SWEET & MAXWELL

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Archbold Review

Cases in Brief

Dangerous drugs—Misuse of Drugs Act 197 s.4(3)—nature of offences—elements

COKER [2019] EWCA Crim 420; 28 February 2019

C was convicted of an offence charged under the Misuse of Drugs Act 1971 s.4(3)(b) (an offence "to be concerned in the supply" of a controlled drug), not s.4(3)(c) ("to be concerned in the making to another … of an offer to supply"). The judge's direction that the jury must be sure that "there has been a supply of class A drugs to another, or the making of an offer to supply" was a misdirection. The wording of the section as authoritatively explained in *Hughes* (1985) 1 Cr.App.R 344 and *Martin and Brimecome* [2014] EWCA Crim 1940, [2015] 1 Cr.App.R 11 (and endorsed in *Abi-Khalil and Porja* [2017] EWCA Crim 17, [2017] 2 Cr.App.R 4) was clear. Section 4(3) gave rise to three separate and distinct offences. Section 4(3)(a) dealt with "supply" or an "offer to supply". Subsections 4(3)(b) and (c) broaden the ambit of the section by applying to those who are "concerned in" *either* the supply *or* an offer to supply controlled drugs. It follows that there was no room for an either/or direction. When the issue was whether a defendant was concerned with supply or an offer to supply controlled drugs, the count in question must either relate to subs.(b) or subs (c). Applying the cases, the elements of the offence under s.4(3)(b) were (a) that there has been the supply of a controlled drug to another in contravention of s.4(1); (b) that the defendant in question participated in an enterprise involving such supply; and (c) that the defendant knew the nature of the enterprise, namely that it involved such supply. Thus, generally at least, while "being concerned in the supplying" of a controlled drug may well be preceded by "being concerned in an offer to supply", where the prosecution elected to proceed under s.4(3)(b), it was *being concerned in the supplying* which must be proved. The judgment did not deal with an indictment containing separate counts, one under s.4(3)(b) and another under s.4(3)(c); but if the facts should so warrant, the court could not envisage a difficulty in an indictment containing both counts as alternatives. The court expressed sympathy with the judge: the treatment of the offence in *Archbold* 2019 para.27-41 was unduly compressed; and *Blackstone* 2019 para.19.49 wrongly included the "either/or" formulation. (The court nonetheless concluded that, on the evidence, the conviction was not unsafe).

Homicide—manslaughter—joint enterprise—lack of knowledge of weapon following Jogee; Ruddock v The Queen *[2016] UKSC 8, [2017] AC 387—causation—overwhelming supervening event; observation on facts by judge at sentencing—relevance on appeal*

TAS [2018] EWCA Crim 2603; 21 November 2018

One of T's co-accused stabbed and killed the victim during a pre-planned confrontation. Having been directly involved in an initial incident of minor violence, T was driving a car behind the co-accused when the fatal stabbing took place. T was convicted of manslaughter, his two co-accused of murder. The judge had directed the jury that if they were not sure that T (or the co-accused) had intended to kill or cause grievous bodily harm, they must consider whether, as part of a joint enterprise, T intended the victim some harm short of really serious harm, and, if they were sure that he did, acquit of murder and convict of manslaughter. On appeal, T argued that the presence without his knowledge of the knife was an overwhelming supervening event, and as a result, T should not be liable for the fatality which occurred as a consequence: *Jogee*; *Ruddock v The Queen* [2016] UKSC 8, [2017] AC 387, [97].

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(1) To understand this area of joint enterprise liability (as opposed to the move from foresight to intention), it was important to consider the pre-*Jogee* decisions and their relationship to *Jogee*. The court considered *Smith (Wesley)* [1963] 1 W.L.R 1200, *Betty* (1964) 48 Cr. App.R 6; *Anderson, Morris* [1966] 2 QB 110; *Reid (Barry)* (1976) 62 Cr.App. R 109; *Calhaem* [1985] QB 808; *Powell*; *English* [1999] 1 AC 1; *Rahman* [2008] UKHL 45, [2009] 1 AC 129; *Hyde* [1991] 1 QB 134 and *Chan Wing- Siu v The Queen* [1985] AC 168.
(2) In underlining the requirement for proof of intention, one of the effects of *Jogee* was to reduce the significance of knowledge of the weapon so that it impacted as evidence of intention, rather than being a pre-requisite of liability for murder. The court did not accept that if there were no necessary requirement that the secondary party knew of the weapon in order to bring home a charge of murder (as was the effect of *Jogee*), the requirement of knowledge of the weapon was reintroduced through the concept of supervening overwhelming event for manslaughter. As in *Jogee* [96], the joint enterprise was to participate in an attack, T not intending to kill or cause grievous bodily harm, and if the violence escalated and death ensued, then T would be guilty of manslaughter on a proper application of *Church* [1966] 1 QB 59. On the facts which must have been found by the jury, T took the risk that the others involved in the joint enterprise with him would go further than to inflict only some harm. Consistent with the principles identified in the authorities and the modern approach to knowledge of a specific weapon, there was no reason to distinguish the case where the victim was kicked to death or killed with a weapon that was either picked up off the ground or brought by the principal to the scene.
(3) What was left of the overwhelming supervening act? It was important not to abbreviate the test as stated in *Jogee*: was the act one which "nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history". The question could be asked whether the judge was entitled to conclude that there was insufficient evidence to leave to the jury that if they concluded (as they must have) that, in the course of a confrontation sought by T and the co-accused leading to an ongoing and moving street fight, the production of a knife was a wholly supervening event rather than a simple escalation. In the light of the relegation of knowledge of the weapon as going to proof of intent, it could not be that the law brought back that knowledge as a pre-requisite for manslaughter. Whether there was an evidential basis for an overwhelming supervening event which was of such a character as could relegate into history matters which would otherwise be looked on as causative (or, indeed, withdrawal from a joint enterprise) rather than mere escalation was very much for the judge who has heard the evidence and who was in a far better position than the Court of Appeal to reach a conclusion as to evidential sufficiency. This analysis fitted with that in *Brown* [2017] EWCA Crim 1870 and both were to be distinguished from *Rafferty* [2007] EWCA Crim 1846, [2008] Crim. LR. 218.
(4) On sentencing T, the judge took the approach that he had not known that the co-accused had a knife. The court should not take such an assessment into account in order to determine the factual basis for the conviction: *Johnson (Lewis)* [2016] EWCA Crim 1613, [2017] 1 Cr. App.R 12.

Homicide—murder—joint enterprise—lack of knowledge of weapon following Jogee; Ruddock v The Queen *[2016] UKSC 8, [2017] AC 387—causation—overwhelming supervening event*

HARPER [2019] EWCA Crim 343; 5 March 2019

H, appealing her conviction for murder, argued that the use of a knife, the presence of which was unknown to her, by her co-accused was an overwhelming supervening act, because it transformed a situation of spontaneous, drunken, ineffectual violence into a fatal incident. Applying *Tas* [2018] EWCA Crim 2603 above, the submission ignored the thrust of *Jogee; Ruddock v The Queen* [2016] UKSC 8, [2017] AC 387: knowledge of a weapon was merely evidence going to intention. If lack of knowledge of the knife were an overwhelming supervening event, the observations in *Jogee* that such knowledge was no more than evidence from which the jury could reach conclusions about intention would be wrong.

Miscarriages of justice—compensation—Criminal Justice Act 1988 s.133(1ZA)—European Convention on Human Rights Art.6—compatibility

R (HALLAM) v SECRETARY OF STATE FOR JUSTICE; R (NEALON) v SAME [2019] UKSC 2; 30 January 2019

For a detailed analysis, see page 6.

Procedure on trial on indictment—joinder and severance—Indictment Rules 1971 r.9—CrimPR3.21(4)—significance of change—relevance of the admission of bad character evidence

TONER [2019] EWCA Crim 447; 15 March 2019

T was convicted on an indictment charging indecency with young children between 1986 and 1991, and of possession of indecent images of a child in 2015. On appeal, he argued that the two groups of offences should not have been tried together. Until the Indictment Rules were replaced in 2016 the provisions of the rules allowing joinder were very strict. Indictment Rules 1971 r.9 required charges to be founded on the same facts or form a series of offences of the same or a similar character. The court considered authorities on the old rules (*Ludlow v Metropolitan Police Commission* [1971] AC 29; *Baird* (1993) 97 Cr. App.R. 308; *C*, *The Times* 4 February 1993). The court had real doubts as to whether the charges against T could be said to form a series of offences of the same or a similar character, but it was not necessary to decide the point. The strict terms of r.9 had not been reproduced precisely in the current rules. CrimPR3.21(4), now governed the ordering of separate trials. The opening words of the rule state that the court "may", not "must", exercise its powers to order separate trials if the defendant may be prejudiced or embarrassed in his or her defence, or it was otherwise desirable to do so. That did not mean that the width of the judge's discretion was infinite, or that the new rule was intended to effect a revolutionary change. However, the court rejected T's argument that there was no diminution of the strictness of r.9 at all. The replacement of the old rule with the new removed the technical barriers to joinder in appropriate cases. In a case where the evidence on one count would be properly admissible on the other as evidence of bad character under the Criminal Justice Act 2003 s.101, it was difficult to argue that the defendant would be "prejudiced or embarrassed in his or her defence" by having both counts or sets of counts on the same indictment. The judge was not required to order severance of

the indictment and separate trials unless on their proper construction the rules compelled it, or there was some other factor (such as the need to avoid overloading the indictment or over-burdening the jury) making separate trials desirable. In T's case, if the child pornography counts had been severed, an application at the defendant's trial for the historic offences to adduce the facts on which the pornography charges were based under s.101(d) of the 2003 Act as showing a sexual interest in young boys, could properly have been allowed, and vice versa (*D, P and U* [2011] EWCA Crim 1474 [2013], 1 W.L.R 676).

Self-defence—Criminal Justice and Immigration Act 2008 s.76(5A) and (8A)—householder's defence—non-intruder cases—application—belief in trespassing; reliance on sentencing remarks on appeal in Court Martial Appeal Court
CHEESEMAN [2019] EWCA Crim 149;
13 February 2019
The victim had entered C's room in an army base with C's consent. C left, and, when he returned, the victim was damaging his property, having locked the door. C gained entry and stabbed him in, C claimed, self-defence.
(1) The Court Martial Appeal Court found on appeal that the judge advocate had been wrong to rule that the householder defence (Criminal Justice and Immigration Act 2008 s.76(5A) and (8A), as amended by the Crime and Courts Act 2013) applied only to cases where the person injured as a result of the use of self-defence was an intruder, rather than somebody who had entered the premises lawfully but thereafter become a trespasser, misconstruing the scope of s.76(8A)(d) ("D believed V to be in, or entering, the building or part as a trespasser"). The Judge Advocate had been misled by the constant references to "intruders" in the speeches of ministers quoted in *Ray* [2017] EWCA Crim 1391, [2018] QB 948, thus erroneously taking the paradigm example as defining the limits of the provision, where that could not be accommodated within the statutory language. Subsection (8A)(d) was concerned with the belief of the defendant as to whether the person concerned was in, or entering, the building or part as a trespasser, not a belief whether the person entered the building as a trespasser. Most cases where the householder defence was engaged would relate to an intruder, so belief as to trespass would cause no difficulty. In other cases, such as this, it would be unnecessary for a jury (or board in a court martial) to wrestle with questions of property law and the niceties of whether someone who started as an invitee became a trespasser. The defence was not directly concerned with the question of whether someone was or was not a trespasser but rather the defendant's belief. No doubt, the clearer it was that someone was a trespasser the more readily a jury would not be troubled by the issue whether the defendant did or did not hold the belief. On the facts of this case, the victim became a trespasser when he started to damage C's room and belongings. But the appellant did not understand that to be the case and would not, on that account, have believed him to be a trespasser. C's case was that he understood the victim to be a trespasser when C demanded that he leave the room, and he failed to do so. The use of the language of "trespass" in a judge's direction would be likely to confuse without some simple elaboration. The question was whether the defendant believed that the person concerned had no right or business to be in the building, or was there without authority, at the time of the violent incident. This error, however, did not render unsafe the conviction for murder and it was accordingly affirmed.
(2) In a court martial, sentencing remarks were delivered by the judge advocate. While the judge advocate did not take part in the deliberation of the board in determining guilt or innocence, it was the board and the judge advocate who determined sentence. That enabled the judge advocate to pronounce sentence in the sure knowledge of the underlying findings of fact made by the board. The Court Martial Appeal Court therefore relied on the account of the facts in the sentencing remarks in concluding that the conviction was nonetheless safe.
[*Comment: Although the Court Martial Appeal Court – the Court of Appeal Criminal Division, wearing another hat – did not consider the case law referred to in* Taj *above, the explanation of the procedural differences between civilian trial on indictment and courts martial justifies the difference in approach to the utility of sentencing remarks (or – as arose in* Harper *above – statements by the prosecutor at sentence) in the two jurisdictions.* RP]

SENTENCING CASE

Detention and Training Orders
MCGEECHAN [2019] EWCA Crim 235, 7 February 2019
The applicant sought leave to appeal against a sentence received for offences committed during the supervision period of a Detention and Training Order (DTO). He had been made subject to a 24-month DTO on 16 June 2017. In June 2018, he was released and was then subject to a period of supervision until the DTO expired in June 2019. On 1 September 2018, he pleaded guilty to various offences including dangerous driving. These offences were committed on 30 August 2018 (during the supervision period of the DTO). The applicant was 18 years old when he committed those offences and 19 at the date of sentence. He was sentenced on 3 October 2018 to 21 months and 18 days' detention in a young offender institute (YOI).
The parts of the sentence to be considered in this note are (i) the 12 months' detention in a YOI for the offence of dangerous driving and (ii) the nine months and 18 days' detention for the commission of an imprisonable offence during the supervision period of the DTO (this being the period between the date of the new offences and the date when the DTO would have expired) (the Court referred to this as "the breach detention"). The sentencing judge had ordered that the breach detention be served immediately and the detention for the dangerous driving run consecutively.
The grounds of appeal were that (i) the court had no power to order that the sentence of detention imposed for the offence of dangerous driving should run consecutively to the breach detention; (ii) it was not necessary to impose the whole of the period between the new offences and expiry of the DTO by way of the breach detention; (iii) the sentence imposed in respect of the dangerous driving offence was manifestly excessive.
The power to impose detention for offending during the supervision period of a DTO and a separate sentence for the new offence is contained within s.105 of the Powers of

Criminal Courts (Sentencing) Act 2000. Section 105 (3) (a) states that the breach detention shall either be served before and be followed by, or be served concurrently with, any sentence imposed for the new offence.
As to ground (i), s.106 of the 2000 Act states that where an offender has been released, following the period of detention and training under a DTO, any sentence of detention in a young offender institution shall have immediate effect. Any such sentence must therefore be served concurrent with and not consecutive to any detention period imposed for breach of the DTO. Section 106 is engaged where a sentence of detention in a young offender institution is imposed and the offender is subject to a DTO. In this case, at the time of sentencing, the applicant was subject to the supervision part of the 2017 DTO. The sentence of 12 months' detention in a YOI had to take effect on the day that it was passed. The Court did not have power to order that this should be served as a consecutive sentence.
As regards ground (ii), the Court reduced the breach detention to six months to reflect the applicant's compliance with the supervisory period of his DTO and to acknowledge that the later offences were not a straightforward case of repeat offending.
As regards ground (iii), the Court concluded there were no grounds for reducing the sentence for the dangerous driving offence.
The Court reduced the breach detention to six months and made that concurrent with the sentence of 12 months for the dangerous driving offence. (The Court also reduced the period of disqualification from driving, but that falls outside the scope of this note.)

Features

Re-opening an appeal or other final determination of the Court of Appeal Criminal Division

By Sarah Bergstrom[1]

The Court of Appeal was created by statute and therefore the jurisdiction of the Court derives almost entirely from statutory provisions,[2] which are supplemented by the Criminal Procedure Rules and the Practice Direction. The primary source of the Court's powers and jurisdiction is the Criminal Appeal Act 1968. Once an appellant has exhausted his statutory rights of appeal (which are limited to one appeal[3]), a determination of the Court is final.
The Court of Appeal does not have its own system for formally recording its orders, which means that a determination only becomes final when it is recorded into the Crown Court system (currently Crest, but likely to be the Common Platform in the future). Once the order has been formerly entered a jurisdiction to re-open a final determination does exist, but its scope is very limited.

How the jurisdiction has developed
The jurisdiction of the Court to re-open a final determination applies in both the Civil and Criminal Divisions of the Court of Appeal and the first case which attempted to fully analyse its application in the Criminal Division was *Yasain*,[4] when the Court initially considered the circumstances in which a final determination of the Criminal Division could be re-opened.

After that case was decided in 2015, *Hockey*[5] considered the jurisdiction in detail again. There it was established that a final determination could be re-opened where the decision had been entered into the record, but either:

(i) on a proper analysis *the order was a nullity,*[6] or
(ii) there had been some *defect in procedure which may have led to a real injustice.*[7]

The second category was adopted following the line of authority set out in *Daniel.*[8] In that case, solicitors informed the Registrar[9] that they were representing the appellant and would be instructing counsel for the hearing. However, as a result of an administrative error (which was admitted by the Registrar), the case was listed as non-counsel and determined. The case was subsequently re-opened by the Court because it was accepted that there had been a defect in established procedure resulting in a real injustice to the appellant.
The Court, in both *Yasain* and *Hockey*, then went on to consider a *third* category of cases where a final determination could be re-opened, based on the principles set out in the context of civil appeals in *Taylor v Lawrence*[10]:

(iii) Where it was necessary for the Court to re-open that decision in order to avoid real injustice, the appellate Court had an implicit power/jurisdiction to do so in exceptional circumstances, where there was no other effective remedy.[11]

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2 The Criminal Appeal Act 1968 is the main statute which governs the appeal process and the powers of the Court and judiciary. See also s.15 of the Senior Courts Act 1981.
3 *Pinfold (Terence Joseph)* [1988] QB 462. This finality is, however, subject to the power of the Criminal Cases Review Commission to refer cases to the Court (as was done, eventually, in *Pinfold*: see [2003] EWCA Crim 3643, [2004] 2 Cr.App.R 5).
4 [2015] EWCA Crim 1277; Skudra, [2015] 9 *Archbold Review* 4.
5 [2017] EWCA Crim 742.
6 As in (1976) 62 Cr.App.R 5; see at [24]–[25].
7 See at [27] and at [8].
8 (1977) 64 Cr.App.R 50, [1977] QB 364.
9 The Registrar of Criminal Appeals.
10 [2002] EWCA Civ 90, [2003] QB 528.
11 *Yasain* at [36]–[44].

Taylor v Lawrence was a case about a boundary dispute, where injustice was said to have been caused by the judge failing to recuse himself. Arguably that was a breach of natural justice as opposed to a simple procedural defect in the proceedings.

In applying *Taylor v Lawrence* to the Criminal Division, there were said to be three interests specific to crime which were identified:

(1) the interests of the State (including finality of proceedings);

(2) the interests of the defendant;

(3) the interests of the victim.

A second important difference identified between the jurisdiction to re-open in two Divisions was the existence of the Criminal Cases Review Commission (CCRC) as an effective remedy. The CCRC has statutory powers of its own to refer a case to the Court of Appeal Criminal Division,[12] even if there has previously been an appeal under the Criminal Appeal Act 1968. The Court of Appeal Civil Division does not have an equivalent body and the only remedy in that Division is a further appeal to the Supreme Court.

Although by statute an appeal to the Supreme Court also lies from the Criminal Division, this is limited to cases where a question of public importance has been certified and it is only available in appeal cases.[13] An application to re-open, however, can be made in respect of any final determination of the Court and is not limited to appeals. It could include a decision of the Court on a renewed application for leave or an application to apply for an extension of time to apply for leave.

The significance of an alternative effective remedy

In *Hockey*, the appellant sought to re-open a confiscation order imposed by the Court of Appeal nearly ten years earlier, on an appeal made by the prosecution under s.31(2) of the Proceeds of Crime Act 2002. The Court declined to re-open that determination and, whilst saying that it was not for the Court to identify mechanisms for challenge which were open to a party, pointed out that the appellant had, in fact, a statutory remedy under the Criminal Appeal Act, which he had failed to exercise.[14]

As a consequence of that judgment, Hockey did then exercise his statutory right of appeal, but his application was dismissed.[15]

What *Hockey* clearly confirms is that a precondition for reopening the appeal is that no alternative effective remedy[16] should exist and that the purpose of re-opening a final determination is not to improve the efficiency of appeal proceedings. This is because the CCRC will normally always be an effective remedy, being a "tried and tested" route to achieve the objectives of an appellate court. Thus, in *Melius,* an application to re-open was dismissed on the basis that the applicant had an alternative effective remedy and could have made an application to the CCRC.

Powell[17] was another confiscation case. The confiscation order had been wrongly calculated in the Crown Court and the error had not been brought to the attention of the Court of Appeal in Powell's appeal hearing in November 2010. Of this error, the parties had also been unaware. Before applying to re-open his case, Powell had previously applied to both the CCRC and the High Court without success. The re-opening of the case was also unopposed by the prosecution and on its own unique facts the case was regarded as exceptional and was re-opened on that basis.

The procedure for making an application to re-open

Yasain[18] envisaged that the Criminal Procedure Rule Committee might set out a framework for a procedure to be followed if a party wished to re-open a case. In *Hockey,* the Court gave a practical framework for such a procedure.[19] This was subsequently adopted by the Criminal Procedure Rule Committee and developed into a binding procedure which is now set out in Crim PR 36.15.

The development in the "inherent or implicit" jurisdiction

In *AW,*[20] the Court considered an application to re-open a sentencing appeal decided on 7 May 2015. It was alleged by the applicant's legal representatives that there had been a defect in established procedure which could be said to have been an administrative error causing an injustice. That error was accepted by the Court, but the application to re-open was not lodged until 31 January 2017. During the intervening period the applicant had obtained a further report to effectively bolster her appeal application. The Court dismissed the application to re-open and said that legal representatives must act without delay to successfully re-open a case under this jurisdiction. The purpose of the discretion to re-open a case, it said, was not to provide an applicant with an extended period to build his case, before then applying at leisure to re-open it. The Court also referred to the inherent jurisdiction as set out in *Taylor v Lawrence* and applied in *Yasain*.

The effect of Gohil

In 2018 the Court of Appeal decided *Gohil and Preko,*[21] and this decision is now regarded as the leading case on applications to re-open. This was an application to re-open a final determination on a renewed application for leave to appeal against conviction.

The offences related to money laundering and the applicants alleged that the prosecution had failed in their duties of disclosure and misled the Court on the previous occasion into dismissing their applications. They also argued that the CCRC would not be an effective remedy for an applicant in a situation where the prosecution had misled the Court of Appeal, as it could not be assumed that the CCRC would refer the case back to the Court of Appeal.

The allegations against the prosecution were extremely serious and the Court accordingly sought the assistance of an Advocate to the Court[22] to assist with the issues of jurisdiction and its scope. In a very careful and considered judgment, the Court (Gross LJ William Davis J and Garnham J) refined the principles set out in *Hockey* and *Yasain* but determined that the application to re-open was not well founded and it was refused.

The most important point arising from the judgment is that instead of there being three categories of case in which a previous decision can be re-opened, the Court said that there are only two:

12 Section 9(1) of the Criminal Appeal Act 1995.
13 [2017] EWCA Crim 59.
14 Section 10.
15 [2018] EWCA Crim 1419.
16 [2016] EWCA Crim 1538.
17 [2016] EWCA Crim 1539.
18 See at [42].
19 See at [16].
20 [2017] EWCA Crim 819.
21 [2018] EWCA Crim 140.
22 Appointed by the Attorney General and formerly known as an "Amicus".

(i) Where on a proper analysis *the order was a nullity;*[23]

(ii) Where there had been *some defect in procedure which may have led to a real injustice*[24] and it is necessary to re-open a final determination (a) to avoid a real injustice (b) in exceptional circumstances which make it appropriate to do so and (c) there is no alternative effective remedy.[25]

The effect of the judgment is that the defect in procedure jurisdiction mentioned in *Daniel* (i.e., the second category of case identified in *Yasain*) has in effect been fully amalgamated with the *Taylor v Lawrence* injustice category[26] (previously the third category identified in *Yasain*). This was perhaps a natural development given that both categories stem from what is often called the inherent or implicit jurisdiction of the Court to regulate its own proceedings.

The result of this is that the Criminal Procedure Rules and the case-law are now fully aligned. The Rules state that an application to re-open must:

(3)b) explain—

(iii) why it is necessary for the court to re-open that decision in order to avoid real injustice,

(iv) how the circumstances are exceptional and make it appropriate to re-open the decision notwithstanding the rights and interests of other participants and the importance of finality,

(v) why there is no alternative effective remedy among any potentially available, and

(vi) any delay in making the application.

In *Rostami*[27] it was argued before the Court that the applicant should be allowed to re-open a renewed application for leave because of an administrative error in procedure. He maintained that he wished to be represented by counsel and had been denied the opportunity of doing so. On investigating the assertions made, the Court found that the applicant's allegations were not credible and that the strong indications were that any procedural errors were the fault of the applicant and his advisors. This was not, therefore, a *Daniel* type case and the application was refused.

In *Rostami* the Court also stressed that, even where all the conditions for re-opening a final determination are satisfied, the Court still retains a residual discretion to decline to re-open the decision.[28] If a successful application to re-open will not impact on the safety of the conviction, this residual discretion is unlikely to be exercised in favour of re-opening the case. *Gohil* was cited as the leading authority.

Conclusion

Since *Yasain* there have therefore been significant developments in the case law clarifying the jurisdiction of the Court to re-open final determinations. The Criminal Procedure Rules also now establish a clear procedure for making such applications. The jurisdiction has been shown to be exceptionally limited and the hurdles are often insurmountable. This is perhaps unsurprising given the statutory framework in which the Court operates and the availability of the CCRC as an alternative effective remedy in most cases.

23 At [98]–[100] of the judgment.
24 See [101].
25 See [110].
26 See [101]–[129] of the judgment. The decision in , fn.8 above, was mentioned with approval at [113]–[114].
27 [2018] EWCA Crim 1383.
28 See [18]–[19].

Compensating miscarriage of justice – what price for wrongful imprisonment?

By Jodie Blackstock[1]

On 30 January 2019, the UK Supreme Court handed down the long-awaited judgment in the case of *Hallam and Nealon v Secretary of State for Justice* [2019] UKSC 2, in which JUSTICE intervened.

The case concerned whether the statutory provisions governing eligibility for compensation of persons whose conviction for a criminal offence is reversed are compatible with the presumption of innocence guaranteed by Art 6(2) of the European Convention on Human Rights (ECHR). Had the Justices found the provisions incompatible, a declaration to that effect would have been issued pursuant to s.4 of the Human Rights Act, requiring Parliament to revisit the law. Unfortunately for the appellants and all other miscarriage of justice victims lucky enough to have their case referred back to the Court of Appeal Criminal Division (CACD),[2] the majority of the Justices did not find the provisions to violate Art 6(2).

The test for compensation

Section 133(1) of the Criminal Justice Act 1988 (CJA) provides for compensation following a reversal of a conviction or pardon. Usually a conviction will be reversed as a result of the conviction having been quashed by the CACD on an out-of-time appeal following a referral from the Criminal Cases Review

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2 19 cases were referred back last year, according to the CCRC 2017/2018 Annual Report, which is roughly 13% of its caseload for the year. Of the 1,439 applications received, 532 were "no appeals", meaning that they had not exhausted their right of appeal and could only be referred back in exceptional circumstances: https://s3-eu-west-2.amazonaws.com/ccrc-prod-storage-1jdn5d1f6iq1l/uploads/2018/07/CCRC-Annual-Report-2017-18_Web-Accessible.pdf

Commission. The section provides for compensation when a new or newly discovered fact shows beyond reasonable doubt that a "miscarriage of justice" has occurred.[3] (An *ex gratia* scheme additionally enabled compensation to be awarded where it was just and fair to do so – and enabled many of the high-profile miscarriage of justice victims of the 1980s and 90s to receive compensation. However, this scheme was abolished in 2006.[4]) Until s.175 of the Anti-social Behaviour, Crime and Policing Act 2014 inserted new s.133(1ZA) into the CJA, there was no definition of "miscarriage of justice" in the legislation.

Previous courts had grappled with what an appropriate definition of "miscarriage of justice" might be, and this is why Government had sought to clarify the test. The cases culminated in *Adams v Secretary of State for Justice* [2012] 1 AC 48 before the UK Supreme Court where the Court was asked to define "miscarriage of justice" without offending the presumption of innocence. The Court did not consider that Art.6(2) ECHR was engaged. However, the majority did decide that a test of innocence was setting the bar too high. The Court adopted four categories of case, of progressively wider scope, as a framework for discussion.

They were:

(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

(4) cases 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.

By a majority, the *Adams* Court held that the term "miscarriage of justice" covered all cases falling within category (2). It therefore included, but was not limited to, cases falling within category (1). The minority view was that the term should be confined to category (1) cases. Lord Philips for the majority explained that the test will

> [E]nsure 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 one. 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 three.

Nevertheless, in 2014, the category (1) test was established in statute, which required the new or newly discovered fact to demonstrate that the person did not commit the offence. It required the person to prove, for the purposes of compensation that they were innocent. The intention was said to be to provide a definition of miscarriage of justice that was comprehensible to applicants and straightforward for the Secretary of State to apply.[5]

The difficulty with such a test is that the CACD does not consider whether the appellant is innocent of the crime; it considers whether the conviction is unsafe. As Baroness Helena Kennedy QC said during the debates in the House of Lords over the 2014 amendment

> When a case has gone wrong and new material comes to light which changes the whole complexion of the case, and it becomes clear that a jury in possession of all the evidence would have reached a different verdict, those who have suffered should have some compensation. To expect them to prove that they were innocent beyond reasonable doubt is to add to the injustice they have already suffered. Miscarriages of justice lead to ruined lives. Families are destroyed. People often end up without partners when they come out of prison. They lose jobs and homes. The mental despair and anguish are never fully resolved. That is why they need to have such real help afterwards. People's lives never go back to how they were. This is where we find, as a decent society, that we have to make amends.[6]

JUSTICE's past work securing the quashing of convictions demonstrated the difficulties faced for victims of miscarriage of justice upon release from prison. In its report *Compensation for Miscarriage of Justice* (1982)[7] it set out the deficiencies in the system at that time. Last year JUSTICE published the report *Supporting Exonerees: Ensuring accessible, consistent and continuing support* (2018), which confirms that upon release, victims of miscarriage of justice still receive just £46 and a travel warrant. There is no automatic accommodation, social security assistance or psychiatric assessment available to them. The report records the hardship, difficulty in adjustment and trauma that victims of miscarriage of justice face for years after their release.

As the conclusion states, "[a] wrongful conviction can ruin a person's life." Although there is a support service run by the Citizens Advice Bureau, this is very limited, both in location and substance, and requires self-referral. As the report records, victims of miscarriage of justice struggle to adjust or to trust authorities, having spent years in prison both becoming institutionalised and also grappling with the fact that they should not be there. Modern life has many obstacles to navigate – for example: the internet, (smart) mobile phones, and contactless payments on public transport. JUSTICE is not aware of any cases where a satisfactory explanation or apology for the wrongful conviction has been given to a victim of miscarriage of justice, in contrast to many other situations where the State will conduct an inquiry to learn lessons and avoid future mistakes. Rebuilding a life lost – home, relationships, education, employment – and removing the stigma attached to a conviction, is a monumental task.

Against this backdrop, compensation for miscarriage of justice goes some way to acknowledge the wrong that has been caused and support the victims to begin their life again.

As recommended in *Supporting Exonerees,* JUSTICE considers that anyone who has suffered imprisonment follow-

3 The section implements Art.14(6) of the International Covenant on Civil and Political Rights 1966.

4 For how this abolition came about, see Spencer, *"Compensation for Miscarriages of Justice"*, [2010] CrimLR 803.

5 Hansard (HC Debates) Public Bill Committee, 14th Sitting, 11 July 2013, cc 463-464.

6 Hansard HL Deb Report Stage, 4th Sitting, 22 January 2014, Col 674.

7 The report can be found at: https://justice.org.uk/our-work/areas-of-work/criminal-justice-system/supporting-exonerees-ensuring-accessible-continuing-and-consistent-support/.

ing a conviction that was later quashed should be entitled to compensation, unless it can be shown that they contributed to the withholding of the new fact, the conviction was quashed on a mere technicality and/or a re-trial was ordered at which the person was convicted.[8] This is because, once a person's conviction is quashed, the law recognises that he/she is not guilty of the crime and should not have been imprisoned. This is the test that applies in Scotland, where the unamended s.133 CJA test continues to apply, as does the *ex gratia* scheme. Guidance indicates that the successful appellant will normally be eligible for the payment of compensation and further consideration will not normally be required, unless the appeal was allowed on an error by the trial judge, a point of law or the delay in appearance of the new fact was wholly or partly attributable to the individual.[9] Contrary to the assertion expressed to the UK Parliament by Government set out above, there is clearly an alternative way of determining eligibility for compensation than an innocence test.

Nevertheless, it is now only the amended s.133 CJA test that can provide compensation. As the statistics demonstrate, this is virtually impossible to satisfy.[10] To underline the narrow confines of the test, it applies only:

(a) on an out-of-time appeal – so disregarding the year or more a person may have spent in detention on remand and pending appeal in a case where a conviction was quashed on an appeal that was brought in time;

(b) where there is a new or newly discovered fact – which would exclude an alternative judicial opinion on the fairness of evidence heard at trial, such as confession evidence adduced under pressure or in the absence of legal assistance; or a failure to apply the law correctly (such as the cases where a defence under the Refugee Convention was missed); or even cases where, on appeal, it was held that the defendant was convicted of an offence that did not exist;

(c) if the new or newly discovered fact demonstrates beyond reasonable doubt that there was a miscarriage of justice – which in practice is produced by the appellant, and therefore must be demonstrated by the appellant; and, now,

(d) if the new or newly discovered fact shows that the person did not commit the offence.

For the avoidance of doubt, JUSTICE considers that the amended test is a wholly inadequate response to miscarriage of justice.

Article 6(2) ECHR

Given that Parliament has considered and adopted a definition of miscarriage of justice limited to innocence, it might have been thought that there was no longer any way to challenge a refusal of compensation that requires innocence to be demonstrated. However, since the Joint Committee on Human Rights and a majority of the House of Lords thought that such a test would violate the ECHR, this route of challenge was embarked upon by the two appellants in this case. Mr Hallam had served seven years for a murder which, it seems, he did not take part in because his conviction was quashed on the basis of alibi evidence. Mr Nealon had served 17 years for an attempted rape that he almost certainly did not commit, his conviction being quashed on the basis of DNA evidence. Neither were able to produce evidence that satisfied the Secretary of State beyond reasonable doubt that they did not commit the offence.

According to the Strasbourg case law, a victim of miscarriage of justice is entitled to the presumption of innocence in accordance with Art.6(2) ECHR. The European Court of Human Rights has considered the application of the protection in a significant number of cases, culminating in the case of *Allen v UK* before the Grand Chamber. This case predated the legislative change in 2014, and therefore considered whether the Secretary of State's approach to awarding compensation, as well as the Justices' reasoning in *Adams,* had violated the presumption of innocence. The Strasbourg Court concluded that the presumption was not violated because of the nature of the proceedings and the fact that neither the Secretary of State, nor the courts had in fact to determine whether she was innocent or not.

The UK Supreme Court in *Hallam and Nealon* had to consider whether Art.6(2) was engaged at all (since the Court in *Adams* had decided it was not) and if so, whether the new test was in violation of the protection in light of the Strasbourg case law. By a majority of 5-2, the Court decided that the presumption of innocence was not violated. The majority gave differing and interestingly developed reasoning, although they agreed that the Strasbourg case law was incoherent and did not constitute a clear and constant line of jurisprudence that must be followed by the Supreme Court. Most accepted that Art.6(2) was engaged. This was because the Grand Chamber in *Allen* at [94] made clear that Art.6(2) applied to the UK procedure.

> Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the fair-trial guarantees of Article 6 § 2 could risk becoming theoretical and illusory. What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public.

The Strasbourg Court had further explained that where criminal proceedings have ended in an acquittal, the person is "innocent in the eyes of the law and must be treated in a manner consistent with that innocence."

However, Lord Hughes at [95]–[130] considered that the Strasbourg Court had not properly contemplated when the presumption of innocence should apply. He did not think it was in issue following the quashing of a conviction and should not be a consideration during the application of a statutory eligibility test for compensation. Further, he considered that the distinction between "discontinuance" and "acquittal on the merits" (see below) was completely unexplained and failed to address the meaning of "acquittal," which in some jurisdictions is a positive exoneration, but in most it is not – especially in jurisdictions where a jury does not make findings of fact.

8 In cases where a person is acquitted on a different basis, this may preclude compensation under s.133 of the CJA and serves to underline how necessary the ex gratia scheme was to ensuring compensation is provided to deserving individuals.

9 See: http://www.gov.scot/Topics/Justice/law/miscarriages/Compensation-Scheme/compensationscheme

10 After the test came in, only around one application per year has successfully been awarded compensation out of around 30 per year.

Lord Mance, with whom Lord Lloyd-Jones agreed, giving the lead judgment at [1]–[75], thought that the method by which Strasbourg determined whether a violation had occurred or not was incoherent. In the Strasbourg case law, the type of quashing proceeding is important – whether the person's conviction was overturned by way of a "discontinuance of proceedings" or "an acquittal on the merits" – as was the language used by the tribunal refusing compensation. For example, if a person's conviction is quashed due to a particular piece of evidence casting doubt on the way the prosecution put its case, but there is a possibility of a re-trial because strong evidence still exists, it would be acceptable for the tribunal considering compensation to voice suspicion on that basis. This is because the decision amounts to a discontinuance, not a final determination. However, the Grand Chamber in *Allen* went on to hold that, irrespective of the type of quashing proceeding, the presumption of innocence would be infringed if the decision-maker expressly determined eligibility based on whether the applicant was innocent or not. The Court considered that a refusal to compensate in accordance with *Adams* category (2) would not violate the presumption, but in category (1) it would.

Lord Mance in *Hallam* considered that there was no real difference between voicing suspicion and requiring innocence be made out in the eligibility test. He saw no coherent reason why category (2) should not also violate the presumption of innocence if category (1) did so. He found the distinction unconvincing. At [47] he asked what words would be permissible in a refusal of compensation? He considered that the real test as to when an infringement of the presumption of innocence would occur was whether the decision-maker in its reasons for refusing compensation indicated that the quashing court had reached the wrong conclusion and that the person should remain convicted. Only this would violate the presumption of innocence.

Lady Hale at [76]–[82] agreed that Art.6(2) ECHR was engaged. However, she also agreed with Lord Mance that it was not possible to say that the statutory test would violate the presumption of innocence in all cases. She found that there was room in the Strasbourg jurisprudence to conclude that the Court would consider the test acceptable so long as the decision-maker refrains from suggesting that the applicant should have been convicted.

Lord Wilson at [83]–[95] was strident in considering that there was hopeless and irretrievable confusion in the Strasbourg case law. He found its line of reasoning to be "wrong" and incoherent" (at [90]) by blurring the fact that "innocence" pertains to the criminal law and had been divorced from its context. He concluded that it need not be followed pursuant to the application of s.2 of the Human Rights Act. However, he conceded that if there had been a requirement to do so, s.133(1ZA) would have violated Art.6(2).

For the minority, Lord Reed at [140]–[192] carefully considered the Grand Chamber judgment in *Allen* and concluded that the Court had indeed contemplated the circumstances of acquittal in England and Wales. He found that the Court has set out clearly and consistently that a test requiring innocence would infringe the Convention. This was based on a logical link between the criminal proceedings and the compensation proceedings, which rest on the facts found by the CACD. It was also based on the language used and which of the *Adams* categories the acquittal fell into – which aligned with the Strasbourg distinction between a discontinuance case and an acquittal on the merits (a category (1) or (2) case equating to an acquittal on the merits, meaning that to question the innocence of that person would violate Art.6(2), whereas a category (3) or (4) case would amount to a discontinuance, and thus to voice suspicion as to guilt would not invoke violation). Moreover, the Grand Chamber in *Allen* made clear that irrespective of the kind of acquittal, it is nevertheless impermissible for the criteria for awarding compensation to "[call] into question the innocence of an acquitted person or to require any assessment of the applicant's criminal guilt" at [188]. As such, he considered that the reasoning of the Court was sound and summarised coherently in *Allen,* which was intended to provide authoritative guidance. Moreover, it was clear that the s.133(1ZA) required consideration of innocence and the Strasbourg Court would find it in violation of Art.6(2).

Lord Reed also considered the practical application of the s.133(1ZA) test, which is founded on the CACD decision and consideration of the evidence as a whole. He thought a distinction between innocence in a general sense and innocence established by a new or newly discovered fact for the purposes of compensation was an unrealistic distinction with no material difference. He held at [184]:

> …[t]he implication of the decision is likely to be that, although the new or newly discovered fact has led to the quashing of the conviction, the person's innocence has not been established. The decision therefore casts doubt on the innocence of the person in question and undermines the acquittal.

Lord Kerr at [193]–[206] agreed, expressing concern for Lord Mance's formulation, which if applied, he thought would mean that many deserving applicants would be cut out from receiving compensation because, while they were factually innocent of the crime, they would not be able to prove this.

The decision is interesting for the majority's express criticism of the Strasbourg approach to post-conviction application of Art.6(2) and determination not to follow the Grand Chamber decision in *Allen*, which the appellants, JUSTICE, the Joint Committee on Human Rights, the majority of Peers in the House of Lords and the minority Supreme Court Justices all considered to clearly preclude an innocence test.

What happens next? It is likely that the appellants will seek to take their cases to Strasbourg to see whether the Court in fact agrees with itself in *Allen* or takes heed of the majority Justices' criticism of its extension of Art.6(2) into this arena. If they do appeal, the Court will be tasked with defining even more specifically the concepts of "innocence" and "acquittal" for the purposes of compensation regimes that the majority Justices found to be so lacking in the Strasbourg jurisprudence.

Elsewhere, JUSTICE and other groups concerned with miscarriage of justice will be seeking Parliamentary review of the law, which so unfairly precludes compensation for those wrongly convicted, though finding time between Brexit debates is currently proving difficult.

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