

Westminster Commission on Miscarriages of Justice

Second evidence session (part 2)

The Criminal Bar

Lord Garnier QC Thank you very much for coming.

We have 6 of us. My name is Edward Garnier; Baroness Stern; Michelle Nelson QC; Dr Philip Joseph; Erwin James; Anne Owers.

As you know we are inquiring into the work of the CCRC. We intend to absorb the evidence we see from evidence from people such as yourselves and then produce a report, probably in the new year.

We have from Mr Blaxland, sorry, from Mr Birnbaum, a statement which was very helpful. Perhaps before we ask you question, if you want to make a preliminary statement, or preliminary observations to make, otherwise we will move straight on.

Henry Blaxland QC I'd like to make one point to start with. There has, over the years been some controversy about whether or not the CCRC has become an obstacle to the investigations of miscarriage of justice.

Bob Woffinden, the late Bob Woffinden, who, you'll know, devoted his journalistic life to investigating miscarriages, certainly felt that it had become an obstacle. And there are people involved in the Innocence Projects who feel the same.

My view, for what it's worth, and I have come here in my personal capacity, while also representing an association called the Criminal Appeal Lawyers Association, is that the CCRC was a very important development. It was a great achievement when it was set up. It was undoubtedly an improvement on the previous system of Home Secretaries' references. And I think it's important to make that fundamental point because there are a myriad of criticisms which one can make about the way the CCRC works and the relationship between the CCRC and the Court of Appeal and so on and so forth.

But what worries me is that it wouldn't take much, in the days of austerity, for somebody to decide that the system is working so badly that the plug needs to be pulled. And the most important message I'd like to get across is that that that is entirely the wrong approach.

I don't know whether that is on your agenda at all but I'm aware that there are people who, I think, misguidedly, think that there is a systemic problem. And there are particular problems to be addressed, but I don't think it's a systemic problem.

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**Michael
Birnbaum QC**

Personally, I would agree with that, except that I think there is a systemic problem and that is the predictive test, which I don't think makes sense, and I think it's become an obstacle. I think that the CCRC is now a good deal less effective than it was a number of years ago. And what I think we need to try and do as a profession and perhaps you could do as a committee is to give it some guidance, as to how it can get back on track on avoid the annihilation that Henry rightly fears.

Lord Garnier QC

So just drawing from the points you've both made, I don't know whether you were able to hear the final part of the evidence from the ...

**Henry Blaxland
QC**

I'm sorry, I couldn't really -

Lord Garnier QC

Essentially what they were saying is that it's quite clear that the numbers, there is a distinction between the 'performance of of the Scottish Commission and the Birmingham Commission' but he advises not to misinterpret those figures in a way that would be damaging, if you like to, the reputation or the performance, or to misunderstand the performance of the English, Welsh and Northern Irish Commission.

But drawing from what you have both just said, obviously, Mr Birnbaum you would like the terms of reference or statutory test for our Commission to be altered - would you alter it to mirror the Scottish, or would you produce a different form of words?

**Michael
Birnbaum QC**

I haven't actually studied that. But it just seems to me that there needs to be something along the lines whereby the CCRC could act more independently of the Court of Appeal's view and could take its own view as to whether it thought the conviction was unsafe and could refer, on that basis. I just think at the moment it gets very cowed by criticism of the court, from the Court of Appeal, and very afraid of criticism.

Lord Garnier QC

Do you think they would be less cowed if they had a different sort of leadership? This is not a personal remark against the former or current leadership, but if for example they had a High Court judge, or a senior Crown Court judge, as the head of it, do you think that would give a different tenor to their applications and their references?

**Michael
Birnbaum QC**

Yes. I think that having a very senior judge as Chair would give the Commission more weight with the Court of Appeal. But I was broadly, but I would say that the Chair should be someone with lifelong experience of the criminal justice system rather than someone who appears to be chosen because they might be thought to be good at running things.

I think you need, as I say in my note, a real commitment to try to discover miscarriages of justice and putting them right. But the judge

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suggestion is an interesting one.

Henry Blaxland QC

So I think I think there's a very good case for substituting the predictive test with the Scottish miscarriages of justice test.

But there is an inescapable logic about the predictive test because if the Court of Appeal is ultimately going to be *the* body which has to determine whether or not the conviction is safe, then one can understand the logic of that.

Originally, of course at the top, the representations were made to the Royal Commission back in 1995 that the CCRC should itself, should be a completely independent body, which *itself* had the power to overturn convictions. There was quite strong feeling about that. But that was rejected. That's why we got what we were.

But I don't think that the nature of the test, I think that would be cosmetic actually. I think what it is really to do is the relationship between the Court of Appeal and the commission. That has been quite poisonous in the last five years or so.

I'm going to refrain from saying why it was quite poisonous, but actually that's already changed a bit. And I'll give you an example of what I mean – I've done, this year, I've done two CCRC reference cases - conviction appeals – both of which were unsuccessful, for understandable reasons, one in front of the President and one in front of Hallett LJ. But at the end of both judgments, the court was at pains to point out that the references were quite properly made. And they commended the Commission. Now that change of atmosphere is important.

There was another problem, which was that there was, as you probably know, a series of cases involving immigration and asylum issues, in which the CCRC referred cases on the Exceptional Circumstances basis, in other words, without there being an initial appeal. The Court of Appeal effectively indicated that they weren't happy with that. The result of that, of course, is very unsatisfactory, is that you require people – unrepresented people – to appeal. Their appeal is not well formulated, very often rejected, then goes to the CCRC. So that itself created a problem.

Sorry, I'm waffling on, but actually it was a... the relationship between the court and the commission is extremely important – it takes two to tango.

Lord Garnier QC

Just before I introduce, just before I invite Ms Brimelow to introduce herself to us, could I just follow up on what you're saying?

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What I'm interested in is your view on whether, because of what you've said or despite what you said, whether you find that the Birmingham Commission is an effective operator of the statutory test and therefore an instrument of justice in dealing with miscarriages of justice?

Do other, fundamental things need to be done or is it tweaking?

Henry Blaxland QC

Well there are fundamental things that must be done, but the predictive test is only part of it.

It's, for example, the CCRC is in the experience of a number of people I speak to, not my personal experience, because I tend to just represent people when they get to court, is that it's too deskbound. There isn't enough investigation. They don't, they don't very often, it's very unusual to go and see the applicants.

And it is, really, quite important to go to see the people who are complaining. I know that it's a strain on resources as such, but it's very easy to get into an embattled frame of mind, and very easy to become very cynical when you're essentially working within a pure office environment, and you're not out there. I've long thought that there should be, that the Commission should use not just the police to investigate cases, but they should use experienced defence solicitors to help with the investigation of cases.

Again, I'm going to give you one more example. Sorry, I'm here and I've got the opportunity to get these things off my chest.

Lord Garnier QC

Yes, give us your example, and then I'm going to introduce -

Henry Blaxland QC

One example of how it can go wrong. The Rettendon Range Rover murders, which was an appeal many years ago - *Whomes and Steele*, which is quite a well known case.

It was referred to the Court after a reference, after an investigation - a section 19 investigation. My instructing solicitor uncovered some absolutely basic information with some relatively elementary enquiries, which simply had not been pursued by the police force who had been commissioned to investigate it.

Now what that tells me, is that the mindset - although it was referred, the case was referred - the mindset of those who referred it was *far* too conservative. It needed to be a much more dynamic investigation. So getting experienced defence solicitors involved, not just as Commissioners, because there are some - Celia Hughes and Sharon Persaud - but using them as investigators in addition to police officers is something which might be considered.

Lord Garnier QC

Ms Brimelow, thank you very much for coming, and very good of you

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travel in this heat from court to come and help us.

Kirsty Brimelow QC Thank you so much for the invitation.

Lord Garnier QC Not at all. We've just been asking a few questions and hearing a little evidence from your colleagues, and we'll pick it up as we go along, so I don't think you, you won't be lost. Before I call Michelle Nelson to ask, I was wondering, did you -

Baroness Stern This question has been answered.

Lord Garnier QC Right, I'll cross you off. Michelle Nelson.

Michelle Nelson QC I just wanted to pick up a point you made about use of lawyers, or defence solicitors, as you said. And what you're saying, Michael, in the note you provided, seems to suggest that your relationship as a lawyer, has not been entirely successful.

Michael Birnbaum QC I feel it's almost adversarial at times. I think that quite often – I come from a rather different point of view from Henry. Henry is the person people go to, when there's been a referral. I mean, he's got a marvellous experience of the Court of Appeal.

But my experience of the Commission, and I've done a number of cases over the years and we have the same jaundiced view, is that they seem to take fairly early on a decision that they're not going to refer this case, and then they give you a PSOR [Provisional Statement of Reasons] and you say, 'I'm sorry, a lot of this is rubbish. You haven't understood our points. Meet us - let's have a discussion. Maybe we'll abandon some of our points. Maybe you'll accept some of those that you feel at the moment are no good, and they won't do it. And their excuse is – it's funny that Henry says they should go and meet applicants – because their excuse is, 'The limited time we have to go and visit people and see people, we should go and see the applicants who are unrepresented.' And it's a difficult balance, but where you've actually got someone who's been around a few years and done lots of appeals and says 'Look, actually, you've got this wrong. Let's at least talk on the phone or have a video conference'. They won't do it.

They used to, and it was much better. And also, because if your case is going to go down the tubes, if you know, that actually it's a goner and they're not going to refer it. Then you can gently withdraw from the case. You can tell your client 'I'm sorry, but it's not a runner', and you can cease to do a lot of work, that is generally unpaid and that you could devote to other things.

So if they could just be encouraged to see people, talk to people a bit

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more, as in lawyers.

And also the other thing I just mention is this, is that most of us who do CCRC case are very selective. We don't do everything that is thrown our way – some of them we say “I'm sorry, this won't go, this won't fly”. So we start from the base that we take the cases that we think are worthwhile. And they might take the view that decision of someone like Glyn, or me, or Henry, to refer, to ask them to look at the case is worth something.

Then, I just want to say a thing about unrepresented applicants. This is a very, very big problem and I don't know what the solution is, because there's just a very small proportion of those cases, that are probably worthwhile, where the people are unrepresented.

Most of them are going to be complete failures. But how you get to the cases that are serious and worthwhile where there has been a genuine miscarriage. and where the person hasn't got representation, I don't have a solution to that, and that is a worry. I can go on about ‘they should talk to me, they should talk to Henry, they should talk to Glyn’, but there may be cases where they need to talk to the applicants and identifying those is a real problem.

Michelle Nelson QC They've certainly identified as an issue. They say that in recent years, the people coming to them who are now not legally represented has risen significantly, it's something like 10%, now, of applicants are coming to them with the benefit of legal representation. And they say that's created a number of problems, not just in dealing -

Michael Birnbaum QC Sorry, 10% are?

Michelle Nelson QC Are legally represented. So, they are now dealing with a lot of people who are not legally represented, and they say that identifying the issues or where potentially they should go and do their research has become much harder.

So it's interesting to hear that you're saying you haven't got a good relationship with them at times. But they are now saying that they are in trouble because they are struggling with unrepresented applicants.

Henry Blaxland QC Yes, that's because of the funding cuts as I'm sure other people have told you.

Lord Garnier QC Ms Brimelow, is there anything you'd like to add to what the others have said.

Kirsty Brimelow QC Yes, thank you very much.

My experience with CCRC has been similar and different, I think, from

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what I've gathered through the evidence that has just been given.

I actually, with the case of *Wang Yam*, which is one of the, I think then, there was a statistic of only 4% of referrals to the Court of Appeal. That was, so I was one of that 4% that was actually referred from the CCRC to the Court of Appeal. And I worked on that case, made the initial application, then went through every step with the CCRC. And I had an individual who was an investigator. And I had regular conversations with the individual at the CCRC. Somebody called Phil Pledger. He's now retired, but his background was police investigation and he -

I can still recall as well, I think one point on functioning is I still recall, when he first contacted me and I replied, his response was "you're the only lawyer who has responded to me", and he contacted various people in the CPS, various counsel who prosecuted. But because of the age of the case, people move on, and there's not that same corporate memory that one person actually still had a grip of what was going on with it. And I found exactly the same thing with the case when I was then picking up through the civil proceedings that the lawyer, at the CPS, for example, no longer was there, there had been no handover, it was a complicated case, and so nobody got a grip of it. And so what was happening with him at the CCRC is that nobody was getting back to him. The case is finished, as far as just about everybody was concerned on the prosecution side. Obviously, on the defence side, it was my application. So I got back to him. And he had the same issues with any trying get papers from court, everything else.

So that was, I think, one fundamental flaw, in that there didn't seem to be any procedure to assist the CCRC to any kind of, the way we have procedural rules, that if there's a request, then there has to be a rule that somebody has to get back to them with a reply within a certain period of time. That was my experience there.

My second experience there, again, I think, was exceptional. But it's why I agree with what's being said, in that because we communicated, I was able to put my points across to him very clearly, and it made it much easier for him to see where the issue was, so I was able to assist without influencing. He kept his independence, and he did go and see the applicant in prison, and carry out an interview with the applicant in prison.

The other person on the case, as well, was a very active former prosecutor, senior lawyer at the CPS, who had been in the investigative side, particularly in the fraud side. So those two people made a big difference to that case, which is why I agree the points – you need someone who is proactive.

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Issue for me personally, as a lawyer, I got paid zilch. So I kept on, this is over three years of work back and forth, hundreds of hours. The reason was, because once it got referred to the Court of Appeal, the expectation is when you get leave at that point, legal aid will be triggered.

Unfortunately for me, by that stage, even though I was successful, my client was slightly impressed by another firm who said, "Oh, we'll also put these other issues", all of which were going to go nowhere and hadn't been referred. So he went, he moved away from myself, and my solicitor. So we got nothing in terms of all the work we'd done.

That, that is, it's an occupational hazard for barristers. It should not be an occupational hazard for barristers or solicitors, because these cases are very serious, and the CCRC is obviously dealing with people who are literally their entire lives are... often, it is about their entire lives that are being spent in prison. So funding is a big issue for lawyers as well.

It doesn't have to be a huge amount, but even some funding, and you might then find, that the blocks in the system of responding where it happens on defence side, when you have former lawyers on the case, you might also find some of those blocks in the system start to open up. At the moment it works on goodwill.

The other side, I would say with my current experience with a case, which has been ongoing, which is much more probably like the evidence that you've been hearing, is, I get every three weeks a letter saying "We're terribly sorry. We need another X number of weeks to carry on". And actually, in fact, the correspondence they are usually asking for a further 12 weeks at a time at the moment, with nothing really specific as to what the issue is.

So the current case I have pending before the CCRC, a very serious case, is one which is bogged with undue delay and I don't know why, but what I do know is I get letters, I don't have communication. I could easily have a meeting if there was a process for that. And if the person who has the case obviously knew that that was something that they could do.

Lord Garnier QC You're talking about 10% of the cases where people are represented but there will be 90% of the cases where people are not represented, and don't even have the advantage of being... of having you to assist.

Kirsty Brimelow QC Absolutely. The other aspect with representation and non-representation, is some of the non-representation cases, what happens is that they'll go on for years. And then they'll get a reply from the CCRC, "You need to get a lawyer". And that's after X number of years



of being in the system.

And so that also is an issue that's happening to unrepresented defendants.

Lord Garnier QC Could I just pause you there. I'm not sure whether Mr Michael Birnbaum is able to stay or whether you have a -

Michael Birnbaum QC No, it's fine, I can stay, yes.

Lord Garnier QC Could I ask Anne Owers to just come in?

Dame Anne Owers Yes, I mean, I, obviously as you know, I had something to do with looking at miscarriages of justice when I was with JUSTICE, the organisation. And I think a lot of what you're saying strikes home because, I think, when we had successful cases, they were successful not on points that the applicants made to us. They were investigated by a television programme or with the help of Michael, or barristers like that, because people don't necessarily...

Michael Birnbaum QC I'm afraid most applicants – it's not their fault – most applicants' points are rubbish.

Dame Anne Owers Yes, absolutely, but that doesn't mean their cases are rubbish.

Michael Birnbaum QC But after three weeks, you think, my God, there's something there. Then you ring up defence counsel, who says, 'actually, I'm glad you rang - I was very worried about that.'

Dame Anne Owers Exactly, so I do think it goes to your point that you need to do more than just look at the thing on paper. But one of the things you said in your evidence to us, is that PSORs are getting worse than they were. Is that what you feel, and if so why?

Michael Birnbaum QC Yes, I think so. I mean, I think it might be that...

The work is extremely taxing and demanding. It really is, and it's amazing how well they've done in many PSORs. It's extremely difficult. And some people are better than others, Some CRMs are better. Some Commissioners are very good, some not so, but even allowing for all of that, I think the overall quality is getting worse, and I think they're cutting corners.

I think they are trying not to answer the points that you make because it's simply too difficult and onerous and time consuming. I think they're overwhelmed, at the moment. The 90% statistic, which I wasn't aware of, tells us a lot.

Might there be, I'll just throw this out personally. I mean, I suppose there might be some kind of gateway? If you're unrepresented, in an ideal

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world, you would be offered a solicitor or a barrister, who would look at your case and if he said that he thought it might have some merit, then you would have the opportunity of going to the CCRC. If not, then you wouldn't.

It's a rather crude mechanism, but it is a possible way and it would enable someone to identify the points that might fly.

Lord Garnier QC You'd have a double test? You'd have a double hurdle. First, to get to the CCRC, and then to get from the CCRC to the Court of Appeal.

Michael Birnbaum QC No, there would be a filter to get to the CCRC, if you were not represented, you would be offered a lawyer to advise you. And if he or she said that there was a potential case, then your application would go forward. If it didn't, then it wouldn't. Now where you get the funding from, I don't know,

Henry Blaxland QC Yes, can I just make two very quick points in relation to this.

The first, as you'll be aware that in 2008, there was research carried out about the effectiveness of, the importance, of legal representation.

But secondly, you may want to see some work that the Chair of the Criminal Appeal Lawyers Association (CALA), Steve Bird, who's a solicitor, has done, on the question of the rates of pay.

There is funding available for advice, post-conviction, for those people who are not their original lawyers. But the rates of pay for that were being reduced in real terms by 56% since 1986. It's not economic anymore, for solicitors to carry out this work.

Those people who do it, do it, really, as an adjunct to their other practices. And it's just not financially sustainable. I'm sure you know all this already.

Lord Garnier QC We may as individuals, but we don't as a collective party, and we need to hear it from you.

Henry Blaxland QC The figures are really quite stark. You may be helped. We had a – CALA had a seminar about six weeks ago, which a number of lawyers of the Court of Appeal attended, and Mr Bird attended and did a presentation on the funding for appellate work, just to help people to understand how it worked, and I was sitting there thinking 'Why are you doing this? Why do you continue to do this work at all?'. Given that there's just no financial reward at all. The total cost you would get, if your firm worked for 1400 hours, which is the maximum a firm is deemed to be able to work, that you earn, I think, something like £67,000 on the rates of pay which are available for advice and assistance post-conviction.

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Erwin James

You've answered all of my questions – to what extent do you believe the CCRC role is effected by the failings of the criminal justice system. You've said a lot about that. What do you consider such failures to be? You've said loads.

Recommendations? You've sort of hinted at certain things – is there anything you'd recommend recommend that would make that relationship better? In terms of how the CCRC operates between you guys and themselves. I like the idea, that Michael said, of the filtering system. That could help, but I also see that -

**Michael
Birnbaum QC
Erwin James**

I don't think, I don't think you would get funding for that.

Well, isn't that the issue? It seems to me that it's the funding.

It almost, I've had dealings with the CCRC myself. As a prisoner, I've helped other prisoners, I've actually been in prison with people you've represented, by the way, and it's difficult to be, when you see them actually exonerated, it's quite painful to see that they were telling the truth. It's a nightmare, sometimes, prison landing. Somebody like Robert Brown, the Guildford Four, the Birmingham Six. I was with those guys.

But what, do you have a specific recommendation, perhaps, you could give us that we could pin down and say, look, this needs to happen? We know they need more funding.

**Henry Blaxland
QC**

I'm sorry to say, it does come down to funding. I'm afraid that's absolutely critical. We're living in a time of austerity justice. And we all know, the criminal justice system -

Erwin James

But that's not justice – austerity justice is not justice.

**Henry Blaxland
QC**

No, absolutely. But that is the stark reality. And that's a very simple thing to say, but I'm afraid a lot of it does really come down to that.

And it's a sort of vicious circle, really, because the Court of Appeal, you get the impression, sometimes, that the Court of Appeal's main preoccupation is keeping down the work that they have to deal with. And of course, a very easy way of doing that is to discourage the CCRC from referring cases.

I have to say I rather hope that under the current regime, there has been something of a sea change, and a realisation that it got rather bad in the last five years or so.

**Kirsty Brimelow
QC**

I would probably add to that on funding. Yes, I completely agree, but also with the CCRC, my experience, and certainly the experience within my chambers at Doughty Street, really is that it's not particularly seen as a functioning body, and it's not seen as accessible. And that's even

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with lawyers.

And so, when they are, if it's a case which is being referred across, people are considering immediately, is there anything else here to take it back to the Court of Appeal?

And people don't consider the CCRC in the same way. And part of that as well, is because the process is very obscure. It takes such a long time. So you know that, the years will roll by and the investigation, or the grasp of the case itself, and the point, this is with lawyers, that is actually going to be directed at your particular case, is entirely dependent on the quality of the person who happens to have it on their desk. And that is a real variable, and I can't get to the bottom of the level, now, of the quality of people in there.

So I say, the really good people that I've worked with have gone. That's not to say that it's not still stocked full of good people. I just don't know, and I think that accessibility -

Erwin James

But what would you recommend, Kirsty? What would you recommend?

**Kirsty Brimelow
QC**

So, recommendations, is having more accessibility, which means, as a starting point, redoing their website.

Have a process. Have a procedure, have time lines which they have to stick to. Or you can have a complaint process, which is also very easily accessible to the prisoner, and so that whether somebody is or isn't represented, they can complain. It's now been six months. I haven't heard anything, and then you then have somebody taking on the case.

I'm afraid, I think the filter, I'm slightly attracted to an idea of having another filter. We have another filter within my chambers, for example, with joint enterprise cases on, we set a flat fee, we take all of those cases and we go through them and it's yes or no on whether they could be referred back to the Court of Appeal. So it's a similar kind of thing. When the *Jogee* case came in, that actually worked quite well with a mass of cases, many of which didn't fit.

I don't, I think again you're going to then hit the quality. Who is the lawyer who's acting as the filter? And then, can that lawyer then entirely block somebody's access to the CCRC, because that lawyer is saying no? I'd be very uncomfortable with that.

So I think you have to either have another tier in the CCRC, a bit like the single judge tier, but one which is effective. Or you have – because at the moment you have the initial work, and then it's referred to the panel of Commissioners. That's clearly not working, because that first layer of getting it to the panel of Commissioners could take years. So

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the structure needs to be looked at.

You've really got two structures – you can have, as European and international law work, you always have a commission. And then if you get through the commission, it's referred onto the court. We used to have that with the European court, but then that changed. Or you have within domestic law systems, a single judge type of set-up, some sort of 'leave' kind of set-up. Again with time limits and so on, procedure around it, and then it's referred up to the board of Commissioners. At the moment, it's an unregulated mess.

Lord Garnier QC I appreciate that it's 7 o'clock.

I would like Dr Joseph to come in now. If you need to go, just say.

Dr Philip Joseph We were introduced before you came in – I'm Philip Joseph, a consultant forensic psychiatrist, I've done a lot of cases with the Court of Appeal and the CCRC. I was going to ask you about the real possibility test, but I think you've covered that, and said it's a factor, but maybe not a major factor. And I think you've gone over some of the reasons why you see the CCRC as potentially an obstacle rather than a facilitator.

In terms of the Court of Appeal itself, that may also be seen as an obstacle. And I was going to ask you about the perhaps, overly restrictive approach to the admission of fresh evidence and particularly expert evidence. Is that something have you had experience of yourselves? Do you think that's changing at all? Do you think there is a problem with that expert evidence, perhaps not being the right quality to perhaps impress the Court of Appeal? And is that something you feel could be looked at, and what's your comment about it?

Michael Birnbaum QC The problem is this. However you look at the rules, the Court of Appeal is saying we must be very sensitive to the developments in forensic evidence and we will be particularly keen, we will be very sensitive that, particularly, for example, in baby-battering cases, where it's so difficult to work out what actually happened.

But then you get a case, as I had a case, where they thought that the man must have done it and they had very good reason for thinking that he must have done it because he was literally holding the baby at the time when it manifested the symptoms of having been badly battered.

And I had four forensic reports from different disciplines, and all of them were potentially relevant, and all of them, I thought, might have made a difference. None of them were considered.

And not even interested in understanding the argument that was being

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put forward so that the presiding judge doesn't misrepresent the arguments and made a poor judgment.

That is an extreme case.

But the problem with the court is, how you going to change this mindset? People who, as barristers, who are very keen, very keen defence-minded barristers. They get it to the Court of Appeal, and you can see that you're going down because although you've got forensically a good point, it's the wrong case in which to make. It is the case in which they think the chap must have done it.

And I don't know how you reform that, because the rules seem to me when you read them, and you read the rules about the Court of Appeal's approach to fresh evidence, they seem very balanced, and very sensible, and even rather generous. But maybe Henry's had more fortunate circumstances.

Henry Blaxland
QC

The problem is, it's a different one. The problem is the test which the Court of Appeal applies to fresh evidence cases. There's been a long history of this.

Originally, there was a case called *Stafford and Luvaglio*, which was a notorious case, which was always referred to, or was referred to, as reliable [inaudible]. In the case of *Pendleton*, which was after the 1995 [Criminal Appeal] Act, the House of Lords effectively reinstated the jury impact test, which meant that the Court of Appeal is not a fact finding body, it's a court of review and therefore, the way to approach conviction appeals is to determine whether or not a jury might have acquitted, had they had the new evidence. But there's been a whole series – that's still the leading case. But there's been a series of cases since which have undermined it, so we're back to *Stafford and Luvaglio*.

And the problem is, it's the problem, I'm afraid, which is deeply embedded in the legal system, is that when you've working in this job for too long, you just become cynical. And that cynicism infects the way that the court operates.

If you apply the jury impact test properly, and say look, a jury acting reasonably *might* have come to a different conclusion. Refer the case back to the jury and a new jury can the decide. But I think the watering down of that test, and the undermining of *Pendleton*, I was Mike Mansfield's junior in *Pendleton*, so it's an issue which is very dear to my heart, but the undermining of *Pendleton* is very [inaudible].

And it's slightly off point, but I know that one of the topics which which was on your list was the whole question of the impact of *Jogee*, but it's

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a related point, actually, which is this.

You can't blame the CCRC for not referring more cases on the basis, on the back of *Jogee*, because, both the Supreme Court and Court of Appeal have made quite clear that as a matter of policy, they haven't quite said that, but the effect is now of the policy, that they're not going to open old convictions.

And Lord Hughes came and gave a very interesting talk at a CALA conference a couple of years ago. And he warned and said that. And so that's the message that went out, and then in the case of *Johnson*, the Lord Chief Justice [inaudible]. It does mean I'm afraid this is one of the greatest sources of injustice, which is still festering within the system. There are a significant body of, mainly young people, who have been wrongly convicted of murder because they've been convicted under the old system.

And, nowadays of course, but the major development, following on from *Jogee* is there are many more convictions for manslaughter, which of course, makes a very significant difference, and the complaints are perhaps that's how *Jogee* has had a detrimental effect. It does make a major difference. But there's nothing, nothing the CCRC can do about that. I mean in fact the CCRC, I think, have done their best to try to find a way through the conundrum of *Jogee*, and they've just come up against a brick wall.

**Michael
Birnbaum QC**

I would agree with that, but I'd just add two things.

One is, bearing in mind that this was a terrible muck-up by the judiciary – terrible, awful – and to some extent by people like us who didn't realise that they've done it, you might have expected the Court of Appeal to have the humility to say "Well, actually it is our duty to try to seek out the cases in which there's been injustice."

No, what they want to do is to put up a wall with this. The other thing Henry's point about *Stafford and Luvaglio* was well made. But what I find interesting about the jury impact test, is that quite often, it seems to me, where they do allow appeals on expert evidence, and they do, they will often say, "we're not sure – we think the jury might have acquitted if they heard the evidence". When they're against you, they never mention the jury impact test, they say 'this conviction is not unsafe'.

**Kirsty
Brimelow
QC**

If I could just pick up, pick up just briefly that because with the jury impact, in fact, I have been arguing exactly this and there's a new Court of Appeal judgment out today, handed down. It's also it's a case called *L*.

It's a child case, which also was on your list and that was an application

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to adduce fresh evidence, including expert evidence, including psychiatric, and evidence of psychologists, as to the functioning of a child's brain, and this was where a child, it was a murder where a child had killed a child. And the child didn't give the account, which would have given a very good defence on manslaughter until after he'd been convicted of murder, where he denied his presence, that it was him at all.

And so it was looking at, I think the other big issue is the number of children. We lock up more children still than anywhere else in Europe, and they should be – one thing, I was asked, I was in front of, Davis LJ was presiding – and one thing he asked me was, am I advocating in every child defendant case that there has to be expert evidence as to how a child's brain functions when you're looking at issues of intent, for example, children with knives, and I couldn't say in every single case.

However, I would say that there needs to be much more focus on expert evidence when you're looking at intent with children who are killing or committing GBH, they're all going out with knives. And so that I would really commend that case and we did go back to *Pendleton*, I think Henry might be slightly comforted in that the negative impact, the impact on the jury is back up and running in *L*. I didn't have too much of a battle on it, but I still I'm afraid we lost. But there we are. The conviction, as you say, the conviction was held to be safe.

So that was the point that came through.

Lord Garnier QC And that case is now published, and reported?

Kirsty Brimelow QC It's now on, yes, it was handed down today.

Lord Garnier QC I'm really grateful to you all for coming at the end of long days of work, be it in chambers or in court. You've been more than generous. We could have listened to you til midnight.

Henry Blaxland QC I've got one more parting shot, do you mind? I just say one more thing?

Lord Garnier QC Yes?

Henry Blaxland QC Eddie Guilfoyle. That's all I need to say. The failure to refer Eddie Guilfoyle's case is astounding.

Lord Garnier QC If after this evening, you have other things that you'd like to tell us, please write to us, don't feel hindered from writing to us. I know this has been a truncated – thank you very much for joining us.

Kirsty Brimelow Thank you. Can I say the same thing, but I'm also just going to shout

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QC

out, I've got a wonderful work experience with me from Stanford University. And she helped put together a table comparing across jurisdictions of where they have a CCRC equivalent, looking at Norway in particular, and then looking at other jurisdictions. So I'll send that to you on the international side as well.

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