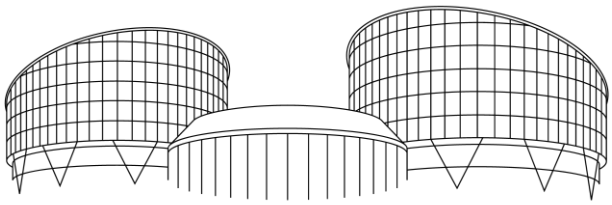

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF ALLEN v. THE UNITED KINGDOM

(Application no. 25424/09)

JUDGMENT

STRASBOURG

12 July 2013

This judgment is final but may be subject to editorial revision.

In the case of Allen v. the United Kingdom,

The European Court of Human Rights sitting as a Grand Chamber composed of:

Dean Spielmann, *President,*
Josep Casadevall,
Guido Raimondi,
Ineta Ziemele,
Mark Villiger,
Isabelle Berro-Lefèvre,
Khanlar Hajiyev,
David Thór Björgvinsson,
Ján Šikuta,
George Nicolaou,
András Sajó,
Ledi Bianku,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Paul Lemmens,
Paul Mahoney,
Krzysztof Wojtyczek, *judges,*
and Michael O'Boyle, *Deputy Registrar,*

Having deliberated in private on 14 November 2012 and 22 May 2013,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 25424/09) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Ms Lorraine Allen ("the applicant"), on 29 April 2009.

2. The applicant, who had been granted legal aid, was represented by Stephensons, a firm of solicitors based in Wigan. The United Kingdom Government ("the Government") were represented by their Agent, Ms Y. Ahmed, Foreign and Commonwealth Office.

3. The applicant alleged under Article 6 § 2 of the Convention that the decision, following her acquittal, to refuse her compensation for a miscarriage of justice violated her right to be presumed innocent.

4. On 14 December 2010 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. On 26 June 2012 a Chamber of the Fourth Section composed of L. Garlicki, D. Björgvinsson, N. Bratza, G. Nicolaou, L. Bianku, Z. Kalaydjieva, V. De Gaetano and T.L. Early, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72 of the Rules of Court).

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24 of the Rules of Court.

7. The applicant and the Government each filed a memorial on the admissibility and merits of the application.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 14 November 2012 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms Y. AHMED, *Agent*,
Mr J. STRACHAN, *Counsel*,
Mr C. GOULBOURN,
Mr G. BAIRD, *Advisers*;

(b) *for the applicant*

Mr H. SOUTHEY QC, *Counsel*.

The Court heard addresses by Mr Strachan and Mr Southey and their answers in reply to questions put by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1969 and lives in Scarborough.

A. The criminal conviction

10. On 7 September 2000 the applicant was convicted by a jury at Nottingham Crown Court of the manslaughter of her four-month old son, Patrick. She was sentenced to three years' imprisonment.

11. Evidence was given at her trial by expert medical witnesses who described how the injuries suffered by her son were consistent with shaking or an impact. The conviction was based on the accepted hypothesis concerning "shaken baby syndrome", also known as "non-accidental head

injury" ("NAHI"), to the effect that the findings of a triad of intracranial injuries consisting of encephalopathy, subdural haemorrhages and retinal haemorrhages were either diagnostic of, or at least very strongly suggestive of, the use of unlawful force. All three were present in the case of the death of the applicant's son.

12. The applicant did not, immediately after her trial, appeal against her conviction.

B. The quashing of the conviction

13. Following a review by the authorities of cases in which expert medical evidence had been relied upon, the applicant applied for, and was granted, leave to appeal out of time. The appeal was founded on a challenge to the accepted hypothesis concerning NAHI on the basis that new medical evidence suggested that the triad of injuries could be attributed to a cause other than NAHI.

14. On an unknown date, the applicant was released from prison, having served sixteen months of her sentence.

15. In the context of the appeal proceedings, the Court of Appeal (Criminal Division) ("CACD") heard evidence from a number of medical experts. On 21 July 2005 the court quashed the applicant's conviction on the ground that it was unsafe.

16. As to its role in reviewing the evidence on appeal, the court noted:

> "70. ... [O]n general issues of this nature, where there is a genuine difference between two reputable medical opinions, in our judgment, the Court of Criminal Appeal will not usually be the appropriate forum for these issues to be resolved. The focus of this Court will be (as ours has been) to decide the safety of the conviction bearing in mind the test in fresh evidence appeals which we set out below. That is not to say that such differences cannot be resolved at trial. At trial, when such issues arise, it will be for the jury (in a criminal trial) and the judge (in a civil trial) to resolve them as issues of fact on all the available evidence in the case ..."

17. Turning to consider the facts of the applicant's case, the court again emphasised that its task was to decide whether the conviction was safe. It also noted that, the case being of some difficulty, it was important to bear in mind the test set out by Lord Bingham of Cornhill in *Pendleton* (see paragraph 47 below) of asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. It continued:

> "143. ... [T]he evidence at trial and the evidence adduced by the Crown in this appeal, provide a strong case against [the applicant]. [Counsel for the Crown's] submission that the triad is established and that any attempt to undermine it is based on speculation is a powerful one. Nevertheless strong as is the case against [the applicant] we have concerns about the safety of the conviction."

18. The court reviewed the medical evidence of the experts on behalf of the applicant and the Crown, noting the differences between their views, and found:

> "144. First, in order to dismiss the appeal, we would have to accede to [counsel for the Crown's] submission that we should reject [expert for the applicant] Dr Squier's evidence in its entirety ...
>
> 145. ... We are far from saying that we accept Dr Squier's evidence in preference to that of Dr Rorke-Adams [expert for the Crown]. Indeed, in view of the weight of evidence disputing her opinions we have reservations about whether Dr Squier can be right. But equally, in all the circumstances of this case, the differences between them are ones which the jury would have had to have assessed in the light of all the evidence in the case.
>
> 146. Secondly, although the evidence of the findings of retinal haemorrhages is powerful supporting evidence of shaking, on its own it is not diagnostic of shaking. If the subdural haemorrhages are undermined, the retinal haemorrhages findings will not fill the gap although we recognise that both can be considered together. There is also the issue of whether Dr Adams [for the applicant] may be correct in her view that fixed and dilated pupils seen by the ambulance crew was a sign of brain swelling at that time.
>
> 147. Thirdly, although as we have already stated the amount of force required to cause the triad of injuries will in most cases be more than just rough handling, the evidence suggests that there will be rare cases when injuries will not correspond to the amount of force used. It is at least possible that in such rare cases (maybe very rare cases) very little force will cause catastrophic injuries."

19. Emphasising the importance of the clinical evidence in the case, the court continued:

> "150. ... In summary, [the applicant] was described as a careful and caring mother. She called out Dr Barber late at night because of her concerns for Patrick. Dr Barber described her as being calm and controlled at that time. The prosecution's case at trial was that in the interval between Dr Barber leaving the house and 2.30am when [the applicant] telephoned the emergency services she must have violently and unlawfully shaken Patrick. In our judgment this history combined with the absence of findings of bruises to any part of the head, face or body; and the absence of fractures or any other sign apart from the triad of injuries, does not fit easily with the Crown's case of an unlawful assault based on the triad of injuries, itself a hypothesis."

20. The court concluded:

> "152. As we have said the Crown's evidence and arguments are powerful. We are conscious that the witnesses called on behalf of [the applicant] have not identified to our satisfaction a specific alternative cause of Patrick's injuries. But, in this appeal the triad stands alone and in our judgment the clinical evidence points away from NAHI. Here the triad itself may be uncertain for the reasons already expressed. In any event, on our view of the evidence in these appeals, the mere presence of the triad on its own cannot automatically or necessarily lead to a diagnosis of NAHI.
>
> 153. The central issue at trial was whether [the applicant] caused the death of her son, Patrick, by the use of unlawful force. We ask ourselves whether the fresh evidence, which we have heard as to the cause of death and the amount of force necessary to cause the triad, might reasonably have affected the jury's decision to

convict. For all the reasons referred to we have concluded that it might. Accordingly the conviction is unsafe and this appeal must be allowed. The conviction will be quashed."

21. No retrial was ordered.

C. The compensation claim

1. The decision of the Secretary of State

22. 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" – see paragraphs 49-53 below).

23. By letter dated 31 May 2006 the applicant's solicitors were informed that the Secretary of State did not consider that a right to compensation arose in her case. The letter noted:

> "The Home Secretary is of the opinion that your client does not fulfil the statutory requirements of Section 133(1) of the Act because the medical evidence considered by the Court of Appeal did not disclose a new fact ... The Home Secretary's view is that this new medical evidence about the degree of force required to cause a triad of injuries is not a new or newly discovered fact; rather it shows the changing medical opinion about the degree of force needed to cause a triad and is properly categorised as new evidence of facts known all along rather than new facts."

2. The High Court judgment

24. The applicant subsequently brought judicial review proceedings challenging the decision to refuse to pay her compensation under section 133 of the 1988 Act. She contended that she met the criteria for compensation set out in that section.

25. The claim was dismissed by the High Court on 10 December 2007. The judge began by considering the approach of the CACD in quashing the applicant's conviction, drawing the following conclusions:

> "21. ... (1) the court applied the Pendleton test and did not decide for itself the complex medical issues raised by the evidence which it heard; (2) all that it decided was that the evidence which it had heard could, if accepted by the jury, have led a jury to acquit the claimant; (3) notwithstanding that conclusion, the court was of the opinion that the Crown's case was a strong one. I do not understand that conclusion to be consistent with the proposition that at the conclusion of a new trial, on that evidence, a trial judge would have been obliged to direct the jury to acquit the claimant; (4) the material considered by the Court of Appeal which led to its conclusion was a complex mixture of fact and opinion."

26. He observed that the CACD did not order a retrial, but considered that this was not significant as the applicant had, by that time, served her sentence and any re-trial would have been pointless and would not have been in the public interest.

27. Turning to consider the applicant's compensation claim, the judge noted that although it was accepted by both parties that the applicant had suffered punishment as a result of the conviction which had subsequently been reversed, the remaining elements of her claim under section 133 were in dispute. He continued:

> "29. The interpretation of Section 133 was considered by the House of Lords in *R (on the application of Mullen) v Secretary of State for the Home Department* [see paragraphs 54-62 below]. There was a well known divergence of view between Lord Bingham and Lord Steyn. The facts of the case are far removed from the present case and the *ratio decidendi* of the decision does not assist in the resolution of this claim. It was simply that because the ground upon which Mullen's conviction was quashed did not relate to the investigation or the conduct of the trial or the evidence led at it, so he was not entitled to compensation under Section 133. It was a striking feature of this case that at no stage did he maintain that he was in fact innocent of the crime of which he had been convicted."

28. The judge accepted that the ground on which compensation had been refused by the Secretary of State disclosed an excessively narrow view of what was a new or newly discovered fact. He considered that the distinction between medical opinion and fact was exceptionally hard to draw and that it would be seriously unjust to a claimant to refuse a claim for compensation merely because the claim was based upon a change in medical opinion as well as in clinical findings. However, that finding was not determinative of the applicant's claim, as there was no point in sending it back to the Secretary of State for reconsideration if he was bound to reach the same decision on the compensation application for a different reason.

29. The judge recorded the submission of counsel for the applicant that it was not necessary for her to show that she was innocent of the charge of which she was convicted; and his concession that it was not arguable before the High Court that if all the applicant could show was that there was a doubt about guilt which could or should have led a jury to acquit, the claim for compensation should be allowed. The judge considered this concession inevitable and right in principle in light of observations made by the Lord Chief Justice in the case of *R (on the application of Clibery) v. Secretary of State for the Home Department* [2007] EWHC 1855 Admin, which he cited as follows:

> "41. ... 'Lord Bingham [in *R (Mullen)*] ... considered two different situations, each of which he considered fell within the description of "miscarriage of justice" in Section 133 of the 1988 Act. The first is where new facts demonstrate that the claimant was innocent of the offence of which he was convicted. In such circumstances, it is possible to say that if the facts in question had been before the jury, he *would* not have been convicted. The second is where there are acts or omissions in the course of the trial which *should* not have occurred and which so infringed his right to a fair trial that it is possible to say that he was "wrongly convicted". In such circumstances it is appropriate to say that the claimant *should* not have been convicted.' "

30. The judge continued:

> "42. Mr Southey [for the applicant] has not addressed me on the Strasbourg learning on the presumption of innocence. I make no decision by reference to that. He reserves his position on that for another day. Subject to that it seems to me to be outwith the statutory language to describe a case in which a jury might have reached a different conclusion as showing 'beyond reasonable doubt that there has been a miscarriage of justice'. Lord Bingham's observations about miscarriages of process seem to me to have no bearing on evidential miscarriage of justice cases. In evidential miscarriage of justice cases what is required is that the new or newly discovered fact must show beyond a reasonable doubt that there has been a miscarriage of justice. That is not shown where all that is established is that, if new evidence had been available, a properly directed jury might have reached a different conclusion."

31. The judge further observed:

> "44. Take a case in which a defendant gives no account at interview or at trial – and in which the only evidence against him is that of a single witness – who is convicted on the basis of that evidence together with the supporting evidence of his own silence. If the evidence of the sole witness were subsequently shown to be wholly wrong, whether due to improper motive by the witness or simply by mistake, it is at the least arguable that there would have been in that claimant's case a miscarriage of justice even though nobody would ever have decided, and indeed might never know, whether the defendant was in fact guilty of the charge. But that proposition cannot avail this claimant. For – as the recital of the medical evidence heard by the Court of Appeal and by the trial jury demonstrates – there was powerful evidence against this claimant. At the conclusion of the prosecution case or indeed at the conclusion of all the evidence, on the view of the Court of Appeal expressly stated, it would have been for the jury to determine the issue ..."

32. He concluded:

> "45. As the passages which I have cited from the judgment of the Court of Appeal [in *Clibery*] demonstrate, all that it decided was that the new evidence created the possibility that when taken with the evidence given at the trial a jury might properly acquit the claimant. That falls well short of demonstrating beyond reasonable doubt that there had been a miscarriage of justice in this case. Accordingly and for that simple reason, I dismiss this claim."

3. The Court of Appeal judgment

33. The applicant appealed. On 15 July 2008 the Court of Appeal (Civil Division) dismissed the appeal. Giving judgment for the court, Lord Justice Hughes began by summarising the approach of the CACD in quashing the applicant's conviction. He referred to the conclusions expressed in the CACD judgment, to the effect that although there remained a strong case against the applicant the court had concerns about the safety of the conviction. He continued:

> "17. ... The decision as to the safety of a conviction in a fresh evidence case is for the court itself and is not what effect the fresh evidence would have on the mind of a jury, but in a difficult case the court may find it helpful to test its provisional view by asking whether the evidence now available might reasonably have affected the decision of the trial jury to convict. In the present case it is clear that the CACD

> adopted this latter approach and relied significantly for its decision on what might have been the impact of the medical evidence which it had heard if such evidence had been available to the jury ... [T]here can be no doubt that the court regarded the proper interpretation of the clinical findings in this case as a matter which it ought not itself to resolve, but rather as one which could and should be resolved by a jury on hearing the competing expert opinions. Adopting that approach, it decided that the evidence which was now available *might*, if it had been heard by the jury, have led to a different result."

34. As to the decision of the CACD not to order a retrial, the judge commented:

> "18. ... [B]y the time of the appeal the appellant had served her sentence and a great deal of time had passed. Understandably, in those circumstances, there was no application by the Crown for a re-trial, as there would no doubt have been had the conviction been quashed for these reasons shortly after trial."

35. The judge considered the meaning of "miscarriage of justice" and summarised the difference of approach between Lords Bingham and Steyn in *R (Mullen)* as follows:

> "21. ... Lord Steyn held ... that in this context 'miscarriage of justice' means that the innocence of the defendant is acknowledged. Lord Bingham ... expressed no concluded opinion on this question, but made it clear that he 'hesitated to accept' this interpretation. For his part, he was ready to accept that 'miscarriage of justice' extended in this context to serious failures of the trial process, whether or not innocence was demonstrated."

36. However, he explained that given the unanimous view of the House of Lords that Mr Mullen's claim failed, the different interpretations of Lords Steyn and Bingham were not strictly necessary to the decision.

37. The judge noted that counsel for the applicant accepted that the applicant's innocence had not been demonstrated beyond reasonable doubt, or conclusively, by the decision of the CACD to quash the conviction. He therefore observed that if Lord Steyn's interpretation of section 133 of the 1988 Act was correct, the applicant's claim failed. However, the applicant's submission was that Lord Bingham's approach should be adopted and that on this interpretation, her claim succeeded because something went seriously wrong with the trial process in her case. Reviewing Lord Bingham's comment in *R (Mullen)*, the judge noted:

> "26. ... [I]t is plain that the critical feature of the extended interpretation of 'miscarriage of justice' which [Lord Bingham] was prepared to contemplate is that 'something has gone seriously wrong in ... the conduct of the trial' ..."

38. The judge continued:

> "27. In the present case there was nothing which went wrong with the conduct of the trial, whether seriously or otherwise. In speaking of 'flawed expert evidence' it is clear that Lord Bingham cannot have been contemplating evidence which was conscientiously given and based upon sound expertise at the time of trial. The most that could be said against the expert evidence given at this trial is that it might need adjustment in the light of new medical research and/or thinking. In any event, the

medical evidence given at time of trial has not been demonstrated to be flawed, even in this limited sense. As the passages from the judgment of the CACD which I have cited show, this court's decision went no further than to say that the differences of medical opinion needed to be resolved by a jury. Nor was this a case in which the jury was presented with a medical consensus that the triad was diagnostic of unlawful killing. The medical evidence called for the appellant accepted that it was consistent with unlawful killing but disputed that it necessarily led to that conclusion. The appeal was allowed because over the intervening years more possible force had emerged for the opinion voiced on the appellant's behalf and now supported by Dr Squier's evidence, which the jury had not heard and which the CACD, despite plain doubts about it, was not in a position wholly to dismiss.

28. For the same reasons, I have no doubt that the decision of the CACD does not begin to carry the implication that there was no case for the appellant to answer once the fresh evidence was available ..."

39. The judge went on to discuss the situations in which a disagreement between distinguished experts would lead to the conclusion that it would be unwise or unsafe to proceed with the trial. He noted that there was no authority to suggest that where experts disagreed as to the conclusions which could be drawn from the injuries, the case ought to be withdrawn from the jury. On the contrary he considered that the resolution of such disagreements, bearing in mind the criminal standard of proof, was an important part of the functions of a jury. He therefore concluded:

"29. In the present case, there was no basis for saying that, on the new evidence, there was no case to go to a jury. Moreover, if the court had meant to say that there was (now) no case to answer, it would have said so in plain terms. On the contrary, its oft-repeated statements that the evaluation of the rival medical opinions would be a matter for the jury are wholly inconsistent with a finding that there was no case to answer on the new state of medical evidence. Likewise, the posing of the Pendleton question by way of check is inconsistent with a finding that the case should never have reached the jury if the fresh evidence had been known.

30. In those circumstances, I reach the clear conclusion that, even on the interpretation of section 133 which Lord Bingham favoured, this case cannot succeed ..."

40. Although in the circumstances it was not necessary to resolve the difference of construction of section 133 articulated by Lord Bingham and Lord Steyn, the judge nonetheless expressed a preference for Lord Steyn's approach, noting, *inter alia*:

"40 iii) Whilst I agree of course that the CACD does not ordinarily address the question of guilt or innocence, but only the safety of the conviction, those cases where the innocence of the convicted defendant is genuinely demonstrated beyond reasonable doubt by new or newly discovered fact will be identifiable in that court and the judgment will, in virtually every case, make plain that this is so ... [I]t seems to me [that] the operation of the section poses very real difficulties if the broader definition [of miscarriage of justice] is adopted, for then it becomes necessary to ask in every case of conviction quashed on grounds of fresh evidence whether it satisfies the section 133 criterion of miscarriage proved beyond reasonable doubt or is merely a case of doubt raised to the extent that the conviction is unsafe. If, however,

miscarriage of justice means the establishment of innocence beyond reasonable doubt, there will usually be no difficulty in those cases being apparent from the judgments of the CACD."

41. As regards the applicant's submissions based on the presumption of innocence, the judge referred to the Court's judgments in *Sekanina v. Austria*, 25 August 1993, Series A no. 266-A; *Rushiti v. Austria*, no. 28389/95, 21 March 2000; *Weixelbraun v. Austria*, no. 33730/96, 20 December 2001; *O. v. Norway*, no. 29327/95, ECHR 2003-II; and *Hammern v. Norway*, no. 30287/96, 11 February 2003. He found that they did not lead to the conclusion that the applicant was entitled to compensation under section 133, for the following reasons:

"35. i) None of these cases considered the ICCPR [International Covenant on Civil and Political Rights 1966 – see paragraph 65 below] scheme for payment of compensation for conclusively proved miscarriage of justice, which is what is in issue here.

ii) Article 14 of the ICCPR juxtaposes within it both the provision for compensation in article 14(6), now under consideration, and, in article 14(2), a provision in terms identical to article 6(2) ECHR. Yet by article 14(6) it plainly requires something more than the quashing of the conviction before the right to compensation arises, namely that a miscarriage of justice be conclusively demonstrated by new or newly discovered facts. It does not seem to me that these provisions could co-exist in these terms if the consequence of article 14(2) was that nothing more could be required for compensation beyond the quashing of the conviction on the basis of new fact ...

iii) Whilst the ICCPR is a treaty independent of the European Convention, provisions identical to article 14(6) are to be found in Protocol 7 to the ECHR, article 3. For the same reasons, it is inconceivable that article 3 could be in the terms it is if article 6(2) of the main Convention meant that compensation necessarily followed the quashing of a conviction on the basis of fresh evidence.

iv) As Lord Steyn pointed out in Mullen ..., the distinction between the Austrian domestic scheme then under consideration and the international scheme under Protocol 7 article 3 was one to which the Strasbourg Court carefully drew attention in Sekanina ... at paragraph 25 ...

v) It is plain from the Austrian and Norwegian cases that the line between the application and non-application of article 6(2) is frequently a fine one. In Sekanina the Commission ... expressly stated that article 6(2) 'naturally' does not prevent the same facts being relied upon, post acquittal on the merits, to found a civil claim against the defendant, and this must occur routinely, as also must subsequent child care cases. Yet in Orr v Norway ... the Court held that article 6(2) disabled the complainant in a rape case from recovering compensation post acquittal notwithstanding the different standard of proof attributable to the civil claim; the decision was grounded upon the manner in which the court expressed itself in dealing with the latter question.

vi) The basis for the decisions in the Austrian and Norwegian cases was the closeness of the link between the decision to acquit on the merits and the decision as to compensation. In the Austrian cases the compensation decision was within the jurisdiction of the criminal court, albeit it was usually made by a differently constituted criminal court some time after the acquittal, as for example a confiscation order may be in England. Moreover, the court proceeded in part by analysing the decision of the trial jury. In the Norwegian cases the acquittal was made by a court

composed of judges and jury, and the same judges went on more or less immediately to consider compensation ...

vii) By contrast, compensation in a fresh evidence case under article 14(6) and section 133 is not linked to any acquittal on the merits. Rather, it is to be paid when not only has there been a reversal of the conviction but also where the additional factor exists of a miscarriage of justice demonstrated beyond reasonable doubt, or conclusively, to have taken place.

viii) It can no doubt be said ... that just as compensation for acquittal under the Norwegian scheme was described by the Court as a procedure whose object was 'to establish whether the State had a financial obligation to compensate the burden it had created for the ...person by the proceedings it had instituted against him' (see O v Norway ...), so too is the scheme for compensation for miscarriage of justice under article 14(6). But that is to beg the question when the scheme in question creates such an obligation. If article 6(2) were to apply to claims under the scheme here under consideration, there would be no reason in logic or fairness to distinguish between those whose convictions are quashed on grounds of fresh evidence and those whose convictions are quashed on other grounds; each would be in the position of being able to rely on the presumption of innocence. Indeed, there would be no obvious reason for distinguishing between those who are convicted but whose convictions are quashed, and those who are acquitted at trial. But it is clear that article 14(6) does not provide for compensation to be paid except in the limited circumstances to which it refers.

ix) In Mullen, Lord Steyn held ... that article 6(2) ECHR did not apply to the special rules created by article 14(6) ICCPR. Lord Bingham's decision was that ... the Austrian and Norwegian cases ... could not assist Mullen since his 'acquittal' was unrelated to the merits of the accusation against him."

42. The applicant sought leave to appeal to the House of Lords. Leave was refused on 11 December 2008.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The quashing of a conviction

1. The Criminal Appeal Act 1968

43. Section 2(1) of the Criminal Appeal Act 1968 (as amended) provides that the Court of Appeal:

"(a) shall allow an appeal against conviction if they think that the conviction is unsafe; and

(b) shall dismiss such an appeal in any other case."

44. Section 2(2) requires the court to quash the conviction in the event that it allows the appeal.

45. Section 2(3) provides:

"An order of the Court of Appeal quashing a conviction shall, except when under section 7 below the appellant is ordered to be retried, operate as a direction to the

court of trial to enter, instead of the record of conviction, a judgment and verdict of acquittal."

46. Section 7(1) of the 1968 Act provides that where the Court of Appeal allows an appeal against conviction and it appears to the court that the interests of justice so require, it may order the appellant to be retried. A retrial may be inappropriate where, for example, the defendant has already served the sentence and there would be nothing to be gained from a retrial.

2. Judicial approach to quashing convictions in cases of new evidence

47. In *R v. Pendleton* [2001] UKHL 66, the House of Lords considered what should be the approach of appeal courts in cases involving fresh evidence. Lord Bingham of Cornhill explained:

"19. ... [T]he House in *Stafford* were right to reject the submission of counsel that the Court of Appeal had asked the wrong question by taking as the test the effect of the fresh evidence on their minds and not the effect that that evidence would have had on the mind of the jury ... I am not persuaded that the House laid down any incorrect principle in *Stafford*, so long as the Court of Appeal bears very clearly in mind that the question for its consideration is whether the conviction is safe and not whether the accused is guilty. But the test advocated by counsel in *Stafford* ... does have a dual virtue ... First, it reminds the Court of Appeal that it is not and should never become the primary decision-maker. Secondly, it reminds the Court of Appeal that it has an imperfect and incomplete understanding of the full processes which led the jury to convict. The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe."

48. Lord Brown of Eaton-Under-Heywood in the subsequent Privy Council case of *Dial and another v. State of Trinidad and Tobago* [2005] UKPC 4, commented:

"31. ... [T]he law is now clearly established and can be simply stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, assuming always that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case. If the court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal. The primary question is for the court itself and is not what effect the fresh evidence would have had on the mind of the jury. That said, if the court regards the case as a difficult one, it may find it helpful to test its view 'by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict': *R v Pendleton* ... The guiding principle nevertheless remains that stated ... in *Stafford* ... and affirmed by the House in *Pendleton*:

'While ... the Court of Appeal and this House may find it a convenient approach to consider what a jury might have done if they had heard the fresh evidence, the

ultimate responsibility rests with them and them alone for deciding the question [whether or not the verdict is unsafe].' "

B. Compensation for miscarriages of justice

1. The Criminal Justice Act 1988

49. Section 133(1) of the Criminal Justice Act 1988 provides that:

"(1) Subject to subsection (2) below, 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.

50. The question whether there is a right to compensation under section 133 is determined by the Secretary of State following an application by the person concerned.

51. Pursuant to section 133(5), the term "reversed" is to be construed as referring to a conviction having been quashed, *inter alia*, on an appeal out of time; or following a reference to the Court of Appeal by the Criminal Cases Review Commission.

52. Section 133(6) provides that a person suffers punishment as a result of a conviction when sentence is passed on him for the offence of which he was convicted.

53. Further provisions were inserted into section 133 following the enactment of the Criminal Justice and Immigration Act 2008 introducing a two-year time limit for applications and clarifying the relationship between the conviction being "reversed" and the possibility of retrial. These provisions entered into force on 1 December 2008, that is, after the decision of the Court of Appeal on the compensation claim in the present case (see paragraph 33 above).

2. Judicial interpretation of "miscarriage of justice"

(a) Prior to the compensation proceedings in the applicant's case

54. In *R (Mullen) v. Secretary of State for the Home Department* [2004] UKHL 18, the House of Lords considered the application of section 133 of the 1988 Act. Mr Mullen's trial in England had been possible only because the British authorities had arranged his deportation from Zimbabwe in flagrant breach of local and international law. This emerged only after conviction and his appeal to the Court of Appeal, approximately seven years later, resulted in the quashing of his conviction on the ground that his deportation had involved abuse of process, namely a gross abuse of executive power. His claim for compensation under section 133, or the

ex gratia scheme which existed in parallel at that time, was refused by the Secretary of State. In subsequent judicial review proceedings, the House of Lords unanimously found that section 133 did not require the payment of compensation for a miscarriage of justice in his case. However, there was a divergence of views between Lord Bingham and Lord Steyn as to the proper construction of section 133.

55. As to the term "wrongful conviction", Lord Bingham said:

> "4. ... The expression 'wrongful convictions' is not a legal term of art and it has no settled meaning. Plainly the expression includes the conviction of those who are innocent of the crime of which they have been convicted. But in ordinary parlance the expression would, I think, be extended to those who, whether guilty or not, should clearly not have been convicted at their trials. It is impossible and unnecessary to identify the manifold reasons why a defendant may be convicted when he should not have been. It may be because the evidence against him was fabricated or perjured. It may be because flawed expert evidence was relied on to secure conviction. It may be because evidence helpful to the defence was concealed or withheld. It may be because the jury was the subject of malicious interference. It may be because of judicial unfairness or misdirection. In cases of this kind, it may, or more often may not, be possible to say that a defendant is innocent, but it is possible to say that he has been wrongly convicted. The common factor in such cases is that 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."

56. Although both the High Court and the Court of Appeal in the applicant's case appeared to consider this statement relevant to Lord Bingham's interpretation of "miscarriage of justice" in section 133, it should be noted, as was explained by Lord Hope in the subsequent judgment of the Supreme Court in *Adams* (see paragraph 63 below), that the comments made by Lord Bingham were not directed at that expression but at the phrase "wrongful conviction", in the context of the *ex gratia* scheme in place at the time.

57. Lord Bingham noted that section 133 was enacted in order to give effect to the obligation under Article 14(6) ICCPR, and observed that the latter Article was directed at ensuring that defendants were fairly tried; it had no bearing on abuses of executive power which did not result in an unfair trial. He continued:

> "8. ... In quashing Mr Mullen's conviction the Court of Appeal (Criminal Division) condemned the abuse of executive power which had led to his apprehension and abduction in the only way it effectively could. But it identified no failure in the trial process. It is for failures of the trial process that the Secretary of State is bound, by section 133 and article 14(6), to pay compensation. On that limited ground I would hold that he is not bound to pay compensation under section 133."

58. He hesitated to accept the submission of the Secretary of State to the effect that section 133, reflecting Article 14(6) of the ICCPR, obliged him to pay compensation only when a defendant, finally acquitted in circumstances satisfying the statutory conditions, was shown beyond reasonable doubt to be innocent of the crime of which he had been

convicted. In light of his conclusion that no compensation was payable, it was, however, not necessary to decide this point.

59. Lord Steyn observed that section 133 was modelled on Article 14(6) ICCPR, as was Article 3 of Protocol No. 7 to the Convention. He reviewed several judgments of this Court in which a violation of Article 6 § 2 had been found in respect of compensation proceedings where the applicants had been acquitted at trial, concluding:

> "41. ... The decisions are not relevant to the issue presently under consideration. The interaction between article 6(2) and article 3 of Protocol No. 7 was not under consideration. The reason was that in Austrian legislation there was a wider right to compensation than provided by article 3 of Protocol No. 7."

60. Having concluded that the jurisprudence of this Court was of no assistance in the interpretation of section 133, Lord Steyn turned to examine the interpretation of Article 14(6) on its own terms. He noted that a case where a defendant was wrongly convicted and had his conviction quashed on an appeal lodged within ordinary time limits did not qualify for compensation. He further noted that if there was no new or newly discovered fact, but simply a recognition that an earlier dismissal of an appeal was wrong, the case fell outside the scope of Article 14(6). He therefore concluded that there was no overarching purpose of compensating all who were wrongly convicted; and that the fundamental right under Article 14(6) was unquestionably narrowly circumscribed. He continued:

> "46. The requirement that the new or newly discovered fact must show conclusively (or beyond reasonable doubt in the language of section 133) 'that there has been a miscarriage of justice' is important. It filters out cases where it is only established that there may have been a wrongful conviction. Similarly excluded are cases where it is only probable that there has been a wrongful conviction. These two categories would include the vast majority of cases where an appeal is allowed out of time ... I regard these considerations as militating against the expansive interpretation of 'miscarriage of justice' put forward on behalf of Mr Mullen. They also demonstrate the implausibility of the extensive interpretation ...: it entirely erodes the effect of evidence showing 'conclusively that there has been a miscarriage of justice'. While accepting that in other contexts 'a miscarriage of justice' is capable of bearing a narrower or wider meanings, the only relevant context points to a narrow interpretation, viz the case where innocence is demonstrated."

61. Thus he concluded:

> "56. ... the autonomous meaning of the words 'a miscarriage of justice' extends only to 'clear cases of miscarriage of justice, in the sense that there would be acknowledgement that the person concerned was clearly innocent' as it is put in the Explanatory Report [to Protocol No. 7]. This is the international meaning which Parliament adopted when it enacted section 133 of the 1988 Act."

62. As Mr Mullen was not innocent of the charge, he was not entitled to compensation under section 133.

(b) Following the compensation proceedings in the applicant's case

63. In *R (Adams) v Secretary of State for Justice* [2011] UKSC 18, the Supreme Court, sitting as a panel of nine judges, was asked to look again at the meaning of "miscarriage of justice" in section 133 of the 1988 Act. The justices expressed varying views as to the correct interpretation of the term.

III. RELEVANT INTERNATIONAL LEGAL MATERIALS AND PRACTICE

A. International Covenant on Civil and Political Rights 1966

64. Article 14(2) of the ICCPR provides that:

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

65. Article 14(6) 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."

66. The UN Human Rights Committee has considered the operation of the relevant ICCPR Articles. In *W.J.H. v. Netherlands*, Communication No. 408/1990 [1992] UNHRC 25, where a violation of Article 14(2) and (6) was alleged following the refusal of compensation after acquittal, the Committee observed that Article 14(2) applied only to criminal proceedings and not to proceedings for compensation. It also found that the conditions set out in Article 14(6) were not satisfied.

67. In its General Comment No. 32 on Article 14, published on 23 August 2007, the UN Human Rights Committee said, in respect of the presumption of innocence:

> "30. According to article 14, paragraph 2 everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law. The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle. It is a duty for all public authorities to refrain from prejudging the outcome of a trial, e.g. by abstaining from making public statements affirming the guilt of the accused. Defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence. Furthermore, the length of pre-trial detention should never be taken as an indication of guilt and its

degree. The denial of bail or findings of liability in civil proceedings do not affect the presumption of innocence." (footnotes omitted)

68. In respect of the right to compensation for a miscarriage of justice, the Committee said, in so far as relevant:

"53. This guarantee does not apply if it is proved that the non-disclosure of such a material fact in good time is wholly or partly attributable to the accused; in such cases, the burden of proof rests on the State. Furthermore, no compensation is due if the conviction is set aside upon appeal, i.e. before the judgment becomes final, or by a pardon that is humanitarian or discretionary in nature, or motivated by considerations of equity, not implying that there has been a miscarriage of justice."

B. Article 3 of Protocol No. 7 to the Convention

69. Article 3 of Protocol No. 7 reads:

"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 the law or the practice of the State concerned, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

70. The United Kingdom has neither signed nor acceded to Protocol No. 7.

71. The Explanatory Report to Protocol No. 7 was prepared by the Steering Committee for Human Rights and submitted to the Committee of Ministers of the Council of Europe. It explains at the outset that the report itself:

"... does not constitute an instrument providing an authoritative interpretation of the text of the Protocol, although it might be of such a nature as to facilitate the understanding of the provisions contained therein."

72. As regards Article 3 of Protocol No. 7, the report notes, *inter alia*:

"23. Secondly, the article applies only where the person's conviction has been reversed or he has been pardoned, in either case on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice – that is, some serious failure in the judicial process involving grave prejudice to the convicted person. Therefore, there is no requirement under the article to pay compensation if the conviction has been reversed or a pardon has been granted on some other ground ...

...

25. In all cases in which these preconditions are satisfied, compensation is payable 'according to the law or the practice of the State concerned'. This does not mean that no compensation is payable if the law or practice makes no provision for such compensation. It means that the law or practice of the State should provide for the payment of compensation in all cases to which the article applies. The intention is that States would be obliged to compensate persons only in clear cases of miscarriage of

justice, in the sense that there would be acknowledgement that the person concerned was clearly innocent. The article is not intended to give a right of compensation where all the preconditions are not satisfied, for example, where an appellate court had quashed a conviction because it had discovered some fact which introduced a reasonable doubt as to the guilt of the accused and which had been overlooked by the trial judge."

C. Law and practice on compensation proceedings following discontinuation or acquittal in the member States

73. According to the information before the Court, there is no uniform approach in respect of the law and practice on compensation proceedings following discontinuation or acquittal in thirty-six member States surveyed. Some States have more than one scheme in place, covering different types of compensation.

74. The procedures for claiming compensation vary significantly across the surveyed States. In ten States, available compensation proceedings appear to be linked directly to the criminal proceedings, with the tribunal which disposed of the criminal complaint having jurisdiction to assess a compensation claim where there has been an acquittal in the original trial proceedings (Germany, Russia and Ukraine) or the quashing of a conviction following reopening proceedings (Belgium, France, Germany, Greece, Italy, Luxembourg, Monaco and Switzerland).

75. In thirty States, available compensation proceedings are independent of the criminal proceedings (Albania, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Hungary, Ireland, Lithuania, Luxembourg, Malta, Moldova, Monaco, Montenegro, Norway, Poland, Romania, Russia, Serbia, Spain, Slovakia, Slovenia, Sweden, the former Yugoslav Republic of Macedonia, Turkey and Ukraine). In these States, a compensation claim may be brought administratively to ministers or officials (in Austria, Bosnia and Herzegovina, Croatia, the Czech Republic, Denmark, Estonia, Finland, Ireland, Luxembourg, Monaco, Montenegro, Serbia, Slovakia, Slovenia and Spain and the Former Yugoslav Republic of Macedonia) to the civil or administrative courts (in Albania, Bulgaria, France, Hungary, Lithuania, Moldova, Norway, Romania, Russia, Sweden and Ukraine); or to the criminal courts, before judges different to those who sat in the original criminal case (in Poland and Turkey). Time limits are in place in almost all States surveyed, linking the making of a compensation claim to the conclusion of the criminal proceedings. The exceptions are Ireland and Malta.

76. The vast majority of surveyed States operate compensation schemes which are far more generous than the one in place in the United Kingdom. In many of the surveyed States, compensation is essentially automatic following a finding of not guilty, the quashing of a conviction or the

discontinuation of proceedings (for example, in Bulgaria, Croatia, the Czech Republic, Denmark, Finland, Germany, Montenegro, the Former Yugoslav Republic of Macedonia, Romania, Turkey and Ukraine).

77. There is very little evidence from the practice of Contracting States regarding compensation which is relevant to the interpretation of "miscarriage of justice".

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

78. The applicant complained that the reasons given for the refusal to award her compensation following her acquittal violated the presumption of innocence. She relied on Article 6 § 2 of the Convention, which reads as follows:

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

79. The Government contested that argument.

A. Scope of the complaint

80. The applicant accepted that the refusal of compensation in itself did not raise any issue under Article 6 § 2 because it did not imply anything about the State's views as to her guilt or innocence. Her complaint was that the refusal by the High Court and the Court of Appeal in her case was based on reasons which gave rise to doubts about her innocence.

81. The Government emphasised that there was no general right under Article 6 § 2 to compensation after acquittal merely because the individuals were, as a result of the acquittal, presumed innocent of the charges previously brought against them. The words in section 133 of the 1988 Act should not be given an expansive interpretation based on the premise that it would be beneficial for compensation to be paid to as wide a group of acquitted persons as possible.

82. The Court reiterates that Article 6 § 2 does not guarantee a person charged with a criminal offence a right to compensation for lawful detention on remand or for costs where proceedings are subsequently discontinued or end in an acquittal (see, among many other authorities, *Englert v. Germany*, 25 August 1987, § 36, Series A no. 123; *Sekanina*, cited above, § 25; *Capeau v. Belgium*, no. 42914/98, § 23, ECHR 2005-I; *Yassar Hussain v. the United Kingdom*, no. 8866/04, § 20, ECHR 2006-III; and *Tendam v. Spain*, no. 25720/05, § 36, 13 July 2010). Equally, that Article does not

guarantee a person acquitted of a criminal offence a right to compensation for a miscarriage of justice of whatever kind.

83. The question before the Court is not whether the refusal of compensation *per se* violated the applicant's right to be presumed innocent. The Court's examination of the complaint is directed at whether the individual decision refusing compensation in the applicant's case, including the reasoning and the language used, was compatible with the presumption of innocence enshrined in Article 6 § 2.

B. Admissibility

1. The parties' submissions

(a) The Government

84. According to the Government, Article 6 § 2 applied only to those charged with a criminal offence. Even under the broad interpretation of "criminal proceedings" adopted by the Court, they argued that the compensation proceedings at issue in the present case fell outside that interpretation.

85. First, the Government observed that there was no case-law of the Court which stated that Article 6 § 2 applied to an assessment of eligibility for compensation against the criteria contained in Article 3 of Protocol No. 7. Indeed, they argued that in *Sekanina*, cited above, § 25, the Court had found that Article 6 § 2 did not apply to such proceedings. They claimed that such an approach was consistent with the approach of the UN Human Rights Committee in *W.J.H. v. Netherlands* (see paragraph 66 above). The refusal of compensation based on lack of eligibility could not be incompatible with Article 6 § 2; to hold otherwise would render meaningless the criteria and restrictions in Article 14(6) ICCPR and Article 3 of Protocol No. 7.

86. Second, although the Government accepted that Article 6 § 2 had been found to apply to certain types of compensation proceedings, this was only where there was a close link with the prior criminal proceedings which had given rise to the claim. Here, by contrast, the decision on compensation was distinct from and separate to the decision to quash the criminal conviction, because it was generally taken by the executive and not the judiciary; it was taken pursuant to an administrative process and not in criminal proceedings; it could be based on different evidence, not considered at the trial itself; it was from a temporal aspect remote, as an application for compensation could be made up to two years after the reversal of the conviction; and it was made and provided on a confidential basis to the applicant. Although assessment of whether a miscarriage of justice had been conclusively demonstrated, as required by section 133 of the 1988 Act, involved some evaluation of the evidence that had led to the

conviction in the first place, that process did not involve any infringement of the presumption of innocence and did not undermine the acquittal.

87. The Government therefore invited the Court to conclude that the presumption of innocence was not engaged at all in the context of decisions taken under section 133 of the 1988 Act and, in consequence, to declare the application inadmissible.

(b) The applicant

88. The applicant emphasised that there had been a significant number of judgments by this Court holding that Article 6 § 2 applied when eligibility for compensation following a person's acquittal was being assessed (citing, *inter alia*, *Rushiti* and *Hammern*, both cited above; and *Puig Panella v. Spain*, no. 1483/02, 25 April 2006). Although in some cases concerning civil compensation proceedings the Court had found that Article 6 § 2 did not apply, the applicant stressed that in those cases, courts were required to assess civil liability; whereas section 133 required an assessment of the basis of a person's acquittal and what that acquittal said about criminal liability. Further, whereas in civil proceedings a balance had to be struck with the rights of third parties, no such balance was relevant here, as it was the State that was responsible for payment of compensation. In any event, the Court had found Article 6 § 2 applicable even in cases concerning civil proceedings where those proceedings resulted in the innocence of the applicant being questioned (citing *Orr v. Norway*, no. 31283/04, 15 May 2008).

89. The applicant disputed the argument that Article 6 § 2 only applied where there was a close link to the criminal proceedings. She pointed to the Court's finding in *Šikić v. Croatia*, no. 9143/08, § 47, 15 July 2010 and *Vanjak v. Croatia*, no. 29889/04, § 41, 14 January 2010, to the effect that when criminal proceedings were discontinued, the presumption of innocence had to be preserved in "any other proceedings of whatever nature". She submitted that this must be all the more true in cases of acquittal, where the protection afforded by Article 6 § 2 was even stronger.

90. In any case, the applicant contended that the award of compensation under section 133 was clearly closely linked to the criminal proceedings that had resulted in the conviction being quashed. It was evident from section 133 and the Supreme Court's judgment in *R (Adams)* (see paragraph 63 above) that the key issue in compensation proceedings was the specific reason why the conviction was quashed, and that a decision on compensation required the decision-maker to examine the Court of Appeal judgment quashing the conviction. A refusal to compensate on the grounds identified in *R (Adams)* raised questions as to whether the State accepted that the person claiming compensation was genuinely innocent. This in itself was sufficient to find Article 6 § 2 applicable.

91. Finally, the applicant argued that it could not be correct that Article 6 § 2 did not apply to compensation schemes established under Article 14(6) ICCPR and Article 3 of Protocol No. 7 but applied to all other forms of compensation following acquittal. There was no logical reason for such a distinction to be drawn.

2. The Court's assessment

(a) General principles

(i) Introduction

92. The object and purpose of the Convention, as an instrument for the protection of human beings, requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (see, *inter alia*, *Soering v. the United Kingdom*, 7 July 1989, § 87, Series A no. 161; and *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 162, ECHR 2011). The Court has expressly stated that this applies to the right enshrined in Article 6 § 2 (see, for example, *Allenet de Ribemont v. France*, 10 February 1995, § 35, Series A no. 308; and *Capeau*, cited above, § 21).

93. Article 6 § 2 safeguards "the right to be presumed innocent until proved guilty according to law". Viewed as a procedural guarantee in the context of a criminal trial itself, the presumption of innocence imposes requirements in respect of, *inter alia*, the burden of proof (see *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, § 77, Series A no. 146; and *Telfner v. Austria*, no. 33501/96, § 15, 20 March 2001); legal presumptions of fact and law (see *Salabiaku v. France*, 7 October 1988, § 28, Series A no. 141-A; and *Radio France and Others v. France*, no. 53984/00, § 24, ECHR 2004-II); the privilege against self-incrimination (see *Saunders v. the United Kingdom*, 17 December 1996, § 68, *Reports of Judgments and Decisions* 1996-VI; and *Heaney and McGuinness v. Ireland*, no. 34720/97, § 40, ECHR 2000-XII); pre-trial publicity (see *Akay v. Turkey* (dec.), no. 34501/97, 19 February 2002; and *G.C.P. v. Romania*, no. 20899/03, § 46, 20 December 2011); and premature expressions, by the trial court or by other public officials, of a defendant's guilt (see *Allenet de Ribemont*, cited above, §§ 35-36; and *Nešťák v. Slovakia*, no. 65559/01, § 88, 27 February 2007).

94. However, in keeping with the need to ensure that the right guaranteed by Article 6 § 2 is practical and effective, the presumption of innocence also has another aspect. Its general aim, in this second aspect, is to protect 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 these cases, the presumption of innocence has already operated, through the application at trial of the various requirements

inherent in the procedural guarantee it affords, to prevent an unfair criminal conviction being imposed. 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. To a certain extent, the protection afforded under Article 6 § 2 in this respect may overlap with the protection afforded by Article 8 (see, for example, *Zollman v. The United Kingdom* (dec.), no. 62902/00, ECHR 2003-XII; and *Taliadorou and Stylianou v. Cyprus*, nos. 39627/05 and 39631/05, §§ 27 and 56-59, 16 October 2008).

(ii) Applicability of Article 6 § 2

95. As expressly stated in the terms of the Article itself, Article 6 § 2 applies where a person is "charged with a criminal offence". The Court has repeatedly emphasised that this is an autonomous concept and must be interpreted according to the three criteria set out in its case-law, namely the classification of the proceedings in domestic law, their essential nature, and the degree and severity of the potential penalty (see, among many other authorities on the concept of a "criminal charge", *Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22; and *Phillips v. the United Kingdom*, no. 41087/98, § 31, ECHR 2001-VII). To evaluate any complaint under Article 6 § 2 arising in the context of judicial proceedings, it is first of all necessary to ascertain whether the impugned proceedings involved the determination of a criminal charge, within the meaning of the Court's case-law.

96. However, in cases involving the second aspect of the protection afforded by Article 6 § 2, which arises when criminal proceedings have terminated, it is clear that the application of the foregoing test is inappropriate. In these cases, the criminal proceedings have, by necessity, been concluded and unless the subsequent judicial proceedings give rise to a new criminal charge within the Convention's autonomous meaning, if Article 6 § 2 is engaged, it must be engaged on different grounds.

97. The parties did not suggest that the compensation proceedings brought by the applicant gave rise to a "criminal charge", within the autonomous meaning of the Convention. It is therefore the second aspect of the protection afforded by Article 6 § 2 which is in play in the present case; and the Court will accordingly examine how it has approached the applicability of Article 6 § 2 to subsequent judicial proceedings in such cases.

98. The Court has in the past been called upon to consider the application of Article 6 § 2 to judicial decisions taken following the conclusion of criminal proceedings, either by way of discontinuation or after an acquittal, in proceedings concerning, *inter alia*:

(a) a former accused's obligation to bear court costs and prosecution costs (see *Minelli v. Switzerland*, 25 March 1983, §§ 30-32, Series A no. 62; and *McHugo v. Switzerland* (dec.), no. 55705/00, 12 May 2005);

(b) a former accused's request for compensation for detention on remand or other inconvenience caused by the criminal proceedings (see *Englert*, cited above, § 35; *Nölkenbockhoff v. Germany*, 25 August 1987, § 35, Series A no. 123; *Sekanina*, cited above, § 22; *Rushiti*, cited above, § 27; *Mulaj and Sallahi v. Austria* (dec.). no. 48886/99, 27 June 2002; *O.*, cited above, §§ 33-38; *Hammern*, cited above, §§ 41-46; *Baars v. the Netherlands*, no. 44320/98, § 21, 28 October 2003; *Capeau v. Belgium* (dec.), no. 42914/98, 6 April 2004; *Del Latte v. the Netherlands*, no. 44760/98, § 30, 9 November 2004; *A.L. v. Germany*, no. 72758/01, §§ 31-33, 28 April 2005; *Puig Panella*, cited above, § 50; *Tendam*, cited above, §§ 31 and 36; *Bok v. the Netherlands*, no. 45482/06, §§ 37-48, 18 January 2011; and *Lorenzetti v. Italy*, no. 32075/09, § 43, 10 April 2012);

(c) a former accused's request for defence costs (see *Lutz v. Germany*, 25 August 1987, §§ 56-57, Series A no. 123; *Leutscher v. the Netherlands*, 26 March 1996, § 29, *Reports* 1996-II; *Yassar Hussain*, cited above, § 19; and *Ashendon and Jones v. the United Kingdom*, nos. 35730/07 and 4285/08, §§ 42 and 49, 15 December 2011);

(d) a former accused's request for compensation for damage caused by an unlawful or wrongful investigation or prosecution (see *Panteleyenko v. Ukraine*, no. 11901/02, § 67, 29 June 2006; and *Grabchuk v. Ukraine*, no. 8599/02, § 42, 21 September 2006);

(e) the imposition of civil liability to pay compensation to the victim (see *Ringvold v. Norway*, no. 34964/97, § 36, ECHR 2003-II; *Y. v. Norway*, no. 56568/00, § 39, ECHR 2003-II; *Orr*, cited above, §§ 47-49; *Erkol v. Turkey*, no. 50172/06, §§ 33 and 37, 19 April 2011; *Vulakh and Others v. Russia*, no. 33468/03, § 32, 10 January 2012; *Diacenco v. Romania*, no. 124/04, § 55, 7 February 2012; *Lagardère v. France*, no. 18851/07, §§ 73 and 76, 12 April 2012; and *Constantin Florea v. Romania*, no. 21534/05, §§ 50 and 52, 19 June 2012);

(f) the refusal of civil claims lodged by the applicant against insurers (see *Lundkvist v. Sweden* (dec.), no. 48518/99, ECHR 2003-XI; and *Reeves v. Norway* (dec.), no. 4248/02, 8 July 2004);

(g) the maintenance in force of a child care order, after the prosecution decided not to bring charges against the parent for child abuse (see *O.L. v. Finland* (dec.), no. 61110/00, 5 July 2005);

(h) disciplinary or dismissal issues (see *Moullet v. France* (dec.), no. 27521/04, 13 September 2007; *Taliadorou and Stylianou*, cited above, § 25; *Šikić*, cited above, §§ 42-47; and *Çelik (Bozkurt) v. Turkey*, no. 34388/05, § 34, 12 April 2011); and

(i) the revocation of the applicant's right to social housing (see *Vassilios Stavropoulos v. Greece*, no. 35522/04, §§ 28-32, 27 September 2007).

99. In a number of these cases, the Court found in favour of the applicability of Article 6 § 2. Explaining why Article 6 § 2 applied despite the absence of a pending criminal charge in a trio of early cases, the Court said that the rulings on the applicants' entitlement to costs and compensation were "consequences and necessary concomitants of", or "a direct sequel to", the conclusion of the criminal proceedings (see *Englert*, cited above, § 35; *Nölkenbockhoff*, cited above, § 35; and *Lutz*, cited above, § 56). Similarly, in a later series of cases, the Court concluded that Austrian legislation and practice "link[ed] the two questions – the criminal responsibility of the accused and the right to compensation – to such a degree that the decision on the latter issue could be regarded as a consequence and, to some extent, the concomitant of the decision on the former", resulting in the applicability of Article 6 § 2 to the compensation proceedings (see *Sekanina*, cited above, § 22; *Rushiti*, cited above, § 27; and *Weixelbraun*, cited above, § 24).

100. Developing this idea in subsequent cases, the Court found that the applicants' compensation claim "not only followed the criminal proceedings in time, but was also tied to those proceedings in legislation and practice, with regard to both jurisdiction and subject matter", creating a link between the two sets of proceedings with the result that Article 6 § 2 was applicable (see *O.*, cited above, § 38; and *Hammern*, cited above, § 46).

101. In cases concerning the victim's right to compensation from the applicant, who had previously been found not guilty of the criminal charge, the Court held that where the decision on civil compensation contained a statement imputing criminal liability, this would create a link between the two proceedings such as to engage Article 6 § 2 in respect of the judgment on the compensation claim (see *Ringvold*, cited above, § 38; *Y.*, cited above, § 42; and *Orr*, cited above, § 49).

102. More recently, the Court has expressed the view that following discontinuation of criminal proceedings the presumption of innocence requires that the lack of a person's criminal conviction be preserved in any other proceedings of whatever nature (see *Vanjak*, cited above, § 41; and *Šikić*, cited above, § 47). It has also indicated that the operative part of an acquittal judgment must be respected by any authority referring directly or indirectly to the criminal responsibility of the interested party (see *Vassilios Stavropoulos*, cited above, § 39; *Tendam*, cited above, § 37; and *Lorenzetti*, cited above, § 46).

(iii) Conclusion

103. The present case concerns the application of the presumption of innocence in judicial proceedings following the quashing by the CACD of the applicant's conviction, giving rise to an acquittal. Having regard to the

aims of Article 6 § 2 discussed above (see paragraphs 92-94) and the approach which emerges from its case-law review, the Court would formulate the principle of the presumption of innocence in this context as follows: the presumption of innocence means that where there has been a criminal charge and criminal proceedings have ended in an acquittal, the person who was the subject of the criminal proceedings is innocent in the eyes of the law and must be treated in a manner consistent with that innocence. To this extent, therefore, the presumption of innocence will remain after the conclusion of criminal proceedings in order to ensure that, as regards any charge which was not proven, the innocence of the person in question is respected. This overriding concern lies at the root of the Court's approach to the applicability of Article 6 § 2 in these cases.

104. Whenever the question of the applicability of Article 6 § 2 arises in the context of subsequent proceedings, the applicant must demonstrate the existence of a link, as referred to above, between the concluded criminal proceedings and the subsequent proceedings. Such a link is likely to be present, for example, where the subsequent proceedings require examination of the outcome of the prior criminal proceedings and, in particular, where they oblige the court to analyse the criminal judgment; to engage in a review or evaluation of the evidence in the criminal file; to assess the applicant's participation in some or all of the events leading to the criminal charge; or to comment on the subsisting indications of the applicant's possible guilt.

105. Having regard to the nature of the Article 6 § 2 guarantee outlined above, the fact that section 133 of the 1988 Act was enacted to comply with the respondent State's obligations under Article 14(6) ICCPR, and that it is expressed in terms almost identical to that Article and to Article 3 of Protocol No. 7, does not have the consequence of taking the impugned compensation proceedings outside the scope of applicability of Article 6 § 2, as argued by the Government. The two Articles are concerned with entirely different aspects of the criminal process; there is no suggestion that Article 3 of Protocol No. 7 was intended to extend to a specific situation general guarantees similar to those contained in Article 6 § 2 (compare and contrast *Maaouia v. France* [GC], no. 39652/98, §§ 36-37, ECHR 2000-X). Indeed, Article 7 of Protocol No. 7 clarifies that the provisions of the substantive Articles of the Protocol are to be regarded as additional Articles to the Convention, and that "all the provisions of the Convention shall apply accordingly". Article 3 of Protocol No. 7 cannot therefore be said to constitute a form of *lex specialis* excluding the application of Article 6 § 2.

(b) Application of the general principles to the facts of the case

106. As the applicant was formerly charged with the criminal offence of manslaughter, the presumption of innocence applied to that offence from the time of the charge. Although the protection afforded by the presumption

ceased with her conviction, which she did not then appeal, it was restored following her later acquittal by reason of the judgment of the CACD (see paragraph 45 above).

107. The Court's task at this stage of its analysis is therefore to examine whether there was a link between the concluded criminal proceedings and the compensation proceedings, having regard to the relevant considerations set out above (see paragraph 104 above). In this respect, the Court observes that proceedings under section 133 of the 1988 Act require that there has been a reversal of a prior conviction. It is the subsequent reversal of the conviction which triggers the right to apply for compensation for a miscarriage of justice. Further, in order to examine whether the cumulative criteria in section 133 are met, the Secretary of State and the courts in judicial review proceedings are required to have regard to the judgment handed down by the CACD. It is only by examining this judgment that they can identify whether the reversal of the conviction, which resulted in an acquittal in the present applicant's case, was based on new evidence and whether it gave rise to a miscarriage of justice.

108. The Court is therefore satisfied that the applicant has demonstrated the existence of the necessary link between the criminal proceedings and the subsequent compensation proceedings. As a result, Article 6 § 2 applied in the context of the proceedings under section 133 of the 1988 Act to ensure that the applicant was treated in the latter proceedings in a manner consistent with her innocence. The application cannot therefore be rejected under Article 35 § 3 (a) of the Convention as incompatible *ratione materiae* with the provisions of the Convention.

109. Neither does the Court find the complaint manifestly ill-founded within the meaning of Article 35 § 3 (a) or inadmissible on any other ground. The Court accordingly dismisses the Government's objection of inadmissibility and declares the complaint admissible.

C. Merits

1. The parties' submissions

(a) The applicant

110. The applicant contended that the refusal by the High Court and the Court of Appeal in her case was based on reasons which gave rise to doubts about her innocence. She highlighted, in particular, the High Court's finding that there was still "powerful evidence against" her (see paragraph 31 above); the reference by the Court of Appeal to the fact that the new evidence "*might*, if it had been heard by the jury, have led to a different result" (see paragraph 33 above); the comment that the Court of Appeal had "no doubt that the [judgment of the CACD] does not begin to carry the implication that there was no case ... to answer" (see paragraph 38 above);

and the finding of the Court of Appeal that "there was no basis for saying that, on the new evidence, there was no case to go to a jury" (see paragraph 39 above). These comments had to be viewed in the light of the general position as regards eligibility for compensation. The Court of Appeal's judgment clearly implied that she could potentially have been convicted had she been retried.

111. The applicant pointed out that the requirement that a person prove her innocence had been found to be a violation of Article 6 § 2 in a number of cases (relying on *Capeau*, *Puig Panella* and *Tendam*, all cited above). She argued that if a State imposed a requirement that innocence be established before compensation was payable, it was inevitable that a finding that compensation was not payable implied that the State was questioning the person's innocence.

112. Finally, the applicant referred to the Court's case-law which indicated that even the mere voicing of doubts regarding innocence was incompatible with Article 6 § 2 where there had been an acquittal (relying on *Sekanina*, *Rushiti* and *Diacenco*, all cited above). The applicant insisted that hers was plainly an acquittal based on the merits as the CACD, when quashing her conviction, had found that the factual and evidential basis of the conviction had been undermined.

113. She concluded that in the compensation proceedings in her case, the courts had questioned her innocence and she invited the Court to find a violation of Article 6 § 2.

(b) The Government

114. The Government disputed that there had been a violation of Article 6 § 2 in the present case. Section 133 of the 1988 Act did not offend the presumption of innocence, as it did not call into question the correctness of the acquittal or the applicant's entitlement to be presumed innocent. The cases to which the applicant referred, such as *Rushiti*, cited above, could not be interpreted as justifying an extreme interpretation of Article 6 § 2 to the effect that once a person had been acquitted she must be treated always as positively innocent for all purposes. That, the Government submitted, would not be compatible with Article 3 of Protocol No. 7 or with the Court's case-law on the compatibility with Article 6 § 2 of civil proceedings arising out of the same facts (referring to *Y.*, cited above).

115. The Government contended that in previous cases involving compensation proceedings, including those cited by the applicant, the Court's concern had been with the way in which the decision to refuse compensation had left no doubt that it was based on presumed guilt; the words used had gone beyond mere suspicions or suppositions. By contrast, there was no similar problem with the refusal of compensation under section 133 of the 1988 Act generally or with the specific refusal in the applicant's case. Refusal of compensation would be compatible with

Article 6 § 2 provided that it was clear from the language used that no guilt could be imputed to the applicant (referring to *A.L.*, cited above).

116. Finally, the Government referred to the Court's case-law on the operation of the presumption of innocence in the context of civil and disciplinary proceedings (citing *Šikić*, *Vanjak* and *Bok*, all cited above). This confirmed that the Court adopted a flexible approach to the scope of the presumption of innocence outside criminal proceedings, and was alive to the need to ensure that civil and disciplinary proceedings could function effectively.

117. The Government concluded that nothing in the domestic judgments undermined or cast doubt on the applicant's acquittal. There had therefore been no violation of Article 6 § 2 in the present case.

2. The Court's assessment

118. The Court observes that the present case does not concern the compliance of the compensation scheme established under section 133 of the 1988 Act with Article 3 of Protocol No. 7, a Protocol which the respondent State has not ratified (see paragraph 70 above). It is therefore not for this Court to assess whether that Article has been complied with; nor is its task to evaluate the respondent State's interpretation of the phrase "miscarriage of justice" which appears in that Article, except in so far as its interpretation can be said to be incompatible with the presumption of innocence enshrined in Article 6 § 2.

119. As explained above, once it has been established that there is a link between the two sets of proceedings, the Court must determine whether, in all the circumstances of the case, the presumption of innocence has been respected. It is convenient, therefore, to begin by reviewing the Court's approach to its examination of the merits in previous comparable cases.

(a) The Court's approach in previous comparable cases

120. In the early case of *Minelli*, cited above, which concerned an order requiring the applicant to pay prosecution costs following discontinuation of the criminal proceedings, the Court set out the applicable principle as follows:

> "37. In the Court's judgment, the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty."

121. In the first cases with which it was confronted concerning applications by a former accused for compensation or for defence costs, the Court drew on the principle set out in *Minelli*, explaining that a decision whereby compensation for detention on remand and reimbursement of an

accused's necessary costs and expenses were refused following termination of proceedings might raise an issue under Article 6 § 2 if supporting reasoning which could not be dissociated from the operative provisions amounted in substance to a determination of the accused's guilt without his having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise the rights of the defence (see *Englert*, cited above, § 37; *Nölkenbockhoff*, cited above, § 37; and *Lutz*, cited above, § 60). All three cases concerned prior criminal proceedings which had ended in discontinuation, rather than acquittal. In finding no violation of Article 6 § 2, the Court explained that the domestic courts had described a "state of suspicion" and that their decisions did not contain any finding of guilt.

122. In the subsequent case of *Sekanina*, the Court drew a distinction between cases where the criminal proceedings had been discontinued and those where a final acquittal judgment had been handed down, clarifying that the voicing of suspicions regarding an accused's innocence was conceivable as long as the conclusion of criminal proceedings had not resulted in a decision on the merits of the accusation, but that it was no longer admissible to rely on such suspicions once an acquittal had become final (cited above, § 30). Thus the *Sekanina* principle appears to seek to limit the principle established in *Minelli* to cases where criminal proceedings have been discontinued. The case-law shows that in the latter cases, the *Minelli* principle has been consistently cited as the applicable general principle (see *Leutscher*, cited above, § 29; *Mulaj and Sallahi*, cited above; *Baars*, cited above, §§ 26-27; *Capeau*, cited above, § 22; *A.L.*, cited above, § 31; *Panteleyenko*, cited above, § 67; and *Grabchuk*, cited above, § 42). The distinction made in *Sekanina* between discontinuation and acquittal cases has been applied in most of the cases concerning acquittal judgments which followed *Sekanina* (see, for example, *Rushiti*, cited above, § 31; *Lamanna v. Austria*, no. 28923/95, § 38, 10 July 2001; *Weixelbraun*, cited above, 25; *O.*, cited above, § 39; *Hammern*, cited above, § 47; *Yassar Hussain*, cited above, §§ 19 and 23; *Tendam*, cited above, §§ 36-41; *Ashendon and Jones*, cited above, §§ 42 and 49; and *Lorenzetti*, cited above, §§ 44-47; but compare and contrast *Del Latte* and *Bok*, both cited above).

123. In cases involving civil compensation claims lodged by victims, regardless of whether the criminal proceedings ended in discontinuation or acquittal, the Court has emphasised that while exoneration from criminal liability ought to be respected in the civil compensation proceedings, it should not preclude the establishment of civil liability to pay compensation arising out of the same facts on the basis of a less strict burden of proof. However, if the national decision on compensation were to contain a statement imputing criminal liability to the respondent party, this would raise an issue falling within the ambit of Article 6 § 2 of the Convention (see *Ringvold*, cited above, § 38; *Y.*, cited above §§ 41-42; *Orr*, cited above,

§§ 49 and 51; and *Diacenco*, cited above, §§ 59-60). This approach has also been followed in cases concerning civil claims lodged by acquitted applicants against insurers (see *Lundkvist* and *Reeves*, both cited above).

124. In cases concerning disciplinary proceedings, the Court accepted that there was no automatic infringement of Article 6 § 2 where an applicant was found guilty of a disciplinary offence arising out of the same facts as a previous criminal charge which had not resulted in a conviction. It emphasised that the disciplinary bodies were empowered to, and capable of, establishing independently the facts of the cases before them and that the constitutive elements of the criminal and disciplinary offences were not identical (see *Vanjak*, cited above, §§ 69-72; and *Šikić*, cited above, §§ 54-56).

125. It emerges from the above examination of the Court's case-law under Article 6 § 2 that there 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.

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 (see, for example, *Y.*, cited above, §§ 43-46; *O.*, cited above, §§ 39-40; *Hammern*, cited above, §§ 47-48; *Baars*, cited above, §§ 29-31; *Reeves*, cited above; *Panteleyenko*, cited above, § 70; *Grabchuk*, cited above, § 45; and *Konstas v. Greece*, no. 53466/07, § 34, 24 May 2011). Thus in a case where the domestic court held that it was "clearly probable" that the applicant had "committed the offences ... with which he was charged", the Court found that it had overstepped the bounds of the civil forum and had thereby cast doubt on the correctness of the acquittal (see *Y.*, cited above, § 46; see also *Orr*, cited above, § 51; and *Diacenco*, cited above, § 64). Similarly, where the domestic court indicated that the criminal file contained enough evidence to establish that a criminal offence had been committed, the language used was found to have violated the presumption of innocence (see *Panteleyenko*, cited above, § 70). In cases where the Court's judgment expressly referred to the failure to dispel the suspicion of criminal guilt, a violation of Article 6 § 2 was established (see, for example, *Sekanina*, cited above, §§ 29-30; and *Rushiti*, cited above, §§ 30-31). 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 (see paragraph 125 above). The Court's case-law provides some examples of instances where no violation of Article 6 § 2 has been found even though the language used by domestic authorities and courts was criticised (see *Reeves*, cited above; and *A.L.*, cited above, §§ 38-39).

(b) Whether the applicant's right to be presumed innocent was respected in this case

127. It is relevant to the overall context of the present case that the applicant's conviction was quashed by the CACD on the ground that it was "unsafe" because new evidence might have affected the jury's decision had it been available at trial (see paragraph 20 above). The CACD did not itself assess all the evidence, in the light of the new evidence, in order to decide whether guilt had been established beyond reasonable doubt. No retrial was ordered as the applicant had already served her sentence of imprisonment by the time her conviction was quashed (see paragraphs 21, 26 and 34 above). Pursuant to section 2(3) of the Criminal Appeal Act 1968, the quashing of the applicant's conviction resulted in a verdict of acquittal being entered (see paragraph 45 above). However, the applicant's acquittal was not, in the Court's view, an acquittal "on the merits" in a true sense (compare and contrast *Sekanina* and *Rushiti*, both cited above, where the acquittal was based on the principle that any reasonable doubt should be considered in favour of the accused). In this sense, although formally an acquittal, the termination of the criminal proceedings against the applicant might be considered to share more of the features present in cases where criminal proceedings have been discontinued (see, for example, *Englert*, *Nölkenbockhoff*, *Lutz*, *Mulaj and Sallahi*, all cited above; *Roatis v. Austria* (dec.), no. 61903/00, 27 June 2002; and *Fellner v. Austria* (dec.), no. 64077/00, 10 October 2002).

128. It is also important to draw attention to the fact that section 133 of the 1988 Act required that specified criteria be met before any right to compensation arose. These criteria were, put concisely, that the claimant had previously been convicted; that she had suffered punishment as a result; that an appeal had been allowed out of time; and that the ground for allowing the appeal was that a new fact showed beyond reasonable doubt that there had been a miscarriage of justice. The criteria reflect, with only minor linguistic changes, the provisions of Article 3 of Protocol No. 7 to the Convention, which must be capable of being read in a manner which is compatible with Article 6 § 2. The Court is accordingly satisfied that there is nothing in these criteria themselves which calls into question the innocence of an acquitted person, and that the legislation itself did not require any assessment of the applicant's criminal guilt.

129. The Court further observes that the possibility for compensation following acquittal in the respondent State is significantly limited by the section 133 criteria. It is clear that an acquittal in the course of an appeal within time would not give rise to any right to compensation under section 133. Similarly, an acquittal on appeal based on inadequate jury directions or the admission of unfair evidence would not satisfy the criteria set out in section 133 of the 1988 Act. It was for the domestic courts to interpret the legislation in order to give effect to the will of the legislature and in doing

so they were entitled to conclude that more than an acquittal was required in order for a "miscarriage of justice" to be established, provided always that they did not call into question the applicant's innocence. The Court is not therefore concerned with the differing interpretations given to that term by the judges in the House of Lords in *Mullen* and, after the judgment of the Court of Appeal in the present case, by the judges in the Supreme Court in *Adams*. What the Court has to assess is whether, having regard to the nature of the task that the domestic courts were required to carry out, and in the context of the judgment quashing the applicant's conviction (see paragraph 127 above), the language they employed was compatible with the presumption of innocence guaranteed by Article 6 § 2.

130. As to the nature of the courts' task, it is clear that the examination of whether the section 133 criteria were satisfied required the domestic courts to refer to the judgment of the CACD quashing the conviction, in order to identify the reasons for the acquittal and the extent to which it could be said that a new fact had shown beyond reasonable doubt that there was a miscarriage of justice. To this extent, the context of the proceedings obliged the High Court and, subsequently, the Court of Appeal to evaluate the judgment of the CACD in the light of the section 133 criteria.

131. Turning to the judgment of the High Court, the Court observes that the judge analysed the findings of the CACD and was of the view that they were not "consistent with the proposition that at the conclusion of a new trial ... a trial judge would have been obliged to direct the jury to acquit the claimant" (see paragraph 25 above). Having examined the previous cases which had come before the courts on the question of section 133 compensation, he considered that it was outwith the language of section 133 to describe a case in which a jury might have reached a different conclusion as showing beyond reasonable doubt that there had been a miscarriage of justice (see paragraph 30 above). In the applicant's case, the medical evidence heard by the CACD and the trial jury demonstrated that there was "powerful evidence" against the applicant, and it would have been for a jury to determine the issue (see paragraph 31 above). He concluded that the CACD had only decided that the new evidence, when taken with the evidence given at trial, "created the possibility" that a jury "might properly acquit" the applicant. This fell well short of demonstrating beyond reasonable doubt that there had been a miscarriage of justice in the case (see paragraph 32 above).

132. The Court of Appeal, for its part, also began by referring to the terms of the judgment quashing the conviction. It explained that the CACD had decided that the evidence which was now available "*might*, if it had been heard by the jury, have led to a different result" (see paragraph 33 above). It later said that the decision of the CACD did "not begin to carry the implication" that there was no case for the applicant to answer, and that

there was "no basis for saying" on the new evidence that there was no case to go to a jury (see paragraph 38-39 above).

133. It is true that in discussing whether the facts of the applicant's case fell within the meaning of "miscarriage of justice", both the High Court and the Court of Appeal referred to the contrasting interpretations given to that phrase by Lords Bingham and Steyn in the House of Lords in *R (Mullen)*. As Lord Steyn had expressed the view that a miscarriage of justice would only arise where innocence had been established beyond reasonable doubt, there was necessarily some discussion of the matter of innocence and the extent to which a judgment of the CACD quashing a conviction generally demonstrates innocence. Reference was made in this regard to the Explanatory Report to Protocol 7, which explains that the intention of Article 3 of that Protocol was to oblige States to provide compensation only where there was an acknowledgement that the person concerned was "clearly innocent" (see paragraph 72 above). It is wholly understandable that when seeking to identify the meaning of an ambiguous legislative notion such as "miscarriage of justice" that has its origins in provisions figuring in international instruments – in the event, Article 14(6) of the ICCPR and Article 3 of Protocol No. 7 – national judges should refer to the international case-law on those provisions and to their drafting history setting out the understanding of their drafters. However, the Explanatory Report itself provides that, although intended to facilitate the understanding of the provisions contained in the Protocol, it does not constitute an authoritative interpretation of the text (see paragraph 71 above). Its references to the need to demonstrate innocence must now be considered to have been overtaken by the Court's intervening case-law on Article 6 § 2. But what is important above all is that the judgments of the High Court and the Court of Appeal did not require the applicant to satisfy Lord Steyn's test of demonstrating her innocence. The High Court in particular emphasised that the facts of *R (Mullen)* were far removed from those of the applicant's case and that the *ratio decidendi* of the decision in *R (Mullen)* did not assist in the resolution of her case (see paragraph 27 above).

134. The Court does not consider that the language used by the domestic courts, when considered in the context of the exercise which they were required to undertake, can be said to have undermined the applicant's acquittal or to have treated her in a manner inconsistent with her innocence. The courts directed themselves, as they were required to do under section 133, to the need to establish whether there was a "miscarriage of justice". In assessing whether a "miscarriage of justice" had arisen, the courts did not 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, they did not comment on whether the evidence was indicative of the applicant's guilt or innocence. They merely acknowledged the conclusions of the CACD, which itself was addressing the historical

question whether, had the new evidence been available prior to or during the trial, there would nonetheless have been a case for the applicant to answer. They consistently repeated that it would have been for a jury to assess the new evidence, had a retrial been ordered (see paragraphs 31, 33 and 38-39 above).

135. In this respect, the Court emphasises that pursuant to the law of criminal procedure in England, it is for a jury in a criminal trial on indictment to assess the prosecution evidence and to determine the guilt of the accused. The CACD's role in the applicant's case was to decide whether the conviction was "unsafe", within the meaning of section 2(1)(a) of the 1968 Act (see paragraph 43 above); and not to substitute itself for the jury in deciding whether, on the basis of the evidence now available, the applicant's guilt had been established beyond reasonable doubt. The decision not to order a retrial in the applicant's case spared her the stress and anxiety of undergoing another criminal trial. She did not argue that there ought to have been a retrial. Both the High Court and the Court of Appeal referred extensively to the judgment of the CACD to determine whether a miscarriage of justice had arisen and did not seek to reach any autonomous conclusions on the outcome of the case. They did not question the CACD's conclusion that the conviction was unsafe; nor did they suggest that the CACD had erred in its assessment of the evidence before it. They accepted at face value the findings of the CACD and drew on them, without any modification or re-evaluation, in order to decide whether the section 133 criteria were satisfied.

136. The Court is therefore satisfied that the judgments of the High Court and the Court of Appeal in the applicant's case did not demonstrate a lack of respect for the presumption of innocence which she enjoys in respect of the criminal charge of manslaughter of which she has been acquitted. There has accordingly been no violation of Article 6 § 2 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 6 § 2 of the Convention.

Done in English and French, and notified at a public hearing in the Human Rights Building, Strasbourg, on 12 July 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'Boyle	Dean Spielmann
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinion of Judge De Gaetano is annexed to this judgment.

D.S.
M.O'B.

SEPARATE OPINION OF JUDGE DE GAETANO

1. I agree that in this case there has been no violation of Article 6 § 2 of the Convention. However the judgment leaves unresolved the question – perhaps the most important question from a domestic court's point of view – of what may or may not be said in civil compensation proceedings arising from the same facts which had given rise to the criminal prosecution or investigation.

2. In *Ashendon and Jones v. the United Kingdom* (nos. 35730/07 and 4285/08, 15 December 2011) I had expressed the hope that the Court would one day reassess Article 6 § 2, particularly in the light of the difficulties our case-law has created for national courts in dealing with post-acquittal proceedings. In the instant case, however, the majority have opted for a mere compilation of cases (§ 98(e)) and the generic statements contained in §§ 101, 102 and 123.

3. To state that it all depends on whether "the national decision on compensation [contains] a statement imputing criminal liability to the respondent party" (§ 123) – which in effect means "it all depends on what you say and how you say it" – is just playing with words and most unhelpful. It is as much as saying that "whether the reasons [given in the civil judgment] gave rise to an issue under Article 6 § 2 must be viewed in the context of the proceedings as a whole and their special features" (*Reeves v. Norway* (dec.) no. 4248/02, 8 July 2004).

4. The reality is that in most proceedings for civil compensation following an acquittal in criminal proceedings (or, indeed, when there has been no criminal prosecution at all), for the national court to find for the plaintiff and against the defendant it must find not only that the material element (*actus reus*) of the offence was committed by the defendant, but that the intentional or moral element (*mens rea*) of that offence was also present. It is true that in the civil proceedings the standard of proof will be less strict than in criminal proceedings – on a balance of probabilities, and not beyond reasonable doubt – but that is not really saying much as far as popular perception of guilt or innocence, and therefore of the existence or otherwise of criminal liability, is concerned. This issue was very clearly highlighted in Judge Costa's dissenting opinion in *Ringvold v. Norway* (no. 34964/97, 11 February 2003). Indeed in that case two judges took a diametrically opposed view on the same passages of the Norwegian Supreme Court's judgment. The concurring opinion of Judge Tulkens reflects the theoretical – dare I say, academic – approach to the question of Article 6 § 2 in collateral civil proceedings, whereas the dissenting opinion of Judge Costa is a stark reminder of pragmatic reality: "[The applicant] was told that he had been acquitted of the offence with which he had been charged, but he was subsequently told (on the basis of the same facts) *that it*

was clear that he had committed the offence, and ordered to pay compensation to the victim."

5. I still have difficulty in reconciling the judgment in *Ringvold* with the later judgment in *Orr v. Norway* (no. 31283/04, 15 May 2008). The present judgment in no way alleviates that difficulty. I still believe that Article 6 § 2 has no place whatsoever in civil compensation proceedings, whether following upon acquittal in criminal proceedings or where no criminal proceedings have ever been initiated.