

Commission of Inquiry
Into the Wrongful
Conviction of David Milgaard
before
THE HONOURABLE MR. JUSTICE
EDWARD P. MacCALLUM

Transcript of Proceedings
and
Testimony before the Commission
sitting at the
Sheraton Cavalier Hotel at
Saskatoon, Saskatchewan

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Volume 191

Inquiry Proceedings



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 The Hon. Vic Toews
Mr. Julian Roy, Esq., **for** the Association in Defence
 of the Wrongly Convicted
 (AIDWYC)



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DAVID WILLIAM KYLE, SWORN

- BY MR. HODSON

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Transcript of Proceedings

(Reconvened at 1:00 p.m.)

COMMISSIONER MacCALLUM: Good afternoon.

ALL COUNSEL: Good afternoon.

MR. HODSON: Good afternoon.

DAVID WILLIAM KYLE, sworn:

MR. HODSON: Good afternoon, Mr. Kyle.

Thank you for agreeing to travel to Canada, and
to Saskatoon, to be with us today.

Before we start, Mr.

Commissioner, just a couple of comments. One,
I'd like to introduce Julian Roy, who is counsel
for AIDWYC, who will be here this week. I
welcome Mr. Roy.

COMMISSIONER MacCALLUM: Mr. Roy.

MR. HODSON: And, just before I start to
question Mr. Kyle, I want to touch on some
matters related to this Commission's terms of
reference.

Mr. Kyle will be giving
evidence about the English Criminal Cases -- the
English Criminal Cases Review Commission, of
which he was a member for a number of years, to
tell us about how they deal in England with
wrongful convictions and providing remedies, and



1 the CCRC is the acronym for that commission. And
2 they investigate applications of people alleging
3 wrongful conviction and determine whether a
4 remedy was appropriate. I want to make some
01:03 5 comments about the areas that I intend to cover
6 with this witness, and why, and the areas that I
7 do not intend to cover.

8 And I think it bears
9 repeating that this Commission does not have, as
01:03 10 an express part of its mandate, to review the
11 Section 690 or Section 696 provision of the
12 Federal *Criminal Code*, and this Commission has
13 not looked at any Section 690 or 690 case beyond
14 David Milgaard's case, and I don't want to get
01:04 15 ahead of ourselves, Mr. Commissioner, but
16 certainly this -- these areas will be the areas
17 of submissions at a later date as far as the
18 extent to which this Commission can get into
19 those matters, but I simply want to put it on the
01:04 20 record before Mr. Kyle gives evidence.

21 What is, I think, significant
22 and important for this Commission to hear is
23 Mr. Kyle's knowledge about investigating wrongful
24 convictions, gathering information to support a
01:04 25 claim for wrongful conviction, and the re-opening



1 of investigations. And, certainly, there is a
2 significant part of what he does, and has done,
3 that will be helpful to us.

4 I feel it necessary to
01:04 5 question him and make sure that we have a fairly
6 good understanding of how the Commission in
7 England operates, so I intend to go through that,
8 how it was created, why it was created, and what
9 it does.

01:04 10 I think, to give some context
11 to Mr. Kyle's evidence, not for the purposes of
12 getting into a critical analysis of the
13 differences between the English system and the
14 Canadian system, I can tell you this, that
01:05 15 Mr. Kyle is not -- he is familiar with the
16 section 690/696 proceedings in Canada, but I
17 think, beyond being generally aware of that, it's
18 not something that he has studied in detail. I
19 have not asked him to study it, I've not asked
01:05 20 him to critique it, and he is not in a position,
21 I think, to provide direct comparisons. Rather,
22 he is able to tell us how their Commission goes
23 about their work.

24 As far as his familiarity
01:05 25 with the *David Milgaard* case, he has a general



1 understanding of that, I provided him with some
2 background information. I must say, Mr. Kyle
3 asked me to provide him with one document that
4 summarized everything, and I told him I was not
01:05 5 able to do so. So he has had some -- he knows
6 some knowledge about the case itself and how it's
7 travelled through the various courts and
8 proceedings, from documents, and I think he's
9 able to answer some questions. And I've advised
01:06 10 Mr. Kyle that if the questions go beyond the
11 information that I've provided to him, whether
12 it's a question by me or other counsel, to simply
13 advise us.

14 **BY MR. HODSON:**

01:06 15 **Q** Now, Mr. Kyle, have I stated things sufficiently
16 correct?

17 **A** You certainly have.

18 **Q** Thank you. If we could start off, sir, with your
19 resume, your curriculum vitae which you were kind
01:06 20 enough to provide, and I'd like to go through
21 parts of this. You currently reside in Cheshire;
22 is that correct?

23 **A** Yes.

24 **Q** And I think your career history starts off with
01:06 25 your most recent employment with the Criminal



1 Cases Review Commission, and that is, I think the
2 acronym of that is the CCRC, and we'll maybe refer
3 to that as the 'CCRC' or 'the Commission'; is that
4 fair?

01:06 5 A Yes.

6 Q And I understand you were one of the founding
7 members of that Commission?

8 A Yes, I was.

9 Q And you worked there until August of 2005 when you
01:07 10 retired, and you, I understand you've gone back
11 and done some project work for them?

12 A Yes.

13 Q If you can just comment on a couple of these
14 points. As far as Commission's strategic
01:07 15 development and corporate management, is it fair
16 to say that you were involved from the outset in
17 getting this commission up and running, and
18 getting the people trained and thinking the right
19 way, so to speak?

01:07 20 A That's absolutely right, yes.

21 Q Under your key achievements, there's one I wanted
22 to ask you about, you say here:

23 "Substantially influenced the ethos of
24 the Commission ... and its relationships
25 with stakeholders, overcoming



1 influential stakeholders gloomy
2 forebodings about its prospective
3 independence and ability",

4 And I'm wondering if you could just comment on
01:07 5 that, what that relates to, and perhaps talk a
6 bit about the reaction in England when the CCRC
7 was formed?

8 A Certainly. There were a number of what are
9 described very briefly in this resume as
01:08 10 'influential stakeholders' who had been very
11 influential in pressing for the creation of an
12 independent body to review miscarriages of justice
13 and, to that extent, the decision by the United
14 Kingdom government to establish the Criminal Cases
01:08 15 Review Commission was very much welcomed by a
16 great many people. But when the legislation was
17 drafted and enacted, and more particularly when
18 the first -- is that better --

19 Q Yeah.

01:08 20 A -- when the first group of Commission members were
21 appointed, some of those stakeholders expressed
22 reservations, both about the legislation itself
23 and, in particular, the statutory test which the
24 Commission was going to be required to apply when
01:09 25 making decisions whether to refer cases to the --



1 back for an appeal or not, comments being drawn
2 such as the Commission would inevitably become the
3 handmaiden of the Court of Appeal because there
4 was too close a link between the Commission's test
01:09 5 and that which the Court of Appeal would
6 ultimately apply in deciding whether to quash or
7 uphold a conviction, and also expressing concern
8 about the initial Commission member appointments
9 which were made, and in particular, drawing
01:09 10 attention to the fact that there was no Commission
11 member of the first round of appointments who had
12 any reputation for being a champion of putting
13 right miscarriages of justice. So I think those
14 were the two main concerns which were expressed.

01:10 15 So, on the one hand, these
16 same influential stakeholders welcomed the
17 creation of the Commission, but then expressed
18 disappointment both as to its structure as set out
19 in the *Criminal Appeal Act 1995* which created the
01:10 20 Commission, and also the decisions which had been
21 made about the identities and personalities and
22 backgrounds of the first round of Commission
23 members.

24 Now from my point of view as a
01:10 25 member of the Commission I was concerned, of



1 course, to play my part in doing what I could to
2 allay those fears. To a certain extent of course,
3 as we say, the proof of the pudding was going to
4 be in the eating, and it was going to be a matter
01:10 5 of time and experience to see whether these
6 forebodings were realized or whether they were
7 not, but certainly, in the early days of the
8 Commission, I played my part with some of these
9 individuals, of taking time to meet with them and
01:11 10 talk to them and, hopefully, enable them to take a
11 balanced view about the way the Commission had
12 been set up and the first round of appointments
13 had been made.

14 Q Do I take it from your evidence, sir, that the
01:11 15 influential stakeholders that you are talking
16 about here would be people who were on the side of
17 the wrongfully convicted, in other words the, I
18 think there was a group called Liberty, and as
19 well there was a particular Member of Parliament
01:11 20 --

21 A Uh-huh.

22 Q -- who had been involved in the *Birmingham 6* case?

23 A Yes.

24 Q So it was people who were advocates for wrongfully
01:11 25 convicted people --



1 A Uh-huh.

2 Q -- who, for the most part, expressed concern about
3 the Commission for the two reasons you stated?

4 A That's right, yes.

01:12 5 Q And we'll get into this in a bit more detail, but
6 the Commission replaced -- my understanding is
7 that the previous manner in which England, if I
8 can call it that, dealt with wrongful convictions
9 or miscarriages of justice was that the Home
01:12 10 Secretary had a discretion to refer matters to the
11 Court?

12 A Yes, that's absolutely right, and although, as you
13 quite correctly pointed out, I'm no great expert
14 on the Canadian federal *Criminal Code* and Section
01:12 15 690, I think it -- I think, from what I understand
16 about that procedure in Canada, the powers which
17 were exercised by the Home Secretary prior to the
18 creation of the Criminal Case Review Commission I
19 would describe as analogous to those exercised by
01:12 20 the Minister of Justice here.

21 Q Okay. And so, again, is it fair to say that the
22 early part of your work was to meet with
23 stakeholders and try and, I guess, defend the
24 Commission, both in its mandate and in the makeup
01:13 25 of its personnel?



1 A Well, certainly, to express, if I can put it this
2 way, as I said a moment ago, to encourage a
3 balanced view and say "well, look, we have to wait
4 and see what happens".

01:13 5 But, I mean if we take for

6 example the complaint about the makeup of the
7 Commission and the people who were initially
8 appointed, of course there were any number of
9 criteria by which you might say this person would
01:13 10 be a good person to have on the Commission, and of
11 course it's valid to say that it -- to have
12 someone on the Commission who has experience
13 directly with overcoming miscarriages of justice
14 is a perfectly valid one, and equally the comment
01:13 15 that to have someone like myself with a background
16 in prosecuting, and there was a second member of
17 the Commission who also had a background in
18 prosecuting, it draws the obvious comment, well,
19 how on earth, if you create a Commission which has
01:14 20 got prosecutors on it, can you possibly expect it
21 to undo possible wrongful convictions. Well, that
22 is a valid point of view, but equally you can say,
23 well, somebody who has experience of
24 prosecuting -- and we also had a Commission member
01:14 25 who had been a chief constable, which was a, drew



1 the same sort adverse comment -- you can make the
2 point equally validly that people with prosecuting
3 and investigative experience are likely to have a
4 fairly good insight as to how things should be
01:14 5 done and therefore can be expected, reasonably, to
6 identify where things may have gone wrong.

7 Q And again, over the course of your eight years on
8 the Commission, did there continue to be
9 criticisms of the Commission on those two points?

01:14 10 A Umm, I wouldn't want to sit here and sound
11 complacent, but I think it is fair to say that the
12 degree of concern which was expressed initially
13 has substantially reduced over the initial years
14 of the Commission once those people, and indeed
01:15 15 everybody else, could see how the Commission was
16 actually working in practice.

17 Q If we can go to the next page, please, just go
18 through your work history. And it's my
19 understanding that prior to your engagement with
01:15 20 the CCRC, that you were a prosecutor, you worked
21 in the prosecution service for your entire career;
22 is that correct?

23 A Essentially, that's right. I qualified as a
24 barrister, including doing pupillage, at the end of
01:15 25 1974, and the beginning of 1975 I joined what was



1 then the Director of Public Prosecutions office,
2 and I remained in the prosecution service until
3 1997 when I became a member of the CCRC.

4 Q And can you tell us, did you find that your
01:16 5 experience as a prosecutor working in prosecution
6 services, did you view that as an advantage to you
7 in your work on the Commission?

8 A Oh, undoubtedly, yes.

9 Q And why was that?

01:16 10 A Well, simply because with the 20 plus years'
11 experience that I had prosecuting and during that
12 period seen and assimilated and had to deal with
13 some step changes in the criminal justice system
14 in England and Wales, I thought that that
01:16 15 experience was likely to be highly valuable simply
16 by its nature in changing from being a prosecutor
17 and taking the opportunity to become one of the
18 founding members of the CCRC.

19 Q And did you find that your experience as a
01:16 20 prosecutor somehow put you on the wrong side of
21 the equation in identifying miscarriages of
22 justice in the sense that you had not been a
23 defence counsel?

24 A Not at all. I mean, I think that all the positive
01:17 25 aspects of my previous experience which I've just



1 referred to were extremely valuable. Of course I
2 recognize that having no substantial direct
3 experience in defending, that is, actually
4 representing clients, was something which could be
01:17 5 put on the negative side, if I can put it that
6 way, of my experience. Although I would say that
7 one of the responsibilities of prosecuting fairly
8 is to have regard to the interest of the
9 defendant, so it would be wrong to say that a
01:17 10 prosecutor operates in blind disregard or in blind
11 ignorance of matters which are of interest to the
12 defence, but in any event, I did have colleagues
13 on the Commission who had been defending, had
14 experience of defending and I think one of the
01:18 15 strengths of the Commission is, does arise from
16 these wide profiles of the Commission members,
17 that there was a considerable body of experience
18 covered by the spread of Commission members, and
19 the ethos and culture of the Commission was to
01:18 20 spend a great deal of time talking to colleagues,
21 so if there were areas which we were uncertain
22 about, we may well find relevant experience within
23 the Commission and, if we didn't, we would go
24 outside and get it.

01:18 25 Q If we can just scroll down to the bottom here, I



1 think one of the cases I noted here early on, you
2 were involved in the prosecution of Peter
3 Sutcliffe, the Yorkshire Ripper; is that correct?

4 A Yes.

01:18 5 Q And that would have been fairly early in your
6 prosecution career?

7 A Six years in.

8 Q Yes.

9 A If 1981 was the order of it.

01:19 10 Q Can you tell us, again just generally, I don't
11 think we need to get into too many specific legal
12 details, but the changes that you saw as a
13 prosecutor from 1975 through until 1997 as far as
14 how prosecutors in England and, in particular,
01:19 15 disclosure and things of that nature, was there a
16 bit of an evolution of the practices of
17 prosecutors?

18 A Well, certainly from the point of view of the
19 responsibilities which prosecutors had. You
01:19 20 mentioned disclosure and I think that from the
21 late 1970s onwards the development of the law
22 relating to disclosure was one of the significant
23 ongoing developments during the period that I was
24 a prosecutor. It started with the Attorney
01:19 25 General issuing guidelines on the subject which



1 didn't have the force of law that were generally
2 reckoned to be sensible guidelines through to a
3 more comprehensive statement of the common-law
4 duties of disclosure which emerged from cases like
01:20 5 *Judith Ward* through ultimately to the legislation
6 in the *Criminal Procedure and Investigations Act*
7 of 1996 which followed recommendations made by the
8 Runciman Royal Commission on Criminal Justice.

9 Q And it's my understanding that certainly in the
01:20 10 late '70s, perhaps the early 1980s, that the
11 degree of disclosure required by prosecutors in
12 England was perhaps at the low end; is that fair,
13 compared to what it is now?

14 A Certainly compared to what it is now, yes. I
01:20 15 mean, at the time when I started prosecuting, the
16 only statement of law on the subject of disclosure
17 was that the prosecution were under a duty to
18 disclose names and addresses to the defence of any
19 witness they had who they did not intend to call,
01:21 20 there was not even a requirement to provide copies
21 of the statements, so if you characterize that as
22 being at the low end, that I would say is right.

23 Q And then over the course of the years that changed
24 I take it?

01:21 25 A Oh, indeed, yes. I mean, I've mentioned the case



1 of *Judith Ward* which is one of what I described as
2 one of the blockbuster miscarriages of justice and
3 failure to disclose relevant information to the
4 defence was at the heart of the reasons why the
01:21 5 Court of Appeal in due course found that
6 conviction to be unsafe.

7 Q Is it fair to summarize, and we'll deal with the
8 Runciman report in a moment, I think that's the
9 1993 Royal Commission report --

01:21 10 A Yes.

11 Q -- that recommended the creation of the CCRC, but
12 as well dealt with some criminal law and
13 prosecution recommendations --

14 A Uh-huh.

01:21 15 Q -- is that correct?

16 A That's right, yes.

17 Q And it's my understanding that arising out of
18 the -- I think the term is the blockbuster cases,
19 and that's the *Birmingham 6*, the *Guildford 4* and a
01:22 20 number of other cases where the English Court of
21 Appeal identified some miscarriages of justice,
22 that as a result of that the Royal Commission
23 recommended some changes both in police practices
24 and Crown practices; is that a fair summary?

01:22 25 A It is.



1 Q And you would have been a prosecutor then during
2 that transition period; is that fair?

3 A Yes, which included, I might say, because of the,
4 in the early 1990s when I was then back in the
01:22 5 headquarters of the Crown prosecution service, my
6 division and area of the Crown prosecution service
7 in fact handled the appeals of the *Birmingham 6*
8 and *Judith Ward* from the prosecution point of
9 view.

01:22 10 Q And so you would have had direct involvement then,
11 or some involvement in some of these cases?

12 A Yes.

13 Q Then go to the next page, please, just to finish
14 your -- actually, the next page, just some
01:22 15 publications to point out, I think you testified
16 at the Guy Paul Morin Inquiry in December of 1997;
17 is that correct?

18 A Yes, I did.

19 Q And I've read that transcript and I think, correct
01:23 20 me if I'm wrong, at that point the CCRC had just
21 started?

22 A Yes.

23 Q So your evidence I don't think directly dealt with
24 CCRC issues; is that -- it may have a little bit,
01:23 25 but the focus was other matters related to



1 prosecution services; is that fair?

2 A I think that's right. I think I rather wryly
3 thought at the time when I was asked to give
4 evidence to that inquiry that in a sense the
01:23 5 inquiry was getting two for the price of one
6 because I was there to deal with matters relating
7 to prosecution of cases, but also as another
8 matter in which that inquiry was interested to
9 talk about what, as you've said, were the
01:23 10 relatively new arrangements in the United Kingdom
11 for dealing with miscarriages of justice.

12 Q And then as well just to point out, it looks as
13 though you've had an opportunity to speak at a
14 number of conferences dealing with both the CCRC
01:24 15 and miscarriages of justice; is that correct?

16 A Yes.

17 Q And as well you've published a paper *Correcting*
18 *Miscarriages of Justice: The Role of the Criminal*
19 *Cases Review Commission* in the *Drake Law Review*
01:24 20 [2004], and we'll be dealing with that a fair bit
21 later, but that's a publication of yours; is that
22 correct?

23 A Yes.

24 Q We're done with the résumé. If we can just, maybe
01:24 25 to start with, get a general understanding of the



1 CCRC and its mandate, and on a couple of points,
2 and it's my understanding that there are really
3 two components of the CCRC's work; number one, to
4 actually investigate the application by an inmate
01:24 5 or by someone who alleges a wrongful conviction
6 and, two, that your Commission is essentially the
7 gatekeeper to decide whether or not that person is
8 entitled to go back into court; is that correct?

9 A Yes.

01:25 10 Q And just on the first part then, it's my
11 understanding that when an applicant comes to the
12 CCRC, that they come at the outset and that the
13 CCRC actually gathers information and will go and
14 investigate; is that correct?

01:25 15 A Yes.

16 Q Can you tell us generally about that?

17 A Yes, and that's something which, so far as the
18 Commission's position now is concerned, is
19 somewhat better developed and better structured
01:25 20 than it was in the early days, but essentially the
21 way in which you put it is absolutely right,
22 anybody who is convicted of a criminal offence in
23 England, Wales or Northern Ireland either in the
24 Crown court, which is where the trials of
01:25 25 indictment occur, or in the Magistrates' Court



1 which deal with lesser offences, can apply to the
2 Commission if they believe they have been wrongly
3 convicted, and in general terms, once an
4 application is received by the Commission, the
01:26 5 Commission will then endeavour to decide what
6 investigations might usefully be pursued around
7 issues which appear relevant to the question of
8 whether the person has been safely or rightly
9 convicted or not and, in general terms, that
01:26 10 process involves initially finding out what has
11 happened in the case up until then; in other
12 words, you know, how has the case got to the point
13 where it now is, and that is largely an exercise
14 in -- it's an historical exercise, so it involves
01:26 15 a process of acquiring relevant documentation
16 which will help paint that particular picture.

17 So, for example, the minute an
18 application is received by the Commission, almost
19 as a matter of administrative routine the
01:27 20 Commission will require the Court of Appeal file
21 to be sent. At a fairly early stage in the life
22 of an application, the case is looked at by a
23 member of the Commission and one of the functions
24 which is done, which that member undertakes at
01:27 25 that early stage is what other material should



1 immediately be sought for the purpose of the
2 review and it might be the prosecution files, it
3 might be the Crown court files, it might be
4 defence solicitor's files.

01:27 5 Q Police records?

6 A Police records certainly, police files, and indeed
7 any -- if any other body which appears to have
8 contributed to the investigation and prosecution
9 of that particular case may be called for.

01:27 10 Q Is there an expectation or a requirement that an
11 applicant himself or herself investigate and come
12 to your Commission with the grounds for the
13 application?

14 A There is no requirement or expectation that they
01:28 15 will do so. Generally speaking -- the vast
16 majority of applications received by the
17 Commission appear in the form of a letter written
18 by the applicant possibly from prison in which the
19 applicant gives their understanding of why they
01:28 20 think that they are the victim of a miscarriage of
21 justice and quite often, as you might imagine, the
22 reasons why they think things have gone wrong may
23 actually bear no relationship at all to the actual
24 reason why things have gone wrong, and if I tell
01:28 25 you, for example, that one of the commonest



1 expressions of grief in applicants who apply to
2 the Commission is that their lawyers didn't act
3 for them properly, that again, as will come as no
4 surprise to hear, is very rarely the basis for
01:29 5 referring a case back for an appeal, so we
6 certainly don't expect them to have done any
7 investigative work of their own.

8 Sometimes if they are
9 represented for the purpose of making an
01:29 10 application they may have done some investigative
11 work, but our experience leads us to think that if
12 the case is to be investigated by the Commission,
13 we would actually much prefer it if we could
14 identify the areas of investigation which we wish
01:29 15 to undertake and how they should be structured
16 rather than to have something which has been
17 precooked sent to us.

18 Q And so I take it from that that an applicant who
19 may put forward a ground or two in his or her
01:29 20 letter to the Commission, that that doesn't limit
21 the Commission in the grounds that they
22 investigate; in fact, it may be that the
23 Commission looks at what it thinks are more
24 appropriate. Is that fair?

01:30 25 A That's absolutely fair. I mean, the Commission is



1 very interested to consider very carefully what
2 applicants have to say because they are quite
3 likely to be in a better position than anybody
4 else to know where things have gone wrong, but
01:30 5 what the Commission does is to look, having looked
6 carefully at what the applicant has to say about
7 the predicament he or she finds themselves in,
8 that then to look carefully at the case as a whole
9 and, as I say, this is why this early
01:30 10 investigation into how things have got to where
11 they are is so important, to be able to identify
12 where there are issues which could make a
13 difference to the safety of the conviction.

14 Q There are some writers that have described your
01:31 15 Commission as being more proactive than reactive
16 as far as the investigation, and would you agree
17 with that description?

18 A Yes.

19 Q Let's just talk about the second part which I
01:31 20 think is described as the gatekeeper function. Is
21 that a fair way to put it?

22 A Yes, uh-huh.

23 Q And it's my understanding that in England, after a
24 conviction, a convicted person may appeal to the
01:31 25 Court of Appeal and the Court of Appeal, their



1 jurisdiction or their test in reviewing a
2 conviction comes down to whether or not the
3 verdict is safe; is that --

4 A Yes.

01:31 5 Q Or maybe is it unsafe, I'm not sure what the
6 legislation -- one way or the other; is that
7 correct?

8 A Well, the Court of Appeal is concerned to
9 determine whether the conviction is safe.

01:31 10 Q And if it's not safe?

11 A If it's not safe, they must quash their
12 conviction.

13 Q Right. So that in England after a trial and
14 appeal, an appellate can go to the Court of Appeal
01:32 15 and say my conviction is not safe?

16 A Uh-huh.

17 Q If the Court of Appeal concludes that it's not
18 safe, they must quash the conviction?

19 A Yes.

01:32 20 Q Now, it's my understanding they have the right to
21 order a new trial if they quash the conviction,
22 but that that's rarely exercised; is that right?

23 A They do have that power, but it is a relatively
24 rare occurrence for a retrial to be ordered.

01:32 25 Q And then we've heard -- maybe just a couple of



1 more points on the safe verdict test, and we'll
2 see this in the Commission report a bit later,
3 that was amended I think arising out of the Royal
4 Commission, the 1993 Runciman report, as well to
01:32 5 further define the Court of Appeal test, is that
6 what happened after that?

7 A It did. The government responded to that part of
8 the Royal Commission report dealing with the
9 jurisdiction of the Court of Appeal by amending
01:32 10 the test which the Court of Appeal should apply,
11 although as can be seen if you look at the
12 legislation actually enacted as against the
13 recommendation of the Royal Commission, the Royal
14 Commission recommended a different test than that
01:33 15 which was actually employed.

16 Q And we've heard some mention of the lurking doubt
17 test that I think is in some English Court of
18 Appeal cases?

19 A Uh-huh.

01:33 20 Q And that's not part of the Court of Appeal test
21 now; is that correct?

22 A That's right. I mean, shortly after the bringing
23 into force of the revised test looking simply at
24 the question of whether the conviction is safe or
01:33 25 not, the Court of Appeal took the opportunity in a



1 case which they were considering to say that
2 lurking doubt was no longer part of the language
3 which was to be used in relation to the exercise
4 of the Court of Appeal's jurisdiction.

01:33 5 Q And I think, was the lurking doubt test not
6 described by either academics or Court of Appeal
7 judges themselves about, for lack of a better
8 word, a gut feeling that the conviction wasn't
9 sound; is that a fair description?

01:34 10 A I think that is a fair description. It was
11 reserved for those sorts of cases where the Court
12 of Appeal was effectively saying we can't really
13 articulate why, but, you know, we feel in our
14 bones that there is something wrong with this
01:34 15 conviction and therefore we're going to quash it.

16 I might say I can think of one
17 example since the abolishing of the language of
18 lurking doubt a case which was decided in the
19 Court of Appeal which caused a fair amount of
01:34 20 problems for the CCRC in relation to what we call,
21 what I might describe as an historic sex abuse
22 case where allegations of sexual abuse are not
23 made until many, many years after the event and
24 wrestling with those sort of cases is actually
01:35 25 quite difficult. The Court of Appeal did produce



1 a judgment in which they effectively said we can't
2 put our finger on any particular reason why we
3 think there's a reason to have concerns about
4 either the credibility of the victim or the
01:35 5 ability of the Defendant to mount a proper and
6 fair defence so many years after the event, but
7 nonetheless, we feel uneasy, we think it's unsafe,
8 so that has been a more recent example of what
9 would in earlier years have been called a lurking
01:35 10 doubt situation.

11 Q Then as far as the gatekeeper role, it's my
12 understanding that what the CCRC has the power to
13 do, and I'll take you through the legislation, but
14 generally the CCRC has the power to refer a case
01:35 15 to the Court of Appeal; correct?

16 A Yes.

17 Q And so where a convicted person has either lost an
18 appeal or the appeal period has expired and it's
19 out of a formal remedy, the CCRC can enable that
01:36 20 person to get back in front of the Court of Appeal
21 to argue as if it were an appeal proper from the
22 trial; is that correct?

23 A Yes.

24 Q And in that sense they go back to the Court of
01:36 25 Appeal and the Court of Appeal would then decide



1 whether the conviction is safe?

2 A Yes.

3 Q And again as far as the criteria, and we'll look
4 at the legislation in detail, but it's my
01:36 5 understanding that the test that the CCRC applies
6 in looking at a case is whether or not there is a
7 real possibility that the Court of Appeal will
8 grant a remedy; is that correct?

9 A Yes.

01:36 10 Q So that's your role as gatekeeper after you've
11 gathered the information, you then, as a
12 Commission, and we'll talk about the details
13 later, decide whether or not there's a real
14 possibility they will succeed?

01:36 15 A Yes.

16 Q And we'll see some statistics later, but I think
17 about 70 percent of the cases you send to the
18 Court of Appeal result in a remedy; is that
19 roughly --

01:36 20 A Between 60 and 70, yes.

21 Q And from your perspective, is that the right
22 number as far as the real possibility?

23 A Well, the real -- there is no definition of real
24 possibility and necessarily there has to be a gap
01:37 25 between the real possibility evaluation and the



1 outcome in the Court of Appeal itself, and
2 although there may be some who think that the gap
3 is not wide enough, the view which the Commission
4 has traditionally taken is that to find the Court
01:37 5 of Appeal, if you like, agreeing with our
6 evaluation in two-thirds of the cases and
7 disagreeing with one-third suggests that we are
8 applying a responsible approach to our evaluation
9 of what is a real possibility.

01:37 10 Q And is it correct to say that your Commission does
11 not decide the guilt or innocence of an applicant?

12 A No, it doesn't.

13 Q And does not directly provide a remedy setting
14 aside the conviction or anything of that nature?

01:38 15 A No.

16 Q And that it's up to the court to decide, whether
17 or not the verdict is safe?

18 A Yes.

19 Q And your role is simply to decide whether or not
01:38 20 the applicant should have another chance to go
21 there?

22 A Yes.

23 Q Can you talk a bit about -- you mentioned that one
24 of the early criticisms before the Commission
01:38 25 started was that you would be the handmaiden of



1 the Court of Appeal and I take it from that that
2 since your test in deciding whether cases go there
3 is to try and -- predict might be the wrong word,
4 but what the Court of Appeal might do with it. Is
01:38 5 that the concern, that if the Court of Appeal was
6 dismissing all of these cases, that might mean you
7 would stop sending them there?

8 A I think the fear was that if -- that the
9 Commission might feel obliged to react to an
01:39 10 apparent trend by the Court of Appeal to uphold
11 convictions by thinking to itself, oh, we're
12 obviously applying the real possibility test too
13 liberally, we better raise the bar and send fewer
14 cases so that there is less opportunity for the
01:39 15 Court of Appeal to uphold convictions, I think
16 that's the fear. I don't think the reality
17 demonstrates that at all.

18 I mean, there have been
19 occasions where, when looking at the outcomes of
01:39 20 cases in the Court of Appeal, the Commission has
21 had what might seem to be a good run; in other
22 words, you know, 10 cases have been in the Court
23 of Appeal and in all 10 cases the conviction has
24 been quashed, and then a few months later we had a
01:39 25 run which goes entirely the other way and you



1 suddenly have a run of 10 cases where all the
2 convictions are upheld, but over a period of time
3 the outcome level has remained, as I say,
4 relatively constant, this two-third/one-third
01:40 5 split, and I never sensed at all when I was at the
6 Commission that any of the thinking within the
7 decision-making committees was influenced by a
8 concern that the Court of Appeal might be trying
9 to persuade us to raise the threshold of the test
01:40 10 we were applying.

11 What we do do in the
12 Commission, or we did do, and as far as I know
13 they still do, is to have periodic monthly reviews
14 of outcomes of cases which have been dealt with by
01:40 15 the Court of Appeal in order to see whether we
16 could learn sensible lessons from the way the
17 Court of Appeal had handled cases which we had
18 referred and, in many instances, that was not
19 about the decision itself, but more about how we
01:41 20 had expressed our reasoning in support of it and
21 that there was -- the decision-making -- the
22 decisions to refer cases to the Court of Appeal
23 have to be made by at least three Commission
24 members sitting in committee and every time a
01:41 25 decision-making committee sits it is assembled for



1 that particular case and the Commission as a body
2 has never had cause to get all its Commission
3 members together in order to try and establish
4 some sort of norm simply because the experience of
01:41 5 the actual outcomes in the Court of Appeal, as
6 long as the Commission believes, as it does, that
7 this sort of two-third/one-third outcome rate
8 suggests the responsible approach to the
9 application of the real possibility test, it
01:42 10 hasn't been necessary to consider whether the
11 Court of Appeal thinks we're doing the right thing
12 or not.

13 Q Can I ask your comment, or your understanding or
14 your description of two terms that we see in the
01:42 15 literature and in the cases, and they are the term
16 wrongful conviction and miscarriage of justice.

17 A Uh-huh.

18 Q And what do those terms mean to you?

19 A Well, I think that the term miscarriage of justice
01:42 20 is used quite loosely by people who are
21 considering matters in this area. It's quite
22 interesting I think that the term miscarriage of
23 justice no longer appears anywhere in the 1995
24 *Criminal Appeal Act* and indeed the one reference
01:42 25 in the 1968 act I think to miscarriage of justice,



1 which was the old proviso test which the Court of
2 Appeal applied, has gone, and from the
3 Commission's point of view, I think that's an
4 extremely good thing because what we're concerned
01:43 5 about is not debating the meaning of miscarriage
6 of justice, but considering, on an
7 objective-evidence based, on a -- from an
8 objective-evidence based point of view whether or
9 not a person has been rightly or wrongly
01:43 10 convicted, so to me, expressing myself from the
11 point of view as a former member of the
12 Commission, wrongful conviction means either
13 somebody who has been convicted of an offence
14 which that person didn't commit at all, which is
01:43 15 what I would describe as someone being innocent in
16 the absolute sense, but equally I regard as a
17 wrongful conviction a situation where somebody who
18 has been convicted of on offence in relation to
19 that person either significant relevant new
01:44 20 evidence comes to light subsequently which had it
21 been known to and taken into account by the jury
22 at the trial may have altered their decision as to
23 being sure of the Defendant's guilt or,
24 alternatively, that the process by which the
01:44 25 person was convicted was flawed in some



1 significant respect such that it can be said that
2 that person was not fairly convicted in the sense
3 of the proper application of the burden and
4 standard of proof and the proper application of
01:44 5 the rules and evidence of procedure which the
6 prosecution is obliged to adhere to in seeking a
7 conviction.

8 Q And again, in your view, then, does a person have
9 to demonstrate or establish factual innocence or
01:44 10 innocence in the absolute sense to establish that
11 he has been wrongfully convicted?

12 A Not from the point of view of the application to
13 the Commission's test in deciding whether there is
14 a real possibility that the Court of Appeal might
01:45 15 find that conviction to be unsafe. I mean, I
16 would make the general observation that whilst, if
17 you do have a situation and you may not ever know
18 whether you do or don't have a situation, but if
19 you do have a situation where someone is innocent
01:45 20 in the absolute sense, it would, of course, be
21 very desirable and very gratifying if that could
22 actually be established, but the reality is that
23 that rarely can be established, it's very rare
24 indeed when carrying out investigations into a
01:45 25 conviction which is alleged to be a wrongful one



1 to find wholly-exonerating evidence. In the great
2 majority of instances where the Commission has
3 referred cases to the Court of Appeal it has been
4 on the basis of that other category of wrongful
01:46 5 conviction which I've just described.

6 Q And so if we had a situation where a person was
7 convicted and then 10 years later it became
8 apparent that there was evidence that had it been
9 presented at trial may have affected the verdict
01:46 10 of the jury and the Court of Appeal then quashes
11 that conviction, again, in your view, would that
12 then be a wrongful conviction of that person?

13 A Yes.

14 Q Regardless of whether that person can or cannot
01:46 15 establish his factual innocence?

16 A Yes.

17 Q Can you tell us, in the work of the CCRC, is
18 factual innocence something that is any part or a
19 significant part of what you investigate?

01:46 20 A Umm, no, and it's -- it certainly isn't any, in
21 any way a motivating factor behind how we go about
22 the investigation. It may be, at the end of the
23 investigation, we do acquire evidence which we can
24 then say "this not only shows the conviction to be
01:46 25 unsafe but it also appears to demonstrate that the



1 defendant is factually innocent", but that, if you
2 like, is a bonus, if it happened, but it isn't
3 essential to the meeting of the test or referral
4 to the Court of Appeal.

01:47 5 Q And is it fair to say that, at least how you've
6 described it, where the English Court of Appeal
7 quashes a conviction that you've referred to them
8 on the basis that the conviction is not safe
9 because new information came to light that might
01:47 10 have affected the verdict, that that would be a
11 wrongful conviction, and that the Court would not
12 look at the issue of factual innocence?

13 A No, because the Court would only be concerned with
14 the question whether the conviction was safe or
01:47 15 not, and safety doesn't depend on the
16 establishment of factual innocence.

17 Q Well how --

18 A Well unsafely, I should say, doesn't depend on the
19 issue of factual innocence.

01:47 20 Q And then, generally speaking then, are -- people
21 who have had their convictions quashed after being
22 referred by your Commission, I think you are
23 telling us, would be considered wrongfully
24 convicted and in some instances entitled to
01:48 25 compensation on the basis, solely, that their



1 conviction was quashed; is that correct?

2 A Yes. I hesitate for -- I'm trying to get the full
3 import of that question. The -- a person who is
4 convicted and then successful on appeal may bring
01:48 5 themselves into the frame for compensation, but it
6 by no means follows that simply because someone's
7 conviction is quashed on appeal, that they are
8 necessarily entitled to compensation.

9 Q Even though I think you are saying they would be
01:48 10 wrongfully convicted, the question of compensation
11 depends on other factors, is that --

12 A Well, certainly. I mean for the -- I mean what I
13 am saying is that the question of whether someone
14 should be compensated for having been convicted,
01:48 15 and subsequently that conviction is quashed, is a
16 different question to whether that person has been
17 safely or unsafely convicted.

18 Q And I take it the compensation part is not
19 something you people either deal with directly or
01:49 20 consider in any way in any of your work?

21 A No, we don't. There was a suggestion in the early
22 times, early life of the Commission, that the
23 Commission should actually take over
24 responsibility for considering compensation claims
01:49 25 from the Home Office, and the Commission



1 resolutely resisted that suggestion.

2 Q And I take it, then, that, once the conviction of
3 a person is quashed, that person reverts to the
4 legal presumption of innocence?

01:49 5 A Absolutely.

6 Q And is innocent in that sense?

7 A Yes.

8 Q Can you comment a bit about the investigation
9 phase and, in particular, the following question.

01:49 10 In your -- when an inmate comes in, or a convicted
11 person applies for a remedy, is it correct to say
12 that, when you go to investigate, that you
13 investigate with an eye on the ultimate objective,
14 knowing what it is that's going to get that person
01:50 15 through the gate, so to speak?

16 A Well we do -- we do -- we do our best to identify
17 those issues in the case and those lines of
18 inquiry which are likely to result in that
19 particular outcome. And that, I suppose, is one
01:50 20 of the sort of major concerns for the Commission
21 member and case review manager who are embarking
22 on an investigation, is to make sure that time
23 spent on investigation and resources used on
24 investigation are effectively used, because again
01:50 25 in the early days of the Commission when we were



1 all new to this business of looking into
2 miscarriages of justice, I think it would be fair
3 to say that a lot of time was wasted on
4 investigating issues which simply took you down
01:51 5 blind alleys and got nowhere, and the objective in
6 the early stages of looking at an application now
7 is to go through a rigorous process of case and
8 investigation planning which seeks, as best it can
9 at that early stage, to sort out of what sometimes
01:51 10 can be a mass of material, particularly in the
11 more complex cases, what it is about them which
12 looks as if it might have some impact on the
13 safety of conviction and direct time, effort and
14 resources in to looking at those matters. But it
01:51 15 isn't -- that isn't something which is fixed for
16 all time, because things change as investigations
17 go on, and experience shows you quite often find,
18 particularly in some of the more complex cases,
19 that you discover things during the course of the
01:51 20 investigation which then require a re-appraisal of
21 the case plan and what you are doing.

22 Q But I take it, then, that for example reviewing a
23 matter that had been considered by the trial judge
24 and/or jury or the Court of Appeal the first time
01:52 25 around, I take it your Commission would not look



1 at trying to reargue a point that had already been
2 decided unless there was some new evidence or new
3 law or new change in the law; is that correct?

4 A That is right, because the real possibility test
01:52 5 has to be met by reference to either new evidence
6 or new argument which hadn't previously been
7 considered either at trial or on the previous
8 appeal, so there would be no possibility
9 whatsoever of the Court of Appeal interfering with
01:52 10 a conviction if all we could say is "we think the
11 trial judge got this ruling wrong" unless we can
12 say that there's been some new factor which, had
13 the trial judge been aware of it, would have
14 caused the judge to make a different ruling.

01:52 15 Q And so it's not a case of an applicant saying that
16 "I'd like to try another crack at the Court of
17 Appeal with a different panel five years later and
18 see if they'll buy my arguments?"

19 A No, that would be a completely futile exercise by
01:53 20 the Commission to refer a case on that basis.

21 Q So there has to be something new or changed,
22 either by way of facts, information, law, from the
23 original conviction, that provides a basis to go
24 back to the Court of Appeal?

01:53 25 A Yes.



1 Q You talked about the blockbuster cases, and I
2 think the *Birmingham 6*, the *Guildford 4*, it's my
3 understanding those would have -- those were
4 terrorist bombing cases from the '70s; is that
01:53 5 correct?

6 A Yes. In the 1970s the Irish Republican Army
7 brought its campaign on -- into mainland Britain,
8 and there were a series of bombings in Birmingham
9 and London in the 1970s which gave rise to a
01:53 10 number of prosecutions, and you've mentioned some
11 of them; the Guil -- the Birmingham 6, the
12 Guildford 4, Judith Ward, who was convicted on her
13 own of placing a bomb on a coach which was taking
14 soldiers back to camp, and also a family called
01:54 15 the Maguires, the Maguire 7, who were convicted of
16 providing the explosives which were used by the
17 Birmingham 6 and the Guildford 4, they were all
18 convicted in the 1970s, and with the exception of
19 Judith Ward -- who was a rather Walter Mitty type
01:54 20 of character, as subsequently emerged, she was
21 content to sit quietly in prison being wrongfully
22 convicted -- but in all other cases there was a
23 considerable campaign by Members of Parliament,
24 journalists, authors suggesting that they had been
01:54 25 wrongfully convicted and eventually, by the late



1 1980s-early 1990s, thanks to the reference back to
2 the Court of Appeal of all those cases by the Home
3 Secretary using the powers which he then had, all
4 those convictions were quashed. So it is fair to
01:55 5 describe the main blockbuster miscarriages of
6 justice which gave rise to the Royal Commission in
7 1991, and subsequently to the creation of the
8 CCRC, were Irish terrorist cases. But there were
9 two others, in particular, which were not
01:55 10 terrorist-related, which I've referred to in the
11 *Drake Law Review* article.

12 Q And I think you said these would have been cases
13 that went to the Court of Appeal under the old
14 system, if I can call it that, the Home Secretary
01:55 15 sent them?

16 A Yes.

17 Q Is that -- and, again, is it correct that the
18 reasons those, or some of the reasons those
19 convictions were quashed related to misconduct in
01:56 20 the gathering of evidence and some flawed
21 scientific evidence; is that correct?

22 A Yes.

23 Q And, on that basis, the convictions were quashed,
24 --

01:56 25 A Uh-huh.



1 Q -- there was no new trial, --

2 A Uh-huh.

3 Q -- and these people were termed to be wrongfully
4 convicted and compensated; is that correct?

01:56 5 A Yes.

6 Q If we can go to 340178, please.

7 And, Mr. Commissioner, this

8 report is -- the full report is on the database,

9 I'll only go through parts of it, but this is the

01:56 10 Royal Commission report dated 19 -- July 1993 by

11 Lord Runciman; is that correct?

12 A Yes.

13 Q And if we can go to the next page, it looks like

14 there was a fairly significant Commission to

01:57 15 examine criminal justice system in England and

16 Wales, and in particular whether changes are

17 needed in the conduct of police investigators, the

18 role of the prosecutor, the role of experts -- the

19 next page -- and a number of other things,

01:57 20 including:

21 "the arrangements for considering and

22 investigating allegations of

23 miscarriages of justice when appeal

24 rights have been exhausted;"

01:57 25 and that was the area that gave rise to the CCRC;



1 correct?

2 A Yes, absolutely. I mean there they were very wide
3 terms of reference, in fact it virtually covers
4 the entire process of investigating and
01:57 5 prosecuting, and right the way through to appeal.

6 Q And, if we can go to the next page, just quickly,
7 the index. And I'm not going to go through all
8 these, but this sets out the areas that were
9 covered, and touches on various issues relating to
01:57 10 police investigations, rights of silence,
11 confession evidence, prosecution, forensic
12 evidence, basically everything related to
13 investigation and prosecution of criminal
14 offences?

01:58 15 A Yes.

16 Q If we can go to page 340088 -- or 340188, sorry.
17 I want to just touch on one of these areas that
18 related to police interviews and get you to
19 comment on this. And it has certainly been a
01:58 20 subject, Mr. Kyle, that we've heard some evidence
21 on, is the viability of police officers and a
22 mandatory requirement to tape record or audio
23 record interviews, and the recommendation or the
24 comment here, it says:

01:58 25 "It has also been put to us that, when



1 witnesses are interviewed, the interview
2 and any subsequent witness statements
3 should be tape-recorded or
4 video-recorded if the evidence seems
01:59 5 likely to be contentious at trial. This
6 would, it is suggested, remove any room
7 for argument over whether the witness
8 had made the statement under pressure or
9 inducement and, in identification cases,
01:59 10 it would enable the initial reactions of
11 witnesses as to whether they had or had
12 not obtained a clear view of the
13 suspect, or felt they could or could not
14 identify him or her with certainty, to
01:59 15 be recorded and made available to the
16 defence."

17 And then:

18 "We see attraction in the
19 proposal but doubt whether it is
20 workable on a wide scale. It would be
21 impracticable and costly to record
22 electronically all interviews with
23 witnesses. Nor is it easy to see how
24 the police could predict which
25 interviews would be likely to prove



1 contentious later and so call for
2 electronic recording. Nor would we wish
3 any recommendation of ours to result in
4 more people being taken to the police
01:59 5 station for interviews which could as
6 readily be conducted elsewhere."

7 And it's my understanding, Mr. Kyle, that that is
8 indeed the case in England today, that there is
9 -- there's not a mandatory requirement to video
02:00 10 record or tape record interviews of witnesses?

11 A That's absolutely correct. I mean, as appears
12 from the Commission's report, the matter was
13 raised and debated as part of the evidence which
14 the Commission considered, but the Royal
02:00 15 Commission itself considered that the
16 impracticalities of tape recording interviews with
17 all witnesses so overwhelmingly outweighed any
18 perceived benefits that the Commission itself
19 didn't even make that as one of their formal
02:00 20 recommendations. And certainly, as you say, the
21 position in the United Kingdom at the moment is
22 that witness interviews are not routinely tape
23 recorded, with the only exception being for
24 victims and vulnerable witnesses in certain types
02:01 25 of offence where, usually, their interviews are



1 video recorded, but the purpose of doing that is
2 not in the context which the Commission was
3 considering here, but all about trying to
4 alleviate the rigours of subsequently appearing
02:01 5 and giving evidence at trial.

6 Q What about with suspects and confessions, what's
7 the practice as far as video taping or audio
8 taping those?

9 A There's been a requirement to tape record
02:01 10 interviews with suspects when they are being
11 interviewed under caution since -- I'm just trying
12 to remember what it is -- I know it was around the
13 mid to late 1980s, and I -- and the reason I say
14 that is because I know when I, when the Crown
02:02 15 Prosecution Service came into being in 1986 and I
16 was then branch Crown prosecutor in part of west
17 London, that one of the first tasks which I had to
18 undertake in terms of sorting out prosecution
19 arrangements with the police was to deal with the
02:02 20 process for recording interviews with suspects.
21 So, from 1986 onwards, the procedure of tape
22 recording interviews under caution to suspects was
23 embarked upon and, certainly, it was universal by,
24 I would think, 1988.

02:02 25 Q If we can go to page 340264. And this is the



1 chapter which deals with the Court of Appeal, and
2 I just want to read a couple of comments and ask
3 for you reaction, they say:

4 "The performance of the Court of Appeal
02:03 5 is crucial to the early correction of
6 miscarriages of justice, whether these
7 have resulted from the jury not having
8 some relevant evidence before it, or
9 having some false evidence called before
02:03 10 it, or coming to what has to be accepted
11 as the wrong verdict on the evidence it
12 did hear."

13 And it goes on to talk about appeals against
14 sentence. and then if we can scroll down, the
02:03 15 third paragraph, and they talk about research.
16 They say:

17 "This impression is underlined by
18 research conducted on our behalf. This
19 shows that most appeals are allowed on
02:03 20 the basis of errors at the trial,
21 usually in the judge's summing up. We
22 are all of the opinion that the Court of
23 Appeal should be readier to overturn
24 jury verdicts than it has shown itself
02:03 25 to be in the past. We accept that it



1 has no means of putting itself in the
2 place of the jury as far as seeing and
3 hearing the witnesses is concerned.
4 Nevertheless, we argue in this chapter
02:04 5 that the court should be more willing to
6 consider arguments that indicate that a
7 jury might have made a mistake. We also
8 believe that the court should be more
9 prepared, where appropriate, to admit
02:04 10 evidence that might favour the
11 defendant's case even if it was, or
12 could have been, available at the
13 trial."

14 And just your comment on that, as far as the
02:04 15 recommendation, and what may have prompted that,
16 and what happened after the recommendation?

17 A Well, clearly, the evidence which the Royal
18 Commission considered led it to conclude that the
19 Court of Appeal was not being as effective as it
02:04 20 should have been, as it should be, in redressing
21 wrongful convictions, in other words suggesting
22 that the Court of Appeal was too ready to go the
23 other way and seek to preserve the status quo even
24 in the face of either new evidence or some other
02:05 25 aspect of the trial which ought to have led the



1 Court of Appeal to quash the conviction.

2 I mean I think one needs to
3 see this in the context of the rest of what the
4 Royal Commission had to say about this, because
02:05 5 the Royal Commission was -- in saying that the
6 Court of Appeal should be readier to overturn jury
7 verdicts, I think the Commission also felt that
8 the Court of Appeal should be readier to order
9 retrials, which is sort of coming -- coming close
02:05 10 to sort of eliding two ideas, that is the safety
11 of the conviction against whether there should be
12 a retrial or not. And, in particular, Professor
13 Zander's dissenting view which is expressed at the
14 end of the Commission --

02:05 15 Q Right.

16 A -- went even further than that, and said that the
17 Court of Appeal should be prepared to order a
18 retrial even if it didn't look as if whatever had
19 gone wrong rendered the verdict unsafe, which is
02:06 20 why the Commission's recommendation was that the
21 test should be 'is the conviction' -- that they
22 should quash the conviction if it was unsafe or
23 may be unsafe.

24 So that, clearly, was the way
02:06 25 in which the Commission was, the Royal Commission



1 was thinking, that the Court of Appeal should be
2 prepared to allow appeals more often, should be
3 readier to grant retrials, and that they should do
4 that if the -- they found the conviction not only
02:06 5 to be unsafe but came to the conclusion that it
6 may be unsafe.

7 So that, I think, was the sort
8 of overall context in which the Royal Commission
9 was making its recommendation here. Now as we
02:06 10 know, in the event the recommendation of the test
11 should be 'is or may be unsafe' was not adopted by
12 the government, the legislation simply refers to
13 the fact that the conviction is unsafe, and it
14 remains the position that the Court of Appeal has
02:07 15 got to find the conviction to be unsafe and quash
16 the conviction before it goes on to consider
17 whether there should be a retrial. So I think
18 it's fair to say that, even with the revision of
19 the test which the Court of Appeal applies, it was
02:07 20 not revised in a way which met the concerns which
21 the Royal Commission was expressing.

22 And so the position remains
23 today, as it did then, that if the Court of Appeal
24 wishes to take a restrictive view of when it's
02:07 25 going to find a conviction unsafe, and is also



1 going to take a restrictive view of whether,
2 having found a conviction unsafe, there should be
3 a retrial, that remains the position. And as I --
4 yes, that does seem to remain the position today.

02:07 5 Q Yeah. If we can just go to page 66, 166, I think
6 this has the --

7 A I'm sorry, I just wanted to complete what I was
8 saying --

9 Q Yes?

02:08 10 A -- there, that -- I mean one of the problems, if
11 it can be described as a 'problem', for the Court
12 of Appeal exercising its jurisdiction -- and I
13 suspect this will be the same in any jurisdiction
14 where, particularly where guilt or innocence is
02:08 15 initially decided by a jury at a trial and the
16 appeal process is a review process rather than a
17 re-hearing or re-evaluation of evidence -- that
18 there is always going to be a concern that the
19 deference which is paid to those who try the
02:08 20 facts, that is the jury, is going to be given an
21 over-emphasis when the case comes to be reviewed
22 on appeal, which is why in so many cases, when you
23 read judgements of the Court of Appeal, you see
24 reference to "well, we haven't seen the witnesses,
02:09 25 the jury did, and they are in a far better



1 position than we are to know, to have taken a view
2 as to what the evidence was telling them", so it's
3 in deference to the finding of the finders of
4 facts which, I think, gives rise to the sort of
02:09 5 concern that the Royal Commission was alluding to
6 in this section of their report.

7 Q In other words the Court of Appeal may not have
8 been stepping in, in cases where they ought to
9 have, because they were giving too much deference
02:09 10 to the jury's conclusion?

11 A That, I think, is the risk. It's the -- it's the
12 tension which arises between trial, which is all
13 about making determinations of fact, and appeal,
14 which is all about reviewing what had happened at
02:09 15 the trial, and particularly when it comes to
16 evaluating the impact, for example, of fresh
17 evidence. In that sort of situation, in
18 particular, the Court of Appeal is going to have
19 very considerable regard, and maybe right regard,
02:10 20 to the evidence which was given at trial and the
21 view which the jury took of it, and they will be
22 at pains to ensure that they don't over-emphasize
23 the value to be given to fresh evidence which may
24 be -- fall far short of, obviously, suggesting
02:10 25 that the original verdict was wrong.



1 Q And do I understand the concern about the Court of
2 Appeal being reluctant to order new trials when
3 they quash a conviction, that some people view the
4 Court of Appeal may be too unwilling to quash a
02:10 5 conviction if they are not gonna order a new
6 trial, in other words the quashing of a conviction
7 ends the matter if there's not a new trial and
8 that that may have caused them to be less willing
9 to quash convictions?

02:11 10 A Again, I think that is one of the concerns which
11 the Royal Commission was contemplating when
12 reporting as it did.

13 Q And here in -- paragraph 27, I think, just sets
14 out the former provision where it talked about the
02:11 15 conviction being unsafe or unsatisfactory, and a
16 few other grounds, and I understand it's now been
17 amended to simply refer to being unsafe?

18 A Yes.

19 Q If we can go to page 273, please. And this is the
02:11 20 section, then, that deals with correction of
21 miscarriages of justice, and I'll just go through
22 parts of this with you, Mr. Kyle. The first
23 paragraph, the commissioners state:

24 "The last part of our terms of reference
02:11 25 requires us to consider whether changes



1 are needed in the arrangements for
2 considering and investigating
3 allegations of miscarriages of justice
4 when appeal rights have been exhausted.
02:11 5 Almost all of those who gave us evidence
6 argued that the arrangements should be
7 changed, with the responsibility for
8 reopening cases being removed from the
9 Home Secretary and transferred to a body
02:12 10 independent of The Government. We agree
11 that there is a strong case for change.
12 We therefore argue in this chapter for
13 the establishment of a new independent
14 body to consider allegations of
02:12 15 miscarriages of justice, to arrange for
16 their investigation where appropriate,
17 and where that investigation reveals
18 matters that ought to be considered
19 further by the courts, to refer the
02:12 20 cases concerned to the Court of Appeal.
21 We discuss in some detail the role of
22 such a body, its relationship to the
23 courts and to the Government, its
24 composition and how it should be held
02:12 25 accountable, the powers it may need to



1 investigate cases, and how those cases
2 should be selected."

3 And then just down to paragraph 3. A comment on,
4 I think, the existing system at the time:

02:12 5 "If, therefore, an unsuccessful
6 appellant wishes to reopen his or her
7 case in the courts, the Home Secretary
8 must be persuaded to refer it to the
9 Court of Appeal. The only alternative
02:12 10 course is to persuade the Home Secretary
11 to recommend to the sovereign that the
12 Royal Prerogative of Mercy be exercised.
13 This alternative, which is described
14 more fully in the next paragraph, is
02:13 15 most often used when the case involves a
16 summary conviction in the magistrates'
17 courts. It is very seldom exercised
18 when the option of a reference under
19 section 17 is available, because
02:13 20 successive Home Secretaries have been
21 understandably reluctant to reverse a
22 decision of the courts, preferring
23 instead to ask the courts to reconsider
24 the case as the statute envisages. The
02:13 25 use of the Royal Prerogative to override



1 convictions on indictment is limited to
2 cases where there are convincing reasons
3 for believing that a person is innocent
4 but a reference to the Court of Appeal
02:13 5 is not practicable ..."

6 So I take it, at the time, that there was a fair
7 body of evidence that was advocating for a change
8 and, number one, the creation of an independent
9 body removed from government; and two, a
02:13 10 different way of investigating and perhaps a
11 different test; is that correct?

12 A Yes.

13 Q What -- what, can you tell us, what were the
14 concerns about having an independent body being
02:14 15 the gate-keeper to the Court of Appeal rather than
16 the Home Secretary? And before you answer, if you
17 can maybe just describe for us what the Home
18 Secretary, what that office entailed, who it was;
19 was it a political position?

02:14 20 A The Home Secretary, it is a political position,
21 it's one of the senior ministerial positions
22 which, these days, is referred to as he is -- the
23 Home Secretary's full title is Secretary of State
24 For the Home Department, it's one of the main
02:14 25 organs of state, the Home Office, the Foreign



1 Office being another. So the Home Secretary is a
2 very senior minister, and the Home Office has a
3 very extensive remit around what I would just
4 describe very briefly as homeland security, so the
02:15 5 Home Office is responsible for immigration
6 matters, it is responsible for the police, it is
7 responsible for the prison service, it is
8 responsible for the privation of service and can
9 generally be categorized as the government
02:15 10 department responsible for the maintenance of law
11 and order in the United Kingdom.

12 Now in the absence of a
13 separate body to review something like -- to
14 review possible miscarriages of justice, I mean
02:15 15 inevitably that has to be a public function and it
16 has to be placed somewhere, and historically the
17 powers to re -- to address possible miscarriages
18 of justice was reposed with the Home Secretary.
19 The only other minister I can think of within our
02:16 20 constitution where that responsibility might have
21 been placed would have been with the Attorney
22 General. But I think that the concerns which were
23 considered and addressed by the Royal Commission,
24 which led to this recommendation as to why the
02:16 25 functions exercised by the Home Secretary in this



1 regard were matters for concern which ought to be
2 redressed, would apply equally to any such
3 function being the responsibility of a government
4 minister. And, as the Royal Commission themselves
02:16 5 identified, the problem arose -- the problem of
6 principle arises out of the constitutional
7 separation of judicial and executive powers and
8 that it is, in principle, undesirable for the
9 government minister responsible for the front end
02:17 10 of ensuring that the criminal justice system
11 operates, that is through the process of,
12 particularly, investigation, should then have the
13 back-end responsibility of assuring that
14 miscarriages of justice are redressed. So that
02:17 15 was the point of principle behind the Royal
16 Commission's recommendation.

17 And then having then, from
18 that point of principle, extended what they
19 regarded as the practical consequence of having
02:17 20 this power placed in the wrong hands was that,
21 because of the inherent deficiency and the
22 principle, this resulted in a lack of positive
23 activity taken by the Home Secretary and his
24 department where allegations of miscarriage of
02:18 25 justice were made, what the Royal Commission



1 described as an essentially reactive approach. In
2 other words, the Home Secretary would, if
3 persuaded to do so by an applicant that he ought
4 to refer a case to the Court of Appeal, would do
02:18 5 so, but neither he nor his department would go out
6 of their way to take active steps to investigate
7 whether or not there were reasons to be concerned
8 about the safety of any particular conviction.

9 Q And if we could just go back to the left-hand
02:18 10 side, just go down to the bottom, the footnote, I
11 think it sets out the former provision, and it's
12 section 17?

13 A Uh-huh.

14 Q And this would have been the predecessor to the
02:18 15 CCRC, the remedy section; is that correct?

16 A Yes.

17 Q And so:

18 "Where a person has been convicted on
19 indictment, or been tried on indictment
02:18 20 and found not guilty by reason of
21 insanity, or been found by a jury to be
22 under disability and to have done the
23 act or made the omission charged against
24 him, the Secretary of State may, if he
02:19 25 thinks at any time either --



1 (a) refer the whole case to the Court of
2 Appeal and that the case shall then be
3 treated for all purposes as an appeal to
4 the court by that person; or

02:19 5 (b) if he desires the assistance of the
6 court on any point arising in the case,
7 refer that point to the court for their
8 opinion..."

9 And that would have been the, again the section
02:19 10 that had been under review by the Royal
11 Commission?

12 A Yes.

13 Q Now -- and I'm not sure if this is the correct
14 constitutional term, but in the United Kingdom I
02:19 15 think it's described as a unitary government; in
16 other words, compared to Canada, there is one
17 government that's responsible for policing and
18 prosecution and the Home Secretary would be part
19 of the same level of government as the Attorney
02:19 20 General; correct?

21 A Yes.

22 Q And in contrast in Canada, the federal government
23 deals with certain matters and provincial
24 governments deal with other matters, that's not an
02:20 25 issue -- was not the case in the United Kingdom in



1 that there was only one government to put this
2 function; is that correct?

3 A Yes.

4 Q Go over to the right-hand side, paragraph 5, I'll
02:20 5 read parts to you and ask your comment, it says:

6 "5. The available figures for the
7 number of cases referred by the Home
8 Secretary to the Court of Appeal under
9 section 17 of the Criminal Appeal Act
02:20 10 1968 show that the power is not often
11 exercised. From 1981 to the end of
12 1988, 36 cases involving 48 appellants
13 were referred to the Court of Appeal as
14 a result of the doubts raised about the
02:20 15 safety of the convictions concerned.
16 This represents an average of between 4
17 and 5 cases a year. In the years
18 1989-1992, 28 cases involving 49
19 appellants have been referred, including
02:20 20 a number of cases stemming from the
21 terrorist incidents of the early 1970s
22 and inquiries into the activities of the
23 West Midlands serious crimes squad. We
24 were told by the Home Office that it
02:21 25 receives between 700 and 800 cases a



1 year which are no longer before the
2 courts and where it is claimed that
3 there has been a wrongful conviction."

4 And then:

02:21 5 "Plainly, therefore, a rigorous sifting
6 process is applied, and only a small
7 percentage of cases end in a reference
8 to the Court of Appeal under section
9 17."

02:21 10 And was that the concern you had alluded to a few
11 minutes ago then about the previous system?

12 A Yes.

13 Q And I think here they talk about four to five
14 cases a year going to the Court of Appeal, and
02:21 15 we'll look at some statistics later, but about 30
16 cases a year to the Court of Appeal; is that
17 roughly correct, from the CCRC?

18 A Yes.

19 Q I think the number I have is 287 since 1997, so
02:21 20 over a nine year period roughly 30 a year would be
21 right?

22 A That is roughly right. I mean, I've come armed
23 with the statistics up to the end of August of
24 this year and as of the 31st of August this year,
02:22 25 a total of 340 cases have been referred.



1 COMMISSIONER MacCALLUM: Excuse me a
2 minute. Mr. Kyle, I think I misread section 17,
3 if you just scroll back a page.

4 MR. HODSON: Sure.

02:22 5 COMMISSIONER MacCALLUM: I took it to be
6 dealing with appellants who were under disability
7 of some sort. It's greater than that is it?
8 A It is, sir, yes. The appellants under a
9 disability are included within the ambit of
02:22 10 matters which the Home Secretary was able to
11 refer, but the essential power of referral related
12 to people convicted on indictment.

13 COMMISSIONER MacCALLUM: Oh, so this
14 section 17 simply deals with special cases?

02:22 15 A No, it deals firstly with persons convicted on
16 indictment.

17 COMMISSIONER MacCALLUM: Yes.

18 A And it also embraces --

19 COMMISSIONER MacCALLUM: Oh, I missed the
02:22 20 "or". I see.

21 A Yes, "or" been tried and to have been found not
22 guilty by reason of insanity.

23 COMMISSIONER MacCALLUM: Thank you very
24 much, okay.

02:22 25 BY MR. HODSON:



1 Q If you can go back to paragraph 6, the report
2 says:

3 "6. There is in theory no restriction
4 on the numbers or categories of cases
02:23 5 which the Home Secretary may refer to
6 the Court of Appeal under section 17
7 since the section gives him discretion
8 to refer cases "if he thinks fit". In
9 practice, however, as Sir John May
02:23 10 observed in his second report on the
11 Maguire case, the Home Secretary and the
12 civil servants advising him operate
13 wherein strict self-imposed limits.
14 These rest both upon constitutional
02:23 15 considerations and upon the approach of
16 the Court of Appeal itself to its own
17 powers. The Home Secretary does not
18 refer cases to the Court of Appeal
19 merely to enable that court to
02:23 20 reconsider matters that it has already
21 considered. He will normally only refer
22 a conviction if there is new evidence or
23 some other consideration of substance
24 which was not before the trial court.
02:23 25 Successive Home Secretaries have adopted



1 this approach, and not only because they
2 have thought that it would be wrong for
3 Ministers to suggest to the Court of
4 Appeal that a different decision should
02:23 5 have been reached by the courts on the
6 same facts. They have also taken the
7 view that there is no purpose in their
8 referring a case where there is no real
9 possibility of the Court of Appeal
02:24 10 taking a different view than it did on
11 the original appeal..."

12 Just go to the next page. So again, that would
13 have been one of the concerns then that the
14 Commission heard about in the old system, if I
02:24 15 can call it that?

16 A Well, I mean, I think that the underlying point
17 which is being made there is, it's probably
18 correct, and it's certainly one which has found
19 its way into the basis on which the Criminal Cases
02:24 20 Review Commission works. The point that was being
21 made there was on the face of it section 17 looks
22 very wide simply by saying that the Home Secretary
23 can refer any case he thinks fit, but in practice,
24 the expression "any case he thinks fit" was
02:24 25 restricted to cases where there was something new



1 which hadn't been addressed before because there
2 was no point sending the case back to the Court of
3 Appeal unless there was something new, and as we
4 were saying a moment ago, that's exactly the
02:25 5 position which the Commission now finds itself in,
6 that -- we're not in a position to refer cases
7 back to the Court of Appeal simply for a rerun of
8 the same arguments.

9 Q And then they talk about the second effect of this
02:25 10 criterion and then they quote from Sir John May,
11 and I take it he was an individual who inquired
12 into the *Maguire* case?

13 A Yes.

14 Q That was one of the terrorist cases?

02:25 15 A Yes, the Maguire family were the family alleged to
16 have provided the explosives which were used in
17 the *Birmingham* and *Guildford* cases.

18 Q And comments and says:

19 "...there is no doubt that the criterion
02:25 20 so defined was and is a limiting one and
21 has resulted in the responsible
22 officials within the Home Office taking
23 a substantially restricted view of cases
24 to which their attention has been
02:25 25 drawn... The very nature and terms of



1 the self-imposed limits on the Home
2 Secretary's power to refer cases have
3 led the Home Office only to respond to
4 the representations which have been made
02:26 5 to it in relation to particular
6 convictions rather than to carry out its
7 own investigations into the
8 circumstances of a particular case, or
9 the evidence at trial. The
02:26 10 approach of the Home Office was
11 throughout reactive, it was never
12 thought proper for the Department to
13 become proactive".

14 Again, would that be an accurate summary of what
02:26 15 the situation was before the CCRC?

16 A Yes, I think that's absolutely right. I mean, I
17 think if I look at that and also take into account
18 what is said in the earlier paragraph, in reality
19 it is going to be difficult to demonstrate that
02:26 20 there has been a wrongful conviction if there is
21 nothing which one can say to the Court of Appeal
22 which is different to that which has already been
23 considered. I think the point which is being made
24 here is that what's described as the self-imposed
02:26 25 limits on the Home Secretary's power, in other



1 words, there must be something new, that in itself
2 is not an objectionable position to take. What I
3 think is being suggested is that because that was
4 the view the Home Office took, right or wrong, the
02:27 5 Home Secretary also took the view that -- or
6 certainly what happened in practice was that the
7 Home Office didn't busy themselves very much in
8 trying to find out whether there was anything new.
9 In other words, if the applicant was unable to
02:27 10 draw their attention to anything new, then that
11 tended to be the end of the matter, and the key,
12 it seems to me, whoever this power is exercised
13 by, it doesn't matter whether it's -- for these
14 purposes, practical purposes it doesn't matter
02:27 15 very much whether it's done by a government
16 minister or by an independent person, the key to
17 exposing wrongful convictions is having the will
18 and the resources to go out and investigate to see
19 whether there is anything wrong and not simply sit
02:28 20 back and say to the applicant, well, if you can
21 show me something new I may react to it, but if
22 you can't, I'm sorry, there's nothing I can do.
23 Q And is that something that the CCRC then, I think
24 you've told us, was a significant part of its --
02:28 25 is a significant part of its mandate, to go out



1 and identify information that may give rise to a
2 re-opening?

3 A Yes.

4 Q Scroll down to paragraph 9, it says:

02:28 5 "9. Our recommendation is based --"

6 And they talk about having an independent body:

7 "9. Our recommendation is based on the
8 proposition, adequately established in
9 our view by Sir John May's Inquiry, that
02:28 10 the role assigned to the Home Secretary
11 and his Department under the existing
12 legislation is incompatible with the
13 constitutional separation of powers as
14 between the courts and the executive.

02:28 15 The scrupulous observance of
16 constitutional principles has meant a
17 reluctance on the part of the Home
18 Office to enquire deeply enough into the
19 cases put to it and, given the
02:28 20 constitutional background, we do not
21 think that this is likely to change
22 significantly in the future.

23 10. We have concluded that it is
24 neither necessary nor desirable that the
02:29 25 Home Secretary should be directly



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1 responsible for the consideration and
2 investigation of alleged miscarriages of
3 justice as well as being responsible for
4 law and order and for the police. The
5 view that these two heavy
6 responsibilities should be divided was
7 expressed to Sir John May's Inquiry by a
8 former Home Secretary and confirmed in
9 oral evidence to us by the then Home
10 Secretary and two of his predecessors."

11 And I think that's the point you raised earlier,
12 is it, that the front end and the back end, that
13 someone other than the people responsible for
14 police and law and order, that someone else
15 should be responsible to be checking on that; is
16 that --

17 A That was the point I was making, yes. I mean, the
18 conclusions that the Royal Commission reached on
19 the evidence that they had heard are expressed in
20 this section of the report as both a matter of
21 principle and also the consequential, practical
22 problems which arise which were categorized as
23 being a reluctance, as I'm reading from paragraph
24 9, "a reluctance on the part of the Home Office to
25 enquire deeply enough into the cases put to it."



1 Now, when the Commission --
2 when the Criminal Case Review Commission started
3 in 1997, on the 1st of April of that date, it was
4 almost like a removal lorrie arriving outside the
02:30 5 Commission's offices in Birmingham, transferring
6 the 280 cases from the Home Office which still
7 remained to be looked at, and from my own
8 experience of having dealt with a number of those
9 cases which were transferred by the Home Office,
02:30 10 many of which went back very many years, and, I
11 mean, I've referred both in my résumé and in the
12 article to the *Derek Bentley* case, for example,
13 which was a conviction going back into the 1950s,
14 but from the experience which I had of looking at
02:31 15 those files from the Home Office, I would say that
16 the conclusion which was expressed by the Royal
17 Commission about the reluctance to enquire deeply
18 and proactively into cases is well borne out.

19 As to their suggestion that
02:31 20 they don't think it's likely to change
21 significantly in the future, well, whether they
22 are right or wrong about that doesn't particularly
23 matter because the consequence of this report was
24 the power was taken away from the Home Office in
02:31 25 any event.



1 Q Again, if we can scroll down, it then talks about
2 the creation of the authority and the role -- if
3 we can just go to the top of the next page -- and
4 they talk about police investigations, and I'll
02:31 5 read this and ask you a couple of questions, it
6 says:

7 "Where the Authority instructed the
8 police to conduct investigations, it
9 would be responsible for supervising the
02:32 10 investigation and would have the power
11 to require the police to follow up those
12 lines of inquiry that seemed to it
13 necessary for the thorough reexamination
14 of the case. Where the result of the
02:32 15 investigation indicated that there were
16 reasons for supposing that a miscarriage
17 of justice might have occurred, the
18 authority would refer the case to the
19 Court of Appeal, which would consider it
02:32 20 as though it were an appeal referred to
21 by the Home Secretary."

22 And then again, can you comment on that, about --
23 and we'll get into the details of the
24 legislation, but was that an issue about how,
02:32 25 whoever is going to investigate potential



1 wrongful convictions, two things, their ability
2 to access the police to assist in the
3 investigation and, secondly, what to do when the
4 police may have been the ones involved in the
02:32 5 original investigation and may in fact be one of
6 the contributors to a miscarriage of justice?

7 A Yes. This section of the Royal Commission, of the
8 Royal Commission's report was, of course,
9 expressing a sort of skeleton or framework as they
02:33 10 saw it as to how the independent authority which
11 they were recommending might work and they I
12 think, in my reading of what they had to say,
13 suggested that they anticipated that generally
14 speaking where the Commission which they were
02:33 15 recommending should be established, or where the
16 authority decided to investigate a case, that
17 should be undertaken by the police under the
18 supervision or direction of the authority, because
19 elsewhere in this particular part of the Royal
02:33 20 Commission report there is reference to how the
21 authority should go about deciding whether to
22 investigate a case or not.

23 As it happens, and perhaps
24 this is something which we will come to in more
02:34 25 detail, the way in which the Commission is



1 resourced in terms of people to do the job and the
2 way in which the Commission has decided how it
3 will go about investigating possible miscarriages
4 of justice, by far the greatest amount of
02:34 5 investigation is done by the Commission's own
6 staff and assisted, as indeed the Royal Commission
7 anticipated, by two retired former senior police
8 detectives.

9 The great bulk of the
02:34 10 investigation work which is done by the Commission
11 is done by Commission staff and if we require some
12 form of expert assistance, whether it be forensic
13 science assistance or whatever, we will Commission
14 and obtain that extra evidence ourselves. The
02:35 15 Commission does have the power to require the
16 appointment of an investigating officer if we
17 think that we need that sort of assistance in
18 conducting the inquiry and we have identified
19 criteria which we will apply to the question do we
02:35 20 need an external investigating officer. In broad
21 terms, that's going to arise if the level of
22 investigation is so complex and extensive that our
23 resources simply can't deal with it or if there
24 are investigations which are required which will
02:35 25 need the use of police powers of investigation



1 which we don't have.

2 Q Okay. And perhaps when we get to the legislation
3 I can draw -- I think there's a provision in the
4 legislation that deals with your ability to go to
02:35 5 various police forces?

6 A Absolutely, yes.

7 Q Okay.

8 A And that is certainly in the legislation and that
9 is, that does follow the recommendation which the
02:36 10 Royal Commission were making, but over the 10
11 years that the Commission has been operating we've
12 only required the appointment of an investigating
13 officer in 41 cases which means that we've, which
14 indicates or illustrates how the Commission has
02:36 15 actually gone about its work which, in some
16 respects, may be different to that which was
17 envisaged by the Royal Commission when they were
18 setting out this framework.

19 Q If we can scroll down. Actually, to the next
02:36 20 page, please, the comment here where they
21 recommend that the Commission's decision should
22 not be subject to appeal or judicial review, but
23 that an applicant can apply more than once. It's
24 my understanding in the legislation that there is
02:36 25 the right to seek judicial review of a Commission



1 decision; is that correct?

2 A There is indeed. That recommendation was not
3 acted on. We are susceptible to judicial review
4 and also the applicant is free to apply as often
02:37 5 as they like and some of them do.

6 Q Go down to paragraph 20, *Composition and*
7 *Accountability of the Authority*. The Commission
8 says:

9 "The Authority should consist of several
02:37 10 members, the precise numbers depending
11 on its work load at any particular time.
12 Not all need be full-time. We do not
13 favour a single person, however well
14 qualified and eminent, filling the role
02:37 15 on the model of the ombudsman, since we
16 believe that the consideration of
17 possible miscarriages of justice will
18 benefit from bringing to bear several
19 different points of view. Both lawyers
02:37 20 and lay persons should be represented.
21 We recommend that the Chairman should be
22 chosen for his or her personal qualities
23 rather than for any particular
24 qualifications or background that he or
02:37 25 she may have. We recommend, however,



1 given the importance of the Authority
2 being seen to be independent of the
3 courts in the performance of its
4 functions, that the Chairman should not
02:37 5 be a serving member of the judiciary."

6 And we'll deal with the details of the make-up of
7 the Commission, but it's my understanding that --
8 what, is there 11 Commission members?

9 A I think there are more, I think there are probably
02:38 10 about 14 or 15 at the moment.

11 Q And that they are in addition to lawyers, former
12 police officers; is that correct?

13 A Yes.

14 Q And lay people?

02:38 15 A Yes.

16 Q Can you tell us what, generally what in your
17 experience did lay people bring, sort of
18 non-lawyers, non-police officers, what did they
19 bring to the Commission in your experience?

02:38 20 A Well, they bring a sort of breadth of view and
21 vision as to what you are looking at. I mean,
22 necessarily of course there is a heavy layer of
23 legal input into all of the work which the
24 Commission does, but when you are -- either when
02:38 25 you are looking at the case at the outset and



1 trying to decide where things may have gone wrong,
2 you know, what are the things which look wrong
3 about this case, or at the other end in
4 decision-making, you know, what is the impact of
02:39 5 the fresh evidence that we've discovered, I found,
6 and I think we all found, that the sort of
7 non-restricted legal view of these sorts of issues
8 were, benefited very greatly from having people
9 who were looking at the case not through lawyers'
02:39 10 eyes, but through sensible people of the world
11 eyes.

12 Q And as far as lawyers, you mentioned earlier
13 although initially it was lawyers with a
14 prosecutorial background, that there have been
02:39 15 lawyers with a defence background on the
16 Commission from time to time?

17 A Oh, yes. I mean, the first make-up of the
18 Commission when I was appointed, there were two
19 prosecutors, but there were also -- well, there
02:39 20 was a long-standing practicing member of the
21 English bar who had defence experience and indeed
22 one of the initial members of the Commission who
23 was appointed with me and whose appointment came
24 to an end at the same time as me was Professor
02:40 25 Leonard Lee who had been both an academic, having



1 qualified in Alberta, came across to England, he
2 was a professor of criminal law at London School
3 of Economics, but he had also been a practicing
4 barrister, so the concerns expressed was there are
02:40 5 people whose names are on everybody's lips as
6 being champions of the cause of miscarriage of
7 justice from the bar and solicitors, it's amazing
8 that none of them have been appointed. I mean, I
9 don't even know if they applied, but that was the
02:40 10 concern, but there was a balance of legal
11 experience on the Commission and there remains so
12 today.

13 MR. HODSON: This is probably an
14 appropriate time to break for the afternoon.

02:41 15 *(Adjourned at 2:41 p.m.)*

16 *(Reconvened at 3:02 p.m.)*

17 BY MR. HODSON:

18 Q Go back to 340375, please, I want to call up
19 paragraph 25, it says:

03:02 20 "In our view the Authority should be
21 able to discuss cases direct with
22 applicants if it thinks that this would
23 help it to decide whether a case called
24 for further investigation. It has
03:02 25 struck us forcibly that many people who



1 believe that they are the victims of
2 miscarriage of justice feel that they
3 have a right to be heard and are
4 frustrated by the fact that they have
03:02 5 been unable to put their case in person
6 to the Home Office officials who are
7 considering it. We understand the
8 resource constraints that have prevented
9 the Home Office from interviewing
03:03 10 applicants, and we accept that this
11 could not be done in every case. We
12 nevertheless recommend that the
13 authority be adequately resourced to
14 conduct interviews with prisoners where
03:03 15 it believes that this might help. It is
16 not always possible for people who have
17 suffered a miscarriage of justice and
18 then been sentenced to a long term of
19 imprisonment to set out their case
03:03 20 clearly and cogently in writing and an
21 interview may sometimes be the best way
22 of convincing the Authority that the
23 case is one that is worth
24 investigation."

03:03 25 I'm wondering if you can just comment on, in your



1 experience with the CCRC, what -- did you
2 interview the convicted person, was that part of
3 the work of the review?

4 A Well, it might be. I mean, there's quite a lot in
03:03 5 this paragraph which reflects the thinking of the
6 Commission at the time, of the Royal Commission at
7 the time that it was making its report which in a
8 sense in some respects has been overtaken by the
9 actual event of the Commission and the way about
03:04 10 -- the CCRC that is -- in the way it goes about
11 its work and there are some little clues in this
12 paragraph, if I can put it that way, which I think
13 are quite significant.

14 The first clue, of course, is
03:04 15 the Commission understanding resource constraints,
16 but recommending that the authority be adequately
17 resourced to conduct interviews with prisoners.
18 Well, the matter of resources of a body which is
19 publicly funded is always going to be a matter of
03:04 20 interest to the body in the extent to which it is
21 resourced.

22 The other key is the use of
23 the phrase if it thinks that this would help to
24 decide whether a case called for further
03:04 25 investigation. As we were mentioning before the



1 break, the Royal Commission clearly thought that
2 one of the major questions which an independent
3 authority would have to decide on receipt of an
4 application was whether it merited further
03:05 5 investigation. The way the CCRC actually
6 approaches its work is that any application which
7 comes to it will be investigated. The only
8 question which the CCRC have to decide is how
9 extensive that investigation should be and what
03:05 10 lines of inquiry should be pursued, so if I can
11 put that another way, it is not the situation, so
12 far as the CCRC is concerned in practice, that any
13 application is looked at and an immediate view
14 taken this case doesn't require further
03:05 15 investigation. All cases are investigated. As a
16 minimum, the Commission will look at all the
17 background documentation which tells the
18 Commission how matters have got to where they are.
19 It may be that having done that the Commission
03:06 20 determines that there are no issues which can
21 usefully be investigated, but before that stage is
22 reached, there certainly will have been some form
23 of dialogue between the Commission and the
24 applicant.

03:06 25 Now, that may not necessarily



1 involve an interview and the position the CCRC
2 adopts in relation to interviewing applicants is
3 that we will do it if, as indeed echoing the words
4 of the Royal Commission, we think that an
03:06 5 interview of the applicant would assist in the
6 Commission's understanding of the issues and its
7 decision around what matters should be
8 investigated, so we don't routinely interview
9 applicants, the Commission simply doesn't have the
03:06 10 resources to do that in every single case.

11 However desirable it might be to allow an
12 applicant the opportunity to put his case across
13 the desk face to face with a member of Commission
14 staff, we simply couldn't do that given the number
03:07 15 of applications we have to deal with, but we will
16 interview applicants if we think that that is a
17 necessary step for us to take in order to
18 understand the case and the issues which are
19 involved, but in many cases it isn't necessary and
03:07 20 there's certainly no restriction on an applicant's
21 ability either to write to us or telephone us.

22 Q Do you need to get from the applicant his or her
23 assertion that they did not commit the crime?

24 A That's not necessary because the -- the
03:07 25 applicant's assertion that he did or did not



1 commit the crime is not an essential precondition
2 to us considering whether the conviction has been
3 obtained wrongly or rightfully.

4 Q And so that if there was a conviction that was
03:07 5 obtained improperly, and therefore unsafe, and
6 there may be some suggestion that the applicant
7 committed the crime, is that still -- tell us how
8 you deal with those situations, or do they arise?

9 A Well, the fundamental question which the
03:08 10 Commission has to look into is whether there is
11 reason to think that the conviction may be unsafe
12 and, as we were talking earlier, the circumstances
13 in which a conviction might be unsafe are far
14 wider than the simple question of whether the
03:08 15 applicant is factually innocent or not. So, if
16 you turn that position 'round, whether or not the
17 applicant says he's factually innocent or whether
18 or not we believe he may be factually innocent or
19 not is not actually a hugely relevant
03:08 20 consideration to the determination of whether the
21 conviction is safe or not.

22 Q Would that be any part of the Commission's
23 investigation, then, to try and determine whether
24 the applicant is -- did commit the crime?

03:09 25 A No. The focus of the Commission's investigation



1 is going to be around the question of whether the
2 basis on which the applicant was convicted is safe
3 or not. If in the course of looking at, focusing
4 on that question, evidence came to light which
03:09 5 suggested that the applicant was in fact factually
6 innocent, that may well make the evaluation of the
7 real possibility test easier but, if not, it's not
8 an essential matter.

9 Q If you can go to the next page, in paragraph 27,
03:09 10 they talk about self-incrimination in an
11 interview. What is the Commission's practice as
12 far as requiring the applicant to waive his or her
13 solicitor/client privilege with their defence
14 counsel?

03:09 15 A Umm, well, we consider that a full investigation
16 of a case is likely to include knowing what
17 material was available to defence lawyers and what
18 consideration was given by defence lawyers to the
19 issues in the case, what prompted decisions which
03:10 20 were taken by the defence about the conduct of the
21 case, and therefore we routinely invite applicants
22 to waive the privilege which would otherwise
23 attach to communications they'd had with their
24 legal advisors.

03:10 25 Q And are there cases where some applicants will not



1 waive the privilege?

2 A I'm not aware of any.

3 Q And is that of benefit to the Commission then,
4 when privilege has been waived, to be able to talk
03:10 5 with defence, the defence counsel who ran the
6 trial, to find out what had been discussed between
7 the applicant and his or her counsel?

8 A Certainly, and discussion with legal advisors who
9 represented applicants at trial is a significant
03:11 10 part of the Commission's investigative activities.

11 Q I'm just curious, if it turned out that the
12 applicant told his or her lawyer that he had
13 committed the crime, does that stop the matter for
14 your Commission?

03:11 15 A No, because what -- I mean I think you'd have to
16 go back a step in that, in that eventuality,
17 because of the rules relating to the
18 representation of clients who are facing trial for
19 criminal charges. The general position is going
03:11 20 to be that, if a client tells his lawyers that
21 he's committed the offence, then it is very
22 difficult for the lawyer to continue to represent
23 that client on the basis that he contests the
24 charges without being in breach of the rules of
03:11 25 etiquette relating to the -- their respective



1 legal professions. So I think, in practical
2 terms, it is unlikely that we would be faced with
3 a situation where an applicant had said to his
4 legal advisors "I am guilty of this offence" and
03:12 5 yet those advisors carried on representing him at
6 trial on a non-guilty -- on a not-guilty plea.

7 Q Paragraph 28 talks about:

8 "The Authority should be empowered not
9 only to direct the investigation in the
03:12 10 sense that it would decide which lines
11 of inquiry needed to be pursued but
12 also, if it felt that the case warranted
13 it, to order that the investigation be
14 carried out by a police force different
03:12 15 than the one that investigated the
16 original offence."

17 And I think you told us that that is a provision
18 that is in the legislation but not, one that the
19 Commission does not refer to very much; is that
03:12 20 correct?

21 A The power is certainly there both to require the
22 appointment of an investigating officer, which is
23 usually a senior police officer -- it doesn't have
24 to be but it usually is -- and we also have the
03:13 25 power to require the appointment of an officer



1 from a force different than that which conducted
2 the original investigation.

3 Q And if we could scroll down to the bottom, under
4 paragraph 30, Disclosure the Commission recommends
03:13 5 that:

6 "The Authority should be responsible for
7 ensuring that both the applicant and the
8 prosecution are kept properly informed
9 during the course of the investigation,
03:13 10 whether or not issues of disclosure
11 arise."

12 And:

13 "Before the drafting of the terms of
14 reference of a case to the Court of
03:13 15 Appeal, the parties might be asked
16 whether they wish to make any
17 representations."

18 Can you tell us what, generally, is the
19 relationship, then, between the Commission, or
03:13 20 whoever is working on behalf of the Commission,
21 and the applicant's legal counsel, if they have
22 legal counsel?

23 A I think that, as a general observation about this
24 particular paragraph -- and, again, it represents
03:13 25 a view which the Royal Commission was expressing



1 when setting out this framework or skeleton idea
2 as to how the Commission operates -- that actually
3 very little of the views being expressed by the
4 Royal Commission in that paragraph have actually
03:14 5 been adopted by the Commission in establishing its
6 own working procedures and processes.

7 The position which the
8 Commission, the CCRC, adopts in relation to
9 applicants and their representatives is that we
03:14 10 will, and do, routinely keep them informed of how
11 the investigation is progressing. We will
12 generally tell them what lines of investigation we
13 are pursuing and that sort of dialogue, of course,
14 will feed into the development of the
03:14 15 investigation plan which I was talking about
16 earlier, and so the applicant and their
17 representatives will be kept informed of progress,
18 and they will generally have the opportunity,
19 particularly in the early stages of the
03:15 20 Commission's review, have the opportunity to feed
21 into the identification of issues and the lines of
22 inquiry.

23 What we don't do routinely is
24 make disclosure of information and evidence as we
03:15 25 find it. We will do that if we think it



1 necessary, rather in the same way that we will
2 interview applicants if we think it's necessary.
3 We will disclose information and evidence which we
4 obtain during the course of the investigation if
03:15 5 we want the applicant, or more particularly their
6 legal representatives, to comment on an -- on that
7 evidence, because their comments, we think, will
8 assist the further review of the case. But only
9 in those circumstances would we make disclosure of
03:16 10 information as the investigation is going on. The
11 general position is that we will make the
12 necessary disclosure of information at the time
13 that the investigation comes to an end and we are
14 ready to make a decision on the case.

03:16 15 Now the suggestion of the
16 Royal Commission in paragraph 30 is that:

17 "Before the drafting of the terms of
18 reference of the case to the Court of
19 Appeal, the parties ...",
03:16 20 and by 'parties' that includes both the
21 prosecution and the applicant and their
22 representatives:

23 "... might be asked whether they wish to
24 make any representations."

03:16 25 We don't do that. If we make a decision to refer



1 a case to the Court of Appeal, we make that
2 decision, and articulate the reasons for doing
3 it. If we are thinking that this is a case --
4 and this is so in the majority of the cases that
03:17 5 the Commission deals with -- that it's not a case
6 where there is a basis for referring the case to
7 the Court of Appeal, then we are required to
8 indicate that as a provisional conclusion, and
9 invite representatives -- invite further
03:17 10 representations from the applicant which we can
11 then take into account before making the final
12 decision not to refer a case. And there is the
13 further requirement that, at the point of
14 notifying the applicant of a provisional
03:17 15 conclusion that there are no grounds for
16 referral, we are required to disclose all the
17 evidence and information that we have relied on
18 for the purpose of reaching that provisional
19 conclusion.

03:17 20 Q And if we just go to the top right of this page, I
21 think this talks about the recommendations on
22 disclosure and talks about the police reports:
23 "... since it contains evaluation and
24 interpretation of the material and is
03:18 25 not evidence ...",



1 etcetera:

2 "... would not be sent ... to the

3 parties ...",

4 and then about public interest immunity.

03:18 5 A Uh-huh.

6 Q Can you tell us generally, in practice, if the
7 Commission were to dismiss an application, in
8 other words decide that it would not be going to
9 the Court of Appeal, I take it you would provide
03:18 10 written reasons to the applicant; --

11 A Yes.

12 Q -- is that correct?

13 A There is a requirement in the Act that we should
14 do so.

03:18 15 Q And can you tell us, to what extent do you provide
16 your working papers, your investigation, the
17 information you gathered; what is given to the
18 applicant where you reject the application by way
19 of disclosure after the decision?

03:18 20 A Well generally speaking, as I've -- perhaps I
21 didn't explain the position very well a moment
22 ago -- by the time we make the final decision not
23 to refer, the likelihood is that the applicant
24 would already have had all the information on
03:18 25 which we have relied, because we have the



1 requirement to make that information available to
2 the applicant before we make the final decision so
3 that he is able to consider it for the purpose of
4 making further representations to us in response
03:19 5 to a provisional conclusion. But the general
6 position is that, unless there are reasons
7 associated with public interest immunity why it
8 would be -- we should not disclose, we feel we
9 will disclose it all.

03:19 10 I might just say that, in
11 response to this, that, again, this paragraph
12 appears to be predicated on the basis that most of
13 our investigations are going to be done by the
14 police, and there will be some accompanying
03:19 15 report, and they are suggesting the police report
16 should not be sent to anyone, and it's
17 well-established that such reports attract public
18 interest immunity. That may have been the case in
19 1993, it certainly isn't now, and in those
03:19 20 instances where we do in -- request the
21 appointment of an outside investigating officer,
22 we make it quite clear to them that the report
23 they write will be disclosed to the applicant, and
24 if there are matters which are of sufficient
03:20 25 sensitivity as to require protection from



1 disclosure they should not appear in the report
2 but should appear in some confidential annex.

3 Q So this public interest immunity would be what;
4 confidential names, sources, things of that
03:20 5 nature?

6 A Yes.

7 Q As far as the Commission and its employees, their
8 discussions between them, memos between them,
9 advice, legal or otherwise, passed amongst
03:20 10 Commission members; would that be shared with an
11 applicant?

12 A No. I don't -- I mean I answer that simply, and
13 that is the answer to the question, but the
14 requirement which is placed on the Commission as a
03:20 15 matter of law emerges from a case which actually
16 arose in relation to the exercise of the Home
17 Secretary's powers. It's a case *ex parte Hickey*
18 (ph) and others, which sets out the requirements
19 for disclosure of information in these
03:21 20 circumstances. But the view which the Commission
21 takes is that the information to be disclosed is
22 the evidence -- is that information and evidence
23 which supports and explains the conclusion which
24 is being expressed through the Commission's
03:21 25 statements of reasons and we would not regard



1 internal discussion, either minutes of meetings or
2 internal memoranda, as being information or
3 evidence which supported the decision. It's
4 material which, if you like, goes -- which
03:21 5 supports the process by which the decision was
6 made rather than the decision itself.

7 Q Okay. And we'll maybe come back to that when we
8 look at some statutory provisions. If we could go
9 to 339707, and this is the *Criminal Appeal Act*
03:22 10 1995 that created the Criminal Cases Review
11 Commission, is that correct?

12 A Yes.

13 Q Go to page 721. I'll just walk through some of
14 these provisions and have you elaborate. I think
03:22 15 the Commission is created under section 8, and it
16 states it:

17 "... shall not be regarded as the
18 servant or agent of the Crown ...",
19 and can you comment on that? What's the purpose
03:22 20 of being independent of the Crown?

21 A This is part, I think, of the underlying statutory
22 framework for the Commission which serves to
23 demonstrate and underpin its independence from
24 either the government or, in this case, from the
03:23 25 government.



1 Q Again, if we can scroll down, I think no fewer
2 than 11 members. And so that I am clear here, the
3 Commission would have Commission members
4 appointed, and I think by Her Majesty on the
03:23 5 recommendation of the Prime Minister; correct?

6 A Yes.

7 Q And then below the commissioners would be staff
8 persons, is that correct, case managers and other
9 staff people?

03:23 10 A Umm, I'm sorry, I didn't quite follow that?

11 Q Sorry, that the Commission itself is made up of at
12 least 11 members --

13 A Yes.

14 Q -- but the Commission, in addition to Commission
03:23 15 members, would employ a staff?

16 A Oh yes, yes, yeah.

17 Q And that it would be staff that would be involved
18 in reviewing files and investigating and the
19 Commission, my understanding, would supervise that
03:23 20 and be responsible for making decisions?

21 A The Commission, as you rightly say, consists of
22 Commission members, of whom there must be at least
23 11, and those within the terms of the statute.
24 They are the people who make decisions whether or
03:24 25 not to refer cases or not. The investigation of



1 cases is done by a body of Commission staff called
2 case review managers, and as with any other
3 organization, of course, the Commission also
4 employs people to look after the general
03:24 5 administration of the organization. But the
6 essential work of investigating and reviewing and
7 deciding on the case work is done by the
8 Commission members and the case review managers.

9 Q And can you tell us a bit about case review
03:24 10 managers, they would be employed by the
11 Commission, and what type of people would normally
12 fill that role?

13 A Well the essential requirement for a case review
14 manager is that they should have very
03:24 15 well-developed analytical skills and the ability
16 to assimilate large amounts of information, make
17 judgements around the information that they are
18 given, identify relevant issues, and be able to
19 identify appropriate lines of inquiry. So,
03:25 20 essentially, the sort of people that you are
21 looking for are those that have that level of
22 analytical and judgemental skills around that
23 aspect of the Commission's work, so --

24 Q Are they normally lawyers?

03:25 25 A A lot of them are, but they don't have to be



1 lawyers. On any given recruitment round many of
2 the applications are from people who are legally
3 qualified, but the profile of the case review
4 managers is not limited to lawyers, there are a
03:25 5 number of former police officers and people who
6 come from other investigative backgrounds, such as
7 trading standards or immigration department, and
8 also former probation officers. So there is quite
9 a wide mix of background and experience.

03:26 10 Q And I see, in subsection (6), there's a
11 requirement that two-thirds of the members be
12 persons to have knowledge and experience in the
13 criminal justice system?

14 A Uh-huh.

03:26 15 Q And that would be police, lawyers, for example?

16 A Yes.

17 Q If we can scroll down, I --

18 A That is quite a wide -- a wide concept of
19 knowledge or experience of any aspect of the
03:26 20 criminal justice system. So, for example, one of
21 the Commission members is a consultant forensic
22 psychiatrist who counts as having experience of an
23 aspect of the criminal justice system.

24 Q Okay. If we could scroll down to section 9, and
03:26 25 it's my understanding that this is the power



1 section, if I can call it that, that allows the
2 Commission to send a case to the Court of Appeal;
3 is that correct?

4 A Yes. And the next four sections, 9, 10, 11, and
03:27 5 12, deal with the essential powers of the
6 Commission, section 9 deals with people convicted
7 on indictment in England and Wales, --

8 Q The next page.

9 A -- section 10, I think, is people convicted on
03:27 10 indictment in Northern Ireland.

11 Q All right. If we can actually just scroll up to
12 the top, subsection (2) says that:

13 "A reference under subsection (1) ...
14 shall be treated for all purposes as an
03:27 15 appeal by the person under section 1 of
16 the 1968 Act against the conviction."

17 A Yes.

18 Q And do I take it, from that, that what you are
19 really doing is allowing the applicant to go back
03:27 20 before the Court of Appeal as if he had just been
21 convicted?

22 A Yeah, that's right, and that subsection there is
23 essentially the reinforcement of the Commission's
24 gate-keeping role. We can send them through the
03:27 25 gate, once we've sent them through the gate, then



1 they are back before the Court of Appeal.

2 **Q** And it's my understanding that, once you let them
3 through the gate, they are on their own, so to
4 speak, they have their own counsel, and that the
03:28 5 Commission does not play any part in arguing the
6 appeal on behalf of the applicant?

7 **A** That is correct.

8 **Q** And if we can go to the next page, sorry, to the
9 next page, and the next page, 725, sorry. I think
03:28 10 section 13 would set out the test, is that
11 correct, --

12 **A** Yes.

13 **Q** -- the conditions? And this is where we see the
14 Commission cannot make a reference unless:

03:28 15 "... there is a real possibility that
16 the conviction, verdict, finding or
17 sentence would not be upheld were the
18 reference to be made,"?

19 **A** Yes.

03:28 20 **Q** I maybe have double negatives there, but in any --
21 that's the test, there is a real possibility that
22 they will succeed in the Court of Appeal; correct?

23 **A** Yes.

24 **Q** And then, here, the limits are the Commission must
03:29 25 consider:



1 "in the case of a conviction ... because
2 of an argument, or evidence, not raised
3 in the proceedings which led to it or
4 ... any appeal ...",

03:29 5 and that would be the requirement for it to be
6 new; is that correct?

7 A Yes.

8 Q And so can you give us some examples of that?

9 What is argument or evidence not raised in the
03:29 10 proceedings, I mean how definitive is that line
11 drawn, and can you give us some examples where
12 something that at first glance may appear not to
13 be new was made into something new?

14 A Well the concept of argument or evidence not being
03:29 15 raised in the proceedings which led to it, I mean
16 in plain English that simply means it hasn't been
17 raised before, either at trial or on appeal. But,
18 as we were talking before the break, we can't --
19 leaving aside the matter of exceptional
03:30 20 circumstances which is referred to in subsection 2
21 generally -- but the essentially position is that
22 we can't find a real possibility simply based on a
23 rehashing or re-cooking of arguments or evidence
24 which have already been addressed at trial or on
03:30 25 the Court of Appeal -- or in the Court of Appeal.



1 But, usually, the question is not so much have we
2 managed to identify something new -- if we haven't
3 then that's likely to be the end of it -- but if
4 we do find something new the essential question is
03:30 5 going to be, in deciding whether the real
6 possibility test is met, whether that new evidence
7 or new argument has sufficient weight or impact to
8 provide the basis for a serious challenge to the
9 safety of the conviction.

03:30 10 Q

11 And what are some of the common examples where
12 cases that are referred to the Court of Appeal,
13 where you do find something that is because of an
14 argument or evidence not raised in the proceedings
but -- previous?

03:31 15 A

16 Well the sort of situation where new evidence
17 arises, again, I mean I -- within the 340 cases
18 which we, which the Commission has referred to the
19 Court of Appeal, it's probably very difficult to
03:31 20 say that there is any particular type or category
21 of evidence, but it -- it may for example, in some
22 cases, be new forensic evidence which hadn't been
found before.

23 One of the aspects of the
24 Commission's work, particularly when dealing with
03:31 25 cases which go back sort of beyond 10 or 15 years,



1 is the huge almost sort of daily developments in
2 DNA techniques and the ability to have material,
3 analysed by DNA experts is now considerably
4 greater than it was 10 or 15 years ago, and
03:32 5 indeed, going back to the time before DNA evidence
6 was -- existed at all. So developments in
7 forensic science is going to be one possible
8 source of new evidence.

9 But otherwise, I mean, new
03:32 10 evidence can come from any source. It may be
11 witnesses who simply weren't known about at the
12 time, they come out of the woodwork in the course
13 of our investigation, or they may be drawn to our
14 attention.

03:32 15 Q What about -- sorry -- what about recanting
16 witnesses, witnesses who gave incriminating
17 evidence at trial, and then later provide a
18 different version or recant their evidence?

19 A Well there are two types of situation where that
03:33 20 can arise. The first is, as you've asked in
21 relation to the question, is the recounting
22 witness. The other situation which is quite often
23 encountered is a situation where two people are
24 convicted of an offence and, after they have both
03:33 25 been convicted, one of them comes forward and says



1 "I'd like, I'd now like to say that I am guilty,
2 but in actual fact my co-defendant wasn't there at
3 all, he's innocent". So you've got the pos -- the
4 situation with the recanting witness and also the
03:33 5 situation with the co-accused who seeks to
6 exonerate, after conviction, his partner in crime.

7 Now the situation so far as
8 the Court of Appeal is concerned -- and this is
9 the reality of the situation -- is that the Court
03:33 10 of Appeal is understandably cynical about the
11 recanting witness and, therefore, experience would
12 lead the Commission to think that simply having a
13 statement from a witness who says "I'd now like to
14 say that I gave untrue evidence at trial, I now
03:34 15 wish to say that my -- that the situation is
16 different", without more, the Commission would be
17 unlikely to regard that as being a reason for
18 sending the case back to the Court of Appeal. So
19 the focus of the Commission's investigation in
03:34 20 that situation would be around endeavouring to
21 find some sort of independent confirmation as to
22 the reliability and truth of the recanting
23 evidence.

24 Q And what is your understanding as to why your
03:34 25 Court of Appeal is cynical about recantations?



1 A I think that the underlying reason for the
2 cynicism is that there may be all sorts of
3 motivations or pressures on witnesses to recant
4 which has got nothing to do with the truth, or
03:35 5 otherwise, of what they are saying.

6 Q What about the time factor involved between the
7 original trial evidence and the recantation; is
8 that a factor if it's a year later, 10 years
9 later, 20 years later, as far as when the
03:35 10 recantation comes?

11 A Well I think that the lapse of time between the
12 giving of the evidence and the recantation is
13 going to be a significant consideration for
14 investigation because I think, in terms of
03:35 15 investigating what the position actually is and
16 whether the recantation, what is now being said is
17 the truth as opposed to what was being told, being
18 said at trial, is going to depend on what factors
19 you can identify which might have influenced the
03:35 20 change of heart, and over a considerable period of
21 time. I mean if matters have lain dormant for 15
22 years, then all of a sudden the witness comes
23 forward and says "oh, I'd now like to say that I
24 didn't tell the truth at trial ", you'd obviously,
03:36 25 as an investigator of that matter, be very



1 interested to know how it comes about that, after
2 that length of time, there is this sudden change
3 of heart.

4 Q And again, in your experience, does the Commission
03:36 5 take many cases, or send many cases to the Court
6 of Appeal that are based on primarily a witness
7 recanting his or her trial evidence?

8 A I don't believe there have been more than a
9 handful of such cases, simply because if the
03:36 10 starting point is going to be that the simple fact
11 of recantation is unlikely to persuade the Court
12 of Appeal to have concerns about the safety of the
13 conviction and therefore it only -- the Commission
14 is likely to find that the real possibilities test
03:37 15 is met only in circumstances where it is possible
16 to identify some form of independent information
17 on which an evaluation of the recantation is a
18 genuine one can be found.

19 Q Can you comment on this area, that in identifying
03:37 20 some new information, does that provide you with
21 the basis to look back at the balance of the
22 conviction; in other words, that if there's a new
23 piece of information that gets you, so to speak,
24 in the door into looking at the conviction and you
03:37 25 then find other matters that were perhaps fully



1 argued before the court or before the jury that
2 give you some unease, how do you deal with that?

3 A I think that the point behind your question is a
4 perfectly valid one, that yes, the Commission has
03:38 5 to be able to articulate something new, but in
6 articulating the significance and weight which
7 might be given to that new evidence or argument,
8 the Commission may well, in the course of its
9 statement of reasons, refer to an aspect of the
03:38 10 case which has been addressed previously and say
11 that whilst there is nothing essentially new about
12 that aspect, nonetheless the court should actually
13 look again at that particular aspect of the case
14 and re-evaluate it in the light of the new
03:38 15 evidence, and I think a very good example where
16 that has happened is in a case involving Sally
17 Clark which the Commission referred to the Court
18 of Appeal a couple of years ago.

19 Sally Clark had been convicted
03:39 20 of murdering two of her children and initially
21 the, it looked as if the children had died
22 naturally of cot death, there was no apparent
23 cause of death which could be identified on
24 postmortem examination to explain why they had
03:39 25 died, but as a result of the ensuing



1 investigations, the view was taken that this was
2 not two cases of cot death, but cases of
3 deliberate murder by the children's mother and she
4 was prosecuted and convicted.

03:39 5 Part of the evidence at trial
6 came from a consultant pediatrician who gave
7 evidence to the effect that the chances of two
8 children in the same family dying naturally of cot
9 death was in the order of 76 million to one and he
03:40 10 further illustrated that by reference to -- I
11 can't remember the precise illustration he gave,
12 but it was by reference to sort of winning the
13 grand national on an accumulated bet 20 years
14 running or something like that, but in any event,
03:40 15 the effect of the evidence was statistically the
16 chances of two children dying naturally of cot
17 death in the family was extraordinarily small.

18 Sally Clark was convicted, she
19 appealed against conviction and one of the grounds
03:40 20 of the original appeal was to the effect that the
21 statistical evidence given by the pediatrician was
22 misleading. By the time of appeal, I think it was
23 generally accepted that the statistical evidence
24 was misleading, but the Court of Appeal took the
03:40 25 view that there was plenty of other evidence in



1 the case to suggest Sally Clark's guilt and
2 therefore even if the statistical evidence was
3 misleading, it really probably didn't make -- have
4 much of an impact on the jury's verdict, so that
03:41 5 was the position at the end of the first appeal.

6 Sally Clark applied to the
7 Commission and we investigated the case and the
8 principal basis on which the case was referred to
9 the Court of Appeal was that there was undisclosed
03:41 10 evidence from the pathologist who carried out the
11 postmortem on one of the children to the effect
12 that microbiological examination had established
13 the existence of an extensive staphylococcal
14 infection which certainly provided a clinical
03:41 15 cause of death suggesting that in fact the baby
16 may have died from this staphylococcal infection
17 and not as a cot death. That information had not
18 been disclosed and so we referred the case
19 principally on the basis that the real possibility
03:42 20 test was met because there was new evidence
21 suggesting that one at least of the children had
22 died of an infection and not as a matter of cot
23 death and therefore to look at the case on the
24 basis of both children had died from cot death was
03:42 25 wrong.



1 But as part of the reasoning
2 in the reference we also invited the Court of
3 Appeal to reconsider the significance in the
4 context of the case as a whole of the misleading
03:42 5 statistical evidence which had been given at trial
6 and which had been addressed by the Court of
7 Appeal at the previous appeal and in due course,
8 when Sally Clark's convictions were quashed, which
9 they were by the Court of Appeal following our
03:42 10 reference, the Court of Appeal expressed itself in
11 a wholly different way and in dealing both of
12 course with the undisclosed evidence of the
13 infection, but also took the view that in fact the
14 misleading statistical information must have had
03:43 15 quite an impact on the jury's consideration at
16 trial.

17 So I think that's quite a good
18 example of how even though the basis of the
19 reference, the new basis, the new material was the
03:43 20 evidence of the infection, we did invite the Court
21 of Appeal as part of our reasoning to take a more
22 cumulative view of the case, including the
23 misleading statistical evidence.

24 Q If I can just follow up with some factors that
03:43 25 were present in David Milgaard's case, and I



1 appreciate that you only have a general
2 understanding of the facts and the players, but
3 you are familiar with Ron Wilson's evidence and
4 his recantation?

5 A Uh-huh.

6 Q And Nichol John's statement --

7 A Uh-huh.

8 Q -- and her evidence at trial. And just your
9 comment following up on your last point about

03:44 10 Sally -- was it Sally --

11 A Sally Clark.

12 Q Sally Clark. I almost said Sally Field, but Sally
13 Clark, that the Ron Wilson recantation that came
14 in 1990 and if the Commission concluded that that

03:44 15 might provide some basis, and I appreciate your

16 comment about recantations usually don't pass

17 muster, but might that allow you to have a window

18 into Nichol John's evidence; in other words,

19 here's new information about how Ron Wilson and

03:44 20 Inspector Roberts, the polygraph operator, worked,

21 that might allow us to now look into Nichol John

22 and her statement, and notwithstanding the fact

23 that that was fully canvassed before the judge,

24 the jury, the Court of Appeal, that new

03:44 25 information might cause you to look at old



1 arguments in a different way. Is that a fair way
2 to put it?

3 A That's an absolutely fair way of putting it, yes.

4 Q And so that new information in your investigation
03:45 5 might cause you to look at other evidence in a
6 different way and that might be part of what's
7 sent to court?

8 A Yes.

9 Q And I take it in exceptional circumstances you can
03:45 10 send a reference there even if there are not new
11 facts or new arguments?

12 A Yes, you can. We've never been entirely sure what
13 exceptional circumstances there would be, and I
14 can't immediately think of a case which we have,
03:45 15 where we have referred on the basis that we can't
16 find any new argument or new evidence but we think
17 there are exceptional circumstances, generally
18 speaking, I believe we have always found ourselves
19 in a position when making a reference to be able
03:45 20 to articulate new evidence or argument.

21 Q Are there some cases that are dismissed by the
22 Court of Appeal after you send them there on the
23 basis that the Court of Appeal doesn't think
24 there's anything new?

03:46 25 A The Court of Appeal, if the Court of Appeal



1 upholds convictions, they sometimes disagree with
2 our evaluation of the impact which the fresh
3 evidence or the new argument has on the safety of
4 the conviction. I don't think we've ever been
03:46 5 criticized for having sent a case back where there
6 is nothing new at all. I think the nearest we've
7 come to it is, from my own experience, in a case
8 where we referred a case on the basis of
9 non-disclosure of information which we thought was
03:46 10 a significant and relevant non-disclosure and the
11 Court of Appeal not only disagreed but went so far
12 as to say they thought we hadn't really given sort
13 of any thought at all to the impact of this
14 non-disclosure, they seemed to be saying this
03:47 15 seems to us to be the Commission saying we found a
16 piece of information which wasn't disclosed,
17 therefore, the conviction must be unsafe, and we
18 were told quite roundly in the Court of Appeal
19 judgment that if non-disclosure of information is
03:47 20 going to be the basis of a referral, we must be
21 able to explain what use the defence could have
22 made of it in a way which might have affected the
23 jury's verdict.

24 Q Can you comment on that? I take it that when you
03:47 25 identify new information, that the next step then



1 is to ask yourself the question what effect might
2 that information have had on the jury?

3 A Yes.

4 Q And that's the real -- the question, and if it
03:47 5 would have had no impact based on the view of the
6 Commission members, then it would not meet the
7 real possibility test?

8 A That's right, yes.

9 Q And so, for example, if in a case where it turns
03:47 10 out that a witness, there's a new witness that
11 wasn't called at trial but that witness' evidence
12 really doesn't change much, that that might be one
13 where you say that would not have any effect on
14 the verdict so we're not going to send it up?

03:48 15 A Yes.

16 Q You are familiar, in the David Milgaard case, of
17 the motel room incident and the evidence relating
18 to that generally?

19 A Yes.

03:48 20 Q And in particular one of the grounds in this case
21 was a witness by the name of Deborah Hall who did
22 not testify at trial, two individuals did, Craig
23 Melnyk and George Lapchuk, about an incident?

24 A Uh-huh.

03:48 25 Q And Deborah Hall's evidence later was, perhaps I



1 think in fairness, acknowledged that the incident
2 happened and words were spoken, perhaps slightly
3 different, but that she viewed the comments made
4 by David Milgaard as a joke, whereas Mr. Melnyk
03:48 5 and Mr. Lapchuk arguably viewed it a different
6 way?

7 A Uh-huh.

8 Q Now, can you tell us again, is that something that
9 says okay, here's -- let me back up, two
03:49 10 questions. I guess the first question is could
11 she, was she known at the time of trial and could
12 she have been called, and I take it that would be
13 a hurdle as well, that would be the initial hurdle
14 as to is it indeed fresh evidence; in other words,
03:49 15 if defence counsel knew about this potential
16 witness and chose not to call her, for whatever
17 reason, that that might end the new evidence?

18 A Well, that would certainly be a consideration
19 because one of the questions of course -- one of
03:49 20 the questions which the Court of Appeal is
21 required to consider when deciding whether it's
22 necessary or expedient in the interests of justice
23 to receive new evidence, which is what the test
24 under section 23 of the *Criminal Appeal Act* of
03:49 25 1968 is, the Court of Appeal has the power to



1 receive fresh evidence if to do so is necessary or
2 expedient in the interests of justice, and in
3 deciding that question they have to have regard to
4 four particular factors, one of which there is a
03:49 5 reasonable explanation for the evidence not having
6 been called at trial, and a tactical decision by
7 the Defendant and his or her legal advisors not to
8 call evidence is likely to be a hurdle because the
9 Court of Appeal takes the view, and I think
03:50 10 probably rightly, that the time to deploy your
11 defence to the full effect is at trial, that you
12 don't hold evidence back in the hope that you can
13 then persuade the Court of Appeal to take a
14 different view to the jury.

03:50 15 So yes, in the existence of
16 the evidence and its availability to be called at
17 trial is undoubtedly a factor and a potential
18 hurdle for getting the Court of Appeal to receive
19 it, but it certainly wouldn't be a necessarily
03:50 20 exclusive excluding factor if, having regard to
21 other considerations, and in particular just how
22 significant is it, irrespective of why it wasn't
23 called at trial to the safety of the conviction,
24 might result in the evidence being allowed, but
03:51 25 from the Criminal Cases Review Commission point of



1 view, we have to consider both the existence of
2 the fresh evidence and also the likelihood of the
3 Court of Appeal receiving it, and in the
4 circumstances if they, if the sort of circumstance
03:51 5 arrives about the motel incident were to be part
6 of the Commission's investigation, we of course
7 would be -- we would look at the evidence of the
8 witness who wasn't called and who is now saying,
9 oh, yes, it all happened, but it was clearly a
03:51 10 joke, then there would be, I think, an immediate
11 line of inquiry open there so far as the
12 Commission was concerned because we would want to
13 know from the witnesses who gave the evidence at
14 trial, particularly if they hadn't been asked what
03:52 15 their interpretation of the events were, whether
16 they have anything to contribute to the question
17 as to whether what they witnessed was genuine or
18 not, so there would be an obvious line of inquiry
19 to be pursued there. What the outcome would be I
03:52 20 have absolutely no idea, it would depend on the
21 case.

22 I understand, for example, in
23 the, at Mr. Milgaard's trial when this incident
24 was adduced in evidence through the two people who
03:52 25 did give evidence, that their evidence was left to



1 the jury on the basis that they would have to
2 consider the possibility of it having, of being a
3 sort of, either an event which happened or not,
4 did it happen at all and if it did happen, was
03:52 5 this a genuinely incriminating activity by Mr.
6 Milgaard or was it in fact, have some other
7 innocent interpretation. So if the evidence
8 itself had already been left to the jury on that
9 basis, then further evidence to the effect that it
03:53 10 might have, "I thought it was a joke" probably
11 wouldn't make a great deal of difference.

12 Q If we can go down to section 14, I think in
13 subsection (1) it indicates that your Commission
14 can refer a case to the Court of Appeal without an
03:53 15 application having been made?

16 A Yes.

17 Q And does that happen, has that happened?

18 A No, I don't think it has. I'm just racking my
19 brains though because of course the Commission has
03:53 20 got plenty to do from people who do apply without
21 going out searching for cases.

22 Q Okay.

23 A But there have been two categories of case where
24 we have undertaken an investigative role
03:53 25 irrespective of applications. One was following



1 the Sally Clark case, to have a look and see
2 whether there were any other cases where mothers
3 had been convicted of killing their children in
4 circumstances where there might be the same sorts
03:54 5 of question marks over the evidence, and the other
6 category was where the Commission embarked on a
7 review of historical sex abuse cases arising out
8 of allegations made by people years after the
9 event who had spent their childhood years in care
03:54 10 homes, but I -- although we undertook the
11 investigation around those two category of cases,
12 I don't know whether any of them have actually
13 referred to, have actually resulted in references.

14 Q Go down to the bottom, subsection (3), and go to
03:54 15 the next page, it appears that you have the
16 ability to seek the assistance of the Court of
17 Appeal and get their opinion on a matter?

18 A Uh-huh.

19 Q And is that -- has the Commission done that?

03:55 20 A We've done it, but not very often. I think no
21 more than two or three times.

22 Q Subsection (4) --

23 COMMISSIONER MacCALLUM: Why would you do
24 it, sir, in those situations?

03:55 25 A We would do it if -- I'm just trying to think of a



1 particular example. Yes, I've dragged a case out
2 of my memory on this. There was an issue over
3 whether the Court of Appeal would have
4 jurisdiction to enter an appeal based on fresh
03:55 5 medical evidence suggesting that the convicted
6 person -- he had been convicted of murder, there
7 was fresh evidence to suggest that he was
8 suffering from mental illness to entitle a
9 conviction, to enter a conviction of manslaughter
03:56 10 on the grounds of diminished responsibility, but
11 he had pleaded guilty to the offence of murder,
12 and there was an issue over whether the court had
13 jurisdiction to entertain any appeal at all on the
14 grounds suggesting diminished responsibility where
03:56 15 the Defendant had originally entered a plea of
16 guilty to murder, so we asked the court's opinion
17 as to whether or not, because the authorities were
18 unclear as to whether the court would have
19 jurisdiction, so we asked the court for their
03:56 20 opinion as to whether they thought they did have a
21 jurisdiction. They gave us their opinion that
22 they didn't I think, so we didn't refer the case.

23 COMMISSIONER MacCALLUM: Thank you.

24 BY MR. HODSON:

03:56 25 Q Would I be correct that the Commission would not



1 then be sending cases to the Court of Appeal for
2 an opinion on whether or not you think there's a,
3 for example, a real possibility of succeeding,
4 that you would send it there in the normal way as
03:57 5 opposed to seeking an advanced ruling on whether
6 you should send it there?

7 A I think the court would go ballistic if we did
8 that.

9 Q Yeah. So there would be some unique circumstances
03:57 10 where, and I think the case you identified had a
11 bit of a quirk to it as to whether --

12 A That's right, yes, and I think that probably, that
13 sort of taking the two together, we have to be
14 very careful that we don't look as if we're asking
03:57 15 for the court's opinion about a matter which is
16 our responsibility to decide.

17 Q Subsection (4) says that where the Commission
18 makes a reference, it shall give to the court to
19 which the reference is made a statement of the
03:57 20 Commission's reasons for making the reference?

21 A Uh-huh.

22 Q And send a copy to the Crown, and then in
23 subsection (5) it says the reference is treated as
24 an appeal. The appeal may be on any ground
03:57 25 relating to the conviction, whether or not the



1 ground is related and any reason given by the
2 Commission for making the reference, and it's my
3 understanding that there has been an amendment to
4 that that now requires leave to add to the grounds
03:58 5 found by the Commission; is that correct?

6 A That's correct, yes. There was an amendment by
7 the *Criminal Justice Act 2003*.

8 Q And so that for a while, for six years if you sent
9 reasons to the Court of Appeal, the applicant
03:58 10 and/or his counsel was free to add or deal with
11 whatever grounds they wished to put in; is that
12 correct?

13 A Yes, that is correct, and in one case I can think
14 of, the grounds of appeal which were actually
03:58 15 presented at the appeal hearing bore no relation
16 whatsoever to any of the grounds on which the
17 Commission had made its reference.

18 Q But that would be a matter for the applicant and
19 his or her lawyer to deal with?

03:58 20 A Yes.

21 Q You opened the gate and they decide what to do
22 once they are through; is that a fair way to put
23 it?

24 A They did. They can't any more.

03:58 25 Q How did they do in the case?



1 A Badly I'm afraid.

2 Q The amendment I read I think in one of the
3 articles, that by now limiting the applicant to
4 the grounds stated in your reasons, has that
03:59 5 caused the Commission to be a bit more exhaustive
6 and careful in setting forth the reasons than it
7 was before the amendment?

8 A It certainly has prompted a recognition by the
9 Commission that the applicant now is restricted
03:59 10 unless he can persuade the Court of Appeal to give
11 leave to extend the grounds and this actually,
12 this amendment in the 2003 legislation does, to an
13 extent, re-open that paragraph in the Royal
14 Commission report we were looking about, about
03:59 15 giving the parties the opportunity to comment on
16 our decision and reasoning for referring cases to
17 the Court of Appeal.

18 We haven't, as far as I know,
19 gone to the, because of the amendment, gone to the
04:00 20 lengths of inviting, of giving a provisional
21 statement of reasons of a reference of a case and
22 saying do you think there are any more grounds you
23 would like us to include in them, but the effect
24 of this particular amendment is, as you suggested,
04:00 25 to make the Commission more alive to ensuring that



1 the full range of grounds are put in the
2 reference.

3 Now, the reason why this may
4 be significant is the extent to which the
04:00 5 Commission wishes to investigate a matter because
6 prior to the amendment where it was open to the
7 applicant to put in any grounds that he liked, the
8 Commission tended to the view that the minute we
9 found enough information and material on which to
04:01 10 base a reference, we would send the case to the
11 Court of Appeal even though there may be issues
12 outstanding which, were we to carry on the
13 investigation, might provide additional grounds
14 for a reference, and I think the, that the
04:01 15 principal practical effect of this particular
16 amendment is to cause the Commission to think very
17 carefully about the point at which it makes the
18 reference and the extent to which it leaves
19 uninvestigated issues outstanding.

04:01 20 There's obviously a difficult
21 balance to be drawn there because the effect of
22 not -- the effect of deciding to go carry on with
23 an investigation may mean the reference is delayed
24 by weeks or months or whatever and if you said to
04:01 25 the applicant we actually think you've got a very



1 good chance of getting your conviction quashed on
2 the basis of what we've now got, would you like us
3 to refer it now or would you like us to
4 investigate a bit more to give you further
04:02 5 grounds, who knows what the applicant's answer
6 might be, but I suspect it's likely to be I would
7 like to get back to the court as soon as possible.

8 Q Is there any general -- how long does -- and I
9 appreciate every case is different, but can you
04:02 10 give us an idea of the time lines involved in the
11 Commission's investigation of cases in maybe
12 recent years?

13 A I mean, that really is a very difficult question
14 to answer because of the huge variety and the
04:02 15 types of case which the Commission deals with. We
16 certainly don't have any targets for completion of
17 cases, but the real critical question of course is
18 how quickly after an application is received at
19 the Commission are we able to make a start on
04:03 20 working at it because there is a cue of cases and
21 therefore there is a delay which the Commission is
22 always trying to keep to a minimum between the
23 receipt of an application and starting work on it,
24 but I think we would generally hope that in the
04:03 25 great majority of cases which require a full-scale



1 investigation as opposed to very many of them
2 which can be dealt with relatively quickly, but of
3 the cases which require a full investigation, I'm
4 sure that we would hope that we would have our
04:03 5 investigation complete and decisions made within a
6 sort of six month period, but that really is
7 almost plucking a figure out of the air because
8 that may be an aspiration that may apply to a
9 majority of cases, but there will be those which
04:03 10 take considerably longer.

11 Q If you can scroll down to -- or do you know what
12 prompted that amendment? I appreciate that
13 parliament passed it, but was there some issue
14 that arose that prompted the amendment to limit
04:04 15 the appeal grounds to the reasons?

16 A It was prompted by representations made by the
17 Court of Appeal.

18 Q Okay. Paragraph 6 talks about cases where an
19 application has been made, but the Commission
04:04 20 decides not to make the reference of the
21 conviction. The Commission shall give a statement
22 of the reasons for the decision to the person who
23 made the application. And you touched on that
24 earlier, that I think in addition to the reasons,
04:04 25 you would also provide all of the information that



1 went into your decision; is that correct?

2 A Yes, yeah, and before we make the decision, we're
3 required, at common law, to indicate a provision
4 conclusion and give the applicant the opportunity
04:04 5 to make further representations before we make the
6 final decision.

7 Q Now, I saw a reference in one of the articles as
8 far as statistics, and I think it's over 90
9 percent of the applications the Commission
04:04 10 receives are rejected; is that correct?

11 A Yes. I think the figure, the referral figure is
12 around 4 percent. I mean, I'm not going to do the
13 math because I'm not very good at doing math off
14 the top of my head, but as of the end of last
04:05 15 month, the Commission had not referred 7,920 cases
16 over its lifetime and had referred 340, so
17 whatever percentage 340 of 7,900, about 8,000, I
18 think it's around 4 or 5 percent.

19 Q And a couple of questions on that. There has been
04:05 20 mention of the floodgates argument, that if you
21 make it too easy you will get too many that apply
22 I think is how it's been put, and what has your
23 experience been there as far as -- I take it with
24 7,900 applications being rejected, are there a
04:06 25 number of applications that are, on their face,



1 without merit?

2 A There are, yes. I mean, some applications are, do
3 appear to come into that category, but as I was
4 saying earlier, we don't come to that conclusion
04:06 5 simply based on the application itself, we will
6 look at the case because we take the view that an
7 applicant may be unable to articulate valid
8 grounds as to why the conviction may be unsafe and
9 therefore simply because none appear on the face
04:06 10 of the application itself, that doesn't mean to
11 say that we'll reject it at that stage, but once
12 the documentation relating to how the case has got
13 to where it is is looked at, it may be quite
14 apparent from that that there is no issue which is
04:07 15 capable of effective investigation, in which case
16 that case will be concluded relatively quickly.

17 Q Is there any way to -- is there a general theme,
18 in those cases where applications are denied, as
19 to what the deficiency is?

04:07 20 A I don't think so, no. It's going to depend on the
21 particular case but, I mean, generally speaking it
22 is simply going to be a situation where the
23 applicant -- the applicants themselves have not
24 said -- have not been able to identify anything
04:07 25 specific which they think would give rise to an



1 issue meriting referral. And when we look at the
2 case, we would look at the judge's summing up for
3 example, that all appears to be perfectly all
4 right, there don't appear to be any disclosure
04:07 5 problems, there don't appear to be any lines of
6 inquiry which have produced new evidence, and if
7 that is the culmination of the investigation which
8 is done then that is inevitably going to lead us
9 to a provisional conclusion that we shouldn't
04:08 10 refer the case.

11 What can happen is that we
12 will reach that point and indicate that as a
13 provisional conclusion and all of a sudden that
14 will prompt, either from the applicant or their
04:08 15 representatives, an identification of issues which
16 haven't previously been raised which can then lead
17 us to start investigating.

18 Q And, as far as those cases where the applications
19 are denied, I take it that there are cases where
04:08 20 applicants are not pleased with your -- with the
21 Commission's decision?

22 A Uh-huh.

23 Q And that would be common, that applicants who do
24 not get the relief that they request would be
04:08 25 unhappy with either the conclusion, the reasons,



1 or how you went about your work?

2 A I'm sure that probably is true. I mean, not all
3 of them take the trouble to tell us, but there are
4 those who do, and some of them express themselves
04:09 5 very vociferously, they make complaints, they put
6 in further applications. Very, very rarely an
7 applicant will say "well, I'm disappointed with
8 the decision, but I do actually think you've done
9 as good a job as you can". And then, in the
04:09 10 middle, there will be those who, no doubt, do find
11 the decision disappointing but accept it.

12 Q And what about political pressure, is there
13 anything that's brought to bear on the Commission
14 in that regard about either pending cases or cases
04:09 15 that have been dealt with perhaps unfavourably to
16 the applicant?

17 A No. No, that doesn't happen.

18 COMMISSIONER MacCALLUM: Is there anything
19 to stop it happening? In the House, for example,
04:09 20 can it be raised once an applicant has entrusted
21 its case to you, or their case to you?

22 A Sorry, in Parliament?

23 COMMISSIONER MacCALLUM: In Parliament,
24 yes.

04:10 25 A Yes. Umm, there's nothing, I don't think there's



1 anything which could stop the applicant's Member
2 of Parliament attempting to raise it as an issue,
3 but I suspect that the response in Parliament
4 would either be to prevent the case being
04:10 5 discussed at all, or if it was discussed then the
6 responsible minister -- I'm not sure who, I
7 presume the responsible minister in this situation
8 would be either the Home Secretary or the Attorney
9 General -- would simply say "this is not a matter
04:10 10 for me, the government have no standing in the way
11 in which the Commission makes decisions in
12 individual cases".

13 The remedy for an applicant
14 who is dissatisfied with our decision is not to
04:10 15 seek to have political pressure put on us, and I
16 think that would be stamped out fairly quickly.

17 COMMISSIONER MacCALLUM: I was thinking
18 more of an applicant who, before you made any
19 decision, takes it upon himself to ask for
04:11 20 political intervention?

21 A I think the answer would be this is not a matter
22 in which the politicians become involved, either
23 as politicians or through debate in Parliament,
24 because it's a matter which is being considered by
04:11 25 the Commission and, therefore, it simply isn't



1 appropriate for it to be debated either directly
2 by the minister or in Parliament.

3 COMMISSIONER MacCALLUM: But there is no
4 statutory bar, so far as you know, in this Act,
04:11 5 for example?

6 A There's nothing in our legislation which would
7 prevent that, but --

8 COMMISSIONER MacCALLUM: Is there anything
9 in the legislation which prevents an applicant
04:11 10 from launching a parallel private investigation
11 of his own or from launching a media campaign in
12 support of his application?

13 A There's nothing -- there's nothing to stop that --

14 COMMISSIONER MacCALLUM: No.

04:11 15 A -- and -- but I think the point which I've made, I
16 don't know what -- where the Commission would like
17 to position itself within the criminal justice
18 system, at a point where applicants don't think
19 that it's in their interests to do that, --

04:12 20 COMMISSIONER MacCALLUM: Uh-huh.

21 A -- because one of the -- well, not one of.

22 The key strength of the
23 Commission, as I see it, is undertaking this
24 positive pro-active investigative role in relation
04:12 25 to applications which are made to it, and I



1 certainly wouldn't like to suggest that the
2 Commission is the sole repository of understanding
3 as to how to go about investigating miscarriages
4 of justice, but we are -- the Commission is
04:12 5 building up a considerable body of experience as
6 to how such cases can best be investigated. And,
7 you know, particularly if you have a situation
8 where the question of new evidence which impacts
9 on the credibility of witnesses who have already
04:13 10 given information or evidence at trial and the
11 investigation may require re-interviewing some of
12 those in -- those witnesses, the Commission would
13 far prefer to be left to get on with that, so that
14 the timing and the nature of any re-interviewing
04:13 15 of witnesses was under the Commission's control
16 and done by the Commission's staff with the
17 assistance of its investigation advisor rather
18 than having a situation where we're treading over
19 ground which has already been plowed by either a
04:13 20 journalist or a private investigator who may have
21 been focusing on the wrong issues but, at the same
22 time, then created a situation where you have yet
23 another statement from a witness which may or may
24 not assist.

04:13 25 COMMISSIONER MacCALLUM: Now you have about



1 ten years experience to refer to and has such
2 interference been experienced by the Commission
3 in terms of private investigations or attacks
4 through the press on the merits of a matter?

04:14 5 A I'm not aware of there having been any situations
6 where the Commission has been under pressure from
7 overt publicity through the media. There have
8 been cases where journalists are interested but
9 there is, of course, a difference between a
04:14 10 journalist contacting the Commission and
11 expressing an interest and actually going public
12 with the stuff, and -- with the material and
13 seeking to publicize what the journalist thinks is
14 relevant evidence, and I'm not aware of that
04:14 15 having happened.

16 As for some sort of parallel,
17 private investigation, well if an applicant is
18 represented the representatives may be -- they may
19 think that it would be a good idea for them to
04:15 20 undertake their own inquiries, and particularly if
21 they have any reason to be unhappy with the way in
22 which the Commission is going about its
23 investigation, but again the Commission would want
24 to try and minimize and eradicate that risk by
04:15 25 ensuring that dialogue with legal representatives



1 at an early stage of the investigation is
2 effective and that there is a common understanding
3 as to what the investigation is going to cover and
4 how it's going to be done.

04:15 5 I mean, I can think of a
6 situation where the Commission intended to obtain
7 some further expert opinion about an aspect of the
8 case and the applicant's representative suggested
9 very strongly that they disagreed with our choice
04:16 10 of expert and that had to be dealt with quite
11 firmly. Of course, we listen to what they have to
12 say and we would take into account any suggestions
13 they may have, but ultimately it's our
14 investigation and, if we determine on a particular
04:16 15 course, that is what we will do.

16 But if there is tension in the
17 early stages, we would hope to iron that out by
18 securing a common understanding as to what we want
19 to investigate, why we want to investigate, and
04:16 20 how we're going to go about it.

21 BY MR. HODSON:

22 Q Would there be an understanding now, after this
23 Commission has been in place for a number of
24 years, amongst the counsel who represent
04:16 25 applicants that the Commission, as part of its



1 job, will go out and do the investigation?

2 A Yes.

3 Q And so that it's an expectation on their part that
4 you will do the investigation as opposed to the
04:17 5 applicant; is that a fair --

6 A Yes.

7 Q -- way to -- yes?

8 A Yes. And I think that, going back to what I was
9 saying earlier about the Commission developing a
04:17 10 reputation for its activities and its position
11 within the criminal justice system, that if in the
12 early days the starting assumption on the part of
13 experienced legal representatives in the matter of
14 miscarriages of justice was that the Commission
04:17 15 was going to be ineffectual and didn't know what
16 it was doing and needed to be told what it was
17 doing, that assumption has been largely overtaken
18 by a better appreciation that the Commission does
19 actually take its role extremely seriously, and
04:17 20 does have the experience and the ability to go
21 about investigations properly and effectively.

22 Q And can you tell us, what would you see as being
23 the advantages of the Commission investigating
24 possible wrongful conviction, miscarriages of
04:18 25 justice, or reviewing information, as opposed to



1 the applicant and/or the applicant's -- people
2 assisting the applicant?

3 A Well I think the big, the greatest risk with
4 leaving the investigation to the applicant or
04:18 5 their representatives -- and we've already
6 identified one risk, which was articulated in the
7 Royal Commission report -- was that that
8 encouraged the person who was going to make the
9 decision whether to refer the case or not somewhat
04:18 10 inactive and put in too -- laying too much store
11 by what the applicant was able to come up with by
12 way of persuasion to refer the case back.

13 But when one looks, say,
14 assuming the investigation is to be done, the
04:19 15 strength, I think, of the Commission doing it
16 rather than leaving it to the applicant is that
17 the Commission, all things being equal, is likely
18 to have a far better understanding of what it is
19 about the case that needs investigating and to
04:19 20 what end that investigation is best directed.

21 So if we take, for example, a
22 situation where you have a case which was dealt
23 with, in terms of trial, many years ago, and the
24 applicant and his legal representatives are
04:19 25 absolutely convinced that witnesses at the trial



1 many years ago either didn't tell the truth or
2 could have said something different and they
3 convince themselves that that is the case, so they
4 run back to the witnesses and ask them to give
04:19 5 them another statement telling them what happened
6 25 years ago, now I think the Commission's view in
7 such circumstances would be that it's extremely
8 unlikely that asking a witness to give a version
9 of events from memory 25 years ago, even if it
04:20 10 differed from the evidence which was given at
11 trial, is actually likely to be given a great deal
12 of weight either by the Commission or, indeed, by
13 the Court of Appeal. Because all you're doing is
14 playing off the same witness, playing off the same
04:20 15 witness' recollection over a long period of time,
16 but an applicant or representative may be very
17 firmly of the view that that is the best way of
18 doing the investigation whereas in fact the
19 actual, the more effective investigation, might be
04:20 20 on very different lines.

21 And I think, from the point of
22 view of the investigation being an effective one
23 and producing material which has a positive
24 outcome so far as any decision to refer the case
04:21 25 is concerned, it is better that if you have a



1 body, as we do with the CCRC, who has both this
2 investigatory and decisive role, that the
3 advantages are very much in favour of the
4 Commission identifying lines of inquiry and how
04:21 5 they should be pursued and the objectives which
6 those investigations are -- seek to achieve.

7 Q Can you comment, you gave the example of a witness
8 giving a different version 25 years later, --

9 A Yes.

04:21 10 Q -- can you give us an idea of how the Commission
11 might approach that if the suggestion from the
12 applicant is "the witness has lied at trial"?

13 A Uh-huh.

14 Q I mean what, and I appreciate it's a very general
04:21 15 question, but where do you go with that?

16 A Well, it would depend on the particular case, but
17 if the suggestion is that the witness lied at
18 trial the answer to that question is not likely to
19 be found in the -- well the -- I suppose it's
04:22 20 possible, if it's a matter of lying, then of
21 course you could go back to the witness and say
22 "did you lie at trial", and if the answer is "yes
23 I did" well then you can investigate from that,
24 but that's a rather -- that's a fairly stark
04:22 25 example. I think it's more like -- the sort of



1 example, the situation I had in mind, is more
2 around if you went back, if you went back and
3 interviewed this particular witness, they would be
4 able to tell you far more about it and maybe put a
04:22 5 different interpretation on the facts or something
6 like that.

7 What I think we would be more
8 interested in, you know, it might be a good idea
9 to find out from that witness what they'd --
04:22 10 whether they do have any different recollection,
11 but the witness' recollection 25 years after the
12 event is unlikely to be the defining or
13 determining factor, and it would be far more
14 significant I think, in those circumstances where
04:23 15 it's suggested that evidence given at trial 25
16 years ago may have been inaccurate or whatever, we
17 would be more interested in looking into the
18 circumstances in which that evidence was obtained
19 at the time rather than simply re-interviewing
04:23 20 witnesses for their subsequent recollection.

21 But more, I think more
22 significantly, in context of an investigation as a
23 whole, if there were to become a time when it was
24 necessary to interview that witness, we would
04:23 25 prefer the timing of that interview to be under



1 the Commission's control so that it can take place
2 within the context of the whole investigation and
3 so that, by the time any further interview took
4 place, it was done in the context of any necessary
04:24 5 background investigations which would inform the
6 purpose and structure of that interview.

7 Q Just back on the advantages of the Commission, I
8 take it one would -- compared to an applicant --
9 one would be the coercive powers you have to
04:24 10 compel not only documents but, also, interviews of
11 witnesses; is that correct?

12 A Oh, well, if it -- certainly, if it comes to using
13 the Commission's powers of investigation, then
14 clearly that is -- that gives us a distinct
04:24 15 advantage over an applicant going it alone.

16 We don't, at the moment, have
17 any powers to compel witness interviews. There is
18 a shopping list of legislative change which the
19 Commission is compiling for the Home Office to
04:24 20 consider, and the giving the Commission the power
21 to compel witnesses to answer questions or be
22 interviewed is one of them, but at the moment the
23 power to compel evidence is limited to documents.

24 Q And has that been a challenge, then, for the
04:25 25 Commission in seeking to get information from



1 witnesses?

2 A Generally speaking, we haven't encountered a
3 problem, that on the whole, if the Commission
4 wants to speak to witnesses, on the whole they are
04:25 5 happy to be interviewed by us.

6 Q And is that a significant part of the
7 investigative work; do you go back and
8 re-interview all the witnesses who testified at
9 trial?

04:25 10 A By no means, no, we would only interview those
11 witnesses who we thought were relevant to a line
12 of inquiry which was under investigation. So it
13 certainly wouldn't necessarily involve
14 interviewing all the witnesses, and I can envisage
04:25 15 circumstances where that was necessary, but it
16 certainly isn't routinely necessary.

17 Q And again, just to finish up on this point, where
18 an applicant's application is dismissed, I think
19 you would give them everything that the Commission
04:26 20 has? Maybe, let's do it this way. What are the
21 documents that the Commission would not provide to
22 an applicant where the Commission had rejected an
23 application, just generally?

24 A Well we wouldn't, generally, give them documents
04:26 25 which were irrelevant to the decision which we



1 were making, but if they were potentially -- if
2 they were potentially relevant in terms of their
3 association with the decision and the reasons for
4 it, the only basis on which we wouldn't disclose
04:26 5 them is if we were entitled to withhold disclosure
6 on some public interest immunity ground.

7 Q And what about, though, internal discussions
8 amongst Commission members? I --

9 A Yes.

04:27 10 Q Is --

11 A The view which I would take about that is they
12 would be documents which we didn't -- which I
13 would not regard as being relevant to the reasons
14 for the decision.

04:27 15 Q Okay. I think it's 4:30, Mr. Commissioner,
16 probably appropriate to break.

17 COMMISSIONER MacCALLUM: Thank you.

18 *(Adjourned at 4:27 p.m.)*



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