Liberty’s briefing on Miscarriages of Justice – clause 151 of the Anti-social Behaviour, Crime and Policing Bill – in the House of Lords

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Liberty (The National Council for Civil Liberties) is one of the UK’s leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

**Liberty Policy**

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.


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Introduction

Liberty considers that the proposals in clause 151 of the Bill will, in a very small number of cases, turn the presumption of innocence on its head. The proposal risks causing serious injustice to individuals and damaging the reputation of British fairness. In its progress through Parliament so far the proposal has received opposition from all sides, with both Liberal Democrat and Labour members urging the House of Lords to resolve the issue. We welcome amendment 15 which would give statutory force to the current judicial test or the alternative approach, as advocated by the Joint Committee on Human Rights, to remove clause 151 from the Bill. We urge peers of all parties to show their support for both or either of these amendments at Committee Stage of the Bill.

Background

1. Clause 151 of the Bill inserts a new subsection (1ZA) in section 133 of the Criminal Justice Act 1988 which provides that, where a person has been convicted of a criminal offence, a miscarriage of justice has occurred “if and only if the new or newly discovered fact shows beyond reasonable doubt that the person was innocent of the offence.” This significantly increases the burden of proof on an individual who believes they have been the victim of a miscarriage of justice and wants to claim compensation.

2. Concerns about this proposal were raised during the Second Reading of the Bill. Baroness Hamwee noted “it is ironic that the burden of proof is lowered at the start of the Bill and then raised at the end when it deals with individuals who suffer a miscarriage of justice at the hands of the state. They should not have to prove their innocence, a concept not used elsewhere in the criminal justice system.”1 Baroness O’Loan asked “Is this really mischief which requires to be remedied through legislative change, or is it something that will damage forever the reputation of law in the United Kingdom?”2 The House also heard from Lord Hope, who welcomed the opportunity for parliament to consider the matter but sounded a note of caution that

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1 See the House of Lords Second Reading debate of the Anti-social Behaviour, Crime and Policing Bill, Hansard, 29 October 2013 per Baroness Hamwee at column 1493
2 See the House of Lords Second Reading debate of the Anti-Social Behaviour, Crime and Policing Bill, Hansard, 29 October 2013 per Baroness O’Loan at column 1514
“it is at least doubtful whether the test that this clause lays down will cover all cases of miscarriage of justice where it is just that compensation should be available.”\(^3\)

3. Similarly, the proposal was discussed with concern by members of the House of Commons at Report Stage, where Simon Hughes stated “Having looked at the issue again, I honestly believe that the removal of the clause would be the better way to deal with the problem.”\(^4\) Dr Jullian Huppert set out “I agree with the shadow Minister that we should flag this up as a big issue, but leave it to the other place to find the right answer. By then, I hope that the Government will have reflected on it and accepted the principle that it is incredibly hard for anybody absolutely to prove their innocence. That is a really tough threshold. I hope that the Minister will reflect on that and that we can strike a better balance in the other place.”\(^5\)

**The proposal**

4. In the Second Reading debate in the House of Commons the Home Secretary made the following statement:

...we have also clarified the test for determining eligibility for compensation when someone has been the victim of a miscarriage of justice. The absence of a clear statutory definition of what amounts to a miscarriage of justice for these purposes has led to repeated legal challenges and shifting case law.\(^6\)

5. However, clause 151 as currently drafted would not simply ‘clarify’ the test, but goes far beyond this to limit significantly eligibility for compensation for miscarriages of justice. The proposed test is flawed in practical and principled terms, as described below.

6. Under existing law, to obtain compensation an individual needs to prove that “a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice.” There has been disagreement in the case law on what is

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\(^3\) See the House of Lords Second Reading debate of the Anti-social Behaviour, Crime and Policing Bill, Hansard, 29 October 2013 per Lord Hope at column 1520
\(^4\) See the House of Commons Report Stage Second Sitting of the Anti-social Behaviour, Crime and Policing Bill, Hansard, 15 October 2013 per Simon Hughes MP at column 612
\(^5\) See the House of Commons Report Stage Second Sitting of the Anti-social Behaviour, Crime and Policing Bill, Hansard, 15 October 2013 per Dr Jullian Huppert MP at column 610
\(^6\) See the House of Commons Second Reading debate of the Anti-social Behaviour, Crime and Policing Bill, Hansard, 10 June 2013 per Theresa May at column 75.
meant by a “miscarriage of justice.” One view – that held by Lord Steyn in R (Mullen) v Home Secretary - held that the concept of “miscarriage of justice” only included the cases of persons who were demonstrably innocent; that is, where the person concerned has shown that he is clearly innocent.\(^7\) On the other hand, in the same case Lord Bingham was of the opinion (based on Article 14(6) of the International Covenant on Civil and Political Rights, which enshrines the right to compensation for miscarriages of justice and to which the UK is a party) that the concept had a wider meaning. This wider meaning also encompassed cases where, although it is not possible to say for sure that a person is innocent, it is possible to say he has been wrongly convicted because of a “failure of the trial process”. The Supreme Court adopted the latter, broader view in R (Adams) v Secretary of State for Justice.\(^8\) This was reformulated by the Divisional Court in R (Ali) v Secretary of State for Justice as a requirement that the individual prove “beyond reasonable doubt, that no reasonable jury (or magistrates) properly directed as to the law, could convict on the evidence now to be considered.”\(^9\)

7. The proposed addition to the 1988 Act contained in the Bill would return the law to the narrower pre-Adams position and impose a significantly heavier burden on those who have been wrongly convicted. The current test asks them to show that a jury could not rightly find beyond reasonable doubt that they were guilty; the new test would ask the individual to go further and prove positively, beyond reasonable doubt, that they were innocent.

8. There are practical problems with this proposal. First, the individual is in effect being asked to perform the onerous task of proving a negative: that they did not commit the requisite acts with the requisite state of mind that would make them guilty of the offence. In addition, the individual may be claiming compensation in relation to a prosecution that took place decades ago, and obtaining evidence sufficient to prove innocence beyond reasonable doubt where the events took place in the relatively distant past imposes a significant practical burden. The end result will be that those who should be entitled to compensation will be unable to obtain it, due to the virtual impossibility of proving their innocence.

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\(^7\) [2004] UKHL 18.  
\(^8\) [2011] UKSC 18.  
\(^9\) [2013] EWHC 72 (Admin).
9. The particular class of individuals who would be detrimentally affected by this change in the law would be those for whom the evidence is sufficient to show that a reasonable jury could not on the evidence have found beyond reasonable doubt that they were guilty of the offence, but for whom that evidence is insufficient to prove their innocence beyond reasonable doubt. This is highly unsatisfactory as a matter of criminal law principle. The presumption of innocence operates as a fundamental safeguard in our criminal justice system: if state prosecutorial authorities cannot evince evidence capable of showing beyond reasonable doubt that a defendant is guilty they should not secure conviction, and if an individual was found guilty in those circumstances they have been wrongly convicted and are entitled to compensation for the wrong they have suffered. If the proposed change becomes law, these individuals will not be able to obtain compensation unless they can fulfil the extra, extremely difficult step of proving their innocence beyond reasonable doubt, a demand that would never be made of them in the original criminal trial.

New Strasbourg jurisprudence indicating potential breach of Article 6(2)

10. In addition, there is a real possibility that clause 143 as currently drafted would violate the UK’s obligations under the Human Rights Act 1998 (HRA) and the European Convention on Human Rights (ECHR). The Grand Chamber of the European Court of Human Rights recently published its decision in Allen v UK, which concerned the case of a woman whose conviction for killing her infant son was quashed, but who was refused compensation on application to the Secretary of State. While emphasising that Article 6 ECHR does not “guarantee a person acquitted of a criminal offence a right to compensation for miscarriage of justice,” the Court made clear that the protection of Article 6(2) (the presumption of innocence) extended beyond the criminal trial itself:

“the presumption of innocence means that where there has been a criminal charge and criminal proceedings have ended in 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.”

Allen v UK, App. No. 25424/09, 12 July 2013, para 103

Allen v UK, App. No. 25424/09, 12 July 2013, para 82

11. Therefore, where the individual can demonstrate the necessary link between the previous criminal proceedings and the later compensation proceedings, they are entitled to that protection of Article 6(2). The Court then referred explicitly to the competing judicial interpretations in Mullen and Adams, discussed above, and stated that the key question was “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, the language they employed was compatible with the presumption of innocence guaranteed by Article 6(2).”

12. While no violation was found in the case in question, the Court’s judgment strongly suggests that, were the “clearly innocent” test – that contained in clause 143 of the Bill – to be employed, it would fall foul of Article 6(2). The Court noted that while the “clearly innocent” test originated in Article 14(6) of the ICCPR, it had since been “overtaken by the [Strasbourg] Court’s intervening case-law on Article 6(2).” Crucially, the Court goes on to state “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 clear implication is that, if an applicant were required to satisfy that test to obtain compensation, as they would be should clause 143 be enacted, then the UK would be in violation of Article 6(2) ECHR.

Conclusion

13. The criminal law, through the presumption of innocence, accepts that sometimes individuals will not be convicted even though it is not 100% certain that they were innocent: it is guilt that must be proven. This proposed provision is inconsistent with this key principle of criminal law and as a result risks denying redress to individuals who may have endured years of unjustified imprisonment and censure. We urge the Parliament to heed the clear warning given by the European Court of Human Rights and uphold a long-standing principle of British criminal law, and reconsider this ill-advised proposal.

13 Allen v UK, App. No. 25424/09, 12 July 2013, para 129.
14 Allen v UK, App. No. 25424/09, 12 July 2013, para 133.
15 Allen v UK, App. No. 25424/09, 12 July 2013, para 133.