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## BUILDING INSTITUTIONS TO ADDRESS MISCARRIAGES OF JUSTICE IN ENGLAND AND WALES: 'MISSION ACCOMPLISHED'?

Carole McCartney\* & Stephanie Roberts\*\*†

### ABSTRACT

*The revelation of miscarriages of justice can lead a criminal justice system to a crisis point, which can be capitalized upon to engineer legal reforms. In England and Wales, these reforms have included the establishment of three bodies: the Court of Criminal Appeal, the Criminal Cases Review Commission, and the Forensic Regulator. With differing remits, these institutions are all intended to address miscarriages of justice. After outlining the genesis of these bodies, we question whether these three institutions are achieving their specific goals. This Article then outlines the benefits accrued from the establishment of these bodies and the controversies that surround their operation. At present, both individually and collectively, these institutions represent a partial solution to miscarriages of justice. However, this Article argues that calls for a greater focus upon "actual" innocence made in light of this partial success are misguided. Such a refocusing may have the unintended consequence of fostering a climate where miscarriages of justice flourish. The rights of all suspects need protection, and due process concerns have the concomitant benefit of protecting the innocent from wrongful conviction. A blinkered approach to "miscarriages" will not necessarily assist the wrongfully convicted and may even increase their number.*

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## I. INTRODUCTION

The aim of any criminal justice system should be to ensure the guilty are convicted and the innocent acquitted, and that this is done in a lawful and just manner. Yet there are a multiplicity of ways in which miscarriages of justice<sup>1</sup> may occur. The criminal justice system in England and Wales, like many other countries, has endured periodic crises upon the revelation of wrongful convictions. Such crises have often resulted in legal reforms. This Article outlines three: (1) the creation of the Court of Criminal Appeal in 1907, (2) the CCRC in 1995, (3) and the Forensic Regulator Unit in 2007. These bodies each have an explicit remit to prevent or correct miscarriages of justice. While England and Wales cannot claim, “mission accomplished” with regard to addressing miscarriages of justice, the creation of these three institutions, with refinement and proper resourcing, deserves appreciation. By examining their genesis and remit, judgments regarding the effectiveness of these institutions can be made, permitting an appraisal of arguments as to whether there should be a greater emphasis on innocence within the appellate process.

A glance at the recent history of criminal justice in England and Wales shows a familiar pattern of crisis and reform. The Court of Criminal Appeal<sup>2</sup> was founded at the start of the twentieth century amid “heated press opinion, high profile individual cases of miscarriages of justice, a Royal Commission, and a public inquiry.”<sup>3</sup> This series of events bears a striking similarity to those culminating in the creation of the Criminal Cases Review Commission (CCRC) after a similar crisis in confidence and a Royal Commission at the end of the twentieth century. The CCRC was not the only progeny of the 1993 Royal Commission on Criminal Justice. Although enduring a much longer and more turbulent gestational period, the office of the Forensic Regulator was also fashioned as a direct response to the same crisis and high profile miscarriages of justice, albeit with a remit aimed at prevention rather than cure.

While the Court of Appeal and CCRC both have enabling legislation that provides a straightforward encapsulation of their mission and

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1. While there remains some residual debate over the nomenclature, this article uses the phrase “wrongful conviction” to indicate the conviction of the factually innocent, and the phrase “miscarriage of justice” to encompass a broader category including those who may be factually guilty but were convicted unlawfully or in contravention of principles of justice. Reforms in England and Wales have always targeted this broader category which is both necessary and in the interests of justice.

2. The Court of Criminal Appeal became the Court of Appeal (Criminal Division) in the Criminal Appeal Act 1966. Therefore, the phrases “Court of Criminal Appeal” and “Court of Appeal” refer to the same court; the term used is dependent on the time period being referred to.

3. RICHARD NOBLES & DAVID SCHIFF, UNDERSTANDING MISCARRIAGES OF JUSTICE 50 (2000).

operation, the Forensic Regulator has no statutory basis, making discernment of powers and responsibilities more problematic. However, all three pose similar problems when it comes to gauging their effectiveness. While the Court of Appeal and CCRC produce statistics, which give an indication of throughput, these are woefully inadequate when measuring their successes in ensuring miscarriages of justice are corrected. The Forensic Regulator Unit not only has a more oblique remit with no relevant statistics produced, it has also been operational for significantly less time, making evaluation more problematic. However, observations over the intentions of the regulator and the tools at its disposal can be determined and its effectiveness at preventing miscarriages of justice postulated. This article will detail the genesis of each institution, outlining its role and operation before considering some of the criticisms aimed at each and evaluating its effectiveness in addressing miscarriages of justice. We start with the oldest institution, the Court of Criminal Appeal.

## II. THE COURT OF CRIMINAL APPEAL

The Court of Criminal Appeal's creation has been described as "the product of one of the longest and hardest fought campaigns in the history of law reform."<sup>4</sup> It took approximately thirty-one Parliamentary bills<sup>5</sup> between 1844 and 1906 before the Court of Criminal Appeal was created, with judges being the most vocal opponents.<sup>6</sup> There are various reports from the period that reveal that the judiciary did not object to their decisions being reviewed in relation to sentences or questions of law, but that they were clearly very hostile to an appeal system based on errors of fact.<sup>7</sup> Official reports generated from various enquiries into alleged wrongful convictions between 1844 and 1906 show that judges were reluctant to accept that innocent people were convicted.<sup>8</sup> This attitude of denial contributed to the delay in setting up the court.<sup>9</sup>

4. JUSTICE COMMITTEE, CRIMINAL APPEALS 6 (1964).

5. This is an approximate figure because different sources suggest different numbers but this is the figure listed in the *Return of Criminal Appeal Bills* (1906) H.L. 201.

6. See ROSEMARY PATTENDEN, *ENGLISH CRIMINAL APPEALS 1844-1994* (1996) at 22-27.

7. The views of the judges can be ascertained in the following reports: COMMISSIONERS ON CRIMINAL LAW, SECOND REPORT ON THE CRIMINAL LAW (1836), CMND 343; COMMISSIONERS ON CRIMINAL LAW, EIGHTH REPORT ON THE CRIMINAL LAW (1845) PARL. PAP, VOL XIV; HOUSE OF LORDS SELECT COMMITTEE, REPORT FROM THE SELECT COMMITTEE OF THE HOUSE OF LORDS ON AN ACT FOR THE FURTHER AMENDMENT OF THE ADMINISTRATION OF THE CRIMINAL LAW (1848) CMND 523; ROYAL COMMISSION ON THE LAW RELATING TO INDICTABLE OFFENCES, REPORT OF THE ROYAL COMMISSION ON THE LAW RELATING TO INDICTABLE OFFENCES (1879), CMND 2345.

8. See SELECT COMMITTEE REPORT (1848) *Id.*: Baron Parke, p.4; Lord Denman CJ, p.44; Lord Brougham, p.49).

9. This view was also shared by the press. THE TIMES, Feb. 2, 1860 ("We believe that in our

Prior to the creation of the Court of Criminal Appeal, the Home Secretary<sup>10</sup> had the power to grant a pardon to those suspected of being wrongly convicted under the prerogative of mercy. It was believed that a Court of Criminal Appeal was then unnecessary as injustice could be rectified via this procedure.<sup>11</sup> The unsatisfactory nature of this process, however, was illustrated by the cases of Adolf Beck and George Edalji.<sup>12</sup> The Home Office rejected sixteen attempts by Adolf Beck, who had been mistaken for the real culprit, to have his convictions for defrauding women in 1896 and 1904 reviewed. Widespread press coverage led to an inquiry after Beck's innocence had finally been confirmed.<sup>13</sup> The case of George Edalji added fuel to the flames. Edalji was wrongly convicted of maiming horses in 1903. He had an alibi and the crimes had continued while he was in prison awaiting trial. Edalji was eventually pardoned after a campaign that included a petition of 10,000 signatures being sent to the Home Office and newspaper articles written by the author Sir Arthur Conan Doyle. These cases and others<sup>14</sup> showed that whilst the pardon power could remedy injustice, an appeal process that allowed for errors of fact to be reviewed was also needed. The Government responded to this mounting pressure by setting up the Court of Criminal Appeal in the Criminal Appeal Act 1907.

Although the Court of Criminal Appeal was established to remedy wrongful convictions of the factually innocent, it has often been opined that it has never fulfilled the function intended for it. Difficulties have stemmed from its function in deciding appeals on factual error grounds where the appellant is arguing he or she did not commit the crime, necessarily forcing the Court of Appeal to trespass on the role of the jury. The difficulty arises when determining how far it is allowed, or should be allowed, to do this. The Court of Appeal has been accused of adopting too restrictive an approach to its role of correcting miscarriages of justice. Three main complaints have been levelled at the court: that too much deference has been shown to the jury verdict;<sup>15</sup> that there has

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Courts of Justice innocent men never are convicted. If at long intervals some singular exception occurs to this universal rule, it is only an exception, which by its extreme rarity proves the rule.”).

10. The Home Secretary is Secretary of State for the Home Department which is a Government Department responsible for some areas of the English and Welsh criminal justice system, notably the police. The other Government Department with responsibility for law and order is the Ministry of Justice.

11. PATTENDEN, *supra* note 6, chapter one.

12. For details of Beck and Edalji, see C.H. ROLPH, *THE QUEEN'S PARDON* 36 (1978); PATTENDEN, *supra* note 6, at 27–30.

13. BECK INQUIRY, REPORT OF THE COMMITTEE OF INQUIRY INTO THE CASE OF ADOLF BECK (1904) CMND 2315.

14. See PATTENDEN, *supra* note 6 at 30 n.215 for other examples.

15. See R.E. ROSS, *THE COURT OF CRIMINAL APPEAL* (1911); D. Seaborne Davies, *The Court of Criminal Appeal: The First Forty Years*, 1 J. SOC'Y PUB. TCHRS. L. 425 (1951); MICHAEL KNIGHT

been undue reverence to the principle of finality,<sup>16</sup> and that the court is motivated by the fear that “opening the floodgates” to a deluge of appellants would see the court flounder, ensnared by tight resource and budgetary constrictions.<sup>17</sup> These factors have undoubtedly had an influence on the Court’s working practices and were fundamental in establishing the Court as one of *review* rather than *rehearing*. This has led to problems, particularly for those pleading factual innocence.

Leave<sup>18</sup> of the Court is generally required to appeal, the test being whether the appeal is *reasonably arguable*.<sup>19</sup> As Spencer has noted, this is “a process which lends itself quite well to the detection of procedural and legal errors, but much less well to dealing with the problem that the trial court, without breaking any of the rules, just reached the wrong result.”<sup>20</sup> Whilst the appeal judge may be able to determine from the transcript of the summing up whether the trial judge was biased, or whether he misdirected the jury on the law, determining whether the appellant is factually innocent requires more investigation. As the judge reviews the case on paper and usually does so in his evenings and weekends, carrying out his normal judicial functions during the day, there is the potential for many miscarriages of justice to be missed. This process means that very few appeals get through the leave filter and only a small fraction of those that do are appeals based on factual innocence.

The Court suffers from a lack of resources, which is why the leave filter is important as the only control the Court has over the number of cases appearing before it. Spencer has cited the heavy workload of the Court as the main reason for its problems in determining factual innocence appeals. He states:

This institutional overcrowding . . . is the reason, of course, that defendants who are convicted in the Crown Court need leave in order to

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CRIMINAL APPEALS (1970); K. Malleon, *Review of the Appeal Process*, RCCJ Research Study No. 17 (1993); TUCKER COMMITTEE, REPORT OF THE DEPARTMENTAL COMMITTEE ON NEW TRIALS IN CRIMINAL CASES (1954), CMND 9150; JUSTICE COMMITTEE, *supra* note 4; DONOVAN COMMITTEE, REPORT OF THE INTERDEPARTMENTAL COMMITTEE ON THE COURT OF CRIMINAL APPEAL (1965) CMND 2755 [hereinafter DONOVAN COMMITTEE REPORT]; RUNCIMAN ROYAL COMMISSION ON CRIMINAL JUSTICE CHAPTER TEN (1993) CMND 2263 [hereinafter RCCJ].

16. See K. Malleon, *Appeals Against Conviction and the Principle of Finality*, J.L.S. 151 (1994); PATTENDEN, *supra* note 6 73–74; BOB WOFFINDEN, MISCARRIAGES OF JUSTICE 322 (1987); P. Hill, *Finding Finality*, 146 NEW L.J. 1552 (1996).

17. See RCCJ, *supra* note 15, at 162–78; J.R. Spencer, *Does Our Present Criminal Appeal System Make Sense?* CRIM. L. REV. 677 (2006).

18. A legal term generally translating as “permission.”

19. Lord Justice Auld, Review of the Criminal Courts, chapter 12, ¶ 73 (2001). Available at <http://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts-review.org.uk/> (last accessed 30 November 2012). This process is usually conducted by reading a transcript of the judge’s summing up, along with Counsel’s advice on appeal, copies of the trial documents, a list of witnesses and the indictment and record sheet.

20. Spencer, *supra* note 17 at 684.

appeal. And it is the reason why the Criminal Division of the Court of Appeal, like the Court of Criminal Appeal before it, has always done its best to avoid getting involved in appeals that turn on disputed facts, and particularly those that require the hearing of witnesses: one of the consequences of which is that the defendant is in a weak position to appeal where he was wrongly convicted (as against convicted in proceedings vitiated by an error of procedure or of substantive law). Appeals on the basis of “I simply didn’t do it!” are particularly time consuming, and if the Court of Appeal were obliged to handle anything but a trivial number of them, this would seriously retard the task of dealing with appeals against sentence: a task that must be given high priority, if the court is to hear the appeal before the sentence is served.<sup>21</sup>

The problem of resources has been a recurring issue and impacts on the working practices of the Court, as it does on all parts of the criminal justice system. But it is not just a heavy workload that causes problems; the Court’s review function also causes difficulties for the factually innocent. This function was summed up by Blom-Cooper, who stated that “[t]he Court of Appeal cannot substitute itself for the jury and re-try the case. That is not its function. It must oversee the fairness of the trial and satisfy itself that there was evidence on which the jury could properly convict.”<sup>22</sup> If the Court’s role is merely to assess the fairness of the trial and whether the prosecution had satisfied the burden of proof and the jury was able to convict, it is very difficult for injustice to be rectified. It precludes the Court from delving too deeply into factual issues and the merits of a case. The difficulties the review function has caused can be illustrated by those appeals that are based on factual error grounds where, at its most simplistic level, the appellant is arguing he or she did not commit the crime. These are generally the “lurking doubt” and fresh evidence grounds of appeal.

The Criminal Appeal Act 1907 gave the Court wide powers to quash a conviction where the verdict was unreasonable or could not be supported by the evidence. The approach the Court adopted can be illustrated by the case of *R v McGrath*.<sup>23</sup> The then Lord Chief Justice, Lord Goddard summed up the attitude of the Court when he said the Court was:

[F]requently asked to reverse verdicts in cases in which a jury has rejected an alibi, but this court cannot interfere in those cases in the ordinary way, because to do so would be to usurp the function of the jury. Where there is evidence on which a jury can act and there has been a

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21. *Id.* at 693.

22. LOUIS BLOM-COOPER, *THE BIRMINGHAM SIX AND OTHER CASES: VICTIMS OF CIRCUMSTANCE* 8–9 (1st ed. 1997).

23. *R v. McGrath*, (1949) 2 All ER 495.

proper direction to the jury this court cannot substitute itself for the jury and re-try the case. That is not our function.<sup>24</sup>

This approach was perceived to be a restrictive one and an illustration of deference to the jury verdict. As a result, the Donovan Committee, set up to review the Court's working practices, recommended in 1966 that "the verdict . . . was unreasonable and contrary to the weight of the evidence" ground should be replaced by giving the Court the power to allow an appeal where the verdict is "unsafe or unsatisfactory."<sup>25</sup> The Committee felt that the advantages to be gained by this change were that the safeguards for an innocent person wrongfully convicted would be increased.<sup>26</sup> This change was enacted in the Criminal Appeal Act 1966 and consolidated in the Criminal Appeal Act 1968.

The aim of Parliament in enacting the unsafe and unsatisfactory ground was to impose on the Court a duty to form its own opinion about the correctness of a conviction, notwithstanding the fact that no criticism could be made of the conduct of the trial. The Court appeared to do this shortly after the enactment of the 1968 Act in the case of *R v Cooper*,<sup>27</sup> which created the lurking doubt ground of appeal. This requires the Court to form its own subjective opinion about the evidence in the case. Lord Widgery stated:

[I]n cases of this kind the Court must ask itself a subjective question, whether we are content to let the matter stand as it is, or 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.<sup>28</sup>

Despite the enactment of the unsafe and unsatisfactory ground and Lord Widgery's seemingly liberal interpretation of it, the review function continues to hamper the criminal division's approach in those appeals where there is no procedural or legal irregularity and no fresh evidence. Malleson's study<sup>29</sup> of the first 300 appeals of 1990 revealed that the principle of lurking doubt was directly or indirectly raised in 10 of the 281 appeals that were finally decided. She concluded that the Court appears to regard the principle as a last resort for those cases where no criticism can be made of the trial, yet concern about the justice of the conviction still lingers.

Malleson's research was carried out for the Royal Commission on

24. *Id.* at 496.

25. DONOVAN COMMITTEE REPORT, *supra* note 15, at ¶ 150.

26. *Id.*

27. *R v. Cooper*, (1969) 1 Q.B. 267.

28. *Id.* at 271.

29. Malleson, *supra* note 15.



Criminal Justice (RCCJ), which was established on the day the Birmingham Six were freed<sup>30</sup> and it proposed reforms to the appeal process with the aim of restoring public confidence. The Commission discussed the lurking doubt ground and stated that they “fully appreciate[d] the reluctance felt by judges sitting in the Court of Appeal about quashing a jury’s verdict” as “the jury has seen all the witnesses and heard their evidence; the Court of Appeal has not.”<sup>31</sup> The majority recommended that there should be a single ground of appeal which was whether a conviction “is or may be unsafe.” The Government rejected the words “or may be” preferring the test to be simply “is unsafe” which was enacted in the Criminal Appeal Act 1995.<sup>32</sup> In their response to the RCCJ, the Government stated that the concept of lurking doubt was incorporated into the unsafe ground.<sup>33</sup> This was confirmed by an update of Malleon’s research by Roberts using the first 300 appeals of 2002 which revealed that the principle of lurking doubt was referred to directly or indirectly in seven of the 300 appeals with one allowed and six dismissed or refused.<sup>34</sup> Therefore, although lurking doubt has arguably been incorporated into “unsafe,” the position under the Criminal Appeal Act 1995 is not markedly different to that under the Criminal Appeal Act 1968 with the Court continuing to adopt a restrictive approach to these appeals despite the recommendations of the RCCJ.

Although the general consensus has been that the reluctance of the judges to usurp the role of the jury has inhibited their use of the lurking doubt ground of appeal, the RCCJ report highlighted the deficiencies of the Court’s review function. This was illustrated by the late, former Court of Appeal judge Sir Frederick Lawton, who stated:

The court does not re-try cases . . . . It has to proceed on the basis that findings of fact implicit in the jury’s verdict are the facts of the case. It can only disregard them if there is new evidence, or the findings of the jury were perverse, or the court has a lurking doubt. Reading a transcript of evidence is not conducive to raising a lurking doubt.<sup>35</sup>

This explains why very few lurking doubt appeals manage to get

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30. This case and the RCCJ report are discussed *infra*.

31. RCCJ, *supra* note 15, at 171–72 ¶ 46.

32. This is the current test the Court has to quash convictions. Section 2(1) of the Criminal Appeal Act 1995 states that the Court of Appeal (a) “shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case.”

33. LORD CHANCELLOR’S DEP’T, ROYAL COMMISSION ON CRIMINAL JUSTICE: FINAL GOVERNMENT RESPONSE (1996).

34. S. Roberts, *The Royal Commission on Criminal Justice and Factual Innocence: Remedying Wrongful Convictions in the Court of Appeal*, 1 JUST. J. 86 (2004).

35. Frederick Lawton, *Judgments Without Prejudice*, THE TIMES, Oct. 23, 1990.

through the leave filter and why they are generally unsuccessful,<sup>36</sup> thus curtailing the opportunities for those who are factually innocent to overturn their convictions.

Although it may have been the intention of Parliament that the Court of Criminal Appeal would take an active role in reassessing evidence, giving the Court wide powers under section 9 of the Criminal Appeal Act 1907 to adduce fresh evidence, the Court imposed its own restrictions: the evidence had to be credible and relevant to the issue of guilt; the evidence had to be admissible; and the evidence could not have been put before the jury.<sup>37</sup> Whilst these criteria were partly due to deference to the jury verdict and the principle of finality, the third restriction directly relates to the review function. In 1966, the Donovan Committee acknowledged that if fresh evidence were admitted, there would be a risk that the Court would on occasions find itself retrying a case, which was “a function which Parliament did not intend it to discharge.”<sup>38</sup> The Committee recommended that additional evidence should be received if it was relevant and credible, and if there was a reasonable explanation for the failure to place it before the jury.<sup>39</sup> These recommendations were the subject of a late amendment to the Criminal Appeal Act 1966 which then became Section 23 of the Criminal Appeal Act 1968. The RCCJ also heard evidence from a variety of witnesses about problems relating to fresh evidence appeals and made various recommendations later incorporated into Section 23 of the Criminal Appeal Act 1968 by Section 4 of the Criminal Appeal Act 1995.

The Court now has the power to hear fresh evidence where this is “necessary or expedient in the interests of justice”<sup>40</sup> and must have regard to four factors: (a) whether the evidence appears to the Court to be “capable of belief;” (b) “whether . . . the evidence may afford any ground for allowing the appeal;” (c) whether the evidence would have been admissible in the lower court on an issue which is the subject of the appeal; and (d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.<sup>41</sup> There is evidence to suggest, however, that the Court’s attitude towards fresh evidence appeals since the Criminal Appeal Act 1995 remains unchanged.<sup>42</sup>

36. For a further discussion on the problems of lurking doubt appeals specifically, see L. Leigh, *Lurking Doubt and the Safety of Convictions*, CRIM. L. REV. 809 (2006) L. James, *Criminal Appeals and the Lurking Doubt* 154(49) J.P. 780 (1990).

37. These principles from the early cases are summed up in *R v. Parks*, (1961) 1 W.L.R. 1484.

38. DONOVAN COMMITTEE REPORT, *supra* note 15, ¶ 132.

39. *Id.* ¶ 136.

40. Criminal Appeal Act, 1968, c. 19, § 23 (U.K.).

41. Criminal Appeal Act, 1968, c. 19, § 23(2) (U.K.), as amended by Criminal Appeal Act, 1995, c. 35, § 4 (U.K.).

42. See Roberts, *supra* note 34.

Fresh evidence appeals illustrate the complexity of the relationship between the Court and the jury. The Court defers to the jury verdict because an appeal is not a rehearing of witnesses (the jury is meant to be in a better position to draw inferences regarding witness testimony than the Court of Appeal), and the task of deciding whether a defendant is factually guilty is legally given to the jury. The review function also hampers the Court of Appeal from assessing fresh evidence as the Court is assessing whether the jury *could* have convicted and not whether it *should* have convicted. Yet the Court of Appeal's deference to the jury verdict is difficult to comprehend in fresh evidence appeals, because the Court is deciding on evidence never put before a jury. How should it then decide on guilt when this is not within its defined role? A lack of clarity on this issue compounds the difficulties that face the factually innocent and explains why so few fresh evidence appeals are brought before the Court and why so few are successful, forcing the innocent to frame their appeals in technicalities or procedural irregularities.

The resulting emphasis on procedural and technical appeals does assist those factually innocent appellants who have such irregularities or "due process" failures in their case. Due process arguments thus have an important role to play in providing factually innocent appellants with grounds of appeal. The problem arises when factually innocent appellants do not have due process failures to argue or when these arguments are unsuccessful in gaining relief. Such appellants are then forced to negotiate the flaws of fresh evidence appeals or locate a new procedural irregularity to try again. This is not an easy task even though the creation of the CCRC was heralded as the "solution" to such issues. This body was intended to have the power and resources to undertake investigations and possibly locate new facts (admissible fresh evidence) or shed new light on previously argued facts, capabilities that the Court of Appeal does not have. These capabilities, however, have meant that the relationship between the Court of Appeal and the CCRC has proved to be difficult, as those cases sent to the Court of Appeal via the CCRC can accentuate the very difficulties that the Court of Appeal has in handling fresh evidence appeals. The CCRC itself has also been subject of criticism in relation to its ability to deal with factually innocent appellants, particularly because the origins of the CCRC also lay in crisis following the revelation of a series of high profile wrongful convictions.

### III. THE CRIMINAL CASES REVIEW COMMISSION

The origins of the CCRC lay in continued failures of Home Secretaries to use their powers wisely as well as frustrations with the

remit and operation of the Court of Appeal. The Home Secretary was given an additional power by Section 19 of the Criminal Appeal Act 1907 to refer a case back to the Court of Appeal for determination of the prerogative of mercy. The Criminal Justice Act 1948,<sup>43</sup> however, severed the link between the referral power and the prerogative of mercy, which left the Home Secretary with the power to grant a pardon or to refer a case to the Court of Appeal for determination. The Home Secretary also had the option of commissioning an inquiry into a case, which was carried out independently from the Court. Section 19 of the 1907 Act became Section 17 of the Criminal Appeal Act 1968, allowing the Home Secretary to refer a case to the Court “if he thinks fit.”

The problems associated with this process were highlighted in 1975 when the then Home Secretary Roy Jenkins referred the *Lattimore*<sup>44</sup> case back to the Court of Appeal. This was the first of a number of cases during the 1970s where the appellants were believed innocent. Three young boys, Colin Lattimore, Ahmet Salih, and Ronnie Leighton, were convicted of crimes leading to the death of Maxwell Confait, and after leave to appeal was refused, a campaign was launched on their behalf.<sup>45</sup> Their convictions were subsequently overturned and an inquiry into the case found serious police malpractice during the investigation.<sup>46</sup> The publicity surrounding this case contributed to calls for a Royal Commission on Criminal Procedure (RCCP), which made a subsequent legislative recommendation to codify police powers, leading to the Police and Criminal Evidence Act 1984.

During the 1970s there was also hostility to references by the Home Secretary to the Court of Appeal, illustrated by the notorious case of *Cooper and McMahon*.<sup>47</sup> Cooper, McMahon, and another man Murphy were convicted of murder. The case went to appeal in February 1971 and was dismissed. The case was referred back to the Court, and in November 1973 Murphy’s conviction was quashed. Home Secretary Roy Jenkins then referred the case of Cooper and McMahon back to the Court in 1974, and the case was rejected. After public disquiet and media concern escalated, the case was referred back to the Court again in 1976, and failed, while a fifth referral to the Court was rejected by Lord Widgery. A month after publication of a book on the case by Ludovic Kennedy, the Home Secretary William Whitelaw remitted

43. Criminal Justice Act, 1948, 11 & 12 Geo. 6, c. 49, § 38(6) (U.K.).

44. *R v. Lattimore*, (1976) 62 Cr. App. R. 53 (U.K.).

45. See CHRISTOPHER PRICE & JONATHAN CAPLAN, *THE CONFAIT CONFESSIONS* (1977).

46. HENRY FISHER, *REPORT OF AN INQUIRY BY THE HONOURABLE SIR HENRY FISHER INTO THE CIRCUMSTANCES LEADING TO THE TRIAL OF THREE PERSONS ON CHARGES ARISING OUT OF THE DEATH OF MAXWELL CONFAIT AND THE FIRE AT 27 DOGGETT ROAD, LONDON SE6* (1977).

47. WOFFINDEN, *supra* note 16.

Cooper and McMahon's sentences, and they were released from prison. However, the case was referred back to the Court of Appeal for the sixth time in 2003; the convictions were finally quashed, but by then both had died.<sup>48</sup>

The cases of Laszlo Virag and Luke Dougherty also raised concerns. In 1974, a free pardon had been given to Virag, and Dougherty's conviction had been quashed by the Court of Appeal. The Home Secretary announced in the House of Commons that, in view of the serious questions raised by these two cases, he had appointed a committee, headed by Lord Devlin, to look into the law and Home Office procedures. The report, published in 1976,<sup>49</sup> was highly critical of the Home Office's practices in the Virag case, which had meant a two-year delay in his release because of the "serious misjudgment of the importance of the case by the officer who first dealt with it, coupled with the fact that officers in the Division were under exceptional pressures due to staff shortages."<sup>50</sup>

There continued to be disquiet about Home Office procedures into the 1980s. A series of television programmes about wrongful convictions were broadcast on the BBC in April 1982, featuring individuals who had petitioned the Home Office for referral to the Court of Appeal. These BBC programmes, entitled *Rough Justice*, provoked a great deal of interest, including from the House of Commons Home Affairs Committee.<sup>51</sup> The Committee heard oral evidence concerning these cases and others from Home Office officials, representatives of the human rights organisation JUSTICE, and the Criminal Bar Association (CBA). The Home Affairs Committee subsequently reported that both JUSTICE and the CBA had suggested that the chances of a successful petition to the Home Secretary might sometimes depend less on the intrinsic merits of the case than on the amount of external support and publicity it was able to attract. The report referred to Lord Devlin's proposal in 1976 for an independent review tribunal, stating that the proposal had been rejected by the Home Office on the grounds that the existence of a body would have detracted from the Home Secretary's freedom to reach decisions and that it would in practice operate as "another court above the Court of Appeal."<sup>52</sup>

Meanwhile, the Court of Appeal continued to be hostile to Home

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48. *R v. Cooper* [2003] EWCA Crim 2257.

49. DEVLIN COMMITTEE, REPORT OF THE DEPARTMENTAL COMMITTEE ON EVIDENCE OF IDENTIFICATION IN CRIMINAL CASES (1976) HC 338.

50. *Id.* ¶ 6.17.

51. HOUSE OF COMMONS HOME AFFAIRS COMMITTEE, SIXTH REPORT, MISCARRIAGES OF JUSTICE, (1981-82) HC 421.

52. *Id.* ¶ 12.

Secretary references, and calls persisted for an independent review tribunal. On June 16, 1988, a motion was debated in the House of Commons to establish an independent review body, but it lost by 121 votes to 45.<sup>53</sup> The real catalyst for change proved to be the cases of the Guildford Four and the Birmingham Six.

The “Guildford Four,” wrongly believed to be members of the Irish Republican Army (IRA), had been convicted of the murders of five people in 1975 who died in the Guildford and Woolwich pub bombings. Their first appeal just two years later was heard after convicted IRA terrorists confessed to carrying out the pub bombings. This appeal failed. The case garnered a great deal of public interest, featuring in a number of books and television programmes, and the Home Secretary referred their case back to the Court of Appeal in 1989 after a persuasive campaign by a number of Members of Parliament, House of Lords peers, and two former Law Lords, Devlin and Scarman. New evidence showed confession evidence had been fabricated, and the Director of Public Prosecutions stated that the Crown no longer wished to maintain the convictions.<sup>54</sup> The Court of Appeal consequently quashed the convictions. The “Birmingham Six” were also believed to be part of the IRA and were similarly convicted of murder in 1975, this time for the Birmingham pub bombings. They had two failed appeals in 1976 and 1988, and as a result of public pressure surrounding this and the Guildford Four case, the Home Secretary referred the case to appeal in 1991. The Director of Public Prosecutions again stated that the Crown no longer wished to maintain the convictions, but the Court of Appeal heard the appeal in full. After hearing evidence that confessions had been tampered with and that there were serious flaws in the forensic evidence, the Court quashed the convictions.<sup>55</sup>

A number of other “Irish terrorism” convictions were overturned at this time, including those of the “Maguire Seven.” The Home Secretary referred this case to appeal in 1990, and the convictions were overturned largely on the basis of nondisclosure of evidence and the discrediting of forensic evidence. They had all served their sentences by this time and one of them, Giuseppe Conlon, father of Gerard Conlon, who himself was one of the Guildford Four, had died.<sup>56</sup> The conviction of Judith

53. B. Woffinden, *The Independent Review Tribunal*, NEW L.J. 1108–09 (1989).

54. See WOFFINDEN, *supra* note 16; GERRY CONLON, *PROVED INNOCENT: THE STORY OF GERRY CONLON OF THE GUILDFORD FOUR* (1990); PAUL HILL & RONAN BENNETT, *STOLEN YEARS: BEFORE AND AFTER GUILDFORD* (1990); Clive Walker, *Miscarriages of Justice in Principle and Practice*, in *MISCARRIAGES OF JUSTICE: A REVIEW OF JUSTICE IN ERROR* 31 (Clive Walker & Keir Starmer eds., 1999); NOBLES & SCHIFF, *supra* note 3.; PATTENDEN, *supra* note 6.

55. See BLOM-COOPER, *supra* note 22; WOFFINDEN, *supra* note 16; CHRIS MULLIN, *ERROR OF JUDGMENT: THE BIRMINGHAM BOMBINGS* (1986).

56. See ANNIE MAGUIRE & JIM GALLAGHER, *WHY ME?* (1994).

Ward, who had been tried in 1974 for the twelve deaths resulting from the bombing of a British Army coach, was also overturned in 1992 after forensic evidence was discredited and a large amount of material never disclosed to the defence was discovered. Her confessions were also deemed unreliable due to mental incapacity.<sup>57</sup>

The case of the Guildford Four led to an inquiry by Lord Justice May.<sup>58</sup> Such an inquiry was time-consuming (taking four and a half years), expensive, and of course hugely embarrassing to the government and law enforcement authorities. The government clearly did not desire a thorough inquiry, then, into each further miscarriage of justice as they came to light, so the Birmingham Six and Judith Ward cases were never examined in any depth. Although a Royal Commission on Criminal Justice (RCCJ), chaired by Lord Runciman, was announced as a direct response, the Commission did not confine itself to the issues set out in the terms of reference and instead took an expansive view of their remit, extending almost to the entire criminal process.<sup>59</sup> As previously discussed, the RCCJ reporting in 1993, recommended changing the Court of Appeal's powers to quash convictions and amending the fresh evidence provisions in Section 23 of the Criminal Appeal Act 1968. The major change however, was the recommendation that a new body should be created to consider alleged miscarriages of justice, to supervise their investigation if further inquiries are needed, and to refer cases to the Court of Appeal. The CCRC was subsequently created in the Criminal Appeal Act 1995 and began work on April 1, 1997.

The principal reason for establishing a new body was the need for decisions to be made independently of the executive. To ensure this, the Criminal Appeal Act provides that the CCRC "shall not be regarded as the servant or agent of the Crown."<sup>60</sup> However, the Commission's connection with the Government is not completely severed, as the Commissioners are appointed by the Queen on the recommendation of the Prime Minister.<sup>61</sup> One-third of the Commissioners must be legally qualified<sup>62</sup> and at least two thirds of the members of the Commission "shall be persons who appear to the Prime Minister to have knowledge or experience of any aspect of the criminal justice system."<sup>63</sup> The Commission is also reliant upon the Ministry of Justice for resources

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57. See JUDITH WARD, *AMBUSHED* (1993).

58. SIR JOHN MAY, REPORT OF THE INQUIRY INTO THE CIRCUMSTANCES SURROUNDING THE CONVICTIONS ARISING OUT OF THE BOMB ATTACKS IN GUILDFORD AND WOOLWICH IN 1974 (1990) H.C. 556.

59. RCCJ, *supra* note 15, at 162–78.

60. Criminal Appeal Act, 1995, c. 35, § 8(2) (U.K.).

61. *Id.* § 8(4) (U.K.).

62. *Id.* § 8(5) (U.K.).

63. *Id.* § 8(6) (U.K.).

and the Ministry sets the terms and conditions of the Commission members' employment.

Under the Criminal Appeal Act, the Commission has the power to require an "appropriate person" from the public body that carried out the original investigation to appoint an investigating officer to carry out inquiries.<sup>64</sup> Where the public body was a police force, the appropriate person will be the Chief Constable of that force.<sup>65</sup> This has proved controversial. Malet has argued that the Act takes a very trusting attitude towards the police by leaving the police to examine their own failings.<sup>66</sup> A related problem is that the police must finance the cost of the reinvestigation. The majority of investigations and case reviews are undertaken by CCRC Case Review Managers, who write a report and make a recommendation that is sent to Commissioners to review. If the case is to be rejected (i.e., not sent for a further appeal), then a Commissioner alone can review the report and decide. A panel of three Commissioners is required to decide that the case should be referred back to the Court of Appeal.

Eligibility for review depends on whether the application arises from a conviction in England, Wales, or Northern Ireland. Only in exceptional circumstances can a case be referred without the applicant having exhausted the normal appeals process. To refer a case to the Court of Appeal, the Commission is given statutory guidance under Section 13, which states that there must be a "real possibility" arising from an argument or evidence that was not raised during the trial or at appeal, or from "exceptional circumstances,"<sup>67</sup> that the conviction or sentence would not be upheld.<sup>68</sup> The exceptional circumstances, a late insertion after a lengthy campaign, remain defined on a case-by-case basis. These statutory provisions appear more restrictive than the power the Home Secretary had to refer cases "if he thinks fit." It is difficult to define what *real possibility* means but the late Supreme Court judge, Lord Bingham, stated that a real possibility "plainly denotes a contingency which, in the Commission's judgment, is more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty."<sup>69</sup>

While the CCRC is widely accepted to be an improvement on the

64. *Id.* § 19(1) (U.K.).

65. Criminal Appeal Act, 1995, c. 35, § 22(4) (U.K.).

66. D. Malet, *The New Regime for the Correction of Miscarriages of Justice*, Part 2 159(44) J.P. 735 (1995) at 736.

67. Criminal Appeal Act, 1995, c. 35 (U.K.).

68. *Id.* at 13(1)(a), (b) (U.K.); Criminal Appeal Act 1995, 1995, c. 35, § 13(2), (U.K.) (explaining that the Commission may require the Chief Constable to appoint the investigating officer from his own force or another.).

69. *R v. CCRC Ex Parte Pearson*, (2000) 1 Cr. App. R. 141, 149.



Home Secretary's reference procedure, there are major difficulties in assessing its performance. The Commission receives 800 to 1000 applications annually and refers around 4 percent of completed cases to appeal. It is argued that a 4 percent referral rate is too low, but it remains problematic to state that more cases *should* be referred without examining them in more detail; it is also difficult to provide anything more than anecdotal evidence, emanating from those who have been rejected, that more cases should be referred back to appeal. It is clear that the Commission is referring far more cases than the Home Office, which referred 67 cases between 1980 and 1993,<sup>70</sup> but this is to be expected given the increased budget and manpower. If the Commission's referral rate were not significantly better than the Home Office, then serious questions would have to be asked about its competence. In crude statistical terms, Nobles and Schiff calculated that in 2006–2007, the Commission made a contribution of 0.058 percent to the total successful appeals against conviction and sentence.<sup>71</sup> If using these figures to measure the Commission's contribution to remedying wrongful convictions and sentences, the contribution appears insignificant.

The Commission's "success" rate at the Court of Appeal has also been the subject of controversy. As of May 2013, there were 528 CCRC referrals to the Court of Appeal, and 498 had been heard. Of those, 341 had been quashed and 145 had been upheld.<sup>72</sup> This represents a success rate of 60.8 percent of those appeals heard by the Court (341/528). When calculated in terms of cases that have been closed (15,199), the Commission has won a further appeal in just over 2 percent of eligible cases. The difficulty for the Commission is if the success rate at appeal is too high, it appears that the Commission has set a prohibitive threshold for referral by sending only those certain to win. However, if the successful appeal rate is too low, then it appears that the Commission is sending weak cases with little chance of success, irritating the Court of Appeal. This balancing act was outlined in a memorandum to the House of Commons Justice Committee:

The Commission has accordingly had to tread a careful line between not, automatically, referring all but the most threadbare cases (so as not to

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70. PATTENDEN, *supra* note 6.

71. Richard Nobles & David Schiff, *After Ten Years: An Investment in Justice?* in THE CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT 151, 152–53 (Michael Naughton ed., 2010). This figure is based on 33 referrals which succeeded at the Court of Appeal out of 2000 successful appeals against conviction and sentence. The 0.058 per cent figure is the total successful Commission referrals (33) out of 57,000 people found guilty and sentenced in the Crown Court.

72. See the CRIM. CASES REV. COMM'N *Case Library* which is available on the Ministry of Justice website at <http://www.justice.gov.uk/about/criminal-cases-review-commission/case-library> (last accessed 27 June 2013).

burden the courts with a mass of hopeless appeals) and not being so cautious as to refer only those cases where it judges the applicants prospect of success on appeal is more or less assured.<sup>73</sup>

There are other areas where the Commission has been criticised and these criticisms can be divided into two broad areas. The first is its working practices and backlog of cases; the second is its lack of focus on those who are factually innocent.

Since the Commission's inception, it has been besieged by problems of funding, delays, and backlogs.<sup>74</sup> Initially, the Commission was a victim of its own success as large numbers applied; additionally, 279 cases were transferred from the Home Office, which were prioritised by the Commission. The First Report of the Home Affairs Select Committee in 1998–1999, which scrutinised the work of the Commission, reported that there was a two-year delay before cases were reviewed.<sup>75</sup> As a result of this backlog, the Commission was given an enlarged budget of £1.28 million to increase the number of Case Review Managers from twenty-eight to forty during 1999–2000 and to fifty during 2000–2001. The move proved to have an impact on cases awaiting review, which dropped from 1,208 in May 1999 to 211 by March 31, 2004.<sup>76</sup> However, the Commission's funding was reduced from £7.8 million in 2004 to £5.75 million in 2005, which coincided with the largest increase in applications for five years. This prompted the then Chairman Professor Graham Zellick to report in the 2005–2006 Annual Report that due to budget restraints, backlogs and waiting times had increased.<sup>77</sup>

73. See CRIMINAL CASES REVIEW COMM'N, MEMORANDUM, 2009, H.C. 343 (U.K.), available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/343/9031004.htm> (last accessed 28 November 2012).

74. See A. James, N. Taylor & C. Walker, *The Criminal Cases Review Commission: Economy, Effectiveness and Justice*, CRIM. L. REV. 140 (2000); R. Nobles & D. Schiff, *The Criminal Cases Review Commission: Reporting Success*, 64 MOD. L. REV. 280 (2001); Clive Walker & Carole McCartney, *Criminal Justice and Miscarriages of Justice in England and Wales*, in WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 183 (C. Ronald Huff & Martin Killias eds., 2008).

75. HOME AFFAIRS COMMITTEE, FIRST REPORT: THE WORK OF THE CRIMINAL CASES REVIEW COMMISSION, 1998–9, H.C. 106 (U.K.), available at <http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmselect/cmha/106/10602.htm> (last accessed 27 November 2012). The CCRC was originally under the remit of the Home Office and therefore subject to the scrutiny of the Home Affairs Select Committee. It is now under the remit of the Ministry of Justice and so under the scrutiny of the House of Commons Justice Committee.

76. CRIMINAL CASES REVIEW COMM'N, ANNUAL REPORT & ACCOUNTS, 2003–2004, H.C. 9 (U.K.). Available at: [http://webarchive.nationalarchives.gov.uk/20110215111039/http://www.ccr.gov.uk/CCRC\\_Uploads/2003%20-%202004\\_AnnualReport.pdf](http://webarchive.nationalarchives.gov.uk/20110215111039/http://www.ccr.gov.uk/CCRC_Uploads/2003%20-%202004_AnnualReport.pdf) (last accessed 1 December 2012).

77. CRIMINAL CASES REVIEW COMM'N, ANNUAL REPORT & ACCOUNTS, 2005–2006, H.C. 1290 (U.K.). Available at: [http://webarchive.nationalarchives.gov.uk/20110215111039/http://www.ccr.gov.uk/CCRC\\_Uploads/Annual%20Report%202005%20-%202006.pdf](http://webarchive.nationalarchives.gov.uk/20110215111039/http://www.ccr.gov.uk/CCRC_Uploads/Annual%20Report%202005%20-%202006.pdf) (last accessed 1 December 2012).

In a bid to streamline, the Commission changed its working practices in 2006, which are set out in its annual report. These changes appear to be having a positive impact on the Commission's backlog despite further reductions in funding. In giving evidence to the House of Commons Justice Committee on March 10, 2009, the current Chairman, Richard Foster, stated that there were seventy-eight cases waiting to be allocated to a case review manager (down from 225 in March 2006) and that complex cases now had a twenty-week wait (down from twenty-one months in 2005). He stated that quicker allocation of cases had reduced the backlog and that approximately eighty-five percent of cases were resolved within twelve months.<sup>78</sup> However, the reduction in funding has also led to a reduction in Case Review Managers of thirty percent over the period 2005–2011, a cut necessary to prevent a projected funding gap of £1.8 million by 2010–2011. The reductions have also forced the Commission to cut the number of Commissioners from sixteen to eleven. Unless funding increases (which is highly unlikely), the Commission runs the risk of struggling to keep waiting times and backlogs in check, with cases potentially cursorily reviewed and possibly rejected too swiftly.

The Commission has further been criticised for its lack of focus on factual innocence. These criticisms largely relate to its role which is to 'review the cases of those that feel they have been wrongly convicted of criminal offences, or unfairly sentenced. We consider whether there is new evidence or argument that may cast doubt on the safety of an original decision.'<sup>79</sup>

This perceived lack of focus on innocence was explained by former Chairman Professor Graham Zellick who stated that:

[T]o deal only with people who are innocent—even if they could be identified—would not . . . widen our role, but would greatly narrow it . . . . What of the principle of legality, of due process and of the integrity of the criminal justice process? We think these things are rather important, as does the Court of Appeal.<sup>80</sup>

The Court of Appeal has the power to overturn convictions if it considers the conviction to be "unsafe." There are currently two interpretations of unsafe: that a factually innocent person has been wrongly convicted, or a factually guilty person has been convicted but

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78. *Examination of Witnesses*, JUSTICE COMMITTEE, Q6 & Q7, available at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/343/9031001.htm> (last accessed 1 December 2012).

79. See CRIMINAL CASES REVIEW COMM'N: OUR ROLE (OVERVIEW), [http://webarchive.nationalarchives.gov.uk/20110215111039/http://www.ccrc.gov.uk/about/about\\_27.htm](http://webarchive.nationalarchives.gov.uk/20110215111039/http://www.ccrc.gov.uk/about/about_27.htm) (last accessed 2 December 2012).

80. Graham Zellick, Letter to the Editor, THE GUARDIAN, June 20, 2005.

there has been a serious procedural or legal error or illegality.<sup>81</sup> The Court's approach is summed up in *R v Hickey and others*, where Roch LJ stated:

This court is not concerned with the guilt or innocence of the appellants; but only with the safety of their convictions . . . [T]he integrity of the criminal process is the most important consideration for courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials.<sup>82</sup>

The Commission can refer a case where there is a real possibility that it will not be upheld, which means it refers cases under both interpretations of unsafe. Its work is thus not restricted to just those who maintain innocence and as a result, the Commission's approach has been criticised:

The CCRC's dependence on the criteria of the appeal courts has the knock-on effect that its reviews are merely safety checks on the lawfulness or otherwise of criminal convictions, as opposed to the kind of in-depth inquisitorial investigations . . . that seek the truth of the claims of innocence by alleged victims of miscarriages of justice in the way that was expected by the RCCJ.<sup>83</sup>

As a result of this perceived reluctance of the CCRC to involve itself in "innocence" claims, Naughton states that there is then a need for a body that, "unlike the CCRC, is not bound to the criteria of the appeal courts and is sufficiently resourced and empowered so that it is not dependent on government,"<sup>84</sup> although he does not explain how such a body would be funded or operate. In defence of the CCRC's position, David Jessel, a former CCRC Commissioner, has responded that:

[F]ewer innocent people would be freed if the legal criterion was provable innocence rather than unsafety of conviction, if only because it is so damnably difficult to prove. Is this what the campaigners want? If so, be careful what you wish for . . . [T]o consider the safety of a conviction provides a sterner test for the system and a more useful one for the innocent individual than any test for factual innocence alone ever could.<sup>85</sup>

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81. For a discussion on the two interpretations of unsafe, see S. Roberts, '*Unsafe*' Convictions: *Defining and Compensating Miscarriages of Justice*, 66 MOD. L. REV. 441 (2003).

82. Court of Appeal, unreported, transcript 30 July 2007.

83. Michael Naughton, Conclusion, in THE CRIMINAL CASES REVIEW COMMISSION: HOPE FOR THE INNOCENT? 233 (Michael Naughton ed., 2010).

84. *Id.* at 225.

85. David Jessel, *Innocence or Safety: Why the Wrongly Convicted are Better Served by Safety*, THE GUARDIAN, Dec. 15, 2009, available at <http://www.guardian.co.uk/uk/2009/dec/15/prisons-and-probation> (last accessed 2 December 2012); See Hannah Quirk, *Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer*, 70 MOD. L. REV. 759 (2007).

There are a number of points to be made in relation to this. The Court of Appeal has always proven more receptive to appeals based on procedural or legal errors (“due process” failures) than those based on factual innocence as previously discussed. Therefore, if the Commission believes there is a greater chance of success with a procedural or technical ground of appeal, then it is going to increase its chances of success when referring on that basis. This benefits those who are factually innocent, those who are most often seriously hampered by the “invisibility” of their innocence: “[I]nnocence is not something that exists, out there, to be touched, felt, or measured, any more than guilt.”<sup>86</sup> To demand proof of factual innocence as a threshold for appellants would raise the bar to a prohibitive level and would inhibit further the CCRC—particularly at their initial stage of review. This is where procedural and legal issues are critical, as these are often visible on the face of documents and materials initially reviewed, rather than buried deep in a case, requiring significant investigation to uncover. Downgrading the importance of due process arguments would be unworkable in practice, and it should be the role of an appellate court to uphold the integrity of the trial process and protect the right to a fair trial, which is conducted according to law, regardless of guilt or innocence.

Applications relying on a claim of factual innocence often do not have a legal or procedural error, or if they did, those arguments would have been made at the first appeal. The difficulty then arises in locating fresh evidence. Whilst the CCRC can be criticised for taking too restrictive an approach when deciding that evidence would not pass the fresh evidence provisions in Section 23 of the Criminal Appeal Act 1968,<sup>87</sup> many of the CCRC’s problems are in fact created by the approach of the Court of Appeal. This is, of course, exacerbated by the subservient position of the Commission in relation to the Court of Appeal. If the Court takes a restrictive approach to fresh evidence, then it is understandable to some extent that the Commission will also. A simple solution is to abolish the fresh evidence restrictions in Section 23 of the Criminal Appeal Act 1968, which would give the Commission more flexibility. This would also allow compelling evidence of factual innocence that was available at the trial and the first appeal to be referred back to the Court.

Whilst the Commission can perhaps be criticised for being too

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86. R. Nobles & D. Schiff, *Guilt and Innocence in the Criminal Justice System: A Comment on R (Mullen) v Secretary of State for the Home Department*, 69 MOD. L. REV. 80, 91 (2006).

87. See Campbell Malone, *Only the Freshest Will Do*, in THE CRIMINAL CASES REVIEW COMM’N: HOPE FOR THE INNOCENT? 107, 109 (Michael Naughton ed., 2010).

cautious in its relationship to the Court of Appeal,<sup>88</sup> there is little point in having a body such as the CCRC referring cases without regard to the powers and procedures of the Court of Appeal. Therefore, it is perhaps better to look to reforming the Court of Appeal to make that institution more receptive to factual innocence claims. An alternative solution, as Naughton suggests, would be to make more use of the pardon power, which the Minister of Justice may still exercise when convinced of a person's innocence.<sup>89</sup> A pardon removes the punishment for the crime, which is obviously beneficial to those imprisoned; however, there is the potential for creation of a "two-tier" appellate system, with a Court of Appeal rectifying procedural and legal errors and the Minister of Justice dealing with cases of factual innocence. This takes us full circle to the constitutional problems that led to the removal of the Home Secretary's referral power and the creation of the CCRC. The pardon power also does not remove the conviction, which only the Court of Appeal has the power to do. This is illustrated by the notorious case of Derek Bentley who was executed for murder in 1953. After a prolonged campaign by his sister, he was eventually pardoned in 1993, but his case had to return to the Court of Appeal in 1998 before the conviction was finally overturned.<sup>90</sup> Therefore, making more use of the pardon power is not necessarily a solution to these problems.

The CCRC was not the only progeny of the 1993 Royal Commission on Criminal Justice. While the creation of the CCRC could be considered a relatively swift and necessary reaction to the failings of the appellate process, there was also consideration of the causes of the miscarriages of justice that had necessitated the Royal Commission. The so-called Irish terrorism wrongful convictions had brought to the fore the issue of expert evidence and flawed forensic science. Many of the cases had been characterised by an early reliance upon false test results stating that the individuals had been in contact with explosives. The RCCJ looked then at the issue of forensic science and the use of experts during the criminal process and found that there were no real checks and balances in place to prevent reliance upon flawed forensic science or charlatans. This prompted recommendations that were preventative in nature, although these reforms were to take considerably longer to be acted upon.

88. See R. Nobles & D. Schiff, *The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal*, CRIM. L. REV. 173 (2005); Walker and McCartney, *supra* note 74.

89. The Home Secretary previously had the power to grant a pardon but the power now rests with the Minister of Justice.

90. *R v. Bentley* (deceased), [2001] 1 Cr. App. R. 21.

## IV. THE FORENSIC REGULATOR UNIT

There is an obvious risk of wrongful convictions with reliance upon unsupervised or unregulated scientists, or upon unscientific techniques. During an investigation a “false positive” can inculpate an innocent individual, while a “false negative” may mean a perpetrator will go undetected and can continue offending. Poor scientific and professional standards thus destabilises public confidence in forensic science and consequently has an impact upon confidence in the criminal process. During the massive expansion of forensic science provision in England and Wales in the last fifty years, there have been a series of reports commenting upon the provision, as well as the regulation, of forensic services.

Given that many of the major miscarriages of justice of the 1980s and 1990s had at their core flawed forensic evidence, the RCCJ looked into the provision of expert and scientific evidence, making thirteen recommendations specific to forensic science. Of these, the establishment of an oversight body was deemed a priority. The Report recommended the creation of a Forensic Science Advisory Council (FSAC) to serve as the regulator for the forensic science community. Such a Council could be a mechanism for ensuring scientific standards, integrity, and continuity of provision of forensic science to the criminal justice system. A report into serious contamination at a military forensic explosives laboratory by Professor Caddy in 1996<sup>91</sup> also recommended the creation of an “Inspectorate of Forensic Sciences” and advocated the registration of individuals as forensic practitioners. Reforms were not initiated, however, until the 1999 establishment of the Council for the Registration (CRFP).

The CRFP was established to give the courts a single point of reference on the competence of forensic practitioners. It was to promote public confidence in forensic practice in the United Kingdom through publishing a register of competent forensic practitioners; ensuring that registered practitioners stayed up to date and maintained competence; and disciplining registered practitioners who did not meet the required standards of “safe, competent practice.”<sup>92</sup> The CFRP register was welcomed as an important step in ensuring that those presenting themselves at court as expert witnesses were competent to fulfil that

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91. BRIAN CADDY, ASSESSMENT AND IMPLICATIONS OF CENTRIFUGE CONTAMINATION IN THE TRACE EXPLOSIVES SECTION OF THE FORENSIC EXPLOSIVES LABORATORY AT FORT HALSTEAD (1996).

92. Applicants were required to provide details of their qualifications and experience, references from colleagues and users of their services, and declarations about their past and future conduct. An assessor from the relevant specialty reviewed a sample of their recent cases against competence criteria developed in association with professional bodies. Registration was granted for four years, submitting annual returns.

role. However, it stopped far short of bringing rigorous scrutiny to bear upon forensic science, and problems with flawed forensic and expert evidence continued. For example, in February 2007, Gene Morrison was jailed for appearing in numerous court cases as a forensic psychologist. Working on over 700 cases from 1977, he was found guilty of perverting the course of justice and perjury. He had earned over a quarter of a million pounds for reports that were often cut-and-pasted from the internet. His “qualifications” had been purchased from sham universities over the internet.<sup>93</sup> In the light of financial difficulties, lack of stakeholder support, and the failure to prevent such problematic “experts,” the CRFP was closed in 2009.

The failures of forensic science were still causing considerable concern throughout the short lifespan of the CRFP, whose remit was too restricted to have much impact upon forensic science failures. In 2002, four youths had been put on trial for the murder of a schoolboy named Damilola Taylor. All four were acquitted, leading to a reexamination of the police investigation and forensic exhibits, during which significant blood spots and fibres were found that had been overlooked during initial examination. A major inquiry ensued, concluding that “human failures” had led to the omission of vital bloodstains.<sup>94</sup> A House of Commons Science and Technology Select Committee 2005 report, *Forensic Science on Trial*, made sixty recommendations on the regulation of forensic science, the training of scientists, and other pertinent issues, calling for the Government to establish a “Forensic Science Advisory Council” to oversee and regulate the forensic science market and provide independent and impartial advice on forensic science. After consultation, the government decided that a named individual would become a “Forensic Regulator,” emulating other regulatory structures, with the responsibility of overseeing the quality of forensic science in England and Wales.

The first Forensic Regulator was appointed in 2007 and was tasked with establishing and monitoring quality standards, including those applying to national forensic science intelligence databases, and ensuring the accreditation of suppliers of forensic services. The Regulator’s Manual<sup>95</sup> sets out requirements for all forensic science service providers, and the Regulator oversees accreditation (via the UK

93. *Fraudulent forensic expert jailed*, BBC NEWS (Feb. 17, 2007), [http://news.bbc.co.uk/2/hi/uk\\_news/england/manchester/6386069.stm](http://news.bbc.co.uk/2/hi/uk_news/england/manchester/6386069.stm). In 2009, he was also found guilty on several charges relating to the rape and sexual assault of at least six young girls. *Bogus Forensic Scientist Jailed for Child Rape*, BBC NEWS (Dec. 11, 2009), [http://news.bbc.co.uk/2/hi/uk\\_news/england/manchester/8407395.stm](http://news.bbc.co.uk/2/hi/uk_news/england/manchester/8407395.stm).

94. Alan Rawley and Brian Caddy, *DAMILOLA TAYLOR: AN INDEPENDENT REVIEW OF FORENSIC EXAMINATION OF EVIDENCE BY THE FORENSIC SCIENCE SERVICE* (2007).

95. Still in draft form and requiring detailed appendices.



Accreditation Service (UKAS)) using the international laboratory testing ISO17025 standard for all laboratories that supply forensic services. While reliance upon ISO17025 has been widely seen as appropriate, the standard is not specific to a forensic laboratory, necessitating supplementary standards and modifications to tailor the standard to forensic science.<sup>96</sup>

On the one hand, the introduction of a Regulator was presented as creating an oversight body for forensic science providers in the UK based on ISO standards and “a light touch” in steering forensic service providers. However, with a lack of “teeth” and with gaps in regulation, accreditation may prove to be superficial, although the lack of a statutory basis and enforcement powers have not yet been deemed a hindrance requiring remedial legislation. Even with UKAS appending supplementary standards onto ISO17025 to make it forensic specific, it is unlikely that any standard can regulate every aspect of a forensic practitioner’s work. Oversight of crime scene examination and evidence retrieval remains very difficult, if not impossible, particularly where police personnel are working without external supervision. Over half of forensic science services (measured by cash value) in England and Wales are delivered within police forces’ own scientific support services, with this set to increase. These services are not yet subject to the same quality standards regimes as apply to commercial providers. Yet different standards increase the risk of flawed results being relied upon or challenged in the courts.

At present few of the scientific processes delivered by police scientific support services are subject to accredited quality standards, yet the closure of the Forensic Science Service (FSS) in the UK and the budgetary crisis in the public sector are seeing police personnel increasingly carrying out forensic processes. A parliamentary report into the closure of the FSS in March 2012 has warned that the government did not sufficiently consider the wider implications for the criminal justice system of such a closure, and remarks upon the “in-house” provision of forensic services by the police directly:

It is an issue of great concern that many police laboratories are not accredited to the same quality standards as the FSS and private sector providers . . . . We are of the view that the transfer of work from the FSS to a non-accredited police or private laboratory would be highly undesirable, as it would pose significant and unacceptable risks to criminal justice. The role of the Forensic Science Regulator is vital and we urge the Government to bring forward proposals to provide him with

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96. The Forensic Regulation Unit, *Manual of Regulation*, December 2008, 9.16 (p38).

statutory powers to enforce compliance with quality standards.<sup>97</sup>

The use of personnel directly employed by the police or working alongside police in shared premises, for example, has been denounced by all reports looking into forensic science. Indeed, high-profile miscarriages of justice in England and Wales were tainted by the suspicion that the police had too easily influenced scientists who were undertaking testing and reporting results. The UK Forensic Regulator's Codes of Practice for individual forensic practitioners states that all practitioners be governed by the principles of "independence, impartiality and integrity," but as Glidewell LJ stated in the *Judith Ward* appeal:

For lawyers and judges a forensic scientist conjures up the image of a man in a white coat working in a laboratory, approaching his task with cold neutrality, dedicated only to the pursuit of scientific truth. It is a sombre thought that the reality is sometimes different . . . . Forensic scientists employed by the government may come to see their function as helping the police. They may lose their objectivity.<sup>98</sup>

The Forensic Regulator insists that "organisational structures" do not hinder the goals of independence, impartiality, and integrity, but this is optimistic perhaps, if a scientist is employed by, or working directly alongside, the police. While one would wish to believe in the integrity of all law enforcement and forensic science personnel wherever they may be situated, only naivety would lead one to rely upon it.

Thus, there is still a heavy reliance upon the integrity of the individual, and keen and capable supervision of their work. Yet even forensic scientists concede that forensic science "is not sufficiently well developed as a profession to have the full characteristics of a profession in place."<sup>99</sup> The expansion of the private forensic science market has also raised the possibility of increasing the number of "cowboys" or "charlatans": (dishonest, or incompetent practitioners) and "cherry pickers" (companies or scientists who will undertake only 'profitable' forensic services and eschew the longer, more complex and costly forensic investigations). Practitioners may face pressures that are supposedly balanced by professionalism of the scientist, but they may feel under duress from customers who demand "useful" results; otherwise, materials can be sent to other providers, or payment for tests that produce "no results" can be withheld. Along with most of the public sector in the UK, the Regulator also faces serious resource restrictions.

97. SCIENCE AND TECHNOLOGY COMMITTEE, *THE FORENSIC SCIENCE SERVICE*, 2010-12, H.C. 855, at 3 (U.K.).

98. LJ Glidewell in *R v. Ward* [1993] 1 W.L.R. 619 at 674.

99. S. Willis, *Forensic Science, Ethics and Criminal Justice*, in *HANDBOOK OF FORENSIC SCIENCES* 523 (J.G. Fraser and Robin Williams eds., 2009).

Failings in the provision of expert evidence have taken place against a backdrop in the UK of the privatisation of forensic science provision, leading to even greater need for robust regulation. There is a clear need in a deregulated market for forensic science to avoid “bargain basement” forensic services that cut corners. While economic dire straits may make savings on scientific support attractive, the consequences of “cut-price” forensic services or experts should be obvious. Indeed, the UK is already witnessing the return of “in-sourcing” of police scientific support services. It does not require much trawling of the historical record to recount that the influence of police over “experts” was often at the root of flawed expertise in high-profile miscarriages of justice. With the police in charge of forensic evidence during an investigation, there is a need for accountability, with transparency paramount.

#### V. CONCLUSION

That wrongful convictions can have an enduring impact upon the criminal justice system is not a revelation. As this article has shown, the wrongful convictions of the factually innocent have played a significant part in achieving large-scale law reform in England and Wales. But both the CCRC and the Court of Appeal suffer from similar criticisms; despite owing their creation to the wrongly convicted factually innocent, both have proved to be deficient at identifying and correcting factual innocence claims.

For the Court of Appeal, this deficiency is evidenced by the difficulties faced by those arguing fresh evidence or lurking doubt appeals. The Court’s approach to these appeals is not surprising given its lack of resources, its willingness to uphold jury verdicts in order to retain confidence in them, and the restrictions placed upon it by its review function. Consequently, its preference for due process appeals is easy to understand given that the task of assessing whether due process has been followed is much easier compared to trying to assess whether a person is factually innocent. Appellants, guilty or innocent, are then often forced to frame their appeals in technicalities. While assisting those who have due process failures, this lack of focus on innocence means that for those who do not have due process failures, fresh evidence and lurking doubt appeals will remain rare and difficult. An appeal process that allows the appeal court to assess whether the jury *should* have convicted rather than whether it *could* have convicted may provide an answer to these problems.

These problems associated with the Court also impact on the CCRC. While it is accepted that the CCRC is an improvement on the previous government machinery for referring cases back to appeal, criticisms

remain that it too has proven deficient in a number of areas. Its funding and the number of applicants have caused significant difficulties. Yet whilst there are criticisms in terms of its referral rates, and its success at the Court of Appeal, evidence of these problems remains anecdotal and there is no reliable method by which to gauge whether more cases *should* have been referred back to the appeal courts. If it is true that the Commission has prioritised procedural and technical grounds of appeal over those of factual innocence (and there is no empirical evidence to support this) then it is somewhat understandable that the Commission in its subservient role will sensibly refer those cases that are more likely to be successful. This is not necessarily the Commission's fault, and we would argue that critics should be recalibrating their aim and seeking to reform the Court's illiberal approach to fresh evidence (and therefore factual innocence) appeals.

A further valid criticism of it though is in respect of mission failure. The CCRC has not taken up (some may argue, due to lack of resources) the systemic role that was envisaged by the RCCJ. The Royal Commission did not inquire into the specific causes of individual cases of wrongful conviction, even though it was established in light of several high profile appeals. Instead, it took a much broader view and interpreted the Terms of Reference as seeking reforms that could prevent future miscarriages of justice.<sup>100</sup> The CCRC was given a similar role—to use its knowledge, gained via case-work, to recommend systemic reforms that could prevent future miscarriages.<sup>101</sup> However, it can be argued that the CCRC has yet to fulfil this part of its remit. It has become too “bogged down” by individual casework, and while it has contributed to criminal justice policy, it could do much more than it currently does in this respect. The CCRC then is undoubtedly an improvement on the Home Office in seeking to address miscarriages of justice in the Court of Appeal, but there does not appear to be any quantifiable evidence that it has achieved anything by way of prevention. If the CCRC is unwilling or unable to accept this wider remit, then this “slack” should be picked up by another body. This potentially explains the rise in Innocence Projects in England and Wales, which provide a platform in which innocence arguments can be heard and calls for reform made.<sup>102</sup>

100. Of course, many have argued that the RCCJ failed in this mission itself.

101. It was stated in the RCCJ report, *supra* note 15 chapter ten ¶22, that ‘we think it is important that the [Commission] should also be able to draw attention in its [annual report] to general features of the criminal justice system which it had found unsatisfactory in the course of its work, and to make any recommendations for change it thinks fit.’

102. For a discussion on the relationship between Innocence Projects and the CCRC in England and Wales, see S. Roberts and L. Weathered, *The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission*, 29(1) OXFORD J. LEGAL STUDIES 1 (2009).

The legal engineering then undertaken in England and Wales in creating the Court of Appeal and the Criminal Cases Review Commission has resulted in two bodies that seek to overturn miscarriages of justice, albeit with only partial success, with both in need of reform and extra resourcing if they are going to succeed and take a preventative role, too. The only significant body that has a wholly preventative remit (which has no real role—as yet—in overturning miscarriages of justice) is the Forensic Regulator. However, the preventative role of the Regulator is seriously limited by under-resourcing and a lack of powers. It may also yet lead to a false sense of security with legal professionals relying upon the validity and veracity of scientific evidence that in effect is still poorly regulated.

The forensic market in England and Wales remains in turmoil, with serious limitations to any guarantees that forensic evidence will not play a role in any future miscarriages of justice. Placing the Regulator on a statutory footing may assist, but unless the Regulator is given a considerably widened remit and strong powers in conjunction with legal reforms that limit the admission of flawed scientific evidence into the courts, then this body will fail to have a critical impact upon miscarriages of justice.

The Forensic Regulator holds only a detached position with respect to the criminal process. However, the Regulator was appointed in light of miscarriages of justice as a preventative measure, yet it has resulted in only a partial attempt to guarantee no further convictions will be marred by flawed science. Many other developments in the forensic science market are presently working against this aim and could be increasing the risk of miscarriages of justice. The result could be that the Court of Appeal and CCRC are going to be put under greater strain in the future because the body trying to prevent miscarriages of justice is hamstrung by a lack of powers and limited remit, and developments in the criminal justice process in the previous decade have seen due process protections diminished and risks of flawed evidence increased.

England and Wales has then turned to incremental reforms to try and maintain, or strengthen due process protections. Yet the “law and order” rhetoric has most often triumphed, resulting in the diminishment of due process protections. This contrasts with the U.S., where work on exonerations has expanded to include policy formation and lobbying, which has led to significant policy and legislative changes across many states to protect the innocent from conviction. In England and Wales the route taken concentrates upon due process instead of “innocence.” This in itself is not to be criticised, because the pursuit of justice is assisted by such due process protections and encompasses justice for the guilty at the same time as protecting the innocent. Due process is important for

maintaining the integrity of the criminal justice system and securing public confidence. It does, however, entail difficulties for those innocent individuals who may fall through the many cracks, as the system still functions poorly to assist them postconviction. While there could be modifications to current bodies and processes to make them more conducive to recognising and swiftly addressing miscarriages of justice, we suggest the bodies remain focussed on due process because of the extra benefits offered by this approach. The rights of the guilty matter, too, and due process protections also protect the innocent. There must not be a blinkered focus on the innocent; it is far better to concentrate efforts on seeing that all individuals are being convicted lawfully: “This razor focus on the wrongful convictions of people who had nothing to do with the crime dilutes the spectrum of other reasons why people are wrongly convicted.”<sup>103</sup>

It appears in this instance, that the phrase “mission accomplished” can be attributed the same meaning as that surely intended by President George W. Bush on the deck of the USS *Abraham Lincoln* aircraft carrier during the Iraq War. England and Wales have made significant advances and have made commendable progress in addressing miscarriages of justice. However, there is still much to achieve, and it may take years and further turmoil before the institutions are optimised and their operations refined. Until such time, perseverance with reform efforts and vigilance remain essential to ensure that miscarriages of justice do not continue to blight the criminal justice system.

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103. E. Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083 (2011).