IN THE SUPREME COURT OF THE UNITED KINGDOM **UKSC 2012/0175**

KEVIN NUNN

v

THE CHIEF CONSTABLE OF SUFFOLK CONSTABULARY

THE CROWN PROSECUTION SERVICE

INTERVENERS' CASE

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1. These submissions are advanced with the leave of the court on behalf of three organisations: JUSTICE, Innocence Network UK (INUK) and the Criminal Appeal Lawyers Association (CALA). Each organisation has provided a statement (appended to these submissions) of its history, experience and ongoing work, which is relevant to the issues to be considered by the Supreme Court.

2. These submissions do not address the facts of the appellant's case. They are provided because of broader concerns that the judgment of the Divisional Court may have the unintended consequence of leading to miscarriages of justice going uncorrected.

3. The Interveners' core submission is that the prosecution has a continuing duty of disclosure following conviction in order to prevent or correct a miscarriage of justice. To be effective, that duty should operate in the same manner after trial as it does before and during trial. It would create the risk of injustice for there to be a different test for disclosure following the conclusion of the trial. The test set out at para. 59 of the Attorney-General's Guidelines should, therefore, be construed consistently with the statutory test in the Criminal Procedure and Investigations Act 1996 (CPIA) and the common law duty of disclosure in criminal cases.

THE CERTIFIED QUESTION AND THE ISSUES RAISED ON THE APPEAL

4. The certified question is: "*Whether the disclosure obligations of the Crown following conviction extend beyond a duty to disclose something that materially may cast doubt upon the safety of a conviction so that the Defendant was obliged to disclose material sought by the Claimant in these proceedings?*"

5. The question is based on the conclusion of the Divisional Court at paras. 24 and 33 that the extent of the prosecution's duty of disclosure following conviction is as formulated at para. 59 of the Attorney-General's Guidelines on disclosure: "*The interests of justice will also mean that where material comes to light after the conclusion of the proceedings, which might cast doubt upon the safety of the conviction there is a duty to consider disclosure.*"

6. In arriving at its conclusion the Divisional Court referred to:
   i. S.7A CPIA,[1] which provides that the prosecution's duty to keep its disclosure obligations under review does not apply following conviction (para. 24);
   ii. The right of appeal to the Criminal Division of the Court of Appeal (para. 25);
   iii. The availability of a remedy for miscarriages of justice provided by the Criminal Cases Review Commission (para. 34).

THE COMMON LAW DUTY AND THE STATUTORY REGIME

7. The quashing of the convictions in the cases of the Birmingham Six (*R v McIlkenny and ors* (1991) 93 Cr.App.R. 287) and the Maguire Seven (*Maguire* [1992] Q.B. 936) provided the background to a fundamental reappraisal by the Court of Appeal of the prosecution's duties of disclosure in the case of *Judith*

[1] As amended by the Criminal Justice Act 2003. The continuing duty of the prosecutor to disclose was originally contained in S.9 CPIA, which was repealed by the 2003 Act.

Ward [1993] 1 WLR 619, described by Lord Bingham in *R v H* [2004] 2 AC 134 as a "*ground-breaking*" decision.[2] [3] In *Ward* the court commented at p.642:

> "*Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defence*".

8. The court later approved the dictum in the case of *Hennessey* [1978] 68 Cr.App.R. 419 that all relevant evidence of help to the accused must be either led by the prosecution or made available to the defence and stated:

> "*We would emphasise that "all relevant evidence of help to the accused" is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led.*"

9. In *Keane* [1994] 1 WLR 746 the Court of Appeal adopted a test for disclosure formulated at first instance by Jowitt J. in the case of *Melvin*:

> "*I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (l) or (2).*"

10. In the context of public interest immunity, in *Agar* 90 Cr.App.R 218 (cited in *Keane*) the Court of Appeal expressed the balancing exercise required in determining whether to order disclosure of material relevant to the identity of an informer as follows:

> "*There was a strong, and absent any contrary indication, overwhelming public interest in keeping secret the source of information; but as the authorities show,* ***there was an even stronger public interest in allowing a defendant to put forward a tenable case in its best light.***" (emphasis added)

11. As Lord Bingham stated in *R v H*, the CPIA gave statutory force to the prosecution's duty of disclosure, but changed the test. As amended by the Criminal Justice Act 2003, that test is to be found in S.3(a) which establishes

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[2] See para. 20.

[3] The history of the development of the disclosure regime in this period was recorded and the principles adopted by the House of Lords in *R v Brown (Winston)* [1998] AC 367.

that the prosecution's duty is to disclose material "*which might reasonably be considered capable of undermining the case for the prosecution or assisting the case for the defence.*" By S. 21 CPIA the common law rules as to disclosure were abrogated in relation to all investigations, which commenced after "*the appointed day*". Notwithstanding that, in none of the authorities, including the leading case of *R v H*, nor in the Attorney-General's Guidelines, has it been suggested that the substitution of the statutory test for the common law test on disclosure has materially altered the basis on which the prosecution should discharge its duty. As Lord Bingham stated in *R v H* and as the Attorney-General's Guidelines reiterate: "*The "golden rule" is that fairness requires full disclosure should be made of all material held by the prosecution that weakens its case or strengthens the defence.*"

12. The miscarriage of justice cases of the early 1990s led to the setting up of the Royal Commission on Criminal Justice chaired by Viscount Runciman.[4] The CPIA was enacted following three Government consultation papers[5] and was part of the government's response to the findings of the Royal Commission.[6] It introduced for the first time a regime for disclosure, which was structured around the court's management of criminal trials.[7] The Act introduced the requirement for the defendant to provide a statement setting out the nature of his defence, which triggered the prosecution's further and continuing duty of disclosure. It is in that context that the statutory provision bringing to an end the prosecution's continuing duty "to review" disclosure should be understood. The statutory scheme operated to ensure the fairness of the trial, but had no further role once the trial was at an end. Indeed, neither the Royal Commission, nor the subsequent Government consultation papers considered the question of post-conviction disclosure.

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4 See INUK's statement for an account of the background to the Royal Commission.

5 'Disclosure' – May 1995, Cm 2864; 'Improving Effectiveness of Pre-Trial hearings on the Crown Court' – July 1995, Cm 2924; 'Mode of Trial' – July 1995, Cm 2908.

6 The Criminal Appeal Act 1995 being the other principal enactment in response to the Commission's report.

7 The requirement for the defence to engage with the disclosure process was introduced in part from concerns that, as a direct result of the decision in *Ward*, the courts and prosecution were becoming overburdened with disclosure requests – see *Turner* [1995] 1 WLR 264. The current Attorney-General's guidelines on disclosure stress the importance of ensuring that the disclosure process is not "abused" and that defence practitioners should "avoid fishing expeditions".

13. It is submitted that, although the prosecution no longer has a duty of continuous *review* of disclosure once the trial is at an end, there is a continuing duty, consistent with the tests promulgated in the authorities cited above, to ensure that the defence is provided with material, which may undermine the prosecution or assist the defence.

14. By S.21 CPIA the common law duty of disclosure is abrogated in respect of "*things falling to be done after the relevant time*". However S.21 applies where Part 1 CPIA applies. Part 1 applies in the circumstances set out in S.1 CPIA, which involve charge and progression to trial. For example, S.1(2)(a) applies the provisions of Part 1 where "*a person is charged with an indictable offence and he is committed for trial for the offence concerned.*" Once the trial is at an end a person is no longer "*charged with an indictable offence*" and so the provisions of Part 1 no longer apply. It follows that the abrogation of the common law rules of disclosure is confined to the trial process.

15. It is not disputed that the prosecution has a continuing duty of disclosure while an appeal is extant (see *Makin* [2004] EWCA Crim 1607). Whenever the question of non-disclosure is raised as an issue on appeal the prosecution has a continuing duty to review not just the material at trial, but all material that has been obtained since. On occasion that will require the Court of Appeal to conduct an ex parte hearing to consider whether to order further disclosure.[8] Given that the statutory duty under the CPIA does not bite after conviction, the continuing duty of disclosure can only subsist at common law.

16. There is no reason in principle why the duty should not continue to operate once appeal proceedings are at an end. That is implicit in the Attorney-General's Guidelines and the CPS Guidance *Reviewing Previously Finalised Cases: CPS Policy*, which both provide for post-conviction disclosure. The Attorney General's Guidelines place reliance upon '*the interests of justice*' in this regard.

[8] See for example *R v Maxwell* [2011] 1 WLR 1837 where at paras. 72-76 Lord Brown described the proceedings in the Court of Appeal when the court held an ex parte hearing prompted by fresh evidence drawn to its attention by the appellant Mansell's new solicitor deriving from an article in a local newspaper. It later emerged following an investigation commissioned by the CCRC that the court was misled at the ex parte hearing. The case provides a reminder that effective disclosure is heavily dependent on the good faith and professionalism of those who operate it. It also provides an example of how the intervention of a new solicitor can uncover material, which may then lead to further investigation by the CCRC.

For the duty to be discharged effectively the prosecution must provide the defence with the opportunity of considering all of the material which the prosecution and police have gathered, that has not previously been disclosed, which may provide a lead on evidence relevant to an issue in the investigation of whether a conviction is unsafe. This is the approach required by *Ward* and *Keane*.

17. It is now also required that the police retain exhibits post-trial, pursuant to the Code of Practice under S.23(1) CPIA, paras 5.7-5.10. The duty of retention at trial requires that exhibits be provided to the defence in order that forensic tests may be conducted, which are relevant to the issues at trial or may provide a lead on such an issue. The same would apply to the records of tests conducted by experts instructed by the police or prosecution. Unless there were some valid basis for refusing access to this material before or during the trial of the defendant, there could be no valid basis for refusing access after conviction.

18. The above cases and the statements of the Interveners in the annex show the existence of a system of post-conviction disclosure that has been in operation for many years. Police and prosecutors have continuously applied the principles of fairness upon receipt of requests for assistance in the preparation of appeals or applications for review, and provided disclosure. *Nunn* may have shed light on the arbitrary operation of this practice, but has not sought to introduce a duty that did not hitherto exist.

Scotland

19. In Scotland the application of the common law, and article 6 ECHR, principles of fairness have led to a statutory continuing duty, which provides helpful comparative support for the existence of this duty in England and Wales. The development of the law on disclosure followed a similar path to that in England and Wales, and looked to England and Wales' approach by example. Legislation was introduced in 2010 to put on a statutory footing the duty of disclosure, following the Coulsfield Review.[9] Prior to this there had been a number of

[9] Lord Coulsfield, *Review of the Law and Practice of Disclosure in Criminal Proceedings in Scotland* (Scottish Government, 2007).

miscarriages of justice as a result of prosecution failures to disclose evidence pre-trial to the defence.

20. The Judicial Committee of the Privy Council in *McDonald v HM Advocate*, [2008] UKPC 46 also recorded these failings.[10] The Court considered the duty of disclosure upon appeal in the context of the right to a fair trial pursuant to article 6 ECHR. Lord Hope held that the appellant would have to demonstrate that there was a reasonable possibility of unfairness as a result of non-disclosure in order for article 6 ECHR to be engaged (at para. 37). Lord Rodger considered at para. 74 that the Crown is not under a duty to re-investigate all the material in its possession – that would be unduly burdensome and inappropriate on appeal. However he held at para. 75 that if the Crown had failed to disclose the statements of Crown witnesses or, subject to article 8 ECHR, the convictions and outstanding charges of such witnesses, the appellants would have been entitled to an order requiring their disclosure, since this information would always be disclosable. Similarly, if the appellants were able to satisfy the court that material would have a bearing on an issue in contention between the parties in the appeal, the court would have the power to order its production, even if it was not material which the Crown would be under an article 6(1) duty to disclose.

21. The Criminal Justice and Licensing (Scotland) Act 2010 introduced a statutory regime concerning post conviction disclosure. S133 provides a duty to disclose after the conclusion of proceedings at first instance where appellate proceedings are instituted. This includes information that should have been disclosed in earlier proceedings, and information of which the prosecutor has become aware since the disposal of the earlier proceedings and that would have been required to be disclosed had it been known at the earlier stage (s133(3)). An appellant may apply to the prosecutor for further disclosure under s135. The legislation goes further than *McDonald* by providing that where the conviction is upheld on appeal, the prosecutor has a further duty to disclose information that s/he subsequently becomes aware of that has not already been disclosed and would

[10] Lord Hope set out a brief history of the development in Scotland at common law and procedural changes being made by the Crown as a result.

have been required to disclose (s136, or where convicted persons do not fall under that section, s137).

The post-conviction disclosure duty as explained in *Nunn*

22. The Attorney-General's Guidelines at para. 59 require decision makers to consider disclosure "*where material comes to light after the conclusion of the proceedings, which* ***might cast doubt*** *upon the safety of the conviction*" (emphasis added). Yet at para. 33 of its judgment the Divisional Court stated that for the test in the Attorney-General's guidelines to be satisfied, "it is necessary to show something that *materially* may cast doubt upon the safety of the conviction". The Court then illustrated the application of this test by reference to the need for the convicted defendant to establish that there had been scientific advances, which might reasonably be anticipated to provide a result which might affect the safety of the conviction. Expressed in this way, the burden is cast on the defendant to satisfy the test of materiality before he has been supplied with the very material that may itself provide the basis for undermining the prosecution case or supporting his defence. This is to put the cart before the horse and is inconsistent with the common law test for disclosure.

23. As the statements of INUK and CALA demonstrate, refusals of requests for disclosure made subsequent to the judgment of the Divisional Court are being received where otherwise it was anticipated that they would be granted.

24. It is submitted that the appropriate test for disclosure is, as set out in the CALA statement: that there is material that could have been disclosed or tested at the time of trial, which would assist in the preparation of an appeal. Where this test is satisfied, there should be a duty to disclose.

THE RIGHT OF APPEAL

25. The Divisional Court cited the defendant's right of appeal itself as a safeguard against wrongful conviction relevant to its conclusion as to the limitations on the prosecution's duty of disclosure post conviction. However at para. 31 the Court commented: "*It has been made clear in a number of decisions of the Court of*

Appeal (Criminal Division), that the Court will not receive under S.23 of the Criminal Appeal Act, the views of a new expert based on matters which could have been investigated at trial."

26. The operation of the power to receive fresh evidence in S.23 Criminal Appeal Act 1968 (as amended) has been considered on many occasions by the appellate courts, most authoritatively in *R v Erskine; R v Williams* [2010] 1 WLR 183[11]: para.39:

> "*Virtually by definition, the decision whether to admit fresh evidence is case- and fact-specific. The discretion to receive fresh evidence is a wide one focussing on the interests of justice. The considerations listed in subsection (2)(a) to (d) are neither exhaustive nor conclusive, but they require specific attention. The fact that the issue to which the fresh evidence relates was not raised at trial does not automatically preclude its reception. However it is well understood that, save exceptionally, if the defendant is allowed to advance on appeal a defence and/or evidence which could and should have been but were not put before the jury, our trial process would be subverted. Therefore if they were not deployed when they were available to be deployed, or the issues could have been but were not raised at trial, it is clear from the statutory structure, as explained in the authorities, that unless a reasonable and persuasive explanation for one or other of these omissions is offered, it is highly unlikely that the "interests of justice" test will be satisfied.*"

27. The right of appeal provides no protection to a wrongly convicted defendant unless he has the ability effectively to challenge the process, which has led to his wrongful conviction. The statutory provision likely to be of greatest importance to such a defendant is the power to receive fresh evidence in S.23 CAA. If, as the Divisional Court stated, the power in S.23 will not be exercised to receive fresh expert evidence based on matters that could have been investigated at trial, then the effectiveness of the right of appeal is severely limited.

28. The Divisional Court's summary at para. 31 of how the Court of Appeal will approach an application to receive fresh expert evidence receives support from an observation of the Court of Appeal in the case of *R v Steven Jones* [1997] 1 Cr.App.R. 86:

[11] The Court of Appeal reviewed a large number of authorities dealing with the admission of new expert evidence and deprecated excessive citation of authority in future cases.

> "*It would clearly subvert the trial process if a defendant, convicted at trial, were to be generally free to mount on appeal an expert case which, if sound, could and should have been advanced before the jury.*"

29. But, as the many cases reviewed in *Erskine* demonstrate, the court has an overriding duty to act in the interests of justice. For the Court of Appeal's power in S.23 CAA to receive new evidence to be capable of operating to serve the interests of justice, it is necessary that a convicted defendant should be able to have access to the means to investigate the possibility of obtaining new evidence. For the prosecution to deny a convicted defendant access to material, which may lead to him being able to challenge his conviction on the grounds of new evidence, is to undermine the safeguard of the right of appeal to the Court of Appeal.

30. It follows that the Divisional Court's reasoning in relying on the protection afforded to a convicted defendant by the right of appeal as a basis for limiting the prosecution's duty of disclosure is flawed. The convicted defendant is thus caught in the Catch 22 situation of being hampered in his ability to challenge his conviction by his inability to obtain further disclosure from the prosecution.

THE AVAILABILITY OF THE CRIMINAL CASES REVIEW COMMISSION AS A REMEMDY

31. The detailed background to the setting up of the CCRC and an analysis of the experience of how the CCRC works in practice is set out in the appended statements, in particular those provided by INUK and JUSTICE. In summary, the CCRC was formed following recommendations of the Royal Commission on Criminal Justice. The Commission concluded that the possible routes for re-hearing by the Court of Appeal were too narrow and an independent body was needed to consider claims of miscarriage of justice. The Criminal Appeal Act 1995 created the CCRC and its operations began in March 1997. Its statutory remit extends to review of both convictions and sentences in all cases across England, Wales and Northern Ireland.[12]

[12] Ministry of Justice (2013) "Report of the Triennial Review of the Criminal Cases Review Commission", p.2.

32. The critical statutory provisions governing the powers and duties of the CCRC in relation to conviction on indictment are:

    i. No case will be considered unless the applicant has exhausted his rights of appeal (S.13(1)(c) Criminal Appeal Act 1995);

    ii. The test for referring a case to the Court of Appeal is whether there is a real possibility that the conviction would not be upheld were the reference to be made (S.13 (1)(a));

    iii. Absent exceptional circumstances the reference may only be made on the basis of evidence or argument, which had not been raised in the proceedings, which led to it or any previous appeal (S.13(1)(b) and (2));

    iv. A power to require the production of documents from a "person serving in a public body" (S.17);[13]

    v. A power to require the appointment of an investigating officer to carry out inquiries (S.19);

    vi. An obligation to have regard to any application or representations made to the Commission by or on behalf of the person to whom it relates (S.14(2)(a));

    vii. Where the CCRC rejects an application, an obligation to provide the applicant with its statement of reasons for the rejection (S.14(6)).

33. The requirement for a convicted defendant to have exhausted his rights of appeal serves to underline the importance of the prosecution's duty of disclosure being available at the appeal stage, as submitted above.

34. The condition that a referral may only be based on new evidence or argument means in practice that many applications to the CCRC are based on fresh evidence or on an invitation to the CCRC to consider obtaining fresh evidence. The "real possibility" test involves a difficult exercise of judgment based on a predictive assessment of the outcome of an appeal were it to be referred. In a fresh evidence case that in turn requires the CCRC to consider how the court

[13] As a matter of broad principle no documents or material will be requested from a public body unless it appears that it may assist the CCRC in determining whether or not a case should be referred to an appellate court. The fact that material held by a public body relates directly or indirectly to a case under review by the CCRC or to a case being investigated for the Court of Appeal by the CCRC will generally satisfy the requirement of reasonableness, CCRC "Formal Memorandum: The Commission's power to obtain material from public bodies under S.17 of the Criminal Appeal Act 1995", p.2.

may exercise its power under S.23 CAA 1968. Debate about the exercise by the CCRC of its powers has often focussed on how it interprets the "real possibility" test and whether this has led to an over-cautious approach.

35. The requirements in S.14 for the CCRC to consider representations made by an applicant and to provide an applicant with the written reasons for rejection are intended to reflect the principle established in *R v SSHD Ex Parte Hickey and others* [1995] 1 WLR 734 that there should be sufficient disclosure to an applicant to allow him to present his best case.[14] The Royal Commission on Criminal Justice also recommended that adequate arrangements be provided for granting legal aid to convicted persons so that they may obtain advice and assistance in making representations to the CCRC.[15] While it considered that aid would not normally continue once the CCRC initiated its own investigations, it acknowledged that in some cases it might ask the applicant's legal representative to provide further information or assistance, perhaps involving the continuation of investigations already started by solicitors (at para. 32).

36. In its statement JUSTICE has provided an account of the operation of the precursor to the CCRC, the Home Secretary's power to refer a case, and in particular drawn attention to the shortcomings of that system and the importance to the decision making process of informed submissions being made on behalf of the applicant. While welcoming the introduction of the CCRC, JUSTICE makes the critically important point that the CCRC is "*not a body set up to represent the convicted person, but an independent agency of enquiry and that its decision as to what investigation would be necessary may differ from that of solicitors*." The professional duty of a legal representative to his or her client is fundamentally different to the duty to the applicant owed by the CCRC. INUK sets out in its statement the budgetary and resource limitations upon the CCRC in carrying out its functions, which demonstrate that with hundreds of applications each year, it is not possible thoroughly to investigate each case to find the fresh evidence that will satisfy S.23 CAA 1968.

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[14] Hansard, Criminal Appeal Bill, per Nicholas Baker MP, Standing Committee B, 30 March 1995; per Baroness Blatch, House of Lords, Second Reading 15 May 1995, col. 329; Committee 18 June 1995, col. 1525; Report, 3 July 1995, col. 964.

[15] See CALA's Statement at p.2 for discussion of the limited availability of legal aid for convicted persons in practice.

37. One direct consequence of the setting up of the CCRC has been that JUSTICE has moved away from individual case work, which it undertook so effectively over many years, to focus on law reform. As a consequence there is now a greater responsibility on others to assist those who continue to complain that they have been wrongly convicted, be they individual solicitors or barristers working either pro bono or with limited public funding, or projects such as INUK.

38. INUK and CALA draw attention to the results of a study conducted by Professor Jacqueline Hodgson and Juliet Horne at the University of Warwick on the impact of legal representation on applications to the CCRC, published in 2008, which demonstrated the significant extent to which applications to the CCRC were assisted by the involvement of legal representatives.

39. There are, it is submitted, three principal reasons why legal representation or other assistance to an applicant is so important to assist the CCRC to discharge its duty. First, the application of the statutory "real possibility" test involves expert knowledge of the jurisprudence of the criminal appellate courts and the workings of the criminal justice system. Second, knowledge of how to gather, collate and present new evidence requires both experience and familiarity with agencies and professional bodies and their procedures. Third, analysis of the issues and focus on relevant submissions. The CCRC itself identified early in its operations that[16]:

> "*Legal advisers can greatly assist applicants to identify relevant issues, to marshal information, and to develop submissions, e.g. by interviewing witnesses or obtaining expert reports. They are able to advise applicants on the Commission's case review process and to identify those issues that have already been dealt with at trial and cannot be taken further by the Commission.*"

40. Further, S.14(4)(A) and (B) Criminal Appeal Act 1995[17] require an appellant whose case has been referred to the Court of Appeal by the CCRC to obtain leave to argue any ground of appeal which is not contained in the Statement of Reasons. That has curtailed the ability of the appellant to rely on additional grounds of appeal either rejected or not considered by the CCRC. As a

[16] CCRC, Annual Report 1998, p 10, para 2.5
[17] Amendments inserted by S.315 Criminal Justice Act 2003.

consequence it means that a greater importance attaches to the submissions made by the applicant to the CCRC.

41. In order for effective submissions to be made to the CCRC, the applicant's representatives require access to all relevant material. Very often a convicted defendant will instruct new representatives, because of dissatisfaction with the way in which the case has been conducted by the trial lawyers. If the trial lawyers have failed to make appropriate inquiries of the police or prosecution and so failed to obtain relevant material or undertake relevant investigations, then it is necessary for these inquiries to be made by the new representative. It is wrong to restrict the ability of the new representative to act in the best interests of the applicant, by limiting the prosecution's duty of disclosure post conviction.

42. It follows from the above that the Divisional Court's reliance on the existence of the CCRC to justify its conclusion on the limits to the prosecution's post conviction duty of disclosure was misplaced because it failed to take into account:

    i. The complexity of the task facing the CCRC in assessing the merits of an application;
    ii. The specific statutory requirement that the CCRC consider representations by the applicant;
    iii. The evidence of the assistance provided to the CCRC from applications made to it with the benefit of legal representation;
    iv. The examples of new evidence being discovered by the applicant's representative, not by the CCRC.

43. All of these factors demonstrate that the CCRC is not a substitute for legal representation, but rather a replacement for the Home Office regime that was found to lack transparency and independence. Legal representation was fully intended to continue in the operation of applications to the CCRC, thereby requiring the continuation of the common law disclosure regime as necessary.

CONCLUSION

44. The annexes provided by the three Interveners record a number of examples of cases over the years in which miscarriages of justice have been exposed by dint

of the work undertaken by independent lawyers and/or journalists. The recent case of Victor Nealon (see the INUK and CALA statements) provides a salutary reminder of how the persistence of an individual practitioner can make the difference. No system of justice is immune from human frailty and nothing should be done to obstruct inquiries, which may provide new evidence to correct an injustice. The public interest in the finality of litigation must yield to the public interest in ensuring that justice does not miscarry.

45. The dangers of reliance on expert evidence, in particular where the area of expertise is in a state of development and where there is some controversy over new techniques, is well recognised by the courts.[18] Scientific tests and techniques are constantly developed and improved. It is therefore wrong in principle to require that disclosure of material exhibits to the defence should depend on the defence establishing, in advance of tests being carried out, that the results of the tests would be necessarily relevant to the safety of the conviction. It should be sufficient that the results may assist in the presentation of a defendant's case.

46. The limitations on the state's duty of disclosure established by the Divisional Court may have the consequence of depriving a wrongly convicted defendant of the opportunity of presenting his case in the best possible light. The cases referred to in the annexes demonstrate that failures in disclosure have continued to be a source of injustice. They also demonstrate the importance for newly instructed lawyers or representatives of having access to all relevant material in the possession of the prosecution. In some cases the material necessary to re-investigate may already be in the former solicitor's papers, or require the interview of a witness. This can be freely investigated without hindrance by the Crown. However, if the defendant has been inadequately represented at trial then appropriate inquiries may not have been made of the prosecution. Likewise, if the relevant issue is one of scientific advancement and exhibits need re-testing, these can only be obtained from the police. Worse, the police through inadvertence or malpractice may fail to disclose relevant material. Therefore, unless the prosecution continue to be under a duty to disclose

[18] See *R v Henderson*; *R v Butler; R v Oyediran* [2010] 2 Cr.App.R. 24.

relevant material post conviction then the defendant runs the risk of being arbitrarily deprived of potentially significant material.

47. The potential for detrimental impact on miscarriage of justice investigations exists notwithstanding the existence of the CCRC. The CCRC's case review process is limited and cannot ensure a thorough review in every application. Claimants of miscarriage of justice rely on lawyers and organisations such as innocence projects to undertake investigative work and present a persuasive case to the CCRC. Limiting the state's duty of disclosure could inadvertently result in poorer applications to the CCRC and greater reliance upon the CCRC that it is unable to satisfy.

48. It is, therefore, submitted that the requirement for the prosecution to disclose all material, which may cast doubt on the safety of the conviction, should be construed as requiring the prosecution to continue to disclose material after conviction in the same manner as it would before trial.

Henry Blaxland Q.C.

David Emanuel

13th February 2014