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This is a pre-publication version of a book chapter published in: Lennon, G., King, C. and McCartney, C. (eds.) Counter-terrorism, Constitutionalism and Miscarriages of Justice: A Festschrift for Professor Clive Walker, London, Hart Publishing, pp. 249-267.

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POST-CONVICTION REVIEW IN ENGLAND AND WALES:  
PERPETUATING AND RECTIFYING MISCARRIAGES OF JUSTICE

STEPHANIE ROBERTS

INTRODUCTION

In an ideal world, post-conviction review in criminal cases would serve several important functions: it would ensure the process leading to conviction is fair and that it yields a reliable result; it would protect established boundaries between the state and the individual; and it would remedy miscarriages of justice (MoJ). In his ‘Review of the Criminal Courts’ in 2001, former Court of Appeal (CoA) judge, Sir Robin Auld, set out some criteria for a good appellate system. The criteria were that it should do justice to individual defendants and to the public (as represented principally by the prosecution); it should bring finality to the criminal process, subject to the need to safeguard either side from clear and serious injustice (such as would damage the integrity of the criminal justice system); it should be readily accessible, and clear and simple in its structures and procedures and efficient and effective in its use of judges and other resources in righting injustice and in declaring and applying the law, and it should be speedy.<sup>1</sup> These criteria are relevant to any

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<sup>1</sup> R Auld, *Review of the Criminal Courts* (Stationery Office, 2001), ch 12, para 2. Available at <http://webarchive.nationalarchives.gov.uk/+http://www.criminal-courts-review.org.uk/> (last accessed: November 1, 2017).

criminal appellate system but appeal processes can often struggle to fulfil each of these goals which is to some extent understandable; as Walker has stated ‘it is obvious the judges of the Court of Appeal handle a tricky task. As the high priests of the law, they must not undermine the faith that the trial process is “an embodiment of justice”.<sup>2</sup> At the same time, they must also take heed of the possibility of miscarriage and occasionally intervene to correct mistakes.’<sup>3</sup> Whilst structures and procedures can be assessed for clarity and simplicity and speed can be measured, defining benchmarks for the other criteria can be difficult.

In the United Kingdom, the two main bodies involved in reviewing criminal convictions are the CoA and the Criminal Cases Review Commission (CCRC).<sup>4</sup> The CoA was created by the Criminal Appeal Act (CAA) 1907 as the Court of Criminal Appeal which became the criminal division of the Court of Appeal in the CAA 1966. The CCRC was created by the CAA 1995 after recommendations by the Royal Commission on Criminal Justice (RCCJ) to take over the role the Home Secretary had to refer cases to the CoA.<sup>5</sup> The CoA and the CCRC have both been criticised for their alleged failings in achieving their primary goal of rectifying MoJ, which in turn has led to arguments that these institutions perpetuate them.<sup>6</sup> The CoA is often criticised for perpetuating MoJ by not rectifying wrongful convictions at the first opportunity; for example, the Guildford Four convictions were quashed on their second appeal and the Birmingham Six convictions were

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<sup>2</sup> Citing R Nobles and D Schiff, *Understanding Miscarriages of Justice* (Oxford, Oxford University Press, 2000) 39. Walker was writing a book review.

<sup>3</sup> C Walker, ‘Nobles, R., and Schiff, D., *Understanding Miscarriages of Justice: Law, the Media and the Inevitability of Crisis*’ (Oxford University Press, Oxford, 2000) in (2000) *20 Legal Studies* 615, 617.

<sup>4</sup> References in this chapter to ‘appellate processes’ refer to both the CoA and the CCRC.

<sup>5</sup> CAA 1968, s 17.

<sup>6</sup> Appeal and post-appeal procedures have been identified by Walker as a cause of a MOJ, see C Walker ‘Miscarriages of Justice in Principle and Practice’ in C Walker and K Starmer (eds) *Miscarriages of Justice A Review of Justice in Error* (London, Blackstone Press, 1999), 55.

quashed on their third appeal. The most extreme example of this is the case of *R v Cooper and McMahon*<sup>7</sup> which took six appeals before the conviction was finally quashed but by then both had died. The fact that these appeals need to return to the CoA potentially shows the CoA's failings in not recognising the merits of the initial appeal, though this is not necessarily the case if the subsequent appeal might simply be stronger because of, for example, fresh evidence found or new law or procedure. The criticisms of the CCRC largely relate to its workload and backlog, the referral rate to the CoA and the number of appeals referred which are successful.

This chapter draws on Professor Clive Walker's contributions to scholarly scrutiny of these areas to examine such criticisms of the CoA and the CCRC. The chapter is divided into two parts, considering the CoA and CCRC respectively. The first part reviews the working practices of the CoA in order to determine how it constructs miscarriages of justice; further, the power the CoA has to quash convictions will be explored in relation to errors of fact (fresh evidence and lurking doubt appeals) and errors of law (procedural irregularities) and the difficulties associated with each. The second part will evaluate the role and working practices of the CCRC.

## I. CONSTRUCTING MISCARRIAGES OF JUSTICE IN THE COURT OF APPEAL

As a starting point, 'a "miscarriage" means literally a failure to reach an intended destination or goal. A miscarriage of justice is therefore, *mutatis mutandis*, a failure to attain the desired end-result of 'justice'. Justice is about distributions, about according persons their fair shares, and treatment.'<sup>8</sup> The role of the CoA is not to declare people innocent, rather it is to quash a conviction

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<sup>7</sup> [2003] EWCA Crim 225.

<sup>8</sup> See C Walker, 'Miscarriages of justice and the correction of error' in M McConville and G Wilson (eds.), *Handbook of Criminal Justice Process* (Oxford University Press, 2002), 506. For a typology of miscarriage of

if the court thinks it is 'unsafe'.<sup>9</sup> This explains why, when quashing a conviction, there is rarely an accompanying apology from the CoA, which causes much consternation for successful appellants.<sup>10</sup> The CoA does occasionally express regret and apologise, though this is not required within its legally defined role and such pronouncements are very rare.<sup>11</sup>

The main criticism of the CoA is that it has never fulfilled its intended function. It took approximately 31 bills<sup>12</sup> over a sixty year period before the CoA was finally created by the CAA 1907, after the public furore caused by the wrongful conviction of Adolf Beck who was generally accepted to be factually innocent.<sup>13</sup> This was the start of a recurring theme of crisis and reform in criminal appeals in England and Wales. Further reforms were enacted in Criminal Appeal Acts in 1964, 1966 and 1995 after further periods of perceived crisis and high profile MOJ.<sup>14</sup>

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justice cases see that chapter and C McCartney and C Walker, 'Criminal Justice and Miscarriages of Justice in England and Wales,' in CR Huff and M Killias (Eds), *Wrongful Conviction International Perspectives on Miscarriages of Justice* (Temple University Press, Philadelphia, 2008) 192-193.

<sup>9</sup> CAA 1995, s 1(1). In *R v A(D)*, Lord Bingham stated 'the Court of Appeal is in no position to declare that the appellant is innocent... That is not the function of this court. Our function is to consider whether in the light of all the material before us this conviction is unsafe.' [CA, unreported, transcript 14 March 2000].

<sup>10</sup> For example, at a press conference after the Birmingham Six were freed, one of the six, William Power, criticised the appeal system and stated: 'It's all about points of law. It had nothing to do with justice. The truth didn't come out. Nobody was interested in the truth.' *The Times*, 15 March 1991.

<sup>11</sup> See, for example, *R v Fell* [2001] EWCA Crim 696; *R v Ward* (1993) 96 Cr App R 1; *R v Kelly* [2003] EWCA Crim 2957; *R v Martin C* [2003] EWCA Crim 1246; *R v Mattan* *The Times*, 5 March 1998; *R v Roberts*, [1998] EWCA Crim 998.

<sup>12</sup> This is an approximate figure because different sources suggest different numbers of bills but this is the figure listed in the Return of Criminal Appeal Bills (1906) H.L. 201.

<sup>13</sup> For details of the case, see R Pattenden, *English Criminal Appeals 1844 – 1944* (Clarendon Press: Oxford, 1996), 28-30.

<sup>14</sup> See generally, R Pattenden, *Ibid*; R Nobles and D Schiff, *Understanding Miscarriages of Justice* (Oxford, Oxford University Press, 2000); S Roberts, 'Reviewing the Function of Criminal Appeals in England and Wales' (2017) 1

A number of problems with the CoA have been identified from the academic literature and the empirical studies conducted on the CoA. The problems include: 1. Its deference to the jury;<sup>15</sup> 2. The CoA's reverence for finality;<sup>16</sup> 3. A lack of resources, which impacts upon the working practices of the CoA;<sup>17</sup> 4. The process of review;<sup>18</sup> and 5. The CoA's function of review rather than rehearing (namely that it adjudicates on whether the jury *could* have convicted, not on whether it *should* have convicted).<sup>19</sup> These issues make it difficult for appellants to overturn their convictions, but whilst the academic consensus appears to suggest that the CoA is too reluctant to quash convictions, it is difficult to measure in any meaningful way whether the CoA should be quashing more convictions because there is no gauge by which this could be measured.

The CoA uses its power to overturn convictions that it finds to be unsafe in two situations: first, when a factually innocent person has been wrongly convicted and, second, when something has gone wrong either pre-trial or during the trial (procedural irregularities) that warrants a

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*Institute of Law Journal (Jersey)*, (online article); C McCartney and S Roberts, 'Building Institutions to Address Miscarriages of Justice in England and Wales: "Mission Accomplished?"' (2012) 80 *University of Cincinnati Law Review* 1333.

<sup>15</sup> See RE Ross, *The Court of Criminal Appeal* (London: Butterworth and Co, 1911); D Seaborne-Davies, 'The Court of Criminal Appeal: The First Forty Years' (1951) 1 *J.S.P.T.L.* 425; M Knight, *Criminal Appeals* (London: Stevens and Sons, 1970); K Malleon, 'Review of the Appeal Process', RCCJ Research Study No 17 (London, HMSO, 1993); Tucker Committee Report of the Departmental Committee on New Trials in Criminal Cases (1954) (cmd 9150, London: HMSO); Donovan Committee, 'Report of the Interdepartmental Committee on the Court of Criminal Appeal' (cmd 2755, London: HMSO, 1965); Runciman Royal Commission on Criminal Justice Report (RCCJ), cmd 2263, (London: HMSO, 1993) ch 10.

<sup>16</sup> See K Malleon, 'Appeals Against Conviction and the Principle of Finality' (1994) *Journal of Law and Society* 151; P Hill, 'Finding Finality' (1996) *New Law Journal* 1552.

<sup>17</sup> RCCJ, n 15 above; JR Spencer, 'Does Our Present Criminal Appeal System Make Sense' (2006) *Crim LR* 677.

<sup>18</sup> The Auld Review outlined the problematic appeal preparation process for the judges who do not have much time to read the papers and often do this in their evenings and weekends: Auld Review, n 1 above, ch 12.

<sup>19</sup> See Roberts, n 14 above; McCartney and Roberts, n 14 above.

conviction being quashed, whether the appellant is factually innocent or factually guilty.<sup>20</sup> Both of these interpretations of ‘safety’ are evident in Walker’s definition of a MoJ which reflects what he calls ‘an individualistic rights-based approach.’<sup>21</sup> He suggests that a miscarriage of justice can be considered to have occurred whenever suspects or defendants or convicts are treated by the State in breach of their rights, whether because of, first, deficient processes or, second, the laws which are applied to them or, third, because there is no factual justification for the applied treatment or punishment; fourth, whenever suspects or defendants or convicts are treated adversely by the state to a disproportionate extent in comparison with the need to protect the rights of others; fifth, whenever the rights of others are not effectively or proportionately protected or vindicated by State action against wrongdoers or, sixth, by State law itself.<sup>22</sup> There is also an additional seventh category of an ‘indirect miscarriage which affects the community as a whole.’<sup>23</sup>

This ‘due process’ focus has been criticised by Naughton who argues that ‘it leads to the perverse conclusion that no miscarriage of justice has occurred even if a factually innocent person is convicted so long as due process is adhered to.’<sup>24</sup> However, Walker clearly states that those who are wrongly convicted because they are factually innocent would fall into the third category,<sup>25</sup> subject to the qualification that the system should be allowed some time to correct itself, whether through acquittal or the payment of damages. Consequently, the notion of ‘miscarriage of justice’ involves a completion of a process (in failure) and not simply a mistake. Therefore, using this

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<sup>20</sup> See S Roberts, ‘Unsafe Convictions: Defining and Compensating Miscarriages of Justice’ (2003) 66(3) *Modern Law Review* 441.

<sup>21</sup> Compare Greer who also adopts a due process/human rights approach to defining MoJ: S Greer ‘Miscarriages of Justice Reconsidered’ (1994) 57(1) *Modern Law Review* 58.

<sup>22</sup> Walker, n 6 above, 33.

<sup>23</sup> *Ibid* 37.

<sup>24</sup> M Naughton, *The Innocent and the Criminal Justice System* (London, Palgrave Macmillan, 2013) 26.

<sup>25</sup> Walker, n 6 above, 35.

argument, the label ‘miscarriage of justice’ would only be ascribed to those cases that have been through the appeal process and failed and are subsequently sent back to the CoA via the CCRC and then overturned.<sup>26</sup> There is a further qualification to this, which is that there must be some kind of State responsibility for the conviction, construed widely. Whilst this qualification may narrow the parameters of how we define a MoJ, it does reflect the fact that there has always been a focus on due process (as well as factual innocence) in the definition of MoJ used in England and Wales rather than the narrower definition of ‘wrongful conviction’ focusing on factual innocence in countries such as the United States.<sup>27</sup>

Walker’s definition has also been criticised by Nobles and Schiff as being too vague: ‘this definition raises more questions than it answers. What rights? What is disproportionate adverse treatment? When are the rights of others not properly protected?’<sup>28</sup> They have further argued that ‘whereas human rights standards offer a form of argument about the priority of one value against other values, or rights as principles in contrast to social or economic policies, they remain in Bentham’s famous phrase “nonsense.”’<sup>29</sup> Walker, however, has criticised this as a ‘wholly inadequate and unconvincing response to their growing use by the Court of Appeal and the signal given by the HRA 1998 to take fuller heed of 50 years of jurisprudence from Strasberg.’<sup>30</sup>

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<sup>26</sup> This view is also reflected in the compensation scheme for MoJ. See Ch 16 (Quirk and King) in this collection.

<sup>27</sup> See S Roberts and L Weathered, ‘Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission’ (2009) 1 *Oxford Journal of Legal Studies* 43; B. Garrett, ‘Actual Innocence and Wrongful Convictions’ in Erik Luna, ed., *Academy for Justice, A Report on Scholarship and Criminal Justice Reform*. Available at <http://academyforjustice.org/volume3/> (last accessed March 23, 2018); K A Findley, ‘Innocence Found: The New Revolution in American Criminal Justice’ in S Cooper (ed) *Controversies in Innocence Cases in America* (London: Ashgate Publishing, 2014).

<sup>28</sup> R Nobles and D Schiff, ‘Review of Justice in Error’ (1994) 34(3) *Brit J Crim* 383.

<sup>29</sup> Nobles and Schiff, n 14 above, 30.

<sup>30</sup> Walker, n 3 above, 620.



Such conflict alludes to the argument over whether the CoA should see rights and fairness as grounds of appeal in their own right or whether they should only be considered in light of the factual accuracy of the jury verdict (verdict rectitude). Nobles and Schiff argue that there is:

unresolved conflict between due process and truth which underlies the criminal justice process. If the legal system cannot get at the truth, then the best it can do is to provide processes, which justify the inevitable punishment of the innocent. But if the legal system is intended to get at the truth, then how does one justify procedures which make no demonstrable contribution to the accuracy of its outcomes?<sup>31</sup>

They further argue that ‘if there is no clear, consistent, and specific basis for identifying what constitutes a breach of due process within criminal justice, or which rights under what conditions should be given priority, how is the Court of Appeal (or any other review body) to operate’.<sup>32</sup> But Walker, as an advocate for rights and fairness being grounds of appeal in their own right, has criticised the reliance on what he calls ‘narrower values’ such as finality and ‘truth’ (of verdicts) as the basis for the maintenance of the authority of criminal justice, stating:

.....these will not suffice as the Birmingham Six case well illustrates, no matter how final the Lord Chief Justice’s pronouncements were in dismissing the appeal, the case kept coming back whenever there was new evidence that they had not been accorded their rights. Such uncertainty and scepticism is only “threatening” to the system if one’s ultimate values fail to emphasise respect for rights.<sup>33</sup>

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<sup>31</sup> R Nobles and D Schiff ‘Miscarriages of Justice: A Systems Approach’ (1995) 58(3) *Modern Law Review* 299, 317.

<sup>32</sup> Nobles and Schiff, n 14 above, 32.

<sup>33</sup> Walker, n 3 above, 620.

This argument of Walker's can be traced through the case law of the CoA but it has proved to be a complicated issue at times determining exactly what role rights and fairness play on appeal as a review of the case law will now demonstrate.

## II. DEFINING RIGHTS AND FAIRNESS IN THE COURT OF APPEAL

There was much judicial and academic debate after the enactment of the CAA 1995 in relation to errors of law and procedure, and the reformed safety test.<sup>34</sup> It had been settled law prior to the CAA 1995 that the CoA had the power to quash convictions regardless of whether it considered the appellant to be factually guilty. It would appear that this approach was initially followed after the enactment of the CAA 1995.<sup>35</sup> However, in *R v Chalkley*,<sup>36</sup> it was held that the CoA did not have the power under the new test to allow an appeal if it thought the appellant was factually guilty. This case was followed a number of times<sup>37</sup> but *R v Mullen*<sup>38</sup> took the approach of the Court in *Hickey* and adopted a broader interpretation of unsafe, moving away from *Chalkley* and reverting back to the approach taken by the CoA prior to the 1995 Act. This emphasised that the CoA still

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<sup>34</sup> See, for example, I Dennis, 'Fair Trials and Safe Convictions,' (2003) 56 *Current Legal Problems* 211, R Nobles and D Schiff (2001) 'Due Process and Dirty Harry Dilemmas: Criminal Appeals and the Human Rights Act' 64(6) *Modern Law Review* 911; A Clarke 'Safety or Supervision? The Unified Ground of Appeal and its Consequences in the Law of Abuse of Process and Exclusion of Evidence' (1999) *Criminal Law Review* 108; D Ormerod and N Taylor, 'Mind the Gaps: Safety, Fairness and Moral Legitimacy' (2004) *Criminal Law Review* 266; A Ashworth and M Redmayne, *The Criminal Process* (Oxford, Oxford University Press, 2005) 357.

<sup>35</sup> See *R v Hickey and others* CA, unreported, transcript 30 July 1997. Case No 96/5131/S1.

<sup>36</sup> *R v Chalkley* [1998] QB 848.

<sup>37</sup> *R v Rajcoomar* [1999] Crim LR 728; *R v Callaghan* 5 March 1999, unreported; *R v Hewitson and Bramich* [1999] Crim LR 307; *R v Thomas* (Matthew) [2000] 1 Cr App R 447; *R v Blackwood* (Junior) 10 March 2000, unreported; *R v MacDonald* [1998] Crim LR 808.

<sup>38</sup> *R v Mullen* [2000] QB 520.

performed a supervisory role in assessing the overall fairness of the prosecution process. This test was then re-interpreted in light of the Human Rights Act 1998 (HRA) in order to make the CAA 1995 HRA compatible.

From its early days, the CoA has considered it part of its role to ensure that the accused had a fair trial,<sup>39</sup> but the HRA made *fairness* much more of an issue. Some initial judgments took the view that unfairness was a matter of degree and not all cases of unfairness will result in an unsafe conviction.<sup>40</sup> In *R v Togher*<sup>41</sup> the CoA followed *Mullen over Chalkley*, stating that an unfair trial would almost inevitably be unsafe. This case was endorsed by two judgments of the House of Lords – in *Forbes*<sup>42</sup> and *A*.<sup>43</sup> These judgments appeared to apply the approach that if the trial was unfair then this should lead to an unsafe conviction, though this appeared to be refuted by the House of Lords in *R v Lambert*.<sup>44</sup> In later cases, there does seem to be an acceptance that if a trial is unfair then the conviction has to be unsafe,<sup>45</sup> though these cases also suggest that not every departure from good practice will make a trial unfair and it is a matter of degree to be judged in each case. In *R v Early and others*,<sup>46</sup> despite the defendants' guilty pleas, the CoA quashed the convictions after the prosecution failed to inform the judge that some witnesses were informants in a

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<sup>39</sup> See *R v Christie (Albert)* [1914] AC 545.

<sup>40</sup> See *R v Davis* [2001] 1 Cr App R 8; *R v Francom* [2001] 1 Cr App R 17; *R v Skuse* [2002] EWCA Crim 991; Independent, June 17, 2002; *R v Botmeh (Jawad)* [2001] EWCA Crim 2226; [2002] 1 WLR. 531; *R v Cranwell* [2001] EWCA Crim 1216.

<sup>41</sup> *R v Togher* [2001] 3 All ER 463.

<sup>42</sup> *R v Forbes* [2001] 1 AC 473.

<sup>43</sup> *R v A* [2001] 1 AC 473.

<sup>44</sup> *R v Lambert* [2001] UKHL 37; [2002] 2 AC 545.

<sup>45</sup> See *Brown v Stott* [2003] 1 AC 681; *Randall v Queen, The* [2002] UKPC 19; [2002] 1 W.L.R. 2237; *Attorney General's Reference* (No.2 of 2001) [2003] UKHL 68; [2004] 2 A.C. 72; *Bernard v Trinidad and Tobago* [2007] UKPC 34; [2007] 2 Cr. App. R. 22; *Michel v Queen, The* [2009] UKPC 41; [2010] 1 WLR 879.

<sup>46</sup> [2002] All ER (D) 419.

PII hearing, following *Mullen and Togher*.<sup>47</sup> In *R v Grant*,<sup>48</sup> the CA quashed the conviction after covert listening devices were placed in the exercise yard at police stations. In *R v Ali and another*<sup>49</sup> Moses LJ drew a distinction between when it had been unfair to try a defendant, and when a defendant may have received an unfair trial and when either would result in a conviction quashed. Moses LJ stated:

we acknowledge that in cases where it was unfair to try the defendant at all, because of bad faith or executive manipulation, the verdict itself may not be unsafe. But in general, where this court concludes that a hearing was unfair, it will not be able to avoid the conclusion that the verdict was unsafe.<sup>50</sup>

He continued: ‘safe verdicts depend upon a fair resolution of the issue of guilt or innocence. Attempts to draw a distinction between the fairness of the process and the safety of the verdict have, traditionally in this court, failed.’<sup>51</sup>

This distinction between ‘unfair to try’ and ‘fair to try but an unfair trial’ is illustrated by the above cases so in this sense it could be argued that the CoA has been consistent. There is also some general guidance from these cases as to how the CoA defines ‘unfairness.’ In *R v Hanratty*,<sup>52</sup> Lord Woolf drew a distinction between ‘procedural flaws which are technical and those which are not.’<sup>53</sup> He cited this speech by Lord Bingham in *Randall v The Queen*:

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<sup>47</sup> See *R v Gell* [2003] EWCA Crim 123 and *R v Choudhery* [2005] EWCA Crim 1788 for appeals allowed in similar circumstances.

<sup>48</sup> [2005] All ER (D) 44.

<sup>49</sup> [2007] EWCA Crim 691.

<sup>50</sup> *Ibid*, para 28.

<sup>51</sup> *Ibid*.

<sup>52</sup> [2002] EWCA Crim 1141.

<sup>53</sup> *Ibid*, para 97.

There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.<sup>54</sup>

It would appear that ‘technical’ unfairness does not always result in the conviction being quashed whereas gross procedural unfairness, as illustrated in *Mullen*, will always result in a quashed conviction. But whilst the judges may make these distinctions, it is not clear how they decide what is ‘technical’ and what is ‘gross’.

Procedural irregularity appeals are difficult to assess generally in light of the problems of defining concepts such as rights and fairness and the different approaches the CoA takes to these appeals; in this respect, Nobles and Schiff have a point. Although notions of rights, fairness, legitimacy and integrity are extremely important, they are difficult to enforce without a clear definition of what these terms mean in practice and when they will be instrumental in the overturning of a conviction. These terms are now fully integrated into the language of the CoA and cases such as *Mullen*, although very rare, do emphasise that notions of rights and fairness have their own role to play in the jurisprudence of the CoA separate from just being considered in terms of the factual accuracy (or truth) of the verdict. If the CoA dismisses procedural errors because it thinks the appellant is guilty, this forces the appeal to be an examination of the factual accuracy of the verdict and then issues such as finality and truth of verdicts will remain the CoA’s main consideration rather than the broader issue of rights and fairness that Walker and others advocate.

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<sup>54</sup> [2002] UKPC 19, para 28.

This makes it very difficult to predict when convictions will be overturned on the basis of procedural irregularities. There are also similar problems with factual error appeals.

Factual error appeals have proved to be the most problematic for the CoA because they require it to trespass on the role of the jury. Much has been written about the CoA's reluctance to do this<sup>55</sup> and, as a result, the CoA has the reputation of being more likely to overturn a conviction based on a procedural irregularity than one based on an error of fact.<sup>56</sup> The two factual error grounds are 'lurking doubt' and fresh evidence, and both tend to be argued when the appellant is alleging that she is factually innocent. That is not to say that all appellants successful with these grounds will be factually innocent, but if an appellant is considered factually innocent it is more likely these grounds were argued. The lurking doubt ground was established in the case of *R v Cooper*<sup>57</sup> and tends to be argued where there is no fresh evidence and no procedural irregularity but the appellant is asking the CA to reassess the evidence in terms of whether it has a lurking doubt about the verdict.<sup>58</sup> The RCCJ alluded to associated problems when they stated that they 'fully appreciate the reluctance felt by judges sitting in the Court of Appeal about quashing a jury's verdict' as 'the jury has seen all the witnesses and heard their evidence; the Court of Appeal has

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<sup>55</sup> See, for example McCartney and Roberts, n 14 above; McCartney and Walker, n 8 above; Pattenden, n 13 above; Nobles and Schiff, n 14 above; R Nobles, and D Schiff, 'The Right to Appeal and Workable Systems of Justice' (2002) 65(5) *Modern Law Review* 676; Roberts, n 14 above.

<sup>56</sup> This is borne out by empirical studies on the judgments of the CA. See Ross, n 15 above; Seaborne Davies, n 15 above; Knight, n 15 above; Malleon, n 15 above; S Roberts, 'Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal' (2017) 8 *Journal of Criminal Law* 303.

<sup>57</sup> (1969) 53 Cr Ap R 82.

<sup>58</sup> For a general discussion on lurking doubt appeals, see L Leigh, 'Lurking Doubt and the Safety of Convictions' (2006) *Crim LR* 809; L James, 'Criminal Appeals and the Lurking Doubt' (1990) 154(49) *Justice of the Peace* 780.

not.’<sup>59</sup> As a result of this, lurking doubt appeals are very rare and rarely successful.<sup>60</sup> The CoA has recently expressed the view that, for constitutional reasons, this ground should be used in exceptional circumstances only.<sup>61</sup> But there is some confusion as to whether the ground still exists. In *R v Storey*, Openshaw J stated ‘in any event the lurking doubt test, if ever appropriate, is no longer the test applied by this court. The test is whether the conviction is safe.’<sup>62</sup> However, despite this there are recent cases where lurking doubt is still being argued,<sup>63</sup> so it remains a confusing picture.

The CoA was originally given wide powers under section 9 of the CAA 1907 to adduce fresh evidence on appeal but it imposed its own restrictions from civil appeals which were that the evidence had to be credible and relevant to the issue of guilt,<sup>64</sup> the evidence had to be admissible,<sup>65</sup> and the evidence could not have been put before the jury.<sup>66</sup> Although it may have been the intention of Parliament when enacting section 9 that the CoA would take an active role in hearing new evidence and reassessing the old evidence in the case, the CoA relied upon its review function and reverence for finality to adopt a restrictive approach.<sup>67</sup> In 1966, the Donovan Committee heard evidence that the conditions the CoA had imposed on the reception of fresh evidence were too

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<sup>59</sup> RCCJ, n 15 above, ch 10, para 46.

<sup>60</sup> For empirical research on the lurking doubt ground, see Malleon, n 15 above; S Roberts, ‘The Royal Commission on Criminal Justice and Factual Innocence: Remediating Wrongful Convictions in the Court of Appeal’ (2004) 1(2) *JUSTICE Journal* 86.

<sup>61</sup> See Lord Judge CJ in *R v Pope* [2013] 1 Cr App R 214, para 14. See also the LCJ in *R v Fanning* [2016] 2 Cr App R 19.

<sup>62</sup> [2017] EWCA Crim 105, para 7.

<sup>63</sup> See *R v Jones* [2017] EWCA Crim 1705; *R v Ahmed* [2017] EWCA Crim 1049.

<sup>64</sup> *R v Dunton* (1908) 1 Cr App R 165.

<sup>65</sup> *R v Tellett* (1921) 15 Cr App R 159.

<sup>66</sup> *R v Jones* (1908) 2 Cr App R 1.

<sup>67</sup> See *R v Parks* (1962) 46 Cr App R 29.

narrow and it recommended that additional evidence should be received if it was relevant and credible and there was a reasonable explanation for the failure to place it before the jury.<sup>68</sup> These recommendations formed the basis of a late amendment to the CAA 1966 which then became section 23 of the CAA 1968.

As a result of criticisms of the CoA's approach to fresh evidence appeals, the RCCJ made various recommendations which were incorporated into section 23 with the aim of widening the scope of the receipt of fresh evidence by the CoA.<sup>69</sup> The test in section 23(2)(a) was changed from 'likely to be credible' to 'capable of belief' as this would 'be a slightly wider formula giving the CoA greater scope for doing justice.'<sup>70</sup> There were two amendments which would arguably have resulted in the CoA taking an even more restrictive approach to fresh evidence appeals: i) the duty to admit evidence under section 23 if the requirements of section 23(2) are fulfilled was abolished and replaced with a discretion, and ii) the CoA's rarely used power to rehear the evidence presented at the trial was abolished.<sup>71</sup> However, despite these changes fresh evidence appeals continue to be very rare and difficult to succeed with, largely because of the CoA's reverence for finality and deference to the jury.<sup>72</sup>

The CoA's approach to procedural error and factual error appeals indicates why it may perpetuate MoJ as well as rectifying them. While Walker's view that rights and fairness should be safeguarded regardless of the factual accuracy of the verdict has also been the view of the CoA, it is very difficult to predict which procedural errors will result in a conviction being overturned.

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<sup>68</sup> Donovan Committee, n 15 above, para 136.

<sup>69</sup> CAA 1995, s 4.

<sup>70</sup> RCCJ, n 15 above, ch 10, para 55.

<sup>71</sup> CAA 1995, s 4(1)(a)

<sup>72</sup> See Malleon, n 15 above; Roberts, n 56 above.



Also, while Walker has criticised the reliance placed by Nobles and Schiff on what he calls 'narrower values' such as finality and 'truth' (of verdicts), these can result in a restrictive approach being taken by the CoA so they do need to be addressed. The problems associated with the CoA also cause difficulties for the CCRC which will now be discussed.

### III. THE CRIMINAL CASES REVIEW COMMISSION

The CCRC was established by the CAA 1995 after a recommendation by the RCCJ, replacing what had previously been known as the Home Secretary's Reference.<sup>73</sup> It began work on April 1, 1997. The problems associated with the Home Secretary's reference have been well documented.<sup>74</sup> The CCRC has been widely accepted as a vast improvement on the previous system but as McCartney and Walker have stated:

In terms of design, the CCRC is an important and innovative reform that does recognise the possibility of residual error and places state facilities on call for their correction. However, there are increasing criticisms levelled at the performance of the CCRC, including their decision-making processes, their resources, and ultimately their remit.<sup>75</sup>

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<sup>73</sup> CAA 1968, s 17.

<sup>74</sup> See N Taylor and M Mansfield, 'Post-Conviction Procedures' in C Walker and K Starmer (eds), *Miscarriages of Justice A Review of Justice in Error* (Blackstone Press, London 1999) 229; P O'Connor, 'The Court of Appeal: Retrials and Tribulations' (1990) *Crim LR* 615; D Malet, 'The New Regime For The Correction of Miscarriages of Justice' (1995) 159 *Justice of the Peace* 716; R Nobles and D Schiff, 'The Criminal Appeal Act 1995: The Semantics of Jurisdiction' (1996) 59 *Modern Law Review* 573.

<sup>75</sup> McCartney and Walker, n 8 above, 197.

The CCRC has the power to refer cases to the Crown Court and the CoA on conviction or sentence arising from England, Wales and Northern Ireland. To emphasise independence, the CCRC are not to be ‘regarded as the servant or agent of the Crown.’<sup>76</sup> There should be no fewer than 11 commissioners<sup>77</sup> and one third have to be legally qualified<sup>78</sup> with two thirds having to have knowledge or experience of any aspect of the criminal justice system.<sup>79</sup> References can be made to the CA to review a conviction,<sup>80</sup> a sentence other than one fixed by law,<sup>81</sup> a verdict of not guilty by reason of insanity,<sup>82</sup> or a finding that a person under a disability did the act or omission charged against him.<sup>83</sup> Once the reference has been made it is treated as a normal appeal and leave is not required on the grounds referred but it will be required on any additional ones.<sup>84</sup> To refer a case, the CCRC is given statutory guidance under section 13, which states that there must be a ‘real possibility’ arising from an argument or evidence that was not raised during the trial or at appeal, or from ‘exceptional circumstances’ that the conviction or sentence would not be upheld. It is difficult to define what ‘real possibility’ means, but in *R v CCRC Ex Parte Pearson* Lord Bingham stated that a real possibility ‘plainly denotes a contingency which, in the Commission's judgment, is more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty’.<sup>85</sup> McCartney and Walker have argued that a more radical solution

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<sup>76</sup> CAA, s 8(2).

<sup>77</sup> CAA, s 8(3).

<sup>78</sup> CAA, s 8(5).

<sup>79</sup> CAA, s 8(6).

<sup>80</sup> CAA, s 9(1).

<sup>81</sup> CAA, s 9(3).

<sup>82</sup> CAA, s 9(5).

<sup>83</sup> CAA, s 9(6).

<sup>84</sup> Criminal Justice Act 2003, s 315.

<sup>85</sup> (2000) 1 Cr App R 141, 149.

would have been to give the CCRC the power to determine applications or at least to make recommendations to the CoA either to acquit or to order a retrial, but as they point out this could have been seen as interfering too much with judicial independence and the finality of verdicts.<sup>86</sup>

Under section 17 CAA 1995, the CCRC has a very wide power to obtain documents from public bodies and, under section 18A, from a private individual or organisation.<sup>87</sup> Under section 19, the CCRC has the power to require an ‘appropriate person’ from the public body that carried out the original investigation to appoint an investigating officer to carry out inquiries. Where the public body was a police force, the appropriate person will be the Chief Constable of that force. This was a controversial measure when the CCRC was created<sup>88</sup> and as McCartney and Walker have stated ‘...this relationship represents a major concern for the future effectiveness of the CCRC.’<sup>89</sup> This power has been used on 50 occasions.<sup>90</sup> The CCRC’s powers are not just limited to section 17 and section 19 because under, section 21 CAA 1995, it can make any inquiries and investigations it deems necessary. Under section 15 CAA 1995 and section 23A CAA 1968, the CoA can ask the CCRC to carry out investigations on its behalf. This can apply to any case. In 2016/17 the CCRC received one section 15 direction from the CoA. That compares with ten in 2012/13 and there have been a total of around 70. They have mainly involved possible jury bias.<sup>91</sup>

#### IV EVALUATING PERFORMANCE

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<sup>86</sup> McCartney and Walker, n 8 above, 196.

<sup>87</sup> Inserted by the Criminal Cases Review Commission (Information) Act 2016.

<sup>88</sup> Malet, n 74 above, 716.

<sup>89</sup> McCartney and Walker, n 8 above, 196.

<sup>90</sup> House of Commons Justice Committee, Criminal Cases Review Commission, 2014-2015, HC 850 (London, HMSO). Richard Foster giving oral evidence at Q107.

<sup>91</sup> See CCRC, *Annual Report and Accounts 2016-2017* (Stationery Office, 2017), 26.

There are a number of ways in which the performance of the CCRC can be evaluated and the first of these is its workload and budget. The Commission's budget is set by the Ministry of Justice and it is a source of major concern each year. In January 2014, the current CCRC Chairman, Richard Foster, stated 'we had a period, from 2008–09 until this year, in which we had no increase in funding at all, so in real terms our budget is 25% less than it was in 2008-09.'<sup>92</sup> In 2015, Richard Foster stated that the uncertainty over the CCRC's budget meant that it was difficult to plan, particularly around the recruitment of staff.<sup>93</sup> In 2015-2016 the budget was £5.40 million and there was a slight increase in 2016-2017 to £5.43 million. Foster has argued that the Commission would need an additional £1 million to clear its backlog.<sup>94</sup>

The CCRC has been criticised for its workload and backlog.<sup>95</sup> According to the 2016/17 Annual Report they made major changes to the manner in which they carry out their casework through 2014/15 and 2015/16 and during 2016/17 they 'have been engaged in consolidation of those alterations, with particular focus on the associated culture changes and on our longer-running

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<sup>92</sup> Richard Foster, oral evidence to the House of Commons Justice Committee, 14 January 2014. Q1 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-work-of-the-criminal-cases-review-commission/oral/5318.pdf>. This was reiterated in Q131 oral evidence by Richard Foster to the House of Commons Justice Committee 6 February 2015.

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/criminal-cases-review-commission/oral/17993.pdf> (both links last accessed 12 November 2017).

<sup>93</sup> Oral evidence by Richard Foster to the House of Commons Justice Committee 6 February 2015. Q110 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/criminal-cases-review-commission/oral/17993.pdf> (last accessed 12 November 2017).

<sup>94</sup> *Ibid*, January 2014, Q15.

<sup>95</sup> See A James, N Taylor and C Walker, *The Criminal Cases Review Commission: Economy, Effectiveness and Justice*, (2000) *Criminal Law Review* 140; R Nobles and D Schiff, *The Criminal Cases Review Commission: Reporting Success*, (2001) 64 *Modern Law Review* 280; Walker and McCartney, n 8 above; McCartney and Roberts, n 14 above; Roberts and Weathered, n 27 above.

reviews.’<sup>96</sup> From March 2016 to March 2017 they managed to reduce maximum waiting times to allocation from six months to five months for custody cases and from 19 months to 11 months for ‘at liberty’ cases.<sup>97</sup> Whilst these may be an improvement, applicants are still kept waiting some time before their case is even allocated to a case review manager. The CCRC’s working practices may then delay this further.<sup>98</sup> One of the major issues is the rise in applications. In 2010/2011 there were 933 applications but in 2015/2016 there were 1,480 applications and similarly in 2016/2017, there were 1,397 applications.<sup>99</sup> If this level of applications is the new norm then it is hoped that more money will be allocated by the government, rather than returning to the early years of the CCRC when the backlog was much longer.<sup>100</sup>

The second way the CCRC’s performance can be evaluated is by looking at its referral rate.

This is illustrated in table 1 below:

**TABLE 1**

YEAR	Cases Referred	As % of Cases Concluded
2016/2017	12	0.77
2015/2016	33	1.8

<sup>96</sup> Annual Report 2016/2017, n 91 above, 12.

<sup>97</sup> *Ibid*, 13.

<sup>98</sup> For a discussion of the Commission’s working practices see McCartney and Walker, n 8 above; Walker, n 3 above, C Walker and C McCartney ‘Forensic Identification and Miscarriages of Justice in England and Wales’ in X Mallett, T Blythe and R Berry (eds), *Advances in Forensic Human Identification* (CRC Press, Boca Raton, 2014) 391.

<sup>99</sup> It is worth noting that the CCRC has made efforts to improve accessibility, such as by providing easier application forms.

<sup>100</sup> See James, Taylor and Walker, n 95 above; Home Affairs Committee, *The Work of the Criminal Cases Review Commission*, HC 106 (1998–1999).

2014/2015	36	2.2
2013/2014	31	2.7
2012/2013	21	1.6

As the table shows, in 2016/17 the Commission referred 12 cases to the CoA which was considerably lower than the previous 3 years. This means that they referred 0.77% of the 1,563 cases concluded that year. In 2015/2016 the referral rate was 1.8% (33 cases); in 2014/15 it was 2.2% (36 cases); in 2013/2014 it was 2.7% (31 cases) and in 2012/2013 it was 1.6% (21 cases). The Commission's long-term referral rate stands at 3.30%.<sup>101</sup> In their 2016/2017 Annual Report, the Commission commented on the very low number that year: 'we do not think that this unusually low percentage is a long term reduction in the number of miscarriages of justice or the Commission's ability to detect and refer them.'<sup>102</sup> They attribute the reduction instead to the fact that the majority of referrals are single individuals and there were no 'themes' where groups of people may be referred under a single issue.<sup>103</sup> This referral rate has been criticised, for example it has been suggested that the CCRC is taking a restrictive approach to the real possibility test in second guessing the CA.<sup>104</sup> Richard Foster defended the approach of the CCRC saying:

....you have to put yourself in the minds of the Court of Appeal and say, "Are there any grounds here that I think would count with the Court of Appeal?" Otherwise, if you do not

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<sup>101</sup> Annual Report 2016/2017, n 91, above, 14.

<sup>102</sup> *Ibid.*

<sup>103</sup> A major theme recently for the Commission has been a large number of wrongful conviction cases of refugees and asylum seekers. See C Hoyle, M Sato and N Speechley, 'Wrongful convictions of refugees and asylum seekers: responses by the Criminal Cases Review Commission' (2017) *Criminal Law Review* 106.

<sup>104</sup> See, for example, M Naughton, 'Introduction' in Michael Naughton (ed) *The Criminal Cases Review Commission, Hope for the Innocent?* (Hampshire: Palgrave Macmillan, 2010) and subsequent chapters.

do that - if that is not the test that you are operating - you are at risk of sending to the Court of Appeal a lot of cases that they will simply bin.<sup>105</sup>

Writing in 2010, McCartney and Walker argued that:

a significant barrier to CCRC referrals ...relates to their inherent cautionary approach and their internal decision-making protocols. It takes just a single commissioner to refuse referral but it requires three to refer making decisions about whether to refer cases weighted in favour of non referral.<sup>106</sup>

They go on to say that if the case review manager is also applying this test before referring the case to a Commissioner he or she is applying a ‘real possibility of a real possibility test’ which would be particularly restrictive.<sup>107</sup>

The third way the CCRC’s performance can be evaluated is by looking at their ‘success’ rate at the CoA. As of December 31, 2017, the Commission have referred 636 cases to the CoA. Of the 629 where the appeal has been heard by the Court, 421 appeals have been allowed and 195 dismissed. This represents an overall ‘success’ rate of 67% of the appeals heard. This rate calculated annually has been dropping in recent years as illustrated by table 2 below:

**TABLE 2**

YEAR	‘SUCCESS’ RATE
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<sup>105</sup> Richard Foster, oral evidence to the House of Commons Justice Committee, 14 January 2014. Q23.

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-work-of-the-criminal-cases-review-commission/oral/5318.pdf> (last accessed 12 November 2017).

<sup>106</sup> McCartney and Walker, n 8 above, 198.

<sup>107</sup> *Ibid.*

2016/2017	46%
2015/2016	53%
2014/2015	55%
2013/2014	73%
2012/2013	69%
2011/2012	58%

As the table shows there has been a significant drop in the success rate more recently. In 2011/12 the figure was 58%, in 2012/13, the figure was 69%, in 2013/14 the figure was 73% and in 2014/2015 the figure was 55%. However, in 2015/16 the figure dropped to 53% and dropped further still in 2016/2017 to 46%.<sup>108</sup> The difficulty for the CCRC is if the success rate at appeal is too high, it appears that the Commission has set a prohibitive threshold for referral by sending only those certain to win. However, if the successful appeal rate is too low, then it appears that the Commission is sending weak cases with little chance of success. It is a difficult balance and the CCRC have been criticised for being overly cautious.<sup>109</sup> In 2015, when giving evidence to the latest Justice Committee review, Chairman Richard Foster denied they were too cautious stating ‘it is very difficult to look at anything that would give you an independent sightline on what the percentage ought to be.’<sup>110</sup> The lower ‘success’ rate in 2016/2017 may mean that the CCRC was

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<sup>108</sup> Annual Report, n 91 above, p 6.

<sup>109</sup> See Justice Committee, n 90 above, published Written Evidence of Bob Woffinden, Paul May, Michael Zander, Glynn Maddocks, and Cardiff University Law School Innocence Project.

<sup>110</sup> Oral evidence by Richard Foster to the House of Commons Justice Committee 6 February 2015. Q115. <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/criminal-cases-review-commission/oral/17993.pdf> (last accessed 12 November 2017).



being less cautious in its referrals and referring cases with less chance of success, but the fact that only 12 were referred in 2016/2017 may refute this.

A further criticism faced by the CCRC is the argument that they should focus more on innocence. The Commission can refer a case where there is a real possibility that the conviction will not be upheld, which means it refers cases under both interpretations of 'unsafe'. Its work is thus not restricted to just those who maintain innocence. This approach has been criticised by Naughton:

The CCRC's dependence on the criteria of the appeal courts has the knock-on effect that its reviews are merely safety checks on the lawfulness or otherwise of criminal convictions, as opposed to the kind of in-depth inquisitorial investigations that seek the truth of the claims of innocence by alleged victims of miscarriages of justice in the way that was expected by the RCCJ.<sup>111</sup>

As a result of this perceived reluctance of the CCRC to involve itself in 'innocence' claims, Naughton states that there is then a need for a body that, 'unlike the CCRC, is not bound to the criteria of the appeal courts and is sufficiently resourced and empowered so that it is not dependent on government',<sup>112</sup> although he does not explain how such a body would be funded or operate. In defence of the CCRC's position, Richard Foster has stated

I would certainly argue very strongly against some sort of innocence test, because demonstrating that a conviction is unsafe is a much lower hurdle than demonstrating

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<sup>111</sup> M Naughton 'Conclusion' in M Naughton, (Ed), *The Criminal Cases Review Commission, Hope for the Innocent?* (London, Palgrave Macmillan, 2010), 233.

<sup>112</sup> *Ibid*, 225.

evidence, once somebody has been convicted, that they are actually innocent or that it is probable that they are innocent, so I would want to stick with that.<sup>113</sup>

If the CCRC believes there is a greater chance of success with a procedural or technical ground of appeal then it is going to increase its chances of success if referring on that basis. This benefits those who are factually innocent, who are most often seriously hampered by the ‘invisibility’ of their innocence: ‘...innocence is not something that exists, out there, to be touched, felt, or measured, any more than guilt’.<sup>114</sup> To demand proof of factual innocence as a threshold for appellants would raise the bar to a prohibitive level. This is where procedural and legal issues are critical, as these are often visible on the face of documents and materials initially reviewed, rather than buried deep in a case, requiring significant investigation to uncover. Downgrading the importance of due process arguments would be unworkable in practice, and it should be the role of an appellate court to uphold the integrity of the trial process and protect the right to a fair trial, which is conducted according to law, regardless of guilt or innocence. Whilst the CCRC can perhaps be criticised for being too cautious in its relationship to the CoA,<sup>115</sup> there is little point in having a body, such as the CCRC, referring cases without regard to the powers and procedures of

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<sup>113</sup> Richard Foster, oral evidence to the House of Commons Justice Committee, 14 January 2014. Q23 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/justice-committee/the-work-of-the-criminal-cases-review-commission/oral/5318.pdf> (last accessed 12 November 2017). See also H Quirk, ‘Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer’ (2007) 70(5) *Modern Law Review* 759 who argues that a test of innocence is not the solution to the problem of low referral rates.

<sup>114</sup> See R Nobles and D Schiff ‘Guilt and Innocence in the Criminal Justice System: A Comment on R (Mullen) v Secretary of State for the Home Department’ (2006) 69 *Modern Law Review* 80, 90.

<sup>115</sup> See R Nobles and D Schiff (2005) ‘The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal’ (2005) *Crim LR* 173.

the CoA. Therefore, it is perhaps better to look to reforming the CoA to make that institution more receptive to factual innocence claims in factual error appeals.

It was the conclusion of the House of Commons Justice Committee in 2015 that ‘the CCRC is performing its functions reasonably well.’<sup>116</sup> The Committee could see no conclusive evidence that the CCRC is failing to apply the ‘real possibility’ test correctly in the majority of cases. They accepted that ‘application of the test is a difficult task and is by no means a precise science, but where potential miscarriages of justice are concerned we consider that the CCRC should be willing to err on the side of making a referral. The Commission should definitely never fear disagreeing with, or being rebuked by, the Court of Appeal.’<sup>117</sup> They recommended that the CCRC be less cautious in its approach to the real possibility test. They further stated that they were ‘concerned that there may be some miscarriages of justice which are going uncorrected because of the difficulty the CCRC faces in getting some such cases past the threshold of “real possibility”, as a result of the CoA’s approach.’<sup>118</sup> They went on to say that:

while it is important that the jury system is not undermined, properly-directed juries which have seen all of the evidence may occasionally make incorrect decisions. The Court’s jurisprudence in this area, including on ‘lurking doubt’, is difficult to interpret and it is concerning that there is no clear or formal mechanism to consider quashing convictions arising from decisions which have a strong appearance of being incorrect. Any change in this area would require a change to the Court of Appeal’s approach, which would itself require a statutory amendment to the Court’s grounds for allowing appeals. We are aware that this would constitute a significant change to the system of criminal appeals in this country and that it would qualify to a limited extent the longstanding constitutional doctrine

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<sup>116</sup> Justice Committee, n 90, part 4, para 54.

<sup>117</sup> *Ibid*, Conclusions and Recommendations, para 2.

<sup>118</sup> *Ibid*, para 4.

of the primacy of the jury. Neither of these things should be allowed to stand in the way of ensuring that innocent people are not falsely imprisoned.<sup>119</sup>

The Committee recommended that the Law Commission review the CoA's grounds for allowing the appeal. However, this was rejected by the then Minister for Justice, Michael Gove, seemingly on the assurance of a belated written submission from former Lord Chief Justice, Lord Justice Judge. The Law Commission shortlisted the issue as a possible area of inquiry in response to an open call for subject areas but it was not included in the topics chosen to investigate.

## CONCLUSION

A very brief analysis of the history of miscarriages of justice was carried out by Lord Steyn in the House of Lords case of *R v O'Conner and another* and *R v Mirza*.<sup>120</sup> He stated that:

nowadays we know that the risk of a miscarriage of justice, a concept requiring no explanation is ever present. In earlier times courts sometimes approached the risk of a miscarriage of justice in ways which we would not nowadays find acceptable.

He referred to the fact that in 1980 the Court of Appeal denied the Birmingham Six the right to sue the police in civil proceedings citing Lord Denning MR's now infamous comment that 'this is such an appalling vista that every sensible person in the land would say: It cannot be right that these actions should go any further.'<sup>121</sup> He also referred to Lord Devlin's comment that the cases

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<sup>119</sup> *Ibid*

<sup>120</sup> [2004] UKHL 2, para 4.

<sup>121</sup> Cited in *McIlkenny v Chief Constable of the West Midlands* [1980] QB 28.

of the Birmingham Six, the Maguire Seven and the Guildford Four were ‘the greatest disasters that have shaken British justice in my time.’<sup>122</sup> Lord Steyn referred to the RCCJ and the setting up of the CCRC and made reference to ‘a more general change in legal culture’<sup>123</sup> citing the case of *R v Secretary of State for the Home Department, Ex p Simms*<sup>124</sup> where, ‘in the face of some 60 miscarriages of justice in the 1990s, the House of Lords set aside Home Office instructions denying prisoners access to journalists in their efforts to get their convictions overturned.’<sup>125</sup>

It is not entirely clear whether we are living in more enlightened times. It is still very difficult to succeed with factual error appeals and while it is easier to succeed with an appeal based on a procedural irregularity, these appeals are not without their problems. While it is the role of the CoA to uphold the integrity of the criminal justice system determining which procedural errors will result in the conviction being quashed is difficult to determine. All these appeals cause problems for the CCRC who have to try and predict whether the CoA will quash the conviction if they refer. The CCRC has been welcomed as a much needed addition to the extant appeal avenues in England and Wales and, whilst it can be criticised in some areas, it deserves praise for the good work that it has done over the last twenty years. It acknowledges that additional funds are needed to improve its performance and now might be the time to review its remit and statutory powers to ensure it has the funds to cope with the demands made of it. It is unfortunate that Michael Gove chose not to allow the Law Commission to review the Court’s grounds for allowing appeals, but as history has shown the CoA’s powers have been continually changed to liberalise its approach without much success. So for now, the CA and the CCRC will continue both perpetuating and

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<sup>122</sup> P Devlin, ‘The Conscience of the Jury’ (1991) 107 *Law Quarterly Review* 398.

<sup>123</sup> See n 120 above, para 4.

<sup>124</sup> [2000] 2 AC 115.

<sup>125</sup> See n 120 above, para 4.

rectifying MoJ unless their powers, remit and funding are thoroughly addressed. As Walker himself has previously concluded:

Criminal justice systems should be judged, *inter alia*, by the number of injustices produced by them in the first place, and, secondly, by their willingness to recognise and correct those mistakes. The British system could improve on both counts. The institution of the CCRC is much to its credit, but the failure to reform the Court of Appeal may yet undermine its future.<sup>126</sup>

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<sup>126</sup> Walker, n 8 above, 522.