Triennial Review of the Criminal Cases Review Commission

Response by Paul May to Ministry of Justice

Personal Background

Between 1985 and 1991, I chaired the London-based campaign for the Birmingham Six. I subsequently led campaigns for Judith Ward, the Bridgewater Four and Danny McNamee as well as several less-publicised miscarriage of justice victims including the East Ham Two (conviction for triple murder quashed by the Court of Appeal in 1994). More recently, I organised the campaign for Sam Hallam from 2006 until his release in May 2012 and represented him in his application to the Commission. I am currently involved with two cases awaiting decision by the CCRC – Eddie Gilfoyle and Colin Norris.

Introduction

1. Thank you for the opportunity to comment on the functions, powers and structure of the Criminal Cases Review Commission (CCRC). For more than 25 years, I have engaged with the Commission and its predecessor (C3 Division in the Home Office) concerning alleged wrongful convictions. C3's lamentable performance and obduracy in the face of notorious miscarriages of justice contributed significantly towards the serious reputational damage which the English criminal justice system suffered - domestically and internationally – in the 1980s and 1990s.

2. While valid criticisms can be directed at the CCRC, it is beyond argument that the Commission has been incomparably more diligent, rational and transparent in reviewing claims of wrongful convictions than its predecessor. Since the CCRC's establishment, five times the number of convictions have been referred to the Court of Appeal each year than previously. More than two thirds of referrals have resulted in quashed convictions.

Functions

3. There is a continuing need for the CCRC to perform the functions set out at 1(a) to 1(j) of the survey questions. I have specific comments on the following functions:

Sentences

4. Not long after the Commission's creation, the Court of Appeal in *Graham*[1] effectively nullified the CCRC's powers to refer discretionary sentences. The Court advanced the irrational argument that since the CCRC's primary role is to refer convictions where a miscarriage of justice may have occurred (and a lawfully-sentenced defendant could '*hardly be described as the victim of such'*) the CCRC must refrain in most cases from exercising its statutory powers. As a consequence, the Commission tends only to refer sentences which are patently unlawful and/or where there has been a clear arithmetical error. The decision in *Graham* has created the anomalous situation where Parliament has conferred a wide statutory discretion to refer '*any sentence (not being a sentence fixed by law)*' which the Court of Appeal has effectively refused to recognise.

[1] [1999] 2 Cr. App. R. (S.) 312

Northern Ireland

5. While Scotland has a separate Commission, the CCRC deals with applications from Northern Ireland as well as England and Wales. There are many similarities between the two criminal justice systems but also significant differences. These include the continuing use of non-jury trials in Northern Ireland for offences deemed to involve terrorism. This requires (notwithstanding that Northern Ireland's population only accounts for 3% of the CCRC's remit) the appointment of at least one Commissioner and staff who are familiar with that jurisdiction. This factor should be accommodated in determining the overall resources necessary for the Commission to perform its functions.

Summary Convictions

6. The pressure on the Commission is such that it has been suggested the duty to receive applications in relation to summary convictions be removed. This would be a mistake. Most applications to the CCRC relate to convictions for indictable offences but it should be recognised the impact of wrongful conviction for a summary offence can be as serious for the person concerned as conviction for an indictable offence. This may include adverse effects on career, education and personal relationships. The CCRC's functions in relation to summary offences should be retained.

Military Cases

7. The Commission has yet to refer any cases dealt with by Courts Martial or Service Civilian Courts. The recent high-profile case of Danny Nightingale (described by several politicians as a 'miscarriage of justice') confirms the need for the Commission to retain the power to review such convictions.

The Royal Prerogative of Mercy

8. The Commission has, to date, not used its power under s16(2) of the Criminal Appeal Act 1995 (the Act) to refer cases to the Secretary of State on the grounds that they justify exercise of the Royal Prerogative of Mercy. It was always expected such a power would be applied sparingly but there are occasional cases[2] where the Court of Appeal has shown it is either unwilling or incapable of achieving justice. It is surprising (and disappointing) that the CCRC has not seen fit in 15 years to exercise its s16(2) power in a single case.

Powers

The 'Real Possibility' Test

9. Under s13(1)(a) of the Act, the Commission may only refer convictions if it considers *'there is a real possibility that the conviction, verdict, finding or sentence would not be upheld'.* Some

[2] A notorious example was Michael McMahon and David Cooper whose wrongful convictions were subject to six Court of Appeal hearings before the convictions were posthumously quashed in 2003.

argue that s13(1)(a) should be repealed and a different referral test put in its place. It is difficult to discern the logic behind such arguments. If the Commission were to refer convictions where there was scant or no hope of success, this would raise false hopes on the part of appellants, cause significant delays in appeals being heard and create an (ultimately futile) antagonism between the Commission and the Court of Appeal.

10. It has been suggested that an 'innocence test' could be applied under which the CCRC would refer convictions if it believed the person is innocent. Such a proposal is simplistic and naïve. Many commentators have correctly concluded that introduction of an 'innocence test' would result in a minuscule number of convictions being referred to (and consequently quashed by) the courts. It should be borne in mind that in every case of wrongful conviction, there existed at trial sufficient evidence to convince a jury of the defendants' guilt. Fresh evidence which casts sufficient doubt on the safety of the conviction is rarely of a nature to establish conclusively that it is impossible the person committed the offence.

11. If an 'innocence test' were applied by the Commission, it must follow that the current requirement imposed on the Court of Appeal by s2 (1) (a) of the Act (that the Court *'shall allow an appeal against conviction if they think that the conviction is unsafe'*) would also be replaced. In *McNamee*[3], the Court of Appeal made clear its view of any notion that its role is to determine appellants' innocence. The Court's task (per Swinton-Thomas LJ)

> 'is to resolve the question as to whether the conviction of this Appellant is safe in the light of the fresh evidence. We test that question by asking whether the jury, if they had knowledge of the fresh evidence, would necessarily have come to the conclusion that they did… we have concluded that it is not possible for us to say that the jury would necessarily have arrived at the same conclusion if they had knowledge of the fresh evidence. However it does not at all follow that this Appellant is innocent of the charge brought against him or that he has served 11 years imprisonment for a crime which it has been found that he did not commit'

12. There can be little doubt from the foregoing that the Court of Appeal would have upheld Mr McNamee's conviction if an 'innocence test' had applied in 1998. As Chair of the Danny McNamee Campaign, it was my firm belief that he had indeed not committed the offence (conspiracy to cause explosions) for which he had been convicted. Nevertheless, the nature of the evidence in his case (and of the alleged inchoate offence) rendered it virtually impossible that any new material would conclusively prove his innocence (as opposed to the Court being persuaded fresh evidence made the conviction unsafe). Mr McNamee's conviction was the very first referred by the newly-established CCRC in July 1997. The fresh material which pointed to his conviction being unsafe was so strong that the Commission took less than four months to reach its referral decision. Had the CCRC been required to ask itself whether Mr McNamee was innocent it is questionable whether his conviction would have been referred at all. It can be assumed the Court of Appeal

[3] 1998 WL 1751094

would set the bar for establishing innocence at an elusively high evidential level. Perversely, application of an 'innocence test' would keep more innocent people in prison.

13. The 'real possibility' test could be replaced by some other statutory criterion (such as that placed on the Scottish CCRC that they refer convictions if they believe '*that a miscarriage of justice may have occurred*')[4]. There is no evidence that the Scottish CCRC's actual practice is any different from its English counterpart when making referral decisions. In both jurisdictions, the respective Commissions are primarily influenced by their assessment of the courts' likely response.

14. The perceived requirement to 'second guess' the Court of Appeal has, however, encouraged the Commission to adopt an excessively cautious approach towards referral decisions. On several topics, the jurisprudence of the Court of Appeal (Criminal Division) is either confused or inconsistent. There are also potential evidential issues about which the Court has never delivered a clear judgment. In such instances, the Commission's estimation as to how the Court *might* receive fresh evidence must necessarily contain elements of conjecture. There is considerable scope for the Commission to adopt a bolder interpretation of the meaning of 'real possibility'. The test does not require the CCRC to believe it <u>probable</u> the Court would overturn the conviction only that there is a credible prospect of such an outcome. In such cases, the Commission's inclination should be towards the option of referral.

Private Companies

15. It is imperative that the obligation under s17 of the Act on persons serving in public bodies to produce such documents and other material as the CCRC may reasonably require is extended to private organisations and individuals as soon as practicable. Recent years have seen widespread privatisation of functions within the criminal justice system previously undertaken within the public sector. This particularly applies to companies engaged in forensic science activities. I understand that such companies have so far co-operated voluntarily with the CCRC but it is not difficult to envisage situations where a private company might be more reluctant e.g. if the company's competence or probity was being called into question.

16. The CCRC's powers under s17(2) to issue directions that material '*must not be destroyed, damaged or altered*' should also be extended to include private bodies and individuals.

Structure

17. There is no need to change the CCRC's present status as a Non-Departmental Public Body '*not regarded as the servant or agent of the Crown*'[5].

18. In common with most who had the misfortune to deal with the Home Office's C3 Division prior to April 1997, I view any suggestion the Commission's functions might return to being '*delivered as part of a Government Department*' with genuine horror. C3 performed its duties in a manner which was entirely opaque and unaccountable to persons claiming wrongful conviction, those representing them and the broader public. Correspondence

[4] S194C(1)(a) Criminal Procedure (Scotland) Act 1995

[5] s8(2) Criminal Appeal Act 1995

routinely took months before cursory (and often inaccurate) replies were received (if at all). C3 reacted passively to submissions and rarely – if ever – conducted inquiries on its own initiative. Where police inquiries were initiated (often as a means of deflecting public pressure in contentious cases) investigations proceeded with no supervision or direction by the Home Office. Reasons prepared by C3 officials for the Secretary of State rejecting[6] or even referring[7] cases were often inadequate and/or erroneous.

19. I have invariably found Commission personnel to be responsive, efficient and (even where we disagree) courteous. In Sam Hallam's case, the CCRC's Statement of Reasons covered 90 detailed pages (and Thames Valley Police's inquiry report – which was readily disclosed – a further 79 pages). This compares favourably with C3's absurdly taciturn attitude towards disclosure of information which might be helpful to applicants.

Merger?

20. The CCRC draws much of its strength as an organisation from development of a considerable body of expertise through dedicated Commissioners and employees possessing specific experience and interest in miscarriage of justice issues. This advantage would be lost if the CCRC's functions were merged with another body.

21. One of many problems with C3 derived from its high staff turnover as a division within a government department. No sooner would staff acquire a modicum of knowledge and experience than they moved elsewhere within the Home Office. Applicants were often 'back to square one' as newer, more inexperienced officials took on responsibility for their cases. This problem could recur if the Commission were to be subsumed within a wider body. The CCRC should continue to be a separate, distinct organisation.

Membership

22. The Act provides that the '*Commission shall consist of not fewer than eleven members'*[8] at least one third of whom '*shall be persons who are legally qualified'*.[9] Two thirds must '*have knowledge or experience of any aspect of the criminal justice system'*[10]. It is regrettable that the Ministry of Justice has latterly allowed the CCRC to operate with nine Commissioners. When it was created in 1997, there were thirteen Commissioners dealing with under 300 cases inherited from the Home Office. Fifteen years later, with applications now running at over 1,000 per year, there are nine Commissioners. This reduction (and continuing budgetary cuts) adversely contributes to significant delays in reviewing and resolving applications.[11]

[6] In the Bridgewater Four case, six extensive submissions of fresh evidence between 1990 and 1993 were rejected in a single February 1993 letter from the Home Secretary covering less than 1½ A4 pages. The rejection letter contained serious untruths and was successfully challenged before the Divisional Court in R. v Secretary of State for the Home Department ex p. Hickey (No.2) 1 All E.R. 490 (1995)

[7] A July 1993 letter from the Home Secretary informed Sam Kulasingham and Prem Sivalingham (the East Ham Two) their murder convictions would be referred. He cited anomalies in prosecution witness statements but omitted mention that a serving officer had witnessed sustained police assaults on suspects. This crucial evidence was only disclosed after the Lord Chief Justice ordered an Essex Police inquiry report be released to the men's lawyers prior to their (successful) 1994 appeal.

[8] S8(3)

[9] S8(5)

[10] S8(6)

[11] For example, Eddie Gilfoyle's case has been with the CCRC for 2½ years with no decision made to date.

23. All but one of the present Commissioners are lawyers (as are three new appointees recently announced). It is clearly desirable (and a statutory requirement) that legally qualified persons should form a proportion of the Commission's membership, I intend absolutely no criticism of the dedication and expertise of the existing Commissioner but the absence of other relevant areas of experience diminishes the Commission's potential effectiveness. Past Commissioners have included individuals from – *inter alia* - policing [12], investigative journalism[13], scientific research[14] and forensic psychiatry[15] backgrounds. It is to be hoped that when the next round of appointments takes place that serious attention will be given to broadening the Commission's membership.

Further Comments

Budget

24. For several years, the CCRC has suffered successive funding cuts which have hampered its capacity to investigate and decide upon applications in a timely manner. These reductions (described by a former CCRC '*as damaging in practice as they are demoralising in prospect'*) are a major cause of acute delays faced by applicants claiming wrongful conviction.

25. In 2002-03, the Commission employed 50 Case Review Managers (CRMs) to investigate an annual total of 955 applications. By 2011-12, the number of CRMs had fallen to 30 dealing with 1040 applications per year. The number of applications received by the Commission has risen dramatically during 2012-13 further exacerbating delays in CRM allocation and investigation.

26. The annual cost to the public purse of the CCRC (£5.8m in 2012-13) is modest (especially when compared with the many millions of pounds previously spent on drawn-out, unsupervised and abortive inquiries into just a handful of the more notorious miscarriage of justice cases such as the Birmingham Six and Bridgewater Four). The CCRC should be allocated sufficient resources to perform its functions properly and to reduce considerably the unacceptably lengthy waiting times suffered by applicants.

Waiting Times

27. While many of the delays in reaching decisions are attributable to resource constraints and the intrinsic nature of the required inquiries, there is a danger that CCRC staff and Commissioners have come to regard extensive delay as some inescapable norm with no institutional necessity to adopt a sense of urgency in relation to the applications received. It should be impressed on the CCRC that any unnecessary sloth in resolving cases is unacceptable and must be avoided.

[12] e.g. Former Chief Constable, Baden Skitt who oversaw an exemplary (and prompt) investigation into Danny McNamee's conviction,
[13] e.g. former BBC *Rough Justice* and *Trial and Error* journalist, David Jessell.
[14] The Commission's first Chairman, Sir Frederick Crawford had been a research scientist and university Vice-Chancellor.
[15] e.g the late Dr James McKeith.

Police inquiries

28. Under s19 of the Act, the Commission '*may require the appointment of an investigating officer'* to conduct inquiries on its behalf. While the Home Office was previously far too ready to initiate police inquiries as a means of consigning contentious cases to the 'long grass', the Commission has – until very recently - been unduly reluctant to exercise its s19 powers.

29. As Sam Hallam's representative, I was advised in January 2010 that the CCRC had decided to appoint an Investigating Officer to inquire into specific aspects of his conviction. We agreed that the evidence in the case was such that Commission staff on their own would not be in any practical position to conduct the large number of interviews and other investigative work necessary to bring the case to a conclusion. DCI Steve Tolmie of Thames Valley Police led a commendably thorough investigation by up to 20 officers over 15 months which uncovered significant fresh evidence culminating in Mr Hallam's successful appeal in May 2012.

30. I was surprised to learn that the Thames Valley Police investigation was only the 40th occasion (out of more than 13,000 applications since 1997) on which the Commission had exercised its s19 powers. I am aware of (and often share) concerns about 'the police investigating the police' but this option currently amounts to 'the only show in town' in cases where a wide-scale investigation is required. I understand the Commission has latterly been more willing to require s19 appointments and would encourage this development.

The Court of Appeal

31. The establishment of the CCRC has resulted in transformative improvement of the system under which claims of wrongful conviction are reviewed and referred. Sadly, there has been little improvement in the negative – and at times openly hostile - attitude of the Court of Appeal towards miscarriages of justice since the bleak day in January 1988 when I attended the Central Criminal Court to hear Lane LCJ deliver his infamous, irrational dismissal of the Birmingham Six's appeal. The Court remains capable of performing breath-taking feats of illogic in its desire to uphold convictions. One example was Sam Hallam's 2007 appeal. Latham LJ disposed of the uncomfortable fact that a key prosecution witness at trial retracted his identification by averring absurdly that the jury must have understood the witness's spoken words to mean the opposite of those same words when written down in the trial transcript.

32. Much of the criticism levelled from some quarters at the CCRC would be better directed towards the admittedly more intractable and difficult issue of reform of the Court of Appeal. It is sometimes overlooked by critics that the Commission has no power to quash convictions or to effect changes in existing law. It can only refer convictions to the courts (who reject almost one third of CCRC referrals). One statutory provision ripe for legislative reform is s23(2)(d) of the Criminal Appeal Act 1968 which requires the Court of Appeal to have particular regard to '*whether there is a reasonable explanation for the failure to adduce'* evidence at previous hearings. The 'failure to adduce' provision is frequently used to exclude

evidence which was available to the defence at trial or previous appeals but not used for whatever reason. Consequently, the CCRC may well not take account of evidence which falls foul of the 'failure to adduce' provision when making referral decisions. An illustration of anomalies which can arise from this requirement was provided at Sam Hallam's May 2012 appeal. The Court declared inadmissible a statement from a witness who said he had seen Mr Hallam outside a public house some considerable distance from the murder scene on the night in question. Although this statement had been available to the defence at trial, it made little sense until linked with much later material uncovered by Thames Valley Police indicating Mr Hallam's presence at the same location.

33. It is, moreover, not always understood that the Commission can only operate within the parameters of the existing law. In this respect, criticism of how the doctrine of joint enterprise has been applied in certain cases should be directed at Parliament (which has the capacity to change the law) and not at the Commission (which possesses no such power).

A Campaigning Role?

34. Having been actively involved for more than a quarter century with campaigns on behalf of wrongly convicted persons, I am baffled by those who urge that the Commission should adopt a more campaigning/combative stance particularly in relation to the Court of Appeal. Such a role was never envisaged for the CCRC by either the Royal Commission on Criminal Justice or Parliament. The Commission's task is to investigate – and where appropriate refer to the courts - claims of wrongful conviction. A situation where the Commission and Court of Appeal were locked in permanent conflict would be unedifying and of no assistance to those who have been wrongly convicted. The job of campaigning to reform the courts and other parts of the criminal justice system can best be performed by campaigners.

Conclusion

35. In conclusion, I would endorse the verdict on the CCRC given by Professor Michael Zander at a recent conference: '*Actually doing rather well but could do even better'.*

Paul May
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