

# The Criminal Cases Review Commission: Innocence Versus Safety and the Integrity of the Criminal Justice System

*Michael Naughton\**

## 1. Introduction

The Criminal Cases Review Commission (CCRC) was established by the *Criminal Appeal Act 1995*, (U.K.), 1995, c. 35, following a recommendation by the Royal Commission on Criminal Justice (1993) (“RCCJ”). It replaced the Criminal Case Unit of C3 Division of the Home Office where the Home Secretary had the power to order re-investigations of alleged miscarriages of justice and send them back to the Court of Appeal (Criminal Division) (hereafter ‘Court of Appeal’) under s. 17 of the *Criminal Appeal Act 1968*, (U.K.), 1968, c. 19. In essence, the RCCJ was an extension of the inquiries by Sir John May<sup>1</sup> into the events surrounding the conviction of the 11 people, mostly family members, who were convicted in the cases of the Guildford Four<sup>2</sup> and the Maguire Seven.<sup>3</sup> These

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\* Senior Lecturer, School of Law and Department of Sociology, University of Bristol, UK. Founder and Director, Innocence Network UK (INUK). This article is an outgrowth of a paper presented at the Innocence Network Annual Conference hosted by the Ohio Innocence Project at the University of Cincinnati College of Law, April 7-10, 2011. I am grateful for the feedback that I received on the day and to Kent Roach for his invitation to submit the article. I am especially indebted to Gabe Tan for her thoughts and comments on previous drafts that helped me to refine my own thoughts.

1. See, J. May, *Report of the Inquiry into the circumstances surrounding the convictions arising out of the bomb attacks in Guildford and Woolwich in 1974*, HC 556, 1989-90, (HMSO: London, 1990); J. May, *Second Report on the Maguire Case*, HC 296, 1992-93, (HMSO: London, 1992); J. May, *Report of the Inquiry into the circumstances surrounding the convictions arising out of the bomb attacks in Guildford and Woolwich in 1974, Final Report*, HC 449, 1993-94, (HMSO: London, 1994). See, also, Royal Commission on Criminal Justice, “Report” (HMSO: London, 1993).
2. G. Conlon, *Proved Innocent* (London: Hamish Hamilton, 1990).

cases along with the cases of the Birmingham Six<sup>4</sup> and a string of other notable cases in which (predominantly) Irish people who were believed to be innocent victims of wrongful convictions for terrorist offences that were committed by the IRA (Irish Republican Army)<sup>5</sup> caused a public crisis of confidence in the entire criminal justice system.<sup>6</sup> In particular, the RCCJ found that successive Home Secretaries under the old system for investigating alleged miscarriages of justice were not proactive in weeding them out and were even failing to refer potential miscarriages of justice back to the Court of Appeal for political as opposed to legal reasons. Since 1997, the CCRC has received applications from alleged victims of miscarriages of justice in England, Wales and Northern Ireland (NI) who have previously failed in their appeals against conviction but continue to question the validity of those convictions.<sup>7</sup>

3. A. Maguire with J. Gallagher, *Miscarriage of Justice: An Irish Family's Story of Wrongful Conviction as IRA Terrorists* (UK: Court Wayne Press, 1994).
4. See, P.J. Hill and G. Hunt, *Forever Lost, Forever Gone* (London: Bloomsbury Publishing Plc, 1995). The RCCJ was announced on March 14, 1991, the day that the Birmingham Six overturned their convictions in the Court of Appeal.
5. See, for example, B. Woffinden, *Miscarriages of Justice* (London: Hodder & Stoughton, 1987); C. Mullin, *Error Of Judgement: The Truth About The Birmingham Bombs* (London: Chatto & Windus Ltd., 1986); R. Kee, *Trial and error: the Maguires, the Guildford pub bombings and British justice* (London: Hamish Hamilton, 1986); JUSTICE, *Miscarriages of Justice* (London: JUSTICE, 1989); J. Ward, *Ambushed: My Story* (London: Vermilion, 1993); A. Maguire, *Miscarriage of Justice* (Colorado: Roberts Rinehart Publishers, 1994); H. Callaghan, and S. Mulready, *Cruel fate: one man's triumph over injustice* (Amhurst: University of Massachusetts Press, 1995); J. Rose, S. Panter, and T. Wilkinson, *Immocents: How Justice Failed Stefan Kiszko and Lesley Molseed* (London: Fourth Estate, 1997); C. Walker, and K. Starmer, *Miscarriages of Justice*. (London: Blackstone, 1999); L. Kennedy, *Thirty-Six Murders & Two Immoral Earnings* (London: Profile Books, 2002).
6. See, M. Colvin, "Miscarriages of Justice: The Appeal Process" in M. McConville and L. Bridges, ed., *Criminal Justice in Crisis* (Aldershot: Edward Elgar, 1994); also. D. Kyle, "Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission" (2004), *Drake L. Rev.* 52, at p. 657; L. Elks, "*Righting Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission*" (London: Justice Publications, 2008).
7. See, Criminal Cases Review Commission "Our history" (2011), online at: <[http://www.ccrc.gov.uk/about/about\\_28.htm](http://www.ccrc.gov.uk/about/about_28.htm)> (accessed on August 20, 2011). Although this discussion is restricted to the CCRC's handling of alleged wrongful convictions, it must be noted that the CCRC deals, also, with a range of other issues that its predecessor C3 Division did not, such as

As with all reforms against miscarriages of justice,<sup>8</sup> the CCRC was hard fought for<sup>9</sup> and stands unique as the world's first statutory publicly-funded body charged with the task of reviewing alleged miscarriages of justice. It is, perhaps, not surprising, then, that it has been the subject of much pride in certain quarters in its native jurisdiction<sup>10</sup> and viewed with a great deal of interest from other jurisdictions that see it as a possible extension to their own criminal justice system to solve their miscarriages of justice problem. For instance, the CCRC spawned the Scottish Criminal Cases Review Commission (SCCRC), which started its work in April 1999 under the terms of s. 194A of the *Criminal Procedure (Scotland) Act 1995* (U.K.), 1995, c. 46 (as amended by s. 25 of the *Crime and Punishment (Scotland) Act 1997* (U.K.), 1997, c. 48),<sup>11</sup> and the Norwegian Criminal Cases Review Commission (NCCRC),

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sentence matters, technical miscarriages of justice such as cases where murder convictions should be quashed on the grounds of diminished responsibility, and cases that might be deemed more trivial such as road traffic offences and destruction orders under the *Dangerous Dogs Act 1991*, (U.K.), 1991, c. 65. In addition to the critical analysis of how the CCRC departs from the recommendations of the RCCJ, this represents another departure from what the RCCJ recommended. For a discussion of the CCRC's successful referral of Dino the German Shepherd dog that relieved him from "death row", see Endangered Dogs Defence and Rescue, "Dino — The Legal Struggle", online at: <<http://www.endangerreddogs.com/EDDR-DinoLegalHistory.htm>> (accessed August 23, 2011).

8. For a discussion see, for instance, M. Naughton, *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg*, (Basingstoke: Palgrave Macmillan, 2007), at chapter 4.
9. In particular, JUSTICE, the all-party human rights organization, which was the main provider of pro bono casework assistance to alleged innocent victims of wrongful conviction campaigned for forty years for a state-funded organisation to undertake such tasks and is widely held to have provided the blueprint for the CCRC. See, JUSTICE *Remedying Miscarriages of Justice* (London: JUSTICE, 1994). For a critical discussion, see, M. Naughton, "Wrongful Convictions and Innocence Projects in the UK: Help, Hope and Education" (2006), *Web Journal of Current Legal Issues* 3.
10. For instance, a group of academics in universities in England and Wales with an expressed interest in miscarriages of justice writing together hailed the CCRC as: ". . . that rare thing — a public body of which the UK can be proud, indeed which is envied in many countries around the world". See, C. McCartney, H. Quirk, S. Roberts, and C. Walker, "Weighed in the balance", *Guardian Unlimited* (November 29, 2008), online at: <<http://www.guardian.co.uk/commentisfree/2008/nov/29/ukcrime-prisonsandprobation>> (accessed on August 22, 2011).
11. See, Scottish Criminal Cases Review Commission "About the Commission"

which came into force on January 1, 2004.<sup>12</sup> Moreover, there is an on-going debate for a CCRC-type body in the U.S.,<sup>13</sup> Australia,<sup>14</sup> Canada<sup>15</sup> and New Zealand.<sup>1617</sup> **[author: would you be able to put the contents of these two footnotes together? we are not able to have footnotes side by side]**

As time has passed, however, it has become increasingly apparent, particularly to those of a more critical persuasion and/or who provide casework assistance to alleged innocent victims of wrongful conviction, that the CCRC is not the solution to the wrongful conviction of the factually innocent that it was widely thought to be.<sup>18</sup> In specific terms, s. 13(1)(a) of

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(2011), online at: <<http://www.sccrc.org.uk/home.aspx>> (accessed on August 23, 2011).

12. See, Norwegian Criminal Cases Review Commission "Introduction" (2011), online at: <<http://www.gjenopptakelse.no/index.php?id=31>> (accessed on August 22, 2011).
13. See, R. Schehr, "The CCRC As Seen From the United States", in M. Naughton, ed., *The Criminal Cases Review Commission: Hope for the Innocent?* (Basingstoke: Palgrave Macmillan, 2009); also, B. Scheck and P. Neufeld, "Toward Formation of "Innocence Commissions" In America" (2002), 86:2 *Judicature* 98; R. Schehr and L. Weathered, "Should the United States establish a Criminal Cases Review Commission?" (2004), 88:3 *Judicature* 122.
14. For example, L. Weathered, "Does Australia need a specific institution to correct wrongful convictions?" (2007), *Australian and New Zealand Journal of Criminology* (August).
15. See, C. Walker and K.M. Campbell, "The CCRC as an Option for Canada: Forwards or Backwards?" in M. Naughton, ed., *The Criminal Cases Review Commission: Hope for the Innocent?*; also, K.M. Campbell, "The fallibility of justice in Canada: A critical examination of conviction review" in M. Kiliass, and R. Huff, eds., *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (Philadelphia: Temple University Press, 2008), at pp. 130-133.
16. For instance, P. Ellis, "Criminal Cases Review Commission" (2007), online at: <[http://www.peterellis.org.nz/MediaReleases/2007-0514\\_peterellis\\_CriminalCases.htm](http://www.peterellis.org.nz/MediaReleases/2007-0514_peterellis_CriminalCases.htm)> (accessed on August 22, 2011).
17. In addition, at the Innocence Network Annual Conference in Cincinnati in 2011, delegates from Japan were also interested in learning about whether the CCRC-model would be a suitable bolt-on for their criminal justice system.
18. The main source for a comprehensive critique of the CCRC from the perspective of assisting alleged factually innocent applicants is M. Naughton, ed., *The Criminal Cases Review Commission: Hope for the Innocent?*, *op. cit.*, footnote 13. It contains 16 chapters of analysis by a collective of 17 authors comprised of leading criminal appeal practitioners, academics, investigative journalists and representatives from third sector voluntary organizations that assist victims of miscarriages of justice.

the *Criminal Appeal Act 1995* mandates that it can only refer an alleged miscarriage of justice back to the CACD if there is a “real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made”. This fatally compromises the CCRC’s claim of “independence” and with it its ability to assist innocent victims of wrongful conviction.

The real possibility test contained in s. 13 of the *Criminal Appeal Act 1995*<sup>19</sup> shackles the CCRC to the criteria of the Court of Appeal for quashing convictions. It means that the CCRC is always in the business of second-guessing how the Court of Appeal might decide any conviction that it refers.<sup>19</sup> It means that the CCRC does not attempt to determine the truth of alleged miscarriages of justice but, rather, whether convictions might be considered “unsafe” by the Court of Appeal. This disconnects the CCRC entirely from a concern with whether alleged victims of miscarriages of justice that apply to it for review are factually innocent or guilty. This is, perhaps, most problematic at the extremes of the CCRC’s operations when it means assisting the factually guilty to overturn convictions on abuses of process and turning a blind eye to potentially factually innocent victims who are unable to fulfil the real possibility test to the satisfaction of the CCRC.<sup>20</sup>

Against this background, this article is structured into three parts. First, it considers the meaning of “unsafety” for the Court of Appeal and the requirement for fresh evidence as grounds for appeal and how this conflicts with a lay perspective on how the criminal justice system should operate. The first part is illustrated with two notable abuse of process successful appeals to evidence the quashing of convictions for terrorist activities and murder, respectively, despite the Court of Appeal having no doubts about the factual guilt of the appellants. Second, it compares how far the working remit of the CCRC differs from what was recommended by the RCCJ, that is, a

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19. See, R. Nobles and D. Schiff, “The Criminal Cases Review Commission: Reporting Success?” (2001), *Mod. L. Rev.* 280.

20. For a critique of the CCRC and convictions given in magistrates’ courts see K. Kerrigan, “Miscarriage of Justice in the Magistrates’ Court: The Forgotten Power of the Criminal Cases Review Commission” (2006), *Crim. L. Rev.* 124.

focus on possible legal unsafety rather than factual innocence and guilt. It is shown that the CCRC's real possibility test means that the factually innocent may be procedurally barred from having their convictions referred to the Court of Appeal whilst the convictions of the factually guilty are routinely referred and overturned on technical legal grounds. Finally, the article engages, critically, with four lines of defence that have emerged in the literature that are routinely deployed in response to critiques of the CCRC's structural limitations in assisting the factually innocent.

It is argued that quashing the convictions of terrorists, murderers and violent offenders on the grounds of abuse of process and points of law that does not undermine the reliability of the factual evidence of the appellants' guilt represents a form of integrity that is at odds with what the RCCJ recommended and a lay perspective on the function of the criminal justice system: a test for legal unsafety can conflict with a lay concern with whether appellants are, in fact, innocent or guilty and can even result in serious threats to public safety.

It is concluded that there is an urgent need for a review of the operations of the CCRC so that it may fulfil its public mandate as outlined by the RCCJ. As such, parties interested in setting up a CCRC-style body in their own jurisdiction as a possible solution to the perennial problem of the wrongful conviction of the factually innocent could learn much from the available critical literature of the workings of the CCRC. Indeed, such due diligence might assist in avoiding instituting a body that may not be appropriate for its desired task.

## **2. The Court of Appeal: Fresh Evidence and Unsafety**

A lay perspective on the criminal justice system might think that criminal trials are about convicting the factually guilty and acquitting the factually innocent and that the criminal appeals system exists to provide an avenue for factually innocent victims to overturn their wrongful convictions. This is a perspective that is transmitted to us in popular culture through newspapers, films and TV crime dramas and by political utterances on the criminal justice system. Charles Clarke,<sup>21</sup> the

then Home Secretary, succinctly summed up a lay perspective on the criminal justice system in the following terms:

What individuals want to see is a legal system which correctly finds guilty those who are guilty and acquits those who are innocent, with respect to what they did or didn't do rather than whether or not the legal process was or was not correctly followed.

This view of how the criminal justice system should operate prioritises the question of factual guilt or innocence over procedural justice. It also expresses the lay perspective on what would constitute a miscarriage of justice: it is either the wrongful conviction of the factually innocent or the acquittal of the factually guilty.<sup>22</sup>

Contrary to this, the criminal justice system does not function in a way that corresponds with a lay perspective. No human system is perfect and successful appeals against criminal conviction are both commonplace<sup>23</sup> and reveal the plethora of ways in which innocent victims are wrongly convicted in criminal trials.<sup>24</sup> Yet, appeals at the Court of Appeal against convictions given in the Crown Court do not seek to determine whether appellants are factually innocent or factually guilty of the crimes for which they were convicted. Instead, the Court of Appeal has strict grounds for receiving evidence to assist its

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21. Charles Clarke cited in A. Travis, "Anger at legal compensation shakeup" *The Guardian* (April 20, 2006).

22. See, M. Naughton, *Rethinking Miscarriages of Justice: Beyond the tip of the iceberg*, *op. cit.*, footnote 8, at pp. 14-26; also, M. Naughton, "The Importance of Innocence for the Criminal Justice System" in M. Naughton, ed., *The Criminal Cases Review Commission: Hope for the Innocent?*, *op. cit.*, footnote 13, at p. 17-22.

23. See, M. Naughton, "How big is the "iceberg?": A zemiological approach to quantifying miscarriages of justice" (2003), *Radical Statistics*, 81, at p. 5-17.

24. See, M. Naughton, *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg*, *op. cit.*, footnote 8, at chapter 4; C. Walker, "Introduction" in C. Walker and K. Starmer, K., eds., *Justice in Error* (London: Blackstone Press Limited, 2003); C. Walker, "Miscarriages of justice: An inside job?" (paper presented as the Annual Lecture of the Institute for Criminology and Criminal Justice, University of Hull, May 2001), online at: <[http://www.leeds.ac.uk/law/ccjs/an\\_reps/13rep07f.doc](http://www.leeds.ac.uk/law/ccjs/an_reps/13rep07f.doc)> (accessed on August 24, 2011); S. Greer, "Miscarriages of Justice Reconsidered" (1994), 57:1 Mod. L. Rev. 58; M. Naughton, "Innocence Projects" (2006), 348 ScoLAG: Scottish Legal Action Group 202; M. Naughton and G. Tan, "The need for caution in the use of DNA evidence to avoid convicting the innocent" (2011), 15:3 International Journal of Evidence and Proof 245.

decisions about whether to allow or dismiss appeals against convictions given in the Crown Court which are set out in s. 23 of the *Criminal Appeal Act 1968*<sup>25</sup> as follows:

(1) For the purposes of an appeal under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice:

- (c) receive any evidence which was not adduced in the proceedings from which the appeal lies.

(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to:

- whether the evidence appears to the Court to be capable of belief;
- whether it appears to the Court that the evidence may afford any ground for allowing the appeal;
- whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and,
- whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

Section 23(1)(c) highlights how appeals in the Court of Appeals are not full re-hearings of criminal trials but, rather, require that the evidence adduced must, save in exceptional circumstances, not have been heard in the original trial, that is, it has to be “fresh” evidence. These requirements demonstrate the technical nature of the criminal appeals process, which often presents insurmountable barriers to overturning wrongful convictions, particularly when evidence of innocence exists that was or could have been available at the time of the original trial and is, therefore, not deemed fresh and is not admissible for an appeal.

Indeed, the overriding doctrine of finality<sup>26</sup> dictates that defendants at trial must forward their full defence before a jury

25. As amended by the *Criminal Appeal Act 1995*.

26. For a discussion, see K. Malleon, “Appeals Against Conviction and the Principle of Finality” (1994), 21 J.L. & Soc.; R. Nobles and D. Schiff, “The Right to Appeal and Workable Systems of Justice” (2002), 65:5 Mod. L. Rev. 679. Elsewhere, Nobles and Schiff have noted that:

An unstated but equally important consideration [of finality] is that this restriction frees a court to develop definitions of crimes and standards of fairness, without needing to consider the large number of convicted prisoners that, as a result, it might be likely to release into the community (with retrials becoming an increasingly remote possibility as time passes).

See, R. Nobles and D. Schiff, “Absurd Asymmetry — a Comment on R v.



who are the ultimate arbiters of whether they are guilty or not guilty of the specific criminal offence that they are charged with on the basis of the evidence at trial. As Bingham L.J. asserted in *R v. Campbell*:<sup>27</sup>

This Court has repeatedly underlined the need for defendants in criminal trials to advance their full defence before the jury and call any necessary evidence at that stage. It is not permissible to advance one defence before the jury and, when that has failed, to devise a new defence, perhaps many years later, and then seek to raise that defence on appeal.

Overall, under s. 2(1) of the *Criminal Appeal Act 1995* the role of the Court of Appeal is solely to adjudicate whether any evidence that is deemed to fulfil the admissibility clauses and is accepted as fresh affect the legal safety of the conviction and to quash a conviction if it decides that the conviction is “unsafe”:

- 2(1) Subject to the provisions of this Act, the Court of Appeal:
- shall allow an appeal against conviction if they think that the conviction is unsafe; and,
  - shall dismiss such an appeal in any other case.

In place of statutory guidelines, the leading authority on the circumstances under which convictions would be deemed unsafe in the eyes of the Court of Appeal is *ex p Pearson*, which was also the first judicial review of a decision by the CCRC not to refer a conviction to the Court of Appeal. Noting that the term “unsafe” in s. 2(1)(a) of the 1968 Act does not lend itself to precise definition, Bingham L.C.J. saw the following situations as “obvious” examples of unsafety:

1. Where it appears that someone other than the appellant committed the crime and the appellant did not;
2. Where the appellant had been convicted of an act that is not in law a crime;
3. Where a conviction is shown to be vitiated by serious unfairness in the conduct of the trial or significant legal misdirection; and,
4. Where the jury verdict, in the context of other jury verdicts, defies any rational explanation.<sup>28</sup>

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Cottrell and Fletcher and BM, KK and DP (Petitioners) v. Scottish Criminal Cases Review Commission” (2008), 71:3 Mod. L. Rev. 464.

27. [1997] 1 Cr. App. R. 199.

In addition, Bingham L.C.J. identified a fifth category of unsafe convictions in *Pearson*<sup>29</sup> where the Court of Appeal may have some “lurking doubt” or uneasiness about whether an injustice has been done.<sup>30</sup>

*Pearson* sets wide parameters under which the Court of Appeal may deem a conviction unsafe that both tallies and conflicts with the lay perspective on miscarriages of justice in significant ways. For instance, a lay perspective might readily accept that scenario 1 may be a miscarriage of justice on the basis that the appellant would appear to be factually innocent, assuming that the appellant was not convicted of a joint enterprise crime which would make matters less straightforward.<sup>31</sup> Yet, a lay perspective may see scenario three as potentially problematic, particularly if the procedural abuse of process did not also undermine the factual evidence of the appellants’ guilt.

“Abuse of process” has been defined as something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respect a regular proceeding.<sup>32</sup> Two notable abuse of process successful appeal cases in England and Wales are Michael Weir and Nicholas Mullen. There is little doubt that Weir murdered 79-year-old Leonard Harris. A DNA profile extracted from the victim’s gloves matched Weir’s profile on the National DNA Database (NDNAD) and he was duly convicted and given a life sentence. Weir overturned his conviction a year later, however, when it was ruled that the DNA evidence, the only

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28. *Pearson, R (on the application of) v. Criminal Cases Review Commission*, [2000] 1 Cr. App. R. 141, at para. 10.

29. See, *supra*.

30. Bingham L.C.J. cited the case of *R. v. Cooper*, [1969] 1 Q.B. 267, 53 Cr. App. R. 82, [1969] 1 All E.R. 32 (Eng. C.A.), as an example of “lurking doubt”. The successful appellant, Sean Cooper, had his conviction overturned on the basis of a possible misidentification for an assault occasioning actual bodily harm. However, pointing to the rarity of such successful appeals, Stephanie Roberts examined 300 appeals in 2002 and found that only one was quashed on the basis of lurking doubt. See, S. Roberts, “The Royal Commission on Criminal Justice and Factual Innocence: Remediating Wrongful Convictions in the Court of Appeal” (2004), 1:2 JUSTICE Journal 86.

31. See, B. Krebs, “Joint Criminal Enterprise” (2010), 73:4 Mod. L. Rev. 578.

32. See, *R. v. Hui Chi-Ming*, [1992] 1 A.C. 34, 179 N.R. 323 (Hong Kong P.C.). See also, *Beckford (Anthony)*, [1996] 1 Cr. App. R. 94.

evidence linking him to the murder of Mr Harris, was inadmissible. It transpired that Weir's DNA profile was loaded onto the NDNAD as a result of an earlier charge for a drug offence which was later dropped, meaning that his profile should have been removed from the NDNAD at that time under the terms of the *Police and Criminal Evidence Act 1984* (U.K.), 1984, c. 60 (PACE).<sup>33</sup>

As for Mullen, the Court of Appeal was also satisfied of his factual guilt for his role in IRA bombing campaigns.<sup>34</sup> As Steyn L.J. observed in Mullen's failed application for compensation:

Mr Mullen was not innocent of the charge. On the contrary, the conclusion is inescapable that he knowingly lent assistance to an active IRA unit.<sup>35</sup>

Despite this, Mullen's conviction was quashed because it was said by the Court of Appeal to have involved "a blatant and extremely serious failure to adhere to the rule of law".<sup>36</sup> Ten years into his 30-year sentence it was found that all involved in his deportation from Zimbabwe, the police, MI6, the Security Service and officials from the Foreign Office and the Home Office as well as the relevant authorities in Zimbabwe, had colluded to secure his extradition. He was denied access to a lawyer contrary to Zimbabwean law and internationally-recognized human rights so that he could stand trial in the U.K., which amounted to an abuse of process that invalidated his conviction. The quashing of the conviction has been described as the Court of Appeal's way of denoting its condemnation of the behaviour of the prosecuting authorities in ever bringing the case of Mullen to trial.<sup>37</sup> In quashing

33. The National DNA Database, "Annual Report 03/04" (2004), online at: <<http://www.forensic.gov.uk/pdf/company/publications/annual-reports/annual-report-NDNAD.pdf>> (accessed on August 24, 2011), at p. 5. It is interesting to note that the House of Lords subsequently ruled that such evidence obtained in breach of PACE is not necessarily inadmissible and that it should be left to the discretion of the trial judge as to whether or not to admit evidence in these circumstances. Despite this, Weir's conviction was not reinstated as the Crown Prosecution Service (CPS) missed the the deadline to take the case to appeal by a day. See, J. Steele, "Bungle by CPS ends murder appeal" *The Telegraph* (August 2, 2000).

34. BBC News, "IRA Prisoner wins appeal" (February 4, 1999).

35. *Secretary of State for the Home Department ex parte Mullen*, [2004] UKHL 18, at paras. 56-57.

36. Rose L.J. in *R. v. Mullen*, [1999] EWCA Crim 278, at para. 40.

Mullen's conviction, Rose L.J. was clear about the possible advantage to offenders likely to be guilty who plead not guilty and maintain their innocence whilst preparing their appeals:

. . . for a conviction to be safe, it must be lawful; and if it results from a trial which should never have taken place, it can hardly be regarded as safe.<sup>38</sup>

In quashing Mullen's conviction Rose L.J. was, equally, unequivocal about the need for convictions such as his to be quashed in the public interest so as to preserve the integrity of the criminal justice system:

It is for the judge in the exercise of his [*sic*] discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience . . . not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those who are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means.<sup>39</sup>

### 3. How the CCRC Deviates from what the RCCJ Recommended

As indicated above, s. 13 of the *Criminal Appeal Act 1995* requires the CCRC to employ a real possibility test in deciding whether convictions referred are likely to be overturned.<sup>40</sup> In so

37. See, S. Roberts, "‘Unsafe’ Convictions: Defining and Compensating Miscarriages of Justice" (2003), 63:3 Mod. L. Rev. 441.

38. *R. v. Mullen*, [1999] EWCA Crim 278, at para. 66.

39. Rose L.J. in *supra*, at para. 18, citing Steyn L.J. in *R. v. Latif*, [1996] 1 All E.R. 353, [1996] 1 W.L.R. 104 (U.K. H.L.).

40. Bingham L.C.J. defined the prescribed "real possibility test" as: imprecise but plainly denot[ing] a contingency which, in the Commission's judgment, is more than an outside chance or a bare possibility but which may be less than a probability or a likelihood or a racing certainty. The Commission must judge that there is at least a reasonable prospect of a conviction, if referred, not being upheld. The threshold test is carefully chosen: if the Commission were almost automatically to refer all but the most obviously threadbare cases, its function would be mechanical rather than judgmental and the Court of Appeal would be burdened with a mass

doing, the CCRC is subordinated to the appeals criteria of the Court of Appeal in a way that was not envisaged by the RCCJ in its recommendations for a new post-appeal body to investigate alleged miscarriages of justice.<sup>41</sup> Indeed, the RCCJ had a clear definition of what would constitute a miscarriage of justice and how the new body should operate. In terms of definition, the RCCJ fully corresponded with lay understandings: it was either the wrongful conviction of the factually innocent and/or the wrongful acquittal of the factually guilty.<sup>42</sup> As the RCCJ Report noted, the reason for its own establishment and for its recommendation for the setting up of the CCRC was because:

Public confidence was undermined when the arrangements for criminal justice failed to secure the speedy conviction of the guilty and the acquittal of the innocent.<sup>43</sup>

In terms of how the CCRC should operate, the RCCJ was expressly critical of the custom of successive Home Secretaries to show undue deference to the Court of Appeal and the “self imposed restriction” of not referring cases back where it was thought that there was no real possibility that it would take a different view that it did at the original appeal.<sup>44</sup> It was on this

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of hopeless appeals; if, on the other hand, the Commission were not to refer any case unless it judged the applicant’s prospect of success on appeal to be assured, the cases of some deserving applicants would not be referred to the Court and the beneficial object which the Commission was established to achieve would be to that extent defeated. The Commission is entrusted with the power and the duty to judge which cases cross the threshold and which do not.

See, *Pearson, R (on the application of) v. Criminal Cases Review Commission*, *supra*, footnote 28, at para. 17.

41. For a critical discussion see M. Naughton, “Introduction” in M. Naughton, ed., *The Criminal Cases Review Commission: Hope for the Innocent?*, *op. cit.*, footnote 13.
42. Although the remit of the RCCJ was far reaching, “to examine the criminal justice system from the stage at which the police are investigating an alleged or reported criminal offence right through to the stage at which a defendant who has been found guilty of such an offence has exhausted his or her rights of appeal”, its considerations referred to the issues raised “only to the extent that they b[ore] on the risks of an innocent defendant being convicted or a guilty defendant being acquitted”. Royal Commission on Criminal Justice, “Report” (HMSO: London, 1993), at p. 1. For a critical discussion see, M. Naughton, “The Importance of Innocence for the Criminal Justice System”, *op. cit.*, footnote 22; also M. Naughton, *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg*, *op. cit.*, footnote 8, at p. 14-26.
43. Royal Commission on Criminal Justice, *ibid.*

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

... creation of a new body independent of both the Government and the courts to be responsible for dealing with allegations that a miscarriage of justice [i.e. wrongful conviction of the factually innocent] has occurred.<sup>45</sup>

That the CCRC should be independent was crucial for the RCCJ. Although the RCCJ felt that the Court of Appeal ought to be able to quash the convictions of the factually innocent, it recognised that it operates within a realm of legal rules and procedures that mean it is neither “the most suitable or the best qualified body to supervise investigations of this kind”.<sup>46</sup> To attend to this shortcoming, the RCCJ instructed that the CCRC was to conduct thorough re-examinations of alleged miscarriages of justice and it would retain the authority of the Home Secretary under the discredited C3 system whereby any convictions referred back to the Court of Appeal were to be ‘in the interests of justice’ in the lay sense<sup>47</sup> and were to be, accordingly, considered as first appeals.<sup>48</sup>

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

... if the Court of Appeal were to regard as inadmissible evidence which seemed to the [CCRC] to show that a [wrongful conviction of an

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44. See, *ibid.*, at pp. 181-182.

45. See, *ibid.*, at p. 183.

46. See, *ibid.*, at p. 183.

47. See, M. Newby, “Historical Abuse Cases: Why They Expose the Inadequacy of the Real Possibility Test” in M. Naughton, ed., *The Criminal Cases Review Commission: Hope for the Innocent?*, *op. cit.*, footnote 13.

48. As the RCCJ asserted:

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

See, Royal Commission on Criminal Justice, *op. cit.*, footnote 42, at p. 183.

innocent] might have occurred. We therefore recommend that the possible use of the Royal Prerogative be kept open for the exceptional case.<sup>49</sup>

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

Contrary to this, the CCRC is not concerned with whether applicants are factually innocent or guilty, convictions that it refers are not considered as first appeals and it is mandated to also take account of the reasons for why the conviction was not overturned in any failed appeals before the application to the CCRC. And, after almost fifteen years of casework and the 13,681 applications that it has so far received,<sup>50</sup> it is yet to refer a single conviction for consideration for a Free Pardon under the Royal Prerogative of Mercy.<sup>51</sup> The following quote from the CCRC website aptly illustrates how it, instead, understands its remit and scope:

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

- was the trial as a whole fair?
- did the trial Judge make the correct legal rulings during the course of the trial (for example, in relation to disclosure of evidence, the admissibility of evidence or a submission of no case to answer)?
- did the trial Judge fairly sum up the case to the jury and assist the jury with the appropriate legal directions?

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49. See, *ibid.*, at p. 184.

50. Figures to 30 June 2011.

51. However, prior to the setting up of the CCRC Free Pardons under the Royal Prerogative of Mercy were fairly frequent when the evidence of the applicants factual innocence fell outside of the scope of the Court of Appeal's grounds of appeal, *i.e.* it was not fresh evidence. For a discussion, see M. Naughton, "The Importance of Innocence for the Criminal Justice System", *op. cit.*, footnote 22, at pp. 25, 30-37. It is also interesting to note that since the publication of the critique of it not referring any cases for a Free pardon under the Royal Prerogative of Mercy the CCRC have now acknowledged on its website that it is something that it has the power to do. It remains the case, though, that it is yet to use this power.

- very importantly, is there now fresh evidence that was not presented at trial?<sup>52</sup>

This highlights the extent to which the CCRC deviates from what was recommended by the RCCJ, its total lack of independence from the Court of Appeal, and the need for further distinctions to be made in terms of the part that the CCRC plays as an integral part of the criminal appeals system.<sup>53</sup> For instance, the RCCJ's perspective on a "fair trial" as mentioned in the first bullet point was in terms of "fairness of the outcome" and whether a factually innocent defendant was convicted, whereas the CCRC see it as about "fairness of process" in terms of compliance with the prevailing criminal justice procedures. This links with the references to the "correctness" and "fairness" of legal rulings and summing up by the trial judge in the second and third bullet points, which further detaches the work of the CCRC from the perspective of the RCCJ. The CCRC, then, is best viewed as a bolt-on quality control mechanism<sup>54</sup> to the existing criminal appeals system that works to ensure that the decisions of the Court of Appeal meet with its own rules and procedures in the global interests of upholding its (the Court of Appeal's) vision of criminal justice system integrity; it seeks to determine whether convictions are

52. Criminal Cases Review Commission, "What we can do for you", online at: <[http://www.crc.gov.uk/canwe/canwe\\_32.htm](http://www.crc.gov.uk/canwe/canwe_32.htm)> (accessed on August 25, 2011).

53. Indeed, focus group research with CCRC Commissioners and Case Review Managers (CRMs) found that those who participated in the session openly expressed that they "are gatekeepers for the Court of Appeal". See, G. Maddocks and G. Tan, "Applicant Solicitors: Friends or Foes?" in M. Naughton, ed., *The Criminal Cases Review Commission: Hope for the Innocent?*, *op. cit.*, footnote 13, at p. 128.

54. Robert Schehr's analysis is interesting on this point. He applied a Marxian perspective to argue that the CCRC is a "state strategic selection mechanism", serving as a meliorating institution that appeared during a time of a legitimacy crises in the criminal justice system to fend off instability. For Schehr, the social control function of state strategic selection mechanisms is manifest in contemporary society as "adaptive responses" to apparent crises. From this perspective, the CCRC is a product of the public crisis of confidence in the criminal justice system that was exposed in the successful appeal of the Birmingham Six (and other cases) that represents but another structural device available to meta-organisations responsible for the administration crime and punishment. See, R. Schehr, "The Criminal cases Review Commission as a State Strategic Selection Mechanism" (2005), 42 *Am. Crim. L. Rev.* 1289.



lawful, not whether they are just in the lay sense of factual innocence and guilt.

The knock-on effect of this is that the CCRC does not undertake thorough investigations to determine in the public interest whether claims of innocence are valid or not. It is not akin to a public enquiry of the factual truthfulness of alleged miscarriages of justice in the way that was pictured by the RCCJ. On the contrary, the real possibility test and the quest to determine whether alleged wrongful convictions might be legally unsafe by the Court of Appeal means that it tends to conduct mere “desk top reviews”<sup>55</sup> of applications to see whether there is an apparent abuse of process or possible fresh evidence, which fails to recognise that factually innocent victims can be wrongly convicted even in the absence of any violations of due process.<sup>56</sup>

Indeed, in England and Wales today factually innocent people are, perhaps, more at risk of falling prey to wrongful convictions than they have ever been. A string of legislations enacted over recent years to “rebalance” the criminal justice system to ensure that guilty offenders are brought to justice have made forms of evidence that are inherently unreliable admissible in criminal trials. For instance, the *Criminal Justice Act 2003* (U.K.), 2003, c. 44, has allowed “hearsay” and “bad character” evidence and previous criminal history into criminal proceedings, practices and forms of evidence which are well established causes wrongful convictions in other jurisdictions, for instance the United States. Likewise, the valid need to increase convictions for rape has led to a shift in the burden of proof under the *Sexual Offences Act 2003* (U.K.), 2003, c. 42, so that those now accused have to prove that consent was sought and obtained, which is something that cannot so easily be

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55. See, M. Newby “Investigating Miscarriages of Justice — Thinking Out of the Box” Keynote Speech to the Innocence Network UK (INUK) Spring Conference 2010, Cleary Gottlieb Steen & Hamilton LLP, London, March 12, 2010. Online at: <<http://www.innocencenetwork.org.uk/communications.htm>> (accessed on August 26, 2011) [author: this link is no longer live]; also M. Naughton, “Can Lawyers Put People Before Law?”, *Socialist Lawyer* (June 2010), at pp. 30-32.

56. For a critical discussion of the structural and procedural causes of miscarriages of justice see, M. Naughton, *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg*, *op. cit.*, footnote 8, at chapter 3.

proven. And, the legitimate need to tackle gang and organized crime led to the *Criminal Evidence (Witness Anonymity) Act 2008* (U.K.), 2008, c. 15, which permits evidence to be given anonymously. This undermines the ability of defendants to cross-examine their accusers. It disregards the reality that false witness testimony is an established phenomenon in debates about the causes of wrongful convictions around the world.<sup>57</sup>

However, when convictions are given on the basis of such evidence it can be almost impossible for them to be overturned under the existing arrangements, despite the existence of the CCRC. As discussed, the Court of Appeal generally requires fresh evidence that undermines the reliability of the evidence that led to convictions and, therefore, the safety of the conviction in law. Barry George,<sup>58</sup> who spent seven years in prison for the murder of Jill Dando, is, perhaps, a fortunate successful appellant who illustrates this general rule. His conviction for the murder was overturned in April 2007 following a CCRC referral back to the Court of Appeal. George was, then, acquitted at a re-trial in the Central Criminal Court (“Old Bailey”) in August 2008. Identified by police as a “loner” and “misfit” who lived near to the murder scene, George was seen as a potential suspect in the eyes of the police, who then embarked on a “suspect-led policing” operation to build an incriminating case against him. In particular, the police actively manufactured evidence against him by trawling through 800 newspapers and magazines that George had hoarded at his flat, finding eight stories relating to Jill Dando, which was presented as evidence of his “obsession” with her, thereby establishing a motive.<sup>59</sup> To further establish that he was capable of carrying out the shooting, the police pointed out that he was a member of the Territorial Army some 20 years earlier<sup>60</sup>

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57. For a critical discussion, see M. Naughton, “Innocence Must be the Question” in J. Robins, ed., *Wrongfully Accused: Who is Responsible for Investigating Miscarriages of Justice?* (London: Waterflow, 2011, Forthcoming).

58. See, *R. v. George*, [2007] EWCA Crim 2722.

59. A. Bloxham, “Barry George: I was Stalking Another Woman at Time of Jill Dando Murder”, *The Telegraph* (August 3, 2008).

60. Although they omitted to say that he left the following year before completing his basic training.

and made reference to magazines and books found at his home on firearms, also dating from the 1980s.<sup>61</sup>

At the expense of an objective fact-finding investigation into the murder of Jill Dando, the police actively sought, and found, circumstantial, but yet admissible, evidence to link George to the crime. Yet, the police investigation that helped to secure George's conviction was entirely legitimate and no police officers transgressed from normal, routine policing methods and codes of conduct:<sup>62</sup> they did not beat a confession out of him as in the cases of the Guildford Four and the Birmingham Six; they did not put a plastic bag over his head as in the case of Keith Twitchell,<sup>63</sup> and, they did not do deals with criminals to obtain incriminating testimonies against him as in the case of Reg Dudley and Bob Maynard.<sup>64</sup> Notwithstanding the fact that all the "evidence" that led to George's conviction was at best highly circumstantial, this was not the ground which the CCRC referred his conviction on. Instead, George's conviction was referred back to the Court of Appeal by the CCRC on the sole basis of fresh evidence which pointed towards the possible unreliability of the single speck of Firearm Discharge Residue (FDR) evidence that was claimed to link him to the murder.

Providing further evidence of the CCRC's lack of focus on whether applicants are factually innocent or guilty is required, Professor Graham Zellick's, the then Chairman of the CCRC, observation in a press statement when the referred conviction was being heard in the Court of Appeal is most telling:

Our investigation of this case could not have been more thorough or intensive . . . you can infer virtually nothing . . . It neither points to guilt or innocence, it is neutral.<sup>65</sup>

This runs counter to how the CCRC was imagined by the RCCJ: that is, that it would re-investigate claims of innocence

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61. S. Lomax, *Trial and Error: The Case of Barry George* (London: Libertarian Alliance, 2003).

62. Such as the *Police and Criminal Evidence Act 1984* (U.K.), 1984, c. 60, s. 66 (London: H.M.S.O. 1985).

63. See, *R. v. Twitchell*, [2000] 1 Cr. App. R. 373.

64. See, R. Dudley, "We were Victims Too", *The Observer* (July 7, 2002); also D. Campbell, "Fall Guys", *The Guardian* (July 10, 2002).

65. See, S. Laville, "Six years on, evidence that helped convict TV presenter's murderer is deemed valueless", *The Guardian* (June 21, 2007).

thoroughly to determine whether they are valid or not and assist factually innocent victims of wrongful conviction to obtain justice in the Court of Appeal or through the Royal Prerogative of Mercy route.

Another consequence of how the CCRC assisted in the overturn of Barry George's conviction is that although there is not a shred of reliable evidence to prove that he murdered Jill Dando, he was unsuccessful in his claim for compensation because he could not prove that he was factually innocent.<sup>66</sup>

Finally, the CCRC's reference to fresh evidence in bullet point four above demonstrates, further, how far its operations are at odds with the RCCJ and lay understandings of its role. It means that the CCRC will emulate the Court of Appeal in assisting factually guilty offenders to overturn their convictions, as in the abuse of process cases of Weir and Mullen cited above,<sup>67</sup> whilst it may not refer the cases of factually innocent victims of wrongful conviction if the review is unable to adduce fresh evidence and the conviction is not felt<sup>68</sup> to fulfil the real possibility test.

66. O. Bowcott and S. Laville, "Supreme court ruling redefines miscarriages of justice" *The Guardian* (May 11, 2011).

67. Although neither of these successful appeals were referred by the CCRC.

68. I use the term "felt" because it is an entirely subjective judgment by, first, the CRM reviewing an alleged miscarriage of justice and, then, either one commissioner to refuse to refer or three commissioners to agree unanimously that a case should be referred to the Court of Appeal on the basis that it fulfils the real possibility test. As Bingham L.C.J. in *Pearson* asserted:

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

See, *Pearson, R (on the application of) v. Criminal Cases Review Commission*, *supra*, footnote 28, at para. 16. Bingham L.C.J. also noted that:

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

See, *Pearson, R (on the application of) v. Criminal Cases Review Commission*, *supra*, footnote 28, at para. 18. The forgoing also highlights a structural bias

Gabe Tan's<sup>69</sup> research on CCRC referrals to the appeal courts<sup>70</sup> by the CCRC is insightful on this point. It revealed that the CCRC is better at assisting the factually guilty to overturn alleged miscarriages of justice than the factually innocent. More specifically, Tan showed that since 2006, 35 convictions were overturned by the Court of Appeal on points of law or abuse of process following a CCRC referral. Citing the joint-appeals of *Ronald Clarke & James McDaid* as one such example,<sup>71</sup> Tan observed that although there was no doubt that Clarke and McDaid were guilty as charged and the Court of Appeal dismissed their convictions at their first appeal, the CCRC referred their convictions for GBH back to the Court of Appeal solely on the ground that the bill of indictment was not signed. At the second time of asking the Court of Appeal again dismissed their convictions but their convictions were subsequently quashed by the House of Lords on the basis that the absence of a signature on their indictment invalidated their trial and, hence, their convictions cannot stand.<sup>72</sup>

#### 4. The Defence of the CCRC's Statutory Subordination to the Court of Appeal

The foregoing analysis has shown that the CCRC is not the kind of independent post-appeal body for investigating alleged miscarriages of justice to determine if the claims of innocence by applicants are valid as was recommended by the RCCJ. Despite this, four lines of defence have emerged in the literature that have been deployed in response to critiques of the CCRC's statutory limits in assisting potentially factually innocent victims of wrongful conviction: (1) that the CCRC and the Court of Appeal need to have the same test; (2) that the

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against referring cases back to the Court of Appeal as a CRM and three commissioners must be in agreement that a conviction should be referred. See, A. James, N. Taylor and C. Walker, "The Criminal Cases Review Commission: Economy, Effectiveness and Justice" (2000), *Crim. L. Rev.* 140.

69. G. Tan, "A Case for Abolishing the Criminal Cases Review Commission?" *Public Law* (Forthcoming).

70. The sample of 157 referrals consisted of 152 referrals to the Court of Appeal with the remaining five to the Crown Court for convictions and sentences given in a magistrates' court.

71. [2006] EWCA Crim 1196.

72. *R. v. Clarke*, [2008] UKHL 8.

integrity of the criminal justice system is paramount and the wrongly convicted are better protected by a test for unsafety rather than a test for provable innocence; (3) that the concern with the limitations of the CCRC is assisting victims of wrongful conviction who may be factually innocent risks further eroding due process rights afforded to suspects of crime; and (4) that Parliament requires the CCRC to work to the Court of Appeal test so it is wrong to blame the CCRC for its failures in assisting the factually innocent. Each will now be critically considered in turn.

### **5. The CCRC and the Court of Appeal need to have the Same Test?**

A common argument in defence of the CCRC is that it should have the same test as the Court of Appeal as there is no point at all in referring cases that have no chance of being overturned. It is argued that such a practise would raise expectations among applicants, cause a tension and much confusion between the CCRC and the Court of Appeal, and would not be in the public interest.<sup>73</sup>

The first problem with this line of defence from an innocence perspective is that it overlooks the historical context of the establishment of the CCRC. The CCRC was set up in the wake of a public crisis of confidence in the criminal justice system precisely because of the symmetry that was identified by the RCCJ between the C3 system for assessing and referring alleged miscarriages of justice under the guidance of the Home Secretary and the Court of Appeal and its apparent failures in overturning the wrongful conviction of people believed to be

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73. Examples of this line of defence may be found in Professor Graham Zellick cited in *R. v. Fletcher*, [2007] EWCA Crim 2016, at para. 55; J. Wagstaff, "The Criminal Cases Review Commission" United Against Injustice (UAI) 3rd Annual Miscarriage of Justice Day Conference, Conway Hall, Holborn, London (October 9, 2004); G. Zellick, "Oral Evidence to the House of Commons Home Affairs Committee: The Work of the Criminal Cases Review Commission", (October 10, 2006), online at: <<http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/1635/6101001.htm>> (accessed on August 24, 2011). See also, G. Zellick, "Facing up to Miscarriages of Justice" (2005), 31 Man. L.J. 561; K. Kerrigan, "Real Possibility or Fat Chance?" in M. Naughton, ed., *The Criminal Cases Review Commission: Hope for the Innocent?*, *op. cit.*, footnote 13, at chapter 12.

factually innocent.<sup>74</sup> Moreover, the RCCJ, which gave life to the CCRC, was set up on the day that the Birmingham Six overturned their convictions in the Court of Appeal and it is both geographically and politically symbolic that the CCRC is based in Birmingham rather than the Capital. It is an enduring reminder that it was set up in governmental response to one of the most notorious miscarriages of justice in British legal history to restore public confidence that the criminal justice system could rectify such miscarriages of justice, understood as the wrongful conviction of the factually innocent, if and when they occur.

Second, this position fails to recognize other possible impacts and wider benefits that sending such cases back to the appeal courts might have, even if they were not to be overturned. Such cases could, for instance, raise public awareness of the inability or unwillingness of the Court of Appeal to overturn cases of appellants thought (even by the CCRC after its impartial investigations) to be factually innocent but who do not fulfil the current real possibility test as the evidence of their innocence was available at the time of the original trial and is, thus, not considered by the CCRC to be fresh in the eyes of the Court of Appeal.<sup>75</sup>

Contrary to this, the perspective that the CCRC and the Court of Appeal should work to the same test (legal unsafety) works to prevent public knowledge of the limits of the Court of Appeal in dealing with factual innocence appeals. It fails to understand that the RCCJ intended that the CCRC be independent so that it would be asymmetrical with the Court of Appeal in its investigations of alleged miscarriages of justice, defined as the wrongful conviction of the factually innocent. The CCRC was not anticipated to be an addition to the criminal appeals system that was deferential to the Court of Appeal. For the RCCJ, it was to be a body to provide a remedy for factually

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74. See, M. Naughton, "The Importance of Innocence for the Criminal Justice System", *op. cit.*, footnote 22, at p. 22; R. Nobles and D. Schiff, "Absurd Asymmetry — a Comment on R v. Cottrell and Fletcher and BM, KK and DP (Petitioners) v. Scottish Criminal Cases Review Commission", *op. cit.*, footnote 26, at p. 472.

75. See, M. Naughton, "The Importance of Innocence for the Criminal Justice System", *ibid.*, at p. 22.

innocent victims of wrongful convictions either through the Court of Appeal or if innocent victims were not thought to have legal grounds via the Royal Prerogative of Mercy avenue. In its dealings with the Court of Appeal, factual innocence is not a live issue due to the real possibility test. As for the Royal Prerogative of Mercy, as noted, the CCRC is yet to refer a case for consideration and is unlikely to ever do so because reviews to determine whether applications might be legally unsafe are not to be equated with investigations that seek to determine whether claims of innocence are valid or not (discussed further below with reference to the CCRC handling of the case of Neil Hurley).

### **6. The Integrity of the System is Paramount and the Innocent are Better Protected by a Test for Unsafety than a Test for Provable Innocence?**

A second line of defence of the CCRC's statutory link with the Court of Appeal responds directly to the establishment of innocence projects in the U.K., which are seen as unnecessary in a jurisdiction with the CCRC.<sup>76</sup> There are three planks to this defence: (1) that it is dangerous for innocence projects to argue that the CCRC is not concerned with factual innocence as if it was widely known it could lead to the further marginalization of miscarriages of justice by the public and politicians; (2) that the wrongly convicted are actually better served by a test for

76. It is interesting that innocence projects have emerged in the U.K. in a post-CCRC environment, which, on its face, suggests that the CCRC may not be the panacea for miscarriages of justice this line of argument supposes. More specifically, innocence projects were introduced by the Innocence Network U.K. (INUK) and pioneered by the University of Bristol Innocence Project (UoBIP), the first innocence project in the U.K. and founding member of INUK. Since its establishment in September 2004 to the time of writing, September 2011, INUK has received almost a thousand applications from alleged innocent victims of wrongful conviction for an investigation by the University of Bristol Innocence Project or a member innocence project, almost half of whom have been refused a referral back to the Court of Appeal by the CCRC. INUK has to date assisted in setting up more than 30 innocence projects in UK universities who are collectively investigating almost 100 cases. For information on INUK see online at: <<http://www.innocencenetwork.org.uk>> (accessed on August 24, 2011). For information on the UoBIP see online at: <<http://www.bris.ac.uk/law/aboutus/law-activities/innocenceproject/index.html>> (accessed on August 24, 2011).



legal unsafety as fewer innocent people would overturn their convictions if the legal criterion was provable factual innocence, if only because factual innocence is often impossible to prove; and (3) that the integrity of the criminal justice system is of primary importance and to consider the safety of a conviction provides a more demanding test for the system is the surest way to assist the factually innocent in overturning their convictions.<sup>77</sup>

Perhaps unfortunately for this line of attempted defence, the CCRC's own website (as cited above) makes it abundantly clear that it not concerned with whether applicants are factually innocent or guilty but, rather, with whether the Court of Appeal might find the conviction unsafe. Moreover, the evidence is irrefutable: the real possibility test and the evidence from Tan's research (cited above) means that CCRC assists in the quashing of criminal convictions given to factually guilty offenders when there has been an abuse of process whilst it refuses to undertake thorough investigations of claims of innocence if the evidence of innocence is not considered to be fresh.

However, I do agree with the idea that if this was more widely known it is likely that there would be the kind of public and political backlash that is feared by adherents to this line of defence, this is precisely what occurred prior to the setting up of the RCCJ amid the fallout from the cases of the Guildford Four, Birmingham Six, and so on, and is the reason for the establishment of the CCRC. This would likely happen not because the public and politicians would want to sideline miscarriages of justice but, rather, because they care about miscarriages of justice, understood in a lay sense of the RCCJ as the wrongful conviction of the innocent and the factually guilty escaping justice on 'technicalities' such as abuses of process.

Second, the argument that the wrongly convicted are actually better served by a test for legal safety as fewer innocent people would overturn their convictions if they had to prove factual innocence rather than unsafety of conviction reveals a profound misunderstanding of what it means to be

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77. Examples of this perspective may be found in D. Jessel, "Innocence or safety: Why the wrongly convicted are better served by safety", *The Guardian* (December 15, 2009); H. Quirk, "Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer", (2007) 70:5 Mod. L. Rev. 759.

innocence-focused: it is about the *quality* of convictions overturned, not the *quantity*. Moreover, an innocence-focused approach does not necessarily seek to prove that alleged victims of wrongful convictions are, in fact, innocent, although if it is possible to prove factual innocence all attempts will be made to prove it. Indeed, the methodology of an innocence-focused approach is two-pronged: an interrogation of the process that to the conviction (police investigation and prosecutorial conduct, for instance) and the evidence that is claimed to prove that the alleged innocent victim is factually guilty whilst, simultaneously, seeking ways to determine whether the claim of innocence by the alleged victim can be validated. Such an approach operates akin to the kind of public enquiries that the RCCJ thought the CCRC would.

The case of Simon Hall,<sup>78</sup> investigated by the University of Bristol Innocence Project and referred back to the Court of Appeal by the CCRC, provides a good illustration. The investigation questioned the reliability of the fibre evidence that was claimed to link Simon Hall to the murder of 79-year-old Joan Albert,<sup>79</sup> as well as suggesting that DNA testing be undertaken on the handle of the murder weapon (knife) to either incriminate or exclude him.<sup>80</sup> However, if the possibility of proving factual innocence is not available, say in a case where a rape conviction is based on the testimony of the accuser and the investigation can show that the alleged victim of the rape lied,<sup>81</sup> the person should be regarded as factually innocent as dictated by the presumption of innocence as there is no reliable

78. M. Naughton and G. Tan, "The Right to Access DNA Testing by Alleged Innocent Victims of Wrongful Convictions in the UK?" (2010), 14:4 *International Journal of Evidence & Proof* 338.

79. University of Bristol, "Why the conviction of Simon Hall cannot stand" (2010), online at: <<http://www.bris.ac.uk/news/2010/7384.html>> (accessed on August 24, 2011).

80. University of Bristol, "University of Bristol Innocence Project response to Simon Hall judgment by the Court of Appeal" (2011), online at: <<http://www.bris.ac.uk/news/2010/7432.html>> (accessed on August 24, 2011).

81. As in the case of Warren Blackwell, for instance. Blackwell was convicted of sexual assault in 1999 following allegations by Shannon Taylor that he had attacked her outside a social club. After spending three years in prison, Blackwell's conviction was overturned when it emerged that Taylor had a history of making false allegations of sexual assault against other men and frequently changed her name so that she could not be identified by the police. See, S. Greenhill, "Sex attack liar named by Peer" *Daily Mail*, online at:

evidence that the victim of the wrongful conviction is factually guilty of the alleged criminal offence.

Third, the idea that the integrity of the criminal justice system is paramount and provides the surest way to assist the factually innocent in overturning their convictions conflates the test for legal safety with factual innocence. It misrepresents the CCRC's real possibility test and the basis on which the Court of Appeal overturns criminal convictions. It seeks to justify the test for legal unsafety on the assumed basis that it acts to assist factually innocent victims of wrongful conviction. Just as crucially, it calls for a distinction between a legal notion of "integrity", defined as strict compliance with criminal appeals procedures, and a lay understanding of "integrity". The latter would distinguish between successful appeals overturned on the basis of factual innocence, such as Sean Hodgson,<sup>82</sup> the first DNA exoneration in the U.K., and successful appeals that are overturned on abuse of process, for example Mullen and Weir cited above.

Another case investigated by the University of Bristol Innocence Project, and under review for the fourth time of asking at the CCRC at the time of writing, shows how and why the test for legal unsafety can fail the factually innocent. Neil Hurley,<sup>83</sup> convicted in 1994 and given a life sentence for the murder of his former partner and mother of their two children, Sharon Pritchard, made three failed applications to the CCRC between 1997 and 2005. In them he submitted that several witnesses who gave evidence against him at trial subsequently claimed that they were coerced by officers from South Wales police into making false statements against him; and that two other suspects, one of whom ended up as a prosecution witness, may not have been sufficiently investigated by the police. Sharon Pritchard was found lying naked in a muddy playing field and the two suspects had allegedly returned home in the

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<<http://www.dailymail.co.uk/news/article-411438/Sex-attack-liar-named-Peer.html>> (accessed on August 24, 2011).

82. See, *R. v. Hodgson*, [2009] EWCA Crim 490.

83. See, M. Naughton, "Why 'safety in law' may fail the innocent — the case of Neil Hurley", *The Guardian* (February 11, 2010); M. Naughton and G. Tan, "The Right to Access DNA Testing by Alleged Innocent Victims of Wrongful Convictions in the UK?", *op. cit.*, footnote 78, at pp. 335-338.

early hours of the morning that the murder took place with their clothing covered in blood and mud. Hurley also claimed that the owner of a local pub may be able to provide an alibi for him at the crucial time when Sharon Pritchard was murdered.

All of Hurley's applications were refused a referral back to the Court of Appeal by the CCRC with an explanation for why it did not think that his conviction would be considered to be unsafe. In summary, the CCRC argued that although some witnesses retracted their statements, others did not; that the question of other suspects who may not have been investigated properly was a jury point that was addressed in court; and, that it was aware of a long history of incidents between him and Sharon Pritchard and that during investigation the police received numerous calls highlighting such history.

Perhaps most tellingly, the CCRC's restricted review of whether Hurley's applications might be considered unsafe by the Court of Appeal failed to investigate his claim of innocence more appropriately and missed the obvious possibility of DNA testing that could potentially exonerate him and possibly even lead to the conviction of the real murderer of Sharon Pritchard if it is not him. The fourth application that was submitted to the CCRC on Hurley's behalf by the University of Bristol Innocence Project requested the urgent testing of the 120 exhibits that were recovered from the crime scene, the victim and Hurley himself that potentially contain biological samples that have yet to be subjected to any form of DNA testing at all to determine if he is, in fact, innocent or guilty.<sup>84</sup>

In this context, it is interesting to reflect on a recent statement to the press by the current Chair of the CCRC<sup>85</sup> in response to critiques of its handling of claims of factual innocence by applicants:

If we came across any new evidence that we thought suggested somebody was innocent we'd move heaven and earth to look into it. I've

84. University of Bristol, "DNA testing might prove possible innocence" (June 17, 2010), online at: <<http://www.bristol.ac.uk/news/2010/7074.html>> (accessed on August 24, 2011).

85. Chief Executive of the Crown Prosecution Service (CPS) prior to his appointment as Chair of the CCRC. For a critical reflection see, M. Naughton, "Justice must be seen to be done", *Guardian Unlimited* (November 20, 2008), online at: <<http://www.guardian.co.uk/commentis-free/2008/nov/20/justice-law>> (accessed on August 24, 2011).

got people who'd lie down in the street to stop the traffic if they thought it would help.<sup>86</sup>

Such statements are regularly mobilised when the CCRC engages in public debate. They are both revealing and profoundly misleading of the role of the CCRC and how it reviews alleged wrongful convictions. The CCRC, evidently, want the public to see it as fulfilling its public mandate as recommended by the RCCJ, as a “champion of justice”,<sup>87</sup> to give the impression that it assists factually innocent victims of miscarriages of justice. But, the reference to “new evidence” in the forgoing quote highlights that the CCRC is restricted to working to the Court of Appeal test. Moreover, as the CCRC’s three previous reviews of Neil Hurley’s alleged miscarriage of justice aptly illustrate, evidence of potential innocence has to be unearthed by an investigation that is looking for it. It is not just happened across in a (mainly desk top) review of whether the conviction might be legally unsafe.<sup>88</sup>

### 7. The Due Process Defence

A third line of defence attempts to muddy the waters still further by arguing that a critique of the limitations of the CCRC in dealing with applications by potentially factually innocent victims of miscarriages of justice risks further eroding due process rights for suspects of crime, which are increasingly under attack by a government that is overly concerned with convicting the guilty. It is argued, further, that due process safeguards apply to all, whether factually innocent or factually guilty, and that a focus on factual innocence implies that some suspects are more important than others.<sup>89</sup>

This argument fails to comprehend that the discourse of factual innocence has been instrumental in effecting landmark

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86. Richard Foster cited in J. Robins, “Criminal Cases Review Commission comes under fire”, *The Times* (January 21, 2010).

87. See, D. Jessel, “Innocence or safety: Why the wrongly convicted are better served by safety”, *op. cit.*, footnote 77.

88. See, M. Naughton, “The Importance of Innocence for the Criminal Justice System”, *op. cit.*, footnote 22, at pp. 20-35.

89. An example of this argument may be found in H. Quirk, “Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer”, *op. cit.*, footnote 77.

due process safeguards in response to widespread public crises of confidence in its workings that were prompted by the belief that factually innocent people had been wrongfully convicted and imprisoned. For instance, a raft of established and globally respected due process safeguards against the conviction of the factually innocent derived from the *Confait Affair*,<sup>90</sup> in which three suspects believed to be factually innocent were found to have been “fitted-up” by the police, and the subsequent recommendations of the Royal Commission on Criminal Procedure (RCCP).<sup>91</sup> These included PACE that provides protections for suspects in police investigations, the national duty solicitor scheme so that suspects can have access to legal advice in police stations and the separation of police investigations from decisions to prosecute.

In short, in the face of public awareness of its shortcomings in terms of acquitting or overturning the convictions of cases of miscarriages of justice in which victims are believed to be factually guilty, it is the criminal justice system that defers (is reformed) to fit with the lay notions, not the other way around: that is why the RCCP and the RCCJ were established to offer recommendations for reform to dispose of existing public crises in the criminal justice system. Indeed, the Court of Appeal, itself, which adherents to the due process defence of the CCRC argues as appropriately having judicial supremacy over the CCRC, has its origins in the public crisis of confidence in the criminal justice system that was caused by the miscarriage of justice case of Adolf Beck, which was instrumental in the establishment of its forerunner, the Court of Criminal Appeal, in 1907.<sup>92</sup>

Second, it is a fact of social, political and legal life that

90. H. 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” (London: HMSO, 1977); C. Price and J. Caplan, *The Confait Confessions* (London: Marion Boyars, 1976); C. Price, “Confession Evidence, the Police and Criminal Evidence Act and the Confait Case in Baxter” in J. Caplan and L. Koffman, eds., *Police: The Constitution and the Community: A collection of original essays on issues raised by The Police and Criminal Evidence Act 1984* (Abingdon: Professional Books Limited, 1985).

91. See. Royal Commission on Criminal Procedure ‘Report’ (London: HMSO, 1981).

92. Twice wrongly convicted of larceny due to misidentification at the turn of the

successful appeals in the Court of Appeal are different and that some *are* more important than others, that is, perhaps, why there is public, political and legal criticism when convictions like Mullen and Weir are overturned.<sup>93</sup> Successful appeals overturned on an abuse of process that leaves the evidence of factual guilt intact, such as Mullen and Weir, are simply of a different order and not to be equated with successful appeals in which the factual evidence of guilt is completely discredited.<sup>94</sup>

Third, the due process defence of the CCRC also errs in its understanding of the thrust and motivation of Herbert Packer's<sup>95</sup> models that it relies upon for its framing. Packer will forever be immortalised in criminal justice studies the world over by virtue of the influence of his models of the underlying values and operational remit of the U.S. criminal justice process — “due process” and “crime control”. They do not need to be rehearsed here, save to emphasize that Packer's models were entirely orientated to the lay concern of factual innocence and factual guilt. The values of the “due process” model were, in essence, described as prioritizing civil liberties in order to protect against miscarriages of justice, understood as the wrongful conviction of the factually innocent. On the other hand, the underpinning values of his “crime control” model were depicted as prioritising the conviction of the factually guilty. In short, for Packer's analytic (as well as from a lay perspective and the RCCJ) there is nothing wrong *per se* with crime control, nor a criminal justice system that seeks to convict factually guilty offenders, so long as it protects, as far it can,

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20th Century See, T. Coates, *The Strange Case of Adolph Beck* (London: Stationery Office Books, 2001).

93. For instance, the CPS made a public apology for its failures in the Weir case. See, J. Steele, “Bungle by CPS ends murder appeal”, *op. cit.*, footnote 33. The fallout from the Weir successful appeal case also feed into reform of the 800 year old Double Jeopardy Rule under the *Criminal Justice Act 2003*, which now allows acquitted individuals to be tried again for certain serious offences if there is “new and compelling evidence” of factual guilt. See, *Criminal Justice Act 2003*, Part 9.
94. For instance, the successful appeal of Robert Brown who had his conviction for murder overturned after serving 25 years in prison when it was found that the way that the police interviewed him amounted to torture. See, *R. v. Brown*, [2002] EWCA Crim. 2804.
95. H. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968).

against the wrongful conviction of the factually innocent. It is in the public interest that factually guilty offenders are convicted, which is, after all, the intended purpose and function of the criminal justice system. Contrary to this, arguments for legal safety over factual innocence, as discussed above, can assist factually guilty offenders to overturn murder convictions whilst failing potentially factually innocent victims of wrongful conviction (such as Neil Hurley) because the CCRC pay undue deference to the Court of Appeal.

A final problem with the due process defence of the CCRC is that it confuses *suspect's* rights *within* the criminal justice process and the rights of alleged factually innocent *applicants* to the CCRC *outside* of the criminal justice process. Due process safeguards, indeed, seek to protect all suspects, whether factually innocent or guilty, at the police investigation stage, defendants at the trial stage, and appellants at the first appeal stage. However, the CCRC was established to be an extension to due process safeguards operating at the external post-appeal stage to assist the potentially factually innocent who fail to have their conviction overturned within the normal appeals system: some applicants to the CCRC may be able to find fresh evidence that was not available at the time of the original trial that can prove they are factually innocent, such as Sean Hodgson who benefited from advancements in DNA science; some applicants might be able to muster fresh evidence to show that an accuser lied, such as Warren Blackwell; but, as recognized by the RCCJ, some applicants who are potentially factually innocent (for instance, Simon Hall and Neil Hurley) need the CCRC to investigate their claim of innocence thoroughly and if they are found to be innocent but do not have admissible grounds of appeal to have their cases referred through the other method available for a Free Pardon under the Royal Prerogative of Mercy. As such, it is not appropriate to criticize critiques of the limits of the CCRC in assisting the factually innocent on the basis of a possible eradication of the due process rights of suspects within the criminal justice process. The CCRC does not deal with *suspects* of crime but, rather, with the alleged innocent victims of wrongful conviction who have not been able to have their convictions overturned within the normal



appeals system, quite often because there has been no identifiable breach of due process rights in the police investigation or the trial proceedings.<sup>96</sup>

### 8. The Court of Appeal is to Blame?

A final defence of the CCRC in the literature is the attempt to deflect critical attention away from the CCRC altogether and to lay the blame for the on-going difficulties that the factually innocent face in trying to overturn their convictions with the Court of Appeal. It is argued that the CCRC must work within the statute set by Parliament and that the problem of the CCRC cannot be addressed independently of the Court of Appeal.<sup>97</sup>

The failure of this perspective is that the statute that governs the workings of the CCRC is wider than it just working with the Court of Appeal: whilst the CCRC will work within the parameters of the Court of Appeal test with certain applications that it is appropriate to do so, it is required by its governing statute to use other available avenues when the applicant is innocent but does not have admissible grounds for appeal — the Royal Prerogative. Moreover, applicants to the CCRC will, in the main, have already failed in a normal appeal at the Court of Appeal where alleged abuses or process and fresh evidence can be dealt with and the CCRC was supposed to conduct external in-depth investigations of claims of innocence. The CCRC was not established because the public were concerned that the Guildford Four, the Birmingham Six, and others, were unable to overturn their convictions because of the flagrant abuses of process in their convictions. It was because they were believed to be factually innocent and the existing system for dealing with such alleged miscarriages of justice could not or would not refer their cases back to the Court of Appeal.

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96. For an extensive discussion of how the factually innocent are vulnerable to wrongful convictions without breaches of due process see, M. Naughton, "How the Presumption of Innocence Renders the Innocent Vulnerable to Wrongful Convictions" (2011), 2:1 Irish Journal of Legal Studies 40.

97. Examples of this line of argument may be found in J. Robins, "Criminal Cases Review Commission comes under fire", *op. cit.*, footnote 86; K. Kerrigan, "Real Possibility or Fat Chance?", *op. cit.*, footnote 73.

## 9. Conclusion

The wrongful conviction of the factually innocent is a perennial problem that plagues criminal justice systems the world over. It is the search to find a solution to the problem of the wrongful conviction of the innocent that led to the establishment of the CCRC and which, no doubt, fuels the interest in the CCRC in other jurisdictions. It is understandable that the CCRC seems attractive as it is believed to be a proven, ready-made remedy that can simply be added on to other criminal justice systems. Indeed, the miscarriages of justice in the late 1980s and early 1990s revealed the inner workings of all that can go wrong with a criminal justice system and caused a public crisis of confidence in the entire criminal justice system that resonated around the globe. The RCCJ was established to show the world that something was being done to fix the problem and dispose of that public crisis. And, although the CCRC does not correspond with the recommendations of the RCCJ, its failings in dealing with continuing claims of factual innocence by alleged victims of miscarriages of justice are less widely known. In short, the CCRC is not only unfit for the purpose of assisting potentially factually innocent victims to overturn their convictions, it is a missed opportunity to once-and-for-all deal with the problem domestically, meaning that within its own jurisdiction the factually innocent continue to suffer wrongful convictions that may never be overturned.

Whatever intentions lie behind the arguments in defence of the CCRC's subordination to the Court of Appeal they do not withstand critical scrutiny. It may make the relationship between the CCRC and the Court of Appeal more workable<sup>98</sup> to have a test that is in harmony, but the problem identified by the RCCJ is that the previous system for dealing with miscarriages of justice was failing precisely because of the symmetrical deference of C3 to the Court of Appeal.

The argument for the integrity of the criminal justice system to be the principal concern for the CCRC and the test for legal unsafety over factual innocence forwards a notion of 'integrity' as understood in the strict legal sense of a blind adherence to

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98. See, for instance, R. Nobles and D. Schiff, "The Right to Appeal and Workable Systems of Justice", *op. cit.*, footnote 26, at pp. 692-693.

procedures, even if it means overturning the convictions of factually guilty terrorists, murderers and violent offenders that may present an on-going threat to public safety.<sup>99</sup> By contrast, “integrity” as understood from a lay perspective would distinguish between criminal convictions that are quashed in light of evidence of procedural irregularities and/or abuses of process that do not undermine the factual guilt of the appellant, which can be sent for re-trial, and those that are or should be overturned when the evidence that indicates factual guilt is entirely discredited, whether it is fresh evidence or not. This is the task that the CCRC is widely believed to undertake and a principle reason why other jurisdictions are interested in exploring the establishment of their very own CCRC-style body.

The due process defence is, similarly, unconvincing and ineffective. It is not appropriate to argue against the concern for potentially factually innocent at the post-appeal stage to protect rights for suspects of crime within the criminal justice process. Moreover, the whole point of due process as modelled by Packer is to protect the factually innocent from wrongful conviction. So, to argue for retaining the current system that leaves potentially factually innocent victims of wrongful convictions procedurally barred from overturning their convictions to somehow protect existing due process rights for suspects of crime seems a bizarre interpretation in the extreme.

The argument that the Court of Appeal is the site of the real problem misses the point entirely. The CCRC was set up because of apparent flaws with the Court of Appeal in dealing with alleged factual innocence appeals when the evidence was not fresh. It deals with alleged miscarriages of justice at the post-appeal stage for that very reason: it is meant to deal with

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99. For instance, Mullen was charged with an IRA blackmail plot after his successful appeal. See, BBC News, “Man shocked by ‘IRA blackmail’” (January 8, 2009), online at: <<http://news.bbc.co.uk/1/hi/uk/7818170.stm>> (accessed on August 24, 2011). It can also be argued that any deterrent affect of criminal convictions is threatened by the quashing of convictions on technical abuses of process, which can also, arguably, further contribute to a lack of legitimacy in the criminal justice system.

difficult cases that the Court of Appeal is not best placed to, not to be subordinate to the Court of Appeal.

For the CCRC to be a truly independent body to effectively assist potentially factually innocent victims of wrongful conviction in the way that the RCCJ foresaw, the following reforms are required. First, the CCRC needs to be truly independent from the Court of Appeal. This means that the real possibility test has to be removed and the CCRC should be able to refer any cases in which it believes that a wrongful conviction of a factually innocent person might have occurred.

Second, this would have a knock-on effect in terms of the CCRC's remit of how it reviews alleged wrongful convictions, which should not be restricted to fresh evidence. Akin to public enquiries, this would entail thorough re-investigations that seek to get to the bottom of whether claims of innocence are valid or not, as opposed to, mainly, paper reviews of the credibility of evidence.

Third, the CCRC must be permitted to acknowledge that forms of evidence, even if deemed to be admissible by trial judges, are potentially unreliable and that juries make mistakes. These points were made in the Reports by the RCCJ and the organisation JUSTICE<sup>100</sup> almost 20 years ago but are yet to be put into effect.

Fourth, all referrals by the CCRC should be deemed to be first appeals. That is, they should be afforded the same status as the powers of the Home Secretary's under s. 17 of the *Criminal Appeal Act 1968* under the previous system for reviewing alleged miscarriages of justice. This would free the CCRC from the current fresh evidence criteria and further enable it to operate independently and to refer cases of applicants thought to be factually innocent in the wider interests of justice.

In reflecting on these proposed reforms of the CCRC, it is interesting to note the recent acknowledgements from ex-CCRC Commissioners who were at the fore of defending the CCRC when they were in post. In response to the critique of the CCRC statutory straightjacket, Laurie Elks recently conceded that:

It may indeed be time to carry out a review of the CCRC's remit — a

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100. See, JUSTICE *Remedying Miscarriages of Justice*, *op. cit.*, footnote 9.

review promised at the time of the passing of the 1995 Act. It would for instance be possible to widen the CCRC's power of referral to include — exceptionally — cases where it suspects that a miscarriage of justice has occurred even where it is not persuaded that the *real possibility* test has been satisfied. This would compel the Commission to draw its frame of reference in wider terms.<sup>101</sup>

In a similar vein, and also shortly after leaving the CCRC after a 10-year stint as a Commissioner, David Jessel observed:

Miscarriages of justice used to dominate the headlines — now you're lucky if it's, you know, a small paragraph on page 4. [The CCRC is] . . . a victim of financial cuts, and the salami-slicing that is going on has, I think, really made it impossible for it to fulfil its original ambition. Do I fear for the future? Well, yes, I do. The CCRC . . . could take certain steps that would certainly guarantee it a longer, healthier, happier, more respected vision. It shouldn't entertain cases that are based on points of law, for instance. It should respect the work of campaigners. It shouldn't sniff at high-profile cases and make them take their place in the queue. They should break or renegotiate the link with the Court of Appeal. They should own their own belief in what a miscarriage of justice is, rather than saying "Well, actually, we have to define what the Court of Appeal would think is an unsafe conviction".<sup>102</sup>

The main motivation for this article was to detail the statutory limitations of the CCRC in assisting the factually innocent and to show the failings of the defences of the CCRC that are routinely deployed. This might assist both domestic and international colleagues in understanding the structural underpinnings of the CCRC that governs how it deals with applications and the kind of applicant it is most inclined to assist: those that have an identifiable abuse of process or fresh evidence at the expense of an investigation into claims of innocence by alleged factually innocent victims of wrongful convictions to determine their validity.

The central message of the article, then, is that there is an urgent need to review the workings of the CCRC within its own jurisdiction and for wide-ranging reforms so that it can fulfil its public mandate as envisaged by the RCCJ. This signals, too, a

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101. See, L. Elks, "Miscarriages of justice: a challenging view" (2010), 7:1 Justice Journal 19. See, also, J. Price and D. Eady, "Innocence Projects, the CCRC and the Court of Appeal: Breaching the Barriers?" (2010), 9 Archbold Review 6.

102. David Jessel speaking on BBC Radio 4, The World This Weekend (March 13, 2011).

need for a careful consideration of the appropriateness of the CCRC-model as a transplant onto criminal justice systems in other jurisdictions before such an endeavour is embarked upon. The CCRC is not currently doing the job that it was thought to be set up to do in its own jurisdiction. It is, therefore, unlikely that a wholesale adoption of how it is currently constituted will be a fix for the problem of the wrongful conviction of the factually innocent in other jurisdictions.