COMPENSATION FOR MISCARRIAGES OF JUSTICE

R. (Adams) v. Secretary of State for Justice; *Re MacDermott's and McCartney's Applications* [2011] UKSC 18, *The Times*, May 12, 2011 (May 11, 2011)
Supreme Court of the United Kingdom

Appeal – Compensation – Miscarriage of justice

A. Background

Andrew Adams was convicted of murder in 1993 by a judge and jury sitting in the Crown Court, and was sentenced to life imprisonment. At trial, he had argued that the principal prosecution witness had colluded with two police officers to give false testimony against him. An appeal against conviction was refused in 1998, but in 2007 his conviction was quashed on a reference by the Criminal Cases Review Commission, as it was discovered that information that would have greatly assisted in cross-examination of the crucial witnesses had been missed by his defence team. He applied for compensation from the Secretary of State for Justice but his application was refused. He brought judicial review proceedings but was unsuccessful in the English High Court and Court of Appeal.

Eamonn MacDermott and Raymond McCartney were convicted in 1979 by a judge sitting alone at the Belfast City Commission of various offences, including the murder of a police officer, and were both sentenced to life imprisonment. They had argued at trial that admissions said to have been made by them in police interview were either concocted or the result of ill-treatment by officers. Appeals against conviction were refused in 1982, but their convictions were quashed in 2007 on a reference by the Criminal Cases Review Commission, it having emerged that senior prosecution officials had accepted that the officers who had questioned them had assaulted another suspect in the same investigation. They applied for compensation from the Secretary of State for Northern Ireland, but their applications were refused. They too brought judicial review proceedings, and were unsuccessful in the Northern Irish High Court and Court of Appeal.

A nine-judge constitution of the Supreme Court of the United Kingdom (Lord Phillips P.S.C., Lord Judge C.J., Lord Hope D.P.S.C., Lord Rodger, Lord Walker, Lady Hale, Lord Brown, Lord Kerr and Lord Clarke JJ.S.C.) considered appeals in both these cases together.

B. Legislation

The provision in United Kingdom law under consideration was section 133 of the *Criminal Justice Act* 1988, subsection (1) of which provides:

> "… 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 ... unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted."

This provision was enacted to give effect to the United Kingdom's obligations under the *International Covenant on Civil and Political Rights* 1966, Article 14(6) of which provides:

> "When a person has by a final decision 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 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."

Section 133 initially existed alongside an *ex gratia* payment scheme operated by the Home Secretary after the ratification of the covenant by the United Kingdom in 1976, but after the termination of this scheme in 2006 it has provided the only route by which compensation could be claimed following a miscarriage of justice. It only applies in cases where a conviction has been quashed on an appeal out of time or on a reference by the Criminal Cases Review Commission, and not where a defendant has been acquitted at trial or where his conviction has been quashed on an appeal within time.

C. "Miscarriage of Justice"

In considering what constituted a "miscarriage of justice", the court examined various aids to interpretation, including the wording of Article 14(6) in both English and French, the *travaux préparatoires*, subsequent practice in countries that had ratified the covenant, the judgment of the British House of Lords in *R. (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 14, [2005] 1 A.C. 1, and statements made in Parliament in the debates leading to the

enactment of section 133. It found none of these of much assistance, and held that a fresh approach was needed.

In particular, it considered the four categories of potential miscarriages of justice set out by Dyson L.J. in the Court of Appeal judgment in *Adams*, *viz.*:

(i) where fresh evidence shows clearly that a defendant is innocent of the crime of which he has been convicted;
(ii) where fresh evidence is such that, had it been available at the time of the trial, no reasonable jury could properly have convicted the defendant;
(iii) where 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
(iv) 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 (although some doubt was expressed as to whether this was a standalone category).

By a majority of five to four (per Lords Phillips, Hope, Kerr and Clarke and Lady Hale), it was held that section 133 should not be restricted to category (i), but that it should not encompass categories (iii) and (iv). However, it was not satisfied with the wording of category (ii), and instead adopted what Lord Phillips described as a "more robust" test: "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." It held that this test was consistent with the presumption of innocence as guaranteed by Article 6(2) of the European Convention on Human Rights.

The view of the minority (*viz.* Lords Judge, Rodger, Walker and Brown) was that section 133 should apply only to category (i), in particular on the basis that the new or newly discovered fact should demonstrate not only that the conviction was unsafe, or that the investigative or trial processes were defective, but that justice had surely miscarried, the ultimate hallmark of a miscarriage of justice being the conviction and incarceration of the truly innocent. It was also seen as vitally important by several judges that compensation not be paid out to anyone who was in fact guilty.

D. "New or Newly Discovered Fact"

As to what constituted a "new or newly discovered fact", the court was more divided. A minority (*viz.* Lords Phillips and Kerr and Lady Hale) adopted the definition of "newly-discovered fact" in section 9(6) of the Irish *Criminal Procedure Act* 1993 (section 9 of that Act

giving effect to Article 14(6) in the Republic of Ireland), *viz.* "a fact which was discovered by him or came to his notice after the relevant appeal proceedings had been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings".

A larger minority (*viz.* Lords Judge, Rodger, Walker and Brown) adopted the same approach as applies in circumstances where a defendant seeks to deploy fresh evidence on appeal, *i.e.* the test under section 23 of the *Criminal Appeal Act* 1968, which normally predicates that there should be a reasonable explanation for the earlier failure to adduce the evidence at trial.

Lord Clarke held that the term could include facts known to the defendant or to his legal advisers at trial or on appeal, and that the relevant knowledge was that of the trial court, but did not decide upon a test to be applied. Lord Hope, on the other hand, held that the term excluded facts which had been disclosed to the defence and which were therefore knowable, even if not in fact known.

E. Outcome

All nine judges were agreed that the appeal in the case of *Adams* should be dismissed, but by a majority the appeal in *MacDermott and McCartney* was allowed (the majority finding that it fell within the "more robust" reworded category (ii) test put forward by Lord Phillips). The minority would have remitted the latter case to the Secretary of State for further consideration.

F. Comment

One of the issues considered by the court was whether an appeal court, when allowing an appeal, is obliged or entitled to declare that the defendant is in fact innocent. Lord Phillips (at [45]) agreed with the opinion of Lloyd L.J. in the English Court of Appeal in *R. v. McIlkenny*, (1991) 93 Cr.App.R. 287, that the court was not so entitled, and cited with approval the policy justification for this rule put forward by the Court of Appeal for Ontario in *R. v. Mullins-Johnson* [2007] ONCA 720, (2007) 87 O.R. (3d) 425, *viz.* that there should not, in effect, be introduced a third verdict in addition to "guilty" and "not guilty" of "factually innocent", as it would degrade the acquittals of those against whom the charges had simply not been proved, and would effectively create two classes of acquitted defendants: those found to be factually innocent and those who had benefitted from the presumption of innocence. However, the question was not firmly decided: of the other judges, only Lords Kerr and Judge expressed clear opinions, the former (at [172]) agreeing with Lord Phillips and the latter (at [251]) coming to the opposite view.

In considering that question, Lords Phillips and Kerr (at [47] and [173] respectively) examined the position in New Zealand, and cited the New Zealand Law Commission's 1998 report "Compensating the Wrongly Convicted", which proposed that proof of innocence be required before compensation was paid out, and recommended that a tribunal be set up to determine this issue. In fact, the New Zealand Government has now implemented guidelines providing for *ex gratia* payments, those guidelines requiring proof of innocence not beyond reasonable doubt but on the balance of probabilities. Lord Kerr (at [173]) also considered the situation in Canada, where, similarly, there are guidelines providing for *ex gratia* payments, those guidelines again requiring proof of innocence, and noted that Canada had been found in breach of the Covenant by the United Nations Human Rights Committee for failing to establish a procedure for determining whether an applicant was indeed innocent.

The situation in Australia, not referred to by the court, where all jurisdictions (save the Australian Capital Territory, where a statutory scheme exists) may make *ex gratia* payments, but where no standards or guidelines have been published, was addressed by the Australian Institute of Criminology's 2008 paper "Compensation for wrongful convictions", which recommended the implementation of similar legislation or guidelines, and which appears to have operated on the assumption that a "wrongful conviction" is one where a person who is factually innocent has been convicted. Accordingly, as a result of this judgment, the United Kingdom would seem to have instituted a more generous scheme than several other Commonwealth jurisdictions.

As to the decision itself, it is unfortunate, particularly given the problems the court encountered in analysing *Mullen* (in which the House of Lords came to a practical decision on the facts of the case but failed to set out any clear or agreed principles to be applied in future cases), that it failed to come to agreement on some of the central aspects of this case. Although there was unanimous agreement that the appeal in *Adams* should be dismissed, there was no majority as to the basis of that dismissal (four judges holding that it should be dismissed because it did not fall within the reworded category (ii), another four because it did not fall within category (i), and Lord Hope because the material on the basis of which the conviction had been quashed was not a "new or newly discovered fact"). Furthermore, there was no majority at all on the meaning of "new or newly discovered fact", with two groups of three and four judges each adopting two different but similar statutory tests, Lord Clarke essentially failing to decide upon any test and Lord Hope going down a route all of his own. It must be doubtful whether

this judgment will constitute the last word on section 133, with the likelihood being that the court will sooner or later find itself revisiting the issues it failed to decide.

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A TRIO OF CASES, A TRIO OF OPINIONS: THE RIGHT OF ACCESS TO COUNSEL IN CANADA'S POLICE STATIONS

R. v. Sinclair, 2010 SCC 35, 259 C.C.C. (3d) 443
R. v. McCrimmon, 2010 SCC 36, 259 C.C.C. (3d) 515
R. v. Willier, 2010 SCC 37, 259 C.C.C. (3d) 536
(October 8, 2010)
Supreme Court of Canada

Right to silence – Right to instruct and retain counsel – Police interviews

When the police obtain a confession from a suspect in interview, the prosecution will be anxious to get it in front of the court. Legal argument over whether such a confession is admissible will often be crucial in deciding the outcome of the case, and competent defence counsel will examine the minutiae of the interactions between the defendant and police officers to see whether there is any basis for having the confession excluded. On May 12, 2009, the Supreme Court of Canada heard three cases, all of which turned on the issue of whether, where the defendant requested access to a lawyer but was denied it, his subsequent confession should have been excluded. The judgments, and manifold dissenting reasons, were all delivered on October 8, 2010, and demonstrate a highly divergent range of opinions in Canada's highest court as to the meaning of section 10(b) of the *Canadian Charter of Rights and Freedoms* ("the Charter") - "Everyone has the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right." Three distinct positions were adopted by members of the court. Using the author's own labels, these will be referred to as the "restrictive position", the "intermediate position" and the "expansive position". *Sinclair* contains the fullest expression of these views, and is therefore the case on which this note is based.

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