



WESTMINSTER COMMISSION ON MISCARRIAGES OF JUSTICE TRANSCRIPT OF FOURTH EVIDENCE SESSION – SOLICITORS

9 SEPTEMBER 2019

- Lord Garnier** We are expecting one further member of our Commission, Erwin James, who is the editor of Inside Time. I'm sure he is known to the three of you by reputation and the work that he does as a journalist and broadcaster and his experiences in this area of public policy. Could I just invite you from Mr Foot across, and just get you to say how you have become engaged in this area of public policy?
- Matt Foot** My name is Matt Foot. I'm a solicitor at Birnberg Pierce and Partners. I do criminal defence and nothing else. I work in protest, terrorism and appeals, so a collection of things.
- Mark Newby** I'm Mark Newby, I'm a solicitor advocate. I practice in Jordans Solicitors in Doncaster, but by pure accident 20 odd years ago became involved in miscarriages of justice cases and have been heavily involved since, and I suspect the most recent one there's been an interest in is the case of Victor Nealon. I sit on the Law Society's Crime Committee, in addition.
- Steven Bird** I'm Steven Bird, I am the Managing Director of Birds Solicitors in south-west London. I've been a solicitor since 1990, dealing just with criminal defence work, and with miscarriages of justice work, for about 25 years. I'm also the chairman of the Criminal Appeal Lawyers Association.
- Lord Garnier** Thank you. All three of you have got both individually, but collectively, huge experience in criminal defence work and criminal appeal work, and we are looking into the work of the Commission which is based in Birmingham. That's been going since 1997 having been set up in 1995. I'm not sure whether anyone was in practice during the outset of the Commission. Anyway, during the course of your professional lives, and particularly since you have become engaged in miscarriages cases, how have you each considered the system to change - both the Commission system, but also the way in which your work in this field has had to change and it has changed to

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meet the fluid situation that the Commission has presented to you since 1997?

Matt Foot

I started out in about 1997, so I wasn't involved in doing appeals until much later on, in 2010 or something like that. But I did grow up with a father who was a journalist who worked on appeals, and in terms of the Bridgewater Four, so I've grown up with that sort of culture and obviously kept an eye on it throughout that period. Perhaps I joined at the wrong time – it seems to me that the CCRC started off sort of as a campaigning organisation and has been less so over the last ten years. I'm not entirely certain of all the reasons for that, but I definitely think that is reflected in a number of issues, not least the referral rate. But from my own experience, I was involved in a case, which I was asked to talk about, with Sam Hallam, which was a very good case. I wanted to talk today about the good, the bad and the ugly. Sam Hallam was the good. The CCRC did a very good job. There was a Case Review Manager called Glen Mathieson who did an excellent job on that case.

Appeal cases are very difficult because they have been through the court and they have been through an appeal, so, people generally don't intend to leave things behind. They are complicated cases because you have to work out what happened at court, and then you have to address what could be fresh and what's gone wrong that's still relevant, and why the case is a miscarriage, and they did a very thorough job on that case. and there was also a very good campaign led by Paul May, but there was also a police inquiry. These things can be a lottery, but the Thames Valley Police did an excellent inquiry into the Sam Hallam case and showed the flaws within the police investigation which were very serious.

To sum up that case very briefly – 14 people at the scene said Sam Hallam wasn't there. His case was he wasn't there – he was the only defendant of nine who said he wasn't there. Of the 14 people, that included the intended victim of the tragic murder, a friend intervened of the person being assaulted. The person who intervened, who knew Sam Hallam, said he wasn't there. And that just wasn't investigated properly by the police and that meant that he came out of prison in 2012 because of the good work that they'd done.

Lord Garnier

Just remind us, the gap between 2012 and the alleged crime?



Matt Foot

In 2004, I think, the murder took place, the senseless murder which he was no part of, he wasn't there. They did a very good job on that. There was one little thing I would add to that which was that when they referred the case, they advised me – and I am perfectly happy to take suggestions and advice of what to do, about who to instruct and they said I should instruct trial counsel. I think that was a mistake, and I didn't follow that advice. I think if I had followed that advice, I think Sam Hallam could still be in prison, because one of the reasons he was acquitted was of a very significant failing in the summing up. So, I say that not to make a nit picking point but I think it reflects that little bit of deference of the CCRC to the Court of Appeal and to counsel, and to the police, in the way that they approach cases these days, which may not have existed when they first set out, when you had people like David Jessel who understood that the police can hide things, they can cover up, and can be a problem, but there is less understanding of that in the CCRC today.

Lord Garnier

We'll come on to that later, but perhaps the other two gentlemen may want to pick up the point of where things have changed in your experiences. Has it become more difficult to get cases through into the CCRC and then from there, on to the Court of Appeal... what are the things which have made the changes to which Mr Foot referred to, in your experience?

Mark Newby

I've been a practising solicitor from around 1999/2000. For me, the Commission, there are a lot of dedicated people within the Commission and I've always said that, but the problem is the dedication isn't matched by the delivery and it is very much a fluid organisation in terms of development. So when I first started it was an organisation who had a lot of problems. Then it sort of moved away from that and was starting to try and do stuff to fix that and there was a move forward, and then it gets dragged back again and it's bound by its fluidity and its structure because of course it constantly changes its Commissioners. We've had different Chairs come in. It's the nature of the organisation, but that has an impact and then alongside of that we have the development of the Court of Appeal and I've talked about it before, about the symbiotic relationship between the CCRC and the Court of Appeal because the CCRC is operating to second guess and accord with the Court of Appeal, and it's this constant tension between the two bodies and we've seen in recent years, a much tougher Court of Appeal, and we can talk about the



reasons for that. That creates that tension. It makes it harder for applicants. So for me it's a very variable organisation and there's far too much inconsistency within it which represents a major disturbance to applicants.

Steven Bird

I agree with what Mark said there and it seems as though I am the only one old enough to have been around when and before the commission came into being and my recollection of previous days is fairly hazy. I was a fairly junior solicitor in those days, but the initial impression when it started was that it was a vast improvement on sort of the Home Office situation that one had at that point and one has to be perhaps mindful of that improvement. But I think as things have changed over the years, I think one also has to consider the restrictions it works under in terms of funding. We've had a huge increase in the number of cases it has taken over the last sort of five or six years and a large cut in funding that it has got to deal with. I don't really see how you can expect the same sort of service to be provided when you're increasing the number of cases and decreasing the amount of money you've got to deal with them. I've heard [former CCRC Chair] Richard Foster talk a couple of years ago saying about for every £10 they essentially had ten years ago they now had about £4 per case. That has to be significant.

Lord Garnier

We'll come on and deal with the funding aspect in a moment, but could I just ask the three of you almost in a yes and no answer – do you think it is more difficult nowadays for a wrongly convicted person to get their case to the Court of Appeal through the CCRC now than it was when you first started in practice or first started dealing with this sort of case?

Matt Foot

That raises one point that I just wanted to make today the most important point which is there is a problem with the referral rate, there is a specific problem with the re-referral rate. What I mean by that is when Anne was talking about when the CCRC was set up, that came out of the Birmingham Six, the Guildford Four and the Bridgewater Four. All those cases took more than two appeals before they were quashed. The system doesn't generally, often, doesn't see the full picture. To my knowledge, there are only, of all the cases in the CCRC, there are only two cases that have been referred twice. But the CCRC is now of an age where that is a terrible anomaly. It was set up in 1997 and yet there have been only



two cases referred twice and that means that, I think on the re-referral rate, you are in a worse position, because cases like the Guildford Four and the Birmingham Six are not being referred, those sort of cases. and that's a terrible position to be in. I don't say across the board, I mean on those cases which are not being re-referred and they need to be.

Lord Garnier

Do you believe that?

Mark Newby

Yes, absolutely. I'm just going to highlight the case of Susan May which would have been a re-referral, which after five years of fresh investigation, was refused again. And the circumstances are quite concerning. That demonstrates, in our view, an unwillingness, an over-preoccupation of the Commission not to want to re-refer that case unless it's absolutely bolted on. Effectively our view is that the Commission is so worried about re-referring a case it has already referred and lost, and it's preoccupied that it's absolutely bolted on and that it's not going to be on the losing side again. Overall, to try and answer your other question more quickly, yes, I'm afraid I do think it's much more difficult to get a referral through the Commission now.

Steven Bird

I think the short answer is that, yes, it is more difficult now than it was, to get a referral when the Commission started and maybe even ten years ago. And that is reflected in referral rate: I think it was 13 cases referred in the last financial year, 19 the year before that, 12 before that and before that it was in the thirties. And I think you need to look at those figures and take out the thematic referrals such as the immigration document referral cases and also the victims of trafficking. We've had quite a few referrals over the past number of years but if you take those out of the numbers, it becomes even more stark that there are far fewer referrals than there used to be.

Baroness Stern

Thank you very much. Can I come on to talk about austerity and money and to ask you: what is the effect on your practice of the reduction in resources for all the sort of things that you do, and in particular has this affected your ability to do miscarriages of justice casework?

Matt Foot

The figures for the rate for the work we do on appeal work have not gone up since 1997, which is when I started the job, unfortunately. In fact, they've even gone down now, so that's one aspect which is a real problem. In fact, there are very few firms who do this work and there is a lot of pressure

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on the people who do. One of the reasons is that they are very time intensive. They take a lot of your time. A lot of it is, you expect to be pro bono in understanding the case and going back. Historically my mentor was Jim Nicholls, one of the best appeal lawyers we've ever had, and I worked with him on work experience, and he was able to do that work because other cases subsidised the appeal work. But the problem is the other cases, you're not funded properly these days. For two cases, you would have to bill five cases for two these days. So you can't subsidise the appeal work because you are not paid properly for the other work anymore as a solicitor, and so there are less and less people doing this work.

And so the CCRC complain about this, obviously, and they are right. There is less and less people doing this work. Fewer cases will be prepared for the CCRC, and they'll be working with unmanaged cases, and that's going to get worse.

Steven Bird

Matt's right, there hasn't been an increase in the rate for over 20 years and the rate has actually gone down by 8.75% in 2014. So we are now working on an hourly rate of £45.35 in London, I think it might be slightly less outside London. That was £45.70 before 2014 and if you inflation-proof that, from going back to the late 90s you're looking at an equivalent rate of over £90 per hour. So you can see, the actual erosion in real terms is huge.

There are lots of different types of legal aid scheme and the one that's used for this particular type of work is very very limited indeed, both in terms of the rates of pay you get but also the eligibility for clients coming in to try and access your services under legal aid. If you're earning a disposable income after tax and national insurance of more than £99 per week then you are not going to be able to qualify for this scheme at all. Or if you've got capital over £1,000, you are not going to qualify for the scheme at all. Now that takes a lot of people out of the scheme, even people in prison. Because you have to take into account also their partner's income and capital, even if they're in prison. So it's a very, very limited scheme in terms of eligibility, and also in terms of money available for the lawyers who do it. Consequently, there are fewer, fewer and fewer firms who do this work to any proper standard. The rate of pay that we get, the hourly rate is the same, it doesn't matter who does the work within the firm. So



a paralegal could do the work at that rate or a twenty-year qualified solicitor could do the work at that rate. So it may, that sort of lends itself to some firms, if they are going to do this, to using a lot of paralegal input. In our firm we use very experienced solicitors, consequently we have to limit what we do quite considerably. We probably get somewhere around ten enquiries a week from prisoners - we take on about one a fortnight. We keep the level of work manageable, and provide a proper service to our clients and put the time in, and of course leaving us some time for other work where we might actually get some proper funding for it. I think it's a huge problem, in terms of eligibility for those seeking advice and trying to find solicitors who are dedicated to doing this sort of work. The Criminal Appeal Lawyers Association is getting smaller and smaller every year. It is a small organisation and there's a reason for that.

Mark Newby

If I can echo what both my colleagues have said, but I mean just to give a really practical illustration of this, take for example, the fixed amount allowed by the Legal Aid Agency for a CCRC review of £466. That's effectively 10 hours work, but everything has to come off that. And the solicitors obviously run offices and all of those. And out of that ten hours, so for example, we might be asked to pay from the previous solicitor to obtain the case papers. Every letter, every communication has to come out of that the appellant will want a visit, the family will want to speak to us, they'll be telling us about fresh evidence, and they'll want us to investigate all of these different aspects. We're subject to a very rigorous process with the Legal Aid Agency for sufficient benefit, and we've got to be able to justify all of that work under public funding and then what's happened with legal aid practitioners over the last few years is we have been subject to aggressive auditing by the Legal Aid Agency where they've then come back trying to claw back money and a lot of practitioners were targeted. And a number of them gave up criminal appeal work as a result and that's the overall atmosphere under which we are asked to undertake CCRC reviews.

Steven Bird

I should say that that £466 limit, it's actually £500 minus 8.75%, I can never quite work out what the figure is, that can be extended by application to the Legal Aid Agency, and you can keep extending it, and you can instruct experts if you can find any that will do the work at the rates the Legal Aid



Agency will pay and you can get counsel involved as well on that scheme. But you're always looking over your shoulder making sure that everything you're doing is pushing the case forward that there is sufficient benefit in the case to justify the use of public funds. It's quite a tough regime to work under. And I'm having my audit next week so I'm looking forward to that.

Baroness Stern Can I just pursue one point you made, you now do one a fortnight?

Steven Bird No, we take on one new case a fortnight.

Baroness Stern And you used to take on?

Steven Bird I don't know how much we would have taken on a couple of years ago, more than that certainly, but I think the point is that we are taking on about 5% of the cases, so twenty in a fortnight, and taking on one. And that's trying to filter out cases where you think that there may be more of a point in it than some of the other cases - it's quite a difficult exercise because you can't really tell until you get into the case whether there is anything there or there isn't.

Mark Newby And I think one of the other problems is that under Legal Aid Agency rules is if that appellant has been to two previous providers, we can only take it on if there are exceptional circumstances. And what always greatly worries me is that appellants send us information, some appellants have actually sat down in a prison wing, and there is a crucial point which they've never even realised which could lead to the quashing of their conviction, and we are sifting out, just like the CCRC, cases where there are really good grounds of appeal but we can never get across the line because of the regime under which we've got to operate.

Baroness Stern So finally, if someone came from heaven and gave you as much money as you needed, how many of the twenty cases per fortnight, you take one at the moment, how many of them would you think it's a good use of time to take?

Steven Bird I think if you could afford the good quality solicitors to do the work, you'd take on as many as you could. You've still got to filter out those which wouldn't go very far, but at the moment we effectively try to do that pro bono. We're doing quite a bit of work before we say to someone 'no, we can't do this'. But if we sign them up on a legal aid form to give them that kind of advice, then they can't go anywhere else. So it's difficult,

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you've got to have some sort of sense as to whether the case will go anywhere but we'd certainly take on a lot more and I'd like to think we'd take on all of them if we could. At least to get to a point where we can you know spend five, six, seven hours looking at a case and saying 'actually, no, this really isn't going to go anywhere'.

But I should also perhaps say in terms of the budget, CCRC referrals plus out of time appeals to the Court of Appeal accounts for £2 million per year. That's it. That's the total cost for this work out of a criminal legal aid budget of £879 million. So it's not very much money.

Michelle Nelson

On the topic of the CCRC and investigation, and probably for you, Mr Foot, just looking at your background, what is your view about their carrying out empirical investigation? Is it your view that they are reluctant, that they don't do sufficient? And they've certainly vigorously defended themselves by saying that they could do their job from their desk.

Matt Foot

With Sam Hallam they did a very good job, Glen Mathieson did an excellent job. That wasn't my experience in Eddie Gilfoyle. I feel that there is a problem, I suspect, of, basically, not getting out of the office. If you're working on a big case you need to feel it, you need to meet people, the appellant, you need to meet witnesses that have been given to you. You perhaps need to go to the scene on a big case - I don't mean on every case. And I don't think that happens at all. I don't think anybody leaves the building ever, to be honest, hardly even, in Birmingham. And you don't feel a case, you can't resolve a case, just through reading things, just through paper. You have to understand people and evidence and how it fits together. And I think it's impossible to do by just reading paper, just reading documents.

In the beginning, I believe they did get out. And I know for a fact that they did, on the case of Eddie Gilfoyle, the work that the Case Review Manager did on the first referral was exceptional. It was very proactive, he was involved with the family and involved with the case. But that's not the case now.

Michelle Nelson

Did you want to add anything to that?

Mark Newby

The case of Victor Nealon is a pretty stark illustration of why I regularly criticise the commission for desktop reviews, and



Nealon is the perfect example. The recent history of the Nealon case was that Mr Nealon was convicted of attempted rape in 1996, strongly protested his innocence, said he wanted forensic tests done, nothing happened about that. But he went to trial and he was convicted, immediately applied to the CCRC for applications in 1999 and 2002. For the 2002 application, the Commission said "we don't undertake speculative testing" and declined him. And the Commission basically relied on what they were told by the police. And the police hadn't done the testing, and therefore there was an incentive not to do the tests. And so what then happened was obviously, he came forward in 2008/9. We did the testing and what was discovered on the intimate clothing of the victim was that it was someone else and not Victor Nealon, and his conviction was quashed as a result.

He served something like 11 years after his first application to the CCRC. The Chairman of the Commission apologised but I'm not sure how valuable that apology is for Victor Nealon. And the real truth of the matter is this: that if we had asked the Commission in 2008 to undertake those tests, they would have refused us, because they had already refused it previously so why would they do it? The only reason they investigated Victor Nealon's case was that they were confronted with forensic evidence that was served upon them and that raises another potential issue, which we may or may not come to today which is the issue of Nunn, and the fact that the defence are now not able to gain access to exhibits. So, I got away with that, because it was before Nunn and it was just after Sean Hodgson, and I persuaded the police to give me access to the exhibits. But I wouldn't be able to do that now, and so I'm in endangered territory in being able to obtain exhibits for any particular case.

Lord Garnier

Is that a matter of law or is that a matter of practice?

Mark Newby

It's a matter of the police's interpretation of what Nunn says and their reluctance to provide access to exhibits which might overturn a conviction. What Nunn does say is that whilst there is no duty post-conviction, the Supreme Court went to extreme lengths to persuade the police forces that they should still assist where it is appropriate to do so, but this has been completely misinterpreted, and it remains a considerable problem. But jumping back to the desktop review point,

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Nealon is the perfect illustration of how badly things can go wrong by not leaving the ivory tower and basically relying on what the police tell you.

Michelle Nelson And can I just ask in relation to that, you had funding, did you, legal aid funding to get -

Mark Newby We legal aid funded it, yes.

Steven Bird It is possible under legal aid funding to obtain DNA testing, that kind of thing, so we would tend to get the case to a point where we've done that kind of work before it goes to the Commission. We're never quite sure what the Commission does after that, how sort of active they are in investigating things, but you know if you've done a lot of the legwork yourself beforehand, then -

Michelle Nelson They're likely to come on board, do you think?

Mark Newby To be fair to the Commission, the third review, once they'd got that evidence was lengthy but very thorough, so no criticism can be made of what the Commission did during its the third review, but the years were lost by then to Mr Nealon.

Michelle Nelson Can I just ask on that, did you understand why they were not prepared to undertake the testing?

Mark Newby The Commission at some point had a policy that they effectively wouldn't undertake speculative testing. It subsequently changed that policy by some degree so it wasn't quite as stark as that, but certainly at that point, that was the case. But unfortunately, and again this is a concern, we asked the Commission what the full rigour of the records were going back to how the decisions had been made, and the records weren't available, and we were told that unfortunately their record keeping wasn't as good as it ought to have been then. Which is rather surprising, really, but that was where we were so we'll never get an ultimate answer as to precisely what went wrong there, but clearly there was opportunity for work to be taken, and the Chair accepted that.

Anne Owers Thank you. When you take a case to the CCRC, how much cooperation is there between yourselves and the CCRC once you've sent something there, do you work collaboratively on lines of enquiry, is there communication at the start? What actually happens in practice when one of your cases goes there?

Steven Bird It sort of depends on the case and how much you manage to

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do before you get it in to the Commission. They're very good at writing to you every couple of months to say there isn't anything to report, particularly, and one of the bugbears we have is the length of time it takes to get from a submission to a decision. And I think there was a time when this had improved but it seems to be slipping back again now, that's certainly the feeling, I don't know whether there are any statistics or they have any detail about that. But it is relatively easy to be in communication with the person who is the Case Review Manager on your case, you'll know who it is, and you have email, or telephone conversations. They do seem reluctant to speak to lawyers overly much - on one case I saw the judicial review of a refusal, and when we got permission, the CCRC decided not to challenge that but to re-review the case. And we had written into the consent form to say that they must meet us if there was any indication that they weren't going to refer that case back. That was about 15 months ago and we still haven't had any decision on whether that case has been referred back.

Anne Owers

And for others, do you get to know what they're doing, and why they're doing it?

Mark Newby

No, so there's cases like Nealon are an illustration, but I can talk perhaps talk about Susan May briefly as well. If you effectively hold the cards or the Commission needs you, they will start to engage with you. So with Nealon we had all the expert evidence so they had to start to engage and we were in regular communication. In Susan May, there were detailed forensic enquiries which needed our input and so we were able to get a meeting and be updated, but there comes a tipping point in the applications, in my experience, where they cut off. They would say that they have a duty to safeguard which direction they are effectively going in and therefore they are reticent to share information. What I say about that is really that they are too secretive and there is no reason that they can not provide much more fulsome updates and information without ultimately revealing their direction of travel. But my experience is that the Commission will simply not share information. There's a slight variance in that it depends on the quality of the Case Review Manager as well, sometimes there can be greater influence or better sharing from a Case Review Manager. I noticed, and I know you've heard evidence from Professor Hoyle and Dr Sato, and obviously they talk in their research on the different impact of



Case Review Managers and I certainly think that's correct - it does have a significant effect.

Michelle Nelson

Can I just ask something on the back of that? You spoke initially about the constant changes, the changes in personnel and the impact that had, is that your view, that the people vary so very greatly, the Case Review Managers, Commissioners, that it's such a mixed bag?

Mark Newby

Well certainly from my part, I can only judge the influence of Case Review Managers, the work of the Commissioner is generally shielded away from me, I'm dealing effectively with Case Review Managers but I'm aware of the policy and the other work that certain Commissioners do. But certainly for the Case Review Managers are variable, there are some like Glen Mathieson and others that have been very good, and others that have not been so good. And for me that just can't be right. There can't be such a wave of inconsistency between Case Review Managers and I don't think the Commission has ever effectively grappled with this and resolved it.

Michelle Nelson

And is that something you would all -

Matt Foot

I'd totally agree with what Mark's said. It's very uneven. This word independence is used sometimes as an excuse not to collaborate, and that's a real problem. You could have spent a long time thinking about certain issues on a case, as you usually have, and that is lost in the process if there is no collaboration. And I think it has got better now but it used to take ages to be allocated a Case Review Manager at all to the cases. And so you use a whole period of time. You've thought a lot about the case and you've put in careful representations which just sit there for about a year. but even when you get to that stage there's not a sense of bashing that around - 'what did you mean by this, what is this?' So points may be lost from witnesses, and that's just incredibly frustrating.

Erwin James

It seems to me that when you believe there is a merit in - a miscarriage of justice. It seems odd to me that there is no cooperation. They almost say, they put you to one side, the lawyers. It seems to me that the footwork you put in would assist them, the CCRC. It shouldn't be discarded, they should surely raise your input. Does that make sense?

Matt Foot

That's how it should work, but I don't believe it does.

Steven Bird

I think also once you consider the small percentage of

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applicants that are legally represented, and how their chances are furthered, I'm not quite sure of the figures but think it's slipped to around 10%, which is pretty small, and it comes back to the point probably that I was making about funding earlier on.

Michelle Nelson

But it also makes a difficulty, if they're not going to do the empirical investigations, if you're having people come unrepresented, somebody needs to be sitting down with them, talking to them, and going and following up, and if that's not happening in 90% of cases, then there's a difficulty.

Philip Joseph

I've got two questions, the first one you've covered to some extent - it's entitled the good and the bad, and if we take Victor Nealon as an example of the bad, and Sam Hallam as an example of the good. It's a question of what can be learnt when they go wrong but when also it goes right. So perhaps starting with the Victor Nealon case, I mean you've outlined it to some degree, but it's still not entirely clear why it took so long for them to finally get their act together - whether it was simply about their failure to deal with this idea of speculative investigations and so on. With that case, what took so long and how can you stop another Nealon happening at all?

Mark Newby

Well it takes so long because as far as the Commission is concerned, the process is at an end. Victor Nealon made his application in 2002, it was dead in the water, that was the end of it. The only way in which the Commission, that was ever going to come back onto the Commission's radar was if another application was made. Then at that point the Commission looks at it and realises something seriously has gone wrong and then undertakes this further investigation. So there are going to be other Victor Nealons. There are going to be other people who've applied to the Commission, then potentially something has gone wrong but if they don't get back before the Commission, then nothing will happen.

One of my criticisms of the Commission is, the Commission is very good at dragging academics in to do research, but what it never does is really review its own case stock, it never looks at what it's done, goes back to old cases and say should we relook at this, should we see if we can get something right here. It never does that at all, and if you look at the recent disclosure controversy in the Attorney General's review it's not the Commission that's now decided to go and look at its old cases, it's done that as the result of an ongoing review by



other agencies. So there's the Commission sat with this perfect stock of cases, it could be offering all sorts of useful input and assistance to the criminal justice system and its not doing that. And so that's why these appellants are sitting there with no hope of matters being re-looked at unless they can find a lawyer to send it back and so -

Philip Joseph

But apart from the apology they made, did they do any sort of review that case, or try and learn any lessons from it?

Mark Newby

Well I would hope they've tried to learn some lessons from it but of course I won't be privy to what they've done internally as a result of that.

Philip Joseph

But what lessons do you think they should learn?

Mark Newby

They obviously can't fix the problem that if they had the wrong policy, that that policy was wrong, but they should keep their policies carefully under scrutiny to make sure they are not making these wrong turns, because one wrong policy decision can affect a whole raft of applicants and so I hope they revisited that, and I hope they took the opportunity to think about if they had any other cases that might be of a similar territory. But again it's behind the veil, so we don't really know what the Commission has done as a result of that case.

Philip Joseph

And then again, in the case of things going well, so Sam Hallam, what again should the CCRC be taking from that case which was successful? What good practice, as it were, should they be getting from that?

Matt Foot

Well I think as I said, the Case Review Manager was thorough, did his job properly, he was excellent, but he's not there anymore. We need lots of people like him who are passionate about getting out of the office, and believe in the case. It's a culture, I'm not just having a go at individuals. The referral rate reflects a culture - last year we were told that 0.7% of cases being referred was a blip, this year it's 0.9%. I don't know if that's a definition of a blip but that is disgraceful. It is a shocking figure, that less than 1 in 100 cases are being referred. It is really shocking and I don't just say that to have a go - this is real people who are affected by that figure. What's the figure next year? We have no confidence that it's going up to 6% or whatever. And so within the CCRC there's a feeling that if you take on a case it is going to be knocked back. That's the culture.

Philip Joseph

Is it a cynicism and a defeatist attitude?

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Matt Foot

If I'm being fair to them there are probably a lot of cases which don't have points which can go, and they've been dealing with a lot of cases and cuts, but I just think there's been a culture which I think has come from the top, I'm afraid, where it doesn't matter. Currently, the current Chair has said it doesn't matter that it's less than 1% - it's not a sign of lack of success. I mean I just cannot begin to understand that kind of understanding, I find it shocking for people that I have to represent or may have to represent, that someone thinks it's okay that it's less than 1%.

Philip Joseph

My other question, you've mentioned the higher referral rates in Scotland for example about your view on the CCRC's real possibility test as opposed to a different test, and whether you feel that the current test is a bar to referrals, is having an impact?

Matt Foot

So there are two views: I think if they applied the test properly that should be referring lots of cases, but I am all for changing the test if it's going to help anything. So what was put before the [Westminster] Commission from the barristers before about the Scottish test, I'm all for that, if it's going to make it mean that more innocent people are going to get before the Court of Appeal then we need to change the test. Whatever it takes, there's no point in moaning about all this, we actually want to make it make a difference so if it means changing the test we need to change the test.

Mark Newby

Yes, I mean I've written about this quite a bit and there is quite a good example now because in the recent Attorney General's review on disclosure there has been a lot of debate on the Criminal Procedure and Investigations Act test, and if it's the correct test or whether it's about the implementation of the test which is the problem. And it is the same sort of argument with the Commission. But there are problems, and one of the unique areas where there are problems, where the rate of referral is even more difficult - if it's possible to be so - is in the area of sexual offences, and there are real problems with the way in which the test is applied and the perception of the test, and again a lot of the research has now touched upon that.

It is a difficult situation, because you can't just change the Commission's test because at the end of the day the



Commission's test could only be changed effectively if that's linked to what the Court's test is. And certainly when the Justice Committee looked at it some years ago, and I gave evidence to the Justice Committee, they were calling for the Law Commission to review the whole thing, and of course that just fell on deaf ears and it never happened. And I've wrestled with it, my initial view was that we should change the test, my subsequent view was, perhaps maybe I'm not right that we need to change the test, but we certainly need to change its implementation and we've got to get this right, and we're definitely not getting it right in terms of the review of sexual offences.

Lord Garnier

You could use the whole debate about whether we should change the test if you like as a cover, because if you are either incompetent or incapacitated you can't do the initial work either as a caseworker or the Commission as a whole, it doesn't really matter what the test is, because if you haven't got the groundwork, the foundations to build towards the test, it doesn't really matter what the test is. So there is an argument perhaps that we are leading up a blind alley talking about the test, it is the work that needs to be done by the Commission before you get a decision on referral, and it is the relationship between the Commission and the Court of Appeal, and where they are out of kilter.

Matt Foot

I agree, I think it's about approach as being more important than the test, but I'm all for changing the test if it's going to get it out of the way.

Anne Owers

And it can help it change the approach.

Matt Foot

Exactly.

Anne Owers

What about the other bit of it, which is the need for fresh evidence? That can be a real difficulty, can't it, where the argument is simply that the jury got it wrong? Do you believe we ought to go that far?

Matt Foot

My view on fresh evidence is that it's not of an absolute for taking a case to the Court of Appeal, but obviously, generally you need it. I think the approach of the CCRC to fresh evidence can be formalistic, and often you have bits of evidence that are sort of fresh alongside bits of evidence that have been with the Court before but are now reanalysed in light of that evidence.



So I'll give an example of an appeal I did, a case called David Sellu. He was lucky in one sense, that he'd never had an appeal so he didn't have to go via the CCRC. It was a complicated case to do with grossly negligent manslaughter, the evidence that we put forward to the Court of Appeal, on one view, was not completely fresh. In my view the CCRC never would have put that anywhere near the Court of Appeal, but putting the evidence together, there was something that had gone very badly wrong in that case, Leveson LJ found for a different reason outside of the grounds, that the conviction was unsafe. It's made a big difference on how we treat medical cases in this country. But I am absolutely convinced that the CCRC would have never referred that case so it was very very lucky to have won then, and that is why I think it is about approach and understanding the whole case rather than about being formalistic.

Mark Newby

I've certainly experienced cases in the Court of Appeal where if the Court's determined it wants to receive the evidence it will receive it, and do whatever has to do to get that evidence in and that doesn't fit the approach of the CCRC, which wants to very carefully and methodically analyse whether that fresh evidence will be accepted by the Court or not.

Lord Garnier

There comes a point when you have got a certain amount of experience in this field, and I don't mean to belittle the work you do - there's a smell test, and your experience tells you that there is something wrong here, are you saying that the CCRC is too mechanical and it doesn't have the olfactory ability to sniff out things which are going wrong?

Matt Foot

I think that's right, and again, I'm not having a go at individuals but I think there's a personnel problem. I wouldn't have known that 'smell test' ten years ago, it comes from experience and knowing the Court of Appeal as to how they would approach it, I just think there's a lack of understanding and it's a conservative approach to the smell test, when you put it in that way.

Steven Bird

You can't have a rate of turnover of staff as in the CCRC, it has a fairly quick turnover of staff and their Case Review Managers, they're never going to build up that kind of experience, they need to be there for some time and get that feeling of cases.

Michelle Nelson

Is there an argument for having somebody who is there and has this experience almost reviewing their decisions, so not

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even the Commissioners, but a solicitor, ex-solicitor, barrister, maybe High Court judge, whoever, who's got the feeling of this arena, who looks at the decisions?

Matt Foot

I think there needs to be more of a, some sort of mechanism where people have more of a feel for it, that this could work.

Steven Bird

And that's potentially the role of a Commissioner, I suppose, but you're thinking of something in between a Commissioner and a Case Review Manager.

Erwin James

Erwin James, editor-in-chief of Inside Time, also a Guardian columnist since 1998. I spent a lot of time in prison - I know the smell test, when people say they're innocent it's very difficult. The only person who knows who is innocent are the people involved or not involved. And when you're in prison for a long time with people like the Birmingham Six people, and Steven Dowling who wrongly served 27 years, Robert Brown, 25 years, we all knew he was innocent - fellow prisoners. Slight tangent, but bear with me.

I deserved to be there, but when you're with people who say that, John Roberts he served 15 years, 15 years later he said my mum won't let me go, and then fifteen years on, there's him on the Independent newspaper in the appeal court with his mum Rose. She fought like hell to get him out, with people like you, by the way, to get him out, thank god for that. So my second tangent is, I want to pay tribute to Matt's father, Paul Foot who fought tirelessly for people who they thought were in prison unjustly. Particularly the Bridgewater Four, I was in prison with those guys, I saw the deterioration of Michael Hickey and Vincent Hickey. Because before the CCRC, it was journalists who got in there and worked with you guys, and now, I'm not sure who they hold - and also the people who I was in prison with, they'd never see you in this context and it is such a privilege to see people like yourselves fight for these people, not because you like them, not because they're your friends but because you believe in justice and you believe injustice can be addressed.

So my question, I do apologise, in your experience, how willing is the CCRC to refer cases in which the defendant has received poor legal representation, because that is a massive issue? Because people like myself, you know, I never had the money to get a real court case, i just had to take what was coming, you're lucky if you get people like you who believe in



you, if you don't... The CCRC, how do they feel about 'I've had poor legal representation, how does the CCRC see that?'

Steven Bird

It's probably one of the main things that we get from anyone who is writing to us to ask for their case to be taken on, saying 'I was let down by my legal team'. It's really difficult. I mentioned earlier on my firm does a lot of work with victims of human trafficking who should never have been prosecuted in the first place. They had been let down by their lawyers, by the prosecution lawyers, by the police, by judges as well, they should not be there, yet we still try to go around the houses and not always be overtly critical of previous lawyers, because it doesn't tend to help. If you don't have to do it, you don't do it. We would do that in cases direct to the Court of Appeal or to the CCRC. I think it's a rare case that the CCRC will refer on that basis.

Matt Foot

To be fair to the CCRC on that point, as Steve said, it is one of the hardest grounds to take to the Court of Appeal in terms of them listening to that. But it is part of the miscarriages of justice. I mean for Eddie Gilfoyle, his solicitor ended up on the same wing as him in prison a few years later, a sole practitioner fraudster basically, that's the sort of level of things. But even a terrible fact like that is not a ground.

Erwin James

Most lawyers want to do a good job, they don't go in wanting to do a bad job. But not everyone who is representing people is the most efficient.

Mark Newby

Well I think that just as a brief example, there is a case called *F* going back a few years, probably around 2010 and that was a case where the defendant had a genital deformity and the argument was that the complainant would have clearly been able to describe that genital deformity if it actually happened. And the Commission issued a provisional statement not to refer. The barrister who represented the defendant at the original trial wouldn't cooperate with the Commission. The commission came up with some artificial explanation, some analysis as to why it would have been appropriate not to ask the question, and obviously we made strong representations against it, and the Commission, to be fair, in the end accepted their representations and changed its mind and that barrister would not have asked those questions. And the Commission got there in the end in that case, but it shows the overall picture, which is that there is a reluctance to advance the



argument, because there is a worry that that is a ground which the Court is generally quite hostile to.

Lord Garnier

We're going to wind up in a minute, I want to ask you finally, we've tiptoed around the relationship between the CCRC and Court of Appeal (Criminal Division). Do you have any evidence-based observations about the way those bits of the criminal justice system interact? Is it a relationship of equals, is it a very hierarchical relationship, is the CCRC reluctant to 'take on' the Court of Appeal in a fight, or am I misrepresenting?

Matt Foot

I think they're reluctant to take them on in a fight, I think they need to just keep referring cases even if they are going to get knocked back, if they believe them rather than being over-worried about it being refused. They should not count out the Court of Appeal based on its actions if they believe in the case they should refer it. Of course if it meets the test, but they shouldn't be judging it just on - the predictive test is a problem because they have to apply it, it's not just arbitrarily just referring cases, but I think if they've got decent grounds they need to put them before the court of appeal and keep sending them back. Cooper and McMahon it took five times before the conviction was quashed, nobody said on the fifth time, they didn't say, when the CCRC started out 'we're not doing it because we're going to lose', they referred it because they believed there was something badly wrong. And that's my point about re-referrals, because we're in this period now where cases are not being re-referred, that are akin to the Birmingham Six and the Guildford Four and we are in a worse position.

Michelle Nelson

But it's not just that they get rejected by the Court, they often get criticised, and that seems to be, historically -

Matt Foot

I think they need to take that on their shoulders, it doesn't happen very often. The Court has said those things, I think the last Lord Chief Justice said they need to refer and not be frightened of us, so they're going to have to take those cases on and take some criticism every now and then.

Steven Bird

If your success rate on referrals is 70%, then perhaps you could be referring more cases.

