

INQUIRY

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THE TRUTH OF EDDIE GILFOYLE BY HIS SISTER SUE CADDICK

In 1992, Eddie Gilfoyle was convicted of the murder of his pregnant wife, Paula Gilfoyle. More than two decades on and after serving 18 years in prison, Eddie Gilfoyle and his family continue to fight to have his conviction overturned despite clear evidence that Paula Gilfoyle may have committed suicide. The following is the transcript of the speech given by Sue Caddick, sister of Eddie Gilfoyle, at the INUK Symposium on the reform of the Criminal Cases Review Commission held at Norton Rose in London on the 30 March 2012.



Eddie Gilfoyle and sister Sue Caddick. Click on image to watch the clip of Sue Caddick's speech.

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18 Years. Close your eyes and try and imagine just how long 18 years really is. My brother, Eddie Gilfoyle has just spent 18 years in prison for something he didn't do.

18 years is a long time in prison if you are guilty. If you are innocent like Eddie it is an eternity. The damage done to Eddie and to my family is irreparable.

On Thursday the 4th June 1992, Paula Gilfoyle, Eddie's wife was found hanged in the garage of their home, two weeks before their first baby was due to be born. Paula left a handwritten suicide note at the scene. Our nightmare began.

Eddie is from a law abiding family. He has never been in trouble with the police. He was arrested three times accused of murdering his wife. No account was made of the fact that this was a man in a deep state of shock and grief. No respect afforded him.

MY BROTHER'S KEEPER (CONT.)

He was interviewed for hours on end. He was shouted at, screamed at and bullied. The police pulled all sorts of dirty tricks. 84 times they called Eddie a liar and a fantasist. Eddie did not lie. Eddie told the truth. But, the police were not interested. They were on a mission to get a conviction. They did not investigate one thing Eddie told them.

Over the past 20 years we have fought very hard and dragged the truth into the light and it is very clear today that it was not Eddie Gilfoyle who told the lies. The facts show that this was a tragic suicide, which means, the police had to invent a case and spin a fantasy together which they put to the jury. So who really is the fantasist? Who is the Walter Mitty in this case? Who is the liar? It is not Eddie Gilfoyle.

Eddie served in the British Army. He served in Germany and saw active service in Northern Ireland and the Falklands War. The police ridiculed his army service both in private and in public, in court and in the media. I am deeply ashamed at how my country has treated this man, a war veteran and so should you be, because this was done for you, in your name. We allowed this to happen and it is high time we forced the authorities to right the wrong that has been done to this man.

Because of what has happened to Eddie, I have been asked to come here today and talk to you about our experience with the criminal justice system over the past 20 years. I can tell you it has failed Eddie at every stage and let him down.

A miscarriage of justice doesn't just happen on its own. In Eddie's case, as in many others, it started with the police. Errors made by the police on the night Paula died led to crucial evidence being destroyed or thrown away by the police and led to Eddie having an unfair trial. So catastrophic were the mistakes made by the police at the scene on the night and at the post mortem that the police themselves ordered a secret investigation into what went wrong, which they kept hidden from Eddie's trial.

By taking Eddie to trial and accusing him of such a horrible crime all eyes, all attention, was focused on what they accused Eddie of doing, not on what the police had done wrong.

No one was interested in the catastrophic police mistakes. No one demanded the Chief Constable's resignation for the appalling negligence and incompetence of his police force. No one questioned what went wrong or how on earth Eddie Gilfoyle could ever possibly get a fair trial when the police had completely destroyed all the evidence. None of this mattered. All the focus was switched onto Eddie.

Eddie's trial was a sham. Everything that could go wrong did go wrong. There was a complete failure to disclose evidence that could have helped Eddie. A defence team that I think completely failed him and a jury that were deceived. They were told a completely dishonest version of what had happened. It is this dishonesty, serious non disclosure and covering up from the top to the bottom of the system that prevents Eddie from getting justice today.

After the trial my family made over 100 complaints against Merseyside Police. Lancashire Police reinvestigated the case. They uncovered a whole load of dishonesty and corruption.

In 1994 Lancashire Police concluded their reinvestigation. Lancashire Police said there was no evidence of a crime. Paula Gilfoyle committed suicide. A year after Lancashire Police concluded their investigation Eddie went to the Court of Appeal with all of the new evidence Lancashire had uncovered.

How naïve we were back in 1995. We honestly thought that the Court of Appeal would see the dreadful mistake that had been made and that they would put right this mistake. After all, we had an independent police investigation saying there was no evidence of a crime. What else could anyone possibly need? Did the Court of Appeal listen to anything the Lancashire inquiry uncovered, did they heck.

The appeal court judge said that because the Chief Constable of Merseyside had not yet agreed to the disciplinary charges recommended against his officers the Lancashire Police's inquiry was not yet concluded. The Court of Appeal said they could not hear any of the evidence uncovered by Lancashire Police because it was considered to be an ongoing inquiry, even though the Lancashire Police's inquiry concluded the year before. The

A whole load of new evidence was passed around the system to prevent Eddie from using it. Even though it has never been heard in any court, it is now lost to Eddie forever. How disgraceful is that? How can that ever be right? How can that ever be justice?

Not only did the Court of Appeal refuse the new evidence in the Lancashire Police's inquiry, the Court of Appeal did not care about all the other evidence presented to them by the CCRC. They threw most of it out. So what is the point? What is going wrong between the CCRC and the Court of Appeal?

I get the feeling that the Court of Appeal hates being told by the CCRC that there has been a miscarriage of justice, that the justice system got it wrong. The Court of Appeal judges sit high up on that bench of theirs and look down their noses at the likes of Eddie trying to get justice. They would rather stick pins in their eyes than admit the jury got it wrong, and yet we are all so trusting of this system. We honestly think we can present all of this evidence that proves our innocence and we can't.

It doesn't matter how many rules the police, the CPS, the defence break, as they have done in Eddie's case, the Court of Appeal is just not interested. The Court of Appeal will only allow evidence that is brand new. Something your defence could not possibly have known or found out at your trial.

Even if you are lucky enough to find some brand new evidence, the Court of Appeal does not look at how it fits into your case, next to all the other evidence that proves your innocence. No, it doesn't work like that. They look at the new evidence all on its own, in isolation, where it makes no sense to anyone, then they throw your case out.

The Court of Appeal has set the bar so high that it is virtually impossible to overturn a conviction brought in by a jury. Of course, the CCRC know this and that it is their problem.

Over the years the CCRC have gone from a body that was set up to try and get to the truth, to a body that tries to get a case that will win according

to the rules at the Court of Appeal.

If the CCRC tried to get your case back to the Court of Appeal without new evidence they are on a hiding to nothing, and they know it. No matter how much the CCRC believe you are innocent, without new evidence it counts for nothing.



Eddie and Paula Gilfoyle

And let's be really honest, how can someone sitting in a prison cell possibly hope to find new evidence? You can't just write to the CCRC and say I am innocent. Oh no, you need to find a solicitor who will work for free, sometimes for years, going through boxes and boxes of evidence, looking for new evidence.

If you are lucky enough to find such a solicitor, lucky enough he will put an application into the CCRC for you, you still have to wait years for the CCRC to appoint a case worker to look at your case.

The CCRC dupe the public that they investigate miscarriages of justice. They do not. They just review what your solicitor has put together. Well, the solicitor could have done that and we could miss out the CCRC altogether.

And since it was established it has become a convenient excuse for government officials not to get involved with your case. Because they say it is with the CCRC, we can't get involved. What a brilliant cop out.

No doubt the CCRC is under resourced and understaffed. But it is not just being under resourced or the high bar they have to jump to get back to the court of appeal that is the problem with the CCRC. A major problem they have is if the police or the CPS is hiding evidence.

If the police want to hide evidence from the CCRC, they will. In Eddie's case the Merseyside Police hid a box of evidence for at least 16 years. It contained Paula's five year diaries

It is not the CCRC that fights to get justice for innocent people. It is families, mothers, fathers, husbands, wives, brothers, sisters. Families know the system doesn't work fairly. It is families who fight for justice. Families know that justice becomes a game of who wins and who loses. Not a search for the truth as they pretend it is.

The burden to get justice should not be placed on the shoulders of families or on the shoulders of dedicated unpaid solicitors. That burden should fall on the CCRC. But I am afraid that the CCRC is paralysed and ineffectual because of the impossibly high bar set by the Court of Appeal, the impossible task of making the police and prosecution disclose evidence that the CCRC doesn't know even exists.

Over the past 20 years we have had to drag the truth out of Merseyside Police and Merseyside CPS. Today, the Crown's case is in shreds. There is nothing left of their case that they put before the jury. Every other agency that has looked at Eddie's case, apart from the Merseyside Police, have said that Paula Gilfoyle committed suicide and that Eddie's conviction is unsafe and unsatisfactory.

Eddie's case is now back before the CCRC for the third time. I want the CCRC to refer Eddie's case back to the Court of Appeal for his conviction to be overturned. I want them to lift the weight off Eddie's shoulders and give him his life back. I want justice for Eddie.

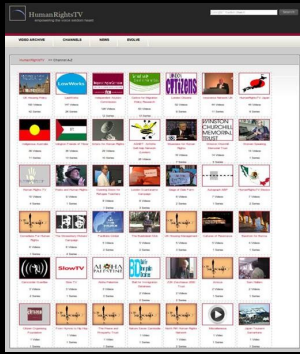
But, if we ever do get Eddie's conviction overturned, it will not be because of anything the CCRC has done. It will be because of others, Eddie's family, Eddie's solicitor and others who have helped campaign on Eddie's behalf and that is really sad.

Do any of you in this room truly grasp, truly understand the enormity of what we have done to these innocent people, to Eddie, to Sue May, to Paddy Hill? How much damage we have really done to all of them? How shameful is it that after everything they have been forced to go through, innocent people who are severely traumatised, mentally broken, have to travel the length and breadth of this country telling anyone who will listen what has happened to them? Doing TV interviews, radio interviews, venues like this in their desperation to get justice to clear their names to make sense of the indefensible?

Have we not damaged them enough? Have we not put them through enough? Can any of you truly comprehend what courage it takes to do what they have to do? Can any of you really comprehend just how brave any of these innocent people really are? I feel truly ashamed to have to stand next to Eddie, Sue May and Paddy Hill today and so should you. Because we have failed them. After everything they have suffered. After everything they have been through the CCRC sits up the road neither use nor ornament to the brave courageous victims of a miscarriage of justice.

I hope by explaining Eddie's case to you today cleverer people than me can find the answers to make the CCRC a credible organisation, a force to be reckoned with, that fights for innocent people like Eddie. The CCRC should be a national treasure, something to be proud of, but as you can see it has not managed to obtain justice for Eddie, when he is so clearly innocent, nor for many others like him.

People like Eddie and my family are crying out and are desperate for the CCRC to work as it claims. Because until it does, people like Eddie, families like mine, are lost. We are helpless and that can't be right while an organisation like the CCRC exists. And yet my family are still fighting the might of the State alone and that is not justice. **I**



What is it ALL about and why it HAS to be done.



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A PERSPECTIVE OF A FORMER COMMISSIONER: DAVID JESSEL'S SPEECH AT THE INUK SYMPOSIUM ON THE REFORM OF THE CCRC

What I hope to do in the next twenty minutes or so is examine what I believe is the key problem with the Criminal Cases Review Commission (CCRC) and the Court of Appeal (Criminal Division) (CACD) – and that's the statutory terms of the relationship between them. I think that unlocking that nexus is possible, practical and desirable.

At the same time, I want to look at the critical importance of investigation, and why I believe that reaffirming the CCRC's investigatory role – along with that change in the statutory test – *could* satisfy some of the current criticisms. The hoped-for outcome is to reunite the constituency of concern about miscarriages of justice, CCRC, individual campaigns, national innocence network – which at present is divided, suspicious, resentful and racked with internecine feuding, much to the delight of those who are indifferent to injustice.

I think it's sensible to start by defining what's capable of reform and what's not. The CACD is the sole and exclusive body for determining criminal appeals. And it always will be. It's not what I had in mind – I thought in terms of some supra-judicial body on the lines of Edgar Wallace's the Four Just Men, though I hope I was reconstructed enough to allow that half of them would be women. It didn't happen. Runciman ruled that out. I was at a dinner with the former LCJ Lord Bingham some years ago who hailed the Criminal Appeal Act 1995 which set up the CCRC as a masterstroke of genius, the ultimate judicial *compromesso storico*, in that it preserved the independence and sovereignty of the CACD.



David Jessel

You cannot overestimate just how hard it was for the higher judiciary to swallow the idea of a bunch of hicks up at the other end of the MI marking their homework. They were unchastened by the revelations of their institutional shortcomings. They thought – they still think – people had

been terribly unfair to Lord Lane. They murmured, disgracefully, at High Tables that the so-called miscarriages of justice in Irish cases were no such thing. They murmur it still. That darling of the law, Lord Denning, blurted out what many of his brethren were actually thinking when he said that if the Birmingham Six had been hanged, there would have been a salutary finality to the whole business.

They really did believe that it is healthier to have finality in the law. Denning, again, in refusing the Birmingham Six appeal – 'just consider the course of events if their action were to proceed to trial ... If the six men failed it would mean that much time and money and worry would have been expended by many people to no good purpose. If they won, it would mean that the police were guilty of perjury; that they were guilty of violence and threats; that the confessions were involuntary and improperly admitted in evidence; and that the convictions were erroneous. That was such an appalling vista that every sensible person would say, "It cannot be right that these actions should go any further."'

They didn't think there was any problem, except perhaps an ill-founded public hysteria. So, when they had to swallow the setting up of the CCRC, reserving their exclusive monopoly on decision making made the whole unnecessary business just about tolerable.

As we've heard often enough, the fact that they had the last word was cemented in by the real possibility condition.

In 1999 the judgment in *Pearson*, handed down by Lord Justice Rose, saw the judiciary – not, it should be noted, Parliament – defining the terms – “ ‘the ‘real possibility’ test....is imprecise” he said, and then helpfully added more precision “but (it) plainly denotes a contingency which, in the Commission's judgment, is more than an outside chance or a bare possibility but which may be less than a probability or a likelihood or a racing certainty. The Commission must judge that there is at least a reasonable prospect of a conviction, if referred, not being upheld... The Commission is entrusted with the power and the duty to judge which cases cross the threshold and which do not.”

The logic of this, of course, is that if the CACD took it into its head never to quash the convictions of red-headed people, the CCRC could never refer a red-head. *Pearson* was proof of what I had always suspected – that the CACD would accept the CCRC, flatter it even – but they'd play the long game, and slowly reel it in.

They did it on sentence referrals pretty swiftly. Parliament had specifically included the power to send

The logic of this, of course, is that if the CACD took it into its head never to quash the convictions of red-headed people, the CCRC could never refer a red-head.

back a sentence for variation when it set up the miscarriages of justice body, the logic being, presumably, that an unjust sentence is a miscarriage of justice. But in the case of *Graham* the court – not Parliament, but the very Court whose failures and

complacency had led to the 1995 Act – stated “a defendant sentenced lawfully, in accordance with the prevailing tariff, and when all factors relevant to sentence were known to the sentencing judge, can, in our view, hardly be described as a miscarriage of justice.” Note that apparently self-deprecating ‘in our view’: if that's their view, it pulls the plug on unfair sentences.

And the CCRC had to accept it. No matter that an unjust sentence is clearly a miscarriage of justice – it was none of the CCRC's business. The CCRC does still send up some sentence cases, but they are almost always based on some arithmetical irregularity and miscalculation of days spent on remand.

And as with sentences, the bar came down on whole categories of case. Historic cases – cases of huge significance to those of us are inspired by the history of judicial failure, cases like that of Derek Bentley, hanged by that terrible man Goddard, Hanratty, Timothy Evans, Ruth Ellis – the CCRC didn't win them all, but it sent them up, until it got the clearest steer that such cases were not welcome.

PERSPECTIVE OF A FORMER COMMISSIONER (CONT.)

My red-head analogy is not so far-fetched when you take another category of cases – shaken baby cases. The impartial scientific truth about these cases is that in many cases we don't know why some babies die. We do know that many babies die in totally unsuspecting circumstances and display, on post mortem, the same symptoms that some expert witnesses swear are diagnostic of abuse. Cases referred by the CCRC were helping to nudge the CACD towards engaging with the problem that the finest scientific witnesses say 'we simply don't yet know how many of these babies die' – which is useless in an adversarial system. But the CACD soon wearied of this, and in a recent shoulder-shrugging judgment said – I paraphrase – this is all too difficult, and upheld a conviction – thus demonstrating that there is no real possibility, and therefore no real point, in the CCRC sending any such cases back. In 20 years' time science will make us see some of these convictions in the same way we regard the burning of witches. I do not hesitate to liken this attitude to the same sanctimonious detachment as characterised the pre-Runciman CACD. They are keeping innocent people – people who have already suffered the tragedy of a child's death – in prison because they believe the integrity of the jury must always prevail, even if its verdict is based on flawed and dogmatic science.

So there we see how the Court has used the real possibility test to transform what we thought was the role of the CCRC, which was to send up cases which we – the public, the press, the non-judiciary, the CCRC – thought were miscarriages of justice; instead, the balance has shifted to the CACD none-too-subtly instructing the CCRC only to send up cases where the court will consider a conviction to

be unsafe.

And that means that a referral knocked back, is a referral dead. I once asked Lord Rose, the then Vice President of the Court, what he would do if we sent the same case back a second time; he said that that would be 'most unwise'. This means that the CCRC is effectively denied the power that even the Home Office had – to keep sending a case back until the Court got it right. You will remember how it used to infuriate Lord Lane, who would become increasingly exasperated about re-referrals from the Home Office – 'the more times this cases has come before the court, the more certain we have become that no miscarriage of justice has occurred.' Campaigners know that it's only by sending cases back again, and again, that you can shame the Court out of its occasional bouts of stubbornness – or, as one prominent barrister described it to me the other day, its intellectual dishonesty. The CCRC sent back the case of *Stock* after the CACD refused the referral; if it refuses again, as in the Birmingham Six or the Carl Bridgewater cases, you've got to have the power – and the will – to send it back again.

I'm sometimes seen as a little naïve in my belief that cases come right in the end. Maybe that's because of my own experience in sending *Cooper and McMahon* up a fifth time – the Home Office were responsible for the second, third and fourth. I am sure Eddie Gilfoyle's case will come good in the end, as will Simon Hall's.

But you can't take no for an answer; and abiding by the real possibility rule means that there is overwhelming pressure on the CCRC to take the Court's no for your answer.

PERSPECTIVE OF A FORMER COMMISSIONER (CONT.)

Now, my friend and former colleague Alastair MacGregor says there's no point in sending up cases where there's *no* real possibility of the conviction being quashed, but I think that's a false dichotomy, an advocate's point, and a counsel of despair. It's not a question of sending up cases with a real possibility, *versus* sending up cases with no real possibility; it's a question of the CCRC saying – listen, we've got strong and compelling new arguments that this was a miscarriage of justice; you've got the last word on it – make your decision and justify it.

Could this lead to conflict with the Court of Appeal? Very probably. But I'm personally happier with a CCRC which acts a challenge to the CACD, rather than a collaborator with it.

My former colleagues at the CCRC are lawyers all, even though the 1995 Act said only that a third of them need be; some of them are as passionate for justice as any campaigner I've met. But the CCRC needs to stand at arms-length to the legal world. It should not be hand in hand with the system of criminal justice – or, as one distinguished and well-meaning lawyer once said, the handmaiden of the Court of Appeal. I didn't do it enough in my time at the Commission, but you need to challenge the pervasive legalism of an organisation which was set up to challenge the assumptions of the criminal justice system and those who work in it.

I've heard colleagues at the CCRC say that the CCRC and the CACD have to operate on symmetrical terms, using the same test, whatever it is. I'm not sure that's necessarily true. If, for instance, the CCRC could refer, like the Scots, on the grounds that there's reason to fear a miscarriage of justice

may have occurred, the Court could quash or uphold on any terms it liked – but, critically, it would have to answer the question of whether or not justice had miscarried.

As we know, the court takes a narrow view, paying exaggerated courtesy to the supremacy of the jury, and routinely chucks out arguments and evidence on the basis that they have already been deployed at trial or at the first appeal. So it becomes an increasingly uphill task as appeal succeeds appeal – you've fired your best shots, and the rules of the game say you're not allowed to fire them again. Now, I'm often staggered at how the evidential landscape has changed since the original trial. Often you can say that had the CPS known now what we know now, the trial wouldn't have taken place. So the CACD's pious devotion to the supremacy of the jury verdict stands revealed as even more vacuous – there wouldn't have been a jury verdict, because there wouldn't have been a jury, because there wouldn't have been a trial. I'd therefore suggest we expand any new formulation to include this very provision – if the basis of the prosecution case is now fundamentally changed from what it was at trial, a miscarriage of justice has occurred. I believe that that is the best formulation for intractable cases like Susan May's, bogged down in the quagmire of bloodstain evidence when all around it the whole cases has changed.

The CCRC has followed the trajectory of almost every public institution in British history: CCRC – brave new invention, probably won't work. CCRC – actually doing rather well. CCRC – could do better. CCRC – a national scandal.

The CCRC had it good at the start. It had relatively few cases, and, as with the early *Rough Justice* programmes, it had some low-hanging fruit it could easily pluck. Some quick wins - cases that had been hanging about in Home Office cupboards for years. It also had a team of Commissioners who had the zeal and curiosity of pioneers.

With success came a flood of applications which swamped the CCRC and to some extent doused its fire. You cannot do justice to 1000 new cases a year. I know what it takes for television to unpick a case - about four months of four people's time, on average. And those were cases which we cherry-picked as being good cases where you could expect results; and we tended to steer clear of sex cases, especially those involving children - which are by far the largest category of CCRC applications, which, to my mind, represent the largest cohort of potential miscarriages of justice, and which don't often feature in the catalogue of innocence campaigners. The CCRC can't scrape those cases off, and indeed has had some significant successes through its access to medical records, school records, police files and so on. Few of those claiming to have been falsely accused have had success with the CCRC. But some have, some who would otherwise still be wrongfully convicted. I am sure the CCRC has missed some. I cannot yet imagine what extra powers or extra commitment would guarantee a 100% success rate. I'd be grateful for any ideas.

My prescription for the CCRC and it simply can't go on as it is - is to get it to do less, freeing it to do what it does better.

The CCRC has huge powers to inspect material that journalists can only dream of accessing - medical

records, police disciplinary records, surveillance logs, the Holmes record of every step of a police investigation into a major crime, CPS records and so on. Sometimes it finds gold in those files, which leads to a successful referral.

But I fear that those very powers - taken with the huge caseload - can, paradoxically, limit the genuine investigative process, and create the mindset that the answer lies in the files, and if the answer isn't there you've done all that is possible. As I said, sometimes you do find something - like the jealous wife of a man later convicted of assaulting their daughter after the wife complained; the social services records showed her saying she'd get even with the husband one way or another, whatever it took.

But 99 times out of a hundred there is nothing, and the case is closed. But who knows what a real investigation would reveal - not the interrogation of documents, but talking to friends, neighbours, victims - visiting the scene of the crime, listening to all those forensically inadmissible whispers which help paint the real picture, instead of the artificially cropped and trimmed composite which forms the evidence at trial.

In one the best successes of the CCRC, the rape case of Warren Blackwell, it was a visit to the scene which first made the case review manager say: it doesn't make sense to commit a rape at midnight on New Year's Eve on a public footpath on the village green.

PERSPECTIVE OF A FORMER COMMISSIONER (CONT.)

Not valid as an argument, of course, because it had been before the jury – but it was the springboard, the motive, to dig and dig deeper, until the CCRC discovered



the fact that the so-called victim was a serial false accuser. Warren Blackwell spent 3 years in prison for a sex attack that never happened.

I don't think you could have done that from a desktop review. In the same way, in the case of a man called Mark Cleary who was convicted of drowning a young child in a local reservoir, *Trial and Error* followed up a piece of evidence from a man who could pinpoint a child's cry of distress at a precise time – he had a digital alarm clock – which would have put Cleary out of the picture. His evidence was dismissed because he said he heard the cry from 'the banking', and the judge rightly pointed out that the reservoir was too far away for the witness to have heard anything. But when we went to the witness to explain that, he opened his bedroom window and said – no, that's the banking – the disused railway embankment that ran along the bottom of his garden and along which (as everyone agreed) the toddler had been taken to his death – at a time which proved Mark Cleary an innocent man.

Again – you wouldn't have got that from a desktop investigation; and remember, the majority of cases at the CCRC aren't investigated at all. They are reviewed, yes, but a review may often take the form of reading an application form and deciding – there

and then – that there's nothing in the case. Now, in most cases that's an accurate assessment – and this ruthless triage, or filter, may be inevitable when you have 1000 cases a year. It's also a racing certainty that by not investigating so

many cases, genuine miscarriages of justice slip through. A

random spot check on the screen process isn't good enough; if two out of ten cases cause raised eyebrows among fellow commissioners, then extrapolating from that we are talking about hundreds of cases over which some might feel uncomfortable.

Even when cases do survive to receive a fuller investigation, the CCRC's resources mean that a committee must determine which investigative avenues may be followed up, and which should be closed down. Often that's sensible enough – 'please check Google Earth images in case a satellite can show I wasn't there on the day'. But any of us who have been involved in successfully investigating miscarriages of justice know that it's by following your nose, along the unlikeliest little byways, that you stumble across the evidential treasure – like that man and the banking.

Yet, again – in all fairness to the CCRC sometimes those committees do suggest work such as commissioning new expert reports. Dr Michael Naughton has written "in cases involving expert evidence, if an applicant is able to find additional experts post-appeal that support the defence case at trial, the CCRC will tend not to see

the case as having a real possibility in the appeal courts as the arguments are not new.” That is not the case. I can think of scores of cases where new defence experts commissioned by the CCRC have produced reports which lead to successful referrals. But there is no point in getting new Expert X to repeat what defence Expert Y has said at trial. The trick is to discover Expert Z who will cast the evidence in an entirely new light – something the CCRC did in the case of Simon Hall, although sadly the CACD could not, or would not, follow the argument.

There’s always a balance in looking at a case between the analytical approach and the investigative approach. I’d claim that the shortage of funds and the mindset of the CCRC has skewed that balance towards the analytical at the expense of the investigative. And it’s a lot easier to analyse a case onto the reject pile than to investigate a case onto the referral pile.

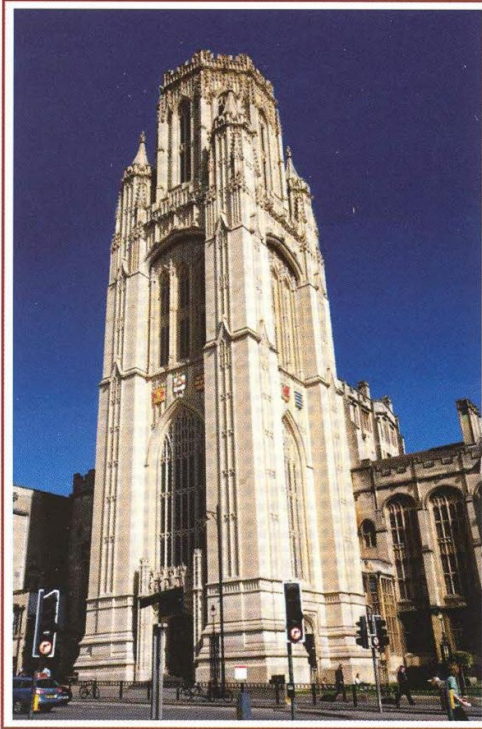
Here again, I’m perilously close to Dr Naughton – except that I’m aware that to conduct any extra investigation, or proper preliminary analysis, is going to mean a CCRC roughly triple its size. And we are where we are on that, too; there’s not a hope in hell of this government increasing the budget and staffing of the CCRC to do the job in the terms which, I suspect, would satisfy my ambitions and disarm its critics. Something has got to give and I now believe in a pretty radical – and fairly unattractive – cutback of the CCRC’s case intake. As I’ve said before, it cannot, in all honesty, do justice to its caseload. And in this business, honesty and justice are not unimportant considerations.

You could, for instance, take out the non-custodial cases. You could take out cases based on points of law. You could take out cases where for years the applicant hasn’t expressed any claim to innocence. This would all be unfair and unjust, just as it is unfair for the NHS to ration its resources to exclude life-extending liver treatments to 66-year-old drinkers like myself. But the upside is that refining the CCRC’s intake should lead to a sharpening of its focus – and that focus must be on more rigorous investigation.

And here’s where we can draw upon the full resources of organisations like INUK and other campaigners, a new infantry of investigation, knocking on those doors, taking those statements, leafing through the unused material, pestering for more research on Shaken Baby and so on; getting those stories into the papers, and onto television. That’s the way to keep the CCRC on its toes – present them with evidence achieved by digging, to spur them on to do some digging of their own, with the vast statutory powers of investigation they have. **I**



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"WHO JUDGES THE CCRC?"

SUSAN MAY'S SPEECH AT THE INUK SYMPOSIUM

In 1993, Susan May was convicted of the murder of her aunt, 89-year-old Hilda Marchbank. After serving 12 years in prison, Susan was released on parole in 2005. Despite evidence against Susan now substantially discredited, the Court of Appeal had twice dismissed her appeal and the CCRC in 2010 issued its decision not to refer her case back to the Court of Appeal. The following is Susan's speech at the INUK Symposium on the reform of the CCRC where she gave a heroic account of her continuing fight for justice.

20 years ago to this very date – 30th March 1992 – my home was being raided by numerous police and I was carted off to Oldham police station accused

of something I did not do. It was the beginning of the worst nightmare ever...which still continues.

A number of you will be familiar with my situation. I was wrongly convicted of murder 20 years ago and despite fighting from day one to prove my innocence I still remain convicted. My Aunt was 87 years old and I saw her on the night of 11 March 1992. She waved me off when I left her and I discovered her body the following morning.

I believe I was wrongly convicted because I had a poor defence team for trial. I totally trusted

my then solicitor – at that time I even trusted police! I was brought up so to do. He was my local family solicitor who had never handled a murder case before and I feel it so important that this should not be allowed to happen. It should be a legal procedure that you are represented by a solicitor who is au fait with the particular law you are accused of. He should have told me this and handed me over to a criminal solicitor. I feel quite silly now to say he told me I did not need any defence expert witnesses to challenge the prosecution because, he said, I

would not get convicted. I believed him because I was innocent and I was green to world of injustice. So I went to trial with only prosecution evidence. Another huge problem in many cases is that so often expert witnesses, especially prosecution experts go way beyond their expertise and remit and juries are influenced by this.

Obviously, my Q.C. could cross examine the prosecution expert but that is not as powerful as having defence experts there to give different opinions, to allow the jury to hear differing views and to give them the opportunity to realise there are 2 sides to the 'story' being told.

In my case, my jury did not even hear about the other suspects, the unidentified footmarks and fingerprints in Aunt's house. My jury looked at me in the dock and thought: if not her, who?



Click for clip of Susan May's speech at the INUK Symposium

SUSAN MAY'S SPEECH (CONT.)

No other option was offered to them, so how fair a trial was that? Sadly too, once convicted if your defence did not run with all the evidence available at trial, then the Court of Appeal will not deem it as new evidence for an appeal because it was available at trial but not used.

Being given a life sentence for a crime you are totally innocent of is the most horrendous thing ever and the road ahead will always be very difficult. Once convicted, to overturn the verdict made by the jury is fraught with red tape, bureaucracy and attempting to show this 'wonderful British legal' system was wrong becomes the challenge of all challenges. It is as though the system has to be protected at all costs.

The CCRC was formed 15 years ago. I thought it was a beacon of light which would ensure those wrongly convicted got justice. 15 years ago I was still in Durham prison where I spent 7 years out of the 12 I did serve in prison. I had just lost my first appeal and hearing the news that this new and independent body was to look into alleged miscarriages of justice filled me with so much hope.

My first appeal was in 1997, it failed, I was in despair - my lawyers informed me there were no grounds to appeal the judgment and only if new evidence came to light could we make a submission to the CCRC. Effectively that was the end of the road for me as far as they were concerned.

Nevertheless I proceeded to make and submit my own submission to the CCRC who then carried out a thorough investigation of the whole case, identified

new evidence and referred me to the Court of Appeal.

It seems to me that the CCRC now sees its role as 'tester' of these submissions. This is not what the CCRC was set up to do. When I sent my case to the CCRC in 1997 I had renewed hope that at last a fairer system was in place following the major miscarriages of justice - the Birmingham Six, Guildford Four, Maguire Seven and other notable cases. I was appointed an excellent case worker, Dawn Butler, who really got her teeth into my case. Dawn uncovered lots of new information. She discovered that the chief prosecution forensic scientist rewrote his original notes from 1992. So after I was convicted and in preparation for future appeal, he forged a new document. She proved that the senior police officer had lied. She found out that he had also had the main forensic exhibits removed from FSS months **before** trial and stored them in his locker at Oldham Police Station - something he denied doing in later years and only when we pushed the CPS and DPP to enquire further did he finally 'discover' these forensic samples which had been in his possession for over 3 years in unsealed bags! Yet, this senior police officer has never been brought to account for this. Various courts have just accepted it, saying 'it was unfortunate' he did not admit to having these samples.

It became a catalogue of errors and lies and on the strength of Dawn Butlers' findings I was referred back to the Court of Appeal in 1999.

SUSAN MAY'S SPEECH (CONT.)

Sadly my appeal hearing was delayed because my Q.C. was doing the Jill Dando case and my appeal did not get heard until 2001. And I say sadly because I truly believe for



Hilda Marchbank

the first few years the CCRC were doing the job expected of them and in

turn the Court of Appeal were showing some respect for the Commission. But after around 2000 there appeared to be a turning point. It was as though someone in the realms of power had decided that the system was being shown to have too many mistakes, the system was being shown to be too wrong. After that point, the Court of Appeal's criticism of the CCRC was greater and the CCRC became almost scared of the Court of Appeal. Their remit for sending cases back changed in order to appease the Court of Appeal.

When the CCRC was formed we lost valuable people who before had investigated wrongful convictions - *Trial and Error*, *Rough Justice*, *Panorama* all had brilliant people working for them - investigative journalists who had a passion for righting wrongs and who would go to any length to look into a case. Inevitably, they all thought the CCRC would now take over that work, investigating thoroughly, but they don't.

It would be great if the Commission looked back at the reasons they were set up in the first place and how cases were unlocked by good investigative journalists and those who were willing to knock on doors to uncover the truth.

My appeal went ahead in 2001 and the Statement of Reasons issued by CCRC was powerful. Just on the point of the forged forensic evidence I should have overturned my conviction. But I didn't and that appeal was dismissed - yet again I hit rock

bottom. But as always I picked myself

up and because off the record I had been told the CCRC themselves were disgusted with Court of Appeal judgement. I reapplied to the CCRC. I said the CCRC should stand up against the Court of Appeal's decision if indeed it disagreed with the Court of Appeal - after all, it is supposed to be an independent body. The CCRC took my case back and even gave me Dawn Butler as my case worker again.

I was told that my case was to be prioritised and would take approximately 6 months. That was in 2002. Dawn set about to totally discredit the senior police officer in my case. She told me she was compiling a dossier on him regarding all the inconsistencies and lies she had uncovered and that would get me back to the Court of Appeal again. Very sadly, Dawn died and my case was passed to another case worker and the promised 6 months went to 8 years for the negative decision that I recently got in 2010 that my case was not to be sent back to Court of Appeal. It sent me back to Court of Appeal in 1999 on strong evidence which still stands. To date, we now have even more evidence to discredit the case against me, so it seems unbelievable that the CCRC refused me in 2010.

The chief prosecution forensic scientist has been discredited and his evidence struck out, the evidence of his assistant has been deemed by the CCRC as unreliable and the senior police officer in my case ***who's evidence the appeal court relied on to dismiss my last appeal*** has been described by the CCRC now as no longer impressive or reliable and his evidence can no longer be relied on. There are many conflicting statements on the forensic issue and total confusion around the prosecution statements. What more does the CCRC want?

Another point I feel important is Dawn came to see me several times in prison. I even met the Commissioner who was overseeing my case, Sir Leonard Leigh. This is something the CCRC should do; meet with the applicant face to face. But sadly, it rarely happens now, maybe due to cost cutting, but what price justice?

However not to be deterred I have continued to push the CCRC again and again. My last Q.C. Michael Mansfield wrote to the CCRC saying he could not believe it had refused to send my case back and recently the CCRC agreed to allow me to re-apply. So I now wait and see if it will accept my case again. As you see I am not going to go away and will fight for as long as it takes.

As you all know many are now saying the CCRC has lost its way. It is not fit for purpose. I am not saying this through sour grapes; my case does not stand alone – Eddie Gilfoyle, Jeremy Bamber, Andrew Pountley, Karl Watson, Frank Wilkinson, Simon Hall, Ray Gilbert and many others. We have to at least have a review of the CCRC as it is the only way back

to Court of Appeal. In the past the Police Complaints Authority was replaced by the Independent Police Complaints Commission (IPCC) because it was seen to be failing. Critics would even say now that the IPCC needs examining. Any body like these has to be subject to scrutiny. We need a full reappraisal of what it began as and how it is now. Because of the 'real possibility test', the CCRC is not only second guessing how the Court of Appeal will view a case, but how the Court of Appeal viewed it previously. This should not be its priority, the whole case needs to be considered and even if fresh evidence has been identified, it must look at the full picture, everything is relevant. At the various hearings in my case - a trial and two appeals, only fragments of the case were heard because of the rules surrounding appeals. In addition, as time passes and you discover more about a certain point that may have been argued before, because that point has been referred to at a previous appeal you are told it can't be raised again. It is totally unfair to have to base an appeal around completely new evidence. The whole picture needs putting forward in order to show how newly discovered material completely alters what the judges ruled on previously. Fragmented evidence is biased and very unhelpful. My case is now totally different to that presented to my jury in 1993. People like me do not bang on year after year after year about their cases for the benefit of their health. In fact, it is detrimental to one's health. The desperation of injustice is painful, it is all consuming and it never goes away.

Another grave concern is the attitude of the Court of Appeal. Even if the CCRC refers a case, there is no guarantee that the judges will acknowledge the evidence the CCRC has found. Following my last appeal an article was written about my failed appeal. The journalist in question had sat through the whole appeal and he questioned whether were the judges in that same court as him? He titled the article, "Who Judges the Judges" and that is so true. I

think we can now also ask, "Who Judges the CCRC?" It is our only route back to Court of Appeal and yet in the last 6 years it really hasn't achieved a lot. Within over 304 convictions which have been overturned, they include sentence reductions, low level convictions like dogs without muzzles in public places. It was not set up to deal with judicial errors like these. It was supposed to deal with major cases. Out of those major cases referred in the last 6 years only a very few have been rectified from the thousands of applicants. Mistakes do happen, lawyers make them, juries too and police. It leads to innocent people being convicted and going to jail for many years...it is a never ending nightmare.

I was fortunate to be released after 12 years because throughout my time in jail I was classed as an IDOM (in denial of murder). I refused to take part in any of the obligatory prison offending behaviour courses. I refused home leaves indeed anything which allowed them to say I was proving I

was 'safe' to be released. I was often told that I would never be released because I refused to conform. But even though I may be free from the confines of jail I am not free. I still feel locked up because my conviction still stands. I had hoped I would not be institutionalised, but I was. My family sees me as a different person now because I am. It took me ages to re-adjust to life outside and to be honest I still have hang ups.

The journalist in question had sat through the whole appeal and he questioned whether were the judges in that same court as him? He titled the article, "Who Judges the Judges" and that is so true. I think we can now also ask, "Who Judges the CCRC?"

I along with all others who have been through this am damaged. Prison damages you; the whole experience of being wrongly convicted and the years spent in jail leaves scars that will never disappear. Families are damaged. My fight goes on and I am sure this contributes to my determination to stay strong. I was determined to survive the horrors of prison whilst inside and still I have that same determination to fight this system which

locks up innocent people and refuses sometimes to admit it.

As far as I am concerned the innocence projects are doing is proof that the whole system is flawed. I cannot stress enough how valuable and useful your efforts will be. If the system was 'working' as it should, then there should be no need for your involvement. You would just be studying the differing aspects of the law but believe me you are needed and appreciated. **I**

CAUSES FOR CONCERN: THE INUK'S DOSSIER OF CASES BY GABE TAN, EXECUTIVE DIRECTOR, INUK

On the week of the INUK Symposium, INUK published a dossier of 44 cases involving potentially innocent victims of wrongful conviction who have been refused at least once by the CCRC.

This week, INUK published a dossier of 44 cases. These cases involve alleged victims of wrongful conviction who have been refused a referral by the CCRC at least once despite continuing doubts about the evidence that led to their conviction. They contain claims of innocence by individuals who have been convicted for serious offences – murders, armed robbery, rape and sexual abuse against children. Collectively, these 44 individuals have spent over 500 years in prison. Many are unlikely to achieve release on parole unless and until they admit guilt to the crimes they claim to be wrongly convicted of.

INUK and our 25 member innocence projects only work on cases where people are claiming factual innocence – i.e. they are claiming to have no involvement or culpability in the crimes that they were convicted of. We work mainly on cases that have failed in their first appeal or have tried unsuccessfully to achieve a second appeal through the CCRC. About 80 per cent of applications to INUK are deemed to be ineligible either because they have not exhausted their appeals or because they are not clearly not factually innocent. Many applicants falsely maintain innocence because they misunderstand or disagree with the law. At the same time, many applicants to INUK are clearly guilty but are seeking to overturn their convictions on technicalities. These are not the kind of cases that INUK work

on.

These 44 cases in the dossier have been withered down from over a thousand enquiries for assistance. They have been rigorously assessed by undergraduate and post-graduate students at the University of Bristol. Their claims of innocence have been verified against core documents, including the judges summing up, appeal judgment, forensic reports, witness statements and CCRC statement of reasons that explains why it refuses to refer these cases back to the Court of Appeal. Their convictions are deemed by INUK to be dubious to say the least due to the nature of the evidence that led to their convictions. Many are convicted on highly circumstantial evidence, inconsistent witness testimonies, alleged confessions to witnesses who are known to have mental or personality disorders. Take the case of Christopher Moody for example. There is no physical evidence at all linking him to the murder of Maureen Comfort. His conviction was based solely on two alleged confessions he has always denied making – one allegedly to a mentally unstable prisoner who made other claims in his testimony that could not be verified by the evidence; and another alleged confession to a 14 year old girl who did not report the confession until over a year later and is a close family friend of the victim.

If you look at cases 35 onwards, you will note that a significant proportion of cases involve sexual offences where individuals are convicted mainly on the allegations of the accuser despite their testimonies being inconsistent with the evidence or a clear financial or personal motive for

INUK'S DOSSIER OF CASES (CONT.)

Despite problems with the evidence that led to these convictions, these cases have been deemed by the CCRC to not fulfil the real possibility test i.e. they do not think that there is a real possibility that the Court of Appeal will overturn these convictions. The main reason for the CCRC's refusal to refer these cases is the lack of fresh evidence which the CCRC is generally required to limit its review to. The evidence that support these individuals' claims of innocence was either heard at trial or could have been available at the time of the trial.

The present arrangements with the CCRC mean that if the jury has decided to convict despite inconsistencies in the evidence, the CCRC is unlikely to be able to refer these cases despite their possible innocence. Returning to the case of Christopher Moody, the CCRC had decided that there were no grounds of referral mainly because the jury had decided to convict despite hearing of the apparent unreliability with the two alleged confessions. Jury deference means that the CCRC cannot refer his conviction unless there is substantial fresh evidence to cast further doubts on the reliability of the confessions. Equally, if trial counsel, for tactical reasons or by reason of omission fail to adduce evidence supporting innocence at the time of trial, such evidence is unlikely to constitute the kind of fresh evidence that is required for a referral back to the Court of Appeal by the CCRC. The stringent fresh evidence criterion applied by the CCRC means

that innocent victims of wrongful conviction have to bear the consequences of the failures of their trial counsels. It also fails to take into account the reality that defendants often have little knowledge of the criminal trial process and rely entirely on the judgment and expertise of their counsel.

Further, very few innocent victims of wrongful conviction will be fortunate enough to find fresh evidence. I recently wrote about the case of Sean Hodgson in the Socialist Lawyer. Hodgson overturned his conviction for the rape and murder of Teresa de Simone after DNA evidence exonerated him entirely. Cases like Hodgson are highly rare in a jurisdiction where biological materials are routinely destroyed or lost. However, it should not have taken DNA evidence and 27 years of imprisonment for Hodgson to have his conviction overturned. Hodgson was convicted mainly on his own confessions. The unreliability of Hodgson's confession was put forward at trial and, certainly, when he applied for leave to appeal in 1983. Hodgson was a notorious compulsive liar with a known severe personality disorder. He had made repeated false claims to the police for other criminal offences, including confessions for two other murders that he could not have committed as they did not happen.



Click for article on INUK's Dossier of Cases published in The Guardian

Many of the details that the prosecution claimed could only have been known by the killer were widely reported in newspapers and television reports. It should not have required fresh evidence in the form of a DNA exoneration to quash his conviction 27 years later. He was convicted mainly on his own confession, which we knew then and certainly more so in the last two decades, to be an inherently unreliable form of evidence. Hodgson's conviction should arguably have been overturned much earlier on the basis of his questionable confession alone. Yet, without the miraculous discovery of the DNA evidence, Hodgson would most certainly still be trapped within the prison system.

On the other side of the coin, the CCRC is routinely referring the convictions of guilty individuals back to the Court of Appeal because there is a real possibility that their convictions will be quashed on some form of procedural breach.

A couple of examples: Ronald Clarke and James McDaid – In 1995, both of these men were convicted of GBH after launching a savage attack on the victim, Mr Jacobs. The attack was a savage and clearly pre-meditated. Clarke, McDaid, along with a group of men, went into a pub where Mr Jacobs was and attacked him with knives and machetes. Both of his hands were almost severed as a result of the attack. In 2001, the CCRC referred the convictions of both men back to the Court of Appeal solely because their bill of indictment was not appropriately signed. The appeal was initially dismissed by the Court of Appeal and subsequently allowed by the House of Lords.

If the overriding concern of the CCRC is truly about safeguarding the innocent, then the requirement for fresh evidence should not be a barrier for revisiting the convictions of those who might be.

The dossier of cases published by INUK is evidence of how potentially innocent victims of wrongful conviction can be failed by the CCRC due to the real possibility test and the fresh evidence requirement that it applies. On the other side of the coin, the CCRC is routinely referring the convictions of guilty individuals back to the Court of Appeal because there is a real possibility that their convictions will be quashed on some form of procedural breach. It is failing those who might be innocent and, at the same time, assisting guilty people to overturn their convictions.

In the case of Joseph Fletcher, the appellant was convicted of 6 counts of indecent assault against young women and an additional count of indecent assault based on a full act of sexual intercourse. At trial, over two years after the original charges were made, the additional count of indecent assault was added to the indictment as an alternative to a count of rape. The CCRC referred Fletcher's conviction solely for the additional count back to the CACD in light of the House of Lord's decision in the separate appeal of *R v J*, which held that the prosecution of defendants based exclusively on an act of intercourse should be prohibited when the 12-month time limit has past. The CACD quashed Fletcher's conviction for the additional count, holding that the 12-month

INUK'S DOSSIER OF CASES (CONT.)

time limit has past. The CACD quashed Fletcher's conviction for the additional count, holding that the 12-month time limit in *R v J* would apply in instances where the count of indecent assault was added to the indictment as an alternative to the charge of rape.

In response to INUK's dossier of cases, Alistair Macgregor who is the deputy chair of the CCRC, said that we should be reminded of the 'considerable achievement' of the CCRC and the 320 convictions it has quashed. This 'success rate' needs to be seriously qualified – they include sentences, convictions that were quashed and replaced with lesser offences (such as manslaughter for murder), and like the cases highlighted above, convictions of guilty individuals that were quashed on technicalities.

The CCRC was established because of concerns that factually innocent people were being wrongly convicted and are unable to overturn their convictions, evidenced by cases such as the Birmingham Six, the Guildford Four, the Maguire Seven and so on. The concern about whether appellants might be factually innocent or guilty therefore underpins the historical formation of the CCRC. Yet, the statutory test currently applied by the CCRC has detracted it from the fundamental question of innocence or guilt.

Not only is the body failing potentially innocent applicants who go to the CCRC for help in overturning their convictions, as evidenced by the dossier of cases. At the same time, it is routinely assisting guilty violent criminals, sex offenders and drug traffickers in overturning their convictions on techni-

calities.

This is certainly not to body that public had wanted and is completely at odds with the mandate of the Runciman Commission back in the early 90s, which was to examine the criminal justice system only to the extent that they bore on the risks of an innocent defendant being convicted or a guilty defendant being acquitted. There is an urgent need to abolish the 'real possibility test' and uncouple the CCRC from the Court of Appeal. Its remit has to be refocused to one of investigating cases to ascertain if the evidence that led to a conviction is reliable. It should take into account all evidence, fresh or otherwise, and not let the Court of Appeal influence its review or decision making process.

I would like to end by emphasising that the 45 cases in the dossier are solely cases that have been assessed by INUK. They are therefore very much the tip of the iceberg and we estimate that there could be dozens more possible innocence cases that have been failed by the CCRC, such as Eddie Gilfoyle whom you will hear from later today, Michael Stone, Andrew Pountley and so on.

We would encourage other campaign organisations to similarly start compiling your dossier of cases and work in partnership with us so that we can all have better sight of the extend of the problem. **I**

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AN ACADEMIC'S PERSPECTIVE ON THE REFORM OF THE CCRC BY PROFESSOR RICHARD NOBLES, QUEEN MARY UNIVERSITY

I am in the presence of an audience who have so much more experience of miscarriages of justice than myself. Some of you have suffered from miscarriages of justice. Some of you have acted as legal representatives in miscarriage cases. Some of you carry out investigations in order to identify miscarriages, and others have campaigned for changes in the law to prevent miscarriages in future. In the presence of so much practical experience one has to ask what an academic can bring to these proceedings.

My answer is that an academic can offer the benefit of the long view. In my research into miscarriages of justice I have looked at the processes and procedures that preceded the creation of the Criminal Court of Appeal in 1907, the operation of the Criminal Appeal Act 1907, and the subsequent amending statutes. I have also studied the work of the Home Office in administering the pardon and referring cases to the Court of Appeal, Criminal Division. And I have closely followed the work of the CCRC since it commenced its investigations in 1997.(1) When one looks at the history of Criminal Appeals the overriding impression is one of déjà vu. The constant feature of the history is the reluctance of English judges to undertake an independent assessment of the safety, by which I mean the factual accuracy, of a jury's verdict finding someone guilty.

If one goes back to the 19th century debates on Bills which proposed the introduction of a court to consider appeals against convictions, one can find



Professor Richard Nobles

statements such as the following, from a senior judge:

'I think that the complaints of the present mode of administering the criminal law have little foundation, for the cases in which the innocent are improperly convicted are extremely rare' .(2)

The creation of the Court of Criminal Appeal in 1907 was not the result of the judges taking a more enlightened view of the need for a court to re-examine the possible innocence of persons convicted by juries, but in response to campaigns supported by famous persons which had been taken up in the media.(3) And, in an echo of the events that led to the creation of the CCRC, this media pressure was not simply the reporting of cases in which the press had become certain that innocent people had been wrongly convicted, but huge frustration at the failure of the authorities to provide an appropriate remedy. (4) Prior to the creation of the Court of Criminal Appeal in 1907, this frustration was directed at the Home Secretary Office, who had the power to issue a pardon, including a full pardon which recognised the innocence of the convicted prisoner.(5) But the Home Office had consistently been reluctant to exercise that power on the basis that only a court could undo a conviction.(6) One can hear the echoes here of the frustrations that led to the creation of the CCRC – a judiciary reluctant to undertake independent reassessments of wrongful convictions, a home office which felt

AN ACADEMIC'S PERSPECTIVE ON THE REFORM OF THE CCRC (CONT.)

that Constitutional considerations prevented them from exercising their powers, and a press that had become impatient with both.

This history makes one cautious about some of the proposals for reform which are typically offered. A good example here is the periodic reformulation of the Court of Appeals statutory power to hear appeals against convictions.(7) It is significant that the statutory powers of the 1907 court included the ability to set aside a conviction if 'on any ground, there was a miscarriage of justice.'(8) The *carte blanche* power to declare anything as a miscarriage of justice was not exercised. In practice, the Court relied on the more specific authority provided by the statute: 'that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence.' (9) The general power to remedy anything considered a miscarriage was interpreted as only allowing verdicts to be overturned where there was new evidence. (10) In addition, the 1907 Act gave the Court power to carry out a full investigation into the truth of the appellant's guilt. (11)

These powers of investigation were rarely exercised, fell into disuse, and were removed in later amendments. Despite the presence of these wide powers, the response of the Court was constructed in the same terms that it is still constructed today, namely the need to show a high degree of deference to the verdict of a jury.(12) The first case before the court was rejected on the basis that: 'there ought not to be a [reconsideration of the verdict] where only admissible evidence went before the jury.'(13)

To quote two of the 1909 judgments: 'the Jury are

the judges of fact. The Act was never meant to substitute another form of trial for trial by jury'(14) and 'we are not here to re-try cases which have been heard by a jury.'(15) The strength and consistency of this attitude was noted by the Royal Commission on Criminal Justice in 1993, who stated that:

'Ever since 1907, commentators have detected a reluctance on the part of the Court of Appeal to consider whether a jury has reached a wrong decision.'(16)

The commission believed that the court should be more willing to consider arguments that indicate that a jury might have made a mistake, and be more prepared, where appropriate, to admit evidence that might favour the defendant's case, even where this evidence was, or could have been, available at the trial.(17)

From 1907 until 1964 (18) the Court had no power to order re-trials, so the Court could not ask a new jury to re-assess the issue of factual guilt. Those seeking reform argued that the absence of this power inhibited the Court from quashing jury verdicts. (19) But a perceived reluctance to quash convictions on any basis other than an error of law has continued, despite the introduction of the re-trial power. In 1966 the 1907 grounds of appeal were altered to allow convictions to be quashed which were 'unsafe and unsatisfactory'. (20) The chosen words were not likely to change the practice of the Court for at least two reasons. Firstly, because they had previously been proposed in the parliamentary

debates leading up to the 1907 Act, and there rejected because they were considered 'hopelessly vague'. (21)

And second, because in 1966 the then Lord Chief Justice claimed that the practice of the court had already anticipated the

new powers, and that the Court were already doing everything that Parliament might have wanted from the change of words: 'This is something which we have done and which we continue to do, although it may be we have no lawful authority to do it'. (22)

One has echoes here of the circumstances surrounding the most recent changes to the statutory powers of the Court in 1995. The wording was then changed to the single standard of 'unsafe' dropping the alternative of 'unsatisfactory.' (23). When this change was debated in the standing Home Affairs committee in Parliament, the members of this committee took the view that the Court, under the leadership of Lord Justice Taylor, had already adopted a more liberal attitude. In response to the media outrage which had accompanied the successful final appeal of the Birmingham 6, the court was quashing a much higher number of convictions than had been the case before. (24)

The members of the standing committee ended up having quite a strange debate, in which they discussed what change in the wording of the Court's powers could signal the need for the court to continue with this current more liberal attitude. (25)

If there is a sense of *déjà vu* about the different



statutory powers which have been given to the Court to quash convictions, one has a similar impression with regard to the work of those responsible for investigating miscarriages of justice. The inadequacies of the Home Office in investigat-

ing possible miscarriages with a view to granting pardons was one of the factors which led to the setting up of the court in 1907. (26)

Aside from issues going to efficiency, there was also a perception that granting pardons on the basis of a prisoner's innocence was something of a contradiction, and a belief that questions of guilt and innocence were matters better left to a court. (27) This is a Constitutional issue – the Home Secretary, as a politician, cannot declare a prisoner to be innocent without being seen to usurp a function that rightfully belongs to the Courts. The 1907 Act did not remove this Constitutional problem. The Home Secretary was left with his power to grant pardons without reference to any restrictions on what evidence he might consider. (28) In addition he was given a new power to refer convictions to the new Criminal Court of Appeal. (29)

The Home Secretary's power to refer was subject to no time limits, no need to obtain leave, and no bar against raising issues that the defence had failed to raise at the trial. But the Act also

AN ACADEMIC'S PERSPECTIVE ON THE REFORM OF THE CCRC (CONT.)

stated that appeals from the Home secretary would be treated on the same basis as appeals which came to the Court through the normal procedure. (30) As such, there was a tension between the Court and the Home Secretary. Whilst the Home Office's investigations were not controversial, though they might be inadequate, the openness of the power to refer was.

On the one hand, since the Home Secretary had been given an unlimited power to refer, why should he limit himself to cases which would have gone to the court in the normal way, via leave to appeal out of time? But against that, since the Court was obliged to treat referrals from the Home Secretary no differently from those which came through the normal procedures, what was the point of referring cases that the court was likely to reject. The result was a relationship between the Home Secretary and the Court which was never easy. With high profile miscarriages which had gained media attention, the Home secretary provided a safety valve for the Court. The referral process provided an extra opportunity, and in some notorious cases multiple opportunities, (31) for the Court to review a conviction and on occasions, to relax its general restrictions, and approach an appeal with less commitment to uphold the verdict of the original jury. At the same time, the Court was also prone to criticise the referral of cases which it regarded, according to its normal procedures, as having little merit. (32) Perhaps the most famous, and least successful, of these criticisms was that made by Lord Lane, at the completion of the Birmingham 6 penultimate appeal: 'the longer this appeal has gone on, the more convinced we are that the jury verdict was correct' (33) – a remark intended to forestall any fur-

ther reference from the Home Secretary on anything other than the strongest of grounds.

The Royal Commission on Criminal Justice looked at the relationship between the Home Office and the Courts, and concluded that the Home Office was not exercising its power to investigate and refer as robustly as was needed. It attributed this failure to the doctrine of separation of powers. (34) The Home Secretary, as a politician and a member of the executive, was reluctant to challenge the judiciary's own construction of what constituted a miscarriage of justice. With this diagnosis, one that placed responsibility for the failings of the Home Office on the fact that an executive body must not be seen to interfere with the administration of justice, the obvious remedy was to allocate that responsibility to a body which would be seen as independent of Government – the body which is the subject of today's symposium – the CCRC.

Writing in 2000, David Schiff and myself questioned whether the perceived undue deference of the Court of Appeal to the verdicts of juries could be solved by a change in the statutory powers of the Court of Appeal, and whether the perceived undue deference of the Home Office to the Court of Appeal could be solved by a transfer of this function to an independent agency. (35) Whilst the CCRC cannot be accused of being political in its decisions to refer cases to the Court, it still faces criticism when it refers cases that the Court believes would not have come before it through the normal procedure. (36) The powers given

to the CCRC (37) positively invite such criticism. Whilst the Home Secretary could at least hide behind a referral power that contained no express limitations, the CCRC are expressly required to restrict themselves to referrals that have a 'real possibility' of success, and are required to base those references, unless there are exceptional circumstances, on arguments and

With regard to the CCRC, I can see some possibility for change. Rather than a statutory power to refer which enshrines a relationship of deference, the CCRC need one that gives them more ability to refer cases that the Court may conclude lack merit.

grounds not previously raised at trial or on appeal. In other words, having diagnosed the Home Office as a body which was unduly deferential to the Court, Parliament passed a statute that placed the new 'independent' body under a statutory duty to behave in exactly the same way. The Commission can dispense with the pre-requisite of novel evidence and arguments only in exceptional cases, but this, combined with the real possibility test, requires the Commission to double guess when the Court would, as it occasionally does, entertain doubts in an appeal which is a more of a re-assessment of evidence rather than an examination of new evidence, or an analysis of legal errors. In his extensive survey of the cases referred by the Commission, Laurie Elks found only one example of a case referred to the Court on this basis, and that was the case of Mills and Poole, in which the referral was a response to a direct invitation made by Lord Chief Justice Woolf, when an earlier refusal to refer in the absence of new evidence was the subject of an application for judicial review.(38)

So where do we go from here? What are the possibilities of increasing the Court's willingness to engage with the possibilities of prisoner's factual inno-

cence, and overturn jury verdicts? And what are the possibilities of achieving this through changes in the statutory powers of the Court or the CCRC? With regard to the Court, and in light of the history of statutory amendments, I remain sceptical. With regard to the CCRC, I can see some possibility for change. Rather than a statutory power to refer which enshrines a relationship of deference, the CCRC need one that

gives them more ability to refer cases that the Court may conclude lack merit.(39) They need to be able to say, in such cases, that they are simply doing their job. The form of words that might enable this experiment would be to give the CCRC power to refer on the basis of the standard that has ebbed and flowed within the Court's own judgments – that the CCRC has become convinced, on the basis of its own investigations, that there is a 'lurking doubt' about the safety of a conviction.(40)

In the paper which Michael Zander has presented, a copy of which he kindly sent to me earlier, he has put forward powerful arguments against this proposal, which he believes would trigger an enormous increase in the number of cases that would come to the commission. I agree with much of his analysis, including his view that the CCRC are being blamed for the failings of the Court – that it is the Court's excessive deference to the verdict of juries, their reluctance to form an independent view of the safety of

AN ACADEMIC'S PERSPECTIVE ON THE REFORM OF THE CCRC (CONT.)

convictions, which is the underlying problem. But I am not convinced that the resulting situation would be as catastrophic as he suggests. The alternative to the current powers, would be one in which the CCRC still has to act responsibly, so as to maintain public confidence in criminal justice. And this will not occur if the Court is overwhelmed by references, or the CCRC is unable to manage its own workload. So the Commission is unlikely to interpret lurking doubt in a manner which dispenses entirely with the deference currently shown by the Commission and the Court to both juries and to the decisions of the Court of Appeal in earlier appeals of the same case. But freeing up the basis for referral in this way may be a more subtle and effective way of inducing a more responsive attitude from the Court than a change to their powers. A requirement for the Court to satisfy itself that every prisoner was innocent would overwhelm the court and, as history of the amendments to the Court's statutory powers shows us, anything more subtle is likely to be ineffective.

But this change in the power of referral is an experiment that is at least worth considering. I

Notes:

1. See the following publications by Nobles & Schiff: *Understanding Miscarriages of Justice: Law, The Media and the Inevitability of Crisis* (OUP 2000) (hereafter 'Understanding'); 'Public confidence in criminal justice: the lessons from miscarriages of justice' (2009) 48(5) *Howard Journal of Criminal Justice* 461; 'After Ten Years: An Investment in Justice?' in M. Naughton (ed) *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan, 2009), ch.11; 'Absurd Asymmetry - a Comment on *R v Cottrell and Fletcher and BM, KK and DP (Petitioners) v Scottish Criminal Cases Review Commission*' (2008) 71 *Modern Law Review* 464; 'Guilt and Innocence in the Criminal Justice System: A Comment on *R (Mullen) v Secretary of State for the Home Department*' (2006) 69 *Modern Law Review* 80; 'A Reply to Graham Zellick' [2005] *Criminal Law Review* 95; 'Misleading Statistics Within Criminal Trials' (2005) 2 *Significance* 17; 'The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal' [2005] *Criminal Law Review* 173; 'A Story of Miscarriage:

Law in the Media' (2004) 31 *Journal of Law and Society* 221; 'The Right to Appeal and Workable Systems of Justice' (2002) 65 *Modern Law Review* 676; 'The Criminal Cases Review Commission: Reporting Success?' (2001) 64 *Modern Law Review* 64, 280; 'Due Process and Dirty Harry Dilemmas: Criminal Appeals and the Human Rights Act' (2001) 64 *Modern Law Review* 911; 'The Never Ending Story: Disguising Tragic Choices in Criminal Justice' 60 *Modern Law Review* 293 (March 1997); 'Criminal Justice: A Systems Approach' 58 *Modern Law Review* 299; 'Optimism Writ Large: A Critique of the Runciman Commission on Royal Commission on Criminal Justice' in M. McConville and L. Bridges (Eds) *Criminal Justice in Crisis* (Edward Elgar 1994); (With Nicola Sheldon) 'The Inevitability of Crisis in Criminal Appeals', 21 *International Journal of the Sociology of Law* (1993) 1.

2. Quoted in A.H. Manchester, *Sources of English Legal History 1750-1950* (London, 1984) 184.

3. The celebrity most noted for supporting miscarriage cases prior to the creation of a Criminal Court of Appeals was Arthur Conan Doyle, associated by the public with his literary creation, Sherlock Holmes.

4. On the role of the press, see 'Understanding', *ibid*, pages 39-41, 48-51.

5. 'Understanding', *ibid*, 42-45.

6. See J. Kempster, *The Perversion of Justice by the Criminal Departments of the State* (London 1905); the debates in Parliament arising from the Adolf Beck case, Parl. Deb HC 21 March 1905, cc 679-704 and 1039-52; and Report of the Committee of Inquiry into the case of Mr. Adolf Beck, Cd. 2315 (London 1904).

7. See Nobles & Schiff, 'Criminal Appeal Act 1995: The Semantics of Jurisdiction' 59 *Modern Law Review*, 573.

8. Criminal Appeal Act 1907 s4 (1).

9. *Ibid*.

10. A thorough survey of cases is found in M. Knight, *A Study of the Powers of the Court of Appeal Criminal Division on Appeals Against Conviction* (London 1970), and the *Supplement 1969-73* (London 1975).

11. Criminal Appeals Act 1907, s9.

12. On the reasons why deference is a necessary part of the relationship between appeal courts and the tribunals which they supervise see Nobles & Schiff, 'The Right to Appeal and Workable Systems of Justice' 65 *Modern Law Review* 676.

13. *Williamson* [1908] 1 Cr. App. R 3.

14. *McNair* (1909) 2 Cr. App. R 2,4.

15. *Simpson* (1909) 2 Cr. App. R 128, 130.

16. The Royal Commission on Criminal Justice, Cm 2263 (London 1993) ch 10, para 3.

17. *Ibid*.

18. Criminal Appeal Act 1964, s1(1).

19. See 'Understanding' *ibid*, p62-64.

20. Criminal Appeal Act 1966 s4(1).

21. This was the view of the then Attorney General, Parl. Deb. HC July 29 1907, cc. 635-6.

22. Parl. Deb. HL 12 May 1966, c. 837.

23. Criminal Appeals Act 1995 s2.

24. See 'Understanding' *ibid*, p83.

25. For example, the following remark was addressed to the Home Secretary by a member of the committee: 'He should consider the amendment or any other form of words that seems appropriate to ensure that we underwrite what is said to be the change in the court's approach or, where that change has not happened, to give a clear signal.' Mr. D. Trimble HC Standing Committee B 21 March 1995, c. 18.

26. See *supra*, note 6.

27. As early as 1883, the judge and author J.F. Stephen, observed: 'To pardon a man on the ground of his innocence is in itself, to say the least, an extremely clumsy mode of procedure.' *A History of the Criminal Law of England*, i (London 1883), 312.
28. Criminal Appeal Act 1907, s19(1).
29. Ibid.
30. Ibid, s19(1)(a).
31. The Luton Post office murder case was referred back to the Court of Appeal four times. See L. Kennedy (ed.) *Wicked Beyond Belief: The Luton Murder Case* (St. Albans, 1980).
32. 'it is clearly undesirable to encourage astute criminals dishonestly to by-pass the court after the conviction in the hope that fresh evidence, genuine or otherwise, might be got before the court as the result of a petition to the Home Secretary'. *Sparkes* (1956) 40 Cr. App. R 83, 91.
33. *R v Callaghan* (1989) 88 Cr. App. R. 40. The official report does not include the remark, which was widely reported in the press at the time, and since.
34. The Royal Commission based its recommendation to set up an independent review body 'on the proposition, adequately established in our view by Sir John May's Inquiry, that the role assigned to the Home Secretary and his Department under the existing legislation is incompatible with the constitutional separation of powers as between the courts and the executive.' See Royal Commission on Criminal Justice, Cm 2263 (London, 1993) ch. 11. para 9.
35. Nobles & Schiff, 'Criminal Appeal Act 1995: The Semantics of Jurisdiction' 59 *Modern Law Review*, 573.
36. Nobles & Schiff, 'The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal' [2005] *Criminal Law Review* 173.
37. Criminal Appeals Act 1995, s13.
38. *Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission* (Justice 2008) p126.
39. See Nobles & Schiff, 'Absurd Asymmetry - a Comment on *R v Cottrell and Fletcher and BM, KK and DP (Petitioners) v Scottish Criminal Cases Review Commission*' (2008) 71 *Modern Law Review* 464.
40. Articulated by Lord Justice Widgery, as the need for the Court of Appeal to 'ask itself... whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it.' *Cooper*, 53 Cr. App. R 82.



WHAT DO THE WRONGLY CONVICTED WANT FROM THE CCRC? DR ANDREW GREEN, CHAIR, UNITED AGAINST INJUSTICE (UAI)

This meeting has been called because many criticisms of the CCRC have been aired over the last few years, and we need to formulate proposals for its reform. I am here to contribute to this discussion as the current Chair of United Against Injustice (UAI). UAI is a national federation of local and specialist organisations composed of the families, friends and supporters of people who claim to have been wrongly convicted of serious crimes. Our member organisations give support to prisoners and their families and attempt to progress their cases. So I am here in order to summarise as best I can the views of the campaign organisations and the experiences that have resulted in the adoption of these views.

The member organisation with which I have been involved since it was founded in 1993 is INNOCENT, which is based in Manchester. INNOCENT was founded following the campaign initiated by Harry Fletcher of NAPO (who spoke earlier today) in 1992, which was based on a dossier of 160 cases of prisoners to which I contributed. A meeting to publicise this campaign was held in Manchester University Student Union, attended by many families that I had contacted, and as a result the families formed their own organisation and chose the name INNOCENT.

When the CCRC was established we were keen to take advantage of its resources and the initial enthusiasm of its case review managers. I contributed extensively to many applications, by researching the cases in detail, drafting applications, and negotiating with the Commission. Initially we were gratified that one of these, Susan May's case, was re-



Dr Andrew Green is Chair of UAI and Assistant Director of the University of Sheffield Innocence Project

ferred for a second appeal (and were subsequently angered at the Court of Appeal's treatment of it), and delighted that another case we supported, that of John Brannan and John Murphy, was referred and the conviction overturned. But we quickly became disillusioned by the Commission's methods of reviewing other cases.

Criticisms

One case that was investigated by Ann Craven, then Chair of INNOCENT, was that of Paul Higginson. In 2000 Derek Ianson was murdered at his home in Salford. Two men wearing balaclavas broke into his house, chased him into the back garden. In sight of his partner and children, one mowed him down with bursts of fire from a machine gun. The other was equipped with a pistol, but did not discharge it. Stuart Grainger was prosecuted as the killer, and Paul Higginson (through use of the joint enterprise doctrine) as the second gunman. Both denied involvement.

Stuart Grainger had an existing quarrel with the victim and was recognised, despite the balaclava, by his partner. The evidence against Paul Higginson was far more tenuous: his mobile phone was located at the scene by cell site analysis, and he was an 'associate' of Grainger (i.e. he knew him). His defence was that he was not involved in the crime or the preceding dispute, that he had an alibi, and crucially, that shortly before the crime was committed, his phone had been borrowed by a man called Lee Tansy, who returned it to him

the following morning. He knew Tansy to be a violent criminal, and was afraid to refuse this request, he told his solicitors. He instructed his lawyers to prepare and present the case on the basis that the gunman at the scene was not him, but Tansy, and that is how the case was presented in court.

Both men were found guilty. The appeal which followed relied on challenges to the witness identification of Grainger, since if Grainger's conviction had been quashed, there would have been no joint enterprise involving Higginson. Higginson's application to the CCRC, which was based on further evidence in support of his alibi, was turned down. But with the final Statement of Reasons, the Commission disclosed that throughout the preparation for the trial and the trial itself, Higginson's own solicitors had had Lee Tansy as their client as well as him, and had advised him when he was arrested under suspicion of involvement of this same crime.

The lawyer who submitted Higginson's application, Maslen Merchant of Hadgkiss Hughes and Beale, regarded this as a blatant conflict of interest. We at INNOCENT agreed with him. Maslen immediately resubmitted the application, arguing that this conflict was grounds enough for a referral. There were reasons for believing that this was more than a serious breach of rules, and that it had had a material effect on the preparation of the defence case.

In response the CCRC contacted the original solicitors. They replied that their firm had 'firewalls' in place that prevented any information relating to any of their clients becoming available to any staff who were not dealing with them directly. The lawyer act-

ing for Lee Tansy could have known nothing of Paul Higginson, and vice versa. The Commission accepted the law firm's assurances uncritically, and continued to refuse to refer the case.

The CCRC makes claims, in its reports and on its website, to be 'independent', but it is part of the Criminal Justice System and it shares the norms and values of that system. They include a strong working presumption that all lawyers are competent, honest, responsible, and dedicated to pursuing the best interests of their clients and serving the interests of justice. Whenever there is a conflict between applicants and their trial lawyers, they invariably believe what lawyers tell them and disbelieve claims of applicants.

In the experience of UAI's member groups, lawyers routinely:

- prepare cases inadequately,
- do not read unused material disclosed to them,
- do not listen to their clients,
- make inadequate defence statements so that relevant records are not disclosed to them and the credibility of their clients is then questioned in court, and
- make bad deals with the prosecution over what evidence is used.

WHAT DO THE WRONGLY CONVICTED WANT FROM THE CCRC? (CONT.)

Lawyers, we always say, are the problem, not the solution. We do not mean the few dedicated and highly competent lawyers like my fellow panel member Mark Newby, or Maslen Merchant (mentioned earlier). We need their help, and there are far too few people like them. But as Gareth Peirce said last night (1): 'Lawyers are at the heart of many cases of the wrongly accused and wrongly convicted: wrong, shoddy, lazy representation. It is a recurrent theme. It should haunt us.'

The CCRC is dominated by lawyers, and we have learned that unless lawyers are its servants rather than the people who run it, it will continue to be not fit for its intended purpose. The Statements of Reasons that we see (in which the CCRC gives its reasons for not referring cases) read like cases for the prosecution.

Paul Higginson's case illustrates just one of the criticisms voiced forcibly at a meeting held in January this year of representatives of grass roots campaign groups. Those who are suffering because a family member or close friend has had their life damaged beyond repair by the criminal justice system, and who find the CCRC has merely repeated and prolonged the process, express themselves more forcibly than observers or former employers of the CCRC, and the proposal before the meeting was 'Abolish the CCRC!'

The criticisms of the CCRC were long and detailed, too many to mention or do justice to here. Pre-

'Lawyers are at the heart of many cases of the wrongly accused and wrongly convicted: wrong, shoddy, lazy representation. It is a recurrent theme. It should haunt us.'
- Gareth Pierce

dictably, the main focus of criticism was the slavish dependence on the Court of Appeal brought about by section 13(1(a)) of the Criminal Appeals Act 1995, which prevents the CCRC from referring a case unless it finds that there is a 'real possibility' that the Court will not uphold the conviction. The Commission's interpretation of this provision is applied extremely strictly to their definition of 'fresh evidence'.

Fresh evidence, as defined by the Court, is evidence that was not available to the defence at the time of the trial. It includes evidence that the prosecution held but defence lawyers did not ask for. In keeping with the attitude holding that lawyers can do no wrong, it is assumed that defence lawyers, when they completely neglect some aspect of their client's case, do so for tactical reasons or for some good, if unstated, reason.

The CCRC use this over-strict interpretation of appeal judgements as an excuse for doing nothing. Why go to the trouble of using their extensive powers to obtain records, given them by section 17 of the 1995 Act, when almost no undisclosed evidence (the main resource for potential fresh evidence), counts as 'fresh'?

But applicants too are blamed for the failure of their own applications. Those who write their own applications fail (not surprisingly, because they are not lawyers) to explain properly why evidence they think exists is fresh and why it is important and makes a difference to their case;

or, if they trust a lawyer to make their application for them, they are once more surrendering their case to a lawyer who, if she or he spends no more time on it than the Legal Services Commission is prepared to pay for initially, will produce an application no better than would the applicant her or himself. Once more the CCRC is left with the easy option of doing no more than desk top reviews, processing cases quickly, and as a result giving the appearance of being an efficient organisation. Rarely will a case review manager work proactively on a case, looking for leads and fresh evidence that could substantiate an applicant's claims (as former commissioner Laurie Elks confirmed this morning). On one occasion, asked to interview a police officer, the case review manager refused because he predicted the officer would lie to him!

Yet the Court of Appeal can, according to section 4 (1) of the 1995 Act, 'receive any evidence which was not adduced in the proceedings from which the appeal lies,' and is not absolutely bound to the provision that it should 'have regard to ... whether there is a reasonable explanation for the failure to adduce the evidence at the trial.' The Act gives the Commission plenty of scope to present challenging cases. South Wales Against Wrongful Conviction (SWAWC) argues:

"[The Commission members] lack the moral courage to challenge the Court of Appeal when they potentially have the power to do this, either through persistent referral or by alerting government to the inadequacy of [the Commission's] remit and its perpetuation of miscarriages of justice. They succumb to their remit too easily and interpret it too literally

(paper given to the Abolish the CCRC meeting)."

Abolish or reform?

Despite their strong criticisms of the CCRC, those present at the meeting agreed to follow INUK's general demand for radical reform rather than abolition. The few examples of thorough, proactive investigations leading to referrals, such as the cases of Susan May and Brannan and Murphy (both investigated by case review manager Dawn Butler) showed what it could achieve. The CCRC is simply what we have, and it would seem unlikely that its resources (inadequate though they are) would be transferred to any other body following abolition. Innocent prisoners who have lost their first appeals must, whatever our view of the CCRC may be, apply to the Commission if they want a second appeal, and so they and their supporters are likely to campaign publicly for the abolition of the very body from which they seek help.

For these reasons, UAI has concentrated on advising those claiming to have been wrongly convicted about how they might get a positive result from the Commission. On its website is a page of advice on making an application to the CCRC (www.unitedagainstinjustice.org.uk/advice/CCRC%20applications%20guide.html – now somewhat out of date but generally still applicable). We explain what applicants need to provide that will count as fresh evidence, how to justify their claim that evidence is indeed fresh,

WHAT DO THE WRONGLY CONVICTED WANT FROM THE CCRC? (CONT.)

and how to make it clear to the CCRC that the fresh evidence relates to the issues in their case and how it would have made a difference to the jury's decision in their trial, if the jury had had the opportunity to hear it. We tell applicants about what we see as the CCRC's shortcomings, and suggest how to ensure that their application will progress beyond a review of paperwork and be fully investigated.

More recently we have taken to warning applicants that, because the CCRC will avoid doing serious work on a case if they can, all the work needs to be done in advance of the application. SWAWC advises:

"[The CCRC] reject about 90% of applications very quickly because they don't raise anything new – this creates the situation where much of the investigation has to be done by the applicant or their representatives if they are fortunate to have any. The CCRC do not investigate unless a good chunk of the work is already done for them."

INNOCENT has developed contacts with the few good lawyers on which applicants can rely, with experts on whom it can rely and who are prepared to do some work pro bono, and with INUK and its member innocence projects.

The demands for reform of the CCRC which have emerged from UAI member organisations include the following:

1. Radical change of the 'real possibility test' so that the CCRC is free to refer more cases in which applicants appear to be actually innocent because much

of the case presented against them at their trials has been demolished. It may be argued that the appeal court itself is the true source of the problems applicants encounter with the CCRC, but it is probably more possible to achieve the reform of the CCRC than reform of the Court of Appeal.

2. Specific modification of the definition of 'fresh evidence', so that the current over-strict interpretation of this term by the appeal court is not binding on the Commission. Applicants should not be required to explain why evidence that is plainly relevant and significant in their cases was not obtained or even considered by their trial lawyers. There should be no prior assumption that trial lawyers did their work diligently. The mere fact that evidence was not heard by the lower court and not then known to the applicant should be sufficient for it to be regarded as fresh.

3. The CCRC must adopt a far more proactive approach in their reviews of applications. Many applicants only have vague ideas of 'what went wrong' in their trials and the preparation of their defence. Even when their applications are made on their behalf by lawyers, these are often badly prepared and merely invite the CCRC to investigate in general terms. Case review managers should have sufficient knowledge, experience and motivation to assess what significant undisclosed evidence may be held by the original investigators, or what tactics were pursued in the course of investigations (for example, pressure put on witnesses) that are likely to have led to

injustices.

4. The demand for a proactive approach requires wholesale retraining or replacement of personnel employed on case investigations, and of those who manage their work, including Commission members. They need to know far more about police investigative practices (what they should be, and what they are in practice). They need to know far more about how defence lawyers normally work, and the financial and other problems that lead to poor preparation of cases. The CCRC should never rely on police officers to investigate on its behalf, but employ on its own staff fully trained as investigators. It follows that the CCRC should be given enough funding to employ sufficient staff, to train their staff fully, and to provide the resources they need to work to a high standard. **I**



Note:

1. www.thejusticegap.com/News/a-death-of-justice. Gareth Peirce was speaking at a meeting held at the College of Law to launch the publication of *Wrongly Accused: who is responsible for investigating miscarriages of justice?* edited by Jon Robins (London, Wilmington Publishing and Information Ltd, 2012): see also the essay 'Poor defence' by Maslen Merchant in this same publication.



NEWS

Events

On the 30th March 2012, INUK held its **Symposium on the reform of the Criminal Cases Review Commission**. Attended by around 150 delegates, the Symposium was kindly hosted by Norton Rose LLP in London and funded by the Joseph Rowntree Reform Trust (JRRT). INUK would also like to thank Lexis Nexis for supporting the event.

On the 27th April 2012, INUK held its **Annual Spring Conference**, which was kindly hosted by Cleary Gottlieb Steen & Hamilton LLP in London. The event, which saw innocence project case-workers sharing casework and investigative techniques, was attended by around 60 delegates from various INUK member innocence projects.

Dr Michael Naughton and Ms Gabe Tan are pleased to accept an invitation to speak at the **International Conference on the Prevention of Wrongful Convictions** in Changchun City, Jilin, China. The Conference, the first such conference in China, is organised by the Research Center of Criminal Justice, Renmin University of China and will be held on the 6th-10th August 2012.

Communications

INUK published its Dossier of Cases containing 44 cases of alleged wrongful convictions that have been refused at least once by the Criminal Cases Review Commission. The Dossier of Cases and accompanying Press Release (issued on 28 March 2012) can be found on: www.innocencenetwork.org.uk/ccrcreform

Press coverage

The INUK Symposium on the reform of the Criminal Cases Review Commission and Dossier of Cases were featured in various national and local newspapers and professional magazines, including: The Guardian, The Times, The Northern Echo, Durham Times, Lancashire Evening Post, Sunderland Echo, Watford Observer, Manchester Evening News, Bromsgrove Advertiser, Law Society Gazette and Lawyer 2B.

Dr Michael Naughton was interviewed on BBC Radio 4 on the successful appeal of Sam Hallam on 19 May 2012.

Case Statistics

As of June 2012, 104 cases have been referred to INUK member innocence projects for full investigation. 104 cases deemed eligible by INUK are currently on the waiting list pending referral to an innocence project. INUK has received 1,067 enquiries for assistance and 550 full applications.



**SNAPSHOTS FROM THE INUK SPRING CONFERENCE 2012,
CLEARY GOTTlieb STEEN & HAMILTON LLP, LONDON, 27 APRIL
2012**



Presentation by Students from the University of Sheffield Innocence Project - Helen Clifton, Joseph Ogle, Charlotte Page and Richard Choo



Presentation by Sandie Ferrans and Rory Hishon from the White and Case LLP Innocence Project



Presentation by Lianne Edwards and Vaughan Caines from the University of Bristol Innocence Project

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INQUIRY welcomes submissions for any of the following categories:

- 1) Feature Articles on any issue relating to wrongful convictions and/or innocence project work (no more than 2,000 words).
- 2) Reviews of books, articles or films on the subject of wrongful convictions and/or innocence projects (no more than 1,000 words).
- 3) Innocence Project News from Members (no more than 250 words)
- 4) Research Updates (no more than 250 words)
- 5) Student articles on any issue relating to wrongful convictions and/or innocence project work (no more than 1,000 words).

DEADLINES & SCHEDULES FOR 2012

Autumn Issue

The deadline for the submissions for all of the above categories is MONDAY, 27 August 2012

INSTRUCTIONS

All submissions and expressions of interest should be sent by e-mail with INQUIRY in the subject line to:

innocence-network@bristol.ac.uk

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