#APPEAL

Briefing
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No chance?

The case for reforming the referral test from the Criminal Cases Review Commission to the Court of Appeal

About

APPEAL (the working name of the Centre for Criminal Appeals) is a non-profit law practice committed to fighting miscarriages of justice and demanding reform. We provide investigation and legal advocacy for victims of unsafe convictions and unfair sentences who cannot afford to pay for a lawyer themselves. We use individual cases as leverage for system-wide criminal justice reform by educating the media, parliament, criminal justice policy makers, the legal profession and the public about how and why miscarriages of justice occur and what needs to change to stop them.

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SUMMARY

The miscarriage of justice review body, the Criminal Cases Review Commission ('CCRC') was created in the wake of the infamous wrongful convictions of the Birmingham 6 and the Guildford 4. It was designed to act as a conduit for sending potential miscarriages of justice back to the Court of Appeal Criminal Division ('CACD') so the safety of the conviction can be reviewed in light of new or 'fresh' evidence.

The CCRC has the legal power to refer a case back to CACD only if it concludes that there is a "real possibility" that the Court will overturn the conviction or reduce the sentence. An ex-Commissioner at the CCRC described the test as "the wicked fairy at the baptism of christening of the CCRC[1]". We agree and in this briefing we will state why.

In practice, the real possibility test - as set out in section 13 of the Criminal Appeal Act 1995 - hinders decision-making and investigation at the CCRC, and anchors CCRC decision making to that of the CACD. This impairs some wrongfully convicted people from accessing the CACD and allows miscarriages of justice to go unidentified and unremedied.

We believe that the real possibility test is partly to blame for the fact that rather than acting as a conduit to the CACD, the CCRC acts more as a gatekeeper. Since its inception in 1997, the CCRC has rejected more than 97% of applications from people who claim to have been wrongfully convicted.

More than 97% of applications to the CCRC are unsuccessful

The 'real possibility' test should be urgently reviewed with a view to implementing a new referral test, by repealing or amending section 13 CCA 1995.

WHAT'S THE PROBLEM?

The problems with the test stem from the fact that it is, by nature, a predictive test. This means the CCRC has to second guess how things might play out before the Court. This has resulted in various problems:

||||| It fosters deference by the CCRC to the CACD

The test anchors the CCRC's decision making to that of the judiciary, encouraging it to be deferential to the court and hindering decision making. This is illustrated by the fact that since the CCRC's inception, the CCRC has rejected more than 97% of cases.

Evidence suggests that the CCRC may feel fear reputational embarrassment from being rebuked by the CACD for making audacious referrals. However, its first duty should be to victims of potential miscarriages of justice.

The CCRC denies being deferential to the Court but in 2018 it acknowledged that a low success rate in the CACD may cause it to make fewer referrals.[2]

[1] David Jessel, ex CCRC Commissioner, see Carolyn Hoyle and Mai Sato, Reasons to Doubt (OUP 2019)

[2] https://www.thejusticegap.com/miscarriage-watchdog-blames-drop-in-referrals-on-low-success-rate-in-court-of-appeal-and-lack-of-lawyers-willing-to-take-cases-on/

"[The test] risks replicating rather than challenging endemic injustice within the system"

Professor Kevin Kerrigan, Northumbria University

It denies the CCRC a chance to refer cases where it considers a miscarriage of justice may have occurred, compromising the independence of the CCRC

If the CACD has made its attitude towards a particular case or type of case clear – the 'real possibility' test means the CCRC cannot deviate from that view, even if it thinks a miscarriage of justice may have occurred.

This means that individuals who the Commission feels have been subject to a miscarriage of justice may nevertheless be denied access to an appeal hearing.

The CCRC was established to be independent of government and courts. To be so, it must be able to make referrals even when it feels precedent may not be favourable. As it currently stands, if the court has got something wrong, the CCRC is obliged to "sustain erroneous jurisprudence"[3] meaning it cannot truly act as an effective accountability mechanism for the Court, or as a safety net for miscarriage of justice victims.

Case study – Joint Enterprise

In the 2016 *Jogee* ruling, the Supreme Court found that lower courts and the judiciary had been wrongly interpreting the law on joint enterprise for the past 30 years. Following this, the CCRC rightly made a string of referrals to the Court of Appeal. However to date, all have been unsuccessful and as a result the CCRC are now reluctant to refer joint enterprise cases. Felicity Gerry QC argued to the Westminster Commission that applying a very high threshold for overturning such decisions "effectively neuters the CCRC". It leaves no legal recourse for a significant number of mainly young people who have been wrongfully convicted under the old law.

The CCRC is required to predict the unpredictable

The CCRC does not always have legally qualified staff on each case. Expecting case review managers to predict the decisions of the senior judiciary – even in light of CCRC guidance – is unreasonable and will give rise to inconsistency and variation in their decision making.

Inconsistencies in the CACD's jurisprudence also mean that second-guessing its decisions is not a straightforward exercise.

[3] p330 Reasons to Doubt, Hoyle

Case investigation is hindered

If a reviewer at the CCRC predicts that a line of enquiry will not give rise to fresh evidence that will persuade the CACD, relevant and potentially relevant investigation will be aborted prematurely. This is something APPEAL has observed in its casework and was also the view of some stakeholders who gave evidence to the Justice Select Committee inquiry in 2015.[4]

Case Study: Andy Malkinson

Relying on the 'real possibility' test, the CCRC in 2012 rejected an application by our client Andy Malkinson. It declined to commission DNA testing on the basis that it considered there was no "realistic prospect" of it "resulting in new evidence which would raise a real possibility that the Court of Appeal would quash the conviction".

Later, we were able to commission new DNA testing ourselves, which detected no DNA from Andy Malkinson but did identify DNA from an unknown male in multiple crime-specific areas. This case illustrates the narrow investigative mentality fostered by the predictive test.

WHAT NEEDS TO BE DONE?

The 'real possibility' test (section 13 of the Criminal Appeal Act 1995) should be repealed and replaced with a referral test that does not anchor CCRC decision making to that of the CACD.

We support the language suggested by the Westminster Commission on Miscarriages of Justice: for the CCRC to refer a case "where it determines that the conviction may be unsafe, the sentence may be manifestly excessive or wrong in law or where it concludes that it is in the interests of justice to make a referral"[5].

This would include all cases where it finds that a miscarriage of justice may have occurred, including any cases where it has "lurking doubt" about the safety of the conviction[6].

[4] Paragraphs 12 and 13 of the Justice Select Committee report, *Twelfth Report, Criminal Cases Review Commission*, March 2015, available here

[5] Page 37 of the Westminster Commission on Miscarriages of Justice in its report, *In the Interest of Justice: An inquiry into the Criminal Cases Review Commission*, 5 March 2021, chapter 4. Available here.

[6] "Lurking doubt" is a ground on which the Court of Appeal can rectify miscarriages of justice arising from trials that appear technically sound but in which the appeal court has a "lurking doubt" as to whether an injustice has been done (*R. v. Cooper 53 Cr.App.R. 82*). As later confirmed by the Lord Chief Justice, the threshold is exceptionally high.

WHO SUPPORTS REFORM?

The Westminster Commission on Miscarriages of Justice concluded in its March 2021 report on the CCRC that changing the "problematic" test might create a different, more independent mindset.

It recommended that:

> "the 'real possibility' test should be redrafted to expressly enable the CCRC to refer a case where it determines that the conviction may be unsafe, the sentence may be manifestly excessive or wrong in law or where it concludes that it is in the interests of justice to make a referral. By definition this would include all cases where it finds that a miscarriage of justice may have occurred including 'lurking doubt' cases[7]."

In its response, the CCRC stated that it supported an independent review of the test.[8]

Reform is also supported by the Criminal Appeal Lawyers Association and a significant number of appeal practitioners.

In April 2022, Justice Secretary Dominic Raab asked the Law Commission to consider including a review of the law in this area in their 14th work programme set to commence in 2022. [9] This is being actively considered by the Law Commission[10].

In the meantime, the Westminster Commission also recommended that:

> "while 'real possibility' remains the test to be applied by the CCRC, it should be bolder in interpreting it: determining in each case whether there is more than a fanciful chance of the verdict being quashed, even if quashing is less likely than not. It should also remove any targets for success rates before the Court of Appeal."

In its official response the CCRC denied that it could take a bolder approach to applying the test, stating that bold decision making cannot compensate for a lack of merit in a case and may waste public funds by taking up unnecessary court time.

However, a bolder approach was recommended by the Justice Select Committee in 2015, who took the view that "if a bolder approach leads to 5 more failed appeals but one additional miscarriage being corrected, then that is of clear benefit.[11]"

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[7] Page 37, Westminster Commission on Miscarriages of Justice report – ibid

[8] The CCRC's official response to the Westminster Commission report, available here

[9] This is contained in a letter dated 8 April 2022 from Dominic Raab to Andrew Selous MP following campaigning from Mark Alexander who is a prisoner appealing his conviction - see more here

[10] https://www.theguardian.com/law/2022/jul/10/prisoners-denied-access-to-forensic-evidence-in-bid-to-prove-their-innocence#:~:text=Prisoners%20convicted%20of%20serious%20crimes,their%20innocence%2C%20experts%20have%20warned.

[11] Part 2, Justice Select Committee report – ibid

OTHER JURISDICTIONS

Scotland

There are only a handful of criminal cases review commissions worldwide – the English, Welsh and Northern Irish CCRC having been the first. The Scottish CCRC can refer cases to the High Court of Justiciary where it believes a miscarriage of justice may have occurred and that it is in the interests of justice to do so. It also has a higher rate of referrals[12].

New Zealand

New Zealand's recently-established CCRC may refer a conviction or sentence to the appeal court if the Commission, after reviewing the conviction or sentence, considers that it is in the interests of justice to do so. It must have regard to several factors, which include the prospects of its appeal court allowing the appeal, but is able to make its own assessment of merits of a referral in all circumstances.

Canada

Canada is in the process of establishing its equivalent of the CCRC, having completed a Government consultation process. On the issue of the appropriate grounds of referral, the recommendation arising from the consultation is that:

"We recommend that the new commission may refer a case back to the courts where it concludes that a **miscarriage of justice *may* have occurred**. This is a lower standard that is more generous to the applicant."[13]

They explicitly considered and rejected a predictive test as used by England's CCRC:

"We do not see either the present test in s. 696.3 of the Code or our recommended test as a **"predictive" test** in the sense that the English legislation requires the English Commission to direct its mind to whether the Court of Appeal would overturn a conviction or sentence. **The new commission should form its own independent view about the possibility that there has been a miscarriage of justice. It should not refer cases only when it is certain that a Court of Appeal would agree**." [14] (emphasis added)

[12] Westminster Commission on Miscarriages of Justice, Second Evidence Session Transcript Scottish CCRC, available here

[13] Government of Canada, A Miscarriages of Justice Commission, available here

[14] 'A Miscarriage of Justice Consultation' - Executive Summary, December 2021, Hon. Harry LaForme and the Hon. Juanita Westmoreland-Traoré, https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mjc-cej/p1.html

FURTHER READING

The Justice Select Committee, 'Justice – Twelfth Report, Criminal Cases Review Commission', 17 March 2015. Available here.

Michael Zander, 'The Justice Select Committee's report on the CCRC - where do we go from here?' [2015] Crim LR 473.

The Westminster Commission on Miscarriages of Justice in its report, In the Interest of Justice: An inquiry into the Criminal Cases Review Commission', 5 March 2021, chapter 4. Available here.

The CCRC's official response to recommendation 5 of the Westminster Commission's report. Available here.

Carolyn Hoyle and Mai Sato, Reasons to Doubt (OUP 2019), esp 14-17 and 330-338. Re. Criminal Appeal Act 1968 and Criminal Appeal Act 1995