Appendix 2

Legal Definitions of Miscarriage of Justice: The Case of Nicholas Mullen

Nicholas Mullen, a member of the Provisional Irish Republican Army, was convicted in 1990 for his involvement in running a 'bomb factory' in Clapham but freed by the CACD in 1999. Lord Justice Rose, Mr Justice Colman and Mr Justice Kay argued that an 'abuse of process' had to outweigh the conviction despite the fact that Mullen had never denied his involvement in the 1980's bombing campaign. Mullen's defence argued that his conviction was unsafe because the manner in which their client had been removed from Zimbabwe breached Zimbawean and international law (Roberts, 2003). During the appeal R v Mullen [1999] 2 Cr App, material was presented to the Court which showed that the police, MI6 and officials from the Home Office and Foreign Office had worked closely with the Zimbawean authorities to deport Mullen from Zimbawe, where he had fled from the UK, despite the actions of these individuals infringing international law. The judges on hearing the appeal said that the facts relating to the bombing campaign were not considered by the Court as the grounds of appeal were that an abuse of process had taken place and not whether Mullen was guilty or not of the offence. Following his release from the CACD, Mullen applied for statutory compensation as set out in section 133(1) of the Criminal Justice Act 1988:

> Where 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 to the person who has suffered as a result.

The Home Secretary refused the request for compensation so Mullen applied for judicial review of that decision. The basis of the Secretary of State's refusal was by reference to the principles of justice and that Mullen's trial had proceeded properly. The case was heard in the Administrative Court by Lord Justice Brown and

Mr Justice Scott Baker. It was argued that the dispute was one of law and concerned the true meaning of section 133(1) and secondly, what in this context was meant by the expression 'miscarriage of justice'. Lord Justice Brown agreed with the Secretary of State that the Mullen case did not constitute a miscarriage of justice. LJ Brown agreed that there had been an abuse of process in bringing the claimant to trial but this did not demonstrate there had been a miscarriage of justice. LJ Brown argued that:

> In short, a miscarriage of justice in the context of section 133 means, in my judgement, the wrongful conviction of an innocent accused. Compensation goes only to those whose convictions are adjudged unsafe. The quashing of the claimants conviction in this case was a vindication of the rule of law, not the righting of a mistaken verdict. Although, as prosecuting counsel in Mullen submitted and the Court of appeal held, the word unsafe "can refer to a miscarriage of justice in the round, including such abuse of process as would have prevented proceedings", that is not the sense in which the expression miscarriage of justice is used in section 133.

The judgement, however, was reversed by the Court of Appeal when Lord Justice Schiemann rejected the arguments of the Home Secretary in R (on the application of Nicholas Mullen) v Secretary of State for the Home Department [2002] EWCA Civ. The judgement importantly restored the presumption of innocence in both civil and criminal proceedings and asserted the importance of rights and fairness in relation to what constitutes a miscarriage of justice. In the Administrative Court, Mullen argued that his case 'was no less a miscarriage of justice because it was consequent upon a trial which ought not to have taken place at all'. Lord Justice Rose had argued during his first appeal that 'unsafe' meant 'likely to constitute a miscarriage of justice' so the issue for the Administrative Court was whether 'unsafe' was actually a synonym for miscarriage of justice.

The Home Secretary had relied upon article 3 of the Seventh Protocol to the European Convention on Human Rights (ECHR) which states that:

> The intension is that States would be obliged to compensate persons only in clear cases of miscarriages of justice, in the sense that there would be a clear acknowledgement that the person was clearly innocent.

Despite this Lord Justice Schiemann rejected the case against Mullen because 'our criminal justice process does not provide for proof of innocence'. The Court of Appeal judge then outlined some of the principles that underpin the criminal justice system including the presumption of innocence and the fact that the role of the CACD is to determine whether a conviction is unsafe and not to determine if the appellant is guilty or innocent. Following this decision the Secretary of State was given leave to appeal to the House of Lords to again clarify what constitutes a miscarriage of justice. The case was heard in 2004. In their judgement two distinct views were expressed. Lord Steyn, with whom Lord Rogers agreed, presented a restrictive view, whilst Lord Bingham, with whom Lord Walker agreed, took a wider interpretation. The fifth member of the Appellate committee, Lord Scott, did not express a view.

In R (Mullen) v Secretary of State for the Home Department [2004] the appellate committee expressed two views on the meaning of 'miscarriage of justice'. In the particular case it was unnecessary for them to reach a final view on the point, as the unusual circumstances of the particular application fell outside the statutory scheme in any event on the narrow ground that Mullen's conviction had been overturned because of an abuse of process in the way he had been brought to the United Kingdom, rather than as a result of any defect in his trial or investigation leading up to it (Fitzgerald, 2004).

Lord Steyn, with whom Lord Roger's agreed, considered that the concept of a 'miscarriage of justice' only extended to '...clear cases of miscarriage of justice, in the sense that there would be an acknowledgement that the person concerned was clearly innocent' (paragraph 56). He explained that he envisaged that the statutory test would be met either when the Court of Appeal pronounced the appellant to be innocent or where this could be inferred from the new evidence (paragraph 55). On the other hand Lord Bingham, with whom Lord Walker agreed, said that whilst he

did not express a concluded view, he would hesitate to accept the Secretary of State's submission that the statutory test was only satisfied in cases where the applicant was shown to be innocent. He drew attention to the usual meaning of 'wrongful conviction' and suggested that there was a parallel with the meaning of a 'miscarriage of justice' (2004, paragraphs 4 and 9(1)). As regards this meaning he said:

> Plainly the expression includes the conviction of those who are innocent of the crime of which they have been convicted. But in the 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 reason why a defendant may be convicted when he should not have been...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.

The fifth member of the appellate Committee, Lord Scott, did not express a view one way or the other on this point.

In relation to defining a miscarriage of justice from the perspective of receiving statutory compensation, case law draws a distinction between a conviction reversed on the basis of a new/newly discovered fact; the former is not sufficient in itself to satisfy the statutory test, the evidence must have led to a new factual conclusion; see R v Secretary of State for the Home Department ex parte Garner (1999) 11 Admin LR 595 and R (Murphy) v Secretary of State for the Home Department [2005] EWHC 140 (Admin) at paragraph 50. Similarly it was accepted that the new or newly discovered fact relied upon must have been the principal reason for the conviction being quashed. Murphy also establishes that the fact in question must have been discovered after the exhaustion of the ordinary in time appellate process. However, provided a new fact is established and it led to the quashing of the conviction, it is unnecessary for that fact to go so far as to show that the applicant did not commit the crime in question for this part of the statutory criteria to be satisfied: see R (Clibery) v Secretary of State for the Home Department [2007] EWHC 1855 (Admin) at paragraph 14.

In Clibery the Divisional Court considered what Lord Bingham meant when he suggested that the statutory phrase encompassed those who "should clearly not have been convicted at their trials". The Court said that it was intended to encompass two circumstances. Firstly, where events showed that the applicant was innocent and secondly where "there were 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 the latter context the Divisional Court noted Lord Bingham's emphasis upon the right guaranteed by article 6 of the European convention on Human Rights (ECHR) to a fair trial. For this analysis see paragraphs 21 – 25 of the Divisional Court's judgement.

Both Lord Bingham and Lord Steyn were agreed that the key to interpreting the meaning of "miscarriage of justice" in section 133 CJA is the use of the equivalent phrase in article 14(6) of the International Covenant on Civil and Political Rights (ICCPR) from which the section 133 obligations to pay compensation is derived. However, it might be argued that Lord Bingham's interpretation of "miscarriage of justice is to be preferred to that of Lord Steyn for the following reasons:

Neither article 14(6) ICCPR nor section 133 CJA require in terms that any applicant should demonstrate they are 'innocent' of the crime of which they were convicted. Innocence is a simple and widely understood concept. If it was intended to limit article 14(6) and/or section 133 to those who could prove their innocence this would have been stated expressly.

Secondly as Lord Bingham explained in Mullen the phrase "miscarriage of justice" is not a legal term of art and has no settled meaning. As he suggested, it may well have been chosen by the signatories to the ICCPR precisely because of the latitude of interpretation it offered to the States involved: see paragraph 9(2) of his speech. The test propounded by Lord Steyn in Mullen might therefore be unworkable in practice, given the basis upon which the CACD has repeatedly stated that its role is not to determine the innocence of the defendant, for example see R v McIlkenny and Ors (1991) 93 CrAppR 287 at 311. In accordance with the CACD in fresh evidence cases, the Court's role is simply to determine whether the new evidence,

if given at trial, could reasonably have affected the jury's decision to convict: R v Pendleton [2002] 1 WLR 72. If Lord Steyn's interpretation were adopted it might so severely restrict the number of applicants who would be eligible for compensation and recognition by the State that a miscarriage of justice had taken place, that this cannot have been Parliament's intension, in the absence of a clear indication to that effect.

Thirdly the *Hansard* records of the Parliamentary debates from which section 133 CJA was enacted say nothing that 'miscarriage of justice' should be confined to circumstances of established 'innocence'. As Lord Bingham noted in Mullen, when the proposed section 133 was debated in the House of Lords, the minister was pressed to say whether a miscarriage of justice connoted the innocence of a defendant or simply the raising of a doubt about their guilt. In response the minister said nothing to indicate either way. It could similarly be argued that the approach of Lord Steyn is inconsistent with the way that the Home Office and now the Ministry of Justice has explained and operated section 133 criteria prior to and since the House of Lords decision in Mullen. In internal guidance issued in April 2003 to the Home Office's Claims Assessment Team (who then had responsibility for determining section 133 applications), reference was made to the fact that the Court of Appeal 'rarely' refers in terms to a miscarriage of justice and usually focuses on the safety of the conviction. It then stated:

> Consequently the long standing policy has been to accept that the late reversal of a conviction on the ground of a 'new or newly discovered fact' is sufficient, of itself, to establish that there has been a miscarriage of justice. Accordingly, when examining statutory claims, we confine ourselves to asking whether there has been any fault on the part of the applicant as to the late emergence of the new fact (Paragraphs 10 and 11).

The document goes on to summarise the criteria that an applicant would be required to satisfy. In keeping with the passage quoted above, the document indicated that the only requirement distilled from this aspect of the statutory test is the need to show that the conviction was quashed on the ground of a 'new or newly discovered fact' and that the disclosure of the unknown fact was not

attributable to the applicant (paragraph 12). There was no suggestion that a requirement of demonstrable innocence must also be met.