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Post-Appeal Measures to Address Wrongful Convictions/ Miscarriages of Justice in the Republic of Ireland

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Abstract

Research shows that there have been instances where, in the Republic of Ireland, some people have been convicted of offences they never committed. By enacting the Criminal Procedure Act of 1993, Ireland has put in place measures to prevent, minimise and remedy cases of miscarriages of justice. The first measure under the Act is to provide for circumstances in which the Court of Appeal can quash a conviction on the basis that there was a miscarriage of justice and the second measure is for the government to compensate people who have been wrongfully convicted. In this article, the author reviews case law from the High Court, Court of Appeal and Supreme Court to demonstrate how these courts have interpreted or applied the relevant provisions of the Criminal Procedure Act. The author illustrates that this jurisprudence has dealt with issues such as the meaning of miscarriage of justice, the types of damages that a person who has suffered a miscarriage of justice may be awarded; the burden of proof under the Act with specific reference to the admissible evidence to prove a miscarriage of justice. The discussion also shows that the compensation scheme under the Act is more flexible than that contemplated in the international treaties ratified by Ireland.

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1 INTRODUCTION

In the Republic of Ireland, as is the case in many other countries, it is not impossible for persons to be convicted of offences when they should not have been convicted.¹ Jurisprudence from courts in the Republic of Ireland which is discussed later in this article shows that there have been instances where, for example, persons who did not commit offences or should not have been prosecuted for offences, were prosecuted and convicted. These instances included cases where the police or the complainants fabricated evidence that was relied upon to prosecute and convict the accused. In one case an applicant was convicted of an offence based on the complainant's fabricated evidence. The Court of Criminal Appeal² held that this was "a most alarming and disturbing case" in which the applicant "an entirely innocent man, was despite this all important fact convicted of the offence of sexual assault."³ Thus, the applicant was "beyond doubt innocent."⁴ In another case, the Supreme Court held that the appellant was entitled to compensation because there was evidence to show that at the time the committed the offence, he was insane which "demonstrate[d] innocence."⁵ The Republic of Ireland has put in place several measures to deal with the issue of miscarriage of justice. The first is to provide for circumstances in which the Court of Appeal can quash a conviction on the basis of a miscarriage of justice.⁶ This applies in cases where a new or newly discovered fact, which comes to the applicant's knowledge after exhausting the appeal process and sometimes after serving his/her sentence, shows that there was a miscarriage of justice.⁷ The second strategy is to compensate people who have suffered miscarriages of justice. In October 1973 Ireland signed the International Covenant on Civil and Political Rights and in December 1989 ratified this treaty.⁸ Article 14(6) of the ICCPR provides that

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

In *The Director of Public Prosecutions v Feichín Hannon*⁹ the Court of Criminal Appeal referred to Article 14(6) of the ICCPR and held that "it obliges States bound by it to provide compensation for a miscarriage of justice "according to law."¹⁰ The Court added that the Republic of Ireland has enacted section 9 of the Criminal Procedure Act of 1993 as "an attempt to comply with the relevant State obligations arising under this Covenant and perhaps otherwise."¹¹ In August 2001, Ireland also ratified Protocol No. 7 to the Convention for the Protection of Human Rights

1 See generally, Mujuzi "The Right to Compensation for Wrongful Conviction/Miscarriage of Justice in International Law" 2019 *Int'l Human Rights LR* 215–244.

2 This Court was later named the Court of Appeal, see *The People (At the Suit of the Director of Public Prosecutions v Anthony Buck* [2020] IESC 16 para 42.

3 *The Director of Public Prosecutions v Feichín Hannon* (2009) IECCA 43, 1.

4 *Ibid.* 3.

5 *Abdi v Director of Public Prosecutions* [2022] IESC NN para 53.

6 In *Michael O'Callaghan v Ireland and the Attorney General* [2020] IECA 180 para 74, the court refers to a wrongful conviction as one of the examples of miscarriages of justice.

7 See Criminal Procedure Act, 1993.

8 See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=en#EndDec (accessed 19 December 2023).

9 *The Director of Public Prosecutions v Feichín Hannon* (2009) IECCA 43.

10 *Ibid.* 4.

11 *Ibid.* 4. See also *Michael O'Callaghan v Ireland and the Attorney General* para 12.

and Fundamental Freedoms.¹² Article 3 of Protocol No. 7 provides that:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to the law or the practice of the State concerned, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him.

Article Protocol No.7 has also been domesticated in Ireland through the European Convention on Human Rights Act.¹³ In 1993, Ireland passed the Criminal Procedure Act¹⁴ which, inter alia, provides for (i) circumstances in which a wrongful conviction can be set aside and (ii) the right to compensation for miscarriage of justice.¹⁵ There are differences between the relevant provisions of the Criminal Procedure Act on compensation for miscarriage of justice and Articles 14(6) of the ICCPR and 3 of Protocol No.7. Since the coming into force of the Criminal Procedure Act, Irish courts have handed down several judgments on whether applicants had been wrongfully convicted and/or qualify to be compensated for miscarriage of justice. The purpose of this article is to analyse this case law and demonstrate how courts have interpreted the relevant legislation to determine, inter alia, the conditions that a person has to fulfil before he/she can be compensated. The author will start by discussing the measures in the Criminal Procedure Act meant to address miscarriages of justice before dealing with the issue of compensation.

2 MEASURES IN PLACE TO ADDRESS MISCARRIAGE OF JUSTICE

The Criminal Procedure Act does not define “miscarriage of justice.” In *Abdi v Director of Public Prosecutions*,¹⁶ the Supreme Court held that the concept “miscarriage of justice” is “not subject to a statutory definition and ... derives in part from international obligations.”¹⁷ In *The People (at the Suit of the Director of Public Prosecutions) v Nora Wall*¹⁸ the Court of Criminal Appeal referred to earlier case law and provided some of the examples of what many constitute miscarriage of justice. It held that:

Examples of circumstances which may constitute a miscarriage of justice include, but are not limited to the following: (a) Where it is established that the applicant was innocent of the crime alleged. (b) Where a prosecution should never have been brought in the sense that there was never any credible evidence implicating the applicant. (c) Where there has been such a departure from the rules which permeate all judicial procedures as to make that which happened altogether irreconcilable with judicial or constitutional procedure. (d) Where there has been a grave defect in the administration of justice, brought about by agents of the State.¹⁹

The Criminal Procedure Act provides for measures to combat miscarriages of justice. The first measure is in section 2 of the Act which provides that a person who has been convicted of an offence and:

(1)(a)... who, after appeal to the Court [Court of Appeal] including an application for leave to appeal, and any subsequent re-trial, stands convicted of an offence to which this paragraph

12 ETS No.117.

13 See Schedule 5 of the European Convention on Human Rights Act No. 20 of 2003.

14 Criminal Procedure Act No 40 of 1993.

15 See *The People (at the Suit of the Director of Public Prosecutions) v Anthony Buck* [2020] IESC 16 para 42.

16 *Abdi v Director of Public Prosecutions* [2022] IESC 24.

17 *Ibid.* para 39.

18 *The People (At the Suit of the Director of Public Prosecutions) v Nora Wall* [2005] IECCA 140.

19 *Ibid.* para 6. See also *Martin Connemey v The Director of Public Prosecutions (Application Pursuant to Section 9 Of The Criminal Procedure Act, 1993)* [2014] IECCA 31 paras 25–26.

applies, and (b) who alleges that a new or newly-discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed is excessive, may, if no further proceedings are pending in relation to the appeal, apply to the Court for an order quashing the conviction or reviewing the sentence.

Section 2 was enacted after a public outcry in the Republic of Ireland and in Britain after some people were convicted under questionable circumstances and members of the public were concerned about miscarriages of justice.²⁰ Section 2 is applicable to convictions which took place before and after the coming into force of the Act.²¹ The right under section 2 is a “limited” right to the extent that the applicant has to meet the threshold under the section for the conviction or sentence to be quashed.²² For a person to invoke section 2, he/she should be able “to identify one or more new or newly discovered facts.”²³ Therefore, the burden is on the applicant to convince the court that a new or newly discovered fact has come to light.²⁴ The Supreme Court held that section 2(1)(a) requires:

[T]he accused to bring forward credible evidence of a fact that shows that the conviction should not have occurred and that the jury in considering that fact might reasonably, as opposed to merely speculatively, not proceeded to conviction in the light of what that fact demonstrates. ... [T]his requires the demonstration of a “defect or error in the trial such as would render the convictions unsafe and unsatisfactory.”²⁵

A person who challenges his/her conviction or sentence under section 2 has to incur the costs of his/her legal representation²⁶ and if he/she cannot afford a lawyer, he/she has to represent himself.²⁷ However, if his/her application to appeal to the Supreme Court is allowed, he/she qualifies for legal aid for which he/she is encouraged to apply.²⁸ Because the Act does not define the word “fact,” the Court of Criminal Appeal relied on the Concise Oxford English Dictionary to define this term and held that it means “[a] thing that is indisputably the case” [or] “the truth about events as opposed to interpretation.”²⁹ This means that a court will only consider evidence of a newly discovered fact when it deals with “matters of fact and not opinion.”³⁰ For evidence to be admitted under section 2, it has to be of a factual nature as opposed to opinion evidence.³¹

20 *The Director of Public Prosecutions v Martin Conmey (Application pursuant to Section 2 of the Criminal Procedure Act, 1993)* (2010) IECCA 105 1–2; *Catherine Nevin v The Director of Public Prosecutions (Application Pursuant to Section 2 of the Criminal Procedure Act, 1993)* (2010) IECCA 106, 2.

21 *Michael Joseph Kelly v The Director of Public Prosecutions (in the Matter of an Application Pursuant To Section 2 of the Criminal Procedure Act, 1993)* (2008) IECCA 7; *The Director of Public Prosecutions v Martin Conmey* (2010)105.

22 *John Gerard McDonagh v The Commissioner of an Garda Síochána, Assistant Commissioner John O’Mahoney, Ireland and the Attorney General* [2015] IEHC 390 para 53.

23 *The Director of Public Prosecutions v Andbrian Meehan* [2016] IECA 124 para 24.

24 *The Director of Military Prosecutions v Commandant Nile Donohoe* [2017] IECA 92 para 57. See also *Director of Public Prosecutions v McGinley* [2022] IECA 239

25 *The People (At the Suit of the Director of Public Prosecutions v Anthony Buck* [2020] IESC 16 para 43. See also para 44.

26 *The People (at the Suit of the Director of Public Prosecutions) v Martin Conmey* [2012] IECCA 75.

27 *The People at the Suit of the Director of Public Prosecutions (in the Matter of Section 2 Criminal Procedure Act, 1993) v M. S.* (2006) IECC 48 3; *Anthony Buck v Director of Public Prosecutions* (2018) IECA 59 para 10.

28 *The People at the Suit of the Director of Public Prosecutions (in the Matter of Section 2 of the Criminal Procedure Act 1993) v Anthony Buck* (2019) IESCDT 16 para 19.

29 *Michael Joseph Kelly v the Director of Public Prosecutions* (2008) 7, 4. See also *Michael McKeivitt v The Director of Public Prosecutions (in the Matter of Section 2 of the Criminal Procedure Act 1993)* (2013) IECCA 22 para 22

30 *Michael Joseph Kelly v the Director of Public Prosecutions* (2008) 7, 4.

31 *Ibid.* 4.

The Supreme Court held that “[w]hat s 2 is thus concerned with is facts, not opinions and not beliefs.”³² The court explained the differences between “facts” and “beliefs.”³³ Case law shows that these facts have included different types of evidence such as scientific, documentary³⁴ and photographic evidence.³⁵ The Court of Criminal Appeal referred to section 2 of the Act and held that:

The legislative intendment relates to material which could, should or might have been adduced at a trial of an evidential or factual nature, and which, seen objectively, would render the conviction a miscarriage of justice such that it should be quashed.³⁶

In terms of section 2 of the Act, a person who has been convicted of an offence and his/her appeal has been dismissed by the Court of Appeal, may still approach that court for it to do one of the two things — either quash the conviction or review the sentence. Once the conviction is quashed, the sentence will fall away. However, the review of the sentence does not affect the conviction. Section 2 can be invoked to challenge both the conviction and sentence or either a conviction or sentence. This explains why in some cases applications under section 2 were made to challenge sentences only.³⁷ A fact is not new or newly discovered if, at the time the applicant was sentenced, it “was known about and available, or discoverable with reasonable due diligence, at the material time.”³⁸ In other words, a fact is not newly discovered if it was indirectly considered by the judge at sentencing or it “was capable of being discovered at the sentence hearing.”³⁹ For the person to invoke section 2 of the Act, he/she must base their argument on one of the two grounds: either that a new fact “shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed is excessive”; or that a newly discovered fact shows that there has been a miscarriage of justice in relation to the conviction or that the sentence imposed is excessive. The Act defines what amounts to a “new” fact and also what amounts to a “newly discovered fact.” Section 2(3) of the Act provides that:

In subsection (1) (b) the reference to a new fact is to a fact known to the convicted person at the time of the trial or appeal proceedings the significance of which was appreciated by him, where he alleges that there is a reasonable explanation for his failure to adduce evidence of that fact.

The Court of Criminal Appeal considered section 2(3) to be an “expanded definition of a new fact.”⁴⁰ A clear understanding of section 2 requires the court to refer to the Act itself and to the relevant case law in which the section has been interpreted.⁴¹ In case of section 2(3), the convicted person not only knew the fact in question at the time of his/her trial or appeal but also appreciated its significance to the outcome of the trial but he/she failed to adduce the evidence

32 *The People (at the Suit of the Director of Public Prosecutions v Anthony Buck* [2020] IESC 16 para 23.

33 *Ibid* para 22.

34 *Michael Joseph Kelly v the Director of Public Prosecutions* (2008) 7, 4–5; *The People at the Suit of the Director of Public Prosecutions (Application under the Criminal Procedure Act 1993, Section 2) v Yusuf Ali Abdi* (2019) IECA 38.

35 *Michael Joseph Kelly v the Director of Public Prosecutions* (2008) 7, 5

36 *Michael McKeivitt v The Director of Public Prosecutions* (2013) 22 para 36.

37 See for example, *The People at the Suit of the Director of Public Prosecutions v Stephen Egan* [2017] IECA 95; *The People (Director of Public Prosecutions) v Johnston* 1998 WJSC-CCA 5579, cited in *The People at the Suit of The Director of Public Prosecutions v Stephen Egan* [2017] IECA 95 paras 2–22.

38 *The People at the Suit of the Director of Public Prosecutions v Stephen Egan* [2017] IECA 95 para 49. See also *The People at the Suit of the Director of Public Prosecutions (in the Matter of Section 2 of the Criminal Procedure Act 1993) v Stephen Egan* (2017) IESCDT 138 para 29.

39 *The Director of Public Prosecutions v B.M.* (2019) IECA 267 para 22.

40 *The Director of Public Prosecutions v Andbrian Meehan* 124 para 60.

41 *Anthony Buck v Director of Public Prosecutions* (2018) IECA 59 para 10.

of that fact during trial or appeal and he/she has a reasonable explanation for failure to adduce that evidence. In other words, he/she must convince the court that his/her failure to produce evidence was not due to negligence. The court is obliged only to hear a reasonable application. The Act does not define or describe what amounts to a reasonable explanation. However, the Supreme Court held that for the court to determine what amounts to a reasonable explanation, it is required to assess the case-specific evidence only.⁴² Put differently, whether the explanation is reasonable depends on the facts of each case. In *The People (at the Suit of the Director of Public Prosecutions v Anthony Buck)*⁴³ the Supreme Court gave examples of what amounts to reasonable explanations.⁴⁴

This should be understood in the context that during his/her trial, the accused has an obligation not to hold evidence back with the aim of using it to challenge his conviction at a later stage.⁴⁵ On the other hand, section 2(4) of the Act defines a newly discovered fact as follows:

The reference in subsection (1) (b) to a newly-discovered fact is to a fact discovered by or coming to the notice of the convicted person after the relevant appeal proceedings have been finally determined or a fact the significance of which was not appreciated by the convicted person or his advisers during the trial or appeal proceedings.

The Court of Criminal Appeal held that for section 2(4) to be applicable, two requirements must be met: “the first requirement to consider is whether there are any further proceedings pending in relation to the appeal; and whether by reference to section 2(4), any relevant appeal proceedings have been “finally determined.”⁴⁶ The Court added that once those two requirements have been met, section 2 of the Act will be applicable even if the applicant has instituted a claim before the European Court of Human Rights.⁴⁷ The Court also held that “the function of this Court is simply to determine whether the newly discovered facts, if established as such in evidence, render the conviction unsafe and unsatisfactory so that the conviction ... should be quashed.”⁴⁸ For a convicted person to succeed on the “newly discovered fact” ground, the following conditions must be in place. Firstly, he/she should have discovered the fact in question or the fact in question should have come to his notice under one of the two stipulated circumstances. One, if the fact in question was discovered by the convicted person or it came to his notice after the appeal proceeding had been finally determined. This means, *inter alia*, that if he/she discovers such a factor before the appeal proceedings have been finalised

42 *The People at the Suit of the Director of Public Prosecutions (in the Matter of Section 2 of the Criminal Procedure Act 1993) v Brian Meehan* (2017) IESCDET 18, 3.

43 *The People (at the Suit of the Director of Public Prosecutions v Anthony Buck* [2020] IESC 16.

44 *Ibid.* 16 para 14 where the Court held that “[i]t is clear from the express terms of the definition of ‘new fact’ provided by the relevant legislation, that the legislation creates [sic] its own test ... A consideration of s 2(3) shows that a person tried on a criminal charge may decide not to call a witness but there may be ‘a reasonable explanation for his failure to adduce’ that relevant evidence. This may be an instance of duress, whereby calling a witness will lead to the disclosure by the accused of a fact, and the accused appreciates the significance of which’ but he alleges a case for not adducing that fact. Any excuse proffered must be demonstrated to be reasonable. It may be to do with duress ... However, there is no limitation in what may be a reasonable excuse in the section, but it is apparent that the excuse for not disclosing a fact relevant to any defence available at trial must be more than that the accused or his legal representatives felt that a particular fact might not make a difference, or be somehow merely embarrassing or that a proposed witness might not stand up well on cross-examination. All of these ordinary decisions are made in the context of a trial. For a case to be run, to result in a conviction and to be affirmed on appeal indicates that in the context of miscarriage of justice application, the new fact must be shown have arisen in a context where the accused was put under some extraordinary disablement whereby, notwithstanding that the accused knew of its significance, a reasonable explanation then existed for not adducing that evidence.” See also para 16.

45 *The People (At the Suit of the Director of Public Prosecutions v Anthony Buck* [2020] IESC 16 para 16.

46 *Michael McKeivitt v The Director of Public Prosecutions* (2013) 22 para 20.

47 *Ibid.* para 20.

48 *Michael Joseph Kelly v the Director of Public Prosecutions* (2008) 8.

and he/she fails to bring that fact to the attention of the Court, then that fact becomes a new fact and would have to be governed by section 2(3)(a).⁴⁹ In other words, he/she would have to give a reasonable explanation to the court why such fact was not disclosed before the appeal was finalised. However, nothing prevents an applicant from arguing that a fact is both new and newly discovered. As the Court of Appeal held, for section 2 of the Act to be triggered, the evidence has to constitute “new facts”, or “newly discovered facts”, or a combination of both.⁵⁰ In such a case it is for the court to determine, based on the evidence before it, whether to consider the fact as a new fact or a newly discovered fact.

For the applicant to succeed on the ground of a newly discovered fact, he or she has to convince the Court that “the information was not known to him at the relevant time.”⁵¹ If the evidence was known to the applicant at the time of the trial, he/she must explain why he/she did not take the necessary steps to bring that evidence to Court at the time of his/her trial.⁵² In *Michael Joseph Kelly v The Director of Public Prosecutions (In The Matter of an Application Pursuant to Section 2 of the Criminal Procedure Act, 1993)*⁵³ the Court held that as a general rule, opinion evidence should not be admitted as a newly discovered fact. This is because, opinion evidence is not a “fact” and that it would open the door for people to challenge “virtually every conviction” in which opinion evidence was used.⁵⁴ Furtherer, the Court also held that in exceptional circumstances, opinion evidence may also be admissible. For example,

where a state of scientific knowledge as of the date of trial may be invalidated or thrown into significant uncertainty by newly developed science. There may also be cases where the opinion of an expert at trial may later be shown to have been tainted by dishonesty, incompetence or bias to such a degree as to render his evidence worthless or unreliable.⁵⁵

In *The People at the Suit of the Director of Public Prosecutions (Application Under the Criminal Procedure Act 1993, Section 2) v Yusuf Ali Abdi*⁵⁶ the Court of Appeal held that the above exceptions allow a departure from the general rule that opinion evidence is inadmissible “in circumstances of sufficient exceptionality, which cases are likely to be rare.”⁵⁷ The Court added that those circumstances are not exhaustive.⁵⁸

In this case, the court found that evidence that the applicant’s initial diagnosis was incorrect and that the new evidence showed that he was insane (suffering from schizophrenia) at the time he committed the offence of murder, were newly discovered facts within the meaning of the Act. This evidence, although opinions of experts, was admissible.⁵⁹ It is for the Court and not the expert witness to decide whether there was a miscarriage of justice.⁶⁰ As a general rule,

49 See *The People (at the Suit of The Director of Public Prosecutions v Anthony Buck* [2020] IESC 16 paras 20–21.

50 *The People at the Suit of the Director of Public Prosecutions (Application Under the Criminal Procedure Act 1993, Section 2) v Yusuf Ali Abdi* (2019) IECA 38 para 60.

51 *In The Matter of Section 2 Criminal Procedure Act, 1993 the People at the Suit of the Director of Public Prosecutions v M. S.* (2006) IECC 48 3

52 *Ibid.*

53 *Michael Joseph Kelly v The Director of Public Prosecutions* (2008) 7.

54 *Ibid.* 5.

55 *Ibid.* 5. See also *John Gerard McDonagh v The Commissioner of an Garda Síochána, Assistant Commissioner John O’Mahoney, Ireland And The Attorney General* [2015] IEHC 390 para 63.

56 *The People at the Suit of the Director of Public Prosecutions (Application under the Criminal Procedure Act 1993, Section 2) v Yusuf Ali Abdi* (2019) IECA 38.

57 *Ibid.* para 83.

58 *Ibid.* para 84.

59 *Ibid.* para 85–90.

60 *Ibid.* para 35.

the fact that a person was convicted in terms of a piece of legislation which is later declared unconstitutional does not mean that his/her conviction will be quashed under section 2.⁶¹

If a convicted person does not proceed on the basis of the first ground, then he/she would have to proceed under the second ground which provides that he/she or his/her legal advisor did not appreciate the significance of the fact at the time of the trial. Unlike in the first scenario where the convicted person was not aware of the fact in question at the time of the trial or appeal, in the second scenario he/she or his/her legal advisor was aware of the fact in question at the time of the trial or appeal but he/she or his/her legal advisor did not appreciate the significance of that fact at that time.⁶² There are two possible ways in which one can approach this provision. Firstly, it could be argued that it is not a requirement that both the convicted person and his/her legal advisor failed to appreciate the significance of the fact. Failure by either the convicted person or his/her legal advisor to appreciate the significance of the fact in question triggers the application of section 2(4). It could, for example, be the case where the convicted person appreciated the significance of the fact but his/her legal advisor did not and as a result the legal advisor chose to exclude it from the grounds advanced in the in defending the convicted person at trial or during appeal. In other words, the subsection should be read disjunctively. The second approach is that if the accused appreciated the significance of the fact but his legal advisor did not adduce it in evidence or put emphasis on it during cross-examination, then the legal advisor is presumed to have appreciated its significance. In other words, the subsection should be read conjunctively. The Supreme Court has preferred the second approach by holding that it “preserves the unity of client and advisor that the common law appreciates.”⁶³ However, the Court also held that there is an exception to the rule. For example, “where the accused appreciated the significance of a fact but his lawyers did not agree.”⁶⁴ This would amount to “ineffective assistance of counsel.”⁶⁵

One of the factors that the court will look at in assessing whether the applicant’s legal advisor appreciated the significance of the fact in question is the legal advisor’s experience. If the legal advisor was “able, experienced and highly regarded” the court will regard “it as inconceivable that such” a lawyer could not have appreciated the significance of the fact.⁶⁶ The applicant’s lawyer will be taken to have appreciated the significance of the evidence at the time of the trial or appeal even if they had refused to adduce that evidence although the applicant had instructed them so.⁶⁷ If during the accused’s trial or appeal, his/her lawyer brought an application to rely on a fact, which he/she later alleges to be a newly discovered fact under section 2(4) of the Act, the Court will not entertain that argument because such an application (at the time of the trial or appeal) “provides the clearest possible, and indeed conclusive, evidence that the significance of the matters now sought to be relied upon were considered before the appeal to the Court of Criminal Appeal.”⁶⁸ In other words, it is proof that the lawyers “fully appreciated”

61 *Michael McKevitt v The Director of Public Prosecutions (in the Matter of Section 2 of the Criminal Procedure Act 1993)* (2013) IECCA 22.

62 *The People at the Suit of the Director of Public Prosecutions (In the Matter of Section 2 of the Criminal Procedure Act 1993) v Brian Meehan* (2017) IESCDT 18, 2 –3.

63 *The People (At the Suit of the Director of Public Prosecutions v Anthony Buck* [2020] IESC 16 para 29.

64 *Ibid.* para 29.

65 *Ibid.* para 29.

66 *The Director of Public Prosecutions v Andbrian Meehan* [2016] IECA 124 para 24 (in this case the application was dismissed); *Anthony Buck v Director of Public Prosecutions* (2018) IECA 59 para 10(iv).

67 *Anthony Buck v Director of Public Prosecutions* (2018) IECA 59 para 11.

68 *The Director of Public Prosecutions v Andbrian Meehan* [2016] IECA 124 para 24.

the significance of the materials.⁶⁹

The mere fact that a person has made an application under section 2(1) does not mean that his/her application will be successful. Thus, section 5 of the Act empowers the Court, on a reference made by the registrar, to summarily dismiss the application in question if it considers it to be frivolous or vexatious.⁷⁰ In *Brian Meehan and the Director of Public Prosecutions (in the Matter of an Application Pursuant to Section 2 of the Criminal Procedure Act, 1993)*⁷¹ the Court referred to section 5 of the Act and held that it “only has jurisdiction to make an order pursuant to s.5 when the registrar refers an application made pursuant to s.2 to the court” and that the registrar may only refer the matter to the court if it appears to him/her “that the notice of an application pursuant to section 2 does not disclose a prima facie case that a miscarriage of justice has occurred.”⁷²

However, in deciding whether or not to dismiss an application under section 2, the Court has to bear in mind to important issues — the litigant’s constitutional right to access courts and the court’s duty to prevent litigants from abusing the Court process.⁷³ Therefore, the Court’s discretion to dismiss an application under section 2 of the Act “must be exercised sparingly. There must be a high threshold.”⁷⁴ therefore, the application should be dismissed “only in clear cases.”⁷⁵ There have been instances in which the Court has invoked section 5 to dismiss some applications.⁷⁶ The Supreme Court has given examples in which a case ought to be dismissed summarily.⁷⁷ Courts have developed criteria that are used to assess whether or not the application should be considered on merit.⁷⁸ If the application is not dismissed summarily, it will be considered as an appeal.⁷⁹ The Court of Appeal held that there are two parts to section 2. The first part deals with the issue of whether there is a new or newly discovered fact and the second part deals with the question of the weight and credibility of the evidence adduced to prove the existence of a new or newly discovered fact. The Court will only deal with the second part after the applicant has adduced evidence of a new or newly discovered fact otherwise the application will be dismissed without proceeding to the second part.⁸⁰ If the application is dismissed on the ground that it does not disclose a new or newly discovered fact, the applicant can bring a new

69 *Ibid.* para 66.

70 See also s 5(5).

71 *Brian Meehan v The Director of Public Prosecutions (in the Matter of an Application Pursuant to Section 2 of the Criminal Procedure Act, 1993)* (2014) IECCA 10.

72 *Ibid.* para 11.

73 *Michael McKevitt v The Director of Public Prosecutions (in the Matter of Section 2 of the Criminal Procedure Act 1993)* (2013) IECCA 22 para 6.

74 *Ibid.* para 52.

75 *The People (at the Suit of The Director of Public Prosecutions v Anthony Buck* [2020] IESC 16 para 38.

76 See for example, *The People at the Suit of the Director of Public Prosecutions v Philippe Cauneze* (2015) IECA 345, para 4

77 *The People (At the Suit of The Director of Public Prosecutions v Anthony Buck* [2020] IESC 16, para 39 where the Court held that “an application under s 2 of the 1993 Act is capable of being disposed of by way of legal argument as to its validity. Hence, for instance, a ruling of law is not a newly discovered fact, nor is a fresh argument on a fact and nor is an opinion on fact a newly discovered fact, unless there has been an advance of scientific knowledge that in reality changes the nature of a fact ... Similarly, where the same fact has been brought forward and has been analysed on a prior occasion or has been disposed of in the same form on an appeal, it cannot be said that there is a new fact and hence an application asserting a miscarriage of justice is bound to fail.”

78 See *Michael Joseph Kelly v The Director of Public Prosecutions* (2008) 7, 5.

79 Section 3 of the Act. See *The People at the Suit of the Director of Public Prosecutions (in the Matter of Section 2 of the Criminal Procedure Act 1993) v Anthony Buck* (2017) IESCDT 6.

80 *Anthony Buck v Director of Public Prosecutions* (2018) IECA 59 para 11.

application at a later stage if he/she thinks that there is a new or newly discovered fact.⁸¹

For the Court's jurisdiction to be triggered under section 2, the applicant does not have to show that a miscarriage of justice "actually occurred." The Court will assess the application if the evidence shows that "there may have been a miscarriage of justice."⁸² Because the Act does not define what amounts to "miscarriage of justice" in the context of section 2, courts have explained the meaning of the phrase. The Court of Criminal Appeal held that "there is no universally applicable definition of 'miscarriage of justice' available to be applied" when dealing with an application under the Act.⁸³ In *Michael Joseph Kelly v The Director of Public Prosecutions (in the Matter of an Application Pursuant to Section 2 of the Criminal Procedure Act, 1993)*⁸⁴ the Court of Criminal Appeal referred to the jurisprudence of the Supreme Court and held that the Court is required to objectively evaluate the newly discovered fact "with a view to determining in the light of it whether the applicant's conviction was unsafe and unsatisfactory in the context of what the legal advisors might have done with the material if it had been available to them."⁸⁵ The Court of Appeal has arrived at a similar conclusion when dealing with the failure by the prosecutor to disclose the evidence to the accused.⁸⁶

The burden is on the applicant to convince the Court that the newly discovered fact renders his conviction a miscarriage of justice.⁸⁷ The Court has to conduct an objective evaluation of the evidence (of the new or newly discovered fact) before it in "determining whether the fact at issue, if known about and/or properly appreciated, could have been used by the defence to raise a significant doubt in the minds of the jury with respect to a significant element of the prosecution case."⁸⁸ For the Court to find that the newly discovered fact could have been used by the defence to raise a significant doubt in the mind of the jury, it does not have to conclude "for certain that such evidence would influence the outcome."⁸⁹ What matters is that the evidence shows that "the possibility that it might do so [influence the outcome] could not be tenably or credibly denied."⁹⁰ Put differently, the Court has to be convinced that "material being relied upon as being newly discovered facts, would, if it had been before the jury at the original trial, have had at least the potential to influence the outcome."⁹¹

If the evidence that the applicant would like to rely on to prove a new or newly discovered fact is in the hands of the police, the court is empowered to order the police to make that evidence available to the court or compel any witness to come to court.⁹² For evidence to be considered as a new fact or newly discovered fact for the purpose of section 2 of the Act, the Court has to be

81 *Ibid.* para 5.

82 *The Director of Public Prosecutions v Martin Conmey* (2010) 105 2; *Catherine Nevin v The Director of Public Prosecutions (Application Pursuant to Section 2 of the Criminal Procedure Act, 1993)* (2010) IECCA 106, 2–3.

83 *Martin Conmey v The Director of Public Prosecutions* [2014] 31 para 42.

84 *Michael Joseph Kelly v The Director of Public Prosecutions* (2008) 7.

85 *Ibid.* 9. See also *Michael McKevitt v The Director of Public Prosecutions* (2013) 22 para 31

86 *The Director of Public Prosecutions v Martin Conmey (Application Pursuant to Section 2 of the Criminal Procedure Act, 1993)* (2010) IECCA 105.

87 *Brian Meehan v The Director of Public Prosecutions (in the Matter of an Application Pursuant to Section 2 of the Criminal Procedure Act, 1993)* (2014) IECCA 10 para 14.

88 *The People at the Suit of the Director of Public Prosecutions (Application Under the Criminal Procedure Act 1993, Section 2) v Yusuf Ali Abdi* (2019) IECA 38 para 9.

89 *Ibid.* para 93.

90 *Ibid.* para 93.

91 *Ibid.* para 94.

92 Section 3(3) and (4) of the Act. See also In *John Gerard McDonagh v The Commissioner of an Garda Síochána, Assistant Commissioner John O'Mahoney, Ireland and the Attorney General* [2015] IEHC 390 para 56.

convinced that its availability might have changed the outcome of the trial. In other words, had the evidence been available at the time of the trial, the applicant might not have been convicted of the offence of which he/she was convicted. It could be that he would have been convicted of another offence or would have been acquitted. That is why section 3 of the Act gives the court different options should it find that there was a miscarriage of justice. Section 2 does not apply to newly discovered facts which are irrelevant or collateral to the facts at issue at the accused's trial.⁹³ The matter raised should have "a clear proximate connection to the trial itself" and has to come "within the range of material which if it had been raised as evidence in the trial may have raised significant doubts in the minds of the court."⁹⁴ For the Court to find that the newly discovered fact shows that there was a miscarriage of justice during the accused's trial, the materials submitted for the purpose of the section 2 review should appear to be "credible although it may not be incontrovertible."⁹⁵ This is so because "there is no requirement that it be incontrovertible."⁹⁶

Should the convicted person convince a court that indeed there was a miscarriage of justice, the conviction may be quashed or the sentence may be set aside. However, nothing prevents the court from ordering a retrial or substituting his conviction or sentence with an appropriate one.⁹⁷ If the court finds that there was indeed a miscarriage of justice and orders a retrial, this does not mean that the convicted person is permanently barred from challenging his/her conviction again (should he be convicted after the retrial). Section 2(5) of the Act provides that:

Where— (a) after an application by a convicted person under subsection (1) and any subsequent re-trial the person stands convicted of an offence, and (b) the person alleges that a fact discovered by him or coming to his notice after the hearing of the application and any subsequent re-trial or a fact the significance of which was not appreciated by him or his advisers during the hearing of the application and any subsequent re-trial shows that there has been a miscarriage of justice in relation to the conviction, or that the sentence was excessive, he may apply to the Court for an order quashing the conviction or reviewing the sentence and his application shall be treated as if it were an application under that subsection.

Section 2(5) is applicable to two sets of facts. First, to a fact that was discovered by the convicted person or which came to his/her notice after the application under section 2(1) was considered or after the re-trial based on that application. Second, to a fact that was known to the convicted person or to his/her legal advisor at the time of the application and at the time of the subsequent trial but the convicted person or his/her legal advisor did not appreciate the significance of that fact.⁹⁸

If a convicted person does not make an application under section 2 of the Act, the Act provides for a second route through which the allegation of miscarriage of justice may be addressed. Section 7 of the Act provides that:

(1) If a person — (a) who has been convicted of an offence, (b) who after appeal against the conviction stands convicted of an offence, and (c) who alleges that a new or newly-discovered fact shows that a miscarriage of justice has occurred in relation to the conviction, petitions the Minister for Justice with a view to the Government advising the President to grant a pardon under Article 13.6 of the Constitution and no further proceedings are pending in relation to

93 *Catherine Nevin v The Director of Public Prosecutions (Application Pursuant to Section 2 of the Criminal Procedure Act, 1993)* (2010) IECCA 106.

94 *Michael McKevitt v The Director of Public Prosecutions* (2013) 22 para 30.

95 *The People at the Suit of the Director of Public Prosecutions (Application Under the Criminal Procedure Act 1993, Section 2) v Yusuf Ali Abdi* (2019) IECA 38 para 96.

96 *Ibid.* para 96.

97 See generally ss 3 and 4 of the Act.

98 *The People (At the Suit of the Director of Public Prosecutions v Anthony Buck* [2020] IESC 16.

the appeal, the following provisions of this section shall apply. (2) The Minister for Justice shall make or cause to be made such inquiries as he considers necessary and — (a) if he is of opinion either — (i) that the matters dealt with in the petition could appropriately be dealt with by way of an application to the Court pursuant to section 2, or (ii) that a case has not been made out that a miscarriage of justice has occurred and that no useful purpose would be served by further investigation, shall inform the petitioner accordingly and take no further action, and (b) in any other case, shall recommend to the Government either — (i) that it should advise the President to grant a pardon in respect of the offence of which the applicant was convicted, or (ii) that it should appoint a committee pursuant to section 8 to inquire into and report on the case.

Unlike under section 2 of the Act, where the convicted person can make an application to Court on the ground that that his conviction or sentence was a miscarriage of justice, in the case of section 7 such a person can only ask a pardon in relation to the conviction. This is the case although Article 13(6) of the Constitution empowers the President to pardon any person or to communicate any sentence. The definitions of “new facts” and “newly discovered fact” under section 7 are identical to those under section 2 of the Act.⁹⁹ The Supreme Court held that the executive has a right to “commute a sentence in whole or in part.”¹⁰⁰ However, if the Minister of Justice is of the view that the petitioner’s case should be handled by a Court under section 2 or that it is not an appropriate case in which to advise the President to grant the pardon, he/she shall inform the petitioner and take no further action. It is up to the petitioner to decide whether or not to make an application to Court under section 2. However, should the Minister be of the view that the petition is meritorious, he/she has two options at his/her disposal: either to recommend to the government to advise the President to pardon the petitioner; or to recommend to the government to appoint a committee to inquire and report on the case. The committee’s role is to advise the government whether in its opinion (that is in the Committee’s opinion) “the President should be so advised.”¹⁰¹ However, since a prisoner does not have “a substantive right to remission of his sentence,”¹⁰² he/ she also does not have a right to be pardoned by the President. The President and the Minister have “a very wide executive discretion” on the issue of pardon.¹⁰³ However, the exercise of such powers is not beyond judicial scrutiny. The High Court held that the exercise of the executive power to pardon offenders or remit sentences “can only be criticised by the courts if they are carried out in “a capricious, arbitrary or unjust way.”¹⁰⁴ Only the President has the power to pardon and cannot delegate it to the Minister of Justice.¹⁰⁵ The effect of a pardon is to nullify the conviction.¹⁰⁶ Once a Court has found that there was a miscarriage of justice and the conviction has been quashed or the President has pardoned the petitioner on the ground that there was a miscarriage of justice, the issue of compensation comes into the picture.

99 See s 7(3) and (4).

100 *Michael Lynn v The People (At the Suit of the Director of Public Prosecutions), The Minister for Foreign Affairs and Trade, The Attorney General and Ireland Respondents* [2019] IESCDET 238 para 9.

101 Section 8(1).

102 *Paul O’Shea v The Minister for Justice and Equality and the Governor of Shelton Abbey and the Attorney General and Ireland* [2015] IEHC 636 para 21.

103 *Michael Mchugh v The Governor of Portlaoise Prison and the Minister for Justice, Equality and Law Reform and the Irish Prison Service* [2015] IEHC 641 para 29.

104 *Liam Grogan v The Parole Board and the Minister for Justice, Equality and Law Reform* [2008] IEHC 204 para 6.

105 *Jonathon Caffrey v Minister for Justice and Law Reform, Ireland and the Attorney General and the Parole Board; John Coughlan v Minister for Justice and Law Reform, Ireland and the Attorney General and the Parole Board* [2012] IEHC 313, 4.

106 *Noel Callan v Ireland and the Attorney General* [2011] IEHC 190, 3.

3 COMPENSATION FOR MISCARRIAGE OF JUSTICE

The fact that a person's conviction has been quashed may not be sufficient remedy. It could be that he/she would like to be compensated for the income he/she lost during incarceration and for the emotional and physical suffering occasioned by the miscarriage of justice. Thus, section 9 of the Act provides that:

(1) Where a person has been convicted of an offence and either — (a) (i) his conviction has been quashed by the Court on an application under section 2 or on appeal, or he has been acquitted in any re-trial, and (ii) the Court or the court of re-trial, as the case may be, has certified that a newly discovered fact shows that there has been a miscarriage of justice, or (b) (i) he has been pardoned as a result of a petition under section 7, and (ii) the Minister for Justice is of opinion that a newly-discovered fact shows that there has been a miscarriage of justice, the Minister shall, subject to subsections (2) and (3), pay compensation to the convicted person or, if he is dead, to his legal personal representatives unless the non-disclosure of the fact in time is wholly or partly attributable to the convicted person.

The Court of Criminal Appeal held that section 9 of the Act is meant to give effect to Article 14(6) of the ICCPR.¹⁰⁷ The Criminal Procedure Act was enacted in 1993 before Ireland ratified Protocol No.7 to the Convention for the Protection of Human Rights and Fundamental Freedoms in 2001. However, Ireland had signed this Protocol in December 1984. This could explain why in *Michael O'Callaghan v Ireland and the Attorney General*¹⁰⁸ the Court of Appeal held that the Criminal Procedure Act was “specifically introduced” so that Ireland would comply with its obligation under Article 3 of Protocol 7 to the European Convention on Human Rights.¹⁰⁹

There are three circumstances in which a person qualifies for compensation for miscarriage of justice. First, if that person's conviction has been quashed by a court on the ground “that a newly discovered fact shows that there has been a miscarriage of justice,” that person qualifies for compensation. As the High Court held in *The People (at the Suit of the Director of Public Prosecutions) (In the Matter of an Application Under the Criminal Procedure Act 1993, Section 9) v Yusuf Ali Abdi*,¹¹⁰ “[t]here must be a relationship between the “newly-discovered fact” and “miscarriage of Justice”. The one must demonstrate the other, and it may be that the form of demonstration is cause and effect.”¹¹¹ There are three situations under this ground (under section 9(1)(a)). The first situation is that a person will qualify for compensation if the conviction was quashed based on an application under section 2 of the Act. The conviction is thus quashed outside the normal appeal process. That is, after his/her conviction has been confirmed by the final appellate court. This is the situation contemplated under Article 14(6) of the ICCPR and Article 3 of Protocol No. 7. This observation is also supported by the Explanatory Report on Article 3 of Protocol No. 7.¹¹²

The European Court of Human Rights has explained, based on the Explanatory Report, that Article 3 of the Protocol No. 7 does not apply to cases where a conviction has been reversed on appeal.¹¹³ The Human Rights Committee has come to the same conclusion when interpreting

107 *The Director of Public Prosecutions v Feichin Hannon* (2009) IECCA 43, 4.

108 *Michael O'Callaghan v Ireland and the Attorney General* 180.

109 *Ibid.* para 54. See also para 67.

110 *The People (At the Suit of the Director of Public Prosecutions) (In The Matter of an Application Under the Criminal Procedure Act 1993, Section 9) v Yusuf Ali Abdi* [2020] IEHC 434.

111 *Ibid.* para 9.

112 Paragraph 22.

113 See for example, *Matveyev v. Russia* (Application no. 26601/02) (3 July 2008).

Article 14(6) of the ICCPR.¹¹⁴ In *The Director of Public Prosecutions v Feichín Hannon*¹¹⁵ the Court of Criminal Appeal referred to Article 14(6) of the ICCPR, Article 3 of Protocol No.7 and to the Explanatory Report on Protocol No.7 and held that the international instruments “require compensation of a person who is ‘reconnu innocent’ [recognised to be innocent], and that phrase is of course helpful in the construction of those Articles.”¹¹⁶ Thus, for the court to find that there was a miscarriage of justice, there is no requirement that the accused’s trial was unfair or that the state was culpable.¹¹⁷ Therefore, “[s]ection 9(1) does not require that the finger of blame must be pointed at any person or thing.”¹¹⁸

The second situation under section 9(1)(a) in terms of which a person qualifies for compensation if the court certifies that “a newly discovered fact shows that there has been a miscarriage of justice” and where the conviction has been quashed on appeal. And the third situation is where a person has been acquitted after a retrial. An acquittal under section 9 of the Act should be given its ordinary meaning.¹¹⁹ These two cases are, strictly speaking, not contemplated under Articles 14(6) of the ICCPR and 3 of Protocol No. 7. In these cases, the state compensates a person because he/she, for example, should not have been prosecuted for the offence in question.

There are thus two separate processes; the first process is for the applicant to proceed under section 2 of the Act and ask a court to quash his/her conviction on the basis that there was a miscarriage of justice. Once that process has been completed, the applicant has to make another application to court under section 9 of the Act for the court to “certify that a newly discovered fact shows there has been a miscarriage of justice” for the applicant to be compensated.¹²⁰ However, “[n]ot all appellants who succeed in an appeal on the basis that some ‘newly-discovered fact’ has emerged become entitled to a certificate” to the effect that he/she should be compensated for a miscarriage of justice.¹²¹ In *The People (at the Suit of the Director of Public Prosecutions v Anthony Buck*¹²² the Supreme Court explained the relationship between section 2 and 9 of the Act. The Court held that:

A finding of a miscarriage of justice under s 2 on the basis of a new fact does not amount to a finding that the person tried and convicted was innocent. That requires an additional level of proof. Hence the test for obtaining a certificate from the court under s 9 differs from that under s 2. The s 9 procedure requires more than the quashing of a conviction or, on a retrial ordered under a miscarriage of justice application, the acquittal of the accused. A finding is required that a miscarriage of justice has occurred. This is a civil procedure where factual innocence

114 See *Uebergang v Australia*, Comm. 963/2001 para 4.3; *Irving v Australia*, Comm. 880/1999 (HRC 2002) para 8.4; *W.J.H. v Netherlands* Comm. 408/1990, (HRC 1992) para 6.3; *Wilson v The Philippines*, Comm. 868/1999, (HRC 2003) para 6.6; *Anderson v Australia*, Comm. 1367/2005, (HRC 2006) para 7.5.

115 *The Director of Public Prosecutions v Feichín Hannon* (2009) IECCA 43.

116 *Ibid.* 5–6.

117 See *The People (At the Suit of the Director of Public Prosecutions) (in the Matter of an Application Under The Criminal Procedure Act 1993, Section 9) v Yusuf Ali Abdi* [2020] IEHC 434 para 29. In *Abdi v Director of Public Prosecutions* [2022] IESC 24 para 48, the Supreme Court held that “if innocence is not demonstrated in consequence of an acquittal following on the discovery of a new fact, then for a certificate of a miscarriage of justice to issue, what is required is that the accused demonstrate such bad faith on the part of the State authorities ... that undermines the justice system, or such a failure in the administration of justice ... due to error that the prosecution is fundamentally undermined.”

118 *The People (At the Suit of the Director of Public Prosecutions) (in the Matter of an Application Under the Criminal Procedure Act 1993, Section 9) v Yusuf Ali Abdi* [2020] IEHC 434 para 31.

119 *Ibid.* para 12, the High Court held that “Section 9(1) of the 1993 Act does not give any special meaning to the term “acquittal” which departs from the ordinary meaning as understood by lawyers.”

120 *Martin Conmey v The Director of Public Prosecutions* [2014] 31 para 1.

121 *The People (At the Suit of the Director of Public Prosecutions) (in the Matter of an Application under the Criminal Procedure Act 1993, Section 9) v Yusuf Ali Abdi* [2020] IEHC 434 para 24.

122 *The People (At the Suit of the Director of Public Prosecutions v Anthony Buck* [2020] IESC 16.

is to be established or a finding is made that the prosecution should never have been brought because there was never any credible evidence implicating the accused.¹²³

Another observation to make about section 9 is that a person also qualifies for compensation if such a person has been pardoned by the President “and the Minister for Justice is of opinion that a newly-discovered fact shows that there has been a miscarriage of justice.”¹²⁴ Thus, the mere fact that a person has been pardoned by the President does not mean that he/she qualifies for compensation. In addition to the pardon, the Minister of Justice also has to be satisfied that “a newly-discovered fact shows that there has been a miscarriage of justice.” This situation is contemplated in Articles 14(6) of the ICCPR and 3 of Protocol No.7. This is clearly explained in the Explanatory Report on Protocol No.7.¹²⁵

In *The People (at the Suit of the Director of Public Prosecutions) v Nora Wall*¹²⁶ the Court of Criminal Appeal referred to section 9 of the Act and to earlier case law and held that “[a]n application pursuant to s.9 of the Act is a civil claim in which the onus of proving that a newly discovered fact shows there has been a miscarriage of justice rests on the applicant” and that “[t]he standard of proof is the same standard as in any civil claim, namely the balance of probabilities.”¹²⁷ A person can invoke section 9 even if the newly discovered fact came to his attention after serving his sentence.¹²⁸ In this case the challenge is only limited to the conviction.

Once the Court has certified that a newly discovered fact shows that there has been a miscarriage of justice or the Minister of Justice, in the case of where a person has been pardoned, is of the opinion that that a newly discovered fact shows that there has been a miscarriage of justice, the Minister of Justice is obliged to compensate the person in question or if he/she is dead, his/her “legal personal representatives unless the non-disclosure of the fact in time is wholly or partly attributable to the convicted person.”¹²⁹ For the Minister to decline compensating the person in question on this ground, it has to be shown that indeed the non-disclosure of that fact is attributable to him and not to any other person. This condition is also contemplated under Article 14(6) of the ICCPR and Article 3 of Protocol No.7. This is clearly explained in the Explanatory Report on the Protocol which provides that “there is no right to compensation under this provision if it can be shown that the non-disclosure of the unknown fact in time was wholly or partly attributable to the person convicted.”¹³⁰

Another observation to be made about section 9 is that the person has “the option of applying for compensation or of instituting an action for damages arising out of the conviction.”¹³¹ The Minister can only pay compensation if the application is made to him/her.¹³² The mere fact that a court has certified that there was a miscarriage of justice or that the person has been pardoned on the ground that there was a miscarriage of justice does not automatically mean that such a person will be compensated. For him/her to be compensated, he/she must make an application to the Minister. Should the person make an application to Court, the Court will “assess damages pursuant to section 9(2) of the Act in respect of the period commencing on the date on which

123 *Ibid.* para 41.

124 Section 9(1)(b)(ii).

125 Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms Strasbourg (22.XI.1984) para 23.

126 *The People (At the Suit of the Director of Public Prosecutions) v Nora Wall* [2005] IECCA 140.

127 *Ibid.* para 6.

128 *Francis Shortt v Commissioner of an Garda Siochana, Ireland and the Attorney General* 2005 IEHC 311 para 1.

129 Section 9(1).

130 Paragraph 24.

131 Section 9(2).

132 Section 9(3).

the Plaintiff was charged.”¹³³ The assessment should not be limited “only to matters arising following the conviction.”¹³⁴ If the applicant argues that he/she should be awarded special damages, he/she should adduce evidence of the exact loss that he/she incurred as a result of the wrongful conviction. That is, for the court to award special damages, it has to be “satisfied that the Plaintiff has established in evidence causation, that is the required factual nexus between the events of which he complains, principally his conviction, and the’ loss that he incurred.”¹³⁵

The court will also award the applicant general damages where the police violated his/her constitutional rights before his/her arrest which preceded the wrongful conviction. If the plaintiff does not adduce evidence to satisfy court the exact amount he/she should be awarded for the breach of his constitution right, the court will determine the amount.¹³⁶ This means that an application for compensation for miscarriage of justice could also include a claim for human rights violations that occurred during the investigation before the plaintiff was charged. Apart from the general damages that relate to human rights violations, the court may also award the plaintiff general damages for the pain, suffering and embarrassment he/she went through as a result of the prosecution, the conviction and the serving of the sentence.¹³⁷ Apart from special and general damages, a person who has suffered a miscarriage of justice can also apply for aggravated and exemplary damages. In *Francis Shortt v Commissioner of an Garda Síochána, Ireland and the Attorney General*¹³⁸ the Court held that “[i]t can be said that both aggravated and exemplary damages are awarded in respect of the external circumstances accompanying the cause of action. The former are measured on the basis of compensation.”¹³⁹ The Supreme Court explained the circumstances in which exemplary damages may be awarded.¹⁴⁰

Although the Court can award different types of damages, it “must also be conscious that it does not award double compensation.”¹⁴¹ However, if the plaintiff is not satisfied with the damages awarded to him/her by the High Court, he/she may appeal to the Supreme Court which can set aside the High Court’s order and increase the damages.¹⁴² The Act does not stipulate the maximum amount of damages that a court can order the Minister to compensate the applicant. This ensures that a court takes the unique circumstances of each case into consideration when assessing and awarding damages.

Should a person make an application to the Minister, the Minister determines the amount to pay to him/her.¹⁴³ However, section 9(5) of the Act provides that “[a]ny person who is dissatisfied with the amount of compensation determined by the Minister may apply to the High Court to determine the amount which the Minister shall pay under this section and the award of the High Court shall be final.” This means that in the event of a disputed amount, it is the High Court and not the Minister who has the final say. A person who claims that he/she has suffered

133 *Francis Shortt v Commissioner of an Garda Síochána, Ireland and the Attorney General* 2005 IEHC 311 para 3.

134 *Ibid.* para 3.

135 *Ibid.* para 71.

136 *Ibid.* para 86.

137 *Francis Shortt v Commissioner of an Garda Síochána, Ireland and the Attorney General* 2005 IEHC 311 para 87–89.

138 *Ibid.*

139 *Ibid.* para 89–90.

140 *Francis Shortt v The Commissioner of an Garda Síochána, Ireland and the Attorney General* (2007) IESC 9 12.

141 *Francis Shortt v Commissioner of an Garda Síochána, Ireland and the Attorney General* 2005 IEHC 311 para 91.

142 In *Francis Shortt v The Commissioner of an Garda Síochána, Ireland and the Attorney General* (2007) IESC 9 (the Supreme Court increased the amount from €1,923,871 to €4,623,871.00).

143 Section 9(4).

a miscarriage of justice can only claim compensation on the basis of section 9 of the Act. The Court of Appeal held that “there is no cause of action entitling a person to damages for a ‘miscarriage of justice’ which exists outside and independently of the Criminal Procedure Act, 1993 and which stems from the common law or the Constitution.”¹⁴⁴ This is so because “there is nothing in the Criminal Procedure Act, 1993, either by virtue of its content or the circumstances of its enactment, which suggests that the Act was giving partial recognition to a right which was of more general origin and scope.”¹⁴⁵ The court added that section 9 of the Act was enacted to give effect to the right under Article 3 of Protocol No.7.¹⁴⁶ Therefore, there is no “general right to damages for a “miscarriage of justice”.”¹⁴⁷ In the same vein, there is no “constitutional right to damages for miscarriage of justice.”¹⁴⁸ However, a person still has a constitutional right to litigate if he argues that his right to a fair trial was violated.¹⁴⁹ Even in this case, he/she can only be compensated in limited circumstances where a judicial error led to his/her wrongful conviction.¹⁵⁰ It is evident that the right to be compensated for miscarriage of justice is neither a constitutional nor a common law right. It is a statutory right of international origin. This is so because it was included in a statute which domesticated Ireland’s international treaty obligation.

A person can only be compensated if the newly discovered fact shows that there was a miscarriage of justice. Section 9(6)(a) and (b) of the Act defines a newly-discovered fact. This definition will not be repeated here because, the definition of a newly-discovered fact under section 9(1)(a) of the Act is identical to the one under section 2(4) of the Act. This means that the discussion of section 2(4) above is applicable here. The definition of a newly-discovered fact under section 9(1)(b) of the Act is more or less the same as the one under section 9(1)(a), the only difference being that each definition is applicable to different circumstances.¹⁵¹ Case law from Irish courts shows that the following have been admitted as some of the newly discovered facts for the purpose of section 9(1) of the Act: that the complainant had a history of making false allegations against people; that because of her psychiatric condition, her evidence was based on flashbacks;¹⁵² the prosecution did not disclose to the defence that one of the main prosecution witnesses was unreliable and had a history of making false allegations of rape or sexual assault against people;¹⁵³ one of the prosecution witnesses later confided in her friend that she had lied at the accused’s trial and her evidence had been relied on to convict the accused;¹⁵⁴ the police had planted drugs on the plaintiff’s property leading to his conviction for dealing in drugs;¹⁵⁵ and that the applicant was convicted of an offence when he was a mental

144 *Michael O’Callaghan v Ireland and the Attorney General* para 53.

145 *Ibid.* para 54.

146 *Ibid.* para 54.

147 *Ibid.* para 59.

148 *Ibid.* para 61.

149 *Ibid.* paras 61–73.

150 *Ibid.* para 74.

151 *The People (At the Suit of the Director of Public Prosecutions) (In the Matter of an Application Under the Criminal Procedure Act 1993, Section 9) v Yusuf Ali Abdi* [2020] IEHC 434 para 25.

152 *The People (At the Suit of the Director of Public Prosecutions) v Nora Wall* [2005] IECCA 140 para 8(1).

153 *Ibid.* para 8(2).

154 *Ibid.* paras 8(3) and 13. The same witness came to court and confirmed that she had lied under oath to have the accused convicted because the accused had mistreated her in the past and she wanted him to suffer. See also *Francis Shortt v Commissioner of an Garda Siochana, Ireland And The Attorney General* 2005 IEHC 311 para 17 (where the estranged ex-wife the one of the prosecution witnesses informed the Court that he had told her that he had perjured himself at the plaintiff’s trial).

155 *Francis Shortt v Commissioner of an Garda Siochana, Ireland And The Attorney General* 2005 IEHC 311

patient (insane) at the time he committed that offence.¹⁵⁶

The Act does not define what amounts to a miscarriage of justice. Because of this courts are reluctant to define this term.¹⁵⁷ However, as illustrated in *The People (at the Suit of the Director of Public Prosecutions) v Nora Wall*¹⁵⁸ the Court of Criminal Appeal referred to earlier case law gave some of the examples of miscarriage of justice.¹⁵⁹

In *Martin Conmey v the Director of Public Prosecutions (Application Pursuant to Section 9 of the Criminal Procedure Act, 1993)*¹⁶⁰ the Court reiterated that under section 9 of the Act, the court is not limited to establishing whether the applicant was innocent of the offence of which he/she was convicted. Rather, “the question which this Court must address, and the only question which it can address, was as to whether the original conviction of the applicant was a miscarriage of justice.”¹⁶¹ The Court added that “[t]he concept of miscarriage emphatically does not involve positive proof that the applicant is factually innocent of the offence.”¹⁶² Requiring proof of innocence would be “impossible” in a majority of cases.¹⁶³ In *The People (at the Suit of the Director of Public Prosecutions) (in the Matter of an Application under the Criminal Procedure Act 1993, Section 9) v Yusuf Ali Abdi*¹⁶⁴ the High Court held that “[t]he phrase ‘newly-discovered fact’ is not confined to new evidence having a bearing on proof of guilt of the accused. It may relate to other matters which undermine confidence in the process or result of the original trial.”¹⁶⁵

For a person to be compensated for miscarriage of justice, it is not a prerequisite that he/she should have been innocent of the offence of which he/she was convicted.¹⁶⁶ Therefore, when a court is called upon to determine whether or not there was a miscarriage of justice, its inquiry is “not confined to the question of actual innocence but extend[s] to the administration of the justice system itself.”¹⁶⁷ This means that a court may find that there was a miscarriage of justice and order that the applicant should be compensated “even if there was involvement by the applicant” in the commission of the offence.¹⁶⁸ This approach is more generous than the one contemplated under Article 3 of Protocol No. 7 as clarified in Explanatory Report on the Protocol.¹⁶⁹

Strictly speaking, under Article 3 of the Protocol, states are obliged to pay compensation where

156 *The People (At the Suit of the Director of Public Prosecutions) (In the Matter of an Application Under the Criminal Procedure Act 1993, Section 9) v Yusuf Ali Abdi* [2020] IEHC 434.

157 *Ibid.* para 21.

158 *The People (At the Suit of the Director of Public Prosecutions) v Nora Wall* [2005] IECCA 140.

159 *Ibid.* para 6. See also *Martin Conmey v The Director of Public Prosecutions* [2014] 31 paras 25–26

160 *Martin Conmey v The Director of Public Prosecutions* [2014] 31.

161 *Ibid.* para 29.

162 *Ibid.* para 37.

163 *Ibid.* para 37. See also *The People (At the Suit of the Director of Public Prosecutions) v Nora Wall* [2005] IECCA 140 para 6(5).

164 *The People (At the Suit of the Director of Public Prosecutions) (In the Matter of an Application Under The Criminal Procedure Act 1993, Section 9) v Yusuf Ali Abdi* [2020] IEHC 434.

165 *Ibid.* para 30.

166 However, the reasoning of the Court of Criminal Appeal in some cases could easily be interpreted as equating miscarriage of justice with innocence. See for example, *John Gerard McDonagh v The Commissioner of an Garda Síochána, Assistant Commissioner John O’Mahoney, Ireland and the Attorney General* [2015] IEHC 390 para 72. For the position in the United Kingdom, see *Adan, R (On the Application Of) v The Secretary of State for Justice* [2023] EWHC 3059 (Admin) (29 November 2023).

167 *The People at the Suit of the Director of Public Prosecutions (Application Under the Criminal Procedure Act 1993, Section 2) v Yusuf Ali Abdi* (2019) IECA 38 para 14.

168 *Ibid.* para 14.

169 Paragraph 25.

the person was clearly innocent of the offence of which he/she was convicted. However, nothing prevents states from extending the right to compensation to those who were not clearly innocent of the offence. The latter approach is the one followed in Ireland. In other words, Ireland has gone above and beyond its obligation under Article 3 of the Protocol. This is because, as the Supreme Court explained in *Abdi v Director of Public Prosecutions*,¹⁷⁰ Articles 14(6) of the ICCPR and 3 of Protocol No. 7, establish “a minimum standard.”¹⁷¹ A state party has a right to “go further and to expand the definition” of a miscarriage of justice beyond the minimum requirement under the treaties it has ratified.¹⁷² This is in line with the drafting history of Article 14(6) of the ICCPR which shows that the argument that a person only qualifies for compensation if he/she was innocent of the offence of which he/she was convicted, was rejected by the drafters of Article 14(6).¹⁷³ The Court has thus found that there was a miscarriage of justice (because there was no evidence that the applicant had committed the offence).¹⁷⁴

4 CONCLUSION

In this article the measures that Ireland has put in place to deal with the issue of wrongful convictions or miscarriages of justice were discussed and it was shown that there are three circumstances in which a person qualifies for compensation for miscarriage of justice. One, if that person’s conviction has been quashed by a court on the ground “that a newly discovered fact shows that there has been a miscarriage of justice.” Two, if the Court certifies that “a newly discovered fact shows that there has been a miscarriage of justice’ and where the conviction has been quashed on appeal. Three, where a person has been acquitted after a retrial. Articles 14(6) of the ICCPR and 3 of Protocol No. 7 do not require the Republic of Ireland to compensate the victims of miscarriage of justice in the second and third scenarios. In other words, international law requires the Republic of Ireland to compensate victims of a miscarriage of justice who fall under the first scenario above. This means that the Republic of Ireland’s law goes above and beyond what is required of it in international law. South Africa, being a state party to the ICCPR, may have to follow a similar approach when it enacts legislation dealing with compensation for miscarriage of justice.¹⁷⁵ It has been illustrated that the courts have developed a rich jurisprudence on the relevant sections of the Criminal Procedure Act explaining, *inter alia*, the circumstances in which a person qualifies for compensation for miscarriage of justice. This jurisprudence has also dealt with other issues such as the meaning of miscarriage of justice, the types of damages that a person who has suffered a miscarriage of justice may be awarded; the burden of proof under the Act; and the admissible evidence to prove a miscarriage of justice.

170 *Abdi v Director of Public Prosecutions* [2022] IESC 24.

171 *Ibid.* para 42.

172 *Ibid.* para 42.

173 See generally, Mujuzi “The Right to Compensation for Wrongful Conviction/Miscarriage of Justice in International Law” 2019 *International Human Rights L Review* 215–244.

174 *The People (At the Suit of the Director of Public Prosecutions) v Nora Wall* [2005] IECCA 140 para 14.

175 For the weaknesses in South Africa’s laws on compensation for wrongful convictions, see Mujuzi “Compensation for Wrongful Conviction in South Africa” 2023 *Obiter* 50–72.