

CORRECTING MISCARRIAGES OF JUSTICE: THE ROLE OF THE CRIMINAL CASES REVIEW COMMISSION

*David Kyle**

TABLE OF CONTENTS

I.	Introduction.....	657
II.	The Royal Commission on Criminal Justice.....	660
III.	The Criminal Cases Review Commission.....	662
	A. Investigation and Review by the Commission.....	667
	B. Decisions by the Commission.....	670
	C. Applications to the Commission—The Real World.....	671
IV.	Conclusion.....	673

I. INTRODUCTION

On 14 March 1991, six men emerged from the Old Bailey in London to the cheers of supporters gathered outside. These were the “Birmingham Six,” whose convictions sixteen years previously for murder had just been quashed by the Court of Appeal. The Court’s judgment¹ is the official testament to one of the most notorious miscarriages of justice in British legal history. Its language may barely portray the outrage and horror at the bombings during the evening of 21 November 1974 of the Mulberry Bush and Tavern in the Town public houses in Birmingham in which twenty-one people died, and many more were seriously injured.² It may give little clue to the experiences of men imprisoned for sixteen years for offences they did not commit, who continued to protest their innocence,

* The author has been a Member of the Criminal Cases Review Commission since February 1997, having previously been a Chief Crown Prosecutor in the Crown Prosecution Service. He is a graduate of the University of Cambridge and a Barrister.

1. *R. v. McIlkenny*, 93 Crim. App. R. 287 (C.A. 1991).
 2. *See id.* at 289 (describing the bombings).

supported by the campaigning efforts of lawyers, journalists, and Members of Parliament. But its conclusions are uncompromising: Police officers who gave evidence at the trial about interviews with the defendants in which they allegedly confessed to the bombings had deceived the court, and expert scientific evidence called at the trial to show links between the defendants and explosives had been called into question, if not wholly destroyed.³

There were other such cases. In 1974, Judith Ward was convicted of planting a bomb at Euston Station in London and another on a coach carrying soldiers in Yorkshire, in which twelve people died.⁴ Her conviction was quashed by the Court of Appeal in 1992 because of the prosecution's failure to disclose material to the defence, supported at the time of the appeal by fresh psychiatric evidence casting substantial doubt on the reliability of her confessions.⁵

In 1975, the "Guildford Four" were convicted of public house bombings in two towns, Guildford and Woolwich, the previous year, in which seven people died, and again, many more were seriously injured.⁶ Their convictions were quashed in 1989 when evidence of confessions was found to have been fabricated.⁷

In 1976, Annie Maguire and members of her family (the "Maguire Seven") were convicted of being the source of the explosives used in the Guildford and Woolwich bombings.⁸ Their convictions were quashed in 1991 because new evidence about the possibility of innocent contamination cast substantial doubt on the scientific evidence at trial that the defendants had been in contact with explosives.⁹

All these cases arose out of the first wave of terrorist bombings brought to mainland United Kingdom by the Irish Republican Army. However, the chapter of miscarriages of justice from the 1970s is not confined to terrorist cases. In 1976, Stefan Kiszko was convicted of murdering an eleven-year-old girl.¹⁰ His conviction was quashed in 1992

3. *Id.* at 317-18.

4. *R. v. Ward*, 96 Crim. App. R. 1, 1 (C.A. 1993).

5. *Id.* at 67.

6. BOB WOFFINDEN, MISCARRIAGES OF JUSTICE 1 (1988).

7. *See R. v. Stone*, No. 980/3778/X4, 2001 WL 98084 (C.A. Feb. 14, 2001) (noting that the Court of Appeal in the Guildford Four case concluded "that certain investigating police officers 'must have lied'").

8. *R. v. Maguire*, 94 Crim. App. R. 133, 134 (C.A. 1992).

9. *Id.* at 152-53.

10. *R. v. Kiszko*, 68 Crim. App. R. 62, 62 (C.A. 1979).

because scientific evidence that he could not have been the person who raped the child was concealed, and new evidence showed that his confessions were wholly unreliable.¹¹ In 1978, Carl Bridgewater, a young boy delivering newspapers, was murdered when he disturbed burglars at a remote farmhouse.¹² Four men (the “Bridgewater Four”) were convicted the following year.¹³ Their convictions were quashed in 1997 because it was found that interview evidence had been fabricated and confessions unfairly obtained by trickery.¹⁴

Why do these things happen? No doubt, the higher the profile of the case, the greater the risk of miscarriage of justice, fuelled by public concern and resulting pressure on investigators to “get those responsible.” There is the potential for tunnel vision once a suspect is in the frame, accompanied, at worst, by determination to produce the evidence by whatever means or, less culpably, by ignoring the possibility that the wrong suspects have been arrested. The quest of any criminal jurisdiction, faced with incidents of miscarriages of justice, is to discover whether there is a systemic problem to be addressed or whether some idiosyncratic reason can be attributed to the individual case. It is significant that each of the cases mentioned above was investigated and prosecuted at a time when there was no legislation defining and regulating the exercise of police powers, particularly relating to the detention and questioning of suspects, and when there was no adequate definition of the prosecution’s obligations to disclose unused material that might assist the defence. Effected in the period between the convictions in these cases and their exposure as miscarriages of justice, the definition and control of police powers in the Police and Criminal Evidence Act 1984,¹⁵ the requirement for taperecording of all police interviews, and the separation of investigative and prosecution functions through the creation in 1986 of an independent, national prosecuting authority (the Crown Prosecution Service)¹⁶ have been of fundamental significance to reducing the risk of miscarriages of justice. Legislation was enacted in

11. *Stefan Kiszko*, at <http://www.innocent.org.uk/cases/stefankiszko> (last visited May 13, 2004).

12. “*Bridgewater Four*” *Demand Action Against Police* (July 29, 1998), at <http://news.bbc.co.uk/1/hi/uk/141417.stm>.

13. *The Queen v. Indep. Assessor*, No. CO/34232003, 2003 WL 1823010 (Q.B. Apr. 16, 2003).

14. *Id.*

15. Police and Criminal Evidence Act, 1984, c. 60 (Eng.).

16. *See* Prosecution of Offences Act, 1985, c. 23, § 1 (Eng.) (creating the Crown Prosecution Service).

1996¹⁷ to address the prosecution's disclosure obligations, but ongoing experience suggests that failure by investigating authorities and prosecutors to understand or properly to discharge these obligations remains "a potent source of injustice," as it was described by the Court of Appeal when giving judgment in Judith Ward's case.¹⁸

Of equal importance is the question of why it took so long for the miscarriages of justice represented by these cases to be remedied. Judith Ward was content to sit quietly in prison (although there were those who were very concerned about her case), but there was no lack of vociferous campaigning by and on behalf of the others. There will of course be situations when new, exculpatory evidence is genuinely not available until long after the original convictions, notably, for example, when this arises from developments in forensic science. However, because it is idle to pretend that things will not go wrong in even the best regulated criminal justice system, there is a question of critical cultural importance. Will whatever mechanism that is adopted to address the cries of those who claim to have been wrongly convicted have at its heart the will to own up to mistakes and learn lessons, or will it strive to preserve the status quo?

II. THE ROYAL COMMISSION ON CRIMINAL JUSTICE

These considerations were central to the work of the Royal Commission on Criminal Justice, which the Government established on the very day the convictions of the "Birmingham Six" were quashed, with wide terms of reference requiring examination of the criminal justice system from the start of a police investigation through the point when convicted persons have exhausted their rights of appeal.¹⁹ The Royal Commission reported two years later, in 1993, with some 352 recommendations covering a range of activities, including police investigations, safeguards for suspects, the prosecution process, pretrial procedures, the trial process, forensic science, and other expert evidence and the appeals process.²⁰ The final chapter of the Royal Commission report is titled "Correction of

17. Criminal Procedure and Investigations Act, 1996, c. 25 (Eng.).

18. *R. v. Ward*, 96 Crim. App. R. 1, 22 (C.A. 1993).

19. See CRIMINAL CASES REVIEW COMM'N, BACKGROUND TO THE COMMISSION, at http://www.ccrj.gov.uk/aboutus/aboutus_background.html (last visited May 13, 2004) (discussing the establishment of the Royal Commission on Criminal Justice).

20. THE ROYAL COMM'N ON CRIMINAL JUSTICE, REPORT, COMMAND 2263, 180-219 (HMSO 1993) [hereinafter ROYAL COMM'N REPORT].

Miscarriages of Justice.”²¹

Since 1907, when the Court of Criminal Appeal was created, there has been a procedure through which a convicted person, who has exhausted the usual appeal process (in the United Kingdom, a person is only entitled to one appeal in the ordinary way), can nonetheless get back to the Court of Appeal. The Home Secretary²² had a statutory power to refer to the Court of Appeal, “if he thinks fit,” any case in which a person had been convicted on indictment—that is, in the Crown Court when, if there was a plea of not guilty, the case would have been tried by judge and jury.²³ All of the cases mentioned in Part I eventually found their way back to the Court of Appeal by reason of the Home Secretary exercising this power. The statute did not give any help as to when or in what circumstances the Home Secretary should think it fit to refer a case, but in practice, he would do so only if there was new evidence or other consideration of substance that had not been before the trial court.

The Royal Commission voiced two principal concerns about the Home Secretary’s role in relation to miscarriages of justice.²⁴ First, examination of how the role was exercised revealed a restrictive and essentially reactive approach by the Home Office, characterised by the absence of investigative initiative. Secondly, this role assigned to the Home Secretary was incompatible with the constitutional separation of powers between the courts and the executive; indeed, trying to keep them separate had contributed to the reluctance of the Home Office to enquire deeply enough into cases it was asked to consider. Put another way, it was undesirable for the Home Secretary to be directly responsible for reviewing suspected miscarriages of justice as well as being responsible for law and order and the police. The Royal Commission recommended that the Home Secretary’s role in miscarriages of justice should come to an end and that there should be a new, independent body with wide powers of investigation and review, and with the associated power to refer appropriate cases to an appellate court.²⁵ The result, through enactment of the Criminal Appeal Act 1995, was the creation of the Criminal Cases

21. *Id.*

22. The Home Secretary is the Member of the Cabinet responsible for criminal justice.

23. Criminal Appeal Act, 1968, c. 19, § 17 (Eng.) (repealed by Criminal Appeal Act, 1995, c. 35, sched. 3 (Eng.)).

24. ROYAL COMM’N REPORT, *supra* note 20, ch. 11, §§ 6-11.

25. CRIMINAL CASES REVIEW COMM’N, *supra* note 19.

Review Commission,²⁶ which became fully operational on 31 March 1997.²⁷

III. THE CRIMINAL CASES REVIEW COMMISSION

The jurisdiction of the Commission extends to England, Wales, and Northern Ireland.²⁸ Scotland has always had its own legal system, and this, together with the formal devolution of some legislative and executive powers to the Scottish Assembly, makes it entirely appropriate that Scotland should have its own body to address suspected miscarriages of justice, the Scottish Criminal Cases Review Commission.²⁹ Although there are similarities of purpose, structure, and operational framework between the two Commissions, this Article does not touch further on any aspect of the Scottish Commission.

The terms of reference under which the Criminal Cases Review Commission can send cases back to an appellate court are wider than those that applied to the Home Secretary. The Commission's remit extends to both conviction (including findings of insanity and unfitness to plead) and sentence, and furthermore, it embraces cases that have been tried in Magistrates' Courts (in broad terms, those involving offences at the lower end of the gravity scale), as well as those tried in the Crown Court.³⁰ Interestingly, although the great majority of criminal cases dealt with in England and Wales each year are heard in the Magistrates' Courts (many of these involve road traffic offences), only a small percentage (eight percent)³¹ of applicants who ask the Commission to review their cases have been convicted in those courts. It is probably not surprising that the incidence of people alleging that they have been wrongfully convicted is highest at the more serious end of the criminal calendar. As a broad observation, some fifteen percent of applications have related to offences of homicide, fifteen percent to serious assaults, thirty-nine percent to

26. Criminal Appeal Act, 1995, c. 35, § 8 (Eng.).

27. CRIMINAL CASES REVIEW COMM'N, *supra* note 19.

28. CRIMINAL CASES REVIEW COMM'N, INTRODUCING THE COMMISSION, *at* <http://www.crc.gov.uk/aboutus/aboutus.html> (last visited May 13, 2004).

29. *See* Criminal Procedure (Scotland) Act, 1995, c. 12, § 194A (Eng.), *amended by* Crime and Punishment (Scotland) Act, 1997, c. 48, § 25 (Eng.) (creating the Scottish Criminal Cases Review Commission).

30. Criminal Appeal Act, 1995, c. 35, §§ 9-12 (Eng.).

31. Statistical information in this Article is taken from the Commission's internal management information systems and reflects the position as of 30 April 2004. For fuller details of the Commission's performance and processes (as at 31 March 2003), see CRIMINAL CASES REVIEW COMM'N, ANNUAL REPORT 2002-2003, *available at* <http://www.crc.gov.uk/report/report.html> (last visited May 25, 2004).

serious sexual offences, and fifteen percent to drug offences. Of the 228 cases referred back to an appellate court from the start of the Commission until 30 April 2004, only eight have been in respect of Magistrates' Court convictions.

There are some key elements of the Commission's composition and the powers it has been given that not only illustrate how it works, but also encourage insight into whether the expectations of the Royal Commission and Parliament, have been translated into reality. The Royal Commission stressed that the body it was recommending should be independent of government and the courts.³² The Criminal Cases Review Commission is undoubtedly independent. It is what is called a "Non-departmental Public Body"³³ and although it receives funding from the Home Office (current annual budget in the order of \$14 million) and is accountable to Parliament, that department has no say in the Commission's casework operations and has no involvement in, or the ability to influence, case decisions. Commission Members, of which there are at present fourteen, are appointed by the Queen on the recommendation of the Prime Minister.³⁴ The legislation requires that at least one third of Commission Members should be legally qualified and that at least two thirds should have knowledge or experience of the criminal justice system.³⁵ This means that one third of the Membership may be "lay" in the sense of not being legally qualified and not having any knowledge of the criminal justice system. Although the work of the Commission has a significant legal dimension, the ability to think through how a case might be investigated, where weaknesses in the conviction may lie, and whether a miscarriage of justice has been exposed is far from being the preserve of lawyers. The breadth of experience and background amongst the Commission Members, who guide the reviews and make decisions on whether a case should be referred to an appeal, coupled with corresponding breadth of experience and background amongst Case Review Managers who undertake the investigative and review activity, creates a dynamic environment for independence of thought and innovation.

In popular language, the Commission is a body that investigates suspected miscarriages of justice.³⁶ Asking the person in the street what is

32. See generally ROYAL COMM'N REPORT, *supra* note 20.

33. For the statutory provisions establishing the Commission and setting the framework for its operation, see Criminal Appeal Act, 1995, c. 35, § 8, sched. 1 (Eng.).

34. *Id.* § 8(4).

35. *Id.* § 8(5)-(6).

36. CRIMINAL CASES REVIEW COMM'N, *supra* note 28.

meant by a “miscarriage of justice” is likely to produce a variety of responses. All would surely agree that convicting someone of a crime he or she simply did not commit is a miscarriage of justice—what might be described as the wrongful conviction of an innocent person in the absolute sense. But what about the situation when, after conviction, new evidence comes to light that, had the jury heard it, might have induced some doubt about guilt? Or the situation when there has been a flaw in the trial process? Most people would probably accept that these situations are indicative of miscarriages of justice, but they would say that whether it is a miscarriage of justice depends on the degree of doubt induced or the significance of the process flaw—the most extreme view being that “people should not get off on technicalities.” Fortunately, the expression miscarriage of justice is nowhere to be found in the Criminal Appeal Acts 1968 and 1995 in their application either to the Commission or to the Court of Appeal. This is fortunate because it means that in order to do its job, the Commission does not have to concern itself with questions of guilt or innocence in the absolute sense (only rarely, in the Commission’s experience, does new evidence of a wholly exonerating nature come to light) and because the Commission is not forced to debate the meaning of miscarriage of justice either when reaching its decisions or when discussing its role in the wider context of the criminal justice system as a whole.³⁷

The Commission is not itself able to quash convictions or reduce sentences. That remains the preserve of the courts. The Commission can be viewed as the gateway through which applicants must pass if they are to gain further recourse to the courts once their ordinary rights of appeal have been exhausted. Under sections 9 to 12 of the Criminal Appeal Act 1995, the Commission may at any time refer a conviction or sentence either to the Court of Appeal (if the case was heard in the Crown Court) or to the Crown Court (if the case was heard in the Magistrates’ Court).³⁸ The

37. This is not a universally accepted view. As recently as 27 January 2004, the Home Affairs Committee (an all-party committee of Members of Parliament (MPs) that oversees the work of the Home Office and its agencies) asked the Commission’s chairman whether the test applied by the Commission should be changed so as to make a belief that there may have been a miscarriage of justice the basis for referring a case to an appellate court.

38. Criminal Appeal Act, 1995, c. 35, §§ 9-12 (Eng.). An appeal to the Court of Appeal is a review of what happened at trial. The Court has power to receive new evidence, but it is not concerned to substitute its own view of the trial evidence for that of the jury. By contrast, an appeal to the Crown Court takes the form of a rehearing in which the evidence is called by both sides, and the Court reaches a new finding on the facts. (As a further refinement, there is a Court of Appeal for England & Wales in London and a Court of Appeal for Northern Ireland in Belfast. Appeals from

crucial provision, which sets out the conditions that must be met before the Commission can refer a case and that has the defining impact on the Commission's relationship with the Court of Appeal, is section 13 of the Criminal Appeal Act 1995.³⁹ First, there must, other than in exceptional circumstances, already have been a failed appeal against conviction or sentence (this reinforces the position that the Commission is a body of last resort and not simply a substitute for the ordinary trial and appeal processes).⁴⁰ Secondly, the Commission must consider there to be "a real possibility that the conviction . . . or sentence would not be upheld were the reference to be made" (in plain English, that the appeal prompted by the Commission's reference would result in a conclusion that the conviction was "unsafe" or the punishment too severe).⁴¹ The assessment that there is a real possibility must be based, in the case of a conviction, on evidence or argument that has not already been raised at trial or on appeal (other than in exceptional circumstances) or, in the case of a sentence, on information or argument on a point of law that has not already been raised.⁴² So, again in plain English, there has to be something new. The Commission cannot refer a case just because it feels the jury or the magistrates might have gotten it wrong. This obviously draws the comment that there will inevitably be miscarriages of justice that go uncorrected because it is impossible to find anything new. This, regrettably, is likely to be a consequence in any jurisdiction where the appeal process accords deference to the triers of fact at trial⁴³ by ensuring that appeals are not retrials.

It is immediately apparent that a decision of the Commission to refer a case involves predicting what the Court of Appeal will determine.⁴⁴ Those cynical of the Court of Appeal's enthusiasm to reach a different conclusion from that reached at the earlier appeal think that this linking of the test to be applied by the Commission to that which will be applied by

Magistrates' Courts in Northern Ireland are heard in the County Court rather than in the Crown Court.) The great majority of the Commission's referrals are to the Court of Appeal, and this Article focuses on the jurisdiction of that Court.

39. Criminal Appeal Act, 1995, c. 35, § 13 (Eng.).

40. *Id.* § 13(1)(c).

41. *Id.* § 13(1)(a).

42. *Id.* § 13(1)(b).

43. The trier of fact is either the jury or, in relation to trials for scheduled offences in Northern Ireland, a judge sitting without a jury. Northern Ireland (Emergency Provisions) Act, 1973, c. 53, § 2 & sched. 4 (Eng.).

44. This is a view certainly shared by the courts. *See* R. v. Criminal Cases Review Comm'n *ex parte* Pearson, 1 Crim. App. R. 141, 142 (Q.B. Div'l Ct. 2000) (noting that the Commission had to predict what the Court of Appeal would do).

the Court⁴⁵ is unfortunate. From the outset of the Commission's activities, criticism was voiced that it would become the "handmaiden" of the Court of Appeal and that, slowly but surely, it would be manoeuvred by the Court into raising the threshold of the real possibility test higher and higher. "Real possibility" is not defined by the statute, and the Commission has consistently taken the view that it should not be given a restrictive interpretation, a view with which the Court is on the face of it content.⁴⁶ The Commission is very alive to the jurisprudence of the Court of Appeal relating to safety of convictions and the Court's approach to its powers to receive fresh evidence.⁴⁷ The Commission is also very alive to reviewing the outcomes of its referrals, particularly those in which the conviction is upheld, and to seeing if there are lessons to be learned. This, however, has nothing to do with being cowed by the Court, which the Commission would actively resist if there were any reason to think it was happening. As to what is in fact happening with the Commission's referrals, of the 160 conviction referrals so far heard by the Court of Appeal, 107, or sixty-seven percent, have resulted in the convictions being quashed.⁴⁸ This figure is an indicator that the Commission is endeavouring to apply its real possibility test responsibly and to maintain the proper gap between its prediction of outcomes in the Court of Appeal and the outcomes themselves.

For the sake of completeness, the point should be made that, once the Commission has referred a case, it plays no further part in the process. The case becomes, for all purposes, an ordinary, adversarial appeal and is treated as such by the Court and the parties. It is up to the appellant (the Commission's applicant) to make his or her case, and it is up to the

45. See Criminal Appeal Act, 1968, c. 19, § 2 (Eng.), amended by Criminal Appeal Act, 1995, c. 35, § 2(1)(a) (Eng.) ("[T]he Court of Appeal . . . shall allow an appeal against conviction if they think that it is unsafe; and . . . shall dismiss such an appeal in any other case.").

46. See *R. v. Criminal Cases Review Comm'n ex parte Pearson*, 1 Crim. App. R. at 142 (describing a real possibility as "more certain than an outside chance or a bare possibility, but which might be less than a probability, or a likelihood, or a racing certainty").

47. See Criminal Appeal Act, 1968, c. 19, § 23 (Eng.), amended by Criminal Appeal Act, 1995, c. 35, sched. 2, para 4. (Eng.) (allowing the Court of Appeal to receive additional evidence). There is additional case law on this power, but is beyond the scope of this Article to address.

48. See CRIMINAL CASES REVIEW COMM'N, *supra* note 31, at 24 (noting that as of 31 March, 2003, of the 121 convictions heard by the Court of Appeal, 77, or sixty-four percent resulted in the convictions being quashed). As of 30 April 2004, the statistics have changed to those noted in the text.

prosecution to resist the appeal as it sees fit.⁴⁹

A. Investigation and Review by the Commission

In recommending that there should be an independent body to review suspected miscarriages of justice, the Royal Commission clearly contemplated that it should have wide investigative powers, which it would exercise vigorously. The Criminal Appeal Act 1995 provides a range of tools, and they are extensively used.

The Commission can take any steps to assist with investigation and review, including “undertaking, or arranging for others to undertake, inquiries, and . . . obtaining, or arranging to obtain, statements, opinions and reports.”⁵⁰ Stripped of legal language, this means that the Commission’s Case Review Managers, of whom there are forty-eight and who are responsible for setting the direction of the investigation and carrying out the necessary inquiries, have a free hand to do whatever the circumstances of each case require. In practice, this is likely to involve obtaining relevant documents from a variety of sources (in many cases, these, without more, will provide the solution to the review), locating and interviewing witnesses, and commissioning new, expert reports (with an eye to exploiting developments, particularly in forensic science and medicine, or to putting under critical review an aspect of trial evidence that can be so heavily influential on a jury). It is of course important to avoid spending time on fruitless activity that could never, whatever the outcome, have any impact on the safety of the conviction, and a premium is put on early and effective case planning. The Commission aims, through a rigorous selection process, to recruit Case Review Managers who are bright, experienced, analytically skilful, and innovative.⁵¹ A “collegial environment” is fostered, in which open exchange of information and ideas is encouraged. A Commission Member is assigned to each case to help formulate tactics and keep up the momentum of the review. Additional support is available from the Commission’s two Legal Advisers and two Investigations Advisers (both former senior detective police officers).

49. At present, appellants are not restricted in their appeals to the grounds on which the Commission made the reference. When the Criminal Justice Act 2003 is brought into force, appellants will only be able to argue grounds additional to those on which the reference was based with leave of the court. Criminal Justice Act, 2003, c. 44, § 315 (Eng.).

50. Criminal Appeal Act, 1995, c. 35, § 21 (Eng.).

51. Case Review Managers include lawyers, police officers, trading standards investigators, and probation officers.

When it is reasonable to do so, the Commission can obtain unrestricted access to any documents or other material in the possession of a public body that may assist in the exercise of the Commission's functions.⁵² The Act defines "public body" broadly.⁵³ It covers not only obvious sources of potentially useful information (police and other investigating bodies, the Forensic Science Service, prosecuting authorities, courts, government departments, and municipal authorities),⁵⁴ but also applies to material that might be regarded as generally protected from disclosure (for example, information held by the Security Services and medical records of National Health Service patients).⁵⁵ This is a hugely important power. Furthermore, although requests for access must be reasonable within the scope of the particular investigation and review, they are not in any way linked to the prosecution's disclosure obligations. Nor are they confined by the considerations that might, for example, apply when a defendant in criminal proceedings asks for discovery of material held by a third party and is defeated because it is said to be no more than a fishing expedition. It is something of an anomaly that the Commission's powers do not extend to private individuals or organisations, particularly those that do things of a public nature (like telephone companies, utility companies, and transport companies) or that are very likely to have useful information (for example, banks and other financial institutions). There are some peculiarities with the existing arrangements, such that, for example, the Commission cannot require access to the medical records of private healthcare patients, or that the British Broadcasting Corporation appears to be a public body as defined by the Act, whereas the commercial broadcasting authorities are not. It has to be said that, in the Commission's experience, private bodies are usually willing to help so far as they can.⁵⁶ The Commission is, however, alive to the implications for its effectiveness

52. Criminal Appeal Act, 1995, c. 35, § 17 (Eng.).

53. *Id.* § 22(1).

54. *Id.* § 22(1)(a)-(b).

55. *See id.* § 22(1)(c) (defining public body to include "any other body whose members are appointed by Her Majesty, any Minister or any government department whose revenues consist wholly or mainly of money provided by Parliament or appropriated by Measure of the Northern Ireland Assembly"). The duty to comply with such a requirement "is not affected by any obligation of secrecy or other limitation on disclosure," including those imposed by statute. *Id.* § 17(4). Paragraph 6(5) of schedule 1 to the Act requires the Commission to deal with material in a manner appropriate for safeguarding the interests of national security if that, having regard to the nature of the material obtained, is a relevant issue. *Id.* sched. 1, para. 6(5).

56. Private bodies may be subject to constraints of confidentiality, including those arising contractually or under the Data Protection Acts 1984 and 1998. Data Protection Act, 1984, c. 35 (Eng.); Data Protection Act, 1998, c. 29 (Eng.).

2004]

Criminal Cases Review Commission

669

brought about by the distinction between public and private bodies and to the scope for legislative change.

In making its recommendations for an independent body to investigate miscarriages of justice, the Royal Commission suggested that it should be supported by a staff of lawyers and administrators and have access to specialist advisers and that

[i]t may be advisable for it to have on its staff one or two people who are expert in investigations since this should assist it in its role . . . of supervising investigations undertaken by the police. . . .

. . . .

. . . [It] should also be in a position to commission expert advice on particular aspects, for example scientific evidence, if it wished to do so outside the main police investigation.⁵⁷

By expressing itself in this way, the Royal Commission clearly envisaged that the actual task of investigation would normally be undertaken by the police, albeit under supervision, in much the same way as suspected miscarriages of justice had been approached when the power to refer cases to the Court of Appeal was vested in the Home Secretary. Not surprisingly, this drew criticism from commentators doubtful about the impartiality of the police, and alternative models were suggested, which included the proposal that the Commission should have its own separate force of investigators. In the event, the model that the Commission has actually designed, giving investigative responsibility to its Case Review Managers and Members, is different again, but it clearly signals an emphasis on internal investigation and review in a way that does demonstrably underpin the Commission's independence.

The Commission does, however, have an important power to require the appointment of an external Investigating Officer to carry out inquiries in appropriate cases.⁵⁸ The Commission has determined its own criteria for when such appointments should be made, as it is entitled to do.⁵⁹ These can be summarised as: firstly, situations when the exercise of powers that the Commission does not have (for example, of arrest, interviewing suspects under caution, or search and seizure) is likely to be needed;

57. ROYAL COMM'N REPORT, *supra* note 20, at 185-86.

58. Criminal Appeal Act, 1995, c. 35, §§ 19-20 (Eng.).

59. *Id.* sched. 1, para. 6(1).

secondly, when there are allegations of misconduct by those who investigated the offence; and thirdly, when the scale of the investigation is assessed as being beyond the resources of the Commission. Over the life of the Commission, Investigating Officers have been appointed in only twenty-four cases. Of those completed (nineteen), eleven have led to a referral to the Court of Appeal. The Commission believes that it is both meeting expectations about the extent to which it should conduct its own investigations and, through clear directions and close supervision in cases when the appointment of an external investigating officer has been necessary, averting criticism about the inability of the police to deal professionally with suspected miscarriages of justice.

B. *Decisions by the Commission*

Once Case Review Managers have completed their reviews, cases are passed to Commission Members to decide whether they should be referred for appeal.⁶⁰ In the design of its procedures, the Commission has consciously separated the review and decisionmaking functions so as to ensure that independence and objectivity go right through to the end. This means that the Member assigned to assist the Case Review Manager with the review will not be involved in making the decision. Working at the Commission is about maintaining confidence in the criminal justice system,⁶¹ to which referring appropriate cases for appeal necessarily contributes—but it is not a crusade, and Case Review Managers are well aware of this. Nonetheless, close involvement with a review, perhaps extending over many months in the larger cases, carries some slight risk, albeit unwitting, of bias for or against an applicant, and it is this risk that the separation of review and decisionmaking functions is intended to address.

The Commission is required to give reasons for its decisions whether or not to refer cases for appeal.⁶² It does so in the form of a “Statement of Reasons,” a document the Commission has devised that sets out the trial and appeal history, the issues raised for the Commission’s consideration,

60. A decision to refer a case must be made by a committee of at least three Commission Members. Decisions not to refer may be made by one or more of the Members or employees of the Commission. *Id.* sched. 1, para. 6(2). So far, the Commission has chosen not to delegate decisionmaking functions to employees.

61. CRIMINAL CASES REVIEW COMM’N, MANAGEMENT STATEMENT: OBJECTIVES, at http://www.crc.gov.uk/management/management_objectives.html (last visited May 13, 2004).

62. Criminal Appeal Act, 1995, c. 35, § 14(4), (6) (Eng.).

and its evaluation of those issues. Before reaching a decision not to refer a case, the Commission must advise an applicant, with disclosure of relevant documents, of its provisional conclusion that there appear to be no grounds that justify a referral and give the applicant the opportunity to make further representations.⁶³ This is more than “window dressing.” The Commission gives full and careful consideration to any further representations that may be made and has on a number of occasions altered its provisional conclusion and decided to refer the case for appeal.

C. Applications to the Commission—The Real World

Notwithstanding the woeful succession of cases involving police misconduct that brought about the Commission’s creation, real-life experience over nearly seven years shows that, happily, these cases now appear to be the exception rather than the rule. It is worth remembering that, on 1 April 1997, the Commission inherited some 280 unfinished cases from the Home Office, with convictions in some of them going back many years. These included the high profile cases of Derek Bentley (convicted and executed in 1952 for the murder of a police officer) and James Hanratty (convicted of murder and executed in 1962), which had both been the subject of sustained campaigns over the years by relatives, journalists, and authors. Both cases were referred to the Court of Appeal by the Commission. Derek Bentley’s conviction was quashed,⁶⁴ and James Hanratty’s was upheld because of new DNA evidence supporting the safety of his conviction.⁶⁵ The point to be made is that, with cases arising from convictions spanning half a century (in fact, the oldest conviction yet referred by the Commission that was subsequently upheld by the Court of Appeal dates back to 1927⁶⁶), it is difficult for the Commission to make any general pronouncement about causes of miscarriages of justice from its own experience. What is undoubtedly true is that 1 January 1986 (the date

63. See generally *R. v Sec’y of State for the Home Dep’t ex parte Hickey*, 1 All E.R. 490 (Q.B. 1995).

64. *R. v. Bentley*, 1 Crim. App. R. 21, 340 (C.A. 2001).

65. *R. v. Hanratty*, 2 Crim. App. R. 30, 481 (C.A. 2002). The Court of Appeal, in another case referred by the Commission, confirmed its position that the prosecution may introduce on appeal fresh evidence supportive of guilt. *R. v. Craven*, 2 Crim. App. R. 12, 196 (C.A. 2001).

66. There is no time limit on the Commission’s power to refer. The Commission has discretion whether or not to refer, even if the real possibility test is met. Although a relevant factor, the age of the case is not itself a reason for exercising discretion not to refer. The overriding question is whether there would be a tangible benefit from the reference either to the applicant or his family (which includes removing the ongoing stigma of the conviction) or to the criminal justice system.

when the Police and Criminal Evidence Act 1984⁶⁷ came into force) represents a watershed. The majority of cases in which the Commission has addressed allegations of police misconduct relate to investigations and trials before that date. Examples can be found in cases handled by the (now disbanded) West Midlands Serious Crime Squad, which illustrate systemic failings in law enforcement by a specialist police squad (operating in the 1970s and 1980s to tackle armed robberies) involving the mishandling of robbers-turned-informants who gave evidence against their accomplices and the mistreatment of suspects detained for questioning.

Only a small number of applicants to the Commission who have been convicted in more recent times complain of deliberate police malpractice in the form of fabricating evidence, planting evidence, or otherwise “fitting them up” for crimes they did not commit. Most are concerned to persuade the Commission that, for one reason or another, they did not have a fair trial, often accompanied by complaints that their lawyers did not understand the case, did not follow their instructions, did not ask the right questions in cross-examination, or did not call witnesses who should have been called. From the Commission’s perspective, cases that result in referral tend to fall into two broad categories. The first is cases in which relevant new evidence appears, occasionally if rarely being wholly exculpatory, but more often being of a nature that, had it been heard by the jury, might reasonably have caused them to come to a different verdict.⁶⁸ This includes cases, quite often encountered, in which new psychiatric evidence supports the argument that an applicant should have been convicted of manslaughter by reason of diminished responsibility or provocation, rather than murder. The second category, more closely aligned to the types of issues raised by applicants themselves, involves some flaw in the investigation, prosecution, or trial process not brought about by malice but rather, in plain terms, because someone has not done his or her job properly—and this may well be something to which the defence lawyers have contributed. In today’s complex criminal justice system, opportunities for falling down on the requirements of a fair trial are legion, but it is not the simple fact of failure that counts, but its significance to the safety of the conviction, taking account of the whole

67. Police and Criminal Evidence Act, 1984, c. 60 (Eng.).

68. This is the approach that the Court of Appeal takes to evaluating the impact of fresh evidence against the other evidence in the case. *See R. v. Pendleton*, 1 Crim. App. R. 34, 442 (H.L. 2002) (stating that the test to be used by the Court of Appeal in determining whether a conviction is unsafe is “whether the [fresh] evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict”).

circumstances of the case.⁶⁹

IV. CONCLUSION

As of 30 April 2004, the Commission had received 6,724 applications and completed its investigation and review in 6,095, of which 228 (207 convictions and twenty-one sentences⁷⁰) have been referred to an appellate court. Four hundred six applications are under active review. From the outset, the Commission has tried to obtain resources and develop processes that enable it achieve the elusive balance between thoroughness and timeliness, resulting in good quality decisions, whilst at the same time ensuring that applicants do not have to wait too long for completion of their cases and steadily reducing the backlog of cases awaiting review (currently 223; 1,208 at their peak in May 1999). From the Commission's perspective, thoroughness means devoting the effort required, but no more, to identifying relevant issues and undertaking the necessary investigation. On this basis, some cases will be completed very quickly; others may take a considerable time.

The Commission believes that it has established a reputation for independence and that it now occupies a significant position within the criminal justice system. The Commission would also suggest, with an eye to its objective to enhance public confidence in the criminal justice system, that the thoroughness with which it undertakes every review contributes as much to supporting the safety of convictions as it does to exposing miscarriages of justice. In other words, the fact that only four percent of cases end up in referrals cannot of itself be an indicator that the

69. Since 2 October 2000, the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights have been incorporated into United Kingdom domestic law. Human Rights Act, 1998, c. 42, §§ 1-2 (Eng.). The right to a fair trial guaranteed by Article 6 of the Convention now falls to be addressed directly by domestic courts. *Id.* sched. 1, para. 1. Thus far, domestic courts have not generally identified any significant gap between their understanding of fairness and that of the European Court. Matters on which European jurisprudence has had an impact include the extent to which young offenders can be fairly tried in the Crown Court, the drawing of adverse inferences against a defendant who fails to answer questions in police interviews or to give evidence at trial, and discharge of the prosecution's obligations to disclose unused material.

70. This Article has not addressed sentence in any detail. New information or argument on a point of law must be significant and substantial in order to support a referral. In particular, if the sentence is within the "tariff" appropriate to the sentence at the time of sentence, it is *not* an argument on a point of law that there are other cases, apparently similar on their facts, in which lesser sentences were passed or that the Court of Appeal has subsequently set a different tariff.

Commission is failing in its task. At the same time, it is important that the Commission is not complacent about its performance or unaware of external opinion. Lawyers and organisations who are influential in this area of activity raise legitimate concerns about what they see as a low rate of referral, coupled with the suggestion that the Commission is worried about irritating the Court of Appeal. They raise concerns about delay. They question the level of expertise within the Commission and the adequacy of training. They think the Commission is poor at communicating with applicants and their representatives, and they have views about the nature of the relationship between the Commission and an applicant's legal advisers. It is a further objective for the Commission to promote public understanding of its role. Whilst it has to maintain its independence and to operate within its statutory remit, it nonetheless recognises that it must engage in continuing dialogue with its "stakeholders" so that, on their part, they understand the Commission's methods of working and views, and, on its part, the Commission understands their opinions and listens and reacts to their criticisms and suggestions. The Commission is alive to the concerns that others express and is anxious to address them.

Generally speaking, cases come to the Commission because applicants make the initial approach. The Commission does in fact have power to refer cases for appeal even if the convicted person does not make an application,⁷¹ which, at least in theory, means that the Commission could go on a search for cases that might be miscarriages of justice. In practice, the nearest the Commission has come to this in individual cases is to contact the co-accuseds of applicants to ask if they wish the Commission to review their convictions as well. In recent months, however, the Commission has become involved in two separate areas of generic review that have not been directly prompted by individual applications. First, there have been two cases (one, a Commission referral) in which the Court of Appeal has quashed convictions for murder allegedly committed by mothers whose children might in other circumstances have been said to have died from Sudden Infant Death Syndrome.⁷² The Commission is participating in a review ordered by the Attorney General of a number of similar cases in which expert medical, pathological, and statistical evidence

71. Criminal Appeal Act, 1995, c. 35, § 14(1) (Eng.).

72. The mothers were Sally Clarke and Angela Cannings. For more information, see *R. v. Cannings*, No. 200201711 D3, 2004 WL 61959 (C.A. Jan. 19, 2004); *R. v. Clark*, No. 200203824 Y3, 2003 WL 1822883 (C.A. Apr. 11, 2003); Lizette Alvarez, *A Mother's Ordeal Forces Britain to Review Crib Deaths*, N.Y. TIMES, Feb. 8, 2004, at 1, available at LEXIS, News Library, N.Y. Times File.

may be flawed. Secondly, there is concern about the safety of convictions in “historic sex cases”—that is, those in which the complainants only come forward many years after the alleged abuse, so that it may be up to thirty years later that the accused is put on trial.⁷³ Again, the Commission is participating with a group of lawyers who have come together to look into such cases. Given the Commission’s focus in its early years on dealing with its applications and reducing its backlog, these are steps that the Commission is now taking in furtherance of its wish to be actively influential in the criminal justice system, with the longer-term expectation of being able to feed its experience back into the system so as to contribute to the prevention of miscarriages of justice.

It would be quite wrong to suggest that a body like the Commission should be the model for correcting miscarriages of justice in other jurisdictions. It happens to be conceptually sound in the domestic setting of England, Wales, and Northern Ireland because of the manageable geographical size within which agencies like the police, prosecuting authorities, and courts are coherently structured and, just as importantly, because of the essentially uniform body of criminal law, procedure, and evidence. These are doubtless the reasons why there is a similar body in Scotland, why there is soon to be one in Norway, and why there is interest from New Zealand. By contrast, Canada, which covers a huge geographical area, with both federal and provincial systems of law enforcement and criminal justice, has not shown any desire at the government level to change the existing arrangements, which, through powers vested in the Minister of Justice, are broadly similar to the previous arrangements in the United Kingdom. These considerations appear to be equally relevant to the United States, which currently has no bodies at the federal or state level that are remotely akin to the Commission.

It is a statement of the obvious to say that prevention is better than cure. In January 2003, the American Judicature Society hosted a conference in Alexandria, Virginia, which was attended by highly influential representatives in teams from eleven states. What emerged strikingly during the conference were the variations in investigative procedures that apply to law enforcement agencies and at the same time, information about some dynamic developments in fields of investigation where the potential for miscarriages of justice is high, for example, identification cases. Each team was asked to draft a twelve-month action plan as the conference progressed, and not surprisingly, these focused

73. There are generally no time limits on the institution of criminal proceedings in United Kingdom law.

without exception on preventing miscarriages of justice, with no state being able to envisage a body like the Commission tasked with correcting them if they occurred. The most that the Commission can offer is, in one sense, another statement of the obvious—namely, that miscarriages of justice will occur however robust the system—and the more serious observation that mature criminal justice systems have no problem accepting this as a reality and are therefore interested in identifying public mechanisms for redress that work for them.