EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Application no. 70601/11
Andrew Keith ADAMS
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 12 November 2013 as a Chamber composed of:

Ineta Ziemele, *President,*
Päivi Hirvelä,
George Nicolaou,
Ledi Bianku,
Vincent A. De Gaetano,
Paul Mahoney,
Faris Vehabović, *judges,*

and Françoise Elens-Passos, *Section Registrar,*

Having regard to the above application lodged on 4 November 2011,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Andrew Keith Adams, is a British national, who was born in 1970 and lives in Newcastle-On-Tyne. He is represented before the Court by D. Machover, a lawyer practising in London with Hickman & Rose.

A. The circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

1. The criminal conviction

2. On 18 May 1993 the applicant was convicted by a jury of murder. K.T. was the principal witness at his trial. The applicant was subsequently sentenced to life imprisonment.

3. On 16 January 1998 the Court of Appeal (Criminal Division) ("CACD") dismissed his appeal.

2. The quashing of the conviction

4. In 1998 the applicant applied to the Criminal Cases Review Commission ("CCRC") for a review of his conviction. On 27 September 2005 the CCRC referred the applicant's case back to the CACD.

5. On 12 January 2007 the CACD allowed the applicant's appeal. It considered in detail a number of alleged failings in the applicant's defence at trial. It concluded that the failure by the applicant's defence team to deploy relevant evidence in respect of, *inter alia*, K.T. in his defence resulted in his conviction being unsafe, explaining:

> "156. It is difficult to conclude that the criticisms and failures which we have found in respect of any one of the individual topics were on their own sufficient to render the verdict unsafe but we are quite satisfied that taken together, cumulatively they were sufficient to render the verdict unsafe. Each of these topics was important ...
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> 157. We are not to be taken as finding that if there had been no such failures the appellant would inevitably have been acquitted. We are however satisfied for the reasons given that the verdict is unsafe. The appeal will be allowed and the conviction quashed."

3. The compensation proceedings

(a) The decision of the Secretary of State

6. Following the quashing of the conviction, the applicant applied to the Secretary of State for compensation for a miscarriage of justice pursuant to section 133 of the Criminal Justice Act 1988 ("the 1988 Act").

7. By letter dated 3 January 2008 the applicant's solicitors were informed that the Secretary of State did not consider that a right to compensation arose in his case, for two reasons. First, the applicant's conviction had not been reversed on the basis of new or newly discovered facts. Second, it could not be said that there had been a miscarriage of justice in the sense that the applicant should never have been convicted. All that could be said, on the basis of the judgment of the CACD, was that the jury might or might not have reached a different conclusion had the defence made proper use of the material in question.

(b) The High Court judgment

8. The applicant subsequently brought judicial review proceedings challenging the decision to refuse to pay him compensation under

section 133 of the 1988 Act. He contended that he met the criteria for compensation set out in that section.

9. The claim was dismissed by the Divisional Court on 4 February 2009. The court referred to the comment of the CACD to the effect that the judgment quashing the conviction was not to be taken as finding that if there had been no failures the applicant would inevitably have been acquitted. The court considered the discussion of the meaning of "miscarriage of justice" by Lords Bingham of Cornhill and Steyn in *R (Mullen) v. Secretary of State for the Home Department* ([2004] UKHL 18) and held that the applicant did not fall within either interpretation. The court further noted counsel for the applicant's concession that he could not succeed in showing beyond reasonable doubt that a miscarriage of justice had occurred in light of the Court of Appeal's judgment in *R (Allen) v. Secretary of State for Justice* ([2008] EWCA Civ 808).

10. Finally, the court concluded that, in any event, the conviction had not been quashed on the basis of new or newly discovered facts.

(c) The Court of Appeal judgment

11. The applicant was granted leave to appeal on 10 June 2009. On 27 November 2009 the Court of Appeal dismissed the appeal. Lord Justice Dyson, giving judgment for the court, accepted that the applicant's conviction had been quashed on the basis of new or newly discovered facts. He therefore turned to examine whether there had been a miscarriage of justice.

12. He identified four categories of case where the CACD allowed an appeal against conviction on the basis of fresh evidence, and explained each category as follows:

> "19. ... A category 1 case is where the court is sure that the defendant is innocent of the crime of which he has been convicted. An obvious example is where DNA evidence, not obtainable at the time of trial, shows beyond doubt that the defendant was not guilty of the offence. A category 2 case is where the fresh evidence shows that he was wrongly convicted in the sense that, had the fresh evidence been available at the trial, no reasonable jury could properly have convicted. An example is where the prosecution case rested entirely on the evidence of a witness who was put forward as a witness of truth and fresh evidence undermines the creditworthiness of that witness, so that no fair-minded jury could properly have convicted on the evidence of that witness. It does not follow in a category 2 case that the defendant was innocent. A category 3 case is where the fresh evidence is such that the conviction cannot be regarded as safe, but the court cannot say that no fair-minded jury could properly convict if there were to be a trial which included the fresh evidence. The court concludes that a fair-minded jury might convict or it might acquit. There is a fourth category of case to which Lord Bingham referred in *Mullen*. This is where a conviction is quashed because something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted."

13. He noted that the majority of successful appeals against conviction were category 3 cases. In such cases, whether a retrial was ordered depended on all the circumstances of the case, including the seriousness of the offence, the length of time that the defendant had been in custody and how long he still had to serve.

14. The present case, the judge said, was neither a category 1 nor a category 2 case. He continued:

> "20. ... On any view, it was a category 3 case. As I have said, the CACD accepted that there was some force in the submissions made on behalf of the prosecution that the case against the appellant was strong. Nevertheless, they said that the case was 'by no means overwhelming'. In other words, they did not say that no fair-minded jury could properly have convicted if the undeployed evidence had been before them. The appellant had already been in custody for some 15 years when the CACD allowed his appeal. No doubt it was for that reason that there was no order for a retrial ..."

15. Noting counsel for the applicant's submission that it was also a category 4 case, the judge examined carefully Lord Bingham's interpretation of miscarriage of justice in *Mullen* and subsequent case-law in so far as it discussed that interpretation. He concluded that even if the failure to use the undeployed evidence had resulted in an unfair trial in the applicant's case, that did not lead to a miscarriage of justice according to Lord Bingham's interpretation. He explained:

> "61. ... The essence of his interpretation is that something has gone 'seriously wrong in the ...conduct of the trial'...
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> 62. ... I do not consider that the errors of trial counsel identified by the CACD in this case caused something to go seriously wrong with the trial process. These errors were committed by experienced and apparently competent counsel acting conscientiously in good faith in the best interests of their client. It cannot fairly be said that the errors showed that the appellant was deprived of effective representation. Accordingly, on an application of Lord Bingham's interpretation, there was no miscarriage of justice in this case."

(d) The Supreme Court judgment

16. On 25 May 2010 the applicant was granted permission to appeal to the Supreme Court. His appeal was heard together with those of two other appellants. On 11 May 2011 the Supreme Court dismissed his appeal.

17. Lord Phillips, in the majority, considered the primary object of section 133 to be clear, namely to provide entitlement to compensation to a person who had been convicted and punished for a crime that he did not commit. But he considered that a subsidiary object of the section was that compensation should not be paid to a person who had been convicted and punished for a crime that he did commit. He continued:

> "37. ... 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. Thus it is not satisfactory to make the mere quashing of a conviction the trigger for the payment of compensation ..."

18. As a framework for the discussion of the correct interpretation of the phrase "miscarriage of justice", Lord Phillips adopted the categorisation formulated by the Court of Appeal of the circumstances in which convictions might be quashed on the basis of the discovery of fresh evidence. The four categories identified were:

> "9 ... (1) Where the fresh evidence shows clearly that the defendant is innocent of the crime of which he has been convicted.
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> (2) Where the fresh evidence is such that, had it been available at the time of the trial, no reasonable jury could properly have convicted the defendant.
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> (3) 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.
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> (4) Where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted."

19. Lord Phillips considered that section 133 of the 1988 Act did not embrace categories 3 or 4. He then turned to consider category 1, observing:

> "43. ... Plainly section 133 will embrace this category, but does it provide the exclusive definition of 'miscarriage of justice' in that section? ..."

20. He examined a number of arguments for and against the limitation of the phrase "miscarriage of justice" to this category of cases, noting in particular that it would exclude from entitlement to compensation those who no longer seemed likely to be guilty, but whose innocence was not established beyond reasonable doubt. He considered this a "heavy price to pay" for ensuring that no guilty person was ever the recipient of compensation.

21. Examining, finally, category 2, Lord Phillips expressed doubts as to the practicality and sense of the test it proposed and found that it did not provide a satisfactory definition. He therefore concluded that it should be replaced with a more robust test of miscarriage of justice. He continued:

> "55. ... A new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it. This is a matter to which the test of satisfaction beyond reasonable doubt can readily be applied. This test will not guarantee that all those who are entitled to compensation are in fact innocent. It will, however, ensure that when innocent defendants are convicted on evidence which is subsequently discredited, they are not precluded from obtaining compensation because they cannot prove their innocence beyond reasonable doubt. I find this a more satisfactory outcome than that produced by category 1. I believe that it is a test that is workable in practice and which will readily distinguish those to whom it applies from those in category 3. It is also an interpretation of miscarriage of justice which is capable of universal application."

22. Lord Phillips also considered the relevance of Article 6 § 2 to the test for compensation under section 133. He agreed with the reasons given

by the Court of Appeal in the applicant's case for rejecting any reliance on Article 6 § 2. He added:

> "58. ... The appellants' claims are for compensation pursuant to the provisions of section 133. On no view does that section make the right to compensation conditional on proof of innocence by a claimant. The right to compensation depends upon a new or newly discovered fact showing beyond reasonable doubt that a miscarriage of justice has occurred. Whatever the precise meaning of 'miscarriage of justice' the issue in the individual case will be whether it was conclusively demonstrated by the new fact. The issue will not be whether or not the claimant was in fact innocent. The presumption of innocence will not be infringed."

23. As to the scope of the term "miscarriage of justice", Lord Hope explained:

> "96. ... It clearly includes cases where the innocence of the defendant is clearly demonstrated. But [Article 14(6) of the International Covenant on Civil and Political Right 1966 ("ICCPR"), on which section 133 was based] does not state in terms that the only criterion is innocence. Indeed, the test of 'innocence' had appeared in previous drafts but it was not adopted. I would hold, in agreement with Lord Phillips ... that it includes also cases where the new or newly discovered fact shows that the evidence against the defendant has been so undermined that no conviction could possibly be based upon it. In that situation it will have been shown conclusively that the defendant had no case to answer, so the prosecution should not have been brought in the first place.
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> 97. There is an important difference between these two categories. It is one thing to be able to assert that the defendant is clearly innocent. Cases of that kind have become more common and much more easily recognised since the introduction into the criminal courts, long after article 14(6) of the ICCPR was ratified in 1976, of DNA evidence. It seems unlikely that the possibility of demonstrating innocence in this way was contemplated when the test in article 14(6) was being formulated ... The state should not, of course, subject those who are clearly innocent to punishment and it is clearly right that they should be compensated if it does so. But it is just as clear that it should not subject to the criminal process those against whom a prosecution would be bound to fail because the evidence was so undermined that no conviction could possibly be based upon it. If the new or newly discovered fact shows conclusively that the case was of that kind, it would seem right in principle that compensation should be payable even though it is not possible to say that the defendant was clearly innocent. I do not think that the wording of article 14(6) excludes this, and it seems to me that its narrowly circumscribed language permits it."

24. He therefore concluded that category 1 plainly fell within the scope of section 133. He further held that category 2, as rephrased by Lord Phillips, also fell within the scope of that section. He added:

> "102. ... It may be quite impossible to say in such a case that he was, beyond reasonable doubt, innocent. But, as the evidence against him has been completely undermined, it can be said that it has been shown beyond reasonable doubt, or 'conclusively', that there has been a miscarriage of justice in his case which was as great as it would have been if he had in fact been innocent, because in neither case should he have been prosecuted at all."

25. On the question of the compatibility of section 133 with Article 6 § 2 of the Convention, Lord Hope examined the judgments of this Court and held that the principle that was applied was that it was not open to the State to undermine the effect of an acquittal. However, he considered that Article 14(6) ICCPR did not forbid comments on the underlying facts of the case in subsequent proceedings of a different kind, such as a civil claim of damages, when it was necessary to find out what happened. He was of the view that the system created by Article 14(6) did not cross the "forbidden boundary". He noted that the procedure laid down in section 133 provided for a decision to be taken by the executive on the question of entitlement to compensation, which was entirely separate from the proceedings in the criminal courts. He further noted that in none of the cases from Austria or Norway was the court called upon to consider the interaction between Article 6 § 2 and Article 3 of Protocol No. 7. He continued:

> "111. ... On the contrary, the fact that the court was careful to emphasise in *Sekanina v Austria*, para 25 that the situation in that case was not comparable to that governed by article 3 of the Seventh Protocol is an important pointer to the conclusion that ... article 14(6) and section 133 of the 1988 Act are in the category of lex specialis and that the general provision for a presumption of innocence does not have any impact on them. A refusal of compensation under section 133 on the basis that the innocence of the convicted person has not been clearly demonstrated, or that it has not been shown that the proceedings should not have been brought at all, does not have the effect of undermining the acquittal."

26. Lady Hale agreed that a "miscarriage of justice" in section 133 should be interpreted as proposed by Lord Phillips as the phrase was clearly capable of bearing a wider meaning than conclusive proof of innocence. She explained:

> "115. As I understand it, Lord Phillips' formulation ... would limit the concept to a person who should not have been convicted because the evidence against him has been completely undermined ... I agree with Lord Phillips that the object of this particular exercise is to compensate people who cannot be shown to be guilty rather than to provide some wider redress for shortcomings in the system."

27. Lord Kerr also preferred the analysis of Lord Bingham in *R (Mullen)* to that of Lord Steyn, noting:

> "172. ... I cannot accept that the section imposes a requirement to prove innocence. In the first place, not only does such a requirement involve an exercise that is alien to our system of criminal justice, that system of justice does not provide a forum in which assertion of innocence may be advanced. An appeal against conviction heard by the Court of Appeal Criminal Division is statutorily required to focus on the question whether the conviction under challenge is safe. In a number of cases, evidence may emerge which conclusively demonstrates that the appellant was wholly innocent of the crime of which he or she was convicted but that will inevitably be incidental to the primary purpose of the appeal. The Court of Appeal has no function or power to make a pronouncement of innocence ..."

28. Although he proposed his own test, namely whether, on the facts as they stood revealed, it could be concluded beyond reasonable doubt that the applicant should not have been convicted, he was content to subscribe to Lord Phillips' formulation, observing:

> "178. ... This appears to me to achieve the same result as the test which I would have proposed ... The proper application of either test ties entitlement to compensation firmly to the true factual situation. Procedural deficiencies that led to irregularities in the trial or errors in the investigation of offences will not suffice to establish entitlement to compensation. A claimant for compensation will not need to prove that he was innocent of the crime but he will have to show that, *on the basis of the facts as they are now known*, he should not have been convicted or that conviction could not possibly be based on those facts. Of course, if innocence can be proved, the test, on either formulation, will be amply satisfied."

29. Although Lord Clarke preferred the category 2 test as formulated by the Court of Appeal, he accepted the test proposed by Lord Phillips on the basis that it was consistent with his view.

30. As regards Article 6 § 2, Lord Clarke considered that the court hearing and determining a claim for compensation under section 133(1) must not say or do anything inconsistent with the claimant's acquittal. However, he was satisfied that if the analysis set out in the judgment was adopted, there was no risk of its doing so. The question in each case was whether the claimant had proved beyond reasonable doubt that the new or newly discovered fact demonstrated that there was a miscarriage of justice on the basis that no reasonable jury, properly directed, could convict him. The trial of that question in no way affected or impugned the acquittal of the claimant as provided by section 2 of the Criminal Appeal Act 1968. He explained:

> "233. The question at such a trial is different and so is the burden of proof. The position is not unlike a civil process where a claimant seeks damages from a defendant who has been acquitted of, say, causing grievous bodily harm to A at a criminal trial. Under English law it is permissible for A to seek damages from the defendant on the ground that he was unlawfully injured by him, alleging all the same facts as had been relied upon at the criminal trial. The critical difference between the two processes is that at the criminal trial the prosecution has to prove guilt beyond reasonable doubt, whereas at the civil trial A only has to prove liability on the balance of probabilities."

31. Four judges dissented from the Supreme Court's judgment. Lords Judge, Brown, Rodger and Walker were of the view that section 133 was limited to cases where the defendant had been convicted of an offence of which he was truly innocent (category 1 cases).

B. Relevant domestic law and practice

32. Details of the relevant domestic law and practice are set out in the judgment of the Grand Chamber in *Allen v. the United Kingdom* [GC], no. 25424/09 [GC], 12 July 2013.

COMPLAINT

33. The applicant complained under Article 6 § 2 of the Convention that section 133 of the 1988 Act was not consistent with the presumption of innocence since it allowed a person acquitted on the merits to be refused compensation because the State still believed it was possible that he could have been convicted. He alleged that the domestic courts essentially decided that he should be denied compensation because he could not conclusively demonstrate that he was innocent,

THE LAW

34. Article 6 § 2 of the Convention provides:

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

35. The first question is whether that provision applied to the compensation proceedings, which did not themselves involve the determination of a criminal charge. The Court is satisfied that, for the reasons given in *Allen*, cited above, §§ 107-108, the necessary link between the concluded criminal proceedings and the section 133 proceedings existed. Article 6 § 2 was accordingly applicable to the latter proceedings.

36. The applicant contended that since the presumption of innocence applied he was entitled to be treated as innocent. He said that it was not appropriate for the State to suggest that he might be guilty after he had been acquitted. He argued that he was entitled to be treated as a victim of a miscarriage of justice for the purposes of section 133 as, if he were not so treated, he would be required to establish his innocence in order to obtain compensation. This, he claimed, would be incompatible with Article 6 § 2.

37. As the Grand Chamber said in *Allen*, cited above, §§ 93-94, Article 6 § 2 safeguards the right to be presumed innocent until proved guilty according to law. In the context of a criminal trial, it imposes specific procedural requirements. However, it also protects 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. In this second aspect, Article 6 § 2 requires that such persons be treated in a manner consistent with their innocence.

38. As to the correct approach to assessing compliance with Article 6 § 2 in a given case, the Grand Chamber in *Allen* explained:

> "125. ... [T]here is no single approach to ascertaining the circumstances in which that Article will be violated in the context of proceedings which follow the conclusion of criminal proceedings. As illustrated by the Court's existing case-law, much will depend on the nature and context of the proceedings in which the impugned decision was adopted.
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> 126. In all cases and no matter what the approach applied, the language used by the decision-maker will be of critical importance in assessing the compatibility of the decision and its reasoning with Article 6 § 2 ... However, when regard is had to the nature and context of the particular proceedings, even the use of some unfortunate language may not be decisive ..."

39. The applicant in the present case challenges the compatibility with Article 6 § 2 of section 133 itself. However, as the Grand Chamber found in *Allen*, cited above, § 128, there is nothing in the section 133 criteria which calls into question the innocence of an acquitted person and the legislation itself does not require any assessment of the applicant's criminal guilt. Section 133 cannot therefore be regarded as incompatible with Article 6 § 2. Accordingly, the Court must examine whether, as the applicant further alleged, the Supreme Court in applying section 133 required that he conclusively demonstrate his innocence. As the applicant does not criticise any particular language used by the domestic courts in their decisions, the Court will assess whether the interpretation of "miscarriage of justice" by the Supreme Court in the applicant's case complied with Article 6 § 2.

40. All nine justices in the Supreme Court agreed that an acquittal in itself was not enough to demonstrate that a miscarriage of justice had occurred. In *Allen*, cited above, § 129 the Grand Chamber accepted that the domestic courts were entitled to conclude that more than an acquittal was required in order for a miscarriage of justice to be established, within the meaning of section 133, provided that they did not call into question the applicant's innocence. Lord Phillips explained that the test for a miscarriage of justice would be satisfied where a new fact so undermined the evidence against the defendant that no conviction could possibly be based upon it. That test was broadly approved by the other four Justices in the majority (see paragraph 24 and 26-29 above). The application of the test did not undermine the applicant's acquittal or treat him in a manner inconsistent with his innocence. The test did not oblige the court to comment on whether, on the basis of the evidence as it stood at the appeal, the applicant should be, or would likely be, acquitted or convicted. Equally, it did not require the court to comment on whether the evidence was indicative of the applicant's guilt or innocence.

41. It is true that in the course of the Supreme Court judgment there was some reference to the question of innocence. In particular, the Justices discussed whether section 133 required that a claimant conclusively prove his innocence in order to be eligible for compensation. However, it is clear that this was roundly rejected by the majority of Justices in the case in favour of the broader test formulated by Lord Phillips. It is unfortunate that some of the language used in the judgment was liable to create confusion and an undesirable impression in the mind of the applicant as to the standard required for compensation. But in light of the clear test articulated by Lord Phillips, it should be apparent to any future claimant that questions of guilt and innocence are irrelevant to proceedings brought under section 133 of the 1988 Act.

42. In conclusion, the Court is satisfied that the refusal of compensation did not demonstrate a lack of respect for the presumption of innocence which the applicant enjoys in respect of the criminal charge of which he was acquitted. There is therefore no appearance of a violation of Article 6 § 2 of the Convention. The application must accordingly be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Françoise Elens-Passos
Registrar

Ineta Ziemele
President