



WARWICK

LAW SCHOOL

The Criminal Cases Review Commission

Last resort or first appeal?

An examination of the CCRC's discretion
to refer cases not previously appealed

Professor Jacqueline Hodgson
Dr Juliet Horne
Dr Laurène Soubise

Manuscript version: Published Version

The version presented in WRAP is the published version (Version of Record).

Persistent WRAP URL:

<http://wrap.warwick.ac.uk/120200>

How to cite:

The repository item page linked to above, will contain details on accessing citation guidance from the publisher.

Copyright and reuse:

The Warwick Research Archive Portal (WRAP) makes this work by researchers of the University of Warwick available open access under the following conditions.

Copyright © and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable the material made available in WRAP has been checked for eligibility before being made available.

Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

Publisher's statement:

Please refer to the repository item page, publisher's statement section, for further information.

For more information, please contact the WRAP Team at: wrap@warwick.ac.uk

PREFACE

This project was funded by the Economic and Social Science Research Council through their Warwick Impact Acceleration Account in order to evaluate the impact of Horne and Hodgson's earlier research concerning the work of the Criminal Cases Review Commission (CCRC) through an analysis of the CCRC's current approach to applications involving convictions which have not previously been the subject of appeal proceedings.

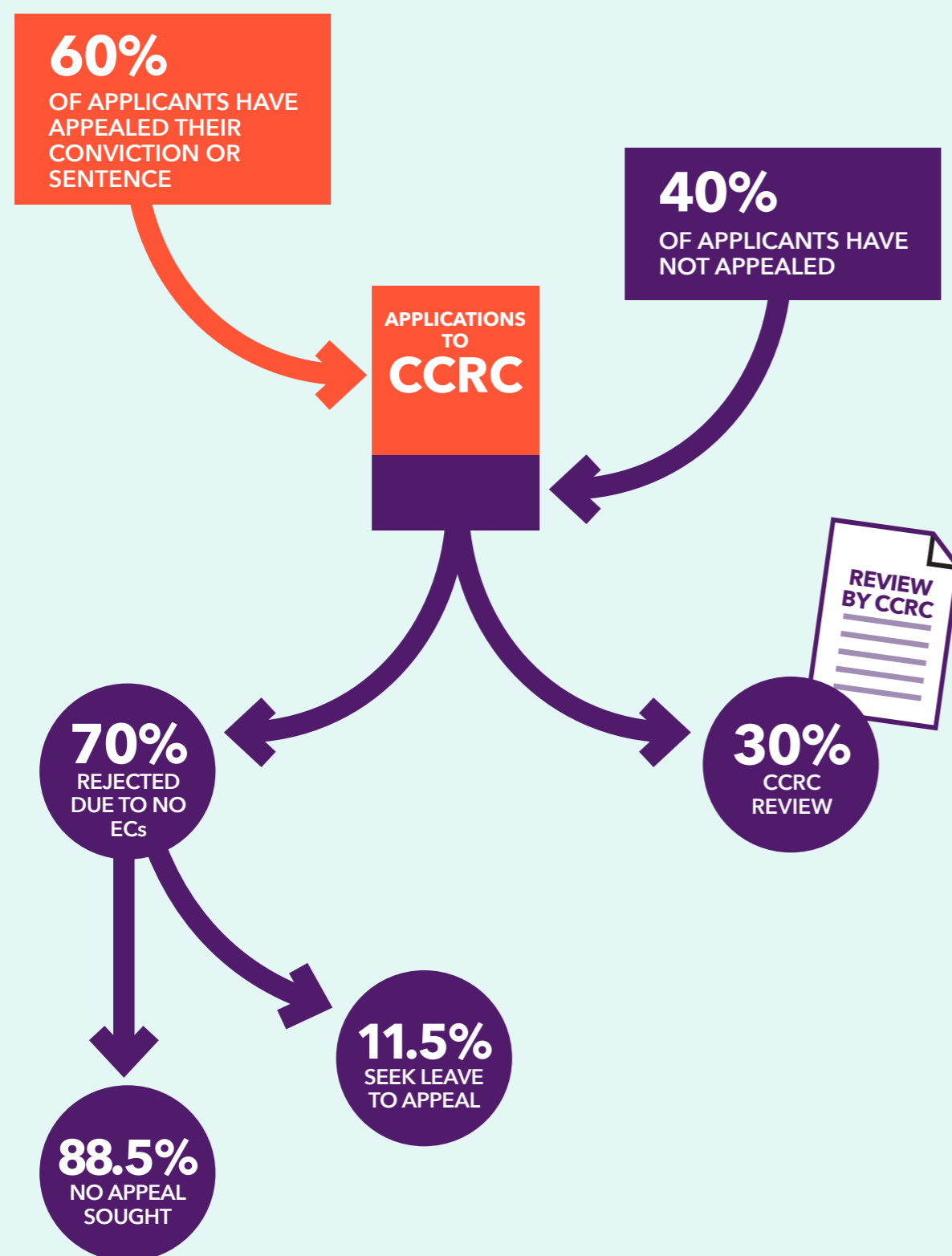
Following changes to the CCRC's approach to cases which have not previously been to appeal, the CCRC acknowledged that this was an area in need of further enquiry and, in particular, expressed concern about what happens to applicants who are rejected by the CCRC on this basis. Given Horne and Hodgson's previous research with the Commission, and in particular, Horne's doctoral research which identified significant concerns that meritorious applications, particularly from vulnerable applicants, might be rejected during this 'No Appeal' process, the CCRC invited them to submit a proposal for a project to investigate the new procedures.

The researchers wish to thank the CCRC's Research Committee who granted approval for the project and the staff and Commissioners at the CCRC who have generously given their time and assisted with this research.

CONTENTS

PREFACE	2
EXECUTIVE SUMMARY	5
NO APPEAL CASES AT THE CCRC	
A. INTRODUCTION.....	7
B. BACKGROUND TO THE RESEARCH	11
1. The CCRC decision-making process	11
2. The CCRC NA policy	12
C. THE RESEARCH	15
1. Data gathering at the CCRC	15
2. Data limitations	16
3. CCRC assistance	16
D. FINDINGS.....	17
1. The nature of NA cases	17
2. Impact of the new NA policy	18
3. 'Exceptional circumstances' before and after the new policy	19
4. Changes in the CCRC screening and reviewing process	22
5. Vulnerability	24
6. Appeal following rejection of a NA case	28
E. NO APPEAL CASES AND THE ROLE OF THE CCRC.....	29
F. PRINCIPAL RECOMMENDATIONS.....	33

APPLICANT ROUTES TO THE CCRC



EXECUTIVE SUMMARY

1. The Criminal Cases Review Commission (CCRC) is an independent body, created by statute, which investigates possible miscarriages of justice and, within statutory criteria, refers appropriate cases to the appeal courts. Because the CCRC is meant to supplement and not replace the work of the appeal courts, the statute provides that, except in exceptional circumstances, the CCRC should only refer cases that have previously been the subject of appeal proceedings.
2. Despite this requirement, around 40% of applicants to the CCRC have not previously been to appeal. To some extent this is likely to be the result of the many barriers and disincentives to appeal (including legal restrictions on appeal against magistrates' court guilty plea convictions, time limits, the risk of losing time served in prison and difficulties in securing legal assistance). In order to deal with these 'No Appeal' cases, the CCRC has developed an abbreviated process through which most of these cases are rejected. If no potential 'exceptional circumstances' are identified in this process, the case will be rejected. Nearly three quarters of the 'No Appeal' cases are rejected on this basis (representing about 30% of all CCRC applications) and these applicants are advised to apply to the appeal courts directly.
3. There is no statutory definition of 'exceptional circumstances' and the CCRC has grappled with the issue of how to apply this requirement. Research by Horne (2016) demonstrated that the CCRC's previous approach was inconsistent and created a risk of meritorious cases being overlooked. In devising its current practice, the CCRC was driven by a concern to deal with all applications fairly. In particular, the Commission was mindful of how long applicants who had exhausted the appeal process - and therefore had no other option but to apply to the CCRC - were having to wait for decisions. The CCRC sought to improve the consistency and efficiency of its decision-making by narrowing the definition of exceptional circumstances and making exceptional circumstances a requirement for starting a case review (rather than simply a requirement for referring the case to the appeal courts).
4. This project followed up Horne's research and examined 250 No Appeal cases closed during four sample periods between 2010 and 2016, together with a smaller sample of 120 appealed cases for comparative purposes. The research reveals that, as the CCRC intended, the new policy has led to a more consistent approach to the treatment of No Appeal cases and to increased efficiency in terms of a significant reduction in time taken to close such cases.
5. Once rejected by the CCRC due to the absence of prior appeal proceedings, however, very few applicants go on to apply for leave to appeal against conviction (only 21 out of 183 applicants in the sample who had been rejected by the CCRC at the 'No Appeal' stage). This raises the prospect that a wrongful conviction that is rejected by the CCRC on the basis of No Appeal might never be subjected to proper examination by the appeal courts. Whilst some of these applications might be entirely without merit, it is still important that the CCRC's process is able to identify potentially meritorious cases and, in particular, those involving vulnerable applicants, some of whom may be unable to initiate their own appeal.
6. The research reveals that, in looking for potential exceptional circumstances to justify beginning a review in a No Appeal case, the CCRC has taken a much narrower approach to 'exceptional' and has increased its reliance on applicants identifying the relevant information. Although a higher proportion of No Appeal cases have been put forward for review work, the research shows that this simply reflects the reclassification of checks formerly carried out at the initial stages.
7. In order to elicit information from the applicant about exceptional circumstances, the CCRC's application form invites the applicant to indicate any exceptional circumstances based on a good reason why the applicant 'did not appeal and cannot appeal now without the CCRC's help'. Applicants appear, however, to find it difficult to give any such reason with almost 80% of applicants in the sample either failing to answer the question or citing a reason which is expressly excluded by the CCRC's definition of exceptional circumstances (e.g. being unable to secure legal representation for the appeal). Even lawyers acting on applications had difficulty with this issue, with 27.5% failing to answer the question and 20% citing reasons which the CCRC expressly exclude.

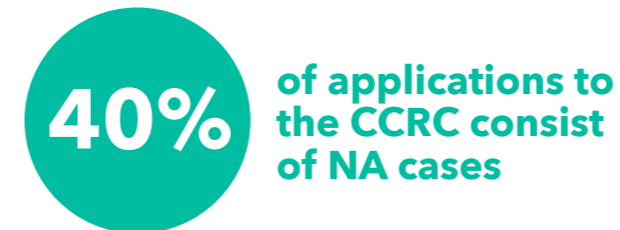
8. This increased reliance on applicants highlighting possible exceptional circumstances before a review can begin raises particular concerns about the treatment of vulnerable applicants. The CCRC's policy recognises that mental illness or disability may present a serious disadvantage in pursuing leave to appeal but states that, because these issues are so common in the prison population, the presumption must be that these will not amount to exceptional circumstances.
9. The research suggests that this presumption is being applied in practice. Over half of the 250 No Appeal applications which were examined involved an applicant with some form of vulnerability but only 10 of them were sent for review based on the applicants vulnerability as an 'exceptional circumstance'. The sample of 250 included cases involving highly vulnerable applicants in which the CCRC declined to find exceptional circumstances. Given the acknowledged difficulties facing such applicants in mounting their own appeal, it appears that the CCRC is unduly dismissive of claims of vulnerability amounting to exceptional circumstances.
10. The CCRC has been granted broad powers and discretion in its investigation of alleged miscarriages of justice. It has seen an enormous increase in the number of applications received in recent years whilst experiencing a real terms budget cut of around 30%. It is inevitable, therefore, that the CCRC would find ways to deal more quickly with its caseload and, in particular, the 40% of applications which have not previously been appealed.
11. This research suggests that, in its treatment of No Appeal cases, the CCRC is increasingly prioritising efficiency and consistency (explained by an overall concern of fairness, especially for those applicants who have already appealed their conviction) over a more humane and individualised approach and relying on the availability of appeal as justification for this approach. However, the CCRC's legitimate concern to avoid usurping the appeal courts role and to deal with cases expeditiously must be balanced with its role as a safety net, particularly given that the appeal process is often not experienced as either accessible or fair and given the significant proportion of vulnerable applicants. The necessary task of making the appeal courts more accessible will require changes within the courts and in the provision and funding of legal advice. The CCRC cannot make those changes itself but, equally, cannot ignore the problem while it waits for the system to act. This research suggests that, in the meantime, such applicants are in danger of falling through the criminal justice system's safety net.

NO APPEAL CASES AT THE CCRC

A. INTRODUCTION

Following the string of high-profile miscarriages of justice of the 1970s and 1980s, the establishment of the Royal Commission on Criminal Justice was announced in March 1991. The Royal Commission was given the task of examining all stages of the criminal process, and one of its recommendations led to the Criminal Appeal Act (CAA) 1995 which established the Criminal Cases Review Commission (CCRC). This replaced the former system whereby a Home Office unit considered the safety of a conviction and could refer it to the Court of Appeal. The Home Office was perceived to be insufficiently independent and was criticised for refusing to take a more proactive stance in investigating alleged miscarriages.¹

The CCRC started work as an independent body investigating possible miscarriages of justice in April 1997. From its establishment until 31st December 2017, the CCRC referred 636 cases to the appeal courts, representing a referral rate of just under 3%.² Under s. 13 of the CAA 1995, in order for the Commission to refer a case to the appropriate appeal court, there must be a real possibility that the conviction or sentence will not be upheld. Importantly, a reference cannot be made if there has been no appeal or leave to appeal has not been sought (s. 13(1)(c)). Only if there are 'exceptional circumstances' can the Commission refer in such 'No Appeal' (NA) cases. The CCRC was created as a body of last resort and so applicants are first required to exhaust all remedies in order that the Commission does not usurp the role properly carried out by the appeal courts. As explained by the CCRC in its 2013/14 annual report, '[a]pplications to the Commission should not be seen, or used, as a mechanism by which applicants can by-pass conventional appeal processes.' (p. 14) However, the statute does not define what 'exceptional circumstances' are, giving the CCRC wide discretion in that respect.



Around 40% of applications to the CCRC consist of NA cases (47% of applications in 2012/13; 48% in 2013/14; 46% in 2014/15; 39% in 2015/16; 38% in 2016/17). Given that these cases represent such a large proportion of CCRC applications, the Commission needs to be able to deal with these cases effectively within the resources available, whilst also ensuring that applicants are not screened out of the process prematurely. These are factors that the Commission must balance in all aspects of its work - how to ensure that applicants are treated fairly and receive a just outcome from this body of last resort, whilst also acting within its resources and operating with acceptable waiting times for applicants.

The CAA 1995 sets out the test to decide which cases may be **referred**, but not which cases should be **reviewed** by the CCRC; this is for the Commission to decide. This is the same for NA cases. Exceptional circumstances are required to refer NA cases, but it is within the Commission's discretion to determine at what point exceptional circumstances must be made out - after review and at the point of **referral**, or in order to trigger even a review. Although requiring exceptional circumstances in order to trigger a review would save resources by screening out many NA applications at an early stage,

...it can be difficult for applicants themselves to identify exceptional circumstances which could justify a referral of their case to the appeal courts, or for the CCRC to spot such circumstances without a detailed review of the case.

Before examining how the CCRC deals with those cases, it is important first to consider why so many applicants have not attempted to appeal their conviction before applying to the CCRC.

1. Royal Commission on Criminal Justice Report 1993, Chapter 11, para 2-11. Belloni, F and Hodgson, J. (2000) *Criminal Injustice* chapter 1.
2. <https://ccrc.gov.uk/case-statistics/>

First, the right of appeal is limited by statute in England and Wales in a variety of ways. For summary convictions, the right to a rehearing in the Crown Court is not as generous as it might appear, with the exclusion of any defendant who pleaded guilty in the magistrates' court.³ As a result, a referral by the CCRC is usually the only remedy for wrongful convictions following a guilty plea at the magistrates' court.⁴

People who wish to appeal a Crown Court conviction are required to seek leave to appeal. The only ground for overturning a conviction before the Court of Appeal is that it is 'unsafe' (CAA 1995 section 2 (1) (a)). As a result, the Court of Appeal does not hear all of the evidence again, but looks for new evidence casting doubt on the verdict or for unfairness in the Crown Court proceedings. Furthermore, those convicted are expected to identify grounds and to seek leave to appeal within a short period of time (28 days from their conviction under s. 18(2) Criminal Appeal Act 1968). Stressing the importance of finality, the Court of Appeal has been keen to impress upon applicants and their representatives that time limits have to be strictly observed and reasons provided for requiring extensions.⁵ By contrast, the CCRC can refer a case to the Court of Appeal without any time limit.

There are practical barriers and disincentives to appealing against a conviction, such as the risk of losing time served in prison and the difficulties in securing legal assistance.

Second, access to legal aid for legal representation on appeal can be difficult. The representation order for trial covers initial advice on appeal and legal aid will also fund the drafting of the grounds for appeal if the lawyer who assisted the client at trial advises that there are any. However, if the lawyer finds no ground for appeal, the trial legal aid stops and the person must either pay for legal assistance herself, find a lawyer willing to act pro bono or apply for legal aid under the very limited 'advice and assistance' scheme. Trial lawyers are particularly unlikely to advise that errors by lawyers might provide grounds for appeal or to suggest grounds for appeal if the client pleaded guilty.⁶

Although it is not necessary to have a lawyer to appeal, serving prisoners might find it particularly difficult, especially given the high rate of illiteracy in prison.⁷ Since 2012, there is no longer a mandatory requirement for prisons to have a designated Legal Services Officer whose duty it was 'to ensure that no prisoner who is likely to need a legal service fails to apply for it due to ignorance or general inadequacy.'⁸ In particular, Legal Services Officers used to 'give assistance to prisoners who wish to appeal, see all prisoners who are or could become appellants on the morning after their arrival at the prison and inform such prisoners that it is in their interest to seek professional legal advice.'⁹ Although prison officers are still asked to provide appeal forms and assist prisoners in completing them, the absence of this dedicated and specially trained service means that prisoners might have difficulties in accessing the forms to appeal and/or get limited help to submit them. Moreover, a recent report by HM Inspectorate of Prisons found 'large numbers of prisoners at some jails who were locked up for more than 22 hours a day, or throughout the working day.'¹⁰ As a result, prisoners have fewer opportunities to engage in activities such as education, visiting the library or merely socialising which could increase the likelihood of them appealing their conviction, either by improving their knowledge of the justice system or simply by obtaining the contact details of a lawyer to assist them with their appeal.

Third, applicants may also be deterred from seeking to appeal as there is a growing risk that time served will not count against their sentence. Section 29 of the Criminal Appeal Act 1968 enables the Court of Appeal to direct that the time applicants for leave to appeal have spent in prison between lodging their application for leave to appeal and its dismissal, will not count in relation to the sentence they are required to serve. The Court of Appeal can make this 'loss of time order' if it considers the application 'wholly without merit', even if the applicant had received legal advice that there were grounds for appeal.

The Court has, in recent years, indicated that it is now necessary for it to use this power more frequently than before and has directed that loss of time should be considered in every unmeritorious application.¹¹ Research suggests that applicants are likely to be dissuaded from appealing due to fear of a loss of time direction.¹² This view was supported by CCRC staff who advise prisoners in outreach surgeries and on the CCRC advice line.

These staff reported that prisoners, and in particular female prisoners (more of whom may have caring responsibilities which make them particularly sensitive to further delay in their release), frequently cite fear of loss of time as a reason why they do not want to appeal and would rather apply to the CCRC.

In contrast, no 'loss of time' order can be made in cases which the CCRC refer to the appeal courts. Coupled with the introduction of an 'easy-read' form for CCRC applications in 2012, accompanied by guidance which clearly states that the loss of time order does not apply, this may explain why people contesting their conviction might find it easier to apply to the CCRC directly, instead of first attempting to appeal.

3. Magistrates' Court Act 1980, section 108 and *R v Birmingham CC ex parte Sharma* [1988] Crim. L. R. 741.

4. If a convicted person can show that the plea was entered equivocally or under duress then he may be able to argue that the plea was a nullity so that the case can be returned to the magistrates' court for trial but the Crown Court defines equivocal plea and duress very narrowly in this context and few cases are remitted (See *R v Marylebone JJ, ex p Westminster Crown Court* [1971] 1 WLR 567 DC and *R v Birmingham Crown Court ex p Sharma* *ibid.*)

5. *R v Roberts and Others* [2016] EWCA Crim 71; simply relying on the merits of the grounds of appeal in support of an extension was deemed insufficient: *R v Wilson* [2016] EWCA Crim 65.

6. This has always been a problematic ground of appeal and the Royal Commission on Criminal Justice (Chapter 10 paras 58-9) recommended broadening the test to include some thing less than "flagrantly incompetent advocacy".

7. Government data on English and Maths skills of prisoners show that 56% of people entering the prison system have literacy skills no higher than those broadly expected of an 11 year old child (data for 2015/16): *OLASS English and Maths assessments: participation 2015/16* available at <https://www.gov.uk/government/statistical-data-sets/fe-data-library-education-and-training> [accessed 13/10/2017].

8. PSO 2605.

9. *Ibid.*

10. HM Inspectorate of Prisons, *Life in Prison: Living Conditions* (2017) p. 3, available at <https://www.justiceinspectorates.gov.uk/hmiprison/inspections/life-in-prison-living-conditions/> accessed 12 February 2018.

11. *R v Hart and Others* [2006] EWCA Crim 3239; *R v Gray and others* [2014] EWCA Crim 2372.

12. The Royal Commission on Criminal Justice noted that prisoners and solicitors were under the misapprehension that sentence could be increased if an appeal was brought. The possibility of a loss of time order contributed to this, as for prisoners, the net effect was the same: bringing an appeal may result in spending a longer period in custody. See Royal Commission on Criminal Justice Report 1993 Chapter 10, paras. 18-19.

B. BACKGROUND TO THE RESEARCH

1. The CCRC decision-making process

All applications to the CCRC initially go through an administrative phase: cases which are ineligible (because they do not fall within the CCRC's jurisdiction) or those which are still within the statutory time period to appeal or have an appeal pending are rejected by administrative staff¹³ (currently, about 6% of applications¹⁴). Administrative staff also identify re-applications and NA cases. Whilst all eligible post-appeal, first applications go straight through for a review, re-applications and NA cases are first assessed to decide whether they are re-applications on the same grounds as a previous unsuccessful application or, for NA cases, whether there are potential exceptional circumstances.

This initial assessment of the case used to be carried out by a Commissioner, but it is now carried out by a case review manager and then passed on to a Commissioner for a decision. Re-applications which do not present new grounds and NA cases which do not have potential exceptional circumstances are rejected at this 'initial assessment' stage (currently, about 7% and 30% of applications respectively).



Previously, Commissioners also looked at applications to check whether they revealed any 'reviewable grounds'. Cases deemed to present 'no reviewable grounds' (NRG) were rejected at this 'initial assessment' stage. This has now changed and all appealed cases are now sent for review, although the amount of work carried out by the CCRC as part of this 'review' varies. Cases sent for review are classified from Type 1 to Type 4, depending upon the CCRC's assessment of the case complexity and estimated amount of work for the CCRC to resolve it.¹⁵ Former 'NRG' cases are now dealt with as Type 1 reviews.

Cases which remain after the 'initial assessment' stage (currently, about 56% of applications) are allocated to case review managers for review. When the review of the case is complete, it will fall to be decided either by a single Commissioner (for less complex cases which are thought likely to result in a decision not to refer the case) or a panel of three Commissioners (if there is a potentially referable point or some complexity requiring additional consideration). Our findings show that the amount of paperwork requested at the 'initial assessment' stage to decide whether to send a case for review, and the checks carried out as part of such review, has varied over time.¹⁶

13. See the CCRC's formal memorandum on its decision-making process.

14. The case closure percentage figures in this section are based on data provided by the CCRC from its management information system, covering the period from 1/3/17 to 28/2/18.

15. This stage is called 'screening' by the CCRC, although it does not involve any screening as such (i.e. no case is rejected at this stage), but rather a classification of applications in different categories of reviews.

16. See below.

2. The CCRC NA policy

The CCRC has grappled with the issue of NA cases and what constitutes ‘exceptional circumstances’ from its inception. Juliet Horne conducted research on guilty plea cases in 2013.¹⁷ Since a large proportion of applicants who are convicted following a guilty plea have not appealed, her research also looked at NA cases and showed that the CCRC has struggled to define a consistent approach to such cases. She found that the CCRC’s own guidance and policy documents reflected two opposing approaches to dealing with applications where the applicant has not appealed and where there are no obvious exceptional circumstances. The first approach consists in simply rejecting applications without further enquiry on the basis that there has been no prior appeal: this means that potential ‘exceptional circumstances’ are required at the ‘initial assessment’ stage merely to trigger a review. The second – more generous – response is to investigate the case, aware that it will also be necessary to identify exceptional circumstances if the investigation leads to the discovery of a real possibility that the appeal court might find the conviction unsafe.

The research revealed that both approaches were reflected in practice and this led to inconsistency in the treatment of applications. Horne’s analysis showed that the CCRC routinely used the lack of previous appeal to ‘screen out’ a high proportion of cases without a full review, following a superficial inspection by a Commissioner. Sometimes, however, NA cases survived the ‘initial assessment’ stage as a result of being screened by a Commissioner who took the more generous approach. If the subsequent review identified a ‘real possibility’ in such a case, the CCRC generally had little difficulty in finding ‘exceptional circumstances’ to overcome the lack of appeal.

There is no statutory definition of ‘exceptional circumstance’ and the CCRC chooses its own approach.

The use of ‘exceptional circumstances’ as a hurdle for applicants to get over in order for the CCRC to review their case reflects the prioritisation of efficiency concerns over proper consideration of the potential merits of individual cases. Given that cases which were referred only went through for a review by chance (i.e. because they were looked at by a more sympathetic Commissioner) rather than by the consistent application of policy, we cannot be confident that meritorious cases were being identified and passed for review.

The CCRC has attempted to resolve this inconsistency, but has found it difficult, at first, to reach agreement on a policy to deal with NA cases. One Commissioner interviewed by Horne recalled how the issue had been ‘endlessly debated’. Between November 2012 and February 2013, the CCRC implemented a pilot scheme, during which administrative staff were tasked to look at NA applications to see whether the applicant had mentioned any exceptional circumstances to justify referral to the appeal courts in the absence of a prior appeal. If not, the applicant was sent a standard letter strongly encouraging her to appeal or giving her 28 days to notify the CCRC of any exceptional circumstances in the case. The case would only be seen by a Commissioner if the applicant replied to the letter, otherwise it would be closed by the administrator. This was the first time that the CCRC allowed for cases to be closed without a Commissioner’s decision. The pilot scheme represented a very narrow application of the Commission’s discretion to review in NA cases. It prioritised efficiency, requiring exceptional circumstances for the case to be deemed worthy of a review and asking administrative staff to determine whether these were present, instead of Commissioners or case review managers who have more experience of what might constitute exceptional circumstances.

After this pilot had been running for a few months, it was decided that it was inappropriate for administrative staff to be making the decision to close a case¹⁸ and case review managers were tasked with checking whether the application pointed to potential exceptional circumstances prior to cases being closed. The NA process then went through a number of different iterations and was under review at the time of Horne’s research. CCRC management therefore expressed particular interest in her findings and she discussed her concerns with the Head of Casework. These discussions were followed by the approval of a new NA policy by the Commission’s board in July 2014.

According to this new policy, NA applications are first considered by a case review manager, before being passed on to a Commissioner if the case review manager recommends that there are no potential ‘exceptional circumstances’. This first assessment focuses exclusively on potential exceptional circumstances in the application as a requirement for the CCRC to continue to work on the case. The new policy confirms that ‘[t]he existence of a “real possibility” (...) will not, of itself, amount to an exceptional circumstance justifying referral.’¹⁹ It provides a far tighter definition of exceptional circumstances. Exceptional circumstances will only be found if there is ‘a good reason why you did not appeal and cannot appeal now without the CCRC’s help.’²⁰ In this way, the Commission maintains a narrow approach to the exercise of its discretion, both in its definition of ‘exceptional circumstances’ and by requiring ‘exceptional circumstances’ to be demonstrated at the outset in order to trigger a review rather than only at the later referral stage.²¹

In 2014 the CCRC introduced a new policy for NA cases which introduced a more limited definition of ‘exceptional circumstances’.

The CCRC’s intention in introducing the new policy was to increase efficiency and consistency. This approach can be justified by a concern to treat all applications fairly. If those with outstanding appeal rights can be encouraged to take their cases directly to the appeal courts, this will free the CCRC to focus on those who have exhausted the appeal process and have no other option but to apply to the CCRC. However, as a result of the barriers to appeal discussed above, some rejected applicants may not feel able to access the appeal courts and some, despite having potentially successful grounds of appeal, may need the assistance of the CCRC if they are ever to challenge their conviction. The Commission has been successful in referring small numbers of NA cases: of the 49 examples of guilty plea referrals in Horne’s sample up to 2013, 39 were NA cases and of these 39 referrals, the conviction was quashed in 33. Even excluding the 19 immigration and asylum cases, which represented something of an exception, the success rate in having the conviction overturned was 75%. It is crucial that the CCRC’s policy on NA cases allows the organisation properly to assess such cases. The new policy creates a risk that NA cases may be rejected prematurely without the benefit of a more detailed review, which could identify a possible basis of appeal and a need for the CCRC’s assistance.

The new policy puts the onus mainly on applicants either to demonstrate exceptional circumstances or to appeal their conviction, despite the significant barriers to both described above. The CCRC acknowledges that this is an area urgently in need of further enquiry so that the nature of these applications can be fully understood and the CCRC procedures for addressing them properly evaluated. It expressed particular concerns about what was happening to applicants rejected on NA grounds. Given Horne and Hodgson’s previous research with the Commission, the CCRC invited us to submit a proposal for a project to investigate the effectiveness of the new procedures. Having highlighted concerns with the treatment of NA cases (Horne 2017) and the important role that defence lawyers can play in identifying exceptional circumstances in these applications (Hodgson & Horne 2009), we welcomed the opportunity to evaluate the impact of our earlier research through an analysis of current CCRC practices. Our proposal was agreed by the CCRC research committee and funded by the Economic and Social Science Research Council through their Warwick Impact Acceleration Account, at which point Laurène Soubise joined the team. Ethics approval for the project was granted by Warwick University Humanities and Social Sciences Research Ethics Sub-Committee.

This research set out to evaluate the way the CCRC approaches NA cases. In particular, the research sought to identify the characteristics of NA cases that come to the CCRC, ascertain why those applicants have not appealed their conviction and whether those who are unsuccessful take up the CCRC advice to apply for leave to appeal. It also examined whether other factors, such as the availability of legal advice, impact on the nature and quality of applications and on the Commission’s ability to deal with them.

17. Horne, J. (2016) *A plea of convenience: an examination of the guilty plea in England & Wales*. PhD thesis, University of Warwick. Available at <http://webcat.warwick.ac.uk/reCORD=b3057719~S1>.

18. Horne’s sampling revealed a case which was rejected as part of the pilot scheme despite involving a potentially vulnerable applicant who, having been convicted in the youth court, had no right to appeal. A senior member of staff later observed to her that the case illustrated why the pilot scheme was ‘not a good idea.’

19. Formal Memorandum.

20. Standard FAQs sent to unsuccessful applicants.

21. As noted above, the statute refers to the need for exceptional circumstances in order to refer NA cases. The decision on which cases to review is entirely that of the Commission.

C. THE RESEARCH

In 2015/16, an intern at the CCRC carried out a research project into NA cases. The project provided quantitative and qualitative data about 100 NA cases received in July/August 2014 and July/August 2015. The CCRC intended the project to provide the organisation relatively quickly with information about the impact of its NA policy as well as providing some background information to assist in planning this subsequent independent academic research. The project found that the CCRC was closing NA cases more quickly than previously. The most common reason for a NA case proceeding to review was the need to do credibility checks on the main witness or use the CCRC's powers to obtain documents. Only six out of the 100 cases examined were the subject of appeal proceedings after being rejected by the CCRC.

1. Data gathering at the CCRC

Data analysed for the present research project consists of data from the CCRC case management information system (Vectus) and our own analysis of CCRC case files.

(a) Vectus data report

The CCRC's management information system, known as Vectus,²² contains records of all the cases handled by the CCRC. When an application is received, administrative staff input standard information about the case into Vectus and after that all key stages of the case's progress through the CCRC are recorded on the system. From these records and with the help of a member of staff at the CCRC, it has been possible to extract data concerning NA cases closed over a six-year period (from 1 January 2010 to 22 November 2016). The data shows the stage at which each case was closed.

In order to record NA cases on Vectus, administrative staff check whether the applicant has appealed or not, either by checking the Court of Appeal's database (Cactus) or, for summary cases, by contacting the magistrates' court where the applicant was convicted. Applicants who have appealed against sentence, but not conviction, and apply to CCRC in respect of both conviction and sentence are treated administratively as NA cases. Conversely, those who have appealed against conviction, but not sentence, and apply in respect of both are treated as appealed cases. Those who have appealed against sentence, but not against a confiscation order, and apply in respect of the confiscation order, or vice versa, will be treated as NA. Cases in which the applicant has not appealed, but is still within the appeal time limit, are treated as ineligible and rejected outright by administrative staff. As a result, they did not appear on the report created from Vectus data for us by a CCRC member of staff.

We noted some inaccuracies in the cases recorded as NA on Vectus. Those inaccuracies were due to the way the case was closed on the system. If the case was closed as an NA case on Vectus by mistake, it erroneously appeared on our report. Thus, one case where the applicant was not convicted, but simply bound over, was closed as NA on Vectus, whereas it should have been closed as ineligible, because the CCRC cannot review cases where there has been no conviction. However, such inaccuracy was relatively rare in the cases we sampled and therefore only affected the data marginally.



were sampled across
4 time periods



²² The CCRC now uses a new data management system called 'Assure'.

(b) CCRC case file analysis

The CCRC permitted us access to its electronic case records. Four sample periods were chosen – 1 January to 30 April in 2010, 2013, 2014 and 2016. These dates were chosen so that we could track cases before and after the introduction of the ‘easy-read’ application form, and the renewed procedure for dealing with NA cases. The 2010 sample also allowed us to compare the impact of legal representation prior to the most recent legal aid cuts. About one third of applications closed within the sample periods were sampled. In total, 250 NA cases were sampled (50 in 2010, 80 in 2013, 40 in 2014 and 80 in 2016). A smaller sample of non-NA (appealed) cases was also used for comparative purposes (30 per time period, 120 appealed cases in all²³) to ascertain whether there were any significant differences in the characteristics of NA and appealed cases.

We generated a template with key characteristics and interrogated both NA and appealed cases to see if they differed in significant ways. Key characteristics included information about the applicant (sex, age, vulnerability,²⁴ whether in custody or not, prison name if applicable) and about the conviction (offence, court, conviction date, guilty plea/trial, sentence). We also recorded the grounds for appeal and the outcome of the appeal (in appealed cases) or the reasons given by the applicant for the lack of appeal (for NA cases). The date of the application to the CCRC as well as application grounds were also recorded, along with any exceptional circumstances raised explicitly by the applicant and other potential exceptional circumstances in the application identified by us. We also made a note of any application where the applicant sought the assistance of a lawyer and recorded the amount of assistance that appeared to have been provided by the lawyer (i.e. did they act as a mere postbox, simply passing on representations and papers from the applicant without comment or apparent exercise of critical judgment? Or did they make substantive representations?).²⁵ Finally, we took notes on the process the case went through at the CCRC, the documents gathered and/or investigations carried out by the CCRC, the CCRC decision and the reasons it gave to support it. For the older samples, we sought to track what happened to cases that were rejected in that period – did they appeal? Was the appeal successful? Did they re-apply to the CCRC? If so, on what grounds and what was the outcome?

The template form was filled out for each case sampled. Relevant data was found by reviewing the application form, correspondence, the case record (CCRC staff log the content of telephone calls and may record their reflections in ‘case records’ relating to each case) and the statement of reasons (which explains and justifies the CCRC’s decision to the applicant). In describing individuals and cases in this report, insignificant details have been altered in order to disguise the identity of individuals involved.

2. Data limitations

One piece of information missing from our understanding of NA cases is the perspective of applicants themselves. We would have liked to send questionnaires to NA applicants to discover more about why they applied to the CCRC and whether they had considered appealing to the Court of Appeal before or since applying to the Commission. Unfortunately, this part of the project could not be carried out, due to the confidentiality of applicants’ names and addresses and the burden this would have represented for the Commission to do this on our behalf.

3. CCRC assistance

We are grateful for the assistance and support provided by the CCRC in carrying out this research project. After having signed a confidentiality agreement and having gone through security clearance, our researcher was provided with a desk and a computer, and was trained by CCRC staff in finding and collecting data on Vectus. The CCRC provided further assistance by finding out whether applicants had appealed their conviction after having been rejected by the CCRC in the cases we sampled. Our researcher was also able to obtain invaluable help from various staff at the CCRC: in particular, we are grateful to administrative and IT staff who helped organise the practicalities of the fieldwork, to the data analyst who ran reports to identify relevant cases and to the case review manager who coordinated the fieldwork and was always happy to answer questions about CCRC procedures. Other members of staff were also happy to answer more specific queries.

23. Cases are coded with the letters NA for ‘no appeal’ or A for ‘appealed’, the year it was closed and a case number, i.e. NA-2016-48 or A-2010-19.

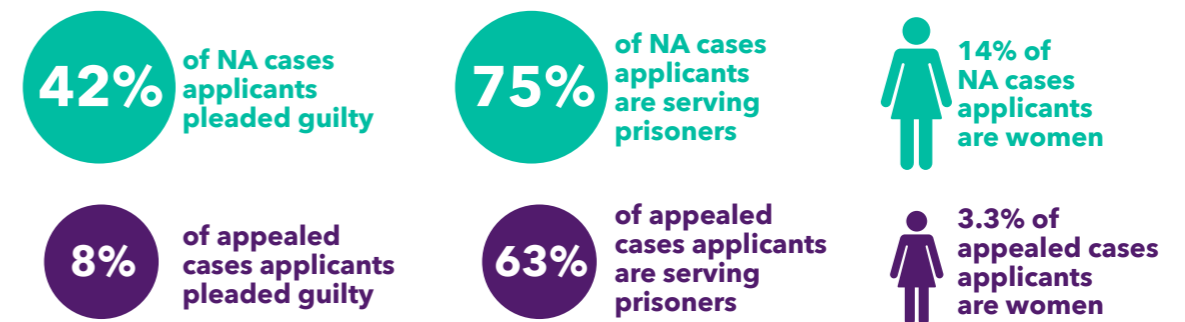
24. We used a wide definition of ‘vulnerability’. Risk factors which might make someone ‘vulnerable’ include, childhood, being a victim of exploitation, lack of fluency in English language, being unable to read or write very well, learning disabilities, hearing impairments, difficulty with communicating and/or understanding and mental health conditions. (Cooper, P. Identifying Vulnerability in witnesses and parties and making reasonable adjustments. (2017) The Advocates Gateway Toolkit 10. Paragraph 1.6. At <http://www.theadvocatesgateway.org/toolkits> on 26/6/18)

25. See Hodgson and Horne (2009) re roles of lawyers acting for applicants.

D. FINDINGS

1. The nature of NA cases

The most significant difference revealed by the comparison of our sample of NA cases with a smaller sample of cases where the applicant had appealed, is the higher proportion of guilty pleas in NA cases: 42% of applicants in our NA sample were convicted following a guilty plea, whereas only 8% of applicants who had appealed prior to their CCRC application had pleaded guilty. Our samples also show that NA applicants were more likely to be serving prisoners: 75% of NA applicants were serving prisoners, whereas the proportion was 63% in our appealed sample. These findings reflect the greater difficulties in appealing faced by applicants who have pleaded guilty or who are serving prisoners, discussed above. This could explain why these applicants are more likely to turn to the CCRC rather than the appeal courts to try to overturn their conviction. We also found a higher proportion of women in our NA sample (14% of women applicants, against only 3.3% in appealed cases).



This finding chimes with comments made by CCRC staff we spoke to who thought that mothers were particularly likely to be deterred by the prospect of a loss of time order against them if they appealed as this would involve a longer separation from their children. This finding could also be explained by the fact that women are more likely to serve short sentences which could be perceived as not worth appealing.²⁶

A higher proportion of applicants who had appealed their conviction were represented by a lawyer (29%) compared to those who had not appealed (17%), leaving us with an overall proportion of 20.5% of applications with legal representation. This could be evidence that lawyers advise their clients to first appeal their conviction before applying to the CCRC. In addition, it could also illustrate the difficulty for applicants to find a lawyer to appeal their conviction, hence their choice to come directly to the CCRC when they have not been able to secure the services of a lawyer. Interestingly, Hodgson and Horne estimated that about 33% of applicants were represented between 2001 and 2007 (their study did not distinguish between NA and appeal cases). Our finding suggests an overall decrease in the number of applicants represented by a lawyer for their application to the CCRC. This is concerning, given that Hodgson and Horne’s research found that CCRC applications with legal representation had a better chance of a referral to the Court of Appeal than those without legal representation.²⁷

Other variables tested, such as age, vulnerability, type of offence, or whether the applicant was sentenced at the Crown Court or the magistrates’ court did not reveal significant disparities between our samples.



26. According to Ministry of Justice statistics on prison population, 17% of female prisoners were serving a sentence of less than 12 months in December 2017 (against 7% of male prisoners at the same date): <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/676246/prison-population-q4-2017.xlsx> accessed 26 March 2018.

27. For example, they identified a case in which the lawyer’s role appeared to be key as it was referred as a result of legal representations after a provisional decision not to review because there had been no appeal and no exceptional circumstances to merit a review. This case would not have reached the Court of Appeal if the solicitors had not persisted in their submissions, yet the conviction was subsequently referred and eventually quashed.

2. Impact of the new NA policy

Changes in CCRC NA policy	
Before 2012	NA cases are screened by a single Commissioner who decides whether to send the case for a full review.
November 2012 - March 2013	Pilot scheme: NA applicants are sent a standard letter by an administrator requesting exceptional circumstances. If they fail to reply and if potential exceptional circumstances cannot be identified, the case is closed without a Commissioner's input.
March 2013 - 2014	Return to the original policy of initial assessment by a single Commissioner.
From July 2014	New NA policy: NA applications screened by a case review manager to identify exceptional circumstances, then passed on to a Commissioner to decide whether to send the case for a full review.

Our analysis of the data reveals that, as the CCRC intended, the new NA policy has led to a more consistent approach to the treatment of NA cases and to increased efficiency in terms of the speed of case-closure. However, the discussion below also demonstrates that very few applicants who are rejected due to their lack of previous appeal go on to apply for leave to appeal against conviction and that vulnerable defendants, in particular, are at risk under the new policy.

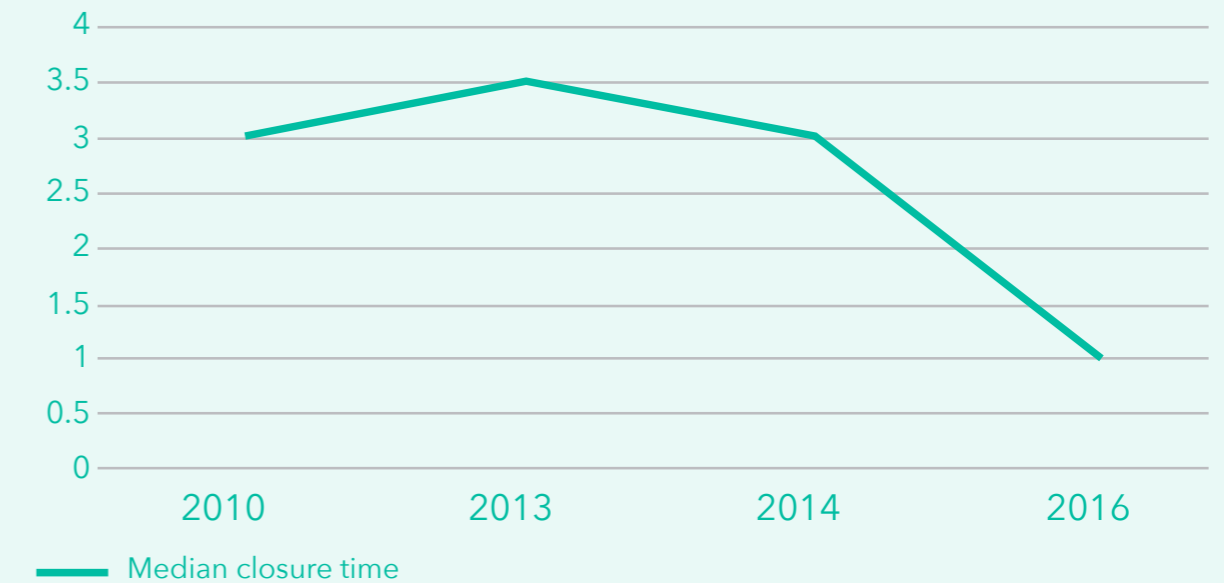
The new NA policy was introduced in July 2014. We collected data on 80 cases completed in 2016, thus looking at cases completed at least 18 months after the implementation of the new policy and therefore likely to have been dealt with under this new policy. This data shows that the new NA policy is being applied consistently. All NA cases were reviewed by a case review manager in the first instance. In accordance with the policy, this first review focused exclusively on the existence - or not - of potential exceptional circumstances to explain the lack of appeal prior to the CCRC application. If the case review manager did not identify any potential exceptional circumstances then the case was passed to a Commissioner for a final decision on whether the case should be rejected.

The new policy appears to have resulted in efficiency savings for the CCRC, as it allowed it to close cases more rapidly. Between 2010 and 2014, the median time for a case to be closed at the 'initial assessment' stage in our sample was three to four months. In 2016, NA cases closed at the 'initial assessment' stage generally took a month or less to close from the moment the application was received (see graph).

The 2014 policy has allowed the CCRC to close cases more rapidly.

The fact that like cases are treated alike and that the CCRC is now able to inform applicants more promptly of insurmountable obstacles to their application ever being referred to the appeal courts should, of course, be welcome. However, our findings show that this could potentially come at the expense of meritorious cases being rejected without proper consideration, which is particularly damaging for vulnerable applicants.

Median closure time for cases closed at 'initial assessment' stage (in months)



3. 'Exceptional circumstances' before and after the new policy

(a) The definition of 'exceptional circumstances'

The Criminal Appeal Act 1995 does not define the 'exceptional circumstances' which could justify a referral to the appeal courts by the CCRC in the absence of a prior appeal. Neither have exceptional circumstances been defined by the courts, leaving it to the CCRC to determine the precise scope of what is required for an applicant to demonstrate exceptional circumstances and the point at which this must be done. The Court of Appeal has rarely criticised the Commission for referring a case under CAA 1995 s. 13(2) on the grounds that there were exceptional circumstances justifying the reference despite the absence of a prior appeal. At most, the Court of Appeal expressed surprise that a case was referred to it under this provision, without anything, such as new evidence, that would have justified such a reference.²⁸ More recently, the Court regretted that the s. 13(2) procedure was deployed as a matter of routine for cases of asylum seekers convicted of identity document offences that could be referred directly to the Court of Appeal and processed by the Criminal Appeal Office.²⁹

Faced with the absence of any legal definition of what constitutes 'exceptional circumstances', the Commission has struggled to define the concept. In its guidance for legal representatives, it explains that exceptional circumstances are interpreted as 'circumstances where an applicant can only make progress with [the Commission's] assistance', citing examples such as 'where the applicant has pleaded guilty in the magistrates' court (and has no other route to appeal) or in some circumstances where public body material needs to be obtained, which the applicant is unable to obtain directly because of, for instance, the sensitivity of the material.' In its guidance to applicants, it underlines that '[e]xceptional circumstances are very rare. There has to be a good reason why you did not appeal and **cannot appeal now without the CCRC's help.**' (original emphasis). It then proceeds to list things that will not be considered exceptional circumstances, such as forgetting to appeal or missing the deadline to appeal, receiving negative advice on appeal from a solicitor or barrister, or being unable to get a solicitor or barrister to help with the appeal.

The CCRC application form has gone through several iterations in this respect, asking applicants why they did not appeal, whether they had 'exceptional circumstances' or 'special reasons' for failing to appeal prior to their CCRC application, or why they could not appeal now. Unsurprisingly given the absence of a clear definition, applicants find it very difficult to identify exceptional circumstances themselves.

28. *R v Gerald* (CA, 3 November 1998), [1998] Lexis Citation 3682, [1999] Crim. L.R. 315 (CA (Crim Div)).

29. See below.

In our overall NA sample, over 27% of applicants do not identify any special reason why they could not appeal prior to applying to the CCRC, even where the application form specifically prompted them to do so. 11% of applicants simply invoke their lack of knowledge of the appeal system as preventing them from appealing (either stating that they were not aware they could appeal, or that they thought they had appealed, or simply that they cannot appeal on their own). Added to this, almost 40% of applicants cite an issue with their legal representative as the reason why they have not appealed, including 32% of applicants who received negative advice on appeal from their legal representatives at trial, either formally or informally. Some appeared to believe that this prevented them from appealing (or even that it meant that their appeal had been rejected), whilst others explained that they were unable to secure alternative legal representation³⁰ and, therefore, they believed, to appeal.

To sum up, almost 80% of NA applicants either were unable to identify any exceptional circumstances or cited a reason that is expressly excluded by the CCRC from its definition of ‘exceptional circumstances’.

Even lawyers appeared to have difficulties in identifying exceptional circumstances. Among the minority of NA applicants who were represented by a lawyer, 27.5% did not identify any exceptional circumstances in their application and 20% cited negative legal advice and/or the appeal being out of time, despite the CCRC’s guidance clearly excluding these reasons from exceptional circumstances.

(b) The identification of ‘exceptional circumstances’ by the CCRC

Our findings match those in Horne’s research with regards to the identification of ‘exceptional circumstances’ by the CCRC: prior to the introduction of the new NA policy, once the CCRC had identified a ‘real possibility’, the lack of appeal became insignificant and ‘exceptional circumstances’ were easily found by the CCRC to justify a referral to the appeal courts. The CCRC referred 11 cases in our NA sample, spanning 2010, 2013 and 2014 cases, and so was required to identify ‘exceptional circumstances’ in all of them to overcome the lack of prior appeal. Several of the decisions appear to be founded on the CCRC having already conducted the review: it was therefore considered more efficient for the case to be referred to the appeal courts by the CCRC, rather than asking the applicant to make their own application to appeal out of time.

This is expressly acknowledged in case NA-2010-27. Due to concern about expert evidence at the trial, the CCRC concluded that there was a real possibility that the applicant’s murder conviction would be quashed and a conviction for manslaughter substituted, meaning that the substituted sentence could lead to the applicant’s immediate release. In order to justify the referral despite the lack of a prior appeal, the CCRC considered that ‘exceptional circumstances’ were made out given that there had been some delay in reviewing the case and that further delay would be caused if the case was returned to the applicant for him to apply for leave to appeal. Interestingly, although it rejected the appeal,

...the Court of Appeal stated in its decision: ‘We understand why the CCRC referred the case. The review which we have conducted was necessary.’ No mention was made of exceptional circumstances, suggesting that the Court did not attach much importance to the issue.

Similarly, over half of the referred cases in our sample involved refugees and asylum seekers.³¹ The CCRC justified the referral of these cases despite the absence of an appeal prior to the CCRC application by the fact that ‘the Commission [was] in the process of considering a tranche of similar applications’ which made it ‘desirable and arguably in the interests of justice that such cases should be considered together and consolidated at the appellate court.’ Interestingly, Sato et al identified immigration cases which were originally rejected because the applicants had not previously appealed their conviction.³² These mistaken rejections illustrate the difficulty for the CCRC in recognising where potential exceptional circumstances

might arise without them having been flagged up by the applicant, unless the case falls under a category already identified by the CCRC as presenting such circumstances (as well as a high probability of a real possibility that the appeal courts will quash the conviction).

On the Vectus data report we obtained,³³ the referral rate for NA cases was 2.2% in 2010, 1.5% in 2013, 1.3% in 2014 and 1.2% in 2016. In our own sample, the referral rate for NA cases was as high as 8% for cases closed in 2010, 7.5% in 2013, before dropping to 2.5% in 2014. In 2016, after the implementation of the new NA policy, none of the 80 NA cases in our sample were referred to the appeal courts by the CCRC. This could be explained as we only sampled closed cases, i.e. some cases might have been screened under the new policy and passed for review, but were still under review at the time of our research. In February 2018, we asked the CCRC how many NA cases received after the implementation of the new policy in July 2014 had been referred to the appeal courts. The CCRC responded that nine such cases had been referred (four in 2015, another four in 2016 and one in 2017). However, when we examined those nine cases in more detail, we found that one was actually screened by a Commissioner under the old policy, whilst another one was not a NA case, as the applicant had previously appealed her conviction, leaving us with seven cases.

The fall in referral rate for NA cases could be explained, firstly, by the fall in the overall referral rate (3.5% in 2009/10, 1.6% in 2012/13, 2.7% in 2013/14, and 1.8% in 2015/16). Secondly, in 2016, the Court of Appeal deplored that the CCRC was referring immigration and asylum cases which had not appealed ‘as a matter of routine’.³⁴

In his judgment, Sir Brian Leveson (President of the Queens Bench Division) stated that this meant that:

resources are not being deployed as efficiently as possible. More important, detailed consideration of other cases of alleged miscarriage of justice (which have previously exhausted all rights of appeal) is being delayed while these cases are being subject to detailed analysis when they could go directly to the Court of Appeal where they will be processed efficiently by the Criminal Appeal Office.³⁵

The judgment went on to ‘encourage’ the CCRC to review its policy on NA cases and to consider investigating ‘only those cases that have been to the Court of Appeal or are appeals from the magistrates court’ so that the organisation’s resources could be focussed on those cases which cannot access the appeal courts directly.

In response, the policy to deal with immigration and asylum cases was amended and the CCRC stopped automatically accepting them as exceptional circumstances cases. As a result, no such cases were referred by the CCRC to the appeal courts in our 2016 NA sample. Thus, case NA-2016-17, although there appears to be a real possibility that the Court of Appeal would quash the conviction given its decisions in other similar cases, was rejected as a NA even before a full review could take place.

Five of the seven NA cases screened under the new NA policy and referred to the appeal courts were immigration cases, four of which were referred before the change in policy regarding immigration and asylum cases. It should be noted, however, that immigration and asylum cases could still be referred to the appeal courts in the absence of a prior appeal in cases where the defendant pleaded guilty at the magistrates’ court, given the impossibility for them to appeal their conviction. The Commission referred one such case in 2017. Nevertheless, an important pathway through which NA cases were referred has now been closed.

Only two other cases dealt with under the new NA policy were referred to the appeal courts. We decided to look at these cases more closely to find out which exceptional circumstances were identified by the CCRC to be able to refer these cases in the absence of a prior appeal. In case NA-2016-83, the applicant pleaded guilty at the magistrates’ court and was therefore able to go through the ‘initial assessment’ stage on that basis. Interestingly, the applicant was also identified as a potential victim of human trafficking at this stage, i.e. the potential of a real possibility which could justify the referral was already identified at this early stage, making a review particularly worthwhile for the CCRC.

30. This is not surprising given the restrictions on legal aid funding for appeals. See above.

31. On this topic, see Sato, M., Hoyle, C. and Speechley, N.E., ‘Wrongful Convictions of Refugee and Asylum Seekers: Responses by the Criminal Cases Review Commission’ [2017] *Criminal Law Review* 106.

32. *Ibid.*, p. 114-115.

33. NA cases closed between January 2010 and November 2016.

34. *YY v The Queen and Ayad Mohammed Nori v The Queen* [2016] EWCA Crim 18 [38] - [44].

35. *Ibid.* [41].

In case NA-2016-82, the applicant was actually invited to apply by the CCRC itself. The Commission had referred the case of his co-defendant to the Crown Court due to the police's failing to disclose the presence of an undercover police officer during the demonstration where the offence had taken place. The CCRC actively sought to identify the applicant and invited him to lodge an application. As a result, the application effectively bypassed the 'initial assessment' stage. In its statement of reasons, the CCRC stated that the use of their powers was necessary to discover relevant information about the applicant's case. Crucially, this information only came to light because of the review undertaken by the CCRC in the case of the applicant's co-defendant. It is unlikely that either the applicant or the CCRC would have been able to identify any 'exceptional circumstances' in this case without the co-defendant's case. Whilst this case demonstrates the way that the CCRC works proactively with other agencies on contemporary issues arising in the criminal justice system, such cases are likely to represent a tiny proportion of all NA cases. There will inevitably be other cases, currently unknown to the CCRC, in which there has been misconduct which is unknown to the applicant and which the applicant could not, in any event, investigate. In such cases the applicant may be able to do little more than assert his innocence. This further demonstrates the danger of relying on the applicant to identify potential exceptional circumstances and of using these as a barrier to review.

4. Changes in the CCRC screening and reviewing process

The vast majority of NA cases are rejected at the 'initial assessment' stage. The data shows an apparent shift under the new NA policy, with more NA cases being sent for review but, as explained below, further analysis reveals that this is a change without real significance.

Out of 250 cases in our NA sample, 183 cases (73.2%) were closed at the 'initial assessment' stage and did not benefit from further investigation. However, this overall rate masks important differences across time periods. Between 2010 and 2014, only 20% of NA cases in our sample were sent for review. Following the introduction of the new NA policy, in 2016 over 37% of cases survived the 'initial assessment' stage and were passed on for review. On the face of it, this could indicate a more generous approach from the CCRC in finding potential exceptional circumstances at the 'initial assessment' stage.

(a) A screening process increasingly reliant on information provided by the applicant

The CCRC has always had a two-stage decision-making process (see above), with a screening test which eliminates a large proportion of cases before conducting further investigation in the remaining cases. However, the amount of documentation reviewed by the Commission at the 'initial assessment' stage has varied over time. Looking at the 183 cases in our sample which were closed at the 'initial assessment' stage, Commissioners requested a range of documents prior to making the decision to close the case between 2010 and 2014. These generally included at least the court file and/or transcripts of the judge's summing up or prosecution opening of facts (in guilty plea cases) and sentencing remarks. In about a quarter of cases, the applicant had appealed their sentence (but not their conviction) before the Court of Appeal and the CCRC therefore had access to the appeal file, which generally includes the transcript of the judge's sentencing remarks. Sometimes, the Commissioner requested the prosecution file or ordered credibility checks on the complainant (in particular in sexual offences cases) instead of, or in addition to, the other documents. This meant that Commissioners were not simply relying on the often limited information provided by applicants, but also had access to further information on the facts of the case and on potential issues worthy of further investigation. Commissioners relied merely on the information provided by the applicant in just three cases between 2010 and 2014 (3% of the total).

The CCRC has taken an increasingly narrow approach to 'exceptional circumstances' and has increased its reliance on applicants identifying the relevant information.

However, during the pilot scheme in which cases were closed at the 'initial assessment' stage either by administrative staff or by case review managers (i.e. between November 2012 and March 2013), no documentation was requested from external sources. The decision to close the case was based purely on the information provided by the applicant.

Following the introduction of the new NA policy, our 2016 NA sample shows that the CCRC increasingly relies on applicants for information about the case at the 'initial assessment' stage. In our sample of 50 cases closed at the 'initial assessment' stage in 2016, the decision to close the case without a review because of a lack of appeal and in the absence of exceptional circumstances was based purely on the information provided by the applicant in 15 cases (30% of the total). In a further 18 cases, the CCRC could also look at the appeal file on the Court of Appeal's database, because the applicant had previously appealed their sentence. The CCRC requested further paperwork, such as the court file and/or the prosecution file in just 17 cases (34% of cases).

We originally believed that this growing reliance on applicants for information about the case at the 'initial assessment' stage could be linked to the huge pressures on resources the CCRC has experienced in recent years. For instance, we thought that requests for paperwork from courts and other external agencies might incur a cost to the Commission, as paper files are couriered from their original location to the Commission's offices. Moreover, transcripts can only be obtained by paying a fee to the Court Transcribing firms contracted by the Ministry of Justice, unless they are already available on the Court of Appeal's database. More importantly, the more paperwork the CCRC requests, the more time case review managers and Commissioners must spend reading through that material. However, the CCRC has rejected the idea that concerns over resources have had an impact on the decision to stop requesting further documentation from other agencies at the 'initial assessment' stage.

(b) The reclassification of 'initial assessment' checks as 'review'

As indicated above,

...more cases survived the 'initial assessment' stage following the implementation of the new NA policy and were sent for a review. However, this apparent surge in review work merely reflects a requalification of checks formerly carried out as standard, as 'reviews'.

The review of the evidence by the CCRC is largely paper-based and often based on files collected by official bodies (usually the prosecution). The Commission defines a 'review case' as 'all (...) cases that require a *substantive* review' (our emphasis) in its Formal Memorandum on its decision-making process.³⁶ The CCRC does not define what exactly will be reviewed in such 'substantive review' but it usually includes at least the court and CPS files. The Commission sometimes also requested transcripts of the judge's summing-up and sentencing remarks. The police and/or defence files were also examined in certain cases, as well as the complainant's social services files if available and relevant.

Yet, out of the 30 NA cases passed on for review in 2016, nine (i.e. almost a third) benefited from a review limited to credibility checks on the complainant in sexual offences cases. Prior to 2016, such credibility checks were carried out as part of the 'initial assessment' stage and so would not have been classed as part of the 'review' process. A further three cases were sent for review merely to determine whether there were any exceptional circumstances, rather than for a full review of the evidence in the case. For instance, in case NA-2016-24, the CCRC thought that the applicant had pleaded guilty in the magistrates' court to some of the charges and put the case through for review on the basis that they could not appeal those particular guilty plea convictions. However, when the CCRC realised that the magistrates had declined jurisdiction in all matters and no guilty pleas had been entered at the magistrates' court, the case was promptly closed as no other exceptional circumstances were apparent. In cases NA-2016-32 and NA-2016-57, the CCRC originally thought that their powers might be necessary to check public records and send the case for review on that basis, however, it was then discovered that other circumstances rendered these credibility checks unnecessary, such as forensic and medical evidence supporting the use of violence during the sexual assault. Again, these cases were promptly closed as NA cases.

³⁶ CCRC, Formal Memorandum on decision-making process, available at <<https://ccrc.gov.uk/publications/ccrc-casework-policies/>> accessed 3 April 2018.

This analysis demonstrates that although more cases were recorded as being 'sent for review' in 2016, compared to previous periods, many of them did not actually benefit from a review aimed at identifying a real possibility that the appeal courts might quash the conviction. If we exclude the 12 cases described above which were merely subjected to a series of checks limited to finding 'exceptional circumstances', only 21% of sampled NA cases closed in 2016 were actually reviewed, a proportion very close to that observed in previous periods. For this reason, this change does not represent an increase in thoroughness on the part of the CCRC and does not provide grounds for greater confidence in the CCRC's ability to identify meritorious cases.

5. Vulnerability

The CCRC recognises that many of its applicants are in some way vulnerable and have mental health, learning or other difficulties which make it more difficult for them to access the CCRC and to engage with court processes. For this reason the CCRC has undertaken ground-breaking work in formulating its own 'easy-read' application form, which led to a dramatic increase in the number of applications to the CCRC. Subsequently the CCRC's customer service manager, who headed up this project, was invited to devise the magistrates' court and Youth Court easy-read appeal forms. The CCRC also engages in outreach work, including through prison surgeries and with young offenders, which is intended to target and offer advice to vulnerable applicants. In 2017, in recognition of the particular needs and vulnerability of young applicants, the CCRC instituted a new policy under which all applicants who are 21 and under are interviewed by a member of staff.

Despite this recognition of vulnerability amongst applicants, our research shows that the CCRC is less willing to acknowledge the relevance of applicants' vulnerability in its NA decisions. The rarity of appeal following rejection of NA cases at the 'initial assessment' stage by the CCRC together with the difficulties facing vulnerable appellants in mounting their own appeal mean that it is very important that the CCRC gives due weight to an applicant's vulnerability when considering exceptional circumstances. Despite this, and although a large proportion of applicants to the CCRC have some form of vulnerability, the CCRC is reluctant to accept vulnerability as an exceptional circumstance which could justify the referral of the case to the appeal courts without a prior appeal. The new policy is particularly restrictive in this regard. The policy recognises that 'a mental illness or disability placing [the applicant] at a serious disadvantage in securing legal representation and/or pursuing an application for leave to appeal' (original emphasis) could constitute exceptional circumstances.

The new policy states that, given the 'significant proportion of the prison population [with] mental health issues' and that applicants are able to apply to the CCRC (albeit with assistance), 'the presumption must be that they would also be able to ask a court to look again at their case.'

As such, mental health issues and vulnerability might not constitute exceptional circumstances.³⁷

CCRC staff have indicated to us that, when participating in prison surgeries, prisoners rarely tell CCRC staff that they have difficulty in completing appeal forms themselves. Instead, when asked why they have not been to appeal they tend to refer to their fear of loss of time or simply say they would 'rather' apply to the CCRC. There are, of course, a number of reasons why prisoners might be unable or simply reluctant to acknowledge that they would have difficulties filling in the appeal forms (ranging from illiteracy to difficulties in grasping the relevant issues) and further research is needed to understand this more fully.

Whilst it is true that a high proportion of the prison population presents some form of vulnerability, we disagree that vulnerability cannot as a result constitute 'exceptional circumstances' which could justify a referral to the appeal courts in the absence of a prior appeal, once a real possibility that the appeal courts might overturn the verdict has been identified. In our view, 'exceptional circumstances' should be found if there are reasons to believe that such a real possibility exists, but the applicant is unable to apply for leave to appeal due to her vulnerability. In particular, we believe it would be unfair to deny those vulnerable applicants the benefit of a review of the evidence in their case on the basis that they do not have exceptional circumstances.

In our overall NA sample, over half of applications³⁸ featured some form of applicant vulnerability (over 80% of whom were not represented), ranging from anxiety to severe mental health issues. Yet, only 10 of our 250 NA cases³⁹ were sent for review on the basis that the applicant's vulnerability could constitute exceptional circumstances.

Even in cases where the applicant was particularly vulnerable, the CCRC seemed reluctant to rely on an applicant's vulnerability – and, therefore, her difficulty in applying for leave to appeal without the Commission's help – as exceptional circumstances to overcome an absence of previous appeal.

When the CCRC referred case NA-2010-15 to the Court of Appeal, the Commissioner had noted that the applicant was vulnerable⁴⁰ but the exceptional circumstances justifying a referral to the Court of Appeal without a prior appeal were limited to the fact that 'an effective investigation of the applicant's case could not have been carried out without the extensive use of the CCRC's special powers'.

In many instances, the CCRC decided to close the case without any enquiry. For instance, in case NA-2010-50, the applicant appeared highly vulnerable⁴¹ and it was difficult to make any sense of the rambling handwritten letter submitted in support of his application to the CCRC. The Commissioner who considered the application decided to reject it without making any enquiry into the case (no case file was requested either from the CPS or from the Crown Court), stating on the rejection letter: 'You may wish to discuss the possibility of submitting an application for leave to appeal out of time with solicitors, or you may wish to submit an application yourself, using the enclosed NG form.'

In case NA-2013-23, the applicant again appeared highly vulnerable⁴² and our researcher could not identify which conviction(s) the applicant wanted the CCRC to review, let alone make sense of his submissions. However, the case review manager who reviewed the application stated on the case record: 'I note that applicant mentions mental health, but he can make his points clearly and states that he simply has not got round to appealing and intends to instruct a solicitor.' In accordance with the policy in place at the time, the applicant was sent a standard letter asking him to provide special reasons why he could not appeal, but failed to respond. As a result, the CCRC closed the case without conducting any enquiry into the evidence.

Case NA-2013-41 is another example of a highly vulnerable applicant in which our researcher could not make sense of the grounds submitted by the applicant in support of her application to the CCRC.⁴³ Yet, the Commissioner who reviewed the case decided to reject it at the 'initial assessment' stage, advising the applicant that 'the only remedy you have is to pursue your own application to vacate your plea as part of an application for leave to appeal out of time', despite the applicant being unlikely to be able to apply for leave to appeal by herself in our view.

Following the introduction of the new NA policy, there appears – at first sight – to be a greater willingness from the CCRC to send a case for review on the sole basis of an applicant's vulnerability. Whilst no case was sent for review on that sole basis in our 2010-2014 sample, six cases were sent for review purely because of the applicant's vulnerability in our 2016 sample. However, none of these cases were later referred to the appeal courts because the CCRC eventually concluded that the applicant's vulnerability in the case did not constitute exceptional circumstances and immediately closed the case without looking further for a real possibility that the appeal courts might overturn the verdict. Our findings show that, although the CCRC appears to be more willing to consider claims of vulnerability, it actually remains unduly dismissive of these claims, rejecting applications from highly vulnerable applicants on the basis that their vulnerability does not constitute exceptional circumstances.

38. 55.6%.

39. 4%.

40. An appropriate adult was present during police interviews and the application included medical evidence referring to cognitive difficulties (in particular with regards to memory and information processing) and to emotional difficulties connected with early sexual abuse and neglect. A psychologist also noted that the applicant might have difficulty with regard to retaining and organising information.

41. He was diagnosed with a psychotic mental illness and a letter by his doctor was included with his application questioning his fitness to plead at trial.

42. The applicant mentioned being diagnosed with paranoid schizophrenia.

43. The applicant had mental health problems and her alcohol adviser told the CCRC that the applicant struggled to understand information. Her submissions to the CCRC included the following: 'My mother and myself has medical condition, [solicitor name and address] [mentions five hospital names followed by question marks] Law? My 1st appeal application [Probation service contact details] I never had this application form And brain injury? Vigilante? (...).

In case NA-2016-22, the applicant, who had been convicted of murder on the basis of the doctrine of joint enterprise, had been diagnosed with paranoid schizophrenia and the application form had been filled by a relative. The case review manager who screened the case recommended to send the case for review because 'a severe mental illness such as schizophrenia could well mean that [the CCRC's] assistance is required.' A year into the review, the applicant's new solicitors contacted the CCRC. As a result, the CCRC immediately decided to close the case:

'Now that it has been established that the applicant is capable of dealing with his affairs and has the correct assistance and support I do not think that there are any identifiable [exceptional circumstances] and as such we can dispose of this by way of a No Appeal No [Exceptional Circumstances] decision notice.' (case review manager)

'The applicant is ably represented by [his relative]. More importantly, he now has solicitors advising him on the merits of an appeal against his conviction. It is not explicit, but the implication from submissions to us, by [his relative], is that they now wish to focus on arguments to be drawn from the recent Supreme Ct judgment in Jogee. In view of this there are no longer any exceptional circumstances.' (Commissioner)

The same applicant later re-applied to the Commission, this time with the help of another relative. He was not represented by a lawyer for this new application. The CCRC rejected the case without a review because the previous decision 'clearly explained that he needed to appeal as there were no [exceptional circumstances]. The CCRC could not identify any exceptional circumstances in this new application: 'All the submissions can be put forward in their own application for permission to appeal.' Although the fact that the applicant was represented by a lawyer seemed to be a determining factor in the first decision to close the case despite the applicant's vulnerability, the absence of a lawyer and his vulnerability are not mentioned in the reasons provided for the second decision.

Case NA-2016-56 is a good illustration of the opposing views dividing the CCRC. The applicant had been convicted of a serious offence. He was a foreign national and did not speak English. The case review manager who screened the case recognised that it would not be easy for the applicant to make an application to the Court of Appeal because of his limited English, but argued that this did not amount to exceptional circumstances. The Commissioner reluctantly agreed to reject the case, but insisted to leave open to the applicant the possibility to make further submissions.

The applicant replied that no lawyer wanted to take his case. The same case review manager argued on the case record:

'I think we have to recognise that, due to language problems, and due to the fact that he is in a foreign country, and due to the fact that he appears to be unable to engage the services of a lawyer, [the applicant] faces considerable difficulties in mounting an application for leave to appeal. To that extent, he has my sympathy. However, I am not persuaded that this, or anything else we have learned since the provisional no [exceptional circumstances] letter amounts to exceptional circumstances. (...) I think we have to remember that we are conceived at the backstop, not a stop-gap.'

His manager also weighed in in favour of closing the case:

'Whilst clearly the applicant has experienced difficulty obtaining representation this is not in itself an [exceptional circumstance]. Many, many applicants have difficulty obtaining legal representation for an appeal and we have rejected other applications on the basis that that does not amount to [exceptional circumstances]. We need to ensure our approach is consistent in all cases in order to be fair to all of our applicants. The Court of Appeal is able to translate correspondence and provide an interpreter if necessary so that should overcome the language barrier. Our investigative powers are not needed to explore the lawyer issue. The Court of Appeal is well practised at dealing with grounds of appeal of that ilk and they regularly obtain waivers of privilege from appellants in order to make enquiries with defence teams. Whilst it would not be an easy task for the applicant - I think the proper course of action is for him to appeal in the normal way.'

However, another Commissioner argued against them to put the case through for review:

'It would be easy to close [the applicant] down on the basis that he has not crossed the [exceptional circumstances] threshold and could appeal himself. My concern remains that he will fail to make his case because of the exceptional combination of language difficulties and the complex issues that require time and investigation. It is true of course that the CACD can and does ask defence reps to account for their actions, but my concern is that [the applicant] will be unable to make a cogent appeal that does justice to the issues he is raising.'

Eventually, the case was closed after the review by a third Commissioner and the Statement of Reasons explains to the applicant:

'The CCRC decided to accept your application for a review because we thought that there might have been very special reasons in your case. However, having considered the matter further the CCRC is not satisfied that there are any exceptional circumstances in your case. The CCRC is of the view that the issues raised in your application could be raised on appeal in the normal way.'

It would be interesting to know whether the decision would have been different if the CCRC had identified a real possibility that the Court of Appeal might quash the conviction in the course of its review.

In case NA-2016-75, the applicant was convicted of theft. The case review manager who screened the case found the applicant's submissions unclear and was unsure as to whether she should send the case for a review.

'It appears from the application form that the applicant has initiated an appeal but has not waited for the outcome of the appeal before sending off an application to us. It may be that they have written back to him to say that there are "ineffective grounds"⁴⁴ and this is why he has not been given an appeal number. Having read what he has raised in relation to real possibility, it is rather difficult to understand, and I'm not convinced that we can simply ask him to go back to the CA if they are just going to tell him again that he can't have an appeal number because there are ineffective grounds - therefore is this an exceptional circumstance? Rather too many issues raised for me to deal with without some significant reading.'

The case was discussed at a meeting with a Commissioner and it was agreed to send the case for a review: 'We agreed that the application is difficult to follow or comprehend. The applicant is struggling to communicate, on which basis we need to look deeper and to understand what the issues are.' The case was allocated to a case review manager who had a long conversation over the phone with the applicant's relative to clarify the submissions. The decision was made to close the case on the basis that there were no exceptional circumstances. The Statement of Reasons sent to the applicant explained that the Commission did not agree that their investigative powers were needed, in particular to trace a potential new witness, as this could be done on the applicant's behalf by solicitors. The applicant also claimed that one of the jurors knew the complainant's family. However, the CCRC responded that it was best for the Court of Appeal to decide whether a jury investigation is necessary. It seems likely that, had this case already been appealed, it would have been investigated further by the Commission.

44. The Court of Appeal checks that grounds of appeal are drafted in accordance with the requirements of r.37.3 of the Criminal Procedure Rules. Applications which do not meet those requirements are rejected as 'ineffective' by the Criminal Appeal Office.

6. Appeal following rejection of a NA case

When rejecting applicants because of a lack of prior appeal, the CCRC has been keen to advise them to try and appeal their conviction before the appeal courts. Yet, the proportion of applicants who do decide to appeal following an unsuccessful application to the CCRC remains low.

In our NA sample, 183 cases were rejected at the 'initial assessment' stage. Out of these, only 21 did then appeal (11.5%), some only appealing their sentence despite having applied for the CCRC to review their conviction as well.

A further four applicants did apply for leave to appeal after an unsuccessful CCRC application, despite having benefitted from a review. However, the number of applicants who did apply for leave to appeal after being rejected by the CCRC as a NA has been increasing progressively over our sample period: 2 out of 37 in 2010 (5.4%), 4 out of 66 in 2013 (6.1%), 4 out of 30 in 2014 (13.3%) and 11 out of 50 in 2016 (22%). This could be due to the CCRC efforts to encourage applicants it rejects through its NA policy to apply for leave to appeal instead.

Applicants who decide to appeal after having been rejected by the CCRC are unlikely to be successful before the appeal courts. Out of 25 cases where the applicant appealed following a rejection by the CCRC, 19 saw their application for leave to appeal being rejected, whilst another one abandoned the appeal. Only two applicants were partly successful in having their sentence reduced or substituted by a hospital order, none was successful in overturning their conviction.⁴⁵ Given the low success rate in having convictions overturned on appeal, this is unsurprising. Yet, only six applicants who were unsuccessful on appeal then re-applied to the CCRC.

The strategy of encouraging applicants to exhaust their appeal remedy prior to applying to the CCRC has thus proven highly effective at saving CCRC resources and conforms with the legitimate argument that the appeal courts, rather than the Commission, should provide finality in cases. Since we cannot know for certain why NA applicants are not appealing against their conviction, it is possible that these applicants were never really serious about challenging their convictions and that their CCRC applications never had any chance to succeed. However, under the old and more flexible NA policy, more NA cases were reviewed by the CCRC despite the lack of appeal and were subsequently referred. Given what we know about applicants' vulnerability and barriers to appeal, there is a danger that potentially meritorious applicants are discouraged from contesting their conviction following their repeated failure to have their conviction reviewed. These cases would thus fall into an abyss, with the CCRC refusing to review them and therefore not identifying the merit in the case, but with the applicant unlikely in practice to be able to apply successfully to the appeal courts.

E. NO APPEAL CASES AND THE ROLE OF THE CCRC

The CCRC was established to act as the criminal justice system's safety net. The Royal Commission on Criminal Justice made the case for the establishment of this independent body tasked with considering allegations that a miscarriage of justice may have occurred. It clearly stated that this new authority would not usurp the role of the appeal courts, as it would normally come into play after exhaustion of appeal rights.⁴⁶ However, Parliament left open the possibility for people who had not appealed their conviction to apply to the Commission, albeit in (undefined) limited 'exceptional circumstances'.

The CCRC has broad powers to investigate allegations of miscarriage of justice and has also been granted broad discretion to define 'exceptional circumstances'. Between 2010-11 and 2012-13, there was a 74% increase in the number of applications to the CCRC caused by the introduction of an 'easy-read' application form in 2012 and other work to improve access to its services. Whilst the number of applications has been increasing, the CCRC budget suffered a cut of 30% (taking inflation into account) between 2009/10 and 2014/15.⁴⁷ With the resulting backlog of cases and delays in processing applications, it was inevitable that the CCRC would try to find ways to deal more quickly with large volumes of cases without expending too many resources on them.

As NA cases represent 40% of CCRC applications and under the legitimate justification that the Commission does not want to usurp the normal appeal process, it is not surprising that they have become a primary target of efficiency concerns at the Commission.

The CCRC's legitimate concerns to avoid usurping the appeal courts in their role of scrutinising the decisions of lower courts and their concern appropriately to prioritise those who have exhausted their appeal rights must be balanced with the CCRC's role as a safety net. The appeal process is often not experienced as either accessible or fair; we have detailed above the numerous legal and practical barriers for convicted people to appeal their convictions. Although the overall number of applications for leave to appeal has seen a 26% decrease between 2011/12 and 2015/16, the proportion of applications for leave to appeal lodged by applicants acting in person has increased markedly.⁴⁸ It is likely that such a decrease in the number of applications for leave to appeal, coupled with the rise in applicants acting in person, is due to the decline in the availability of legal aid. In this time the Court of Appeal has continued to control its workload 'through the combination of leave-requirements, time-limits, and stringent requirements when applicants seek to apply for leave to appeal out of time.'⁴⁹ More recently, the Court has indicated its willingness to support 'robust case management, using sanctions which include loss of time orders, costs and other hard hitting measures including potentially dismissing applications without merits' in cases 'where the Litigant in Person has repeatedly ignored [the Criminal Appeal Office's] directions or is being deliberately vexatious'.⁵⁰ As illustrated in case NA-2016-75 above, some applicants are not even given an appeal number because their grounds are deemed 'ineffective'. In those cases, it is wholly inefficient (as well as clearly unfair) simply to bounce those applicants back from the CCRC to the Court of Appeal on the basis that they have not appealed.

The Court of Appeal must confront the need to make the appeal process more accessible, given the cuts to legal aid and the resulting rise in litigants in person.

45. The appeals of the remaining three applicants were still pending at the time of our research.

46. Royal Commission on Criminal Justice *Report* 1993, chapter 10, para 12.

47. Justice Committee, *Criminal Cases Review Commission*, 25 March 2015, HC 850, p. 17-18, available at <<https://publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/85002.htm>> accessed 3 April 2018.

48. From 2.53% in 2012 to 9.21% in 2015/16 according to the Court of Appeal (Criminal Division) *Annual Report* 2015-16, available at <<https://www.judiciary.gov.uk/publications/court-of-appeal-criminal-division-annual-report-2015-16/>> accessed 16 March 2018.

49. Richard Nobles and David Schiff, 'The Criminal Cases Review Commission: Establishing a Workable Relationship with the Court of Appeal' [2005] *Criminal Law Review* 173, 175-176.

50. Court of Appeal (Criminal Division) *Annual Report* 2015-16, p. 20.

An important step would be to introduce an easy-read application form and to target vulnerable groups as the CCRC has done but these steps will not be effective in diverting NA cases away from the CCRC unless potential appellants can be reassured that they will not be subject to a loss of time order. This would take both a change in the current approach of the appeal courts to loss of time and a programme of outreach to reassure potential appellants.

These are matters which are within the control of the Court of Appeal, not the CCRC. In the meantime, however, it is the CCRC that retains control over which NA cases it will investigate and which it will refer. In the circumstances, the CCRC cannot divest itself of responsibility for NA cases, despite all the pressures and conflicting responsibilities that this report has described. Our findings demonstrate an increased reliance by the CCRC on applicants' ability to frame their application and alert the Commission to its lack of safety and, in the case of NA cases, to 'exceptional circumstances' that could justify a referral to the appeal courts in the absence of a prior appeal. Given the absence of a clear definition of 'exceptional circumstances', the significant proportion of the prison population with a form of vulnerability and the sheer number of applicants unable to secure legal representation, it is highly unlikely that applicants will be able to identify such circumstances in their applications. Prior to the introduction of the new NA policy, the CCRC seemed to be able to easily find exceptional circumstances to justify the referral of NA cases once a real possibility had been identified. At present, unless the case falls into a narrow category previously identified by the CCRC as having potential exceptional circumstances (e.g. Asylum and Immigration cases until 2016 or a clear need for the CCRC's powers), it is unlikely that the case review manager will be able to identify such circumstances without a more detailed review of the evidence. Even in cases where the applicant's vulnerability and their inability to understand the appeal process is clear, our findings show that the CCRC increasingly prioritises efficiency and consistency (justified by a concern of overall fairness to all applicants) over a more humane and individualised approach. These findings are concerning given the role of the CCRC as the safety net for the criminal justice system.

The combination of the CCRC's narrow approach to exceptional circumstances in NA cases and the barriers and disincentives to appeal is likely to limit the ability of some convicted persons (particularly vulnerable ones) to challenge their convictions.

It is clear that the Court of Appeal judgment in *YY and Nori*⁵¹ was intended to influence the CCRC's treatment of some NA cases, and members of staff at the CCRC have mentioned this judgment specifically as an influence on the CCRC's approach to ECs. More recently, the CCRC has used its outreach work, including prison surgeries and a three month campaign on National Prison Radio, to attempt to reduce the number of NA applications by educating potential applicants about the need to apply for leave to appeal before applying to the CCRC. CCRC staff report that the radio campaign appeared to be successful to the extent that there was a significant drop in the proportion of No Appeal applications to the CCRC during the campaign period.

The CCRC clearly takes seriously the need, as articulated by the Court of Appeal, to seek to focus its resources on cases that have exhausted their appeal rights. It should be noted however, that the Court of Appeal's comments were made in the particular context of immigration and asylum offences and, immediately before the relevant comments, the judgment notes that 'these days, the Registrar regularly refers cases to the full court where cases of this type have been lodged'. The implication of this part of the judgment is that the Criminal Appeal Office was well able to recognise this particular type of case and so efficiency required that these cases should go straight to the Court of Appeal where the right of appeal had not yet been exercised. The immigration and asylum cases of the kind discussed in *YY and Nori* are, however, an unusually easily identifiable category of case and the Registrar will not be equally well equipped to identify other potential wrongful convictions. In the circumstances, it would be unfortunate if the CCRC were to allow the Court's comments in this case to inhibit the exercise of its discretion to investigate NA cases and (in exceptional circumstances) to refer them to the Court of Appeal. Parliament gave that discretion to the CCRC and created the organisation independent of government and the courts. In any event, given the data on NA referrals discussed in this report, it can hardly be argued that the CCRC is swamping the appeal courts with its referrals of NA cases.

The CCRC cannot solve the problem of No Appeals on its own...

and will be reliant on others to take steps to increase the accessibility of the appeal courts. In the meantime the organisation is left to manage its own responsibility for NA applicants at a time when it is under unprecedented resource pressures and when criticisms of the CCRC's willingness and ability to fulfil its role are being reported in the media⁵².

At this difficult stage in the CCRC's life, will the new miscarriages of justice be those that nobody took seriously because they had not appealed, even though they had potentially meritorious grounds?

⁵¹ Note 34 above

⁵² e.g. Allison, E., Hattenstone, S. & Bowcott, O. (2018) 'Miscarriages of justice body is not fit for purpose, lawyers say.' The Guardian, 30th May, Rayner, J. (2018) 'An Appalling Vista' Law Society Gazette 11th June and (2018) 'Panorama: Last Chance for Justice' BBC One, 30th May.

F. PRINCIPAL RECOMMENDATIONS

To many CCRC applicants, the appeal process remains arcane. Given the decrease in legal aid funding and the resulting difficulties for many applicants to secure the services of legal professionals to assist them with their appeal, the Court of Appeal needs to address the issue of accessibility of the appeal process as a matter of urgency. Any such steps must address appellants' fear of loss of time as well as the accessibility of the appeal court forms and of legal advice.

While the barriers to appeal remain significant, we would also recommend a more generous approach from the CCRC to NA cases, in particular for vulnerable applicants. In the light of the CCRC's admirable efforts to reach out to vulnerable potential applicants, it is particularly unfortunate that it is willing to minimise the significance of those vulnerabilities when making decisions in NA cases.

Given the barriers to appeal and the high proportion of the prison population with some form of vulnerability, there is a significant risk that the current NA policy might lead to some cases being rejected purely on the basis of a lack of appeal, without any consideration of whether or not there might be a real possibility that the conviction is unsafe. If such a possibility is identified, the Commission must, of course, then find exceptional circumstances to justify a referral of the case to the appeal courts. However, vulnerability, in these circumstances could constitute such exceptional circumstances (whilst vulnerability itself might not be 'exceptional', vulnerability in combination with new evidence or argument arising out of a CCRC review and giving rise to a real possibility of an overturned conviction could reasonably be said to be exceptional). Furthermore, Nori and YY notwithstanding, the Court of Appeal has not so far shown much reluctance to examine cases referred to by the CCRC despite the absence of a previous appeal.

The Court of Appeal needs to...

- address the issue of accessibility
- address appellants' fear of loss of time.

The CCRC should consider...

- a more generous approach to NA cases, in particular for vulnerable applicants.



Criminal Justice Centre

School of Law
University of Warwick
Coventry CV4 7AL
United Kingdom

☎ +44 (0)24 7652 3075

✉ law@warwick.ac.uk

🌐 warwick.ac.uk/fac/soc/law/research/centres/cjc

🐦 [WarwickCJC](https://twitter.com/WarwickCJC)