

INQUIRY

THE NEWSLETTER OF THE INNOCENCE NETWORK UK

CRIMINAL CASES REVIEW COMMISSION SPEECH TO INUK ANNUAL CONFERENCE 2013

This Special Issue of INQUIRY is the full text of the presentation given by Ranjit Sondhi and David Robinson, Commissioner and Legal Advisor at the CCRC, respectively, on what makes a strong application to the CCRC from its perspective. It was given at the INUK Annual Conference, University of Sheffield, 1-2 November 2013.

It will be followed by a Special Issue of the full text of Mark Newby's, Solicitor Advocate, Quality Solicitors Jordans, Doncaster, presentation at the INUK Annual Conference 2013.

To keep the debate going, we are interested in articles in response to these special issues for future issues of INQUIRY, which can be e-mailed to the Editor at the e-mail address below.



(Ranjit's Sondhi's (RS) sections are in plain text, David Robinson's (DR) are in italics)

RS: Hello, and thank you for inviting us to speak today – this is the first INUK event to which the Commission has been invited since 2008 so we are very pleased to be here and to have been asked to talk about “what constitutes a strong application to the CCRC”.

Before we get down to that, we should perhaps just say a few words by way of introduction.

My name is Ranjit Sondhi and I am a Commissioner at the CCRC. I am one of the non-legally qualified, or lay Commissioners, and have been in post just under a year.

Just to give you a brief resume of my background: after graduating in Nuclear Physics in 1971, instead of drifting into a professional career, I took a deliberate decision to join those in the student movements of the time for whom the fundamental issues of individual liberty and social justice lay at the heart of any open, diverse and democratic society.

These have remained for me central themes in all that I have done since – first during my years as a community activist in neighbourhood action projects, then as a researcher into aspects of community and identity, then as a lecturer in youth and community work, and finally as a member of various independent public bodies that were set up to ensure effective regulation, good governance and public accountability. I have served on several boards including the Commission for Racial Equality, the Ethnic Minority Advisory Committee of the Judicial Studies Board, the Lord Chancellor's Advisory Committee on Legal Education and Conduct, the Judicial Appointments Commission, Bar Standards Board and even the National Gallery and the BBC - where, incidentally, I had special responsibility for the English Regions and had the deliciously ironic title of English Governor.

I would like to think that all the sentiments and ideals, values and principles that I have cherished throughout my career find a natural resonance with those who work in the CCRC. Even though I am more cautious than most about the challenges of working within any structure created by the establishment, I have been struck by the independence and integrity of my colleagues at the CCRC – all of whom show tremendous resilience, selflessness and a strong commitment to redressing miscarriages of justice – a cause that they share with you with the same passion, force and conviction.

Editor

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DR: Hello, my name is David Robinson...I'm a solicitor-advocate with a background in criminal defence. I qualified in 1998 and went on to practise exclusively in criminal matters in and around the Midlands where I heard more than my fair share of no comment interviews. In 2006, I joined the Commission as a Case Review Manager. After almost four years I left to represent a number of Iraqi nationals before the Al-Sweady Public Inquiry. This Inquiry is looking into alleged claims that UK troops tortured and murdered a number of Iraqis following a major firefight in Southern Iraq in 2004. After spending almost 12 months in and out of Beirut I decided it was time to return home. Shortly after this I returned to the Commission where I am now the sole legal advisor.

So, we are supposing that the fact of your presence at this conference means that you all care about miscarriages of justice. On that basis, then, we are also supposing that most of you know will know at least something about the CCRC so we won't spend too long telling you who we are and what we do. Briefly though, here are a few facts and a bit of background about the Commission.

We are an independent statutory body set up in 1997 to investigate alleged or suspected miscarriages of justice in England, Wales and Northern Ireland. We have the power to refer appropriate cases back to the Appeal courts – we are the only body with the power to do that.

We are based in Birmingham, where we currently have just under 100 staff including ten Commissioners. Our budget for this year, provided as a cash grant from the Ministry of Justice, is a little over 5 million pounds. In the last couple of years we have seen the number of applications to the Commission rise from around 1000 a year to around 1,500 a year.

Since starting work in 1997 we have so far referred a total of 537 cases to the appeal courts – that is an average of 33 referrals a year or very nearly one every eight working days. Those 537 referrals have come from a total of 15,624 cases closed so far. This means that we have referred one in every 29 applications we have considered.

Of all the cases we have referred, 70% have gone on to succeed at appeal.

The cases we refer come generally from the most serious end of the criminal spectrum – just over 25% of our referrals have been for murder convictions, almost 12% have been for rapes, and 8% have been for robberies. The rest relate to a mixture of other mostly serious and mostly indictable only offences.

In fact, although the Criminal Appeal Act 1995 that created the Commission requires us to consider applications in relation to any criminal conviction, whether arising from the Crown Court or the Magistrates Court, the fact is that 90 per cent of all our applications, and 95 per cent of all our referrals have related to Crown Court cases.

So, with that background in mind, we move on to the main purpose of this talk: to address the question "What constitutes a strong application to the CCRC?"

We have tried where appropriate to address our answers specifically to innocence projects – and by that we mean all innocence projects whether they be INUK, or non-INUK or indeed, any other university-based pro bono group working in this area. But it is worth pointing out that much of what we have to say to you on this topic is exactly the same as what we would have to say to a roomful of qualified lawyers.

One response to the question "what makes a strong application" – and this is perhaps the one that you might expect a lawyer to give – is to say: "Every case is different so, of course, it depends entirely on the case in question". No doubt that is true – and this is a point to which we will return a little later – but it is not much use to us here today so we will try to address the question in a more general, and non-case specific way.

We will do so under five headings – these are little more than sign posts to help give a bit of structure to our talk – as I am sure you will see, they overlap with one another to a considerable extent. If all goes according to plan, there should be time for some questions at the end.

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So our first heading, is: Timeliness.

TIMELINESS

First and foremost, a good application to the CCRC is one that actually arrives.

We heard yesterday that the 27 INUK projects are between them currently involved in considering around 100 cases. We do not know how many other cases are with non-INUK projects at the moment – presumably it is dozens more.

While it is good to hear that innocence projects are involved in assisting so many individuals with their cases, there appears to be something of a mismatch between the number of cases that seem to get worked on, and the number of cases that result in applications to the CCRC.

Since the first Innocence project started in this country in 2005, innocence projects have collectively been directly involved in 19 applications involving 17 individual cases. All of those application have come to us from five universities.

To put that into some sort of context, in that same period since 2005, 266 CCRC referrals have gone back to the courts - almost exactly half of the total number of cases referred by the Commission.

For us, the questions that those innocence projects statistics raise are these: “How many meritorious cases might there be out there in the hands of innocence projects and how many more referrals might we have been able to make if we had seen more applications from them?”

So, our position is this, as far as the CCRC is concerned, an application that reaches us is better than one that does not. We genuinely, actively welcome applications from innocence projects – if you are working on cases the circumstances of which mean that they will have to come to us if they are ever to make any real progress towards appeal, you need to make those applications to us and the sooner you can do that, the better.

FOCUS

RS: Focus on the good points and explain them clearly and succinctly. Receiving an essay on every conceivable aspect of a case is not helpful to us and it is not helpful to your applicant.

We often see applications consisting of detailed submissions on a great many points. Sometimes the quality and the amount of work involved in those submissions is impressive, and sometimes it is not.

One feature that we see time and time again in voluminous applications of this kind is that a lot of work, or at least a lot of words, have been spent on points that are simply not leading anywhere. A good application focuses on the good points. Throwing the kitchen sink at it is not the answer. In fact, if you genuinely have good points to make, throwing in lengthy submissions on a host of weak points is likely to be detrimental to your applicant's cause because it will simply slow the process down. We will look carefully at everything that you send in an application and that takes time, so pare them down to what really matters.

It may help to concentrate on the following questions:

Is it new? This is crucial because, if the point you are seeking to raise has already been considered at trial, or on appeal, or on previous application to us, and you don't have at least something to say about why it does, or might, look different now, it is not going anywhere – at least not until there is some new element that can bring it back to life.

So, for instance, new evidence will include the testimony of a witness whose evidence is newly emerged and where there is a good reason it could not have been adduced at an earlier stage. In this category we have things like changes in scientific or medical understanding, previously unknown information that affects the credibility or reliability of an important witness, such as the complainant in a sexual offence case.

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As well as being “new” in the appropriate sense, a point will also have to be significant if it is going to result in or contribute to a referral and, ultimately, to the quashing of a conviction?

So you need to focus on what seems to be significant in a case. We see a lot of cases where the applicant or their representatives, seem to have become almost fixated on a detail that is going nowhere.

For instance – in one case a supporter of a man convicted of a rape has complained repeatedly that she knows he was wearing button flies on the night of the attack and in court the victim described him as “unzipping” his trousers. She cannot get to grips with the fact that, even if what she says is true and the witness was wrong about the buttons, the whole issue looks like an insignificant point which, by itself, amounts to nothing when weighed against the rest of the evidence on which the jury convicted the man.

So, with the importance of newness and of significance in mind, make sure you focus your attention, and ours, on those points that at least might be capable of raising a real possibility that the Court will quash the conviction – anything else is a waste of your time and ours and, perhaps more importantly, of your applicant’s.

That brings us on to “Pragmatism”.

PRAGMATISM

DR: The main point here is this: you may not like the CCRC or the Real Possibility test that we are required to apply; you may disagree with the Court of Appeal’s focus on safety and its rules on the admissibility of evidence, but how you feel about these things does not matter when it comes to dealing with a potential application to the Commission.

Articulate them in your essays, your dissertations and your articles, but put them aside when working on a case and engage with these elements as they are, not as you want them to be.

An application to the CCRC is not a theoretical academic

exercise – it is the start of a practical rule-governed process. You will be doing your applicant no favours if you blur the distinction between the two.

We recognise that innocence projects have a dual purpose: to assist the applicant but also to enhance the education and experience of students. Those two aims might not always be commensurable. You need to strike the right balance between the two and make sure that the needs of your applicant come first.

Please also be realistic about what you are going to be able to actually do on a case – in most cases it is going to be impossible for you to get your hands on the kind of undisclosed material that we rely on so often in order to find reasons to refer cases. In our experience, the non-disclosure of material that might have assisted the defence or undermined the prosecution case is the single largest cause of wrongful convictions but it is also, without any doubt, one of the most difficult areas to investigate.

The Commission’s main tool for investigating miscarriages of justice is the power of Section 17 of the Criminal Appeal Act 1995. This section gives us the power to obtain material from public bodies. It literally means we can get anything that we believe we might need from any public body from MI5 to the NHS. It covers everything from the basic undisclosed case material in the hands of the police and the CPS, to social services records and the secret products of covert human intelligence sources. It is an invaluable power and it is one which we use hundreds of times a year, typically several times for each and every case we review.

Our section 17 powers give us invaluable access to information. If you are going to be making applications to us, you need to know both the reach and the limitations of our powers.

We do not, for instance, have the power to obtain whatever we like from private sector organisations – although we are lobbying government for that power. We can only obtain material in relation to cases we are working on, and, furthermore, it has to be reasonable for us to require that material.

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We have been asked several times by innocence projects to use our section 17 powers on their behalf to get hold of some particular information and then hand it over to the project for its use.

Obviously we can see why that is an attractive idea for you, but we have to be clear that here is no prospect whatsoever of this happening.

The principle reason is that we would be breaking the law if we did. The Criminal Appeal Act very carefully, and very deliberately, makes it a criminal offence for us to disclose to virtually anyone the material we obtain under section 17 other than in the limited and specific circumstances set out in sections 24 and 25 of the act.

Another, and perhaps more important reason, is that there is little doubt that if we were to start handing out section 17 material, we would very soon find that the material, which is the lifeblood of Commission investigations, would cease to flow as the organisations on which we rely to provide it, would soon stop trusting us. The law may continue to insist that we have a right to it, but in reality that would mean very little if we lost the trust of bodies that we expect to give us their most sensitive material.

So where does that leave you in terms of making a good application to the CCRC? Well, if you know about section 17, its reach and its limitations, and understand how we will actually use it, you can make submissions in light of that. Our policy on the use of section 17 is publicly available – you will find it in the section 17 formal memorandum on our web pages.

If you think we need to use section 17 in a particular way in relation to your case, say so in your submissions, make an argument as to why we should based on the likely evidential value of the enquiry and we will look at it very carefully. If it has merit, we will do it.

The one particular area where we think the real strength of innocence projects might lie is in dealing with your applicants one-to-one and really helping them to articulate what they think has gone wrong with their case.

Perhaps the best thing you could do for them would be to really engage with them, get to grips with their case and give some structure and some legal insight into what can all too often be deeply muddled and confused accounts of what has happened to them and why they feel something has gone awry.

If you can apply your minds and training to developing a serious alternative case theory and base on it some concise, informed and insightful submissions to the Commission, you will in most cases, be doing as much as any good representative could.

OBJECTIVITY

RS: This is a plea for you to be as objective as you can, to retain some critical distance and some professional detachment. Try to be optimistic but sceptical without being cynical.

Objectivity is key to doing the casework well. As we all know, problems of tunnel vision, or confirmation bias, in police investigations can and do give rise to wrongful convictions – Sam Hallam is one well publicised example of a phenomenon that we see time and again in CCRC referrals. You need to be acutely aware of the dangers and careful to ensure that it does not affect your innocence project work.

Remain objective, if for no other reason than that the point that eventually gives rise to a referral can come from the least expected quarters. It is a common occurrence for us to make a referral on points never even dreamt of by the applicant or their representatives – Sam Hallam's was one such case. The lesson for us, and one that you may want to bear in mind is this: it may not turn out to be what you thought it was, but it may still be a wrongful conviction. If you are too closely involved in one aspect of a case, you might easily miss another.

Remaining objective will also help you to be resilient and philosophical when you need to be and, unless you have a magic formula for always picking winners, you will need to be.



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At the CCRC it can sometimes be the case that as much, and sometimes more, work goes into a non-referral as goes into a referral. If you engage in a significant amount of casework you will find yourselves investing a lot in cases that do not end the way you wanted. There will be cases for which you have high hopes that fall apart in your hands. You will be lied to and you'll have your trust betrayed. Any experienced criminal lawyer will, I am sure, recognise these experiences so you can at least console yourselves with the fact that you are getting an authentic taste of the job.

For instance:

- *the Formal Memorandum on sexual offence cases sets out, among other things, our approach to running credibility checks on complainants*
- *the formal memo on interviewing explains how we go about deciding whether to interview somebody and...*
- *the memo called "Experts – selection and instruction" explains, perhaps unsurprisingly, how we will go about selecting and instructing expert witnesses.*

PROFESSIONALISM

DR: Really, professionalism amounts to a combination of all of the qualities above exhibited to a high degree. The majority of you who so generously give your free time to working in innocence projects are studying law – presumably, most of you aim to one day be lawyers of one kind or another.

Involvement in an active pro bono project should be able to provide you with some practical experience of the law. Hopefully it will also provide you with an opportunity to demonstrate professionalism with regards to the quality, the timeliness and the focus of your submissions and the pragmatism and objectivity of your approach to the application and to your relationship with the individuals who are effectively your clients.

An important part of being professional when it comes to making an application, is to understand the Commission, our statutory role, the test we are required to apply and our casework processes.

Just as with the section 17 point we made a few moments ago, the information is available to help you to make professional effective applications. Please use the Formal Memoranda on our website. They explain how we work and what you can expect of us in relation to a whole range of casework issues.

A good professional will be aware of these things and will make their submissions to us in light of them. Those applications should be better as a result. They will "work the system to their best advantage" if you want to look at it that way. It is all part and parcel of being professional.

Finally, you may remember that a little earlier we made the point that the answer to the question "What makes a good application" will always depend on the specific fact of the case in question.

Obviously, general observations like those we have made here today can never deal with the specifics of a case. However, we would like to be able to provide some kind of help in that area and so we are from today making available a dedicated advice line for innocence projects and pro bono groups to provide real practical assistance to those of you who are working on cases with a view to making an application to us.

Several experienced CCRC case reviewers have volunteered to take calls from Innocence Projects to discuss the cases you are working on and to offer advice about how they might be progressed. We are aiming this at the students doing the casework in the projects, but anyone within an innocence project can call. We plan to run this phone line for six months initially and we will then evaluate how well used, and how useful it seems to be. We hope you understand that, in the interests of managing the resource implications of such a scheme, we need to be able to con-

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should email a dedicated inbox – the address is:

student@ccrc.gov.uk

– with the name of the convicted person, a brief outline of the case and a couple of suggestions for a time slot for the call. We will then email you back to set up the call. The case reviewers who discuss cases with innocence projects will of course play no further role in the handling of the case should an application arrive.

We hope that this new initiative will be of real practical help to those of you who are aiming to make applications to the Commission. If you want to take part, all you need to do is email that address – student@ccrc.gov.uk – and we send you the details of how the scheme will work.

RS: Well, thank you for listening patiently for so long and so close to lunchtime, we hope it has been of some use.

If you can bear it, we will be taking some questions from the floor, but first we thought that it might be useful to spend a couple of minutes dealing with some of the practical casework questions that we frequently get asked.

Firstly, what constitutes new evidence?

We mentioned earlier the fundamental importance of the “newness” of evidence. We thought it might be helpful to expand a little on what constitutes new evidence or new legal argument.

For the CCRC to be able to refer a case, we need to be able to identify some significant new evidence or new legal argument. Usually this means something that was not covered at trial or on appeal – or in an earlier CCRC application. That might mean something new that was simply not known about earlier like the discovery of a totally new witness or a development in the scientific or medical understanding of an issue. It might be new facts about a witness that potentially undermines their reliability or credibility as mentioned before.

But it can also be something subtler. For instance, we are about to refer a case on a point that has been heard before because we have uncovered more evidence in support of that point. It was a credibility issue in fact. The Court of Appeal had dismissed the point on the basis that the evi-

dence, though admissible, was too weak to persuade them to quash the conviction. Although what we have found is essentially some more of the same, we think that, considered alongside the original material, it does raise a real possibility that the court will quash the conviction on exactly the same point on which they declined to do so once before. Whether they do or not remains to be seen, but this is an example of some new evidence breathing new life into a point that has been considered before and dismissed. It demonstrates that an issue may not necessarily be dead just because it has been argued before – new evidence can bring a point back to life if it makes the case look significantly different now.

It is always worth bearing in mind that new legal argument, rather than new evidence, can contribute to, or give rise to a referral. New legal argument is usually some significant new point of law that has not been made before, such as a complaint that the judge’s summing-up was faulty in some important regard – for instance on the status of recent complaint evidence – was inadequate, or that the prosecution put inadmissible evidence in front of the jury.

We are also often asked about Exceptional Circumstances as regards the kinds of issues that will persuade us to accept a case in spite of the fact that the individual concerned has not exhausted their right to an ordinary appeal.

The Commission was deliberately created as an essentially post- appeal body and unless we can find exceptional circumstances allowing to us do so, we cannot review a case where a person has not at least sought leave to appeal.

It is a significant issue for us – in a typical year, around 40% of all applications to the Commission are made in relation to people who have yet to seek leave to appeal. The figure varies from year to year, but we usually manage to identify exceptional circumstances in between 10 and 15% of those cases and can accept the case, but for the majority we have to advise them to seek an appeal via the courts.

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So what sort of things count as exceptional circumstances? Well, there is no simple definition, but exceptional circumstances basically means that there has to be a very strong argument about why the person did not appeal and why they cannot appeal now. Things like forgetting to appeal, being unaware of your appeal rights or missing the deadline to appeal, will not usually count as exceptional circumstances. In all of those situations, the individual can still ask the court for an appeal even if it is an “out of time” application.

There is no list of what does or does not count as “exceptional circumstances”, but we can offer some examples of what we have accepted in the past. We have agreed on many occasions that there were “exceptional circumstances” where the nature of the issues were such that there was little or no chance that the individual concerned would get access to the information they needed to launch an appeal without our powers to get information and investigate cases. In other cases we have agreed that there are exceptional circumstances when a case looks similar to a tranche of other cases that are under review, and where an applicant’s co-defendant has been or is about to be referred.

There are no automatic “exceptional circumstances”. We look at each case on its merits. So, if you are contemplating an application to us in a case where there has been no prior appeal, you will need to intelligently address the question of “exceptional circumstances”.

Finally, another frequently asked question relates to the circumstances under which we might prioritise a case.

We basically look at cases in the order in which they arrive, but we deal with the cases of people in prison - or out on licence following a life sentence - before those of people who are at liberty.

There can however be special reasons why a particular case should be looked at more urgently. They can be things like concerns about the health of the person applying, a serious illness affecting a potentially important witness, or something affecting how long evidence may last.

If you think your case should be prioritised ahead of others, the time to make your case for prioritisation will usually be after we have written to you to say we will be reviewing the case.

You will find useful memos on each of these subjects, and many more besides, on our web pages at ccrc.gov.uk – please, do make use of them, and please do use the phone line we’re making available and start getting some well thought out and well constructed applications to us.

Now, in the time left before lunch, we will try to answer any other questions you may have.





Innocence Network UK (INUK)

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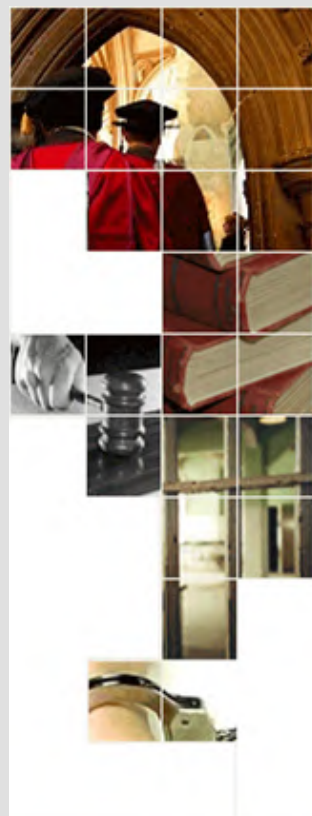
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- 3) Innocence Project News from Members (no more than 250 words)
- 4) Research Updates (no more than 250 words)
- 5) Student articles on any issue relating to wrongful convictions and/or innocence project work (no more than 1,000 words).

Please note: all submissions from students must be from member innocence projects and must be vetted and sent via their staff director.

DEADLINES & SCHEDULES FOR 2014

Next Issue

The next issue will also be in the form of a Special Issue of the full text of Mark Newby's, Solicitor Advocate, Quality Solicitors Jordans, Doncaster, presentation at the INUK Annual Conference 2013.

To keep the debate going, we are interested in articles in response to these special issues for future issues of INQUIRY.

The deadline for the submissions for all of the above categories is Monday 26th May 2014.

INSTRUCTIONS

All submissions and expressions of interest should be sent by e-mail with INQUIRY in the subject line to: innocence-network@bristol.ac.uk

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