Dr Hywel Francis MP  
Chair  
Joint Committee on Human Rights  
Committee Office  
House of Commons  
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Dear Hywel,

Anti-social Behaviour, Crime and Policing Bill clause 161:  
Compensation for miscarriages of justice

Thank you for your letter of 11 December 2013; we also note the Committee’s  
Ninth Report of the 2013-14 session. As requested, the Government’s  
assessment of the compatibility of clause 161 of the Bill with Article 6(2) of the  
Convention in light of the recent decisions of the European Court of Human  
Rights in A.L.F. v UK (application no. 5908/12) and Adams v UK (application  
no 70601/11) is set out in this letter, together with its response to the  
Committee’s conclusions in its most recent report. We will respond separately  
to the other conclusions and recommendations in the Committee’s Ninth  
Report.

1. The Government is grateful for the analysis set out in the Committee’s  
report, in which it reiterates the view of the Strasbourg Court of the scope for  
misconceptions under the current law. The Government agrees with the  
Committee that the test set out by Lord Phillips in Adams is clearer than the  
current case-law. The Strasbourg Court in Allen, Adams, and A.L.F has also  
ruled that this test is compatible with the presumption of innocence.  
However, whilst the Government acknowledges that these cases signal a  
dislike, quite simply, to any use of the word “innocent”, it does not agree that it  
follows the definition in clause 161 is incompatible with the presumption of  
innocence or would inevitably be found to be so after full and proper argument  
and further dialogue with domestic courts.

2. The Joint Committee considers in its report that the Government is  
seeking to persuade Parliament to depart from the position that has been  
taken by both the Supreme Court and the European Court of Human Rights,  
and that it would be unusual to do so in the absence of disagreement between  
the two.
The Government disagrees with this description. Whilst it is true that the Government is seeking to replace the definition agreed by the Supreme Court in Adams, and that developed later by the divisional court in Ali, the Strasbourg Court judgments were not deciding whether the tests applied domestically were correct per se (see Allen para. 129), but whether the test, or more precisely, the exercise of it, was compatible with Article 6(2). The Government sees nothing constitutionally inappropriate in its legislative proposal. Put simply, because the Strasbourg Court found a particular approach to be compatible with the Convention does not mean that no other approach is compatible. The Government is seeking to legislate within its margin of appreciation, and does not consider itself bound by any particular formulation of what will amount to a miscarriage of justice which the Court has found to be compatible with Article 6(2). Indeed, the Supreme Court and European Court are not necessarily in agreement on this issue – the Supreme Court in Adams were satisfied that, whichever of the tests in question was applied, there would not be a breach of the presumption of innocence (see Lord Phillips at para 58 and Lord Hope at para. 111, cited by the Strasbourg Court in Adams at paras. 22 and 25).

3. The Committee notes (at paras. 47, 49 and 67 of its report) that there is widely shared concern at the lack of clarity in the current case-law, and a lack of consensus as to the correct test to be applied. In light of this, the Government believes that it is right to seek to introduce greater certainty. In part, it is for reasons such as these that the Government has opted for the approach outlined in clause 161 – a clear innocence test is the simplest and clearest means of providing certainty to applicants and decision-makers.

KF v UK

4. The Government agrees with the Committee that KF is not per se a decision that a “clear innocence” test is compatible with Article 6(2), but it does not follow that the opposite is true, or that the case is not supportive of the Government’s position.

5. The Government’s point was that KF was a decision assessed under Lord Steyn’s test of innocence in Mullen. This makes it relevant to our current discussion. The applicant himself focused not on any particular phrase but on the approach adopted in Mullen and by the Court of Appeal in Allen. Still, the Court focused on the language used, rather than the underlying test. This reflects the view expressed in Allen (para 129) that the Court was not concerned with the differing interpretations given to the term “miscarriage of justice” by the judges in the House of Lords in Mullen and by the judges in the Supreme Court in Adams. It also reflects the consistently stated view of the Court that it is the language used that is critical (para. 126 Allen).

It would be just as possible to turn down an application for compensation under the proposed statutory test in an Article 6(2) compatible way as it was under the then applicable Mullen test. The Government therefore continues to consider that KF is relevant authority in support of the view that the proposed test is not incompatible with the presumption of innocence.
6. The Court did not find in either *A.L.F* or *Adams* that Article 6(2) had been breached; indeed, the Court found both applications to be inadmissible on the basis that there had been no appearance of a violation of Article 6(2). The complaints in each were that compensation was refused based on “doubts as to his innocence” (para. 16, *A.L.F.*) and that section 133 “allowed a person acquitted on the merits to be refused compensation because the State still believed it was possible that he could have been convicted” (para. 33, *Adams*). In both cases the test considered by the Court was the *Adams* test. The Government agrees with, and welcomes, the finding that the *Adams* test is compatible with Article 6(2). That approach to what constitutes a miscarriage of justice, like the innocence approach, in reality, however, involves consideration by the decision-maker whether in light of the new fact the applicant might still have been convicted (clearly this is not a formulation of the actual tests, but of the kind of consideration undertaken when applying either test). It is hard to rationalise why, per se, the *Adams* test would be compatible, but an innocence test would not. In substance both involve the decision-maker looking at the new fact to determine whether a miscarriage of justice occurred.

7. The Government accepts that both judgments (in particular at paragraph 24 of *A.L.F.* and 41 of *Adams*, quoted in the report) suggest that a reference to the applicant’s “innocence” in the language used by a court or the Secretary of State in determining an application for compensation for a miscarriage of justice would best be avoided. But in *A.L.F.*, whilst the Court advises that it may be “prudent” not to use the term innocence to avoid bringing Article 6(2) “into play”, it does not prohibit it. The Court appears to be concerned that the decision whether there has been a miscarriage of justice should not be, or give the appearance of being, an adjudication on the guilt or innocence of the applicant.

8. The extracts from the Court’s decision (on admissibility) that the Committee cites describe the *Adams* test. They are not a determinative statement about the possible tests that could be applied, nor could they be. As noted above, the Grand Chamber in *Allen* declined to engage in such an exercise. The Court has stated repeatedly that the essential point to note is that there is no single approach to ascertaining the circumstances in which Article 6(2) will be violated following the conclusion of criminal proceedings (*Allen*, para. 125). The Court has further noted that signatories to the Convention are entitled to provide in national law that more than an acquittal is required to determine whether a miscarriage of justice has occurred (*Allen* at para. 129).

If the Court is right in that regard (and the Government submits that it must be) the Government considers that each formulation (in *Adams*, *Ali* or that proposed in clause 161) of what will amount to a miscarriage of justice involves the decision-maker examining whether the new fact leaves open the possibility (but no more than that), that the applicant could have been convicted of the crime. That in itself cannot give rise to a violation of Article 6(2).
9. Moreover, if comments by the decision-maker in refusing compensation, regardless of the test to be applied, such as “all that can be said is that the jury may or may not have convicted [the applicant] had the new evidence been available”, are found to be compatible, then it is difficult to discern a clear logic. The decision-maker’s comment is clearly based on the view either that the new fact does not establish clear innocence or that it does not so undermine the evidence that no conviction could possibly be based on it. From the perspective of Article 6(2) it is difficult to comprehend the difference.

10. The Strasbourg Court has decided that Article 6(2) is “in play” insofar as it is engaged in compensation decisions for miscarriages of justice, but has been clear in its four most recent decisions in this area that what is determinative is the language used in declining an application for compensation. It does not follow that the proposed test requires an applicant to show that he was in fact innocent of the offence. The Secretary of State is not concerned to re-try the claimant and make a finding whether the claimant is guilty or innocent – what is determinative is whether the new fact on the basis of which the conviction was overturned demonstrates a clear miscarriage. This would be so where it is clear from the new fact that the claimant was innocent. The Government does not accept the Committee’s contention that the test “unavoidably requires the applicant” to demonstrate his innocence. As far as the Secretary of State is concerned, a person is presumed innocent of a charge until proven guilty. If the conviction is overturned the presumption is engaged again. As stated in A.L.F. (para 20) Article 6(2) “protects individuals who have been acquitted from being treated by public officials and authorities as though they are in fact guilty of the offence charged”. Nothing in the proposed test suggests otherwise. The Court also states that “Article 6(2) requires that such persons be treated in a manner consistent with their innocence”. But treating someone consistently with the presumption of innocence following the quashing of their conviction does not automatically involve compensating them. Any test short of compensation on acquittal could, on one view, be said to call into question the innocence of an acquitted person, yet it is clear Article 6(2) does not go so far.

11. As stated in earlier correspondence, the Government considers that it would be just as possible to refuse an application under the proposed test that would not cross the Article 6(2) line, as to have a refusal on a lower threshold that would cross that line. Neither the Adams test nor the proposed test require an applicant to be treated in a manner inconsistent with the presumption of innocence – a refusal under either test carries exactly the same implication. Importantly, a decision under either test does not require an examination of the merits of the acquittal on which the presumption of innocence rests: nothing in the two most recent judgments of the Court changes that. The Government does not, therefore, agree with the Committee’s assessment that section 133, as amended by clause 161, would be the subject of successful challenge in Strasbourg.
The admissibility decisions in *Adams* and *A.L.F.*, as decisions of the Strasbourg Court, cannot be determinative of whether the proposed test is compatible with the presumption of innocence, since the chamber was not considering that test. For the same reason, the decision of the Grand Chamber in *Allen* is also not considered to be determinative.

Rt. Hon Damian Green MP