defendant that the prosecution may well start again;

c) cases which are stopped because of a lack of evidence but where more significant evidence is discovered later; and

d) cases involving a death in which a review following the findings of an inquest concludes that a prosecution should be brought, notwithstanding any earlier decision not to prosecute.

[Deadly meetings: Rafal Delezuch, 15/08/12: Xuan Wei Zhang, 04/04/12: Lloyd Butler, 04/08/11: Demetre Fraser,31/05/11: Kingsley Burrell-Brown, 30/03/11: Mikey Powell, 07/09/03: John Leo O'Reilly,03/07/94, all died after coming into contact with West Midlands Police]

Cell Officer In Lloyd Butler Death Guilty Of Misconduct *BBC News, 25/01/13*

The custody sergeant who was responsible for the care of a man who died in a police cell has been found guilty of gross misconduct. Lloyd Butler, 39, from Birmingham, died after being arrested when his family called police because he was drunk. The internal West Midlands Police hearing also found a second officer guilty of misconduct. The force said the officers "in no way" contributed to Mr Butler's death but offered condolences to his family. The case was investigated by the Independent Police Complaints Commission.

Solicitors Irwin Mitchell, which have been acting on behalf of Mr Butler's family, said the IPCC report had highlighted a series of errors and "unacceptable behaviour" by officers on duty at Stechford police station on 4 August 2010. It said some scheduled checks on the cells were missed and that officers did not comply with requirements to wake up drunk detainees. The solicitors also said officers were seen making personal phone calls and browsing the internet instead of monitoring CCTV.

Sgt Mark Albutt was found guilty of gross misconduct in his public duty and will be given a final written warning. PC Dean Woodcock was found guilty of misconduct in his public duty. West Midlands Police said he would be "subject of management advice".

Mr Butler's mother Janet said the family was "relieved" at the outcome of the hearing. She said: "I have to live with the guilt of knowing that I called the police to try and help protect Lloyd on the day he died. However, I did so believing that they would do everything they could to protect and help him. Sadly that was not the case but hopefully other officers will learn from this case and others in a similar situation will be properly looked after in future."

In a statement, West Midlands Police said: "The hearing found that while the behaviour of the officers in no way contributed to the death of Mr Butler, it was found that their actions fell far below the force's expectations." It added: "We do not underestimate the impact this incident has had on the Butler family, and the wider community and the force extends its sincere condolences to Mr Butler 's family and friends."

Hostages: Darren Waterhouse, David Norris, Brendan McConville, John Paul Wooton, John Keelan, Mohammed Niaz Khan, Abid Ashiq Hussain, Sharaz Yaqub, David Ferguson, Anthony Parsons, James Cullinene, Stephen Marsh, Graham Coutts, Royston Moore, Duane King, Leon Chapman, Tony Marshall, Anthony Jackson, David Kent, Norman Grant, Ricardo Morrison, Alex Silva,Terry Smith, Hyrone Hart, Glen Cameron,Warren Slaney, Melvyn 'Adie' McLellan, Lyndon Coles, Robert Bradley, Sam Hallam, John Twomey, Thomas G. Bourke, David E. Ferguson, Lee Mockble, George Romero Coleman, Neil Hurley, Jaslyn Ricardo Smith, James Dowsett, Kevan Thakrar, Miran Thakrar,Jordan Towers, Patrick Docherty, Brendan Dixon, Paul Bush, Frank Wilkinson, Alex Black, Nicholas Rose, Kevin Nunn, Peter Carine, Simon Hall, Paul Higginson, Thomas Petch, Vincent and Sean Bradish, John Allen, Jeremy Bamber, Kevin Lane, Michael Brown, Robert Knapp, William Kenealy, Glyn Razzell, Willie Gage, Kate Keaveney, Michael Stone, Michael Attwooll, John Roden, Nick Tucker, Karl Watson, Terry Allen, Richard Southern, Jamil Chowdhary, Jake Mawhinney, Peter Hannigan, Ihsan Ulhaque, Richard Roy Allan, Sam Cole, Carl Kenute Gowe, Eddie Hampton, Tony Hyland, Ray Gilbert, Ishtiaq Ahmed.

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MOJUK: Newsletter 'Inside Out' No 410 31/01/2013)

R on the application of Barry George, Ismail Ali, Kevin Dennis, Justin Tunbridge

Lord Justice Beatson and Mr Justice Irwin dismissed applications by Ismail Ali, Barry George, Kevin Dennis and Justin Tunbridge to quash decisions by the Justice Secretary to refuse them compensation as victims of a 'miscarriage of justice'.

I. Overview: This is the judgment of the court to which we have both contributed. These judicial reviews concern the effect of the decision of the Supreme Court in R (Adams) v Secretary of State for Justice; Re MacDermott, and Re McCartney [2011] UKSC 18, hereafter "the Adams cases". The Supreme Court broadened the band of persons whose convictions were reversed who qualify for compensation under section 133 of the Criminal Justice Act 1988 ("the 1988 Act") on the ground that there has been a "miscarriage of justice". As a result, some of those whose previous applications for compensation were rejected on the basis of the former understanding of the law reapplied. A number of those whose applications were again refused by the Secretary of State have challenged his decision to do so. The five claimants, Ismail Ali, Kevin Dennis, Barry George, Ian Lawless, and Justin Tunbridge, are in this category. On 18 May 2012 Irwin J ordered their cases to be treated as lead cases, presenting the court with a range of factual scenarios to enable it to provide some guidance as to the application of the decision of the Supreme Court.

The question of whether and, in what circumstances, a person whose conviction has been set aside or who has been pardoned should be so compensated was said by Lord Bingham in Re McFarland [2004] UKHL 17 at [7] to be "a difficult and sensitive one". This is because of (a) the need to distinguish those who are the innocent victims of mistake or misidentification and those who are fortunate to have escaped their just deserts, (b) the difficulty in some cases of doing so, and (c) the "interaction, in this field, of judicial and executive activity" with the consequent need for each of these two branches of the State to recognise and respect the proper role of the other.

Section 133 of the Criminal Justice Act 1988 gives effect in domestic law to the United Kingdom's obligations under Article 14(6) of the International Covenant on Civil and Political Rights 1966 ("the ICCPR") to provide a right to compensation to those whose convictions for a criminal offence have been reversed, or who have been pardoned on the ground that a new or newly discovered fact shows that there has been a miscarriage of justice. Article 14(6) states that the new or newly discovered fact must "conclusively" show that there has been a miscarriage of justice. Section 133, adapting the language of the ICCPR to a common law context and the division of functions between judge and jury, states that the new or newly discovered fact must show "beyond reasonable doubt" that there has been a miscarriage of justice. We set out section 133, as amended at [22].

"Miscarriage of justice" is a concept which, as a matter of general language, has a number of legitimate meanings, and can have a wide meaning. It is the fundamental concept in Article 14(6) and section 133 and it has been accepted that in this specific context it has an autonomous meaning which is narrower than the way it can be understood in other contexts. There is a history of disagreement between senior judges about the meaning of the statutory concept in section 133 and the way qualifying "miscarriages of justice" are to be formulated. The differences can be seen in the decisions of the House of Lords in Re McFarland [2004] UKHL 17 and R (Mullen) v Home Secretary

[2004] UKHL 18, and that of the Supreme Court in the Adams cases.

Before the decision of the Supreme Court in the Adams cases on 11 May 2011, a disagreement between Lord Steyn and Lord Bingham in Mullen's case had been resolved by the Court of Appeal in R (Allen) v Secretary of State for Justice [2008] EWCA Civ 808 at [40] and by the Divisional Court in R (Siddall) v Secretary of State for Justice [2009] EWHC 482 (Admin) at [49] in favour of Lord Steyn's view. Lord Steyn considered that section 133's 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. Lord Bingham's provisional view was that the concept had a wider meaning and also encompassed cases where, although it is not possible to say a person is innocent, it is possible to say he has been wrongly convicted because of a "failure of the trial process".

In the Adams cases four members of the Supreme Court were of the same view as Lord Steyn in Mullen's case. They would have confined "miscarriage of justice" and the scope of section 133 to cases in which the individual is shown, beyond reasonable doubt, to be innocent of the crime for which he had been convicted. But they were in the minority. Five members of the Court held that Lord Steyn's interpretation was too narrow. It is therefore now clear that the concept of "miscarriage of justice" under section 133 is broader, and does not only cover those who show they are demonstrably innocent.

The issues identified by the parties to these five lead cases (set out at [13] – [14]) are said primarily to concern the application of the decision of the Supreme Court and, in one sense, are presented as "second order" questions. It will, however, not be possible to address them without first considering what falls within the broader meaning given by the Supreme Court to the concept of "miscarriage of justice" in section 133. It will be seen that this is not entirely straightforward.

A significant part of the discussion has proceeded by categorising cases in which the Court of Appeal Criminal Division (hereafter "the CACD") has set aside a conviction on the ground of new evidence, and then seeking to identify which of those categories would qualify as miscarriages of justice within section 133. The categorisation of Dyson LJ in the Court of Appeal in Adams case ([2009] EWCA Civ 1291 at [19]) was used as a framework for discussion in the Supreme Court by Lord Phillips, Lord Hope and Lord Clarke. Although the Supreme Court restated the second of these categories, and although Lord Kerr (at [179]) warned that consideration of possible categories of entitlement tends more to confuse than enlighten, Dyson LJ's categories remain a useful starting point.

Category 1: Where the court is sure that the defendant is innocent of the crime of which he has been convicted (as where DNA evidence shows this beyond doubt).

Category2: Where the fresh evidence shows that the defendant was wrongly convicted in the sense that, had the fresh evidence been available at the trial, no reasonable jury could properly have convicted.

Category 3: Where the fresh evidence is such that the conviction cannot be regarded as safe, but the court cannot say that no fair-minded jury could properly convict if there were to be a trial which included the fresh evidence.

Category 4: Where the conviction is quashed because 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.

Dyson LJ stated that category 4 was referred to by Lord Bingham in Mullen's case. In the Adams cases, Lord Kerr ([2011] UKSC 18 at [179]) did not believe Lord Bingham intended

8.1 Prosecutors must have regard to the current guidelines on sentencing and allocation when making submissions to the magistrates' court about where the defendant should be tried.

8.2 Speed must never be the only reason for asking for a case to stay in the magistrates' court. But prosecutors should consider the effect of any likely delay if a case is sent to the Crown Court, and the possible effect on any victim or witness if the case is delayed.

Venue for trial in cases involving youths

8.3 Prosecutors must bear in mind that youths should be tried in the youth court wherever possible. It is the court which is best designed to meet their specific needs. A trial of a youth in the Crown Court should be reserved for the most serious cases or where the interests of justice require a youth to be jointly tried with an adult.

Accepting Guilty Pleas

9.1 Defendants may want to plead guilty to some, but not all, of the charges. Alternatively, they may want to plead guilty to a different, possibly less serious, charge because they are admitting only part of the crime.

9.2 Prosecutors should only accept the defendant's plea if they think the court is able to pass a sentence that matches the seriousness of the offending, particularly where there are aggravating features. Prosecutors must never accept a guilty plea just because it is convenient.

9.3 In considering whether the pleas offered are acceptable, prosecutors should ensure that the interests and, where possible, the views of the victim, or in appropriate cases the views of the victim's family, are taken into account when deciding whether it is in the public interest to accept the plea. However, the decision rests with the prosecutor.

9.4 It must be made clear to the court on what basis any plea is advanced and accepted. In cases where a defendant pleads guilty to the charges but on the basis of facts that are different from the prosecution case, and where this may significantly affect sentence, the court should be invited to hear evidence to determine what happened, and then sentence on that basis.

9.5 Where a defendant has previously indicated that he or she will ask the court to take an offence into consideration when sentencing, but then declines to admit that offence at court, prosecutors will consider whether a prosecution is required for that offence. Prosecutors should explain to the defence advocate and the court that the prosecution of that offence may be subject to further review, in consultation with the police or other investigators wherever possible.

9.6 Particular care must be taken when considering pleas which would enable the defendant to avoid the imposition of a mandatory minimum sentence. When pleas are offered, prosecutors must also bear in mind the fact that ancillary orders can be made with some offences but not with others.

Reconsidering a Prosecution Decision

10.1 People should be able to rely on decisions taken by the CPS.

Normally, if the CPS tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, the case will not start again. But occasionally there are reasons why the CPS will overturn a decision not to prosecute or to deal with the case by way of an out-of-court disposal or when it will restart the prosecution, particularly if the case is serious.

10.2 These reasons include:

a) cases where a new look at the original decision shows that it was wrong and, in order to maintain confidence in the criminal justice system, a prosecution should be brought despite the earlier decision;

b) cases which are stopped so that more evidence which is likely to become available in the fairly near future can be collected and prepared. In these cases, the prosecutor will tell the

Test.

The second part of the Threshold Test - can further evidence be gathered to provide a realistic prospect of conviction?

5.8 Prosecutors must be satisfied that there are reasonable grounds for believing that the continuing investigation will provide further evidence, within a reasonable period of time, so that all the evidence together is capable of establishing a realistic prospect of conviction in accordance with the Full Code Test.

5.9 The further evidence must be identifiable and not merely speculative.

5.10 In reaching this decision prosecutors must consider:

a) the nature, extent and admissibility of any likely further evidence and the impact it will have on the case;

b) the charges that all the evidence will support;

c) the reasons why the evidence is not already available;

d) the time required to obtain the further evidence and whether any consequential delay is reasonable in all the circumstances.

5.11 If both parts of the Threshold Test are satisfied, prosecutors must apply the public interest stage of the Full Code Test based on the information available at that time.

Reviewing the Threshold Test

5.12 A decision to charge under the Threshold Test must be kept under review. The evidence must be regularly assessed to ensure that the charge is still appropriate and that continued objection to bail is justified. The Full Code Test must be applied as soon as is reasonably practicable and in any event before the expiry of any applicable custody time limit.

Selection of Charges

6.1 Prosecutors should select charges which:

a) reflect the seriousness and extent of the offending supported by the evidence;

b) give the court adequate powers to sentence and impose appropriate post-conviction orders; and

c) enable the case to be presented in a clear and simple way.

6.2 This means that prosecutors may not always choose or continue with the most serious charge where there is a choice.

6.3 Prosecutors should never go ahead with more charges than are necessary just to encourage a defendant to plead guilty to a few. In the same way, they should never go ahead with a more serious charge just to encourage a defendant to plead guilty to a less serious one.

6.4 Prosecutors should not change the charge simply because of the decision made by the court or the defendant about where the case will be heard.

6.5 Prosecutors must take account of any relevant change in circumstances as the case progresses after charge.

Out-of-Court Disposals

7.1 An out-of-court disposal may take the place of a prosecution in court if it is an appropriate response to the offender and/or the seriousness and consequences of the offending.

7.2 Prosecutors must follow any relevant guidance when asked to advise on or authorise a simple caution, a conditional caution, any appropriate regulatory proceedings, a punitive or civil penalty, or other disposal. They should ensure that the appropriate evidential standard for the specific out-of-court disposal is met including, where required, a clear admission of guilt, and that the public interest would be properly served by such a disposal.

Mode of Trial

it to be a freestanding category. Indeed, it was only considered in the context of the then extant ex gratia scheme for compensation, which operated alongside the statutory scheme

In the Supreme Court in the Adams cases, Lord Phillips reformulated category 2. He stated (at [55]) that "a new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it". He described this as "a more robust test", "workable in practice", and a test "capable of universal application" rather than being so only in common law jurisdictions. Lord Hope, who agreed with Lord Phillips's formulation, stated (at [101]) that Dyson LJ's test was too broad. His agreement with Lord Phillips's formulation suggests that he considered it was narrower. It, however, cannot be said (see below at [32] and [33]) that Lord Kerr and Lord Clarke saw Lord Phillips's formulation as a narrower test than Dyson LJ's. We consider whether the differences are merely ones of formulation or whether they reflect differences of substance at [37] –[38].

The details of the cases of the five claimants are given in section VI of this judgment. At this stage, it suffices to give a thumbnail sketch of each case to provide some context to the list of issues before us. Their convictions were reversed by the CACD on dates between 26 March 2004 and 26 June 2009. Three of them, Messrs Ali, Lawless and Tunbridge, were not subject to a retrial after the CACD quashed their convictions. In the case of Mr Dennis, the CACD ordered a retrial, but at the retrial the trial judge accepted, in the absence of the expert evidence which had been discredited and had led to his original conviction being set aside, that there was no case to answer, and Mr Dennis was then acquitted on the direction of the judge. Mr George was retried and an application to stop the case at half-time was rejected. The jury deliberated for two days and then acquitted him.

All the claimants applied for compensation under section 133. Their applications were made and refused by the Secretary of State between June 2008 and December 2009, long before the decision of the Supreme Court in the Adams cases. Four of the claimants lodged judicial review applications against those refusals. They did so on the following dates: 17 October 2008 (Mr Tunbridge), 23 November 2009 (Mr Ali), 7 December 2009 (Mr Lawless), and 15 January 2010 (Mr George). These challenges were also lodged long before the decision of the Supreme Court. The applications of Messrs Ali, George and Lawless were, in different circumstances, stayed pending the decision of the Supreme Court. Messrs George and Lawless were also given permission to apply for judicial review. Mr Ali was refused permission on the papers and his case was stayed before it was renewed to an oral hearing. Mr Tunbridge's renewed application for permission was refused by Blair J at an oral hearing on 9 June 2009 because, on the pre-Adams understanding of the law, his challenge was unarguable. In the case of Mr Dennis, a letter before claim was written on his behalf on 15 May 2009. The defendant responded on 8 June 2009. Thereafter, no proceedings were lodged by Mr Dennis in the almost two years until the decision of the Supreme Court in the Adams cases.

After the decision of the Supreme Court, the claimants cited made new applications for compensation or asked that the Secretary of State reconsider his refusal of their pre Adams applications. Messrs Ali, Dennis, and Tunbridge, applied respectively on 29 May, 10 June, and 17 June 2011. The Secretary of State maintained the previous decision in their cases, in the case of Messrs Ali and Dennis after initially refusing to reconsider it. In the case of Mr Tunbridge he declined to reconsider the previous decision on the ground that there were no new facts which had not been considered. The Secretary of State also reconsidered the previous decision in the cases of Messrs George and Lawless, and maintained it. Thereafter, the cases which

had been stayed proceeded, and Messrs Dennis and Tunbridge lodged judicial review proceedings on 20 January 2012. They and Mr Ali were given permission to apply for judicial review during the course of the hearing.

II. Summary of issues & outcomes: The parties attempted to agree a list of the issues which arise in these cases but, save in respect of two generic issues (issues (4) and (5) in the list below), they did not succeed. Mr Strachan, on behalf of the defendant, submitted that questions such as when a person is demonstrably innocent, when evidence is so undermined by a new fact or facts that no conviction could be based on it, the approach to be taken by the Secretary of State when considering the decision of the CACD quashing the relevant conviction, and the extent to which the Secretary of State should apply procedural and evidential rules of the type that would be applied by a trial judge in considering an application, were dealt with comprehensively in the Adams cases. He maintained that, to a large measure, they are fact-specific and not susceptible of a generic approach.

It is useful to list the questions which one or both of the parties maintained fell for decision, and to summarise our conclusion on them or indicate where we address them. They are: -

(1) When will a person be demonstrated to be clearly innocent so as to fall within category 1 as set out in the Adams cases? It was not submitted that any of the claimants had been demonstrated to be clearly innocent so this question does not arise. When it does arise, its determination will depend on the particular facts and circumstances. It is not a matter which is susceptible of a generic answer.

(2) In what circumstances will evidence be "so undermined" by a new fact or facts that no conviction could be based upon that evidence, so that the case falls within category 2 as set out in the Adams cases, and qualifies under the statutory compensation scheme? This is the fundamental question before us. We address the relevant principles when considering the decision of the Supreme Court at [27] – [38]. We deal with the application of those principles, first in a general way at [39] – [50], and then when considering the individual cases of the five claimants at [73] – [213].

(3) What is the proper approach for the Secretary of State to take when considering the decision of the CACD quashing the relevant conviction of a person who subsequently makes an application under section 133? We discuss this at [42] – [44]. As we explain, the precise answer to this question will depend on the terms of the CACD's judgment, which, as is illustrated by its judgments in the cases of these claimants, will vary: see [86] ff., [107] ff., [147] – [148], [175], and [193]. In general terms, the Secretary of State must accept the decision of the CACD and the implications of that decision unless there is fresh evidence or there are other exceptional circumstances, such as those which obtained in Mullen's case where (see [25]) it was conceded that Mullen had been "properly convicted".

(4) What test is to be applied for the purposes of section 133 where there has been a retrial after the conviction was quashed? We discuss this at [48] – [49]. The test is the same as in cases where there has been no retrial, but its application will depend on what happens at the retrial. As is seen from the cases of Messrs Dennis and George (see [112] ff. and [149]), that will vary. Here too, the Secretary of State must generally accept the rulings of the judge presiding at the retrial and the implications of those rulings unless there is fresh evidence or there are other exceptional circumstances.

(5) In what situations should the Secretary of State reconsider applications which have been refused by the application of a test other than that set out by the Supreme Court in the Adams cases? We summarise the approach to be taken at [50] and con-

prosecution is required. In considering this question, prosecutors should have regard to how community is an inclusive term and is not restricted to communities defined by location.

f) Is prosecution a proportionate response? Prosecutors should also consider whether prosecution is proportionate to the likely outcome, and in so doing the following may be relevant to the case under consideration:

• The cost to the CPS and the wider criminal justice system, especially where it could be regarded as excessive when weighed against any likely penalty. (Prosecutors should not decide the public interest on the basis of this factor alone. It is essential that regard is also given to the public interest factors identified when considering the other questions in paragraphs 4.12 a) to g), but cost is a relevant factor when making an overall assessment of the public interest.)

• Cases should be capable of being prosecuted in a way that is consistent with principles of effective case management. For example, in a case involving multiple suspects, prosecution might be reserved for the main participants in order to avoid excessively long and complex proceedings.

g) Do sources of information require protecting?

In cases where public interest immunity does not apply, special care should be taken when proceeding with a prosecution where details may need to be made public that could harm sources of information, international relations or national security. It is essential that such cases are kept under continuing review.

The Threshold Test

5.1 The Threshold Test may only be applied where the suspect presents a substantial bail risk and not all the evidence is available at the time when he or she must be released from custody unless charged.

When the Threshold Test may be applied

5.2 Prosecutors must determine whether the following conditions are met:

a) there is insufficient evidence currently available to apply the evidential stage of the Full Code Test; and

b) there are reasonable grounds for believing that further evidence will become available within a reasonable period; and

c) the seriousness or the circumstances of the case justifies the making of an immediate charging decision; and

d) there are continuing substantial grounds to object to bail in accordance with the Bail Act 1976 and in all the circumstances of the case it is proper to do so.

5.3 Where any of the above conditions is not met, the Threshold Test cannot be applied and the suspect cannot be charged. The custody officer must determine whether the person may continue to be detained or be released on bail, with or without conditions.

5.4 There are two parts to the evidential consideration of the Threshold Test.

The first part of the Threshold Test - is there reasonable suspicion?

5.5 Prosecutors must be satisfied that there is at least a reasonable suspicion that the person to be charged has committed the offence.

5.6 In determining this, prosecutors must consider the evidence then available. This may take the form of witness statements, material or other information, provided the prosecutor is satisfied that:

a) it is relevant; and

b) it is capable of being put into an admissible format for presentation in court; and

c) it would be used in the case.

5.7 If satisfied on this the prosecutor should then consider the second part of the Threshold

which the offending was premeditated and/or planned; whether they have previous criminal convictions and/or out-of-court disposals and any offending whilst on bailor whilst subject to a court order; whether the offending was or is likely to be continued, repeated or escalated; and the suspect's age or maturity (see paragraph d) below for suspects under 18).

Prosecutors should also have regard when considering culpability as to whether the suspect is, or was at the time of the offence, suffering from any significant mental or physical ill health as in some circumstances this may mean that it is less likely that a prosecution is required. However, prosecutors will also need to consider how serious the offence was, whether it is likely to be repeated and the need to safeguard the public or those providing care to such persons.

c) What are the circumstances of and the harm caused to the victim?

The circumstances of the victim are highly relevant. The greater the vulnerability of the victim, the more likely it is that a prosecution is required. This includes where a position of trust or authority exists between the suspect and victim. A prosecution is also more likely if the offence has been committed against a victim who was at the time a person serving the public.

Prosecutors must also have regard to whether the offence was motivated by any form of discrimination against the victim's ethnic or national origin, gender, disability, age, religion or belief, sexual orientation or gender identity; or the suspect demonstrated hostility towards the victim based on any of those characteristics. The presence of any such motivation or hostility will mean that it is more likely that prosecution is required.

In deciding whether a prosecution is required in the public interest, prosecutors should take into account the views expressed by the victim about the impact that the offence has had. In appropriate cases, this may also include the views of the victim's family.

Prosecutors also need to consider if a prosecution is likely to have an adverse effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence. If there is evidence that prosecution is likely to have an adverse impact on the victim's health it may make a prosecution less likely, taking into account the victim's views.

However, the CPS does not act for victims or their families in the same way as solicitors act for their clients, and prosecutors must form an overall view of the public interest.

d) Was the suspect under the age of 18 at the time of the offence?

The criminal justice system treats children and young people differently from adults and significant weight must be attached to the age of the suspect if they are a child or young person under 18. The best interests and welfare of the child or young person must be considered including whether a prosecution is likely to have an adverse impact on his or her future prospects that is disproportionate to the seriousness of the offending. Prosecutors must have regard to the principal aim of the youth justice system which is to prevent offending by children and young people. Prosecutors must also have regard to the obligations arising under the United Nations 1989 Convention on the Rights of the Child.

As a starting point, the younger the suspect, the less likely it is that a prosecution is required.

However, there may be circumstances which mean that notwithstanding the fact that the suspect is under 18, a prosecution is in the public interest. These include where the offence committed is serious, where the suspect's past record suggests that there are no suitable alternatives to prosecution, or where the absence of an admission means that out-of-court disposals which might have addressed the offending behaviour are not available.

e) What is the impact on the community?

The greater the impact of the offending on the community, the more likely it is that a

sider its application when dealing with the cases of Messrs Dennis and Tunbridge at [128] and [196] ff.. The underlying question is whether the Secretary of State is required to reconsider all decisions under section 133 made before the decision of the Supreme Court in the Adams cases, however long ago the decision was made, and whether or not the earlier decision was challenged. We do not consider that he is.

(6) To what extent must the Secretary of State apply procedural and evidential rules of the type that would be applied by a trial judge in determining whether particular forms of evidence are admissible or not? We discuss this at [46] – [47]. Again, the Secretary of State must generally accept such rulings and their implications unless there is fresh evidence or other exceptional circumstances. However, there can be differences of approach by judges about whether to admit evidence and the exercise of discretion under, for example, section 78 of the Police and Criminal Evidence Act 1984 (hereafter "PACE"). The Secretary of State may be entitled to conclude that a different view might be taken on such a matter if there is good reason for so concluding.

(7) What is the role of the court in determining these applications for judicial review in the light of (i) common law principles, and (ii) the European Convention on Human Rights ("the ECHR")? Our analysis is in [51] – [72]. We have concluded that the role of the court is not itself to determine whether or not the statutory test in section 133 has been met, but to supervise the Secretary of State's decisions using the familiar tools of its judicial review jurisdiction. On the assumption (which we have made without accepting) that ECHR Article 6 applies to these decisions, we have also concluded that the level of scrutiny by the court in judicial review proceedings satisfies its requirement for the determination overall to be by an independent and impartial tribunal.

(8) What is the outcome of the challenges by the five claimants? The circumstances of the individual claimants and the application of the principles and the test in the Adams cases to them is considered at [74] – [213]. We have concluded that the judicial review brought by Mr Lawless must be allowed. The Secretary of State's decision is set aside and his application for compensation must be reconsidered. We reject the challenges of Messrs Ali, Dennis, George, and Tunbridge to the decisions to refuse them compensation under section 133 of the Criminal Justice Act 1988.

The Court considers Barry George's case in paragraphs 140 -187.

Barry George was convicted of the murder of Jill Dando in July 2001. His appeal against conviction was dismissed by the Court of Appeal in July 2002. Following an investigation the Criminal Cases Review Commission George's case was referred to the Court of Appeal in May 2007; the Court of Appeal concluded his conviction was unsafe and quashed it; a retrial was ordered. George was found not guilty in August 2008. On the facts of the case the Court conduded:

" ... in the end, there was no submission formulated by [counsel for Barry George] capable of persuading us that the trial judge was wrong to leave the case to the jury. In our view, this has the consequence that this daimant's case inevitably fails the test even as formulated by [counsel for Barry George]. There was indeed a case upon which a reasonable jury, properly directed, could have convicted the claimant of murder. That was the effect of the judge's ruling on the submission made to him.

'It follows that in our judgment the Secretary of State was entirely justified in the conclusion he reached. For those reasons the daimant's case fails." (paras 159 - 160)

The Court considers Ismail Ali's case in paragraphs 74 -100.

Ismail Ali was convicted of assault occasioning actual bodily harm upon his wife at Luton Crown Court in May 2007. His conviction was quashed by the Court of Appeal in

November 2008. After considering the facts of the case the Court conduded:

II ... The simple critical questions in this case are therefore: (a) did the Secretary of State approach the case in the wrong way, and (b) was he irrational in concluding that the key proposition was not established with the necessary degree of confidence?

"With due consideration to the arguments advanced by [counsel], our view is that the decision of 23 August 2011 was a rational and proper conclusion. In this instance, the Secretary of State had the correct test in mind, following the decision of the Supreme Court in the Adams cases. The extracts from the letter which we have quoted make that sufficiently dear. On the crucial second question, it seems to us that the Secretary of State was entitled to say the claimant had not established to the necessary degree of confidence that no jury could properly convict on all the evidence taken together .... if the first part of the test formulated by Lord Phillips in the Adams cases and reflecting section 133(1) is to be given proper respect, the decision by the Secretary of State was proper and this daim must fail." (paras 99 - 100)

The Court considers Kevin Dennis' case in paragraphs 101 – 139.

Kevin Dennis was convicted of the murder of Babatunde Oba in December 2000. His conviction was quashed in March 2004 and a retrial ordered. During the retrial in 2005 the trial judge agreed with submissions there was no case answer and directed the jury to acquit Dennis of murder. His conviction for violent disorder remains. On the facts of the case the Court concluded:

"It is consistent with logic, and we believe with the language of the 1988 Act, that the question must be answered by reference to the facts known at the time of the assessment of the claim. This is not only rational and consistent with the broader approach, but seems to us to be the natural conclusion from the language of the statute, which provides that "the conviction is not to be treated (emphasis added) for the purposes of this section as "reversed" unless and until … (etc)". The essential word in the provision is how the Secretary of State will "treat" a conviction which has been overturned. The "treatment" by the Secretary of State is something which can only arise when the matter is under active consideration. It is hard to see how this reading is capable of causing injustice or is to be thought disproportionate."

However, while the court considered the approach taken by the Secretary of State in July 2012 was subject to valid criticism, this claim failed on grounds of time. The language of the transitional provisions excluded this claim from the ambit of s133(5A). (paras 138 – 139)

The Court considers Justin Tunbridge's case in paragraphs 188 - 214.

Justin Tunbridge was convicted of two counts of indecent assault in September 1995. In December 1995 he was refused leave to appeal his conviction. His case was subsequently investigated by the CCRC and refereed to the Court of Appeal (Criminal Division) in February 2007. His convictions were quashed by the Court of Appeal in April 2008. The Court conduded:

"Essentially. two points arise in this case. Firstly, was there an obligation on the part of the Secretary of State to reconsider the application for compensation following the Adams cases? Secondly, if there was such an obligation, then should this claim for compensation have succeeded in the light of the principles laid down in the Adams cases?" (para 200)

On the first point the Court conduded: We consider that the approach in Cheung was correct. A three month "limitation" period is appropriate. Hence, only where the earlier, challenged decision was made within 3 months of the decisions in the Adams cases, would it be appropriate to accede to the challenge. Hence, this case fails on the grounds of time." (para 212) Despite this finding the Court went on to consider the second point and on the facts of the case conduded:

II ... it would not be irrational or unreasonable on the part of the Secretary of State to con-

should ask themselves the following:

Can the evidence be used in court?

Prosecutors should consider whether there is any question over the admissibility of certain evidence. In doing so, prosecutors should assess:

a) the likelihood of that evidence being held as inadmissible by the court; and

b) the importance of that evidence in relation to the evidence as a whole.

Is the evidence reliable?

Prosecutors should consider whether there are any reasons to question the reliability of the evidence, including its accuracy or integrity.

Is the evidence credible?

Prosecutors should consider whether there are any reasons to doubt the credibility of the evidence.

The Public Interest Stage

4.7 In every case where there is sufficient evidence to justify a prosecution, prosecutors must go on to consider whether a prosecution is required in the public interest.

4.8 It has never been the rule that a prosecution will automatically take place once the evidential stage is met. A prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour. In some cases the prosecutor may be satisfied that the public interest can be properly served by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal rather than bringing a prosecution.

4.9 When deciding the public interest, prosecutors should consider each of the questions set out below in paragraphs 4.12 a)

to g) so as to identify and determine the relevant public interest factors tending for and against prosecution. These factors, together with any public interest factors set out in relevant guidance or policy issued by the DPP, should enable prosecutors to form an overall assessment of the public interest.

4.10 The explanatory text below each question in paragraphs 4.12 a) to g) provides guidance to prosecutors when addressing each particular question and determining whether it identifies public interest factors for or against prosecution. The questions identified are not exhaustive, and not all the questions may be relevant in every case. The weight to be attached to each of the questions, and the factors identified, will also vary according to the facts and merits of each case.

4.11 It is quite possible that one public interest factor alone may outweigh a number of other factors which tend in the opposite direction. Although there may be public interest factors tending against prosecution in a particular case, prosecutors should consider whether nonetheless a prosecution should go ahead and those factors put to the court for consideration when sentence is passed.

4.12 Prosecutors should consider each of the following questions:

a) How serious is the offence committed?

The more serious the offence, the more likely it is that a prosecution is required.

When deciding the level of seriousness of the offence committed, prosecutors should include amongst the factors for consideration the suspect's culpability and the harm to the victim by asking themselves the questions at b) and c).

b) What is the level of culpability of the suspect?

The greater the suspect's level of culpability, the more likely it is that a prosecution is required.

Culpability is likely to be determined by the suspect's level of involvement; the extent to

both stages of the Full Code Test (see section 4). The exception is when the Threshold Test (see section 5) may be applied where it is proposed to apply to the court to keep the suspect in custody after charge, and the evidence required to apply the Full Code Test is not yet available.

3.5 Prosecutors should not start or continue a prosecution which would be regarded by the courts as oppressive or unfair and an abuse of the court's process.

3.6 Prosecutors review every case they receive from the police or other investigators. Review is a continuing process and prosecutors must take account of any change in circumstances that occurs as the case develops, including what becomes known of the defence case. Wherever possible, they should talk to the investigator when thinking about changing the charges or stopping the case. Prosecutors and investigators work closely together, but the final responsibility for the decision whether or not a case should go ahead rests with the CPS.

3.7 Parliament has decided that a limited number of offences should only be taken to court with the agreement of the DPP. These are called consent cases. In such cases the DPP, or prosecutors acting on his or her behalf, apply the Code in deciding whether to give consent to a prosecution. There are also certain offences that should only be taken to court with the consent of the Attorney General. Prosecutors must follow current guidance when referring any such cases to the Attorney General. Additionally, the Attorney General will be kept informed of certain cases as part of his or her superintendence of the CPS and accountability to Parliament for its actions.

The Full Code Test

4.1 The Full Code Test has two stages: (i) the evidential stage; followed by (ii) the public interest stage.

4.2 In most cases, prosecutors should only decide whether to prosecute after the investigation has been completed and after all the available evidence has been reviewed. However there will be cases where it is clear, prior to the collection and consideration of all the likely evidence, that the public interest does not require a prosecution. In these instances, prosecutors may decide that the case should not proceed further.

4.3 Prosecutors should only take such a decision when they are satisfied that the broad extent of the criminality has been determined and that they are able to make a fully informed assessment of the public interest. If prosecutors do not have sufficient information to take such a decision, the investigation should proceed and a decision taken later in accordance with the Full Code Test set out in this section.

The Evidential Stage

4.4 Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.

4.5 The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely. It means that an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty.

4.6 When deciding whether there is sufficient evidence to prosecute, prosecutors

clude that he could not be sure an acquittal would be the outcome of a trial before a reasonable jury, properly directed. This would obviously be a case where the jury's conclusions would turn on their view of the credibility of the two witnesses whose evidence was in conflict.

"For these reasons, we would in any event reject the challenge to the decision in this case." (para 213 - 214)

The Court considers Ian John Lawless' case in paragraphs 161-187.

Ian John Lawless was convicted of the murder of Alfred Wilkins in February 2002. Following a referral from the CCRC, the Court of Appeal concluded his conviction was unsafe and quashed it in June 2009. There was no application for a retrial. The Court conduded:

" ... it is important not to lose sight of the fact that, notwithstanding the autonomous nature of the concept in section 133, it is also necessary to consider whether the new fact "so undermines the evidence against the defendant that no conviction could possibly be based on it". Mr Lawless's confessions to a number of prosecution witnesses were effectively the only evidence against him. Focusing on the fact that in lay terms he might be said to have brought the prosecution and conviction upon himself is to disregard or marginalise the uncontroverted evidence of his psychological makeup and pathological behaviour or to assume that the non-disdosureof the tendency of such a person to make false confessions is nevertheless inevitably "wholly or partly attributable" to that person. In this case, the claimant had all along daimed he had such a tendency.

"Despite the elegance with which [counsel] sought to defend the decision of the Secretary of State, we have conduded that the decision was in error. The view taken by the Crown that there should be no application for a retrial in this case was correct. The agreed psychological analysis had become available many years earlier. Once all expert evidence agreed that the confessions were unreliable, no jury could properly convict on the basis of such admissions. This was not a fresh issue; it was the central issue at first instance. What was new was the joint view of the experts, accepted by all parties and by the [Court of Appeal Criminal Division], that the confessions were unreliable. In the absence of the confessions there was simply no case. The Secretary of State should have conduded that this was a case where he was sure no jury could properly convict. He failed to consider whether, in the light of Mr Lawless's psychological makeup and pathological behaviour, it is proper to regard the non-disdosure of his tendency to make false confessions as "wholly or partly attributable" to him." {paras 184 - 185}

The Court went on to say: "For these reasons, the Secretary of State's decision to refuse compensation in this case is quashed and Mr Lawless's entitlement to compensation must be reconsidered by the Secretary of State in the light of this judgment." {para 187}

Substantial Changes to the Code for Crown Prosecutors

The Director of Public Prosecutions, Keir Starmer, QC, has today published a new edition of the Code for Crown Prosecutors (Attached) , the overarching document that guides prosecutors and police in deciding whether or not to charge a suspect.

The publication follows a three month public consultation on a shorter, streamlined version of the Code. Mr Starmer said: "The Code for Crown Prosecutors is an essential document that governs all charging decisions made by both prosecutors and police in a breadth of different cases across England and Wales. "The CPS has recently widened the range of cases that it prosecutes, which includes motoring, benefit fraud, sexual offences, corruption, murder and the most complex fraud and organised crime. Given this variety of cases on which charging decisions are made, this new version of the Code is a simpler, stripped back statement

of overarching principles that can be applied to every case. It sits side-by-side with a wealth of existing legal guidance on specific offences."

Changes to the Code following feedback to the consultation include:

- Additional clarification on the question of whether there is sufficient evidence to prosecute, including more detail on the three questions prosecutors should ask themselves, i.e. whether the evidence can be used in court, whether it is reliable and whether it is credible

- Greater clarity on the effect of a prosecution on the victim's health, setting out that if there is evidence that a prosecution is likely to have an adverse impact on the victim's health that it may make a prosecution less likely, taking into account the victim's views

- A clear reference to the CPS website where specific policies and guidance, for prosecutors to use in conjunction with the Code, may be accessed by the public.

The final version of the Code retains reference to proportionality as a consideration under the public interest stage of the test, which was included in the version on which the public was consulted. Proportionality previously featured in the versions of the Code in 1986 and 1992.

Mr Starmer added: "As I have said previously, the inclusion of proportionality represents a common sense approach to ensure prosecutors and police are prioritising the right cases to prosecute from the start. The majority of the respondents to the consultation who made comments relating to proportionality were in favour of the concept, which is intended to avoid bringing into the system cases in which criminality could be better addressed by other, more appropriate means.

"The consultation period has been an invaluable way of testing from different perspectives the high level principles set out in the new Code. I also held discussions with police, victim support services, campaigning groups, lawyers and other criminal justice agencies. Feedback from these groups and others informed the drafting of the final version."

This is the second version of the Code published by Mr Starmer and the seventh to date. Its publication today supports the ongoing CPS 'refocusing programme', designed to make the organisation leaner, more efficient and best able to serve the public.

The Code for Crown Prosecutors

1.1 The Code for Crown Prosecutors (the Code) is issued by the Director of Public Prosecutions (DPP) under section 10 of the Prosecution of Offences Act 1985. This is the seventh edition of the Code and replaces all earlier versions.

1.2 The DPP is the head of the Crown Prosecution Service (CPS), which is the principal public prosecution service for England and Wales. The DPP operates independently, under the superintendence of the Attorney General who is accountable to Parliament for the work of the CPS.

1.3 The Code gives guidance to prosecutors on the general principles to be applied when making decisions about prosecutions. The Code is issued primarily for prosecutors in the CPS, but other prosecutors follow the Code either through convention or because they are required to do so by law.

1.4 In this Code, the term "suspect" is used to describe a person who is not yet the subject of formal criminal proceedings; the term" defendant" is used to describe a person who has been charged or summonsed; and the term "offender" is used to describe a person who has admitted his or her guilt to a police officer or other investigator or prosecutor, or who has been found guilty in a court of law.

General Principles

2.1 The decision to prosecute or to recommend an out-ofcourt disposal is a serious step that affects suspects, victims, witnesses and the public at large and must be undertaken with the utmost care.

2.2 It is the duty of prosecutors to make sure that the right person is prosecuted for the

right offence and to bring offenders to justice wherever possible. Casework decisions taken fairly, impartially and with integrity help to secure justice for victims, witnesses, defendants and the public. Prosecutors must ensure that the law is properly applied; that relevant evidence is put before the court; and that obligations of disclosure are complied with.

2.3 Although each case must be considered on its own facts and on its own merits, there are general principles that apply in every case.

2.4 Prosecutors must be fair, independent and objective. They must not let any personal views about the ethnic or national origin, gender, disability, age, religion or belief, political views, sexual orientation, or gender identity of the suspect, victim or any witness influence their decisions. Neither must prosecutors be affected by improper or undue pressure from any source. Prosecutors must always act in the interests of justice and not solely for the purpose of obtaining a conviction.

2.5 The CPS is a public authority for the purposes of current, relevant equality legislation. Prosecutors are bound by the duties set out in this legislation.

2.6 Prosecutors must apply the principles of the European Convention on Human Rights, in accordance with the Human Rights Act 1998, at each stage of a case. Prosecutors must also comply with any guidelines issued by the Attorney General; with the Criminal Procedure Rules currently in force; and have regard to the obligations arising from international conventions. They must follow the policies and guidance of the CPS issued on behalf of the DPP and available for the public to view on the CPS website.

The Decision Whether to Prosecute

3.1 In more serious or complex cases, prosecutors decide whether a person should be charged with a criminal offence and, if so, what that offence should be. They make their decisions in accordance with this Code and the DPP's Guidance on Charging. The police apply the same principles in deciding whether to start criminal proceedings against a person in those cases for which they are responsible.

3.2 The police and other investigators are responsible for conducting enquiries into any alleged crime and for deciding how to deploy their resources. This includes decisions to start or continue an investigation and on the scope of the investigation. Prosecutors often advise the police and other investigators about possible lines of inquiry and evidential requirements, and assist with pre-charge procedures. In large scale investigations the prosecutor may be asked to advise on the overall investigation strategy, including decisions to refine or narrow the scope of the criminal conduct and the number of suspects under investigation. This is to assist the police and other investigators to complete the investigation within a reasonable period of time and to build the most effective prosecution case. However, prosecutors cannot direct the police or other investigators.

3.3 Prosecutors should identify and, where possible, seek to rectify evidential weaknesses, but, subject to the Threshold Test (see section 5), they should swiftly stop cases which do not meet the evidential stage of the Full Code Test (see section 4) and which cannot be strengthened by further investigation, or where the public interest clearly does not require a prosecution (see section 4). Although prosecutors primarily consider the evidence and information supplied by the police and other investigators, the suspect or those acting on his or her behalf may also submit evidence or information to the prosecutor via the police or other investigators, prior to charge, to help inform the prosecutor's decision.

3.4 Prosecutors must only start or continue a prosecution when the case has passed