there being a "public assembly" and is also subject to the limitation that it cannot be used to prohibit a public assembly that has not yet begun.

It is possible that the decision in *Jones* will lead to amendments to section 14 to mirror the language in section 14A which does expressly permit the prohibition of future, trespassory assemblies in a specific district or area. However, in the case of trespassory assemblies, the rights of property owners provide a counterweight to the rights to freedom of expression and assembly of protestors and there remains the possibility of assembling on public property. Amending section 14 to include the power to prohibit future assemblies in "public places" would run the risk of violating the rights to freedom of expression and assembly in Articles 10 and 11 of the European Convention on Human Rights. The European Court of Human Rights has repeatedly reaffirmed the "essential nature of the freedom of assembly and its close relationship with democracy" and the fundamental importance of free speech in a democratic society and it is unlikely that a prospective ban on all peaceful assemblies within an area the size (and significance) of central London would be "necessary in a democratic society" (*Helsinki Committee of Armenia v Armenia* (Application no. 59109/08), Judgment of 31 March 2015, not yet reported, at [45]–[47]).

Of course, the police have additional powers beyond those contained in the Act 1986 including, for instance, power to prevent a breach of the peace. But such powers, like section 14, are unlikely to provide a satisfactory solution to protests that are separated in time and space and which form, disaggregate and reform like starling murmurations.

Stevie Martin

Address for Correspondence: Fitzwilliam College, Cambridge, CB3 0DG, UK. Email: ssm41@cam.ac.uk

COMPENSATION FOR MISCARRIAGES OF JUSTICE: DEGREES OF INNOCENCE

WHILST the presumption of innocence may be the relatively uncontroversial golden thread that runs through English criminal law, it has provided a rich seam of case law in relation to compensation for wrongful convictions, most recently in the conjoined appeals of *R. (Hallam and Nealon) v Secretary of State for Justice* [2019] UKSC 2, [2019] 2 W.L.R. 440. It is generally accepted that compensation should be paid to the factually innocent whose convictions have been quashed. At issue is whether it should also be paid to those who did – or may have – committed a crime and have "got away with it", and whether such a refusal to pay compensation contravenes the presumption of innocence in Article 6(2) of the European Convention on Human Rights (ECHR).

States are obliged to offer such compensation under Article 14.6 of the International Covenant on Civil and Political Rights 1966 (ICCPR). A domestic scheme for England, Wales and Northern Ireland was enacted as section 133 of the Criminal Justice Act 1988 (CJA 1988) providing 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.

The CJA 1988 did not define a miscarriage of justice and, for a provision that affects so few individuals, this question has consumed a great deal of judicial and scholarly attention. Sam Hallam's conviction for murder was quashed after seven years in prison as photographs found on his mobile phone "significantly undermined" the prosecution evidence. Victor Nealon's conviction for attempted rape was quashed after 17 years in prison, as a sample obtained from the victim's clothing showed no trace of his DNA, but a full profile from an unknown male. Their respective claims for compensation were refused by the Justice Secretary on the ground that the fresh evidence on which their appeals were based did not show beyond reasonable doubt that they had not committed the offences. The appellants argued, unsuccessfully that this is incompatible with the presumption of innocence in Article 6(2).

Eligibility is largely restricted to those whose convictions have been quashed following an out-of-time appeal or a referral by the Criminal Cases Review Commission (Section 133(5) of the CJA 1988). The Court of Appeal does not use the term "miscarriage of justice" when quashing convictions; the statutory test it applies is whether a conviction is "unsafe" (Criminal Appeal Act 1995, s. 2(1)). There are thus four types of "successful" appeal:

> Category 1: Where the fresh evidence [on which the appeal was based] shows that the defendant is innocent;
> Category 2: Where it is established, beyond reasonable doubt, that had the fresh evidence been available at the trial, no reasonable jury could properly have convicted;
> Category 3: Where the fresh evidence renders the conviction unsafe, but the court could not say that no fair-minded jury could properly have convicted;
> Category 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.

In the previous leading case on compensation that established these categories, the UK Supreme Court narrowly held that compensation was available only to those in the first two categories, but it was unanimous that Article 6(2) was not engaged because the right to compensation was not

conditional on proof of innocence by a claimant (*R. (on the application of Adams) v Secretary of State for Justice* [2011] UKSC 18), as refined in *R. (on the application of Ali) v Secretary of State for Justice* [2013] EWHC 72 (Admin), [2013] 1 W.L.R. 3536).

Legislation was introduced almost immediately that further restricted eligibility for compensation to cases in which, "if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence" (CJA 1988, s. 133(1ZA), inserted by Anti-social Behaviour, Crime and Policing Act 2014, s. 175). The Government's intention was clear from the initial wording of the Bill (amended by the House of Lords) which required the new evidence to show that the person was factually innocent. This re-opened the question about compliance with Article 6(2).

The appeals of Hallam and Nealon were dismissed by the UKSC which held (by four to three) that Article 6(2) was engaged in compensation cases, but (by five to two, Lord Reed and Lord Kerr dissenting) that the definition of miscarriage of justice in section 133(1ZA) is compatible with Article 6 (2). Once criminal proceedings have terminated, the only continuing relevance of Article 6(2) is to prohibit a public authority from suggesting that the acquitted defendant should have been convicted, which section 133(1ZA) does not.

The majority deprecated at length, and in strikingly blunt terms, the ECtHR's decisions on this matter. In a case determined before section 133(1ZA) was enacted, the Grand Chamber had reviewed its extensive jurisprudence and found that Article 6 is engaged in these cases as there is a "link" between the concluded criminal proceedings and the subsequent compensation proceedings. It held unanimously that one of the functions of Article 6(2) is to protect an acquitted person's reputation from statements or acts that would seem to undermine it once criminal proceedings have concluded (*Allen v United Kingdom* (Application no. 25424/09) (2013) 63 EHRR 10 (ECtHR)). The refusal of compensation to Allen for her wrongful conviction was held not to breach Article 6(2), however, as she was not required to demonstrate her innocence in order to qualify, and the language used by the domestic courts in upholding the decision of the Justice Secretary had not undermined her acquittal or treated her in a manner inconsistent with her innocence. Lord Wilson thought it was the first time that the domestic courts had to grapple with Strasbourg jurisprudence that was "not just wrong but incoherent" (at [90]). In the view of the majority, the ECtHR had failed to accommodate the differing contexts in which the same facts may be adjudicated upon according to different tests and standards of proof in criminal and civil settings. Baroness Hale considered that the ECtHR "appear[s] to have demanded that the court hearing the civil claim phrase its decisions in less than fully transparent

language. This is contrary to the rule of law: courts must always be able to explain their decisions fully, clearly and honestly" (at [78]).

Nealon and Hallam have filed their applications to the ECtHR. Lord Mance took the view that, as the ECtHR had accepted in *Allen v UK* that excluding category 3 cases from compensation was not incompatible with Article 6(2), there was no sensible basis for not also excluding category 2 cases. He questioned whether this area of law is one where uniformity of approach between countries is critical. He and Baroness Hale thought that cases after *Allen* suggested that the ECtHR may be moving towards the UKSC's limited view. Lord Lloyd-Jones thought that this specific issue has not yet been directly addressed by the ECtHR but that it would be anxious to do so. In his dissent, Lord Reed found it difficult to accept that the UKSC should deliberately adopt a construction of the ECHR which it knows to be out of step with established ECtHR decision-making; and that it was clear that the ECtHR would find section 133(1ZA) to violate Article 6(2). It is fair to say that the positions of both the UKSC and the ECtHR lack clarity. Making predictions about the outcome of any Europe-related matter in the current climate might be deemed a fool's errand, but the emotional case for the appellants appears stronger than the legal one. Hallam's father killed himself while his son was in prison; Nealon was left homeless, suffering from post-traumatic stress disorder and unable to work.

The requirement to demonstrate innocence presents an almost insuperable hurdle for most appellants; the Guildford Four or Birmingham Six would not qualify for compensation today. Proving innocence is most difficult for those who have been convicted solely on a disputed confession (particularly conflict-related cases from Northern Ireland) or by a "credibility contest" between complainant and defendant as in historical sexual abuse cases. When a conviction is quashed, the individual receives just £46 and a travel warrant; apologies and explanations are rare. There is no automatic assistance with accommodation, benefits, medical or psychological needs. Curtailing compensation was a mean-spirited decision by Parliament that accords with other recent policies eroding defendants' rights and undermining the presumption of innocence (see H. Quirk and C. King, "Justice Denied? Compensation for Miscarriages of Justice" in Lennon et al. (eds.), *Counter-Terrorism, Constitutionalism and Miscarriages of Justice* (Bloomsbury 2018), ch. 17). If the Strasbourg appeal fails, the All-Party Parliamentary Group on Miscarriages of Justice should ask Parliament to re-consider its responsibilities.

HANNAH QUIRK

Address for Correspondence: Dickson Poon School of Law, King's College London, Somerset House East Wing, The Strand, London, WC2R 2LS, UK. Email: hannah.quirk@kcl.ac.uk

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