A critical evaluation of the utility of using innocence as a criterion in the post conviction process.

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Abstract

This thesis examines the plight of the innocent person who has been wrongly convicted. It starts from the premise that such a fate is abhorrent and that the criminal justice system should have effective mechanisms in place to correct such errors. The Court of Appeal (Criminal Division) (CACD) has stated that it is not part of its function to consider 'innocence'. Only the safety of a conviction is within its purview. The Criminal Cases Review Commission (CCRC) cannot correct an error itself, but can invite the CACD to consider doing so if it, CCRC, considers that there is a 'real possibility' of the CACD quashing the conviction.

My hypothesis was that, in the light of these stated positions, neither the CACD nor CCRC does treat 'innocence' as a discrete criterion in determining appeals and applications respectively. I tested this hypothesis by examining CACD judgments delivered in 2009 and judgments on CCRC conviction referrals in the period 1997-2011. I examined 404 case files at CCRC. I found that neither body gave consideration explicitly to whether the applicant/appellant was 'innocent'.

I then considered whether 'innocence' could and should be an explicit consideration for either body. I argue that while 'innocence' could be designated a material consideration it should not be. The most important change that Parliament should make is to CACD's application of the appeal test: that is the real obstacle for appellants who claim they are innocent. I propose that the CACD should be required by statute to receive fresh evidence more readily, and in some fresh evidence cases required to remit the case for retrial. Such changes would impact positively upon CCRC, which would then be able to refer more cases in which the applicant might be innocent.

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Preface

Alan Livesey was murdered on the evening of 22nd February 1979. The police were called to 41 The Crescent at 11:28pm and upon arriving they found the body of the 14 year old. He had been fatally stabbed. As matters unfolded over the following days and weeks an extraordinary story emerged.

Alan's mother Margaret Livesey quickly became the chief suspect. The suspicion is counter intuitive since a mother killing her son is most unusual. It becomes even more counter intuitive when one considers Alan's age. A mother killing an infant is rare but it is much more rare for a mother to kill a teenage son. Still, such incidents can happen especially when the mother is overcome by rage. In this case the victim was bound and subjected to elements of torture before death (specifically small knife wounds had been inflicted on his eyelids). These factors would suggest that this was not a killing carried out in a moment of sudden rage.

Margaret Livesey had spent the evening of the 22nd February drinking in a local pub and had then been given a lift to the end of The Crescent where she was dropped off just after 11pm. She spent part of the next few minutes drinking a glass of cider with neighbours before asking the neighbour's son to go and check on her son. He came back a few minutes later with the grim news of Alan's death. According to the prosecution prior to going to her neighbour's house Margaret Livesey is said to have been dropped off, returned home, flown into a rage, killed her son, tied him up and inflicted other wounds. She was then said by the prosecution to have calmly walked to the neighbour's house to drink the glass of cider.

By 7:45pm on 27th February after a police interview lasting nearly four hours Margaret Livesey had confessed to murdering her son and been formally charged by the police. There was some evidence from neighbours which bolstered the

prosecution case, but the confession was crucial. Margaret Livesey withdrew her confession within a few days of making it saying that she had been confused and that the police had convinced her that she must have committed the crime.

Margaret Livesey was tried twice for the murder of her son. Her first trial, which started in Preston on 2nd July 1979, was aborted during jury deliberations when a relative of one juror was taken seriously ill and the juror was discharged. The jury had already completed two days of deliberations when the juror was discharged on 11th July. Press reports indicate that the judge then asked whether both prosecution and defence would give their written consent to proceeding with just 11 jurors. The defence declined to do so and a retrial was ordered. The retrial started just 8 days later on the 19th July 1979. During the first trial lurid, but perfectly permissible, headlines about the trial had featured prominently in the Lancashire Evening Post[1] easily the most widely read local newspaper in the area.

[1] All the images in this thesis are reproduced with the permission of the Lancashire Evening Post.

On the 2nd July 1979 the lead story was

ARMY BOY 'STABBED TO DEATH IN RAGE'

AN ENRAGED mother stabbed her 14-year-old son to death after a violent argument, wrapped a football sock round his neck to hide the blood, and then tied his hands behind his back, it was claimed at Preston High Court today.

By BRIAN ELLIS

HOPING

be choosey!

The case featured as front page lead on the following two days and again on the 5th July when the story was headlined:

Lancashire
Evening Post
No. 28,704 THURSDAY, JULY 5, 1973

Murder charge mum on oath

WHY I ADMITTED KILLING MY SON ALAN

MURDER suspect Margaret Livesey entered the witness box today to tell a High Court jury: "I never killed my son."

Her voice trembling with emotion, the 43-year-old housewife said: "I didn't do it."

Livesey, who has pleaded not guilty at Preston to murdering her 14-year-old Army cadet son at the family's home in The Crescent, Bamber Bridge, in February, was giving evidence at the start of the trial's fourth day.

Mrs Margaret Livesey confessed to killing Alan after

In the days before 24 hour television news and the Internet local evening newspapers were a key source of news. It is inconceivable that at least some of the second jury did not see these stories. Whether it influenced their deliberations is unknown, but after deliberating for just five hours they returned a guilty verdict. Margaret Livesey was sentenced to life imprisonment.

Her case was taken up by the BBC Television programme Rough Justice which carried out a detailed reinvestigation and broadcast the results in October 1983. The authorities were unmoved. Lancashire Police commented "This force does not want to substitute trial by TV for trial by judge and jury."[2] The organisation JUSTICE submitted a dossier to the Home Office in November 1983, but still to no

[2] Mike Hill and Nicola Adam, *Lancashire's most notorious murders* (At Heart 2008) 39.

avail. Further work by JUSTICE and a second Rough Justice TV programme did eventually bear fruit when the Home Secretary, Douglas Hurd, referred the case back to the Court of Appeal. Jubilation from the campaigners was dashed a year later in December 1986 when the Court of Appeal rejected the appeal saying:

> *"We have carefully considered all these matters and we are not of the view that this conviction was in any way unsafe or unsatisfactory. The more information that was adduced before us, the more we became convinced that the verdict of the jury was correct. This appeal is dismissed."*[3]

Margaret Livesey remained in prison until the late 1980s. Campaigning journalist Bob Woffinden also included a chapter on the case in his 1987 book on Miscarriages of Justice.[4] He particularly focussed on the way in which the Court of Appeal had dealt with the appeal.

All of the events described happened in the village of Bamber Bridge which sits on the outskirts of what is now the city of Preston. I was born and raised in the village and the case made an indelible impression upon me. The conviction of Margaret Livesey always struck me as implausible and it helped to build a life-long interest in how innocent people may be convicted of a crime and the difficulties which face them once they have been convicted.

This thesis explores just how difficult it is for someone who claims to be innocent to get a conviction overturned.

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[3] *R v Livesey* Court of Appeal (Criminal Division) 16th December 1986.

[4] Bob Woffinden, *Miscarriages of Justice* (Hodder and Stoughton 1987) 269.

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I could not have completed this thesis without the help and support of a lot of people. My wife, Fiona, was a constant source of encouragement and support. She also provided practical support and constructive criticism by reading some of the many drafts the thesis has undergone. The lifetime efforts of my father and my late mother enabled me to pursue my interest in the subject, which would otherwise have been impossible.

The Commissioners and staff at CCRC were unfailingly helpful and endured interruptions to their work without complaint. Above all, they were interested in what I was doing and continue to be interested. I particularly want to thank John Wagstaff and Justin Hawkins, whom I met on my first visit to CCRC. Both helped me immensely during the research. A number of Commissioners also took particular interest in my research and I would like to thank Michael Allen, Ian Nichol, Alastair MacGregor, John Weeden, Penny Barrett and CCRC Chairman Richard Foster for all giving freely of their time. I was also fortunate enough to meet two former Commissioners, Laurie Elks and Barry Capon, and they too provided me with a valuable insight into their time at the Commission.

My supervisors Professor Rosemary Pattenden and Dr. Ian Edwards worked very hard to try to ensure that the finished product achieved the necessary level of academic rigour. Any shortcomings are no reflection on the effort they put in.

Last, but not least, was our Border Collie, the irrepressible and loyal Jazz. The many hours I spent walking with Jazz were a perfect opportunity to clarify my ideas. Sadly, he passed away in 2013 so did not see the end of the process, but his contribution was immensely valuable.

Chapter One - Overview

1.1 INTRODUCTION

This thesis is a critical evaluation of innocence in the post-conviction process in England, Wales and Northern Ireland.[1] The evaluation is original because it comprises the first detailed analysis of the manner in which the Criminal Cases Review Commission[2] handles cases in which innocence is in issue. This analysis was possible because CCRC granted access to its case files. The thesis is also original in providing an assessment of the way in which the CACD deals with such cases, in the wake of the major changes made by the Criminal Appeal Act 1995. I conclude that innocence is not an explicit material consideration in the post-conviction process, and crucially, that I do not consider that it should be one. I identify some cause for concern about the treatment of certain cases, but argue that amending the manner in which the Court of Appeal deals with certain fresh evidence cases is a better way forward than making innocence an explicit criterion. This chapter is an outline of the route to this conclusion.

In chapter two I examine why we should be concerned about the conviction of the innocent. My hypothesis is that innocence is not a material consideration in the current post-conviction process. The research questions address what role it does, could or should have. I explore the meaning of the term innocence, both within and beyond the criminal justice system. The criminal justice system contains various safeguards designed to avoid convicting someone who is innocent. A short overview of some of the safeguards is included. If the safeguards fail, there are mechanisms to enable the resultant error to be corrected. The statutory arrangements governing the Court of Appeal, Criminal

[1] For ease of reference I will henceforth describe the jurisdiction as England to encompass the whole.

[2] Henceforth CCRC.

Division[3] and the Criminal Cases Review Commission are set out. Finally, I consider the specialised vocabulary that had developed in relation to correction of error, particularly the terms "miscarriage of justice" and "wrongful conviction." I conclude that adopting specific definitions for these terms and the notion of innocence will be helpful for the purposes of this thesis.

Chapter three is a review of the academic literature on post conviction appeal processes. I adopt the appointment of the Runciman Royal Commission[4] as a convenient starting point, since its recommendations form the basis of the current arrangements. My focus on post conviction remedies deliberately limits the scope of the literature review, because I want to explore how difficult it is for someone to get an error corrected. Literature on miscarriages of justice ranges across the causes of miscarriage of justice, comparative studies, or attempts to quantify the scale of miscarriages. All of these have been considered in the preparation of this thesis. Some have been helpful, since understanding how an error occurred may assist in rectifying it, but since the arrangements for correction usually pay relatively little systematic heed to the cause of the error any help is limited. Recent literature on the post conviction process concentrates heavily on the work of the CCRC. As it is a relatively new body this emphasis is understandable. It is apparent that much of the literature is based upon external observation of CCRC. External observation of CCRC means that it was undertaken without access to CCRC's internal files. I identify a gap in the literature, which I consider could be addressed by systematic, empirical observations of case files at CCRC and analysis of CACD judgments. The empirical observations will enable me to determine what role, if any, innocence has in the current post conviction process and then consider what role it could, or should, play.

Chapter four sets out my methodological approach and its rationale. The approach is a combination of black letter law, empirical research and a review of the literature. There is an explanation of the methodology adopted in each aspect of the empirical research. The limitations which existed in respect of the research

[3] Henceforth CACD.

[4] *The Runciman Royal Commission on Criminal Justice* (Viscount Runciman Cmd 2263 1993).

at CCRC are considered and the risks flowing from that and my relationship with Commissioners and staff at CCRC are assessed. The chapter also contains details of subsidiary questions that I developed in order to facilitate answering the research questions.

Empirical research on the appeal decisions of the CACD is reported in chapter five. This has two components; decisions issued during the calendar year 2009, and decisions on conviction referrals made by CCRC. Most of the 2009 appeals were argued on grounds that were neutral as to the appellant's guilt or innocence, being focussed on some element of the conduct of the trial or investigation. For cases where innocence was in issue, particularly cases involving fresh evidence, I found it difficult to discern any consistency of approach by the CACD. I also found it difficult to discern any consistency of approach to the issue of ordering a retrial following a successful appeal. The second component of the observations covered CACD decisions made between 1st April 1997 and 31st March 2011 on CCRC conviction referrals. Although, compared with the 2009 sample, more of these cases were about guilt or innocence, there were still a substantial number where the issue was the integrity of the criminal justice system. In cases involving fresh evidence, and thus questions of factual guilt or innocence, I again found it difficult to identify any consistency either in the application of the tests for admitting and evaluating fresh evidence or the ordering of a retrial in appropriate cases. I observe that the CACD's decisions on CCRC referrals give an insight into the cases of only a small fraction of those who apply to CCRC. To complete the picture I needed to understand the 96.5% of applications to CCRC that did not result in a referral.

Chapter six contains a critical analysis of the CACD's handling of appeals. I focus on appeals in which fresh evidence is tendered, since such appeals tend to raise assertions of innocence in a way that enables the CACD's approach to be assessed. I begin by considering, briefly, the assessment made by others before providing my own assessment. I conclude that the CACD is ideally equipped to deal with cases where the conduct of the trial or other due process matters are in issue. It is less impressive when dealing with fresh evidence. I conclude CACD's

application of s23[5] and its approach to retrials is unpredictable and inconsistent. As CCRC is engaged in a predictive exercise when applying the "real possibility" test, I conclude that it is trying to predict the utterly unpredictable. I consider why the CACD is unpredictable. I was able to conclude from this analysis that innocence is not a material consideration in the current process, which supports my hypothesis.

Chapter seven records the observations I made of case files at CCRC. These observations had two components; a random sample of files covering the period 1997-2009 (the random sample) and a sample of files where a referral had been refused by a committee of three commissioners (the committee sample). The random sample results provide an insight into applications received by CCRC, particularly cases involving assertions of innocence. I found that a large majority of cases in the random sample had little prospect of being referred to the CACD, usually for the lack of any fresh evidence or argument. Accordingly, few cases were finely balanced and required the careful application of the statutory "real possibility" test that must be met if CCRC is to refer a case to an appeal court.[6] Focussing on cases in the committee sample, supplemented by some reported judicial review proceedings, enabled me to observe the difficulties faced by Commissioners when applying the real possibility test. I identify the characteristics of a small number of cases that troubled me, but in each case found that the reasoning, based on the likely response of the CACD, was compellingly argued.

From the observations on the two samples at CCRC I was able to form judgments about the quality of applications, the grounds submitted by applicants, the plausibility of claims of innocence and evaluate CCRC's approach to claims of innocence. Despite many poor quality applications, I found CCRC's work to be consistent, thorough and diligent. I identify some risks that could mean that meritorious cases are missed. The observations are supported by case studies drawn from CCRC's files.

[5] S23 of the Criminal Appeal Act 1968 governs the admission of fresh evidence in Criminal Appeals.

[6] The provision is explained in detail in chapter two.

I analyse the performance of CCRC in chapter eight. I begin by considering criticisms others have made of CCRC. My response to those criticisms is based partly on my analysis of the criticism independent of my findings, but also uses my findings as evidence in respect of the criticisms. The second part of the chapter is my assessment, drawing upon the empirical findings, of the deficiencies in the current arrangements, particularly highlighting the role of the CACD. I conclude that, within the constraints of its relationship with the CACD, CCRC operates effectively, but those constraints mean that innocence is not an explicit consideration at CCRC.

Chapter nine draws upon the conclusion that innocence is not a material consideration in the current post-conviction process and considers whether it could, or should, be one. I conclude that, though theoretically it could do so, it would not be desirable. The normative question "should innocence be a material consideration in the post conviction process?" is answered in the negative. I set out my reasons for these conclusions. That leaves unresolved, however, that small body of troubling cases that I identified at CCRC. The key characteristic of such cases was that they contained some fresh evidence which, in some manner, weakened the prosecution case. I therefore consider whether making the treatment of fresh evidence the key issue, rather than innocence, might be a more effective way of addressing those troubling cases. I consider that such a change would be beneficial to those asserting innocence and in the wider interests of justice. The Runciman Commission made two key recommendations about the treatment of miscarriages of justice; the introduction of an independent review body and a different approach from the CACD. The former has happened and is functioning effectively. The latter has not and I therefore propose two statutory changes. One aimed at forcing the CACD to adopt a more liberal approach to the receipt of fresh evidence. The other to require the CACD, in specified fresh evidence cases, to order a re-trial. I consider other possible changes, detailing their strengths and weaknesses. I also consider the suggestions for change made by others, but because they focus on innocence and/or reform of CCRC I do not think they would be as effective. In short, trying to change CCRC without addressing the shortcomings of the CACD would be unsatisfactory.

Chapter Two - What is special about innocence?

2.1 INTRODUCTION

This chapter explains why the plight of the innocent person who has been convicted in error is worthy of study. The first part of the chapter contains a brief review of some of the measures taken within the criminal justice system to minimise the risk of someone being wrongfully convicted. The current arrangements for correcting error are described in detail in part two. The mechanisms of correction have generated a specialised vocabulary, particularly the terms "miscarriage of justice" and "wrongful conviction." Part three of this chapter considers the varied use of these terms and the implications of those various uses. I discuss the concepts of "innocent" and "innocence", which extend beyond the vocabulary of error correction. The chapter concludes with an attempt to create a hierarchical structure as a framework for the discussions in this thesis.

2.2 THE RESEARCH QUESTIONS

The topics discussed in this chapter underpin my three inter-related research questions. The first is "to what extent is innocence a material consideration in the post conviction process?" My hypothesis is that innocence is not an explicit material consideration in the post conviction process. If the evidence supports that hypothesis it leads to two further questions; "*could* innocence be a material consideration in the post conviction process?" and the normative question, "*should* innocence be a material consideration in the post conviction process?"

2.3 INNOCENCE WITHIN THE CRIMINAL JUSTICE SYSTEM

The focus of this thesis is the plight of an "innocent"[1] person who has been wrongly convicted. That focus falls upon a small part of the criminal justice system, the post-conviction process. I should clarify that any reference to the "post-conviction process" means both the process of appeal, and also any other avenues open to the individual, such as an application to CCRC or seeking exercise of the Royal Prerogative of Mercy. Furthermore, when discussing innocence in the context of the post-conviction process I restrict discussion to its role in relation to conviction. Claims of innocence may have relevance to sentencing or parole decisions, but neither of those topics falls within the scope of this thesis.

In order to place the research focused on the small part of the criminal justice system in context, some brief description of the prior elements of that system is necessary. Before doing that it is also worth adopting a definition of the criminal justice system in England. For my purpose the approach adopted by Sanders et al will serve well. They describe the criminal justice system in the following terms:

> *"… a complex social institution which regulates potential, alleged and actual criminal activity within limits designed to protect people from wrongful treatment and wrongful conviction."*[2]

It is their reference to "limits designed to protect people from wrongful conviction" which I will examine in detail. The criminal justice system in England is complex. Its characteristics include a set of rules defining particular crimes,[3] differentiation

[1] I have placed the word within quotation marks because, as discussed later in this chapter, the precise meaning is not easily defined.

[2] Andrew Sanders, Richard Young and Mandy Burton, *Criminal Justice* (4th edn, OUP 2010) p1.

[3] The rules are derived from both the Common Law and Statute.

between civil and criminal liability[4] and procedural rules covering investigation and trial stages designed to ensure that a defendant is treated "fairly".

One of the objectives of the criminal justice system has the dual purpose of convicting the guilty and acquitting the innocent. This thesis considers what happens if these twin objectives are not achieved. As part of the complexity of the criminal justice system, however, a number of safeguards are built into the system in an attempt to deliver the objective as efficiently as possible. These safeguards include the following:

2.3.1 The search for truth

Philosophically truth is a difficult concept. How can we ever be sure that we know the truth about something? The difficulty of establishing the truth with certainty and the fact that the consequences of an incorrect conclusion can be severe have important implications for an adversarial criminal justice system. An extreme view of these implications is that these factors result in a system that abandons the search for truth. Dershowitz puts it thus:

> *"That is why a criminal trial is not a search for truth. Scientists search for truth. Philosophers search for morality. A criminal trial searches for only one result: proof beyond a reasonable doubt."*[5]

More realistically, Sir Robin Auld concluded that the trial is a search for truth, subject to conditions:

[4] The differentiation is not always absolute or easy to identify, but the law endeavours to treat civil and criminal liability differently.

[5] Alan Dershowitz, 'Casey Anthony: The System Worked' (*The Wall Street Journal*, 7th July 2011) <http://online.wsj.com/article/SB10001424052702303544604576429783247016492.html?mod=WSJ_Opinion_LEADTop> accessed 3rd February 2012.

> *"It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent."*[6]

The balance between these twin principles shifts from time to time as, in line with Packer's models[7] of crime control or due process, legislators move in one direction or the other. But, even where the move is towards a model favouring crime control, the search for truth, whatever the limitations, remains at the heart of the trial process.

2.3.2 The presumption of innocence

A second layer of protection against adjudicative error[8] is derived from the presumption of innocence, a succinct way of stating that the prosecution carries the burden of proof. The presumption of innocence is enshrined into the fabric of society,[9] but under the stresses and strains of application it can, as Ashworth has illustrated, falter quite markedly.[10]

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[6] Robin Auld, *A Review of the Criminal Courts of England and Wales* (2001) p 459.

[7] Herbert L Packer, 'Two models of the criminal process' (1964) 113 University of Pennsylvania Law Review 1.

[8] There are protections built into the stages of the system that precede trial in both the investigatory phase and the decision to charge, but the focus here is on the trial proceedings.

[9] Now explicitly so under Human Rights Act 1998 s1 and Schedule 1 Article 6(3) which states "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

[10] Andrew Ashworth, 'Four threats to the presumption of innocence' (2006) 10 International Journal of Evidence and Proof 241.

2.3.3 The standard of proof

The third layer of protection is drawn from the standard of proof that must be achieved by the state. The standard is set at the highest level possible short of certainty in an effort to minimise the risk of convicting the innocent. In modern adversarial jurisdictions the standard to which the facts must be demonstrated is often expressed as "beyond a reasonable doubt."[11] This, inevitably, begs the questions, what does that phrase mean and how should the standard be applied? Laudan has argued persuasively that the standard exemplified by the phrase beyond a reasonable doubt (BARD) is vague, difficult to interpret or explain and ultimately so flawed that it should be abandoned.[12] The reality remains, however, that any method of assessment must contain within it some probability measure. Since the issues at stake are not capable of being subjected to some sort of mathematical precision, it is inevitable that statements of the standard of proof will centre on the language of probability. Even stating the probability in some notionally mathematical way, as Laudan does, hardly resolves the issue. If BARD means, for example, a probability of greater than 95%, it still requires the adjudicator to make a subjective judgment about what constitutes that degree of probability.

If the required degree of probability has not been achieved the accused is declared acquitted or not guilty. This is, of course, fundamentally different from a finding of innocent. Laudan has challenged this general reliance on a system based on just two possible verdicts.[13] He points out that since in some states in the United States previous acquittals are taken into account in later sentencing,

[11] The Judicial Studies Board directs that a judge should instruct the jury to convict if they are "sure that the defendant is guilty." Further elaboration is discouraged and the case of *R v Majid* [2009] EWCA Crim 2563 cited as a caution against doing so. *Crown Court Bench Book - Directing the Jury* (Judicial Studies Board, 2010) p16.

[12] Larry Laudan, 'Is it Finally Time to Put 'Proof Beyond a Reasonable Doubt' Out to Pasture?' in Andrei Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge 2012).

[13] Larry Laudan, 'Need verdicts come in pairs?' (2010) 14 International Journal of Evidence and Proof 1. Laudan acknowledges that the Scottish system provides for a third "not proven" verdict.

the point is not just one of some philosophical importance but has practical significance.[14]

2.3.4 Exclusionary rules of evidence

Further safeguards exist in the provisions relating to what evidence the prosecution may adduce in order to secure a conviction.[15] These safeguards include rules governing excluding evidence that has been improperly obtained,[16] permitting only certain types of hearsay evidence[17] and limiting the scope of bad character evidence.[18]

But what if, in spite of these and other pre-trial safeguards, something goes wrong and an "innocent" person is convicted.

2.3.5 Mechanisms to Correct Error

The response has been to provide mechanisms for addressing the error. The two primary ones are review by an appellate court and executive clemency. Judicial review[19] by a Court of Appeal considering fresh evidence in criminal conviction cases was introduced into England in the early 20th century.[20] Executive clemency

[14] Ibid p3.

[15] I am not attempting to give a comprehensive statement of the exclusionary rules, merely providing some examples of the operation of the rule.

[16] Police and Criminal Evidence Act 1984 s76(2) and s78(1) being two key examples.

[17] Criminal Justice Act 2003 ss 114-118.

[18] Ibid ss 98-113.

[19] In a general, rather than administrative law, sense.

[20] Criminal Appeal Act 1907. Prior to the 1907 Act appeals on points of law could be pursued and determined by the Court for Crown Cases Reserved.

by way of a Royal Pardon can be traced back to medieval times.[21] Prior to 1907 the only route for a wrongful conviction to be addressed was by application of the Royal Pardon. A driving force in the introduction of the 1907 Act was the desire to reduce the burden on the Home Secretary from such applications.[22] The utility of each of these mechanisms, with particular emphasis on the Court of Appeal, will be considered in detail in this thesis. The extent to which the protections against error constructed for the trial process continue to feature after conviction will be examined.

Even with these error correction mechanisms in place the prospect of error still remains. The review by judicial tribunal may perpetuate error or the consideration of clemency might conclude, incorrectly, that it is not justified. The response was to introduce another process of review by an executive body (previously the Home Secretary, now The Criminal Cases Review Commission) as an additional safeguard against error. The operation of that additional process will also be considered in detail.

2.4 CURRENT POST CONVICTION REMEDIES

This section describes the current arrangements for addressing potential miscarriages of justice in England. Any evaluation of the arrangements must flow from a clear understanding of what those arrangements are. I restrict consideration to miscarriages of justice arising from convictions in the Crown Court, because the outcome of appeals from the magistrates' courts are not reported in an accessible fashion and it makes this project manageable. In

[21] For a useful discussion of the exercise of present day Ministerial power see *Taming the Prerogative: Strengthening Ministerial Accountability to Parliament* (House of Commons Public Administration Select Committee HC422, 2004). Further discussion of the prerogative and its potential utility is contained in chapter nine.

[22] Rosemary Pattenden, *English Criminal Appeals 1844-1994 : appeals against conviction and sentence in England and Wales* (Clarendon Press 1996) provides, in chapter one, a detailed historical account of the process leading to the 1907 Act.

addition, crimes dealt with in the magistrates' court are usually less serious ones. Neither point is intended to suggest that miscarriages of justice in magistrates' court are unimportant, but the absence of accessible reports provides a pragmatic rationale for focussing on Crown Court convictions. [23]

I set out these details in a descriptive manner, reserving criticism of the current arrangements or legislation to chapter nine. This section has two parts, each of which addresses the composition and role of one of the two bodies, the CACD and the CCRC, which have primary responsibility for addressing miscarriages of justice. Each part begins with a description of the relevant body and then goes on, in the case of the CACD, to examine the legislative provisions that govern the determination of appeals and, in the case of the CCRC, the statutory provisions under which it operates. Since some of the research referred to in this thesis was undertaken under previous statutory arrangements, I highlight any significant differences. The rarely used Royal Pardon is covered briefly since I go on to consider its potential utility in chapter nine. Finally, I include a short summary of the statutory provisions on compensation for miscarriages of justice, because the Supreme Court considered the meaning of innocence for the purposes of compensation in 2011. The outcome of its deliberations feature in the proposals for change outlined in chapter nine.

2.5 THE COURT OF APPEAL

The Court of Appeal has two divisions. One deals with appeals in civil litigation, the other criminal appeals. The latter is of interest for this thesis, but the existence of the former is relevant since any assessment of the workload of the Court of Appeal judges must take account of the workload of both divisions.

[23] Kerrigan argues for a greater focus on miscarriages of justice in the magistrates' court. Kevin Kerrigan, 'Miscarriage of Justice in the Magistrates' Court: the Forgotten Power of the Criminal Cases Review Commission' [2006] Crim LR 124.

In May 2012 there were 36 Lords Justices of Appeal presided over, in criminal matters, by the Lord Chief Justice, Sir Igor Judge. An appeal in he Criminal Division of the Court of Appeal (CACD) is normally heard by a panel comprising a Lord Justice of Appeal and two High Court judges or one High Court Judge and a nominated circuit judge.[24] The implications of the workload and composition of the court for the consideration of claims of innocence is explored further in chapter six.

2.5.1 Appeals from convictions in the Crown Court

The CACD's powers in respect of appeals against conviction derive from the Criminal Appeal Act 1968 (the 1968 Act), as amended. Section 1 gives a person convicted on indictment a right of appeal to the Court of Appeal,[25] either with leave from the Court of Appeal[26] or if the trial judge certifies that the case is fit for appeal.[27] In practice, based on the data for 2009,[28] the majority of cases heard as full appeals receive leave from a single judge of the Court, who has reviewed the papers.[29] Some cases are heard by leave of the full court.[30] Trial judges grant certificates in a small minority of cases.[31] Prior to 1st January 1996, when amendments made under the Criminal Appeal Act 1995 came into force, an appellant did not require the leave of the court to appeal on a point of law. Notice

[24] The composition is subject to statutory provisions under s 9 and s 55 of the Senior Courts Act 1981.

[25] Criminal Appeal Act 1968 s1 (1).

[26] Ibid s1 (2) (a).

[27] Ibid s1 (2) (b).

[28] Supplied to the author by the Court of Appeal office. There were 428 appeals against conviction heard in 2009.

[29] 291 of the 428.

[30] In 2009 there were 69 cases.

[31] 4 in 2009.

of appeal, or of application for leave, has to be given within 28 days of conviction.[32] The CACD had power to extend this time limit.[33]

2.5.2 Test Applied on Appeal

In determining an appeal against conviction the CACD considers whether the conviction is unsafe. If it so concludes, then it must allow the appeal;[34] otherwise it must dismiss the appeal.[35]

Prior to 1996 there was a different test. The CACD had to decide whether a wrong decision of law,[36] or a "material irregularity"[37] had occurred in the original proceedings. Where the CACD found that either of these issues might be decided in the appellant's favour, it had a residual power to nevertheless dismiss the appeal, if it considered that no miscarriage of justice had actually occurred.[38] The third ground of appeal required the CACD to consider whether "under all the circumstances of the case"[39] the jury's verdict was "unsafe or unsatisfactory".[40] If it did so conclude, it had no power to use the proviso.[41] The 1995 Act removed the three distinct issues and replaced them with the single test of whether the conviction was unsafe.[42] The reference to the verdict being unsatisfactory was

[32] Criminal Appeal Act 1968 s18 (2).

[33] Ibid s18 (3).

[34] Ibid s 2(1)(a) which came into effect on 1st January 1996 following an amendment made in the 1995 Act.

[35] Ibid s 2(1)(b).

[36] Criminal Appeal Act 1968 s 2(1)(b) as originally enacted.

[37] Ibid s 2(1)(c) as originally enacted.

[38] Ibid s 2(1) as originally enacted.

[39] Ibid s 2(1)(a) as originally enacted.

[40] Ibid.

[41] The various circumstances when the proviso was not available are detailed in Pattenden n22 184-190.

[42] Criminal Appeal Act 1968 s 2(1)(a).

also removed as a consideration. The proviso enabling the CACD to dismiss the appeal if it considered no miscarriage of justice had occurred was abolished.

The changes, partly based on the recommendations of the Royal Commission on Criminal Justice,[43] were the subject of lengthy Parliamentary debate[44] and subsequent academic consideration[45] as MPs, the legal profession and academics all tried to assess the implications of the modified test. Since the purpose of this thesis is to consider *current* arrangements for addressing miscarriages of justice, the impact of the law prior to these changes is not considered in detail.

2.5.3 Admission of Fresh Evidence

Some appeals to the CACD involve the consideration of fresh evidence.[46] It has a discretionary power to receive evidence not adduced in the proceedings from which the appeal is made. It may receive the evidence, if it considers it necessary or expedient to do so in the interests of justice.[47]

If the CACD contemplates exercising this discretionary power, it must have particular regard to four factors, which are:

- Whether the evidence appears capable of belief;
- Whether the evidence may afford a ground of appeal;

[43] *The Runciman Royal Commission on Criminal Justice* (Viscount Runciman Cmd 2263 1993).

[44] See, for example, HC Deb 6 March 1995, Vol 256, Cols 23-114.

[45] J. C. Smith, 'The Criminal Appeal Act 1995: Part 1: Appeals against conviction' [1995] Crim LR 920 and J. C. Smith, 'Criminal appeals and the Criminal Cases Review Commission' (1995) [145] New Law Journal 533.

[46] Many concern issues about aspects of the trial such as the judge's summing up or directions or decisions on admission of evidence.

[47] Criminal Appeal Act 1968 s 23(1).

- Whether it would have been admissible in the original proceedings;
- Whether there is a reasonable explanation for the evidence not being adduced in the original proceedings.

The CACD may consider all four factors and be satisfied on each one, but still decline to receive the evidence if it decides that it is neither necessary nor expedient to do so in the interests of justice. It may also consider factors beyond those listed. The primary consideration on any fresh evidence is the court's view on whether it is necessary or expedient in the interests of justice to receive it.[48]

Before 1st January 1996 the approach to be taken by the CACD to the consideration of fresh evidence was slightly different. It had to assess whether the evidence would afford a ground of appeal and, if so, whether the evidence was "likely to be credible" in contrast to the later test of "capable of belief". This prompted Parliamentary debate on the distinction between "credible" and "capable of belief".[49]

2.5.4 Retrial Provisions

If CACD allows an appeal against conviction then, by virtue of s7 (1) of the 1968 Act, it may, if it considers such a step would be in the interests of justice, order the appellant to be retried. The retrial provision was introduced by the Criminal Appeal Act 1964 and, initially, limited to cases in which the appeal was allowed "by reason of evidence received or available to be received under section 23" of the Act.[50] This limitation was removed in 1988.[51]

[48] As articulated in *R v Kenyon* [2010] EWCA Crim 914.

[49] During the Parliamentary debate on the Bill the Government indicated that it believed that the new test represented a lowering of the threshold for the admission of fresh evidence. HC Deb 06 March 1995 vol 256 cols 23-114.

[50] Criminal Appeal Act 1968 s 7(1).

[51] Criminal Justice Act 1988 s 43(2).

2.6 THE CRIMINAL CASES REVIEW COMMISSION

2.6.1 Creation of CCRC

Under the 1968 Act the CACD may only give leave to appeal once.[52] Between 1908 and 1997, the Home Secretary could refer a case, which had already been appealed, back to the CACD.[53] Upon such reference "the case [was] then [to] be treated for all purposes as an appeal to the Court by that person".[54] The 1907 Act required the appellant to have petitioned the Sovereign for the exercise of the Royal prerogative of mercy, but this requirement was removed by the 1968 Act, which permitted the Home Secretary to make a reference on the application of the appellant or without any such application.

The Home Secretary's referral power came under increased scrutiny and criticism in the late 1980s and early 1990s,[55] and the Royal Commission on Criminal Justice[56] recommended that the power be transferred to an independent review authority.[57] The Criminal Appeal Act 1995 established, from 1st January 1997, a Criminal Cases Review Commission (CCRC).[58] The Commission opened to applications on 1st April 1997 when it also inherited 279 cases in progress from the Home Office. The Act abolished references by the Home Secretary.[59]

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[52] Confirmed in *R v Pinfold* 1988 QB 462 CA.

[53] Criminal Appeal Act 1968 s 17.

[54] Criminal Appeal Act 1907 s 19(a) and Criminal Appeal Act 1968 s 17(1)(a).

[55] Michael Mansfield and Nicholas Taylor, 'Post-Conviction Procedures' in Clive Walker and Keir Starmer (eds), *Justice in Error* (1993) and see Pattenden n22 pp 387-396.

[56] The appointment of the Royal Commission was triggered by the successful appeal, at the third attempt, by the Birmingham Six. This drew into sharp focus the concern over the exercise of the power of referral by the Home Secretary.

[57] *The Runciman Royal Commission on Criminal Justice* n43 Ch11 para 11.

[58] Criminal Appeal Act 1995 s 8.

[59] Ibid s 3 abolished Criminal Appeal Act 1968 s 17.

The Act requires the Commission to have a minimum of 11 commissioners,[60] with at least two thirds required to having knowledge of the criminal justice system.[61] At least one third of the commissioners must be legally qualified.[62]

2.6.2 CCRC's Powers

The Criminal Appeal Act 1968 (as amended) provides that where a person has been convicted on indictment the Commission may at any time refer the conviction to the Court of Appeal. Such a reference is to be treated as an appeal under s1 of the 1968 Act.[63] The referral power is not unfettered. Section 13 of the Act sets out three pre-conditions that must normally be met for a reference to be made. They are:

1. An appeal against the conviction has been refused;
2. The Commission consider that there is a real possibility that the conviction would not be upheld were a reference to be made;
3. The Commission reach this view on the basis of an argument or evidence not raised at trial or on appeal or on an application for leave to appeal.

Under normal circumstances, an applicant to the Commission will have failed at appeal and have convinced the Commission on the basis of something new that there is a real possibility that the CACD will find that the conviction is unsafe.

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[60] Criminal Appeal Act 1995 s 8(3). This provision was breached for over two years, since the Commission had only had nine Commissioners after David Jessel reached the end of this permitted term in July 2010. There is a saving provision at Schedule 1 s6 (4) that prevents a vacancy amongst Commissioners from rendering a decision invalid, but arguably that provision was intended to cover the situation where the Commission was actively seeking to fill such a vacancy. Since the Commission declared, in its 2009-10 Annual Report, that it was not doing so, it could be argued that there is at least some doubt about the validity of its decisions.

[61] Ibid s 8(6).

[62] Ibid s 8(5).

[63] Ibid s 9(2).

The Act allows the Commission to disregard the requirement of a prior appeal, new argument or evidence, if the Commission considers there are "exceptional circumstances" which justify such action.[64] The "exceptional circumstances" provision does not allow the Commission to dispense with its judgment of whether there is a real possibility that the conviction would not be upheld.

The 1995 Act sets out a number of other matters about references. For the present purpose, the key elements are:

- The reference may be the result of an application by an individual or on his behalf or without an application having been made.[65]
- The Commission must give a statement of reasons for its decision.[66]
- The Commission can, should it wish, seek the opinion of the Court of Appeal.[67]

2.6.3 Amendments to the 1995 Act

Under the 1995 Act, as originally enacted, the making of a reference meant that an appeal against conviction could be treated as a vehicle to raise any ground of appeal even if it had not been the reason for the Commission's referral.[68] Some appellants took the opportunity to canvas numerous grounds, for which the CACD would have been unlikely, under the normal appeal provisions, to grant leave.[69]

[64] Ibid s 13(2).

[65] Ibid s 14(1).

[66] Ibid s 14(4)(a) in the case of reference, s 14(6) where it declines to make a reference.

[67] Ibid s 14(3).

[68] Ibid s14 (5).

[69] *R v Cleeland* [2002] EWCA Crim 293 is probably the most extreme example with 20 separate grounds of appeal recorded in the CACD judgment.

From 4th April 2005 the Court's leave to add grounds beyond those stated by CCRC was required.[70]

Another issue that arose was what approach CCRC should adopt in cases involving a change of law. The CACD's practice was to decline to grant an extension of time to applicants, seeking leave to appeal out of time, following a later ruling in another case which might prove advantageous to them. CCRC decided that, if an applicant's prior appeal had been refused, it could not take into account the practice of the court in refusing leave, since that was not a decision on the substantive point. If CCRC referred the case, which obviated the need for leave, the CACD would apply the law and, in all likelihood, allow the appeal.

This tension could be resolved, in cases where the appellant had not previously appealed, by CCRC declining to refer the case and forcing the applicant to apply for leave, which the CACD would likely refuse. A subsequent application to the Commission could be refused since it did not satisfy the requirements of s.13 (1)(b)(i) as the argument had already been raised on appeal. This created the anomalous position that an applicant who had had an earlier appeal refused was in a better position than an applicant who had never appealed.

An amendment to the 1968 Act by the Criminal Justice and Immigration Act 2008 gave express power to the CACD to dismiss an appeal based on a change of law, if the CACD would not have exercised its power to grant an extension of time to a normal appeal. This became a factor that the CCRC had to take into account in considering whether the "real possibility" test would be satisfied. The CACD's normal practice was, in effect, imposed upon the Commission.

[70] Criminal Justice Act 2003 s315 amending the 1995 Act.

2.6.4 Other Powers

The 1995 Act endows CCRC with further important powers. Section 17 gives it power to obtain documents from public bodies and Section 19 to appoint investigating officers. Section 15 establishes CCRC as a body empowered to carry out investigations at the request of the CACD.[71]

2.6.5 Royal Prerogative of Mercy

The exercise of the Royal Prerogative of Mercy is a matter upon which the Home Secretary is able to make a recommendation to the Sovereign.[72] The 1995 Act enables him to seek the assistance of the Commission in considering whether to make such a recommendation.[73] The Commission has the power, under s16 (2), to make a recommendation of its own volition. The Commission has made only one such recommendation, which related to a sentence, in the light of assistance rendered to the authorities by the individual after sentence and appeal.[74]

2.7 COMPENSATION FOR MISCARRIAGES OF JUSTICE

The UK is a signatory to the International Covenant on Civil and Political Rights 1966. The covenant obliges signatories to pay compensation to an individual who is the victim of a miscarriage of justice.[75] For a number of years the UK ran two

[71] The Commission has investigated a number of allegations of jury irregularities. See, for example, *R v Hewgill and Others* [2011] EWCA Crim 1778.

[72] n21.

[73] S 16 (1) so provides.

[74] *Annual Report 2010-11* (Criminal Cases Review Commission, 2011) p22.

[75] Article 14.

compensation schemes. The first was a discretionary scheme.[76] The second, under the Criminal Justice Act 1988 (the 1988 Act),[77] addressed concerns about whether the discretionary scheme complied with the UK's covenant obligations.[78] In April 2006 the Government closed the discretionary scheme[79] to new applications and, in 2008, the 1988 Act was amended to restrict eligibility for compensation and limit the amount of compensation under the statutory scheme.[80]

Section 133 (1) of the 1998 Act provides, as far as is material for this thesis, as follows:

> *"...when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction..."*

The provision has been the subject of protracted litigation and was considered by the Supreme Court in 2011.[81]

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[76] For a brief history of the ex gratia scheme see *R (Adams) v Secretary of State for Justice* [2011] UKSC 18 [73].

[77] S 133.

[78] For details of the pressure on the UK to put the compensation scheme on a statutory footing see *R (Mullen) v Secretary of State for the Home Department* [2004] UKHL 18 at para 28 in the judgment of Lord Steyn.

[79] Written Ministerial Statement, Hansard Column 15WS 19 April 2006.

[80] Criminal Justice and Immigration Act 2008 s61.

[81] *R (Adams) v Secretary of State for Justice* n76. The Government has also proposed a further amendment, presumably to limit the effect of the Supreme Court decision, in The Anti-social Behaviour, Crime and Policing Bill 2013-14 contains a provision to restrict compensation for miscarriages of justice to cases in which "if and only if the new or newly discovered fact shows beyond reasonable doubt that the person was innocent of the offence."

2.8 THE KEY PROVISIONS

For the purposes of this thesis, four of the provisions set out above are of greatest importance:

- The power of the CACD to quash a conviction which it considers unsafe.
- The provisions to be applied by the CACD in respect of the admission of fresh evidence.
- The power of the CACD to order a retrial.
- The power of CCRC to refer a case to the CACD where CCRC considers that there is a real possibility that the CACD will find the conviction unsafe.

The application of these provisions lies at the heart of attempts by the wrongfully convicted to have a conviction quashed. They confer on the decision-makers, whether CACD or CCRC, discretionary powers. The evaluation of this discretion forms the core of this thesis.

2.9 A QUESTION OF DEFINITION

Consideration of the special place afforded to innocence must be undertaken with a clear understanding of the terminology used in relation to the topic. The erroneous conviction of an innocent man has generated its own vocabulary. Authors use the terms miscarriage of justice and wrongful conviction to describe cases where someone has been convicted who should not have been. I now consider the scope of these two terms, their relationship with each other and with the concept of innocence. My objective here is to explore the use of these terms from a definitional perspective. The academic literature reviewed in chapter three

makes use of the terms, but the focus of that chapter is the nature of the enquiries undertaken and the findings.

2.9.1 Innocence

Some people claim that innocence forms the very foundation of the criminal justice system. The presumption of innocence is the "golden thread" running through English law.[82] In fact, the presumption hangs by a somewhat frayed thread and once an individual has been convicted, restoration of the presumption becomes well nigh impossible.

The pioneer of the concept of a presumption of innocence was 18th and 19th century lawyer Sir William Garrow, who is widely credited with the introduction of the phrase "innocent until proven guilty". The presumption of innocence has statutory recognition.[83] However, as Blake and Ashworth have pointed out the presumption is, in a substantial number of cases, reversed by statute.[84] Ten years later Ashworth returned to the subject, examining to what extent the response to the events of 9/11 impinge upon the presumption of innocence.[85] Despite these limitations, the notion of innocence still seems to play an important part in public consciousness about the criminal justice system.

However, both judges and academics have explicitly recognised that the determination of innocence is not an issue with which the law of criminal evidence and procedure troubles itself. The CACD has observed in numerous cases that it

[82] *Woolmington v DPP* [1935] AC 462 HL 481. Strictly speaking Viscount Sankey was describing the burden on the prosecution when using the phrase "golden thread", but he does also refer (p 480) to the presumption of innocence.

[83] See n9.

[84] Andrew Ashworth and Meredith Blake, 'The presumption of innocence in English criminal law' [1996] Crim LR 306.

[85] Ashworth n10. The implications have been explored in a number of articles, see for example, Vincent Tadros and Stephen Tierney, 'The presumption of innocence and the Human Rights Act' (2004) 67 MLR 402.

is not the function of the court to determine the guilt or innocence of an appellant.[86] Louis Blom-Cooper has made the same point.[87] The former Chairman of CCRC Professor Graham Zellick made the point powerfully when he put it thus "The opposite of guilty is not innocence but not guilty."[88] The philosopher Larry Laudan has written a series of penetrating works on the subject.[89]

If the presumption of innocence can be said to exist, it can be most plausibly argued to exist at the trial stage.[90] Once an individual has been convicted the presumption may be considered to have been addressed and removed. The restoration of the presumption might be said to arise upon a successful appeal and the ordering of a re-trial, since the defendant is entitled to be so treated. Indeed, appeal courts take considerable care not to prejudice a re-trial by withholding appeal judgments until a retrial has concluded.[91] However, where the conviction is quashed and no retrial ordered, it is clear that the CACD is not making any finding of innocence.[92]

That this is the position is also clearly articulated in the sphere of compensation. Many of those who have had their convictions quashed, such as Adams, George and Jenkins, have been subsequently refused compensation demonstrating that no finding of innocence has been made and innocence is not presumed.[93] Even when specifically invited to make such a declaration the CACD has declined.[94]

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[86] See, for example, *R v Hickey and Others* [1997] EWCA Crim 2028.

[87] Louis Blom-Cooper, *The Birmingham Six and other cases : victims of circumstance* (Duckworth 1997) 8.

[88] Graham Zellick, 'The Causes of Miscarriages of Justice' (2010) 78 Medico-Legal Journal 11 13.

[89] Larry Laudan, *Truth, error, and criminal law : an essay in legal epistemology* (Cambridge University Press 2006).

[90] One can also raise issues about the extent to which the presumption exists during, for example, investigation or bail hearings, but they go beyond the scope of this thesis.

[91] See, for example, the cases of *R v Clark and Drury* [2010] EWCA Crim 2849 or *R v Maxwell* [2010] UKSC 48.

[92] *R v Davis, Rowe and Johnson* [2000] EWCA Crim 10, [2001] 1 Cr App R 8.

[93] The refusals of claims by Adams and George are confirmed in *R (Adams) v Secretary of State for Justice* n76 and of Jenkins claim in Alexandra Topping, 'Sion Jenkins, foster father of Billie-Jo Jenkins, 'loses claim for compensation'' (*The Guardian*, 10th August 2010)

2.9.2 Lingering stigma and the presumption of innocence.

The scale of the difficulty facing someone trying to recapture a state of innocence can be illustrated by cases in which, following an acquittal or a quashing of a conviction on appeal, the police utter the phrase "we are not looking for anyone else." As Richard Ingrams put it:

> *"That is the traditional response of the police when faced with the acquittal of men they are convinced were guilty all along…. The implication is clear. The men were almost certainly guilty. The police just didn't have the evidence to prove it. At no point [in the cases of Waheed Ali, Sadeer Saleem, and Mohammed Shakil] was Hayman prepared to admit that they might just have been innocent."*[95]

At least one successful appellant has taken objection to lingering stigma. *Bento's* murder conviction was quashed in 2009 and a retrial ordered.[96] The CPS then decided not to proceed with a retrial and Bedfordshire Police issued a statement about that decision. *Bento* subsequently issued libel proceedings against the police and was awarded £125,000 in damages.[97]

<http://www.guardian.co.uk/uk/2010/aug/10/sion-jenkins-billie-jo-loses-claim-for-compensation> accessed 11th February 2012.

[94] *R v Hallam* [2012] EWCA Crim 1158 [49].

[95] Richard Ingrams, 'There is never enough evidence' *The Independent* (London, 2nd May 2009). Ingrams was discussing comments by ex police officer Andy Hayman following the acquittal of three men charged with terrorist bombings in London.

[96] *R v Bento* [2009] EWCA Crim 404.

[97] *Bento v Chief Constable of Bedfordshire Police* [2012] EWHC 349 (QB).

2.9.3 Defining Innocence

So, given that the law, whilst using the terms innocent and innocence, forbears, except perhaps, in the sphere of compensation to adopt any settled definition of the terms, how should the concept be defined for the purposes of this thesis? Actually, there is a question that precedes that one. Should innocence be defined at all? I conclude that it should, since the research observations focus on trying to consider how claims of innocence have been dealt with. If innocence is not defined, at least for the purposes of this thesis, then the research observations become hedged with questions of "what do you mean by innocence?" whenever an assertion is made that someone was claiming to be innocent.

The attempt to define the term results in the identification of multiple possible definitions. Innocent may describe a quality in an individual in a general sense, often associated with naïveté. Or it may mean, in the criminal law context, as a matter of fact someone did not commit a particular crime. It will become apparent that in the criminal law context what is meant by being innocent "as a matter of fact" is itself a complex concept.

The difficulty in differentiating between innocence as state of being and factual innocence is that only the individual concerned can know the former. I can never truly know whether someone else possesses the state of being which would merit the description innocent. The difficulties in the search for truth referred to above apply equally to identifying someone who is innocent.

If innocence cannot be easily articulated in a general way, I need to look at other attempts to define it to see whether a definition can be formulated and applied to

the cases I review. A potential source is the approach adopted by the Innocence Network in the UK.[98] The INUK tells applicants that:

> *"We will only assist in cases where an individual is claiming to have absolutely no involvement in the crime at all, including claims that no crime has occurred at all (e.g. where deaths are accidental or resultant of natural causes as opposed to criminal homicides)."*[99]

This definition is expanded upon in the INUK protocols, which offer additional gloss as follows.[100]

> *"no crime has occurred e.g. possible 'cot-death' cases where there are convictions for murder (Sally Clarke, Angela Cannings, Donna Anthony), where an alleged murder victim is claimed to be still alive, where deaths are accidental rather than as a result of a crime (Sheila Bowler, Pat Nichols), where there is a claim of a false allegation, and so on" or*
>
> *"s/he is entirely not involved in the commission of the criminal offence that s/he has been convicted of, however, cases where people are convicted of joint enterprise crimes who claim that they have no legal culpability at all will also be eligible for member innocence projects (e.g. Mark Day, convicted with a co-accused he did not even know)"*

The focus is clearly upon those who did not commit the criminal act or situations where there was no criminal act. INUK reports that as at December 2011 it had

[98] INUK is a network of Innocence Projects based at UK Universities. Further details are provided in section 3.3.

[99] 'Guidance for New Applicants Seeking Casework Assistance by an Innocence Project' (December 2011) <http://www.innocencenetwork.org.uk/wp-content/uploads/2011/12/INUK-Guidance-for-New-Applicants-December-2011.doc> accessed 6th February 2012.

[100] INUK Protocols January 2010 Edition.

received over 1000 applications, of which almost 200 were deemed to have "plausible claims of innocence."[101] Clearly, for a network that is operating almost entirely on a pro bono basis, it makes sense to filter out unmeritorious cases (after all, another way of looking at the same statistics would be to say that 80% of the applicants to INUK were unable to mount any plausible claim of innocence). However, INUK is not operating to a statutory framework and, accordingly, its definitional approach can allow for greater discretion by the decision maker.

It is worth noting that the second limb of the second scenario refers to those who claim no *legal* culpability when convicted of a joint enterprise crime. This is a complex area of law and INUK has previously indicated that those who fail to understand the legal position on joint enterprise will be advised that they are ineligible.[102] The implication of the wording chosen is that the applicant is not within the scope of the first limb (i.e. does not qualify as "entirely not involved") and, thus, must have had some degree of involvement, but claims no legal culpability. This seems to be a potentially difficult distinction to draw.

Another potential source for a definition of innocence is one of the few jurisdictions that has a specific statutory provision relating to inquiry into claims of innocence. The state of North Carolina established a Commission in 2007 to inquire into claims of actual innocence.[103] By January 2012 it had received 1,102 applications and rejected 953 of them.[104] Four of the cases have resulted in a formal hearing and two of them, involving three defendants, have ended with a declaration of innocence from the Commission. The Commission's powers are set out in a North Carolina statute that seeks to limit claims to those of actual innocence. It does so by adopting this wording that sets out that the applicant must be:

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[101] Michael Naughton, 'Criminal Justice System Still Failing the Innocent' (2011) <http://www.innocencenetwork.org.uk/criminal-justice-system-still-failing-the-innocent> accessed 11th February 2012.

[102] INUK Protocols January 2010 edition p16.

[103] North Carolina General Statutes Chapter 15A Criminal Procedure Act Article 92.

[104] 'NC Innocence Inquiry Commission Case Statistics' (Compiled January 2012) <http://www.innocencecommission-nc.gov/stats.html> accessed 11th February 2012.

> *"… asserting the complete innocence of any criminal responsibility for the felony for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime, and for which there is some credible, verifiable evidence of innocence that has not previously been presented at trial or considered at a hearing granted through post conviction relief."*[105]

It may be observed that the application may fail for lack of credible, verifiable evidence, or because the evidence of innocence is not fresh, but the essence of the provision is that the individual must be asserting complete innocence of the felony and also of any reduced level of criminal responsibility. This approach would seem to require evidence of innocence, as opposed to undermining the prosecution case.[106]

The approach taken by both INUK and the North Carolina Commission acknowledges implicitly the complexity of the notion of innocence in a legal context. Both exclude, for example, those who have responsibility for a lesser crime. Such cases would also have been excluded under the procedures used by JUSTICE.[107] Other cases present particular difficulties and have been excluded from consideration by investigative journalists. Jessel writes that the Trial and Error TV programme adopted an approach that excluded certain cases:

> *"We don't touch most rape cases, for instance, because there is virtually nothing that an investigation can do. There are no new witnesses to find, no new forensic evidence and the crucial point at*

[105] North Carolina General Statutes Chapter 15A Criminal Procedure Act Article 92 § 15A-1460. Definitions.

[106] The distinction is explored more fully in chapter nine.

[107] JUSTICE is a campaign group now focussed on strengthening the justice system, but it did previously undertake investigations into claims of wrongful conviction.

> *issue – usually the degree, if any, of consent – has been thoroughly argued in court."*[108]

I offer no criticism of any of the individuals or organisations that adopt this narrow approach to innocence. With the exception of the North Carolina Commission, all are taking on this work on a voluntary basis and have to manage their resources accordingly. They are perfectly entitled to do so by placing restrictions on the type of case they will consider. In contrast, the CACD and the CCRC have to operate within a statutory framework, so any approach which makes innocence an explicit factor must inevitably identify, on the basis of justifiable policy, those cases which qualify for treatment and those which do not.

However, for the purposes of the research observations and the critical analysis, I intend to adopt, as a working definition, the approach of INUK in the following terms:

> *"…cases where an individual is claiming to have absolutely no involvement in the crime at all, including claims that no crime has occurred at all (e.g. where deaths are accidental or resultant of natural causes as opposed to criminal homicides)."*[109]

I have adopted this definition because it seems to coincide most closely with the popular public view of what constitutes a miscarriage of justice. These are the cases that are most likely to offend our sense of morality. Whether the definition could be applied in a formal statutory context is one of the issues I shall consider.

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[108] David Jessel, *Trial and Error* (Headline in association with Channel Four Television 1994) p54.

[109] See n99.

2.9.4 Miscarriage of Justice

The term miscarriage of justice is one without any settled single meaning. This is not a special problem since the elasticity of meaning, referred to by HLA Hart as the "open texture" of language,[110] means that the term can encompass different circumstances according to the context of its use. The 9th edition of Black's Law Dictionary defines a miscarriage of justice in the following terms:

> *"Miscarriage of justice. (1862) A grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."*

The date in parentheses denotes the earliest year in which the editor was able to verify written use of the phrase. The definition comprises eight words. It suggests, by use of the word "grossly" as a descriptor of an unfair outcome, that there may be some lesser unfair outcome, which is not to be considered a miscarriage of justice. Furthermore, the definition refers to any grossly unfair outcome, which could therefore include, for example, the imposition of an excessive sentence or the acquittal of a guilty person. Since the outcome is from a "judicial proceeding" this would encompass civil as well as criminal matters. The example given to illustrate the definition relates to a criminal conviction. Such a definition would certainly include the cases of the innocent within its scope, but is not restricted to such cases.

2.9.4.1 Popular Definitions

It is fair to assume that public perception of a miscarriage of justice is derived from views expressed in the media by campaigners, authors and journalists. Public

[110] H. L. A. Hart, *The Concept of Law* (Clarendon Press 1961).

perception probably focuses on the conviction of someone who did not, as a matter of fact, commit the crime, which, usually, was committed by someone else, but in some cases was not committed by anyone i.e. there was no crime.

Journalists such as Bob Woffinden and the late Ludovic Kennedy, who are clear that factual innocence is the key component, have fuelled this view of a miscarriage of justice. A substantial number of authors have taken up the cause of one victim or another and, in the Internet era, a number of websites pursue matters where the claim is of a miscarriage of justice based on factual innocence.[111]

BBC TV's Rough Justice series and Channel 4's Trial and Error also focussed on miscarriages of justice in which the fundamental issue was whether the convicted person had, as a matter of fact, committed the crime in question. Rough Justice worked closely with the campaign group JUSTICE. JUSTICE undertook investigative work into alleged miscarriages of justice, producing a succession of reports on the workings of the Court of Appeal,[112] Compensation for Wrongful Imprisonment[113] and, most pertinently for the current purpose, Miscarriages of Justice.[114]The Guardian's long running series "Justice on Trial" is clearly focussed upon those cases where it is asserted an innocent person has been convicted in error.[115]

There is nothing wrong with this approach, but in the context of the legal understanding for criminal appeal purposes, these cases are only one category

[111] See, for example, 'MOJO UK' <http://www.mojuk.org.uk/> accessed 10th February 2012.

[112] JUSTICE and Edward Sutcliffe, *Criminal Appeals. (A Report by JUSTICE.)* (Stevens & Sons 1964).

[113] JUSTICE and Charles Wegg-Prosser, *Compensation for wrongful imprisonment* (JUSTICE London 1982).

[114] JUSTICE and George Waller, *Miscarriages of Justice* (JUSTICE 1989).

[115] 'Justice on Trial' (*The Guardian*) <http://www.guardian.co.uk/uk/series/justice-on-trial> accessed 29th February 2012.

with which the Court of Appeal has to grapple. Such cases are important, but they are only part of the picture.

2.9.4.2 Judicial Observations

Judicial consideration of miscarriages of justice has, at least in some instances, concluded that the definition of the term is self-evident. Lord Steyn said in *Mirza* that "Nowadays we know that the risk of a miscarriage of justice, a concept requiring no explanation, is ever present."[116]

Lord Bingham was less certain, observing, "'Miscarriage of Justice' is an expression which, although very familiar, is not a legal term of art and has no settled meaning."[117] Although Lord Bingham proffered this opinion in the context of a judicial review application about a refused compensation claim, his analysis is accurate for all aspects of the criminal process. The judgment in Mullen, the case in which Lord Bingham made his observation, caused considerable confusion, prompting a succession of further judicial review actions after refused compensation claims.[118] Another, not wholly successful, attempt to clarify the same issue, was made by the Supreme Court in Adams.[119] The fact that an expanded Supreme Court of nine was split five-four on the major issue of what constituted a miscarriage of justice illustrates the complexity of defining the term.[120]

[116] *R v Connor and Another, R v Mirza* [2004] UKHL 2 [4].

[117] *R (Mullen) v Secretary of State for the Home Department* n78 [9].

[118] For example, *R (Harris) v Secretary of State for Justice* [2008] EWCA Civ 808; *R (Siddall) v Secretary of State for Justice* [2009] EWHC 482 (Admin); *R (Anthony Clibery) v Secretary of State for the Home Department* [2007] EWHC 1855 (Admin).

[119] *R (Adams) v Secretary of State for Justice* n76.

[120] A point explored by Hannah Quirk and Marny Requa, 'The Supreme Court on Compensation for Miscarriages of Justice: Is it better that ten innocents are denied compensation than one guilty person receives it?' (2012) 75 MLR 387.

2.9.4.3 The Royal Commission on Criminal Justice

On the day the Birmingham Six had their murder convictions quashed by the Court of Appeal, the Government established a Royal Commission on Criminal Justice (RCCJ) under the Chairmanship of Viscount Runciman.[121] The Commission's terms of reference were broad, extending far beyond the treatment of alleged miscarriages of justice and the factors that might cause a miscarriage.

The Royal Commission's final report uses the term miscarriage of justice, but does not attempt to define it. The Commission comes closest to defining the phrase in reviewing the role of the Court of Appeal. It states that the Court has an important role in correcting miscarriages of justice:

> *"whether these have resulted from the jury not having some relevant evidence before it, or having some false evidence called before it, or coming to what has to be accepted as the wrong verdict on the evidence before it."*[122]

These examples cannot be intended to be an exhaustive list of what can go wrong and the last one mentioned conflicts with the well-recognised reluctance of the Court of Appeal to interfere with the jury's findings on the facts presented to them.[123] The failure to offer a definition is a surprising omission. This failure becomes even more striking when considered in the context of chapter eleven of the Commission's report, since that specifically addresses miscarriages of justice. We may speculate about the RRCJ's reasons for not defining the term, but it did not do so and no help can be derived from that source.

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[121] HC Deb vol 187, col 1109, 14 March 1991.

[122] *The Runciman Royal Commission on Criminal Justice* n43 ch10 para 1.

[123] For example, *R v Hakala* [2002] EWCA Crim 730.

2.9.4.4 Criminal Cases Review Commission

Another possible source of a definition is the Criminal Cases Review Commission, whose creation was one of the key recommendations of the RCCJ. The Commission, too, has avoided defining the term. The Commission's Legal Adviser, John Wagstaff is reported to have said:

> *"I don't even know what a miscarriage of justice is. We simply consider whether convictions are reliable and refer cases back to the appeal courts if we believe that there is a real possibility that the conviction will be overturned."*[124]

As far as conviction referrals to the CACD are concerned, the Commission's mandate is to consider whether there is a "real possibility" that the CACD will find the conviction unsafe. Accordingly, the Commission may be correct to take the view that it need not define miscarriage of justice.

2.9.4.5 Academic Definitions

In the absence of any officially sanctioned definition of miscarriage of justice it is worth considering how academics define the term.

One of the earliest responses to the RCCJ report was *Criminal Justice in Crisis*.[125] Although highly critical of the Royal Commission, the editors do not attempt to define a miscarriage of justice. They list a number of well-known miscarriages of justice from both before and during the sitting of the Royal Commission, but do

[124] Michael Naughton, *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan 2010) p22.

[125] *Criminal Justice in Crisis* (Michael McConville and Lee Bridges eds, Elgar 1994).

not draw any conclusion about what, in the abstract, constitutes a miscarriage of justice.

Walker and McCartney take the view that a miscarriage is a failure to reach an intended goal, so a miscarriage of justice is a failure to achieve the desired goal of justice.[126] Taking a "rights based" approach the authors develop the definition to say that a miscarriage occurs when an individual is treated by the State in a way which breaches his rights. This is developed further into six exemplars of miscarriages of justice. The definition seems to comprise two key strands – cases where the process has failed and those cases, "core cases" to use their terminology, in which the person is factually innocent.

Nobles and Schiff specifically eschew offering a definition of miscarriage of justice.[127] They do so in the belief that the various definitions attempted have serious shortcomings. They argue that the legal system and the media system conceptions of a miscarriage of justice are at variance on occasions. They conclude that the general conception, shared by many diverse communities, is that the issue is not injustice as such, but rather wrongful conviction. This shift of focus from miscarriage of justice to wrongful conviction is an important change of emphasis. This leads logically on to the need to try to attempt to define why these diverse groups may consider some convictions to be wrong. Having highlighted a number of the *causes celebres,* Nobles and Schiff identify two key characteristics of wrongful convictions. There are those who were convicted, but did not, in fact, commit the offence. Secondly, there are those whose convictions are flawed, because some part of the process that produced those convictions did not operate as it should. They describe the former as a concern with the truth,[128] the latter as a concern with due process.

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[126] Clive Walker and Carole McCartney, 'Criminal Justice and Miscarriages of Justice in England and Wales ' in C. Ronald Huff and Martin Killias (eds), *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (2008).

[127] Richard Nobles and David Schiff, *Understanding Miscarriages of Justice: Law, the Media and the Inevitability of a Crisis (Oxford Monographs on Criminal Law & Justice)* (OUP 2000) 15.

[128] Though as noted above the adversarial criminal trial is a search for truth subject to limitations.

Roberts adopts a straightforward approach to the issue of definition stating that, "The term 'miscarriage of justice' in this article is used to describe those cases where a factually innocent person has been wrongfully convicted."[129]

The broadest definition of the term is that used by Naughton.[130] Naughton argues that successful "mundane", "routine" and "exceptional" appeals are all miscarriages of justice,[131] including those in the Crown Court on appeal from a summary conviction in the magistrates' court. He calculates, using this approach, an annual average of 4,823 miscarriages in England during the period 1986-2005.[132] Naughton describes his findings as the "Official Miscarriages of Justice Iceberg."[133] Some commentators take issue with Naughton's approach.[134] Roberts points out:

> *"A major problem with this book is that Naughton does not engage with the existing literature on what a miscarriage of justice is, which is problematic when he is asserting that his argument is a 'radical redefinition'."*[135]

[129] Stephanie Roberts, 'The Royal Commission on Criminal Justice and Factual Innocence: remedying wrongful convictions in the Court of Appeal' (2004) 1(2) Justice 86 fn3.

[130] Michael Naughton, *Rethinking Miscarriages of Justice: Beyond the Tip of the Iceberg* (Palgrave 2007).

[131] He characterizes appeals from the magistrates' court as mundane, appeals from the Crown Court as routine and referrals by CCRC as exceptional.

[132] Naughton n130.

[133] Ibid ch 2.

[134] Hannah Quirk, 'Re-Thinking Miscarriages of Justice: Beyond the Tip of the Iceberg.' (2009) 49 British Journal of Criminology 418 and Stephanie Roberts, 'Book Review: Michael Naughton Re-Thinking Miscarriages of Justice: Beyond the Tip of the Iceberg.' (2009) 13 Theoretical Criminology 274.

[135] Roberts Ibid p275.

It may also be argued that the correction of error at the earliest opportunity is evidence of a system that works reasonably well. Lord Bingham, writing in an extra judicial capacity, and considering the true meaning of injustice, observes:

> *"[T]here is one instance of injustice which we would all instantly recognise and condemn as such: where a person is convicted and punished for a crime that he has not, or is not shown to have, committed. If, in reasonable time, such a wrongful conviction is corrected on appeal, the legal system may be said to be working."*[136]

Naughton distinguishes between miscarriages of justice that are internal to the criminal justice system and those that are external to the system. Internal ones depend upon the way in which the criminal justice system operates and encompass miscarriages relating to any failure of the system. External ones, Naughton argues, are those in which the accused is factually innocent and, he suggests, might more properly be defined as wrongful convictions.[137]

This brief review of academic offerings relating to England suggests no consensus about the meaning of miscarriage of justice. However, there is a discernible theme. With the exception of Roberts, who adopts a narrow definition of miscarriages of justice, all those who attempt to define the term adopt a fairly broad approach, but then seek to refine that approach to differentiate cases according to notions of "concern for truth" or as "core cases" or "external to the system."

[136] Tom Bingham, *The Business of Judging : Selected Essays and Speeches* (Oxford University Press 2000) p269.

[137] This distinction is explored further below.

2.9.4.6 Comparative Approaches

Have other jurisdictions been more successful than England and Wales in defining miscarriage of justice? The legislative position in Scotland, under which an appeal to the High Court (an appeal court in this context) by a person convicted on indictment may be brought on the basis of "any alleged miscarriage of justice,"[138] may offer an insight. One might expect either statutory or judicial definition of the term. Neither source is fruitful, with a conspicuous absence of detailed attempts to come to terms with the phraseology of the legislation. The creation of the Scottish Criminal Cases Review Commission provided another legislative opportunity for definition. The Sutherland Committee considered whether the Scottish test 'miscarriage of justice' should be replaced by the English test of 'unsafe.'[139] It recommended against this and, when the SCCRC was established, its powers of referral were based upon it forming the belief that "(a) a miscarriage of justice may have occurred; and (b) that it is in the interests of justice that a reference should be made."[140]

Former Scottish Commissioner Peter Duff considered whether there is any practical difference between the miscarriage of justice and unsafe test.[141] Although he acknowledges some differences between the two regimes, most notably the absence of a 'real possibility' test in Scotland, he concludes that in reality there is little difference between the tests.

The criminal process in the United States has proven to be fertile ground for miscarriages of justice. Gross, in seeking to quantify the scale of the problem,

[138] Criminal Procedure (Scotland) Act 1995 s 106(3).

[139] Stewart R Sutherland, *Criminal appeals and alleged miscarriages of justice: report by the committee appointed by the Secretary of State for Scotland and the Lord Advocate* (1996) para 2.23.

[140] Criminal Procedure (Scotland) Act 1995 s 194C (1).

[141] Peter Duff, 'Straddling Two Worlds: Reflections of a Retired Criminal Case Review Commissioner' (2009) 72 MLR 693.

offers a definition.[142] His focus is on those who have been exonerated. Exoneration, he states, is a legal concept meaning that those who were convicted of a crime were later relieved of all legal consequences of that conviction, because of new evidence of innocence. Forst uses a social concept in discussing errors of justice, leading him to identify two categories of error: those where an innocent person is harassed, detained or sanctioned or those where a culpable offender receives a sanction which is not optimal in social cost terms.[143] He describes the former category as errors of due process, the latter errors of impunity. The majority of American commentators, however, have a narrower perspective on the definition of miscarriages and focus on the wrongful or false conviction of the innocent. This is evident in the work of Gross,[144] Schehr and Sears,[145] Medwed,[146] Griffin[147] and others. Marquis provides an interesting counterpoint by challenging the factual basis of many of the claims of actual innocence and in doing so highlights the difficulty of definition.[148] The analysis of the causes of miscarriages of justice in the United States includes matters such as improper police procedures or failure to disclosure material that might assist the defence, which are neutral on the question of innocence. The United States model does not, therefore, assist in the quest for a clear definition.

Sangha et al compare the jurisdictions of Canada, Australia and England.[149] In similar fashion to Nobles and Schiff, the authors recognise the broader debate

[142] Samuel Gross, 'Convicting the Innocent' (2008) 4 Annual Review of Law and Social Science 173.

[143] Brian Forst, *Errors of justice : nature, sources, and remedies* (Cambridge University Press 2004).

[144] Gross n142.

[145] Robert Carl Schehr and Jamie Sears, 'Innocence Commission: Due Process Remedies and Protection for the Innocent' (2005) 13 Critical Criminology 181.

[146] Daniel S. Medwed, 'Anatomy of a Wrongful Conviction: Theoretical Implications and Practical Solutions' (2006) 51 Villanova Law Review 337.

[147] Lissa Griffin, 'The Correction of Wrongful Convictions: A Comparative Perspective' (2000) 16 American University International Law Review 1241.

[148] Joshua Marquis, 'The Myth of Innocence' (2005) 95 The Journal of Criminal Law and Criminology 501.

[149] Bibi Sangha, Kent Roach and Robert Moles, *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets The Reality* (Irwin Law Inc 2010).

about the scope of the term miscarriages of justice, but make no attempt to resolve that debate.[150] However, they do define those cases that fall within the scope of their work. They include both the conviction of the innocent and other serious justice errors. In line with what they term the "standard view" of such things, a case cannot be identified as a miscarriage of justice until after normal appeal procedures have been exhausted. Until the error is corrected it should be termed an *alleged* miscarriage of justice.[151]

The foregoing analysis illustrates that there is no agreed definition of miscarriage of justice. The meaning of the phrase is elastic and can expand and contract to accommodate the context in which it is deployed, a situation that seems unlikely to change. I shall consider the implications of this in the conclusions to this chapter.

2.9.5 Wrongful Conviction

I now consider whether the term wrongful conviction may usefully be distinguished from miscarriage of justice. Lord Bingham considered that "wrongful conviction" was just as imprecise a phrase as miscarriage of justice:

> *"The expression 'wrongful convictions' is not a legal term of art and it has no settled meaning. Plainly the expression includes the conviction of those who are innocent of the crime of which they have been convicted. But in ordinary parlance the expression would, I think, be extended to those who, whether guilty or not, should clearly not have been convicted at their trials."*[152]

[150] Ibid p2.

[151] Ibid p3.

[152] *R (Mullen) v Secretary of State for the Home Department* n78 [5].

Zellick, in his speech to the Medico-Legal Society in 2009,[153] acknowledged that he was using three different terms; "miscarriage of justice", "unsafe conviction" and "wrongful conviction" and said that they "may or may not all mean the same thing."[154] He did attempt to define them. In his view a "wrongful conviction" is "…where someone who has been convicted and whose appeal or application for leave to appeal has been unsuccessful should now have the conviction quashed."[155] It is difficult to see how this differs from either a miscarriage of justice or an unsafe conviction.

Naughton has consistently sought to draw a distinction between miscarriages of justice and wrongful convictions. He starts by pointing out that a miscarriage of justice "… cannot be said to have occurred unless and until an applicant has been successful in an appeal against a criminal conviction."

He proceeds to make an important distinction:

> *"Miscarriages of justice are distinct from the specific problem of the wrongful conviction of the innocent as a successful appeal against a criminal conviction is not evidence of the wrongful conviction of the innocent. On the contrary, a successful appeal against criminal conviction denotes an official and systemic acknowledgement of what might be termed a breach of the 'carriage of justice', and it bears no relation to whether a successful appellant is factually guilty or factually innocent."*[156]

He states that his primary concern is with the wrongful conviction of the innocent. These, he contends, are entirely external to the workings of the criminal justice

[153] Zellick n88.

[154] Ibid p12.

[155] Ibid p13.

[156] Michael Naughton, 'Wrongful Convictions and Innocence Projects in the UK: Help, Hope and Education' (2006) 3 Web Journal of Current Legal Issues.

system, whereas miscarriages of justice are entirely internal to the workings of the criminal justice system.

Naughton is clear that a distinction should be drawn "between miscarriages of justice and wrongful conviction of the innocent – terms which are often, incorrectly, used synonymously and/or interchangeably."[157] The distinction that Naughton tries to make here is not, I think, dissimilar to the distinction made by Walker and McCartney or Nobles and Schiff referred to above. It is an attempt to separate cases into those where the system has failed (internal) and those where the system has functioned properly, but in light of fresh evidence the outcome is seen to have been erroneous (external). Whether this distinction, which predicates innocence on the basis of the fresh evidence, is one that can be sustained is an issue I shall explore in this thesis.

A number of key points emerge from this analysis. First, many commentators use the terms "miscarriage of justice" and "wrongful conviction" as synonymous. Secondly, in spite of Naughton's reservations, there is nothing inherently wrong in doing so. Since neither phrase has an agreed meaning, the context in which they are used will determine the meaning. Thirdly, and most importantly, it is evident from the discussion of the term "miscarriage of justice" that a number of commentators seek to differentiate between different types of miscarriage. One approach, therefore, is to achieve that differentiation by defining "miscarriage of justice" and "wrongful conviction" to mean separate things. I intend to take this approach. For the purposes of this thesis, my definition of wrongful conviction will, in line with Naughton's approach, involve the notion of innocence.

[157] Ibid.

2.10 DEFINING ERROR CORRECTION TERMS

This examination of key terminology was undertaken to enable me to define, for the purposes of this thesis, what I mean by miscarriage of justice, wrongful conviction and innocent. Since the first two are defined, in part, by reference to an outcome of an appeal hearing they can fit within an overall hierarchy which has at its apex the notion of an *unsafe conviction*.[158] Any conviction that is quashed by the CACD is, by statutory definition, unsafe. However, not all unsafe convictions are, in my typology, miscarriages of justice.

The second tier in my hierarchy is *miscarriage of justice*, which will have the following characteristics:

1. The appeal is one either made out of time or upon a reference by CCRC.
2. The appellate court quashes the conviction. [159]
3. The reason for the quashing of the conviction is immaterial.

I have adopted the approach at point 1 because, if only CCRC referrals were considered eligible, a case such as that of Barri White would be excluded.[160] White and Keith Hyatt were convicted of murder (White) and perverting the course of justice (Hyatt) following the murder of Rachel Manning in 2000. The case featured on BBC Rough Justice in 2005 and the two were subsequently given leave to appeal, over 4 years out of time, by the CACD. Fresh evidence in the case challenged the forensic evidence at trial and created sufficient doubt in the minds of the CACD for the convictions to be quashed and, in the case of White, a retrial

[158] There seems to be a measure of agreement amongst academic writers that until a conviction is quashed a case should be classified as an "alleged miscarriage of justice."

[159] See below for an important caveat on retrials.

[160] *R v White and Hyatt* [2007] EWCA Crim 3029.

ordered. White was acquitted at the retrial. If the granting of an extension of time were considered to constitute a "normal" appeal, then a case such as this, which would be considered by many to be a miscarriage of justice,[161] would be excluded from consideration.

So, for this purpose the normal appeal process is confined to those cases in which an appeal was brought within the normal time limit and concluded. Even where the outcome of such a case was the quashing of a conviction such a case would not be considered a miscarriage of justice, but rather the correction of error at the earliest opportunity[162] and thus defined as an *unsafe conviction* in the hierarchy adopted here.

One limitation of this definition is the exclusion of those cases in which a guilty person is not convicted of a crime that he committed. The definition does not seek to deny that such an occurrence may properly be described as a miscarriage of justice. However, limiting the definition in the manner set out permits detailed study of post appeal or out of time appeals against convictions, which is the purpose of this thesis.

The third tier in the hierarchy is *wrongful conviction,* which I define in the following manner. It will always be a miscarriage of justice as defined by criteria 1-2 above. However, it will be distinguished from the general class of miscarriages of justice by virtue of the reason for the quashing of the conviction. A wrongful conviction is one overturned because the person is innocent.

[161] A view strengthened by the subsequent conviction of another man for the murder of Rachel Manning. 'Rachel Manning - 41 year old man found guilty of her murder' *The Daily Telegraph* (4th September 2013) <http://www.telegraph.co.uk/news/uknews/crime/10285779/Rachel-Manning-41-year-old-man-found-guilty-of-her-murder.html>

[162] This approach also affords consistency with the statutory compensation provisions that require an appeal to have been successful either following an appeal out of time or on a reference by CCRC.

This means, in turn, that a definition of innocence must be adopted. *Innocence* will be defined as meaning that the person had no involvement in the act(s) which gave rise to the conviction or that there was no crime committed. From a pragmatic perspective, it will almost invariably be the case that there will be some fresh evidence about the commission of the crime (or the absence of a crime) in such cases. I explore the limitations of this definition in chapter nine.

2.10.1 The Retrial Caveat

Some commentators have taken the view that a case may be considered a miscarriage of justice upon the quashing of a conviction. However, I think the appellation (and that of wrongful conviction) should be delayed in cases in which the CACD orders a retrial. Where no retrial is ordered the case may be classified at once.[163] However, where a retrial is ordered only the conclusion of any further proceedings allows the case to be finally classified. Various outcomes are possible. White was acquitted at retrial so would be classified as a wrongful conviction.[164] Jenkins was acquitted after two hung jury retrials, but as he was not convicted again would be regarded as a wrongful conviction.[165] *Barron* was convicted at his retrial, so his case would not be regarded as a wrongful conviction despite his original successful out of time appeal.[166] In *Bento* the CPS decided not to pursue a retrial, so his would be regarded as a wrongful conviction.[167]

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[163] The CACD may decide not to order a retrial for a number of reasons. It may be impractical due to the passage of time. The reason for quashing the conviction (e.g. that the trial judge erred in rejecting a no case submission) may logically militate against an order for retrial.

[164] Rob Gibson and Jessica Cunniffe, 'Barrie White Cleared in Retrial' (*Milton Keynes News*, 24th December 2008) <http://www.mk-news.co.uk/Home/Barrie-White-cleared-in-retrial.htm> accessed 10th February 2012.

[165] James Sturcke, 'Sion Jenkins cleared of Billie-Jo murder' (*The Guardian*, 9th February 2006) <http://www.guardian.co.uk/uk/2006/feb/09/ukcrime.jamessturcke1> accessed 12th February 2012.

[166] *R v Barron* [2009] EWCA Crim 910 was his successful appeal. His conviction at retrial was upheld on appeal. *R v Barron* [2010] EWCA Crim 2950.

[167] *R v Bento* n96.

These definitions provide a contextual background for the research that is undertaken, allowing cases to be distinguished, though not without difficulty, in a nuanced manner.

Chapter Three - Literature Review

3.1 INTRODUCTION

In this chapter I consider existing literature on miscarriages of justice in the post conviction context to determine to what extent the issue of innocence has already been addressed. The focus in this thesis is the post conviction arrangements in England, which means that the main scrutiny will fall upon the CACD and the CCRC. Before that, other important contributions to academic literature on miscarriages of justice are briefly reviewed, with particular emphasis on any relevance they have to innocence. After that the focus turns to literature more specifically directed at the issue of innocence.

3.2 TOPIC AREAS

Miscarriages of justice, as defined in the variety of ways set out in chapter two, have attracted considerable academic interest. This part highlights some key themes.

3.2.1 Miscarriage of Justice Case Studies

Much non-academic literature centres on individual case studies.[1] These are very important to the individual affected and may, incidentally, shed light on problems

[1] Martin Young and Peter Hill, *Rough Justice* (BBC 1983); David Jessel, *Trial and Error* (Headline in association with Channel Four Television 1994); Bob Woffinden, *Miscarriages of Justice* (Hodder and Stoughton 1987) and Sion Jenkins and Bob Woffinden, *The Murder of Billie-Jo* (John Blake Publishing 2008) being examples.

encountered by the innocent. However, since many preceded the introduction of CCRC, they have limited value in assessing the current post-conviction arrangements.[2] In considering the efficacy of the system examination of a larger number of cases is likely to produce a more robust conclusion.

3.2.2 Causes of Miscarriages of Justice

Identifying how miscarriages of justice occur may enable steps to be taken to prevent further miscarriages. JUSTICE set out its view on the primary causes in 1989.[3] More recently, Eady developed interesting notions on the subject in his doctoral thesis,[4] arguing that the wrongful convictions are an inevitable risk of current political and investigative approaches. The topic has generated interest from disciplines other than law, with psychologists considering topics such as identification errors,[6] eyewitness errors[7] and susceptibility to falsely confess.[8] Prevention is very important, but the focus of this thesis is the correction of error once it has happened.

3.2.3 Jury Error

Jury error may be the cause of a miscarriage of justice, but current rules on jury secrecy prevent any meaningful examination of this important topic area. Commentary on the constitutional significance of the jury is eloquently stated by

[2] There are more recent examples such as Louise A Naylor, *Judge For Yourself, How Many Are Innocent?* (Roots Books 2004), but the emphasis is on individual cases rather than the process.

[3] JUSTICE and George Waller, *Miscarriages of Justice* (JUSTICE 1989).

[4] Dennis Eady, 'Miscarriages of Justice: The Uncertainty Principle' (DPhil Thesis, University of Cardiff 2009).

[6] Graham Davies and Laurence Griffiths, 'Eyewitness Identification and the English Courts: A Century of Trial and Error' (2008) 15 Psychiatry, Psychology and Law 435.

[7] Elizabeth F. Loftus, *Eyewitness Testimony* (Harvard University Press 1996).

[8] Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions : a Handbook* (Wiley 2003).

both Blackstone who described it in his Commentaries as a "bulwark of liberty"[9] and, memorably, by Lord Devlin in 1956 as "the lamp that shows that freedom lives."[10] The fact that many jury members are diligent and conscientious is borne out by research by Thomas[11] and supported by Grove's account of his jury service.[12]

However, the efficacy of the decision-making is beyond academic scrutiny. Cornish summarised the position:

> *"Arguments about the attributes and abilities of English juries are likely to reach stalemate for lack of accurate knowledge of how they function; hence the now frequent appeal for research into juries."*[13]

Since then, the Contempt of Court Act 1981 and the House of Lords decision in *Mirza* have confirmed that jury deliberations are secret.[14]

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[9] William Blackstone, *Commentaries on the Laws of England*, vol 4 (9th edn, 1783), p349.

[10] Patrick Devlin, *Trial by jury* (3rd impression with addendum. edn, Stevens 1966), p164.

[11] Cheryl Thomas, *Are Juries Fair?* (Ministry of Justice Research Series 1/10, 2010).

[12] Trevor Grove, *The Juryman's Tale* (Bloomsbury 1998).

[13] W. R. Cornish, *The Jury* (Penguin Books 1971) p20.

[14] *R v Connor and Another, R v Mirza* [2004] UKHL 2. It should be noted that Thomas has pointed out in her research, n11 above, that the extent of limitations on jury research is sometimes overstated.

3.2.4 Comparative Studies

3.2.4.1 Wrongful Convictions in Adversarial and Inquisitorial Systems Compared

The inquisitorial system is typically a judge led inquiry that seeks to establish proof of the circumstances of some occurrence. The adversarial approach gives two parties the opportunity to set out their view on the circumstances and a third party (in England a magistrate or jury) makes a finding of fact.[15] Rules governing what evidence the parties may properly present and other aspects of the process are intended to provide balance between the adversaries, since one of them, the state, is endowed with greater resources. Adversarial jurisdictions may contain inquisitorial components.[16] In the context of miscarriages of justice CCRC's role is inquisitorial.

Some characterise the inquisitorial system as a search for truth, rather than a contest between prosecution and defence.[17] Huff et al suggest that there are fewer miscarriages in inquisitorial jurisdictions than in adversarial.[18] However, those who have examined the French inquisitorial system are not convinced that it is free from error.[19] Mansfield does not advocate wholesale change to an inquisitorial system, though he sees merit in adopting some elements of that system[20] The

[15] Or in a civil case, a judge.

[16] For example, the role of the Coroner in England.

[17] Ludovic Kennedy, 'The Advantages of the Inquisitorial over the Adversary System of Criminal Justivce' (Howard League for Penal Reform 15 November 1989).

[18] *Wrongful Conviction : International Perspectives on Miscarriages of Justice* (C. Ronald Huff and Martin Killias eds, Temple University Press 2008).

[19] Ruth Brandon and Christie Davies, *Wrongful Imprisonment : mistaken convictions and their consequences* (Allen and Unwin 1973) and Jacqueline Hodgson, *French Criminal Justice : a comparative account of the investigation and prosecution of crime in France* (Hart 2005).

[20] Michael Mansfield and Tony Wardle, *Presumed Guilty : the British legal system exposed* (Heinemann 1993).

Royal Commission on Criminal Justice considered recommending a move to an inquisitorial system in England, but decided against this.[21] The Royal Commission opined that differences between the two systems were sometimes overstated and noted that each system tended to incorporate elements of the other.

3.2.4.2 Wrongful Convictions in Other Adversarial Systems

Comparisons between adversarial jurisdictions is instructive, though the federal nature of the United States of America creates a complexity which makes it difficult, at times, to consider that as one jurisdiction, since there are up to 50 possible variants to consider.[22] Even within the United Kingdom, there is not a single adversarial system since that in Scotland differs significantly from the rest of the United Kingdom.[23] Nevertheless, there is useful comparative work, including an analysis by Griffin of the regimes in the United States and England, with particular reference to cases referred by CCRC.[24] She concludes, based on referrals resulting in quashed convictions, that CCRC has been a success. She attributes this to a number of factors, an important one being the Court of Appeal's reception of new evidence, which it does:

[21] *The Runciman Royal Commission on Criminal Justice* (Viscount Runciman Cmd 2263 1993) Ch 1 paras 11-15.

[22] Some may be identical, but a simple experiment comparing the statutory definition of theft in Alabama, Georgia, Nevada and Texas showed that each had its own definition suggesting that identical state provisions are unlikely.

[23] For example, Scotland has the "not proven" verdict available to juries. Sally Broadbent's' helpful briefing paper for MP's on the verdict may be found at: Sally Broadbent, 'The "not proven" verdict in Scotland' (*House of Commons Library*, 15th May 2009) <www.parliament.uk/briefing-papers/SN02710.pdf> accessed 9th January 2012.

[24] Lissa Griffin, 'Correcting Injustice: Studying How the United Kingdom and the United States Review Claims of Innocence' (2009) 41 University of Toledo Law Review 107.

> *"much more frequently and willingly than U.S. courts, which are constrained by concerns of finality and deference to jury verdicts that severely restrict their acceptance of new evidence."*[25]

Another important factor is that:

> *"the CCRC and the Court of Appeal routinely receive new evidence of scientific developments to ensure that claimed miscarriages of justice are not the result of junk science or outmoded scientific knowledge."*[26]

These observations might surprise English based commentators, who regard the CACD, and thus CCRC, as reluctant to receive and act upon fresh evidence and unduly deferential to the jury. Griffin's study is a comparative one and her conclusion that the CACD, and CCRC, show a greater willingness to accept fresh evidence than occurs in the United States does not necessarily mean that either deals with fresh evidence in a clear and consistent fashion.

The creation of CCRC in England, and similar bodies in Scotland and Norway, has prompted academic commentators to consider the potential for similar bodies in other jurisdictions.[27] A major study examining the approach to forensic issues in England, Australia and Canada concluded that in spite of the rules derived from statute and case law designed to ensure that criminal trials are properly conducted the reality is that there are many instances where the rules have not been properly applied.[28] The authors recommend changes to both forensic

[25] Ibid p108.

[26] Ibid p109.

[27] Lynne Weathered, 'Does Australia Need a Specific Institution to Correct Wrongful Convictions?' 40 Australian & New Zealand Journal of Criminology 179 and R. C. Schehr, L. Weathered and M. Chaney, 'Should the United States establish a criminal cases review commission?' 88 Judicature 122.

[28] Bibi Sangha, Kent Roach and Robert Moles, *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets The Reality* (Irwin Law Inc 2010).

science and the legal systems, but their strongest recommendation is for the adoption of a CCRC type body in Australia and Canada.

Although studies of how miscarriages of justice are handled in other jurisdictions, inquisitorial or adversarial, are valuable, it is beyond the scope of this thesis to consider innocence on a comparative basis.

3.2.5 Scale of Miscarriages of Justice

There is merit in trying to assess the scale of miscarriages of justice in order to implement appropriate mechanisms to permit error correction. There are three significant obstacles to assessing scale. The first, detailed at length in chapter two, is the absence of an agreed definition of what constitutes a miscarriage of justice. Naughton's estimate of the scale, detailed in section 2.9.4.5, generates a figure of 4,823 miscarriages of justice annually. However, that reflects an approach which treats all successful appeals as a miscarriage of justice. Huff asked law professionals in the United States to estimate the number of wrongful "index" convictions based on their experience at trial.[29] He adopted an estimate of 0.5% of all index convictions being erroneous. Such estimates will, inevitably, be influenced by what the respondent considers to fall within the scope of the term "wrongful conviction".

The second problem in quantifying the number of miscarriages is that errors which remain uncorrected cannot be counted. Nobles and Schiff acknowledge that we cannot know the true scale of the problem.[30] Kerrigan concurs saying that a

[29] C. Ronald Huff, Arye Rattner and Edward Sagarin, *Convicted but innocent : wrongful conviction and public policy* (SAGE 1996). Index crimes are the most serious - murder and non-negligent manslaughter, forcible rape, aggravated assault, robbery, burglary, larceny-theft, motor vehicle theft and arson.

[30] Richard Nobles and David Schiff, 'After Ten Years: An investment in Justice' in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan 2010) p152.

"definitive figure for the number of people that are convicted each year of offences they did not actually commit is not possible."[31] Kerrigan has adopted a definition here; people convicted of "offences they did not actually commit". Having concluded that a definitive figure is not possible, he cites Naughton's figure of almost 5,000 a year as evidence of the possible scale of miscarriages of justice. Even if Naughton's figure were accepted, it would seem to include successful appellants who fall outside Kerrigan's definition.

A further difficulty in measuring the scale of miscarriages is to what extent one should take into account errors arising from the acquittal of a guilty person. Laudan and Allen are critical of the failure of many attempts to assess the scale for failing to ask questions about acquittals of the factually guilty.[32] Inevitably such miscarriages of justice are much more difficult to study. Changes to double jeopardy provisions in England[33] have given rise to a small body of cases that can be studied. The provision, permitting retrial after a previous acquittal, only applies for serious offences specified in the Act.[34] An application has to be made, with the consent of the Director of Public Prosecutions (DPP), to the CACD. The application must be supported by some "new and compelling evidence" before the CACD will grant the necessary permission.[35] Finally, if a retrial were ordered, the accused would need to be convicted (or plead guilty) for this to be regarded as miscarriage by acquittal.

O'Doherty's review of the operation of the new provisions concluded that the safeguards constituted a high threshold for the prosecution to meet before the

[31] Kevin Kerrigan, 'Real Possibility or Fat Chance?' in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan 2010) p166.

[32] Ronald J Allen and Larry Laudan, 'Why Do We Convict As Many Innocent People as We Do?: Deadly Dilemmas' (2008) 41 Tex Tech L Rev 65, 86.

[33] Criminal Justice Act 2003, ss 75-83.

[34] Ibid Schedule 5 Part 1 which lists the qualifying offences, which are all serious criminal offences such as murder, manslaughter, rape, other sexual offences and drug, related crime.

[35] Ibid s 78.

CACD would grant the DPP's request.[36] O'Doherty does not consider the new provisions as potentially correcting a miscarriage of justice. Starmer reports that since the provisions came into force in 2005 12 applications have resulted in seven retrial orders.[37] All resulted in convictions.[38] These cases confirm that some guilty people are acquitted and permit some limited study of the issue. Blackstone's famous maxim that "It is better that ten guilty persons escape than that one innocent suffer" is clearly posited on the acquittal of the guilty.[39]

These difficulties in measuring the scale of miscarriages of justice are formidable. There is a measure of agreement that miscarriages do occur and that mechanisms to deal with them or reduce the likelihood of occurrence are appropriate. With the exception of Naughton, most commentators view miscarriages as exceptional events.[40] Rather than make any further effort to assess the scale of miscarriages of justice, I proceed on the basis that they are rare and focus my attention on the treatment of these exceptional cases.

Each of the research topics discussed above has merit. All offer the potential for further enquiry. However, my interest is in the position once someone has been convicted in England. What obstacles confront that person in overturning his conviction if he claims to be innocent? I now consider the development of the concept of innocence as a notion, which might distinguish some cases from miscarriages of justice more generally.

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[36] Stephen O'Doherty, 'New Trials for Old Crimes' (2009) 173 JPN Criminal Law & Justice Weekly 469.

[37] Keir Starmer, 'Finality in Criminal Justice: when should the CPS reopen a case?' [2012] Crim LR 526.

[38] The most infamous is the case of *Gary Dobson* convicted in January 2012 of the 1993 murder of Stephen Lawrence. *Dobson* had previously been acquitted in 1996 following an unsuccessful private prosecution.

[39] Blackstone n9 ch27 p358.

[40] Even Naughton identifies a group of miscarriages that he terms "exceptional". See section 2.9.4.5 above.

3.3 THE INNOCENCE DEBATE

Some of the literature about innocence was discussed in chapter two in order to formulate the hierarchy of definitions that concluded the chapter. The concept has acquired increased prominence in the past twenty years largely initiated by the foundation of the Innocence Project at Benjamin N. Cardozo School of Law at Yeshiva University in 1992.[41] In the United Kingdom the Innocence Network UK (INUK) founded at the University of Bristol by Michael Naughton, highlights the issue of innocence.[42] The network received support from a number of notable figures.[43] It comprises 25 Universities across the UK where, supervised by a staff director, students examine cases of people claiming innocence.[44] The key point about these developments is that the focus is not miscarriages of justice or wrongful convictions, but innocence. The difficulties inherent in trying to define what is meant by innocence are discussed in chapter two and explored further in chapter nine, where I argue that the difficulty of defining the term for a statutory purpose represents a significant, though not insurmountable, obstacle to using the term as a material consideration in the post-conviction process.

3.4 CORRECTION OF MISCARRIAGES OF JUSTICE

As explained in chapter two, post conviction arrangements provide two inter-related routes for those seeking the correction of a wrongful conviction. The first is

[41] 'About the Innocence Project' (*Innocence Project*) <http://www.innocenceproject.org/about/> accessed 9th February 2012.

[42] Michael Naughton, 'About INUK' (*Innocence Network UK*) <http://www.innocencenetwork.org.uk/about-us> accessed 10th January 2012.

[43] Ludovic Kennedy was a founding patron and current patrons include Bruce Kent and Michael Mansfield QC. It received approval from Michael Zander who had served on the Runciman Commission. Michael Zander, 'Innocence is not enough' (2008) 158 New Law Journal 663.

[44] The number is taken from the INUK membership list for 2011-12.

by appeal to the Court of Appeal (Criminal Division). The second is by application to the Criminal Cases Review Commission, which may refer a case to the CACD for an appeal to be heard. Only the CACD can quash the conviction. CCRC cannot correct the error itself, but a CCRC refusal has a similar practical consequence to the rejection of an appeal by the CACD, since it denies the applicant access to the body that can quash the conviction.

Each of these two bodies has, at times, disavowed any interest in innocence. Lloyd LJ said in the judgment on the third appeal of the Birmingham Six:

> *"Nothing in section 2 of the Act, or anywhere else, obliges or entitles us to say whether we think that the appellant is innocent. This is a point of great constitutional importance. The task of deciding whether a man is guilty falls on the jury. We are concerned solely with the question whether the verdict of the jury can stand."*[45]

Roch LJ asserted much the same in the Bridgewater four judgment, "This Court is not concerned with the guilt or innocence of the appellants; but only with the safety of their convictions."[46]CCRC's position was stated on its website, ''We do not consider innocence or guilt, but whether there is new evidence or argument that may cast doubt on the safety of an original decision.''[47]The new website no longer contains the statement, nor does the archived version of the former website.[48] CCRC robustly defends its position. CCRC Chairman Richard Foster asserts, in his foreword to the CCRC's 2008-09 Annual Report:

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[45] *R v McIlKenny* [1992] 2 All ER 417 (CA) 425.

[46] *R v Hickey and Others* [1997] EWCA Crim 2028.

[47] Cited by Stephanie Roberts and Lynne Weathered, 'Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission.' [2008] Oxford Journal of Legal Studies 1 p9.

[48] The later page is archived at:

http://webarchive.nationalarchives.gov.uk/20110215111039/http://www.ccrc.gov.uk/canwe.htm
Last accessed 16th August 2012.

> *"Some critics of the Commission claim that we are too concerned with the safety, or rather unsafety, of a conviction and not concerned enough with the innocence of the person.*
>
> *This criticism is misguided. The fact is that we have never come across, and cannot conceive of, a situation where we would not refer a case where there was compelling evidence of innocence. If there were such evidence of innocence, it would, necessarily, also be compelling evidence that the conviction was unsafe."*[49]

He made the point with greater vigour in a newspaper interview:

> *"It's utterly spurious to claim we're not interested in innocence," he says. "The claim that we wouldn't refer a case if we had evidence of innocence is both ridiculous and offensive. It is true that we're not in the business of seeking to establish who did and didn't commit a crime. We're in the business of establishing whether or not a conviction is safe – and our critics should be glad that we are."*[50]

Nevertheless, given the CACD's stated position, to which CCRC must pay heed in applying the "real possibility" test, CCRC is unlikely to refer a case based on innocence *unless* it has some new material that justifies the referral. It is the new material that provides the foundation for a referral, not the innocence of the applicant. This leads neatly to consideration of literature assessing the performance of the CACD and the CCRC.

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[49] *Annual Report 2008-09* (Criminal Cases Review Commission, 2009) p5.

[50] Amelia Hill, 'Criminal cases review commission: the last bastion of hope' *The Guardian* (London, 30th March 2011) <http://www.guardian.co.uk/law/2011/mar/30/criminal-cases-review-commission-inside?INTCMP=SRCH> accessed 7th May 2012

3.5 LITERATURE ON THE COURT OF APPEAL.

The work of the CACD has been subjected to detailed consideration on a number of occasions.[51] Malleson's study for the Runciman Commission identified that the majority of the CACD's work on appeals against conviction deals with due process issues.[52] These studies were conducted before the amendments in the 1995 Act changed the test to be applied by the CACD to whether the conviction was "unsafe".[53] Consequently they provide detail of the CACD's previous, rather than current, approach. Roberts examined judgments from the first 300 appeals in 2002.[54] She compared her findings to those of Malleson,[55] with particular emphasis on appeals based upon either "lurking doubt" or fresh evidence. Roberts found fewer cases of lurking doubt being argued, offering the possible explanation that "the Court is not taking a more liberal approach to these appeals".[56] Although more fresh evidence appeals were being heard, "the chances of success were higher before the 1995 Criminal Appeal Act than they are now after the changes have been made".[57]

Spencer's review of the appeal system examined its theoretical purpose, whether the current system met that purpose and, importantly for this thesis, whether the current legal machinery was equal to the task.[58] He concluded in respect of the

[51] See, for example, Rosemary Pattenden, *English Criminal Appeals 1844-1994 : appeals against conviction and sentence in England and Wales* (Clarendon Press 1996); Michael Knight, *Criminal Appeals: a study of the powers of the Court of Appeal Criminal Division on Appeals against conviction* (Stevens 1970).

[52] Kate Malleson, *Review of the Appeal Process. Research Study Number 17* (Royal Commission on Criminal Justice, 1993).

[53] As noted in chapter 4 it had previously been whether the conviction was unsafe or unsatisfactory.

[54] Stephanie Roberts, 'The Royal Commission on Criminal Justice and Factual Innocence: remedying wrongful convictions in the Court of Appeal' (2004) 1(2) Justice 86.

[55] Malleson n52.

[56] Roberts n54.

[57] Ibid.

[58] John Spencer, 'Does Our Present Criminal Appeal System Make Sense?' [2006] Crim LR 677.

CACD that it was not. He ascribed this primarily to it being "grotesquely overworked".[59] As a consequence the CACD:

> *"has always done its best to avoid getting involved in appeals that turn on disputed facts, and particularly those that require the hearing of witnesses: one of the consequences of which is that the defendant is in a weak position to appeal where he was wrongly convicted (as against convicted in proceedings vitiated by an error of procedure or of substantive law). Appeals on the basis of "I simply didn't do it!" are particularly time-consuming, and if the Court of Appeal were obliged to handle anything but a trivial number of them, this would seriously retard the task of dealing with appeals against sentence: a task that must be given high priority, if the court is to hear the appeal before the sentence has been served."*[60]

Jellis compares procedures in the Australian state of Victoria and England, since the former was contemplating addressing a backlog of appeals by adopting the appeal procedures of the CACD.[61] Jellis spent a week in the Criminal Appeals Office to examine the potential applicability of the English appeal model to Victoria. He concludes that the English Court of Appeal procedures give undue emphasis to efficiency and thus jeopardise the Court's ability to rectify error. He suggests that Victorian reformers "should proceed with extreme caution"[62] and take particular note of "the perpetual sense of crisis that has surrounded the ability of the English COA to detect and rectify miscarriage of justice: a controversy that has never existed in respect of the Victorian appellate process."*[63]*

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[59] Ibid p692.

[60] Ibid p693.

[61] Benjamin Jellis, 'Justice in Criminal Appeals: A Comparison between the Appellate Jurisdiction of the English Court of Appeal and the Court of Appeal of the Supreme Court Victoria' Oxford Student Legal Studies Paper No 06/2011 Available at SSRN: http://ssrncom/abstract=1919962.

[62] Ibid p56.

[63] Ibid p56.

Leigh has undertaken analysis of the CACD's approach to cases of "lurking doubt."[64] Lord Widgery described the concept as a concern over "whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done."[65] Leigh's assessment of the CACD's approach to such cases was broadly positive, concluding that provided that the CACD's response was not "visceral",[66] but founded upon "the evidence and the circumstances of the case,"[67] then lurking doubt still had a role to play. Grist's assessment was rather less positive, arguing that the concept had outlived its usefulness, because it gives rise to too much uncertainty.[68] The CACD attracts regular commentary in academic and practitioner publications on the implications of decisions in individual cases, but there appears to be little attempt to assess the wider picture. I also observe that in much of the criticism of CCRC there are passing observations about the CACD. Some commentators identify the CACD as a problem.[69] Naughton considers that a focus on the CACD is to miss the point.[70] These studies suggest that there is still concern about the effectiveness of the CACD in addressing miscarriages of justice. By examining a large number of cases, rather than specific individual cases, I can assess whether the operation of the CACD is a cause for concern for those claiming innocence.

[64] L. H. Leigh, 'Lurking Doubt and the Safety of Convictions' [2006] Crim LR 809.

[65] *R v Cooper* [1969] 1 QB 267 (CA), 271.

[66] Leigh n64 809.

[67] Ibid.

[68] Rupert Grist, 'Lurking Doubts Remain' (2012) 176 Criminal Law and Justice Weekly 313.

[69] Michael Zander, 'Does the CCRC live up to what the RCCJ envisaged?' (Helping the Innocent: Symposium on the Reform of the Criminal Cases Review Commission, London, 30th March 2012) or Kerrigan.

[70] Michael Naughton, 'The Criminal Cases Review Commission: Innocence versus safety and the integrity of the criminal justice system' (2012) 58 Criminal Law Quarterly 207, 239.

3.6 CRIMINAL CASES REVIEW COMMISSION

CCRC has attracted considerable academic scrutiny. The majority of that scrutiny has been undertaken without access to CCRC's own files. It has been conducted using published data, such as CCRC annual reports, or based upon assessment of some court of appeal decisions, or the product of an author's dealings with CCRC in an individual case. The scrutiny has not, generally, been focused upon how CCRC has handled cases involving a claim of innocence, nor has it been conducted using CCRC's own internal case files.

The initial assessment of CCRC in this academic scrutiny was generally quite favourable. Walker concluded, "CCRC has started well and has gained widespread support and confidence."[71] Walker, in collaboration with McCartney, offered an updated assessment in 2008.[72] "The CCRC has been widely accepted in theory and in practice, to be a great improvement on its predecessors."[73] CCRC's independence and its "receptive approach and attitude" were in "complete contrast to the reluctance in governmental departments to reinvestigate cases with thoroughness."[74]

Further contributions to the academic literature from Leigh,[75] Kyle[76] and Elks[77] are largely complimentary about the Commission. With respect to the three authors,

[71] Clive Walker, 'Miscarriages of justice: An inside job?' (*Centre for Criminal Justice Studies, University of Leeds*) <http://www.law.leeds.ac.uk/assets/files/research/ccjs/1213rep.pdf> accessed 10th January 2012.

[72] Clive Walker and Carole McCartney, 'Criminal Justice and Miscarriages of Justice in England and Wales ' in C. Ronald Huff and Martin Killias (eds), *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (2008).

[73] Ibid p197.

[74] Ibid p197.

[75] L. H. Leigh, 'Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission' (2000) 38 Alberta Law Review 365.

[76] D. Kyle, 'Correcting Miscarriages of Justice: The Role of the Criminal Cases Review Commission' (2003-2004) 52 Drake L Rev 657.

this is not unduly surprising since each was either a serving or retired Commissioner at the time of publication. Elks also published an exhaustive review of the Commission's first ten years examining a number of trends that emerged during that period and the occasional tension between CCRC and the CACD.[78]

Nobles and Schiff have considered CCRC's performance on a number of occasions.[79] They also consider the relationship between CACD and CCRC when assessing the impact of the CACD decision in *Cottrell and Fletcher*.[80] Although Nobles and Schiff's analysis identifies difficulties in trying to measure CCRC's success, they conclude:

> *"In terms of the rhetoric of justice, the creation of the Commission represents a success, not because such rhetoric can be achieved, but because the Commission can do more, and thereby come closer to this rhetoric, than what went before."*[81]

After this generally encouraging initial response CCRC has, more recently, been subjected to greater criticism.[82] My purpose here is to identify the criticisms rather than question them, which is reserved for chapter eight.

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[77] Laurie Elks, *Righting Miscarriages of Justice?: Ten Years of the Criminal Cases Review Commission* (JUSTICE 2008).

[78] Ibid.

[79] For examples, see Richard Nobles and David Schiff, 'The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal' [2005] Crim LR 173 and Richard Nobles and David Schiff, 'Criminal Cases Review Commission: Reporting Success?' (2001) 64 MLR 280.

[80] Richard Nobles and David Schiff, 'Absurd Asymmetry - a Comment on R v Cottrell and Fletcher and BM, KK and DP (Petitioners) v Scottish Criminal Cases Review Commission' (2008) 71 MLR 464.

[81] Nobles and Schiff, 'Criminal Cases Review Commission: Reporting Success?' n79 p298.

[82] John Cooper, 'CCRC and Court of Appeal' (2011) 175 JPN Criminal Law and Justice Weekly 298; Jon Robins, 'Is the Criminal Cases Review Commission losing its appeal' [2008] October Legal Action 7 and Michael Naughton, 'No Champion of Justice' in Jon Robins (ed), *Wrongly Accused: Who is responsible for investigating miscarriages of justice?* (Solicitor's Journal 2012).

3.6.1 Too timid and deferential to the CACD

Cooper expresses this succinctly concluding that something is "not working" based upon the statistic that only 470 cases had been referred from 13,368 applications.[83] He ascribes this to CCRC being unduly deferential to the CACD. Malone asserts that CCRC adopts an unduly conservative application of the real possibility test, saying:

> *"The approach of the CCRC is worryingly inconsistent, and that is something that should be addressed after more than a decade of referring cases and evaluating the CACD's judgments in relation to those references."*[84]

Nobles and Schiff characterise CCRC's relationship with CACD as one of compliance by CCRC in line with the "constraints imposed by its relationship with the CACD."[85] Naughton reiterates the point in later works.[86]

3.6.2 Out of touch with the approach of the CACD

Newby, who has a specialism in cases of historical sex abuse, argues that recent developments have seen the CACD start to adopt a "common sense" approach to such cases.[87] He cites the cases of *Bell*[88] and *Burke*[89] in support of his

[83] Cooper n82.

[84] Campbell Malone, 'Only the Freshest Will Do' in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan 2010) p116.

[85] Nobles and Schiff, 'After Ten Years: An investment in Justice' n30 p158.

[86] Naughton, 'No Champion of Justice' n82 and Michael Naughton and Gabe Tan, *Innocence Network UK Symposium on the Reform of the Criminal Cases Review Commission* (2012).

[87] Mark Newby, 'Historical Abuse Cases: Why they expose the Inadequacy of the Real Possibility Test' in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan 2010).

contention and argues that CCRC's application of the real possibility test fails to recognise this shift in attitude by the CACD. He says:

> *"To be sure, the CACD appears adaptive to the assessment of cases to correct possible miscarriages of justice in a way that embraces a common-sense approach, which the CCRC fails to grasp."*[90]

3.6.3 Too focussed on legal or technical issues

Naughton asserts that:

> *"The CCRC does not work on miscarriages of justice as understood by the RCCJ and JUSTICE in terms of wrongful conviction of the innocent, operating, instead, within a legal notion of miscarriage of justice based on the correctness of criminal conviction in law."*[91]

He extends this notion in summarising the outcome of a symposium in 2012 suggesting that "Cases based on points of law or legal technicalities that have no bearing on the applicant's possible innocence could be excluded from CCRC's remit."*[92]*

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[88] *R v Bell* [2003] EWCA Crim 319.

[89] *R v Burke* [2005] EWCA Crim 29.

[90] Newby n87 p105.

[91] Michael Naughton, *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan 2010) p222.

[92] Naughton and Tan n86 p17.

3.6.4 Not a success

Nobles and Schiff's assess CCRC's effectiveness, pointing out that by its 10th anniversary its expenditure was nine times greater than its predecessor, Division C3 at the Home Office.[93] They calculate that CCRC's contribution to successful appeals in 2006/07 amounted to 0.058%, thus calling into question its assertions to have been successful.[94] Naughton and Tan point to the need for major reform.[95] These criticisms of CCRC are balanced by observations from MacGregor,[96] Jessel,[97] Barrington[98] and Quirk,[99] all of whom find much to admire in the work of CCRC. Since all have had roles at CCRC this is perhaps not surprising. The whole issue of how CCRC's performance should be evaluated is considered in chapter eight.

3.6.5 Hope for the Innocent?

The two symposia reported upon by Naughton contain the most detailed critiques of CCRC and the key findings merit summary here. Naughton asserts that CCRC is "curtailed by the requirement" of the application of the real possibility test. It cannot act "completely independently" and is merely a "gatekeeper" for the CACD. Its role as a legal watchdog is perfectly acceptable, but falls short of what

[93] Nobles and Schiff, 'After Ten Years: An investment in Justice' n30.

[94] They figure expresses the number of CCRC referrals allowed by the CACD as a percentage of all the appeals allowed by the CACD in that year.

[95] Naughton and Tan n86.

[96] Alastair MacGregor, 'Unrealistic Expectations' in Jon Robins (ed), *Wrongly Accused: Who is responsible for investigating miscarriages of justice?* (Solicitor's Journal 2012).

[97] David Jessel, 'Time to reconnect' in Jon Robins (ed), *Wrongly Accused: Who is responsible for investigating miscarriages of justice?* (Solicitor's Journal 2012).

[98] Ralph Barrington, 'Up to the job' in Jon Robins (ed), *Wrongly Accused: Who is responsible for investigating miscarriages of justice?* (Solicitor's Journal 2012).

[99] Hannah Quirk, 'Governing in prose' in Jon Robins (ed), *Wrongly Accused: Who is responsible for investigating miscarriages of justice?* (Solicitor's Journal 2012).

it is thought to do and what the RCCJ and JUSTICE anticipated that it would do. It has less scope than under previous arrangements since, unlike Home Office Division C3, it must have regard to previous appeal decisions. The restrictions on its powers of referral generate a lack of consistency between it and the CACD, with the latter willing to intervene in cases of lurking doubt and innocence where the CCRC will refuse to refer. CCRC is beholden to government for funding, which further undermines its claims for independence. Naughton takes issue with the conclusions of Walker and Campbell who suggest a CCRC type body as a potential way forward for Canada.[100] Naughton concludes that CCRC's deficiencies, which Walker and Campbell note, "suggest that such a move would be folly",[101] thus ascribing a conclusion to the article which the authors did not reach themselves. The report of the 2012 symposium suggests reform of the real possibility test is needed and that the CCRC needs to be more proactive in investigations and interviewing applicants. CCRC's deference to the CACD, and thus lack of independence, is again highlighted.

Not all commentators share Naughton's analysis. Elks review of Hope for the Innocent concludes "that the individual contributions fall far short of bearing out Naughton's thesis which, taken at its widest, is unsustainable."[102] Zander, who points out that the RCCJ's criteria for independence had been met, disputes Naughton's assertion that CCRC's independence is compromised.[103] CCRC carried out investigations, did not come within the court structure and did not make judicial decisions.[104] Zander also disagrees with INUK's proposal that cases in which an individual "might be innocent" should be referred to the CACD.[105]

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[100] Clive Walker and Kathryn Campbell, 'The CCRC as an Option for Canada: Forwards or Backwards?' in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan).

[101] Naughton, *The Criminal Cases Review Commission: Hope for the Innocent?* n91 p224.

[102] Laurie Elks, 'A review of the "Criminal Cases Review Commission. Hope for the Innocent?"' [2010] 1 Archbold Review 5.

[103] Zander n69.

[104] Ibid.

[105] Ibid.

Bob Woffinden, a veteran campaigner, foresees the end of CCRC as a result of its failure to refer the case of Susan May to the CACD for a second time.[106] He concludes an assessment of its performance:

> *"The complaints are that the CCRC has become characterised by pusillanimity and procrastination. It is taking far too long to evaluate cases; it is not referring the cases it should; and even where it does refer convictions, its poor case analysis leads to poor appeals."*[107]

A common feature of these observations is that they are drawn from external scrutiny of CCRC,[108] often informed by in-depth contact with CCRC on individual cases. There are risks in drawing conclusions about the operation of a system on the basis of a few cases, especially if they are cases in which one has been personally involved. I concluded that scrutiny of a significant number of cases within CCRC would be beneficial. This would also take forward a suggestion made by Malone that "There [should] be a random-sample audit of a small number of cases which have been considered by a panel of three Commission members but not referred."*[109]*

Before pursuing this notion I considered previous research undertaken *within* CCRC.

[106] Her first CCRC referred appeal was *R v May* [2001] EWCA Crim 2788.

[107] Bob Woffinden, 'The Criminal Cases Review Commission has failed' (*The Guardian*, 30th November 2010) <http://www.guardian.co.uk/commentisfree/libertycentral/2010/nov/30/criminal-cases-review-commission-failed> accessed 5th February 2012.

[108] Using publicly available material as opposed to CCRC's internal case files.

[109] Malone n84 p116.

3.6.6 Literature from research within CCRC

There is relatively little literature based upon internal scrutiny of CRCC. Hodgson and Horne considered the impact of legal representation and had access to CCRC files for the purpose.[110] O'Brian studied a large number of CCRC case files particularly looking at the treatment of expert evidence.[111] He concludes that CCRC is far better placed than the CACD to address disputes over expert evidence and should be readier to refer such cases. This thesis broadens his investigation by considering a wider range of issues, beyond fresh *expert* evidence. Although case specific information is subject to confidentiality undertakings, it should be possible to draw sound conclusions by examining a significant number of cases.

3.7 THE GAPS IN THE LITERATURE

This thesis is focused on innocence in the post conviction process. This entails study of the two bodies that bear responsibility for carrying out the process. The review above reveals that there has been relatively little analysis of the work of the CACD since the amendments made by the 1995 Act. The focus for research has, understandably, been CCRC. The literature on the CACD is relatively uncritical. I conclude that a further detailed analysis of the approach of the CACD in cases where innocence was asserted will fill a gap in the existing literature. It will update Roberts' work and permit assessment of how effective the CACD is in addressing miscarriages of justice.

[110] Jacqueline S. Hodgson and Juliet Horne, 'The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission (CCRC)' (6th October 2009) Electronic copy available at http://ssrncom/abstract=1483721 .

[111] William O'Brian Jr, 'Fresh Expert Evidence in CCRC Cases' (2011) 22 Kings Law Journal 1.

Although CCRC has been the subject of a much greater degree of scrutiny, the review shows that much of that has been from an external perspective, without access to CCRC's own case files. The research conducted within CCRC has not focussed on the issue of innocence. A fundamental criticism of CCRC is that, despite the words of Richard Foster,[112] it pays insufficient heed to the innocence of an applicant. The clear implication is that innocence should be a material consideration to be addressed by CCRC (and by extension the CACD). This thesis tests that proposition by first answering the question "to what extent is innocence a material consideration in the post conviction process?" and in the light of that to what extent innocence could or should be a material consideration.

[112] See n49.

Chapter Four - Methodology

4.1 INTRODUCTION

This chapter sets out both the theoretical and practical bases of the methodological approach chosen to address the research questions. I explain the methodological approaches and identify some of the strengths and weaknesses of the methods used. I then detail how I undertook the empirical research to inform the analysis which follows.

4.2 METHODOLOGICAL APPROACH

To evaluate the difficulties encountered by a wrongfully convicted person I formulated a hypothesis. My hypothesis is that innocence is not an explicit factor in the post conviction process. I intended to test the hypothesis by examining examples from case law and the work of the CCRC.

I was also conscious of the potential for my personal assumptions and pre-conceptions to influence the research. It is difficult to eliminate such factors and one way to try to reduce their potential impact is to state what those key assumptions and pre-conceptions are. Two major, related assumptions form part of my thinking. I believe that the overwhelming majority of people serving lengthy prison sentences for serious criminal offences have been rightly convicted. Secondly, cases in which an innocent person has been convicted in error are rare. These assumptions were one of the reasons why, as detailed below, I adopted a random sampling technique for part of this research. I wanted to consider a range of cases, not just those which tended to conform to my own view.

My interest in wrongful convictions is largely derived from reading accounts of individual cases.[1] These are almost exclusively the work of journalists and often part of a campaign about the case.[2] I wanted to try to understand and evaluate the difficulties that individuals, in a collective sense, face once they have been wrongfully convicted. I wanted to focus on how the criminal justice system deals with such cases. This led me to conclude that at least a proportion of the research would be best described as "Law in Action." A practical, empirical, aspect to some of the research would place it squarely within the socio-legal approach. Harris recognises that some use the term socio-legal studies "broadly to cover the study of law in its social context, but I prefer to refer to the study of the law and legal institutions from the perspective of the social sciences."[3] I consider both to be valid since the treatment of miscarriages of justice takes place within a social context and the social sciences, particularly psychology and psychiatry, are relevant to the subject. I consider that a focus on purely practical issues would provide an incomplete picture, because law in action takes place within a context. That context is the legal rules that govern the approach to miscarriages of justice. This suggested that a black letter approach would also be needed to try to develop a coherent exposition of the legal rules involved.

The black letter approach is characterised by Salter and Mason as a "descriptive exposition of the meaning for lawyers of a large number of technical and co-ordinated legal rules contained in 'primary sources' (mainly cases and statutes)."[4] The exposition is an attempt to gather, organise and comment upon the system of

[1] For example, Martin Young and Peter Hill, *Rough Justice* (BBC 1983); Ludovic Kennedy, *Wicked beyond belief : the Luton murder case* (Granada 1980); Bob Woffinden, *Miscarriages of Justice* (Hodder and Stoughton 1987) Sion Jenkins and Bob Woffinden, *The Murder of Billie-Jo* (John Blake Publishing 2008).

[2] Occasionally, as in the Sion Jenkins case, the book is an account of the outcome of the case, but most of the accounts relate to cases that were still being pursued at the time of publication.

[3] Don Harris, 'The Development of Socio-Legal Studies in the United Kingdom' (1983) 2 Legal Studies 315

[4] Michael Salter and Julie Mason, *Writing law dissertations : an introduction and guide to the conduct of legal research* (Longman 2007).

legal rules derived from those sources. The emphasis is on seeking to identify the system that emerges rather than treating the law reports as articulating a series of one-off decisions. This approach seemed appropriate for part of my research examining the decisions of the Court of Appeal (Criminal Division).

The adoption of a purely black letter approach had some weaknesses. First, I was not convinced that the law on miscarriages of justice would be reducible to exposition as a system. Exposition as a system suggests some coherence of approach, underpinned by the adoption of legal principles. I was content to see if that could be identified, but concerned at the implications if it could not. The second weakness was that the black letter approach focussed on the legal concepts alone, but miscarriages of justice can legitimately be viewed within a wider social context. Thirdly, a significant part of the mechanism for addressing miscarriages of justice, the Criminal Cases Review Commission, applies rules from the legal system in a way which is not, for the most part, recorded in case law. Most of its work is not reported at all, being subject to statutory confidentiality restrictions that prohibit disclosure.[5] Those restrictions mean that evaluation of CCRC's work is best undertaken by reading case files and observing how CCRC undertakes its task. The limitations arising from the confidentiality restrictions led me to conclude that, although I should include a black letter approach as part of my methodology, I should not restrict myself to it.

I then considered how best to construct a socio-legal methodology for part of the research, particularly the component carried out within CCRC. I was keen to try to understand how CCRC went about its task and whether the criticisms of it, from academic and non-academic sources, were justified. I chose a random sampling approach to minimise the risks of bias from any selective approach. In addition to gathering information about the types of case, the process of review and the difficulties encountered by applicants and CCRC I also wanted to make an assessment of the work of CCRC. I considered whether quantitative assessments

[5] Criminal Appeal Act 1995 s 23.

were appropriate. For reasons which are set out in chapter eight I concluded that such assessments, including some which CCRC itself uses, were of limited value. I opted to try to make a qualitative assessment.

The third aspect of methodology that is closely linked with the black letter approach was to consider the academic literature on miscarriages of justice. I wanted to consider, with a focus on the issue of innocence, what aspects had been the subject of academic scrutiny and commentary. The black letter and socio-legal empirical findings were then used in order to consider and comment upon that other research.

The methodology is a combination of black letter law analysing the decisions of the CACD, socio-legal empirical interrogation of CCRC case files and a review of the existing academic literature on the topic.

4.3 EMPIRICAL OBSERVATIONS: METHODOLOGY

This section details the methods used to conduct the studies of the work of the CACD and the CCRC.

The analysis of the work of the CACD has two components. The first is judgments on appeals against conviction issued during calendar year 2009. I examine all appeals rather than only fresh evidence (which I used as a proxy for innocence) appeals for two reasons. First, considering all appeals provides a context for fresh evidence appeals. It enables one to assess the balance of the CACD's work. Are most appeals about due process issues? If fresh evidence appeals are rare does that, as Spencer suggests,[6] have implications for their treatment? Second,

[6] John Spencer, 'Does Our Present Criminal Appeal System Make Sense?' [2006] Crim LR 677.

focussing only on fresh evidence appeals risks overlooking claims of innocence pursued on other grounds. The most obvious example would be cases argued on the basis of "lurking doubt."[7]

The second component of the CACD's work that I decided to analyse was its judgments issued during the period 1st April 1997 to 31st March 2011 on cases referred to it by CCRC. There were a number of reasons for this.

. As CCRC is charged with addressing miscarriages of justice there was the prospect of finding a significant number of fresh evidence (innocence) cases. If such cases were rare in the 2009 sample, I would have a sample of cases from which to draw more robust conclusions.
. The total sample would be larger strengthening the conclusions about the overall approach of the CACD.
. The cases cover the period 1997-2011. This reduces any potential impact of the 2009 cases being, for some unexpected or unknown reason, unrepresentative.
. Interaction between the CACD and CCRC is an important part of the post conviction process and the judgments may shed light on that relationship. In particular, given that CCRC undertakes the predictive test of assessing whether a "real possibility" exists that the CACD would find a conviction unsafe, does the CACD offer any clear and consistent guidance of value to CCRC?

The objective is to identify the CACD's approach to claims of innocence. That involves analysing particular cases, but care has to be exercised about drawing wide conclusions from individual cases. I might disagree with a decision of the CACD, but that is not the point of the exercise. The CACD itself observes that drawing conclusions from previous cases is of limited value:

[7] *R v Cooper* [1969] 1 QB 267 (CA).

> *"it is not helpful to look at the facts of other cases for comparative purposes, because cases invariably differ in the way that they may have been presented to the jury at trial and the potential significance of the fresh evidence".*[8]

With that in mind I set out the criteria that I use to evaluate the performance of the CACD. From analysis of the judgments it is possible to form a judgment about whether the CACD:

1. Displays a receptive or restrictive approach to the formal receipt of fresh evidence.
2. When it has formally received fresh evidence is consistent in the application of the relevant legal test.
3. Displays a receptive or restrictive approach in evaluating fresh evidence.
4. Adopts an approach to the issue of retrial that is clear and consistent.

With reference to the judgments on CCRC referrals, I consider an additional matter, which is whether there is evidence that the CACD offers helpful guidance to the CCRC to enable the latter to discharge its statutory function more effectively.

This analysis would provide information about the work of the CACD and enable assessment of whether it deals effectively with claims of innocence.

[8] *R v Colin Cooper* [2010] EWCA Crim 1379 [20].

4.4 CACD JUDGMENTS IN 2009.

I analysed 355 judgments and collected, inter alia, data about the conviction, the grounds of appeal, whether there was an assertion of factual innocence, the way the CACD approached any issues of fresh evidence, the outcome of the appeal and whether, when a conviction was quashed, a retrial was ordered. I collected a wider range of data than the items noted above, but ultimately I decided it was not relevant.[9] I only formed that judgment once I had collected and considered it. The data was analysed to enable the questions set out above to be answered. The study also replicated that undertaken by Kate Malleson for the Royal Commission, enabling comparison of the findings. [10]

4.5 JUDGMENTS ON CCRC REFERRALS.

Between 1st April 1997 to 31st March 2011 CCRC referred 392 Crown Court convictions to the CACD. I read all of those that had been decided to see to what extent innocence featured and how it was dealt with by the CACD. I captured very similar data to that on routine judgments. I also collected more data than I needed, but again I did not know what might be irrelevant until I had collected it and undertaken some analysis of it.

[9] For example, I routinely noted the name of the appellant's counsel.

[10] Kate Malleson, *Review of the Appeal Process. Research Study Number 17* (Royal Commission on Criminal Justice, 1993).

4.6 RESEARCH WITHIN CCRC.

I wanted to examine case files at CCRC to assess how effectively it addresses claims of innocence. I sought and was granted permission to examine case files.[11] I wanted to understand the problems that CCRC faces in addressing innocence claims. I posed a series of questions designed to enable me to understand the way CCRC operates and the range of problems it faces. From this wider picture I hope to identify its approach to dealing with applications from those asserting innocence. The questions I hoped to answer were:

1. *What claims do applicants make in their applications to CCRC?*
2. *To what extent do applicants back up their claims with evidence or argument?*
3. *What difficulties does CCRC face in reviewing applications?*
4. *Do particular types of offence create special difficulties?*
5. *Are CCRC's powers sufficient to fulfil its role?*
6. *Are reviews carried out diligently and thoroughly?*
7. *Does CCRC go beyond any grounds stated by the applicant in reviewing cases?*
8. *Where CCRC refused to pursue lines of enquiry did it provide clear justification for its refusal?*
9. *Is CCRC's review of applications clear and consistent?*
10. *Is CCRC's approach to investigating fresh evidence issues clear, consistent and thorough?*
11. *Is CCRC's approach to the application of the "real possibility test" clear, consistent and careful?*

[11] Initially I examined a random sample of cases, but as detailed in the methodology and observation chapters I later refined this to concentrate on committee refusals to refer.

Analysis of the data from both the CACD and CCRC, coupled with answers to these subsidiary questions would be used to answer the research question "to what extent is innocence a material consideration in the post conviction process?" I want to assess whether there are weaknesses in the current processes. I also want see if there are particular barriers facing those claiming to have been wrongfully convicted. If there are such barriers, then how might those barriers be addressed? By formally introducing the issue of innocence into the process or by some other means?

In order to undertake the research effectively at CCRC I made a series of visits. I chose this approach, rather than making one extended visit, because it enabled me to analyse the data I had collected on each visit prior to embarking upon the next visit. This proved to be a very good way of proceeding because it also enabled me to make two important modifications to my methodology, which are detailed below. The visits I made were as shown in the table below.

Dates	Duration
20-22 September 2010	3 days
8-10 October 2010	3 days
8-12 November 2010	5 days
13-15 December 2010	3 days
10-14 January 2011	5 days
21-23 February 2011	3 days
15-17 March 2011	3 days
27-28 October 2011	2 days

The visit from 20-22 September 2010 was used partly to test the methodology. As I had not previously had experience of accessing the file systems at CCRC I spent some time exploring how documents were stored, how easy they were to access and assessing how useful particular documents were in enabling research data to be extracted.

The visit on 27-28 October 2011 was primarily used to clarify any outstanding issues which had emerged in my data analysis.

I started at CCRC intending to carry out purely random sampling, believing this would give me a bias free sample of applications to consider. That sample eventually numbered 257 applications. I wanted to examine the extent to which applicants asserted innocence, how CCRC dealt with such assertions and what particular problems CCRC faced in trying to review cases.

As the random sampling progressed it became clear that many cases presented relatively little difficulty for CCRC since they offered little material which was fresh. However, a body of cases that had been reviewed by a Committee of three Commissioners were generally much more finely balanced. Accordingly, I focussed the latter part of my research at CCRC on those cases. A number of these cases had been the subject of judicial review actions and I took the opportunity to include judicial review actions within this sample. Judicial review cases provide additional benefit because they are not subject to the normal constraints on confidentiality applicable to cases examined within CCRC. The final sample was 172 cases. In these cases I particularly wanted to examine the application of the “real possibility” test that governs the Commission’s referral of cases to the CACD. A proportion of these cases also raised issues of fresh evidence and the inferences to be drawn from the fresh evidence. This exercise was, in the context of considering innocence, of considerable importance.

4.7 LIMITATIONS AND RISKS

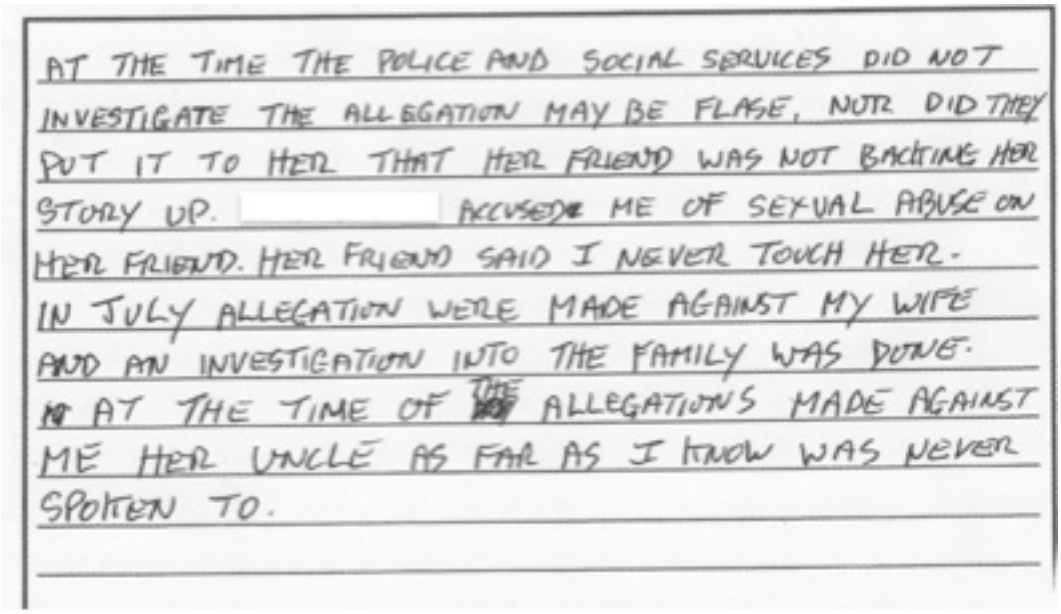
It also quickly became apparent that any given case file could comprise a substantial number of documents, some of which were in excess of 100 pages in length. To undertake a fully detailed review of any randomly selected case could take more than a day. In two cases, for example, the Final Statement of Reasons issued by CCRC ran to over 150 pages, so to read that and analyse it would be work lasting over a day. To consider the other documents in the case file would mean that a three day visit to CCRC might result in the analysis of just two or three cases. The selection of such cases might not cast any real light on the normal operations of CCRC. I elected, therefore, to try to analyse as many cases as I could by developing a method of doing so which would be a compromise between an exhaustive analysis and an unacceptably superficial one.

I decided that the key documents which I would try to read in each case would be the application form, the CACD judgment on a prior appeal (if there had been a prior appeal), the internal CCRC case record[12] and the Final Statement of Reasons.

After my first visit I refined this process because of difficulties with application forms. I encountered two significant problems with the majority of application forms. First, the document was always a scanned version of an original hard copy document. In a significant number of cases it was virtually impossible to decipher the document. The scanned document often suffered from a poor quality scan which rendered parts of it illegible or, if the scan was of good quality, the writing on the original was so faint that it was illegible on the scan. Even if the scan was of high quality, many application forms were handwritten and the handwriting was regularly indecipherable. The second problem was that the section of the

[12] The Commission generates, for each application, a Case Record document that sets out, in tabular, chronological form, developments in the review.

application form that contained the statement in support of an application was often uninformative. The following redacted example is taken from an application form used by CCRC in a Casework training seminar held in October 2011. The statement is brief. Clearly the applicant feels a sense of injustice, but he has not been able to formulate specific grounds. It is also unusually legible.[13]


AT THE TIME THE POLICE AND SOCIAL SERVICES DID NOT INVESTIGATE THE ALLEGATION MAY BE FLASE, NOR DID THEY PUT IT TO HER THAT HER FRIEND WAS NOT BACKING HER STORY UP. [redacted] ACCUSED ME OF SEXUAL ABUSE ON HER FRIEND. HER FRIEND SAID I NEVER TOUCH HER. IN JULY ALLEGATION WERE MADE AGAINST MY WIFE AND AN INVESTIGATION INTO THE FAMILY WAS DONE. AT THE TIME OF THE ALLEGATIONS MADE AGAINST ME HER UNCLE AS FAR AS I KNOW WAS NEVER SPOKEN TO.

The combination of these problems meant that I abandoned my attempt to use the application form as an authoritative source of data.

As a result the core document in every case was the Final Statement of Reasons. I acknowledge that this carries a risk that my analysis would be unduly reliant on CCRC's own conclusion. The FSOR represents the Commission's final statement of its position and there may be issues that the applicant has raised that CCRC has overlooked or there may be issues which the Commission should have identified of its own volition, but failed to do so. However, in those cases where I had read the original application I saw no evidence that this risk had manifested itself, so I judge that it was unlikely to have a major impact on my observations.

[13] It is also an example of CCRC going beyond the grounds of an application in reviewing a case, since it was eventually referred and the conviction quashed on grounds other than those raised by the applicant.

Although the FSOR was the core document, other documents were consulted in order to achieve as much clarity and accuracy as possible and to minimise the risk highlighted above. I was also aware that an applicant always had the opportunity to point out in response to a Provisional Statement of Reasons that CCRC had not dealt with an issue which had been raised. Wherever possible, the prior appeal judgment or the single judge refusal was considered. An advantage with appeal judgments is that they are generally public documents and can therefore be considered off site. The original indictment and the summing up from the original trial provided important details on many occasions. The Court of Appeal office summary also proved very helpful in getting an understanding of a case.[14] The Case Record also clarified points in many instances.

The reliance on these documents could also mask other important elements in the process. For example, there was an observable lack of consistency in the way in which case files were structured. This might be something as apparently simple as the file name given to a document, but this could mean that I risked missing important elements in a case. The sampling also might not expose whether the allocation of a case to a particular Case Review Manager might give that applicant a better chance of success.

In order to try to address these limitations I adapted my methodology so that it was less reliant on limited documentary material. The review of a case and the subsequent application of the "real possibility" test is a dynamic process. Each phase requires the exercise of judgment by one or more individuals at CCRC. Inevitably, however good internal procedures may be, this gives the scope for some degree of inconsistency. I chose to explore this further by seeking permission to conduct interviews with individual commissioners and members of

[14] The administrative office of the CACD produces a document that summarises the details of an appeal case for the benefit of the single judge. These documents are not publicly available, but were routinely supplied to CCRC.

staff.[15] Permission was granted by the Richard Foster, the CCRC Chairman. These interviews served a further purpose, which was to allow me to test whether some of the conclusions which were emerging from my observations were valid.

I devised a standard set of questions to use in the interviews. The interviews were semi-structured because each followed a similar format, but I was free in each one to explore further any points which came up. I asked that the questions were not divulged to interviewees in advance. I asked each interviewee for permission to make a digital audio recording of the interview. This was partly to avoid me taking notes during the interview which would risk interrupting the flow of discussion and partly so that I could listen to the content again subsequently. All interviewees gave their consent. I conducted interviews with four Commissioners and seven members of staff In addition I approached one ex-Commissioner and he consented to be interviewed.

The questions which formed the basis of the interviews were as follows:[16]

1. Please tell me your name, your role at CCRC, how long you have been undertaking that role and your previous experience or background.

2. What is your approach when a new case is allocated to you? Describe how you go about assessing it.

3. What criteria do you use in deciding whether a case should go to committee?[17]

4. Do you think there is a risk of becoming case-hardened? If so how can you try to guard against that risk - both individually and as an organisation?

[15] Although I had ample opportunity to undertake informal discussions with individuals going beyond this to more formal planned interviews went beyond the scope of my original research proposal. Accordingly I considered it, at the very least, courteous to ask for approval to conduct such interviews.

[16] The questions are listed as I had scripted them.

[17] I did make it clear to interviewees that I understood that a referral could only be made by a Committee of three Commissioners.

5. In what circumstances would you

a) interview applicants

b) visit crime scene

c) interview witnesses

d) commission further research

Would you say in your time at CCRC there has been any change in approach on the above?

6. CRCC could be said to have some "standard positions" e.g. Guilty pleas, Ineffective Counsel claims, Retractions and credibility - How can you avoid the risks inherent in a standard position?

7 Do you think you have ever had a case in which you were convinced that someone was innocent in the sense that they simply as a matter of fact did not commit the crime but was not referred? If yes - what convinced you and what was the obstacle?

8. In what proportion of cases (as an estimate) would you say that any genuinely fresh evidence is produced?

9. How can you ensure that applications are considered "imaginatively" i.e. how do you go beyond what's on the application form (indeed should you do so?)

10. How do you avoid the risk of just looking at the papers relating to trial and any prior appeal and being constrained by what's in those papers?

11. In your experience what proportion of applicants actually say they are innocent?

12. What would you say are the three commonest grounds stated in support of an application?

13. How could CCRC be more effective? What changes would you like to see? (the changes don't necessarily have to be at CCRC).

14. How, if at all, has the 2009 CACD decision in R v Erskine (on fresh evidence) affected your thinking/approach?

These interviews greatly enriched the observations I made on the data files at CCRC. In some cases they reinforced my conclusions.[18] In other cases they revealed the level of disagreement which sometimes arose over whether a case should be reviewed further or merited a referral. There was clear evidence of constructive internal disagreement and criticism. Where an individual considered that a decision was flawed they would articulate that view very clearly to others within the organisation. The interviews were an integral element of the qualitative assessment detailed in sections 8.6 and 8.7 below.

There is a further risk to be considered. I spent a significant amount of time at CCRC and also had extensive contact by email and telephone. Commissioners and staff were unfailingly interested in my research and extremely co-operative and helpful. This inevitably creates a risk that my objectivity becomes compromised and I feel less inclined to be critical of CCRC and its decision making.[19] This risk was exacerbated further because the response from CCRC was in such marked contrast to the attitude of the Court of Appeal office. I tried to minimize the risk in a number of ways. First, I agreed as part of the terms of the research agreement CCRC files that I would have unlimited access to files.[20] Secondly, it was agreed that I would be under no constraints as far as criticizing

[18] For example, the responses about the most common grounds of application reported in section 7.6.3 below were entirely consistent with my assessment.

[19] This is a recognised risk in conducting empirical research of this nature. There is no ideal solution, but steps can be taken to minimize the risk. See, for example, Valli Kanuha, '"Being" native versus "going native": Conducting social work research as an insider' (2000) 45 Social Work 439 and Sion Jenkins, 'Methodological challenges of conducting 'insider' reflexive research with the miscarriages of justice community' (2013) 16 International Journal of Social Research Methodology 373.

[20] The only files to which I would have limited or no access were those which had a security classification. In all of my sampling I came across only one such file.

CCRC was concerned.[21] Thirdly, by conducting the interviews detailed above I was able to highlight areas of concern (risks) in a constructively critical way. Finally, simply being aware of the risk was helpful in trying to minimize it.

4.8 RESULTS

I have devoted a separate chapter to the results of my observations on each body. The results also inform the evaluation of the criticisms of current arrangements. Each results chapter starts with a reminder of the specific issues I was examining, followed by a short statistical summary of key findings. This is primarily to provide a sense of the composition of the sample. So, information about the types of offence, the gender of the applicant, guilty pleas and so on is included.

The chapter on the CACD judgments then concentrates on the issues raised in the appeal and how it related (or did not relate) to innocence. Any themes that emerged as part of the observations are noted and particular difficulties encountered by those asserting innocence identified. The chapter lays the foundation for chapter six, which contains an assessment of the performance of the CACD in cases involving innocence.

The chapter on the CCRC focuses on what applicants asserted and how CCRC went about considering those assertions. In all cases I considered whether there was an assertion of innocence and, if so, whether CCRC addressed such claims effectively. I was interested to examine to what extent CCRC went beyond the contents of the application. The Committee decisions covered similar issues, but also focussed much more on the application of the real possibility test. The

[21] Indeed in the evaluation section there are aspects which I do criticise.

chapter forms the basis for the assessment of the quality of CCRC's performance, which appears in chapter eight.

Chapter Five – Court of Appeal Data

5.1 INTRODUCTION

This chapter examines the work of the CACD as evidenced by the judgments that it issues on appeals against conviction.[1] I survey the output of the CACD for the calendar year 2009,[2] then analyse the CACD's judgments[3] on convictions referred to it by CCRC. The key conclusions from my observations are set out and these provide the foundation for the evaluation of CACD's effectiveness in chapter six.

There are a number of reasons for examining the work of the CACD. In the context of innocence, I want to see whether there are cases in which the court addresses the issue. I want to identify the types of cases that the court determines and consider to what extent innocence and evidential points feature. I consider whether conclusions about the CACD's approach to fresh evidence cases can be drawn and I question whether the CACD's approach, in such cases, is clear and consistent. I also discuss the CACD's treatment of retrials in cases of a successful appeal. I will argue that the CACD does not operate consistently in addressing fresh evidence or the issue of retrials, but appears to use the fresh evidence framework in a restrictive way, thus limiting the number of successful appeals. If it adopted a more consistent approach to the issue of ordering a retrial it could, to some degree, free itself from this constraint.

[1] Details of its statutory role are set out in chapter two.

[2] Since this phase of the research was undertaken in 2009-10 it was the most recent calendar year at that time.

[3] This covers judgments issued to the 31st March 2011.

5.2 THE PRIMARY RESEARCH QUESTION

In undertaking these observations I sought to relate them to my primary research question, "to what extent is innocence a material consideration in the post conviction process?"

5.3 APPEAL JUDGMENTS FROM 2009

The amendments to the 1968 Act made by the 1995 Act were potentially of considerable significance,[4] prompting suggestions that the CACD might modify its approach. I have taken the opportunity, therefore, to compare my findings with those of two other studies by Malleson[5] and Roberts.[6] I have not attempted to precisely replicate either of those studies and the comparison is made to see whether there have been any obvious changes since they were done.

The analysis in part one is based upon 312 appeal judgments. I provide basic details of the types of offences involved and the grounds of appeal that were argued. The cases in which appeals were allowed are identified and analysed further to enable successful grounds of appeal to be recorded. Those cases in which the appeal was allowed also raise the possibility of the CACD ordering a retrial, so the decision and any reasoning about a retrial are also noted. The CACD's approach to the whole issue of retrial is assessed as part of this exercise.

[4] It may be recalled from chapter two that the test to be applied by the CACD became whether the conviction was "unsafe" and the provisions on the reception of fresh evidence were modified by requiring evidence to be "capable of belief" rather than "likely to be credible."

[5] Kate Malleson, *Review of the appeal process. Research Study Number 17.* (Royal Commission on Criminal Justice, 1993).

[6] Stephanie Roberts, 'The Royal Commission on Criminal Justice and Factual Innocence: remedying wrongful convictions in the Court of Appeal' (2004) 1(2) Justice 86.

Four grounds of appeal were particularly relevant in considering innocence. Those were: wrongful rejection of a submission of no case, fresh evidence, lurking doubt and disputed identification evidence. Fresh evidence cases were of greatest interest in claimed innocence and those cases are considered in greatest detail.

One of the goals of this chapter, in preparation for the evaluation in chapter six, is to consider the extent to which the CACD acts in conformity with its own stated values. These values, set out in a variety of cases over an extended period of time, include finality, certainty and the primacy of the jury. These are partially to achieve constitutional aims (primacy of the jury being considered important by the CACD), but also some pragmatic aims such as preventing the CACD from being swamped with appeals (the floodgates argument). The CACD's approach can also be characterised in accordance with the Crime Control/Due Process model postulated by Herbert Packer.[7] Although I have commented on how the CACD's decisions might reflect an approach consistent with Packer's model, I do not suggest that the judges have any conscious regard to it.

5.4 SAMPLE CHARACTERISTICS

My sample covers 355 appellants. I obtained a list from the Court of Appeal office giving names of each appellant whose case was decided during 2009. I obtained judgments for as many of these cases as possible. Some of the judgments were not available for reasons of confidentiality.[8] A further group were not available because a retrial was pending. My request to read these judgments at the Court

[7] Herbert L Packer, 'Two models of the criminal process' (1964) 113 University of Pennsylvania Law Review 1.

[8] This relatively small number of cases, around 25 in total, was reduced to less than 10 because I was able to gain access to the judgments during my research at CCRC. The judgments had been withheld mainly because of the subject matter that was usually of a sexual nature.

of Appeal Office was declined.[9] I read each judgment and extracted data from it and recorded that in a database. Not all of the data captured was useful for this thesis.

Providing a profile of the sample is complicated because one appeal judgment may cover multiple appellants and/or multiple offences. For statistical analysis I have simplified this. The appeals of 355 appellants were disposed of in 312 judgments. In some cases an appellant was convicted of more than one offence. That might be, for example, multiple counts of rape or rape and indecent assault. Table 5.1 shows the number of times a particular offence featured in the sample, but is restricted to one count per appellant. So, though an appellant might have been convicted of three rapes that would count as one for the purposes of the table. If an appellant was convicted of rape and indecent assault, only the more serious offence is noted in the table. This is an artificial approach, but the table is intended to provide a general picture of the types of offence.

[9] Email to the author 18 November 2010.

Table 5.1 - Types of Offence

Type of Offence	Number
Murder	71
Sexual Offences (Rape, indecent assault, incest)	75
Drugs (conspiracy to import, supply or use)	22
Offences against the person (GBH, ABH, Wounding)	40
Robbery, theft, burglary	52
Manslaughter	7
Kidnapping	7
Fraud, Obtaining property by deception	14
Driving related	7
Total	295

The majority of the offences were in respect of serious crimes. The total does not match the total number of 355 appellants because there were a variety of other offences that appeared infrequently or were less serious.[10]

5.4.1 Outcome of Appeals

118 (33.3%) of the appeals were allowed or allowed in part and 237 (66.7%) dismissed. Of those allowed, 29 (24.58%) resulted in an order for retrial.

[10] For example, *R v Trafalgar Leisure Ltd* [2009] EWCA Crim 217, an appeal against conviction for failing to control waste.

5.5 OBSERVATIONS

5.5.1 Grounds of Appeal

I examined each judgment to identify the ground(s) upon which the appeal had been argued. I expected to find relatively few based upon the submission of fresh evidence. The reason is a pragmatic one arising from the requirement that an appeal be lodged within 28 days of the conclusion of the trial.[11] This makes it unlikely that the defence will discover fresh evidence that was not available during the trial. The proximity of the appeal to the trial would doubtless cause the CACD to ask whether there was any convincing reason why the fresh evidence could not have been adduced at trial.[12] If the fresh evidence emerges after the 28-day time limit has passed, an appellant may seek leave for an extension of the time limit.[13] Fresh evidence cases are probably the likeliest ones in which an extension would be granted.[14]

[11] Criminal Appeal Act 1968 s 18(2).

[12] Ibid s 23(2)(d).

[13] Ibid s 18(3).

[14] The granting of the extension merely allows the appeal to be heard, the outcome still depends upon the hearing.

Table 5.2 - Types of Grounds of Appeal

Grounds[15]	Total	% of total grounds of appeal
Poor or unbalanced summing up	76	13.22%
Misdirection on law/evidence	65	11.30%
Evidence wrongly included or excluded	126	21.91%
Other judicial errors	83	14.43%
Inconsistent verdicts	14	2.43%
No case to answer	39	6.78%
Weak ID evidence	13	2.26%
Jury irregularity	26	4.52%
Fresh evidence	54	9.39%
Lurking doubt	9	1.57%
Counsel's errors	5	0.87%
Other[16]	29	5.04%
Not specified	20	3.48%
Indictment error	7	1.22%
Prosecution non-disclosure	9	1.57%
	575	100.00%

[15] For this purpose I adopted the categories used by Malleson in her review for the Runciman Commission n5.

[16] This covers a number of unusual grounds. For example, in R v Majid [2009] EWCA Crim 2563 the treatment of the appellant's affirmation rather than taking an oath was a ground of appeal.

The first four types of ground fall within a general category of judicial error. 350 (60.87%) such grounds asserting judicial error were argued for appellants. Within Packer's model these would be considered appeals based on due process. Cases involving material failure of disclosure by the prosecution, technical errors in an indictment and allegations of jury irregularity would also be regarded as due process issues. If these cases are taken into account, then due process grounds constitute 392 (68.17%) of the total. The majority of appeals focus on due process issues. The CACD focuses on the grounds of appeal, but not to the exclusion of all else. It is required to consider the overall safety of the conviction. Where it focuses on the assertion of due process, it tends to be reticent in expressing its views about the weight of the evidence and thus the guilt or otherwise of the appellant. I do not suggest that such appeals are less important than appeals based upon other factors, such as fresh evidence. They are distinguishable and the CACD's approach to determining them may, understandably, have less regard to the evidential issues.

The four categories of case in which the CACD was asked to give particular consideration to the merits of the evidence were those involving fresh evidence, issues of identification, lurking doubt and arguments of no case to answer. I shall return to these in more detail later in this chapter.

5.5.2 Successful Appeals

As due process errors are argued most frequently, I expected, on a numerical frequency basis, those grounds to achieve success most often. This was borne out as shown in the following table.

Table 5.3 - Successful Grounds of Appeal

Grounds	Number of Cases	% of Number of Cases
Misdirection/Poor summing up	34	28.81%
Evidence wrongly included or excluded	17	14.41%
Other judicial errors	20	16.95%
Inconsistent verdicts	3	2.54%
No case to answer	10	8.47%
Weak ID evidence	1	0.85%
Jury irregularity	1	0.85%
Fresh evidence	17	14.41%
Lurking doubt	0	0.00%
No jurisdiction	1	0.85%
Co-D should have been tried separately	0	0.00%
Counsel's errors	1	0.85%
Prejudiced trial	0	0.00%
Other	2	1.69%
Not specified	0	0.00%
Indictment error	7	5.93%
Prosecution non-disclosure	4	3.39%
	118	

The greatest measure of success arose in those cases in which due process errors were argued with 82 (68.49%) of the 118 cases being successful on the basis of some judicial error, non-disclosure or a flawed indictment. There were also 17 cases in which fresh evidence was the reason for a conviction being quashed.

5.5.3 Innocence in Due Process Appeals

An important point about appeals founded on due process is that the CACD's focus is on the due process issue rather than the guilt/non guilt or innocence of the appellant. Unless the appellant added other grounds that supported a claim of innocence, I treated the due process appeals as neutral as far as innocence is concerned. The CACD's purpose in such appeals is to assess whether the defendant's rights were compromised sufficiently to render the conviction unsafe. This can be a fine judgment, since the CACD has to consider what weight to afford to any transgression of the defendant's rights and balance that against the gravity of the offence and the weight of evidence against the defendant. The CACD will override the latter two factors if the breach of a defendant's rights is sufficiently serious. Rose LJ explained the CACD's task thus:

> *"In every case the outcome depends on the kind of breach and the nature and quality of the evidence in the case. Just and proportionate satisfaction may, in an appropriate case, be provided, for example, by a declaration of breach or a reduction in sentence, rather than the quashing of a conviction."*[17]

The point can be illustrated by a case drawn from outside the sample. In *Maxwell*[18] the case against the defendant was heavily dependent upon the

[17] *R v Dundon* [2004] EWCA Crim 621 [15].

[18] *R v Maxwell* [2009] EWCA Crim 2552.

evidence of a witness who was in prison with the defendant. It later emerged, following a CCRC investigation, that the witness had received special treatment from the police and prison authorities. These included the provision of drugs and visits to a brothel.[19] Although the offence was very grave (murder) and there was subsequent evidence (in the form of a post-conviction admission of guilt), the CACD held that the breach of due process rights was sufficiently serious to justify quashing the conviction.[20]

So, although the CACD weighs evidence in such cases, it is not the primary consideration. Accordingly, it is justifiable to treat such cases as neutral as they offer very limited insight into the determination of issues of guilt/non guilt or innocence by the CACD.

5.5.4 Innocence Appeals

The CACD does not see it as part of its function to pronounce a successful appellant innocent.[21] In four particular types of appeal the appellant's innocence is a major substantive issue.[22] Where that is the essence of the appellant's case, determination of such appeals inevitably involves some consideration by the CACD of the factual aspects of the case. It is in these cases that the principles of certainty and finality espoused by the CACD tend to manifest themselves most overtly. This is particularly exemplified by the CACD's insistence that a defendant furnish the fullest defence possible at trial.[23]

[19] Ibid [20].

[20] The CACD ordered a retrial. Their power to do so was challenged but ultimately upheld by the Supreme Court. *R v Maxwell* [2010] UKSC 48. Maxwell pleaded guilty on the first day of his retrial.

[21] See, for example, the comments of Roch LJ in *R v Hickey and Others* [1997] EWCA Crim 2028.

[22] It may not have been the only issue argued.

[23] *R v Kenyon* [2010] EWCA Crim 914 [27].

There is something of a paradox to be addressed in positioning the CACD's approach to these cases in the Crime Control/Due Process model. The categories discussed in the preceding section sit most comfortably within the Due Process limb, but the grounds of appeal in this section may not sit comfortably within the Crime Control limb. In emphasising finality, certainty, jury primacy and not opening the floodgates the CACD could appear to be giving crime control values priority over a "just" outcome in any given case.

5.5.5 No case to answer

It is an established principle that the trial judge may accede to a defence submission that there is insufficient evidence upon which a properly directed jury could convict.[24] Failure to accede to a submission that is made out constitutes an error of law. 39 (6.78%) of the 2009 appeals were founded upon the ground that a no case submission was wrongly rejected. These appeals are a variant of judicial error, since the argument is that the trial judge should, even without a submission from the defence, have made such a finding and withdrawn the case from the jury. Ten (8.47%)[25] of these appeals were successful.

These appeals are argued on the basis that there is insufficient evidence upon which a properly directed jury could convict. The CACD must, inevitably, consider the evidence upon which the jury did convict. Although it is clear from *Galbraith* that this is a matter of law, the assessment must address the evidence for how else can the CACD conclude that it was insufficient? Hughes LJ emphasised in *Riat*[26] that *Galbraith* remains settled law. The crucial point, as Hughes LJ stressed

[24] *R v Galbraith* [1981] 73 Cr App R 124, [1981] 1 WLR 1039, CA. If the submission is made out then the trial judge *must* accede to it. I use the word may to indicate that the submission may be properly rejected.

[25] This is the percentage of all successful appeals in the sample.

[26] *R v Riat* [2012] EWCA Crim 1509.

in *Riat*, is the absence of the "necessary minimum evidence."[27] This could be interpreted, where a conviction is quashed, as the CACD concluding, in effect, that a jury that finds an appellant guilty has made an error. This is not the basis upon which the appeal is allowed.[28] The trial judge erred in permitting a case lacking that necessary minimum evidence to go to the jury. The jury may merely compound his error. The situation is further complicated since, if, at the conclusion of the prosecution case, the judge incorrectly determines there is a case to answer the jury might subsequently hear damaging admissions during cross examination. The CACD has taken the view that, even where a defendant has been cross-examined into admitting his guilt, the conviction should, if there was no case to answer at the close of the prosecution case, be regarded as unsafe.[29] In the uncomplicated case, however, a guilty verdict compounds the judge's error, but does not alter the fact that the error was his.

In considering whether the evidence meets the necessary minimum standard the CACD is not weighing it in the sense of considering whether it is reliable. It proceeds on the assumption that the evidence is reliable and considers whether, at its highest, it is sufficient to justify a properly directed jury returning a guilty verdict. In *Salisu,*[30] two members of staff, the second being a Mrs Evans, at a care home were charged with wilful neglect following the death of a patient. Mrs Evans was not present on the night in question and was charged on the basis that she had overall responsibility for ensuring the necessary one to one care was provided, even during her absence on holiday. The CACD reviewed the evidence of the steps she had taken to ensure such care was provided and concluded that there was some evidence of breaches of the duty of care so that the factual element of the offence might be made out. However, there was insufficient evidence of the necessary *mens rea* and thus the CACD found that the trial judge should have stopped the trial.

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[27] Ibid [27].

[28] Indeed the jury, having heard the defence case, may not have made an error.

[29] *R v Smith and Others* [1999] 2 Cr App R 238 (CA).

[30] *R v Salisu and Others* [2009] EWCA Crim 2702.

In *Lane* the appellant had been convicted of causing death by dangerous driving. He pleaded not guilty on the basis that the death of the moped rider was an accident.[31] The trial judge was concerned about the conviction and gave leave to appeal. The source of his concern was the evidence an expert gave about the crash. Having reviewed that, the CACD decided there was no evidence upon which a properly directed jury could convict.

These two cases illustrate some of the difficulties to trying to define innocence. If one tries to define it as a lack of factual involvement, then Lane causes difficulty since he was involved. Evans' factual involvement was limited, but it was the absence of *mens rea* that led to her conviction being quashed.

Some potential miscarriages of justice are prevented by the "no case to answer" process.[32] In the context of innocence such cases embrace both factual claims of absence of involvement, but also claims of lack of the necessary mental component of the crime.[33] The successful appellant is not declared innocent,[34] but these cases are important because they do provide a route, in the absence of fresh evidence, for an appellant to have the strength of the case against him re-considered.

In all of the successful "no case" appeals, no retrial was ordered. There is a compelling logic for this. The CACD has decided that the prosecution evidence

[31] *R v Lane* [2009] EWCA Crim 1630. The case is unusual being one of only four appeals in the sample in which the trial judge certified the case for appeal. He did so on the basis that he had wrongly rejected the submission of no case to answer.

[32] I make this assertion on the basis that the CPS has prosecuted a case to trial having decided that there was a realistic prospect of conviction. When the trial judge accepts a no case to answer submission he prevents those cases reaching a jury, thus averting a potential miscarriage of justice. One could argue that the 1,486 cases so determined in 2010 were potential miscarriages.

[33] In practice, no case submissions at trial may be much more prosaic. For example, the Crown may fail to notify a key witness and the remaining evidence may be insufficient.

[34] However, the appellant is formally "not guilty", an important consequence which affords protection under the double jeopardy rule.

was insufficient for a jury to convict and, if it was insufficient at a first trial, there seems nothing that logically could be done to make it sufficient at a retrial.[35]

5.5.6 Lurking Doubt

Nine appeals in the sample included a ground of "lurking doubt." None succeeded on this ground. These cases might be said to fall between those in which there was "no case to answer" and those where there is some fresh evidence. Asserting lurking doubt is really an invitation to the CACD to review the case and find that whilst the evidence may have been sufficient for a reasonable jury to convict it was too weak to sustain the conviction.

Lord Widgery initiated the phrase "lurking doubt" in the 1969 *Cooper* appeal.[36] The case, with echoes of the misidentification of Adolf Beck,[37] turned upon identification. Another man was the true perpetrator, but the CACD was shown photographs of Cooper and the other man leading it to conclude that the "physical resemblance is really quite striking".[38]

The CACD applied the then relatively new test of whether the conviction was "unsafe or unsatisfactory". It acknowledged that prior to the amendment to the legislation "it was almost unheard of for this court to interfere in such a case".[39] It now did so and Lord Widgery observed:

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[35] Although, following the Supreme Court decision in *R v Maxwell* [2010] UKSC 48, it could be argued that if the prosecution have acquired additional evidence since the original trial then a retrial could be ordered. Furthermore, if after successful appeal further evidence of guilt were to be found the Crown could, in specified serious cases, seek permission from the CACD to prosecute the individual again.

[36] *R v Cooper* [1969] 1 QB 267 (CA).

[37] *Committee of inquiry into the case of Mr. Adolf Beck* (Home Office, 1904).

[38] *R v Cooper* n36 270.

[39] Ibid 271.

> *"… we are indeed charged to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done. This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it."*[40]

These observations prompted speculation that the CACD might be prepared to intervene more readily in future.

The CACD has generally been slow to intervene in such cases and my observations confirm that. The CACD has also shown a disinclination to use the phrase "lurking doubt". In the 2009 sample it is only argued in nine cases. Analysis of those cases shows that it is rare for lurking doubt to be argued as a primary ground and even rarer for such cases to succeed on that ground. However, the CACD will intervene on occasion and may do so without explicit use of the term "lurking doubt". In *Dayshon B* the appellant was convicted of rape, but acquitted on other counts in respect of the same complainant.[41] The trial judge had made it clear during his summing up that the principal issue was the credibility of the complainant. If the jury believed her, then the defendant would be found guilty on all four counts, and if not, acquitted on all four. The appeal was argued on the basis that the verdicts were inconsistent. It is notoriously difficult to succeed with an argument that verdicts are logically inconsistent. Elias LJ observed that a verdict will not be illogical "simply because credibility is in issue".[42]

[40] Ibid 271.

[41] *R v Dayshon B* [2009] EWCA Crim 2804.

[42] *R v Sukhbir Dhillon* [2010] EWCA (Crim) 1577 [40].

However, in the case of *Dayshon B* the trial judge was so concerned at the verdicts that he certified the case for appeal. Perhaps tellingly from the perspective of "lurking doubt", the CACD's decision in quashing the conviction was based upon sharing with the trial judge a "sense of discomfort"[43] and, having drawn together various matters, the CACD found the conviction "inherently unsafe".[44]

Such decisions are rare, running counter to the CACD's adherence to the primacy of the jury. Leigh found that the CACD's use of lurking doubt was careful and considered.[45] There are those who argue that the concept is an unhelpful one and should be consigned to history,[46] but I suggest that the CACD may still, on rare occasions, have recourse to a decision founded on a "lurking doubt". However, the Lord Chief Justice stressed just how rare this might be in 2012:

> *"It can therefore only be in the most exceptional circumstances that a conviction will be quashed on this ground [lurking doubt] alone, and even more exceptional if the attention of the court is confined to a re-examination of the material before the jury."*[47]

5.5.7 Identification Issues

Identification appeals might be thought of as sitting somewhere between "no case" to answer and "lurking doubt" appeals. The appeals are often, in essence, an invitation to the CACD to consider whether crucial identification evidence was

[43] *R v Dayshon B* n41 [22].

[44] Ibid.

[45] L. H. Leigh, 'Lurking Doubt and the Safety of Convictions' [2006] Crim LR 809.

[46] Rupert Grist, 'Lurking Doubts Remain' (2012) 176 Criminal Law and Justice Weekly 26th May 313.

[47] *R v Pope* [2012] EWCA Crim 2241 [14].

of sufficient strength to justify the conviction. There were 13 appeals in the sample that raised this ground of appeal, but only one was allowed.

The part which misidentification plays in the wrongful conviction of the factually innocent can hardly be doubted given the infamous case of Adolf Beck.[48] JUSTICE identified misidentification as a major cause of miscarriages of justice in its 1989 report.[49] The fallibility of eyewitness testimony generally, of which identification evidence is merely one kind, has been extensively reported by psychologists.[50]

The close relationship between an appeal founded upon disputed identification evidence and a submission of "no case" to answer is illustrated by *Dollive.*[51] The victim, who was robbed in the street, spent a long time considering the VIPER[52] images[53] and said that he was "pretty confident"[54] of the accuracy of his identification of the perpetrator. A defence submission of no case to answer on the basis that the identification evidence, at its highest, was too weak to sustain a conviction was rejected. In many identification appeals the issue revolves around whether the trial judge warned the jury with sufficient clarity about the risks involved in convicting based on identification evidence. In this case the CACD took the view that even the appropriate Turnbull warning[55] could not cure the flaw, since the evidence itself was too weak for a properly directed jury to convict upon it.

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[48] *Committee of inquiry into the case of Mr. Adolf Beck* n37.

[49] JUSTICE and George Waller, *Miscarriages of Justice* (JUSTICE 1989).

[50] Elizabeth F. Loftus, *Eyewitness testimony* (Harvard University Press 1996); Graham Davies and Laurence Griffiths, 'Eyewitness Identification and the English Courts: A Century of Trial and Error' (2008) 15 Psychiatry, Psychology and Law 435.

[51] *R v Dollive* [2009] EWCA Crim 1144.

[52] Video Identification Parade Electronic Recording.

[53] *R v Dollive* n51 [3].

[54] Ibid [5].

[55] *R v Turnbull* 1976 63 Cr App R 132.

That case may be contrasted with the conviction for indecent exposure of *Grigsby*.[56] Grigsby protested his innocence, supplementing his denial by asserting that he had an alibi. The complainant's description of the exposer differed from the appellant in a number of particulars, to such a degree that defence counsel unsuccessfully asked the judge to withdraw the case from the jury. The CACD upheld the conviction concluding that the judge had been correct to allow the case to go to the jury and, also, that he had given an admirable *Turnbull* direction about the dangers of acting on identification evidence alone, and the need to look for supporting evidence. The conclusion which emerges from the cases examined is that if the CACD determines that the identification evidence passes the "no case to answer" threshold then, absent a *Turnbull* misdirection, it will be most unlikely to interfere with the verdict of the jury.

These three categories of appeal – "no case to answer", "lurking doubt" and disputed identification evidence - have much in common. They are not "due process" issues and they take into account the evidence at the original trial. In "no case" appeals the CACD considers whether the evidence, at its highest, reaches the "necessary minimum" standard. In "lurking doubt" and disputed identification cases the CACD is invited to consider subjectively the weight of evidence that has met that minimum standard. If the CACD operates to its stated values, it is to be expected that it will be slow to intervene in such cases. That is borne out by the observations, particularly in cases involving "lurking doubt" or disputed identification. These appeals do, nonetheless, offer a small hope to those asserting innocence that, even in the absence of fresh evidence, a conviction may be quashed.

[56] *R v Grigsby* [2009] EWCA Crim 220.

5.6 FRESH EVIDENCE

The relatively small number of successful appeals against conviction suggests that the majority of trials are conducted properly and that there was sufficient evidence to permit a conviction.[57] A jury may, nevertheless, have reached an erroneous verdict, but I now consider the position where the evidence upon which the jury convicted is supplemented by some fresh evidence about the crime. These cases tend to be those in which the appellant is making the assertion of innocence most vigorously.

There are difficulties in trying to assess the CACD's performance in this respect. Each criminal case is unique and so, too, is each appeal. It is not sufficient for the researcher to take a particular case with which he takes issue over the outcome. What I attempt to do here is identify the types of case that the CACD has to address and observe some differences between those. In chapter six I consider whether it is possible to discern from the CACD's approach to fresh evidence cases to what extent it takes innocence into account in its deliberations.

Fresh evidence can take a variety of forms. The archetypal form, regularly cited by innocence campaigners, is the case of *Hodgson.*[58] Hodgson was convicted, largely on his admissions to police, in 1982 of the 1979 murder of Theresa De Simone. In 2008 a retained exhibit was subjected to DNA testing, which established that DNA on the victim's clothing belonged to a third party, thus effectively excluding Hodgson from blame. The CACD said "the prosecution's case was demolished".[59] The DNA was matched with another individual, since

[57] Of 1,435 applications to appeal against conviction in 2009 only 164 (11.43%) resulted in the conviction being quashed. Strictly speaking some, possibly most, of the appeals heard in 2009 will have been from applications made in 2008, but the figures do not vary significantly from year to year. *Judicial and Court Statistics 2009* (Ministry of Justice).

[58] *R v Hodgson* [2009] EWCA Crim 490.

[59] Ibid [6].

deceased, who had confessed to the murder in 1983. He had not been believed by police due to discrepancies in his account.

Beyond this archetypal case, fresh evidence has various forms. I consider first one that presents a particular difficulty when considering innocence.

5.6.1 Fresh Psychiatric Evidence

In nine appeals the fresh evidence was about the appellant's mental state. In each case the appellant had been convicted of murder. It was not contested that the individual had killed another person. It was argued that the conviction was unsafe, because the appellant was suffering from some mental health condition, which would have made manslaughter a more appropriate verdict.

These cases are difficult for the CACD. They often relate to crimes committed many years previously. Psychiatric experts are offering opinions, based on current observations, about someone's previous mental state. These difficulties, and the approach to fresh evidence cases in general, were explored in the judgment in the joined cases of *Erskine and Williams.*[60] From an innocence perspective these cases present a problem. Some would argue that an appeal that results in a substituted conviction of a lesser offence is an indication of innocence of the more serious offence. However, since one way of trying to differentiate cases of innocence is identifying an absence of actus reus, these cases seem to me to fall outside the scope of innocence. That is not to say that they are not important, merely that they are not cases involving assertions of innocence as defined in this thesis.

[60] *R v Erskine, R v Williams* [2009] EWCA Crim 1425.

The remaining 45 cases involving fresh evidence about the commission of the crime fall into two broad categories; those involving new witness evidence and those involving new expert evidence.

5.6.2 Witness of Fact Evidence

26 cases involved some fresh witness evidence. They included fresh witness statements, a witness admitting perjury and the content of email messages. In *Bento*[61] the defendant's murder conviction was quashed and a retrial ordered when four witnesses testified to the CACD about the possession of a handbag by the victim, in contradiction of CCTV footage on which the prosecution relied. It is not clear from the judgment why this evidence was not adduced at the original trial. In the event the Crown Prosecution Service decided not to proceed with a further trial.[62]

In *Dale* the defendant was convicted of rape with the issue at trial being whether there had been consent.[63] The fresh evidence came in the form of a witness statement from an individual who failed to attend a retrial. The CACD considered whether the evidence, if admitted, might have influenced the jury, decided it would not and declined to admit it. In *Sneddon* a key prosecution witness admitted having lied at the trial. The witness was convicted of perjury and the conviction quashed.[64]

The CACD was not always clear about how it reached the view that a conviction was unsafe on the basis of the fresh evidence. In *Corteil,* the appellant was

[61] *R v Bento* [2009] EWCA Crim 404.

[62] 'No retrial for cleared boyfriend' (*BBC News*, 9 July 2009) <http://news.bbc.co.uk/1/hi/england/beds/bucks/herts/8142790.stm> accessed 6 January 2011.

[63] *R v Dale* [2009] EWCA Crim 280.

[64] *R v Sneddon* [2009] EWCA Crim 430.

convicted of failing to notify a change of circumstance to the benefits office.[65] The Court accepted evidence that taunting email messages sent to the appellant by her former partner, after the appellant had completed her sentence, undermined the safety of her conviction. The judgment offers no insight into how the CACD found this evidence to be capable of belief.

In none of my illustrative cases did the fresh evidence *offer positive, incontrovertible proof* of the appellant's innocence. The fresh evidence undermined the strength of the case against the appellant sufficiently to cause the CACD to find the conviction unsafe. This highlights the precise nature of the CACD's task, which is not to seek evidence of innocence, but to consider whether, in the light of the fresh evidence, the conviction is unsafe.

5.6.3 Expert Evidence

The second category of fresh evidence appeals covers expert evidence. This ranges from cell site tracking of mobile phones, to blood spatter and to evidence about recovered memory. 19 appeals included some new expert evidence as a ground of appeal.[66] The majority of these appeals were unsuccessful with the CACD being unconvinced by the fresh evidence or not even prepared to receive it.[67]

In *Carter,*[68] a conviction for the murder of a baby, the appellant tendered fresh medical opinion to challenge the cause of death, asserting that there had been a lucid interval between the original incident and the baby's death. The CACD

[65] *R v Corteil* [2009] EWCA Crim 1927.

[66] Excluding fresh expert evidence on the psychiatric state of the appellant.

[67] This distinction is explored in chapter six.

[68] *R v Carter* [2009] EWCA Crim 1739.

decided that the fresh evidence might have influenced the jury's deliberations, but overall it was insufficient to render the conviction unsafe.

The expert evidence offered in *Thambapillais* convinced the CACD.[69] A conviction for conspiracy to defraud was quashed on the basis of fresh expert evidence about the reliability of computer data on financial transactions. Although the CACD has indicated that it deprecates the practice of defence counsel seeking to adduce evidence from "bigger and better experts", it accepted it in this case.[70] A second expert cast doubt on the report of the first expert and that was accepted by the CACD without demur. There is no reference in the judgment to the application of the s23 tests and the court did not order a retrial.

Loftus involved fresh evidence of fact and expert opinion.[71] Loftus was convicted of various sexual offences committed during the 1970s. He now sought to adduce evidence that he had been in prison for at least part of the time during which the offences were alleged to have occurred. He also sought to adduce expert evidence that, if the assaults had taken place, the victims would have sustained obvious physical injuries. The CACD received the evidence about the dates, but decided that it did not undermine the evidence that the assaults had taken place. It accepted that precision over timing was difficult because the events had taken place so long prior to trial. The CACD declined to receive the expert evidence on the basis that it was purely speculative.

It adopted a similar approach to expert evidence in the case of *R v E,*[72] another sexual offences case. The defence wanted to call evidence from Professor Conway, an expert on recovered memory, about the likelihood of the complainant, who was between 4 and 8 years of age at the time of the offence, being able to

[69] *R v Thambapillais and Another* [2009] EWCA Crim 567.

[70] *R v Steven Jones* [1997] 1 Cr App R 86 CA.

[71] *R v Loftus and another* [2009] EWCA Crim 2688.

[72] *R v E* [2009] EWCA Crim 1370.

give the level of detail she did about the events. The CACD declared that the question of whether the complainant was telling the truth was quintessentially a jury matter. It declined to receive Professor Conway's report on the basis that it did not afford a ground of appeal.

A successful appeal drawing upon fresh expert evidence is *Barron.*[73] He was convicted in 1995 of the murder of his wife. The evidence against him included blood spatter on his clothing, which, the prosecution said, had occurred as a consequence of the blows he had struck. Fresh expert evidence offered an alternative explanation: that the spatter could have arisen from his dying wife's exhalations as he cradled her in his arms.[74] The CACD accepted the evidence and ordered a retrial.[75]

The observations illustrate that fresh expert evidence can be of value to those asserting innocence, but not invariably so. The CACD's *approach* to fresh evidence is an important consideration and is explored in greater detail in chapter six.

5.6.4 Retrials

The CACD has the power, upon quashing a conviction, to order a retrial.[76] For those claiming innocence, a retrial affords the opportunity to have the case heard again and decided by a new jury. The CACD quashed the conviction in 118 appeals, all of which are therefore potential candidates for a retrial. A retrial was ordered in 29 cases (24.58%). In some cases the decision not to order a retrial

[73] *R v Barron* [2009] EWCA Crim 910.

[74] This is the same argument deployed in the case of Sion Jenkins and the same expert, Professor Schroter, was used.

[75] Barron was convicted again. His appeal against that conviction was unsuccessful. *R v Barron* [2010] EWCA Crim 2950.

[76] Criminal Appeal Act 1968 s 7.

was pragmatic, since the appellant had already completed his sentence. I will consider the potential utility of this option and the CACD's overall approach to it further in chapter six.

5.6.5 Innocence

I attempted to identify, in each appeal, whether an appellant asserted innocence. I based my assessment on the case put forward by the defence, either on appeal or at the original trial. In some cases, even where the appeal was founded upon a due process issue, the judgment recorded the defence at trial and if that constituted an assertion of innocence I counted it as a claim of innocence. I concluded that the appellant claimed innocence in 259 of the 355 appeals. In the remaining 96, I was either unable to determine the point or the appellant clearly did not contest guilt. I was unable to determine the point in some cases where the appeal judgment focussed on, for example, a ground of appeal relating to a judicial direction.

In the cases where I concluded that there was some assertion of innocence I noted a range of possible types illustrated in the following table.

Table 5.4 - Claims of Innocence

"Type" of Innocence	Comment
Denial	A denial of any involvement in the events giving rise to the conviction.
Self-defence	Admission of involvement but a claim of acting in justified self-defence.
Consent	Always in the context of sexual offence, an assertion that the complainant had consented.
Psychiatric Grounds	Seeking to have a murder conviction reduced to manslaughter.
Duress	Admission of involvement, but a claim of acting under duress.
Lesser Offense	Admission of involvement, but seeking conviction of a lesser offence thus claiming innocence of the graver offence.
Present, but not involved	Usually in the context of a brawl, an admission of being present, but denying culpability for some aspect of the offence.
Accident	The events were acknowledged, but criminal liability was denied on the basis that the outcome was accidental.
Absence of *mens rea*	The acts took place, but the appellant was not blameworthy.

This is not intended to be an exhaustive list, merely an illustration of the range of claims of innocence being made.

The CACD asserts that innocence is not a matter that it should consider.[77] Nevertheless, I observed that it does intervene in some fresh evidence cases where the issue before the court is the guilt/non-guilt of the appellant. It does, even whilst espousing the principles of finality, certainty and primacy of the jury, take it upon itself to quash convictions. Even where there is no fresh evidence, the CACD will, admittedly rarely, quash a conviction based upon its "sense of unease." It may avoid using the phrase "lurking doubt", but we should not perhaps be too concerned about the terminology if the CACD is seeking to ensure that justice is done.

I conclude that the CACD does offer some remedy to those asserting innocence. The difficulty, however, is how to predict in what circumstances the CACD will address evidential issues and find in favour of the appellant. This issue is fundamental to the operation of the CCRC, which must consider whether there is a "real possibility" of a conviction being quashed. Central to that has to be an understanding of what the CACD might quash and, with particular reference to innocence, how the CACD approaches cases involving fresh evidence.

5.7 CHANGE OF APPROACH

The changes recommended by the Runciman Commission resulted in statutory amendments made by the 1995 Act. The amendments were not precisely in line with the Commission's recommendations, but they did introduce a different test

[77] *R v McIlKenny* [1992] 2 All ER 417 (CA) 425.

for the CACD to apply to appeals.[78] I considered whether there was any evidence that the change produced any difference in the grounds or outcome of appeals. I was able to undertake a comparison because Malleson undertook a research study for the Runciman Commission in which she identified the grounds of appeal and the grounds that were successful.[79]

I compared my findings with Malleson's and found that judicial error was the most common ground of appeal in both studies. It accounted for 58.5% of the grounds in Malleson's study and 60.87% in this study. In terms of successful grounds, Malleson found that judicial error accounted for 64.7% of successful appeals whilst I found it accounted for 60.31%. These figures would seem to suggest that little has changed, but I did observe an increase in the number of cases involving fresh evidence. Malleson identified 23 cases (6.99% of her sample) whilst I noted 54 cases (9.66%). Malleson reported six (5.88%) successful appeals grounded on fresh evidence, whereas I identified 17 (14.41%). One might tentatively conclude that the CACD has become a little more receptive to fresh evidence appeals. This could be the case in respect of the number of appeals reaching the CACD and also those achieving success. However, some caution is needed here since by 2009 the CCRC was in existence and 11 of the fresh evidence cases heard by the CACD were referred to it by CCRC. Malleson's study does not identify Home Secretary referrals, but since there were only 3 cases referred in 1989 (and thus likely to have been determined in 1990) and since Malleson's study only covered January-July 1990 the influence of CCRC's work on these figures may partially explain the difference.

In any event, I would suggest that it is how the CACD deals with the cases that is of greatest significance and, in particular, whether it does so in a manner that is clear and consistent. This has an importance beyond that relevant to the individual

[78] For example, the Commission recommended that the test to be applied by the CACD was whether the conviction "is or may be unsafe" but the statute limits this to "is unsafe."

[79] Kate Malleson, *Review of the Appeal Process. Research Study Number 17* (Royal Commission on Criminal Justice, 1993).

appellant, since CCRC has to base its decisions on the application of a predictive "real possibility" test that the CACD might find the conviction unsafe. To what extent the CACD operates in a way to facilitate the application of this test is considered further in chapter six.

The majority of the CACD's work involves reviewing due process issues. Members of the court do so with a skill and expertise derived from long experience of judicial process. They weigh other issues in reaching a decision on whether a conviction is unsafe, but the focus is the due process issue.

Fresh evidence cases, which, by contrast with due process cases, might raise the issue of innocence,[80] are uncommon. Some present particular difficulties in the context of innocence, since the appeal's objective is to achieve a lesser conviction. The remaining fresh evidence appeals, whether based on new expert evidence or new witness evidence, afford the innocent the possibility of having their convictions quashed. Given these cases can be identified I consider in chapter six whether it is possible to discern whether the CACD's approach takes account of innocence as a consideration. I also consider whether, when a conviction is quashed, the CACD's approach to retrial is clear and consistent.

5.8 CACD JUDGMENTS ON CCRC REFERRALS

This part contains the results of an analysis of available CACD judgments on conviction referrals made by CCRC between 1st April 1997, when CCRC started operations, and 31st March 2011. A list of all judgments by the CACD and the Northern Ireland Court of Appeal was compiled, primarily from CCRC annual

[80] I say "might" here to reflect the fact that some fresh evidence cases do not raise the issue of innocence because the fresh evidence is psychiatric and seeking to reduce a conviction from murder to manslaughter.

reports and the CCRC website.[81] Given the focus on wrongful convictions judgments on sentence referrals were excluded. Summary conviction referrals were excluded, because with no written judgments available it was impossible to analyse them. A small number of judgments had to be excluded because, for security reasons, the CACD declined to give public reasons for its decision.[82] Five cases resulted in further appeals to the House of Lords.[83] Only the ultimate decision by the House of Lords has been included in the results.[84] It proved impossible to locate a written judgment in three cases.

By the 31st March 2011 the CCRC had made 476 referrals,[85] of which 452 had been determined. Once the exclusions outlined above have been made, the number of appeals considered in this sample totals 359. 234 referrals (65.18%) have resulted in the conviction being quashed and 125 in the conviction being upheld. This success rate is lower than that reported by the Commission,[86] but this is explained by a higher success rate on sentence references, which affects the overall figures.[87]

[81] 'CCRC Case Library' <http://www.ccrc.gov.uk/case.htm> accessed 20 June 2011 CCRC's own website has since been incorporated into the website of the Ministry of Justice.

[82] *R v Morrison and Others* [2009] NICA 1.

[83] The five are: *R v Pendleton* [2001] UKHL 66 *R v Kansal* [2001] UKHL 62; *R v Clarke* [2008] UKHL 8 and *R v Kennedy* [2007] UKHL 38. The Clarke case involved two defendants.

[84] This approach has been adopted since in each case the House of Lords overturned the decision of the CACD (four convictions were quashed, that of Kansal was upheld). It would seem perverse to take account, for statistical purposes, of decisions that were subsequently overturned.

[85] CCRC, 'Case Statistics' (*CCRC* April 2011) <http://www.ccrc.gov.uk/cases/case_44.htm> accessed 15th April 2011.

[86] The Commission's "success rate" on referrals was, at 31st March 2011, 70.46% (315 referrals quashed from 447 determined) ibid.

[87] There had been 59 sentence referrals determined of which 49 were successful (83.05%).

Table 5.5 - Types of Offence – CCRC Referrals

Type of Offence	Number
Murder (including attempted murder)	133
Rape and other sexual offences	66
Drugs	48
Robbery, theft, burglary	54
Deception, fraud	30
Assaults, wounding's	32
Manslaughter	8
Kidnapping	3
Total	374

The total number of offences listed exceeds the sample size because there is a degree of double counting. For example, some murder cases also involved robbery. This analysis was intended to give a sense of the type of cases being referred.

Cases fall within two broad headings; those primarily about due process and those involving fresh evidence. CCRC's role requires it to consider whether there is a "real possibility" that the CACD will consider a conviction unsafe, encompasses both types of case. Classifying cases is not straightforward, because a reference by CCRC may be on mixed grounds. *Adams'*[88] murder conviction was quashed by the CACD, because various evidential points, which

[88] *R v Adams* [2007] EWCA Crim 1.

might have influenced the jury, had not been deployed at trial. The points were not deployed due to errors by trial counsel, since the prosecution had properly disclosed the material. The case could be classified as quashed on the basis of ineffective counsel, fresh evidence or a combination of the two. I classified it as a fresh evidence case, since the CACD gave weight to the evidence in its decision. This difficulty of classification means that it is not possible to state precisely the number of cases that fit within each category. Broadly speaking, the cases split approximately 50% due process and 50% fresh evidence.

5.9 DUE PROCESS ISSUES

There were five major due process themes. I consider each before considering their relevance to claims of innocence.

5.9.1 Police Misconduct

Misconduct by police officers can be placed on a spectrum of seriousness according to the nature of the misconduct. It may involve conduct that was directly related to the securing of a conviction.[89] Alternatively, the conduct may not relate to the instant case, but the officer in question has been discredited in other matters and his evidence has become tainted.[90] 69 of the referrals in the sample (18.95%) included police misconduct as a ground and in 57 cases it was the principal ground of the referral. Many of these referrals arose from the activities of the now discredited, and disbanded, West Midlands Serious Crime squad, the Flying Squad at Rigg Approach in London and the police in Northern Ireland

[89] As in the case of *R v Twitchell* [2000] 1 Cr App R 373 CAin which the conduct complained of was the placing of plastic bags over the defendant's head to extract a confession.

[90] *R v Deans* [2004] EWCA Crim 2123 being an example.

during the terrorist era. The success rate is very high with 64 of the 69 referrals resulting in the conviction being quashed (92.75%). In the other five cases, despite the police misconduct, there was sufficient untainted evidence for the conviction to remain safe.

I was able to divide cases into "direct" or "indirect" misconduct. Direct misconduct covers those in which the conduct complained of directly related to the appellant. So, the police officer who, in the case of the Cardiff Newsagent three, was found to have made notes at an impossible speed is an example of direct misconduct, since his notes related directly to the case under investigation.[91] Indirect misconduct covers those cases where, for example, a police officer has been convicted of an offence of corruption that casts doubt on his honesty. The CACD considers the degree of the officer's involvement in the case before determining whether the case is sufficiently tainted for a conviction to be unsafe. The CACD has developed a sophisticated approach to such cases, grading officers as to the degree of taint that their involvement in a case carries.[92] The Court is alert to the risk of an appellant "simply and opportunistically jumping on a bandwagon created by the Rigg Approach investigation."[93]

Of the 64 successful referrals relating to police misconduct, 31 were due to some direct misconduct and 33 due to indirect misconduct. Of the 64 cases, 39 were in respect of incidents which preceded the coming into effect of the provisions of the Police and Criminal Evidence Act 1984 and its associated codes of practice.

These appeals might be described as fresh evidence appeals, since the misconduct of a police officer has been established after conviction. I was unable

[91] *R v O'Brien and Others* [2000] EWCA Crim 3.

[92] Used in the case of *R v Willis* [2006] EWCA Crim 809 Certain police officers were classified as Category A and would no longer be put forward as witnesses of truth. Category B officers were those who might be inferred to have acquiesced to another officer's misconduct even if they had not indulged in misconduct themselves.

[93] Ibid[30].

to discern any consistent treatment, by the CACD, of these cases as involving fresh evidence. Khan and Bashir is a good example.[94] They were convicted of cloning credit cards. The investigating officer, DS Spackman, was later convicted of various unrelated serious criminal offences. This could be regarded as fresh evidence, which, if the jury had known of it, might have changed their view of the case. The CACD could have applied the tests in s23 of the 1968 Act and then, if they were in any doubt, applied the test from Pendleton.[95] The judgment makes no reference to these tests and concludes, "We can however deal with this appeal very briefly. Notwithstanding evidence beyond Spackman himself, these convictions simply will not do. They are unsafe."[96]

5.9.2 Judicial Error

I note above that judicial error is a common ground of appeal and the most common reason for an appeal succeeding. Its prevalence in routine appeals might lead one to expect that CCRC would refer few cases on this ground. In fact, the Commission has referred 56 cases in which judicial error was at least one of the grounds of appeal.

There are two explanations for this relatively large number. First, if an issue has been overlooked on first appeal, it can be said to be a new issue on a referral and therefore within CCRC's remit to refer it.[97] Secondly, although CCRC's remit is generally restricted to those cases in which an appeal has already been determined, either by a substantive decision of the court or by the refusal of leave

[94] *R v Khan and Bashir* [2005] EWCA Crim 3100.

[95] *R v Pendleton* n83.

[96] *R v Khan and Bashir* n94 [17].

[97] An issue may have been overlooked because, for example, Counsel missed it or the appellant composed his own grounds of appeal and missed it. The CACD under the pressure of a steady flow of appeals may not have picked the matter up itself.

to appeal,[98] it may refer a case in the absence of a prior appeal in exceptional circumstances.[99]The success rate (23 of 56 – 41.07%) is lower than the average of around 70%. I could not discern any pattern in the issues being raised. They include summing up errors, adverse inference issues, good character directions, direction to convict and others.

5.9.3 Non-Disclosure by the Prosecution

The Criminal Procedure and Investigations Act 1996, as amended by the Criminal Justice Act 2003, introduced a new disclosure regime. Operational guidance was revised in May 2010.[100] A prosecution failure to comply with the requirements applicable at the time of trial may suffice for the CACD to find a conviction unsafe.[101] Failure to disclose may be inadvertent or deliberate.

It was an issue in 72 referrals in the sample. In 47 cases it was the principal ground of appeal. 54 of the 72 cases resulted in the conviction being quashed (75%). Twenty (27.7%) of these cases arose from the failure by Customs and Excise to disclose some material issue, such as the fact that a key witness was an informant. These cases may overlap with misconduct cases, since the CACD may regard a deliberate failure to disclose as misconduct.

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[98] By virtue of the Criminal Appeal Act 1995 s13(1)(c).

[99] Criminal Appeal Act 1995 s 13 (2). See *R v Aston* [2010] EWCA Crim 3067 for an example of such a referral.

[100] The guide is now under almost constant revision, since it is Internet, rather than paper, based. See 'Disclosure Manual' (*Crown Prosecution Service*) <http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/index.html> accessed 20 June 2011 The major revision identified for May 2010 was a new Guidance Booklet for ExpertsDisclosure: Experts' Evidence, Case Management and Unused Material.

[101] For example, *R v Causley* [2003] EWCA Crim 1840 in which the prosecution failed to disclose that a prison witness had previously testified, in a separate case, about a prison confession.

5.9.4 Unfair Trial

22 referrals contained a ground of appeal asserting that the applicant had been denied a fair trial. In 10 cases the conviction was quashed. A fair trial is a fundamental requirement of the criminal justice system. The Human Rights Act 1998, which came into force in October 2000, added a new dimension. Two important issues arose quickly. First, was the Act to have effect in respect of trials that had taken place prior to October 2000? Second, would a finding that trial proceedings were in breach of the right to a fair trial mean that a conviction must inevitably be quashed?

The House of Lords determined that the Act did not have retrospective effect.[102] Perhaps of greatest significance for the future was the line of decisions culminating in the case of *Dundon,*[103] which concluded that all the circumstances of a conviction had to be taken into account in determining whether a conviction was safe. Thus, even if a trial proceeding had been unfair, it would not necessarily mean that the conviction would be unsafe.

The development of this line of authority has meant that there have been relatively few referrals in which the fairness of the proceedings has been a substantive issue. The CACD tends to rely heavily on the distinction between fairness and safety, adhering to the view that one can have the latter even in the absence of the former.[104] Nevertheless, it is clear that in a case where the unfairness is sufficiently serious the CACD will quash a conviction. The Human Rights Act is not the only protection of the right to a fair trial and the CACD has in some cases,

[102] *R v Lambert* [2001] UKHL 37, [2002] 2 AC 545; *R v Kansal* n83.

[103] *R v Dundon* n17.

[104] This was the clear interpretation placed on the decision in *R v Lambert* n102 by the Divisional Court in *R (Dowsett) v Criminal Cases Review Commission* [2007] EWHC 1923 (Admin) [14].

usually predating the Act, used the abuse of process doctrine to quash a conviction.[105]

5.9.5 Change of Law Cases

A common law system based on statute and judicial precedent evolves. Some of that evolution, particularly in the field of judicial precedent, has the effect of "clarifying" a previous understanding of the law, which makes something that was previously considered an offence no longer an offence, or a lesser offence.[106]

This generates the possibility of an appeal by an individual who had been properly convicted at the time and had no grounds of appeal, but now, in all likelihood beyond the 28-day time limit, has grounds to do so. The CACD regulates the position by, generally, refusing leave to appeal out of time. This refusal acts to prevent the substantive issue coming before the court. The CACD adopts this position as a matter of public policy, based upon concerns that it might be swamped with applications.[107] Hughes LJ summarised the CACD's approach as:

> "*[the] very well established practice of this court, in a case where the conviction was entirely proper under the law as it stood at the time of trial, to grant leave to appeal against conviction out of time only where substantial injustice would otherwise be done to the defendant."*[108]

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[105] *R v Bargery* [2004] EWCA Crim 816, for example, in which the defendant's guilty plea was based on what the CACD referred to as an offer "which should not have been put before him" [21].

[106] The reverse is also true, since the law may develop to make criminal something that was not previously an offence. However, for a detailed analysis of the position where the act is no longer an offence, see Richard Nobles and David Schiff, 'Absurd Asymmetry - a Comment on R v Cottrell and Fletcher and BM, KK and DP (Petitioners) v Scottish Criminal Cases Review Commission' (2008) 71 MLR 464.

[107] See for example *R v Campbell* [1997] 1 CAR 234.

[108] *R v Ramzan and Others* [2006] EWCA Crim 1974, [2007] 1 Cr App R 10 [30].

The CACD uses the leave requirement as a filter to exclude cases, unless there would be "substantial injustice" to the defendant. CCRC was not bound by such an approach. The issue arose when it received a number of applications involving a change of law. Five change of law cases have generated subsequent CCRC references.[109] These revealed a tension between the CACD and CCRC. CCRC realised that if the substantive case were considered, then the CACD, being bound by precedent, would be highly likely to quash the conviction. However, CCRC also knew that an application for leave out of time would, absent substantial injustice, have been refused by the CACD. This tension came to the fore when CCRC decided to refer the case of four appellants to the CACD based upon the change of law resulting from the House of Lords decision in *Saik.*[110] The Director of HM Revenue and Customs sought judicial review of the Commission's decision and the High Court explored the tension in some detail.[111] Such was the Court's concern that it took the unusual step of inviting CCRC's Chairman Professor Graham Zellick to address it on the issue. Ultimately the Commission's decision to refer was upheld. The CACD rehearsed the issue in considerable detail in *Cottrell.*[112]

The position produced anomalies for applicants. An applicant who had previously failed at the CACD would be raising a new issue with CCRC. An applicant who lodged an appeal seeking an extension of time would, absent substantial injustice, be refused leave. An application from that person to CCRC would fail since the change of law issue had already been considered by the CACD and would not be a "new" issue. The applicant who was out of time could apply direct to CCRC, which would have the power to refer the matter to the CACD using the exceptional circumstances provision. CCRC could also act to produce conformity with the CACD's policy approach by refusing such an application, thus forcing the

[109] *R v Saik* [2006] UKHL 18; *R v Preddy* [1996] AC 815 HL; *R v Porter* [2006] EWCA Crim 560; *R v Smith (Morgan James)* [2001] 1 AC 146 HL; *R v J* [2004] UKHL 42.

[110] *R v Saik* n109.

[111] *R (Director of Revenue and Customs) v Criminal Cases Review Commission* [2006] EWHC 3064 (Admin).

[112] *R v Cottrell* [2007] EWCA Crim 2016.

applicant to lodge an appeal that would be likely to be refused. All of this produced a situation in which the person best placed to succeed with an application based on a change of law was one who had had a previous appeal rejected.

The CACD's discomfort with the position was clear from the analysis by Lord Bingham in *Cottrell*.[113] CCRC did not offer it comfort with a policy document that made it clear that it would not have regard to the number of convictions that might be affected by the development in the law.[114] However, it did state that it would adopt a policy of directing applicants who had not appealed that they should do so. This would then enable the CACD to deal with the matter, including acceptance of the case if the substantial injustice test were met, but relieve the Commission of the problem in any application founded on this basis since the ground would not be new.[115]

This still left, however, the issue of those cases where there had been a previous appeal on unrelated grounds. In essence the CCRC referral could be seen as granting leave where the CACD might not have done. This raised the prospect of CCRC having to apply the "substantial injustice" test, which Professor Zellick rejected as too vague.[116]

The solution to this problem was an amendment to the 1968 Act,[117] by the addition of a provision which specifically allows the CACD, on a reference by CCRC following a development in the law, to dismiss the appeal if the CACD would, on an application for an extension of time, have thought it inappropriate to

[113] Ibid [42].

[114] CCRC Formal Memorandum "Discretion In Referrals (including applications based on a change in the law)" [14].

[115] Ibid [15].

[116] *R (Director of Revenue and Customs) v Criminal Cases Review Commission* n111 [34].

[117] Criminal Justice and Immigration Act 2008 s42.

grant an extension. The effect is to force CCRC to factor this into the real possibility test. If the CACD would not have thought an extension of time appropriate, then there would not be a real possibility of the conviction being declared unsafe. It is an inelegant solution since, in order to consider whether the real possibility test is met CCRC has, in these cases, also to consider whether leave would have been granted which means it must also apply the substantial injustice test which Professor Zellick was so loath to do.

There have been a significant number of cases (29) referred following changes in the law. The success rate is high at just over 75%. Such cases provide an interesting challenge when considering innocence. Some, such as the referrals following the trigger case of *Smith*[118] do not raise any issue of factual innocence since they are founded upon a development, since reversed, in the law on provocation.[119] In a case such as *Rowland* the appellant had offered a guilty plea to manslaughter at his trial in 1997 but the prosecution secured a conviction for murder. [120] A failed appeal was followed by an unsuccessful application to CCRC. Then, following the decision in *Smith* a further application to CCRC, supported by additional psychiatric evidence, resulted in a referral. The CACD applied the law on provocation as developed in *Smith,* quashed the murder conviction and substituted a manslaughter conviction.

What, viewed from an innocence perspective, should be made of convictions which are quashed following developments in the law? The House of Lords decision in *Saik* clarified the *mens rea* requirements for conspiracy in money laundering.[121] The CACD applied the law as it had been developed and quashed *Ramzan's* conviction ordering a retrial.[122] Should *Ramzan* be regarded as innocent

[118] *R v Smith (Morgan James)* n109.

[119] Reversed by the Privy Council in *Attorney General for Jersey v Holley* [2005] UKPC 23; followed by the CACD in R v *R v James, R v Karimi* [2006] EWCA Crim 14.

[120] *R v Rowland* [2003] EWCA Crim 3636.

[121] *R v Saik* n109.

[122] *R v Ramzan and Others* n108.

or should such an assessment only be made after the retrial? Of even greater difficulty is any assessment of innocence in the case of *Fletcher.*[123] His initial appeal[124] was heard and refused 2 weeks after the decision in *R v J* had developed the law on the practice of charging indecent assault as an alternative to unlawful sexual intercourse or rape.[125] Although he had been convicted on a number of counts of indecent assault, one was specifically added to the indictment as an alternative to a rape charge. The jury acquitted him of rape, but found him guilty of the indecent assault, so we may conclude that it found the indecent assault proven beyond a reasonable doubt. The CACD's decision that the indictment should not have been preferred scarcely renders his actions "innocent," yet he could make a claim to be so.

5.9.6 Due Process Issues Conclusions

In all of the above categories the primary ground of appeal relates to the integrity of the system, rather than the substantive issue of the guilt or innocence of the defendant. It would be facile to suggest that the CACD ignores the evidence in all such cases. Even if it does take the view that there has been a breach of system integrity, it will then go on to consider whether the breach is sufficiently serious to outweigh other evidence against the defendant. In some cases it will conclude that the other evidence against the defendant remains strong and uphold the conviction. In others it will quash the conviction, but with considerable reluctance, as in the case of the M25 three.[126] In that case the CACD commented that the evidence against one defendant on three of the counts was overwhelming, but a combination of non-disclosure and jury irregularity meant that the convictions against him and his co-defendants were no longer safe. The CACD went beyond re-stating its statutory obligations, indicating its scepticism with the following

[123] *R v Cottrell* n112.

[124] *R v F (Joseph)* [2005] EWCA Crim 3518.

[125] *R v J* n109.

[126] *R v Davis, Rowe and Johnson* [2000] EWCA Crim 10, [2001] 1 Cr App R 8.

comment, "For the better understanding of those who have listened to this judgment and of those who may report it hereafter this is not a finding of innocence, far from it."[127]

This suggests that, although the CACD will make some assessment of the overall strength of the case against the appellant, it will, once it determines a breach of due process, give considerable weight to protecting the integrity of the criminal justice system.

5.9.7 Due Process and Innocence

The majority of the cases decided on the basis of some flaw in the trial or investigation may be considered miscarriages of justice, but it is not clear that they should be regarded as wrongful convictions. The appellants *may* be innocent, but since the CACD has demonstrated in cases such as Rowe, Mullen and Maxwell a willingness to quash convictions even where it was sceptical about the appellant's innocence it would be inappropriate to draw such a conclusion.[128]

5.10 FRESH EVIDENCE

The introduction of fresh evidence was argued in 153 referrals, of which 105 were quashed and 48 upheld. Even in a flawlessly conducted investigation and trial, there may be some new evidence that subsequently comes to light that renders the original conviction unsafe. Such evidence may shed light on possible

[127] Ibid [95].

[128] Indeed in some cases there seems little doubt that the appellants were factually guilty. In *R v Clarke* n83 the House of Lords quashed the convictions because the indictment had not been signed. Since they had served their sentences no re-trial was ordered.

innocence, so these cases merit detailed analysis. The introduction of fresh evidence before the CACD is not a straightforward matter and a number of hurdles must be overcome. Some themes among fresh evidence cases were DNA, medical issues, identification, witnesses of fact, expert evidence, and complainant issues. I consider these in turn.

5.10.1 DNA

The development of the use of deoxyribonucleic acid (DNA) profiling in criminal investigation started in 1986.[129] DNA profiling, sometimes called genetic fingerprinting, has been an increasingly powerful investigative tool ever since. It has been used to considerable effect in the United States where the Innocence Project reports that since 1989 more than 250 people have been exonerated by the use of DNA evidence.[130] The US Innocence Project deals only exceptionally with cases where there is no DNA evidence available, just five are listed on its website.[131] Such is the confidence in DNA evidence it might be thought surprising that only ten of the CCRC's referrals in the UK have featured DNA as an issue and only 3 have resulted in convictions being quashed.

There are reasons why this may not be surprising. DNA evidence requires some transfer of bodily matter (sweat, saliva, semen) that can successfully be recovered from the crime scene. Many crimes do not involve such transfer. The US Innocence Project estimates that only 5-10% of crimes might yield some DNA

[129] The first use was exculpatory. A youth who had confessed to murder was proven not to be connected to the semen left on the victims. Mass screening was undertaken and Colin Pitchfork became the first person to be convicted following the use of DNA testing. Claire Marshall, 'DNA pioneer's 'eureka' moment' (*BBC* 9th September 2009) <http://news.bbc.co.uk/1/hi/programmes/newsnight/8245312.stm> accessed 3rd April 2012.

[130] 'Innocence Project DNA Exonerations' (*Innocence Project*) <http://www.innocenceproject.org/Content/How_many_people_have_been_exonerated_through_DNA_testing.php> accessed 20 June 2011.

[131] 'Innocence Project Non DNA Exonerations' (*Innocence Project*) <http://www.innocenceproject.org/know/non-dna-exonerations.php> accessed 20 June 2011.

evidence. In addition, a significant number of CCRC's cases relate to crimes that happened more than 10 years prior to an application to CCRC, so there is the chance that the evidence has not been preserved. Furthermore, DNA is not just an exculpatory tool. CCRC has declined to refer cases to the CACD on the basis that DNA evidence has strengthened the case against the defendant.[132]

The infamous case of *Hanratty* provides another illuminating example.[133] The CCRC referred the case on 17 different grounds, primarily relating to non-disclosure of various matters by the prosecution. However, the CACD ordered the exhumation of Hanratty's body in order that DNA samples could be obtained and compared with the DNA found on the clothing of one of the victims. The test proved to be a match. Counsel for Hanratty's relatives conceded that, unless the clothing sample had been contaminated, the evidence against Hanratty was compelling.

There have been a few cases in which DNA testing has exonerated a convicted person. In addition to the case of *Hodgson*[134] there is the case of *Shirley* who was convicted of murder and rape.[135] Later DNA testing showed that the DNA extracted from the victim's clothing did not match *Shirl*ey. The Crown's case, as in *Hodgson*, was that the sexual assault and murder were the work of one individual. The presence of someone else's DNA undermined the case against *Shirley*. The CACD made no mention of s.23 fresh evidence tests laid down in the Criminal Appeal Act in its judgment.

These cases may not carry quite the exculpatory weight which some might assert since they don't "prove innocence", they are nevertheless very powerful examples

[132] The cases are discussed in later chapters but cannot, for reasons of confidentiality be identified by name.

[133] *R v Hanratty* [2002] EWCA Crim 1141 and covered in earlier works by Paul Foot, *Who killed Hanratty?* (London: Cape 1971) and Bob Woffinden, *Hanratty : the final verdict* (Pan, 1999 1997).

[134] Detailed above see n58.

[135] *R v Shirley* [2003] EWCA Crim 1976.

of both CCRC and the CACD addressing evidential rather than due process issues.

5.10.2 Medical Issues

Medical cases may involve evidence about the defendant, the victim or complainant, a witness and in some instances the issue of expert competency.

Medical evidence may be very powerful. In *France,* a sexual assault case*,* medical evidence showed that the defendant had an abnormality of the penis, which was such that the complainant would have noticed it.[136] Counsel for the defendant failed to cross-examine on the point and on the ultimate referral by CCRC the CACD found, probably combining the error by Counsel with the medical evidence, that the conviction was unsafe. The CACD was at pains to say that it did not impugn the complainant's honesty. The CACD might have rejected this evidence under s23 of the Criminal Appeal Act 1968, since it could have been adduced at trial and there may have been no reasonable explanation for it not being adduced. The CACD did not say so overtly, but perhaps it considered the ineffective performance by Counsel to be a reasonable explanation.

In *Clark* medical issues became entangled with others, making an assessment of the precise reason for the appeal being allowed difficult.[137] She was convicted of murder after her two children died in their cots. When CCRC referred the case there had been a challenge to the statistical evidence presented by Professor Meadows, but also evidence that the second child had a colonisation of bacteria and might have died of natural causes. Crucially this evidence was not disclosed to the defence. So the quashing might be classified as fresh medical evidence, prosecutorial misconduct, non-disclosure or flawed expert testimony. It is

[136] *R v France* [2009] EWCA Crim 2909.

[137] *R v Clark* [2003] EWCA Crim 1020, [2003] 2 FCR 447.

important to recognise that although Clark always maintained her innocence, the fresh evidence did not demonstrate her innocence, rather it served to weaken the foundations of the prosecution case.[138]

5.10.3 Misidentification

Identification evidence is fraught with difficulty. The problem facing a defendant seeking to overturn a conviction based on a claimed misidentification is how to produce any fresh evidence on the point.

Some cases fall back on due process issues by seeking, for example, to undermine the validity of an identification parade. This was the approach adopted by Counsel for *Stock,* asserting that the police had shown a photograph of the defendant to a witness before the ID parade.[139] When that failed Counsel tried on the next reference to argue that the judge's direction on the issue of identification was flawed.[140] That failed too.

In the modern era the development of Closed Circuit Television (CCTV) has added a new dimension to the problem. In *Bacchus* an expert identified the defendant from CCTV images.[141] The expert was subsequently discredited, undermining the evidence against Bacchus. As the issue in the case was the skill of the expert witness and thus the reliability of his evidence this could be regarded as both due process and fresh evidence.

[138] This is not intended to impugn Sally Clark's innocence. It merely seeks to recognize that the fresh evidence did not prove her innocence.

[139] *R v Stock* [2004] EWCA Crim 2238.

[140] *R v Stock* [2008] EWCA Crim 1862.

[141] *R v Bacchus* [2004] EWCA Crim 1756.

There are cases in which the CACD concludes that the original identification evidence was just wrong. The first conviction referral by CCRC was *Mahood Mattan,* who was hanged for murder.[142] The identification evidence of one witness was crucial, but the Crown conceded his evidence could no longer be relied upon. It is not clear from the judgment whether he erred or lied, but the CACD found the identification unreliable and the conviction unsafe. It expressed profound regret that *Mattan* had been convicted and hanged. In doing so it comes close to declaring him innocent of the crime of which he was convicted.

5.10.4 Witnesses of Fact

Apart from the discovery of new forensic evidence such as DNA the strongest support for a claim of innocence may come from a witness of fact. The difficulty facing applicants to CCRC in such cases is that the introduction of new factual evidence has to overcome the various obstacles imposed by the provisions of s.23 of the Criminal Appeal Act 1968. In the case of new scientific evidence these obstacles may be less onerous since the fresh evidence may be available because of advances in scientific practice. Where the CACD is asked to admit new scientific evidence it rarely rejects it on the basis that it is not capable of belief.

Attempts to introduce fresh evidence of a factual nature often fail at one of two hurdles. Either the new evidence is rejected on the basis that the evidence is not capable of belief, usually a clear reflection on the credibility of the witness, or on the basis that the evidence could have been adduced at trial with no reasonable explanation for the failure to do so.

There are, however, cases in which the CACD does heed the evidence of witnesses in quashing a conviction. Sometimes, as in the case of *Druhan*, the

[142] *R v Mattan (deceased)* [1998] EWCA Crim 676.

CACD seems to pay little heed to s.23 and in effect it rehears the case and supplants its own view for that of the jury.[143]

5.10.5 Expert Evidence or Witness

Referrals in which expert evidence is a central point cover a range of matters. At one level they relate to the competency (or more accurately the incompetency) of the expert. The most striking example is Dr Heath who was forcefully criticised by the CACD in *Puaca.*[144] A CCRC referral in the case of three defendants, where Dr Heath's evidence had been crucial, resulted in their convictions being quashed.[145] However, the CACD will not quash the conviction in every case in which Dr Heath's evidence featured.[146] This is consistent with the CACD's approach to evidence from discredited police officers where it considers each case and the impact of the evidence of the discredited officer in order to reach a decision.

The complex evidence in infant death cases was sufficient for the Government to undertake a systematic review of the expert evidence to see whether further action was warranted. 297 cases were reviewed and a further three were identified as giving cause for concern.[147]

In many cases the issues are finely balanced. Fresh expert evidence may undermine part of the prosecution's case. The CACD has to decide whether, if it admits the evidence under s23 of the 1968 Act, the fresh evidence sufficiently

[143] *R v Druhan* [1999] EWCA Crim 2011.

[144] *R v Puaca* [2005] EWCA Crim 3001.

[145] *R v Boreman and Others* [2006] EWCA Crim 2265. The murder convictions were substituted by convictions for causing grievous bodily harm with intent.

[146] A point illustrated by the refusal of Kenneth Noye's appeal. *R v Noye* [2011] EWCA Crim 650.

[147] *Child Protection; Shaken Baby Syndrome HL Deb, 14th February 2006, Col 1079* (Lord Goldsmith)

undermines the case that, applying the test in *Pendleton,*[148] the conviction becomes unsafe. This falls well short of any finding of innocence. This is illustrated by the cases of *Jenkins*[149] and *George.*[150] In *Jenkins* the appellant was convicted of murdering his foster daughter. The key evidence in the CCRC referral was that blood found on the defendant's clothing could have been as a result of spray from the victim's dying exhalation rather than spray during the assault that caused her wounds. This plausible alternative opinion from the expert could have caused the jury to reach a different verdict and the CACD quashed the conviction. In *George* the probative value to be assigned to gunshot residue found in the defendant's clothing was re-evaluated, leading the prosecution to accept that it had no probative value.

That these decisions fall well short of any finding of innocence is supported by the subsequent events in each case. In each case the CACD ordered a retrial. *George* was subsequently acquitted. *Jenkins* faced two re-trials, but in neither could the jury agree a verdict. Both men have had applications for compensation for wrongful conviction refused because they have not demonstrated beyond a reasonable doubt that they are innocent.[151]

Another area for dispute has been in developments in forensic and medical sciences. The case of *PF* is a good example.[152] He was convicted in 1998 on various counts of indecency, indecent assault and anal rape. Dr Carr-Hill gave the medical evidence in respect of the rape. By the time of CCRC's referral of the

[148] *R v Pendleton* n83.

[149] *R v Jenkins* [2004] EWCA Crim 2047.

[150] *R v George* [2007] EWCA Crim 2722.

[151] Andy Bloxham, 'Sion Jenkins 'refused compensation' for time in jail' *The Daily Telegraph* (London, 10th August 2010) <http://www.telegraph.co.uk/news/uknews/crime/7935970/Sion-Jenkins-refused-compensation-for-time-in-jail.html> accessed 21st February 2012 and Richard Edwards, 'Barry George refused £1.4 million compensation claim over Jill Dando murder' *The Daily Telegraph* (London) <http://www.telegraph.co.uk/news/uknews/crime/7603460/Barry-George-refused-1.4-million-compensation-claim-over-Jill-Dando-murder.html> accessed 21st February 2012 See also *R (Ali and Others) v Secretary of State for Justice* [2013] EWHC 72 (Admin). George was one of the unsuccessful judicial review applicants.

[152] *R v PF* [2009] EWCA Crim 1086.

case and the CACD hearing in 2009 Dr Carr-Hill had retired. In the interim period the Royal College of Paediatrics and Child Health had published revised guidance on the physical signs of sex abuse in children.[153] The two experts who reviewed the matter for the appeal hearing agreed that in the light of the revised guidance Dr Carr-Hill's conclusions should have been neutral on the matter.

New scientific developments occur regularly, but the Courts are generally cautious about adopting them. *Kempster* was convicted of burglary, at least partially, on the basis of ear-print evidence.[154] The CACD reviewed the reliability of such evidence and concluded that it was insufficiently developed. *Kempster's* conviction for burglary was quashed.

This range of cases reveals that there are some cases in which fresh expert evidence goes to the innocence of the accused, but in truth most of the time a revised position in respect of expert evidence (whatever the cause of the revision of position) often tells one little about the innocence of the appellant.

5.10.6 Complainant Issues

Fresh evidence about or from complainants also provides grounds for referral occasionally. Complainant evidence is often critical in sexual assault cases and many of the referrals here involve some sexual assault. They are also characterised by having a relatively high proportion of cases in which the defendant maintains innocence. Innocence claims in this context normally take one of two forms. Either that the sexual activity did not occur or that any sexual activity that did occur was consensual (and legal).

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[153] Royal College of Paediatrics and Child Health, *The Physical Signs of Child Sexual Abuse: an evidence-based review and guidance for best practice* (Royal College of Paediatrics and Child Health, 2008).

[154] *R v Kempster* [2008] EWCA Crim 975.

The fresh evidence in such cases takes a number of forms. In *Payne* painstaking work by the defence and CCRC established additional facts about the timings of alleged assaults during the 1980s.[155] These facts cast sufficient doubt on the re-collections of the complainant for the conviction to be quashed. In *Bryan* the complainant's evidence that she had not known the defendant prior to the assault was fatally undermined by the subsequent discovery of mobile telephone records showing that they had had prior contact.[156] In other cases, fresh evidence has emerged about other allegations made by the complainant that have not been sustained and thus cast doubt on the veracity of the original complaint. There have also been cases in which the complainant has later recounted a different version of events either in a compensation claim or to a third party. These cases usually amount to an undermining of the prosecution case. They do not demonstrate the innocence of the defendant.

5.11 LURKING DOUBT

The limitation on the scope of the concept of lurking doubt has been discussed above. The CACD rarely uses the term itself preferring to refer to the cumulative effects of various pieces of evidence or even declaring some "substantial unease" about a guilty verdict. Given that the CACD rarely allows an appeal involving lurking doubt, it follows that CCRC can hardly ever say that it has identified a real possibility that it will do so when making a referral. The concept appears in the sample as an additional rather than primary ground. The appeals in respect of 18 defendants were classified as involving lurking doubt. In some cases the phrase itself was used, but in others the concept has been used to cover a cumulative effect argument. In ten cases the appeals were successful, though in the case of

[155] *R v Payne* [2007] EWCA Crim 275.

[156] *R v B* [2009] EWCA Crim 2291.

one the CACD made it abundantly clear that it did not really harbour a doubt and was making its finding on due process grounds. Perhaps the successful referral that could be most justifiably considered as a lurking doubt case is the appeal of *Cooper and McMahon.*[157] This case attracted the attention of campaigners such as Sir Ludovic Kennedy and had a remarkable history at the Court of Appeal. Prior to CCRC's founding, it had been referred twice to the CACD by the Home Secretary. Both appeals were rejected. A further attempted reference by the Home Secretary in respect of McMahon failed when the CACD declined to receive fresh evidence. Finally, at the fifth time of asking and after a thorough review of further fresh evidence on the CCRC referral the CACD concluded that:

> *"For present purposes it is unnecessary to say that one of those matters, or any combination of them, is decisive. It is sufficient to say that in their totality they persuade us that these convictions are no longer safe, and that the appeals against conviction must be allowed."*[158]

The conclusion from this is that a cumulative body of fresh evidence can succeed, but it is unusual. It is also worth noting another unusual feature in this case which is that the CACD was prepared to formally disagree with the decision of the CACD in the one of the prior appeal decisions. Both these are events of such rarity that the case merits description as exceptional.

It also seems that after some attempts to test the CACD with cases of lurking doubt or cumulative factors, CCRC may now be less inclined to do so. The case of *Mattan* referred to above had, in truth, little by way of fresh material but it was referred anyway. The reference of *Attwool and Roden* was unsuccessful, but the reference grounds indicated that CCRC was really inviting the CACD to share its

[157] *R v Cooper and Anor* [2003] EWCA Crim 2257.

[158] Ibid [43].

doubts about the convictions.[159] The CACD did not do so. The second CCRC referral of *Stock*[160] was probably done in the hope that the CACD might follow the same approach that it did in *Cooper and McMahon*. It did not do so.

5.12 RETRIALS

I consider the issue of retrial to see if I can discern consistency in the CACD's approach to whether there should be a retrial. Chalmers and Leverick have identified that the CACD is inconsistent in its approach to the retrial issue.[161] My analysis of the approach in CCRC referral cases supports their findings. For example, it is not clear why, despite the Crown's request for an order for retrial, the CACD declined to so order in *Hester.*[162] In *Wilkinson,* the Crown was ill prepared to take a view on the matter so no retrial was ordered.[163] The decision on whether to order a retrial is, once a conviction has been quashed, to be made taking into account the interests of justice. The CACD has set out some of the factors to be taken into account in *Graham*[164] where it identified the public interest and the interest of the defendant, saying:

> *"The public interest is generally served by the prosecution of those reasonably suspected on available evidence of serious crime, if such prosecution can be conducted without unfairness to or oppression of the defendant. The legitimate interests of the defendant will often call for consideration of the time which has passed since the alleged*

[159] *R v Roden and Another* [2008] EWCA Crim 879.

[160] *R v Stock* n140.

[161] James Chalmers and Fiona Leverick, 'When Should a Retrial be Permitted After a Conviction is Quashed on Appeal?' (2011) 74 MLR 721.

[162] *R v Hester* [1998] EWCA Crim 3442.

[163] *R v W* [2011] EWCA Crim 2289.

[164] *R v Graham* [1997] 1 Cr App R 302 CA.

offence, and any penalty the defendant may already have paid before the quashing of the conviction."[165]

Chalmers and Leverick found little evidence of these factors being explicitly applied and my observations concur with their finding.

5.13 CONCLUSIONS

What conclusions may be drawn from analysis of these CACD judgments on CCRC referrals?

First, if one of the objectives of the reforms following the Runciman Commission was to restore confidence in the criminal justice system, then CCRC's (and the CACD's) response to breaches of due process should go a considerable way towards doing so. Each institution has sent a clear message to the bodies such as the police, Customs and Excise and the Crown Prosecution Service that if the safeguards provided in an adversarial system are not observed, then convictions will be referred and quashed. Cleansing the system of some past excesses[166] has been a success story for the CCRC. That success must also be attributed to the willingness of the CACD to take a robust approach to the preservation of the integrity of the criminal justice system.

Second, it is not possible to draw definite conclusions on the incidence of innocence amongst the referred cases. Some are clearly excluded (referrals of cases seeking a reduction in the severity of the offence for example). The

[165] Ibid 318.

[166] Particularly, but not limited to, cases involving police misconduct by the West Midlands Serious Crime Squad and the Flying Squad at Rigg Approach in London.

appellant may be guilty of manslaughter rather than murder. Although he can claim "innocence" of murder, a claim of innocence in a wider sense is scarcely credible. In other cases, the focus on due process means that innocence is not considered.

Thirdly, despite this there are a significant number of cases in which fresh evidence has been adduced, which not only casts doubt on the conviction, but also provides support for a protestation of innocence. However, the CACD's approach to fresh evidence cases is difficult to predict. Despite its critics, CCRC has referred cases based on persuasive fresh evidence of fact and convictions have been quashed.

The critics might respond by saying that the cases that CCRC does NOT refer are the cause for concern. It is here, they say, that CCRC's subservience to the CACD manifests itself most clearly. They highlight cases and accuse the CCRC of being part of a system that is "not working".[167] Woffinden cites the cases of *Susan May, Jeremy Bamber and Eddie Gilfoyle.*[168] The problem with this argument is that it seeks to argue for systemic change based on a very small number of difficult, possibly intractable, cases. It is submitted that the crisis of confidence that beset the Criminal Justice system and led to the appointment of the RCCJ and the establishment of the CCRC was, though based on a small number of cases, based on cases which demonstrated significant failings in the system. My research findings detailed above show CCRC identifying failings in the system. Drawing conclusions about system failures based upon a tiny percentage of cases it has not referred is problematic.

[167] John Cooper, 'CCRC and Court of Appeal' (2011) 175 JPN Criminal Law and Justice Weekly 298.

[168] Bob Woffinden, 'The Criminal Cases Review Commission has failed' (*The Guardian*, 30th November 2010) <http://www.guardian.co.uk/commentisfree/libertycentral/2010/nov/30/criminal-cases-review-commission-failed> accessed 5th February 2012.

To assess whether CCRC is too focussed on technicalities and due process and pays insufficient attention to cases of claimed innocence requires a systematic examination of the cases that CCRC does not refer. That examination is the subject of chapter seven.

Chapter Six - Evaluation of the Court of Appeal

6.1 INTRODUCTION

In this chapter, drawing upon the data in chapter five, I evaluate the CACD's handling of claims of innocence. In part one I explain the difficulties of carrying out the evaluation and explain why I consider the CACD's approach to "fresh evidence" cases as an apposite and pertinent criterion for the evaluation. In part two I assess the CACD's use of its discretionary powers over the receipt of fresh evidence. I consider whether, in cases where it exercises its discretion to receive fresh evidence, the CACD clearly and consistently identifies and applies the appropriate legal test and to what extent, in doing so, it might be said to usurp the jury. In part three I consider the CACD's handling of the issues of lurking doubt, and disputed identification cases. Part four contains an assessment of whether the CACD is consistent in the exercise of a further discretionary power; the decision to order a retrial. Finally, although the CACD's approach to fresh evidence is the key to evaluating how it addresses claims of innocence, I also draw upon additional material, such as the CACD influencing legislative change, to reach my overall conclusions.

My key findings are that the CACD's approach to the receipt of fresh evidence appears to be restrictive. It displays confusion about the correct test to be applied in fresh evidence cases and applies the test in an unpredictable manner. Its approach to the issue of retrial is inconsistent. In spite of its expressed deference to the jury it does, in fact, continue to usurp the jury in many fresh evidence cases. The additional material, including the CACD's approach to the issue of "lurking doubt" and mistaken identification cases also suggests that the CACD is a court that is reluctant to embrace change. I conclude that there is no evidence which would support a contention that the CACD has responded in the last two decades to criticism that its approach to fresh evidence is too restrictive. Analysis of a large

body of fresh evidence cases leaves the reader with the impression that some fresh evidence cases are decided on some underlying basis that the Court has not articulated. This omission and the CACD's generally restrictive approach to the receipt and evaluation of fresh evidence are inevitably reflected in CCRC's application of the "real possibility" test.

6.2 BACKGROUND AND EVALUATION CONTEXT

The Royal Commission on Criminal Justice considered the CACD's approach to fresh evidence appeals to be generally too restrictive.[1] It urged the CACD to adopt a more receptive approach to such appeals. There have been a number of important developments in the twenty years since the Royal Commission report. The 1995 Act amended the statutory test to be applied by the CACD and created the CCRC. The appropriate approach to fresh evidence cases has been considered afresh by the House of Lords and the Privy Council. I now consider whether, in the light of these developments, it is possible to discern any change of approach by the CACD. Has it become more amenable to the receipt and evaluation of fresh evidence or does it still display the reluctance identified by the Royal Commission? Roberts certainly found little to suggest the urging of the Royal Commission had been heeded in her review of the CACD's performance in 2002.[2]

6.2.1 Innocence

There is a significant impediment to evaluating the CACD's approach to claims of innocence. The CACD is generally clear that it is inappropriate for it to proffer any

[1] *The Runciman Royal Commission on Criminal Justice* (Viscount Runciman Cmd 2263 1993) Ch10 paras 51-63.

[2] Stephanie Roberts, 'The Royal Commission on Criminal Justice and Factual Innocence: remedying wrongful convictions in the Court of Appeal' (2004) 1(2) Justice 86.

conclusion on the guilt or innocence of an appellant, repeatedly asserting that its function is to review the safety of a conviction.[3] In spite of this there are cases, admittedly infrequent, in which the CACD will declare the appellant innocent. It did so in Fergus, a case of misidentification, with Steyn LJ saying that "In the court's view, the conviction was not only unsafe and unsatisfactory but F was wholly innocent."[4] In the CCRC referral of Fell's murder conviction the CACD said:

> *"the evidence we have heard leads us to the conclusion that the confession was a false one, that can only mean that we believe that he was innocent of these terrible murders, and he should be entitled to have us say so."*[5]

These cases are anomalies and it is clear that the CACD will normally avoid making any such pronouncement. Indeed, when specifically invited to do so in *Hallam* it declined.[6]

Apart from those cases where fresh evidence is tendered to seek the reduction of a conviction to a lesser offence, the submission of fresh evidence is the best indication that an appellant is claiming to be innocent and the fresh evidence is the best means of establishing that. This permits some assessment of how those claiming to have been wrongly convicted fare. The use of "fresh evidence" cases as a proxy for claims of innocence seems justifiable. Appeals based upon breaches of due process may, of course, be made by appellants claiming innocence. However, in such cases the CACD's primary focus is on the alleged breach of due process, which makes assessment of any claim of innocence less reliable. This is because judgments in such cases tend to contain less evidential information.

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[3] *R v Hickey and Others* [1997] EWCA Crim 2028.

[4] *R v Fergus* [1994] 98 Cr App R 313.

[5] *R v Fell* [2001] EWCA Crim 696 [117].

[6] *R v Hallam* [2012] EWCA Crim 1158 [49].

6.2.2 Limitations

The assessment of CACD's performance in handling fresh evidence cases (and thus by proxy the way it handles cases where innocence is asserted) is difficult for two major reasons.

The first difficulty in trying to deduce the CACD's approach from the cases is that each case is fact-specific. According to Lord Judge the *"statutory framework is uncomplicated."*[7] Further,

> *"[v]irtually by definition, the decision whether to admit fresh evidence is case and fact specific. The discretion to receive fresh evidence is a wide one focussing on the interests of justice."*[8]

Accordingly, one should be slow to judge the CACD's approach on the basis of disagreement over the outcome of a small number of appeals.[9] In analysing a large number of judgments and assessing performance, I seek evidence about both the clarity and consistency of the CACD's approach, and also about the tenor of its approach. Is it receptive to fresh evidence cases? Case studies illustrate some common findings, but are not the sole evidence in support of a finding. Where it proves helpful to illustrate a particular point, I use case studies from outside my research samples.

The second major difficulty in making the assessment arises from the discretionary nature of the statutory provisions within s23 of the Criminal Appeal Act 1968. As will become apparent, assessing whether evidence could reasonably have been

[7] *R v Erskine, R v Williams* [2009] EWCA Crim 1425 [40].

[8] Ibid [39].

[9] Whilst there may be valuable lessons to be learned from analysis of a particular high profile case I wanted to see whether lessons could be learned from the analysis of a wider range of cases.

adduced at trial or should be received in the interests of justice are matters of judgment and assessing the exercise of that judgment is problematic.

I need to be explicit about some aspects of my assessment. It is partly an examination of whether the CACD clearly and consistently identifies and applies the appropriate legal test. However, there is a significant component of my analysis that is not an attempt to deduce the appropriate legal principles to be applied from examining these cases. It is an assessment, across a body of fresh evidence cases, of whether, in exercising its discretion or evaluating the weight of evidence, the CACD seemed reluctant or receptive.

The assessment has six components:

1. The CACD's approach to the receipt of fresh evidence.
2. The legal test and its application if fresh evidence is formally received.
3. The CACD's approach to retrials.
4. The CACD's approach in "lurking doubt" cases.
5. The CACD's approach in appeals based on claims of misidentification.
6. Other evidence of the CACD's approach.

Although these are identified as separate components, the demarcation between some elements is blurred. For example, the CACD may carry out an extensive evaluation of the evidence (the second component above), before deciding whether to receive the evidence at all. It adopted such an approach in considering fresh pathological evidence in *Noye.*[10] A lurking doubt case may be based upon a disputed identification or involve some limited fresh evidence. One of the findings from all the data observations is that many, perhaps most, criminal cases are multi-layered and rarely lend themselves to simple classification.

[10] *R v Noye* [2011] EWCA Crim 650.

6.3 THE RECEIPT OF FRESH EVIDENCE

The appellant who tenders fresh evidence in support of his claim of innocence has two distinct obstacles to surmount. First, he must persuade the CACD that it should "receive" the evidence.[11] If he succeeds, he must then persuade the court that the fresh evidence is sufficient to render his conviction unsafe. If he succeeds, he still faces the possibility that the CACD may exercise its discretion to order a retrial. This section addresses the first stage, the attempt to persuade the CACD to receive the evidence on appeal. The appeal legislation states that the CACD *may* "receive any evidence which was not adduced in the proceedings from which the appeal lies"[12] if it thinks it "necessary or expedient in the interests of justice to do so."[13] When considering whether to receive fresh evidence, the CACD is directed to "have regard in particular to" the four specific tests set out in s23 (2) of the 1968 Act, namely whether the evidence:

1. Appears to be capable of belief.
2. May afford a ground for allowing the appeal.
3. Would have been admissible at trial.
4. Was not adduced at trial on the basis of an explanation that is reasonable.

An appeal may fail any one of these tests and the Court decline to receive the evidence. The CACD may conclude that all of the tests in s 23(2) are satisfied, but still decide that it is not in the interests of justice to receive it. Finally, even if all the

[11] Although the words receive and receipt may appear synonymous with admit and admission I have deliberately avoided using the latter terms. There are two reasons for this. First, to avoid any confusion over the distinct issue of admissibility of evidence and second, because the legislation uses the word "receive" rather than "admit." The CACD does not consistently adopt such a distinction (see *R v Reed, Reed and Garmson* [2009] EWCA Crim 2698 [134] where the CACD declines to admit evidence). This is not a criticism since it is clear from the context which power the Court is exercising.

[12] Criminal Appeal Act 1968 s 23(1)(c).

[13] Ibid s 23(1).

tests are satisfied and the evidence is received, the CACD may not be convinced that the original conviction is unsafe.

In considering the application of the provisions of s23, I stress that the objective is not to try to deduce legal principles from the judgments. It is to consider whether conclusions can be drawn about the CACD's approach to formally receiving fresh evidence, in other words, is it possible to discern its attitude to application of the legal principles? If it is, then how might that attitude be best described? Is it receptive or restrictive? This is a worthwhile pursuit because, particularly for CCRC, which is dealing with a high volume of cases, similarities in cases may be more evident and consequently identifying the CACD's approach would be helpful to CCRC. It is also worth noting that there is much force in Lord Bingham's observation that; "the courts have recognised that the statutory discretion conferred by section 23 cannot be constrained by inflexible, mechanistic rules,"[14] a view subsequently endorsed by Lord Judge LCJ.[15] I am not critical of the principle of the statutory provisions affording discretion to the court. It is the CACD's approach to the exercise of the discretion conferred by the legislation that needs evaluation.

6.4 THE APPLICATION OF THE S23 TESTS

Any search for consistency in the way in which the CACD applies the s23 tests is likely to fail. The tests contain significant discretion, which means that in any given case a differently constituted court might, legitimately, reach a different conclusion. The brief review of the individual elements of s23, which follows is intended to illustrate, by reference to a number of case studies, the exercise of these various elements of discretion. This is designed to facilitate a conclusion

[14] *R (Pearson) v Criminal Cases Review Commission* [1999] EWHC 452 (Admin) [44].

[15] *R v Erskine, R v Williams* n7 [52].

about how the CACD's approach might best be characterised. Is it receptive or restrictive?

6.4.1 Admissibility

The first issue is whether the proposed evidence would have been admissible in the original proceedings. I found no case in either sample in which this issue was determined by the CACD as a reason for refusing an appeal. This is probably unsurprising, since one would expect the single judge to identify such issues on an application for leave to appeal or CCRC to identify them in considering whether to make a reference.

6.4.2 Capable of Belief

The CACD has to exercise judgment in deciding whether it considers evidence to be capable of belief. It was a relatively common reason for appeals being refused. Evidence from expert witnesses was less frequently considered incapable of belief when compared with evidence from witnesses of fact. This finding is illustrated by the following examples.

In *Garvin*[16] the appellant's defence to a conspiracy to supply drugs charge was that he was involved in a transaction about a car and knew nothing of the drugs deal. Subsequently, a man who had fled to Europe but been convicted on his return proffered a statement which appeared to exculpate the appellant. The CACD heard the evidence on a provisional basis[17] and then applied the s23 tests. It found that the evidence would have been admissible at trial and found the

[16] *R v Garvin* [2009] EWCA Crim 1283.

[17] The CACD hears the evidence conditionally, described by the Latin phrase *de bene esse*, in order to reach a view on whether it will receive it.

witness's absence abroad was (just) reasonable explanation for the evidence not being adduced at trial. However, it found the evidence incapable of belief and thus, logically, that it did not afford a ground of appeal. It declined to receive it and dismissed the appeal.

Fresh expert evidence may not be sufficient to convince the CACD that a conviction is unsafe, but it will usually be regarded as capable of belief. I found only one case in my samples in which the CACD refused an appeal on the basis that the expert evidence was not capable of belief. In *Symmons*[18] the Court decided that the appellant had misled the psychiatric expert, who gave evidence about the appellant's mental state. Accordingly, the evidence was deemed not capable of belief.

6.4.3 No reasonable explanation for failure to adduce at trial

The CACD regularly stresses the need for a defendant to present his full defence at trial and not reserve elements for appeal on the basis that he might have a better chance of success. In *Kenyon*[19] *the* CACD observed:

> *"the important factor, emphasised… in many other cases, that the interests of justice lie in there being a single trial at which the defendant and the Crown each presents the whole of its case. It is apt to subvert the process of justice if it is open to a defendant to rely on appeal on something which could have been relied upon at trial, but which he chose not to adduce."*[20]

[18] *R v Symmons* [2009] EWCA Crim 734.

[19] *R v Kenyon* [2010] EWCA Crim 914.

[20] Ibid [27].

If the new evidence could have been adduced at trial, the Court will be slow to accept it on appeal. In *Garmson*[21] the appellant's attempt to challenge DNA evidence given at trial was refused, the Court saying:

> *"We are satisfied, after hearing Professor Jamieson and reviewing the transcripts of the evidence at trial, that the evidence Professor Jamieson gave on this appeal could and should have been given at trial, if Garmson wished to rely upon it."*[22]

The CACD added that had it received the evidence it would not have afforded a ground of appeal.

In *R v Steven Jones*[23] the CACD said that expert evidence was probably more likely to fail to satisfy the reasonable explanation for a failure to adduce test because experts are "interchangeable"[24] in a way in which factual witnesses are not. In *Simmons* the defendant sought to challenge his murder conviction on the basis of a new expert pathologist's report.[25] The CACD decided that the new expert's report differed little from that of the previous defence expert and that the decision not to call the expert who prepared the report for trial was a tactical one. The CACD declared that the evidence was not new. It described the defence approach as "expert shopping,"[26] a practice which it deprecated.

The CACD adopted a similar approach in *Meachen,*[27] a CCRC referral. CCRC, acutely aware of the need for evidence to be adjudged fresh if the CACD were to

[21] *R v Reed, Reed and Garmson* n11.

[22] Ibid [199].

[23] *R v Steven Jones* [1997] 1 Cr App R 86 CA.

[24] Ibid 93.

[25] *R v Simmons* [2009] EWCA Crim 741.

[26] Ibid [40].

[27] *R v Meachen* [2009] EWCA Crim 1701.

consider it, argued, in its statement of reasons, that it went much further than the expert evidence at trial. The CACD agreed that it extended the evidence to a degree, but did not consider that the extension made it fresh evidence and it declined to receive it. Logically, in both *Simmons* and *Meachen,* given that the CACD found the evidence was not new it did not need to apply the s23 tests and it upheld the convictions.

The evidence from these case studies, and a number of other cases,[28] suggests that the court affords a high priority to the principle that defendants must deploy their full defence at trial and seems less concerned to consider the weight or impact on the jury of the evidence that it has decided not to receive.

The discretion to be exercised on evidence that was clearly available at trial is often inextricably bound up with some consideration of the competence of counsel, who may have been responsible for that evidence not being adduced. The CACD's approach to such cases is generally restrictive. Although following the decision in *Thakrar,*[29] the court no longer needs to consider whether the advocacy was flagrantly incompetent, it does still have to make some assessment of the impact. In *Day,*[30] a complex case, it decided that the evidence that might have been adduced, fell within the scope of tactical decisions by counsel. The CACD was unimpressed by the criticism of counsel saying:

> *"We are entirely satisfied that those criticisms are unfounded. In our view, Mr Amlot conducted the case with skill and judgment. The appellant was fortunate to have secured his services: as in the*

[28] See, for example, *R v Shickle* [2005] EWCA Crim 1881, *R v Wooster* [2003] EWCA Crim 748 and *R v Tye* [2009] EWCA Crim 1738.

[29] *R v Thakrar* [2001] EWCA Crim 1096.

[30] *R v Day* [2003] EWCA Crim 1060.

> *immediate aftermath of the trial Mr Day himself very properly acknowledged."* [31]

It did, nevertheless, consider the impact of the evidence and concluded:

> *"Our task is to ask ourselves whether the evidence that Mr Day says should have been given at the trial might reasonably have displaced the view taken by the jury on the evidence that they did hear: Pendleton [2002] 1 WLR 72[19], per Lord Bingham of Cornhill. We find it impossible to answer that question in the affirmative."*[32]

It might also be observed that this approach is evidence of the CACD applying a "jury impact" test in contradiction of some utterances that its role is to consider the safety of the conviction. This point is explored further below.

By contrast, the case of *France* did result in a conviction being quashed because Counsel failed to cross-examine the complainant effectively about an abnormality of Mr France's penis.[33] The CACD's rather more receptive approach in this case may have been influenced by the fact that Counsel was no longer a member of the bar and efforts to locate him to enquire about the cross-examination had proven unsuccessful.

The impression derived from the exercise of the CACD's discretion in receiving fresh evidence is that it remains reluctant to do so. It clearly does not treat the satisfaction of this test as an absolute precondition; otherwise it would have

[31] Ibid [95].

[32] Ibid [94].

[33] *R v France* [2009] EWCA Crim 2909.

refused the appeals by *Thambapillais*[34] and *Shotton*.[35] However, it does appear to use it as means of refusing to receive cogent defence evidence in some cases. Regular references to the need for a defendant to deploy his full defence at trial, coupled with a reluctance to criticise the decisions of trial counsel combine to make this a very difficult hurdle for any appellant to surmount.

6.4.4 Would not have afforded a ground of appeal

Whether fresh evidence founds a ground of appeal is another matter over which the CACD has considerable discretion. In *Cundell*[36] the appellant's conviction for soliciting murder was based, in part, on the testimony of a man whom he had met in prison. That individual now offered fresh evidence about the circumstances under which he had given evidence, casting doubt on his testimony. The CACD heard the evidence conditionally, but declined to receive it holding that it would not have afforded a ground of appeal. In *Tye*[37] the fresh evidence was CCTV footage of the defendant's interaction with two police officers. It did not relate directly to the incident that gave rise to his assault conviction, so the CACD declined to receive it on the basis that it would not afford a ground of appeal. The distinction that the CACD seems to draw here is that the evidence being tendered, would, even at its highest, not be sufficient to render the conviction unsafe.

[34] *R v Thambapillais and Another* [2009] EWCA Crim 567. This case and Shotton are discussed further below.

[35] *R v Shotton* [2009] EWCA Crim 1512.

[36] *R v Cundell* [2009] EWCA Crim 2072.

[37] *R v Tye* n28.

6.4.5 Combined Reasons

In some cases the CACD indicates that the fresh evidence is rejected for multiple reasons. In *Leslie*[38] the defendant was convicted of conspiracy to murder a friend's wife. He appealed on the basis that he had lied at trial, in fear of reprisals. The CACD treated his revised version as fresh evidence and declined to receive it, considering it not in the interests of justice to do so. The court added that it neither considered the evidence capable of belief, nor that there was any reasonable explanation for the failure to adduce it at trial.

6.4.6 Not in the interests of justice

The over-arching test in s 23 (1) empowers the CACD to receive fresh evidence if it considers it "necessary or expedient to do so in the interests of justice". The CACD regards this discretionary test as particularly important. In *Kenyon* the CACD said "the critical test is whether the receipt of the evidence is 'necessary or expedient in the interests of justice'."[39]

Shotton[40] illustrates the use of the test. Shotton, a schoolteacher, was convicted of indecent assaults on three male pupils. On appeal a fresh witness statement cast doubt on the evidence of at least one complainant, who had testified that the appellant locked classroom doors during the assaults. The CACD took the view that it would not be in the interests of justice to receive the evidence. Another striking example is *Chattoo*.[41] Chattoo was one of four men convicted of murder. A significant element of the evidence linked them to a firearm asserted by the prosecution to have been the murder weapon. A subsequent trial of two other

[38] *R v Leslie* [2009] EWCA Crim 2728.

[39] *R v Kenyon* n19 [5].

[40] *R v Shotton* n35.

[41] *R v Chattoo and others* [2012] EWCA Crim 190.

men accused of disposing of that weapon relied on the same evidence. At that later trial a different defence expert undermined the evidence of the prosecution expert sufficiently for the men to be acquitted. This was done to such effect that had this trial taken place first the Crown might not have proceeded with the prosecutions for murder. After a lengthy, rather unconvincing, attempt to characterise the fresh evidence of the defence expert as not particularly damaging to the prosecution case, the CACD concluded "in our view this is clearly a case where it is neither necessary nor expedient in the interests of justice to receive the evidence of Mr Arnold on these appeals."[42]

This evaluation is not just an exercise in picking out cases where appeals have been refused and disagreeing with the decision – it is also about considering cases where appeals have been allowed and trying to comprehend whether the reason for the decision is indicative of a more receptive approach. In *Corteil*[43] and *Thambapillais*[44] and the CCRC reference of *Solomon*[45] the CACD exercised the discretion in favour of the appellants, when, on the face of it, it could have refused the appeals on the grounds of credibility (*Corteil*) or that the evidence could have been adduced at trial (*Thambapillais* and *Solomon*). In trying to assess the exercise of the discretion here I note that both *Corteil* and *Solomon* had completed their sentences and the Thambapillais brothers had served a significant part of theirs. It also seems significant that in the cases of *Corteil* and *Thambapillais* the Crown did not seek to contest either appeal. *Solomon's* case was most unusual. He had deliberately withheld evidence, but the CACD received it because the result of his withholding it had been detrimental to him. The CACD was able to "set the record" straight by substituting lesser convictions. Perhaps the key feature to conclude from these cases is that where the interests of justice test is applied in a less restrictive fashion there are often strong external factors at play.

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[42] Ibid [79] and [82].

[43] *R v Corteil* [2009] EWCA Crim 1927.

[44] *R v Thambapillais and Another* n34.

[45] *R v Solomon* [2007] EWCA Crim 2633.

If these unusual, perhaps exceptional, cases are accepted as anomalous, what can we conclude about the CACD's approach to the exercise of its discretion in the "interests of justice" test? The interests of justice test is necessarily imprecisely framed, because it needs to afford the CACD discretion, but my assessment is that the CACD primarily uses the test in an exclusionary manner, in order to achieve a particular outcome that can then be justified by the assertion that receipt of the evidence is not in the interests of justice.

6.4.7 Conditional Hearing of Evidence.

I should also comment upon the CACD's rather surreal approach to hearing evidence conditionally, deciding that it fails to meet one of the s23 tests and then (having already heard the evidence) declining to receive it. An example of this is *Mockford* in which the Court concluded:

> *"…. we are not persuaded that the interests of justice require that this new evidence should be admitted. We therefore refuse the application to introduce the evidence, although we have in fact heard it and considered it with anxious consideration. Accordingly this appeal is dismissed."*[46]

I can discern no conceivable benefit from this bout of mental gymnastics. In order to determine whether fresh evidence has sufficient weight to form a ground of appeal the CACD must learn the substance of it. If it concludes that it lacks the substance necessary to render the conviction unsafe, it would be far simpler for the CACD to give that as the reason for upholding the conviction, rather than artificially declining to receive it.

[46] *R v Mockford* [2010] EWCA Crim 1380 [17].

6.4.8 Conclusion on the Receipt of Fresh Evidence

Ultimately, the impression created by the CACD's approach to the receipt of fresh evidence is that it is loath to do so. It uses the range of factors under s23 in a way that is restrictive. Sometimes, the Court identifies (as in *Kenyon*[47] and *Chattoo*[48]) the critical test as the "interests of justice"; on other occasions the focus is on the lack of reasonable explanation for the failure to adduce or whether the fresh evidence would afford a ground of appeal. It *could* signal a different approach by, for example, interpreting the failure to adduce test by asking whether there would have been some advantage to the defendant if the information had been withheld at trial.[49] It has not done so and its overall approach creates the impression of a Court that decides cases in advance of a hearing and then skilfully deploys the provisions of s23 to justify its decisions.[50] When it wishes to allow an appeal (*Corteil*[51] *or Thambapillais*[52] for example) it does not enquire too closely about some of the tests, but when it wishes to refuse an appeal it can readily find that one of the tests is not satisfied. Independent support for this suggestion comes from Darbyshire.[53] In reviewing the work of the Court of Appeal she asserts that "in about nine out of ten cases the judges had made their decision pre-court and then stuck to it."[54] This seems to indicate that oral argument and actually hearing fresh evidence are of limited value. A pre-hearing decision may, of course, fall in the appellant's favour. Darbyshire describes a miscarriage of justice case in which the decision to quash the conviction had been made before the hearing, reporting

[47] *R v Kenyon* n19.

[48] *R v Chattoo and others* n41.

[49] I shall return to this issue in chapter nine.

[50] This is not to suggest that CACD lacks a basis for its decisions. A substantial volume of papers from the trial proceedings and a summary prepared by the Criminal Appeal Office staff will have been considered prior to a hearing.

[51] *R v Corteil* n43.

[52] *R v Thambapillais and Another* n34.

[53] Penny Darbyshire, *Sitting in judgment: the working lives of judges* (Hart Publishing 2011). Darbyshire was granted "unprecedented observation of deliberations" upon which she based her comments.

[54] Ibid p338.

"only I knew that the judges had decided to quash the conviction, two days before the accused was released from his iron-barred dock."[55]

Darbyshire appears to approve of the CACD's approach, both in this particular case and in general, but it seems to me to support a notion that the Court makes judgments prematurely and then, in fresh evidence cases, utilises the s23 provisions as a post decision rationale.

6.5 THE EVALUATION OF FRESH EVIDENCE

I now consider the CACD's approach in those cases in which it has formally received some fresh evidence. This assessment includes consideration of the CACD's response to developing case law and the approach it adopts to evaluating fresh evidence. For my assessment I consider the following questions:

- What test should the CACD apply in evaluating fresh evidence?
- Does the Court clearly and consistently identify which test to apply?
- Once the CACD, in a given case, has identified the relevant test how does it apply that test?

I found evidence of confusion in the CACD about the appropriate test to apply once fresh evidence has been formally received. Before detailing that confusion, the development of the approach to fresh evidence, as articulated by the House of Lords and the Privy Council needs to be traced. This contextual position is critical to understanding why there is confusion, or at least, the appearance of confusion.

[55] Ibid. The reference to a male appellant may not be accurate. Given all the details Darbyshire provides the identity of the appellant is not difficult to discern, but as she forbears from identification I adopt the same approach.

The House of Lords decision in *Stafford and Luvaglio* is a convenient starting point. The defendants, who still protest their innocence,[56] were convicted of murdering Angus Sibett in January 1967. For the present purpose the judgment handed down by the House of Lords in 1973 is important.[57] Viscount Dilhorne, giving the leading judgment, considered how the CACD should address fresh evidence that was before it. He was clear that responsibility for the decision about whether the conviction was unsafe (or, at that time, unsatisfactory) lay with the CACD. Its task was not to consider whether the CACD might have come to a different verdict from that which the jury had reached. He did, however, add that the CACD *'might find it convenient to consider what a jury might have done had they heard the fresh evidence, the ultimate responsibility rests with [the CACD] and [the CACD] alone.'*[58] This is an unequivocal statement that the responsibility rests with the CACD, but in discharging that responsibility it *might* find it convenient to consider what a jury *might* have done – which we may call a jury impact test.

The House of Lords reconsidered the issue in 2001 in *Pendleton.*[59] Fresh psychiatric evidence was tendered which might justify Pendleton's murder conviction being quashed. Lord Bingham endorsed the approach adopted by Viscount Dilhorne, saying that he was:

> *"not persuaded that the House laid down any incorrect principle in Stafford, so long as the Court of Appeal bears very clearly in mind that the question for its consideration is whether the conviction is safe and not whether the accused is guilty."*[60]

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[56] Luvaglio does so on his website: 'Villain or Victim?' <http://www.villain-or-victim.com/luvaglio/index.php> accessed 12th March 2012.

[57] *Stafford v DPP* [1973] 3 All ER 762, [1974] AC 878 HL.

[58] Ibid 766.

[59] *R v Pendleton* [2001] UKHL 66.

[60] Ibid [19].

However, Lord Bingham went on to say:

> *"it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe."*[61]

Although Lord Bingham did not place additional emphasis on the words "in a case of any difficulty," it is clear from the rest of his judgment that they are important. He appears to be trying to limit the scope for the CACD to stray into territory which would usurp the role of the jury. *Pendleton* was interpreted by some commentators[62] as a shift towards the CACD giving greater consideration to the impact which fresh evidence might have had on a jury, but if anything, it seems more restrictive than the approach suggested by Viscount Dilhorne, since his approach involved consideration of possible impact on the jury without suggesting that it be confined to a "case of any difficulty."

The third case in the line of authorities is the Privy Council decision in *Dial and Dottin.*[63] The case was additionally difficult because the defendants were facing the death penalty. The Privy Council considered the appropriate test to be applied to fresh evidence about the crime. Some commentators have seen the judgment of Lord Brown, with whom Lord Bingham concurred, as marking a hardening of the line taken in *Pendleton* by making the jury impact test "an optional safeguard."[64]

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[61] Ibid [19].

[62] Adrian Fulford and Peter Wilcock, 'Pendleton: a step forward?' (2002) 152 New Law Journal 1281.

[63] *Dial and another v State of Trinidad and Tobago* [2005] UKPC 4, (2005) 1 WLR 1660.

[64] Henry Blaxland and Peter Wilcock, 'Fresh evidence in criminal appeals - Pendleton revisited' (2006) 10 Archbold News 4.

Lord Judge LCJ has consistently sought to interpret *Dial* as authority for a markedly different approach from *Pendleton.* For example, in *Noye,*[65] after reviewing the approach in *Stafford and Luvaglio* he asserts that "for a while it was thought that Pendleton was authority for a different approach."[66] However, he then goes on to declare:

> *"Any doubts on the issue were resolved by the decision of the Privy Council in Dial and another v State of Trinidad and Tobago [2005] 1 WLR 1660 where Lord Brown of Eaton-under-Heywood gave a judgment expressing the view of Board that: 'The law is now clearly established and can simply be stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal, always assuming that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case...The primary question*[67] *is for the court itself and is not what effect the fresh evidence would have had on the mind of the jury.'"*[68]

The point about *Pendleton,* however, is that it provides authority for the CACD to carry out a jury impact test "in a case of any difficulty."[69] That was a refinement that it brought to the *Stafford and Luvaglio* position. A fundamental flaw in the proposition from the Lord Chief Justice is that he has not quoted all of the relevant words of Lord Brown. In fact, Lord Brown used terminology similar to that used by Lord Bingham in *Pendleton*. His precise words were:

> *"The primary question is for the court itself and is not what effect the fresh evidence would have had on the mind of the jury.* ***That said, if the court regards the case as a difficult one, it may find it***

[65] *R v Noye* n10.

[66] Ibid [26].

[67] The primary question being whether the conviction was unsafe.

[68] *R v Noye* n10 [27].

[69] *R v Pendleton* n59 [19].

> *helpful to test its view 'by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict'."*[70] *(Emphasis added).*

With the addition of that final sentence it becomes difficult to see how the tests in *Pendleton* and *Dial* are different. Responsibility for deciding whether the conviction is unsafe lies with the appellate court. If the appeal involves fresh evidence, which is a minority of appeals, then if that fresh evidence causes the court difficulty, it may ask itself what impact that evidence might have had on the jury as an aid to the appellate court making its decision.

It is also reasonable to suppose that in concurring with Lord Brown, Lord Bingham considered that he (Lord Brown) was merely restating the *Pendleton* test. In support of that contention Lord Brown states "in the Board's view the law is now clearly established and can be simply stated…."[71] These are not the words he would have chosen had he considered that he was changing the previously understood position. If there is a difficulty in Lord Brown's judgment, it is that he does stray into the area warned against by Lord Bingham in *Pendleton*, namely the determination of guilt. His choice of the phrase "if the court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal"[72] was probably intended to convey that, having considered the fresh evidence, the court had no doubts about the safety of the conviction. When read in the context of what precedes the sentence and what follows it Lord Brown seems to be at one with the test set out by Lord Bingham in *Pendleton*.

Lord Judge's position has been consistent. Indeed, prior to the decision in *Dial*, he stressed in *Hakala*[73] that the evaluation of fresh evidence was a matter for the

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[70] *Dial and another v State of Trinidad and Tobago* n63 [31].

[71] Ibid [31].

[72] Ibid [31].

[73] *R v Hakala* [2002] EWCA Crim 730.

CACD and that "the jury impact test would not be helpful."[74] It is not clear whether this was a reference to the *Hakala* appeal or a more general statement of principle. As *Hakala* has subsequently been applied alongside *Pendleton* in a small number of cases it would seem to embrace a refinement, thus lending weight to the notion that a jury impact test should not be applied.

The result of all this is rather unsatisfactory. First, it is unsatisfactory that the appropriate legal principle approach to fresh evidence cases is the subject of confusion. Secondly, Lord Judge's approach as Lord Chief Justice sends a clear message that he prefers a restrictive approach. This analysis indicates that the position is unclear. Does *Pendleton* remain good law or is the approach in *Dial* to be preferred? Do the decisions in *Hakala* (decided prior to *Dial*) and *Noye* add refinement to *Pendleton* or *Dial*? One way of assessing this is to examine what the CACD has done in practice.

6.5.1 The Application of the Test

The CACD has shown a preference for the approach in *Pendleton*. In the period since *Dial* was reported the CACD has applied or followed *Pendleton* in 26 reported cases.[75] During the same period *Dial* was applied in only 3 judgments and in 2 of those cases reference was also made to *Pendleton*.[76] So, even if the decision in *Dial* were support for the imposition of a "harder" line, it does not appear that the CACD is adopting it in preference to *Pendleton*. A series of reported judgments illustrate the fact that in many cases involving fresh evidence

[74] Ibid [86].

[75] These statistics are drawn from citations listed on www.westlaw.com. The search was undertaken in May 2012. The assessment of whether a case was applied, followed, considered, mentioned or distinguished is adopted from Westlaw.

[76] This simple survey was merely a way of trying to gauge whether there was any obvious preference emerging from the CACD's judgments. It might also be noted that in some of the judgments the CACD seemed to treat *Pendleton* and *Dial* as authority for identical propositions.

the CACD continues to apply a jury impact test in accordance with *Pendleton*.[77] In *Synnott* the CACD said:

> *"This court has to consider the fresh evidence and decide whether and to what extent is should be accepted or rejected, and if it is accepted, to evaluate its importance or otherwise, relative to the other material that was before the trial jury; hence what has been called "the jury impact" test referred to by Lord Bingham in Pendleton."*[78]

Nevertheless, the influence of the Lord Chief Justice's approach in *Noye* can be seen in cases such as *O'Neil*.[79] The question in a case such as *O'Neil* should be whether the fresh evidence from two witnesses makes the case one of difficulty in which a jury impact test might then be applied. The CACD guided (or misguided) by the decision in *Noye* leaps to the conclusion that the appeal should be dismissed observing as it does so:

> *'in reaching our decision we reflect on how best to examine the fresh evidence and its possible impact on the safety of conviction, and test our analysis to ensure that we have reached the right conclusion.'*[80]

In *R v TE*[81] the CACD purports to follow the approach in *Noye,* but in essence, it applies a jury impact test using the following words to describe its assessment of the impact of the evidence of the retractions by two witnesses:

> *"First, it must throw considerable doubt on whether the jury could have accepted the evidence of those witnesses about the counts on which*

[77] For a recent example see *R v S and Others* [2012] EWCA Crim 1433 [4] where Rafferty LJ states in relation to fresh evidence "the main issue is its impact".

[78] *R v Synnott* [2011] EWCA Crim 578 [46].

[79] *R v O'Neil* [2012] EWCA Crim 163.

[80] Ibid [35].

[81] *R v TE* [2011] EWCA Crim 1023.

> *they gave evidence. The allegations depended, ultimately, on their word about what happened between 1987 and 2000 and that of their father. If the retraction statements had been before the jury at the trial we think that they would have had a considerable effect on the balance of the evidence overall."* [82]

The CACD may then skilfully take up a position from which it declares that it is responsible for the decision, but in reality it has, as Lord Devlin so eloquently put it, "sapped and undermined the authority of the jury." [83] Actually one could question whether it is really of significance that the CACD seems unclear about whether it is appropriate to apply a jury impact test. Whether it does so or not it still has to evaluate fresh evidence and in doing so, must, inevitably, usurp the jury. Perhaps the key issue therefore is what can be deduced about the approach of the CACD when it undertakes that evaluation. Before considering that issue it is worth noting that this evaluation occurs in a fairly small number of cases. The reason for this is set out in the section above dealing with the receipt of fresh evidence. In a significant number of fresh evidence appeals the CACD refuses to receive fresh evidence and consequently it does not need to carry out an evaluation of the evidence in the context of applying the primary appeal test of safety. I now consider the CACD's approach in those cases where it does evaluate the fresh evidence, apply the statutory safety test and in doing so consistently usurps the jury.

6.6 USURPING THE JURY

The Royal Commission expressed concern at the CACD usurping the jury by supplanting its own view of the evidence.[84] It would appear that some of the

[82] Ibid [77].

[83] Patrick Devlin, *The Judge* (Oxford University Press 1979) p148.

[84] *The Runciman Royal Commission on Criminal Justice* n1 ch10 para 62.

efforts to limit *Pendleton* described above may be designed to address this criticism. Avoiding a "jury impact test" enables the CACD to assert that it, as a court of review, has made the decision on fresh evidence without regard to what impact that evidence might have had on a jury. However, the CACD must, once it has formally received the evidence, evaluate it. It must determine whether the fresh evidence raises sufficient concern about the conviction to render it unsafe. It may conclude that it does not, but in doing so it is clearly considering evidence not heard by the jury and its decision must necessarily supplant that of the jury. If it seeks to place the evidence in the context of all the other evidence, it usurps the jury to an even greater degree.

Usurping the jury in this manner is unsatisfactory for two reasons. First, there is an objection of principle. As Lord Judge put it: "…when there is trial by jury, the constitutional primacy and public responsibility for the verdict rests not with the judge, nor indeed with this court, but with the jury."[85] Second, there is an important practical objection. As Lord Bingham observed in Pendleton, the CACD labours under a significant disadvantage in fresh evidence cases because it "can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard."[86]

There is a further less publicised concern too. When an appeal is heard the CACD receives a significant amount of background material about the case. This includes material that the jury, as the finder of fact, would not be permitted to know. For example, the CACD will have access to the sentencing remarks made by the trial judge that may detail an appellant's previous convictions. Such material, which the jury may not have known about,[87] may be extremely prejudicial to the appellant. Whilst it can be argued that the judiciary is able to confine consideration to those matters that are appropriate, one cannot rule out the

[85] *R v Pope* [2012] EWCA Crim 2241 [14].

[86] *R v Pendleton* n59 [19].

[87] The jury may in some cases know about previous convictions, but the default position is that it should not do so.

possibility that, at least at a subconscious level, such material may influence the CACD.

Can we conclude anything about the CACD's approach when it usurps the jury? Is it narrow or broad, receptive or restrictive? Once again the caveat must be offered that one should be slow to draw conclusions from cases that are necessarily fact specific. However, the CACD gives the impression of being reluctant to embrace fresh evidence. In *Sofroniou*[88] the appellant was convicted of drug offences, partly on the evidence of audio recordings. Once in prison he listened to and transcribed the recordings. His solicitor engaged experts to enhance the sound quality of the tapes to permit even more content to be transcribed. The CACD received the evidence, evaluated it, before concluding that the "availability of the new transcripts would not have affected the jury's conclusion…"[89] and the conviction was safe. Cases such as *Bourne,*[90] *Iqbal*,[91] *Hall,*[92] *Traynor*[93] and *Ahmed*[94] are all examples of cases in which the CACD evaluated fresh evidence and decided that it would not have made a difference to the outcome. In each case the evidence reported could have influenced the jury materially and a more receptive court might have ordered a retrial in each case. Such a course seems to me to have merit and I shall argue in chapter nine that a greater use of the option of retrial would provide a means of addressing the concern about the CACD usurping the jury.

There is a further concern about the approach of the CACD in fresh evidence appeals. What evidence should the CACD consider? Is it all the evidence (acknowledging the disadvantage mentioned above) or just the fresh evidence?

[88] *R v Sofroniou* [2009] EWCA Crim 1360.

[89] Ibid [55].

[90] *R v Bourne* [2009] EWCA Crim 1634.

[91] *R v Iqbal* [2009] EWCA Crim 1627.

[92] *R v Hall* [2011] EWCA Crim 4. I include this notwithstanding Hall's subsequent confession because the contested evidence before the CACD was central to the jury's decision – it did not have the benefit of the confession.

[93] *R v Traynor* [2012] EWCA Crim 1116.

[94] *R v Mushtaq Ahmed* [2010] EWCA Crim 2899.

There is evidence of a tendency for the court to adopt what Elks has described as an "atomistic" approach.[95] This means that the court may look at some fresh evidence, but look at it separately from the rest of the evidence or conclude that any evidence previously considered by the court clearly raised no concerns. The most egregious example is the case of *Stock*.[96] Amongst those who have studied the case there can be very few who do not believe that he was not involved in the robbery of which he was convicted. By the time of his second CCRC referral his case was receiving its fourth hearing in the CACD. The CACD, in effect, adopts the reasoning of the CACD from the third appeal and considers the new issues as separate from, rather than in addition to any earlier grounds. This failure to look at the case holistically resulted in a fairly inevitable conclusion that the newly referred grounds were, if detached from previous issues, insufficient and the conviction was upheld. It adopted a similar approach in *Noye,* taking the view that since two material elements were not directly linked to one another they could not be said to have had any cumulative effect upon the decision of the jury.[97]

So how can the CACD address the criticisms that it usurps the jury and that its approach when doing so is generally restrictive? Once the CACD reaches the point where the case is one of sufficient difficulty for it to apply the jury impact test from Pendleton, it is potentially putting itself in the place of the jury and usurping its function. It may assert that it is solely responsible for the decision, but it is undoubtedly second guessing the jury. The more appropriate course would be, wherever practicable, for the CACD to order a retrial so that its preferred arbiter of fact, the jury, can consider the fresh evidence in context. I shall return to this theme in chapter nine when I consider proposals for change.

[95] Laurie Elks, 'A review of the "Criminal Cases Review Commission. Hope for the Innocent?"' [2010] 1 Archbold Review 5.

[96] *R v Stock* [2008] EWCA Crim 1862.

[97] *R v Noye* n10 [56].

6.7 LURKING DOUBT

The CACD's reluctance to quash convictions on the basis of lurking doubt was recognised by the Royal Commission, which recommended amending the statutory test to make it clear that the CACD could quash a conviction in the absence of fresh evidence or an error of law, where the CACD thought the jury had erred.[98] I set out in chapter five the CACD's continuing reluctance in this respect. The CACD re-affirmed its reluctance in 2012 when Lord Judge said, "it is not open to the court to set aside the verdict on the basis of some collective, subjective judicial hunch that the conviction is or maybe unsafe." [99]

Lurking doubt cases present a particular problem because the ground is usually argued as an additional, rather than a primary, ground of appeal.[100] The CACD's general approach is captured by Lord Judge's observation and whilst I do not suggest that the CACD should adopt a *radically* more liberal approach it could be somewhat more receptive, especially since most such cases do have other grounds of appeal as well.

6.8 MISTAKEN IDENTIFICATION CASES

The causes of wrongful convictions are recognised to include misidentification. Some of the more infamous examples, such as Beck,[101] paved the way for the Criminal Appeal Act 1907. The wrongful convictions of Dougherty (1972) and Virag

[98] *The Runciman Royal Commission on Criminal Justice* n1 ch 10 para 46.

[99] *R v Pope* n85 [14].

[100] The Pope case was unusual in this respect since Counsel for Pope submitted that the only ground of appeal was lurking doubt.

[101] *Committee of inquiry into the case of Mr. Adolf Beck* (Home Office, 1904).

(1969) were examined in great depth by the Devlin Committee, which recommended the introduction of legislation to try to protect against such errors.[102] In spite of this the CACD remains generally very reluctant to interfere in such cases, allowing only one appeal of the thirteen that included this ground in my 2009 sample. Such appeals are sometimes close to lurking doubt with little fresh evidence being tendered. [103] The CACD's approach is generally unsympathetic, relying on the notion that if the trial judge has warned the jury about the dangers of misidentification, in accordance with the principles laid down in *Turnbull,*[104] the jury's subsequent finding of guilty is reliable. Once again my assessment is that the CACD's overall approach is largely restrictive and unduly deferential to the jury.

6.9 THE APPROACH TO RETRIALS

Until the Criminal Appeal Act 1964 the CACD had no power to order a retrial after quashing a conviction.[105] Initially, it was able to order a retrial only in fresh evidence cases, but in 1988 that limitation was removed.[106] Over the past twenty years the CACD has made increased use of the retrial option,[107] but Chalmers and Leverick concluded that there was no consistency of approach displayed. [108] My observations accord with their findings.

[102] Patrick Devlin, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (Cmnd 338, 1976). The recommendations were not implemented by the Government of the day.

[103] Indeed, *R v Cooper* [1969] 1 QB 267 (CA) in which Lord Widgery used the term "lurking doubt" was a case of mistaken identification.

[104] *R v Turnbull* 1976 63 Cr App R 132

[105] Technically it cannot "order" a retrial. The Crown will still have the discretion not to pursue the case following such an order. See, for example, the case of *Bento* described in chapter five.

[106] Criminal Justice Act 1988 s 43 (2).

[107] The initial increase from 1989 in which only 1 retrial was ordered rose to a peak of 48% in 2000 and settled at around 30-40% in the period 2005-2009.

[108] James Chalmers and Fiona Leverick, 'When Should a Retrial be Permitted After a Conviction is Quashed on Appeal?' (2011) 74 MLR 721.

The retrial issue sometimes appeared to be an afterthought. The Crown Prosecution Service had frequently failed to consider its position in the event that the conviction is quashed. For example, in *R v W*,[109] a CCRC referral that might be thought likely to give rise to the issue, the Crown was unprepared and sought an adjournment to consider the issue. The CACD declined the request. The exchange between the CACD and Counsel in *Lodge* is a particularly chaotic example.[110] Darbyshire's account of the miscarriage of justice case discussed above provides another example.[111] She reports that the CACD intended, prior to the hearing, to quash the conviction and order a retrial. In the event they quashed the conviction and appear to have decided against a retrial because the Crown did not seek one.[112] The potential for a greater use of retrials is explored in chapter nine.

6.10 RESISTANCE TO CHANGE?

I now consider other aspects of the CACD's performance. My interest is in how the CACD has addressed cases where innocence is in issue because there is some fresh evidence to consider. However, some of the criticisms of the CACD by, for example, the Runciman Commission, suggest that it is reluctant to embrace change so I have examined whether that criticism has substance. I find that it has. I have grouped these observations together because they all support a proposition that the CACD is resistant to developments that disturb the status quo. Indeed, perhaps paradoxically, it will actively pursue change if it considers its settled order to be under threat. This can create the impression that the CACD affords undue value to maintaining (or restoring) the status quo. I have noted the

[109] *R v W* [2011] EWCA Crim 2289.

[110] *R v Moya Lodge* [2009] EWCA Crim 2651 [15-30].

[111] Darbyshire n53 p340.

[112] This assumes that I have correctly identified the case to which Darbyshire refers.

weight that the CACD attaches to the values of certainty, finality and its deference to the jury. There are five pieces of evidence in support of the contention that it favours the settled position. None is conclusive in its own right, but taken together they make a suggestive combination.

6.10.1 Statutory Amendments

The CACD's role in securing statutory amendments to address what it perceived as two distinct problems, one administrative, the other an issue of principle, is evidence of its pursuit of the status quo. The administrative issue arose when the CACD considered the unrestricted proliferation of grounds of appeal allowed on CCRC referrals was undesirable. Critical comments in three separate judgments gave notice of the CACD's disquiet.[113] Parliamentary debate made specific reference to the concerns expressed.[114] The issue was addressed by an amendment to the 1995 Act made by s315 of the Criminal Justice Act 2003. Appellants are not necessarily disadvantaged by this change, since it merely introduces a requirement for leave. Nevertheless, it is evidence of the CACD exercising control over its own affairs.

The second statutory change, which the CACD skilfully engineered, came about in relation to change of law cases.[115] It achieved this, partly, via a direct observation by Sir Igor Judge in *Cottrell* that the issue merited the "attention of Parliament."[116] That was supplemented by comment from "members of the senior judiciary" on the existing law during consultation on the Criminal Justice and Immigration Bill.[117] Furthermore Sir Igor, then President of the Queen's Bench, was party to the form

[113] *R v Garner* [2002] EWCA Crim 1166, *R v Smith* [2002] EWCA Crim 2097 and *R v Bamber* [2002] EWCA Crim 2912.

[114] HL Deb 18 Feb 2003, Col 1098.

[115] Details of the issue are set out in chapter five. The issue here is the CACD's response.

[116] *R v Cottrell* [2007] EWCA Crim 2016 [60].

[117] HL Deb 27 Feb 2008, Col 691.

of words drafted in an amendment proposed by Lord Lloyd of Berwick.[118] I suggest no constitutional impropriety here. The judiciary made its concerns known and Parliament chose to intervene. Parliament could have rejected the overtures from the CACD.

6.10.2 Influencing CCRC

The CACD has sought to influence CCRC. I note above that Lord Judge LCJ considered *Dial* to advance matters beyond *Pendleton*. Elks recounts in his survey of the first ten years of CCRC how Lord Judge wrote to the Chairman of CCRC, immediately after the judgment in Dial, to impress upon CCRC that "Pendleton was not the last word" on fresh evidence cases.[119]

6.10.3 A unified entity?

CCRC operates as a coherent body with clear strategic goals[120] and a business plan[121] and strives to achieve consistency. I criticise elements of CCRC's measurement of the achievement of its goals,[122] but that is not to decry its attempts to improve its performance and achieve consistency. By contrast, I see no evidence of such an approach at the CACD, which does not appear to act as a unified entity in that sense. The administrative arm of the CACD, Her Majesty's Courts Service, has its first Business Plan endorsed by the Lord Chief Justice.[123] There is no equivalent plan for the CACD itself. Consistency and unity of purpose

[118] HL Deb 21 Apr 2008, Col 1285.

[119] Laurie Elks, *Righting Miscarriages of Justice?: Ten Years of the Criminal Cases Review Commission* (JUSTICE 2008) p68.

[120] CCRC Corporate Plan 2009-2012 published July 2009.

[121] CCRC Business Plan 2009-2010 published July 2009.

[122] In chapter eight, below.

[123] *HM Courts & Tribunals Service Business Plan 2011-2015*

and approach are expected to emerge by some unspoken process, but perhaps more attention to this aspect of its performance is needed.

6.10.4 Assessing Consistency

The CACD's assessment of the consistency of its own performance suggests a narrow perspective. It concludes, in its 2010-11 Annual Report, that because the percentage of appeals allowed and dismissed remains at a very similar level to previous years, that is somehow indicative of clear consistency in the Court's decision making.[124] This is a rather curious approach, especially in the context of the discretion discussed above in the context of fresh evidence cases. It suggests that the CACD is content to continue with its existing approach.

I use these various pieces of evidence to highlight the way CACD exercises significant influence in seeking to exert its authority. I do not suggest this is sinister. Much of it is understandable given the workload pressures on the CACD. The evidence does show, however, attempts to maintain the status quo.[125] It does not, as far as one can tell, seem to consider whether some changes might be in the interests of an improved criminal justice system.

6.11 CONCLUSION – THE APPROACH OF THE CACD

If one is looking to see whether there has been any change of approach by the CACD in the period since 1995 (as urged by the Runciman Commission), the answer is that there is no evidence of any such change. I found little evidence of

[124] *Review of the Legal Year 2010/11* (Court of Appeal Criminal Division) para 1.10.

[125] Although some of the actions described are designed to engineer change, the changes concentrate power in the judiciary.

change between Malleson's findings for the Runciman Commission [126] and subsequent research.[127] Malleson found the majority of appeals against conviction were founded upon claims of judicial error. My own observations accord with this and such cases are more difficult ones from which to assess claims of innocence. Relatively few cases were founded upon fresh evidence or lurking doubt. The statutory changes made by the 1995 Act might have resulted in a more liberal approach by the CACD. That might be reflected by an increased number of fresh evidence or lurking doubt cases being argued. Roberts's conclusion, based on analysis of fresh evidence and lurking doubt cases in 2002, was:

> *"Both lurking doubt and fresh evidence grounds illustrate the difficulties the Court's review function causes the Court in deciding appeals on factual grounds and identifying and remedying miscarriages of justice. If this fundamental issue is not addressed, then consequent amendments to legislation to liberalise the Court's approach will prove to be as ineffective as they have done in the past. It may now be time to address the role of the Court rather than just amending its powers after high profile miscarriages of justice."*[128]

My own findings suggest that more fresh evidence cases were reaching the CACD, though the figures may be slightly inflated because they include CCRC referrals. I found no evidence of any discernible change of approach by the CACD.

Drawing together all of the evaluation and analysis in this chapter leads, whilst recognising the limitations on some of the analysis, to a series of conclusions.

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[126] Kate Malleson, *Review of the Appeal Process. Research Study Number 17* (Royal Commission on Criminal Justice, 1993).

[127] Roberts n2.

[128] Ibid.

The CACD is very good at addressing "due process" issues. It scrutinises the operation of trials and the work of judges in fine detail. The experience of CACD judges coupled with the knowledge acquired from a relatively large number of due process cases result in a high level of skill and expertise being exhibited. Working with CCRC, the CACD has dealt with significant numbers of cases involving police misconduct, prosecution non-disclosure and judicial errors. It has also come to rely heavily upon CCRC to investigate claims of jury irregularity.[129] These aspects of the CACD's work should not be underestimated, nor dismissed as irrelevant to those claiming innocence.

My conclusions on the CACD's handling of fresh evidence cases identify some important areas of concern.

1. In considering whether to receive fresh evidence under s23 it applies the interests of justice and failure to adduce evidence provisions in a generally restrictive, largely exclusionary manner.
2. In those cases where the CACD formally received fresh evidence there was, particularly after the Privy Council decision in *Dial*,[130] a lack of clarity about the appropriate test to be applied.
3. When the CACD does review fresh evidence, whether it applies a jury impact test or not, it tends to do so in a restrictive manner – reflecting its view of the scope of its role and its stated deference to the primacy of the jury.
4. The CACD's stated deference to the primacy of the jury is actually at odds with its practice where it clearly and regularly, in fresh evidence cases, usurps the jury.
5. It displays a tendency to adopt an "atomistic" approach rather than look at evidence holistically.
6. The application of the overall, ultimate test of safety also exhibited a tendency to be restrictive. This was less pronounced, because, in my view,

[129] See, for example, *R v Lewis and Others* [2013] EWCA Crim 776

[130] *Dial and another v State of Trinidad and Tobago* n63.

the CACD was using the other mechanisms available to it under s23 in a way that meant that the application of the safety test was rendered largely irrelevant.[131]

7. The CACD's continuing reluctance to embrace the concept of lurking doubt is further evidence of its narrow approach to the application of the safety test.
8. I was unable to discern any clear approach to the issue of retrial. In partial defence of the CACD here, there were occasions when the Crown seemed ill prepared on the matter.
9. A number of other pieces of evidence suggest that the CACD has a "mind-set" which is by nature restrictive and averse to change.

The combined impact of these conclusions leads me to conclude that the CACD has changed little in the past twenty years and shows little inclination to do so. These various conclusions combine to indicate a court that is making at least some decisions on an underlying, unarticulated basis and then using the discretionary scope afforded by s23 to justify them. The overwhelming impression is of a court that remains unreceptive to fresh evidence cases or other assertions of innocence.

6.12 THE CACD AND INNOCENCE

I can now partly reach a view about my hypothesis that innocence is not a material consideration in the current post-conviction process. As far as the CACD is concerned the evidence is strongly supportive of my hypothesis. The CACD explicitly eschews interest in innocence in a significant number of cases. It also, by its reluctance to adopt a less restrictive approach to the receipt and evaluation of fresh evidence, represents a significant obstacle to those asserting innocence.

[131] If the CACD had decided that the fresh evidence should not be received then it would be an extraordinary case in which it found (absent some error at trial) the conviction unsafe.

Furthermore, the CACD's approach now has a much-enhanced significance since the creation of CCRC. Prior to the creation of CCRC the Home Secretary could refer a case if he thought fit, without regard to the likely outcome. This is not to suggest that the Home Secretary acted in a cavalier fashion in referring cases, merely a recognition that the statute afforded him such discretion. By contrast, CCRC must apply a statutory "real possibility" test so the CACD's *approach* acquires a much greater significance, since CCRC has to have regard to it in making a referral decision. If the CACD's approach is generally restrictive and demonstrates a reluctance to accept fresh evidence, then CCRC will inevitably reflect that in conducting the "real possibility" test. I consider in chapter eight how CCRC has dealt with that issue and the implications for those claiming innocence.

Chapter Seven - Criminal Cases Review Commission Data

7.1 INTRODUCTION

CCRC's role in correcting miscarriages of justice is set out in chapter two. Ultimately, it is subservient to the CACD, since only that court or the Supreme Court has the power to quash a conviction.[1] CCRC is limited to referring a case to the CACD if it (CCRC) considers that there is a "real possibility"[2] that the court will find the conviction "unsafe."[3] In order to test my hypothesis I undertook a detailed examination of CCRC's operation, based upon analysing its confidential case files. This enabled me to assess how CCRC deals with claims of innocence, within the context of all its casework. This chapter describes that examination and chapter eight evaluates CCRC's performance.

This chapter records observations on CCRC's handling of 404 applications. The sample was made up of 257 randomly selected applications spread, reasonably evenly, across the period 1997 to 2009, and 147 cases determined by a committee of three Commissioners. These samples were supplemented by 25 cases in which CCRC's refusal to refer had been challenged by judicial review and for which judgments were available.[4] After this introduction, I profile the two samples giving basic information about the features of the cases reviewed. There is then a summary of CCRC's review procedure and an explanation of some of the limitations upon my review of individual cases. I then record what I observed in

[1] Criminal Appeal Act 1968 s 2. The Supreme Court's power to do so is set out in s 35(3) of the 1968 Act which empowers it to exercise any of the powers of the Court of Appeal.

[2] Criminal Appeal Act 1995 s 13(1)(a).

[3] Criminal Appeal Act 1968 s 2(1)(a).

[4] In fact, there were a total of 48 judicial review judgments upon which I was able to draw, but where a judgment related to a case within my sample I treated it as supplementary information to avoid double counting and inflating the sample totals.

my review of case files in the random sample. I provide observations on motives for application and the most commonly argued points in applications. I then outline a range of difficulties that CCRC faces when conducting a review. I include these because I think that the difficulties may not be fully appreciated by some of the Commission's critics. I then discuss cases involving particular types of offence that create a further and different range of problems for CCRC. Finally, in respect of the random sample, I consider the implications of these various difficulties if innocence were to be made a specific factor in CCRC's deliberations.

It became apparent during the examination of the random sample that many had little prospect of success. In these cases, although there was a formal application of the "real possibility" test, it was, in reality, something of a formality since there was not even a remote possibility of success on referral. However, I was able to identify and analyse a sample of cases where the application of the "real possibility" test was a much more exacting task.[5] These cases, determined by a committee of three commissioners, provided the richest material on CCRC's problems in applying the test. The chapter proceeds with a short explanation of how I identified these cases. I analysed committee refusals and grouped cases into categories to facilitate consideration of the extent to which innocence might be considered to be a factor. I then consider the "real possibility" test and flowing from that, the exercise of CCRC's discretion not to refer a case, even though the "real possibility" test is satisfied. Next, I identify troubling cases. The implications of these more finely balanced cases are assessed, with particular reference to whether a formal recognition of claims of innocence might cause CCRC to conduct the review in a different manner. The chapter concludes with a series of answers to the subsidiary questions about CCRC set out in chapter four.[6]

[5] I use the word identify rather than select because the cases were identified by a process which involved checking CCRC's internal meeting schedules to pick out cases considered by three Commissioners.

[6] At section 4.6.

7.2 FOCUS OF THE RESEARCH

Throughout the research phase I considered my primary research question, "to what extent is innocence a material consideration in the post conviction process?" I sought evidence to see whether CCRC did take innocence into account and if so, how that manifested itself. If not, then might it have made a difference had CCRC done so? I also wanted to make some assessment of the difficulty and complexity of the task facing CCRC, and how well it undertook that task. To consider the difficulties facing CCRC I considered the following questions:

1. What claims do applicants make in their applications to CCRC?
2. To what extent applicants back up claims with evidence or argument?
3. What difficulties does CCRC face in reviewing applications?
4. Do particular types of offence create special difficulties?
5. Are CCRC's powers sufficient to fulfil its role?

To consider how well CCRC undertook its task I reviewed cases files with a view to establishing whether:

1. Reviews are carried out thoroughly and diligently;
2. CCRC considered matters not raised by the applicant;
3. When CCRC refused to pursue lines of enquiry, it provided clear justification for the refusal;
4. CCRC's review of applications was clear and consistent;
5. CCRC's handling of fresh evidence issues was clear, consistent and thorough;
6. CCRC's application of the "real possibility" test was clear, consistent and carefully considered.

Using my conclusions to these questions, I considered whether the practices and procedures of CCRC create obstacles for the wrongly convicted to establish their innocence.

7.2.1 Case Studies

Throughout the text I use case studies to illustrate points. Case studies are anonymous for reasons of confidentiality.[7] This is subject to exception where the case details are in the public domain, either by virtue of a court judgment or because another author has published details with the consent of an applicant.

7.2.2 The Sampling Process

CCRC allocates a unique number to each case it receives. This is made up of a year identifier preceded by a four-digit number. I wanted to study a random sample of cases spread across the operational life of CCRC so I generated 50 random numbers[8] for each of the years 1997-2009 and selected the appropriate case file for that number. By the time I had worked thorough the random numbers I had a database of 257 cases which were applications in respect of Crown Court convictions. In order to reach a sample of 257 cases I actually examined 513 case files. The remaining randomly selected files were cases in which, for example, the application related to a summary conviction (48) or from an applicant seeking a reduction in sentence (82). CCRC refuses to consider cases where the applicant has an appeal in progress.[9] There were 28 of these. I also encountered particular

[7] Criminal Appeal Act 1995 s 23 makes it an offence to disclose information about CCRC cases, except in some limited circumstances.

[8] I used an Apple Macintosh software package called Randomness to do this.

[9] CCRC take the view that the appeal process should be the norm and is likely, in practice, to be concluded more quickly than a review. If the appeal is unsuccessful, the applicant may still apply to the Commission. This approach also has the effect of narrowing the scope of any review by the Commission, since any issues raised by the applicant on appeal would not then be regarded as "fresh" if raised in a subsequent application to CCRC.

difficulty in finding random cases for the years 1997-2000, as case papers were not available. I analysed each of the 257 cases, extracted data and recorded it in a database.

The second component of the sample was developed part way through the analysis of the random sample. It became apparent in considering the random sample that most of the applications had little prospect of success, often offering little or no new material or argument in support of an application. I wanted to review cases where there was a much more finely balanced decision to be made. A referral to the CACD must be made by a committee of at least three commissioners.[10] I identified within the Commission a body of cases that had been considered by a committee of three commissioners, but a referral had been refused. I examined 147 such cases and found that they provided a much greater insight into fresh evidence cases and illustrated the finely balanced nature of some decisions. These cases were supplemented by 25 cases that had been challenged by formal judicial review. I extracted similar data to that in the random sample.

7.3 SAMPLE PROFILE

7.3.1 The Types of Offence

Given that the sample was restricted to convictions in the Crown Court the types of offences giving rise to applications were usually very serious.[11] The following table details the most common offences. Some cases may appear more than once in the calculations because, for example, the applicant may have been

[10] Criminal Appeal Act 1995 Schedule 1 s 6(2)(a).

[11] This is not to suggest that cases in the magistrates' court may not be serious merely that in my sample the cases were usually very serious.

convicted of multiple offences. So someone convicted of rape and kidnapping will have been counted under each heading.

Table 7.1 – Types of Offence

Offence Type	Random Sample (257)	Committee Decisions (172)
Murder/Attempted Murder	47	58
Rape/Attempted Rape	54	16
Sexual Offences: (e.g. Assault, Possession of Indecent Photographs, Buggery)	31	20
Drugs	17	16
Fraud	7	12
Offences against the person (Assault, ABH, GBH)	27	6
Kidnapping	5	0
Robbery & Theft	17	19
Burglary	7	0
Manslaughter	2	2

I also captured other data about the cases I reviewed and key elements of that date are shown in the following table and discussed in the sections which follow.

Table 7.2 – Other Characteristics

Offence Type	Random Sample (257)	Committee Decisions (172)
Assertion of Innocence	228	147
Involvement Admitted	104	50
Involvement Denied	141	88
Gender	247 Male 10 Female	167 Male 5 Female
Guilty Plea	29	9
Represented	126	123
No prior appeal	74	11
Re-applications	26	10

7.3.2 How many claimed innocence?

In the random sample of 257 a total of 228 (88.71%) made some assertion of innocence[12] or such an assertion could be reasonably inferred.[13] In the committee

[12] I used my definition of innocence, "cases where an individual is claiming to have absolutely no involvement in the crime at all, including claims that no crime has occurred at all" to assess this.

[13] For example, an applicant might assert that someone else had committed the crime or that a key witness was lying.

refusals sample the figure was 147 (85.5%). I made the assessment of a claim of innocence in a variety of ways. The most obvious was some unequivocal assertion by the applicant to be innocent or the victim of a miscarriage of justice.[14] In the absence of such an overt statement I considered the arguments being advanced by the applicant to assess whether they amounted to a claim of innocence. This was not always straightforward and in some cases impossible. An applicant might claim to have been poorly represented, but provide no detail on how that affected his case. The exercise illustrates the complexity of trying to differentiate cases according to claims of innocence.

7.3.3 Gender of the Applicant

The applicant was male in 247 (96.48%) of the cases in the random sample and in 167 cases (97.1%) in the committee refusals sample.

7.3.4 Guilty Pleas

The application was from someone who had pleaded guilty at trial in 29 cases (11.3%) in the random sample and in 9 cases (5.2%) in the second sample. This is not necessarily an indication that the convicted person was guilty since people plead guilty for a variety of reasons.[15] Analysis of judgments on the Commission's referrals in chapter five indicates that the Commission has referred cases in which there has been a guilty plea.[16]

[14] I was interested here in recording the assertion, so even if the assertion seemed implausible to me, I still recorded it.

[15] For example, to receive a lesser sentence. False guilty pleas may also be the result of false confessions a topic covered in detail in Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions : a Handbook* (Wiley 2003).

[16] *R v Bargery* [2004] EWCA Crim 816.

7.3.5 Representation

In the random sample 131 (50.9%) applicants appeared to be unrepresented. In the committee refusals sample the figure for those unrepresented was 49 (28.5%). If a family member, friend or pro bono association was assisting the applicant I accepted that as evidence of representation. This finding is at some variance with the findings of Hodgson and Horne who found that one third of applicants was legally represented.[17] Clearly part of the discrepancy may be explained by my inclusion of non lawyers as representatives, but it is also probably explained by the fact that Hodgson and Horne made a much more detailed assessment of whether the applicant was genuinely legally represented whereas I accepted CCRC's computerised record at face value.[18]

7.3.6 No Relevant Prior Appeal

The conventional expectation of the process is likely to be that an applicant has unsuccessfully pursued an appeal before applying to CCRC. In fact, I found that 74 (28.79%) of applicants in the random sample had not previously appealed against conviction. The figure was lower in the committee refusals sample standing at 11 (6.4%).

7.3.7 Re-applications

Just over 10% (26 cases) of the random sample was an application from someone who had had at least one previous application refused. The figure for the

[17] Jacqueline S. Hodgson and Juliet Horne, 'The Extent and Impact of Legal Representation on Applications to the Criminal Cases Review Commission (CCRC)' (6th October 2009) Electronic copy available at http://ssrncom/abstract=1483721 .

[18] And as Hodgson and Horne note the CCRC record was "frequently inaccurate" in respect of representation. Ibid para 3.4.

committee refusals was lower at 5.8% (10 cases). The issue of re-applications is explored in greater depth below.

7.3.8 Conclusions on the profile of the samples

I provide these details primarily to give an overview of the sample. In doing so, I have also included data which seemed worthy of note. For example, since the legislation empowers CCRC to refer a case in the absence of a prior appeal in "exceptional circumstances" it would appear to be drafted on the basis that the norm would be for an appeal to have been refused. The fact that over 28% of applicants in the random sample had not made such an appeal seems worthy of note and further consideration.[19]

7.4 CCRC'S METHOD OF OPERATION

This section details how CCRC deals with applications. This is important because an understanding of how CCRC does its job may provide useful information about to what extent innocence features as a consideration. Secondly, the section contains an explanation of the limitations on this research arising from the availability of data held by CCRC. A major limitation, given resource constraints I operated under, is that the volume of information available in any given case is potentially over-whelming. I consider the implications of this.

[19] See the section on No relevant prior appeal below.

7.4.1 My Analysis of Case Files

CCRC is a digitally based operation. Documents are routinely scanned upon receipt. It has a document management system, which allocates a unique reference number to each document. Management of these documents is undertaken via a specialist computer program called Vectus. CCRC gave me access to Vectus for the purposes of my research. Vectus was introduced to the CCRC in 2000/2001 and, although some of the earlier case documents were migrated to it, the coverage of the period 1997-2000 is far from complete.[20] I examined case files based on the random selection. As I became familiar with Vectus I was able to identify some of the key documents in a case file.

7.4.2 How CCRC deals with applications

From this, and from discussions with CCRC staff, I was able to acquire an understanding of the steps CCRC takes in each case and the relevance of the documents. This description of the process is based upon the operating practice during 2011. Operating practice has been modified over CCRC's lifetime,[21] but an examination of the detail and effect of those changes is beyond the scope of this thesis.

All the cases I analysed started with an application form from the applicant or his advisers.[22] The application is checked for validity – so, for example, an application arising from criminal proceedings in Scotland would be rejected as invalid. Once deemed valid, the case is subjected to Stage 1 screening by a Commissioner. CCRC will invoke its powers, under Section 17 of the Criminal Appeal Act 1995,

[20] This explains in part the absence of files in my random sample for the years 1997-2000.

[21] Details of the various changes can be found in CCRC's Annual Reports.

[22] The 1995 Act does not require an application to be made. CCRC could take on a case of its own volition.

to requisition documents from public bodies in order for the Stage 1 screening to be carried out.[23] It will seek the following Core Documents for this purpose.

- Indictment
- Summing-up
- Advice and grounds of appeal
- Criminal Appeal Office summary
- Single Judge's ruling
- Full Court of Appeal judgment

The Stage 1 screening by a Commissioner is designed to establish if there are any reviewable grounds. The Commission gives four reasons why an application might fail to meet this threshold:[24]

1. No stated grounds – where the applicant has not actually made any submission in support of his application.
2. Repeat of appeal grounds – where the application is based on identical points made to the CACD (on application for leave or full hearing).
3. No plausible grounds – there is no indication of any plausible possibility.
4. Review not possible – where, for example, there is no surviving paperwork.

If the case is classified as having no reviewable grounds (NRG), the Commissioner issues a Provisional Statement of Reasons (PSOR) by letter setting out the reason for his/her view. The applicant is normally given 28 days to make further representations. If none are received, or if any received do not convince the

[23] It should be noted that the powers under Section 17 do not extend to documents or other material held by private individuals or bodies. This is considered further below.

[24] CCRC, 'Formal Memorandum No Reviewable Grounds' <http://www.justice.gov.uk/downloads/about/criminal-cases-review/policies-and-procedures/casework/no-reviewable-grounds-cases.pdf> accessed 12th February 2012.

Commissioner to change his/her view, then a Final Statement of Reasons (FSOR) letter is issued and the case is closed. If the case passes this initial screening process, it is then allocated for review. An assessment of the likely complexity, and thus timescale, of the review is made and the case joins the queue waiting to be reviewed.

Cases that undergo review vary considerably in the volume of documents generated, but the core documents set out above will, where available, feature in all cases. The Commission generates, for each application, a Case Record document that sets out, in tabular, chronological form, developments in the review. The Case Record will typically contain comments from the Commissioner overseeing the case asking for work to be undertaken or indicating views on particular matters. Staff working on the case respond via the Case Record. The Case Record often contains details of the Commission's thinking which does not necessarily appear in formal statements of reasons.

When a case has undergone a full review and the CCRC intends to refuse to refer the case to the CACD, a Provisional Statement of Reasons is issued. This is generally a much fuller document than the letter based PSOR issued in a case deemed to have no reviewable grounds. The applicant, or his adviser, is given a period within which to respond with further representations. This varies according to the complexity of the case, but in any event the Commission generally allows extensions of time upon request. If the further representations do not persuade the CCRC to refer the case, then a Final Statement of Reasons is issued. Such documents vary enormously ranging from a handful of pages to well over 150 pages in some cases. The FSOR is always issued in hard copy format to prevent amendment, which might be possible if a digital version were issued.

By 2011 the CCRC had developed a standard format for a Final Statement of Reasons. That standard format would contain the following elements:

Name of Applicant

Name of Representative

Offence(s) and Sentence(s)

Statement of Decision

Outline of prosecution case at trial

Outline of defence case at trial

Summary of any appeal proceedings

Details of the application and points raised

Analysis of the points raised

Applicant's response to PSOR

Further analysis based on applicant's response

Disclosure. A section detailing any items CCRC felt that it should disclose as a result of its review.

Appendix setting out CCRC's statutory powers

This standard format made my task easier since I knew what to expect when reading a FSOR.

A Vectus case file may contain hundreds of other documents. These could include witness statements, transcripts of evidence at trial, expert's reports from trial, statements obtained by CCRC from witnesses or the applicant and further post – trial expert reports.

7.5 RESEARCH LIMITATIONS

The volume of documents available to review in a case of any complexity is potentially very large. This inevitably imposed limitations on the depth of analysis which could be undertaken on each case. The implications of this are explored in section 4.7 above.

7.6 OBSERVATIONS

This section details my findings, shedding light on claims of innocence, motivations for applying to CCRC and the grounds most commonly put forward by applicants. I have included a number of anonymised case studies to illustrate particular points. In all of the cases referred to, I do so to illustrate a particular point, but do not intend to convey that the case only has relevance in relation to that particular point. Many of the cases involved a suite of issues mixing questions of fact and law. Observations on particular types of offence (e.g. brawl cases) are intended to illustrate a point about the difficulty of investigating such cases, but they may involve a variety of issues such as, but not limited to, fresh evidence, allegations of police misconduct or prosecutorial non-disclosure.

7.6.1 Not every applicant claims innocence

A proportion of the applications that CCRC receives do not relate to innocence since they concern severity of sentence. Even within conviction applications, some 12-15% of applicants in my samples made no claim of innocence. In case SH28 the applicant was convicted of abducting a child and taking him abroad. He

argued that action by the authorities in freezing his bank account, which had the effect of forcing him to return to the UK, was unlawful. The issue had already been determined by the CACD, so CCRC declined his application, but the applicant was not claiming to be innocent.

7.6.2 Why do people apply to CCRC?

I found a variety of reasons why people applied to CCRC. One applicant, in case SH254, submitted what the reviewing Commissioner noted was "not the most impressive application". The applicant offered nothing of substance in his application and stated that he was applying on the basis that he had "nothing to lose." His murder conviction was not referred. Although this was an unusually explicit statement, there was a sense that many applications had been made on a similar basis. Indeed, applicants do have nothing to lose. There is no penalty for a refused application, so it makes sense to apply and hope. The applicant's motives in case SH305 were unusual. He was convicted of a sexual offence against another member of the family. The incident complained of was some six years before the trial, which had itself concluded almost 20 years prior to the application to CCRC. There had been no appeal against conviction. The applicant had long since served his sentence and returned to society where he was earning a living. He put forward two points in support of seeking a quashing of his conviction – one of which was that the complainant had subsequently admitted lying in making the original complaint. As CCRC investigated the case it became apparent that the applicant's position, as a taxi driver, was at risk because the licensing authority had recently extended the disclosure period. The applicant would now have to disclose his criminal record and his licence was unlikely to be renewed. This is, of course, a perfectly valid reason for applying and, if supported by fresh evidence, it may have resulted in a referral. It does illustrate that there may be wide range of legitimate motives for applying to CCRC.

7.6.3 The most commonly submitted grounds of application.

It quickly became clear to me that a significant number of cases, a majority in fact, exhibited very similar characteristics. Three issues appeared, either alone or in combination, with conspicuous regularity. They were almost invariably coupled with an assertion of innocence.

7.6.3.1 Incompetent Representation

Applicants regularly assert that they had been "let down" by their legal representative. This is not surprising. All were convicted, 90% after a not guilty plea and a contested trial. Disappointment at the outcome is likely to be directed at their lawyers. Case SH210 involved an applicant convicted of murder. He raised a series of points about the failure of his counsel to call witnesses and criticised counsel's handling of the case generally. The CACD has, by its decision in the CCRC referral of *Day*,[27] set out an exacting test on the impact of incompetency required to justify quashing a conviction. The CACD, recognising that the earlier standard that the advocacy would have needed to "flagrantly incompetent"[28] for an appeal to succeed had been superseded, stated that the test was:

> *"… in order to establish lack of safety in an incompetence case the appellant has to go beyond the incompetence and show that the incompetence led to identifiable errors or irregularities in the trial, which themselves rendered the process unfair or unsafe."*[29]

CCRC concluded in Case SH210 that the test was not satisfied and refused the application. There are dangers here for CCRC. The complaint is common and the

[27] *R v Day* [2003] EWCA Crim 1060.

[28] *R v Ensor* (1989) 1 WLR 497 CA

[29] *R v Day* n27 [15].

threshold exacting, so it could fall into the trap of adopting an almost "standard" position on such cases. This phenomenon of becoming "case-hardened" can arise when a significant number of cases raise the same issue unsuccessfully. I did not see any evidence that "case-hardening" had occurred, but it is a risk.

7.6.3.2 Police or Prosecutorial Misconduct

In the vernacular this was an assertion that the applicant had been "fitted up." Given that, as noted in chapter five, CCRC has referred a significant number of cases involving police misconduct, it is fair to say that it recognised that such assertions may be true.[30] However, the assertion has to have substance. In case SH78 the applicant, convicted of applying a noxious substance with intent, made assertions, ten years after his trial, of police perjury and corruption. He provided no evidence to support his allegations and, in the absence of such evidence, CCRC refused to pursue the point. In some cases CCRC is already aware of allegations against, or even convictions of, police officers. The burden on the applicant in such cases is somewhat different. He has to convince CCRC that he is not just opportunistically submitting an application in the knowledge that the police officer(s) involved are tainted.[31] If the applicant is able to cross this threshold, then CCRC will investigate the matter thoroughly. If the allegation is about the original police investigation, CCRC may use its powers under s19 of the Criminal Appeal Act 1995 to appoint an investigating officer, usually from another police force. In some cases the misconduct is so serious that the protection of the integrity of the system is viewed by the CACD as being of sufficient importance to quash the conviction of someone whom the CACD might consider guilty. A good example is the case of *Maxwell*.[32] *Maxwell* and his brother were convicted of the murder of an elderly man during the course of a burglary. Much of the evidence at trial came from a prisoner who said that *Maxwell* had admitted various details

[30] See, for example, *R v O'Toole and Murphy* [2006] EWCA Crim 951 just one of a series of cases arising from the activities of the West Midlands Serious Crime Squad.

[31] As explained by Maurice Kay LJ in *R v Willis* [2006] EWCA Crim 809 [30].

[32] *R v Maxwell* [2009] EWCA Crim 2552.

about the crime to him whilst they were in prison together. A subsequent investigation by the North Yorkshire Police revealed that the West Yorkshire Police had provided the prisoner who gave evidence with a range of "benefits" whilst in custody. These were detailed as having been "allowed to smoke cannabis; ·supplied with alcohol; allowed unsupervised home visits and periods of freedom; and·taken on social outings to public houses, police officer's homes and a brothel."[33]

This astonishing catalogue had, not surprisingly, been deliberately withheld from the defence. The CACD quashed the conviction. The case subsequently went to the Supreme Court over the issue of whether the CACD could order a retrial.[34] The issue at stake was whether, although the original trial evidence had been undermined by the results of the investigation commissioned by CCRC, the evidence, subsequent to *Maxwell's* conviction, which was strongly probative of his guilt, could be deployed at a retrial.[35] The Supreme Court held that it could be so deployed. On the first day of the retrial *Maxwell* pleaded guilty to the murder.[36]

7.6.3.3 Witness/Complainant Credibility

In a significant number of cases the applicant asserted that a key witness (or witnesses) had been mistaken or lied at trial. For example, case SH43 was a conviction for rape and indecent assault that had occurred 17 years before the trial. He pleaded guilty at trial, but sought to have his pleas vacated at the sentencing hearing, an application refused by the judge. An appeal on the point was rejected and in due course he applied to CCRC contending that there was now evidence from social services that the complainants had conspired against

[33] Ibid [20].

[34] *R v Maxwell* [2010] UKSC 48.

[35] Maxwell admitted the offence to various people including his solicitor and a probation officer. He subsequently wrote a letter to a police officer admitting his guilt. All these details are drawn from the Supreme Court judgment.

[36] 'Convicted killer finally owns up after his lies cost taxpayer £3m' *Yorkshire Post* (18 June 2011).

him and lied. CCRC examined the allegation, but could find nothing to substantiate it and refused the application.

7.6.4 Rerunning the Trial

The three themes identified above feature repeatedly in the random sample. It was also apparent, however, that they formed part of a broader theme, which was the single most common feature of applications within the random sample. Many applicants were seeking, without stating it in this fashion, a re-run of the trial or appeal. In many cases, particularly those deemed to lack any reviewable grounds, Commissioners regularly wrote to applicants pointing out that the Commission's role did not extend to referring a case on the basis of re-running the evidence. The stated positions of the CACD in respect of the primacy of the jury's decision and the need for finality in criminal proceedings weighed heavily in the Commission's thinking. It is also worth noting that applicants pursuing their cases on these grounds were failing to supply "evidence or argument not previously raised"[37] which, in the absence of any exceptional circumstances, is a pre-requisite for a referral.

7.7 DIFFICULTIES FOR CCRC AND APPLICANTS

I now document some of the problems that CCRC encounters when it reviews cases. I do so because some, though not all, of these difficulties are such that it matters little whether innocence is a factor or not in CCRC's deliberations. Even where the difficulties do not impinge upon the consideration of innocence they are nonetheless important factors that demonstrate that CCRC's role is more

[37] Criminal Appeal Act 1995 s 13(1)(b).

complex than just reviewing every application exhaustively. It is convenient to divide these difficulties into two separate categories.

- Those relating to the nature of the offence (Section 7.7.1).
- Those affected by factors that were not directly related to the offence. These factors ranged across issues such as the availability of documents, considerations of the practicality of investigation, the allocation of resources, the rights of victims and the existence of exceptional circumstances (Section 7.7.2).

A given case may fall within each category even if I use a case study to illustrate just one of them.

7.7.1 The Nature of the Offence

In general terms the type of offence of which the applicant had been convicted did not have a particular impact upon the review. However, there were two types of offence that presented special difficulties that manifested themselves commonly in applications relating to such convictions. They were brawl cases and sex offences, particularly, in the case of sex offences, those of an "historic" nature or those in which the issue was consent.

7.7.1.1 Brawl Cases

Brawl cases were almost all characterised by similar features. The people involved were usually under the age of 30. An altercation of some sort had erupted, often for reasons that were unclear. Typically participants and witnesses were drunk and the events took place at night either in a pub or club or in the street. Testimony at trial was often confused and contradictory since the events often

happened at speed, in far from ideal viewing conditions and the recollections of witnesses were impaired. Clearly, by returning a guilty verdict the jury was sure of the individual's guilt. Trying to make sense of this type of incident at CCRC was particularly problematic.

Case SH235 is an example. The applicant was one of three men who had intervened following a dispute between a man and his partner. The man was beaten and subsequently died. The applicant's submission to CCRC was that one of the other two assailants had kicked the victim in the head leading to his death. The review examined all the witness statements and trial transcripts and sought to clarify any discrepancies and inconsistencies. CCRC concluded that there were some inconsistencies, but such cases tend to have them present. They are archetypally matters for the jury, which has to try to resolve any inconsistencies in reaching its verdict. The prospect of finding fresh evidence in such cases is usually remote. The greater the number of witnesses the more likely it is that a confused picture will exist and this lessens still further the likelihood of finding exculpatory evidence. This application was refused as were a number of others of a very similar nature.

7.7.1.2 Sex Offence Cases

There is no agreed definition of what constitutes an "historic" sex offence. For my purposes, I adopted an approach that classified a sex offence case as "historic" if the time period between the last alleged offence and the trial exceeded six years. I do not suggest that this, admittedly arbitrary, approach is the only one possible. These cases present special difficulties for CCRC because seeking evidence in relation to allegations about offences committed in the 1970s or 1980s is difficult. Employment and other records may well have been destroyed. Many of the cases were allegations raised by adults about events during their childhood. Many were adults who had had a dysfunctional early life. Crucially, they had been believed by the jury and realistically there was little CCRC could achieve in such cases. That is

not to say that CCRC did not explore the matter thoroughly, but such explorations were often fruitless.[38]

The other common case type that was particularly problematic was a sexual offence conviction where the issue was one of consent.[39] Typically, such cases involved an acknowledgement by the applicant that the sexual activity had taken place and an assertion that the complainant had consented. Such cases present particular problems because, in most of them, there is no probative value from any scientific or medical evidence. Most take place in private so there are no witnesses. Once the jury has accepted the complainant's evidence there is, usually, very little progress that CCRC can make on such cases. For example, case SH69 was meticulously prepared and the applicant's own dossier, regardless of any other documents relevant to the case, ran to over 300 pages of carefully tabulated and cross-referenced material. His prior appeal, which had been refused, had been based on a range of issues surrounding the conduct of the trial. CCRC's review concluded that once those issues were taken out of consideration on the basis that the CACD would not re-visit them; the issue was one of consent. Since that was quintessentially a jury issue CCRC concluded that there was no ground for referral.

Apart from these two specific areas I did not observe that any other types of offence generated particular problems deriving from the nature of the offence.

[38] *R v Payne* [2007] EWCA Crim 275, which was a successful referral by CCRC, is an illustration that such reviews are not invariably fruitless.

[39] This is a complex area of law and the consent issue may involve consideration of whether the complainant did consent (and had the freedom and capacity to do so) and also whether, where consent had not been given, the defendant reasonably believed that consent had been granted. For the purposes of the observation here I did not seek to draw this distinction.

7.7.2 Other Difficulties Observed

I observed a range of other issues that impinged upon CCRC's capacity to conduct a review or the scope of a review. All made reviews more complicated, time-consuming and directly affected the applicant's prospects of securing a referral.

7.7.2.1 Lack of Available Data

The difficulties facing individuals convicted of offences that occurred more than, say, 10 years ago are not confined to sexual offences. In a small number of cases, some of which are comparatively recent, the Commission was unable to find any details of the case within the criminal justice system. Case SH312 was an application in 2005 from a man convicted in 1991 of rape, burglary and attempted buggery. He asserted that he was a scapegoat and that there had been no forensic evidence against him. There had been no appeal. Despite exhaustive enquiries CCRC was unable to locate any official documents relating to the trial. The Commission did manage to piece together some information from other sources, but in the light of the applicant's confirmation that he was not offering any fresh evidence or argument the case was refused.[40] In similar vein Case SH211 was an application in 2005 from a man convicted of sodomy in 1966. CCRC interviewed him to try to collect information about the case and made exhaustive enquiries about the possible existence of records, but to no avail. Although these were two clear assertions of innocence, it is difficult, given the absence of relevant data, to imagine what other steps might productively have been taken.

[40] It was not unusual during the review process for CCRC to try to establish clearly what the applicant was asserting and sometimes, as in this example, the applicant confirmed that he was not proffering anything fresh.

The preservation of scientific exhibits may also be a factor. In another case a sample from an old crime had been located within the Forensic Science Service.[41] The expert opinion was that there was a slim possibility that analysis of it would produce a meaningful result, but it was highly likely that the testing would destroy the exhibit.[42] However, advances in technology might mean that at some unspecified future date a meaningful result might be obtained without destroying the exhibit. This requires a fine judgment and, in the particular case, the other circumstances, which included a finding of further inculpatory material, supported a decision not to have the testing undertaken.

7.7.2.2 Resource Implications

CCRC is funded from the public purse. In 2011-12 it spent £6.2m. It must spend its resources prudently. Even if it errs on the side of an applicant in its resource decisions, that does not mean that it is justified in investigating every case and pursuing every line of enquiry suggested by an applicant. In assessing such requests CCRC has to consider, amongst other things, whether it amounts to a speculative "fishing expedition" seeking to trawl possible potential sources of exculpatory evidence. I found a number of cases in which it declined to investigate as requested.

In case SH245 the applicant asserted a degree of incompetence by counsel in failing to call certain witnesses. The applicant furnished no details of the evidence these witnesses might have provided. CCRC consulted trial counsel and established that he had considered calling the witnesses, but had advised his client against doing so. CCRC recognised that the CACD was unlikely to find fault with this tactical decision and, since the evidence could have been adduced at trial the CACD would be disinclined to accept that there was a reasonable

[41] CCRC used this case in a training session for Innocence Projects in October 2011.

[42] It was not certain that the testing would produce anything meaningful by way of probative evidence.

explanation for it not doing so. CCRC declined to interview the witnesses further. It might have taken a different view if the applicant asserted that the witnesses were proffering a different version of events, but with no such assertion the application was refused.

In case SH443 the applicant's solicitor asked CCRC to commission a psychiatric report in order to support a contention that the applicant's denial of sexual contact with a complainant was due to a mental condition which meant that he considered that sexual contact was to be equated with intercourse. This proposition was not supported by any evidence in the application. It was merely an assertion and a request. CCRC declined the request and rejected the application.

These kinds of case emphasise two points. First, the Commission attaches considerable importance to the statutory provision, which subject to exception, envisages some new evidence or argument being the foundation of a referral.[43] Second, CCRC places a clear onus on the applicant to furnish that new evidence or argument. It will review cases up to a point where, on the face of the application, there is nothing new. These are a largely a series of routine checks. That is not to say that they are unimportant, nor that they are not carried out with rigour. However, the approach does need to balance limited resources against investigative zeal.

I also observed that CCRC gave regard, in reaching decisions about how deeply to investigate a case, to the impact of such a decision upon those cases sat in the queue awaiting review. It is important to note that CCRC is a review body, not a re-investigatory body. It will, where appropriate re-investigate, but that is not its core function in respect of every application it receives.

[43] Criminal Appeal Act 1995 s 13(1)(b)(i) specifically envisages a referral being founded upon the basis of some evidence or argument not raised at trial or on appeal.

7.7.2.3 The Rights of Victims

The potential impact of a review on complainants or witnesses is a consideration for CCRC. The Commission is one of the criminal justice bodies to which The Code of Practice for Victims of Crime applies. The code, issued under s32 of The Domestic Violence, Crimes and Victims Act 2004, sets out the way in which victims of crime are to be treated. The code requires CCRC to take into account whether any approach it might make could cause the victim distress. This can be particularly sensitive in cases involving sexual abuse of children. A young man, convicted of indecent assault of two girls under the age of 10, maintained his innocence and in an exchange with CCRC submitted a press cutting about a relation of the two girls having been convicted of beating his dog. This was sufficient to raise concerns, but the CCRC Committee considering the matter took the view that the potential impact of raising the issues again with the two victims outweighed the new evidence that had been received and so declined to interview the other party.[44]

7.7.2.4 Retractions

Another group of cases that raise difficulties because of competing policy considerations are assertions of a retraction by a complainant or witness. Typically, an applicant asserted to CCRC that one or more of the witnesses at trial had subsequently indicated that they no longer adhered to the account given at trial. This might arise in the context of a specific retraction made, for example, to the applicant's solicitor. Alternatively, it might be made to the applicant or someone connected with him.

[44] This case is a good illustration of the difficulty of such decisions since evidence that subsequently came to light resulted in the case being referred and the conviction quashed.

The first point to note may seem self evident, but it is, of course, in the applicant's interests to claim that a witness has retracted some important part of his/her testimony. Accordingly, CCRC has to proceed with some caution and diplomacy in such cases, especially if the assertion relates to a complainant. It has to consider whether the assertion of retraction carries any weight beyond the mere assertion. For example, if the assertion is that the complainant in a case of indecent assault has now retracted the complaint, CCRC has to consider the potential impact on the complainant of asking whether that is the case and inevitably bringing back to the complainant's mind distressing matters about the complaint.

Where there is some evidence to support the assertion, CCRC will either contact the witness/complainant or, in appropriate cases, ask the police to do so. Asking the police to do so may be a necessary step, because a retraction of evidence previously given under oath at trial may amount to perjury. [45] In such circumstances the police may formally caution the person and carry out the interview in accordance with the requirements of PACE.[46]

In cases where there appears to be substance to the assertion of retraction, I observed CCRC go to considerable lengths to verify the position. Case SH73 is an unusual, and probably extreme, example, but still a useful illustration. The applicant was convicted of attempted murder. He subsequently asserted that the victim of the attempt had now retracted his identification of the applicant. The applicant provided an affidavit sworn in an African country, which amounted to a clear retraction. CCRC sent an investigator to the country in question to make enquiries of both the witness and the notary before whom the affidavit was sworn. It became evident reasonably quickly that the affidavit had been sworn by an

[45] As provided for in the Perjury Act 1911 s 1(1).

[46] Under the Code of Practice C "Detention, treatment and questioning of persons by police officers" someone informed that they may be prosecuted should be given a formal caution in terms specified in the Code.

imposter. The original victim maintained that he was in no doubt about the identification of his assailant.

I also observed in a number of cases of retraction that the retraction itself collapsed under further questioning. In case SH439, the victim of a sexual assault went to the applicant's solicitors after the trial to retract her evidence. Mindful of the potential perjury issue, they prudently referred her to another firm of solicitors, who in turn contacted CCRC. CCRC interviewed the complainant and it emerged that she had been pressured by a relation, who was in a relationship with the applicant, to withdraw her retraction. Once this was established she withdrew her retraction and the application was refused.

7.7.2.5 Re-applications

Approximately 10% of the cases in my random sample were re-applications. That is, an application from the same individual, in respect of the same offence, where CCRC has already previously issued a refusal decision. The legislation is silent on the subject of re-applications and an applicant is free to make as many applications as he wishes. I came across one applicant whose application was the seventh one on the same conviction. Re-applications pose another resource issue for CCRC. There is a balance to be struck between giving access to CCRC's services and allowing those resources to be tied up with reviews that have no prospect of success. Any suggestion that the number of applications that an individual could make be limited would seem untenable since if, for example, an applicant had exhausted his entitlement and then came across crucial exculpatory evidence it would seem to deny him access to justice. On the other hand, the applicant making his seventh application on essentially the same grounds should not be allowed to exhaust precious resources and delay the consideration of other cases waiting in the virtual queue. CCRC has adopted a formal procedure for

dealing with such applications and may in certain cases refuse to consider a further application.[47]

Referrals following a re-application are rare, but *Beatty*[48] had his life sentence modified to a hospital order and *Ashton*[49] had his murder conviction reduced to manslaughter. In each case new psychiatric evidence was the key. *Branchflower*[50] and *Traynor*[51] both failed in attempts to have murder convictions quashed following a referral from a second application, but a limit on applications would have prevented even what CCRC clearly judged to be justified referrals.

7.7.2.6 The Limits of CCRC's Powers

I noted above that CCRC routinely requisitions various documents from public bodies as part of the review process. Indeed, before the review process gets underway CCRC puts relevant public bodies on notice that it may wish to requisition documents. CCRC's powers were sometimes a source of tension with public authorities, unaware of the extent of its powers. This is not unduly surprising since if, for example, CCRC issued a notice requiring access to social services' records about a complainant, that might be the first time that particular social services department has received such a notice. Despite these occasional tensions, I did not come across any case in which CCRC's powers in relation to public bodies proved inadequate.

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[47] CCRC, 'Formal Memorandum Persistent Applicants' <http://www.justice.gov.uk/downloads/about/criminal-cases-review/policies-and-procedures/casework/persistent-applications.pdf> accessed 11th September 2012.

[48] *R v Beatty* [2006] EWCA Crim 2359.

[49] *R v Ashton* [2006] EWCA Crim 1267.

[50] *R v Branchflower* [2010] EWCA Crim 1239.

[51] *R v Traynor* [2012] EWCA Crim 1116.

There was, however, one case (SH186) in which the fact that the powers do not extend beyond public bodies was an issue.[52] The case was a conviction for sexual abuse that was covered in detail by the News of the World newspaper. One of the points advanced by the applicant's solicitor was that a key witness had been paid by the News of the World and therefore had an interest in the defendant being convicted. CCRC approached the News of the World to seek information that would help in resolving the issue, but the newspaper was un-cooperative and despite repeated attempts remained steadfastly so.

The case was unusual, but it does highlight an issue that may become more important in future. The decision by the Government to transfer forensic science services to the private sector will leave the Commission reliant upon contractual agreements with forensic science providers, and these may prove to be difficult to enforce in some circumstances.[53] The full implications of the changed arrangements on the work of CCRC are beyond the scope of this thesis, but from a situation where I found the powers to be inadequate in only one case, there is the potential for them to be inadequate more often.

7.7.2.7 No Relevant Prior Appeal and Exceptional Circumstances

In 28.79% of cases in the random sample the applicant had not made a relevant prior appeal. The legislation appears to have been drafted on the basis that normally the applicant will have appealed and had the appeal rejected. That this would be the normal position may be inferred from the statutory provision that permits CCRC to refer such cases that have not been the subject of appeal in "exceptional circumstances."[54]

[52] By contrast the Scottish CCRC's powers do extend to the private sector.

[53] House of Commons Science and Technology Committee - Seventh Report, *Forensic Science Service* (2011) contains an in depth analysis of the proposal.

[54] Criminal Appeal Act 1995 s 13(2).

I found evidence of a difference in approach by the Commission in the period between 2000-2003. At that stage the CCRC took to putting the applicant to proof of exceptional circumstances, and if the applicant could not supply reasoning in support of the existence of exceptional circumstances, the Commission would reject the case. Since 2003, CCRC has considered of its own volition whether it can identify any exceptional circumstances, which might justify the case being fully reviewed, assuming that the applicant had put forward some substantive grounds that would justify a review.

Two examples of a case involving no prior appeal are SH14 and SH32. In SH14 the applicant made various assertions about the unreliability of some witness evidence, but in the light of the applicant's counsel advising that the jury were entitled to reach the view they did, in believing the victim's identification evidence, CCRC declined to refer the case. In SH32 the defendant was convicted of possessing indecent images of children, which he denied (arguing that he had been in bed with his partner at the time the images were downloaded.) That point had been made in his defence at trial and his application now raised nothing new. I found it difficult to envisage, in the context of innocence, what more CCRC might have done in these cases. Both applicants asserted their innocence, but in the absence of any new evidence or argument CCRC's decision that there was no "real possibility" seems soundly based. Furthermore, the absence of a prior relevant appeal meant that some exceptional circumstances would have to exist for the case to be referred. In each of these cases, the applicant was reminded that it was within his rights to pursue an application to the CACD for leave to bring an appeal, and for permission to bring that appeal even though the normal 28 day time limit had passed.

7.8 CONCLUSIONS FROM THE RANDOM SAMPLE

7.8.1 Competing Policy Priorities

A key point that emerges from these various examples is that there are competing policy priorities here, which CCRC has to try to balance. It has to balance its own objective of identifying possible miscarriages of justice with priorities such as the prudent management of resources, the rights of victims and the pressure of applications awaiting review. CCRC's function is to review cases and consider whether they merit referral, but not to the exclusion of every other consideration. This raises the question of whether CCRC could be said to afford these other priorities undue weight. I did not consider that it did so. It was, however, always seeking some trigger that would justify a decision to proceed. If it could not identify such a trigger, it gave the applicant an opportunity to provide one. There was a clear onus on the applicant to do so.

The importance of this for claims of innocence is that it will rarely be sufficient for an applicant to submit a claim of innocence in reliance on what has already been considered. For CCRC to re-investigate every case from scratch, bearing in mind that 90% of those applying for review of a conviction assert innocence, would be an enormous undertaking, requiring far greater resources than are currently used. As CCRC's Chairman, Richard Foster, has pointed out, if CCRC does not deal with cases that have little prospect of success in a timely fashion, the virtual queue is lengthened and those with cases of merit have to wait longer for redress.

7.8.2 The absence of fresh evidence or argument

Very few applicants seemed to understand the need for fresh evidence or argument.[55] The standard approach to reviewing a case, detailed above, means that in its initial consideration of applications CCRC would routinely collect information that might contain something fresh. However, if it does not do so, CCRC clearly regards the onus as resting with the applicant to provide fresh evidence or argument.[56] Failure to do so condemns the vast majority of applications to rejection.

The cases in the random sample provide an understanding of the nature of applications and illustrate the difficulties encountered by CCRC (and applicants) in the review process. Most applicants assert their innocence, but few provide any fresh evidence or argument in support of their assertion. In addition to this basic lack of fresh material, reviews face problems ranging from the complexity resulting from the type of case, to resource considerations and obligations towards victims under the Government Code of Practice.

My examination of the applications within the random sample led me to conclude that the vast majority had no realistic prospect of success. For example, in case SH449 the applicant had been convicted of assaulting a judge during the course of a trial that was not progressing as the applicant would have wished. His appeal against conviction was refused. His application to CCRC asserted that he had been acting in self-defence. Quite apart from the fact that the issue had been aired at trial and appeal the applicant's account seemed implausible. In case SH484 the applicant's request for review of convictions for handling stolen goods,

[55] Ibid s 13 (1)(b)(i) envisages new evidence or argument.

[56] There are exceptions to this proposition. For example, CCRC might receive an assertion about which an applicant would be unable to furnish any fresh material, but which CCRC could use its powers to pursue.

attempted murder, using a firearm to resist arrest and perverting the course of justice simply re-stated the grounds of his rejected appeal.

It is difficult to put a precise percentage figure on the proportion of "hopeless" applications, but my considered estimate is that something over 90% of the applications I reviewed had no realistic prospect of being referred. It is difficult to provide an accurate figure because, inevitably, there are some cases which are utterly hopeless (perhaps offering nothing new, with no indication of any due process issues), others where the applicant seems to offer something new, but it fails to come up to proof, and yet others where the new material withstands examination, but does not seriously undermine the strength of the case against the applicant. Strictly speaking, CCRC applies the "real possibility" test in making a decision on each and every case. In reality, the test is a formality in many cases. I think this is best captured by using the explanation of the "real possibility" test proffered by Lord Bingham in *Pearson*.[57] In characterising a "real possibility," he said that it had to be more than a "bare possibility".[58] I concluded that the vast bulk of applications I reviewed would not have been referred even if the test had used the significantly lower threshold of bare possibility. These cases could be defined in many cases as "no possibility" or "an outside chance" (a term also used by Lord Bingham to exclude cases).[59]

7.9 COMMITTEE REFUSALS SAMPLE

This finding led me to consider how to try to identify those cases that might be described as meeting the bare possibility test, but not reaching the real possibility threshold. If my estimate of the cases failing to meet the bare possibility test (around 90%) was reasonably accurate, and since we know that 3.5% of

[57] *R (Pearson) v Criminal Cases Review Commission* [1999] EWHC 452 (Admin).

[58] Ibid [17].

[59] Ibid [17].

applications meet the real possibility test, that left a body of cases of around 6-7%, where the bare possibility test was satisfied, but were not referred. The legislation and the procedures at CCRC enabled me to find a way to do this in the following manner.

The legislation provides that for a case to be referred to the CACD, it must be considered by a committee of three commissioners.[60] In practice, this means that CCRC staff and Commissioners take to Committee those cases where a referral is being actively considered.[61]

CCRC's procedure for convening a Case Committee meeting enabled me to identify cases which had been considered by Committee, but refused.[62] I analysed these cases to identify the issues considered, the extent to which innocence or fresh evidence featured, the application of the real possibility test, and whether the decisions were clear, consistent and carefully taken. This second sample at CCRC was markedly different in character from the random sample. Conspicuous by their infrequency, were cases seeking a re-run of the trial, re-applications and complaints about incompetent representation. Certain types of case feature in this sample that rarely featured in the random sample. These were cases involving psychiatric issues seeking to reduce murder convictions to manslaughter, public interest immunity, police misconduct, prosecution non-disclosure and cases involving points of law. I conclude that the reason for the presence of these cases in this sample is the consequence of a process of refinement. For example, there may be relatively few applications that raise psychiatric issues, as evidenced by their rarity within the random sample. However, where such issues are raised and have some substance they have a greater tendency to reach a committee for consideration.

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[60] Criminal Appeal Act 1995 Schedule 1 s 6(2)(a).

[61] Committees are convened for other reasons too. For example, a committee will supervise the commissioning and conduct of an investigation under s 19 of the 1995 Act or the conduct of investigation requested by the CACD under s 15 of the Act.

[62] This procedure was a simple Excel Spreadsheet listing the case name, number with details of the composition of the Committee and the date of the meeting.

7.10 OBSERVATIONS

I classified committee cases into a relatively small number of discrete categories. Some of these categories cover cases that might be regarded as less informative on claims of innocence, since the focus of consideration is a due process issue.

The categories that might be characterised as “due process” issues were:

- Psychiatric Issues
- Police Misconduct
- Prosecutorial Non Disclosure
- Public Interest Immunity
- Points of Law

There was another group of cases where claims of innocence were central to the case. The key common feature of these cases was evidential. Within these cases the evidential issues could be subdivided as follows:

- Fresh exculpatory evidence.
- Fresh evidence tending to undermine the prosecution case.
- Fresh expert evidence.
- Fresh inculpatory evidence.

Although the cases lent themselves to categorisation as set out above, there was often a complex interaction of issues under review. A case of alleged police misconduct might contain some fresh evidence that tended to undermine the prosecution case. Although I have categorised cases for the purposes of detailing my observations, that should not be taken to convey any limitation of the scope of the review or consideration of the case. In short, these are my categories not

CCRC's. I now describe in more detail what I observed in each of the identified categories.

7.11 DUE PROCESS

7.11.1 Psychiatric Issues

I observe in chapter five that a number of CCRC referrals were on the basis of psychiatric points. I identified only two applications in the random sample in which a psychiatric issue arose.[63] The committee cases contained 16 applications involving difficult psychiatric issues. All were murder convictions.

Case SHCR4 was a 1976 murder conviction, in which the applicant was asserted to have undertaken a contract killing. He confessed during interview, but later retracted the confession. His application was essentially allegations of misconduct by the police who had conducted the interview. CCRC asked Professor Gisli Gudjonsson to assess whether the applicant was unduly suggestible and likely to have confessed falsely. The applicant failed to co-operate with Gudjonsson and the results were inconclusive, leading the Committee to refuse the application. In case SHCR14 the applicant was, unusually for a case involving psychiatric issues, seeking to have his conviction quashed entirely. He argued that his actions at the time of the murder were unusual, because he was suffering from post traumatic stress disorder (PTSD). CCRC considered the matter carefully and consulted the psychiatrist who had assessed the applicant at the time of the murder. His later opinion, that the applicant might have been suffering from PTSD, which explained

[63] Applicants rarely say that they wish to pursue their case on the basis of some psychiatric point. It is much more likely that they will say, for example, that they were forced to make a confession or that they did not know what they were doing when they committed an offence.

his actions (or lack of action) was, in CCRC's view, overridden by the contemporary psychiatric opinion that he was not suffering from PTSD.

In case SHCR16 the applicant, who had documented mental health problems at the time of the murder, gave a number of different accounts when interviewed by police. Some of the accounts were clearly untruthful and were likely to have influenced the jury. The psychiatric issue facing CCRC was whether the lies were the result of a character defect or alternatively the result of some abnormality of mind,[64] which meant that the applicant was incapable of not lying. Clearly, if the applicant's mental health problems were such that he could not stop himself from lying, then the reference at trial to his untruthful accounts was prejudicial. The psychiatrist reporting to CCRC also faced the problem that the individual might be lying during assessment. Ultimately, CCRC concluded that the fresh psychiatric evidence was insufficient to justify a referral.

When the psychiatric cases as a whole are considered from the perspective of innocence, it is clear that the majority of them do not address the issue. They are usually concerned with whether a murder conviction should more appropriately have been a manslaughter conviction. There are, however, a small number of cases in which the issue of propensity to make a false confession arises and in such cases those asserting that they made a false confession will also be asserting factual innocence.

7.11.2 Police Misconduct

The range of possible police misconduct cases was explored in chapter five. Briefly, it may be that police misconduct is alleged in relation to the particular case under review or there may be a more generalised concern about the conduct of

[64] The test for the partial defence of diminished responsibility was changed by the Coroners and Justice Act 2009 to one of abnormality of mental functioning, but this review preceded that amendment.

the police officers involved in the case. The CACD, and thus CCRC in assessing whether the real possibility test is met, focuses on whether there is evidence of misconduct, whether it appertains to the current case directly and if not, whether any degree of taint is sufficient to undermine the safety of the conviction. The fundamental point is that the focus is on the conduct of the police rather than the conduct of the applicant.

Morris is a case of alleged direct misconduct in which the veracity of DCI Molloy's account was called into question.[65] Morris was convicted in 1968 of the murder, a year earlier, of Christine Darby. Molloy testified that Morris had been asked to take part in an ID parade, but had declined to do so. This led to a "confrontation" identification being undertaken and a witness did positively identify Morris. However, Morris always denied that he had been asked to take part in an ID parade. Molloy claimed that his notes had been written contemporaneously, but the CCRC had commissioned a report from a forensic document analyst who concluded that one of the pages had been re-written at some stage. The re-written section was significant because it did record matters that had been disputed at trial.

CCRC considered whether the findings of the expert constituted evidence of misconduct and, if so, whether it cast sufficient doubt on DCI Molloy's credibility to undermine the safety of the conviction. CCRC concluded that, since there "could be a number of explanations as to why the pages were re-written,"[66] it was doubtful whether his credibility would be undermined. In its FSOR the Commission acknowledges that this is a "debatable" point.[67] The Commission also found that DCI Molloy's published account of the case,[68] some 20 years after the event, was

[65] *R (Morris) v Criminal Cases Review Commission* [2011] EWHC 117 (Admin) [2011] All ER (D) 80 (Feb). All the details of the case given here are derived from the judgment.

[66] Ibid [51].

[67] Ibid.

[68] Pat Molloy, *Not the Moors murders : a detective's story of the biggest child-killer hunt in history* (Gomer 1988).

"unreliable."[69] Furthermore, the applicant asserted that there were discrepancies between what DCI Molloy had said at trial and to the Commission. Additional expert reports were commissioned and these concluded that DCI Molloy's note was not a complete record of everything said during interview.

The Commission concluded that, even if the doubts about the evidence of DCI Molloy in respect of the interview record were accepted, there was nonetheless still a formidable body of evidence against Morris and thus no real possibility the CACD would overturn the conviction. In a case of this complexity, and with a strong case based on other evidence, CCRC would need compelling evidence of misconduct that *seriously undermined* the prosecution case before making a reference.[70]

Case SHCR94 concerned police misconduct of an indirect kind. The applicant was convicted of involvement in a number of armed robberies. He denied this and said that the West Midlands constabulary had fabricated the confession, which was the key evidence against him.[71] The applicant sought to rely on the apparent discrediting of an officer in the case and the officer's allegedly cavalier attitude to Judge's Rules.[72] Since, in the case under review, there was no direct evidence of misconduct by the officer in question CCRC had to consider whether the evidence from elsewhere that he may have behaved improperly might avail the applicant. It concluded that the evidence was insufficient since the officer had never been disciplined for, far less convicted of, any misconduct. It also decided that, even though the committee accepted that the officer had said in relation to Judge's Rules "It's just not my practice to follow the rules," that this was insufficient to cast

[69] *R (Morris) v Criminal Cases Review Commission* n65 [52].

[70] Though as the referral in *R v Maxwell* n34 illustrates if the misconduct is clear enough and sufficiently serious the Commission will refer the case regardless of the strength of the case against the applicant. And, it may be noted, the CACD will be prepared to quash the conviction.

[71] The West Midlands Serious Crime Squad had an infamous reputation in such matters. See, Tim Kaye, *Unsafe and unsatisfactory? : the report of the independent inquiry into the working practices of the West Midlands Police Serious Crime Squad* (Civil Liberties Trust 1991).

[72] Judge's Rules were a precursor to the provisions of the Police and Criminal Evidence Act 1984 in setting out the rules for the treatment and interviewing of suspects.

doubt on the conviction. The difficulty in taint cases is well illustrated here. The applicant asserting innocence has to demonstrate some nexus between misconduct and his case. Both CACD and CCRC have shown that they are alert to the possibility of a bandwagon effect where a police officer is convicted of misconduct.[73] If the nexus were not insisted upon, then all of the officer's cases might have to be reviewed and referred.

Another variant is an assertion of police misconduct without substantive supporting evidence. Case SHCR186 was a conviction for murder. The applicant raised a number of issues in support of his case with the main one being that witnesses had wrongly been allowed to give evidence anonymously, which was a breach of the Human Rights provision that provided the right for him to have witnesses examined.[74] However, for good measure, the applicant added allegations that the police had perverted the course of justice. The Commission asked the applicant if he could provide evidence on the matter, but since he could not they refused to take the point any further. This was another indication that the Commission will not undertake a speculative investigation. It always demands some material that will justify the use of resources to pursue the matter.

In each of these examples the applicant asserted innocence, but the issue of police misconduct rarely goes directly to innocence. For an applicant it may demonstrate, at best, that there was some serious impropriety that makes some evidence unreliable. In some cases, innocent or not, that will be sufficient for a referral to be made. However, where the impropriety is less serious, or indirect, or merely asserted, the Commission will weigh it against the evidence that is not tainted in order to make a decision.

[73] See n31.

[74] Human Rights Act 1998 Schedule 1 Part 1 Article 6(3)(d).

7.11.3 Non disclosure

A similar kind of weighing exercise arises in cases of alleged non-disclosure. The applicant has to convince CCRC that there has been a significant non-disclosure, and then, that the information which was not disclosed might have had a material impact upon the trial proceedings.

Case SHCR187 is a fairly typical example involving convictions relating to the importation of drugs. Such is the criminal sophistication of many involved in this activity that Customs and Excise make regular use of participating informants. They routinely seek to protect informants by obtaining Public Interest Immunity (PII)[75] certificates to protect their identity. In this case, it was not clear whether the applicant had been set up by Customs and Excise, which might have raised interesting issues in relation to entrapment, or whether in fact a person had informed upon the applicant in revenge for an unpaid debt. The applicant asserted that the prosecution had failed to disclose this information to him. Although the assertion was an unsupported one, CCRC recognise that in such cases it is exceedingly difficult for an applicant to provide any substantiation. Accordingly, if, as in the case, a PII certificate exists CCRC may investigate to see if there is any support for the applicant's contention that he has been unfairly prejudiced by the non-disclosure. It did so in this case and concluded that there was no such support.

In case SHCR106 a sexual offence conviction was challenged by an applicant who had always denied the allegations against him. The undisclosed material related to a video of an interview with a potential second complainant. This complaint had not been pursued, because the police were concerned that the juvenile complainant had received some coaching. A second complaint could have strengthened the case against the defendant quite considerably. The problem, CCRC concluded, was that the absence of a second complaint did not,

[75] The wider issue of Public Interest Immunity is discussed below.

logically, weaken the case against the defendant. The fact that the second complainant may have been coached did not necessarily render the evidence untrue. Having said that, since the defendant's case was that the complainant was reflecting the hatred his father felt towards the defendant the possibility that another complainant was coached might have influenced the jury.

7.11.4 Public Interest Immunity

Applications involving the issue of Public Interest Immunity certificates were rare in both samples (only four cases in total). It is beyond the scope of this thesis to consider the law relating to the legitimate withholding of information from a defendant and his advisers in criminal proceedings.[76] It is sufficient to state that the prosecution may apply to a judge for a certificate authorising the withholding of information on the basis that the public interest in withholding it outweighs the interests of justice in it being revealed.[77] The difficulty for the defendant is twofold. First, he may not even know that a certificate has been granted. Secondly, if he does know that one has been granted, he will not know the information that has been withheld and is therefore in no position to make an informed judgment about whether it might be of assistance in his defence. The PII certificate will have been the subject of judicial scrutiny and in some cases the judge's decision will itself have been scrutinised by the CACD.

On an application to CCRC an applicant will secure a further level of scrutiny. In each of the cases in the sample CCRC obtained a transcript of the PII hearing and declared itself satisfied that there was no material covered by the certificate that

[76] For a discussion of the topic see Chris Taylor, 'In the Public Interest: Public Interest Immunity and Police Informants' (2001) 65 Journal of Criminal Law 435 and Chris Taylor, 'What Next for Public Interest Immunity?' (2005) 69 Journal of Criminal Law 75.

[77] Criminal Procedure and Investigations Act 1996 s3 and Part 25 of The Criminal Procedure Rules 2005 SI 384 govern the operation of the non disclosure.

would have been of assistance to the defence.[78] Without access to the material it is impossible to conclude that CCRC's assessment was correct, but it is at least another check on the system. There is also some element of re-assurance to be had from two others sources. First, CCRC has referred a number of cases where non-disclosure was a key ground of referral.[79] Second, in some PII cases, the CACD quashed the conviction and the grounds for quashing it were not, even then, disclosed to the applicant or his advisers.[80]

In the context of claims of innocence these cases are well nigh impossible to form any judgment upon. The applicants may be innocent, but there is primarily a non-disclosure argument being considered and without knowledge of what was not disclosed, one cannot judge whether it was relevant to any assertion of innocence.

7.11.5 Points of Law

A significant number, 50 in all, of the sample cases considered by Committee involved a legal issue. Some were of considerable complexity and exhibited the difficulty that the Commission faces in applying the "real possibility" test to a future decision of the CACD. In the context of innocence legal issues are often entirely neutral since there is no change to the factual elements of the case. However, they can have the effect of transforming a previously criminal act into a non-criminal one. They often revolve around whether a change in law should be applied to the applicant's case, whether the existing case law has been correctly interpreted and applied and, occasionally, whether there has been some error by the trial judge. In addition the Commission needs to keep itself abreast of

[78] My own security clearance at CCRC did not allow me to see any of the documents relating to the certificate.

[79] For example, *R v Vernett-Showers and Others* [2007] EWCA Crim 1767.

[80] *R v Morrison and Others* [2009] NICA 1.

significant developments in the law, especially in case law, which might impact upon cases under review.

A fine question of law arose in Case SHCR55. The defendant had been convicted of cheating the public revenue. His application to CCRC was founded upon the legal argument that what had been identified was a flawed tax avoidance scheme, which was not criminal, but failed to avoid tax as those operating it had hoped it would. CCRC obtained advice from Counsel on the scheme to assist it in making a decision. Ultimately, CCRC concluded for a number of reasons not to refer the case, but the interpretation of the nature of the scheme played a key part in the decision.

7.11.6 Due Process Conclusions

A significant portion of Committee work relates to applications involving issues of due process. Such cases are often neutral in the context of innocence, since the focus is firmly on due process. CCRC clearly considers its role in such cases to be an important function within the wider criminal justice system. I did not observe any evidence that it afforded such cases any different level of weight from those where the issue of innocence was more overtly in issue.

7.12 FRESH EVIDENCE

The second broad group of cases considered by committee were those in which there was some fresh evidence to be considered. Such cases tended to throw into much sharper focus the whole question of claims of innocence. I found it helpful to classify fresh evidence cases into four groups, though I stress again that this should not be taken to mean that the observations on a particular case are

specific to only that group. It was common to find cases in which, for example, there was fresh evidence that supported the applicant's claim and fresh evidence that was unhelpful to him. The four groups I used were:

- Fresh exculpatory evidence.
- Fresh evidence tending to undermine the prosecution case.
- Fresh expert evidence.
- Fresh inculpatory evidence.

7.12.1 Fresh Exculpatory Evidence

The significance of fresh exculpatory evidence in relation to claims of innocence is sometimes overstated. Classically this happens with the finding of DNA on a victim or at a crime scene that does not match the DNA of the convicted person. Some assert that such a finding *proves* that the convicted person did not commit the crime or was factually innocent.[81] This may be a fallacious conclusion. The presence of another person's DNA and the absence of the applicant's DNA may have explanations consistent with the applicant's guilt. The other person's DNA may be present for innocent reasons and the applicant may not have left any DNA, so the person originally convicted may still be guilty. Alternatively the convicted person may have committed the crime in joint enterprise with the person whose DNA was found at the scene. Even in a case where DNA from semen on a rape victim's underwear is not consistent with an applicant's profile it does not *necessarily* exclude him. It depends upon the circumstances of the case. The complainant may have been raped more than once, but not wished to admit that fact. The applicant may not have left any DNA by using a condom. Evidence proving innocence is extraordinarily difficult to find.[82]

[81] Gabe Tan, 'Justice should not depend on luck' [2012] Socialist Lawyer Issue 60.

[82] As discussed in chapter two.

In the case of one convicted sex offender (Case SHCR30) the date of a particular incident, one of a number of convictions, had been fixed by the prosecution by reference to a diary entry. Following conviction and a refused appeal the applicant himself uncovered some records that demonstrated, incontrovertibly, that he was elsewhere, out of the country, on the date identified. This appeared to exculpate him. However, even this was not sufficient, since CCRC took the view that this was merely one of a number of indictments. Furthermore, since the applicant's defence was not that he had never been alone with the complainant, but that no sexual activity had occurred, a revised indictment would not have availed him.

Applicants suggesting or providing exculpatory evidence were rare. There were two cases in which the applicant put forward a named alternative suspect as the perpetrator. There were also two cases in which the applicant submitted details of a fresh witness statement that purported to provide an alibi. These were all weighed carefully, but the weight of the prosecution case and the potential veracity of the alternative combined, in each instance, in a refusal to refer.

7.12.2 Fresh Evidence tending to undermine the prosecution case

The organisation United Against Injustice held a national miscarriage of justice day in October 2003 at which John Wagstaff, then the principal legal adviser to CCRC, was a speaker. According to a report of the proceedings he gave one particularly helpful piece of practical advice to those pursuing cases.

"Rather than presenting more and more evidence that verifies the defence case, try to find evidence that falsifies the prosecution case."[83]

[83] Michael Naughton and Andrew Green, 'The 2nd Annual Miscarriage of Justice Day Meeting' (11th October 2003) <http://www.fitting-up.org.uk/mojday2report.htm> accessed 23rd February 2012.

This observation was based on John Wagstaff's experience of the first six years of operation at CCRC. It is partially founded upon the notion that proving innocence (verifying the defence case) is difficult, both conceptually and evidentially. However, even where there is something new which might undermine the prosecution's case, it still has to be a significant undermining of the case. 31 cases in the sample involved an element of the prosecution case being undermined to some degree by the introduction of fresh evidence. In some cases the decision not to refer was a very finely balanced one and the over-riding factor in each case was the Commission's assessment of how the CACD would be likely to respond to the new evidence. Clearly the distinction between fresh evidence of innocence and fresh evidence that undermines the prosecution case can be a fine one to draw. For example, the production of reliable evidence of an alibi could be said to undermine the prosecution case, but also to support an assertion of innocence. However, the essence of these cases is that the attack is on some part of the evidence that was proffered in support of the prosecution case.

In case SHCR17 the applicant had been convicted of an indecent assault by groping a woman in the street. Identification evidence was not particularly strong and it was bolstered significantly by a finding of the applicant's DNA on a burning cigarette butt in the vicinity of the assault. This cigarette butt was discovered some 75 minutes after the time of the assault. The applicant's solicitors commissioned expert evidence on the likelihood of a barely smoked cigarette continuing to burn for 75 minutes. The expert concluded that this was highly improbable. CCRC considered the case, but reached the view that trial Counsel had not commissioned such a report on the basis that the conclusion would have been obvious to the jury. Accordingly, the evidence could have been adduced at trial and there was no reasonable explanation for the failure to do so – thus the CACD would decline to admit this fresh evidence. On a strict interpretation, this is probably a correct assessment by CCRC, since the CACD has often adopted a restrictive interpretation. However, coupled with the rather weak identification

evidence, the more persuasive undermining of an element of the prosecution case does seem to have merit.

Another example is case SHCR71, a murder conviction. The applicant was in prison for another offence when he was said to have told three other prisoners of his culpability for a murder. The evidence of one of these fellow prisoners, R, formed the cornerstone of the prosecution case. The murder had occurred some years previously and there was a paucity of other evidence. The application to CCRC focussed on trying to undermine R's evidence. The applicant, protesting his innocence, asserted that there was testimony from another prisoner that two prisoners, one of whom was R, had conspired to get the applicant convicted of the murder. The assertion, which was supported in written form, was investigated thoroughly. CCRC interviewed the new witness and concluded that the details of the confession needed to be considered further. The Commission used its powers under s19 of the 1995 Act to appoint an investigating officer to examine the case. In addition to witness interviews the investigation team combed through dozens of newspaper reports to see whether details that R had provided could have been garnered from external sources or whether some of the details must have come from the killer. The exercise was, in the end, rather inconclusive with arguments both ways. This led the Commission to conclude that there would be insufficient force in the fresh material to undermine the prosecution case to the point where there was a real possibility that the CACD would quash the conviction.

The very nature of these cases is that they focus on the guilty/not guilty dimension not the issue of innocence. Undermining a key element of the prosecution case might move the case from being guilty beyond a reasonable doubt to not guilty, but not guilty is not synonymous with innocence.

7.12.3 Expert Evidence

Expert evidence features significantly in the CCRC's review of cases that reach Committee. A significant number of the examples given above feature expert evidence commissioned by CCRC. The cases encompassed expert evidence on documents, DNA testing, ballistics and psychiatric reports. Even in cases where CCRC did not commission expert reports it still featured heavily with, for example, reports on biomechanics, forensic pathology and fire being considered with great care.

As observed such evidence, especially when commissioned by CCRC, may be inculpatory or exculpatory, but in terms of CCRC's role the very fact that it commissions the work is indicative of its inquisitorial approach. CCRC spent £380,348 on forensic and medical reports in the period from April 2006 to January 2012, which suggests that some cases which merit these deeper levels of investigation do receive it.[84] It is not possible to conclude purely from the financial expenditure figures that all cases which merit such expenditure receive it, but I did not observe any cases in which I considered such expenditure had been refused.

7.12.4 Fresh Inculpatory Evidence

Commissioners and staff at CCRC are clear that a review is conducted through the lens of current knowledge. A conviction from the 1990s will be subjected to scrutiny using forensic techniques available at the date of review which, in many cases, will have been developed and improved. This means that, in some cases, fresh inculpatory evidence might also be found. It is also worth noting that because CCRC is working in an inquisitorial fashion it can take into account information which has probative weight against an applicant, but which was not

[84] Figures supplied by CCRC to the author in February 2012.

deployed at trial. It might, for example, take into account evidence which was inadmissible in reaching a conclusion on a case.

The result is that sometimes Committees are called upon to discuss the balance between some new factor that tends towards a referral and some fresh material that is inculpatory. In case SHCR58, the applicant was able to shed some doubt on the veracity of some aspects of the police investigation. However, DNA testing to a degree of sophistication that was not possible at the date of the original investigation provided further evidence in support of the prosecution case. Without this the case might well have resulted in a referral, but after a careful review of the weight of both new features the Committee concluded that the inculpatory material was much more compelling than the other material and declined to refer the case.

In similar vein, case SHCR56 involved an applicant who asserted that a third party had subsequently confessed to the murder of which the applicant had been convicted. There was a complex legal hearsay issue to be considered, and the committee was minded to refuse the application having regard to the precedents that the CACD would be likely to follow. The point was, however, a finely balanced one. The CCRC asked the applicant whether he would consent to a DNA test that would enable comparison with semen found on the body of the victim. The applicant consented and the testing established, to a very high degree of probability, that it was his semen on the victim. This did not preclude the possibility that a third party had subsequently committed the murder, but the likelihood of that was considered so remote that the Commission dismissed the possibility. It was not only cases involving advances in DNA technology that generated further inculpatory material. Another case involved inculpatory material from advances in the identification and matching of fibres.

This aspect of the Commission's work is not something that the Commission can easily promote.[85] The restriction that is placed upon divulging confidential information means that the Commission cannot release details of findings of this sort. Although the sampling suggests that such cases are relatively rare, they are of particular interest from an innocence perspective since they tend to demonstrate guilt rather than innocence.

7.12.5 Conclusion on Fresh Evidence Cases

The review of this sample of cases involving fresh evidence led me to a number of conclusions. First, many of the evidential issues present great difficulties. Evidence is often difficult to acquire and where it is acquired there are difficulties evaluating its importance. The extent of these difficulties led me to conclude that some cases are intractable and could not be advanced. I think it would be easy to underestimate the importance of this finding. There were some cases that troubled me,[86] but in the end they were just intractable. Ultimately, CCRC has to reach a conclusion on such cases, but the conclusion in these cases was that there was insufficient new material to justify a referral.

The second major conclusion, which flows from the preceding observation, is that for an innocent person to have any realistic prospect of having a conviction quashed on a factual basis there has to be some fresh evidence about the crime. An individual may have his conviction quashed on due process grounds, but in such cases that usually has no direct link to the issue of innocence. CCRC may, because the CACD may do so, have some regard to the strength of the evidence against in a due process case, but the focus is much more concentrated on the due process issue. It is also possible that an applicant may persuade CCRC to refer his case on the basis that there is a lurking doubt, but that is such a rarity that fresh evidence is undoubtedly the key.

[85] Criminal Appeal Act 1995 s23 prohibits disclosure except in limited circumstances.

[86] I set out more on this topic below.

7.13 APPLICATION OF THE REAL POSSIBILITY TEST

The common thread which connects virtually all of the cases in the Committee Refusals sample is that they entailed the application of the real possibility test in a much more detailed and considered manner than the majority of the cases in the random sample. The cases had passed the bare possibility test and there was detailed deliberation to determine whether they had reached the real possibility threshold. The arguments here focussed very clearly on the likely approach of the CACD. The nature, as opposed to the substance, of the potential ground for referral, whether due process or fresh evidence, was irrelevant. The focus was on the strength of the point that could be deployed for the applicant and the CACD's likely reaction.

This involves CCRC monitoring closely the approach of the CACD. I can illustrate this by reference to cases involving "historic" sex offences, but the same level of scrutiny by CCRC applies to any category of case.

Case SHCR36 was an application received in early 2001. The case involved a conviction in the late 1990s in relation to the sexual abuse of three young girls in the early 1970s. The application was not a strong one with the applicant asserting that he had not had a fair trial, that there had been prejudicial press coverage, that defence counsel had failed to cross examine with vigour and finally that the prosecution had not tendered any medical evidence. There was relatively little in these points, but as the review was taking place the CACD gave judgment in the case of *R v B (Brian Selwyn).*[87] The CACD used its residual discretion to quash a conviction in relation to sex offences that were alleged to have happened between 1969 and 1972, of which the defendant was convicted in 2002. The CACD accepted that, in essence, the defendant could do little more than assert that he did not commit the crimes. However, given that, as the CACD itself said that the

[87] *R v B (Brian Selwyn)* [2003] EWCA Crim 319.

facts of the case were "far from unique" the question arose about whether similar cases might result in a similar outcome.

The CACD considered how far that judgment might be extended in *Mansoor.*[88] The incidents complained of were of more recent origin having occurred in the 1990s and the CACD upheld the conviction. In doing so it characterised the decision in *R v B* as a "lurking doubt" case. Later in 2003 the issue arose again in *Soares*[89] and *SOA*.[90] The CACD's approach seemed to be to narrow the potential scope for further successful appeals based on *R v B*.[91] This trend has continued since then.[92] In the case under review at CCRC a very careful analysis of the authorities was undertaken. Ultimately, CCRC judged that the case could be distinguished from *R v B* and that was what the CACD would be very likely to do and hence the real possibility test was not satisfied.[93]

7.13.1 The Discretion not to refer

Before considering cases which troubled me but in which the Committee concluded that there was no real possibility of a conviction being quashed, I should also record that there were a number of cases where the test was satisfied, but CCRC exercised its discretion not to refer the case.

The authority for the proposition that CCRC can only refer a case on the basis of a decision by three Commissioners, but does not have to do so was set out in

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[88] *R v Mansoor* [2003] EWCA Crim 1280.

[89] *R v Soares and Others* [2003] EWCA Crim 2488.

[90] *R v SOA* [2003] EWCA Crim 3146.

[91] Though Newby argues to the contrary. See Mark Newby, 'Historical Abuse Cases: Why they expose the Inadequacy of the Real Possibility Test' in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan 2010).

[92] See for example *R v B (Leslie Richard)* [2006] EWCA Crim 2150 or more recently *R v E* [2012] EWCA Crim 791.

[93] Newby n91 would disagree.

chapter two. In fact, my samples would suggest that if the Commission is going to exercise its discretion not to refer a case, then it is quite likely that such a decision will be made by a committee of three Commissioners. In the sample of Committee refusals, 17 involved the exercise of a discretion not to refer.

The commonest reason for such a decision was that, although there might be grounds for a referral in respect of one or more convictions, the applicant had been convicted of a number of other, usually similar, offences and the quashing of one or more convictions would not have any impact on his position. Case SHCR24 is an example. The applicant was convicted in the mid 1990s of various sexual offences committed during the 1980s. It subsequently emerged that one of the complainants had previously made a false allegation to a different police force. CCRC accepted that if the jury had known that fact, it might well have affected their judgment on the particular charge, especially since the applicant was acquitted of a number of charges at the original trial. However, since he was convicted of a large number of offences and the quashing of this particular one would have no impact on the sentence he was serving, CCRC exercised its discretion not to refer the case.

At a casework briefing in 2011 CCRC provided delegates with case papers that had been carefully rendered anonymous. Most delegates, the author included, failed to spot a minor flaw in the indictment, which referred to the crime having being committed between the 1st May and the 31st April of the following year.[94] CCRC took the flaw in the casework study to be insufficient for the indictment to be fatally flawed. However, there have been cases pursued by CCRC on the basis of a flawed indictment that have resulted in convictions being quashed.[95] In case SHCR26, the Commission's routine checking of such matters also revealed that one of the indictments in the case was flawed. However, since there were multiple indictments that were valid the Commission declined to refer the case.

[94] There are only 30 days in April.

[95] Indeed, one of the few Commission cases to reach the House of Lords, *R v Clarke* [2008] UKHL 8, was founded on the fact that the indictment had not been signed.

In the context of innocence the exercise of a discretion not to refer is usually made where there are other convictions that are not affected by the issue that meets the real possibility test. Thus, even if the individual is innocent of the particular offence, he remains convicted of other offences for which the real possibility test is not met.

However, that is not always the case. In some cases there are issues of public benefit to consider especially when the case relates to convictions many years prior to the application. The judicial review case brought by *Mary Westlake* on behalf of her half brother Timothy Evans, who was hanged in March 1950 for the murder of his daughter, brought the exercise of discretion into sharp focus.[96] The Commission declined to refer the case on the basis that Evans had already been granted a free royal pardon and Evans' family had already received compensation. Accordingly, CCRC decided, balancing the public and private interest that there was insufficient public benefit to justify the time and cost of an appeal. The Divisional Court, having weighed the arguments over the benefits and costs issue at length, upheld the decision.[97] By the time the CCRC referred the case of *Luckhurst*[98] to the CACD in 2009 it was actively seeking further guidance on whether to exercise its discretion and not refer "old" cases. The CACD, having declined to give directions to the Commission in how to exercise its discretion, did nevertheless offer some guidance, admonishing the Commission in respect of the *Luckhurst* case as it did so:

> *"In cases of this age, where the defendant has died, the test to be applied by the Commission should not be the rather negative approach that there is "no justification not to refer it" so that it should be referred.*

[96] *Westlake v CCRC* [2004] EWHC 2779 (Admin).

[97] CCRC also noted that although the Brabin report (Mr Justice Brabin, *Case of Timothy John Evans : Report of an Inquiry* (HMSO 1966)) had suggested Evans may have murdered his wife, he had not been tried for that and thus, no reference was possible on that issue.

[98] *R v Luckhurst* [2010] EWCA Crim 2618.

> *We suggest that the approach should be the other way round: that in the judgment of the Commission there should be a positive justification for referring such a case before it is referred. Left to ourselves, we should not have granted any extension of time."*[99]

From an innocence perspective these observations by the CACD are troubling. Suppose in *Luckhurt's* case there had been some rather more compelling fresh evidence presented.[100] Since *Luckhurst* died in 1998 could there be a positive justification for the CCRC to refer the case at the behest of his widow? The result could be that the Commission declines to refer an old case[101] for lack of positive justification even where there is fresh evidence of innocence.

7.14 TROUBLING CASES

As I read the committee refusal cases I came across cases in which the decision not to refer was very finely balanced. In 26 of these cases the decision was one that I found troubling. They were cases that I might have referred. There is a need for caution here. To draw any conclusions from these cases requires more than a disagreement on my part about the decision in an individual case. In the same way that one should be cautious about drawing conclusions about the operation of the CACD upon the basis of disagreeing with one appeal decision, so one should be cautious about reaching conclusions about CCRC's performance on the basis of disagreeing with individual decisions. When I had completed the data collection I analysed these cases to identify what characteristics they shared which gave rise to my doubts about the refusal to refer. I had not set out any criteria in advance try to identify such cases for two reasons. First, I did not know

[99] Ibid [54].

[100] The case, from the 1960s, reads rather like an Agatha Christie story, and although the phrase lurking doubt is not used, there is a sense that the referral was on that basis.

[101] And, of course, there is no precise definition of what constitutes an old case.

if such cases would exist. Second, I did not know what criteria might be appropriate for such an exercise. So, having logged certain cases as "troubling" I then analysed them to see if they shared common characteristics.

As part of this analysis I considered the following factors. The strength of the prosecution and defence cases at trial. Whether, in the light of that if I had been a member of the jury, would I have been sure of the defendant's guilt? Further, if I might not have been convinced myself, could I understand why the jury had convicted D? Then in the light of any fresh evidence that emerged as part of the CCRC review would I have remained sure of the defendant's guilt or satisfied that the original jury would still have convicted the defendant. In essence, I was trying to adopt a jury impact test in accordance with Lord Bingham's guidance in *Pendleton*.[102] If I was unsure of the defendant's guilt or not satisfied that the original jury would have still convicted, then I classified the case as "troubling."[103]

Some key points need to be made before I set out the characteristics that such cases shared. First, my approach is consistent with that of the CACD in treating each fresh evidence case as unique and not specifying, in advance, the criteria to be applied in determining the outcome. Second, just like the CACD and unlike the jury I did not have the benefit of hearing the evidence in court.[104] Thirdly, as well as not specifying criteria in advance the CACD also has available to it the concept of lurking doubt.

When I viewed each of these 26 cases specifically to try to form a conclusion on whether the applicant was innocent I was unable to reach such a conclusion. Whatever doubts I may have harboured about the refusal to refer were not based on any conclusion about innocence. Indeed I should state the conclusion even

[102] *R v Pendleton* [2001] UKHL 66.

[103] I should emphasise that I was applying this approach to cases that a CCRC committee had declined to refer.

[104] Equally I did not have the benefit of hearing an oral submission by Counsel, but I did have access to a full range of file papers some of which may not be seen by the CACD.

more strongly. In not a single one of the 172 Cases in the committee refusals sample did I conclude that the applicant was innocent.

I found that, typically, the cases were not initially particularly strong and often based on circumstantial rather than direct evidence.[105] There was invariably some fresh evidence, which tended to undermine the prosecution case, occasionally counter-balanced with some fresh inculpatory evidence. Fresh evidence came from both witnesses of fact and experts. Cases had, universally, been very thoroughly, indeed exhaustively, reviewed. Great care had been exercised by CCRC to pursue available lines of enquiry. Many of these cases displayed a tension between CCRC's perception of its inquisitorial role and the adversarial approach of many representatives.[106] The final, key, characteristic of these cases was that, since they almost always involved some fresh evidence, they involved the application of the real possibility test taking particular account of the CACD's approach to fresh evidence and in particular its application of the provisions of s23 of the 1968 Act.

I can illustrate cases of concern by reference to case SHCR112, a conviction for armed robbery.[107] The defendant put forward an alibi that had, obviously, been disbelieved by the jury. On application to CCRC further forensic evidence was identified which suggested that another individual had been responsible for the crime. The nature of the evidence was such that a prosecution was started against that person. That prosecution subsequently foundered and the trial judge directed an acquittal. This was a clear finding that there was insufficient evidence against that person upon which a properly directed jury would be entitled to

[105] I am not intending to suggest here that circumstantial evidence is inferior to direct evidence. I have noted elsewhere in this thesis the limitations of direct evidence such as identification. The description of the "typical" case is merely an observation and I do not suggest that it forms the basis for any conclusion about the merits of different types of evidence.

[106] This is not intended as a criticism of either CCRC or representatives merely an observable difference of approach.

[107] By way of balance I should also observe that in three cases I thought a decision not to refer was sound, but a subsequent re-application was referred. One case resulted in the conviction being quashed. The other two cases are pending at the CACD at the time of writing.

convict. The existence of at least some evidence, albeit insufficient to justify a conviction, might have been enough to raise a reasonable doubt in the mind of the jury at the applicant's original trial. For that reason I classified the case as "troubling".

I outlined in chapter six the CACD's general approach to cases involving fresh evidence and conclude that it lacks clarity and consistency. As a result the task facing commissioners is one of considerable difficulty. Although I was troubled by these cases and felt them worthy of referral, I found, in each case, that the committee had sought to apply the test as they anticipated that the CACD would do. Ultimately, I considered that their conclusions were well founded and that whatever my doubts, if I had been charged with discharge of the statutory real possibility test, I would have reached the same conclusion.[108]

The fact remains, however, that this small body of cases troubled me. The implications of my concerns are addressed in the evaluation of CCRC's performance in chapter eight.

7.15 COMMITTEE REFUSAL SAMPLE CONCLUSIONS

The cases in the sample of committee refusals exhibit a very markedly different set of characteristics from the majority of the cases in the random sample. Whereas most cases in the random sample had no realistic prospect of securing a referral, the majority of cases going to committee did have such a prospect. They were reviewed in much greater detail. All contained the essential element of some fresh evidence or argument. The sample contained examples of due process, pure law and evidential issues and sometimes a combination of those issues within one case.

[108] Or at least I could have been persuaded to do so by another commissioner.

The cases that had at least some fresh evidence component focussed attention on claims of innocence more than the cases involving due process issues. The cases involving fresh evidence also illustrated the difficulties encountered by commissioners in trying to apply the real possibility test when giving due heed to the approach of the CACD towards fresh evidence and, in particular, the application of the tests in s23 of the 1968 Act.

My next step is to evaluate the observations and conclusions from both samples to assess how effectively CCRC deals with claims of innocence. That evaluation, and the detailed answers to the questions set out in Section 7.2 of this chapter, form the basis of chapter eight.

Chapter Eight – Evaluation of CCRC

8.1 INTRODUCTION

How effectively does CCRC deal with claims of innocence? In this chapter I draw on my observations at CCRC to test my hypothesis that innocence is not a material consideration for decision-makers in post-conviction decision-making processes. I consider two broad approaches to evaluating CCRC and conclude that an evaluation assessing performance qualitatively is more appropriate. I identify qualitative measures and use my research observations to reach conclusions about CCRC's handling of cases involving claims of innocence. CCRC does not explicitly consider innocence as a separate criterion. However, where there is fresh evidence or argument to consider, reviews are conducted very thoroughly and evidence evaluated with great care. Nevertheless, I also identify areas of weakness and assess the implications for those claiming innocence.

8.2 EVALUATING PERFORMANCE

Assessing the performance of an organisation like CCRC is difficult. A wide range of questions might be posed and answered to form the basis for a judgment of performance. How quickly does it determine applications? Does it have a positive media image? Does it operate to tight fiscal standards? Does it achieve the strategic objectives that it sets itself? The crucial question, I suggest, is whether it correctly identifies and refers possible miscarriages of justice to the appropriate appeal court. Although my focus is on how CCRC handles claims of innocence, the fact that CCRC must consider a wider range of issues provides an important

context for its work. If that is the crucial question, then how can we assess whether CCRC is consistently achieving success?

8.3 Possible Measures of Success

Broadly speaking there are two ways of measuring success. The first is to use quantitative assessments, by collecting and interpreting numerical data in a way that enables a conclusion to be drawn about the extent to which CCRC is reaching its targets. Alternatively, a qualitative assessment focussing on the quality of the work undertaken on a particular case or sample of cases can be used. The methods need not be mutually exclusive. I consider first the utility of quantitative measures.

8.4 QUANTITATIVE MEASURES

8.4.1 CCRC's Referral Rate

In my study CCRC referred fewer than 4% of the applications it received to the relevant appeal court. Professor John Cooper paints the picture thus, "but a glance at the statistics reveals that out of 13,368 applications since 1997 only 470 have been referred. Something is not working."[1] The first objection to this statement is that the conclusion that "something is not working" is not a logical inference from the statistics in the sentence that precedes it. The referral rate is merely a record, expressed as a percentage, of how many applications were

[1] John Cooper, 'CCRC and Court of Appeal' (2011) 175 JPN Criminal Law and Justice Weekly 298.

received and how many cases were referred. At a logical extreme it can be argued that the optimum referral rate is zero. Such a referral rate could be regarded as an indication that the criminal justice system was functioning effectively, because no errors had been identified. It is improbable that human error can have been eliminated so such a finding would be unlikely. If it is inappropriate to conclude that a low referral rate indicates failure on the part of CCRC, then it is also inappropriate to conclude that a low rate is indicative of a well functioning criminal justice system. Either could be true; the rate of referral leaves us unable to discern between them.

Naughton argues that CCRC is not operating as envisaged by the organization JUSTICE in the period before and after the Royal Commission.[2] It is worth considering therefore what, from a statistical perspective, JUSTICE predicted would happen. In its 1994 response to the Home Office consultation paper on establishing a Criminal Cases Review Authority, JUSTICE assessed the likely level of work and referrals from that work.[3] In hindsight, it is possible to see that it over-estimated, predicting 1,650 annually, the number of applications that would be made.[4] However, it suggested that 59 of them would result in a referral, which equates to a referral rate of 3.58%. The average referral rate for the Commission from the period 1st April 1997 to 31st March 2011 is 3.71%. From a statistical perspective, therefore, one could conclude that CCRC is achieving almost exactly what JUSTICE expected, but there is more to the issue than the referral rate, because it is perfectly possible that the predictions that JUSTICE made were inaccurate.

[2] He has advanced this argument in various places but most extensively in Michael Naughton, *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan 2010) pp 222-228.

[3] JUSTICE, *Remedying Miscarriages of Justice* (JUSTICE 1994).

[4] CCRC receives around 1,000 applications a year a figure that has remained noticeably consistent throughout CCRC's operation. In 2012 CCRC introduced measures to make application easier and there was a total of 1,625 applications in 2012/13.

In the context of claims of innocence the referral rate is also misleading. A significant number of applicants to CCRC[5] are pursuing an issue about their sentence, not disputing guilt. CCRC's case numbers also include, for example, matters which they are asked to investigate by the CACD. In addition CCRC will decline to consider a case where an applicant has an appeal in progress with the CACD, but the application is still recorded as an application. The result is that the figure of referrals is not only an unsound basis for conclusions, but also potentially misleading because some applications could never generate a referral.

8.4.2 Comparing the Referral Rate with Previous Arrangements

Another way to try to evaluate the performance of CCRC is to compare the rate of referrals with the rate under the system that preceded the introduction of CCRC. That system, widely regarded as unsatisfactory, placed the power of referral in the hands of the Home Secretary.[6] The Home Secretary based his decisions on advice from civil servants within Division C3 at the Home Office.[7]

Cooper asserts that, upon the advice of C3, the Home Secretary referred 10% of the cases it considered.[8] Naughton makes a similar assertion comparing CCRC's referral rate thus:

> *" This [CCRC's referral rate] equates to a referral rate of less than four per cent, significantly less than the ten per cent of applications that were referred to the Court of Appeal each year by C3 Division, which*

[5] About 14%. Figure provided by CCRC.

[6] Criminal Appeal Act 1968 s17.

[7] A description of this arrangement may be found in Rosemary Pattenden, *English Criminal Appeals 1844-1994 : appeals against conviction and sentence in England and Wales* (Clarendon Press 1996) pp 348-378.

[8] John Cooper, 'Losing your innocence: The Criminal Cases Review Commission 14 years on' (Ewan Davies lecture, Cardiff, May 2011) p2.

was accused of being slow, inefficient, reactive rather than pro-active, and of showing too great a deference to the Court of Appeal." [9]

Neither author cites a source for the figure of 10%, but given the criticisms of the arrangements prior to the introduction of CCRC [10] such a reduction merits investigation. In contrast to the ready availability of statistical data from CCRC, the data for the period prior to 1997 has to be compiled from a variety of sources. The following table suggests that the figure of 10% is an over-estimate.

Table 8.1 – Home Secretary referrals - estimates of percentage.

Period	Applications	Referrals	Percentage
Not specified[11]	700-800 per year[12]	10 per year	1.43%[13]
1982-1991[14]	700-800 per year	97	1.39%[15]
1992	790	11	1.52[16]

[9] Michael Naughton, 'Criminal Justice System Still Failing the Innocent' (2011) <http://www.innocencenetwork.org.uk/criminal-justice-system-still-failing-the-innocent> accessed 11th February 2012.

[10] Pattenden n7 p387-396.

[11] Richard Nobles and David Schiff, 'After Ten Years: An investment in Justice' in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan 2010) p151.

[12] As reported by the Home Office to the Royal Commission. See *The Runciman Royal Commission on Criminal Justice* (Viscount Runciman Cmd 2263 1993) Ch 11 Para 5.

[13] Calculated as 10/700 expressed as a percentage.

[14] Figures derived from HC Deb 10 March 1992 vol 205 cc483-4W.

[15] Calculated as 97/10 years, divided by 700 expressed as a percentage.

[16] *The Runciman Royal Commission on Criminal Justice* n12.

If the referral rate is a useful measure of effectiveness, then the figures suggest that, as CCRC refers a higher percentage of the applications it receives than the Home Office did, CCRC is performing more effectively. For the reasons explained above, I do not consider that this is a justifiable conclusion. The current arrangements could just be less unsatisfactory than the previous one. The issue is whether they are satisfactory in ensuring that appropriate cases are referred back to the CACD.

8.4.3 CCRC's Contribution to Correcting Miscarriages of Justice.

Nobles and Schiff calculate that CCRC's annual contribution to remedying wrongful convictions and sentences stands at 0.058%,[17] which, in their view, calls into question CCRC's ability to claim success in its annual reports. They arrive at this figure by expressing the average number of successful appeals following a CCRC referral as a percentage of all successful appeals.

Nobles and Schiff's approach may be criticised on two levels; the practical and the theoretical. From a practical perspective the figures used for the calculation need to be robust. They assert, for example, that the average number of successful appeals against conviction is "in the region of less than 300".[18] In the years 2001-2005 the single highest number of successful appeals in any one year was the 240 in 2004 and the overall average for the period was somewhat lower at 189.4, significantly less than the figure quoted by Nobles and Schiff.[19] This makes a considerable difference to the calculation of the percentage. A

[17] Nobles and Schiff n11 153.

[18] Ibid 152.

[19] Unhelpfully there are two versions of the Judicial Statistics for 2005. They are: *Judicial Statistics: England and Wales for the year 2005* (Department for Constitutional Affairs, The Stationery Office Cm 6799, 2006) and *Judicial Statistics (Revised): England and Wales for the year 2005* (Department for Constitutional Affairs, The Stationery Office Cm 6903, 2006) The relevant table for this present calculation is 6.1 and appears to be identical in both versions.

calculation, restricted to appeals against conviction, on the basis of successful CCRC referrals compared with all appeals allowed the figure that emerges is rather different. Over the period 2001-2005 there were an average of 189.4 successful appeals against conviction. There were 25 successful conviction appeal referrals by CCRC in 2006/2007.[20] On that basis CCRC's contribution to correcting miscarriages of justice could be said to be 13.2%.

Theoretical issues are also of concern. First, the volume to which Nobles and Schiff were contributing was focussed on claims of innocence. My focus on innocence led me to exclude from consideration those cases involving an appeal or application against sentence only. This is on the basis that such cases are not from an individual asserting innocence. Sentence appeals are much more numerous in the day to day work of the CACD and relatively rare in the referrals of CCRC. By including sentence referrals and appeals CCRC's "contribution" to addressing cases involving claims of innocence might be underestimated.

The second theoretical objection is that Nobles and Schiff acknowledge that the number of miscarriages of justice is unknowable because there may be miscarriages that remain uncorrected. If we can never know the true number, then we must have difficulty calculating CCRC's numerical contribution. The third theoretical objection is that Nobles and Schiff do not define miscarriages of justice, but treat every successful appeal as such a miscarriage. Some commentators take the view that the correction of error at the first opportunity should be considered evidence of a well functioning system, not evidence of a miscarriage of justice.[21]

[20] I use the 2006/2007 figure because Nobles and Schiff do so. The average for the period 2001-2005 is 21.4 so CCRC's contribution would be 11.3%.

[21] Tom Bingham, *The Business of Judging : Selected Essays and Speeches* (Oxford University Press 2000) p269.

8.4.4 CCRC's own measures of performance

Following the appointment of Professor Graham Zellick as Chairman in succession to Sir Frederick Crawford in 2003 CCRC engaged consultants to review its working practices.[22] One consequence was the publication of an annual business plan and a three-year corporate plan. The business plan sets out key performance indicators (KPI), measurements by which an organisation is able to assess whether it is performing satisfactorily or not. The 2009-2010 iteration of the business plan sets out as KPI a target of successful referrals of between 60% and 80%.[23]

The difficulty with key performance indicators in an organisation like CCRC is that they may be misleading, inappropriately targeted and relate to factors beyond the control of the organisation. For example, one can measure how long it takes for cases to be reviewed. A KPI can be established for cases to be reviewed within a certain timescale. It may be met satisfactorily, but that tells one nothing about the much more important issue of whether the *quality* of the review was good. If quality is not measured, but speed is, it raises the risk that in order to meet the target the review is not undertaken as thoroughly as it should be. KPIs which measure performance by reference to the number of complaints or the number of judicial review actions are, to a degree indicative of the Commission's performance, but they are also heavily influenced by the behaviour of applicants who are, inevitably, mostly unhappy with the outcome of a review or a decision of the Commission. The Commission is not in the business of having contented customers, which is not to say that it should not treat its applicants with respect and courtesy; it is in the business of conducting a high quality review of an application.

[22] Referred to in CCRC Business Plan 2006-07 p3.

[23] CCRC Business Plan 2009-10 p19.

I make these points about KPIs generally to indicate that the criticisms of the referral KPI are not specific to that particular KPI. When the KPIs were originally introduced they did not include one in relation to the success rate of referrals. As far as I can establish that first appears in the 2007-08 Annual Report.[24] The target is to achieve a success rate of between 60% and 80%. In 2010-11 the annual figure slipped below 60% (to 59.4%).[25] The problem which this generates for CCRC is that if the organisation is truly being driven by KPIs, and otherwise why have them, then the logical management response to missing this target would be to take a more restrictive approach to referrals, eliminating more marginal ones in order to ensure that the KPI is met in 2011-12. And if 2011-12 were to prove highly successful with over 80% of referrals successful then a much more liberal approach would follow.

Measuring performance quantitatively is relatively easy, but potentially misleading. The success rate on referrals is an interesting piece of data, but it cannot, in isolation, enable one to objectively assess CCRC's performance. If it stood at 20%, it would not necessarily indicate poor performance.

8.5 QUALITATIVE MEASURES

I noted a number of the assessments made of CCRC's performance in chapter three. As I undertook the research I considered it prudent to assess, upon examining CCRC's internal case files, two particularly trenchant strands of criticism of CCRC; that it works within defined parameters of the legal system and that it lacks independence. These, it is asserted, prevent it from dealing effectively with claims of innocence. I use the data I gathered to try to judge the merits of the criticisms. This provides me with an alternative approach to assessing CCRC's

[24] CCRC Annual Report and Accounts 2007-08 p33.

[25] CCRC Annual Report and Accounts 2010-11 p63.

performance. This means, in turn, that if the subsidiary questions I devised are defective in some manner, I can answer a different set of questions to reach a conclusion. The fact that those questions are posed by a third party provides additional independence and safeguards against possible bias in my own questions.

8.5.1 CCRC is not what the RCCJ or JUSTICE envisaged

Naughton argues that the current post appeal system is not that envisaged by the RCCJ or JUSTICE. His key points may be summarised as follows:

- JUSTICE envisaged the review body[26] examining cases of wrongful conviction as popularly understood (i.e. convictions of the factually innocent).[27] CCRC on the other hand works within the parameters of the legal system and is not concerned with whether applicants are innocent or guilty.
- CCRC lacks the independence that JUSTICE said that it needed and which the RCCJ recommended.
- JUSTICE envisaged that a review would consider all the evidence in a case not only that which was fresh evidence.
- That CCRC's investigatory role is restricted in a way which JUSTICE did not envisage, particularly because it is constrained by the "real possibility" test.

[26] At this stage the proposed body was referred to as the Criminal Cases Review Authority.

[27] This represents my understanding of Naughton's position. See, for example, Michael Naughton, 'The Criminal Cases Review Commission: Innocence versus safety and the integrity of the criminal justice system' (2012) 58 Criminal Law Quarterly 207.

8.5.2 CCRC works only within defined parameters of the legal system

Naughton rightly asserts that JUSTICE focussed, in its 1994 submission, on miscarriages of JUSTICE in the sense of the wrongful conviction of the innocent.[28] However, the Home Office consultation paper, to which JUSTICE was responding, indicated that the Government had accepted the majority view from the Royal Commission that errors at trial should fall within the scope of the new body's duties.

CCRC does not fit precisely the JUSTICE proposal, but since CCRC's remit is wider than that proposed it can encompass the role JUSTICE envisaged. It does not preclude consideration of applications from those asserting factual innocence. I found no evidence that the wider responsibilities of CCRC, encompassing due process issues, caused it to pay no heed to claims of innocence.[29] The suggestion that CCRC differs from the model conceived by the RCCJ is disputed in robust terms by one of the original members of the Runciman Commission. In a paper presented to a symposium in 2012 Professor Zander observed that he thought that there had been a "serious misreading of what the Royal Commission envisaged."[30]

8.5.3 CCRC's Independence

The first issue here is: what do we mean by independent? Zander is clear in asserting that CCRC has the independence envisaged by the RCCJ.

[28] JUSTICE n3 was clearly mindful of its own work on such cases and, in identifying cases suitable for review by the Commission, suggested criteria that focussed on such cases.

[29] I dealt in chapter three with the criticism of CCRC's stated approach to innocence.

[30] Michael Zander, 'Does the CCRC live up to what the RCCJ envisaged?' (Helping the Innocent: Symposium on the Reform of the Criminal Cases Review Commission, London, 30th March 2012).

> *"The Royal Commission explained what it meant when it said that the new body should be independent of the Court of Appeal. Paragraph 15 of chapter 11 of the Report begins, 'We believe that there are cogent arguments for the Authority to be independent of the Court of Appeal.' The paragraph then spelled out what that entailed. There were three ingredients – namely, that the new body, rather than the Court of Appeal, should carry out investigations; that it should not come within the court structure; and that it should not take judicial decisions. The CCRC unquestionably satisfies those three tests."*[31]

One could argue that CCRC is independent because it is able to make references without taking account of the wishes of the CACD or a Government Department.[32] On the other hand one can take the view that whilst, technically, CCRC is independent of the Executive, in the sense that there is no direct Ministerial control of its actions, it is dependent upon the Government of the day for its continued funding (and existence) and the level of funding. That these have a direct impact on its operations cannot be doubted, since the CCRC acknowledges in its Annual Reports the effects of some of these constraints.[33] But the concept of some truly free-standing independent body is naïve. Any body charged with examining miscarriages of justice will require funds and if such funds are to come from the public purse (and where else would they come from?), then the body can never be truly independent. The best that one can achieve is that its decision making process is unfettered. Parliament has set down the test it must apply within the current appeal framework and guidance on the application of the test may be derived from judicial decisions.[34] However, there is force in Naughton's point that

[31] Ibid.

[32] As illustrated in the tension which arose over the approach to be taken in change of law cases discussed in chapter three. See, for example, *R (Director of Revenue and Customs) v Criminal Cases Review Commission* [2006] EWHC 3064 (Admin).

[33] CCRC Annual Report 2011-12 p11.

[34] Particularly in the case of *R (Pearson) v Criminal Cases Review Commission* [1999] EWHC 452 (Admin).

the “real possibility” test means that CCRC has to have clear regard to the approach of the CACD.

This raises the question of whether I found evidence that CCRC’s decision making, on all cases, including those where innocence was in issue, was fettered by a lack of independence. At one level there was some evidence of this because all of CCRC’s decision making has to be done in the context of budgetary constraints. It is also true that all decisions on the application of the statutory “real possibility” test reflect CCRC’s subservience to the CACD. It would be possible to change this and I consider this possibility further in chapter nine. However, I did not find any evidence that CCRC’s freedom to act as it saw fit in reviewing, investigating or referring cases was fettered by the Executive, beyond the indirect impact of budgetary constraint.

8.5.4 The scope of review

The third point of critique relates to the scope of review. Naughton argues that neither the RCCJ nor JUSTICE envisaged a review being restricted to fresh evidence, but rather taking account all of the evidence in a case.

This raises two distinct issues:

- What did the RCCJ and JUSTICE envisage?
- Did I find evidence that the scope of reviews was restricted?

8.5.5 What did the RCCJ and JUSTICE envisage?

In fact JUSTICE, in its 1994 submission, said that for a review to be undertaken the review body must be satisfied that:

"There is some new evidence, issue or consideration relevant to the case which, if proved to be true and put into the context of the case as a whole, would cast doubt on the safety of the conviction: and

That it is susceptible to further investigation."[35]

This, it should be noted, is not the test for referral. This articulates the preliminary test that JUSTICE said should apply to deciding whether a case merited further investigation.

There are two key points to emerge from JUSTICE's suggested approach. First of all there is a clear requirement that there is something new, be it evidence, issue or consideration. To emphasise the point JUSTICE said that it would not be right or sensible to review a case that was an exact re-run of appeal. In fact the 1995 Act refers to neither fresh nor new rather "argument or evidence not previously raised" – but that is the test for referral, not the test for review. Secondly, JUSTICE suggested that the applicant might be able to propose a line of enquiry that met the requirement and the Commission should pursue the matter. JUSTICE went on to exclude cases that were not susceptible to further investigation citing, as an example, cases where "it is alleged that a prosecution witness has lied."[36] Further, their report went on to recognise that rape cases in which the defence is consent may also not be susceptible to further investigation. JUSTICE clarified that in referring to new evidence it was promoting a broader approach than the restrictive interpretation operated by C3 at the Home Office. It would include within new evidence "evidence that was previously known about but omitted for whatever reason."[37]

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[35] JUSTICE n3 p30.

[36] In this respect CCRC operates much more broadly than Justice suggested since it does not exclude such cases.

[37] JUSTICE n3 p30.

Bearing in mind that these recommendations were framed at the test for suitability for review how do they measure up when considered against what I found at CCRC? It is important to distinguish the review process from the referral decision.

The first consideration is whether I came across cases in which there was a new issue (of any kind), which was not investigated further without CCRC giving substantive cogent reasons for not doing so. I found no evidence of this. Indeed, given that my assessment was that a majority of applicants in the random sample were seeking a retrial and offered nothing new this is not surprising. There were cases in which the Commission declined to pursue lines suggested by the applicant. The Commission always gave reasons for its refusal. These ranged from concluding that the suggested line of enquiry was purely speculative,[38] to an assessment that the line of enquiry, if pursued, could not help the applicant[39] and considerations of the potential impact on victims.[40]

However, it was much more common to find that the Commission had pursued a line of enquiry suggested by the applicant even if the applicant could not himself provide "new" evidence. For example, in case SH10 the applicant asserted that an identification parade had been conducted improperly. As part of the initial analysis of the case the Commission listened to an audio recording of the parade. When the quality of the audio proved inconclusive CCRC commissioned work by two audio specialists to try to enhance the quality. Ultimately, the elements that were audible were insufficient to indicate any irregularity in the conduct of the parade, but the investigation was a detailed one. It should also be noted that even if the audio recording demonstrated that the ID parade was improperly conducted, that

[38] For example, an assertion, without any supporting material, that a key witness had lied.

[39] A common assertion was that there was an absence of forensic evidence to link the applicant to the crime and thus CCRC should commission forensic testing. This sort of request requires the Commission to consider what probative value any forensic evidence might have and in many cases it may have no such value.

[40] In accordance with CCRC's responsibilities under the *Code of Practice for the Victims of Crime (2006)* (Published under s32 Domestic Violence, Crimes and Victims Act 2004.)

might not necessarily be indicative of innocence. The applicant might have been guilty, but the fresh material could result in that evidence being excluded and the remaining evidence may have been insufficient to sustain a conviction. Other examples of CCRC pursuing a line of enquiry not raised by the applicant, such as case SH122, are given in chapter seven and are not repeated here.

8.5.6 CCRC's Investigatory Role is constrained by the "real possibility" test

This criticism needs to be considered at the theoretical and practical levels. From a theoretical perspective, if the real possibility test were found to constrain investigation, would the test proposed by JUSTICE offer a less constrained solution? The difficulty here is that the argument risks confusing two components: the test for review and the test for referral. The test for review, set out in detail above, is a relatively low threshold requiring the existence of some new material.[41] The fact that many applicants fail to meet the threshold may be because it is too onerous, but at this stage in the process the "real possibility" test is not being applied. At the theoretical level therefore the test for review is, as noted above, couched in similar terms with an emphasis on some new material. Indeed the JUSTICE proposal is narrower because it excludes certain classes of case, such as sex cases in which the issue was consent.

At the practical level I consider whether there is any evidence that the review phase was constrained by the application, perhaps prematurely, of the real possibility test. I did not find any evidence to support that contention.

[41] The threshold appears, in practical terms, to be identically framed in Justice's proposal and the 1995 Act.

8.5.7 Is the real possibility test unduly restrictive?

The final step in the process at CCRC is the application of the "real possibility" test and it is at this stage that CCRC will have regard to the CACD's likely view on any fresh evidence. So, given that the case has passed the JUSTICE "merits" test, and been reviewed and, let us assume, raised some level of doubt at the Commission, what test for referral did JUSTICE propose? The test they suggested was that there should be an "arguable case that there has been a wrongful conviction."[42] They went on to say that it was essential that the Commission applied a less demanding test than the CACD.[43]

The distinction between what JUSTICE proposed and what the Act provides, as far as making a referral is concerned, is between "arguable case" and "real possibility." Each constitutes the less demanding test that JUSTICE advocated. JUSTICE frames the test broadly and does not specify whether the arguable case applies to the original trial or to the appeal. The focus of its proposal is on "wrongful convictions" so it presumably applies to the appeal reference. In deciding whether there was an arguable case the review body would clearly have to apply some test to determine whether there was a sufficiently arguable case. The use of such a term would, I suggest, result in challenge and judicial consideration. Such consideration might result in a different formulation from the "real possibility" test as set out by Lord Bingham in *Pearson*,[44] but it is far from certain that it would do so. Ultimately, the referring body has to distinguish between those convictions that have some genuine prospect of being quashed and those that do not. The current formulation is designed to err in favour of referral (possibility being less than a probability) and moving to an "arguable case" test suggests a very similar approach. I suggest that if those words had been

[42] JUSTICE n3 p36.

[43] Ibid.

[44] *R (Pearson) v Criminal Cases Review Commission* n34.

used instead of “real possibility”, there would have been no practical difference in referrals.[45]

8.5.8 Conclusion.

I considered these criticisms of CCRC’s role in the post conviction process on their merits and then in the context of my research observations. I conclude that CCRC is quite close to the model proposed by JUSTICE and the RCCJ. In particular, the trigger for review places emphasis on the need for something new. The test for referral is framed in different terms, but that test is only applied once a review is completed. Whether more cases would be referred under an arguable case test than a real possibility test is not something we can know with certainty. However, both are a lower threshold than the test of safety that the CACD applies and so there may not be much practical difference between them.

In the context of my research findings I conclude that CCRC operates in a manner that very closely mirrors the JUSTICE proposal. It does seek a trigger for review and investigation. Not every application received is investigated, exactly as JUSTICE expected. It reviews and investigates certain classes of case that JUSTICE considered that it should not. I found no evidence that it prematurely applied the real possibility test. It certainly has the test clearly in mind in every application, but the review process is the key step in obtaining the information to enable the real possibility test to be applied.

[45] Clearly, if the test were to be changed by Parliament the Courts would have to consider what difference Parliament intended to effect. The Government may also have taken the view that since the term “arguable case” is used extensively in pre-trial procedure in civil litigation it was preferable to adopt a clearly distinct phrase.

8.6 MY EVALUATION - JUDGING QUALITY

Ultimately, what really matters about CCRC's performance is not something that can easily be measured numerically. Nor does it matter whether the organisation conforms particularly closely to a model espoused by a campaign group twenty years ago. There are two crucial issues for those asserting innocence. How well does CCRC serve them under the current arrangements and would their position be improved if innocence were made a specific factor that CCRC had to take into account?

This assessment of the quality of CCRC's performance is based primarily on the observations recorded in chapter seven. It also draws upon external evidence in the form of observations by the judiciary from judgments on cases referred on appeal and cases subject to a judicial review application. This evidence is not afforded equal weight to the research observations for two reasons. In the case of Criminal Appeal judgments the judges see only a small part of CCRC's work on a case and, of course, they do not see the cases that CCRC does not refer. Judicial Review proceedings provide the High Court with an insight into the work of the Commission in cases that it does not refer, but the Court is not generally assessing the quality of Commission's work. It is applying the judicial review tests to examine whether the Commission has failed to satisfy the relevant public law principles. Clearly this can include assessment of the quality of the Commission's work, but most judicial review applications focus on disagreement over the application of the "real possibility" test. The court recognises that CCRC has discretion here and the Court will be very slow to interfere. It would be inappropriate to conclude from the application of that different test that CCRC was consistently applying the test accurately. The High Court is assessing whether it has done so in a wholly unreasonable manner. For these reasons, although there is some evidence about quality to be garnered, I afford it less weight.

In assessing CCRC's performance I apply the findings reported in chapter seven to answer the questions posed in chapter four.

8.6.1 What claims do applicants make in their applications to CCRC?

The overwhelming majority of applicants make some assertion of innocence. This may be couched in a variety of different terms. Some directly assert their innocence; others claim to be the victim of a miscarriage of justice. Others assert that witnesses were mistaken or lying and still others that they were the victim of a police or prosecutorial conspiracy. They will often blame their legal representatives for failing to defend them successfully. In reality this does not take us forward in considering innocence. So many applicants assert innocence that, unless the scale of miscarriages of justice is much greater than anyone imagines, it is of little value in any attempt to differentiate cases.

I found that CCRC treats assertions of innocence neutrally, neither believing nor disbelieving them. This is a justifiable approach, given that it is not part of its statutory responsibility to consider innocence. CCRC asserts, in the case of conviction referrals to the CACD, that it focuses on safety and the real possibility test. I found that where an applicant asserted innocence the Commission reviewed the evidence (even where nothing fresh was submitted) and considered the strength of the case before applying the real possibility test. This was not an examination of innocence, per se, but it was a critical evaluation of the case heard at trial, usually supplemented by additional information. In fact, the only cases I came across in which the issue of guilt or innocence was not considered directly were those in which the applicant was arguing that he should have been convicted of a lesser crime. In those cases too, where the issue was often about reducing murder to manslaughter, the evidence was reviewed carefully. Some

would assert that this level of scrutiny is insufficient, but the balancing of resources and the existence of a queue of cases awaiting review renders an in-depth investigation as a routine approach impractical.

8.6.2 To what extent do applicants back up claims with evidence or argument?

I found that the overwhelming majority of applicants submitted little by way of fresh evidence or argument. There were a significant number of applications that were little more than a generalised complaint about the outcome of the trial and a plea for a re-run. There seemed to be a lack of understanding among many applicants of the onus on them to provide something new. In the absence of that, they still had the benefit of a review of their case, particularly with regard to due process issues, but unless there was some fairly clear point of concern[46] the case would not receive a detailed review.

8.6.3 What difficulties does CCRC face in reviewing applications?

Some of the difficulties that CCRC faces may not be fully appreciated. The most significant difficulty is that referred to in the answer to the previous question - the lack of anything new to consider. In addition, there are difficulties of process, such as an absence of relevant paperwork or the fact that the offence took place many years earlier.[47] Furthermore, there are various policy considerations taken into account before and during the review process. These could include, for example,

[46] Which could be either evidential or due process.

[47] Even in the most optimistically calculated estimate it is unlikely that CCRC will be reviewing a case in which the offence was committed recently. If we allow, say, a year between the crime and Crown Court trial, a year between trial and appeal being refused and a further year for the case to reach the front of the queue at CCRC it is likely to be a minimum gap of around three years.

whether there was public benefit in referring a very old case, the costs of investigation, whether the applicant had had repeated previous applications refused and the rights of victims.

8.6.4 Do particular types of offence create special difficulties?

I anticipated, based upon reading CACD judgments on sexual assault cases and "historic" sex cases, that these would present particular difficulties.[48] I found that to be the case. In a lot of sex cases the issue is consent and the decision on that, assuming no misdirection by the trial judge, is quintessentially a jury matter. It is very rare for an applicant to be able to furnish any fresh evidence on the matter.[49] Historic cases present an added layer of difficulty because of the need, in many cases, to try to find some documentary evidence refuting allegations. CCRC's power to inspect records of public bodies has proven helpful in a number of sexual offence cases, but its powers are of no avail if the public body concerned has destroyed the relevant records. Employment records relating to days worked thirty years ago are unlikely to still exist.

The other type of offence that created particular difficulty was an offence against the person during the course of a brawl. I was struck by just how confused (and confusing) the various accounts were. Once again, making sense of these, often conflicting, accounts is quintessentially a jury matter and finding fresh evidence that might resolve such conflict is unusual.[50]

[48] I anticipated this would be the case because the difficulties faced by the CACD in such cases were likely to be replicated in applications to CCRC.

[49] Though it does occasionally happen as in *R v Nkiwane* [2011] EWCA Crim 347.

[50] Again, there is an exceptional case such as *R v Hallam* [2012] EWCA Crim 1158.

8.6.5 Are CCRC's powers sufficient to fulfil its role?

I only observed one case in which CCRC's powers appeared insufficient to enable it to conduct the review exactly as it would have wished. In case SH186 the applicant asserted that one or more witnesses might have had some financial interest in the defendant being convicted. It was suggested that a now defunct national newspaper might have offered to pay the witness for his account. Enquiries were made with the newspaper but rebuffed. The changed arrangements for the forensic science service from 2012 onwards may make this a more significant issue.[51] The privatisation that has been completed means that much forensic work is now conducted in the private sector and CCRC has no statutory right to access the material.[52] It is also possible that, because CCRC staff are aware of the absence of a statutory power to force disclosure, they may in certain cases not seek it in anticipation of a refusal. For example, an insurance company might well refuse to disclose information without the consent of its client. I did not find evidence of this happening, but with CCRC's current powers the possibility cannot be excluded.

[51] 'Forensic Science Service to be wound up' (*BBC News*, 14 December 2010) <http://www.bbc.co.uk/news/uk-11989225> accessed 10 April 2012.

[52] In some cases contractual obligations exist but the enforcement of those would represent a much less certain outcome than the powers afforded to CCRC under s17 of the 1995 Act.

8.7 HOW THOROUGHLY DID CCRC CARRY OUT REVIEWS?

8.7.1 Were reviews carried out thoroughly and diligently?

This is a difficult judgment to make because, in a sense, CCRC could always do more.[53] However, I concluded that reviews were both thorough and diligent. Once there was something to review CCRC considered the case in detail. It pursued points worth following up, or gave a reasoned justification for not doing so. It commissioned expert reports on a range of topics including psychiatric, medical, ballistics and DNA. There was clear evidence from case files that reviews were unconstrained and points were pursued tenaciously, *provided that* there was some justification for doing so. If anything, there were some examples of over enthusiasm, where a point was pursued without sufficient thought being given to the "so what" test which one member of staff explained to me. Before pursuing a line of enquiry or commissioning an expert report, the case review manager should ask what impact knowing the outcome could have on the case. The example given to me was of a case in which DNA evidence on a training shoe was shown to be from the victim of a crime. As there were a number of ways this might have happened it had little probative value. The case was eventually an unsuccessful referral, with the CACD expressing its view about "*the very real limitations of the new evidence in the context of the facts of this case."* [54]

I preface the conclusion above with the precondition: "Once there was something to review…". This prompts a question about whether CCRC is unduly insistent upon some new evidence or argument. I found a very clear emphasis on the requirement for something new in the submission made to the Commission.

[53] To take this to an extreme level CCRC *could* re-investigate every single application to a similar level of detail as the original investigation, but that would be impractical.

[54] *R v Earle* [2011] EWCA Crim 17 [50].

Without it the response was likely to be a refusal. If the applicant raised contentions, there was an onus upon him to provide support for them. However, CCRC was generally alert to cases in which it would be difficult for the applicant to secure new evidence, such as the applicant who asserted that there was a paedophile ring operating within a particular police force.[55] I also found cases in which CCRC found new material itself when the applicant had not supplied it. Of course, I cannot guarantee on the basis of my research sample that CCRC did not fail to find new material that existed.

Cases that received full review did feature some new evidence or argument. They underwent distinct stages – collection of data (either evidence or argument), scrutiny of data to determine its reliability, assessment of the weight or strength of the material in the context of the case as a whole and finally the application of the real possibility test. This insistence on requiring something new seems justified on two levels. First, within the current arrangements it is a statutory requirement under the 1995 Act.[56] The statutory requirement is not absolute and can be overridden in exceptional circumstances.[57] Secondly, without such a requirement CCRC would be obliged to carry out a full review of every application. The resource implications would suggest that more staff and funding would be required and the virtual queue of cases awaiting review would be significantly lengthened.

I also found evidence that CCRC accepted that, in common with other parts of the criminal justice system, it could err. Richard Foster, CCRC Chairman, commented in an internal memo on a case file that it would be extraordinary if the body set up to deal with errors of the justice system considered itself to be incapable of error.

[55] Case SH308.

[56] Criminal Appeal Act 1995 s 13(1)(b)(i).

[57] Ibid s 13(2).

8.7.2 Did CCRC consider matters not raised by the applicant?

I found clear evidence that this was the case.[58] As noted above many applicants do not put forward clear substantial points in support of their application. CCRC expends considerable resources trying to establish from applicants precisely what arguments they are putting forward. As part of its routine work it will check matters that are beyond the scope of the applicant. So, for example, in sexual assault cases it will check social services records about the complainant, or the Impact Nominal Index,[59] or whether a claim was made to the Criminal Injuries Compensation Authority and if so whether there were any discrepancies between the accounts given at trial and to the CICA. Taking the initiative in this way has resulted in cases being referred that would otherwise have been refused.

8.7.3 When CCRC refused to pursue lines of enquiry, did it provide clear justification for its refusal?

The refusal to follow every suggested line of enquiry was a noticeable feature in the cases analysed, particularly in the random sample. CCRC provided a justification in each case. Often these followed a similar form relying upon points relating to resources, which would not be expended on speculative enquiries, or an absence of substance to assertions. As noted in chapter seven CCRC also refused to pursue lines of enquiry where there was a likely impact on a victim.

[58] As, for example, in the application noted at section 4.7

[59] The index is a computer-based information-sharing database that allows Police forces to access information on persons of interest. CCRC has access to it.

8.7.4 Was CCRC's review of applications clear and consistent?

I concluded that these objectives were, in the overwhelming majority of cases, met. The same issues were considered routinely regardless of the staff member or commissioner responsible for the case. Resource issues, victims' rights, the possibility of due process errors and a review of the evidence featured routinely. It was also evident that CCRC went to considerable lengths to try to elicit from applicants precisely what issues they wished to raise. Given that many applicants are disadvantaged or lacking in literacy skills this is an important dialogue. Ultimately, however, the single clearest point of consistency was the onus placed on the applicant to provide some argument or evidence that had not been raised previously. This was not used in an unthinking, reflex fashion and CCRC recognised the difficulties facing applicants in providing something new. However, where an applicant failed to provide it, and CCRC's preliminary work failed to suggest any avenue worth pursuit, the lack of something new proved fatal to many applications.

8.7.5 Was CCRC's handling of fresh evidence issues clear, consistent and thorough?

Given that cases involving fresh evidence tend to raise different issues from the majority of cases I considered whether the handling of them matched the general standard. The evidence enabling me to reach a conclusion on this question was more difficult to evaluate. There are, relatively speaking, only a limited number of fresh evidence applications. However, where there was some fresh evidence I found that it was pursued diligently provided that it was considered relevant. As observed above, CCRC may have erred on the side of over-pursuing fresh evidence. That investigative phase was carried out in a manner that I found clear, consistent and detailed. CCRC staff recognised the precise nature of their statutory role, but I found that they were particularly enthused in cases involving

fresh evidence that might show that the person was innocent.[60] There was some overlap in the approach to fresh evidence with the next question.

I also noted that there were a number of cases in which the collection of fresh evidence by further investigation was very difficult. Virtually every case involving a conviction on indictment and unsuccessful appeal received by CCRC involved a time gap of a *minimum* of three years between offence and application. The difficulty that this passage of time poses for re-investigation should not be underestimated. New evidence may be unreliable, witnesses untraceable, exhibits destroyed and so on. When new evidence is collected it may prove unhelpful to the applicant or it may add little to the case. Some cases are intractable. Even a surfeit of investigative diligence by CCRC cannot overcome some of these difficulties.

8.7.6 Was CCRC's application of the "real possibility" test clear and consistent?

For the most part the application of the "real possibility" test is something of a formality, since the review has identified nothing of substance that would merit a referral. So, taking into account all applications determined, I would conclude that CCRC applies the test in a clear, consistent and careful way. The issue becomes more finely nuanced in the cases that I describe as "troubling". These marginal cases are very finely balanced and as O'Brian observed in respect of fresh expert evidence cases,[61] CCRC could be bolder in making referrals. *Traynor* illustrates just how finely balanced these decisions can be.[62] Traynor was convicted of murdering his partner in 1993. He was refused leave to appeal and a 1998

[60] The view expressed to me informally by a number of staff and commissioners was that such cases were rare. This was also evident from the semi-structured interviews I carried out, as detailed at section 4.7.

[61] William O'Brian Jr, 'Fresh Expert Evidence in CCRC Cases' (2011) 22 Kings Law Journal 1.

[62] *R v Traynor* [2012] EWCA Crim 1116.

application to CCRC was refused. A further application that led to the identification of a possible alternative suspect was refused by a Committee of three commissioners. Following a judicial review application,[63] the Commission agreed to have the case considered by a differently constituted committee of three commissioners. They referred the case. That would suggest, therefore, that there is at least some inconsistency. What should we conclude when the CACD refused Traynor's appeal? Was the first committee right in declining to refer the case? As I have observed, care should be exercised in seeking to draw conclusions from individual cases, but this example at least illustrates how finely balanced decisions are.

I found that the application of the real possibility test by a CCRC committee was undertaken with great care. Committees went to considerable lengths to apply the test to the particular case and to predict the likely response of the CACD. In fresh evidence cases the committee carried out a very detailed assessment of the s23 tests and the case law. The application of the case law is problematic because of the confusion over Pendleton/Dial described in detail in chapter six. This led Committees to identify, on many of the refusals, the precise reason why they did not consider the real possibility test was satisfied. That might be because they considered that the CACD would find the evidence of a witness not "capable of belief" or "that there was no reasonable explanation" for the evidence not having been adduced at trial. The second of these is particularly pertinent to refusals to refer cases based upon fresh expert evidence.[64] Committees also demonstrated in their reasoning a clear understanding of the CACD's reluctance to use the concept of lurking doubt.[65]

[63] Justin Hawkins, 'Commission refers the murder conviction of Alan Traynor to the Court of Appeal' (*CCRC*, 6th April 2011) <http://www.ccrc.gov.uk/news/564_595.htm> accessed 24th January 2012.

[64] *R v Steven Jones* [1997] 1 Cr App R 86 CA.

[65] As discussed in chapter five and articulated by Lord Judge, LCJ in *R v Pope* [2012] EWCA Crim 2241 [14].

I conclude that the test is applied in a clear, consistent and carefully considered manner, bearing in mind that it represents the committee's attempt to make sense of the sometimes confusing picture that emerges from the judgments of the CACD.

8.8 TO WHAT EXTENT DO THESE CONCLUSIONS INDICATE THAT THERE ARE OBSTACLES FOR THE INNOCENT?

I identify three particular problem areas for applicants to CCRC. None of these is peculiar to, or enhanced in respect of, those claiming innocence. There is an issue at the start of the application process. CCRC is under pressure to use its resources prudently. It cannot reasonably spend time dealing with cases which lack merit. Efforts to identify applications which lack merit may, inadvertently, exclude some of merit. I did not find an example of this, but I could envisage it. There is a real onus on applicants to provide CCRC with something fresh in support of their application. Failure to do so will mean that CCRC will carry out some standard checks, which might identify some irregularity of due process, but are relatively unlikely to uncover any fresh evidence.

The second issue is whether CCRC might become "case-hardened" based on the regularity of a particular type of application. Certain issues arise with considerable frequency. Counsel's incompetence, a regretted guilty plea and assertions of witness/complainant retractions were all common assertions. The risk here is that CCRC's response becomes almost a reflex. So an application from someone who pleaded guilty may be met with a response which includes reference to authorities illustrating the CACD's reluctance to overturn a freely given, unequivocal guilty plea.[66] This is not to say that this will always be the response, and CCRC has

[66] *DPP v Reviit and Others* [2006] EWHC 2266 (Admin) contains a discussion of the relevant authorities.

referred cases where the applicant pleaded guilty,[67] but there is a risk that so many of these cases are lacking merit that it becomes a standard position. A similar risk exists in cases where allegations of incompetent representation are made when the Commission can cite, with good reason, the reluctance of the CACD to quash convictions on this ground.[68]

The third significant obstacle lies at the end of the process, when a case has been reviewed and a referral is under serious consideration. In these cases, the reviews were universally comprehensive and thorough. The issue in these was the application of the real possibility test. There are those who urge CCRC to be "bolder"[69] in referring cases, but to do so might be counter-productive.[70] A string of very marginal referrals might have a cumulative impact on the CACD, which in refusing the appeals, might view CCRC referrals with enhanced scepticism. It would also, in the eyes of some, perhaps all, Commissioners be an abrogation of CCRC's statutory duty. Referring cases because one is "troubled" by them is to fail to apply the real possibility test. The precise and forensic application of that test is a key responsibility of CCRC. In reality, when I examined those cases that troubled me, I found that the careful analysis of the likely response of the CACD was compellingly undertaken.

Nevertheless, at the end of the process I am still left with a small number of cases that trouble me (and, in truth, trouble some Commissioners and staff at CCRC).[71] Would making innocence a formal part of the process assist in such cases? Based on my analysis of in excess of 400 cases from the combined samples, I do not consider that it would. In not a single one of the cases that I found troubling did I conclude that the applicant was innocent. So, the question which then arises

[67] *R v Bargery* [2004] EWCA Crim 816.

[68] *R v Day* [2003] EWCA Crim 1060.

[69] O'Brian Jr n61 and see also Cooper n1.

[70] In chapter nine I examine the possibility that CACD has become less receptive to fresh evidence referrals in the past two years.

[71] I explained in chapter seven the characteristics of the cases that troubled me.

is whether those troubling cases merit different treatment from that which they now receive, and, if that is not to be based on the notion of innocence, how might that be achieved?

8.9 CONCLUSION

In this chapter I have considered the role of CCRC in correcting wrongful convictions. I have considered the criticisms made by other commentators and drawn upon my own research observations to assess those criticisms. I conclude that the criticisms of the current arrangements are often misplaced. If there are deficiencies in the current arrangements, they are not due to the quality or thoroughness of the investigation or the independence of CCRC. Although I observed some risks that cases might be missed, this was not attributable to a lack of either thoroughness or independence. It was the combined effect of requiring something new and resource constraints. The real obstacle lies in the application of the real possibility test. CCRC is predicting what it considers the CACD will do, and that is largely determined, as discussed in chapter six, by the generally conservative approach of the CACD, which appears to have changed little in the last twenty years. CCRC's predictive task is rendered even more difficult by the lack of consistency displayed by the CACD in evaluating fresh evidence cases detailed in chapter six. As a consequence CCRC is trying to predict the unpredictable.

It is abundantly clear from the observation data and analysis that CCRC does not explicitly consider innocence in carrying out its function. That is, to a large degree, the inevitable consequence of its relationship with the CACD. If innocence is not a relevant criterion for the CACD, then it is not a relevant criterion for the CCRC. That is not to say that if CCRC received a case in which it was convinced of someone's innocence it would not act. I have no doubt that it would, if new

material was available, refer the case to the CACD and if it was not, it would recommend the exercise of the Royal Prerogative of Mercy. The difficulty with testing this assertion is that such cases are rare. The finding that innocence is not a material consideration in the post-conviction process supports my original hypothesis. It leads to the related questions could it or should it have such a role, to which I now turn.

Chapter Nine – Innocence or Fresh Evidence?

9.1 INTRODUCTION

In the light of my conclusion that innocence is not a material consideration in the current post-conviction process I now consider whether it could, or should, be one. In the first part of this chapter I consider whether innocence could be made a material consideration for the CACD, and in consequence, CCRC. Although there are some difficulties to address, I conclude that it would be possible to legislate to make innocence a material consideration. In part two I consider the normative question "should innocence become a material consideration in the post conviction process?" I argue that, for various reasons, it should not. However, that leaves unresolved the cases I identified at CCRC as "troubling". In the third part of the chapter I re-iterate the characteristics of such cases and explain why CCRC does not refer them at present. I then consider whether affording fresh evidence cases a different approach might be a preferable approach and argue that it would. I argue that the CACD is the primary obstacle to those troubling cases being addressed and that only legislative change will force it to modify its approach. I propose legislation designed to require the CACD to adopt a less restrictive approach to the receipt of fresh evidence and to remit certain cases for retrial. In part four I consider other proposals for change and explain why I do not consider that those proposals will succeed in delivering the change I consider necessary to address the troubling cases.

9.2 COULD INNOCENCE BECOME A MATERIAL CONSIDERATION IN THE POST CONVICTION PROCESS?

There are a number of ways in which innocence could be made a material consideration for the CACD to apply in deciding an appeal. I shall outline some, but there are doubtless others. First, the statutory test in section 2 of the 1968 Act could be changed to introduce an overarching discretionary test requiring the CACD to consider whether an appellant "is innocent." Second, the statutory test could be amended so that the CACD must "quash a conviction if 1) there is a sufficiently serious breach of due process to undermine the safety of the conviction; or 2) D is innocent; or 3) the Court otherwise has sufficient doubt about the safety of the conviction." An alternative in each case would be for the CACD to consider whether D is or "might be" innocent. The introduction of a test in any of these forms would have implications for CCRC, which would have to make a reasoned judgment about whether there was a real possibility that the CACD might find the test satisfied in any given case. I argue below that there is a significant difference between a test of "is innocent" and a test of "might be innocent."

9.2.1. Interpretation and Application

If the legislation suggested above did not define the term innocent, the CACD would have to consider adopting a specific interpretation of the concept of innocence. Which circumstances would fall within the ambit of the concept? Would the CACD restrict the concept to cases of "factual" innocence? How would the court deal with cases in which a lesser conviction (murder to manslaughter) was sought? Would the court, assuming the evidence supported the reduction to

the lesser conviction, do so on the basis that the appellant was innocent of the more serious offence?

How would the CACD deal with cases involving a change of law? Change of law cases seem particularly problematical in this respect. A judgment by an appellate court may have the effect of transforming a deed which was previously criminal into one which is no longer so. This raises three distinct issues. First, what status should be afforded to the successful appellant in the particular case? Should he be regarded as innocent? Secondly, how should others convicted upon the same basis be considered? Thirdly, given the CACD's practice of declining to grant leave in such cases, unless to do so would cause a substantial injustice, should those denied leave nonetheless be regarded as innocent? The whole notion of innocence sits uncomfortably in the context of these cases. Consider, for example, the case of *R v J* and how his case might have been treated as a claim of innocence prior to his successful appeal.[1] J, a man of 35-37 at the time of acts, had intercourse with a girl aged 13-14. At the relevant time the Sexual Offences Act 1956 provided that sexual intercourse with a girl under the age of 16 was unlawful. However, the act also provided that any prosecution had to be brought within 12 months of the offence charged. J's conduct only became known some three years later. The prosecution adopted the then standard approach of charging the defendant with indecent assault, which was not subject to the 12-month statutory time limit. The House of Lords declared such an approach to be impermissible and J's convictions for indecent assault were quashed. So, is J to be regarded as innocent? If an appellant, such as J, had approached an Innocence Project arguing that his actions were not criminal because they fell outside the scope of the offences as defined by Parliament, how would an Innocence Project have responded?

If innocence were to be a specific factor to be taken into account by the CACD, and thus by the CCRC, then what standard of proof would it be expected to

[1] *R v J* [2004] UKHL 42.

apply? Would it be a reverse of the criminal standard and require proof of innocence beyond a reasonable doubt (BARD)? Or would the civil standard balance of probabilities be appropriate? If the standard to be applied is BARD, then not only does *Adams*[2] illustrate the difficulty of articulating such a standard, but it, and the later decision in *Ali*[3] show how narrowly the standard would apply. An illustration of the difficulty in applying the civil standard can be observed, again in the context of compensation, from the New Zealand experience in the case of David Bain.[4] Of course, the fact that deciding which standard is appropriate and that the application of that standard may be difficult does not mean it should not be used. Appellate courts regularly have to make difficult judgments.

A further consequence of the wider test suggested is that, presumably, few appellants would seek to show that they were innocent since it would be much easier to satisfy the lesser test of "might be innocent." The CACD might deal with this issue by applying a more exacting standard to claims of might be innocent. It might interpret the provision as requiring the court to be "absolutely sure" that someone might be innocent. Alternatively, it might set the threshold somewhat lower and require the court to merely be satisfied that someone might be innocent.

This brief summary illustrates that some of the issues of interpretation and application that the CACD would need to resolve are complex and difficult. However, resolving complex difficulties of interpretation is part of the CACD's function and the Court would doubtless fairly quickly establish principles to guide future decision-making. So, in spite of these difficulties, I conclude that statutory change to make innocence a material consideration could be achieved.

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[2] *R (Adams) v Secretary of State for Justice* [2011] UKSC 18.

[3] *R (Ali and Others) v Secretary of State for Justice* [2013] EWHC 72 (Admin).

[4] For full details see the two conflicting reports available at http://www.justice.govt.nz/media/in-focus/topic-library/David-Bain-reports. Last accessed 1st August 2013.

9.3 SHOULD INNOCENCE BECOME A MATERIAL CONSIDERATION IN THE POST CONVICTION PROCESS?

Given that it seems feasible to make innocence a material consideration in the post conviction process I now consider whether such a move should be made. Would doing so deliver a different outcome from the current test of whether the conviction is unsafe? The answer to this question is based upon an assessment of some of the limitations of using innocence as a material consideration.

9.4 LIMITATIONS OF INNOCENCE

This section sets out the limitations of the concept of innocence in a post-conviction context. These limitations, collectively, lead me to conclude that making innocence a material consideration in the post conviction process would add unnecessary complexity, be insufficiently flexible and create an unnecessarily high standard.

9.4.1 Certainty of Innocence

The first objection to making innocence a specific factor combines philosophical and practical considerations. Knowing, with certainty, the truth of something may be impossible. My research observations, which extend to around 750 cases, convince me that, from a practical perspective, it is virtually impossible to conclude with certainty that someone is innocent of a particular crime.[5] I may

[5] It is all too easy to "believe" in someone's innocence and become convinced of it and subsequently be proven wrong in that belief. The dangers of this are apparent from the case of Adrian Prout. Campaigners Sandra Lean and Billy Middleton run a website at 'Wrongly Accused

harbour doubts about a conviction, but that falls short of being convinced of someone's innocence. Even the quashing of a conviction may still leave one undecided on the question of innocence, as illustrated by the inability of the jury to reach a verdict in either of the two retrials of *Sion Jenkins*.[6] Neither jury was convinced of his innocence, since neither delivered a not guilty verdict.[7] I may conclude, since he was not convicted, that Sion Jenkins is entitled to be considered innocent. However, that is not synonymous with knowing that he is innocent. This view gains support when one considers that he was unable to satisfy the Justice Secretary of his innocence sufficiently to secure compensation.[8]

My research observations about the difficulty of concluding that someone is innocent accord with the view expressed by retired SCCRC Commissioner Peter Duff who put it thus:

> *"In practice, I cannot remember the Commission referring a case where I was absolutely certain that the applicant was factually innocent; quite simply it was never possible to be sure about what precisely had happened. As regards some referrals, I thought it possible that the applicant was innocent, but, as regards others, I had severe doubts as to their innocence but was not sure enough of their guilt to argue*

Person' <http://www.wronglyaccusedperson.org.uk/> accessed 3rd February 2012. The site contained details of the case of Adrian Prout who had been convicted of the murder of his wife Kate. A commentary on the case finished with the words "Adrian Prout did not murder Kate." That page is no longer accessible and has been replaced following Adrian Prout's admission in November 2011 that he had indeed murdered his wife. A similar sequence of events occurred in the case of Simon Hall discussed in chapter six.

[6] Sion Jenkins and Bob Woffinden, *The Murder of Billie-Jo* (John Blake Publishing 2008).

[7] A not guilty verdict need not mean that the jury thought him innocent, but the absence of such a verdict can be taken to indicate that they did not consider him innocent. If they had considered him innocent they would have acquitted him.

[8] Andy Bloxham, 'Sion Jenkins 'refused compensation' for time in jail' *The Daily Telegraph* (London, 10th August 2010) <http://www.telegraph.co.uk/news/uknews/crime/7935970/Sion-Jenkins-refused-compensation-for-time-in-jail.html> accessed 21st February 2012.

against a referral. In all such cases, however, I was convinced there had been a 'miscarriage of justice' in legal terms." [9]

9.4.2 Innocence is insufficiently precise

A further reason for concluding that innocence should not be a specific factor is the difficulty of defining it satisfactorily in a statutory context. For those, such as Innocence Projects, campaigners or journalist, who are able to *select* the cases they pursue, a precise definition is not an essential pre-requisite. They are perfectly entitled to exercise a discretionary judgment in deciding whether to accept a case.[10] It is a different proposition in a statutory context. If Parliament were to legislate it could, of course, decline to define the term and leave it to the discretion of the CACD. As indicated above the court would develop the interpretation as it has done with other concepts. However, one weakness of that approach is that the CACD can only develop the law in the cases it hears. This could lead to a period of uncertainty while some of the difficult issues discussed above are resolved. The preferable course might be for Parliament to indicate which cases fall within the ambit of the term. However, just as the CACD would face difficult issues in considering the term it would represent a difficult drafting exercise for Parliament. At a simplistic level it might be defined as meaning the person played no part in the commission of the crime or that no crime was committed. However, how are cases involving attempts to secure a conviction for lesser offence[11] to be considered, or cases where there has been a change of law or cases which seek to bring about a change of law? A wide range of issues generate controversy within English criminal law, for example; self-defence, recklessness, lawful excuse, defences based upon intoxication. How are such issues to be considered in relation to assertions of innocence? Is someone who

[9] Peter Duff, 'Straddling Two Worlds: Reflections of a Retired Criminal Case Review Commissioner' (2009) 72 MLR 693, 721.

[10] On occasions they conclude that their initial judgment was wrong and that the person was guilty.

[11] Most often seeking a reduction of a murder conviction to manslaughter.

damages the property of another, but claims lawful excuse to be treated as asserting innocence? Many of these issues offer a fine dividing line between criminality and non-criminality, but does moving an act beyond the dividing line constitute innocence?

9.4.3 An unnecessarily high standard?

If the test were framed as "is innocent," then innocence could be regarded as unnecessarily high standard to expect an appellant to reach on appeal. Adopting Laudan's analysis[12] of the range of possible outcomes, an appellant falling into any of his categories - "innocent, probably innocent, probably guilty or guilty" – may have his conviction quashed as "unsafe."[13] If innocence were the standard, then only a small proportion would succeed. The evidence from North Carolina supports this view. Only four declarations of innocence have been made from 1,102 applications since the state's Innocence Inquiry Commission began operating in 2007.[14] Further evidence of the difficulty of demonstrating innocence may be drawn from the statistics of those receiving compensation as the victim of a miscarriage of justice in England. Quirk and Requa report the number of applications approved has dropped markedly from 39 in 2004-05 to just one in 2009-10.[15] The downward trend reflects the Government's adoption of a more exacting approach to the obligation upon applicants to demonstrate that they are innocent.[16] It follows that the adoption of a similar standard in the context of criminal appeals would see few appellants able to achieve that standard.

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[12] Larry Laudan, 'Need verdicts come in pairs?' (2010) 14 International Journal of Evidence and Proof 1.

[13] *R v Maxwell* [2009] EWCA Crim 2552 being an example of someone who was guilty, but had his conviction quashed as unsafe.

[14] As noted in chapter two.

[15] Hannah Quirk and Marny Requa, 'The Supreme Court on Compensation for Miscarriages of Justice: Is it better that ten innocents are denied compensation than one guilty person receives it?' (2012) 75 MLR 387, 399.

[16] See *R (Ali and Others) v Secretary of State for Justice* n3 for details of how the test is being applied.

9.4.4 Too low a standard?

On the other hand if the test is "might be innocent" that might be considered to be too low a standard, since "might be innocent" would encompass a much greater number of appellants. Would the CACD consider "might be innocent" should extend to an appellant whom they thought was "probably guilty"? Probably guilty carries an indication of some doubt, a case falling short of the requisite standard required for conviction and such appellants would doubtless argue that they might be innocent. Given the CACD's concern not to open the floodgates to large numbers of appeals it would, presumably, interpret "might be innocent" restrictively and exclude the "probably guilty," but how would it treat the "possibly guilty"?

9.4.5 Isolating Innocence

It is not always clear whether those arguing that innocence should be a key consideration are asserting that it should be the *only* consideration. Quirk[17] and Jessel[18] point out that an adherence to innocence alone would result in a significant narrowing of scope and result in far fewer successful appeals. Innocence is important, but many of the cases observed during my research contained a mixture of issues. These might include issues about the conduct of the investigation or trial, jury impropriety, prosecution non-disclosure, the reliability of evidence given at trial or fresh evidence not heard at trial. If innocence is isolated as a special factor, then the interaction of these various factors, which current arrangements can accommodate, may be neglected. Separating out

[17] Hannah Quirk, 'Identifying Miscarriages of Justice:Why Innocence in the UK is Not the Answer' [2007] 70 MLR 759.

[18] David Jessel, 'Innocence or Safety: Why the wrongly convicted are better served by safety' <http://www.guardian.co.uk/uk/2009/dec/15/prisons-and-probation> accessed 16 February 2010.

innocence may complicate the appeal process. This can be illustrated by the *Adams* case.[19] It is possible to characterise this as a successful appeal based on flawed representation. That flawed representation meant that crucial evidence, which had been properly disclosed by the prosecution, was not used. The CACD weighed that evidence and concluded that the outcome might have been different had the unused material been deployed. Strictly speaking, the evidence was not fresh and the CACD could have declined to receive it on the basis that it could have been adduced at trial. Without it, however, it seems unlikely that the CACD would have found that the flawed representation had had the degree of impact on the outcome that justified the conviction being quashed.[20] This difficulty in seeking to disentangle an often-complex set of interacting issues is another argument against making any special provision restricted to considering innocence.

9.4.6 Difficulty of "proving" a negative

Proving a negative is conceptually and practically problematic. If the onus is on the appellant to demonstrate that he did not do something, he may find it extraordinarily difficult to do so. He may provide evidence, but be disbelieved. Exculpatory material may, in some cases, be impossible to secure. A conviction for historic sex abuse illustrates the difficulty. There is often nothing the appellant can do beyond protest his innocence. He cannot, in many cases, put forward any evidence to prove the negative.

[19] *R v Adams* [2007] EWCA Crim 1.

[20] See *R v Day* [2003] EWCA Crim 1060 for a case in which any shortcomings in Counsel's performance were not considered to have been sufficient to warrant the conviction being quashed.

9.4.7 Internal v External Miscarriages of Justice

Naughton suggests distinguishing between miscarriages of justice and wrongful convictions on the basis that the former are based upon factors internal to the system whilst the latter are based upon external factors. Would such a distinction be able to accommodate the inclusion of innocence as a statutory issue? The application of this distinction to a high profile case of claimed innocence reveals its limitations. Naughton acknowledges this himself when considering the case of the Cardiff Three, who were convicted of the killing of Lynette White in 1988. The CACD quashed the convictions in 1992.[21] The CACD found that the questioning of one of the three was oppressive and excluded the interview evidence. The CACD concluded that the remaining evidence was insufficient to justify a conviction. So, even though the CACD was operating on a matter *internal* to the system (improperly secured evidence) it still had regard to the weight of the evidence as a whole. It could, for example, have decided that there was still sufficient, admissible evidence to justify the convictions of the three men. At this stage the three were, if Naughton's distinction is adopted, victims of a miscarriage of justice as opposed to being the victims of a wrongful conviction. As Naughton notes, "doubts prevailed for the next decade about whether or not the Cardiff Three were involved in the murder."[22] By 2003 advances in DNA technology led the police to Jeffrey Gafoor who subsequently confessed to the murder.[23] If the original investigation and trial had been flawless, the events of 2003 would have given rise to grounds for an appeal.[24] Only the later information transforms the case into one in which the appeal would have been on the basis of information *external* to the criminal justice system and thus a wrongful conviction. So, it was

[21] *R v Paris, Abdullahi & Miller* (1993) 97 Cr App R 99 CA.

[22] Michael Naughton, 'Wrongful Convictions and Innocence Projects in the UK: Help, Hope and Education' (2006) 3 Web Journal of Current Legal Issues.

[23] BBC News, 'Life for Lynette White murder' (4th July 2003) <http://news.bbc.co.uk/1/hi/wales/3044282.stm> accessed 10th February 2012.

[24] Though whether the police would have re-opened the case in 2000 without the convictions having been quashed in 1992 is an interesting point of debate.

only when fresh evidence emerged that one could conclude that the three were innocent.

The problem, in respect of innocence, is that the Cardiff Three protested their innocence throughout. If innocence were a specific or over-arching factor, especially if it were the only factor, they might have remained in prison until at least 2003. Focussing on their claims of innocence might have been counter-productive, since the CACD would have been, I submit, most unlikely to have concluded that they were innocent when their appeal was allowed in 1992. It was only the further information that became available in 2003 that might have driven the CACD to such a conclusion.

9.4.8 Lurking Doubt is not Synonymous with Innocence

I shall argue later that the focus should be on fresh evidence rather than innocence. A consequence of insisting upon something fresh as a means of differentiating cases is that it generally excludes cases of lurking doubt. In the context of claims of innocence I would respond by making three points. First, lurking doubt is just that – a lurking doubt about the accuracy of a conviction. It may fall short of a conviction of someone's innocence. Secondly, the CACD may quite properly give the benefit of such doubt to an appellant, but be entirely disinterested in innocence. Thirdly, although an insistence on something fresh would provide a mechanism for differentiating cases, it need not *prevent* the CACD from reviewing cases involving lurking doubt.

9.4.9 The Approach of the CACD

The biggest objection to this suggestion, however, is not grounded upon the difficulty of defining innocence or using an imprecise term such as "might be

innocent". After all, the current test of safety or the term "interests of justice" could be argued to generate similar issues of definition and imprecision. The difficulty is that it leaves discretion with the CACD. Given that it currently exercises its discretion in a restrictive manner it seems reasonable to anticipate that it would do so in applying any new "innocence" test. It would be subject to the objection, as it is in applying the current test, that it is usurping the jury. Finally, although it is not currently stated as an explicit consideration, innocence could be said to fall within the scope of the current test of safety, especially given that in fresh evidence cases, it has the further discretion afforded by the "interests of justice" test.

The CACD's adherence to values of finality, certainty and the primacy of the jury are partly based on principled considerations, that these are appropriate values within a criminal justice system, and partly on pragmatic ones.[25] It is not clear that the CACD would be minded to adopt any different values if innocence were to be a specific factor for it to consider. Indeed, these values are so well established that, without specific statutory intervention to instruct the CACD to consider innocence cases in accord with a different set of values, it is difficult to envisage the CACD modifying its approach. In cases without any fresh evidence, essentially lurking doubt cases, the CACD's reluctance to intervene is even more pronounced and the introduction of innocence as a factor seems unlikely to change that. I consider that a better way of dealing with the "troubling" cases is to fetter the CACD's discretion in certain cases.

[25] Wishing to avoid a "flood" of appeals.

9.5 OTHER POTENTIAL CONSEQUENCES

9.5.1 Risk of Elevating Innocence

Although the focus of this thesis is the post conviction process at least some consideration should be given to the possible implications for other stages in the criminal justice process. If innocence becomes a specific factor in the post-conviction process, then there is a degree of logic to it being a factor in the pre-conviction, i.e. the trial, process. It is legitimate to ask whether it would be appropriate for such a factor to be relevant only after conviction. The danger here is that if innocence becomes a factor in the trial process, a jury might be tempted away from proof beyond a reasonable doubt and consider that if the defendant cannot convince them of his innocence, then he must perforce be guilty.

9.5.2 Separation of Innocence

CACD and CCRC contribute to the maintenance of the integrity of the system. Breaches of due process by investigators, prosecutors or the judiciary can result in convictions being quashed, on occasion regardless of the guilt of the appellant. The abortive attempt by the Government in 2006 to prevent the CACD's from allowing "appeals on a technicality" might be revived if innocence were specifically identified as a material consideration.[26] The restriction of the CACD's powers might be significantly easier if appeal rights relating to claims of innocence were articulated in a way that enabled them to be separately identified. The Government could limit appeals to those where an appellant was or might be innocent, thus excluding all those in which the ground of appeal related to due process. The

[26] *Quashing convictions : report of a review by the Home Secretary, Lord Chancellor and Attorney General : a consultation paper* (2006).

objections to the Government's 2006 proposal[27] might be more easily resisted under such a regime. It is beyond the scope of this thesis to consider whether due process appeals should be excluded from consideration, but a move that makes such a proposal easier to implement should at least be acknowledged as doing so.

9.6 CONCLUSION – THE LIMITATIONS OF INNOCENCE

Innocence is important as a moral foundation. It also conveys a powerful image to the public and the media. But as a mechanism for reversing error it is flawed, inflexible and of limited utility. Findley, considering the concept in the context of Innocence Projects in the USA, concluded as follows:

> *"Innocence, it turns out, is a complex concept. Yet the Innocence Movement has drawn power from the simplicity of the wrong-person story of innocence, as told most effectively by the DNA cases. The purity of that story continues to have power, but that story alone cannot sustain the Innocence Movement. It is too narrow. It fails to accommodate the vast majority of innocent people in our justice system. It fails to embrace innocence in its full complexity."*[28]

For the reason set out in this section I concur. In my judgment, although innocence *could*[29] be made a material consideration in the post-conviction process, it would be undesirable. It follows from that conclusion that my answer to

[27] John Spencer, 'Quashing Convictions, and Squashing the Court of Appeal' 170 Justice of the Peace 790

[28] Keith A Findley, 'Defining Innocence' (2010-11) 74.3 Albany Law Review 1157, 1207.

[29] In the sense that it is possible to do so by means of a simple statutory amendment.

the normative question "should innocence be a material consideration in the post-conviction process?" is no, it should not.

9.7 FRESH EVIDENCE

However, that is not the end of the story. The limitations of incorporating innocence into the post-conviction process set out above do not mean that claims of innocence are addressed adequately under current arrangements. There is still a body of cases at CCRC that troubled me; where I harboured serious doubts about the accuracy of the conviction.[30] There is an important refinement that could be made which would be of particular benefit to those asserting innocence. The refinement would apply in cases where there is some *fresh evidence* in support of an application to CCRC.[31] Fresh evidence is relatively unlikely within the normal appeal process.[32]

The distinction between undermining the prosecution case and proving innocence can be illustrated by the case of *Sean Hodgson* that is cited as a strong demonstration (indeed proof) of innocence.[33] The DNA found on the victim was established not to be a match for Sean Hodgson.[34] The prosecution's case had been founded upon the premise that whoever committed the sex attack was also the killer. Since the DNA was not from Sean Hodgson he was not the killer. However there is a logical flaw here. The fact that the DNA was undisputedly not Sean Hodgson's does not *prove* that he had nothing to do with the events that

[30] The characteristics of such cases are described in chapter seven.

[31] If there has not already been an appeal when fresh evidence emerges CCRC would be likely to advise the applicant to seek leave for permission to appeal out of time.

[32] For the reasons set out in chapter five.

[33] Gabe Tan, 'Justice should not depend on luck' [2012] Socialist Lawyer Issue 60.

[34] *R v Hodgson* [2009] EWCA Crim 490.

afternoon. The CACD put it succinctly and accurately, saying: '*The new DNA evidence has therefore demolished the case for the prosecution.'* [35]

This is the crucial point. In the great majority of fresh evidence cases in which a conviction is quashed the fresh evidence *undermines* sufficient of the prosecution case for the conviction to be rendered unsafe. What it does not do, in most cases, is provide irrefutable proof of innocence. Rather than seeking proof of innocence the consideration should be whether there is fresh evidence that undermines the prosecution case. This then takes us on to a further complication, which is that fresh evidence comes in a multitude of different guises only some of which bear upon the specific facts of the case. It may be evidence that relates directly to the events of the criminal act, perhaps from a new eyewitness or an expert who proffers an alternative explanation of the evidence. However, it may be less directly related to the events as in the case of an expert who is subsequently discredited in unrelated cases or a police officer who is convicted of a serious offence. The tendering of fresh evidence to seek a reduction in conviction has also been noted. Fresh evidence is often viewed as meaning fresh evidence about the crime itself, whereas as the examples above illustrate it may be fresh evidence about a wide range of other issues too. Rather than focussing on innocence the focus could be on whether fresh evidence exists which may undermine the prosecution case. The breadth of possible types of fresh evidence suggests that an attempt to differentiate between types of fresh evidence would be to over-complicate matters. Whether the new information constitutes fresh evidence will depend upon the facts of the case. If the CACD decides that some new information is not fresh evidence to which the s.23 tests should be applied then it will address other considerations in determining whether the conviction is safe. However, once the CACD decides that the new information does require the application of s.23 that raises the prospect of differentiating cases and treating them differently. Perhaps such cases could be differentiated and afforded special treatment without limiting the CACD's scope in other cases. It could continue to

[35] Ibid [6].

deal with cases involving due process matters, psychiatric issues or lurking doubt in the manner it does now. I now want to consider whether a modified approach to fresh evidence cases at the CACD might have resulted in them being treated differently by both the CACD and if so by CCRC.

9.8 TROUBLING CASES

The troubling cases I identified at CCRC shared the following characteristics. They were not initially particularly strong and often based on circumstantial rather than direct evidence.[36] There was invariably some fresh evidence, which tended to undermine the prosecution case, occasionally counter-balanced with some fresh inculpatory evidence. Fresh evidence came from both witnesses of fact and experts. Cases had, universally, been very thoroughly, indeed exhaustively, reviewed by CCRC.

Although I identified these as a result of systematic analysis, I think that there is a measure of support for the assertion that such cases exist. First, there are sufficient campaigners arguing that someone has been wrongfully convicted to think that some of those cases have merit. Secondly, the notion aligns closely with the assessment of the Runciman Commission that stated:

> *"In our view, once the court has decided to receive evidence that is relevant and capable of belief, and which could have affected the outcome of the case, it should quash the conviction and order a retrial unless that is not practicable or desirable."*[37]

[36] I reiterate that I am not intending to suggest here that circumstantial evidence is inferior to direct evidence.

[37] *The Runciman Royal Commission on Criminal Justice* (Viscount Runciman Cmd 2263 1993) para 62 p175.

Thirdly, I think these are the kinds of case that Lord Cross was referring to in his judgment in Stafford, when he said:

> *"If this fresh evidence was given together with the original evidence and any further evidence which the Crown may adduce then it may be that the jury—or we, if we constituted the jury—would return a verdict of guilty but on the other hand it might properly acquit. So we will order a retrial."*[38]

The comments by Lord Cross and Lord Bingham's observations in *Pendleton*[39] both suggest that there is judicial recognition that these marginal, difficult cases exist.

9.9 WHY WERE THESE CASES NOT REFERRED?

My conclusion is that there is an issue of concern. It arises from the CACD's generally restrictive approach to fresh evidence cases, compounded by the confusion displayed over the appropriate test to apply. These factors provided the foundation for the small number of CCRC committee refusals that I found troubling. I could rarely fault the Commission's logic in the application of the real possibility test. This said far more about the approach of the CACD than it did about the approach of CCRC. CCRC was unwilling to refer these cases because it was confident that the CACD would not entertain any doubts about the safety of the conviction.

Since CCRC was created it, not the CACD, has been the focus of attention for

[38] *Stafford v DPP* [1973] 3 All ER 762, [1974] AC 878 HL p767.

[39] *R v Pendleton* [2001] UKHL 66 [19].

those considering miscarriages of justice. As evidence of this one only needs to consider a collection of essays published in 2012.[40] Most of the essays focus on CCRC.[41] Its relationship with the CACD is considered, but CCRC is identified as the "problem." I consider that the focus is on the *wrong link* in the chain. The problem is the CACD.[42] CCRC and its application of the real possibility test necessarily reflect what the CACD does. As long as the power to quash a conviction rests with the CACD this will remain the case. Modifying the test to be applied by CCRC will not suffice. It might result in more referrals, but not necessarily any greater number of successful ones. Indeed, such a move could be counter-productive if the CACD started to consider CCRC referrals as unduly speculative.

I have observed at various points in this thesis that the CACD is inconsistent. It is inconsistent in the application of the test from *Pendleton* in relation to fresh evidence.[43] It is inconsistent in the way in which it approaches retrial issues.[44] It is, perhaps ironically, rather more consistent in its restrictive approach to the application of the tests in s23 of the 1968 Act.[45] Furthermore, the CACD has a general tendency to be conservative and reluctant to embrace change. There are, the CACD would argue, some powerful reasons for its conservative approach. The CACD has pointed out the need for finality and certainty in proceedings. Defendants should be under no doubt that they must deploy their full defence at trial and not seek to withhold elements in the hope of a more receptive response

[40] Jon Robins (ed) *Wrongly Accused: Who is responsible for investigating miscarriages of justice?* (Solicitor's Journal 2012).

[41] This is not a criticism. The editor posed the question "Who is responsible for investigating miscarriages of justice?" and that is clearly not a role for the CACD so discussion of the CACD was always likely to be limited, but a wider question might have brought the CACD's role into focus.

[42] Some commentators do make this point see, for example, Kevin Kerrigan, 'Real Possibility or Fat Chance?' in Michael Naughton (ed), *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan 2010).

[43] As discussed in chapter six.

[44] See James Chalmers and Fiona Leverick, 'When Should a Retrial be Permitted After a Conviction is Quashed on Appeal?' (2011) 74 MLR 721 and the discussion in chapter six.

[45] As discussed in chapter five.

on appeal. The CACD has also been concerned about the possibility of opening the floodgates to a whole series of additional appeals that might overwhelm it.

We should ask, however, whether the arguments deployed by the CACD are robust. Finality and certainty in verdicts have merit, but should they prevail above justice? The floodgates concern is an extension of that issue and prompts a similar response. However, even if CCRC were to refer *all* of the cases considered by committee,[46] it would represent a very modest additional to the annual workload of the CACD. Finally, it is worth challenging the principle espoused by the CACD that defendants must deploy their full defence at trial. The notion that any legal adviser would suggest to a defendant that his best interests would be served by seeking to hold back material to present to a largely unsympathetic CACD rather than deploy it before a jury seems highly improbable. This tiny risk nevertheless appears to drive much of the CACD's approach to the application of the failure to adduce test.

The 1993 Royal Commission recommended the creation of the CCRC. The creation of CCRC dealt with one of the major concerns about the way miscarriages of justice were addressed by placing the power of referral in the hands of a body independent of the Government. The research detailed here illustrates that the Royal Commission's other major concern about the CACD has been largely unheeded. Continued exhortations to the CACD to adopt a more accommodating approach seem, on the basis of the evidence in this thesis, unlikely to succeed. The time has surely come for the Royal Commission's concern to be addressed and I believe that only legislative change will achieve that objective.

[46] This is a greater number than my troubling cases, but still represents a relatively small number on an annual basis.

9.10 LEGISLATIVE CHANGE

The two primary obstacles I identify are the CACD's restrictive approach to the receipt of fresh evidence and, in those cases in which it does receive it, the manner in which it evaluates it. I therefore propose two legislative amendments.

The first addresses the CACD's approach to considering whether there is a reasonable explanation for the failure to adduce evidence at trial. The CACD has made it clear that it expects a defendant to present his full defence at trial and not hold something back in the hope of a more positive reception at the CACD. I observed in chapter six that the notion of the defendant holding something back seems an unlikely proposition. However, the way in which the failure to adduce test is currently applied does not address the mischief identified by the CACD. The CACD does not assess whether the defendant did hold something back, or might have done so, to derive some benefit or advantage. Instead, it takes the view that if the evidence could have been adduced then the defendant did not deploy his full defence. The onus is then on the defendant to convince the court there was a reasonable explanation for it not being adduced.

I propose a short amendment that would have the aim of matching the test applied by the CACD to the mischief it wishes, quite properly, to address. I propose the insertion of a clause directing the CACD to consider whether it can identify a benefit or advantage to the defendant from the evidence having been withheld. If it cannot identify some benefit or advantage to the defendant then it should be presumed that there is a reasonable explanation for the failure to adduce it. The prosecution can be afforded the chance to rebut the presumption. But the onus is changed here. The emphasis is on receiving the evidence, not artificially excluding it and thus preventing it from being evaluated. The purpose of such a change, which would require a specific amendment to the provisions of s23 of the Criminal Appeal Act 1968, would be to lower, not remove, this

particular barrier to the reception of fresh evidence. There may be other ways to achieve the same objective. I did consider whether the CACD should be asked to determine whether the defendant actually did seek advantage from failure to tender evidence. Since any enquiry to establish the position would run counter to the confidentiality afforded by professional privilege, I concluded such an approach would be unworkable.

The second amendment would introduce special provisions relating to *cases involving fresh evidence.* It would, "in cases of difficulty,"[47] *compel the CACD to order a retrial* unless it was impractical for a retrial to be held. It is important to note that the new provision would not be intended to interfere with the exercise of any of the CACD's other existing powers.

The legislation might be framed in the following manner:[48]

In a case in which the Court receives fresh evidence under s.23 of the Criminal Appeal Act 1968[49] the Court of Appeal shall, if it considers the conviction ***might*** *be unsafe on the basis of that fresh evidence, order a re-trial, unless*

(a) the Court considers a re-trial to be impracticable; or

(b) the Court considers it would not be in the interests of justice to do so.[50]

[47] To adopt the phrase used by Lord Bingham, discussed below.

[48] The legislation governing CCRC's referral powers would not need to be amended to reflect the proposed change. CCRC's power exists where there is a real possibility that the conviction would not be upheld. So, the change would require a different assessment by CCRC, but one that is covered by its existing powers.

[49] I did consider, in line with my adopted definition of miscarriage of justice, limiting the clause to appeals out of time and cases referred by CCRC, but could see no logical reason to adopt a different approach to cases arising from an appeal within the normal time limit.

[50] This test is framed negatively to require the CACD to identify a reason not to order a retrial rather than a reason to do so.

If the court decides not to order a retrial then it shall determine the matter in accordance with the provisions of s.2 of the Criminal Appeal Act 1968.

The presumption in favour of retrial in the class of cases specified is deliberately limited:

- It only applies to conviction referrals on indictable matters.[51]
- It only applies in cases involving fresh evidence where the fresh evidence is the basis of the finding that the conviction might be unsafe.

The objective is to provide for a different treatment for those cases of "difficulty" as identified by Lord Bingham.[52] The test becomes "might be unsafe" rather than is unsafe, but it is subject to limitations. The limitations do not impinge upon the CACD's powers on cases that do not fall within the scope of the limitation. This proposed legislation tries to drive the CACD to order a retrial where the fresh evidence it has received causes it difficulty. Of course, the CACD could thwart this approach by declining to receive the evidence, hence the first amendment proposed above. However, even without that amendment the CACD would seem unlikely to thwart the change for two reasons. First, the troubling cases usually contained fresh evidence that the CACD would be likely to admit. Second, declining to receive evidence to avoid the second new provision would place the CACD in conflict with Parliament's wishes and the CACD would be unlikely to adopt such an approach.[53]

There is powerful judicial support for distinguishing cases as suggested in the second amendment. Viscount Dilhorne gave the leading judgment in *Stafford*, but

[51] Referrals on summary cases may, under present arrangements, involve a rehearing of the evidence.

[52] *R v Pendleton* n39 [19].

[53] And, of course, if it did so Parliament could legislate again.

the judgment of Lord Cross of Chelsea merits careful scrutiny.[54] He identifies three possible outcomes from the CACD's deliberations in a fresh evidence case. They are:

> *"The fresh evidence puts such an entirely new complexion on the case that we are sure that a verdict of guilty would not be safe. So we will quash the conviction and not order a new trial.*
>
> *The fresh evidence though relevant and credible adds so little to the weight of the defence case as compared with the weight of the prosecution's case that a doubt induced by the fresh evidence would not be a reasonable doubt. So, we will leave the conviction standing.*
>
> *If this fresh evidence was given together with the original evidence and any further evidence which the Crown may adduce, then it may be that the jury—or we, if we constituted the jury—would return a verdict of guilty but on the other hand it might properly acquit. So we will order a retrial."*[55]

There seems little doubt that these, but particularly the last one, represent a clear jury impact test. The test Lord Cross proposes would mean the CACD putting itself in the place of the jury to try to assess what the jury might have done. In cases of difficulty, which do not call for an evident quashing or upholding of the conviction, that is the approach to be followed. In essence the proposed statutory provision seeks to give effect to Lord Cross' approach, but strengthens it by *requiring*, if practical, a retrial in his final category of case.

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[54] *Stafford v DPP* n38 p767.

[55] Ibid.

This approach it should be noted, is neither a test of "is unsafe"[56] nor of "might be innocent"[57] – it is a test of "*might* be unsafe". As such, it respects the primacy of the jury. It relieves the CACD of the mental gymnastics involved in applying the test in *Pendleton* or even sidestepping *Pendleton*. It might use the test in *Pendleton* to *identify* that it is dealing with a fresh evidence case of difficulty, but it would not then apply a jury impact test. It would remit the case to a jury. Where that was not practicable (as in a very old case, for example) it would have to apply a jury impact test of its own assessment, but this would be the exception rather than the rule.

It can be argued that the proposed test "might be unsafe" is already encapsulated in Lord Bingham's formulation in *Pendleton*. He says:

> *"The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking* ***whether the evidence****, if given at the trial,* ***might reasonably have affected the decision of the trial jury to convict****. If it might, the conviction* ***must be thought to be unsafe.****"*[58] *(Emphasis added)*

I do not consider that that formulation is a test of "might be unsafe." Lord Bingham refers to evidence that might impact on the jury which in turn leads to a conclusion that the conviction must be unsafe. The test remains one of "is unsafe," with the jury impact test being a route to that conclusion. However, there

[56] Which is the current statutory test and would apply to appeals not falling within the scope of the proposed legislation.

[57] I rejected the use of a test based upon innocence for the reasons set out at the start of this chapter.

[58] *R v Pendleton* n39 [19].

are two important reasons why introducing a "might be unsafe" test would have merit. First, it would resolve the unsatisfactory confusion over whether the jury impact test in Pendleton should be applied by the CACD. Secondly, it would send a clear message to the CACD that Parliament wanted it to adopt a different approach. So, even if it could be argued that the proposed test would be "might be unsafe," there are nevertheless good grounds for introducing it.

There is another very powerful reason for favouring the retrial option. It helps overcome the disadvantage identified by Lord Bingham that the CACD has "in seeking to relate that [fresh] evidence to the rest of the evidence the jury heard.'[59] Ordering a retrial allows all the admissible evidence, both inculpatory and exculpatory, to be considered through a current lens not the lens of the time of trial. So if, for example, other exculpatory evidence has become available, which might not itself have passed the safety and real possibility tests, it might nevertheless as part of the overall evidence tip the balance at retrial. And in some cases justice may be best served by a retrial that results in a reconviction. The case of *Barron* is a good example.[60] The CACD quashed his conviction on the basis of fresh evidence and ordered a retrial. At the retrial in 2010 changes in the law since the original trial meant that previously inadmissible evidence was admissible. Barron was convicted a second time (and his appeal from that conviction was rejected).[61]

Clearly, the CACD might find that a fresh evidence case presented it with no difficulty, in which case it would not apply any Pendleton/Dial test. It might conclude that the fresh evidence was so powerful that the conviction should be quashed or added so little that it should be upheld. The proposed legislation is aimed at the cases of difficulty. To be sure the CACD could find very few cases presented any difficulty and thwart the legislation, but clearly negating the will of

[59] Ibid.

[60] *R v Barron* [2009] EWCA Crim 910.

[61] *R v Barron* [2010] EWCA Crim 2950.

Parliament is not a course the CACD would be likely to adopt. It might consider that, for example, the cases of *Hodgson*,[62] *Earle*[63] and *Pluck*[64] fell into the category of presenting no difficulty, but I find it inconceivable, given two days of expert evidence and a forensic judgment running to fifty pages, that they would consider that *Hall*[65] was a straightforward case.

9.10.1 Not Usurping the Jury

A further advantage of the approach proposed is that it restores the decision on guilt or non-guilt to its rightful place: the jury. The CACD's approach to the role of the jury lacks logic. On the one hand it will express its deference and decline or be slow to interfere with the decision of a jury, but then makes decisions without access to all the evidence and without, in some cases at least, even considering what impact some fresh evidence might have had on the jury. Forcing the CACD to remit more cases for retrial would go some way to addressing this criticism of it.

9.10.2 Consistency with Compensation Decisions

There is, potentially, an additional benefit of adopting these categories. The obligations which a state has under the International Covenant on Civil and Political Rights 1966 to compensate victims of miscarriages of justice are enacted in statutory form in section 133 of the Criminal Justice Act 1988. They have been the subject of much litigation over the last ten years, culminating in the Supreme Court decision in *Adams*.[66] Although the Supreme Court in *Adams* was wrestling with matters of compensation, it found itself trying to define those miscarriages of

[62] *R v Hodgson* n34.

[63] *R v Earle* [2011] EWCA Crim 17.

[64] *R v Pluck* [2010] EWCA Crim 2936.

[65] *R v Hall* [2011] EWCA Crim 4.

[66] *R (Adams) v Secretary of State for Justice* n2.

justice that would qualify for compensation and those which would not. In fact, the categories that the Court adopted closely match the proposal here, which could bring about a welcome consistency of approach. The Supreme Court in *Adams* identified four categories of case. They were as follows:

Category 1

A case in which a new fact will show that a miscarriage of justice has occurred when it so undermines the evidence against the defendant that no conviction could possibly be based upon it.

Category 2

A case in which the fresh evidence shows that he was wrongly convicted in the sense that, had the fresh evidence been available at the trial, no reasonable jury could properly have convicted. This formulation was later clarified and rendered "more readily useful"[67] by the Divisional Court in *Ali* when it adopted the following question:

> *"Has the claimant established, beyond reasonable doubt, that no reasonable jury (or magistrates) properly directed as to the law, could convict on the evidence now to be considered?"*[68]

[67] *R (Ali and Others) v Secretary of State for Justice* n3 [41].

[68] Ibid.

Category 3

A case in which the fresh evidence is such that the conviction cannot be regarded as safe, but the court cannot say that no fair-minded jury could properly convict if there were to be a trial that included the fresh evidence.

So, it could be said that Lord Cross' formulation in *Stafford* is captured here. His clear-cut case of a quashed conviction is mirrored by the combination of categories 1 and 2. Category 3 encompasses his marginal case. In order to complete the analysis of *Adams* mention should be made of category four, which were cases in which compensation would clearly not be payable. Since the issue giving rise to the quashing would not be fresh evidence then this would not impinge upon the proposed reform.

Category 4

A case in which a conviction is quashed because something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted. An example of this would be the case of *Khan and Bashir*.[69] The police officer who investigated their case was subsequently shown to be dishonest, which was sufficient for the conviction to be quashed. The CACD did not need to turn its attention to the guilt or non-guilt of the appellants. The egregious conduct of the officer was sufficient.

Nothing in the proposals put forward here would *prevent* the CACD from re-ordering a retrial in other cases. Logically the CACD might be unlikely to do so in

[69] *R v Khan and Bashir* [2005] EWCA Crim 3100.

cases falling within Category 1 or 2. They could do so at their discretion in a Category 4 case, but they would have to do so in a qualifying Category 3 case.

In formulating this proposal I did consider whether to propose that CCRC have a formal power to recommend a particular course of action to the CACD. Ultimately, I considered that this would be likely to overcomplicate the position. It could potentially be seen as CCRC usurping the Court's Authority. It would also have the potential to delay CCRC decisions if, in addition to other matters, it had to consider whether to make a specific recommendation for retrial.

It might be argued that the proposal is inappropriate since it would interfere with the decision-making processes of the Crown Prosecution Service on the issue of re-trial. There are three points to make in respect of that. First, the CACD is empowered to make the decision, not the CPS. In doing so the CACD applies an interests of justice test, which would include taking account of the views of CPS. In any appeal (whether on fresh evidence or any other matter) the CPS should consider its position on a retrial prior to the appeal. In cases falling within the new provision it would need to consider whether it wished to oppose a retrial on the grounds of impracticality or that it was not in the interests of justice. In doing so it would, if successful, then run the risk that a conviction would be quashed without retrial. Secondly, CPS is not obliged to pursue a retrial. It will review the case afresh and may decide not to proceed.[70] Thirdly, if the ultimate objective is to deliver a just outcome, then some interference with the decision-making processes of the CPS might have to be endured.

9.10.3 The relationship between quashing and retrial

Lord Bingham articulated a further potential objection in *Pendleton*:

[70] As, for example, in the case of Bento. *Bento v Chief Constable of Bedfordshire Police* [2012] EWHC 349 (QB).

> *"In some of the authorities, the decision to allow an appeal is closely associated with the decision to order a retrial. This is understandable but wrong. If the court thinks a conviction unsafe, its clear statutory duty is to allow the appeal, whether or not there can be a retrial. A conviction cannot be thought unsafe if a retrial can be ordered but safe if it cannot. It is only when an appeal has been or is to be allowed because a conviction is thought to be unsafe that any question of a retrial can properly arise."*[71]

The proposal does not fall foul of Lord Bingham's proposition. The safety or otherwise of the conviction does not rest upon the practicability of a re-trial. If the conviction is unsafe and a retrial impracticable, the CACD must quash the conviction. However, in those cases where a re-trial is practicable the CACD can (given the elasticity of the safety test) allow itself to be more readily convinced that a conviction might be unsafe. I acknowledge that this can be argued to be a two-tier test. But the danger Lord Bingham identifies is that cases would *not be quashed despite being unsafe*. My proposition is intended to drive the CACD to allow *more* appeals, because in those cases where a re-trial is practicable there would be a directed presumption to follow that route.

9.11 A MORE RADICAL PROPOSAL

Alternatively, the Commission's referral could in appropriate cases (i.e. fresh evidence and where practicable and where there is a real possibility that the jury might reach a different verdict) be an order for a re-trial.[72] The previous guilty

[71] *R v Pendleton* n39 [20].

[72] Appropriate cases might be further limited by, for example, the same means used to limit cases to which the double jeopardy provisions apply. In this way only the more serious offences would be subject to such an approach.

verdict would not be quashed but the verdict from the second trial would be substituted. There would be no power in the event of a further guilty verdict for a variation of original sentence. In the event of a further guilty verdict there would be a further normal right of appeal.

There would be serious concerns about such an approach, since it would have considerable constitutional significance. It could be viewed as CCRC usurping the authority of the court. It would also have the potential to delay CCRC decisions, since it would have another issue to determine in each case it decided to refer. The greatest objection, however, would be that such a power was incompatible with the principle of the separation of powers under the European Convention on Human Rights. Judicial independence is afforded considerable weight by the ECHR as illustrated by the decision in *Stafford.*[73] However, as noted above any reference by CCRC under such a power would be to a court, thus it could be argued that the defendant's rights are not being infringed, because the ultimate decision on the referral will be made by a properly constituted court in accordance with Article 6 of the ECHR.

Another objection to this is that it offends the principle of double jeopardy.[74] The principle has two limbs. Someone acquitted of a crime would be able to plead that since he had already been acquitted he could not be tried again for the same offence. Someone convicted of a crime, which would be the case under consideration here, could prevent a re-trial by pleading that he had already been convicted of the offence.

The answer to this objection has two parts. First, why would the applicant whose case was referred by CCRC under such a provision plead autrefois convict? If, as suggested, there would be no provision for the trial court to vary the original

[73] *Stafford v UK* (2002) 13 BHRC 260.

[74] Jill Hunter, 'The development of the rule against double jeopardy' (1984) 5 The Journal of Legal History 1 sets out the history of the rule.

sentence, the applicant would seem to have nothing to lose by submitting himself to a re-trial. Second, the prohibition on re-trial following acquittal was removed, in certain circumstances, by the Criminal Justice Act 2003.[75] Presumably, therefore, it would be a relatively simple matter to legislate to prevent an applicant from benefitting from a plea of autrefois convict (and indeed if the re-trial court was able to vary the original sentence such legislation would presumably be required).

This approach would not be completely revolutionary, since it has already been pioneered in Canada. Canada does not have a body such as CCRC. Instead, it has provision under the Canadian Criminal Code for application to the federal Minister of Justice by those who assert they are victims of a miscarriage of justice.[76] The Minister can, if he thinks it likely there has been a miscarriage of justice, take one of a number of steps including, not only sending the case as an appeal to the relevant provincial or territorial court of appeal, but also the ordering of a new trial.[77] In neither case is the conviction quashed by the Minister's action.

Giving CCRC power to direct a retrial would be controversial. The proposal could be implemented, and although it seems less attractive than the legislative scheme proposed, it is not devoid of merit.

9.12 LESS RADICAL PROPOSALS

There are also steps the CACD could take of its own volition to address some of the concerns I have highlighted. It could adopt a much clearer approach to the question of which legal test it intends to apply once fresh evidence has been formally received and adopt a consistent approach to the application of that test.

[75] ss 75-79. The operation of the new provisions is discussed in more detail in chapter three.

[76] Canadian Criminal Code ss 696.1-696.6.

[77] Ibid s 696.3(3)a.

It could take steps to try to achieve greater consistency on the issue of re-trials. It could also develop a small group of Lords Justice of Appeal and judges to specialise in hearing fresh evidence appeal cases. Such a group might develop a level of skill and expertise commensurate with that which the CACD regularly displays in due process cases. This would enhance consistency, which would, in turn, enable CCRC to undertake its predictive responsibilities with enhanced assurance. Although such steps might be beneficial, they still leave the CACD's generally restrictive approach unaddressed. Furthermore, the history of the past 20 years (perhaps the last 100 years) suggests that the CACD taking such steps is an unlikely eventuality.

There is doubtless a range of other modest proposals that could be proposed, but ultimately I doubt that they would bring about an identifiable change of approach at the CACD. There is a further legitimate objection the CACD might make. It could argue that if Parliament is concerned about the way the CACD currently exercises its discretion, then Parliament should intervene. I consider that if Parliament were to intervene, it would be far better for it do so as outlined in my main proposal rather than addressing some more modest reform (though it might beneficially do that in addition).

9.13 OTHER PROPOSALS FOR CHANGE

I now want to consider other proposals put forward to address concerns about cases not being referred by CCRC. Some of these proposals are predicated upon making innocence a material consideration and for the reasons set out above I consider this would be inappropriate. I shall, nevertheless, examine other aspects of the proposals in order to try to evaluate them. I also observe that many of these proposals are directed at CCRC and since I consider that the real problem lies at

CACD it is inevitable that I think a reform directed at CCRC would be of limited effect.

9.13.1 CCRC should be bolder in making referrals

Cooper urges the Commission to be bolder:

> *"The CCRC should challenge how the court interprets its role and bring powerful cases on this stance. It needs to be brave and it needs to be bold. In doing so it can redefine the boundaries and its relationship with the Court of Appeal."*[78]

Grist, a former case review manager at CCRC, is rather equivocal wondering whether such an approach would succeed but suggests no other approach. [79] Malone is clearly of the opinion that CCRC should be bolder. [80]

O'Brian concludes that CCRC should refer more cases involving expert evidence saying '*I did, however, find several cases where I believe that the Commission was overly reluctant to refer.'*[81] These critics may have an ally in current Chair of the CCRC, Richard Foster. Speaking in 2009, soon after his appointment, Mr Foster is reported as saying that he "would 'err on the side of boldness' if there was doubt as to whether or not to send a case back to the appeal courts."[82]There has,

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[78] John Cooper, 'CCRC and Court of Appeal' (2011) 175 JPN Criminal Law and Justice Weekly 298.

[79] Rupert Grist, 'The CCRC: Real Possibilities and Lurking Doubts' (2012) 176 Criminal Law and Justice Weekly 9.

[80] Campbell Malone, 'Out of step' in Jon Robins (ed), *Wrongly Accused: Who is responsible for investigating miscarriages of justice?* (Solicitor's Journal 2012).

[81] William O'Brian Jr, 'Fresh Expert Evidence in CCRC Cases' (2011) 22 Kings Law Journal 1, 9.

[82] Danny Shaw, 'Appeals need 'bolder' approach' (*BBC News*, 5th February 2009) <http://news.bbc.co.uk/1/hi/uk/7870993.stm> accessed 11th January 2012.

however, been a reduction in the annual number of cases referred by the Commission in the period since Mr Foster became Chairman.[83] This is not a criticism. The Commission can only deal with the cases it receives and as observed in chapter seven it receives substantial numbers of unmeritorious applications. Additionally, as noted in chapter eight, trying to measure its performance by counting the number of cases it refers is flawed.

Cooper's exhortation, since it is not strictly a proposal for change, seems to me to lack any prospect of success. It is suggested that if the CCRC makes some bolder references then, in some unidentified way, the CACD might become more receptive to them. Yet, recent judgments in fresh evidence cases suggest that the CACD may have become increasingly *less receptive* to such referrals. The cases of *Hall,*[84] *Earle,*[85] *Pluck,*[86] *Noye,*[87] *Mushtaq Ahmed,*[88] *Luckhurst*[89] and *Traynor*[90] have all been referred since 2009 and all were rejected by the CACD. I am not suggesting that these referrals were part of any conscious decision by the Commission to take a "bolder" approach, but since they were all rejected the Commission might be said to have reached the wrong conclusion on the "real possibility" test.

The Commission's anxiety to maintain a high "success" rate (which is also criticised in chapter eight) for its referrals is also a factor that is likely to make it more cautious. The evidence suggests that if it refers more marginal cases, it will

[83] In the fours years ending 31st March 2008, prior to Mr Foster's appointment in November 2008, CCRC referred an average of 39 cases a year to an appeal court. In the four years to 31st March 2013 the average has been 24. These are all referrals so include summary and sentence referrals.

[84] *R v Hall* n65.

[85] *R v Earle* n63.

[86] *R v Pluck* n64.

[87] *R v Noye* [2011] EWCA Crim 650.

[88] *R v Mushtaq Ahmed* [2010] EWCA Crim 2899.

[89] *R v Luckhurst* [2010] EWCA Crim 2618.

[90] *R v Traynor* [2012] EWCA Crim 1116.

fail to meet its own Key Performance Indicator target and if that happens, it should take steps to try to correct that.[91]

It might also be said that there is some indication from Scotland of the likely consequences of CCRC referring cases that are more marginal. The Scottish Criminal Cases Review Commission has made a number of referrals that seem upon a careful reading to be precisely the sort that some critics would like CCRC to refer.

The referrals were based upon a provision in the Criminal Procedure (Scotland) Act 1995, which allows for a verdict to be quashed upon the basis that the jury has "returned a verdict which no reasonable jury, properly directed, could have returned."[92] In *Beattie* the High Court was asked to accept that this ground, which was one of six grounds of appeal, was made out.[93] In reaching its view on this ground of appeal the Court reviewed all of the evidence that the jury heard and concluded:

> *"Having considered the whole evidence we are satisfied that the circumstances relied on by the Crown were cogent, and that it cannot be said that the verdict of the jury was one which no reasonable jury, properly directed, could have returned."*[94]

The conviction was upheld. The same outcome befell *Kinsella*[95] with the Court concluding on the point:

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[91] For a discussion of the influence of the Key Performance Indicator see chapter eight.

[92] S 106(3)(b).

[93] *Beattie v HM Advocate* [2009] HCJAC 22.

[94] Ibid [65].

[95] *Kinsella v HM Advocate* [2011] HCJAC 58.

> *"Having regard to the convincing evidence implicating the appellant in the crime and the discrepancies in the evidence of alibi witnesses the jury was entitled to reject the alibi and to conclude that the Crown case had been proved beyond reasonable doubt."*[96]

In both of these cases the ground formed part of the reference and reasoning by SCCRC. Although the language is different, the concept does have some parallels with the concept of lurking doubt.

In *Affleck* the ground was added by the appellant in his notice of appeal, the SCCRC reference being on a non-disclosure point.[97] The reference point was unsuccessful and the Court gave only brief consideration to the jury point, before concluding that there was sufficient evidence for it to reach a proper verdict.

The evidence from Scotland, though only of indicative value, is that an invitation to the court to find that the evidence was insufficient for a jury to convict is unlikely to succeed. My conclusion, therefore, is that exhortations to CCRC to be bolder are not likely to deliver the change that is, in my view, needed.

9.13.2 CCRC should be abolished.

When the Conservative Liberal Democrat coalition embarked upon its "bonfire of the quangos" in 2010 it seemed that CCRC, which had been operating for 13 years was already running on borrowed time.[98] In fact, it survived though some of its critics expressed regret at the fact that it had done so. Solicitor, Mark Newby,

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[96] Ibid [26].

[97] *Affleck v HM Advocate* [2010] HCJAC 61.

[98] Ross Hawkins, 'Quangos 'get reprieve' as ministers amend cull plan' (*BBC*, 24th January 2011) <http://www.bbc.co.uk/news/uk-politics-12271426> accessed 3rd April 2012.

did so at an INUK meeting in October 2010. Bob Woffinden did so in the following month.[99] A campaign group was launched in January 2012 with the principal aim of securing the abolition of CCRC.[100]

The difficulty with assessing the prospects of improving the arrangements for dealing with alleged miscarriages is that the call for CCRC to be scrapped is not normally accompanied by a proposal for a new mechanism. The options would seem to be either a return to the previous system where the power rests with a politician, a variation on the theme of CCRC, a right of repeated appeal to the CACD or no mechanism at all for addressing miscarriages, once a first appeal has been determined. The critics who call for CCRC's abolition might wish to reflect upon the possibility that any different arrangement might be even less to their liking. The dangers inherent in such calls are canvassed by a number of commentators.[101]

9.13.3 CCRC should publish its Statement of Reasons for Refusal

A greater degree of understanding of the difficulties CCRC faces in predicting the response of the CACD could be generated by the publication of statements of reasons for refusal. However, one of the difficulties facing those without access to CCRC's internal documents who wish to assess the claims of innocence made by individuals and the quality of the CCRC assessment is that CCRC is not permitted

[99] Bob Woffinden, 'The Criminal Cases Review Commission has failed' (*The Guardian*, 30th November 2010) <http://www.guardian.co.uk/commentisfree/libertycentral/2010/nov/30/criminal-cases-review-commission-failed> accessed 5th February 2012.

[100] 'Call for a United National Campaign to Scrap the CCRC' <http://www.unitedagainstinjustice.org.uk/abolishccrc.htm> accessed 24th January 2012.

[101] Michael Mansfield, 'No Going Back' in Jon Robins (ed), *Wrongly Accused: Who is responsible for investigating miscarriages of justice?* (Solicitor's Journal 2012). Mansfield sees the threat of abolition as greater from within the establishment.

to publish its Statement of Reasons.[102] This may be contrasted with the fuller disclosure that was available under the previous arrangements when applications were made to the Home Secretary.[103] The removal of this restriction upon CCRC would allow it, for example, to share information, via the Final Statement of Reasons, about exculpatory and inculpatory evidence that it has identified as part of its review.

It should also be observed that those who have been refused a referral by CCRC are not bound by any statutory limitation on disclosure. They are perfectly able to publish the Statement of Reasons if they so wish. Given the high profile of many claimed wrongful convictions, it is somewhat surprising that a detailed analysis of the asserted flaws in a Statement of Reasons for refusal is not published alongside the statement itself.[104]

The publication of a statement of reasons for refusal by CCRC is, ultimately, of limited value. It might generate public debate, but there seems little reason to believe that it would bring about any material change to the way the system currently operates.

9.13.4 The UK needs an Innocence Act.

The difficulty with trying to make any assessment of the proposal that the UK needs an Innocence Act is that there is insufficient detail in the proposal.

[102] Criminal Appeal Act 1995 s 23 so provides.

[103] HC Deb 05 March 1997 vol 291 cc859-66. The report contains a very detailed account of the case of Wayne Hood and the Home Secretary's reasons for refusing to intervene. I do not suggest that such a detailed statement was a common occurrence, but it did arise.

[104] One potential obstacle here is that there may be material in the statement which is defamatory (CCRC may reflect, for example, an allegation that a police officer was corrupt) and that might provide good reason not to publish. Nevertheless, absent such a consideration, those who claim innocence might wish to expose what they consider to be the shortcomings of CCRC's work in this manner.

Naughton, the main proponent, refers to an "Innocence Act, similar to the US,"[105] but fails to clarify whether he is referring to federal legislation applicable to the whole of the USA or legislation within a particular state.

The proposition invites a number of questions. How will "innocence" be defined? If innocence were defined in similar terms to the North Carolina provisions, then very few appellants would succeed.[106] Who will decide which cases fall within the ambit of the definition of innocence? Once cases are considered to qualify what mechanism for adjudicating the case will be used? Will it be the CACD? If so, what test will the CACD be expected to apply; the current test of safety of the conviction or some other test? If it were not to be CACD, then what body and what test would apply? How would such a system deal with cases that mixed issues of, for example, non-disclosure and fresh evidence? As noted above the matrix of fresh evidence cases is complex.

Although the proposal cannot be fully evaluated, because it lacks sufficient detail, it is difficult to envisage an Innocence Act being the answer to any shortcomings in the current arrangements.

9.13.5 The Real Possibility test should be changed

At various stages Naughton has suggested modifying the test to be applied by CCRC. He has called for the immediate repeal of the real possibility test, which would be replaced with a test that allowed CCRC to refer a conviction to the CACD if CCRC "thinks that the applicant is or might be innocent."[107] This, he

[105] Michael Naughton, *The Criminal Cases Review Commission: Hope for the Innocent?* (Palgrave Macmillan 2010) p225.

[106] Discussed in chapter two.

[107] Michael Naughton, 'Criminal Justice System Still Failing the Innocent' (2011) <http://www.innocencenetwork.org.uk/criminal-justice-system-still-failing-the-innocent> accessed

argues, would mean that CCRC reviews could not be restricted to the "mere pursuit of fresh evidence,"[108] but would have to consider all the evidence. Subsequently he has suggested that a referral by CCRC should be made if there is a "plausible claim of innocence."[109] The suggested tests are framed rather differently, with, it seems to me, the later suggestion of cases involving plausible claims of innocence representing a more restricted group. These differences are explored in the discussion that follows.

It is not entirely clear whether the potential innocence of an applicant needs to involve consideration of any fresh evidence or could be on the basis of only the previously adduced evidence. In essence, cases of "lurking doubt." If the scope were potentially unlimited, the first objection would be that it amounted to an almost unrestricted right of referral. My research observations recorded that most applicants to CCRC claim that they are innocent.[110] And, indeed, they *might* be. In most cases I was far from convinced that they were, but to rule the possibility out completely would be exceedingly difficult. If large numbers of applicants could satisfy a "might be innocent" test, they would be entitled to have their cases referred to the CACD. The result, according to Zander's analysis, would be the CACD being "deluged."[111] Zander very firmly rejected the suggestion of a "may be innocent test":

> *"I would be strongly against the CCRC referring a case on the stated basis that the defendant is or may be innocent. There are few cases in which it would be possible to do so and to identify a few persons being referred as 'innocent' or 'probably innocent' would by definition*

11th February 2012. Logically applicants would be likely to argue that they passed the "might be innocent" threshold since that would be easier to achieve than an "is innocent" threshold.

[108] Ibid.

[109] Michael Naughton, 'No Champion of Justice' in Jon Robins (ed), *Wrongly Accused: Who is responsible for investigating miscarriages of justice?* (Solicitor's Journal 2012) p22.

[110] As detailed in chapter seven over 85% claim innocence.

[111] Michael Zander, 'Does the CCRC live up to what the RCCJ envisaged?' (Helping the Innocent: Symposium on the Reform of the Criminal Cases Review Commission, London, 30th March 2012).

> *suggest that anyone else referred was not innocent. One would not want second class referrals any more than one wants second class acquittals."*[112]

The logical outcome to using a "might be innocent test" would, therefore, seem to be that most applicants to CCRC would be entitled to a referral (on the basis of a claim that they might be innocent). A successful appeal and re-trial may follow. Presumably, if the re-trial resulted in a re-conviction, there would be facility for a further appeal, application to CCRC and referral so on, ad infinitum. This could be the result since the three bodies involved jury, CACD and CCRC would each be applying a different test.[113] The values of certainty and finality are not without merit. To reduce the risks of the CACD being deluged there needs to be a more exacting way of differentiating cases which merit referral. Perhaps refining the proposed test and restricting referrals to "plausible claims of innocence" might address the concern about the CACD being overwhelmed with referrals, though perhaps not Zander's concern about the prospect of "second class referrals." However, there are still three major objections to a referral test founded upon "plausible claims of innocence."

First, it focuses on innocence and as I have tried to illustrate in the first part of this chapter using innocence as a material consideration is fraught with difficulty. Some of my troubling cases caused me to doubt the accuracy and safety of a conviction, but that did not necessarily mean that I thought the applicant was innocent or had a plausible claim to be so. The focus on innocence also leaves unanswered the question about how cases involving issues beyond innocence, such as breaches of due process or change of law, would be addressed.

Secondly, there is the issue of differentiation. There has to be a mechanism that identifies those cases that are going to merit referral to an appeal hearing. If that

[112] Ibid.

[113] Guilt "beyond a reasonable doubt", "safety" and "might be innocent" respectively.

mechanism sits outwith the CACD, then it must provide some way of determining which cases are to be sent to the CACD. Even if the "real possibility" test is abolished, the referral body is going to have to make some *reasoned judgment* about which cases it will send forward. If the body to which it sends referrals is to be the CACD, then even without an explicit statement of the test to be applied, it will always be subservient to the CACD. The CACD will quickly signal its view on referrals it considers inappropriate, just as it has done under the current arrangements.[114] The test which it might apply could be "arguable case" as suggested by JUSTICE[115] or "plausible claim of innocence" as advocated by Naughton, but in either case the review body has to make some determination of whether the test is satisfied before making the referral.

The third objection is, I think, the most fundamental. The test, whether framed as "might be innocent" or "plausible claim of innocence," is the test for referral, not the test to be applied by the CACD. Even if cases could be differentiated, it would not, in my opinion, deliver the result that Naughton seeks because the review body would be sending cases to the CACD for it to apply the current safety test. If the CACD continues to operate in an unchanged manner, and why would it change, then the referral body sending it a larger number of cases is unlikely to have a significantly different result. For any reform to be effective it has to be targeted, as I have proposed, at the CACD or, more radically, exclude CACD from the process.

[114] *R v Gore* [2007] EWCA Crim 2789.

[115] As discussed in chapter eight.

9.14 THE ROYAL PREROGATIVE OF MERCY

Another aspect of Naughton's proposals also merits consideration. He suggests an expansion of the use of the Royal Prerogative of Mercy.[116]

The proposal is in the following terms:

> *"we recommend an expansion of the use of the Royal Prerogative of Mercy through the introduction of the following:*
>
> . *new legislation that allows the CCRC, in instances where the Court of Appeal dismisses an appeal against conviction heard following a CCRC referral, to refer a conviction to the Secretary of State to consider exercising the Royal Prerogative of Mercy; and,*
>
> . *new legislation that places a duty on the CCRC to consider referring a conviction to the Secretary of State to consider exercising the Royal Prerogative of Mercy in such circumstances."*[117]

Considering the merits of the proposal means that we must first be clear about what is being proposed. The phrase "an expansion of use" could mean an increase in the frequency of the use of the power or it could mean an increase in the scope of the power. The new legislation proposed would seem to indicate that it is an increase in the frequency of use of the power that is sought. What might the implications of such an increase be?

[116] Naughton, 'Criminal Justice System Still Failing the Innocent' n107.

[117] Ibid.

First, how would such an increase come about? The CCRC would be granted a new power that would *allow* it to refer a conviction to the Secretary of State following a dismissed appeal from a CCRC referral. If we assume that CCRC does not currently have such a power, we can consider how many cases this might apply to.[118] From the research results in chapter five we can conclude that 122 cases would have qualified for consideration to 31st March 2011. These are the conviction referrals refused by the CACD. Included amongst them are a number of *causes célèbres* of the current innocence movement.[119] However, cases such as that of Nicholas Tucker, another prominent asserter of his innocence, would not qualify since he has not had his case referred to the CACD by CCRC. This limitation to cases refused by CACD following a referral seems unnecessary.

The second consideration is how CCRC would discharge the duty placed upon it by the proposed legislation. What considerations would it have to take into account? At some point it may have to address this issue anyway since if the Secretary of State were ever to exercise his right under s.16 of the Criminal Appeal Act 1995 to seek the assistance of the Commission on a Royal Prerogative issue, then CCRC would have to consider the basis for reaching a view.[120] In order to shed some light on what CCRC would take into account we need to consider the potential utility of the Royal Prerogative of Mercy.

The position was considered in a judicial review action brought by the Liverpool football supporter Michael Shields.[121] Shields was convicted of assaulting a barman in Bulgaria in the days after Liverpool had played a match in Istanbul. He protested his innocence and a substantial media campaign was run on his behalf. An appeal in Bulgaria was unsuccessful. Subsequently, in line with the Repatriation of Prisoners Act 1984 and the Convention on the Transfer of

[118] It is arguable that CCRC already has the power under the Criminal Appeal Act 1995, s 16(2).

[119] Such as the cases of Susan May, Eddie Gilfoyle and Jeremy Bamber.

[120] At the time of writing CCRC has no public policy document on this issue.

[121] *R (Shields) v Secretary of State for Justice* [2008] EWHC 3102 (Admin).

Sentenced Persons 1983 Shields was transferred to England to serve the remainder of his sentence. He then asked the Secretary of State for Justice (Jack Straw) to exercise the Royal Prerogative of Mercy. The Secretary of State declined to do so on the basis that he did not, under the Act and Convention, have the power to do so.[122] The Divisional Court disagreed and decided that he did have the power and thus he was required to consider the substantive issue.

The Divisional Court also took the opportunity to consider the effect of the exercise of the Prerogative and the considerations that the Secretary of State should have in mind when reaching his decision. In doing so it considered two important judgments in *Foster*[123] and *Bentley*.[124] The first issue to address is the effect of the use of the Royal Prerogative. The Court in Shields identified three situations in which it has been used. They are:

- Special Remission, used in circumstances where prison authorities miscalculate a release date and release a prisoner early.
- Conditional Pardon such as the commutation of a death sentence (the pardon being conditional upon the fulfilment of a condition namely a lesser sentence).
- A Free Pardon that may relate to miscarriages of justice.

The distinctions are important in an innocence context since, presumably, Naughton would wish to see the granting of a free pardon.

But what is the effect of the grant of a free pardon? This has been the subject of some debate. For example, Lord Airedale proposed a motion in the House of Lords in 1983 seeking the use of a different term from “free pardon” for those who

[122] In particular Articles 12 and 13 of the Convention seemed to be in conflict leading the Secretary of State to conclude that he could not intervene.

[123] *R v Foster* (1984) 79 Cr App R 61 CA.

[124] *R (Bentley) v Secretary of State for the Home Department* [1994] QB 349.

were truly innocent.[125] The erstwhile permanent under-secretary at the Home Office, Sir Frank Newsam, had written in his book on the Home Office:

> *"A Free Pardon wipes out not only the sentence or penalty, but the conviction and all its consequences, and from the time it is granted leaves the person pardoned in exactly the same position as if he had never been convicted.* "[126]

When *Foster's* case was considered by the CACD in 1984 a rather different view emerged. *Foster,* who was of low intelligence, had confessed to a serious sexual offence and pleaded guilty at trial. Subsequently it emerged that another person had committed the offence and Foster was granted a full pardon. However, he had been convicted of a second offence, again based upon his confession, and the veracity of that confession was now thrown into considerable doubt. The CACD reviewed the effect of the pardon and concluded that it expunged the penalty, but critically for the current issue, it did *not* affect the conviction. Only the Court had the constitutional power to quash a conviction. This approach was endorsed in both *Bentley* and *Shields*. Clearly the granting of a pardon to someone who is still in prison is of considerable practical importance – but it is not a quashing of the conviction, which may be the very thing that the individual is seeking.

What criteria should the Secretary of State use when considering whether to grant a pardon? The Courts have taken the view that the Prerogative is intended to be flexible and that since the decision rests with the Executive the issue is not justicable. Nevertheless, the Divisional Court recognised in *Shields* that the Secretary of State had in the past applied a test of whether the person was "morally and technically" innocent. So, although, given that the test is flexible, the

[125] HL Deb 21 November 1983 vol 445 col 99.

[126] Frank Newsam, *The Home Office* (George Allen & Unwin: London; Oxford University Press: New York 1954) 114.

Secretary of State does not have to apply that test it seems likely that he will do so. Indeed, that is precisely the test that Mr Straw said he did apply in the case of Shields. First, when he refused the request for the pardon and then, subsequently, when he granted it. Since he declined to reveal the information which led him to either conclusion we cannot know, at this stage, precisely what evidence convinced him of Shields' moral and technical innocence. The media reaction to his final decision was mixed.[127]

If the test is to be one of moral and technical innocence, that presumably must guide CCRC in determining any case that it would be duty bound to consider under the reform proposal. One is then compelled to ask what sort of case might contain evidence of moral and technical innocence yet be one in which the CACD would already have refused an appeal? The only examples that the courts have been able to identify are cases in which the evidence of innocence would not have been admissible.[128] So, this would add another limitation to the kind of cases which CCRC could refer to the Secretary of State since, not only would they be limited to failed appeals on CCRC referrals, but they would also have to have failed because of some issue of inadmissibility of evidence. And even for those cases that circumvent these various obstacles the outcome is not a declaration of innocence merely a relief from punishment.

Naughton has pointed out that since the creation of CCRC the incidence of the use of the Royal Prerogative has declined markedly. It should be noted that the seven cases of free pardon Naughton cites for the period 1987-97 hardly indicate widespread use of the power.[129] Some commentators ascribe the reduction to the creation of CCRC. However, since the Home Secretary had powers of referral to

[127] Marcel Berlins, 'Writ large A free pardon for Shields, but at what cost?' *The Guardian* (14th September 2009) 17. Daniel Foggo, 'Straw's pardon for fan was 'flawed'' *The Sunday Times* (London, 20th September 2009) 8.

[128] *R (Shields) v Secretary of State for Justice* n121 [33].

[129] Hannah Quirk, 'Prisoners, pardons and politics: R (Shields) v Secretary of State for Justice' [2009] Crim LR 648.

the CACD under the previous arrangements it is not immediately obvious why the reduction should relate to the introduction of CCRC.

Although the notion of making greater use of the Royal Prerogative to address cases of injustice is initially attractive, I think that, ultimately, it is unsatisfactory. For the reasons identified above, very few cases would qualify for consideration and of those that were considered only a very small proportion would carry convincing evidence of moral and technical innocence which somehow failed to convince the CACD. For CCRC to recommend the exercise of the Prerogative on the basis that the CACD had reached the wrong conclusion would be rejected as breaching important constitutional separation of powers. Finally, even if the Prerogative were exercised, its effect would be to expunge the penalty not the conviction and since the driving force in many of these cases is for the individual to clear his name the Prerogative would not go far enough.

9.15 EXTENDING THE RIGHT OF APPEAL

There is one final possibility to consider. There is the option of granting an unrestricted right of appeal, at which the evidence is re-heard. This seems an unlikely prospect on grounds of finality and resources. An unrestricted right at which the evidence is re-heard would be likely to attract appeals from most of those convicted in a contested trial before a jury. After all, the appellant would have little to lose. The potential scale of such appeals may be judged from the appeal statistics in 2009.[130] In that year the CACD received 1435 applications for leave to appeal against conviction. 1043 were refused leave. Those could not be prevented from pursuing their appeal with an unrestricted right. Furthermore, those who did not seek leave to appeal would be likely to do so since there is always the chance that the court re-hearing the case might reach a different

[130] *Judicial and Court Statistics 2009* (Ministry of Justice) Table 7.6 p167.

conclusion. In addition, based upon my observations at CCRC, many of these appeals are likely to be lacking any merit. This considerable increase in workload for the CACD would represent an opening of the floodgates and without a significant increase in resources the CACD would undoubtedly struggle to cope. Rather than a relatively short appeal hearing focussed on a narrow range of issues and a limited number of witnesses the appeal would effectively need to re-run the trial. The implications in terms of resources and costs would be enormous.

Having said all of that, these are primarily practical objections and it should be observed that there is a significant anomaly in the criminal justice system in England in this respect. Those convicted in a Magistrates' Court do enjoy an unrestricted right of appeal to have their case re-heard by a Crown Court acting as an appellate body.[131] This accounts for a significant proportion of the Crown Court's current workload. It also invites the question; why should those convicted of less serious offences, in a court with much lesser sentencing power benefit from more generous rights of appeal? There is, frankly, no satisfactory answer to this question of principle. The reasoning appears to be entirely pragmatic.

This survey of proposals for change made by others leaves me unconvinced that the troubling cases I identified at CCRC would be satisfactorily resolved if the changes were implemented. Finding a way of addressing those troubling cases does, however, require a change and for the reasons set out I think such change has to be legislative and directed at the CACD.

9.16 CONCLUSION

My motivation in undertaking this thesis was to examine whether current arrangements in England for addressing the plight of those convicted for crimes

[131] Magistrates' Courts Act 1980 s 108 (10(b)). The right does not extend to those who pleaded guilty.

they did not commit could be improved. These people claim to be innocent, but the post-conviction arrangements seemed to pay no heed to innocence. The research was designed to enable me to answer three questions.

1. Was it the case that the post-conviction arrangements paid no heed to innocence?
2. If that was the case then could the arrangements be changed to make innocence a material consideration?
3. If such a change was possible, should it be made?

After reading and analysing hundreds of case files and judgments I was able to answer the questions. The current post-conviction mechanisms do not, except in some very rare cases, pay any heed to the issue of innocence. Although there might be some difficult and complex issues generated by making innocence a material consideration, the CACD deals with such issues of interpretation on a regular basis and innocence could be made a material consideration. However, for various reasons I conclude that making innocence a material consideration would not be an effective way of addressing these cases. The principal reason is that my analysis of the current arrangements drove me to the conclusion that the obstacle to addressing these cases is the approach of the CACD. Requiring the CACD to consider innocence, either instead of or together with the current test of safety, would still afford it the discretion to continue operating as it does now.

For the situation to change the CACD's approach needs to change. Previous urgings that it should do so have been unheeded. I argue that the system should be more responsive to cases where fresh evidence casts some doubt on the original conviction. I propose legislation to try to engineer this by forcing the CACD to send certain cases, those involving fresh evidence that cause the CACD "difficulty", for re-trial. In some fresh evidence cases the CACD may be so convinced that the conviction is unsafe that it quashes without a re-trial. However,

such an approach is a usurpation of the role of the jury and the CACD will be slow to do that. For those cases where fresh evidence casts doubt on the conviction the CACD should cease usurping the jury by being required, wherever practicable, to remit the case to another jury. Such an approach would ensure that the decision was made on the basis of all relevant, admissible evidence and not the inevitably more limited amount before the CACD itself. The proposed legislation would not prevent the CACD from having the power to quash convictions on any other ground, including lurking doubt.

The role of CCRC would shift to reflect this change, since it would be applying the real possibility test in such cases in respect of the new provision. Since the CACD would be required, in qualifying fresh evidence cases, to apply a test of "might be unsafe" as a means of identifying cases to send for retrial so CCRC would be considering whether there was a "real possibility" of that outcome, rather than the narrower "is unsafe" test.

If properly applied, the result would be more doubtful convictions being referred for re-trial. The outcome of such re-trials would be unpredictable, but that would be expected because the cases involved are not clear-cut. If they were clear-cut, the appeal would be allowed or refused as appropriate. Although other proposals have been considered, I conclude that the CACD would remain unwilling to change its approach.

Only legislative changes directed squarely at CACD and fresh evidence cases will suffice.

Appendix 1 – Confidentiality Agreement

CCRC requires researchers to enter into a formal agreement undertaking to observe confidentiality conditions. The terms of the agreement are reproduced.

Confidentiality Agreement
for the purposes of Academic Research into the functions of the Criminal Cases Review Commission

THIS AGREEMENT is made on the date of signature below

BETWEEN

The Criminal Cases Review Commission ("the Commission"), whose offices are at Alpha Tower, Suffolk Street Queensway, Birmingham, B1 1TT

and

Stephen HEATON of the University of East Anglia
Home address: Mulberry Barn, Heath Road, North Elmham, Dereham, NR20 5EU

("the Researcher")

1 BACKGROUND
1.1 The Commission is a body corporate established under the Criminal Appeal Act 1995 ("the Act"). The nature of its statutory functions means that from time to time the Commission receives information of a highly confidential nature. On occasions this may be information which is subject to restrictions on disclosure under other statutes, such as the Official Secrets Acts or the Data Protection Acts, or to common law obligations of confidentiality. In any event the Commission as a responsible public body has a broad duty to treat with confidence any information with which it is entrusted unless it is clear that in a particular case such a policy runs contrary to the public interest.

1.2 Parliament explicitly recognised the importance of this confidentiality by enacting sections 23-25 of the Act. Section 23 creates a criminal offence of disclosing information obtained by the Commission in the exercise of its functions. Section 24 provides some limited circumstances under which disclosure does not amount to an offence. Section 25 provides a mechanism for a public body to impose on the Commission a requirement to seek the body's consent before the Commission discloses information obtained from the body, even when disclosure is permitted under section 24.

1.3 Responsible academic research into aspects of the Commission's work can provide valuable information both for the Commission itself and also for anyone with an interest in the operation of the criminal justice system. Certain kinds of research would be impossible to conduct unless the researcher had access to information which would normally be covered by sections 23-25 of the Act.

1.4 The Researcher has provided the Commission with a proposal for the subject, methods and extent of his/her research ("the research"), which has been approved by the Commission.

2 'CONFIDENTIAL INFORMATION'
2.1 In this Agreement "confidential information" shall mean all information disclosed (whether orally, in writing or by any other means, including being allowed access to any premises) by the Commission to the Researcher, relating to the statutory functions of the Commission under the Act, but shall not include any part of such information which:

2.1.1 is in or comes into the public domain in any way without breach of this Agreement by the Researcher; or

2.1.2 which the Researcher can show (the burden whereof shall fall for all purposes upon the Researcher):

2.1.2.1 was in his/her possession or known to him/her prior to receipt from the Commission;

2.1.2.2 was independently obtained by the Researcher without recourse to the Confidential Information.

3 AGREEMENT

3.1 In consideration for the Commission's assistance in conducting the research, the researcher undertakes:

3.1.1 to treat all information in the control or possession of the Commission as confidential information unless the Commission has acknowledged otherwise in writing, and to make use of it only for the purpose of the research which is the subject of this agreement;

3.1.2 to ensure that no form of publication resulting from the research is capable (either directly or by association with other published material) of leading to the identification of any individuals unless their connection with the case concerned has ceased to be confidential information;

3.1.3 to observe the principles of Data Protection with respect to all information obtained in the course of the research;

3.1.4 not to copy or write down any confidential information except as is reasonably necessary for the research;

3.1.5 to treat the confidential information with the same degree of care and with sufficient protection from unauthorised disclosure as the Commission;

3.1.6 at the end of the research, to return promptly all documents, materials and records and all copies of confidential information to the Commission and permanently delete any such confidential information from any electronic storage media or memory;

3.1.7 to remain bound by this agreement without limit in time.

3.2 The Commission undertakes:

3.2.1 to allow the Researcher access to all information in the control or possession of the Commission which is reasonably necessary for the purposes of the research;

3.2.2 to provide reasonable facilities for the Researcher in terms of access to the Commission's premises, staff, and equipment for the duration of the research;

3.2.3 not to impose any restriction on the content, form, or medium of publication of the research, except in accordance with this agreement;

3.2.4 not to disclose the product of the research without the Researcher's consent except to any extent to which it has already been published by the Researcher;

3.2.5 for the duration of the research, not to enter into any agreement with any other Researcher in relation to research on the same or a closely similar subject.

3.3 If a party does not enforce a right available to it under this agreement in any particular instance, then that will not prevent it from enforcing that right in future or in any other instance.

3.4 Neither party shall assign or transfer any of its rights or obligations under this agreement without the prior written consent of the other party.

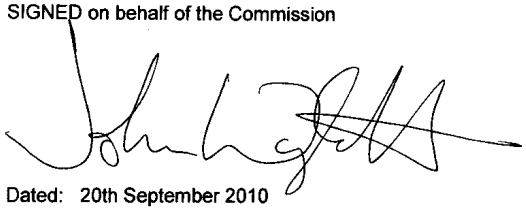
3.5 This agreement does not grant any right or licence under either party's intellectual property rights.

3.6 Neither this agreement nor any of its provisions shall be amended or waived unless agreed to in writing by the Commission and the Researcher. No waiver of any provision of this agreement shall constitute a waiver of any other provision or of the same provision on another occasion.

3.7 This agreement is made subject to English law and to the exclusive jurisdiction of the English courts, and shall be effective as from the date of signature by the Researcher, and despatch to the Commission.

3.8 In the event of any dispute arising from this agreement, the matter will be referred to an arbitrator appointed by agreement of the parties or, in the absence of agreement, by the President of the Law Society.

SIGNED on behalf of the Commission



Dated: 20th September 2010

SIGNED by the Researcher

Dated: 20th September 2010

Postscript - Margaret Livesey

I started this thesis by detailing the case of Margaret Livesey. She remained in prison following the rejection of the appeal on the reference by the Home Secretary until she was finally released in 1989. She moved to the south of England and forged a successful career for herself achieving a senior position in the catering department of a hospital. She was diagnosed with throat cancer and returned to her home area in November 2000 prompting at least some surprise from the local populace. She died in February 2001, aged 64. Her case remains an enigma. In 2009 the Lancashire Evening Post ran a series of articles about the case including a two page spread capturing the conflicting views. Those who remain convinced of her innocence include her son, Alan's brother Derek.

16 Evening Post Friday February 20, 2009

Arguments still rage over whether Margaret Livesey really did torture and murder her teenage son Alan 30 years ago. In the second part of our look back at a murder which shocked Lancashire, Crime Reporter STEF HALL hears from her son on why he believes his mother was innocent, plus the detective who locked her up and remains convinced of her guilt.

Haunted by child's

'A game that went horribly wrong...'

Case for the defence...

SUPPORTERS: Left – Margaret Livesey's son Derek, still living in Bamber Bridge and, above, her solicitor Alistair Logan

NATIONAL INTEREST: The BBC's Rough Justice programme claimed to have uncovered evidence that backed Margaret Livesey's story. It was later rejected

DEREK Livesey was serving with the army in Germany when he learned of his little brother's death.

Officers told the staff sergeant that Alan Livesey had been killed in an accident the previous night.

It was as he prepared to leave for home that he learned the real truth, a senior officer telling him: "Derek, before I say anything to you, you have to look at this" and handed him a pile of British newspapers.

The cheeky fair haired schoolboy, who idolised his soldier brother, had been tied up and stabbed to death in his army cadet uniform.

Derek, now of Carr Street, Bamber Bridge, recalls: "I was in pieces. I have never gotten over it."

Alan, a Walton-le-Dale High School pupil, had joined the Bamber Bridge cadets with his best friend.

When Derek arrived at the family's council house, police sat him in the front room where his 14-year-old brother had been murdered.

He says: "There was blood everywhere, all over the fireplace. It was like somebody had got a knife and stabbed me. The pain was unreal."

The day after Derek's arrival back home, each of the Livesey family was taken to separate police stations and quizzed.

At 4pm officers broke the devastating news his mother Margaret had been charged with Alan's murder.

Flicking through family photos of his smiling mum at a fancy dress party he remembers: "I told them there was no way. After she was charged she put her arms around me and said she was sorry. I backed away at first.

"Afterwards my mum told me they had taken her glasses off her then showed photographs of Alan under her nose saying she must have done it and pressurring her.

"She turned around and said 'If you think I have done I must have done it'. But when I saw her a couple of days later she said she hadn't done it, she had said it under pressure.

"We don't believe she could have done it in the time they claimed. I still think it was a game that went wrong."

At the same time Margaret was appearing in court, her youngest son was being buried at St Aidan's Church in the town.

Holding a small photograph of Alan, his only remaining picture of the youngster, Derek says: "He was very easily led, that's what got him in trouble. But I think it was typical teenage angst. We both got hit, but we deserved it.

"Alan was very bubbly. Although he looks slight in photographs he was tall for his age, and broad. Like me he was no angel, he was due in court for stealing a car before he died.

"He idolised me - I think that's why he joined the cadets. We were proud when he joined the cadets, and thought it might let him have more responsibility and grow up a bit."

Turning to his mother he says: "The papers painted a picture of a cold-hearted woman but she was bubbly and friendly and had lots of friends. She was close to Alan.

"She did drink regularly – at least one glass of cider a night, but I wouldn't consider her alcoholic. She coped very well in prison. She didn't change much inside, but came out a lot cleverer with a Masters in Spanish."

Alan's sister Janet McMullan was pregnant at the time he was murdered. Now 48, she recalls: "My lasting memory of my brother is the week before he died, at the old people's home where my mum worked. "He was really excited because he was the last child at home and they were going to buy him a dog, even though he had been in trouble. Alan and I were very close and he was mum's favourite. He was very good looking and got on better with girls than boys, a real charmer."

Derek, who now works in catering, says: "I think about Alan every day. But you have to move on. I go to see his grave every few months."

Margaret Livesey was freed from Styal Prison in Cheshire in 1989 and moved to Surrey, where she eventually got a job as manager of a hospital canteen.

Janet says: "She coped exceptionally well. She came to live with us then got a place of her own. She was very well thought of at the hospital."

In November 2000 Margaret unexpectedly told her children she was heading back to Lancashire and moving to sheltered accommodation in Walton-le-Dale.

Despite her increasing frailty, she spent a lot of time in School Lane social club with friends.

A former neighbour on The Crescent, who did not want to be named, said: "She looked thin as a rake. She used to go drinking with friends, and often got up dancing, in the School Lane working men's club. It was a different club to where she used to drink. But people recognised her. People couldn't believe she came back to the area – they thought she was very hard faced."

Unknown to her family Margaret was dying of throat cancer and in February 2001 she died aged 64.

Derek says: "It was a shock because we had always been close. I think she moved back here because she knew she was ill and always said she wanted to come back.

"We are still determined to clear her name. Friends still come up to me in Bamber Bridge and say they thought she did it at first but now think she's innocent."

Janet adds: "I think the police should reopen the case. There's a lot more forensics they could do these days, on the knife or cigarette stubs from the scene.

"The technology they can use today was not available at the time of the original probe.

"My mum may have passed away but it has not been forgotten about. She never did it - and that's it.

"I admit there was a time I doubted her but it didn't take long to change my mind."

Livesey left a clause in her will stating her solicitors should continue to fight to prove her innocence.

Today her solicitor Alistair Logan described her as "a lovely woman who always strove to tell the truth".

He says: "We are still continuing to look at clearing Margaret's name. It is very difficult given there has already been an appeal, where certain pieces of evidence in her defence were booted out, so we have to look at new avenues. It didn't help that all the exhibits were lost in 1992.

"So we have to turn back to the circumstances of the death, and I still believe that the cadet factor was key. He was not supposed to wear the outfit that night and was not wearing it when his parents left him.

"I am confident we will get there, though it will take time."

Derek Livesey adds: "I believe the person who killed my brother is still out there and hasn't been brought to justice. I have got my own theories about what happened. I think it was a game that went horribly wrong."

The police officer in charge of the case, Detective Superintendent Ian Hunter, remains “100% convinced” of her guilt.

murder for 30 years

HUNT FOR CLUES: Police search the area for evidence to catch Alan's killer

TRIBUTE: Military pallbearers carried former army cadet Alan Livesey's coffin at his funeral

‘I knew 100% in my mind... Margaret Livesey was the killer’

“WITH some detectives there's that immediate sense – when the hairs on the back of your neck stand up – that you've found the killer. I knew 100% in my mind Margaret Livesey was that person.”

Ian Hunter thumbs through the historic newspaper clippings of the Livesey murder in his black briefcase.

It is 30 years since the then detective superintendent rolled out of bed in the early hours to take a phone call from colleague Detective Inspector John Thomson calling him to a case which turned out to be the most challenging and, in his own words, “traumatic” of his career.

Sitting in the comfort of his cosy bungalow Mr Hunter, a former head of Preston CID, remembers the moment he arrived at 41, The Crescent, Bamber Bridge, and the horrific scene that greeted him.

Mr Hunter, now 78, says: “It is rare that someone who breaks into a house would go to the extent of tying someone up in the gross way this was done.

“We never believed there was a sexual motive. As an experienced detective you become used to being confronted with horrific scenes.

“The first course of action was calling a doctor to the scene, then pathologist, then fingerprint, photographers and plan drawers.

“The question was asked as to whether the parents would make a television appeal, which they did. She was cool and calm: the typical shocked mother.”

It was Mr Hunter who first suspected the grieving mum.

He says: “All the exhibits from the scene, along with clothing were kept in a locked room in Bamber Bridge Police Station.

“Three days in I visited the exhibits and looked at Mrs Livesey's coat. When she had visited the scene she had cradled his head in her lap getting blood on her coat. But when I looked at it I realised some of the staining was typical of that when a stabbing movement is made, causing a fine spray of blood on the arms.

“There was this horrendous realisation that what in the first instance appeared to be a totally innocent mother was, in fact, the assailant.

“I spent many years in CID examining bloodstains and the geography of certain bloodstains. But I kept the realisation to myself at first until a forensic scientist, who I called off duty, came to the police station and confirmed my suspicions.

“I briefed my two detective inspectors to interrogate her. They were stunned when I said she was responsible. I had plans in place to speak to her myself if they failed to reach any conclusions. By the end of that day – five days later – she had confessed.”

But after she had been on remand for three days Livesey retracted her admission and claimed the police had bullied her into it.

From then on the case was shrouded in controversy.

Eight days into her first trial in July 1979 the jurors were discharged because a relative of a juror was ill.

A fresh trial was started a fortnight later.

On the sixth day she was convicted of murder after less than five hours of deliberations.

In 1983 the BBC's Rough Justice programme produced what it claimed was evidence establishing Livesey's innocence and submitted a memo to the Home Office.

Two months later the Assistant Chief Constable of West Yorkshire launched an inquiry into the case with 78 witnesses giving statements.

Still visibly frustrated, the retired Lancashire detective, says: “It must have cost the earth to have officers travelling from Leeds and back each day.

“But I took it in my stride – I myself had done reinvestigations of other cases.”

It was a year later in December 1984 before the Home Office stated nothing had changed.

But the questions were not over.

In 1986, the Secretary of State referred the case to the Court of Appeal after another Rough Justice programme featuring a doctor with doubts over the time of death.

It still angers Mr Hunter that senior officers banned him from attending the appeal hearing at the Old Bailey.

However, the original judgment remained.

Mr Hunter says: “It is the most traumatic murder inquiry in Lancashire ever in terms of what the team was put through, first the trial, then the programmes, the reinvestigation, and then another appeal. I still believe 100%, and always have, that she is the killer.”

Others equally believe Alan Livesey died as he had lived – in fear of Margaret Livesey.

The 14-year-old had told his friends he was “scared to death” of her.

One day an anonymous caller alerted the NSPCC but, without evidence to back up the claims, officials left the boy to his fate.

And his best friend Andrew Matthews had told the court Alan was frightened of her and had been thumped by her.

Despite the passing of time the impact on the community has been lasting.

Former neighbour Maureen Livesey, no relation, recalls: “Before Alan was murdered Margaret and her husband used to sit with us in the social club.

“When we came back home they would stay until 3am and not once check on Alan.

“When the murder happened I had moved to School Lane and the CID came around asking everyone questions. At the time when they asked who I thought could have done it my immediate reaction was the mother. It struck me as odd when she asked the Matthewses to go and check on Alan that night. She had never been bothered before. She did drink a lot and was a bit rough and ready.

“All the neighbours were in shock. We weren't a particularly close knit community, but when something likes that happens on your doorstep it is a shock.”

GUILTY: Margaret Livesey

CONVINCED: Former head of Preston CID Ian Hunter was the first person to suspect that the mother had killed her son

HOLIDAY: Margaret Livesey was freed in 1989 and moved to Surrey before ending her days back in Lancashire

● A full account of the case, A Mother's Wrath: The Murder of Alan Livesey, features in an Evening Post book Lancashire's Most Notorious Murders, by Mike Hill and Nicola Adam. The gripping book opens the archives on 11 of the county's most famous murder cases of the past 30 years. It is available priced £11.99 from the Lancashire Evening Post office, by telephoning Terri on 01772 554547 or e-mailing terri.solomon@jpress.co.uk

Case for the Accused

Margaret Livesey's will contained a very unusual, perhaps unique, provision. It instructed her solicitors to continue to fight to prove her innocence.

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