

# The right to access DNA testing by alleged innocent victims of wrongful convictions in the United Kingdom?

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*Abstract* This article identifies two distinct cases of alleged wrongful conviction that were investigated by the University of Bristol Innocence Project (UoBIP) where the Criminal Cases Review Commission (CCRC), the official body that deals with alleged miscarriages of justice in England, Wales and Northern Ireland, has failed to utilise DeoxyriboNucleic Acid (DNA) testing that may exonerate the applicant: a case where numerous crime scene exhibits exist that has never been subjected to any DNA testing; and a case that has not been subjected to the full range of DNA tests that could be conducted to validate the applicant's claim of factual innocence. It draws from the right to share the benefits of scientific advancements contained in the International Bill of Rights to argue that access to official DNA testing for alleged innocent victims of wrongful convictions is vital to determine the reliability of contested

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convictions in the UK. From this perspective, the CCRC can be conceived to have denied the applicants in the cases cited the opportunity to prove their innocence. It is concluded that the interests of justice require that all attempts must be made to ensure the reliability of criminal convictions, meaning in this context that convicted persons maintaining innocence must have access to the most appropriate and up-to-date DNA techniques that could help exonerate them if they are innocent and even lead to the conviction of the real perpetrators of the crimes that they were convicted of.

*Keywords* International Bill of Rights; Right to benefit from scientific advancements; Criminal Cases Review Commission; Exoneration; DNA testing; University of Bristol Innocence Project

Whether one defines a ‘miscarriage of justice’ as convictions that are ‘unsafe’ in law as required by criminal appeal legislation or a ‘wrongful conviction’ in terms of the wrongful conviction of the factually innocent as understood in a lay or public discourse sense,<sup>1</sup> a range of rights issues can be conceived as coming into play. For instance, the violation of the fundamental *right to liberty* enshrined in Article 5 of the European Convention on Human Rights (ECHR) ratified by the introduction of the Human Rights Act 1998 (HRA) is self-evident where wrongful incarceration has resulted from a miscarriage of justice. Further, the *torture, inhuman and degrading treatment* suffered by many wrongful conviction victims brings Article 3 of the ECHR into view.<sup>2</sup> Indeed, even where the miscarriage of justice did not lead to incarceration, the traumatic ordeal of the wrongful arrest, prosecution and conviction, and the social stigma and damage to reputation that often accompany a criminal conviction, can leave permanent scars, not only in a literal physical sense but, also, in a social, psychological and financial sense.<sup>3</sup> Moreover, the many thousands of people who overturn their miscarriages of justice through a successful appeal against their

1 For various discussions on the problem of defining ‘miscarriages of justice’, see M. Naughton, *Rethinking Miscarriages of Justice* (Palgrave Macmillan: Basingstoke; New York, 2007) 14–36; R. Nobles and D. Schiff, ‘Miscarriages of Justice: A Systems Approach’ (1995) 58 MLR 299; R. Nobles and D. Schiff, *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (Oxford University Press: Oxford, 2000); C. Walker, ‘Introduction’ in C. Walker and K. Starmer (eds.), *Justice in Error* (Blackstone Press: London, 1993); S. Greer, ‘Miscarriages of Criminal Justice Reconsidered’ (1994) 57 MLR 1.

2 This is often exacerbated by the pressures of the prison and parole systems for prisoners maintaining innocence to admit guilt to crimes they claim they have not committed, see M. Naughton, ‘Why the Failure of the Prison Service and the Parole Board to Acknowledge Wrongful Imprisonment is Untenable’ (2005) 44(1) *Howard Journal of Criminal Justice* 1–11; M. Naughton, ‘Does the NOMS (National Offender Management Service) Risk Assessment Bubble Have to Burst for Prisoners who May Be Innocent to Make Progress?’ (2009) 48(4) *Howard Journal of Criminal Justice* 357–72; P. Hill, ‘The Parole Deal’, *Inside Time* (The New Bridge: London, 2001); A. Samuels, ‘In Denial of Murder: No Parole’ (2003) 42(2) *Howard Journal of Criminal Justice* 176–9; A. Thornton, ‘Prisoners Maintaining their Innocence’ *Board Sheet* (2009).

3 Naughton, above n. 1 at 161–86.

conviction each year in the United Kingdom stand testimony to the inherent and widespread unfairness of the way they are convicted, potentially calling the legitimacy of the entire criminal justice system into question.<sup>4</sup>

However, these apparent breaches of human rights provisions are only discovered *retrospectively*, and are not officially recognised unless and until alleged victims of miscarriages of justice/wrongful conviction and/or imprisonment overturn their convictions through a successful appeal. Until such time as convictions are overturned in the appeal courts, the treatment of victims of miscarriages of justice/wrongful conviction is deemed to be legitimate punishment for crimes that they are legally guilty of.<sup>5</sup>

This, then, raises a crucial question that this article will specifically address, namely, the issue of the rights that *might* apply to alleged innocent victims when they are seeking to overturn their wrongful convictions.

On this matter, Article 27(1) of the Universal Declaration of Human Rights (UDHR)<sup>6</sup> states that:

Everyone has the right ... to share in scientific advancement and its benefits.

This is reinforced by Article 15(1)(b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>7</sup> which recognises the right of everyone:

To enjoy the benefits of scientific progress and its applications.

These provisions contained in the International Bill of Rights<sup>8</sup> have been described by William Schabas<sup>9</sup> as relatively neglected and under-developed human rights at

4 Ibid. at 37–52.

5 M. Naughton, 'Factual Innocence versus Legal Guilt', *Prison Service Journal*, Issue 177, May 2008, 32–7.

6 Universal Declaration of Human Rights (1948), available at <<http://www.un.org/en/documents/udhr/>>, accessed 23 July 2010.

7 International Covenant on Economic, Social and Cultural Rights (ICESCR) (1976), available at <<http://www2.ohchr.org/english/law/cescr.htm>>, accessed 23 July 2010.

8 The International Bill of Rights also includes the International Covenant on Civil and Political Rights (ICCPR) which is not referenced in this analysis, see International Covenant on Civil and Political Rights (ICCPR) (1976), available at <<http://www2.ohchr.org/english/law/ccpr.htm>>, accessed 23 July 2010.

9 W. Schabas, 'Study of the Right to Enjoy the Benefits of Scientific and Technological Progress and Its Applications' in Y. Donders and V. Volodin (eds.), *Human Rights in Education, Science and Culture: Legal Developments and Challenges* (UNESCO: Paris; Ashgate: Farnham, 2008) 273–9.

the ‘tail end of Universal Declaration of Human Rights’. Yet, Schabas<sup>10</sup> highlighted how the right to benefit from scientific progress combines with other rights such as the right to health, to food, to clothing, to housing and to education, and how it is also relevant to the civil and political right to receive and impart information.

In illustration, Schabas<sup>11</sup> made reference to the centrality of advancements of medical science in Article 12 of the ICESCR, the ‘right of everyone to the enjoyment of the highest attainable standard of physical and mental health’, such as the reduction of the stillbirth rate and infant mortality, the healthy development of the child and the need for signatory states to create conditions which would assure to all medical service and medical attention in the event of sickness.

Likewise, Schabas<sup>12</sup> observed how Article 11(2) of the ICESCR, the right ‘to be free from hunger’, is directly related to the right to share in the benefits of scientific advancements, as follows:

The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take ... the measures, including specific programmes, which are needed ... [t]o improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.<sup>13</sup>

It is crucial to note, also, that the ICESCR specifies that signatory states are required to do all that they can to afford all citizens these rights without prejudice or discrimination:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>14</sup>

10 Ibid. at 290.

11 Ibid. at 297.

12 Ibid. at 299.

13 International Covenant on Economic, Social and Cultural Rights (ICESCR) (1976), above n. 7 at Art. 11(2)(a).

14 Ibid. at Art. 2(2); see also Universal Declaration of Human Rights (1948), Art. 2, available at <<http://www.un.org/en/documents/udhr/>>, accessed 23 July 2010.

Against this background, the premise of this article is that although the right to science is not legally binding it renders a moral and political argument about the need for reliability in criminal convictions legally cognizable, thus improving the argument made here for access to official DeoxyriboNucleic Acid (DNA) testing for the purpose of challenging the reliability of contested convictions in the United Kingdom (UK). In three parts, the article, first, provides an overview of the current state of post-conviction DNA testing in the UK, contrasting it to the vibrant culture of DNA exonerations in the United States (US). Secondly, it identifies two distinct cases that were investigated by the University of Bristol Innocence Project (UoBIP)<sup>15</sup> where the Criminal Cases Review Commission (CCRC), the official body that deals with alleged miscarriages of justice in England, Wales and Northern Ireland, has failed to see the possibility of DNA exoneration: a case where numerous crime scene exhibits exist that have never been subjected to any DNA testing; and a case that has not been subjected to the full range of DNA tests that could be conducted to validate the applicant's claim of innocence. Finally, it analyses, critically, the reviews undertaken by the CCRC, highlighting the extent to which it can be conceived to have denied the applicants in the cases cited the benefits from DNA science that could prove their innocence due to the way that it is statutorily remitted. It is concluded that the interests of justice require that all attempts must be made to ensure the reliability of criminal convictions, meaning in this context that convicted persons maintaining innocence must have access to the most appropriate and up-to-date DNA techniques that could help exonerate them if they are innocent and even lead to the conviction of the real perpetrators of the crimes that they were convicted of.

### **The contrast between the US and the UK on the use of DNA testing to exonerate factually innocent victims of wrongful conviction**

The use of DNA testing in post-conviction cases to exonerate factually innocent individuals has been a widespread phenomenon in the US over the last two decades. The driver of this movement has been The Innocence Project, founded in 1992 by Barry Scheck and Peter Neufeld at the Benjamin N. Cardozo School of Law at Yeshiva University to assist prisoners who could be proven to be actually innocent through DNA testing. At the time of writing (January 2010), 249 people in the US have been exonerated by DNA testing, including 17 who served time on death row.<sup>16</sup> These successful DNA exonerations have had significant impacts on

15 University of Bristol, 'University of Bristol Innocence Project', 2010, available at <<http://www.bristol.ac.uk/law/aboutus/law-activities/innocence-project.html>>, accessed 23 July 2010. We are, respectively, the Director and the Casework Manager of the UoBIP.

16 The Innocence Project, 'About Us', 2010, available at <<http://www.innocenceproject.org/about/Mission-Statement.php>>, accessed 23 July 2010.

criminal justice reforms in the US. On a federal level, the Justice for All Act of 2004<sup>17</sup> introduced the Innocence Protection Act,<sup>18</sup> which allows all prisoners convicted of federal offences who are maintaining ‘actual innocence’ access to DNA testing if, amongst other criteria, the following are satisfied:

The specific evidence to be tested must not have been previously tested, except that testing using a newer and more reliable method of testing may be requested;

The proposed DNA testing may produce new evidence raising a reasonable probability that the applicant did not commit the offence.<sup>19</sup>

In saying this, it is acknowledged that this federal right of convicted persons maintaining innocence to access DNA testing is not uniformly applied (if at all) throughout all states,<sup>20</sup> and that there remains a continual battle to extend such a right to alleged victims of wrongful conviction equally across different states. In a recent ‘defeat’, for instance, the US Supreme Court, in the case of *District Attorney’s Office v Osborne*,<sup>21</sup> rejected a lower federal court ruling that William Osbourne, a black man in Alaska convicted in 1994 of kidnap and sexual assault of a prostitute in Anchorage, had a constitutional, due process right to access DNA testing that could exonerate him. By a 5–4 majority, the Supreme Court rejected Osbourne’s claim on the main ground that the issue of when to grant access to DNA testing should be a matter for individual states and not the federal judiciary.<sup>22</sup>

Despite this, the growing importance of the role of DNA science in the US criminal justice system can be evidenced from the institution of provisions for post-conviction DNA testing in 46 out of 50 US states.<sup>23</sup> In addition, almost US\$1.3 billion worth of funding to facilitate post-conviction DNA testing that was recently authorised by the Innocence Protection Act also demonstrates a federal commitment to exonerating the factually innocent.<sup>24</sup>

17 Justice for All Act of 2004 (H.R. 5107, Public Law 198–405).

18 Innocence Protection Act of 2004 (introduced under the Justice for All Act of 2004) Public Law 108–405.

19 Innocence Protection Act of 2004, Title IV, Subtitle A.

20 Alabama, Alaska, Massachusetts and Oklahoma are the remaining four states in the US which have yet to enact any legislation providing for post-conviction DNA testing.

21 *District Attorney’s Office v Osborne* No. 08–06 (US 18 June 2009).

22 A. Liptak, ‘Justices Reject Inmate Right to DNA Tests’, *New York Times*, 18 June 2009.

23 *Ibid.*

24 The Justice Project, ‘Innocence Protection Act’, 2009, available at <<http://www.thejusticeproject.org/national/ipa/>>, accessed 23 July 2010.

The situation in the US, however, is in sharp contrast to the ways in which claims of innocence are officially dealt with in the UK. This is despite the fact that the DNA profiling technique was first reported in 1984 by Sir Alec Jeffreys at the University of Leicester,<sup>25</sup> and at its inception, the use of DNA testing in police investigations and criminal prosecutions in the UK has been inextricably linked with preventing wrongful convictions. Indeed, the first DNA test in a criminal case in the UK exonerated the prime suspect, Richard Buckland, of the rape and murder of two 15-year-old school girls, Lynda Mann and Dawn Ashworth. Buckland had revealed knowledge of the location of Dawn Ashworth's body and admitted to her murder under police questioning.<sup>26</sup> In specific terms, Jeffreys utilised DNA extraction techniques to test semen samples from both murders and compared them against a blood sample from Buckland, which conclusively proved that both girls were killed by the same man, who was not Buckland, making him the first person to have his innocence established by DNA fingerprinting. Leicestershire Police and the Forensic Science Service (FSS) then undertook a project where 5,000 local men were asked to volunteer blood or saliva samples in the hope that they could identify the murderer. This took six months, and no matches were found. Subsequently, it was reported that a local man, Ian Kelly, had been heard to claim that he had been paid £200 for giving a sample to the project while pretending to be Colin Pitchfork. Pitchfork was arrested and a sample was found to match that of the killer.<sup>27</sup>

The Buckland/Pitchfork case illustrates the extent to which DNA fingerprinting originally worked as what might be termed science-proper, with an express attempt made to identify a true match with the person who murdered Lynda Mann and Dawn Ashworth. At the same time, the 5,000 samples that were collected from the local area to test against the semen sample can be conceived as the first steps towards a DNA database in the UK. Indeed, less than a decade after the Pitchfork conviction, the FSS established the UK National DNA Database (NDNAD) as a crime investigation tool. This currently stands as the largest DNA database in the world consisting of profiles of over 5.1 million individuals, including an estimated 20 per cent of people who are neither charged nor convicted.<sup>28</sup>

25 A. Jeffreys, V. Wilson and S. Thein, 'Hypervariable "minisatellite" Regions in Human DNA' (1984) 314 *Nature* 67-73; J. Wambaugh, *The Blooding* (Perigord Press: New York, 1989).

26 BBC News, 'DNA pioneer's "eureka" moment', 9 September 2009.

27 Forensic Science Service, 'Colin Pitchfork', 2009, available at <<http://www.forensic.gov.uk/html/media/case-studies/f-18.html>>, accessed 23 July 2010.

28 BBC News, "'Six-year limit" on innocent DNA', 11 November 2009.

The NDNAD has, on rare occasions, aided victims of wrongful conviction to prove their innocence when ‘cold case’ hits finally bring the real offenders to justice, sometimes many years, even decades, after the original crime. Fifteen years after Stephen Kiszko overturned his conviction for the murder of 11-year-old Lesley Molseed, the real perpetrator, Ronald Castree, who had evaded justice for 32 years, was finally convicted. Castree’s DNA profile, which matched with semen found at the crime scene, arrived on the NDNAD due to an arrest for an alleged rape of a prostitute in 2005.<sup>29</sup>

Similarly, some 11 years after Steven Miller, Yusef Abdullahi and Tony Paris (known as the Cardiff Three) overturned their convictions for the murder of Lynette White, a 20-year-old prostitute who had been stabbed more than 50 times in her flat in February in 1988, Jeffrey Gafoor was finally brought to justice in 2003 after advances in DNA technology led to a match between his profile and a blood speck found on a piece of cigarette wrapping in the victim’s flat.<sup>30</sup>

However, the NDNAD is mainly used at the pre-conviction stage to identify potential suspects, rather than to exonerate potentially innocent individuals post-conviction. Moreover, the above examples illustrate the rare occasions where DNA testing and the use of the NDNAD have been successfully used to find the real perpetrators of serious crimes after those originally convicted have had their convictions overturned. DNA advancements have had little effect, however, in causing convictions to be overturned. There have been to date only two known cases where convictions were overturned post-appeal on the basis of new DNA evidence, in legal terms meaning no more than that the convictions were *unsafe*.<sup>31</sup>

The first is the case of Michael Shirley who spent 16 years in prison maintaining his innocence for the murder of Linda Cook. His conviction was quashed in 2003, however, when testing of the semen found on swabs taken from the deceased yielded DNA which did not match Shirley nor the victim—new evidence which was ruled by the Court of Appeal (Criminal Division) to render his conviction ‘unsafe.’<sup>32</sup>

29 M. Wainright, ‘Net finally falls on right man’, *Guardian*, 12 November 2007.

30 J. Bennetto, ‘Convicted after 15 years: the prostitute’s killer who watched three men go to jail for his crime’, *Independent*, 5 July 2003.

31 As discussed further below, a successful appeal is not a declaration of factual innocence, but, rather, an official recognition that a conviction is unsafe in accordance with the prevailing criminal appeal criteria.

32 *R v Shirley* [2003] EWCA Crim 1976; see also P. Johnson and R. Williams, ‘Post-conviction DNA Testing: the UK’s First “exoneration” Case?’ (2004) 44(2) *Sci Justice* 77–82.



More recently, Sean Hodgson, convicted for the 1979 murder of 22-year-old Teresa De Simone, overturned his conviction in March 2009 after 27 years of wrongful imprisonment during which he had always maintained his innocence, when DNA testing of the semen sample collected at the crime scene did not match his profile.<sup>33</sup> Some six months after his successful appeal, Hodgson was completely exonerated from any involvement in the murder when DNA testing on the exhumed body of the original police suspect, David Lace, resulted in a complete match with biological samples from the crime scene.<sup>34</sup>

Whilst these cases have often been heralded as DNA ‘successes’, their exceptionality, coupled with the undue length of time taken to investigate and overturn them, demonstrates an apparent lack of proactivity by the criminal justice system to get to the truth of alleged wrongful convictions, even where both the biological evidence and the DNA technology exist to do so. Sean Hodgson’s conviction, for instance, could have been overturned more than a decade earlier if DNA tests that had been developed and were available to determine the credibility of his claim of innocence had been utilised. Instead, Hodgson spent a further 11 years in prison because the FSS incorrectly declared that all exhibits in the case were destroyed when the first request for DNA testing on the samples was made.<sup>35</sup>

Against this background, the following section draws from two case studies that derive from the investigations of the University of Bristol Innocence Project (UoBIP) that were allocated by the Innocence Network UK (INUK), an umbrella organisation that currently has 25 member innocence projects based in universities in England, Scotland and Wales.<sup>36</sup> Both cases involve prisoners maintaining innocence who are currently serving life sentences for murder and who have exhausted the normal appeals process. They illustrate the existing difficulties for convicted persons maintaining innocence to prove their claims of innocence through DNA testing. It has to be stressed, however, that in drawing from these selected case examples, we are *not* stating at this moment in time that these individuals are factually innocent of the crimes that they have been convicted of. Rather, these case examples ought to be viewed as *claims* of innocence which have the potential to be validated or disproved through DNA testing.

33 *R v Hodgson* [2009] EWCA Crim 490; BBC News, ‘Man’s 1979 murder verdict quashed’, 18 March 2009.

34 A. Jamieson, ‘Teresa de Simone murder: David Lace named as prime suspect after exhumation’, *Telegraph*, 17 September 2009.

35 S. Laville, ‘Miscarriage of justice victim served extra 11 years due to “lost” evidence’, *Guardian*, 19 March 2009.

36 Innocence Network UK, 2010, available at <<http://www.innocencenetwork.org.uk>>, accessed 23 July 2010.

## Case studies

### Neil Hurley

In August 1993, the body of 22-year-old Sharon Pritchard was found by her father lying naked and face down on the playing field of Croeserw Primary School, Croeserw, near Maesteg, South Wales. The single mother of two suffered extensive facial injuries and died as a result of a blood clot, which virtually blocked her entire air passage.<sup>37</sup>

South Wales Police immediately focused their investigation on their number one suspect, Neil Hurley. The victim's ex-partner and father of her two children, Hurley was an obvious suspect. At the time of the murder, he was on bail for charges of alleged threats of violence towards his former partner related to their acrimonious split and access to their two children—an allegation he continues to deny.<sup>38</sup>

Despite the lack of any direct or physical evidence linking Neil Hurley to the crime, he was convicted of murder and sentenced to life imprisonment the following year.<sup>39</sup> Although it was also possible to conduct DNA testing in 1994 when Sharon Pritchard was murdered, only rudimentary blood group tests were conducted on items where blood was found, none of which matched Hurley.<sup>40</sup> For the last 16 years, Hurley has steadfastly maintained his innocence and has refused to undertake any index offence-related offending behaviour programmes, thus harming his progression through the prison system and his chances of achieving parole, meaning that he may never be released.<sup>41</sup> Despite this, he continues to maintain that at the time of the murder he was at home and nowhere near the scene of crime.

Pieces of evidence have emerged since Neil Hurley's conviction which appear to substantiate his claim of innocence. These include a claim from Neil Hurley that the owner of a neighbouring pub can provide an alibi for him at the crucial time when Sharon Pritchard was murdered. In addition, witnesses who gave evidence against Hurley at trial have, subsequently, claimed that they were coerced by

37 Crown Prosecution Service, Swansea, *R v Neil Hurley* (1994) case summary.

38 *R v Neil Hurley*, unreported, judge's summing-up, 18 April–5 May 1994.

39 *Ibid.*

40 Forensic Science Service, Statement of Witness, 18 April 1994.

41 Naughton, above n. 2, 'Why the Failure of the Prison Service and the Parole Board to Acknowledge Wrongful Imprisonment is Untenable', at 1–11; 'Does the NOMS (National Offender Management Service) Risk Assessment Bubble have to Burst for Prisoners who may be Innocent to Make Progress?', at 357–72.

officers from South Wales Police into making false statements against him. It also appears that two other vital suspects may not have been sufficiently investigated by the police, one of whom had returned home with his clothing covered in blood and mud which was not scientifically tested.<sup>42</sup>

These matters were put to the CCRC in 1997 who issued a Statement of Reasons not to refer the conviction back to the Court of Appeal in 2000, concluding that:

From its review of this case, the Commission noted that there was a long history of incidents between Mr Hurley and Ms Pritchard and that the police were aware of this prior to arresting Mr Hurley. Further, during their investigation, the police received numerous calls highlighting such history. In addition to the individual matters raised the Commission considered the case holistically and concluded that there is no real possibility of the conviction being quashed were it to be referred to the Court of Appeal.<sup>43</sup>

Space does not provide for an extensive analysis of the grounds of Neil Hurley's application to the CCRC nor of the CCRC's decision. However, it seems acutely problematic for an official body charged with investigating alleged miscarriages of justice to refuse to refer his case back to the Court of Appeal merely on the basis that it was commonly known that he and his former partner had a volatile relationship following their separation and that there were (unproven) allegations that there had been previous 'incidents' between them in their struggle over access to their two children. In light of the new alibi that he presented for the time of the murder, as well as a number of retracted statements from prosecution witnesses, it seems surprising that the CCRC did not see this new evidence as sufficient to question the reliability of his conviction.

Most significantly, however, the CCRC review of Neil Hurley's claim of innocence failed to consider the possibility of DNA testing that could potentially exonerate him and possibly even lead to the conviction of the real murderer of Sharon Pritchard, despite the possible existence of over 120 exhibits that were found at the crime scene that potentially contain biological samples and have yet to be subjected to any form of DNA testing at all. The blood group tests conducted at the time of the murder investigation were highly limited in contrast with DNA testing techniques available later, and when the CCRC undertook its review. Unlike DNA testing, which could be conducted on almost any form of biological material

42 CCRC Statement of Reasons in the application of Neil Hurley, 2000, 12–14.

43 *Ibid.* at 28.

ranging from skin cells to hair, only a limited range of items, such as those containing blood or semen, can be subjected to blood group analysis. In addition, for the exhibits which did contain blood, several of the blood group tests conducted at that time by the FSS failed to yield any results due to insufficient quantity of blood, a problem that may be overcome with the use of amplification processes for DNA sampling.

Against this background, the UoBIP commissioned an initial assessment of Neil Hurley's claim of innocence by an established forensic scientist in June 2009 which confirmed the real possibility of DNA exoneration and, even, the possibility of identifying the real murderer of Sharon Pritchard should it not be Hurley. In addition to biological swabs, there were several items of clothing and accessories worn by the deceased on the night of her murder which were forcibly removed from her and strewn all over the vicinity of the crime scene which could potentially contain the DNA of the murderer. Equally crucial is a drop of blood, deemed by the forensic scientist in the original investigation to be too small to subject to blood group analysis, found on a stone near the deceased's head. Blood stain pattern assessment on the blood spot suggests that due to its appearance and the position where it was found, it is possible that the murderer could have been injured during the process and dripped her/his own blood onto the rock.<sup>44</sup>

The way that the CCRC reviewed Neil Hurley's first application in 1997<sup>45</sup> throws into sharp relief the limits of its investigatory processes<sup>46</sup> and signals the urgency of testing the available biological evidence from the murder of Sharon Pritchard to determine whether his claim of innocence is truthful. The DNA tests that can prove whether Neil Hurley is innocent or guilty could have been conducted scientifically in the late 1980s and most certainly could have been commissioned by the CCRC in the late 1990s. We are writing this in 2010 and Neil Hurley remains languishing in prison three years past his tariff date, the date that he could have been released on parole, when the means of validating his claim of innocence are still waiting to be pursued.

44 Report by Nigel Hodge, Independent Forensic Scientist, 8 June 2009.

45 For information on two further failed applications to the CCRC, see University of Bristol Innocence Project 'Application to Criminal Cases Review Commission on behalf of Neil Hurley', 2010, available at <<http://www.bris.ac.uk/law/aboutus/law-activities/newsitems/index.html>>, accessed 1 September 2010.

46 See, e.g., D. Eady, 'The Failure to Live Up to its Stated Values? The Case of Michael Attwooll and John Roden' in M. Naughton (ed.), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan: Basingstoke; New York, 2009) 59–76; A. Green, 'Challenging the Refusal to Investigate Evidence Neglected by Trial Lawyers' in Naughton, *ibid.* at 46–58.

### Simon Hall

Simon Hall was convicted in 2003 of the murder of 79-year-old Joan Albert, who was stabbed over a dozen times at her own home on the evening of Saturday, 15 December or the early hours of Sunday, 16 December 2001 in what the prosecution claimed was an interrupted burglary. The only physical evidence against Hall at trial was circumstantial. At his addresses and in his cars were found fibres which an expert witness from the FSS claimed to be 'indistinguishable' from those found at the crime scene and on the victim's body. Apart from this, the two main planks of the prosecution's case against Hall were first, some financial debts as a claimed motive for the burglary and, second, the fact that he had the opportunity to commit the crime since he lacked an alibi between 5.30 am and 6.15 am on Sunday, 16 December. This was the precise time at which the prosecution claimed Joan Albert was murdered.<sup>47</sup>

There were a number of issues argued at trial by the defence that call into question the prosecution case against Simon Hall. First, no source of the fibres has been found and it has never been established how common or uncommon the fibres found at the crime scene and at Hall's addresses and in his cars actually are. In addition, numerous witnesses gave statements of loud noises between 1 and 2 am on Sunday, 16 December and the results of a stomach content analysis suggested a much earlier time of death while Hall was in fact with friends. Finally, none of the DNA or other forensic evidence found at the crime scene linked Hall to the murder.<sup>48</sup> Despite this, Hall's application for an appeal against his conviction was dismissed in September 2003.

The UoBIP's three-year investigation of Hall's case started in the autumn of 2006,<sup>49</sup> centering on two main approaches. First, we made a number of submissions to the CCRC from our investigations into the (un)reliability of the fibre evidence noting, in the first instance, that the description of the fibres by the forensic expert for the Crown as 'indistinguishable' did not amount to a judgment that the fibres are *identical*. Rather, it suggests that the fibres could not be distinguished with the techniques utilised by the FSS at the time of the police investigation.<sup>50</sup>

Further, we argued that even if the fibres were indeed a match, linking such a claim to a charge of murder in the absence of any other corroborative evidence presents serious problems. Fibres, unlike fingerprints or DNA, are not individually unique. One cannot tell with any certainty by looking at fibres alone exactly which

47 *R v Simon John Hall*, unreported, judge's summing-up, 27 February 2003.

48 *Ibid.*

49 See E. Smallman, 'The Innocence Squad', *The Times*, 23 April 2007.

50 UoBIP submission to the CCRC, October 2007 at 20–21.

specific piece of garment they came from. Put simply, finding two sets of fibres that ‘match’ one another is no different from encountering someone who owns the same type of garment as you do, such as a pair of trousers from a Marks & Spencer store.<sup>51</sup>

In addition to the research on the limits of the fibre evidence, the UoBIP also undertook a full investigation of the unused evidence and found two vital pieces of evidence that point to the possibility of Hall’s factual innocence: a statement from the careworker of an elderly man living 10 minutes away from the murder scene and who was also the victim of a burglary on the night/morning that Joan Albert was murdered. The careworker reported after the burglary that two kitchen knives that she used regularly in the preparation of food for her client had been stolen in the burglary. Later, when shown a picture of the murder weapon, she identified it as ‘similar to the one stolen. It appears to have the same colour handle and length of blade. It also has the same rivets on the handle’.<sup>52</sup> The UoBIP also found a schedule of unused material which showed that DNA was recovered from the knife, and that it came from ‘more than one person’.<sup>53</sup>

Despite the possibility that DNA evidence might exonerate Hall and, potentially, even identify the real murderer of Joan Albert if he is, indeed, innocent, the CCRC’s review of his case was focused mainly on the fibre evidence. This is because the CCRC tends to restrict its reviews to evidence that featured in the prosecution’s case and was part of the evidence that led to the conviction.<sup>54</sup> The rationale is that if such evidence can be undermined, the Court of Appeal may be persuaded that, in the terms of s. 2 of the Criminal Appeal Act 1968, the conviction is unsafe in law. Such are the cases that the CCRC refers back to the appeal courts. This means that innocent victims of wrongful conviction must, generally, attempt to undermine the evidence that led to the conviction, rather than explore advancements in DNA science that may become available as new techniques develop. They are, therefore, implicitly denied the human right potentially to benefit from scientific advancements that may positively prove their innocence.

Indeed, when the UoBIP raised the possibility of using Y-STR analysis,<sup>55</sup> a DNA technique that identifies male chromosomes in a mixture of male and female DNA samples, on exhibits from the crime scene, the initial response from the Case

51 Ibid.

52 Private Eye, ‘Miscarriage of Justice: A Stab in the Dark’, 1249, November 2009, 29.

53 Ibid.

54 See, e.g., M. Naughton, ‘The Importance of Innocence for the Criminal Justice System’ in Naughton, above n. 46 at 17–41.

55 UoBIP Note on Y-STR, submission to the CCRC, January 2009.

Review Manager in charge of the review at the CCRC was to decline. He could not see the relevance of our suggestion since DNA evidence did not feature in the evidence against Hall at trial.<sup>56</sup> We subsequently learned from the CCRC's Statement of Reasons that it considered that analysis of the exhibits using Y-STR was 'not feasible' since the original analyses conducted through the standard SGM Plus profiling method did not indicate the presence of a mixture of male and female DNA profiles. The forensic scientist used by the prosecution at the original trial apparently had told them that this was the case.<sup>57</sup> We later verified with a Y-STR expert from the US that this view is entirely incorrect in that male DNA could frequently not be registered at all and, indeed, such are the circumstances when Y-STR could be applied.

In conventional SGM Plus analysis on samples which contain a large amount of female DNA profile, the male DNA profile, particularly if it is present in minute quantities, may not register at all as a result of being 'masked' by the female profile, therefore the results may not reveal a mixed DNA sample.<sup>58</sup> This not only highlights the CCRC's general unwillingness to consider all available means to validate the claims of innocence of its applicants, it also demonstrates the lack of knowledge on the usage of Y-STR analysis specifically by the Case Review Manager who was reviewing Simon Hall's case.

In addition, the CCRC could have considered other DNA testing techniques that are available such as a recent technique known as 'touch DNA'. This new technique is capable of yielding DNA profiles from a minute quantity of skin cells left behind when an assailant comes into contact with the victim, the weapon or the crime scene, and can yield results where previous SGM Plus tests have failed.<sup>59</sup> In the US, Richard and Selma Eikelenboom managed to yield DNA profiles from skin cells recovered from the victim's clothing in a 20-year-old murder case in Colorado, which led to the exoneration of Tim Masters in January 2008.<sup>60</sup>

The same technique also cleared the family of six-year-old JonBenet Ramsey who was found beaten and strangled in the basement of her own home in 1996. For

56 Naughton, above n. 54 at 32-3.

57 CCRC Statement of Reasons in the application of Simon Hall, 2009, 46.

58 C. Johnson, 'Y-STRs: Another Piece in the DNA Puzzle', *Applied Biosystems Forensic News*, February 2008, available at <[http://marketing.appliedbiosystems.com/images/All\\_Newsletters/Forensic\\_Vol13/docs/53144\\_FN\\_Customer\\_Corner\\_a.pdf](http://marketing.appliedbiosystems.com/images/All_Newsletters/Forensic_Vol13/docs/53144_FN_Customer_Corner_a.pdf)>, accessed 23 July 2010.

59 M. Houck and L. Houck, 'What Is Touch DNA?' *Scientific American*, 8 August 2008, available at <<http://www.scientificamerican.com/article.cfm?id=experts-touch-dna-jonbenet-ramsey>>, accessed 23 July 2010.

60 CBS News, 'Drawn To Murder', 25 July 2009.



12 years, the Ramsey family lived under a cloud of suspicion that they were responsible for the murder until touch DNA analysis conducted on the child's clothing yielded a third-party DNA profile which completely exonerated them.<sup>61</sup>

Despite these possibilities, the CCRC failed to commission any DNA testing at all on exhibits found at the crime scene that might exonerate Simon Hall. Perhaps most crucially, the DNA profiles found on the handle of the knife believed to be the murder weapon were left unexplored. Instead, it referred Simon Hall's case back to the Court of Appeal in October 2009 on the basis of new expert evidence that may undermine the reliability of the fibre evidence presented at trial.<sup>62</sup>

Yet, even if Simon Hall does overturn his conviction on the grounds put forward by the CCRC, i.e. on the grounds that the fibre evidence used against him at trial may be unreliable, he will, arguably, never achieve the kind of full vindication of factual innocence that DNA exonerations can offer. Like many victims of miscarriage of justice in the UK, he may continue to live with 'whispering campaigns' of his guilt after release. Overturning a criminal conviction with new expert evidence that renders it unsafe in law does not positively establish factual innocence. Successful appellants such as Barry George,<sup>63</sup> Kevin Callan,<sup>64</sup> Sally Clark<sup>65</sup> and Angela Cannings,<sup>66</sup> for instance, continue to face public doubts about their innocence. Likewise, until the ample DNA possibilities that exist are thoroughly investigated, it is unlikely that the question of who killed Joan Albert will be resolved.

## Discussion

The foregoing case examples illustrate the critical difference between the legalistic/safety approach undertaken by the CCRC in its reviews of alleged miscarriages of justice<sup>67</sup> and the 'innocence-oriented' approach to investigate claims of innocence by alleged victims of wrongful convictions adopted by the University of Bristol Innocence Project specifically, and all member innocence

61 K. Johnson, 'DNA clears Ramsey family in JonBenet's death', *USA Today*, 7 October 2008.

62 CCRC, 'Commission refers the conviction of Simon Hall to the Court of Appeal', 2009, available at <<http://www.ccrc.gov.uk/news/549.htm>>, accessed 23 July 2010.

63 Bird and O'Neill, above n. 42.

64 K. Callan, *Kevin Callan's Story* (Time Warner: New York, 1998).

65 M. Batt, *Stolen Innocence: The Authorised Story of Sally Clark* (Ebury Press: 2004).

66 A. Cannings and M. L. Davies, *Against All Odds. The Angela Cannings Story: A Mother's Fight to Prove her Innocence* (Time Warner Books: London, 2006).

67 D. Jessel, 'Innocence or safety: Why the wrongly convicted are better served by concern for safety', *Guardian*, 19 December 2009.



projects of the Innocence Network UK (INUK) generally.<sup>68</sup> As indicated, the CCRC is not in the business of actively investigating and seeking the truth behind claims of innocence; it does not seek to refer cases back to the appeal courts because it finds or believes the applicant to be factually innocent. On the contrary, it undertakes *reviews* of applications in pursuit of legal grounds of appeal, as opposed to forms of *investigation* that seek to get to the truth, or otherwise, of claims of innocence.<sup>69</sup> This derives, in large part, from the statutory straightjacket that is placed on the CCRC by the ‘real possibility test’, which requires it to determine, not if an applicant is innocent but, rather, if there is a ‘real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made’.<sup>70</sup>

This positions the CCRC as ‘gatekeepers’ for the appeal courts as it strives to second-guess how referrals may be viewed, assessing applications to determine if they are correct in law.<sup>71</sup> Crucially, in this process, however, the CCRC puts upholding legal process above the exoneration of possibly innocent people and may not refer the cases of applicants if evidence that indicates innocence was available at the original trial<sup>72</sup> or was available or already heard at the first appeal.<sup>73</sup> Hence, the CCRC is better seen as a ‘legal watchdog’ body that seeks to ensure that guilty verdicts of criminal trials and refusals to overturn alleged miscarriages of justice by the appeal courts meet with the prevailing rules and procedures of the criminal justice system in the overall interests of upholding its ‘integrity’: it seeks to determine whether convictions are lawful, not whether applicants are innocent.<sup>74</sup>

In sharp contrast to the CCRC, the aforementioned investigations undertaken by the UoBIP were orientated entirely towards getting to the truth of the innocence claims. In those investigations, scientific advancements such as the array of existing DNA testing techniques were considered as they contain the possibility of truth and exoneration.

68 See, e.g., M. Naughton, ‘Why “safety in law” may fail the innocent—the case of Neil Hurley’, *Guardian*, 11 February 2010.

69 Naughton, above n. 46 at chs. 1 and 2; see also Naughton, above n. 1 at 14–26.

70 Criminal Appeal Act 1995, s. 13(a).

71 G. Maddocks and G. Tan, ‘Applicant Solicitors: Friends or Foes?’ in Naughton, above n. 46 at 128.

72 R. Nobles and D. Schiff, ‘The Criminal Cases Review Commission: Reporting Success?’ (2001) 64 *MLR* 280–99.

73 M. Newby, ‘Historical Abuse Cases: Why They Expose the Inadequacy of the Real Possibility Test’ in Naughton, above n. 46 at 97–106; C. Malone, ‘Only the Freshest Will Do’ in Naughton, above n. 46 at 107–17.

74 Naughton, above n. 46 at 3; also M. Naughton, ‘Wrongful Convictions and Innocence Projects in the UK: Help, Hope and Education’ (2006) *Web Journal of Current Legal Issues* 3.

However, as the cases of Neil Hurley and Simon Hall demonstrate, the potential for exonerating alleged innocent victims of wrongful conviction offered by the range of available DNA testing technologies is of little, if any, relevance to the CCRC's restricted remit of reviewing the legal safety of the evidence that led to the convictions of its applicants.

Hence, and perhaps unsurprisingly, although numerous exhibits exist that may contain biological samples yet to be subjected to any forms of DNA testing, the CCRC failed to see the obvious possibility of DNA exoneration in Neil Hurley's case. Moreover, the CCRC can be conceptualised as displaying a *systemic* apathy towards the plight of possible innocent victims of wrongful conviction. This is illustrated by its apparent unwillingness to investigate all avenues provided by DNA testing technologies in the case of Simon Hall. There, routine DNA testing had been conducted which failed to yield any conclusive results, but the possibility remains that he could be exonerated through more advanced and appropriate DNA tests.

It is also crucial to note that a requisite component of the right to access DNA testing is the preservation of biological evidence retrieved from crime scenes. Indeed, returning to the example of the US, the Federal Government is mandated under s. 3600A of the Justice for All Act of 2004 (or Innocence Protection Act)<sup>75</sup> to ensure the preservation of biological evidence in criminal cases. This includes the retention of sexual assault forensic examination kits, semen, blood, saliva, hair, skin tissues and other identified biological material.

In contrast, in the UK it is legitimate under existing provisions to destroy, even prior to conviction, many of the biological items that may exonerate alleged innocent defendants. Whilst the police in this jurisdiction are mandated under the Criminal Procedure and Investigations Act 1996 (CPIA) to retain all case materials at least until the person is released from custody, the CPIA does not cover third parties such as the FSS. Instead, the main provisions relating to the retention of case material are detailed in a 'Memorandum of Understanding' between the Association of Chief Police Officers (ACPO) and the FSS. These are simply 'best practices' rather than mandatory provisions, imposing on forensic scientists specific duties in relation to the preservation of material.<sup>76</sup> Moreover, although under this Memorandum, case materials in murder cases and other serious offences will be kept for 30 years as a matter of course, it does not tend to cover 'items of a perishable nature' such as blood samples, saliva samples and

75 See R. Schehr, 'A View from the United States' in Naughton, above n. 46 at 208–9.

76 Crown Prosecution Service, 'Disclosure of Unused Forensic Material', 2010, available at <[http://cps.gov.uk/legal/d\\_to\\_g/disclosure\\_manual/disclosure\\_manual\\_chapter\\_23/](http://cps.gov.uk/legal/d_to_g/disclosure_manual/disclosure_manual_chapter_23/)>, accessed 23 July 2010.

other biological swabs. In the case of Neil Hurley, a ‘Notification of Intention to Destroy Items of a Perishable Nature’ was issued on health and safety grounds by the FSS two weeks before his date of conviction.<sup>77</sup> Crucially, the Notification called for the destruction of blood and saliva samples, various medical swabs, as well as hair and fingernail samples obtained from the deceased, amongst other items, meaning that the evidence that might prove his innocence may have been destroyed.<sup>78</sup>

What is apparent from this analysis, then, are the systemic obstacles, both in terms of the operations of the CCRC and of the (lack of) adequate provisions to ensure the preservation of evidence, that combine to limit the access of alleged innocent victims of wrongful conviction to DNA testing that could exonerate them.

## Conclusion

The CCRC is restricted by statute to determine not if applicants are factually innocent victims of wrongful conviction but, rather, whether their convictions are ‘safe in law’. In consequence, its reviews of alleged miscarriages of justice centre on whether the prevailing rules of criminal appeal are complied with and the pursuit of ‘fresh evidence’ and/or ‘fresh argument’ not available at the time of the original trial. This is at the expense of investigations that seek to validate whether a claim of innocence may be genuine, with the result that the capacity of DNA testing to exonerate those who are truly innocent has not been fully harnessed or capitalised upon.

The embracement of advancements in DNA science, however, has wider implications in terms of the benefits to the criminal justice system as a whole. In the US, the Innocence Protection Act<sup>79</sup> has encouraged an investment in science by the criminal justice system that has potential benefits for all citizens, in terms of allowing a means of overturning wrongful convictions if and when they occur.

For instance, the Kirk Bloodsworth Post-Conviction Testing Program and the Debbie Smith Backlog Grant Program together authorised almost US\$800 million to conduct post-conviction DNA testing. In effect, alleged victims of wrongful

77 Forensic Science Service, *R v Neil Hurley*, Notification of Intention to Destroy Items of a Perishable Nature, 18 April 1994.

78 Of course, this does not exclude the possibility of DNA tests on other ‘non-perishable’ material which may still be in existence either with the police or the FSS.

79 Above n. 18.

conviction in the US are afforded the right to benefit from the advancements in DNA science. This is a right that we believe should be available in the UK.

Conversely, the failure of the CCRC to capitalise upon the advancements in DNA testing techniques in reviews of alleged wrongful convictions serves to deprive potentially innocent victims from having their innocence established. At the same time, it has also, arguably, blocked the criminal justice system as a whole from benefiting from advancements in DNA science which can get to the truth of claims of wrongful conviction and even bring to justice the real offenders who are at liberty, having the potential to commit further crimes.

The moral and political argument made here is that the system that deals with alleged miscarriages of justice must place the need to seek the truth of claims of innocence above the legality and procedural 'safety' of guilty verdicts. This is bolstered by the legally cognisable rights contained within the international human rights instruments. Although the right to benefit from advancements in science is not legally binding in the UK, this right was included in the International Bill of Rights because of the universal recognition of the importance of scientific advancements to the well-being, and even survival, of citizens. In the same way, for as long as alleged innocent victims of wrongful conviction have no legally enforceable right to DNA testing, they are deprived of possibly the only way to settle a contested criminal conviction and restore the liberty of those who are, indeed, innocent. Such a right is therefore essential to ensuring that the criminal justice system truly operates in the interests of truth and justice.