secretary of State for Justice; R (on the application of Nealon) v Secretary of State for Justice* [2019] UKSC 2 at [77].

<sup>61</sup> *Serious Organised Crime Agency v Gale* [2011] UKSC 49.

<sup>62</sup> As above.

For the ECtHR in *Allen v UK*, the link between the acquittal in criminal proceedings and other proceedings which are not in pursuit of a criminal conviction was key in determining whether or not article 6(2) applied. This link may apply, for example, to civil proceedings where the decision-maker must conduct an analysis of the evidence in, and outcome of, a criminal trial, but to a different standard of proof to obtain a different outcome.<sup>63</sup> However, in *Hallam*, Lord Mance in his leading judgment did not see the concept of a link as “critical”, but rather took the view of Lord Phillips (with whom he concurred) in *Gale* that:

the real test is, or should be, whether the court in addressing the civil claim has suggested that the criminal proceedings should have been determined differently. If it has, it has exceeded its role.<sup>64</sup>

This is a very limited view of the application of the presumption of innocence beyond the criminal trial, but was based on the concern that civil proceedings should not be restricted by the court having to state conclusions in language which is less than transparent. Courts in civil proceedings often use the same evidence presented in the criminal trial, but to a different end. Thus, where a civil court or public authority discusses issues relating to the commission of a criminal offence, they should be free to do so as long as they do not suggest that a criminal court would or should have found the defendant guilty. This reasoning was applied by Lady Hale to section 133 applications. Her ladyship noted that “if it be right that the true question is whether the Secretary of State, or a court in judicial review proceedings, has suggested that the defendant ought to have been convicted, then it does not seem impossible to explain a refusal of compensation without doing this.”<sup>65</sup>

However, this reasoning – and the case law from which it was derived<sup>66</sup> - was based on the effect of the presumption of innocence on the ability of *civil courts* to do justice, rather than a decision taken by the *executive* to compensate an individual for harm. Compensation applications are not analogous to civil claims and therefore this application of the presumption of innocence could be flawed. Civil courts must decide outcomes independently without being influenced by the decision in other proceedings, such as a criminal trial, on the civil standard of proof and with the civil rules of evidence and procedure. However, in compensation applications under section 133, the Secretary of State – who is not bound by any rules of

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<sup>63</sup> *Allen v United Kingdom* (2542409/9) (2016) 63 EHRR 10, [2013] 7 WLUK 424 at [104].

<sup>64</sup> *R (on the application of Hallam) v Secretary of State for Justice; R (on the application of Nealon) v Secretary of State for Justice* [2019] UKSC 2 at [47].

<sup>65</sup> As above at [81].

<sup>66</sup> For example, *Orr v Norway* and *Ashendon and Jones v United Kingdom* (Application Nos 35730/07 and 4285/08) discussed in *R (on the application of Hallam) v Secretary of State for Justice; R (on the application of Nealon) v Secretary of State for Justice* [2019] UKSC 2 at [48] – [53].

evidence – *must* take into account the decisions of the criminal courts (most notably those of the CACD). As Lord Reed noted in his dissenting judgment in *Hallam*:

Although procedurally separate, compensation proceedings under section 133 are nevertheless based on the quashing of a conviction by the criminal courts, and are directed towards obtaining compensation for harm inflicted by the state as a direct consequence of that conviction. But for the outcome of the criminal proceedings, there could be no compensation proceedings.<sup>67</sup>

Clearly, compensation applications rely on the decisions of the CACD, and cannot be made in a vacuum. Indeed, they cannot be made at all unless a conviction has been quashed or, in rare cases, a convicted person has been pardoned. In stating this, Lord Reed is of course right. However, the CACD only has to be satisfied that the conviction is unsafe. If it concludes so, the question of innocence is irrelevant. On the other hand, the Secretary of State in deciding on compensation claims must be sure that the applicant is not guilty. Hence, the decision-making processes cannot be analogous. As Lord Reed’s dissenting judgment made clear:

The problem which arises under article 6(2) when compensation is confined to persons in category 1 ... is that it effectively requires the Secretary of State to decide whether persons whose convictions are quashed because of fresh evidence have established that they are innocent. In *Allen*, the Grand Chamber found at para 128 that there was nothing in the criteria set out in section 133 as it then stood which called into question the innocence of an acquitted person, and that the legislation itself did not require any assessment of the applicant’s criminal guilt. I doubt whether the same could be said of section 133 in its amended form.<sup>68</sup>

The Secretary of State must make crucial decisions typically based on very limited information from the CACD, without the information that would be necessary to make such a judgement about guilt or innocence. Hence, even if we accept the limited application of article 6(2) to only those cases where the applicant’s innocence is established, the test required by way of section 133(IZA) leaves the Secretary of State making most decisions on the basis of insufficient information. Is this not denying the applicant the presumption of innocence after his or her conviction has been overturned? We consider this question below.

***If article 6(2) applies to decisions about compensation for miscarriages of justice, is the definition of “miscarriage of justice” in section 133 (IZA) incompatible with article 6(2)?***

In *Allen v United Kingdom*, the ECtHR held that section 133 as originally worded (without the definition at section 133(IZA)) was compatible with article 6(2) because “there is nothing in these criteria themselves which calls into question the innocence of an acquitted person, and

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<sup>67</sup> *R (on the application of Hallam) v Secretary of State for Justice; R (on the application of Nealon) v Secretary of State for Justice* [2019] UKSC 2 at [151].

<sup>68</sup> As above at [187].

that the legislation itself did not require any assessment of the appellant's criminal guilt."<sup>69</sup> However, as Lord Mance in *Hallam* pointed out, the ECtHR in *Allen* focused on the language used by the English courts in judicially reviewing the Secretary of State's decision when considering whether article 6(2) was breached, "rather than an examination of the meaning of section 133".<sup>70</sup> The Court then asked, is the new definition at section 133 (IZA) incompatible with article 6(2)?

The definition in section 133 (IZA) limits eligibility for compensation to cases that fall within Lord Phillips' category (2) - cases where the fresh evidence so undermines the evidence against the defendant that no conviction could possibly be based upon it, which also includes category (1) – that is, cases where the fresh evidence shows clearly that the defendant is innocent of the crime of which he was convicted.

Based on its very limited interpretation of the applicability of article 6(2) outside the criminal trial, the Supreme Court in *Hallam* held that there was no logical basis on which the court could make a declaration of incompatibility with the definition in section 133(IZA). The majority concluded that the requirement to show beyond reasonable doubt the claimant did not commit the offence would not inevitably lead to a violation of article 6(2) simply because of the way the section is worded. Lord Mance concluded that there was "nothing in section 133(IZA) or in the Secretary of State's rejections of the appellants' claims to compensation"<sup>71</sup> which suggested that the appellant should have been convicted of the offence for which he was charged but acquitted. Hence, on the basis that the Secretary of State has not suggested that the applicant ought not to have had their conviction overturned, it is possible, according to Lady Hale, to explain a refusal of compensation in terms which do not breach the presumption of innocence. The *Hallam* judgment may be logical in theory. In practice, however, as we will demonstrate in the final section below, those who have had unsuccessful section 133 applications – which would no doubt have been successful prior to the introduction of section 133(IZA) – maintain the spoiled identity of an ex-offender and feel that they are treated as though their conviction still stands.

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<sup>69</sup> *Allen v United Kingdom* (2542409/9) (2016) 63 EHRR 10, [2013] 7 WLUK 424 at [128].

<sup>70</sup> As noted in *Hallam* at [58], this is likely because the Court felt that *Allen*'s case fell with the *Adams* category (3), which would not pass the eligibility test set by section 133, and so it had to focus on whether, in rejecting the application the Secretary of State – or English courts in judicial review – breached article 6(2).

<sup>71</sup> *R (on the application of Hallam) v Secretary of State for Justice; R (on the application of Nealon) v Secretary of State for Justice* [2019] UKSC 2 at [53].

The Supreme Court in *Hallam* took the view that whether a rejected compensation application process violates article 6(2) will depend on the individual case before the court . There are two instances where the Supreme Court acknowledged that a violation of article 6(2) *may* (but not always will) occur:

- 1) if the Secretary of State were to refuse an application for a case that falls under *Adams* category (1) and potentially category (2), or
- 2) if the case falls under category (3), but the Secretary of State or the court in judicial review made a comment suggesting the applicant should have been convicted.

The cases of *Hallam* and *Nealon* fell – according to the Supreme Court - within *Adams* category (3); that is, the conviction was quashed because it was unsafe in the sense that the fresh evidence meant that a jury *might or might not have* convicted. The same was concluded in the case of *Allen*.<sup>72</sup> As Lord Mance notes:

In the rare case where the CACD does express itself in terms stating that the defendant is innocent, that will in practice be conclusive... But in other cases, where the CACD has merely determined that the conviction is unsafe, it must be open to the state to resist a defendant's suggestion that the case falls within a different category that would entitle him to compensation, and for the Secretary of State to reach a conclusion on that basis.<sup>73</sup>

Of course, these categories assume that the CACD has a clear rulebook for how to respond to difficult and complex cases, and most are just that. As stated above, the Court is required only to find a conviction to be unsafe in order to quash it. It does not need to be persuaded of the innocence of the applicant, and it does not need to declare its opinion on innocence even if the judges are minded to think that the appellant is indeed innocent. In some cases, the judgment will make a statement about innocence but in most it will not. This does not inevitably reflect the strength of opinion on this matter; it may merely reflect the style of the author of the judgment. Clearly, a CACD judgment cannot be a wholly reliable resource for those charged with deciding on the guilt or innocence of a compensation applicant.

That said, provided that a compensation application in this instance is considered and decided “without suggesting that the defendant should have been convicted, there is no breach of article 6(2).”<sup>74</sup> If, however, as Lady Hale noted, the cases were to fall within category (1) or (2) then article 6(2) may be violated:

In my view, the issue of incompatibility would be better addressed in a case which fell clearly within category (2), where it might be difficult to explain the difference between that and a

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<sup>72</sup> As above at [134].

<sup>73</sup> As above at [69].

<sup>74</sup> As above at [80].

category (1) case without casting doubt on the acquittal ... if it be right that the true question is whether the Secretary of State, or a court in judicial review proceedings, has suggested that the defendant ought to have been convicted, then it does not seem impossible to explain a refusal of compensation without doing this.<sup>75</sup>

As we will discuss below, this approach in *Hallam* places a typically insurmountable burden on applicants for compensation to provide evidence *in addition* to the evidence put forward in the appeal that led to their exoneration.

### **An insurmountable test? Tensions with the role of the Court of Appeal**

It is important to note – as the judgment in *Hallam* made clear – that the criteria imposed by section 133(IZA) are very different to the determination made by the CACD. As was emphasised in *Adams* and in the *Hallam* judgment, the Court is not required to determine whether the fresh evidence so undermines the evidence that no conviction could possibly be based upon it; nor is it required to determine whether the fresh evidence shows that the appellant is innocent (indeed, no one decides on innocence in a criminal trial, only guilt). The CACD quashes convictions on the basis that the conviction in question (not *any* conviction) - is “unsafe”. Thus, having a conviction quashed by the CACD will not automatically place the case in *Adams* category (2) or (1) and in turn will not automatically satisfy the definition in section 133(IZA) for eligibility for compensation.

As Lady Hale pointed out, the cases of *Hallam* and *Nealon* were – like that of *Allen* – cases “in which the fresh evidence rendered the conviction unsafe, in the sense that, had it been available at trial, a reasonable jury *might or might not have* convicted the defendant” (emphasis added).<sup>76</sup> But this is likely to be the case for most convictions quashed by the CACD, save for very rare cases in which it decides to go beyond its remit and passes comment on the appellant’s innocence.

This means that the definition in section 133(IZA) requires someone applying for compensation under this provision to – as Lord Mance puts it – “persuade the Secretary of State to go further”<sup>77</sup> by showing not just that the conviction was unsafe, but that the fresh evidence was such that *no conviction at all could be possible*. As Lord Mance explains:

A defendant seeking compensation after the setting aside of his or her conviction by the CACD may therefore be required to show that the circumstances were not merely such that his conviction was unsafe ... the circumstances must be shown to fall within a higher category, which must, necessarily (and using the terminology in *Adams*) be either category (1) or category (2).<sup>78</sup>

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<sup>75</sup> As above at [81].

<sup>76</sup> As above at [81].

<sup>77</sup> As above at [69].

<sup>78</sup> As above at [70].

His Lordship appears to think this test could be easily met:

All that an applicant for compensation would need to do was assert his or her claim fell into a higher category than category (3), and the state would be precluded from asserting the contrary, because to do so would be to infringe the “presumption of innocence.”<sup>79</sup>

Did the Court think to consider the practical implications of this test, that requires the applicant to persuade the Secretary of State to “go further” than what was considered and determined in their criminal appeal? Convictions quashed by the CACD are almost always going to fall within category (3) where the fresh evidence renders the conviction unsafe such that, if a jury were to have that evidence before them, they might or might not have convicted the defendant. In effect, section 133(IZA) requires the applicant to prove – outside the Court of Appeal - to the Secretary of State that he or she is innocent of the offence for which he or she was convicted (because if no possible conviction could be made upon it, they must be innocent – not just “not guilty” – of the crime). Not only does this not align with the CACD’s remit, it also in effect imposes a test of innocence on a process that lacks transparency and evidential rules.

The tension in the interplay between the purpose of the CACD decision, the test applied by the Secretary of State, and article 6(2) was neatly described by Lady Hale in *Adams*:

Innocence is not a concept known to our criminal justice system. We distinguish between the guilty and the not guilty. A person is only guilty if the state can prove his guilt beyond reasonable doubt...Only then is the state entitled to punish him. Otherwise he is not guilty, irrespective of whether he is in fact innocent. If it can be conclusively shown that the state was not entitled to punish a person, it seems to me that he should be entitled to compensation for having been punished. He does not have to prove his innocence at trial and it seems wrong in principle that he should be required to prove his innocence now.<sup>80</sup>

Section 133(IZA) imposes a near impossible burden, determined by way of a process with no transparent decision-making, precedent, rules of evidence or procedural safeguards, at the discretion of a public authority, not a court. The applicant is required to provide more evidence than they provided at their criminal appeal despite having limited financial means by the time their conviction is quashed. To have any chance of success, they must do so with the assistance of legal representation, without the availability of financial support such as Legal Aid.

Even if an individual in this situation *did* have the means, what, if any, further evidence could meet this test, given that the CACD will almost never make an indication as to their

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<sup>79</sup> As above.

<sup>80</sup> R (*Adams*) v Secretary of State for Justice [2011] UKSC 18 at [116].

innocence when quashing a conviction? Must they find the real perpetrator or obtain a confession from the complainant that they had made a false accusation? Wouldn't they have been acquitted years ago if this was possible? The courts refrain from providing any indication as to what kind of evidence might be sufficient to pass this test. While this is likely because it must be determined on a case-by-case basis, it is difficult to know if anyone can ever satisfy this definition, particularly without financial means.

This also means that the CACD judgment and evidence used in appeal can hinder eligibility based on the definition in section 133(IZA). At the hearing which reversed Hallam's conviction, the CACD denied the request of Henry Blaxland QC, acting on behalf of Hallam, for a positive statement that the evidence demonstrated that Hallam was innocent.<sup>81</sup> This refusal influenced the compensation eligibility decision made by the Secretary of State, who determined that while evidence found on Mr Hallam's mobile phone placed him somewhere other than the scene of the crime for which he was convicted (and was accepted as such by the CACD), "the fresh evidence does not establish positively that your client was not at the murder scene"<sup>82</sup> and therefore the case did not pass the statutory test. This suggests a need for clarification of the both the CACD's obligations in these circumstances as well as the role of the CACD judgment in decisions on compensation.

In considering the role of the CACD, the Supreme Court emphasised in *Hallam* that arguments submitted by counsel geared towards a later application for compensation (submitting that the evidence shows the appellant did not commit the offence and inviting the Court to conclude such) is not appropriate, "since that issue is not before the court".<sup>83</sup> To reiterate, while the CACD judgment is one of the key sources used to determine eligibility for compensation, it will rarely be helpful for a compensation claim.<sup>84</sup>

Such a high bar imposed on applications for compensation severely restricts the likelihood of success (as we will discuss further below), even in the most extreme circumstances such as those of Hallam and Nealon. As one compensation lawyer told us:

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<sup>81</sup> [2015] EWHC 1565 (Admin) at [6]. Interestingly, the court did accept it could so "in an appropriate case".

<sup>82</sup> As above at [7].

<sup>83</sup> *R (on the application of Hallam) v Secretary of State for Justice; R (on the application of Nealon) v Secretary of State for Justice* [2019] UKSC 2 at [130]. See also C Hoyle, 'Compensating Injustice: The Perils of the Innocence Discourse' in J Hunter, P Roberts, S NM Young, and D Dixon (eds) *The Integrity of Criminal Process: From Theory into Practice* (Oxford, Hart Publishing, 2016).

<sup>84</sup> As noted in the following government guide to make a claim for compensation following a miscarriage of justice: <https://www.gov.uk/claim-compensation-for-miscarriage-of-justice>.

...the single biggest barrier to this area of work is the fact that you cannot get compensation for the vast majority of people who suffer a miscarriage of justice... you are not ever going to be able prove that people did not commit it unless someone else came forward... and so at the moment it's a barrier to even get into the stage where you face the normal barriers in terms of trying to progress the cases, there's no compensation for people and that's really depressing and there is no way round it.<sup>85</sup>

***The impact of section 133 (IZA) and subsequent interpretation on compensation applications***

Not surprisingly, the amended legislation has had a significant impact on the number of successful compensation applications for miscarriages of justice. Table 1 shows the most recent figures disclosed by the Ministry of Justice of the number of compensation applications received by the Independent Assessor each financial year since 2000 and the number of those applications that were approved under section 133.<sup>86</sup>

*Table 1: Compensation Applications Approved from 2000-2018*

<b>Year (ending 31 March)</b>	<b>Total Applications Received</b>	<b>Applications Approved Under s 133 (CCRC referred where available)</b>	<b>Number of ex-gratia payments granted (when applicable)</b>
2000-01	46	21	20
2001-02	84	22	12
2002-03	96	24	11
2003-04	106	40	7
2004-05	96	36	13
2005-06	83	23	5
2006-07	41	15	1
2007-08	41	6	N/A
2008-09	37	3	N/A
2009-10	38	2 (2)	N/A
2010-11	61	3 (2)	N/A
2011-12	38	0	N/A
2012-13	36	5 (2)	N/A
2013-14	45	1 (0)	N/A
2014-15	43	1 (1)	N/A
2015-16	29	2 (0)	N/A
2016-17	51	1 (0)	N/A
2017-18	36	0	N/A

Note: The number in brackets in the third column are those applications which were approved following CCRC referrals.

<sup>85</sup> Interview with Lawyer C.

<sup>86</sup> Data obtained from Freedom of Information Requests: FOI 171010002 and FOI 180821011.

In considering these data, it is important to remember that prior to 2006, all applications were first considered under section 133 and if not approved, were then also considered under the “ex gratia scheme”, which has since been abolished.<sup>87</sup> Applicants in effect had two bites of the cherry. Comparison of the data shows a significant reduction in successful compensation applications since the abolition of the ex gratia scheme in 2006-07 and even a reduction in applications received. The most recent data for the year 2017-18 show that not a single application for compensation was successful; the Secretary of State did not consider any of these 36 claims to be meritorious and deserving of compensation. This is in keeping with the broader trend. Successful applications for compensation under section 133 dropped from 21 of 46 applications in 2000-2001 to just 2 of 61 applications in 2010-11. Since 2008, successful applications have remained consistently low, with significant reductions - to just one or two successful applications each year - after 2013/14, when section 133(IZA) was introduced. No convictions quashed after a referral from the CCRC have been successful in the statutory compensation scheme since 2014-15.

In our interviews with compensation lawyers, many expressed concerns about the impact of the new definition in section 133(IZA) on the success of compensation applications, with one concluding that “now practically you are very unlikely to be able to achieve compensatory amounts for a miscarriage of justice”.<sup>88</sup> Another noted:

...the current state of the law is very disappointing: the door has been closed even further with just the narrowest chink of light in respect of obtaining compensation and there is no ex- gratia scheme that would allow an equitable solution to the circumstances. There’s a reluctance to accept responsibility on the part of the State for the victims of miscarriages of justice. ... I find that quite offensive.<sup>89</sup>

The provisions apply not only from the day the Act came into force, but also to any applications pending at the time of enactment.<sup>90</sup> One lawyer described the impact this had on two co-defendants who were brothers: while one received a substantial award, the other received nothing, as his application was still pending at the time section 133(IZA) was

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<sup>87</sup> The discretionary or “ex-gratia” scheme was introduced in 1985; decisions were made by the Home Secretary based on less restrictive criteria than the statutory scheme. For more information, see S Lipscombe, and J Beard, ‘Miscarriages of justice: compensation schemes’ *House of Commons, Home Affairs* SN/HA/2131, 6 March 2015 <<http://researchbriefings.files.parliament.uk/documents/SN02131/SN02131.pdf>>; see also H Quirk and M Requa (2012) ‘The Supreme Court on Compensation for Miscarriages of Justice: is it better that ten innocents are denied compensation than one guilty person receives it?’ *The Modern Law Review* 75(3) 399.

<sup>88</sup> Interview with Lawyer E.

<sup>89</sup> Interview with Lawyer D.

<sup>90</sup> Anti-Social Behaviour, Crime and Policing Act 2014, s175(2)

introduced. Such arbitrariness was regarded as “incredibly unfair”.<sup>91</sup> The new test imposed by section 133(IZA) distinguishes current applicants from those who received compensation prior to the legislative amendment; the latter appearing more deserving, despite the fact it is unlikely that they would have satisfied the definition under section 133(IZA) if applying in the present day.

Although it is clear from the case law that correspondence from the Secretary of State in the refusal to award compensation will avoid language which attributes guilt to the applicant, denial of compensation was experienced by clients of the lawyers we interviewed as an indication that they were not sufficiently innocent to meet the threshold for compensation. Applicants felt confused and insulted by these decisions. Moreover, the only way to challenge the decision of the Secretary of State is by way of judicial review, which is a lengthy and costly process that may not be available or desirable to many rejected applicants.

#### **“Not innocent enough”: the effects of a limited approach to the presumption of innocence in its application to section 133(IZA)**

While the Supreme Court in *Hallam* concluded that there is nothing in the definition at section 133(IZA) that would undermine the applicant’s acquittal, our research has shown quite the opposite. Despite careful wording used by the Secretary of State in rejecting an applicant for compensation – for example, in Victor Nealon’s case, it stated “nothing in this letter is intended to undermine, qualify or cast doubt upon the decision to quash your client’s conviction”<sup>92</sup> – being denied compensation *can* undermine or cast doubt on the quashed conviction. As we noted above, the underlying purpose of compensation is that the State, as a representative of the public at large, attempts to provide redress for the public censure and reputational damage inflicted by a criminal conviction.

By denying compensation to victims of wrongful convictions, doubt remains in the minds of the public and even family members and friends. It sends the message that they are not worthy of redress; maybe even that their conviction was in fact not wrongful. Interviewees described to us how the public and authority figures – including, in some cases, the police - also perceived that only those who received compensation were “true” victims of wrongful conviction. For example, Amelia<sup>93</sup> spoke of her experience during a heated incident with a

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<sup>91</sup> Interview with Lawyer D.

<sup>92</sup> *R (on the application of Hallam) v Secretary of State for Justice; R (on the application of Nealon) v Secretary of State for Justice* [2019] UKSC 2 at [14].

<sup>93</sup> Pseudonym used.

neighbour who was branding her a “murderer” and making physical threats against her, when police who attended the scene specifically asked her whether she had received compensation before taking her seriously as a victim of wrongful conviction.

Those who are denied compensation are likely to feel they are disbelieved, not considered to be innocent, as one victim of wrongful conviction explained:

The problem for me now is that because of this legal nightmare which doesn't allow me to have a legal determination of innocence, I am seeking to challenge the Government because they refused my compensation. They refused it on the basis that I'm not innocent enough. But you're either innocent or you're not, there's no such thing as being not innocent enough. It's not for me to prove my innocence, it's for the State to prove guilt ... That's the point.<sup>94</sup>

This point was recognised by Sion Jenkins who argued:

The current landscape regarding discourses of innocence appears to have created a culture of doubt and mistrust where an appellant, in the eyes of their own community, is sometimes neither ‘innocent’ nor ‘guilty’ if they remain a victim of a miscarriage of justice who has been formally refused compensation by the state.<sup>95</sup>

Lawyers we interviewed described the difficulty in trying to explain to their wrongfully convicted clients why they were “not innocent enough to get a pay-out”<sup>96</sup>:

...it's trying to explain to the clients, no that doesn't mean to say that they're saying you're guilty, but... it's really difficult to explain to somebody. One particular client who was in that situation, every now and again, even though I've explained to him why he's not eligible and that there's nothing more that can be done, he'll still phone me up and say, “can you just explain again why?” ... I mean obviously it just doesn't make any sense whatsoever. He had seven years of his life taken away and, you know, it was a pretty poor investigation that was done, but it was to do with the fact that a witness had just lied.<sup>97</sup>

Even if we were to take the Supreme Court's limited interpretation of the applicability of the presumption of innocence in these proceedings - that is, merely to ensure that a public authority or civil court does not suggest the person should have been convicted – denying compensation in these extreme circumstances because the applicant cannot prove they did not commit the offence will in effect undermine their quashed conviction. Their experiences after being denied compensation show that the “innocence” of the applicant is *not* respected. The denial of compensation not only inhibits attempts to rebuild lives shattered by wrongful conviction and wrongful imprisonment, but it also denies people acknowledgment of the harms

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<sup>94</sup> Interview with Gary (pseudonym).

<sup>95</sup> S Jenkins (2013) ‘Miscarriages of Justice and the Discourse of Innocence: Perspectives from Appellants, Campaigners, Journalists and Legal Practitioners’ *Journal of Law and Society* 3(4), 352.

<sup>96</sup> Interview with Lawyer D.

<sup>97</sup> Interview with Lawyer B.

done by the State through what is seen by many as the State apologising and trying to make good the harm done by way of monetary reparation.<sup>98</sup>

## **Conclusion**

Section 133(IZA) unfairly shifts the burden onto the applicant to pass a seemingly insurmountable test. Essentially, a person who has had their conviction quashed will be ineligible for compensation unless they can prove beyond reasonable doubt that they are innocent, that they did not commit the offence. In practice, this suggests that unless the wrongfully convicted person can prove the identity of the actual perpetrator of the crime, or provide almost infallible exculpatory forensic evidence, he or she will now be unlikely to receive compensation. This has been held not to infringe the presumption of innocence at article 6(2), so long as the decision-maker does not suggest the criminal proceedings should have been differently decided.

As a result, it is now almost impossible to obtain compensation for a miscarriage of justice, even in the most extreme circumstances. While compensation proceedings only arise as a result of a conviction being quashed by the CACD, and the Secretary of State relies on the CACD and other documents from the criminal proceedings to determine an application for compensation, section 133(IZA) requires the applicant to “go further” and obtain some form of additional evidence to prove not only that they have been wrongfully convicted, but that they did not commit the offence. In practice, this is almost impossible.

The majority judgment in *Hallam* notably lacks consideration of the function and impact of compensation for the individual applicant, and risks failing to protect those who have had their convictions overturned from being treated as if their conviction stood. The current statutory framework remains in place for the foreseeable future and the denial of compensation to the wrongfully convicted is likely to continue. Apparently, when it comes to recourse to compensation, the State is keen to deny victims of wrongful conviction recognition as deserving of both acknowledgement and funds to repair the harms caused.

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<sup>98</sup> *O'Brien & Ors v Independent Assessor* [2007] UKHL 10 at [11].