



INUK

Innocent

The Criminal Cases Review Commission

House of Commons Home Affairs Select Committee session of 10 October 2006

Issues that should be raised with Professor Graham Zellick

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Summary

The three submitting organisations assist applicants to the CCRC, and so can speak for applicants and identify the problems they encounter. Long and detailed involvement in appeal cases enables the organisations to identify the source of problems and make recommendations for reforms.

1. Submitting organisations

1.1 United Against Injustice

UAI is a national federation of independent voluntary organisations (including INNOCENT) each of which supports the cases of a number of individuals serving prison sentences for serious crimes, who are believed to be wrongly convicted. UAI was formed in 2001. It publishes extensive guidance to CCRC applicants (unitedagainstinjustice.org.uk), which has been viewed by the CCRC (no adverse comments have been received).

1.2 Innocence Network UK

INUK is the coordinating organisation for Innocence Projects (IPs) based in UK universities, in which students investigate the cases of prisoners maintaining innocence. There are currently four established IPs and at least ten more planned.

1.3 INNOCENT

Based in Manchester, INNOCENT was formed in 1993 and by members of families and friends of prisoners believed to be wrongly convicted. It has supported appeal cases and made submissions to the CCRC (innocent.org.uk).

We speak for victims of miscarriages of justice who are applicants to the CCRC, a group of people whose voices are not otherwise heard.

2. Applicants and the CCRC

2.1 Applicants experience the response of the CCRC to their applications as dismissive and hostile, often viewing Statements of Reasons (the CCRC's final response to an application) as reinforcements of the prosecution case. Investigations fail to explore alternative propositions and evidence submitted.

2.2 The CCRC was set up to restore faith in the criminal justice system following a series of high profile miscarriages of justice by demonstrating that errors would be corrected. Its method was to be inquisitorial.

2.3 The adversarial context in which it operates influences the CCRC to assess each item of potential evidence submitted by applicants according to how it would be criticised by the prosecution. Most suggestions as to what evidence might exist and where it might be found are dismissed as invalid and are not then investigated to discover whether there is any substance to them.

2.4 This attitude is reinforced by the under-resourcing of the CCRC. It can only demonstrate its efficiency and effectiveness by aiming for a swift throughput of cases. This does not deal with the original problem of miscarriage of justice, but hides it.

2.5 It is convenient for the CCRC to treat applicants as not in themselves a valid source of information.

2.6 Genuine unresolved cases will not go away, but remain continuing high profile public presences.¹

3. The problems and possible solutions

3.1 The application form offers half a page to applicants to list possible fresh evidence. It gives no guidance for the submission of applications.

3.1.1 The form should be changed.

3.1.2 CCRC should give guidance and meet applicants and their representatives.

3.2 Investigations are office-based and inadequate.

3.2.1 CCRC officers should use s.17 powers fully, inspect all related documents, and physically search for records when non-disclosure is suspected. Site visits should be made and witnesses interviewed.

3.3 Applicants' suggestions and requests are dismissed. Applicants lack resources, and solicitors acting for them rarely conduct investigations to support applications. Applicants do not understand how to explain why the evidence they ask the CCRC to obtain would make a significant difference to their cases.

3.3.1 Investigators should treat applicants' propositions seriously and be proactive in investigating them.

3.4 The CCRC is under-resourced.

3.4.1 Thorough and proactive investigations require more resources. The CCRC's funding should be increased to a level equivalent to that of the Scottish CCRC (from £5m to £8.8m).

3.4.2 Correcting wrongful convictions saves the government money, as well as bringing other significant benefits.²

3.5 The CCRC is unduly and unnecessarily deferent to the Court of Appeal, which is not systematic or consistent in its judgments.³

3.5.1 It should recognise and act on the evidence that the Court of Appeal is often prepared to hear evidence available but not used at trial.⁴

3.5.2 When considering the effect of fresh evidence, it should use only the House of Lords judgment in *Pendleton*, not subsequent confusing comments by appeal judges.

3.5.3 The 'real possibility' test should be decided by assessing case evidence, not by second-guessing appeal outcomes on the basis of the court's previous inconsistent decisions. The SCCRC is not required to apply this test, but rather must assess whether a miscarriage of justice has occurred, and this is much more in line with public expectations of what the CCRC is set up to do. We propose the Criminal Appeals Act should be amended accordingly, and ask the Select Committee to so recommend.

3.5.4 If the CCRC decides not to refer a case despite its knowledge of evidence that indicates the applicant is innocent, because it fears the case would fail the 'real possibility' test, then it is substituting itself for the court and making a decision which ought to be made by a court. It is in danger of breaching article 6 of the European Convention.⁵ If such evidence exists, the CCRC ought to refer the case.

3.6 A more extended briefing paper is available on request [follows this submission].

4. Session of 10 October 2006

4.1 The submitting organisations invite the Select Committee to support the CCRC by demanding more resources for it, and by encouraging it to establish a confident and healthy independence from the Court of Appeal, while changing its attitude towards applicants and investigating cases more proactively and thoroughly.

4.1 The submitting organisations are willing to send a representative to give evidence to the Select Committee and to supply on request further information and evidence in support of this submission.

End notes

¹ <http://news.bbc.co.uk/1/hi/uk/1006201.stm> . See also Richard Nobles and David Schiff, "The CCRC: establishing a workable relationship with the Court of Appeal" in *Criminal Law Review*, March 2005, 178-9. We recommend strongly that members of the Select Committee should read this important article. We can supply copies on request. CCRC chairman Graham Zellick responded to this article, but did not refute its arguments.

² Michael Naughton (2003) "How big is the 'iceberg'? a zemiological approach to quantifying miscarriages of justice", *Radical Statistics 81*, <http://www.radstats.org.uk/essay/naughton.htm>

³ Nobles and Schiff, op.cit.

⁴ Ibid., p.175

⁵ Michael Naughton, "Wrongful Convictions and Innocence Projects in the UK: Help, Hope and Education", *Web Journal of Current Legal Issues* June 2006, http://webjcli.ncl.ac.uk/2006/issue3/naughton3.html#_Toc138141309

Criminal Cases Review Commission reform

1. England and Wales and Scotland are the only places in the world that have institutions for reviewing criminal convictions following appeals. This commitment to rectifying the possible errors of the criminal justice system is something to be proud of.

A major purpose of the CCRC is to enhance public confidence in the criminal justice system.¹ Its establishment followed the report of the Runciman Commission, which in turn was a response to the scandalous miscarriages of justice of the Birmingham Six and other cases in which Irish people had been wrongly convicted of terrorism related offences. Its purpose was to demonstrate that when mistakes occur, they will be detected and rectified. 'Enhancing public confidence in the criminal justice system' has however been interpreted differently by government ministers and possibly the CCRC itself. They give the impression that public confidence in the system will be enhanced if it is shown that it makes no mistakes in the courts. The rejection of the vast majority of applications is used as evidence that very few mistakes are made in the criminal legal process. Since this approach also accords with what appears to be efficiency – the (relatively) swift processing of cases – then it is favoured.

It is unfortunate therefore that the good impression is marred by penny-pinching or false economies.

2. The cost of investigation of a case by the CCRC averages £6277. (This is a crude figure obtained by dividing the cost of running the CCRC in 2004-5, £5,178,590, by the number of cases reviewed during the year. The figure is necessarily imprecise because there is an overlap of incomplete cases between years.) Our argument is that many cases are not adequately investigated. The comparative figure for the SCCRC is £10625 per case (estimated in the same way).

It is very difficult to estimate the actual savings to the State achieved by overturning wrongful convictions, and still more difficult to estimate the potential savings to the State of overturning potential wrongful convictions. For any wrongly imprisoned individual, the cost to the State is about £35,000 a year. Applications to the CCRC appear to be mainly for review of more serious convictions (very few are for summary convictions, and referrals often concern serious crimes, 30 per cent of them murder cases). So applicants are likely to be serving longer terms of imprisonment. Any referral leading to a successful appeal, if it meant that the person concerned were released just one year earlier than would otherwise be the case, would save the State perhaps £15,000, if CCRC expenditure per case were increased to SCCRC levels. (Of course, this would probably be offset by legal and court costs; but then, any free individual is likely to start earning money and paying tax.) It is not unreasonable in economic terms for more resources to be devoted, on average, per case.

3. The social costs of wrongful convictions are extensive.² Miscarriage of justice victims personal lives are disrupted or destroyed. They lose their jobs, homes, and often their families. Families are also victims.

The government's emphasis on protecting and supporting victims of crime should apply equally to the victims of miscarriages of justice.

Convicting the wrong person does not clear up a crime (except according to police records). Perpetrators remain free to commit more crimes, so crime is not reduced.

If a miscarriage of justice is due to the malpractice of officials, that malpractice continues and is even encouraged.

For all these reasons, the CCRC's work, properly carried out, has value in terms that cannot be directly quantifiable in economic terms.

4. The political costs of failing to rectify miscarriages of justice should not be underestimated. People who are wrongly convicted of serious crimes never give up trying to overturn their convictions. High profile cases will continue to cause damage to public confidence in the criminal justice system and to the government's reputation.

Nobles and Schiff (2005: 189) conclude:

Cases like Mills and Poole³ are exceptional, like many of the cases that led to the creation of the CCRC, because they will not go away. They are identified as exceptional through activities that have no necessary legal significance: a libel jury's verdict, a television documentary, newspaper articles, political campaigns, etc. These activities identify cases where actors outside the legal system examine convictions without the Court of Appeal's usual commitments. And they

are cases that can, as the circumstances that led to the creation of the CCRC aptly demonstrate, create enormous political difficulties for the legal system. Part of the CCRC's role is to give the Court of Appeal the opportunity to quash convictions in such cases. Often, they will only be able to do this by relaxing their commitment to jury verdicts and earlier appeal decisions in the hope that the Court of Appeal will do likewise. Undue deference to the Court of Appeal was, after all, the problem that led to the CCRC's creation. Only by straining at the standards of the court, by sending up some cases that are unlikely to be successful, can the CCRC give the court the opportunity to relax its normal resistance to the quashing of convictions or (at least in the case of referrals) the reduction of sentences. And, like the CCU before them, this can be expected on occasions to result in criticism, and even public rebuke, from the Court of Appeal.

5. Our criticisms of the CCRC's work.

a. Poor investigations

i. Failure to obtain records requested by applicants and their representatives.

The criticism arises out of cases INNOCENT has supported by very thorough submissions, explaining why certain documents are (or may be) important and relevant to the case under consideration.

Section 17 of the Criminal Appeal Act 1995 gives the Commission the power to obtain records from any government body in the UK. When it exercise this power, it normally does so by writing to the body holding the records, and it accepts whatever answer officials employed by the body give it. A Commissioner told me that if these officials answer the CCRC by saying records are destroyed or lost, the Commission accepts this answer, however sceptical about its truth the Commission may be. It does not send someone to physically search for records. Of course there are cases in which negligence and malpractice are suspected, and employees of public bodies, especially the police, may have strong motives for concealing records which might support an application to the Commission.

The Commission's policy clearly arises from its lack of resources. Sending a case review manager out to search through files is more costly than simply writing a letter. But this appears unfair to applicants who are certain that records which could help to exonerate them are likely to exist in the files of organisations involved in their cases.

In some cases a case review manager will make assumptions about the content of an undisclosed document and refuse to ask for it. For example, in a murder case, we asked a CRM to obtain medical records relating to the co-accused of an applicant, but the CRM refused to do so, on the grounds that the applicant's trial lawyers had known that these records had existed, and why they could be important, and had not asked for them. The CRM assumed that they would not be admitted by the Court of Appeal, but this is far from certain(see section (d) below). We did not know the content of these records, and we did not necessarily expect them to be disclosed to us or the applicant, but there was a reasonable expectation that they could be of significant assistance to the case of the applicant, and that the Commission should therefore take them into account.

When the Commission does obtain documents not previously seen by applicants, it normally discloses these only when it issues its Final Statement of Reasons – too late for applicants to explore the implications of such records. The Memorandum submitted to the House of Commons Select Committee on Home Affairs by the Criminal Appeal Lawyers Association, p.2, states:

Regrettably the majority [of case workers] work on the basis that what they do should be kept secret from the applicant for reasons that are bewildering.⁴

ii. Failure to visit scenes of crimes

It is presumably also because its resources are limited that the Commission is unwilling to make site visits. In another murder case supported by INNOCENT, we asked the Commission to visit sites at which an abduction was witnessed and at which the victim's body was found, but the Commission has not done so. Our argument was that these visits would show clearly that key prosecution's witnesses' evidence was misleading.

It is particularly important that the Commission follows up every line of investigation relevant to the case now that the Appeal Court, following the Criminal Justice Act 2003,

is no longer required to consider any matter that is not covered by the Commission's Statements of Reasons. Nobles and Schiff say:

This reform ... places greater responsibility on the CCRC to ensure that every relevant issue is referred to the court. In cases the court perceives as finely balanced, quite weak arguments or evidence may tip the balance. At present, the CCRC need only refer substantial issues, leaving the applicants own legal advisers to identify (and be criticised for identifying) peripheral matters that may later prove essential. This reform will also increase the need for successful applicants to become more involved in the process of investigation, so that they may fully understand why particular aspects of their applications did not form part of the reference. At present, one of the major complaints made against the CCRC is the limited ability of applicants' legal advisers to participate in the CCRC's investigation processes (by, for example, suggesting lines of inquiry) prior to a preliminary decision on whether to refer.⁵

b. Fresh evidence – applicants' problems – applications

The Commission can consider both legal argument and evidence not heard by the trial court. All of the cases supported by INNOCENT are fresh evidence cases. They are also cases in which people have been convicted of serious crimes (mostly murders), and so prisoners are serving long sentences.

Such prisoners are frequently unable to provide fresh evidence in support of their applications. At best they can indicate to the Commission where such evidence might be obtained. They are therefore reliant upon the Commission to exercise its powers to the full in investigating their cases. However the CCRC's application form provides no more than a small box in which applicants can attempt to explain their cases and where fresh evidence might be found. We are tempted to regard this as a means by which the Commission can find excuses to limit the work it has to do, and so process cases quickly and give the impression that the organisation is efficient.

We have even seen applications submitted by experienced solicitors which consist of only a few sentences and no covering letter. Many solicitors acting for applicants do not carry out investigations which would support the applications, but look only at records already obtained.

About 30 per cent of applications can therefore be dismissed as ineligible, many because they present no fresh evidence or argument. A further 50 per cent can be reviewed within 90 working days because they require no more than 5 days' work on each of them (CCRC Annual Report 2004-5, p22). So only approximately 20 per cent of applications are given a more thorough review.

The design of the application form and the CCRC's filtering process give the impression that many applications are not from people who have actually been wrongly convicted, and so the problem of wrongful conviction appears less than it is.

c. Fresh evidence – problems created by the CCRC

The CCRC sometimes damages fresh evidence. In one case INNOCENT found a witness who could help establish an alibi for someone wrongly convicted of murder. The case was taken on by a commissioner, who, instead of contacting the witness, contacted his boss. The boss gave misleading information (since his knowledge was merely hearsay) and indicated to his subordinate that they should not become involved in the case.

In the case of Ishtiaq Ahmed⁶, the CCRC informed the Thames Valley Police that a key prosecution witness had retracted her evidence. Police officers involved in the original investigation and against whom a complaint had been made by Ishtiaq Ahmed of falsifying evidence, were informed of what was happening and given the opportunity to contact the main prosecution witness to ensure that she would no longer stand by the retraction. The case was referred, but the appeal judges upheld the conviction, because they decided to believe the witness when she said she stood by her evidence at trial once more.

d. Evidence not used by the defence

Again and again applicants say they are unable to understand why their legal representatives failed to use evidence in their trials which they believed to be important, or failed to follow lines of inquiry which they believe would have produced evidence that

would have supported their cases, and invariably the CCRC respond that the Appeal Court will refuse to hear any evidence that was available at the time of trials or which was known about and could have been obtained by the defence.

Nobles and Schiff say:

[I]n new evidence cases, the court [of Appeal Criminal Division] has decided that its power to hear any evidence "necessary or expedient in the interests of justice" overrides the general restrictions placed upon that power to hear evidence by other parts of s.23 of the 1968 Criminal Appeal Act. Thus, the CCRC has to consider whether the Court of Appeal would be willing to consider evidence that was available at trial but was not used, and even evidence that was inadmissible at trial.⁷

e. Second-guessing the Court of Appeal's decisions

The problem identified in the preceding section is one of several arising from the requirement that the Commission should not refer a case unless "the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made" (Criminal Appeal Act 1995 s.13 (1)(a)).⁸ In other words, the Commission has to calculate what the Court of Appeal is likely to decide in each case.

United Against Injustice argues:

Section 13 of the Criminal Appeals Act states that the CCRC can only refer a case to the appeal court if there is 'a real possibility' that the conviction will not be upheld. The CCRC therefore attempts to work out how the appeal court makes its decisions, and what are the rules by which it operates.

This is not easy because none of the rules are laid out anywhere. They are contained only in its numerous judgements made over many years. Besides, the appeal court is inconsistent. Not only do the rules change over time as the court makes attempts to adapt itself to changing circumstances, but judges in different courts make incompatible decisions.

When lawyers present arguments to the court they have to pretend that the court is consistent in its judgments, or they would be considered to be treating the court with disrespect. You may think that the court does not deserve any respect, but whatever you think, only the Court of Appeal can overturn your conviction, so you have to pretend to respect it, like everyone else.

Fortunately there is a way through this muddle, which is a ruling in the House of Lords in the case of Pendleton 2001. Since this is a ruling by a superior court, the Court of Appeal should follow it strictly. It applies to fresh evidence (Fresh Evidence section in this Guide, below.)

Pendleton requires the court to apply what is known as the jury impact test to fresh evidence. The Lords said in their judgment (paragraph 19), '...it will usually be wise for the Court of Appeal, in a case of any difficulty, to 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.'

The Lords made it clear that the Court of Appeal should not try to put itself in the position of the jury, and make its own assessment of the case as a whole. The appeal court does not hear the witnesses testimony that the jury heard. All they can decide is, if they hear fresh evidence which is admissible and capable of belief, whether that evidence could have made a difference to the jury's decision, if they had heard it. If so, then they must overturn the conviction.

That seems straightforward. But appeal court judges being the kind of people they are, insist on tinkering with this and adding their own modifications. The CCRC watch these developments and try to assess the chances of cases according to them.

We argue that, since the Court of Appeal has a record of inconsistency, and since Pendleton is the ruling of a higher court, the CCRC should stick with this straightforward ruling and ignore other judgments. If you think that the CCRC is refusing to refer your case even though your fresh evidence passes the 'jury impact test', then argue this point with them.⁹

6. Reform proposals

The approach to the CCRC by INNOCENT and United Against Justice is critical but not hostile. We want the CCRC to succeed in reviewing cases as thoroughly and efficiently as possible, and to refer all meritorious cases for appeals. To that end we have published advice on the UAI website¹⁰ the purpose of which is to enable applicants to submit good quality applications to the CCRC. (The CCRC has seen this advice document and has chosen not to refute any of it or comment on any of the criticisms contained in it.)

We note that the SCCRC invests in talks to prisoners, the police and advocates (SCCRC Annual Report 2005-6, p. 21). We would welcome the provision of advice, as full and detailed as possible, by the CCRC to applicants and their representatives. This should result in applications which are easier to process.

We do not know enough about the CCRC's procedures to comment on how they might be made more efficient. We believe that the CCRC should open itself to genuinely independent academic assessment of its efficiency as well as its effectiveness in achieving its goals. This could be done through independently funded research projects which do not draw on the Commission's already overstretched budget.

We believe that the problem of wrongful convictions is greater than is indicated by the relatively small number of successful appeals against conviction, and that this should be acknowledged. The CCRC is not an expensive way of dealing with this problem, and it should be given the funding it needs.

¹ http://www.ccrcc.gov.uk/about/about_27.htm

² See Michael Naughton (2003) "How big is the 'iceberg'? a zemiological approach to quantifying miscarriages of justice", *Radical Statistics 81*, available online at <http://www.radstats.org.uk/essay/naughton.htm>

³ [2001] EWCA Crim 1753

⁴ www.publications.parliament.uk/pa/cm200304/cmselect/cmhaff/289/4012710.htm

⁵ Richard Nobles and David Schiff (2005) "The Criminal Cases Review Commission: establishing a workable relationship with the court of Appeal" in *Criminal Law Review*, March 2005, 178-9. In the following edition of *Criminal Law Review* CCRC chairman Graham Zellick responded to this article, but did not refute its arguments.

⁶ <http://www.innocent.org.uk/cases/ishtiaqahmed.html>

⁷ Nobles and Schiff, p.175

⁸ http://www.opsi.gov.uk/acts/acts1995/Ukpga_19950035_en_3.htm#mdiv13

⁹ <http://www.unitedagainstinjustice.org.uk/advice/CCRC%20applications%20guide.html#cacd>

¹⁰ <http://www.unitedagainstinjustice.org.uk/advice/CCRC%20applications%20guide.html>