



Innocence Network UK (INUK) Symposium on the Reform of the Criminal Cases Review Commission (CCRC)

Report

Michael Naughton and Gabe Tan





Please note that the points of view or opinions contained in this report are those of the contributors cited and do not necessarily represent the official position of the Innocence Network UK (INUK)





Authors' Note

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We are grateful to Chris Mullin for opening the Symposium. Thank you to the participants for taking time out of their busy schedules to contribute to this Symposium and for their generosity in sharing their experiences and knowledge. Without their willingness to participate, the Symposium simply could not have taken place.

Finally, we wish to thank all who attended the Symposium for their enthusiasm, support and involvement. We invite you to play a part in this important conversation on how the Criminal Cases Review Commission (CCRC) could be reformed so that it can better assist innocent victims of wrongful conviction.

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Authors' Biographies

Dr Michael Naughton is a Reader in Sociology and Law in the Law School and School of Sociology, Politics and International Studies (SPAIS), University of Bristol. He teaches in the general area of crime, justice and society and in his specialist area of miscarriages of justice. He is the Founder and Director of the Innocence Network UK (INUK), which he established in the Law School at the University of Bristol, in September 2004. He is Founder and Director of the University of Bristol Innocence Project, the first innocence project in the UK. Additionally, through the vehicle of INUK he has actively assisted in setting up 34 innocence projects in UK universities to date and provides conference and training materials to support and progress the work of INUK's member innocence projects. He has written widely on issues related to miscarriages of justice for leading academic journals and is a regular contributor to debates on issues relating to wrongful convictions in the media. He is the author of *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg* (Palgrave Macmillan, 2007 [2012]), *Claims of Innocence: An Introduction to Wrongful Convictions and How they Might be Challenged* (University of Bristol, 2011), and he is the editor of *Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan, 2009 [2012]).

Gabe Tan is the Executive Director of the Innocence Network UK (INUK). She deals with prisoners maintaining innocence on a daily basis. She oversees all of the organisation's casework, including eligibility assessment of applications from prisoners, submissions to the CCRC and the referral of cases to member innocence projects. In addition to her work with INUK, Gabe has published various articles on miscarriages of justice in both academic and professional journals. She is also one of the founding members of the first innocence project in the UK – the University of Bristol Innocence Project, which she currently supervises on a pro-bono basis.

Contributors' Biographies

Emily Bolton was awarded an Equal Justice Fellowship and later a Soros Advocacy Fellowship to establish Innocence Project New Orleans (IPNO), a non-profit law office providing legal representation to the wrongfully convicted in the United States. IPNO grew from a staff of one to thirteen during her tenure, and has so far been involved in the exoneration or release of 20 innocent prisoners. Returning to the UK in 2004, she helped develop the UK legal action charity Reprieve. In 2007, working as a UK solicitor, Emily brought a wrongful conviction case to the Court of Appeal via the Criminal Cases Review Commission, which resulted in the quashing of the conviction in 2010. Emily is a trustee of the newly established Centre of Criminal Appeals (CCA), which aims to assist victims of miscarriages of justice obtain high quality representation from experienced practitioners able to undertake a detailed and thorough investigation of the case, as well as provide legal expertise.

John Cooper QC was called to the Bar of England and Wales in 1983, and the Australian Bar in 1989. He was awarded the title of Q.C in March 2010. John is also an Honorary Visiting Professor of Law at Cardiff University. He is now recognised as being one of the leading barristers in London and was described by The Times as "a rising star of the Criminal Bar". John was shortlisted by Liberty, Justice, and the Law Society as Human Rights Barrister of the Year in 2009. Apart from practising as a barrister, John is also a script writer and regularly appears on television and radio, both as a presenter and commentator. Notable criminal cases recently represented by John include: *R v Lui Borges*, *R v Samuel Johnson*, *R v M*, *R v Davies*, *R v Ricky Blackman & Others*, *R v Emigen Shega*, *R v S Brade*, *R v Whitewind*, *R v Stationis*, *R v Paul Page*, and *R v G Tilling*.

Laurie Elks is a former Commissioner at the CCRC and author of *Righting Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission* (2008). Prior to his role at the CCRC he worked as a teacher in Nigeria for Voluntary Service Overseas, as a community worker in Hackney, and as a welfare rights worker for the Child Poverty Action Group. He qualified as a solicitor in 1980 and became a partner of Nabarro Nathanson where he worked as a corporate lawyer.

Harry Fletcher is Assistant General Secretary of the National Association of Probation Officers (NAPO), the Trade Union and Professional Association for Family Court and Probation Staff. Led by Harry, NAPO was instrumental in driving the parliamentary campaign back in the early 1990s that led to the establishment of the CCRC. In particular, NAPO's dossier of close to '200 Cases to Answer' (including a dossier known as the Long Lartin 22) submitted to the Home Secretary between 1992-1993, contributed to the successful appeals of several notorious miscarriages of justice, including Michael O'Brien and Ellis Sherwood in the case known as the 'Cardiff Newsagent Three'.

Mark George QC is a highly experienced defence trial advocate of more than 30 years call. He is regularly instructed in cases of murder, manslaughter, rape and other serious sexual cases. Before he took silk he was regularly briefed in serious cases of historic sexual assault, often representing teachers and carers. In silk he continues to defend in such cases. Mark also has considerable experience of hearings before the Parole Board, where he represents prisoners, particularly before lifer panels. Mark undertakes judicial review work relating to prison law and criminal law, such as challenges to decisions of the CCRC. In addition to criminal work, as a junior Mark also undertook inquests on behalf of bereaved families often following deaths in custody. Mark is an opponent



of the death penalty and has a strong interest in death penalty cases in the United States. He has produced Amicus Curiae briefs in two recent Supreme Court cases in the United States and has been a trustee of Amicus since 2008. Notable cases represented by Mark in recent years include: *R v Peter Wilson* [2011], *R v Power* [2011], *R v Ogumbiyi & ors* [2011], *Morris, R (on the application of) v Criminal Cases Review Commission* [2011], and *R v Hughes* [2009].

Eddie Gilfoyle In June 1992 Eddie Gilfoyle's wife, Paula Gilfoyle, who was eight and a half months pregnant, committed suicide by hanging herself in the garage of their home in Upton, Wirral. Four months later Merseyside Police charged him with Paula's murder and he was subsequently convicted at Liverpool Crown Court in July 1993. After his conviction, the Police Complaints Authority (PCA) instructed Lancashire Police to conduct an inquiry into the case. Lancashire Police concluded that there was no evidence of murder. Their findings also revealed that Merseyside Police had suppressed the evidence of a witness who saw Paula alive and well several hours after it was alleged that Eddie had killed her. Despite the findings by Lancashire Police, Eddie's appeal in 1995 was rejected. His case was featured by Channel 4's 'Trial and Error', where pathologist Professor Bernard Knight concluded that there was no evidence supporting the claim that Paula was murdered. In 2000, the CCRC referred Eddie Gilfoyle's conviction back to the Court of Appeal, where it was again dismissed. In January 2012, Paula's diary and personal papers, which revealed previous suicide attempts and a troubled background, were disclosed by Merseyside Police. An inquiry is now being called to investigate why these documents which could prove his innocence were withheld from his legal team.

Dr Andrew Green founded INNOCENT in 1993, a campaign for alleged victims of wrongful conviction and their families. He is also the Chair of United Against Injustice (UAI) and currently acts as assistant director of the University of Sheffield Innocence Project. Cases supported by INNOCENT include Kevin Callen, Dave Wood, Adrian Maher, Graham Huckerby, Shay Power, Suzanne Holdsworth and Ian Lawless. Dr Green is the author of *Power Resistance Knowledge: the epistemology of policing* (2008).

Paddy Joe Hill is one of the six men known as 'the Birmingham Six' who were wrongly convicted of IRA-related bombings in Birmingham in the 1970s. Paddy spent 16 years in prison before overturning his conviction in 1991. On the day the Birmingham Six overturned their convictions the Royal Commission on Criminal Justice (RCCJ) was set up. The RCCJ's recommendations led to the establishment of the CCRC. Following his release, Paddy set up the Miscarriage of Justice Organisation (MOJO) in Glasgow, which is a charity that provides aftercare support to victims of wrongful conviction who have been released from prison.

David Jessel was a Commissioner at the CCRC from 2000 – 2010. Prior to joining the CCRC David worked for BBC's *Rough Justice*, a television documentary series investigating alleged miscarriages of justice. He subsequently set up a production company, Just Television, dedicated exclusively to the investigation and publicising of miscarriages of justice. He produced the Channel 4 series *Trial and Error*, which exposed numerous wrongful convictions, including the cases of Peter Fell, Mary Druhan, Sheila Bowler and Danny McNamee - all of which led to the convictions being quashed by the Court of Appeal.

Bruce Kent is a British political activist and a former Roman Catholic priest. Active in the Campaign for Nuclear Disarmament (CND), he was the organisation's general secretary from 1980 to 1985,



and its chair from 1987 to 1990. He now holds the honorary title of vice-president. Bruce is also the chair of 'Progressing Prisoners Maintaining Innocence' (PPMI), a working group established to raise awareness about the obstacles to parole and progression confronting prisoners maintaining innocence. Bruce has been an active supporter of Ray Gilbert who has maintained innocence in prison for over 30 years. Ray Gilbert's application was recently refused by the CCRC despite numerous flaws in the evidence that led to his conviction. Mr Gilbert's case is currently being investigated by the University of Bristol Innocence Project.

Glyn Maddocks is a solicitor who has worked on wrongful conviction cases for over 20 years. Through his work on appeal cases Glyn has developed a deep understanding and knowledge of the processes and procedures of the Criminal Cases Review Commission, and of the Court of Appeal in obtaining compensation for victims of miscarriage of justice from the Ministry of Justice. In 2005, in recognition of his work over a twelve year period representing Paul Blackburn, who had his conviction quashed after serving nearly 25 years, Glyn was named Welsh Lawyer of the Year. Glyn is a trustee of the newly established Centre of Criminal Appeals (CCA), which aims to assist victims of miscarriages of justice to obtain high quality representation from experienced practitioners able to undertake a detailed and thorough investigation of the case, as well as provide legal expertise.

Susan May has been maintaining her innocence for over two decades since her conviction for the murder of her 89-year-old aunt, Hilda Marchbank, who was found dead in her home in Tandle Hill Road, Royton, Greater Manchester. In 1999, her case was referred back to the Court of Appeal by the CCRC after investigations by the Police Complaints Authority (now the Independent Police Complaints Commission) reviewed extensive impropriety in the police's handling of her case. Her second appeal was dismissed in 2001. Two subsequent applications to the CCRC detailing new forensic evidence that cast doubts on the expert evidence that contributed to her conviction were unsuccessful. Her case is currently being investigated by the University of Sheffield Innocence Project with the assistance of Mark George QC.

Chris Mullin is a former MP, a minister in three departments, and chairman of the Home Affairs select committee. Before commencing his long-standing political career, Chris was a journalist working for Granada's World in Action. In 1985, the first of several *World in Action* programmes casting doubt on the Birmingham Six's convictions for IRA bombings was broadcast. A year later, Chris' book, *Error of Judgment: The Truth About the Birmingham Pub Bombings* (1986), set out a detailed case supporting the men's claims that they were innocent. The evidence revealed by Chris' investigations catalysed the public campaign that eventually contributed to the release of the Birmingham Six.

Mark Newby was admitted as a Solicitor in 1993, and became a Solicitor Advocate in 2004. Since 2002, he has had a strong interest in miscarriages of justice, and in particular historic sexual offences. He was Director of the Historic Abuse Appeal Panel (HAAP) set up in 2003 to tackle historic allegations and has written and spoken on miscarriage issues ever since. Mark has overturned several high profile wrongful convictions in the last few years, including the cases of Anver Sheikh who overturned his conviction after three appeals; Ian Lawless; and, Andrew France.



Professor Richard Nobles joined Queen Mary, University of London in September 2006 as a Professor in Law, having previously held the position of Reader in Law at the London School of Economics. Since 1990, Richard has been researching, jointly with Professor David Schiff, criminal appeals and miscarriages of justice. Together they obtained an Economic and Social Research Council Research Award in 1991/92 to investigate the role of the Court of Appeal in remedying miscarriages of justice involving the re-assessment of expert evidence. This research subsequently led to a submission to the Royal Commission on Criminal Justice. Professor Nobles is the co-author (with David Schiff) of *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (2000).

Dr Eamonn O'Neill is an award-winning investigative journalist and Programme Director of the MSc in Investigative Journalism at the University of Strathclyde, Glasgow, Scotland. He is also the Director of the University of Strathclyde Innocence Project. His work on miscarriages of justice includes the 11 years he spent investigating the Robert Brown case which ended with a 25-year wrongful murder conviction being overturned by the Court of Appeal in November 2002. Eamonn's work has been honoured in national and international awards including: The Paul Foot Award, The British Press Awards, the Scottish BT Media Awards, and The British Film & Television Academy. He was the first British journalist to be awarded an American IRE (Investigative Reporters and Editors) honour in the Special Award (Tom Renner Award) category for his lifetime's investigative work on miscarriages of justice.

Professor Michael Zander QC (Professor Emeritus of Law at the London School of Economics (LSE)) is a renowned academic in the fields of criminal and civil procedure, the legal profession and legal services. His books include *Cases and Materials on the English Legal System* (9th ed., 2003), *The Law Making Process* (6th ed., 2004), *A Bill of Rights?* (4th ed. 1997), and *The Police and Criminal Evidence Act 1984* (5th ed. 2005). In 1999 he gave the Hamlyn Lectures under the title 'The State of Justice' (2000). Professor Zander was a member of the Runciman Royal Commission on Criminal Justice (1991-1993). He also conducted the Commission's largest research project - The Crown Court Study.



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INTRODUCTION

On the 30 March 2012, the Innocence Network UK (INUK) held a Symposium at Norton Rose LLP, London, regarding the reform of the Criminal Cases Review Commission (CCRC). The Symposium marked the 15th anniversary of the CCRC, which took over responsibility of reviewing alleged miscarriages of justice from the Home Secretary on the 31 March 1997. Set up under the Criminal Appeal Act 1995, the CCRC is the only gateway back to the Court of Appeal for convicted persons who have failed in their first appeal.

As time has passed, it has become increasingly apparent to those that work on cases of alleged wrongful convictions that the CCRC is not the extra safety net for innocent victims of wrongful conviction that was hoped for originally. There is a growing list of cases that have been refused a referral by the CCRC - despite serious doubts about the evidence which led to conviction. Equally concerning are the alleged wrongful convictions that have been dismissed by the Court of Appeal following a CCRC referral, of which the CCRC are powerless to assist further, despite a continuing belief that the applicant may be innocent.

To date, out of around 300 cases that have been assessed by INUK to be potentially genuine claims of innocence, almost a quarter have been refused by the CCRC at least once. In several of these cases the alleged victim has been detained in prison and maintaining their innocence even prior to the establishment of the CCRC. In addition to those cases detailed in a 'Dossier of Cases' (published on the week the Symposium took place), it is estimated that there could be dozens more dubious convictions amongst the long-term prison population that are represented by other miscarriage of justice organisations and individual criminal appeal lawyers.

This Symposium followed two Public Statements issued by INUK on the 15 December 2011 and 28 March 2012, respectively, which highlighted how the CCRC is failing applicants who may be innocent and the urgent need to rethink and reform its current operations.

In particular, as will be clear from the proceedings of the Symposium detailed in this report, there is a growing consensus that the CCRC needs to be uncoupled from the Court of Appeal so that it is truly independent in its review and decision making process. The 'real possibility test' that the CCRC is required to apply under s.13(1) of the Criminal Appeal Act 1995 not only means that innocent victims of wrongful conviction can fail to have their cases referred, it also determines the reach and depth of reviews that are conducted by the CCRC. Rather than a pursuit of the truth behind claims of innocence, the 'real possibility' test restricts reviews to new evidence not available at the time of trial or appeal and whether the Court of Appeal might quash the conviction. This is highly problematic for the following reasons:

First, the CCRC was not intended to simply mimic the approach of the Court of Appeal. It was set up precisely in recognition of the reluctance of the Court of Appeal to address the factual innocence or guilt of appellants and the undue deference placed by the CCRC's predecessor, the Home Secretary, on the Court of Appeal, which meant that neither was adequate in ensuring that innocent victims of wrongful conviction could obtain justice.

This point cannot be properly understood without grounding the establishment of the CCRC in the context of cases such as the Birmingham Six, the Guildford Four, the Maguire Seven, Judith Ward, and other miscarriages of justice. The public belief that innocent people had been wrongfully convicted and imprisoned caused a public crisis of confidence in the entire criminal justice system, ranging from the time that the police start to investigate an alleged crime up to when the appeals



system has been exhausted. This prompted the government of the day to announce the setting up of the Royal Commission on Criminal Justice (RCCJ) on the day that the Birmingham Six overturned their convictions in the Court of Appeal - at the third time of asking.

Second, although the RCCJ did not set specific criteria by which the CCRC should select cases for further investigation, it found the criterion of fresh evidence or new consideration of substance, which was previously limiting the unrestricted discretion, (conferred on the Home Secretary by s.17 of the Criminal Appeal Act 1968) to be 'unsatisfactory'. Quoting Sir John May's report on his inquiry into the case of the Maguire Seven, the RCCJ noted that the fresh evidence requirement self-imposed by the Home Secretary has "...led the Home Office only to respond to the representations which have been made to it in relation to particular convictions rather than to carry out its own investigations into the circumstances of a particular case or the evidence given at trial..." INUK would add to this that the fresh evidence criteria can also substantially disadvantage applicants whose evidence supporting innocence was not used as a result of a mistake or poor trial tactics by their defence lawyers.

Finally, in debates about alleged wrongful convictions, the 'elephant in the room' that is often overlooked is that if the person claiming to be innocent is indeed innocent, the actual perpetrators remain at liberty with the potential to commit more crimes and cause more harm to society. If we accept that innocent people can be wrongly convicted due to a range of causes – eyewitness misidentification, police misconduct, flawed expert evidence, false allegations, false witness testimonies, and so on, then, we cannot overlook these cases merely because they are unable to overcome the practical and legal barriers posed by the CCRC.

As such, the question that framed the Symposium was:

'Accepting that the criminal justice system is not perfect, and that innocent victims of wrongful conviction may be failed by the CCRC, how might the CCRC be reformed to give the innocent a better chance of overturning their convictions?'

This report provides an overview of the papers that were given at the Symposium, as well as two papers that were submitted after the Symposium by John Cooper QC, and by Emily Bolton and Glyn Maddocks on behalf of the Centre for Criminal Appeals (CCA). This report begins by looking at the historical context which led to the establishment of the CCRC, and what the RCCJ and campaigners in the late 1980s and early 1990s envisaged as the future of the CCRC. Secondly, it reports on the key limitations of the CCRC identified by the participants. Finally, it reports on the specific recommendations and statutory amendments offered by the participants to enable the CCRC to have the powers and resources to more adequately help potentially innocent applicants.

The Symposium programme and participant list are located in Appendix I at the end of the report. Appendix II contains the two public statements issued by INUK leading up to the Symposium to provide a context for the discussions. These public statements are the views of INUK and do not necessarily reflect the views of all participants. It also contains a 'Dossier of Cases' released by INUK on the week of the Symposium, which contains 44 cases of potentially genuine wrongful convictions that have been refused a referral by the CCRC on at least one occasion.

The participants in the Symposium are all experts in the area of wrongful convictions. They are victims or alleged innocent victims of wrongful conviction who are struggling to achieve a referral by the CCRC back to the Court of Appeal; experienced criminal appeal practitioners, former Commissioners at the CCRC; investigative journalists who have overturned wrongful convictions; academic scholars who specialise in criminal appeals and miscarriages of justice; or,



representatives of organisations that campaign for, and provide much needed support to, alleged victims of miscarriage of justice and their families.

With the array of participants coming from such diverse backgrounds, it is inevitable that there are diverging views on exactly how, and the extent to which, the CCRC ought to be reformed. Notwithstanding the variation in their views, however, all participants share a common desire to contribute to the improvement of the current operation of the CCRC and ensure that the criminal justice system can better afford innocent victims of wrongful conviction the help, hope and justice they deserve.

The contents of the papers submitted by the contributors have been presented thematically in this report. Minor amendments have been made to improve the flow of the report.

Finally, we would direct any parties interested in this report to the main source for a comprehensive critique of the CCRC from the perspective of its ability to assist alleged factually innocent applicants: Naughton, M. (2009) (Editor) *The Criminal Cases Review Commission: Hope for the Innocent?*, Basingstoke: Palgrave MacMillan. It is the product of the inaugural INUK Symposium that was held on the 31 March 2007 to coincide with the 10th anniversary of the CCRC. It contains 16 chapters of analysis by a collective of 17 authors comprised of leading criminal appeal practitioners, academics, investigative journalists and representatives from third sector voluntary organisations that assist alleged factually innocent victims of wrongful convictions.



EXECUTIVE SUMMARY

Although differing views are expressed in this Report there is a broad consensus on the following issues:

- The existing relationship between the CCRC and the Court of Appeal is unsatisfactory and requires, at the very least, a re-examination. In particular, the 'real possibility' test under s.13 of the Criminal Appeal Act 1995 enshrines a relationship of deference to the Court of Appeal. It prevents the CCRC from referring potentially genuine miscarriages of justice of applicants who may be innocent if it is thought that the Court of Appeal may conclude that the case lacks legal merit. This severely compromises the CCRC's independence and hinders its ability to assist applicants who may be innocent.
- The 'real possibility' test under s.13 of the Criminal Appeal Act 1995 needs to be replaced with a different test that allows the CCRC more independence both in its review of alleged miscarriages of justice, and in its consideration on whether to refer a case back to the Court of Appeal.
- The wording of the fresh evidence criteria under s.23 of the Criminal Appeal Act 1968, which defines fresh evidence as evidence not adduced at trial, is generally unproblematic. However, both the CCRC and the Court of Appeal tend to adopt an overtly strict interpretation of the test. In particular, evidence that was, or could have been, available at the time of the trial is generally not considered as fresh evidence. A looser interpretation of the fresh evidence criteria needs to be adopted so that victims of miscarriages of justice are not procedurally barred from having their convictions overturned.
- The CCRC's powers to obtain records and documents from public bodies under s.17 of the Criminal Appeal Act 1995 would benefit from an extension to private bodies. This is particularly important in the review of historical abuse cases.
- The CCRC's case review approach is generally limited to a desktop review of the case papers. It needs to undertake more fieldwork investigations, such as crime scene visits and re-interviewing of witnesses, particularly in complex, serious cases. Whilst it is accepted that this would require a significant increase in the CCRC's resources, the resource implications could be addressed by refining the CCRC's intake to sharpen its focus. For instance, cases based on points of law or legal technicalities that have no bearing on the applicant's possible innocence could be excluded from the CCRC's remit. Such a refinement can contribute to more rigorous investigations on potentially genuine innocence cases.
- The CCRC needs to undertake more interviews with applicants who are not always able to present their claims fully in writing. The CCRC could make use of technologies such as video conferencing to achieve more communication with applicants without imposing an undue burden on its resources.





WHAT KIND OF A BODY WAS THE CCRC INTENDED TO BE?

(Dr Michael Naughton, Innocence Network UK (INUK)): The question of whether the CCRC is working or failing cannot be answered without contextualising it within the public crisis of confidence in the criminal justice system that was caused by cases such as the Birmingham Six, the Guildford Four, Maguire Seven, Judith Ward and so on – cases which led to the establishment of the Royal Commission on Criminal Justice (RCCJ), whose recommendations led to the formation of the CCRC.

The remit of the RCCJ was far reaching:

“[T]o examine the criminal justice system from the stage at which the police are investigating an alleged or reported criminal offence right through to the stage at which a defendant who has been found guilty of such an offence has exhausted his or her rights of appeal.”¹

It is also important to note that the considerations of the RCCJ referred to the issues raised:

“[O]nly to the extent that they b[ore] on the risks of an innocent defendant being convicted or a guilty defendant being acquitted.”²

These two short quotes give an insight into the RCCJ’s definition of what would constitute a miscarriage of justice and how the new body that it recommended should operate. In terms of definition, the RCCJ fully corresponded with lay understandings: it was either the wrongful conviction of the factually innocent and/or the wrongful acquittal of the factually guilty.

In terms of how the new body that it recommended, and which became the CCRC, should operate, the RCCJ was expressly critical of the custom of successive Home Secretaries to show what it saw as undue deference to the Court of Appeal and the ‘self imposed restriction’ of not referring cases back where it was believed that there was no ‘real possibility’ that it would take a different view to that which it did at the original appeal.³

It was on this basis that the RCCJ recommended that the public crisis in the criminal justice system at the time would be resolved by the:

“[C]reation of a new body independent of both the Government and the courts to be responsible for dealing with allegations that a miscarriage of justice [i.e. wrongful conviction of the factually innocent] has occurred.”⁴

That the CCRC should be independent was crucial for the RCCJ. Although the RCCJ felt that the Court of Appeal ought to be able to quash the convictions of the factually innocent, it recognised that it operates within a realm of legal rules and procedures that meant it was neither “...the most suitable or the best qualified body to supervise investigations of this kind...”⁵ The RCCJ saw this as a shortcoming that could be attended to if the CCRC conducted thorough re-examinations

¹RCCJ (1993) *Report*, HMSO: London: p.1

²RCCJ (1993) *Report*, HMSO: London: p.1 For a critical discussion see, Naughton, M. (2009) ‘Introduction’ in Naughton, M. (2009) (Editor) *The Criminal Cases Review Commission: Hope for the Innocent?*, Basingstoke: Palgrave MacMillan; Naughton, M. (2007) *Rethinking Miscarriages of Justice: Beyond the tip of the iceberg*, Basingstoke: Palgrave Macmillan, pp. 14-26

³RCCJ (1993) *Report*, HMSO: London: p.181-182

⁴RCCJ (1993) *Report*, HMSO: London: p.183

⁵RCCJ (1993) *Report*, HMSO: London: p.183



of alleged miscarriages of justice. It was also recommended by the RCCJ that the CCRC should retain the authority of the Home Secretary under the previous C3 system, whereby any convictions referred back to the Court of Appeal were to be 'in the interests of justice' (in the lay sense)⁶ and were to be, accordingly, considered as first appeals. As the RCCJ asserted:

"Where the result of the investigation indicated that there were reasons for supposing that a miscarriage of justice might have occurred, the [CCRC] would refer the case to the Court of Appeal, which would consider it as though it were an appeal referred to it by the Home Secretary under section 17 [of the Criminal Appeal Act 1968] now"⁷

In further recognition of the limits of the Court of Appeal under the existing criteria in overturning the convictions of factually innocent victims of 'miscarriages of justice', the RCCJ recommended that the Free Pardon under the Royal Prerogative of Mercy should remain an available route for factually innocent victims of wrongful conviction to obtain justice:

"[I]f the Court of Appeal were to regard as inadmissible evidence which seemed to the [CCRC] to show that a [wrongful conviction of an innocent] might have occurred... We therefore recommend that the possible use of the Royal Prerogative be kept open for the exceptional case"⁸

This was incorporated into the Criminal Appeal Act 1995 as s.16(2), which permits the CCRC to refer applications to the Secretary of State if it is of the opinion that the applicant is factually innocent but lacking the necessary legal grounds for the appeals system.⁹

Contrary to this, the CCRC is not concerned with whether applicants are factually innocent or guilty; convictions that it refers are not considered as first appeals and it is mandated to also take account of the reasons for why the conviction was not overturned in any failed appeals before the application to the CCRC. Furthermore, after almost fifteen years of casework and the 14,778 applications that it has so far received, (to 31 May 2012), it is yet to refer a single conviction for consideration for a Free Pardon under the Royal Prerogative of Mercy. This is in stark contrast with the situation prior to the creation of the CCRC, where Free Pardons under the Royal Prerogative of Mercy were fairly frequent when the evidence of the applicants factual innocence fell outside of the scope of the Court of Appeal's grounds of appeal, that is, it was not regarded as 'fresh evidence'.

The crux of the problem, from the perspective of the CCRC's ability to assist the factually innocent, is the requirement under s.13 of the Criminal Appeal Act 1995 that it has to employ a 'real possibility' test in deciding whether convictions referred are likely to be overturned. This subordinates the CCRC to the appeals criteria of the Court of Appeal in a way that is contrary to what was envisaged by the RCCJ.¹⁰ The legal authority on how the CCRC should interpret the 'real possibility' test is contained in the case of *R v Criminal Cases Review Commission, ex parte Pearson*, in which Bingham LCJ defined the prescribed test as:

⁶See, for instance, Newby, M. (2009) 'Historical Abuse Cases: Why They Expose the Inadequacy of the Real Possibility Test' in Naughton, M. (2009) (Editor) *The Criminal Cases Review Commission: Hope for the Innocent?*, Basingstoke: Palgrave Macmillan

⁷RCCJ (1993) *Report*, HMSO: London: p.183.

⁸RCCJ (1993) *Report*, HMSO: London: p.184

⁹For a discussion see, Naughton, M. (2009) 'Introduction' in Naughton, M. (2009) (Editor) *The Criminal Cases Review Commission: Hope for the Innocent?*, Basingstoke: Palgrave MacMillan, p.30-37

¹⁰For a critical discussion see, Naughton, M. (2009) 'The Importance of Innocence for the Criminal Justice System' in Naughton, M. (2009) (Editor) *The Criminal Cases Review Commission: Hope for the Innocent?*, Basingstoke: Palgrave MacMillan



“[I]mprecise but plainly denot[ing] 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 threshold test is carefully chosen: if the Commission were almost automatically to refer all but the most obviously threadbare cases, its function would be mechanical rather than judgmental and the Court of Appeal would be burdened with a mass of hopeless appeals; if, on the other hand, the Commission were not to refer any case unless it judged the applicant’s prospect of success on appeal to be assured, the cases of some deserving applicants would not be referred to the Court and the beneficial object which the Commission was established to achieve would be to that extent defeated. The Commission is entrusted with the power and the duty to judge which cases cross the threshold and which do not.”¹¹

The following quote from the CCRC website aptly illustrates the impact of the ‘real possibility’ test on how it understands its remit and scope:

“If you are asking us to review your conviction, we will not be looking again at the facts of your case in the way that the jury did to decide if you are guilty or innocent. Our concern will only be with the question which the Court of Appeal would ask, which is whether your conviction is unsafe. This can mean us considering issues such as:

- was the trial as a whole fair?
- did the trial Judge make the correct legal rulings during the course of the trial (for example, in relation to disclosure of evidence, the admissibility of evidence or a submission of no case to answer)?
- did the trial Judge fairly sum up the case to the jury and assist the jury with the appropriate legal directions?
- very importantly, is there now fresh evidence that was not presented at trial?”

This highlights the extent to which the CCRC deviates from what was recommended by the RCCJ and its total lack of independence from the Court of Appeal. It calls for further distinctions to be made between what the RCCJ recommended and the part that the CCRC plays as an integral part of the criminal appeals system.

For instance, the RCCJ’s perspective on a ‘fair trial’ (as mentioned in the first bullet point) was in terms of ‘fairness of the outcome’ and whether a factually innocent defendant was convicted, whereas the CCRC see it as about ‘fairness of process’ in terms of compliance with the prevailing criminal justice procedures. This links with the references to the ‘correctness’ and ‘fairness’ of legal rulings and the summing up by the trial judge in the second and third bullet points, which further detaches the work of the CCRC from the perspective of the RCCJ. The CCRC, then, is best viewed as a bolt-on quality control mechanism to the existing criminal appeals system that works to ensure that the decisions of the Court of Appeal meet with its own rules and procedures in the global interests of upholding its (the Court of Appeal) vision of criminal justice system integrity; it seeks to determine whether convictions are lawful, not whether they are just in the lay sense of factual innocence and guilt.

The knock-on effect of this is that the CCRC does not undertake thorough investigations to determine whether claims of innocence are true. It does not undertake the kind of public enquiries of claims of innocence by alleged victims of ‘miscarriages of justice’ in the way that was pictured by the RCCJ. Instead, the ‘real possibility’ test means that it seeks to determine whether alleged

¹¹R v Criminal Cases Review Commission, ex parte Pearson [1999] All ER (D) 503, para.17





wrongful convictions might be regarded as legally unsafe by the Court of Appeal, which means that it tends to conduct mere 'desk top reviews' of applications.¹² It seeks to determine whether there is an apparent breach of process or any possible fresh evidence that might undermine the evidence that led to the conviction, this fails to recognise that factually innocent victims can be wrongly convicted even in the absence of any transgressions of due process.¹³ This runs counter to how the CCRC was imagined by the RCCJ: that is, that it would re-investigate claims of factual innocence thoroughly to determine whether they are valid or not, and assist factually innocent victims of wrongful conviction to obtain justice in the Court of Appeal or by a Free Pardon under the Royal Prerogative of Mercy.

Finally, the CCRC's reference to it being 'very important' that applicants have fresh evidence (in bullet point four above) demonstrates, further, how far its operations are at odds with the RCCJ and lay understandings of its role. It means that the CCRC will emulate the Court of Appeal in assisting factually guilty offenders to overturn their convictions (as will be detailed below). At the same time, the CCRC may not refer the cases of factually innocent victims of wrongful conviction if the review is unable to adduce fresh evidence and the conviction is not felt to fulfil the 'real possibility' test. I use the term 'felt' because it is an entirely subjective judgment by, first, the Case Review Managers (CRM) reviewing an alleged wrongful conviction, and then, either one commissioner to refuse to refer, or three commissioners to agree unanimously that a case should be referred to the Court of Appeal on the basis that it fulfils the 'real possibility' test.¹⁴ As Bingham LCJ in *Pearson* asserted:

"The exercise of the power to refer accordingly depends on the judgment of the Commission, and it cannot be too strongly emphasised that this is a judgment entrusted to the Commission and to no one else...the Commission cannot therefore invite the court to review issues or evidence upon which there has already been a ruling."¹⁵

Bingham LCJ also noted in *Pearson* that:

"The Commission has, in effect, to predict how the Court of Appeal is likely to answer the question which arises under section 23, as formulated above. In a conviction case depending on the reception of fresh evidence, the Commission must ask itself a double question: do we consider that if the reference is made there is a real possibility that the Court of Appeal will receive the fresh evidence? If so, do we consider that there is a real possibility that the Court of Appeal will not uphold the conviction? The Commission would not in such a case refer unless it gave an affirmative answer to both questions."¹⁶

¹²Newby, M. (2010) 'Investigating Miscarriages of Justice – Thinking Out of the Box' Keynote Speech to the Innocence Network UK (INUK) Spring Conference 2010, Cleary Gottlieb Steen & Hamilton LLP, London, 12 March. [Online] <<http://www.innocencenetwork.org.uk/communications.htm>> Accessed 12 July 2012; See also, Naughton, M. (2010) 'Can lawyers put people before law?', *Socialist Lawyer*, June, pp. 30-32

¹³See, Naughton, M. (2007) *Rethinking Miscarriages of Justice: Beyond the tip of the iceberg*, Basingstoke: Palgrave Macmillan, Chapter 3; Naughton, M. (2011) 'How the Presumption of Innocence Renders the Innocent Vulnerable to Wrongful Convictions', *Irish Journal of Legal Studies*, 2(1), pp. 40-54; Naughton, M. (2012) 'No Champion of Justice' [Online] <<http://thejusticegap.com/2012/03/no-champion-of-justice>> Accessed 12 May 2012; Spencer, J. (1989) *Jackson's Machinery of Justice*, Cambridge: Cambridge University Press, p. 203; Spencer, J. (2006) 'Does our present criminal appeal system make sense?', *Criminal Law Review*, August: 677-694, p. 683

¹⁴See, James, A. Taylor, N. and Walker, C. (2000) 'The Criminal Cases Review Commission: Economy, Effectiveness and Justice', *Criminal Law Review*, March: 140-153

¹⁵ex parte Pearson, para. 16

¹⁶ex parte Pearson, para. 18



In this context, it is interesting to reflect on a recent statement to the press by the current Chair of the CCRC, formerly the Chief Executive of the CPS,¹⁷ in response to critiques of its handling of claims of factual innocence by applicants:

“If we came across any new evidence that we thought suggested somebody was innocent we’d move heaven and earth to look into it. I’ve got people who’d lie down in the street to stop the traffic if they thought it would help.”¹⁸

Such statements are regularly mobilised when the CCRC engages in public debate. They are both revealing and profoundly misleading about the role of the CCRC and how it reviews alleged miscarriages of justice. The CCRC, evidently, want the public to see it as fulfilling its public mandate as recommended by the RCCJ, as a ‘champion of justice’,¹⁹ to give the impression that it assists factually innocent victims of wrongful convictions. However, the reference to ‘new evidence’ in the forgoing quote highlights that the CCRC is restricted to second-guessing the Court of Appeal criteria. Crucially, evidence of potential factual innocence has to be unearthed by an investigation that is looking for it. It is not just happened across in a (mainly desk top) review of whether the conviction might be legally unsafe.²⁰

(Harry Fletcher, National Association of Probation Officer (NAPO)): In 1991, NAPO began researching the extent of miscarriages of justice following the high profile cases of the Guildford Four and the Birmingham Six. In preparation for its submission to the Royal Commission on Criminal Justice (RCCJ) in 1992, NAPO produced evidence that indicated that several hundreds of convicted prisoners may have been victims of a miscarriage of justice. This evidence was based on interviews with staff in 15 prisons. In its evidence to the RCCJ, NAPO argued for the establishment of an independent review tribunal to investigate alleged miscarriages of justice. That body would employ independent staff to investigate cases, would have the power to interview relevant witnesses and have access to all documentation. Members of the body would be drawn from a range of disciplines and be representative of the whole community. NAPO even went so far as to say that the independent review body should itself be allowed to reach decisions in individual cases. In March 1992, a supplementary report was submitted to the RCCJ based specifically on the investigation of cases in a single prison - HMP Long Lartin. The supplementary report detailed 22 cases of ‘cause for concern’, who were later known as the ‘Long Lartin 22’. In the ensuing months and years, six or seven out of the 22 case overturned their convictions. In 1992, NAPO teamed up with Liberty and Conviction and presented a dossier to the Home Office detailing over a hundred cases where there appeared to be a lurking doubt about the conviction. By the end of 1992, a revised dossier of 163 cases where it was believed that the conviction may be unsafe or unsatisfactory was sent to the Home Office.

In February 1993, NAPO along with Liberty, published a Private Members Bill to create a ‘Miscarriage of Justice Board’. The Bill was sponsored by MPs of all parties, led by Jean Corston MP. Other MP’s included Chris Mullin (Labour), Harry Greenway (Conservative), Andrew Bennett (Labour), Tessa Jowell (Labour), Leuan Wyn Jones (Plaid Cymru), Steven Byers (Labour), Richard Alexander (Conservative) and Barbara Roche (Labour). The Bill called for the establishment of a politically independent body to investigate alleged miscarriages of justice, known as the Criminal Justice

¹⁷Naughton, M. (2008) ‘Justice must be seen to be done’, *The Guardian*, 20 November.

¹⁸Richard Foster cited in Robins, J. (2010) ‘Criminal Cases Review Commission comes under fire’, *The Times*, 21 January

¹⁹See, Jessel, D. (2009) ‘Innocence or safety: Why the wrongly convicted are better served by safety’, *The Guardian*, 15 December

²⁰See, Naughton, M. (2009) ‘Introduction’ in Naughton, M. (2009) (Editor) *The Criminal Cases Review Commission: Hope for the Innocent?*, Basingstoke: Palgrave MacMillan, p.20-35





Review Board. The Board was to replace the power to refer cases back to the Court of Appeal which was then exercised by the C3 Division of the Home Office. It recommended that the Board should have the following roles and powers:

- The Board's scope is remitted to the examination of serious cases involving persons who were convicted of a criminal offence on indictment.
- The case officer examining the case shall take all steps necessary or desirable for the purposes of investigating the application and of obtaining or preserving evidence relating to the application.
- The case officer shall, with the written authorisation of the Board, have the same powers of investigation, search and seizure as a police constable, but shall not be entitled to exercise powers of arrest conferred only upon a police constable.
- The Board shall refer the case to the Court of Appeal if, upon a consideration of the application, it determines that there may have been a miscarriage of justice or that the application for any other reason raises an arguable ground of appeal against conviction.
- The Board shall consist of thirteen members and shall include among its members, persons who hold or have held high judicial office, a registered medical practitioner (who is a psychiatrist), persons who have knowledge and experience of the supervision or aftercare of discharged prisoners, and other persons who have knowledge of the criminal justice system. In addition, there shall be a prescribed minimum number of women and a minimum number of members of ethnic minorities who shall be members of the Board.

However, the way in which the CCRC was finally constituted under the Criminal Appeal Act 1995 deviated significantly from what was campaigned for and recommended under the Private Members Bill. The CCRC, as it is currently constituted, is not fit for its intended purpose of undertaking a thorough examination of alleged miscarriages of justice and making independent referral decisions. The number of referrals through to the Court of Appeal remains woefully low and campaigns for reform needs urgently to be resurrected.

(John Cooper QC, 25 Bedford Row): Prior to 1995 the Home Office was responsible for investigating alleged miscarriages of justice, and by virtue of the Criminal Appeal Act 1968 Section 17 the Home Office was given a very wide and ill-defined brief to refer cases if they "thought it fit to do so". During the era of the Home Office, appeal referrals averaged about 10% of those matters it was seized to consider. That statistic alone indicates that this government department was very reluctant to refer any case to the Court of Appeal and a considerable weight of dissatisfaction mounted up on behalf of those campaigning and voluntary bodies which were, prior to 1995, referring cases to the Home Office for its consideration.

The overwhelming criticism of the Home Office regime and the driving force for the initiation of the CCRC was that the Home Office lacked independence. The words of The Criminal Appeal Act 1995 Section 8 (2), the statute which created the CCRC, make it clear that the Commission "...shall not be regarded as a servant or agent of the Crown..."

The Runciman Commission, which acted as the 'midwife'²¹ to the CCRC, as well as categorically stating that the Commission should be independent of the Crown, also laid down that the CCRC should be completely independent of the Court of Appeal in the conduct of its investigations, whilst acknowledging that once that investigation is completed and the CCRC is of the view that the

²¹See Elks; L. (2010) 'A review of *The Criminal Cases Review Commission: Hope for the innocent?*' 1 Archbold Review 5-6



matter should be referred, the ultimate decision must lie with the Appellate court, as would be the case in a conventional appeal.

So it was that the CCRC came into existence on the 1st April 1997. Upon the inauguration of the CCRC, there was amongst many campaign groups, great hope and expectation. Indeed such reputable a campaign group as JUSTICE stopped its miscarriage of justice work in anticipation that the CCRC would now fill that role. It is perhaps telling to observe that the very role that JUSTICE ceased to undertake after the CCRC started its work, has now been taken up again by Innocence Projects throughout the United Kingdom.

(Professor Michael Zander, Emeritus, London School of Economics and Member of the RCCJ):

There is no doubt that the main thrust of the proposal to set up the new body was that it should replace the Home Office's C3 section - partly for constitutional reasons and partly because C3 did not undertake sufficiently energetic investigations. The RCCJ said that it based its recommendation for the establishment of a new body on the proposition that the role assigned to the Home Secretary and his Department under the then existing legislation was incompatible with the constitutional separation of powers between the courts and the executive. "...The scrupulous observance of constitutional principles has meant a reluctance on the part of the Home Office to enquire deeply enough into the cases put to it..."²²

Enquiring deeply into a case relates to *investigation*, the purpose of which is to see whether there is something important that is new that was not placed before the trial or the appeal courts. That is reflected in s.13(1). There is nothing in chapter 11 of the RCCJ's Report dealing with 'Correction of Miscarriages of Justice' to suggest that it thought that the new body should refer cases to the Court of Appeal by reference to a new principle. If anything the implication is rather to the contrary, since the Report said that once a case had been referred, "...It would be for the Court of Appeal...to treat it as an appeal from the Crown Court..."²³ That sounds as if the RCCJ assumed that the Court of Appeal would operate according to its customary approach. The difference would only be that the case would have benefitted from the additional in-depth investigation undertaken by the new body.

(Professor Richard Nobles, Queen Mary, University of London): A constant feature of the history of criminal appeals is the reluctance of English judges to undertake an independent assessment of the factual accuracy, of a jury's verdict finding someone guilty. One can hear the echoes here of the frustrations that led to the creation of the CCRC - a judiciary reluctant to undertake independent re-assessments of wrongful convictions, a Home Office which felt that Constitutional considerations prevented them from exercising their powers, and a press that had become impatient with both. The RCCJ noted in 1993 that: "Ever since 1907, commentators have detected reluctance on the part of the Court of Appeal to consider whether a jury has reached a wrong decision..."²⁴ The RCCJ believed that the Court of Appeal 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.²⁵

Looking at the relationship between the Home Office and the Courts, the RCCJ concluded that the Home Office was not exercising its power to investigate and refer as robustly as was

²²RCCJ (1993) *Report*, HMSO: London: Chapter 11, para.9

²³RCCJ (1993) *Report*, HMSO: London: Chapter 11, para.16

²⁴RCCJ (1993) *Report*, HMSO: London: Chapter 10, para. 3

²⁵RCCJ (1993) *Report*, HMSO: London: Chapter 10, para. 3



needed. It attributed this failure to the doctrine of 'separation of powers'.²⁶ 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. This diagnosis resulted in the creation of the CCRC.

However, the undue deference of the Home Office to the Court of Appeal was not resolved by the creation of the CCRC. In fact, the current referral criteria exercised by the CCRC can be regarded as a step backwards from the referral power that the Home Secretary had previously. Prior to the creation of the CCRC, there were no limitations in the Home Secretary's referral power. 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. In contrast, the CCRC's referral power is now restricted by statute to cases deemed to have a 'real possibility' of success, and on new evidence or arguments not previously raised at trial or on appeal. In other words, having identified the Home Office's (self-imposed) undue deference to the Court of Appeal as a problem, the Criminal Appeal Act 1995 then imposed a duty on the CCRC to adopt a deference to the Court of Appeal in exactly the same way as the Home Office had previously.

(Paddy Joe Hill, Birmingham Six): When the CCRC started, its remit was to look at 'miscarriages of justice'. For people in prison, miscarriages of justice are people who are innocent and who have been wrongly convicted. As things stand, the CCRC is referring cases of guilty people on technicalities. This is not its intended function. In addition, the CCRC was supposed to be an independent body. But how is it supposed to be independent? The CCRC is financed by government. Its senior members are appointed by government and a number of them used to work for the Crown Prosecution Service. The CCRC is not as independent as it claims to be. It helps to maintain the status quo of the judicial system.

²⁶The RCCJ 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. RCCJ (1993) *Report*, HMSO: London: Chapter 11, para. 9



THE KEY PROBLEMS WITH THE CCRC

The 'Real Possibility' Test and the Court of Appeal's relationship with the CCRC

(John Cooper QC, 25 Bedford Row): The Criminal Appeal Act 1968 Section 2, as amended by the Criminal Appeal Act 1995, was intended by Parliament to liberalise the Court of Appeal in exercising its ability to overturn convictions. It should be stated straightaway that analysis of cases which have come before the Court of Appeal display a pragmatic rather than a liberalised attitude to their work. Section 2 lays down that the Court of Appeal can quash convictions if it feels they are unsafe. It follows from this that the CCRC can only refer cases to the Court of Appeal if there is a 'real possibility' that the Court of Appeal will quash such a conviction as unsafe. This is the well-known 'real possibility test'. Its genesis can be traced back to the authority of *R v CCRC, ex parte Pearson*,²⁷ where Lord Bingham CJ observed that to cross this threshold there must be "...more than an outside chance or bare possibility but which may be less than a probability of a likelihood or a racing certainty. The CCRC must judge that there must at least be a reasonable prospect of a conviction if referred not being upheld.."

In relation to a conviction, the 'real possibility' must arise from an argument or evidence that was not raised during the trial or appeal,²⁸ or from exceptional circumstances²⁹ - which will be defined on a case by case basis. Interestingly, Section 13 never uses the expression 'miscarriage of justice'; miscarriage of justice is not a legal term (and neither is factual innocence or a wrongful conviction). In fact the situation changed as a result of a judgment in the Supreme Court in *Adams & others*,³⁰ which held that a miscarriage of justice should be described as existing "...when a new fact showed evidence was so undermined that no conviction could possibly be based on it..." As a result of this decision a number of claimants may now be entitled to compensation as a result of spending time in prison following wrongful conviction. Although the case concerned compensation it is notable because it was the first time that a definitive definition of a miscarriage of justice had been handed down by the Supreme Court (judgment handed down on 11 May 2011).

The overriding consideration for the CCRC is therefore safety. Put more strictly, and here lies the root of much controversy, whether the Court of Appeal would find it unsafe. This severely curtails the approach that the CCRC takes. In fact, it is interesting that during the Parliamentary debates which established the CCRC, the requirement that the CCRC should consider factual innocence was dropped to allow passage of the Bill. The work of the CCRC can therefore be seen through the telescope of whether the Court of Appeal will be prepared to receive it.

(David Jessel, former CCRC Commissioner): The Court of Appeal has used the 'real possibility test' to shape the role of the CCRC, which was originally intended to refer cases that the public, the press, the non-judiciary and even the CCRC thought were miscarriages of justice. Instead, the balance has shifted towards the Court of Appeal, by instructing the CCRC only to send up cases where the Court of Appeal (not the CCRC) will consider whether a conviction was unsafe.

²⁷ex parte Pearson

²⁸S. 13 (1)(b) Criminal Appeal Act 1995

²⁹S.13 (2) Criminal Appeal Act 1995

³⁰R (Adams) v SSJ [2011] UKSC 18



Key examples on how the Court of Appeal has transformed the CCRC include the following:

- i. Sentence referrals – Parliament had specifically included the power to send back a sentence for variation when it set up the CCRC, the logic being, presumably, that an unjust sentence is a miscarriage of justice. This has changed with the case of *Graham* where the Court of Appeal 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..." (*R v Graham* [1999] 2 Cr App r (s) 312). Following the case of *Graham*, the CCRC had to accept that it could no longer refer unjust sentences except on the basis of some arithmetical irregularity and miscomputation of days spent on remand.
- ii. Historical cases – the CCRC used to refer historical cases, such as *Goddard*, *Hanratty*, *Timothy Evans*, *Ruth Ellis*, - until it received the clearest sign that such cases were not welcome by the Court of Appeal.
- iii. Shaken Baby Syndrome (SBS) cases – The impartial scientific truth about these cases is that in many cases we do not know why these babies died. We do know that many babies die in totally unsuspecting circumstances and display, on post mortem, the same symptoms that some expert witnesses claim are diagnostic of abuse. Cases referred by the CCRC were helping to nudge the Court of Appeal towards engaging with the problem that the finest scientific experts say that science has yet to establish the cause of death in these cases. The Court of Appeal recently decided that such cases were too difficult to adjudicate and upheld a conviction, thus demonstrating that there is no 'real possibility' and therefore no real point in the CCRC sending such cases back to the Court of Appeal. As a result, innocent people who have already suffered the tragedy of a child's death may remain in prison because the Court of Appeal believes that the integrity of the jury must always prevail, even if its verdict is based on flawed and dogmatic science.

As a result of the 'real possibility' test, the CCRC is effectively denied the power that the Home Office had previously. Prior to the establishment of the CCRC, the Home Office could refer a case back to the Court of Appeal repeatedly until it reached the 'right verdict'. The Court of Appeal is resentful of repeated referrals by the CCRC on the same case. However, campaigners know that it is only by sending cases back again and again that the Court of Appeal can be pressured into coming to the correct verdict, as in the cases of the *Birmingham Six* and the *Bridgewater Four*. The CCRC and the 'real possibility' test have effectively taken away the very pressure which is necessary to overturn a wrongful conviction.

(Laurie Elks, former CCRC Commissioner): The 'real possibility' test means that the CCRC will have to adopt the Court of Appeal's thinking, even to the point of referring cases on legal points which may have little to do with legal innocence. The case of *Farnell*, which was the first judicial review application lost by the CCRC, illustrates this point. In *Farnell*, the CCRC's decision not to refer the case back to the Court of Appeal was challenged because it had failed to take a highly legalistic point (related to the law on provocation). The CCRC's Case Committee had grasped the legal issue in question but did not think it had any bearing on the safety of the conviction. The Divisional Court held that the CCRC had applied the wrong test and accordingly quashed its decision. There is also a separate question as to whether years of applying the 'real possibility' test can erode an independent mode of thinking. There is a widespread phenomenon of internalisation, where the Court of Appeal's legalistic approach has been internalised into the CCRC's case review process. This has resulted in two 'dangers' – first, cases are not pursued on the basis that the Court of Appeal would regard it as contrarian. Second, a line of investigation is not pursued on the basis that the Court of Appeal is expected to disapprove it.



(Mark George QC, Garden Court North): The CCRC has proved to be a real disappointment due to its subordination to the Court of Appeal and consequent inability to ensure that cases where there appeared to have been a miscarriage of justice, will be able to receive further consideration from the Court of Appeal. As a criminal lawyer, I believe that the CCRC is not fulfilling its original purpose. A combination of a restrictive statutory test for referral of a case (as set out in the Criminal Appeal Act 1995), together with the reluctance of the Court of Appeal to be seen to encourage what it (probably unjustifiably) believes would be a flood of unmeritorious appeals, has left many lawyers and campaigners against injustice wondering what exactly is the point of the CCRC. It seems to have become an organisation that likes to say “No”. The need for reform would appear to be beyond argument.

Since the overriding objective of the Criminal Procedure Rules, which all who practice in the criminal courts are expected to promote, includes the “acquittal of the innocent”, we are entitled to assume that the criminal justice system would welcome proposals that make the attaining of this objective more likely than at present. However, it would be a mistake for the campaign to reform the CCRC to limit itself to proposing amendments to s.13 of the Criminal Appeal Act 1995 to cases “where the applicant is or might be innocent”. This would set the bar too high. The current test in the Court of Appeal means that an appeal can be allowed on the grounds that the Court of Appeal considers the conviction unsafe, even if the Court of Appeal thinks that the appellant is probably guilty. If there is evidence of actual innocence this is likely to satisfy the Court of Appeal’s criterion but many people will benefit from setting the bar lower than that. I therefore recommend a referral criteria based on both ‘safety’ and ‘innocence’.

(Emily Bolton and Glyn Maddocks, Centre for Criminal Appeals (CCA)): Another way to approach this problem would be through interpretation of the statute rather than its wholesale revision. It is arguable that the current standard enables the CCRC to refer more cases than it would if it had to apply the Court’s standard itself: the CCRC does not have to conclude that a conviction is unsafe, but rather whether there is a “real possibility” that the Court of Appeal would reach that conclusion. That can and should be read and used as a much broader standard. Were the CCRC to have to actually apply any test itself, the discretionary terms “possibility” and “would” go out of the picture, and the CCRC would be obliged to precisely determine the safety of the conviction itself rather than speculate about what the Court may do with it, which could once again narrow the gateway.

(Susan May, alleged miscarriage of justice victim): Following an unsuccessful appeal in 1997, I applied to the CCRC and was appointed Dawn Butler as my case worker. Butler was an excellent case worker. Through her intensive investigation and dogged determination, she uncovered several new, vital pieces of evidence. She discovered that the chief prosecution forensic scientist re-wrote his original notes from 1992 and forged documents, presumably in preparation for future appeal. Butler also found out that a senior police officer had removed main forensic exhibits months before trial and stored them in his locker at the police station. Following a catalogue of errors and untruths discovered by Butler, my case was referred back to the Court of Appeal in 1999, which was unfortunately dismissed.

On my re-application, it was argued that the CCRC should stand up against the Court of Appeal if it genuinely disagreed with its decision. Ultimately, the CCRC is supposed to be independent. In 2002, the CCRC once again accepted my case for full review and assigned Dawn Butler as my case review manager again. My case was to be prioritised and I was told that the review would take approximately 6 months. During this time, Butler was in the process of compiling a dossier on the senior police officer in question, including all inconsistencies in his evidence. Very sadly, Dawn Butler passed away and my case was passed on to another case review manager. The promised





6 months went to 8 years, when I received a decision from the CCRC in 2010 not to refer my case to the Court of Appeal. However, when the CCRC referred my case in 1999, it referred it on strong evidence which still stands. The forensic evidence that led to my conviction has been discredited. The evidence given by the senior police officer has been described by the CCRC as no longer impressive or reliable. Yet, if an organisation like the CCRC is not prepared to challenge the Court of Appeal by referring my case again, despite belief in my innocence, then the CCRC will be no more than a 'tester' for the Court of Appeal, which is not what it was set up to do.

We have to, at least, have a review of the CCRC, which is the only way back to the Court of Appeal once a first appeal is unsuccessful. In the past, the Police Complaints Authority was replaced by the Independent Police Complaints Commission because it was seen to be failing. Critics would even say now that the Independent Police Complaints Commission needs re-examining. Any body like these has to be subject to scrutiny. We need a full re-appraisal of how the CCRC is operating now. 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.

(Bruce Kent, Progressing Prisoners Maintaining Innocence (PPMI)): The case of Ray Gilbert illustrates how the bar of the 'real possibility' test is set so high that many will be unable to reach it - despite obvious doubts about the evidence that led to conviction. This is notwithstanding the observations by the ex-Chair of the CCRC, Professor Graham Zellick, who once said that where there is a 'lurking doubt' a claim of wrongful conviction should be referred to the Court of Appeal.

Raymond Gilbert was convicted in 1981 (along with his co-accused Johnny Kamara) of murder, a brutal stabbing of an innocent young man, John Suffield a bookmaker. He was convicted primarily on the basis of his own confessions, which he maintains, were coerced out of him by the police and other prisoners. Gilbert pleaded guilty mid-way through the trial and was convicted as a result. Three decades on, Gilbert remains in prison despite being given a 15-year tariff. There are many 'doubts' about Ray Gilbert's conviction: In 2000, Kamara had his conviction quashed when it emerged that the CPS had failed to disclose 201 witness statements which supported the defence. However, these statements, which pointed to other suspects, equally supported Gilbert's defence. Gilbert's defence was one of alibi. He maintained that at the time of the murder, he was with his girlfriend June Bannan. Bannan, who initially supported Gilbert's claim to have been in bed with her that morning, retracted her evidence after being threatened with prosecution for obstructing the course of justice. However, at trial, Bannan inadvertently reinstated her alibi evidence when she testified that she was arguing with Gilbert at home on the morning of the Friday, 13th February, when the murder took place. Gilbert's confessions also display clear signs of manipulation, omission and contradiction. Gilbert was interviewed over the course of 48 hours without the presence of a solicitor. He gave a number of confessions, each one refining the previous, correcting details to match the police's case. Gilbert's confessions also did not match key facts of the crime. Whilst there was no forensic evidence linking Gilbert (or Kamara) to the crime, bloody shoe prints found at the scene matched neither of them.

The CCRC, for a range of reasons, dismissed all doubts about Gilbert's conviction. It argued that the 201 witness statements were of no help to Gilbert as he was convicted primarily on his confessions and guilty plea. It also suggested that Gilbert knew facts about the murder scene that only someone who had been there might have known. With limited investigations, the CCRC dismissed the idea that the police might have 'fed' him some information. Yet, the case of Ray Gilbert has much more than a 'lurking doubt' attached to it. How much more doubt does the CCRC need for his case to meet its highly narrow criterion of the real possibility test?



(Gabe Tan, Innocence Network UK (INUK)): A consequence of the 'real possibility' test is that the CCRC is not only failing potentially innocent victims of wrongful conviction. 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. An example is the case of 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 violent and clearly pre-meditated. Clarke and McDaid, along with a group of other 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. 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.

Another example is 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 Court of Appeal 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 Court of Appeal 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. The remaining convictions for the other 6 charges stood, which raises the question – what is the point in the referral?

In response to INUK's dossier of cases (see Appendix 2), Alistair Macgregor, 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 were 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 technicalities. This is certainly not the body that the 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.



(Professor Michael Zander QC, Emeritus, London School of Economics and Member of the RCCJ): The Royal Commission explained what it meant when it said that the new body³¹ should be

independent of the Court of Appeal. Paragraph 15 of chapter 11 of the Report begins, "...We believe that there are cogent arguments for the Authority to be independent of the Court of Appeal..." The paragraph then spelled out what that entailed. There were three ingredients - namely, that the new body, rather than the Court of Appeal, should carry out investigations; that it should not come within the court structure; and that it should not take judicial decisions. The CCRC unquestionably satisfies those three tests.

INUK says, however, that the CCRC is not independent of the Court of Appeal because it is shackled by the terms of the 'real possibility' test enshrined in s.13. I do not think that the RCCJ would have agreed. There is not a word in the RCCJ's Report regarding the grounds for referring a case. Strange as it may seem, I think that the matter was never even discussed by the Royal Commission. All that the Royal Commission's Report said as to when the new body should refer a case was this: "...When, therefore an investigation is completed whose results the Authority believes should be considered by the Court of Appeal, we recommend that it should refer the case to the court, together with a statement of its reasons for so referring it..."³²

Since it did not deal with the question, I am speculating, but I believe that the RCCJ would have agreed with the basic approach of s.13 which stipulates that a referral should be based on some new argument or evidence that makes a significant difference - but that exceptionally it need not be something new. There are two elements. It must be something significant creating a 'real possibility' that the decision would be reconsidered and generally it should be something new.

As to the first, I believe that the RCCJ would have taken the view that it makes no sense to suggest that the CCRC should refer conviction cases where it did **not** think there was a real possibility that the conviction would be reconsidered. This would raise false hopes for appellants and delay the Court of Appeal's hearing of cases which were going to succeed, resulting in longer periods of imprisonment for wrongfully convicted prisoners. The Scottish CCRC has been given what seems to be a more open-ended remit. The statute for the Scottish CCRC says that it can refer a case to the appeal court on the grounds that it believes that a miscarriage of justice **may** have occurred **and** that it is in the interests of justice.³³ Some think that the difference in the statutory formula explains the higher rate of referrals by the Scottish CCRC. That may or may not be so. But it is wrong to think that the Scottish CCRC makes referrals without regard to the appeal court's likely response. In this respect the Scottish CCRC operates in much the same way as the English CCRC.³⁴

³¹Which it suggested should be named the 'Criminal Cases Review Authority'

³²RCCJ (1993) *Report*, HMSO: London: Chapter 11, para.16

³³Criminal Procedure (Scotland) Act 1995, s.194C inserted by the Crime and Punishment (Scotland) Act 1997, s.25. The formula was proposed by the Sutherland Committee, *Criminal Appeals and Alleged Miscarriages of Justice*, 1996, Cmnd.3425, para.5.63. The CCRC apparently does not wish it had that wider remit. In its first report on the CCRC in March 1999, the House of Commons Home Affairs Committee said that the Commission had submitted some observations on ideas for amending the statutory test for referral. 'They suggested that the phrase 'miscarriage of justice' would itself be unclear as a test and that it made sense for the Commission's test to be based on the same concepts as the Court of Appeal's test, if the situation was to be avoided where cases were referred under one set of criteria but then had to be rejected by the Court on different criteria.' (*The Work of the Criminal Cases Review Commission: First Report*, H.C. Papers 1998-1999, para.23) For the contrary view, that asymmetry could be desirable, see Nobles, R. and Schiff, D. [2008] 71 *Modern Law Review*, 464-72

³⁴The phrase 'miscarriage of justice' is the basis also of the right of appeal in Scotland. Section 106 (3) of the Criminal Procedure (Scotland) Act 1995 (inserted by the Crime and Punishment (Scotland) Act 1997, s.17 permits a person to appeal 'against any alleged miscarriage of justice in which he was convicted', including any miscarriage on the basis of evidence not heard at the trial or on the basis that the jury's verdict was one that no reasonable jury, properly directed, could have returned. The two Commissions are therefore both working to the same formula as their respective appeal court.



What if the CCRC does not refer such a case or if, having referred it, the Court of Appeal does not quash the conviction? The answer may be to continue to argue the case. By the same token, if the Court of Appeal declines to quash the conviction, the CCRC, if convinced that the case needs to be reconsidered, can refer it again.³⁵ And, if all else fails, the CCRC has the power (under s.16(2)) to ask the Home Secretary to exercise the Prerogative of Mercy. I believe that the CCRC as established by the Criminal Appeal Act 1995 does broadly live up to what the RCCJ envisaged. If I were to suggest something that has perhaps **not** lived up to what the RCCJ envisaged, it would be the Court of Appeal's excessive deference to jury decisions.³⁶ That is the cause of much of the problem for which Innocence Network UK blames the CCRC. But perhaps what the RCCJ envisaged in that regard was unrealistic.³⁷

(Dr Michael Naughton, Innocence Network UK (INUK)): It is often argued by defenders of the CCRC that the Court of Appeal, not the CCRC, is to be blamed for the on-going difficulties that the factually innocent face in trying to overturn their convictions. It is argued that the CCRC must work within the statute set by Parliament and that the problem of the CCRC cannot be addressed independently of the Court of Appeal. This was expressed by the then Chair of the CCRC Professor Graham Zellick (2006) as follows:

"...It may be that what really lies at the root of the problem is not the test we apply but the test that the Court of Appeal applies, the test of safety, because, of course, any change to that test would have corresponding implications for us; we would have to adjust our approach accordingly..."

The problem with this perspective is that the statute that governs the workings of the CCRC is wider than it just working with the Court of Appeal. Whilst the CCRC will work within the parameters of the Court of Appeal's test with certain applications where it is appropriate to do so, it is required by its governing statutes to use other available avenues when the applicant is innocent but does not have admissible grounds of appeal – i.e. sending it to the Home Secretary for the exercise of the Royal Prerogative of Mercy. Moreover, applicants to the CCRC will, in the main, have already failed in a normal appeal at the Court of Appeal where alleged abuses of process and fresh evidence can be dealt with. As an extrajudicial safeguard, the CCRC was supposed to conduct external, in depth investigations of claims of innocence.

The CCRC was not established because the public were concerned that the Guildford Four, the Birmingham Six and others were unable to overturn their convictions because of the flagrant breaches of process in their convictions. It was because they were believed to be factually

³⁵The case of David Cooper and Michael McMahon, defendants in the Luton Post Office Murder case, was referred to the Court of Appeal five times (four times by successive Home Secretaries, once by the CCRC) before the convictions were quashed in 2003 – 33 years later and after both men had died.

³⁶The RCCJ's Report said: 'We are all of the opinion that the Court of Appeal should be readier to overturn jury verdicts than it has shown itself to be in the past. We accept that it has no means of putting itself in the place of the jury as far as seeing and hearing the witnesses is concerned. Nevertheless, we argue in this chapter that the court should be more willing to consider arguments that indicate that the jury might have made a mistake.' (RCCJ (1993) *Report*, HMSO: London: Chapter 10, para.3)

³⁷In their masterly and deeply pessimistic book Richard Nobles and David Schiff argue persuasively that '[a]n appeal court and trial courts cannot coexist without deference from the former towards whatever practices constitute the latter' (Nobles, R. and Schiff, D. (2000) *Understanding Miscarriages of Justice – Law, the Media and the Inevitability of Crisis*, Oxford: Oxford University Press, p.243).





innocent and the existing system for dealing with such alleged miscarriages of justice could not, or would not, refer their cases back to the Court of Appeal. 15 years on, there is growing consensus of an urgent need to review the workings of the CCRC and for wide ranging reforms so that it can fulfil its public mandate as envisaged by JUSTICE, NAPO and the RCCJ. The CCRC's independence needs to be enhanced by unshackling it from the Court of Appeal.

Symmetrical or Asymmetrical?

(Laurie Elks, former CCRC Commissioner): I could not see how one could have a body (the Court of Appeal) dealing with the safety of convictions of first time appeals and another inferior body (the CCRC) creating a separate body of law, practice and precedent on second time "miscarriage" appeals. I do not believe that the task for the reviewing body in first-time appeals and repeat appeals is sufficiently different to justify separate legal codes and practice. The scope for confusion is obvious; and it is inevitable that the 'inferior' CCRC would be subject to judicial review and would find itself cut down in size pretty fast by the judiciary. I do, however, accept that the Court of Appeal's relationship with the CCRC, in particular the Court of Appeal's reluctance to learn from the CCRC's approach, is a tricky area and one which requires continuing and anxious debate within the CCRC. Further, the CCRC should be more willing to make contrarian referrals when it is right to do so, although it is unclear how the CCRC should get through to the Court of Appeal and persuade it, in such instances, to set aside its view from time to time.

(Mark Newby, Quality Solicitors Jordans LLP): Concerns that an asymmetry test between the Court of Appeal and the CCRC would raise expectations, cause confusion and serve no public interest as expressed by Elks and the CCRC's previous Chairman, Professor Graham Zellick, is unfounded. A change of the CCRC's test to 'miscarriage of justice' would not in any way change the assessment process and would still leave both the CCRC and the Court of Appeal in the realm of assessing the overall safety of the conviction. In reality, the CCRC is already operating out of sync with the Court of Appeal by having to second guess what amounts to a 'real possibility'. However, what is important is that a change of test would change the emphasis of the CCRC's review. It would focus its attention on identifying suitable miscarriage of justice cases and getting them back to the Court of Appeal, rather than a current focus of undertaking somersaults in defining what amounts to a 'real possibility'.

(David Jessel, former CCRC Commissioner): The argument as to whether the CCRC and the Court of Appeal should be symmetrical or asymmetrical is a false dichotomy. It is not a question of sending up cases with a 'real possibility' versus sending up cases with no 'real possibility'. It is a question of presenting to the Court of Appeal cases where there are strong and compelling new arguments that there was a miscarriage of justice, and asking the Court of Appeal to make a decision and justify it. No doubt, this could lead to conflict with the Court of Appeal but the CCRC should rightly act as a challenge to the Court of Appeal, rather than a collaborator with it.

(John Cooper QC, 25 Bedford Row): There is no point having a body such as the CCRC referring cases without regard to the powers and procedure of the Court of Appeal. Perhaps it is better to consider reforming the Court of Appeal to make it more receptive to factual innocence claims which would then have a knock-on effect for referral to the Commission.

(Professor Richard Nobles, Queen Mary, University of London): In 2000, my colleague Professor 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 (i.e. the CCRC).³⁸ 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 of Appeal believes would not have come before it through the normal procedure.³⁹ The powers given to the CCRC⁴⁰ positively invite such criticism. Whilst the Home Secretary could at least hide behind a referral power that contained no express limitations, the CCRC is expressly required to restrict itself to referrals that have a 'real possibility' of success, and is required to base those references, unless there are exceptional circumstances, on arguments and 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 CCRC 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 CCRC to double guess when the Court would, as it occasionally does, entertain doubts in an appeal which is 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 CCRC, Laurie Elks found only one example of a case referred to the Court of Appeal 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.⁴¹

With regard to the Court of Appeal, and in light of the history of statutory amendments, I am sceptical of the possibilities of increasing the Court of Appeal's willingness to engage with the possibilities of prisoner's factual innocence. With regard to the CCRC, however, there is some possibility for change. Rather than a statutory power to refer, which enshrines a relationship of deference, the CCRC needs one that gives it more ability to refer cases that the Court of Appeal may conclude lack merit.⁴² The CCRC needs to be able to say, in such cases, that it is simply doing its 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.⁴³

Michael Zander argued that changing the CCRC's test for referral would trigger an enormous increase in the number of cases that would come to the CCRC, I am not convinced that the resulting situation would be as catastrophic as he suggested. 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 of Appeal is overwhelmed by references, or the CCRC is unable to manage its own workload. So the CCRC is unlikely to interpret 'lurking doubt' in a manner which dispenses entirely with the deference currently shown by the CCRC and

³⁸Nobles, R. and Schiff, D. (1996) 'Criminal Appeal Act 1995: The Semantics of Jurisdiction' 59 *Modern Law Review*, 573

³⁹Nobles, R. and Schiff, D. (2005) 'The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal' *Criminal Law Review* 173

⁴⁰S.13 Criminal Appeal Act 1995

⁴¹Elks, L. (2008) *Righting Miscarriages of Justice? Ten years of the Criminal Cases Review Commission*, London: JUSTICE, p126.

⁴²Nobles, R. and Schiff, D. (2008) 'Absurd Asymmetry - a Comment on R v Cottrell and Fletcher and BM, KK and DP (Petitioners) v Scottish Criminal Cases Review Commission' 71 *Modern Law Review* 46

⁴³Articulated 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 be 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' (R v Cooper (1969) 53 Cr. App. R 82).



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.

(Dr Michael Naughton, Innocence Network UK (INUK)): A common argument in defence of the CCRC is that it should have the same test as the Court of Appeal, as there is no point at all in referring cases that have no chance of being overturned. It is argued that to create an asymmetrical system would be 'absurd' as such a practise would raise expectations among applicants, cause a tension and much confusion between the CCRC and the Court of Appeal, and would not be in the public interest:

'...Whatever statutory test Parliament...imposed it has to be one that articulates with the test that the Court of Appeal itself has to apply. If you break that link and you establish an asymmetry between the two tests, you will be creating an absurd situation. It would create tension between the Court of Appeal and the Commission, it would raise expectations, it would cause confusion, and it is difficult to see what possible public interest could be served by referring cases on a basis that had no relation to the test employed by the court itself....'⁴⁴

The first problem with this line of defence is that it overlooks the historical context of the establishment of the CCRC. The CCRC was set up in the wake of a public crisis of confidence in the criminal justice system precisely because of the symmetry that was identified by the RCCJ between the C3 system and the Court of Appeal, and its apparent failures in overturning the wrongful conviction of people believed to be factually innocent.⁴⁵ Moreover, the RCCJ, which gave life to the CCRC, was set up on the day that the Birmingham Six overturned their convictions in the Court of Appeal and it is both geographically and politically symbolic that the CCRC is based in Birmingham rather than the Capital, London. It is an enduring reminder that it was set up in governmental response to one of the most notorious miscarriages of justice in British legal history to restore public confidence that the criminal justice system could rectify wrongful convictions given to those widely believed to be factually innocent, if and when they occur.

Secondly, this position fails to recognise other possible impacts and wider benefits that sending such cases back to the appeal courts might have, even if they were not to be overturned. Such cases could, for instance, raise public awareness of the inability or unwillingness of the Court of Appeal to overturn cases of appellants thought (even by the CCRC after its impartial investigations) to be factually innocent but who do not fulfil the current Court of Appeal criteria, as the evidence of their factual innocence was available at the time of the original trial and is, thus, not considered by the CCRC to be likely to be considered to be fresh in the eyes of the Court of Appeal.⁴⁶

⁴⁴The then Chair of the CCRC, Professor Graham Zellick, 2004 cited in *R v Cottrell and Fletcher*, paragraph 55; see, also, Zellick, G. (2005) 'Facing up to Miscarriages of Justice', *Manitoba Law Journal*, 31: 555-564; Newby, M. (2009) 'Historical Abuse Cases: Why They Expose the Inadequacy of the Real Possibility Test' in Naughton, M. (2009) (Editor) *The Criminal Cases Review Commission: Hope for the Innocent?*, Basingstoke: Palgrave Macmillan; p. 104; Kerrigan, K. (2009) 'Real Possibility or Fat Chance?' in Naughton, M. (2009) (Editor) *The Criminal Cases Review Commission: Hope for the Innocent*, Basingstoke: Palgrave Macmillan.

⁴⁵Naughton, M. (2009) 'Introduction' in Naughton, M. (2009) (Editor) *The Criminal Cases Review Commission: Hope for the Innocent?*, Basingstoke: Palgrave MacMillan; Nobles, R. and Schiff, D. (2008) 'Absurd Asymmetry - a Comment on *R v Cottrell and Fletcher* and *BM, KK and DP (Petitioners) v Scottish Criminal Cases Review Commission*', *Modern Law Review*, 71(3): 464-472





Contrary to this, the perspective that the CCRC and the Court of Appeal should work to the same test (legal unsafety) works to prevent public knowledge of the limits of the Court of Appeal in dealing with factual innocence claims by alleged victims of wrongful conviction. It fails to understand that the RCCJ intended that the CCRC should be independent of the courts, precisely, so that it would be asymmetrical with the Court of Appeal in its investigations of alleged miscarriages of justice, defined as the wrongful conviction of the factually innocent. The CCRC was not anticipated to be an addition to the criminal appeals system that was deferential to the Court of Appeal. For the RCCJ, it was to be a body to provide a remedy for factually innocent victims of wrongful convictions either through the Court of Appeal or if innocent victims were not thought to have legal grounds via the avenue of the Royal Prerogative of Mercy. In its dealings with the Court of Appeal, factual innocence is not a live issue due to the 'real possibility test'. As for the Royal Prerogative of Mercy, the CCRC is yet to refer a case for consideration and is unlikely to ever do so because reviews to determine whether applications might be legally unsafe are not to be equated with investigations that seek to determine whether claims of factual innocence are valid or not.⁴⁷

The Problem with Fresh Evidence

(John Cooper QC, 25 Bedford Row): In practice the issue of safety will hinge on fresh evidence or new legal argument. Presently many references fail because they do not raise any material new matters. There is a residual power invested within the CCRC to refer cases even in the absence of new evidence if it considers that there are exceptional circumstances to justify such a step, but again in practice this power is used only very exceptionally.

The problem with this very narrow definition of the parameters of both the CCRC and the Court of Appeal, is in short, that they are concerned with safety, not whether the accused is guilty of any conviction. This is graphically demonstrated by an analysis of a case in 2008. In *R v Stock (Anthony)*.⁴⁸ The CCRC referred the case on two occasions to the Court of Appeal. The facts are instructive and reveal a clear case of a miscarriage of justice which was upheld by the Court of Appeal. The appellant was convicted of robbery in July 1970 and was sentenced to 10 years imprisonment. The only witness to the robbery, who was able to give any description of any of the robbers was W who heard a scream and ran to the scene. At the trial, W said in evidence: 'the man looked at me. He hit me to the ground with the iron bar he was wielding.' W also gave evidence that the assailant made certain threats. W gave a description to the police and an identikit of the man was created. Later detectives matched the identikit picture with the features of the appellant who had been arrested and charged with a robbery in 1968 but who had subsequently been acquitted. W was taken to the appellant's house by detectives where a confrontation took place. W recognised the appellant as the man who had taken a swing at him. Three other employees of the supermarket, where the robbery took place, also stated that someone similar to the identikit picture had been in the supermarket on the Thursday before the robbery and on the morning of the robbery itself. They subsequently picked the appellant as that person. The appellant's defence was alibi.

The reference to the Court of Appeal was summarised in the grounds of appeal that:

- 1) there were substantial grounds to regard the identification evidence as being

⁴⁶Naughton, M. (2009) 'The Importance of Innocence for the Criminal Justice System' in Naughton, M. (2009) (Editor) *The Criminal Cases Review Commission: Hope for the Innocent?*, Basingstoke: Palgrave MacMillan, p.5

⁴⁷Naughton, M. (2009) 'Introduction' in Naughton, M. (2009) (Editor) *The Criminal Cases Review Commission: Hope for the Innocent?*, Basingstoke: Palgrave MacMillan, p. 36

⁴⁸*R v Stock* [2008] EWCA Crim 1862





contaminated by W having been shown photographs and by his subsequent failure to disclose this at trial;

- 2) that there were substantial grounds to regard the identification evidence of the other three witnesses as contaminated for the same reasons;
- 3) that there were significant failings in the summing-up in relation to the identification evidence, the alibi evidence and the evidence of the detectives in the case;
- 4) there was evidence to suggest that the evidence exonerating the appellant was true.

In dismissing the appeal, the court observed that its jurisdiction and duty on a reference by the CCRC, as in any ordinary appeal, was to consider the safety of the conviction and not whether the accused was guilty. Section 13(1) of the Criminal Appeal 1995 gave the CCRC power to make a reference if it considered that there was a real possibility that the court would not uphold a conviction in the event of a reference because of a new argument or evidence. Section 13(2) empowered it, in exceptional circumstances, to make such reference even where there was no new evidence or argument and, by necessary implication, acknowledged or extended the power of the court in exceptional cases to depart from its previous decision where there was no new argument or evidence.

The Court of Appeal in *Stock* also referred to *Thomas*⁴⁹ which made it clear that the power provided by the s. 13(2) of the Criminal Appeal Act 1995 permitting the CCRC to refer a case in exceptional circumstances (clearly referring to cases where there is 'a lurking doubt') would rarely result in a successful appeal. The judgment in *Stock* presented a clear reversal from the dicta in *Pendleton*⁵⁰. *Stock* represented a difficulty encountered by a number of cases which may come before the CCRC, cases where it may be difficult to find admissible evidence which affects the view of the original verdict to the extent that it may be unsafe and cases which are affected by the passage of time. Furthermore *Stock* is not assisted by the general reluctance of the Court of Appeal as expressed in *Thomas* to consider exceptional circumstances.

The development of authorities since *Pendleton* is instructive when considering the limits of the safety test. *Pendleton* emphasised the role of the jury as the 'fact finder'. The majority opinion in the Court of Appeal was that in a case of difficulty they should 'test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe.' (Per Lord Bingham) This has particular impact on the effect of expert evidence on juries, and I will comment upon this later in this Paper. In other words the Court of Appeal in *Pendleton* is suggesting that it should stand back in cases of any difficulty and consider what doubts the jury might have had.

Pendleton was set back by the case of *Hakala*⁵¹ which proposed a jury impact test. Here it was held that it was integral to the process, but if fresh evidence is disputed, the court must decide whether, and to what extent, it should be accepted or rejected and if it is to be accepted, to evaluate its importance or otherwise, relative to remaining material which was before the trial jury. (Per LJ Judge).

⁴⁹R v Thomas [2002] EWCA Crim 941

⁵⁰R v Pendleton [2001] UKHL 60 [2002] 1 WLR 72

⁵¹R v Hakala [2002] EWCA Crim 730



Particular concern around this case⁵² centred upon the Court of Appeal apparently seeking to usurp the jury's function. The new evidence test is laid out in s. 23 of the Criminal Appeal 1995 Act which states that if it is necessary or expedient in the interests of justice, the Court of Appeal will receive any evidence which was not adduced in the proceedings from which the appeal lies:

1. If it is capable of belief
2. If it affords a ground of appeal
3. If it is admissible
4. If there is a reasonable explanation for failure to adduce it.

Section 23 does not distinguish between fact or expert evidence. So, two questions will be asked before a referral:

- a) Will the Court of Appeal receive the evidence?
- b) If so is there any real possibility that the new evidence will cause the Court of Appeal to quash the conviction?

The receipt of fresh expert evidence presents its own particular problems with how the CCRC considers and executes its role. An analysis of referrals indicated that the CCRC is unduly deferential to the Court of Appeal in cases involving expert evidence. A number of commentators have suggested that the CCRC should become more proactive, in cases of expertise when seeking fresh evidence.

In the authority of *Kai Whitewind*⁵³ the court made it clear that the fact that the expert, chosen to give evidence by the defence, did not give his evidence as well as it was hoped, or that parts of his evidence were exposed as untenable, thereby undermining confidence in his evidence as a whole, does not begin to justify the calling of further evidence to substantiate the unsatisfactory evidence at trial. Where expert evidence has been given and apparently rejected by the jury, it could only be in the rarest of circumstances. The Court of Appeal opined, that the court would permit repatriation or near repatriation of the evidence which had the same effect by some other expert to provide the basis for a successful appeal. The court went on to observe that if it were otherwise, the trial process would represent no more, or not very much more, than what it referred to as 'a dry run' for one or more of the experts, on the basis that, if the evidence failed to attract the jury at trial, an application could be made for the issue to be revisited by the Court of Appeal. The Court of Appeal made it clear that they were of the view that that was not the purpose of their jurisdiction.

Despite this guidance, which must be taken as the general rule, the Court of Appeal will, in exceptional circumstances, depart from its own structure for typically pragmatic reasons⁵⁴ *Kai Whitewind* is also an authority for the Court of Appeal standpoint, that conflicts of expert evidence, however complicated, can always be safely left to be determined by the jury.

It has been suggested that the CCRC take a de novo role in examining expert evidence⁵⁵. The crux of the suggestion is that the CCRC depart from *Pendleton* and examine disputed expert evidence that was presented to the jury. This suggestion is in step with recent recommendations made by the Law Commission in relation to Expert Evidence in Criminal Proceedings in England and

⁵²In which I led for the appellant

⁵³R v Kai Whitewind [2005] EWCA Crim 1092.

⁵⁴See, for instance, R v Campbell [1997] 1 Cr App R 199, where the Court of Appeal admitted fresh evidence as to the effect of epilepsy

⁵⁵O'Brian W. (2011) 'Fresh Expert Evidence in CCRC Cases' 22 *King's Law Journal* 1-26





Wales.⁵⁶ A short consideration of the Law Commission's Report is of assistance.

The stated policy objective of the Law Commission was to 'minimise the risk of miscarriage of justice in cases where a party seeks to rely on expert evidence, whether the evidence is tendered by the prosecution or the defence.'⁵⁷ To achieve this, the Law Commission, advised by its Working Parties, recommended a series of measures to ensure that individuals who expressed expertise in a particular discipline should be inherently reliable if their evidence is deemed to be admissible and that such reliability should be tested in advance of it being heard by the jury by reference to certain criteria. The Law Commission Report suggests that court-appointed experts should be enlisted on a structured basis⁵⁸ and should incorporate measures designed to ensure that the purported expert is properly screened, that each party's rights are protected and that the maintenance of transparency within the proceedings is ensured. The Law Commission proposed an independent panel of court experts. The Criminal Bar Association, when consulted, observed that the panel should contain representatives of the Law Society and the Bar Council, acting in accordance with a set of agreed criteria, to make sure that there was a measure of professional agreement as to the suitability of potential appointees. The benefits of a panel of independent experts appointed by the courts are plain. It would provide independent, learned guidance for a judge, where it is considered that evidentiary reliability should be determined by the court in accordance with the new regime proposed by the Law Commission.

The new regime improves upon the present common law power for judges in criminal cases to call witnesses of fact during a trial if it is in the interest of justice⁵⁹. In practice, this power is rarely used, but it is probably flexible enough to permit a judge to call an expert witness to assist with a determination of expert evidence at trial, particularly as a matter of admissibility. It must be stated that this has never been tested.

The Law Commission recommends a significant restraint upon Crown Court Judges appointing experts and that it, in any event, should be limited to cases only where the complexity and the likely importance of the disputed opinion evidence are such that it would be in the interests of justice to call upon the assistance of an independent expert. Paragraph 6.57 of the Law Commission Report goes on to empathise that "... the assistance of a court-appointed expert would not be in the interests of justice in the vast majority of criminal cases involving expert opinion evidence, so the power would be relied on only very rarely..."⁶⁰ If the CCRC were to take the *de novo* role of examining expert evidence, then as well as appointing their own expert which they are already entitled to do, the CCRC would contact the trial experts and present them with fresh evidence. As a matter of practice, in most expert cases referred by the CCRC, the prosecution expert ends up agreeing with the CCRC expert.⁶¹ It must be emphasised that if the CCRC were to extend its role into examining fresh expert evidence in this manner it would depart from Pendleton and potentially be susceptible to an accusation that the role of the jury is being undermined.

(Laurie Elks, former CCRC Commissioner): The existing test for the admission of new evidence by the Court of Appeal (and consequently the CCRC) under s.23 of the Criminal Appeal Act 1968 is unproblematic and is as flexible as it needs to be. S.23 allows the Court of Appeal to receive

⁵⁶Law Commission (2011) *Expert Evidence in Criminal Proceedings in England and Wales*, Law Com No. 325, HC 829, London: The Stationery Office

⁵⁷Law Commission (2009) *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales*, Consultation Paper No. 190, p.79

⁵⁸Law Commission (2011) *Expert Evidence in Criminal Proceedings in England and Wales*, Law Com No. 325, HC 829, London: The Stationery Office, para 6.42

⁵⁹See for instance *R v Robert* (1984) 80 Cr App R 89

⁶⁰The family jurisdiction has a long well established regime of appointing single joint experts

⁶¹O'Brian W. (2011) 'Fresh Expert Evidence in CCRC Cases' 22 *King's Law Journal*, p 9



any evidence which was not adduced in the proceedings if it thinks it necessary or expedient in the interests of justice. S.23(2) sets out the criteria in considering whether or not to admit fresh evidence, including whether the evidence is capable of belief, whether it affords grounds for allowing the appeal, the admissibility of the evidence in trial proceedings, and whether there is a reasonable explanation for the failure to adduce the evidence at trial.

(David Jessel, former CCRC Commissioner): The Court of Appeal takes a very narrow view, paying exaggerated courtesy to the supremacy of the jury. It routinely chucks out arguments and evidence on the basis that they have already been deployed at trial or at the first appeal. As a result, it is becoming an increasingly uphill task as appeal succeeds appeal. However, the evidential landscape could have radically changed since the original trial. Evidence may have emerged which, had the CPS known about such evidence, the trial would not have taken place at all. In such instances, the Court of Appeal's devotion to the supremacy of the jury verdict stands as even more vacuous – there would have been no jury verdict because there would not have been a trial.

(Susan Caddick, sister of Eddie Gilfoyle): In June 1992, Eddie Gilfoyle's wife, Paula Gilfoyle, was found hanged in the garage of their home, two weeks before their first baby was due to be born. A handwritten suicide note was left at the scene. A year later, Eddie was found guilty of murder when the jury accepted the prosecution's case that he had staged the suicide. Following Eddie's conviction, my family made over 100 complaints against Merseyside Police to the Police Complaints Authority, which led to a re-investigation of the case by Lancashire Police. In 1994, Lancashire Police completed its investigation and concluded that there was no evidence of a crime and that Paula Gilfoyle had committed suicide. When the appeal was heard in 1995 on the basis of Lancashire Police's evidence, the Court of Appeal dismissed the appeal on the basis that the Chief Constable of Merseyside Police had not yet agreed to the disciplinary charges recommended against his officers and the inquiry by Lancashire Police was not yet concluded. The Court of Appeal held that the evidence uncovered by Lancashire Police was therefore inadmissible as it was considered to be an ongoing inquiry. This, in my view, was a deliberate tactic by Merseyside Police which agreed to the charges the very next day after Eddie's appeal was dismissed.

Shortly after the CCRC's establishment, it referred Eddie's conviction back to the Court of Appeal, which was held in 2000. The CCRC included all of the new evidence uncovered by the Lancashire Police inquiry on the basis that these had never been heard i.e. it was new evidence. This time, the Court of Appeal held that the evidence uncovered by Lancashire Police should have been used at the 1995 appeal as it was available then. It was therefore inadmissible as it was no longer new. From my experience with Eddie's case, the Court of Appeal will only allow evidence that is brand new – i.e. evidence that the defence could not possibly have known or found out at trial. Further, even if fresh evidence is available, as an appeal is not a re-hearing, the Court of Appeal does not look at how it fits into the case, next to all the other evidence that proves innocence. Instead, it looks at the new evidence in isolation. The Court of Appeal has set the bar so high that it is virtually impossible to overturn a conviction brought in by a jury.

As this relates to the CCRC, the 'real possibility test' means that the CCRC equally has to abide by this stringent notion of fresh evidence. The CCRC has 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. No matter how much the CCRC believes that an applicant may be innocent, it cannot do anything in the absence of fresh evidence.

(Susan May, alleged miscarriage of justice victim): The fresh evidence requirement has meant that the Court of Appeal could not hear my case as a whole. On both appeals, only fragments of my case were heard because of the fresh evidence criteria. However, as time passes, more evidence





may have emerged relating to a certain point that may have been argued before. Because that point has been referred to at a previous appeal, you are told that it cannot 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 previously. Fragmented evidence is biased and very unhelpful. My case is now totally different from that presented to the jury in 1993.

(Andrew Green, United Against Injustice (UAI)): At a meeting on the abolition of the CCRC held in January this year by representatives of grass roots miscarriage of justice campaign groups, the main focus of criticism at the meeting was the CCRC's 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 CCRC's interpretation of this provision is to apply an extremely strict 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 uses this over-strict interpretation of appeal judgements as an excuse for doing nothing. Why go to the trouble of using its extensive powers to obtain records, given to it by section 17 of the 1995 Act, when almost no undisclosed evidence (the main resource for potential fresh evidence), counts as 'fresh'?

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 in his paper.

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 CCRC plenty of scope to present challenging cases. At the aforementioned meeting, South Wales Against Wrongful Conviction (SWAWC), an affiliate group of United Against Injustice argued that the CCRC lacks the moral courage to challenge the Court of Appeal when it potentially has the power to do this, either through persistent referral or by alerting government to the inadequacy of the CCRC's remit and its perpetuation of miscarriages of justice. It succumbs to its remit too easily and interprets it too literally.

(Professor Michael Zander, Emeritus, London School of Economics and Member of the RCCJ):

In the RCCJ's Report dealing with the Court of Appeal, the RCCJ said that, if the court 'has a serious doubt about the verdict', it should be ready to quash the conviction even though there is nothing new and no irregularity at trial.⁶² It fully appreciated the reluctance felt by appeal court judges

⁶²RCCJ (1993) *Report*, HMSO: London: Chapter 11, para.46



about quashing a jury's verdict but the RCCJ said, '...we do not believe that quashing the jury's verdict where the court believes it to be unsafe undermines the system of jury trial...'.⁶³

Quashing a conviction when there is nothing new is sometimes referred to as acting on a 'lurking doubt', a phrase associated with the 1969 case of *Cooper*⁶⁴. Kate Malleson's research for JUSTICE found that in the 21 years between 1968 and 1989 there were only six cases in which the 'lurking doubt test' had been applied. But in her 1990 sample of 102 successful appeals there were six 'lurking doubt' cases and in her 1992 sample of 114 cases there were 14 cases in which the conviction was quashed because the court considered that the jury had reached the wrong result, although there was no fresh evidence and no criticism of the trial process. In nine of these the court said that the evidence was too weak or flawed to justify a conviction; in the other five cases the court referred to having a 'lurking doubt'.⁶⁵ So far as I am aware there are no recent figures, but it is said that the Court of Appeal is today less ready to act on that basis.⁶⁶

The RCCJ said that, whether or not the Court referred to the 'lurking doubt' principle, these were cases where the combined experience of the three members of the court led them to conclude that there may have been an injustice in the trial and in the jury's verdict.⁶⁷ The RCCJ recommended that in the proposed re-draft of section 2, '...it should be made clear that the Court of Appeal should quash a conviction, notwithstanding that the jury reached their verdict having heard all the relevant evidence and without any error of law or material irregularity having occurred, if, after reviewing the case, the court concludes that the verdict is or may be unsafe...'.⁶⁸ If not an invitation to allow full-on challenge to jury decisions, this was at the least a suggestion that the 'lurking doubt test' be given express statutory approval.

The recommendation was not implemented. Of course, it is one thing for the Court of Appeal occasionally to quash a conviction, with or without mention of 'lurking doubt', on the grounds that the jury got it wrong. It is something rather different to give that concept legislative expression. The proposition that a conviction is unsafe if the Court is of the view that, on the evidence, the jury should not have convicted, would be a fundamental new principle of our criminal justice system. It is tantamount to saying that criminal convictions in Crown Court cases require the assent, not only of at least ten members of a jury but, on a belt and braces principle, also of the Court of Appeal. Were it not for the resource implications, that might be an excellent reform. It would give official recognition to an uncomfortable but obvious fact – that juries sometimes do get it wrong. But the resource implications are extremely serious. Once the news got around the prisons, the number of applications for leave to appeal on the grounds that the jury got it wrong would increase exponentially. How could the system cope with that likely deluge, not just in terms of the sheer numbers of applications, but of the resulting increased workload for judges required to consider all the evidence in all those cases?

⁶³RCCJ (1993) *Report*, HMSO: London: Chapter 11, para.46

⁶⁴*R v Cooper* [1969] 1 QB 267, CA

⁶⁵RCCJ (1993) *Report*, HMSO: London: Chapter 10, para.43. Professor Malleson's research was published in JUSTICE (1989) *Miscarriages of Justice*, London: JUSTICE. The 1990 and 1992 samples were the basis of her report to the Runciman Royal Commission, *Review of the Appeal Process*, published by the Royal Commission as Research Study No.17, 1993

⁶⁶Professor Leonard Leigh, a former member of the CCRC, examined 'lurking doubt' cases. He concluded that the Court of Appeal did not quash convictions on the basis merely of a sense of unease. 'There must be some combination of evidence and circumstances which leads the court to that conclusion' (Leigh, L. (2006) 'Lurking Doubt and the Safety of Convictions' *Criminal Law Review*, 809, 810)

⁶⁷RCCJ (1993) *Report*, HMSO: London: Chapter 10, para.45

⁶⁸RCCJ (1993) *Report*, HMSO: London: Chapter 10, para.46



Should at least the CCRC, however, have the power to refer cases to the Court of Appeal where there is nothing new, simply on the grounds that it thinks the jury got it wrong? Stated baldly like that, the proposition would probably attract little political support – if only again because of the fear that the CCRC would quickly itself become deluged with a rising tide of requests for referrals back to the Court of Appeal. But in 1994, when developing its thinking through a Consultation Paper, the Home Office seemed to have in mind something along those lines. Normally the Authority (which became the CCRC) would refer cases on the basis of something new but, the Consultation Paper said, ‘...*The Government does not propose, however, that the Authority’s [which became the CCRC] power to refer should be limited in statute to cases where something “new” appears to have emerged. Apart from the difficulties of interpretation which this would give rise to, it would exclude the possibility of a reference being made in an exceptional case where the Authority felt real disquiet about the safety of a conviction even in the absence of new matters. The Government therefore considers that the Authority should be empowered to refer a conviction to the courts according to a test expressed in terms wide enough to encompass the variety of circumstances described above, where it appears that there may be grounds for doubting the safety of the conviction and that it would be right for the courts to be given the opportunity to reconsider the case....*’⁶⁹

That sounded like a quite strong endorsement of the concept. However, when one looks at the 1995 Criminal Appeal Act its only expression is subsection (2) of s.13 which says that in exceptional circumstances the CCRC can refer a case even though there is nothing new. Whatever Ministers intended, this has proved to be a useless safety valve. In the fifteen or so years since the establishment of the CCRC it has hardly ever been used.⁷⁰ I imagine the reason is that the CCRC lacks the confidence to use the power, fearing that the Court of Appeal will not welcome referrals when there is nothing new. But if the CCRC believes that the case should be reconsidered it should exercise the power to require that it be reconsidered, even if the reference fails.⁷¹

(Mark George QC, Garden Court North): No artificial barriers should be erected to prevent a full argument being heard on any appeal. The CCRC should be able to refer cases on consideration of ALL the evidence, whether it is fresh evidence or evidence that was available at the time of trial, or first appeal, but for some inexplicable reason, was not used. It should do away with the restriction that currently prevents an argument being raised that has already been adjudicated on. There may have been developments in the case that mean that an argument that has not previously found favour may now be considered to have merit.

(Gabe Tan, Innocence Network UK (INUK)): This week, INUK published a dossier of 44 Cases for Concern. These cases involved 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. These individuals have been convicted for serious offences – murders, armed robbery, rape and sexual abuse against children. Collectively, these 44 individuals have spent over

⁶⁹Home Office (1994) *Criminal Appeals and the Establishment of a Criminal Cases Review Authority, A Discussion Paper*, London: Home Office, paras. 43-44

⁷⁰The case of R v Stock [2008] EWCA Crim 1862 was referred a second time on the basis of s.13(1) and 13(2) of the Criminal Appeal Act 1995 in 2007. The reference to s.13(2) was in order to include material that the Court of Appeal had considered on the first referral but which in the CCRC’s view had not had the impact it might have had (information from the CCRC’s Head of Communications, 29 March 2012)

⁷¹There has been one such case – that of Anthony Stock who was sentenced in 1970 to 10 years imprisonment. His appeal was dismissed in 1971. The case was referred to the Court of Appeal Criminal Division by the Home Secretary in 1993. The appeal was dismissed in 1996. In July 2003 the CCRC referred the case back to the Court of Appeal. That appeal was dismissed in August 2004. In September 2007 the CCRC referred it back to the Court of Appeal. That appeal was dismissed in August 2008. (R v Stock [2008] EWCA Crim 1862)



500 years in prison. Many are unlikely to achieve release on parole unless and until they admit guilt to the crimes for which they claim to have been wrongly convicted. INUK, and our 26 member innocence projects, only work on cases where people are claiming factual innocence – i.e. that they have no involvement or culpability at all in the crimes for which they were convicted. 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 they are 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. The 44 cases in the dossier have been withered down from over a thousand enquiries for assistance.

The convictions in the dossier of cases are deemed by INUK to be dubious 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 was no physical evidence at all linking him to the murder of Maureen Comfort. His conviction was based solely on two alleged confessions he had 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. In addition, 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 there being a clear financial or personal motive for making a false allegation.

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 to which the CCRC is generally required to limit its review. The evidence that supports 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 for referral mainly because the jury decided to convict despite hearing the apparent unreliability of 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, fails 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. This means that innocent victims of wrongful conviction have to bear the consequences of the failures of their trial counsels and do not 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.

However, very few innocent victims of wrongful conviction will be fortunate enough to find fresh evidence. In the case of Sean Hodgson, for instance, 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. 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 which rendered his conviction unsafe. Yet, without the miraculous discovery of the DNA evidence, the factually innocent Hodgson would most certainly still be trapped within the prison system. 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.

(Emily Bolton and Glyn Maddocks, Centre for Criminal Appeals (CCA)): It is CCA's overall position that all advocates for the wrongfully convicted should work to ensure that the CCRC and the Court of Appeal consider *all* the evidence available in a case when reviewing an appeal where it is argued that the conviction in question is unsafe.

However, it appears that there are diverse views on exactly *how* this can be most effectively achieved. It is important to distinguish here what is meant by 'new evidence.' Evidence that an appellant may wish to bring before the Court of Appeal will have a particular status:

- a) previously adduced;
- b) previously available but not adduced;
- c) previously available but not discovered or adduced; and,
- d) newly discovered and not previously available or adduced.

Section 23 of the Criminal Appeal Act of 1968, uses the term 'fresh evidence' to refer to evidence admitted in the Court of Appeal. It does not specifically define 'fresh evidence' as 'evidence which was not adduced in the proceedings from which the appeal lies.' However, by implication, it appears from the Act that this restriction applies to such evidence, but only in so far as it can't be 're-run' (i.e., a witness called to say the same thing).

Of course evidence previously adduced *is* considered by the Court as the context of the actual grounds for appeal, providing that it has been transcribed, or still exists in document form. The Court cannot decide the case on fresh evidence without considering the previously adduced evidence as context.⁷² Furthermore, this does not mean that the 'fresh evidence' must not have been *available* at trial, merely that it had not been placed before the decision-maker at trial. If you can give a 'reasonable explanation for the failure to adduce' the evidence at trial, the court has the discretion to allow the evidence to be put forward on appeal. And even this is not determinative.⁷³

⁷²Although the court may choose to test its views by asking itself what the original jury might have concluded, the question which in the end we have to decide is whether in our judgment, in all the circumstances of the case including both the verdict of the jury at trial upon the evidence they heard and the fresh evidence before this court that we have heard, the convictions were safe and satisfactory. If so the convictions must stand. If not the convictions must be quashed.' Quoted in R v McKenny [1991] 93 Cr. App. R. 317; Taylor, P. (Editor) (2001) *Taylor on Criminal Appeals*, Oxford: Oxford University Press, p.277. Pre Section 23 Amendments, but applied since then in several cases.

⁷³The main test is whether the interests of justice are served by admitting the fresh evidence and ultimately whether the new evidence casts doubt on the safety of the conviction.' Taylor, P. (Editor) (2001) *Taylor on Criminal Appeals*, Oxford: Oxford University Press, p.278. It is important to note that this is a broad standard that favours reaching a just result. Indeed the Supreme Court in R (Adams) v SSJ [2011] UKSC 18 revisited this issue and could not agree on what it meant, which means the door is still open more than a chink, and should continue to be pushed further. 'Fresh evidence' does not have to be evidence that was not, or could not have been, obtained at the time of trial – a rule that applies in many US jurisdictions. Rather, it simply means evidence that the decision maker did not previously hear. This is a very sensible rule, and eliminates many of the procedural barriers that sometimes obstruct the claim of an innocent person in the US system.





However, it may be possible that the CCRC has been, in practice, conflating the two types of evidence – ‘not heard at trial’ and ‘not available at trial’ – given that it states on its own website:

‘...[W]e have to be able to say to the Court, “Look, here is a new piece of evidence, or a new legal argument that hadn’t been identified at the time of the trial, that the jury never got the chance to consider. It could have changed the whole outcome of the trial....”’ (Emphasis added)

The evidence does not have to be ‘newly discovered’ (that is, ‘not identified’ at the time of trial) to be admitted as fresh evidence, merely not presented to the trial court. If it was available at trial but not used, that is something the Court of Appeal would consider in determining whether the evidence would be admitted, (‘whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings’⁷⁴) but such evidence would not automatically ruled out for this reason.

It is CCA’s position that any procedural bars to the Court of Appeal being able to hear *all* the evidence, in a potential unsafe conviction case, should be challenged. Therefore, it would be preferable that the Act gave the broadest possible scope for the admission of fresh evidence, and made explicit that all the evidence, whether previously adduced, previously available but not adduced, previously available but not discovered or adduced or newly discovered and not previously available or adduced, *should* be considered by the Court in ruling on the safety of the conviction.

However, CCA would argue that there is at present, no bar to the Court considering all such evidence in one way or another. The current wording of the statute is not as restrictive as the INUK critique as presented in its Public Statement suggests, and CCA takes the position that as advocates for the wrongfully convicted we should promote the broadest legitimate construal of the law that helps our constituency, rather than the narrowest.

Innocence or Safety?

(Professor Michael Zander QC, Emeritus, London School of Economics and Member of the RCCJ): The INUK statement for this conference proposes that the CCRC should have the power to refer cases to the Court of Appeal ‘if it thinks that the applicant is or might be innocent’. I have no problem with a referral to the Court of Appeal where the CCRC has come to the conclusion that the convicted person is innocent – providing that it is on the basis that in the CCRC’s view the conviction is unsafe. But I would be strongly against the CCRC referring a case on the stated basis that the defendant is or may be innocent. There are few cases in which it would be possible to do so⁷⁵ and to identify a few persons being referred as ‘innocent’ or ‘probably innocent’ would, by

⁷⁴[T]he fact that there is no reasonable explanation for the failure to adduce the evidence may have little or no bearing on the question whether the admission of the evidence would show the conviction to be unsafe. The unreasonable failure may simply be due to an error of judgment by the appellant’s lawyers, for which it would be unjust to penalize the appellant’ (Commentary to R v Cairns [2000] Crim L.R. 473., Taylor, P. (Editor) (2001) *Taylor on Criminal Appeals*, Oxford: Oxford University Press, p.278

⁷⁵Professor Peter Duff, a member for years of the Scottish Criminal Cases Review Commission, wrote: ‘In practice, I cannot remember the Commission referring a case where I was absolutely certain that the applicant was factually innocent; quite simply it was never possible to be sure about what precisely had happened. As regards some referrals, I thought it possible that the applicant was innocent, but, as regards others, I had severe doubts as to their innocence but was not sure enough of their guilt to argue against a referral. In all such cases, however, I was convinced there had been a ‘miscarriage of justice’ in legal terms’ (Duff, P. (2009) ‘Straddling Two Worlds: Reflections of a Retired Criminal Cases Review Commissioner’ 72 *Modern Law Review*, p. 693, 721)



definition, suggest that anyone else referred was not innocent. One would not want second class referrals any more than one wants second class acquittals.⁷⁶

(John Cooper QC, 25 Bedford Row): To suggest that the CCRC has no interest in factual innocence may be doing a disservice to it. They are concerned with unsafe convictions and it could be said nothing is more unsafe than someone who is factually innocent.

(Emily Bolton and Glyn Maddocks, Centre for Criminal Appeals): INUK has argued that the CCRC can't be independent of courts, as intended, when it has to apply a standard that requires it to second guess what the Court of Appeal would do with a case, that is, to determine whether there is a "real possibility" that the Court would quash the conviction were the case referred to the Court by the CCRC. INUK proposes replacing the 'real possibility' standard with a standard that reads: 'the CCRC thinks the applicant is or might be innocent.' INUK presumably hopes that this new approach would give the CCRC room to have a view independent of what the Court of Appeal may or may not do with the case.

The first issue presented by this proposal is whether introducing the concept of 'innocence' into the standard of review helps or hinders innocent people, convicted of crimes, have their convictions quashed by the Court of Appeal. The following questions regarding the INUK proposal remain outstanding: a) How would INUK propose that 'innocence' is defined for CCRC? b) What existing standards would it draw on? c) How would INUK quantify 'might be' with reference to probabilities? d) How would INUK propose that it avoid the pitfalls of introducing the concept of 'innocence' into the standard that have been so damaging to the interests of prisoners maintaining innocence in the US?

Assuming that what is meant here by 'innocence' is what a layperson understands it to mean, CCA has grave concerns about any attempt to introduce an 'innocence' standard at any point in the proceedings designed to identify and remedy wrongful convictions, as an 'innocence' standard will make it far harder for the innocent people convicted by our criminal justice system to have their convictions overturned.

INUK is in effect saying 'people are having trouble hitting the bullseye with the CCRC, so let's draw it smaller,' when a bigger bullseye is in fact easier to hit. There are many actually innocent prisoners who can only get as far as proving their conviction is unsafe, that is, hit the bigger bullseye, but could not provide evidence that shows they might be innocent, and so would not have a chance of striking that smaller target.

It is CCA's position that fewer innocent people would get their convictions quashed under a CCRC 'innocence' standard than they do under the 'real possibility' standard, because the CCRC would be only able to consider a much smaller category of cases, those that the CCRC thinks might be innocent, rather than the broader category where the CCRC considers that there is a real possibility that the Court of Appeal would find the conviction to be 'unsafe.' This would mean that fewer innocent people in the criminal justice system will be able to get help from the CCRC in placing all their evidence before the Court via CCRC's Section 17 powers, and so fewer innocent people will have their convictions quashed.

⁷⁶See, further, Hannah Quirk, 'Identifying Miscarriages of Justice: Why Innocence in the UK is not the Answer' (2007) *Modern Law Review*, p. 759-777.



Assuming from the INUK Public Statement that INUK means by 'might be innocent' that the applicant's proposed grounds for appeal must contain a claim of actual innocence backed up with at least some positive evidence of innocence, or evidence that negates the prosecution's case, it seems that under the INUK proposal, the CCRC would be a narrower gateway to the Court of Appeal than it is today.

While it may be that INUK has a more nuanced definition of what it means by 'innocence', this is not clear from its Public Statement. If INUK is looking for a way to distinguish 'due process' or 'technicality' cases from 'innocence' cases (if that were ever going to be wholly attainable, which is doubtful), so that 'innocence' cases can be used as sympathetic examples in campaigns for systemic reform, CCA would suggest that this is more a consideration for campaigners in selecting cases to highlight.

The Court of Appeal applies a much broader test, that of whether the conviction is 'unsafe', which itself makes no reference to 'innocence'.⁷⁷ 'Innocence' may be a narrower category than 'unsafe', albeit the legal procedures that must be followed in order for a conviction to be 'safe' attempt to provide a mechanism to insure that an innocent person should not be convicted in the first place.⁷⁸ Once the Court finds that the evidence fails to prove that the applicant is guilty, under the usual criminal standard, that is the end of the enquiry – there is no need to positively prove you are innocent.

If it has been understood correctly, INUK's position in this regard is at odds with the views emerging in the US, where the innocence project movement has been active for longer and has resulted in the DNA exoneration of 289 convictions since 1989, as well as a contested additional number of non-DNA exonerations.⁷⁹ The US system has various innocence standards in federal and state appellate law. However, generally in the US, the prisoner has to prove innocence by 'clear and convincing' evidence. It is the experience of US innocence projects and legal practitioners that any reference to 'innocence', while appealing from a campaigning perspective, leads to a nightmarish standard for a wrongfully convicted person to have to meet, and a gift for those prosecutors (or courts) with an interest in defending convictions. In the US, the use of the innocence concept in law leaves the majority of the wrongfully convicted with no way out of their predicament, including the actually innocent among them. Professor Keith Findley, Chair of the US Innocence Network has recently published a law review article arguing that advocates for the innocent in prison need to argue for a far broader notion of innocence than that currently used in the US. According to Professor Findlay, the American innocence standard is too narrow – 'it fails to accommodate the vast majority of innocent people in our justice system. It fails to embrace innocence in its full complexity.'⁸⁰

While CCA does not believe that INUK is proposing that the UK adopt a US-style standard of innocence for CCRC's review of cases, the introduction of the term 'innocent' into the process (even as a term of art, and qualified by 'might be') can rapidly snowball out of control and be deployed as a pretext for cutting both the remedies and resources available to people whose claims about their convictions challenge the principles and practices of the various institutions

⁷⁷'If the Court concludes that the appellant was wrongly convicted of the offence charged, or is left in doubt whether the appellant was rightly convicted of that offence or not, then it must of necessity consider the conviction unsafe. The Court is then subject to a binding duty to allow the appeal.' *R v Graham and others*, at 308, cited in Taylor, P. (Editor) (2001) *Taylor on Criminal Appeals*, Oxford: Oxford University Press, p.201.

⁷⁸As Symposium contributor Mark George QC noted, one of the overriding objectives of the Criminal Procedure Rules 2010 is the 'acquittal of the innocent.'

⁷⁹The US focus on DNA testing as a tool to exonerate prisoners has created an atmosphere in post –conviction litigation where only something as 'certain' as a DNA test enables you to claim you are 'really innocent.'

⁸⁰Findley, K. (2010-11) 'Defining Innocence', 74 *Alb. L. Rev.* 1157



that make up the criminal justice system. It is very much a case of 'be careful what you wish for.' Indeed, in the *Adams* case, in which the Supreme Court interpreted the standard to be met by a person whose conviction has been quashed who seeks compensation, it can be seen what a legally and morally fraught business it is attempting to define innocence in the context of criminal law.⁸¹

(Dr Michael Naughton, Innocence Network UK (INUK)): The argument that the wrongly convicted are actually better served by a test for legal safety as fewer innocent people would overturn their convictions if they had to prove factual innocence rather than unsafety of conviction, reveals a profound misunderstanding of what it means to be innocence-focused: it is about the *quality* of convictions overturned, not the *quantity*. Moreover, an innocence-focused approach does not necessarily seek to prove that alleged victims of wrongful convictions are, in fact, innocent, although if it is possible to prove factual innocence through scientific advancements in DNA techniques, for instance, all attempts will be made to prove it (as in the case of Sean Hodgson). Indeed, the methodology of an innocence-focused approach takes the presumption of innocence seriously and applies a two-pronged approach: an interrogation of the process that led to the conviction (police investigation and prosecutorial conduct, for instance) and the evidence that is claimed to prove that the alleged innocent victim is factually guilty whilst, simultaneously, seeking ways to determine whether the claim of factual innocence, by the alleged victim, can be validated. Such an approach is akin to the public enquiries that the RCCJ thought the CCRC would undertake.

It is crucial to acknowledge in discussions about whether the factually innocent are better served by a test for legal safety, even where criminal trials are conducted in accordance with due process that they can result in the conviction of the factually innocent.⁸² In the United States, a major barrier faced by innocence projects is that the conviction of an innocent person can still be regarded by the Supreme Court as constitutional as long as the person was convicted in accordance with the prevailing procedures of due process.

This is very much akin to the barrier posed by the safety test. Based on the current test of 'safety', a conviction based on dubious evidence (contested forensic science, inconsistent witness testimonies, highly circumstantial evidence, to give a few examples) may still be regarded as safe if the appellant was convicted lawfully, with no breaches of due process. The Criminal Appeal Act 1995 gave the Court of Appeal the power to decide whether the conviction is unsafe. This is determined on a case by case basis and is not any more objective than an exercise that seeks to determine whether an appellant is, or might be, innocent.

Indeed, the threshold of 'safety', set by the Court of Appeal, is so high that time and time again, we see instances where despite evidence that led to the conviction being seriously discredited, subsequent to the conviction, the Court of Appeal is still of the opinion that the convictions are not unsafe and dismiss the appeals (as in the cases of Susan May and Eddie Gilfoyle, for instance).

What INUK means by a test of innocence is a call for the presumption of innocence to be at the heart of the CCRC's referral criteria and the Court of Appeal. The question, when deciding whether to refer a case or quash a conviction, should be, whether, in light of the evidence that currently stands, the appellant can be considered guilty beyond reasonable doubt? If the answer is 'no', then

⁸¹Post R (*Adams*) v SSJ [2011] UKSC 18, eligibility for compensation depends on the applicant showing that a new fact so undermines the case against him that no conviction could possibly be based upon it.

⁸²See, Naughton, M. (2011) 'How the Presumption of Innocence Renders the Innocent Vulnerable to Wrongful Convictions', *Irish Journal of Legal Studies*, 2(1): 40-54. See also, Spencer, J. (1989) *Jackson's Machinery of Justice*, Cambridge: Cambridge University Press, p. 203; Spencer, J. (2006) 'Does our present criminal appeal system make sense?', *Criminal Law Review*, August, p. 683.



the presumption of innocence dictates that the conviction can no longer stand and the person is regarded as both legally and factually innocent.

Lack of Diversity in the CCRC's Composition

(David Jessel, former CCRC Commissioner): The bulk of Commissioners and staff at the CCRC are lawyers, even though the Criminal Appeal Act 1995 said that only one third of them need to be. This has impacted upon the CCRC's ability to stand at arm's-length from the legal world. The CCRC should not be hand in hand with the system of criminal justice or be the handmaiden of the Court of Appeal. The CCRC was set up to challenge the assumptions of the criminal justice system and those who work in it. However, its own pervasive legalism needs now to be challenged.

(Laurie Elks, former CCRC Commissioner): The constitution of the CCRC is too 'lawyerly' and I have unsuccessfully advocated, when the last cohort of Commissioners was being recruited, that the CCRC should seek to recruit a member with a forensic science background. The prevailing view was that any such member would inevitably have a limited specialism and would soon get out of the professional swing of things thus limiting his/her value – it was therefore considered better to buy in forensic expertise on a case by case basis. I disagree with this view and am of the opinion that someone with professional experience of thinking scientifically/forensically would add greatly to the expertise of the CCRC. In addition, I argued for the recruitment of investigative advisers. Until recently, the CCRC had two investigative advisers, both former senior police officers. Their contribution to investigations, identifying grounds for referral, and supervising s.19 investigations has been extremely important and insufficiently understood outside the CCRC. It was a very wrong decision on part of the CCRC not to replace one of these advisers when he retired a few months ago. It is important that the CCRC has staff, skilled and experienced in investigation, who are available to be consulted by case review managers. This is particularly true where applications raise issues about the original police investigation which need to be appraised perceptively and it is doubtful that the current resource of the CCRC is sufficient.

(Dr Andrew Green, United Against Injustice (UAI)): The case of Paul Higginson highlights the problem with the CCRC's pervasive legalism and the implications on its case review approach. Higginson was convicted of joint-enterprise murder. His defence at trial was that he was not at the crime scene and the gunman was in fact his co-defendant. During the CCRC's review, it emerged that throughout the preparation for the trial and the trial itself, Higginson's own solicitors had also had his co-defendant as their client. The CCRC rejected submissions by Higginson and his solicitor that there was a clear conflict of interest. It did so on the basis that it had contacted the original solicitors who had 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 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. It includes 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 the claims of applicants.

In the experience of United Against Injustice'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. Lawyers, are the problem, not the solution.

This proposition is supported by Gareth Peirce, who said at the College of Law last night⁸³: ‘... *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.

Deficiencies in the CCRC’s Case Review Approach

(David Jessel, former CCRC Commissioner): Whilst the CCRC’s huge powers under s.17 of the Criminal Appeal Act 1995 to inspect materials, such as medical records, police disciplinary records, surveillance logs, etc., can turn up crucial evidence that leads to a successful referral, paradoxically, those are the very powers that are limiting the genuine investigative process, creating a mindset that the answer lies in the files. However, many miscarriages of justice require more than just a desktop review. In one of the CCRC’s best successes, the case of Warren Blackwell who overturned his conviction for rape following a CCRC referral, it was a visit to the crime scene which first made the case review manager think that it did not make sense to commit a rape at midnight on New Year’s Eve on a public footpath on the village green. This was the springboard to investigate further, which eventually led the CCRC to discover that the so called ‘victim’ was a serial false accuser.

The majority of cases at the CCRC are not investigated at all. They are simply limited to a review of the application form to come to a decision that there are no grounds for referral. This means that genuine miscarriages of justice will inevitably slip through the net. There is always a balance to be struck between the analytical approach and the investigative approach. The shortage of funds and the mindset of the CCRC have skewed that balance towards the analytical at the expense of the investigative. It is a lot easier to analyse a case onto the reject pile than to investigate a case onto the referral pile.

To conduct any extra investigation or proper preliminary analysis is going to mean that the CCRC needs to roughly triple its size. The alternative is a refinement of the CCRC’s intake to sharpen its focus by taking out for instance, the non-custodial cases, cases based on points of law, cases where for years the applicant has not expressed any claim to innocence. This would be unfair and unjust but the upside is that it should sharpen the CCRC’s focus, leading to more rigorous investigations and potentially genuine innocence cases.

(Susan May, alleged miscarriage of justice victim): When the CCRC was formed, valuable people and organisations who before had investigated wrongful convictions were lost, including *Trial and Error*, *Rough Justice* and *Panorama*. There were investigative journalists who had a passion for righting wrongs and would go to any length to look into a case. They have stopped their work on miscarriages of justice due to a mistaken belief that the CCRC would now takeover that work. The CCRC needs to be reminded of the reasons that they were set up in the first place i.e. the cases

⁸³See, 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, Robins, J. (Editor) (2012) *Wrongly Accused: who is responsible for investigating miscarriages of justice?* London: Wilmington Publishing. See also Merchant, M. ‘Poor defence’ in this same publication.



that were overturned through good investigative journalists who were willing to knock on doors to uncover the truth.

(Susan Caddick, sister of Eddie Gilfoyle): Whilst the CCRC says in public that it investigates miscarriages of justice. It does not. It simply reviews what the applicant's solicitor has put together. This means that the burden to get justice remains on the shoulders of families or on the shoulders of dedicated solicitors working on a pro bono basis. Eddie's case is now back before the CCRC for the third time. If the case does get overturned, it will not be because of anything the CCRC has done. It will be because of others – family, solicitors who have helped to campaign on his behalf. The CCRC should be a national treasure, a body to be proud of. Yet, it is unable to obtain justice in Eddie's case despite clear evidence of his innocence. Victims like Eddie and his family are desperate for the CCRC to work as it claims. Until it does, innocent victims of wrongful conviction and their families are lost and helpless. This cannot be right while an organisation like the CCRC exists.

(Mark Newby, Quality Solicitors Jordans LLP): A case that illustrates the deficiencies in the CCRC's desktop review process is that of Victor Nealon. Nealon was convicted of attempted rape in 1997 on the basis of disputed identification evidence. In 1997, Nealon applied to the CCRC to ask for a review of the forensic evidence in his case. The CCRC declined on the basis that it had been dealt with at trial. Unfortunately, had the CCRC bothered to make a more thorough enquiry, it would have discovered that no forensic examination had in fact been undertaken. In 2002, Nealon made a second application to the CCRC and requested again for forensic testing. The request was once again denied on the grounds that the CCRC 'do[es] not undertake speculative DNA tests'. In 2009, Nealon finally managed to commission the DNA testing privately and DNA was found in intimate areas of the clothing, which was not his, but belonged to an unknown male. The only evidence then left in Nealon's case was an argument that the assailant had a lump on his head. The CCRC was presented with evidence that on either side of the days of the offence, Nealon had no lump on his head. The CCRC rejected this submission, arguing that the lump 'might have disappeared' on the day of the offence. It required an eminent expert in Hematoma to prove to the CCRC what one might have thought was obvious i.e. that the lump could not have just 'disappeared'.

The CCRC's reluctance to refer cases back to the Court of Appeal is so pervasive that it will often engage in academic somersaults to arrive at incredulous conclusions to justify why it will not refer. In a case of a man alleged to have raped his daughter in an attic, the CCRC was presented with evidence that the attic was so low that he could not have stood up. The CCRC's answer was that he could have squatted on the floor. This, however, was never the complainant's account. In another care home case, the complainant alleged that he was abused at a black and white minstrel show in 1967. The CCRC was presented with evidence that there was no such show at that time and venue. The CCRC decided not to refer the case on the basis that it could have been another show. Again, this was never the evidence of the complainant. These cases illustrate that the CCRC's approach is intrinsically a negative one that seeks to identify reasons not to refer.

The CCRC has, no doubt, within it some very able people and many competent lawyers who are able to deal with complex issues and have delivered some very good outcomes. It is particularly adept at dealing with cases which requires fresh expert evidence or a forensic approach – 'black and white' cases such as Sally Clark, Angela Cannings and Barry George. However, the position is quite different when it comes to those cases where it requires a much greater interpretation of witness reliability and credibility. In such cases, the CCRC has consistently showed itself to be ill equipped. Whilst the CCRC can point to limited successes, as a whole, the weight of cases demonstrates a lack of perception of the issues of reliability and credibility. An analysis of the



CCRC's referral on sexual offences underlines that it struggles to assist where the starting basis of the conviction is tenuous, such as convictions based solely on the testimony of the accuser. The CCRC is unlikely to assist save for the exceptional cases where a document or a piece of evidence arises which fundamentally affects the basis of the conviction.

(John Cooper QC, 25 Bedford Row): It is important to consider how the CCRC prioritises its workload. It is clear that the objective is to give applicants in custody priority over applicants at liberty. On the whole this is right but a narrow observance of this approach can at times produce unwarranted hardship. For instance should the disproportionate impact on an applicant or witnesses be considered? An applicant, even at liberty, may be suffering detrimental effects in relation to their rehabilitation (for instance a bank manager convicted of dishonesty). Furthermore a third party may be adversely affected even in a case where the applicant is at liberty (a parent convicted who cannot see their child whilst the conviction maintains). Finally, evidence may deteriorate over time and may do so in a case where an applicant has liberty more so than when one who is in custody. In short it is suggested that the priority system of ranking potential referrals at the Commission needs far more flexibility than it presently receives.⁸⁴

Given all these constraints it is timely to acknowledge the statistics which relate to the CCRC since its inception and which were current at the time of writing this Paper.

Total Applications: 13,368

Case waiting: 279

Cases under review: 393

Cases completed: 12,696

Referrals: 470

Heard by the Court of Appeal: 449 (314 quashed, 130 upheld and 5 reserved)

But these statistics bear closer analysis. Some of the cases referred by the CCRC and included in the statistics are on the basis of sentence only. In accordance with CCRC recording practices, if the sentence is varied the CCRC marks this as quashed.⁸⁵ Furthermore the CCRC counts as quashed, referrals in cases where alternative convictions are substituted, for instance manslaughter for murder. The statistics are most susceptible to an accusation of being misleading when one considers that the CCRC rates its success in terms of the number of convictions not individuals. Thus for instance, the Birmingham six, the Guildford four and the Maguire seven would be recorded by the CCRC in its statistics as 17 successes.

During 2009/2010 the Commission faced 22 judicial review applications. The Administrative Court did not grant leave of any of these applications to progress. The turnaround time in conducting its work was reported as being six months in the Commission's Annual Report in 2009/2010⁸⁶, although in some cases a significant amount of time in excess of this elapsed including the case of Patrick Nolan, which was an alleged confession under duress which took the CCRC 5 years to consider. Some of the problem has been as a result of a lack of staff consequent upon lack of funding. In 2010 there were 35 full time staff⁸⁷. There had been a recruitment freeze and since the 31 March 2007 there had been a drop of 12.6% in recruitment⁸⁸.

⁸⁴See the case of Dino the dog in 2004 where the Commission gave a priority to a dog destruction case from Northampton Crown Court (The Telegraph, 15 October 2004)

⁸⁵Sentences represent 13% of applications

⁸⁶CCRC Annual Report and Accounts 2009/2010, p.7

⁸⁷CCRC Annual Report and Accounts 2009/2010, p.19

⁸⁸CCRC Annual Report and Accounts 2008/2009, p.16



The poor funding situation has inevitably caused difficulty at the CCRC, 'leaving staff frustrated... and dispirited' according to Professor Zellick a former Chairman of the Commission.⁸⁹ It will no doubt be further dispiriting to compare the amount of money spent on the Crown Prosecution Service compared to that of the CCRC.

As a result of some, or all of the problems, the role and influence of organisations such as Innocence Projects has become more and more significant over the last decade, many of them picking up the baton laid down by JUSTICE when it ceased its miscarriage of justice campaigning. At the end of November 2010 there were at least 100 contentious murder convictions being analysed by justice groups throughout the country.⁹⁰ An example of the limitations of the CCRC's reviews can be seen in the case of Sean Hodgson who was convicted in 1979 for the murder of a 22 year old. He had his conviction overturned in March 2009 after 27 years of wrongful imprisonment during which he had always maintained his innocence. Six months after his successful appeal, Hodgson was exonerated when DNA evidence testing on the exhumed body of an original police suspect resulted in a complete match from the crime scene.⁹¹ Such was the disillusionment with The Criminal Cases Review Commission that Sean Hodgson's legal team bypassed the Commission and went straight to the police and the prosecution who discovered that DNA on the deceased's body was not Hodgson's.

This is symptomatic of the driving force behind the innocence projects, to effectively investigate and delve deeper than The Criminal Cases Review Commission is either inclined or able to do.

(Laurie Elks, former CCRC Commissioner): I have concerns about the quality of CCRC's review in relation to 'fast track'/'Screen' cases, which I will illustrate with two examples. In one of these cases concerning a sexual allegation, the case review manager pursued certain lines of investigation which proved more protracted than expected. The case ran over the normal review period of 6 months for Screen cases. The case review manager was criticised by another Commission (who had a progress-chasing role) who expressed the view that the investigations should not have been pursued. In another case relating to a conviction for intra-family sexual abuse, the case review manager had not reviewed social services material (which is normal assumed practice for such a kind of case) on the basis that this was a Screen case and such investigation is therefore unnecessary. It is clear that in such Screen cases, there is a danger that process will eclipse thoroughness not least because the expectation that a case will be reviewed quickly may operate subliminally on the thinking and analytical approach of the case review manager. The CCRC is aware of this problem and has introduced a system of spot checks whereby random fast track and single member cases are selected for audit by another Commissioner. The purpose is not only to identify possible shortcoming in individual cases but also to identify areas of suboptimal practice. This is an excellent innovation but it does not entirely eliminate concerns that there may be a handful of fast track cases where the expectation of closure within normative time limits may limit the perception of genuine investigative issues.

(Dr Eamonn O'Neill, University of Strathclyde) There is a historical link between investigative journalism and the uncovering of miscarriages of justice, tracing it from Conan Doyle's

⁸⁹See Robins, J. (2008) 'The Case for the Defence' *Law Society Gazette*, 9 October, p.12

⁹⁰Woffinden, B. (2010) 'The Criminal Cases Review Commission has failed' *The Guardian*, 30 November

⁹¹Jamieson, A. (2009) 'Teresa de Simone murder: David Lacey named as prime suspect after exhumation' *The Telegraph*, 17 September



investigation of the case of George Edaji in 1906-07, the investigative work of Sir Ludovic Kennedy on the cases of Timothy Evans, Derek Bentley, Stephen Ward, Paddy Meehan, Guildford Four and Birmingham Six to subsequent programmes such as BBC's *Rough Justice*. As an investigative journalist, fieldwork investigations were crucial in my own investigative work on the case of Robert Brown, whose conviction was quashed in 2002 following a CCRC referral – interviewing witnesses, visiting the crime scene – as a means of comparing claims made on paper with actual step-by-step geography at the scene of the crime. Desktop investigations are important, but I have to reiterate the consensus of other speakers here that the CCRC should make more use of its legislated investigative powers. I urge staff, case review managers and Commissioners to consider strategically planning to breathe fresh impetus into their inquiries by reorganising how they tackle their cases by including in-the-field approaches as the rule, rather than the exception which they appear to be currently. In addition, I also recommend a priority system where urgent, serious cases are tackled first. I suggest that the CCRC should not have to deal with cases such as destruction orders of dogs as such examples demoralise the CCRC's mission and appearance in the public spheres more than it may realise.

(Paddy Joe Hill, Birmingham Six): The CCRC was doing what it was intended to do in its first years – actively investigating the cases of those who may be innocent. But it is apparent that this is no longer the case. The ones who are investigating are families of alleged victims of wrongful conviction, innocence projects, and so on, who are doing the investigative work without any finance. If the applicant does not have a solicitor who is willing to pro-actively investigate the case, it is unlikely that such applicants will even get past the first sieve of the CCRC. If the Birmingham Six were at the CCRC today, it is unlikely to get past the first stage of the CCRC's review. The CCRC's remit should not include cases like Tyson the Rottweiler that was given a destruction order, but miscarriages of justice – someone who is claiming to be wrongly incarcerated for something he or she is claiming not to have committed. If the CCRC sticks to such cases, it will have a lot more time and a lot more energy, and will get through a lot more cases. The CCRC is a victim of its own making. The remit of the CCRC is set so wide that when it is unable to cope, it puts the blame on the Court of Appeal. Even if the Court of Appeal is to blame, the CCRC should not be passively subordinated to the Court of Appeal. If the Court of Appeal knocks back cases that the CCRC believes to be genuine miscarriages of justice, it should have the courage to take it to the European Court of Human Rights for instance, or any higher courts.

(Emily Bolton and Glyn Maddocks, Centre for Criminal Appeals (CCA)): CCA agrees with INUK (and other presenters at the Symposium, including David Jessel) that the seeking of new evidence should be the focus for CCRC. CCA agrees that in certain priority cases an interview of the applicant may well assist CCRC in progressing promising cases, but most probably *after* the desk-review has taken place rather than before, given the resource constraints under which the CCRC labours.

Interviews with applicants and representatives

(Mark Newby, Quality Solicitors Jordans LLP): Applicants can come up with 'little nuggets' face to face which are not on the papers and which they themselves may not have thought to mention or appreciated their significance. The CCRC largely absents itself from the opportunity to obtain such material through interviewing their applicants and, as a result, weakens its review. Of course, there are resource implications for the CCRC and it certainly cannot visit every applicant. However, there are a range of methods it could employ to achieve greater interaction at an early stage and where warranted, should use its resources to engage face to face with applicants.



(Susan May, alleged miscarriage of justice victim): Whilst in prison, my then case review manager, Dawn Butler visited me several times. I even met Sir Leonard Leigh, the Commissioner who was overseeing my case. This is something that the CCRC should do, but sadly, it rarely happens now. This may be due to cost cutting, but what price justice?

(Paddy Hill, Birmingham Six): When the CCRC was first established, my advice to the CCRC was to go to the prison to talk to the person who was convicted. In most cases, you will find that alleged victims of wrongful conviction are an encyclopaedia of their own cases, so are their families. You will learn more by sitting with them for a few hours than spending months reviewing the paperwork in your offices.

(Emily Bolton and Glyn Maddocks, Centre for Criminal Appeals (CCA)): There are other ways that CCRC can increase their communications with applicants and their representatives using newer technologies, which would go some way towards addressing this problem.

(John Cooper QC, 25 Bedford Row): There is, upon analysis, a failure by the Commission to engage applicants' representatives. Previous Commissioners have remarked that the assistance of applicants' lawyers depends upon the ability of the lawyer. This is not controversial, but there is perceived within practice a distinct lack of mutual communication between the Commission and legal teams.

The Need to Expand the CCRC's Powers under s.17 to Obtain Documentation from Public Bodies

(Laurie Elks, former CCRC Commissioner): Whilst s.17 powers to obtain information from any public body overriding all contrary duties of confidentiality is a strong one, there have been repeated requests by the CCRC for this power to be extended to private bodies, or, at the very least, extending it to all bodies licensed by statute or exercising a statutory function. This would be an easy clause to legislate. The impact of CCRC's resource limitation on the thoroughness of its investigation is unlikely to change. The CCRC has to work with whatever funding the Ministry of Justice gives it and apply its resources accordingly. It cannot pursue every case exhaustively. Further, despite its wide s.17 powers, in the generality of cases, when it is given information by other public officials (for e.g. when public bodies tell the CCRC that they do not hold any documents on a particular case), the CCRC has to assume that it is being told the truth. Whilst the CCRC does, in a small minority of cases, go behind the answers it gets from its enquiries, in the vast majority of cases, it does not have the resources to do so.

(Susan Caddick, sister of Eddie Gilfoyle): S.17 powers become ineffectual when the police or the CPS is intentionally not disclosing evidence. In Eddie Gilfoyle's case, Merseyside Police had hidden (even from the CCRC) a box of evidence for at least 16 years. It contained Paula Gilfoyle's diaries where she recorded an earlier suicide attempt as well as letters – crucial evidence that could prove that she had committed suicide and, therefore, Eddie's innocence. The CCRC had not discovered this box of crucial evidence. It was Eddie's solicitor who made the discovery this year, almost two decades since Eddie's conviction.

(Mark Newby, Quality Solicitors Jordans LLP): It cannot be acceptable any longer for applicants to be left in a position where the CCRC cannot obtain documents because they vest in a private body. This is wholly out of sync with the powers that could be exercised during a trial process and places applicants at a considerable disadvantage. In many historic abuse cases for example, the records are held by private school bodies or church organisations. Investigations into such claims will be restricted if the CCRC cannot obtain those records. The CCRC's approach and conduct when it





obtains documentation is also fundamentally concerning and needs to be reformed.

(Dr Eamonn O'Neill, University of Strathclyde): Gaining access to material held by private entities would be a huge step forward. The Scottish CCRC has the powers to access materials from private bodies.

Disclosure to applicants

(Mark Newby, Quality Solicitors Jordans LLP): Applicants invariably never see material which the CCRC obtains and might see a redacted selection on either a referral or more likely, a provisional statement of reasons not to refer. Yet, contrast this with the process in the Crown Court where the applicant would be given access to redacted copies of all material deemed to meet the requisite test for disclosure either under the Criminal Procedure and Investigation Act (CPIA) or under the common law for enquiries pre-dating 1997.

Applicant access is essential for it can often be the case, for example in complex historical cases, that the significance of records only becomes clear following direct knowledge and analysis. For example, in the historical abuse cases of *Sheikh*, *Burke* and *Joynson* it was only through a detailed examination of records by the defence, obtained following disclosure requests made, that evidence arose which formed the bedrock of these cases demonstrating opportunity issues and satisfying the Court of Appeal as to the safety of these convictions. The CCRC must, therefore, not only achieve a change in s.17 but also achieve changes to the way in which it handles 'third party' material obtained if it is to aspire to the most comprehensive review.

The CCRC's Powers under ss.19-20

(Laurie Elks, former CCRC Commissioner): In terms of the CCRC's powers to appoint an investigative officer under s.19 of the Criminal Appeal Act 1995, although not all police investigations directed by the CCRC have been equally good, I believe that the powers are sufficient.

(Mark Newby, Quality Solicitors Jordans LLP): When there are serious questions over the conduct of an original police investigation it cannot ever be right to continue to use that police force to investigate the evidence behind the potential miscarriage of justice. Similarly, if questions arise over forensic material, the CCRC should not return to the same examiners. The CCRC must consistently have regard to the fact that it has an equal obligation in its review to ensure that justice is seen to be done.

Case Review Managers

(Laurie Elks, former CCRC Commissioner): The criticism that case review managers vary in perception and tenacity is inevitably true. This leads to the problem of inconsistency which the CCRC should be alive to. The leadership team at the CCRC should be ready to offer guidance to case review managers and Commissioners who are too expeditious or too slow.

(Mark Newby, Quality Solicitors Jordans LLP): Inconsistencies between case review managers could potentially jeopardise the applicant's chance of an appeal. In the case of Kenneth Fulton, he had his conviction quashed in 2007 on the basis that gynaecological evidence presented at trial was wrong and misleading. However, his successful appeal would not have been possible had a second case review manager not reversed a previous decision by the Commission to refuse a referral of his case back to the Court of Appeal and commissioned a fresh expert report. It cannot be right that applicants like Kenneth Fulton can face the prospect of being refused a referral



because different case review managers take different views or have not undertaken the required investigative work.

There can be no doubt that there are many case review managers who are committed and strive to unearth the possibility of a miscarriage of justice. However, there are those who demonstrate not only a much reduced willingness to take that approach but whom do not in any way present the pro-active and open approach to these cases which the CCRC should engender. Like any institution, there is a danger that case review managers can become institutionalised by their own views and past decision making. They do have considerable influence over any case subject to the overall decision making process called for by the Commissioners. Either a rotational approach needs to be taken or other systems need to be put in place so that they are constantly challenged to deliver a fresh approach and not to become stagnated by a number of years of employment within the CCRC.



RECOMMENDATIONS FOR REFORM⁹²

A New Test for Referral and a the Removal of the Fresh Evidence Barrier

(Innocence Network UK (INUK)): The 'real possibility test' under s.13 of the Criminal Appeal Act 1995 needs to be immediately repealed. It should be replaced by a test that allows the CCRC to refer a conviction back to the Court of Appeal if it thinks that the applicant is or might be innocent.

(David Jessel, former CCRC Commissioner): There should be a test for referral that allows the CCRC to refer cases back to the Court of Appeal if the basis of the prosecution case is now fundamentally changed from what it was at trial.

(Mark George QC, Garden Court North): S.13 of the Criminal Appeal Act 1995 to be amended as follows:

A reference of a conviction, verdict, finding or sentence shall not be made under any of sections 9 to 12 unless –

(1)(a) having considered all the evidence in the case, including, but not limited to, any new evidence, the Commission is of the opinion that the Court of Appeal should consider the conviction (verdict, finding or sentence) again, either because there is a real doubt about the safety of the conviction or because the Commission thinks that the applicant is or may be innocent.

(b) the Commission so considers –

- (i) In the case of a conviction, verdict or finding, because of an argument, or evidence, not raised in the proceedings which led to it or any appeal or application for leave to appeal against it or *which the Commission considers ought to be reconsidered...*

(Mark Newby, Quality Solicitors Jordans LLP): The 'real possibility test' under s.13(1) of the Criminal Appeal Act 1995 should be amended to the following:

The Commission considers that there may have been a miscarriage of justice and that the conviction should be referred to the Court of Appeal for review.

(Dr Andrew Green, United Against Injustice): There needs to be 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. In addition, there needs to be 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 CCRC. 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.

⁹²Please note, some of the recommendations are repeated from the foregoing.



(Emily Bolton and Glyn Maddocks, Centre for Criminal Appeals (CCA)): Rather than changing the standard of review applied by the CCRC to requiring the CCRC to come to its own view of a case in terms of innocence, stakeholders may wish to consider other ways of addressing the problems raised here:

i) While this presumably has already been attempted in the past, further liaison with the CCRC could be undertaken to flesh out what internal policy changes and/or external legislative changes would be needed to enable the CCRC to develop the capacity to prioritize cases where an innocence showing is emerging over cases that involve purely technical legal issues.

ii) If it is concluded that new language is needed to give the CCRC a license to refer more cases, such as those that are run aground on procedural impediments relating to fresh evidence, that stakeholders consider simply requiring the CCRC to make its own determination on the *safety* of the conviction.

iii) As there is a difference of views here between those advocating on behalf of the wrongfully convicted as to the best way forward on this issue, with most of the presenters who specifically addressed the issue at the Symposium being against the introduction of an 'innocence' standard of the sort suggested by INUK, CCA suggests that further discussion is needed, particularly with the CCRC itself, before moving forward with any proposal for changing of the standard of review. CCA also agrees that the CCRC and the Court of Appeal should consider all the evidence, as proposed by INUK in its critique, and suggests as some first steps towards achieving this goal: First, that the CCRC be asked to clarify the issues raised here on what it considers to be 'new evidence', and its accordant duties under the statute. Second, that CCRC be asked to clarify whether it feels statutorily able to interpret the 'fresh evidence' preference only as something it must consider when opting whether or not to refer a case to the Court of Appeal, but *not* as criteria for determining whether a case should be subject to a full investigation by CCRC, as that would simply create a chicken and egg dilemma for the applicant that is not in the interests of justice. Third, that the reformulation offered by Symposium contributor Mark George QC, providing for cases to be referred by the CCRC 'because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it, or which the Commission considers ought to be reconsidered' be used as a starting point for drafting any proposed amendment. Fourth, as there is a difference of views here between those advocating on behalf of the wrongfully convicted as to the best way forward on this issue, CCA suggests that the issues be subject to further discussion before any reform proposal is finalised.

Changing the CCRC's Investigative Approach and Powers

(Innocence Network UK (INUK)): CCRC reviews cannot be restricted to the mere pursuit of fresh evidence that was not available at the time of the original trial or the first appeal but must consider all the evidence.

The CCRC's case review process is generally limited to desktop reviews. Whilst its powers to obtain material disclosure from public bodies under s. 17 of the Criminal Appeal Act 1995 are useful, particularly for cases where police or prosecution non-disclosure is a feature, they are limited in cases where full re-investigations of witnesses are required. We propose changing the CCRC's focus to enable it to undertake more fieldwork investigations, including the interviewing of witnesses, crime-scene reconstructions and the interviewing of applicants.

(David Jessel, former CCRC Commissioner): To conduct any extra investigation or proper preliminary analysis is going to mean that the CCRC roughly triple its size. The alternative is



a refinement of the CCRC's intake to sharpen its focus by taking out for instance, the non-custodial cases, cases based on points of law, cases where for years the applicant has not expressed any claim to innocence. This would be unfair and unjust but the upside is that it should sharpen the CCRC's focus, leading to more rigorous investigations and potentially genuine innocence cases.

(Mark Newby, Quality Solicitors Jordans and LLP Laurie Elks, former Commissioner): S.17 powers should be extended to private bodies. Laurie Elks contended that whilst s.17 powers to obtain information from any public body overriding all contrary duties of confidentiality is a strong one, there has been repeated requests by the CCRC for this power to be extended to private bodies, or, at the very least, extending it to all bodies licensed by statute or exercising a statutory function. This would be an easy clause to legislate.

(Mark Newby, Quality Solicitors Jordans LLP): There should be an obligation on the CCRC to engage with the applicant in the case review process. In terms of the CCRC's enquiries and its powers of investigation under ss.19-20, it should be a requirement that no police officer shall be appointed to conduct investigations from the same force as that which conducted the original investigation.

(Dr Andrew Green, United Against Injustice (UAI)): 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.

(Emily Bolton and Glyn Maddocks, Centre for Criminal Appeals (CCA)): CCA agrees that the CCRC should move beyond desk reviews in priority cases, and suggests the following steps: First, further liaison with the CCRC about what aspects of the existing standards are most restrictive to its capacity to continue to investigate cases and use its Section 17 powers on behalf of applicants rather than close or narrow down cases perhaps prematurely. Second, seek suggestions from the CCRC about how priority cases might be defined (with reference to 'innocence' and 'real possibility' discussed above).

Case Review Managers

(Mark Newby, Quality Solicitors Jordans LLP): It is clear that in terms of the quality of case review managers, a much more stringent monitoring of case review manager's work and protocols to make the quality of case reviews more uniform is required. Whilst the rotation of Commissioners on a 5 year basis with an extension of up to 10 years is to be applauded, this should be extended to case review managers.

(Dr Andrew Green, United Against Injustice): 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 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.

Royal Prerogative of Mercy

(Innocence Network UK (INUK)): Under s.16 of the Criminal Appeal Act 1995, the CCRC's role currently extends to considering and reporting to the Secretary of State on any conviction referred to it by the Secretary of State for consideration of the exercise of Her Majesty's Prerogative of Mercy. To enhance the CCRC's independence from the Court of Appeal, we recommend an expansion of the use of the Royal Prerogative of Mercy through the introduction of the following:

a) new legislation that allows the CCRC, in instances where the Court of Appeal dismisses an appeal against conviction heard following a CCRC referral, to refer a conviction to the Secretary of State to consider exercising the Royal Prerogative of Mercy; and,

b) new legislation that places a duty on the CCRC to consider referring a conviction to the Secretary of State to consider exercising the Royal Prerogative of Mercy in such circumstances.

(Emily Bolton and Glyn Maddocks, Centre for Criminal Appeal (CCA)): There are questions outstanding on INUK's proposal in relation to the royal prerogative of mercy. a) Does not the existing statute actually allow for referrals post-dismissal by the Court already (without imposing the positive duty)? b) How would this relate procedurally to other avenues for review where the Court of Appeal denies relief? (Supreme Court, European Court of Human Rights). CCA takes the view that an increase in the number of avenues of review available to an appellant is a good thing, but questions whether it is in the interests of appellants for INUK to construe the existing statute so narrowly, if it is possible that it does already allow for referrals according to (a), above. Therefore CCA suggests the following steps: First, if it has not already been confirmed by the CCRC, further liaison with CCRC on its own view as to whether convictions may already be referred in this way. Second, if CCRC gives an unsatisfactory response, secure a legal opinion on whether convictions can already be referred in this way, if not already in hand. Third, liaison with CCRC about how any positive duty could be worded so that it could be effectively implemented.

(John Cooper QC, 25 Bedford Row): Any power of pardon would not rectify miscarriages of justice because it does not remove the conviction. This could result in the Court of Appeal rectifying procedural and legal error and a Minister of Justice dealing with cases of factual innocence. This will also remove these cases from the jurisprudence of the Court of Appeal and they would not be able to contribute to the development of the law, thereby depriving other appellants of the benefit of favourable changes in the law and, in turn, those applying for a pardon would not be able to use favourable appeal judgments to argue their case.

General Issues

(Dr Eamonn O'Neill, University of Strathclyde): Any organisation such as the CCRC needs to step back every now and again and honestly take stock of the journey it has undertaken, assess where it is, and plan for the next stage of its passage. Academic colleagues who have gallantly put their heads above the parapet to lay out the results of their research seek the same ends of justice that inspired the establishment of the CCRC in the first place. Results of academic publications need to be engaged with and examined urgently. Serious academic commentary and study are not sniping; they are well-meant, important contributions to a healthy, if sometimes tense, debate desperately needed in any democracy. Fresh thinking; engagement with grassroots organisations



in a listening and learning capacity; and a recognition of the importance of research into its work, would be useful for the CCRC to take on board as soon as possible.

(Paddy Joe Hill, Birmingham Six): The CCRC is only one part of a much bigger problem. In the case of the Birmingham Six, none of the police officers who tortured them into making false confessions, the discredited forensic scientist Frank Skuse who gave totally unreliable forensic evidence at trial, were never made accountable for their wrongdoings. We should equally concentrate on preventing miscarriages of justice in the first place. As long as the government does not make accountable those who intentionally cause miscarriages of justice, it will not stop them from happening. In addition, those who are released from prison after overturning their convictions still receive no aftercare or support. This is despite the severity of the harms they suffer – Post Traumatic Stress Disorder, drug and alcohol addictions, family breakdowns, and so on. Overturning miscarriages of justice is just one part of the story. Victims need help and support from the state to re-build their lives after release.

(Emily Bolton and Glyn Maddocks, Centre for Criminal Appeals (CCA)): At a time when government is seeking to cut criminal justice spending, it is CCA's position that as advocates for the wrongfully convicted, we should be arguing for more investigation resources for the CCRC and for the people applying to it, and for the recalibration of the CCRC's practices, rather than wholesale revision of legal standards. It is crucial that any reform effort in this area pay close attention to not jettisoning the baby as well as the bathwater. CCA would welcome the opportunity to work with other stakeholders on such a modified approach.



APPENDIX 1

INUK Press Release (15/12/2011) and Public Statement on the Limitations of the Criminal Cases Review Commission

Innocent people are still languishing in prison despite a publicly funded body that was set up to assist them to overturn their wrongful convictions. The Innocence Network UK (INUK) calls today for the reform of the Criminal Cases Review Commission (CCRC) – the last resort for innocent victims of wrongful conviction.

Fifteen years on since the Criminal Cases Review Commission was established following a recommendation of the Royal Commission on Criminal Justice in the wake of notorious cases such as the Birmingham Six and the Guildford Four, a growing mountain of cases is emerging that reveal the CCRC is not fit for the purpose of helping the innocent to overturn their wrongful convictions.

Since its establishment in September 2004, the Innocence Network UK (INUK) has received over 1,000 requests for assistance from alleged innocent victims of wrongful conviction. It has deemed 200 (20 per cent) to have a plausible claim of innocence, over half of whom have already been refused a referral back to the Court of Appeal by the CCRC at least once.

The CCRC has referred less than 4 per cent of the 13,000 plus applications that it has received from alleged victims of wrongful convictions.

The CCRC was meant to ensure that victims of miscarriages of justice have their cases investigated and referred back to the appeal courts if it is thought that the applicant is or might be innocent. However, the law that established the CCRC requires it to only refer cases if it believes that there is a real possibility that the conviction will be quashed.

As a result, only very few applicants fortunate enough to have fresh evidence that was not available at the time of the original trial or first appeal that is thought to undermine the safety of their convictions will have their cases referred. This leaves the vast majority of applicants unable to obtain a referral back to the courts even though the circumstances that led to their convictions are dubious and they might well be innocent.

A Public Statement issued by the Innocence Network UK (INUK) as part of the Joseph Rowntree Reform Trust-funded project details the key failings of the Criminal Cases Review Commission and its recommendations for reforms so that it can better assist the innocent. This includes the immediate repeal of the 'real possibility test' under s.13 of the Criminal Appeal Act 1995 to be replaced with a test that allows the Criminal Cases Review Commission to refer a conviction back to the Court of Appeal if, after considering all the evidence, it thinks that the applicant is or might be innocent.

Dr Michael Naughton, Founder and Director of the Innocence Network UK (INUK) and Senior Lecturer in the University of Bristol Law School and School of Sociology, Politics and International Studies (SPAIS), said: "Unless the operations of the Criminal Cases Review Commission are drastically reformed innocent people will continue to be let down by the body that Parliament set up to assist them."

The reforms proposed, aimed at making the CCRC a more adequate body to assist the innocent, would also potentially save millions of pounds from the public purse by shortening the length of time that those wrongly incarcerated might otherwise spend in prison. The average costs to taxpayers for each year a male prisoner spends wrongly incarcerated are as follows, Category A (dispersal prison): £64, 597, Category B: £34, 359, Category C: £32,109.



INUK Public Statement: Criminal Justice System Still Failing the Innocent Issued 15 December 2011

History of the Criminal Cases Review Commission

For the last fifteen years, the Criminal Cases Review Commission (CCRC) has been the last resort for innocent victims of wrongful conviction.

Established by the Criminal Appeal Act 1995, the CCRC took over the power of the C3 Division of the Home Office where the Home Secretary had the discretion of sending cases back to the Court of Appeal 'if he saw fit'. The creation of the CCRC followed the recommendation of the Royal Commission on Criminal Justice (RCCJ) in 1993. The RCCJ was, in turn, prompted by a public crisis of confidence in the entire criminal justice system that was caused by the high-profile cases of the Guildford Four, Birmingham Six, Maguire Seven, and so on, in which Irish people were wrongly convicted for terrorist crimes committed by the IRA. The RCCJ's inquiry substantiated long-standing criticisms that successive Home Secretaries were failing to refer cases back to the Court of Appeal despite strong evidence of innocence. This failure was due to political influences and an entrenched reluctance of Home Secretaries to challenge the Courts.

To address this apparent constitutional problem, the CCRC was set up as a non-departmental body on 1 January 1997 and took over responsibility from the Home Office and Northern Ireland Office for reviewing alleged miscarriages of justice on 31 March 1997. The role of the CCRC is **to act as an independent public body**, funded by government to review alleged miscarriages of justice and decide if they should be referred back to the Court of Appeal. It has jurisdiction over criminal cases at any magistrates' or Crown Court in England, Wales and Northern Ireland. The CCRC's remit extends to the reviews of both convictions and sentences. It also possesses wide investigatory powers under ss.17-19 of the Criminal Appeal Act 1995, including the power to gain disclosure of materials from any public body.

The CCRC receives an average of 1,000 applications a year. As of 14 November 2011, the CCRC has completed its review of 13,282 applications, out of which 483 convictions and/or sentences have been referred and 320 quashed. This equates to a referral rate of less than four per cent, significantly less than the ten per cent of applications that were referred to the Court of Appeal each year by C3 Division, which was accused of being slow, inefficient, reactive rather than pro-active, and of showing too great a deference to the Court of Appeal.

Why the Criminal Cases Review Commission is failing

The inadequacies of the CCRC have become increasingly apparent with a growing pipeline of convictions that have been refused referrals by the CCRC despite doubts about the reliability of evidence that led to their convictions. They highlight deep-seated failings with the CCRC, both in terms of how it makes decisions on whether to refer cases back to the appeal courts and the way in which it reviews applications from alleged victims of miscarriages of justice.



Lack of Independence from the Courts

The main problem with the CCRC is its lack of independence from the Courts. In its recommendations, the RCCJ called for the 'creation of a new body independent of both the Government and the courts for dealing with allegations that a miscarriage of justice has occurred'. Whilst the CCRC is independent from Government, the RCCJ's recommendation that it should also be independent from the Courts did not materialise.

Pursuant to s.13(1)(a) of the Criminal Appeal Act 1995, the CCRC cannot refer applications to the appeal courts unless 'there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made'. The 'real possibility test' subordinates the CCRC entirely to the appeal courts and restricts its review and decision-making processes to the appeal courts' criteria for quashing convictions, despite the fact that, generally speaking, applicants to the CCRC must have already failed in an appeal at the Court of Appeal. As such, it is perhaps not surprising that the CCRC refers so few cases.

One of the restrictions placed on CCRC applicants is the requirement for fresh evidence or argument not available at the time of the trial. This requirement follows the Court of Appeal's provisions on the admissibility of evidence under s.23 of the Criminal Appeal Act 1968. This requirement restricts the CCRC's ability to assist the innocent if the evidence of their innocence was available at the time of the original trial or previous appeal. If evidence supporting the defence/ the appellants claim of innocence was available but was not produced at trial either by reason of omission, or, tactical decision by trial counsel, such evidence will not, generally, constitute the kind of fresh evidence or argument required by the CCRC.

Overall, the current operations of the CCRC presupposes that jury decisions are always correct which prevents the CCRC from rectifying errors that were known at trial or first appeal. Further, it means that the CCRC often cannot rectify errors of judgment or omissions made by defence counsels/solicitors, notwithstanding the reality that defendants often have little knowledge of the criminal trial process and rely entirely on the judgment and expertise of their legal representatives.

Incompetent Investigations

The 'real possibility test' and the requirement for fresh evidence not only impact on the CCRC's consideration on whether or not to refer a case back to the appeal courts, but also its case review process. As a review (as opposed to investigatory) body, the CCRC generally does not undertake re-investigation of cases. Its case review methodology can be characterised as a 'desktop review', often limited to an appraisal of the arguments or evidence presented to it by applicants – first, to assess whether the evidence is 'fresh' and second, to consider if the application meets the 'real possibility test'. Furthermore, research indicates that Case Review Managers at the CCRC very rarely undertake prison visits to interview applicants. There is no systematic training for Case Review Managers on investigative methods, which often mean that quality of reviews received by applicants can be inconsistent and very much a lottery.

This places a substantial burden on alleged miscarriage of justice victims seeking another chance of an appeal through the CCRC. Often with little or no resources, they have to undertake the substantial task of investigating their own cases and seek fresh evidence or arguments to present to the CCRC. Rather than being assisted by the CCRC in this arduous process, they are faced with the additional hurdle of trying to convince the CCRC of the significance of the evidence and how it could render their convictions unsafe.



The 'real possibility test' that governs the CCRC's case review approach may also jeopardise the chances of success in cases that it does refer to the Court of Appeal. In practice, once the CCRC is satisfied that the 'real possibility test' has been met; it will prematurely end its review and stop investigating other lines of inquiry presented to them. The Criminal Justice Act 2003 also placed an additional requirement that appeals heard on referral by the CCRCs may not be on any ground outside the CCRC's grounds of referral. Consequently, appeals following CCRC referrals are often heard on very narrow grounds (see case examples at the end of this document). On occasions, this may even result in the appeal courts dismissing appeals referred to them by the CCRC without having a full sight of all other evidence that could have supported the applicant's claim of innocence.

Proposals for reform

In light of the limitations of the CCRC outlined above, we recommend the following legislative and policy reforms which are aimed at firstly, enhancing the CCRC's independence by unshackling it from the Court of Appeal; and secondly, improving the thoroughness and quality of its case review process.

- 1) We call for the immediate repeal of the 'real possibility test' under s.13 of the Criminal Appeal Act 1995.
- 2) The 'real possibility test' to be replaced with a test that allows the CCRC to refer a conviction back to the Court of Appeal if it thinks that the applicant is or might be innocent.
- 3) CCRC reviews cannot, therefore, be restricted to the mere pursuit of fresh evidence that was not available at the time of the original trial or the first appeal but must consider all the evidence.
- 4) Under s.16 of the Criminal Appeal Act 1995, the CCRC's role currently extends to considering and reporting to the Secretary of State on any conviction referred to it by the Secretary of State for consideration of the exercise of Her Majesty's Prerogative of Mercy. To enhance the CCRC's independence from the Court of Appeal, we recommend an expansion of the use of the Royal Prerogative of Mercy through the introduction of the following:
 - a) new legislation that allows the CCRC, in instances where the Court of Appeal dismisses an appeal against conviction heard following a CCRC referral, to refer a conviction to the Secretary of State to consider exercising the Royal Prerogative of Mercy; and,
 - b) new legislation that places a duty on the CCRC to consider referring a conviction to the Secretary of State to consider exercising the Royal Prerogative of Mercy in such circumstances.
- 5) The CCRC's case review process is generally limited to desktop reviews. Whilst its powers to obtain material disclosure from public bodies under s. 17 of the Criminal Appeal Act 1995 are useful, particularly for cases where police or prosecution non-disclosure is a feature, they are limited in cases where full re-investigations of witnesses are required. We propose changing the CCRC's focus to enable it to undertake more fieldwork investigations, including the interviewing of witnesses, crime-scene reconstructions and the interviewing of applicants.

Cost

The reforms proposed above, aimed at making the CCRC a more adequate body to assist the innocent, would potentially save millions of pounds from the public purse by shortening the length of time that those wrongly incarcerated might otherwise spend in prison.

The average costs to taxpayers for each year a male prisoner spends wrongly incarcerated are as follows:

Category A (dispersal prison): £64, 597

Category B: £34, 359

Category C: £32,109





Furthermore, prisoners maintaining innocence who have been given indeterminate sentences are faced with what is commonly termed the 'parole deal'. They frequently serve sentences way past their given tariffs and are unable to progress through the prison system or achieve parole due to their refusal to admit guilt and undertake offending behaviour courses.

The Innocence Network UK (INUK) has, to date, received applications from over 1,000 prisoners, of which almost 200 were deemed to have a plausible claim of innocence. Due to their refusal to cooperate with the prison and probation services, it is quite common for the prisoners maintaining innocence to spend extended period in high security or segregation units. To give an illustration of costs, the 200 applicants to the Innocence Network UK (INUK) are costing approximately £7 million for every year that they fail to achieve release. More specifically, the Innocence Network UK (INUK) currently has 21 clients in Category A (highest security) prisons, of whom seven have been in Category A for over ten years, including one who has been in Category A (and has spent extended periods in segregation) for the last twenty years. Collectively, these 21 'clients' currently in Category A are costing the state over £1.3 million per year.

Case Studies

Ray Gilbert

Ray Gilbert was convicted in 1981 of the murder of Liverpool bookmaker John Suffield. He was convicted on his own confessions and his guilty plea, which he claimed, was coerced out of him by police officers and criminals who were on remand with him. With borderline intelligence and a speech impediment, Gilbert's vulnerabilities were clearly not recognised at the time of his interrogation which took place over two days without the presence of a solicitor. In 2001, his co-accused Johnny Kamara overturned his conviction due to over 200 witness statements supporting his defence that were not disclosed by the police. Although the statements also support Gilbert by pointing to other suspects, the CCRC refused to accept that his confessions and guilty plea were made falsely and refer his conviction. Gilbert has to date served 30 years in prison, 15 years past his tariff, and continues to maintain his innocence. The Innocence Network UK (INUK) is currently trying to locate the exhibits from the crime scene for possible DNA testing, said by Merseyside Police to have been lost.

Susan May

Susan May was convicted in 1993 of the murder of her 89-year-old aunt, Hilda Marchback. She was convicted on the flimsiest of evidence, comprising mainly of three alleged fingerprint marks alleged to be hers that were said to contain the victim's blood. However, there are doubts about the testing method and whether the marks are indeed Susan's fingerprints and even whether they did contain human blood. Another piece of evidence against Susan was a remark she allegedly made to a police officer relating to scratches found on her aunt's face, which the prosecution claimed she could not have known about unless she had caused them. Susan has always denied making the remark and the notebook in which the police say the words were logged has gone missing. Susan May's case was referred to the Court of Appeal by the CCRC in 1999 on the basis of police impropriety, but the appeal was dismissed in 2001. Two subsequent applications to the CCRC detailing new evidence that casts further doubts on her conviction have also failed on the basis that the CCRC does not think that there is a real possibility that the Court of Appeal will quash her conviction.

APPENDIX 2

INUK Press Release (28 March 2012) and Dossier of Cases



Innocence Network UK (INUK),
University of Bristol Law School
Wills Memorial Building
Queens Rd
Bristol
BS8 1RJ

Embargo: Thursday
29 March 2012
00.01 Hours

POTENTIAL WRONGFUL CONVICTIONS: Failed by the Criminal Cases Review Commission

The Innocence Network UK (INUK) today, publishes a dossier of 45 cases of alleged innocent victims of wrongful conviction. All of these cases have been refused a referral back to the Court of Appeal at least once by the Criminal Cases Review Commission despite continuing doubts about the evidence that led to their convictions.

The cases included in the dossier comprise mainly of prisoners who are serving life or long-term sentences for serious offences, ranging from gangland murders, armed robbery, rape and other sexual offences. All of them continue to maintain that they have no involvement at all in the offences they were convicted of despite having failed in their appeal and refused a referral by the Criminal Cases Review Commission. They assert that they were wrongly convicted due to various reasons including fabricated confessions, eyewitness misidentification, police misconduct, flawed expert evidence, false allegations and false witness testimonies.

INUK believes that there are continuing doubts and inconsistencies about each conviction. However, the Criminal Cases Review Commission, established to review alleged miscarriages of justice is unable to assist them because their cases are deemed to not fulfil the 'real possibility test'. Under the current statute, the Criminal Cases Review Commission can only refer cases back to the Court of Appeal if there is a 'real possibility' that the conviction would be overturned. The Criminal Cases Review Commission is also generally confined to reviewing fresh evidence not available at the time of trial.

Because evidence suggesting innocence in these cases is not fresh or the jury has decided to convict despite hearing conflicting evidence, the Criminal Cases Review Commission is unable to refer these cases back to the Court of Appeal.

The dossier underlines the urgent need for reforms to the Criminal Cases Review Commission to ensure that such cases can be more adequately dealt with.



Dr Michael Naughton, Founder and Director of INUK, said today, "The crimes that these men and women are convicted of are appalling but in every single case there are questions, conflicts and problems in the evidence that led to their conviction. If they are genuinely innocent, it means that the dangerous criminals who committed these crimes remain at liberty with the potential to commit further serious crimes."

In several cases, prisoners were convicted mainly on the testimonies of prosecution witnesses who were either known criminals or suffer from serious mental or personality disorders. In other cases, convictions were obtained mainly on the basis of highly conflicting identity parade evidence. Many were also convicted despite evidence suggesting innocence such as alibi witnesses outweighing the alleged evidence of guilt.

David Jessel a former CCRC Commissioner now argues that rather than being tied to the 'real possibility test' 'the CCRC could refer because of its own independent concerns that justice has miscarried, while the Court of Appeal would have to answer that case and, if necessary, justify its conclusions that the conviction was safe.'

Gabe Tan is the Executive Director of INUK and deals with prisoners seeking assistance on a daily basis. "Many of the prisoners in the dossier have served two or even three decades in prison. They would have been released on parole much earlier had they admitted guilt to the crimes that they were convicted of. The Criminal Cases Review Commission is unable to help them despite strengths in their claims of innocence. Unless the existing arrangements are reformed, these cases are never going away."

A number of these cases will be highlighted at a symposium which will be held at Norton Rose LLP this Friday, 30 March 2012. Speaking at the symposium are alleged victims of wrongful conviction Susan May and Eddie Gilfoyle, both of whom are widely believed to be innocent of the murders they were convicted of. Paddy Hill of the Birmingham Six case that led to the setting up of the Criminal Cases Review Commission will speak of his dismay at the way the organisation is failing innocent victims of wrongful conviction. They will be joined by criminal appeal barristers and solicitors, investigative journalists, academics and former Commissioners of the Criminal Cases Review Commission.

For full details, see:

<http://www.innocencenetwork.org.uk/627-2>



Innocence Network UK (INUK)

DOSSIER OF CASES

This dossier contains 44 cases of alleged innocent victims of wrongful conviction which have been refused a referral back to the Court of Appeal by the Criminal Cases Review Commission at least once despite doubts about the evidence that led to their convictions.



Innocence Network UK (INUK)

Cases for Concern

(1) BOURKE, Thomas

Thomas Bourke was convicted of the murders of Alan Singleton and Simon Bruno in 1993. Mr Singleton and Mr Bruno were Department of Transport Inspectors who were shot and killed at a garage in Stockport. The prosecution claimed that a failed MOT licensing application was the motive for Mr Bourke to commit the murders. Mr Bourke was convicted largely on witness testimonies. In addition, his car was claimed to match the description of the car driven by the shooter(s). However, two of the witnesses who testified against Mr Bourke were criminals who admitted to being accomplices to the murders. Their sentences were reduced for giving evidence against Mr Bourke. The witnesses repeatedly changed their statements and admitted to initially lying. One of the witnesses claimed to have seen the actual murder. However, forensic evidence not used at trial proved he could not have been in the room where the murders took place. Forensic tests for fire arms residue carried out in Mr Bourke's car, and attempts to match the tyres to marks left in the garage, failed to link the vehicle to the murders or corroborate witness statements. Following Mr Bourke's conviction, it was discovered that there was another car of the same make and colour as Mr Bourke's car in the vicinity of the garage where the murder took place. At the time of Bourke's trial, a gun was found at Strangeways prison where Bourke was being held on remand. Bourke was initially suspected of having the gun smuggled in an attempt to escape from prison. He was escorted to his trial with several armed police officers and security was heightened within the area of the courthouse. It later emerged that Bourke had nothing to do with the gun, which was planted by two other criminals in an attempt to secure early release. Mr Bourke claims that this was a deliberate attempt by the prosecution to negatively influence the jury by depicting him as a highly dangerous criminal at his trial. Bourke's application for leave to appeal was refused in 2007. A subsequent application to the CCRC had also failed. Mr Bourke has spent nearly two decades in prison and continues to maintain his innocence. His case is currently being investigated by the University of Bradford Innocence Project.

(2) CAINES, Timothy

Timothy Caines was convicted on the 24th May 1995 of "joint-enterprise murder with an unknown" in Coventry. The victim, Colin Hickman, was a solicitor and a friend of Caines. Prior to his death, Mr Hickman had experienced threats from several people believed to have been related to disputes over money. Caines maintain that on the day of the murder he visited Mr Hickman's house. He tried to break up a fight between Mr Hickman and some unknown men and was forced to leave after being threatened at gunpoint by one of the men. The evidence against Caines consists mainly of his watch and cap found at Mr Hickman's house, which Caines maintains, was left behind during his visit to the house. There were also eyewitness sightings not heard at trial which pointed to a white intruder at the scene. Caines is black. In 2007, the CCRC rejected Mr Caines' application despite the tenuous nature of the evidence against him. His case is currently being investigated by the University of the West of England Innocence Project.



(3) CHOWDARY, Jamil

Jamil Chowdhary was convicted in 1992 of robbery and murder that took place on the 1 February 1991 at the Phoenix Green Filling Station, Hartley Wintney, Hampshire. The victim, Raymond Kelly, died after being shot during the course of the robbery. Chowdhary came to the attention of the police after accusations made against him by his co-accused, Mohammed Womiq Nazir, who admitted to being one of the two robbers. Nazir testified that Chowdhary was the gunman who accompanied him on the robbery and shot the victim. The prosecution alleged that Chowdhary and Nazir were 'partners in crime' despite the fact that Nazir was facing 12 counts of unrelated criminal charges at the time of trial that did not involve Chowdhary. More significantly, Nazir named three others as the gunman before finally accusing Chowdhary. The witnesses relied on by the prosecution at trial were identified as vulnerable and unreliable. One of the witnesses admitted to lying, being helped by the police to remember details and even, under the pressure by the police, wrongly admitted to the murder herself. In addition, descriptions of two other witnesses who were in the filling station when the shooting took place described both attackers as white. However, Chowdhary, who is of Pakistani descent, has a dark complexion. Analysis of CCTV footage by Channel 4's 'Trial and Error' showed that the gunman was shorter than the robber (Nazir). However, Chowdhary is taller than Nazir, which suggests that he could not have been the gunman. This evidence was submitted to the CCRC, which rejected it as being insufficient to render his conviction unsafe. Chowdhary has served 20 years in prison. His case is currently being investigated by the University of the West of England Innocence Project.

(4) CLARK, Christopher

Christopher Clark was convicted in May 1997 for an indecent assault that took place in Bath, for which he received a life sentence. Clark was convicted on the basis of D.N.A. and fibre evidence as well as testimonies taken from a number of people acquainted with him and the victim herself. At trial, Clark's defence team postulated that despite living in the area, he was elsewhere at the time the crime occurred. The description of the aggressor given by the victim was extremely lacking in similarities with the appearance of Clark. His defence claimed that the evidence submitted by the prosecution had been tampered with, including a blood phial from which some of the DNA evidence was taken. A request for further testing, ordered by the Judge, failed to be carried out. The fibre evidence taken from the victim's clothes resembled the t-shirt that he was wearing at the time when the crime occurred. However, further fibre analyses suggest the fibre evidence given at court was of limited evidential value. Since Clark's conviction, 4 police officers believed to have been involved in the investigation were charged (although not convicted) with perverting the course of justice. Assaults of a similar nature also continued to occur in the area after Clark's conviction. Clark is still seeking disclosure of CCTV evidence which might prove that he was elsewhere at the time of the crime and therefore could not have been the attacker. In 2001, Clark submitted an application to the CCRC. All 72 grounds submitted by Clark to the CCRC were rejected, mainly on the basis that they were either 'irrelevant' to his conviction or could have been available at the time of the trial. Clark's case is currently being investigated by the BPP Law School Innocence Project.



(5) COLLETT, Mark

On 6th May 2005, Mark Collett was convicted of joint-enterprise murder along with three other co-defendants. The victim, John Hancock, died after being severely assaulted at St Ronans Road, Southsea. It was accepted at trial that Collett was not part of the gang who committed the assault. However, it was alleged that he had procured and instructed his co-defendants to carry out the attack. The evidence against Collett consisted of highly circumstantial evidence, comprising mainly of phone records indicating that he had corresponded with the co-defendants on the day of the murder. Collett maintains that he had no knowledge of the attack and the calls were nothing to do with the murder. Collett's application to the CCRC was recently refused. He has served 6 years of his life sentence.

(6) CRITCHLEY, Gary

In 1980, Gary Critchley went to stay in Campbell Buildings, a notorious London Squat, with a friend, for two weeks. On the tenth day of that two week visit, he was found severely injured on the concrete pavement four floors below the squat. He had a broken back, ankle and wrist, and was subsequently found to have suffered brain damage from a hammer blow to the front of his skull. Drug traces in his blood showed he had taken large quantities of sleeping pills as well as alcohol, and he was suffering from hypothermia when found. When police investigated the circumstances, they found a Mr Edward McNeill dead in the squat and the room covered in blood. Most of the blood was Mr McNeill's, who had been bludgeoned with a hammer almost 30 times. Some of it was Gary's. Gary's blood was also found on a car crook lock inside the flat. A bloodstained hammer – described as the murder weapon- was found inside the flat and was found to have no prints or any other links to Gary. Bloodstained clothing bundled up close to Mr McNeill's body included jeans which had traces of both men's blood and a t-shirt with only Gary's blood on it. Despite the fact that Mr McNeill's blood had been spattered all over the room, not one speck of his blood was found on either Gary Critchley's clothing inside the room or on himself, when he was found on the concrete pavement some 50 feet below the squat. Gary Critchley was subsequently charged and convicted of Mr McNeill's murder. In 2005, the CCRC refused to refer Gary Critchley's case back to the Court of Appeal primarily on the basis that evidence supporting his claim of innocence could have been available at the time of his trial. Although the then Lord Chief Justice recommended that he should serve 'no more than 8-9 years', he served more than 30 years before achieving parole in 2012. Mr Critchley's case is being worked on by White and Case LLP Innocence Project.

(7) CUTTS, John

John Cutts was convicted of murder in May 2001, and sentenced to life imprisonment with a fourteen year tariff. It was alleged that Cutts killed his partner, Dawn Berntsen, by striking her to the head with a wine bottle. While Cutts admits his presence at the time of the incident, he denies carrying out this act, claiming it to instead have been done by his friend, James Murphy, in whose Nottingham home the deceased was found. Dawn Berntsen was an insulin dependent diabetic, yet had not been taking insulin for several months prior to the incident. The prosecution argued that although the injuries inflicted would not have caused death usually, they accelerated the onset of ketoacidosis – a condition known to cause death in insulin deprived diabetics. The evidence used at trial to convict Cutts included the testimony of Murphy, blood stains on his clothing and finger



prints on the wine bottle. However, Murphy had his charge reduced in return for his testimony against Cutts. The blood stains and fingerprints matched Cutts' account of trying to wrestle the wine bottle from Murphy. Most importantly, Bernstein's cause of death been disputed by three leading experts, who unanimously stated that the physical assault would not have caused the death although for different reasons. Professor Tattersall denounced the Crown's hypothesis as incapable of scientific verification, arguing that the injuries would not have caused the fatal ketoacidosis. Another expert Al-Sarraj claimed that the deceased could have suffered from viral encephalitis, and Dr Cary proposed that the cause of death may have in fact been the presence of active tuberculosis. Indeed, police officers who called upon Dawn Berntsen on the week of her death advised her to seek medical assistance when they saw her condition. Despite adducing expert evidence concurring that Bernstein did not die from the assault, John Cutts application to the CCRC was rejected in February 2002. Mr Cutt's case is being investigated by the University of Plymouth Innocence Project.

(8) GILBERT, Ray

Ray Gilbert was convicted in 1981 of the murder of Liverpool bookmaker John Suffield. He was convicted on his own confessions and his guilty plea, which he claimed, was coerced out of him by police officers and criminals who were on remand with him. His interrogation took place over two days without the presence of a solicitor. In 2001, his co-accused Johnny Kamara overturned his conviction due to over 200 witness statements supporting his defence that were not disclosed by the police. Although the statements also support Gilbert by pointing to other suspects, the CCRC refused to accept that his confessions and guilty plea were made falsely and refer his conviction. Gilbert has to date served 30 years in prison, 15 years past his tariff, and continues to maintain his innocence. The University of Bristol Innocence Project is currently trying to locate the exhibits from the crime scene for possible DNA testing said by Merseyside Police to have been lost.

(9) GRAY, Steven

Steven Gray was convicted of robbing Isabella Brown, a 94 year old woman, of £30 in Newcastle-Upon-Tyne in 2002. He was sentenced to seven years in prison and was released in 2005, after serving three and a half years. The prosecution alleged that Gray fitted the description of the robber given by the victim. She claimed he had been wearing religious garments, items which were later found in Gray's flat. These garments were not necessary to his work at the Cathedral. Furthermore, Gray was linked to the victim through the church, where he worked and had access to a database of names and addresses of the congregation (Gray denies having such access). Gray was also aware that volunteers from the church visited the elderly in the area, so it is possible he could have committed the crime while using this as cover-up. In addition, Gray was seen arriving at the prayer group meeting unusually early flushed and out of breath. Finally, the prosecution claimed that Gray had a financial motive for robbery, having borrowed money for lunch on that same day. However, computer records indicate that Gray did not log out of his computer at work until 18.05 when the crime was supposed to have happened at 17.30. After work, Gray claims he went to the pub, then went to the Cathedral and then headed home at 19.50. Furthermore, Gray was not caught on CCTV cameras around the time the crime happened. There are also issues around how Gray was identified by the victim. As suitable identity parade foils could not be found, a group identification procedure was not used. Instead, the police conducted a confrontation



identification, where the victim confirmed Gray as the perpetrator immediately. Gray submitted two applications to the CCRC in 2004 and 2005 primarily on grounds of the problems with the identification evidence, the alibi evidence presented by the security record and expert analysis of the CCTV footage, both of these were unsuccessful.

(10) IAQUANIELLO, Gina

In December 2004, Gina laquaniello was sentenced to two and a half years imprisonment for perverting the course of justice. As a member of the Metropolitan Police, she reported to her superiors that she was being harassed after a long period of receiving silent phone calls, finding maggots in her food, a burglary at her home and her brake pipes being cut causing her to crash her car. It was subsequently alleged that Ms laquaniello had perverted the course of justice by making up these allegations. She was accused of having planted male DNA on the threatening letters which she claimed to have received and staging the burglary. Ms laquaniello claims that she was consistently lied to by senior officers who sought to reassure her that she was being treated as a victim when she was, in fact, already a suspect under investigation. Additionally, the investigation did not fully look into the harassment which she suffered at work and at home and evidence from other officers stating that they had heard Ms laquaniello being threatened by another officer. Her appeal to the CCRC resulted in her sentence being reduced to 12 months. She is continuing to seek assistance in overturning her conviction.

(11) LANE, Kevin

Kevin Lane convicted in 1996 of the murder of Robert Magill in Chorleywood, Hertfordshire. Magill was walking his dog when he was shot dead by two men who fled in a BMW. Lane was later arrested and stood trial with another man, Roger Vincent, who was cleared. Vincent and another man have since been convicted of another unconnected contract killing. The main evidence against Lane was a fingerprint found on a binliner in the boot of the getaway car. Lane explained that he had borrowed a BMW from a friend and used it to take his girlfriend and the sons to see his mother and returned it on Sunday evening. Four days later it was used by the killers as their getaway vehicle. The jury could not reach a decision in his first trial, but he was convicted by a 10-2 majority at a subsequent trial. Since Lane's conviction at his second trial, evidence has emerged showing Roger Vincent had lengthy discussions with police officers shortly after his arrest. Vincent also claimed that detective sergeant Christopher Spackman offered him a deal to drop the case against him and pay him a reward if he became a prosecution witness against Lane. Speckman himself was subsequently jailed for conspiring with others to steal £160,000 from Hertfordshire police. Logs later released by the police showed that during the original Magill murder inquiry they had received more than 20 tip-offs claiming Vincent and another man called David Smith had been responsible. They were well known in the criminal world and were suspected of having carried out several killings. Despite several doubts in the reliability of Lane's conviction, the CCRC has on three occasions refused to refer his case back to the Court of Appeal, with the latest review initiated three years ago and still to be completed. In 2011, a 70-page document, supposedly detailing aspects of the case against Lane and containing details on informants, was sent to his lawyers. As a result of the information contained within, and other unresolved aspects of the case, an application has been made directly to the Court of Appeal for the case to be heard. The CCRC's current review has been suspended.



(12) LIN, Liqing

On 12th July 2000, Mr Liqing Lin, who was employed as a chef in a Chinese takeaway in Dudley, was convicted of murder of Kevin Fung and sentenced to life imprisonment with a tariff of 14 years. Although it was the prosecution's case that Mr Lin committed the murder with another male, Jason Kwok, the charge against Kwok was dropped due to the lack of forensic evidence placing him at the scene. Lin maintains that on the day of the murder, he was invited by Kwok to go to the casino. Whilst in the car, Kwok announced that they would both go and see his friend. Whilst in the deceased's house, Lin claims that Kwok unexpectedly attacked the deceased from behind with a hammer. Lin has never denied that he was present at the deceased's house but maintains that Kwok alone carried out the attack. He says that he was an innocent and unwilling witness and had no knowledge that Kwok was planning an attack on the deceased. Although Lin's fingerprints proved his presence at the deceased's house there is no DNA or other forensic evidence linking Lin to the murder itself. The prosecution also adduced the evidence of Andy Lau, who was a friend of Lin and claimed that Lin had confessed to him. Lin claims that the conversation was not in the manner remembered by Lau. Instead, what was told to Lau was that his boss (Kwok) might have killed somebody. Lin claims that after his arrest, he discovered that Kwok had been running a prostitution ring with the deceased. In 2002, after a failed appeal, Lin applied to the CCRC primarily on the basis that he had difficulties understanding the trial proceedings and was not even aware, at the time of his arrest, that he was being accused of murder. He was provided a mandarin interpreter although he spoke a different dialect. In addition, it is likely that Lau had misunderstood the conversation as he, too, did not speak in Lin's dialect. In 2006, the CCRC arrived at its decision not to refer Lin's case to the Court of Appeal. His case is currently investigated by the University of East London Innocence Project.

(13) MAJOR, Danny

Danny Major was a uniformed patrol police officer in Leeds. In November 2006, after two trials, Danny was convicted of ABH and common assault and sentenced to 15 months imprisonment. He was acquitted of a further charge of common assault. It was alleged that on the 6 September 2003, whilst on duty in Leeds City Centre, Major arrested Sean Rimmington for being drunk and disorderly. The prosecution claimed that Major kicked Rimmington twice on the ribs whilst he was handcuffed in the rear of a police van outside Millgarth Police Station. Upon reaching the cell area at Leeds Bridewell, Major was alleged to have removed Rimmington from the van by launching him head first into a concrete floor and punching him in the head on at least 4 occasions. Finally, upon placing Rimmington in the police cell, the prosecution claimed that he assaulted Rimmington by punching him 5 to 6 times to the face, causing injuries to his nose. Major claims that he had committed none of the alleged assaults which were instead committed by other police officers. An expert witness gave evidence at trial that Rimmington's memory was unreliable due to the amount he had to drink that night. At the second trial the jury at Bradford Crown Court heard that officers at Bridewell failed to follow basic procedures. Judge Roger Scott called the custody suite 'a shambles'. He criticised senior officers and called Rimmington's custody record 'a document of fiction'. Another police officer who was a key prosecution witness had also been under investigation for matters including perverting the course of justice and sexual assault of a female, which was dealt with at such a low level that it did not warrant disclosure in court. Significantly, the police failed to disclose crucial CCTV footages that could have helped the defence. These were discovered by accident



in the final days of the trial when it was too late to be used in court. They were subsequently presented to the CCRC which refused to refer Major's case back to the Court of Appeal on the basis that they do not materially enhance the defence's case at trial and would not be seen as new evidence or argument.

(14) MAWHINNEY, Jake and Keith

(Photograph of Jake Mawhinney) Jake Mawhinney and his son Keith were both convicted on 6th December 1999 of the murder of Tony Clarke in Hartlepool. They were jointly charged with Michael Casey who was acquitted of murder but convicted of conspiracy to cause grievous bodily harm. The prosecution claimed that the Mawhinneys had arranged with Casey that Casey would lure Tony Clarke's partner, Shirley Clarke out of their house so that they could conduct a 'punishment beating' on Tony Clarke, each with a pick axe handle. In addition to records of telephone calls between Jake Mawhinney and Casey, the prosecution relied on the testimony of a registered police informer Zieff Payne who gave evidence that the Mawhinneys confessed to him that they had assaulted Clarke with pick-axe handles. Both Jake and Keith Mawhinney gave a positive defence of alibi at trial, maintaining that at the time that the murder, they had been at home. Payne had called on them at about 2 am and stayed with them for about half an hour. In addition, a large car battery charger was found next to Clarke but was not forensically tested as it was overlooked by the police. Subsequent tests showed that it contained hair and blood spatters belonging to Clarke inside the vent, suggesting that it was likely to be the murder weapon. During the trial, the judge warned the jury about Payne's unreliability, mental difficulties and large illegal debts arising from drug dealing. Payne also accused the police of offering him massive inducements to give evidence against the Mawhinneys. In April 2000, leave to appeal was granted by a Single Judge but was dismissed in 2004. A subsequent application to the CCRC also failed due to lack of fresh evidence.

(15) MAY, Susan

Susan May was convicted in 1993 of the murder of her 89-year-old aunt, Hilda Marchbank in her home in Tandle Hill Road, Royton, Greater Manchester. She was convicted on the flimsiest of evidence, comprising mainly of three alleged fingerprint marks alleged to be hers that were said to contain the victim's blood. However, there are doubts about the testing method and whether the marks are indeed Susan's fingerprints and even whether they did contain human blood. Another piece of evidence against Susan was a remark she allegedly made to a police officer relating to scratches found on her aunt's face, which the prosecution claimed she could not have known about unless she had caused them. Susan has always denied making the remark and the notebook in which the police say the words were logged has gone missing. Susan May's case was referred to the Court of Appeal by the CCRC in 1999 on the basis of police impropriety, but the appeal was dismissed in 2001. Two subsequent applications to the CCRC detailing new evidence that casts further doubts on her conviction have also failed on the basis that the CCRC does not think that there is a real possibility that the Court of Appeal will quash her conviction. Susan May's case is currently being investigated by the University of Sheffield Innocence Project.



(16) MCAFEE, John

John McAfee was convicted of the murder of 76 year old Benjamin Jones in Tipton, West Midlands, on 3rd November 2005. His co-accused Graham Ellis was also found guilty. The prosecution alleged that on the 7 April 2004, McAfee and Ellis burgled the home of Benjamin Jones and murdered him in the course of the burglary. They were alleged to have taken some property, including two televisions. The prosecution's case was that one of them returned and set fire to Jones's body and his house. McAfee admits that he had handled one of the televisions from the premises a few days after the murder. He maintains, however, that he received the television from Ellis and his younger brother and did not know, at that point, that the television was obtained from Jones' premises until Ellis confessed to him about the burglary some time after, following which McAfee reported the confession to the police. The prosecution also relied on the identification evidence given by four children who identified McAfee as the man who was walking through a cut at the rear of Jones' house carrying bin liners full of items. In addition, Ellis' then partner gave evidence that she overheard McAfee saying to Ellis on the morning after the murder that a man had been stabbed. However, of the four eyewitnesses, three admitted at trial that they either had reservations that the man they saw was McAfee or were unable to give a firm description of the man they saw. Whilst the fourth witness was certain that she saw McAfee, her descriptions were inconsistent. Moreover, although Ellis claimed at trial that it was McAfee who committed the murder, evidence strongly points to Ellis having committed the murder either with his brother or someone else. Ellis admitted to hiding the murder weapon, which was subsequently discovered by the police. He had washed his clothing, burned his training shoes, and cleaned a soot-covered television which he subsequently sold on to someone else. Hair and DNA of an estranged friend of the deceased were also found on a paraffin container cap and on another discarded paraffin container found in a cupboard amongst many others. This estranged friend was the police's primary suspect until McAfee went to the police on the 18 August 2004 to report on Ellis' admission. In addition, two prisoners were purported to have overheard a conversation whereby Ellis asserted that he was claiming that McAfee was involved in the killing because he had put his (Ellis) name forward to the police and was therefore going to bring him down for that reason. Following his failed appeal, McAfee submitted an application to the CCRC who refused his application on the basis that the grounds put forward had already been dismissed on his appeal. His case is currently investigated by the University of Portsmouth Innocence Project.

(17) MIRZA, Waseem

Waseem Mirza was convicted of murdering his pregnant ex-girlfriend Christine Askey at her home in Nevett Street, on the Callon Estate, Preston, in January 2001. On the face of it, the prosecution's case against Mr Mirza appeared to be strong. His semen was found on her top and on a piece of rag in the victim's house. His saliva was found also found on a cigarette butt. Mr Mirza's claim is that he visited the victim's house upon her invitation on the day of the incident, where he shared a cigarette with her and received oral sex; this would explain and semen and saliva found. In addition, there was overwhelming evidence of other men having been in the victim's house, including male hairs were found in the bath, male saliva found on a glass and unidentified semen found on a shirt. The victim's injuries had in all probability been caused by a right-handed person. This is significant as Mr Mirza is naturally left-handed and has previously sustained injuries to his right hand which would have made it difficult for him to inflict the injuries found on the victim. Furthermore, woollen fibres were found on the victim's face and nails and Mr Mirza has taken tests which prove he is allergic to wool, which could potentially suggest his lack of involvement in the crime. Finally, Mr



Mirza claims that he has an alibi for the time the murder was committed as he was at home with his mother, sister and girlfriend. Since Mr Mirza's conviction, an unsigned letter was sent from India to a local newspaper where the anonymous writer had confessed to the murder. Mirza's application to the CCRC was refused in 2005. His case is currently investigated by the University of Gloucestershire Innocence Project.

(18) MOODY, Christopher

Christopher Moody was convicted in June 1998 of the murder of Maureen Comfort who was found dead in her flat in Leeds in January 1996. As a friend of Maureen Comfort, Moody had the key to her flat. He voluntarily went to the police station after hearing the news of her death. However, he was not charged with the murder until more than two years later when he was in prison for a separate offence. There was no physical evidence linking him to the murder. He was convicted mainly on two alleged confessions. The first was to a close family friend of the deceased who was 14 years old at the time of trial. She claimed that Mr Moody had confessed to her in the summer of 1996 when she was 12 years old. However, she did not tell anyone about the confession until over a year after it allegedly took place. The second was to a fellow cell mate whose testimony was admitted in court despite his mental instability and contradictions in his evidence. To date, Mr Moody continues to protest his innocence of the murder and maintains that none of the confessions ever took place. The CCRC refused Mr Moody's application on two occasions after minimal investigations. No attempt was made to re-interview the witnesses despite the apparent inconsistencies in their evidence. The CCRC also failed to look at the police files, stating that "it seems that they may have accidentally been destroyed in a flood". In 2010, in what is thought to be an unprecedented move, the Parole Board acknowledged that they are "in no doubt that Mr Moody has solid grounds for maintaining his denial of involvement in this offence". His case is currently being investigated by the University of Bristol Innocence Project.

(19) MORGAN, Roger

Roger Morgan and his co-accused Stanley Hale were convicted on the 26th June 1998 of the murders of brothers Kraig (aged 10) and Graham Trickett (aged 14). He was sentenced to life imprisonment with a 15-year tariff. The brothers died as a result of a fire at their home in Woodrow estate, Redditch. The prosecution alleged that Mr Morgan assisted Mr Hale in setting the fire by driving him to and from the brothers' home. The alleged motive was a feud involving a bicycle theft shortly before the fire. The evidence against Mr Morgan was tenuous, with the eyewitness only claiming to have seen "two figures in the darkness". In addition, the prosecution claimed that Mr Morgan confessed to an ex-cell mate who was later alleged to have admitted that he lied because he heard that the victims were children. Mr Morgan maintains that he was with his partner and daughter at the time of the incident and his neighbours can testify to this. There is also a possibility that the fire was started due to an electrical fault.

(20) MORRIS, David

David Morris was convicted on 29 June 2001 for the murders of three generations of a family, two children, Katie Power (10), Emily Power (8), their mother, Mandy Power (34), and the children's grandmother, Doris Dawson (80) who were discovered battered to death in their own home in Clydach, South Wales, on 27 June 1999. The crux of the prosecution case was that he was



witnessed to have had an argument with one of the victims, Mandy Power, with whom he was having an affair, in a pub earlier in the evening. It was claimed that he later went to her address and murdered all 4 victims, before setting the house alight in an attempt to destroy any incriminating evidence. The evidence against Morris was circumstantial, comprising witnesses who gave bad character evidence and a gold bracelet that belonged to Morris which was discovered at the scene of crime covered in blood. His previous criminal record of violent offences was also deemed admissible by the trial judge. His original conviction was quashed at The Court of Appeal in 2005, however he was found guilty again on a retrial in 2006. Three other suspects were arrested in connection with the Clydach murders, including Mandy Power's lesbian lover, her husband, and his brother, both of whom were serving officers of South Wales Police. David Morris, who is currently 7 years into his 32-year sentence continues to protest his innocence, and is hoping new forensic evidence can be uncovered, which will exonerate him. His solicitor, assisted by the University of Winchester Innocence Project, is currently putting together a case to take to the CCRC.

(21) PLUMMER, Justin

On 16 December 1998, Justin Plummer was convicted of the murder of Janice Cartwright-Gilbert in Bedfordshire. Plummer was also convicted of six counts of burglary on 17 December 1998. The deceased was found in her caravan with multiple stab wounds to her chest and neck. Her face had been stamped on repeatedly, leaving a visible shoeprint. Two months later Plummer was apprehended for a series of burglaries, to which he confessed. The police matched a pattern of shoeprint evidence from the burglaries to the murder scene. The prosecution expert witnesses determined that the sole of Plummer's trainer matched marks and indentations found on the victim's face. However, defence expert contradicted these findings. In addition, Mr Plummer also had an alibi at the time of the murder. There were no signs of forced entry in the caravan, which suggests that the deceased knew her assailant. The panic alarm had not been triggered and the dogs in the premises did not sound off. An eyewitness also claimed to have seen a "dark olive-skinned man" at the murder scene, who does not match the description of Plummer. Plummer appealed against his conviction on the basis that the judge had unfairly disclosed his confession to the burglaries, allowing the jury to infer that the murder was a burglary gone wrong. Following his unsuccessful appeal in 2000, Plummer applied to the CCRC which was also unsuccessful.

(22) ROSE, Nick

Nick Rose was convicted of the murder of Charlotte Pinkney, in Devon, in February 2005 and was sentenced to life imprisonment with a 20 year tariff. Ms Pinkney was last seen by her mother on the 27 February 2004. It was not until the 4 March 2004 that that her family reported her missing. Despite a large scale search by the police, Ms Pinkney's body was never found. The prosecution alleged that Mr Rose had murdered Ms Pinkney in his car on the morning of the 28 February 2004, after they had both been out at a party. Evidence used against Mr Rose include, spots of blood on his trainers and in his car; a button and thread identical to those on the trousers that Ms Pinkney was wearing on the night in question found in a vacuum he used to clean his car with; Ms Pinkney's bag found along a track that Mr Rose's car was alleged to have driven past; and, her boot found on wasteland close to Mr Rose's house. Mr Rose claims that the physical evidence could be explained by the fact that Ms Pinkney had been in his car on several occasions. On the morning in question, he had dropped Ms Pinkney off at the community centre after the party. As his car was running out



of petrol and was not taxed or insured, he decided to dump the car at the reservoir. Mr Rose was seen carrying “something heavy” in a black bag, which he maintains was a shovel to dig the car out of the reservoir. Further, it was initially thought that Ms Pinkney had run away as she was in a violent relationship with a 41-year-old drug dealer. Most significantly, several witnesses gave evidence at trial and appeal claiming that they had all seen Ms Pinkney alive between 28 February and 7 March 2004, after the prosecution claimed that she had allegedly been murdered. In January 2008, Mr Rose made an application to the CCRC which was refused in February 2010 on the basis of lack of fresh evidence. His case is currently investigated by the University of Durham Innocence Project.

(23) SLANEY, Warren

For over two decades, Warren Slaney has maintained his innocence of the infamous ‘hot dog’ murders that took place in 1990 in Oadby in Leicestershire. He and another man, Terence Burke, were both convicted of the murder of fast food tycoon Gary Thompson and his associate John Weston. The two victims were found shot dead in Mr Thompson’s front garden and sixty thousand pounds had been stolen. His death was claimed to have been a result of a botched robbery. Slaney was convicted after Burke and another man who admitted to conspiracy to rob, gave evidence for the prosecution that Slaney was the one who committed the shootings. In addition, another witness also claimed to have seen Slaney with Burke shortly before the shootings and claimed that he had boasted to others about the attack. However, claims have emerged that the shootings were committed by Iraqi night club owner Ramzy Khachik, whose car was spotted near the crime scene 2 hours prior to the shooting. Khachik is currently serving a sentence for drugs and firearms offences. Slaney had cast-iron alibi. He was seen by several friends and family at a party at the time of the murders. Further, he does not match the descriptions of the original accounts by eyewitnesses, who described the attackers as over 6 ft and heavily built (over 20 stones). Slaney is 5 ft 8 and weighed 9-10 stones at the time. The man who disposed of the gun admitted that Warren had nothing to do with the murders. This statement was not used in court. There was no forensic evidence linking Slaney to the murders despite his flat being searched 4 times by the police. In 2010, the CCRC refused Slaney’s applications. His case is currently investigated by the University of Winchester Innocence Project.

(24) SPECK, Philip

Philip Speck was convicted of the murder of his neighbour, 82-year-old Rosie Smith, in Dagenham, Essex, in December 2001. He was sentenced to life imprisonment with a tariff of 14 years. On the day the victim died, the defendant admitted to being in the victim’s flat to use her telephone at 10.47am, during which the victim spoke to Speck’s grandmother. CCTV evidence then showed Speck leaving the block of flats at 10.54am, where he proceeded to run errands and go to several public houses where he was seen by a number of witnesses. At 2.15pm Speck had a meeting with his solicitor regarding a child custody battle with his former wife. Upon arriving at the solicitors he was told that his solicitor had been called away on urgent business and could not see him. Upon returning to the block of flats, Speck came across two neighbours worried about the victim as they had not seen her, and then gained admittance to her flat to find her dead. The police initially held that the victim’s death was not suspicious. As a result, the crime scene was not sealed, no exhibits were taken and her possessions were destroyed. Speck came to the police’s attention due to his nervous and sweaty demeanour and his disposal of a piece of garment shortly after the victim’s





death. At trial, the prosecution adduced a witness – the secretary in the solicitors’ office – who claimed that Speck said to her “I could kill a little old lady”. Speck, however, maintains that he in fact stated, “I could kill my old lady” in reference to his wife over the custody battle. In addition, his sweatiness was due to his mental condition and secondly, the garment was disposed of due to an iron mark and no DNA belonging to the victim was found on it. CCTV evidence also showed Speck walking around at the approximate time of murder. Most significantly, there are major disputes over how the victim had actually died. Two pathologists had substantially different accounts of how the victim’s neck injuries were sustained. One argued that they were caused by a fall over furniture and another held they were caused by throttling from behind. Speck’s application to the CCRC in January 2007 was unsuccessful due to lack of substantial fresh evidence. His case is currently investigated by the Nottingham Trent University Innocence Project.

(25) SWINSCOE, Roy

Roy Swinscoe was convicted of armed robbery in Banbury, Oxfordshire, in October 2003, for which he received a life sentence with a tariff of seven years. The prosecution’s case relied on identification by those working at the bank where the robbery took place, witnesses at a nearby car park, as well as by the police. There was also CCTV image of the armed robber, which the prosecution’s facial mapping expert claimed, is Swinscoe. The defendant’s appeal in April 2005 was on the grounds that the identification evidence is not him and should not have been used in the trial, but this was refused by the judge as it was deemed that the evidence was safe. His application to the CCRC in August 2005 was similarly unsuccessful. Swinscoe’s case is currently investigated by the University of Portsmouth Innocence Project.

(26) TUCKER, Nicholas

On the evening of the 21 July 1995, Nicholas Tucker was driving home from the pub with his wife, Carol Burch, when their car veered off the road and plunged into the River Lark near Lackford in Suffolk. Tucker claims that what originally started as a tragic road- traffic accident soon became a murder inquiry that led to his conviction for murder in 1997. The prosecution alleged that Tucker murdered his wife so that he could move abroad to live with his lover and her children. They claimed that he had intentionally driven into the river, dragged Carol Burch from the car after it had entered the river, where he then partially strangled her before holding her under the water to drown her. Tucker has always maintained that his car swerved when he tried to avoid two deer on the road. There was a recognised fault with the passenger-side seat belt and pathologist reports indicated that there was no evidence of forced drowning. The prosecution changed its case several times and did not mention the forced drowning until the summing up of the trial. Also, due to the fact that the case was initially treated as not being suspicious, the car was left for several months before it was forensically tested leading to potential contamination. Tucker served eleven years in prison before being released on parole. Following a failed appeal, Tucker made two applications to the CCRC on grounds of expert evidence supporting his contention that Burch’s death was wholly accidental. Both applications were refused. Tucker’s case is currently under investigation by the University of Cambridge Innocence Project.



(27) DA

DA was convicted in 2000 of the murder by strangulation of a 15-year-old schoolgirl in August 1995. He was sentenced to life imprisonment with a tariff of 16 years. The main evidence against DA comprised of DNA evidence obtained from a cigarette butt that was allegedly found at the crime scene. However, there is no photographic evidence to prove that the cigarette butt was indeed recovered from the crime scene. The cigarette butt was also destroyed following forensic testing and records of the chain of custody have been lost. There are also concerns that the cigarette butt may have, instead, been recovered outside DA's house rather than the crime scene as alleged. In November 2003, DA appealed to the CCRC on the basis of the unreliability of the DNA evidence against him. His application was refused primarily because arguments relating to the unreliability of the DNA evidence do not constitute new evidence required for a referral to the Court of Appeal. DA's case is currently being investigated by the University of Southampton Innocence Project.

(28) AB

On the 21st December 2000, AB was convicted of murder and sentenced to life imprisonment, with a minimum term of 17 years. AB was convicted on the basis of handwriting analysis of a threatening letter sent to a person who knew the deceased and mixed DNA evidence from the stamp used on the letter. However, the prosecution failed to establish a clear motive for AB to have killed the victim. Research and cases in the United States have also demonstrated the inherent unreliability of mixed-DNA evidence. Furthermore, eye witness descriptions do not match AB and the prosecution relied upon evidence from drug dealers who had been granted immunity from prosecution in return for their testimonies. Despite these issues with the evidence against AB, the CCRC rejected his application, stating that there were "no grounds" for the case to be referred to the Court of Appeal. AB has served 11 years in prison to date, maintaining his innocence throughout.

(29) AF

AF was convicted on 28 July 2006 of 2 counts of common assault and 3 counts of assault occasioning actual bodily harm. It was alleged that he had assaulted the 5 victims and robbed one of them of his sandwich. He was convicted after being identified on a video identification parade. There is no physical evidence linking AF to the crimes. AF claims that he was mistakenly identified in the video identification procedure which was conducted in breach of statutory safeguards. There are also inconsistencies between the witness statements and the evidence furnished in court regarding the height, appearance and clothing of the assailant. In fact, one witness had failed to identify AF in the video identification procedure and two other witnesses were uncertain as to whether they had picked out the right person. AF's case is currently investigated by the University of the West of England Innocence Project.

(30) PH

In 2001, PH was sentenced to life imprisonment with a tariff of 16 years for murder. It was alleged that PH was one of a pair of masked men who shot dead the victim in May 2000. PH denies any involvement in the murder and maintains that he was dining with his fiancé and daughter at the



time the crime occurred. He was implicated due to his business partnership with his co-defendant who had been a suspect in an earlier armed robbery. A prosecution witness linked PH to the aqua-green getaway car, claiming to have seen him driving a car of a similar model and colour weeks earlier. However the car which PH was test driving at the time was blue, not aqua-green in colour. PH is still seeking the CCTV evidence that could prove that he was dining in a restaurant at the time of the murder. Following rejection by the CCRC, his case is now being investigated by the University of Lancaster Innocence Project.

(31) TN

TN was convicted on the 10th of February 2010 of robbery. The prosecution alleged that TN was one of the three men who committed the robbery. On the night of the robbery, the three men attended the victim's house in relation to the sale of coins. The victim had had previous dealings with TN. During the course of the robbery, the victim was restrained and gagged by one of the robbers, suffering bruising, whilst TN allegedly stole coins held in the property. He was convicted when the mobile number of one of the robbers was traced to him. TN's co-accused also claimed that he was a participant in the crime. However, the fact that two material prosecution witnesses, the victim and fellow coin dealer, had failed to identify TN as one of the robbers despite having met him on five occasions raises doubts as to the reliability of his conviction. In addition, there is no forensic or other physical evidence connecting TN. His appeal in March 2011 was dismissed and a subsequent application to the CCRC also failed on grounds of lack of fresh evidence. His case is being investigated by the University of Exeter Innocence Project.

(32) MP

MP was co-convicted of the murder of two elderly women in their home in June 1995. He was sentenced to life imprisonment with a tariff of 20 years of which he has now served 16 years, maintaining innocence throughout. The evidence against MP's co-defendant was overwhelming, comprising of fingerprint and eyewitness evidence. The evidence against MP however, consisted mainly of the testimony of another inmate who shared a cell with him whilst he was in prison on remand. The inmate who gave evidence against MP was psychologically unstable and had been witnessed by many other prisoners reading MP's case files. It was also claimed that the inmate was also hoping to strike a deal to shorten his sentence for sexual offences against children. In addition, the prosecution produced tenuous expert witness testimony that cigarette butts retrieved from the crime scene proved MP's presence due to the way the cigarettes had been extinguished. MP's first appeal took place in 2002 and on the grounds that the defence had failed to call witnesses who could have discredited the inmate's testimony. This was accepted as new evidence but dismissed. In 2010, the CCRC referred MP's case back to the Court of Appeal when DNA testing on the cigarette butts at the crime scene claimed to be MP's proved that they had been smoked by MP's co-defendant, not him. Further evidence was also produced in relation to the inmate's psychological instability. However, despite overwhelming evidence supporting MP's claim of innocence, his appeal was again dismissed on the basis that the psychological evidence had been available at the original trial; that the evidence against MP remained "compelling" despite the new forensic evidence; and it was still possible that MP had been there at the time of the murders.

(33) MS

MS was convicted in 1989 of arson and murder that occurred in a house. The prosecution alleged that following a party at the house earlier in the evening, MS returned to the house and, as the occupants slept, set fire to the house. One person died and several others were injured at the time. The prosecution relied on the evidence of a witness who went to the police six months after the incident, claiming that MS had confessed to him that he was responsible for the fire. A man of bad character, the witness claimed at trial that he had turned over a new leaf and wanted to give evidence against MS out of a sense of public duty. However, prior to the alleged confession to the witness, all evidence pointed to the cause of the fire as an electrical component fault within a faulty HiFi, and the coroner's inquest recorded a verdict of accidental death. Following an unsuccessful appeal in 1991 and a subsequent application to C3 Division, MS's case was then passed to the CCRC when it started handling cases. The CCRC was presented with a pro bono report from an electrical engineer confirming that the fault in the stereo could have been the cause of the fire. The witness that MS had allegedly confessed to was also subsequently convicted of sexually abusing his two young nieces from 1984 up until his arrest and conviction in 2000. It was during this conviction that information emerged that the witness suffered from multiple mental and personality disorders. After a four-year review, the CCRC decided not to refer his case back to the Court of Appeal. A judicial review against the CCRC's decision was made which led ultimately to a further 3-year review until 2009, when it again decided not to refer MS's case back to the Court of Appeal. MS's case is currently investigated by the Nottingham Trent University Innocence Project.

Cases 27-33 have been redacted as we have not yet received consent to discuss in the public domain.



Dossier of Convictions for Sexual Offences

Around 70 per cent of applications to the Innocence Network UK consist of convictions of sexual offences. The vast majority of these applicants were convicted solely on the allegations of the accusers. The names of these applicants have been anonymised to protect their identities and the witnesses involved.

(34) AL

AL was convicted of rape and sentenced to 8 years imprisonment. It was alleged that he went out to a red light area in Doncaster and picked up the complainant who was a prostitute. He then took her to a secluded place, where he raped her and assaulted her which left her with a black eye. The complainant alleged that she had asked for money before she would perform any sexual act but he then forced her to have sex. After the incident, she called 999 and reported that she was raped and assaulted. The complainant took the registration number of AL's car and this was then traced by the police. AL was convicted on the complainant's testimony and medical evidence to support her allegations of assault. Whilst AL did not deny having sexual intercourse with the complainant, he maintained that it was entirely consensual and did not, at any point, assault the complainant. Following AL's conviction, it emerged that the complainant had previously made another allegation of rape involving another punter in the same location. More significantly, she retracted her evidence in a statement to the CCRC, claiming that AL did not rape or assault her. This new statement to the CCRC was subsequently retracted. The complainant's ex-boyfriend, who was also a prosecution witness at trial, also made a new statement to the CCRC in which he admitted being the person who assaulted the complainant. In 2004, the CCRC took a statement from another of the complainant's boyfriends who claimed that she admitted to making a false allegation and that she felt guilty that AL was in prison for something he had not done. AL made three applications to the CCRC and all three applications had been refused.

(35) A, John

John A was convicted of 10 counts of historical sexual offences against three of his step- children in 2004 and sentenced to 14 years imprisonment. Mr A had originally been accused of sexually abusing one of his step-daughters back in 1989 and the family was made known to the social services after concerns were raised about the children's welfare and A's suspected violent behavior. Mr A was acquitted of all guilt. In 1998, Mr A was again accused by two of his step-children of a variety of sexual assaults and inappropriate behavior. The trial was halted by the judge when evidence from a medical examination of one of the complainants when she was 12 years old was produced. The evidence concluded that she was a virgin at the time which conflicted with her evidence stating ritualistic abuse from the age of 10. A second trial was ordered, this time with evidence from Mr A's third step-child, following which he was convicted. Mr A maintains that the allegations were entirely fabricated. Since his conviction, previously undisclosed evidence involving unusual markings on his genitals were revealed. This was not described by any of the complainants in their testimonies, shedding further doubt on their credibility. Mr A's case has been reviewed by the CCRC twice and was refused on both occasions.



(36) D

Mr D was convicted on the 27th October 1993 for 3 counts of rape and 4 counts of incest against one of his daughters and two of his step-daughters. The case was brought by the complainants over 15 years after the alleged offences took place. There were major inconsistencies in their accounts, including claims that they were made pregnant and had abortions, although no evidence was produced to substantiate their claims. One of Mr D's daughters stood as part of the defence and one of the charges was dismissed in court due to lack of evidence. Mr D's application to the CCRC was refused in 2003. He was released on parole after serving 8 years in prison and continues to seek to overturn his conviction.

(37) DH

DH was convicted of eight counts of rape, two counts of attempted rape, nine counts of indecent assault, and two counts of indecency with a child. The complainants were five young girls who were known to DH. DH was convicted on the testimonies of the complainants and that of his ex-wife. No physical or medical evidence was produced to support these allegations. The allegations were made shortly after DH's application for residence with his son had been submitted. DH claims that the allegations were perpetrated by his ex-wife out of fear that she might lose custody of their only son together. In addition, one of the complainants changed her statement on the day of the trial. DH's appeal was dismissed in 2007. A subsequent application to the CCRC also failed.

(38) E, Paul

Paul E. was convicted in 2006 following a series of allegations of sexual abuse from his stepdaughters. He was sentenced to 9 years imprisonment. The evidence of the prosecution amounted to a series of allegations made by the complainants and their mother. The abuse allegedly took place between 1970 and 1981. However, it was not until 2005 that any allegations against the accused were made. The lapse of time meant that Mr E faced added difficulties in finding evidence to disprove the allegations against him. Despite this, he successfully disproved the occurrence of 8 of the charges against him but was ultimately convicted of one count of rape and 3 counts of indecent assault. Following a failed appeal, Mr E made two applications to the CCRC, both of which were refused on grounds of lack of fresh evidence.

(39) F, Andrew

Andrew F. was convicted on two counts of rape, and four counts of indecent assault of his teenage nephew. These offences were alleged to have taken place when the complainant was 13-16 years old. There was no medical evidence to support these allegations. Further, the complainant's descriptions of the events that took place were inconsistent and would not have been possible given the layout of the house at the time when the offences were said to have taken place. Andrew F had made 3 applications to the CCRC, all of which have been rejected.





(40) F, Steven

Steven F. was sentenced to nine years imprisonment in 2007 following his conviction of eight counts of indecent assault and two counts of oral rape against his step-daughter. The prosecution alleged that the abuse had occurred regularly since the age of nine. The evidence against Steven F comprised solely of the testimony of the complainant and her friend. However, DNA testing which might support or discredit the prosecution's case failed to be carried out. Additionally, Steven F's wife and young son were in the house when some of these events were alleged to have taken place. Steven F's wife gave evidence in his defence that at the time when the allegations were made, the complainant was distraught over a death in the family and was rebelling against her authority. She had also previously accused a neighbour of a similar offence. Following a recent rejection by the CCRC, his case is currently being investigated by the Nottingham Trent University Innocence Project.

(41) H, John (deceased)

Mr H was convicted of attempted buggery and indecent assault on a male in December 1999 and served 4 years in prison. The alleged offences were said to have occurred in the 1970s at a school where he worked. The allegation came amongst a batch of allegations made by ex-pupils against the ex-employees of the school. Mr H was convicted solely on the allegations of the complainant, which he had always denied took place. Due to the lapse of time – the charges being brought nearly three decades after they allegedly happened, there was no means of obtaining physical evidence to defend against the allegations. Mr H's case was investigated by the University of Bradford Innocence Project until his recent death in 2011.

(42) LB

LB was convicted of 8 counts of rape and 2 counts of cruelty to children in 2005 at Norwich Crown Court and sentenced to 11 years in prison. The offences were alleged to have occurred between 1968 and 1980. The prosecution's case against him was based on his daughter's allegations of rape. She claimed that LB had raped her on a weekly basis between the ages of 9 to 14. His other two daughters claimed he had beaten them and tied them to the toilet and the bath. The mother of the complainants gave testimony supporting these claims. LB argued that he was not present for most of the complainant's childhood as he was working overseas. Two of his sons and his eldest daughter also gave testimonies supporting their father's claim of innocence. In 2007, LB made an application to the CCRC on the basis of new documentary evidence proving that he was not in the country during the occasions when the alleged abused took place. Despite this, his application was refused by the CCRC.



(43) MC

MC, a dentist, was convicted in 2006 of one count of indecent assault and one count of sexual activity with a child. The three complainants alleged that MC had indecently assaulted them during a routine treatment at his dental surgery. The jury found MC not guilty with respect to the charges brought by the third claimant but convicted him on charges relating to the other two complainants. Following MC's conviction, it emerged that the first complainant had previously made false allegations against her stepfather and uncle, with a police video interview showing her retracting her allegation against her uncle. The same victim gave evidence at trial of previous occasions where MC touched her inappropriately. However, records indicate that she had not visited the dental surgery during the dates in question and this was confirmed by her mother. Social Services records for the second complainant were also not disclosed to the defence at trial, depriving him of the ability to adequately assess her credibility. MC's case was dismissed at appeal and a subsequent application to the CCRC was also unsuccessful.

(44) R, Eric

Eric R. was convicted in of six counts of rape and one of indecent assault against his step-daughter and was sentenced to 12 years imprisonment. The offences were said to have occurred when the victim was aged 12-16 but allegations were not made until ten years afterwards. The only evidence against Mr R is the allegations of the victim, corroborated by her sister's testimony. However, there are significant inconsistencies between the complainant's accounts to various witnesses and the police in terms of how many rapes took place, where and when they happened. Further, the complainant had made previous similar allegations against 2 other men although no police reports were filed. Mr R's case was refused by the CCRC in 2005 due to lack of fresh evidence



