THE LONDON ADVOCATE

Newsletter of the London Criminal Courts Solicitors' Association

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Welcome to this Autumn 2024 edition of The London Advocate which I hope you will enjoy reading.

The summer has now passed and with it came the election of a Labour government and we wonder if the new administration will speedily and effectively address the unprecedented crisis currently being faced by the Criminal Justice System.

We have a new Lord Chancellor and Secretary of State for Justice, Shabana Mahmood, a former barrister.

Before the general election as Shadow Justice Secretary she did not pledge increased funding for legal aid, stating that she could not make unfunded proposals.

But she said that, if appointed, she would be a "champion of our legal industry" and pledged to work with the Treasury to "ensure our legal services are a growth sector" and to seek a "renewed partnership for the legal sector".

Make of that what you will.

On a more pleasant note, the popular LCCSA European Conference is nearly upon us. Being held in the beautiful city of Porto, Portugal, from September 27 to 29, the event was a sell-out months ago.

Kindly sponsored by 5 St Andrews Hill Chambers, the conference features speakers from both 5SAH and the LCCSA and also includes a guided city tour with a visit to the Famous Porto Wine Cellar, Taylor's, and a premium wine tasting.

A full report will appear in the next edition of The London Advocate.

Then it's time for the this year's AGM in November. The venue and guest speaker are to be confirmed and tickets will be available soon. Next year's president and committee will be formally elected. Please send any proposals for new committee members to Sara Boxer at admin@lccsa.org.uk.

Piers Desser, Editor

Law Society boost for our unionisation campaign

The Law Society has backed our call for defence solicitors to join a union. President Nick Emmerson said being encouraged to unionise marked a step change in their determination to fight for the sustainability of the justice system.

"It demonstrates how crucial it is that the UK government urgently takes the steps identified by the independent Bellamy Review to keep the system functioning," he said. "It is understandable that members of the profession feel the need to take such drastic action to protect access to justice.

"They play a vital role in the crisis-hit criminal justice system but they are ageing as younger lawyers are not attracted to the work and their numbers declining because their work is not financially viable."

The Law Society Gazette was reporting on a statement issued by the LCCSA in August which said: "Our message to criminal legal aid defence solicitors is get organised and unionised.

"These are dark times for criminal legal aid. The sector is haemorrhaging defence solicitors seeking better pay and working conditions elsewhere, and there are not enough young solicitors entering it to replace them.

"The logical end-point of this trajectory is that ultimately there will be no one left doing this vital work ensuring access to justice for defendants who cannot afford to pay for their representation."

In 2021, Sir (now Lord) Christopher Bellamy published his Independent Review of Criminal Legal Aid following the most detailed and wide-ranging review of the system ever undertaken.

His conclusions were stark and unambiguous. Chief among them were that "absent a substantial increase in funding, there is a high risk that the system will simply be unable to cope with the challenges ahead."

He recommended an overall immediate and bare-minimum increase in fees of some 15% to enable criminal legal aid firms to invest in recruitment, compete for talent, maintain quality, provide training, and ensure retention.

The previous government did not commit to the full 15%, nor did it say how it proposes to remedy the illegality the High Court identified in the process it followed when it made the decision not to uplift fees by the full 15%.

The new government is yet to publish specific policy detail in relation to legal aid, but the mood-music emanating from that direction is that there is no appetite, indeed no capacity, for any new meaningful public spending.

LCCSA president Edward Jones said: "The answer in my view and in the view of the LCCSA committee is for criminal legal aid solicitors to organise collectively by joining a union.

"To that end, the LCCSA has launched the www.defendlegalaid.co.uk campaign to urge our members to join Unite the Union, whose Legal Sector Workers' branch is ready and waiting to represent the interests of the rank and file in their fight for more investment into criminal legal aid as a means of securing better pay and conditions."

Contributors to this edition:

Attorney-General's references — are they always fatal?

By Paul Taylor KC

If the Attorney-General considers that a sentence passed in the Crown Court[1] is "unduly lenient", the sentence can be referred to the Court of Appeal (Criminal Division) [CACD] to be reviewed.[2] The CACD has the power to increase that sentence.[3]

Notification that the Attorney-General is referring a sentence to the CACD creates a terrifying prospect for most defendants (and, to a lesser extent, their lawyers[4]).

This is especially so when the defendant has received a non-custodial sentence and now faces the prospect of imprisonment[5], or where release from a custodial sentence is nearing but the term may now be increased significantly.

In 1988, during the passage of the Criminal Justice Bill, it was envisaged that applications by the Attorney-General would be made sparingly. The original estimate was for around a dozen such applications a year[6]. Between 22nd March 2023 and 6th February 2024 there were 150.[7]

Interestingly, out of the 137 cases referred and determined by the Court at the time the statistics were published[8], 45 sentences (or nearly 33%) were left unchanged.

So, back to the question in the title: Is an Attorney-General's Reference always fatal? Or in other words, does a reference guarantee an increased sentence? The statistics provide the clear negative answer. The statutory framework and approach of the CACD provide an understanding of why that is and in what circumstances the CACD will refuse to intervene.

There are two preliminary hurdles for the Attorney-General to cross before the CACD's *power* to increase a sentence is triggered. Firstly, there is a strict 28 day time limit for the service of the notice of reference. If missed, this cannot be extended. Secondly, the Attorney-General must obtain leave from the CACD. But even if leave is granted, the Court has three options[9]: leave the sentence unchanged[10], increase it, or even reduce it[11].

The approach of the CACD at the reference hearing is generally to consider the following issues:

1. Was the sentence in question too lenient?
2. If it was, was it "unduly" so?[12]
3. Should the Court exercise its discretion and interfere with the sentence, and if so in what way?

The various adjectives used in the authorities demonstrate the high threshold that must be passed before the Court will increase a sentence: The circumstances must be "exceptional", and where the sentencing judge has "fallen into gross error" and that a failure to alter the sentence would affect the public perception of the administration of justice.[13]

In *Attorney-General's Reference No 4 of 1989* (1989) 11 Cr App R(S) 517, Lord Lane CJ stated that: "A sentence is unduly lenient we would hold where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate …"

However, it must always be remembered that sentencing is an art rather than a science: the trial judge was particularly well placed to assess the weight to be given to various competing considerations, and leniency is not in itself a vice.

In R v Kodaolu and Benson [2023] EWCA Crim 525 [26] William Davis LJ cited the words of Lord Lane CJ (pictured below) and observed: "Those principles hold good today, save that sentences now must be considered by reference to the relevant Sentencing Council guidelines."

As stated above, even where the CACD considers that the sentence was unduly lenient, it still has a discretion as to whether to exercise its powers and increase the sentence, and if so by how much.

For example, an increase has been held to be unfair when it may jeopardise medical treatment[14], or where the offender had already carried out unpaid work and the part-payment of compensation made under the suspended sentence order[15]; or an increase may be of a lesser amount than would otherwise have been appropriate when the offender had responded well to the original sentence, because of the detrimental effect to others[16], or where there was "inordinate and inexcusable" delay in the original prosecution.[17]

Occasionally, the CACD will also reduce the sentence that would otherwise have been imposed to take account of the so called double jeopardy principle; the offenders likely anxiety and trauma of being re-sentenced under the reference procedure.[18]

Perhaps if there is one obvious "take away" from the above short analysis, it is the need to personalise submissions in response to a reference by identifying why in this particular case involving this particular defendant, the sentence was not unduly lenient, or if it was why it should not be increased.

Paul Taylor KC is Head of the 5KBW Criminal Appeals Unit. He is the general editor of the third edition of Taylor on Criminal Appeals, the leading practitioners guide for those advising on a potential criminal appeal or judicial review, or an application to the Criminal Cases Review Commission. Paul has been described in Chambers and Partners as "One of the foremost appeal lawyers" (2022) "whose knowledge of criminal appeals is second to none" (2023). He has written and lectured on appellate issues in England, Northern Ireland and the Caribbean.
https://www.5kbw.co.uk/barristers/profile/paul-taylor-kc

See footnotes on next page.

Footnotes:

1. The statutory scheme applies only to certain sentences as prescribed by the Criminal Justice Act 1988 or subordinate legislation. See Archbold Criminal Pleading Evidence and Practice 2024, para 7-440 onwards; Taylor on Criminal Appeals, para 13.27.
2. Criminal Justice Act 1988, s.36 [CJA 1988]
3. Ibid.
4. There is a story (perhaps apocryphal) of a particular judge who was renowned for passing such low sentences that an AG's reference would often follow. After a while, defence counsel would structure the "mitigation" at sentencing hearings to include a sufficient number of aggravating features that would persuade the judge to set the level of the sentence just high enough not to be considered "unduly" lenient.
5. For a recent example see *R v Valencia* [2023] EWCA Crim 1683 where sentences imposed on the 18 year old offender (youth rehabilitation order with intensive surveillance and supervision) were quashed and a total of 4 years detention substituted.
6. Standing Committee H, 23 February 1988, Criminal Justice Bill, col. 218.
7. https://www.gov.uk/government/publications/outcome-of-unduly-lenient-sentence-referrals (Last accessed: 12th March 2024)
8. 6th March 2024
9. CJA 1988, s.36(1)
10. In *R v Kodaolu and Benson* [2023] EWCA Crim 525 [34] leave was refused on the basis that the sentences "fell well within the bounds of what was reasonable given all the circumstances of the case. In our judgment the argument of HM Solicitor General ignores the need to take a nuanced approach to any sentencing guideline."
11. *Att-Gens Ref No 4 of 1989* (1989) 11 Cr App R (S) 517, 521.
12. It is not enough just to be lenient. See *R v Parry, Pawley and Brading* [2023] EWCA Crim 421 [32] per Macur LJ in refusing leave, "...we tend towards the view that the sentence is lenient, but it is not unduly so."
13. Most recently, see *R v Mboma* [2024] EWCA Crim 110 [24]; *R v Farrell Huband* [2024] EWCA Crim 317 [35]
14. *Skinner* Times 23 March 1993.
15. *R v Michael Wilson* [2023] EWCA Crim 673 [44]. See [45] "In those circumstances, although we grant the application for leave to make the Reference and although we find the sentence to be unduly lenient, we exercise our discretion not to interfere with the sentence."
16. See for example, *Attorney-General's Reference No 4 of 1989* (1989) 11 Cr App R(S) 517,521; *Att-Gens ref (No 17) of 2008)* [2008] RTR 29.
17. *R v Mboma* [2024] EWCA Crim 110
18. The CACD has stated that the circumstances in which such a reduction will be made are now "rare": *Att-Gen ref (No 45 of 2014) (Afzal)* [2014] EWCA Crim 1566.

Extradition and life sentences in the United States

By Ben Keith

In extradition cases to the USA there are lots of arguments about the health of its criminal justice system and prisons. One interesting aspect is the issue of the huge number of individuals who receive a sentence of life without parole, often as a result of the Three Strikes law.

This problem of excessive sentences has been examined in detail over the past few years by the European Court of Human Rights (ECtHR). Its conclusions have been conservative and sometimes contradictory. But in spite of criticism from the UK government the ECtHR has upheld the right of the US to use life without parole, albeit without daring to make that explicit.

Throughout Europe, sentences of life imprisonment without the possibility of adequate review and release mechanisms are expressly prohibited under the Convention. This was established in *Vinter & others v United Kingdom* [GC] by the European Court of Human Rights (ECtHR), determining that 'irreducible' life sentences are incompatible with Article 3 ECHR, which prohibits torture, inhuman, and degrading treatment or punishment.

With their irreversible nature and the absence of any prospect of release, the imposition of life without parole sentences in the US has raised concerns about human rights violations and disproportionate sentencing practices.

The prohibition of life imprisonment without the possibility of adequate review, prompted a pertinent question in the Strasbourg Court: should the same prohibition extend to extradition proceedings involving States not party to the Convention?

The cases of *Sanchez-Sanchez v United Kingdom*, *Patrick Bijan Balahan v Sweden*, and *Horne v United Kingdom* addressed this question. All cases concerned individuals facing extradition to

the US with the possibility of receiving life without parole sentences.

Although the cases of *Sanchez-Sanchez* and *Horne* concerned extradition requests from the UK to the US, and the UK is party to the ECHR, the High Court did not take an interest in the matter but Strasbourg did.

The first case in this series was the Grand Chamber case of *Sanchez-Sanchez vs United Kingdom* (application no. 22854/20) which concerned the extradition of Mr Sanchez-Sanchez, a Mexican national, to the US to face trial for drug trafficking, where he alleged there was a real risk that, if convicted, he would be sentenced to life imprisonment without parole.

The Court set out a two-limb "real risk" test, stipulating that the applicant must demonstrate a real risk that they would receive a life without parole if convicted. If this is the case, the sending State must ascertain, prior to authorising extradition, that a mechanism of sentence review existed in the requesting State. That review mechanism should allow the domestic authorities to consider the prisoner's progress towards rehabilitation.

In *Sanchez-Sanchez*, the Strasbourg Court held that on the facts, he had not shown that, in the event of his conviction in the US, there would be a real risk that he would be given a sentence of life imprisonment without parole. There was therefore no need to continue to the second stage of the test.

Bijan Balahan v Sweden concerned the US extradition request to Sweden of Mr Balahan, a US-Iranian national, who was requested to stand trial in California in relation to his third allegation of torture. He had two previous convictions for similar offences serious that engaged the Californian Three Strikes law which would result in Mr Balahan receiving a *de facto* life sentence without parole because he would have to serve a minimum term of 61 years before being eligible for parole, which would exceed his life expectancy.

The ECtHR relied on the fact that judges have a discretion to disapply the Three Strikes law in which case Mr Balahan would face a significantly shorter minimum term.

The court refused the appeal by a majority of 6 to 1 on the basis that there was no real risk of Mr Balahan receiving a de facto life sentence. Judge Wojtyczek argued the opposite, namely that "*the ... high level of uncertainty concerning the outcome of the criminal proceedings ... in the US ... means precisely that the risk is real,*" finding in favour of the Applicant. The appeal against the decision of the court was refused by the Grand Chamber.

With the most recent decision in *Horne v United Kingdom*, the ECtHR missed yet another opportunity to clarify uncertainty surrounding the "real risk" test.

Mr Horne faces charges of second-degree murder in Florida and is likely to receive life without parole. Again, the ECtHR held that there was no "real risk" of Mr Horne receiving based on assurances provided by the US Prosecutor that they would not seek a whole life sentence and ask for a determinate sentence of less than 40 years imprisonment.

Rather problematically, such diplomatic assurances do not bind the sentencing court, the prosecution even said they would appeal if the court gave a longer sentence. Indeed, it is at the judges' discretion to entirely disregard any sentencing recommendations from the prosecution and, as seen in practice in the US, not uncommon for judges to do so.

In all three cases, *Horne, Balahan* and *Sanchez-Sanchez*, the ECtHR invoked Rule 39 of to halt the respective extraditions to the US, where they potentially faced life without parole, pending the Court's examination of their case. While this precautionary measure reflects the Court's commitment to upholding human rights standards in extradition proceedings, particularly concerning the imposition of life without parole sentences and compliance with Article 3 ECHR, the decisions set a difficult precedent.

Since the landmark decision in *Sanchez-Sanchez*, the ECtHR has not gone on to consider the second stage of the "real risk" test. The decisions indicate that the ECtHR has set an impossibly high bar when assessing whether there is a "real risk" of a de facto life sentence, weakening the protection against extradition and giving serious cause for concern about human rights.

Ben Keith was instructed by Roger Sahota at Berkley Square Solicitors in *Horne*, of *Balahan* and *Sanchez-Sanchez*.

Ben Keith is a leading barrister specialising in cross-border and international cases. He deals with all aspects of Extradition, Human Rights, Mutual Legal Assistance, Interpol, Financial crime and International Law including sanctions. He has extensive experience of appellate proceedings before the Administrative and Divisional Courts, Criminal and Civil Court of Appeal as well as applications and appeals to the European Court of Human Rights and United Nations.

Andrew Malkinson: How he won his fight for justice

By Claire Bostock

Justice can and does miscarry, and it is not hard to find examples of such injustices. Andrew Malkinson sets out how he became the victim of a miscarriage of justice in "The Wrong Man: 17 Years Behind Bars", a moving BBC documentary sensitively directed by Fran Robertson and Jemma Gander.

In an account that is deeply poignant, Mr Malkinson explains what happened to him and how he had to fight for two decades to clear his name. He recounts his bewilderment and confusion following his initial arrest, but a firm belief at this time that investigative processes would "clear everything up".

He tells of his utter despair when he was informed by his solicitor that he had been identified by the victim at a video identification parade, and his profound shock following his remand into the prison estate. He recalls his trial and the terrifying dawning realisation during the trial process that he would be unable to persuade the jury that he was innocent, and his shock and disbelief when convicted.

The trauma he endured is evident, and Mr Malkinson accounts for this and the coping strategies he was forced to deploy which enabled him to pursue justice. The collateral damage is also very clear: Mr Malkinson's mother, sister and friend, Karin, set out the devastating impact this miscarriage of justice had on them.

It is noteworthy that the victim herself has also suffered an injustice – her attacker has not yet been brought to justice.

On 19 July 2003, the victim was walking home in the early hours of the morning when she was attacked and raped by a stranger. She was able to give the police a description of the attacker whose face she said she had scratched with her fingernail on her left hand. She was examined by a police surgeon and forensic samples were taken, clothing was seized and photographs were obtained.

With respect to DNA evidence, no useable DNA profiles were obtained from the items examined. Some of the samples years later would yield sufficient DNA profile information as a result of advances in DNA testing techniques to exonerate Mr Malkinson, including nail cuttings and scrapings from the victim's left hand and on areas of potential saliva staining on her clothing.

Some weeks earlier, Mr Malkinson had been a pillion passenger on a motorbike about a mile and half away from the scene where the crime was to take place. He was stopped and spoken to by the police. Those officers went on to claim that they thought he resembled the victim's description of the attacker.

Mr Malkinson became the investigating officers' main suspect. He was visited the day after the attack, on 20 July 2003, and spoken to by officers. He did not have any facial injuries. He was arrested on 2 August 2003 and detained in police custody. He was legally represented, interviewed under caution and answered all questions put to him repeatedly denying the allegations.

He agreed to take part in identification procedures and provide DNA samples. At the video identification procedure on 3 August 2003, the victim picked out Mr Malkinson.

On the same day, a witness who had been a passenger in a vehicle driving past the scene at the relevant time and had seen a man also took part in a video identification procedure. This witness had travelled to take part in the procedure in the back of the same police vehicle with the victim and in breach of the Police and Criminal Evidence Act 1984 (PACE).

After viewing the video parade tape twice, the witness asked to look again at the images of the men numbered 1 and 4. Mr Malkinson was number 4. The witness picked out number 1. It is claimed that immediately after the procedure had ended, she told a police officer that she had picked the wrong man and that she was sure that number 4 was the man she had seen.

This verbal exchange was not recorded in breach of PACE. The driver of the vehicle also saw the same man, but he did not attend an identification procedure until 14 January 2004 by which time he had read descriptions of the attacker in the press and had seen an e-fit drawing of him. He also picked out Mr Malkinson.

The identification procedure relating to this witness took place when the witness was in police custody having been arrested whilst on licence in relation to drug allegations. He was subsequently prosecuted in relation to these matters and, on one view, dealt with leniently.

The defence was not informed about the circumstances surrounding this identification.

At Mr Malkinson's trial, the victim gave evidence. She told the jury that she was "more than 100% sure" that the man in the dock, Mr Malkinson, was her attacker.

The two other witnesses gave identification evidence. They were presented to the jury as honest and reliable witnesses; no previous convictions or other matters had been disclosed to the defence which might provide grounds for doubting their credibility.

Mr Malkinson gave evidence. He denied that he had attacked the victim – he told the jury he was incapable of such actions – and that he had been at home asleep at the relevant time. He explained to the jury that the victim was mistaken, that the other two witnesses were also mistaken and the man they had seen was the actual perpetrator of this appalling crime.

The entire case against Mr Malkinson depended wholly on the correctness of the identification of him. In the summing up, the Judge directed the jury that: "This is not a case where the identification evidence is supported, for example, by forensic evidence, because in this case, there is no such evidence", and gave a conventional Turnbull direction about the special need for caution before convicting in reliance upon the identification evidence.

On 10 February 2004, Mr Malkinson was convicted by majority verdicts (10:2) of an offence of attempting to choke, suffocate or strangle with intent to commit an indictable offence (rape) and two offences of rape.

He was subsequently sentenced to life imprisonment. Although the minimum term of his life sentence was specified as 6 years and 125 days, he remained in custody for some 17 years because he maintained his innocence. He was released on 18 December 2020 subject to the conditions of his life licence, still maintaining his innocence.

Immediately after his conviction, Mr Malkinson sought to mount an appeal. Before the Court of Appeal, Criminal Division (CACD), it was argued by fresh counsel on Mr Malkinson's behalf that the convictions were unsafe on several grounds, to include: that there had been a failure by the trial judge to properly direct on the dangers of unsupported identification evidence and the direction in relation to how the jury ought to approach the absence of a scratch to Mr Malkinson's face had glossed over a significant difficulty in the prosecution case that being, notwithstanding the victim's account that she had scratched her attacker's face with her left fingernail, Mr Malkinson's face was not scratched.

In 2006, the CACD dismissed Mr Malkinson's appeal stating that the evidence against him was "compelling".

Mr Malkinson sought to mount a further appeal via the Criminal Cases Review Commission (CCRC). In 2009, he submitted his first application to the CCRC. New solicitors had been instructed.

This application drew attention to the fact that, in 2007 and 2008, forensic retesting by the Forensic Science Service (FSS) in the case pursuant to "Operation Cube" (nationwide retesting undertaken by the FSS of all forensic testing carried out between 2000 – 2005) produced a mixed DNA result showing not only the presence of a DNA profile matching the victim, but also a searchable partial profile for another person.

The source of this new DNA profile was not the victim's boyfriend or Mr Malkinson's, both of whose DNA profiles were compared to the new result and excluded from being the second contributor. The application asked for a "full review of the forensic evidence" and suggested that the identification evidence was "highly unsatisfactory".

In 2012, the CCRC rejected the application on the basis that in their view notwithstanding the new forensic evidence the statutory test for referral to the CACD: the "real possibility test", had not been met.

In 2018, Mr Malkinson made a second application to the CCRC on the basis that there had been various breaches of Code C of PACE during the investigation. He was now represented by APPEAL. The CCRC indicated that they would not refer the convictions on these grounds.

APPEAL asked for the application to be paused to allow them time to carry on with other investigations which included the commissioning of new DNA testing. This was refused by the CCRC and in 2020 Mr Malkinson's second application to the CCRC was rejected.

In 2021, Mr Malkinson submitted a third application to the CCRC on grounds that:

- Fresh DNA evidence which had been obtained linked the crime to another unidentified male.
- Photographs showing the victim's hands taken shortly after the attack showed that a statement read to the jury at the trial from the police surgeon was incorrect in stating that the middle fingernail on the victim's right hand had been damaged which was significant because the inconsistency between the surgeon's statement and the victim's evidence of losing a nail on her left hand was drawn to the jury's attention as providing a possible basis for doubting her account of scratching her attacker at all which had significantly undermined Mr Malkinson's defence.
- Post conviction disclosure relating to the other witnesses which significantly undermined their identification evidence: both had multiple convictions for dishonesty offences; the second witness had identified Mr Malkinson in the circumstances set out above (when under arrest and six months after the index offence); the second witness was a heroin addict.

In relation to the fresh DNA evidence, during their investigations APPEAL tried but was unable to obtain the exhibits (the victim's clothing) to carry out further DNA testing as

they became aware that they had been lost or destroyed by Greater Manchester Police (GMP).

However, additional enquiries conducted by APPEAL revealed that samples from the exhibits had been retained by an independent body: the Forensic Archive, and these samples were re-tested.

The re-testing revealed the presence of a male's DNA in multiple, crime specific locations on the victim's clothing. The DNA was not Mr Malkinson's, or anyone known to the victim. APPEAL had no authority to carry out a search for an offender on the National DNA Database (NDNAD).

With respect to the photographs and other disclosure, this essentially came to light following an inspection of the police file which was only released to APPEAL after they mounted a legal challenge. The CCRC had not obtained or considered the police file during their review of the convictions in either 2009 or in 2018.

The CCRC commissioned further DNA testing and, in accordance with their statutory powers, requested a search on the NDNAD which led to another man being placed under investigation.

In 2023, the CCRC referred the convictions to the CACD concluding that the if the jury had been aware of the new DNA evidence there is "a real possibility" that Mr Malkinson may not have been convicted, or indeed even prosecuted at all. The CCRC did not refer on the other grounds, although did state these grounds provided some support for the referral.

After the referral was made, APPEAL sought leave to argue these grounds before the full Court (grounds 2, 3, 4 and 5). On 26 July 2023, the CACD quashed Mr Malkinson's convictions on three out of the five grounds argued (grounds 1, 2 and 3).

Following Mr Malkinson's exoneration, three processes were instigated: a public inquiry which is ongoing; a review by the IOPC into the investigation of the case by GMP - also ongoing; a review commissioned by the CCRC in relation to their handling of the case. Chris Henley KC was instructed by the CCRC to carry out the latter review.

On 18 July 2024, the "Independent Review by Chris Henley KC of the CCRC's handling of the Andrew Malkinson case: Report & CCRC Response" was published. During the review, Chris Henley KC identified significant failings and errors in the investigation of the case by the CCRC.

With respect to the first application, the Report notes that there had been "a complete failure" (by the CCRC) to "get to grips with the potential significance of this new DNA result" and that "obvious questions had not been asked, and no formal meeting had taken place with any scientific expert to make sure that the meaning and implications of the new finding were fully understood."

The Report states that the CCRC "fundamentally misunderstood the potential significance of the new DNA evidence presented to them" and that there was "a real possibility" this might have come from the victim's attacker, concluding that, amongst other things: "All involved failed correctly to apply the test for referring a case".

With respect to the second application, the Report is critical of the CCRC's decision not to accede to the various applications to pause while APPEAL sought public funding to commission further DNA tests noting that: "The CCRC were not constrained from having further testing carried out themselves.

A thorough reading of the material relating to the first application should have caused the CCRC to give serious thought to doing this work. This was an opportunity missed".

With respect to the third application, the Report states that Mr Malkinson was "fortunate" that the new DNA testing yielded results which could be linked to the NDNAD on the basis that the CCRC's notes which had been reviewed demonstrated that the CCRC may not have otherwise made the referral. Lessons from the case of Victor Nealon, which bore undoubted similarities, had not been learned.

The Report is highly critical of the CCRC noting that "the CCRC is taking too cautious an approach". In Mr Malkinson's case, the Report notes that the real possibility test was not properly applied and "even now is not being applied properly". Prior to the publication of the Report, leading appellate practitioners and academics had publicly expressed identical concerns about the CCRC.

The Report urges "vigilance" and that many lessons need to be learned most notably in relation to:

- Disclosure and the fundamental importance of "full" and "transparent" disclosure to the defence.
- The "strong emotional pull of identification evidence" on juries and legal professionals including Judges, and "its fallibility even when it comes from multiple witnesses".
- The "deep-seated cultural reluctance which starts right at the top in the Court of Appeal to acknowledge that our criminal justice system will on occasion make mistakes and that entirely innocent defendants will sometime be convicted".

The body which holds the key to opening the door to those who have suffered a miscarriage of justice must, as the Report states, be "a robust, appropriately resourced, bold, mission driven organisation, fearlessly asking the right questions, and analysing new evidence and submissions rigorously, and above all correctly identifying the cases that should be referred".

Prior to the publication of Chris Henley KC's findings, both APPEAL and Mr Malkinson openly called for the Chair of the CCRC to resign.

Since the publication of his findings, other leading figures have expressed their views that the Chair must resign, including the Justice Secretary, Shabana Mahmood, and most recently the former solicitor general, Lord Edward Garnier KC, who also called on the CCRC's Chief Executive to step down. At the time of writing, both the Chair and Chief Executive remain in post.

Notwithstanding his exoneration, Mr Malkinson lives everyday with the pain this miscarriage of justice caused. He still awaits compensation. He wants accountability. He would like to help in any way he can to rectify past miscarriages of justice and prevent future miscarriages of justice from occurring. And as has always been his position – he truly hopes the victim eventually obtains justice.

Claire Bostock is a solicitor at APPEAL, starting with them in January 2024, and an LCCSA committee member. She has particular expertise in representing individuals who have severe mental health difficulties and acting for other vulnerable people including women, young adults and children. She is also a committee member of the Criminal Appeals Lawyers Association.

A short-term fix or longer term problems?

By Liam Chin

It is widely known that the Criminal Justice System is facing insurmountable difficulties in the current climate. The backlog of cases in the Crown Court continues to rise exponentially. There exists an undeniable shortage of criminal practitioners and the effects are well publicised.

Complainants and victims are waiting longer and longer for justice. Innocent people charged with crimes they did not commit; are waiting just as long to be acquitted and exonerated. However, the chronic underfunding of the Criminal Justice System continues. I wait to see if this will be addressed by the new Labour government.

Whilst everyone eagerly urges cases to be brought before the courts, an equal and opposite problem is to be contended with - the prisons and police cells are full! The Criminal Justice System now finds itself in a complete stalemate.

It begs the question: how do we deal with these issues before they spiral beyond the point of no return? Is it now the responsibility of those who work within the system to solve the problems themselves by developing and adopting new initiatives?

I came across one such initiative recently, when I attended a sentencing hearing for a long-standing client of mine, called 'Choices and Consequences' or C2, as it's known more colloquially.

C2 is an initiative being piloted in Hertfordshire. It is a collaborative effort between the courts, police, and probation service. In effect, it works as a deferred sentence.

At face value, it is an impressive initiative that seeks to rehabilitate serial offenders and set them up on a path of strict routine that aims to address their offending behaviour.

Defendants are given an alternative to immediate custody, which undeniably relives some of the pressures on the overpopulated prison system. It sounds like a brilliant plan, prison spaces become available.

Defendants retain some semblance of normality and liberty whilst being supported by measures intended to prevent further criminality. However, the lure of relative freedom may be masking the harsh realities for some of these defendants.

The measures defendants are subject to under C2 are stringent and onerous. During the deferment period, they are told where they must live, they must attend regular appointments with probation, be subject to random drug and alcohol testing, and abide by strict curfew hours which are electronically monitored.

You may think that this still seems like a great alternative, but since its inception most who have signed up to C2 have failed, and when they do, what is the alternative? Most likely, custody.

My client was a prolific shoplifter. The root cause of his offending behaviour was drug and alcohol addiction. Prior to his sentencing, he had already sought help to address these issues and was waiting for a place at a residential rehabilitation centre.

What really gave him hope of rehabilitation and a positive outlook on life was his desire to train his nephew at a boxing gym, something that could not be achieved with his 6 pm to 7 am curfew.

Of course, the court states that for regulated sporting activities; an application can be made to vary the curfew on an ad-hoc basis. However, this is an onerous and laborious process. A brief discussion with a very helpful probation officer confirmed to me that the conditions attached to a C2 far exceed those that probation would recommend in a normal community order or suspended sentence.

The title of the scheme becomes somewhat ironic. 'Choices, and Consequences' reflects the intention of those who conceived the idea. If you make bad choices, there will be consequences.

What does not seem to be considered fully is what happens when a defendant decides to make good choices, attending an exercise class, perhaps evening education, visiting supportive family members for dinner. None of this can be done without leave of the court.

Those who developed this idea and brought it to fruition must be praised for their initiative and dedication. Only time will tell if it is inevitably successful, but it must not be overlooked that the scheme comes with inherent pitfalls.

The current success rate is very low, and I cannot help but feel that many defendants will struggle to abide by the strict regime, ultimately seeing them returned to the over saturated prison environment. However, initiatives like this seem necessary as individuals take it upon themselves to address the crisis we face.

Are there any initiatives that can properly address the lack of resources and funding? Are we trying to paper over the cracks that plague the Criminal Justice System with short-term solutions, and in doing so, are we at risk of creating a longer-term problem?

Liam Chin is a barrister at Crucible Chambers. He has worked for the Freedom Law Clinic and also held the position of board member with the Independent Monitoring Board commissioned by The Ministry of Justice.

And finally, Bruce Reid takes his regular whimsical look at quirks of our profession

Felix Mansfield's unerring aim hits the spot. The paper plane lands squarely on the Judge's nose. Her Honour Judge Hockeysticks rolls her eyes awake and unfolds the origami to reveal the message: " Your sherry is getting warm!"

HHJ – " Do you have an application that should be made in the absence of the Jury, Mr Mansfield?"

FM – "Your Honour, yes."

HHJ – "Very well, you are discharged till next week, members of the Jury, Court rise!"

In the Robing Room, Felix and Squirrel Nutkin basked in the warmth of men being paid a large amount for doing very little. Felix is 9th on the Indictment and hasn't asked a question in two months, Squirrel is 13th and does even less. One advocate has died in harness since the trial started and three of the Jury are suing for wrongful imprisonment.

SN- "Nice little earner this; beats 4 am at Walworth, eh Felix?"

FM – "Or a Local Authority Duty list of dodgy kebab houses and bent Blue Badges. What are you doing for Easter?"

They pause, horrified and then chorus:

"S**t!!!! Compliance!!!!"

They haven't done any for months.

Their Contract Manager, Karen Komodo-Dragon is merciless.

FM – " We got two days over the weekend, even if we spend all weekend in the station we will never get that done!"

SN – " Hmmm, desperate measures are called for..."

Friday night in Brixton as the last drug tourist, robbed of his Rolex lurches to either the police station or the Tube, whichever comes first, Squirrel hunches the trench coat up to guard against the CCTV cameras and approaches the goods entrance of Marks & Spencer. A hooded wraith emerges from the shadows and offers a choice from a bag full of washing powder, batteries and chewing gum. Squirrel politely declines.

Seek and you shall find. Larry Lizard, Felicity Fieldmouse, Ivana Iguana and Darren Deer are huddled in worship round a crackpipe. They look up at Squirrel with the expression of naughty schoolgirls caught with a ciggie and an unsuitable boyfriend.

" Er, Nice to see you Squirrel . . . You come to warn me about a warrant?"

" As always Larry, nice to see you out. Listen, I need a favour."

Money changes hands.

Felix is keeping watch on the corner. A cruising squad car pulls up.

Sgt Fergus Ferret " What's up Felix? No need to be hustling work at this time of night, we usually give 'em your card anyway?

FM – "Good to see you, Fergus, a word in your shell-like . . . "

Saturday morning. PC Bryan Badger is proceeding along the north footway when he is barged by Darren Deer. Bryan keels over in what an uncharitable referee would describe as a 'Tottenham Dive'.

Bryan Badger – "You're nicked!"

Darren Deer – "Get me Squirrel! I am not saying anything!"

At the station, when asked if he has any reply to the charge, he screams:

"All coppers are born out of wedlock". (Despite his reduced circumstances Darren had a public school education).

BB - (bored)" And racially agg. I must caution you again . . . "

DD – Don't want that softie Squirrel! Get me Felix!

Opportunely, Felix is just finishing with Felicity, who has emerged from Sainsburys carrying her own weight in chocolate and batteries but not her wallet.

Fergus Ferrett - " Felicity, have you anything to say to the charge of theft?"

Felicity Fieldmouse –" Yes, F*** Off you Chinese bastard!"

Fergus – (Just as bored) -"Felicity, put your glasses on; I am white."

Felicity -" You grubby Buddhist!"

Fergus -"That'll do, racially agg."

Felicity – "Up the IRA! I'll kill you! And your F*****g Queen."

Fergus – " And encompassing the death of the Sovereign!"

Felicity – Get me Squirrel! This solicitor's useless!"

Felix gets Ivana when she is arrested. A Section 18 search following a drunk in charge of a stolen mobility scooter, reveals that Ivana is living in an internal greenhouse, a tropical jungle, a cornucopia of cannabis.

Two officers fall to the fumes smiling ecstatically. The rest only just manage to hack their way out, courtesy of Larry Lizard's designer collection of zombie knives and samurai swords.

When charged, Ivana proclaims: "Larry made me do it, I am a victim of modern slavery." As Larry is Felix's oldest client he must pass the case to Squirrel.

Larry Lizard is usually too painful to have in the station for more than an hour, and so has been bailed four times this evening but now even Fergus can't justify releasing him; coercive behaviour is a hot topic right now.

His detention inevitably results in criminal damage to several cells (squalid details withheld for reasons of delicacy) and yet more work for Felix and Squirrel.

Court 1 at Camberwell on Monday.

Selena Stoat (CPS) and DJ Puddleduck survey the day's work grimly. A list of 38 and apart from a couple of FTAs, it's all Squirrel's and Felix's – 18 apiece.

Both are comatose on the defence bench after 48 hours in the station.

Not so Larry and his mates who are wired till Wednesday and screaming at SERCO downstairs. If the Court doesn't get them out soon, every one of the gaolers will be in the dock for assault.

Faced with the prospect of three children being left at the school gates this afternoon for one woman and the total blow-out of a hot date for the other, it is the Fair Sex who must clear up as usual.

Selena Stoat – " I suppose I could review some of these cases ."

DJ Puddleduck – "And I could offer an indication of sentence to the defendants in person?"

SS – " Go Gal!"

DJ P – " Larry, if you were to plead today I could take a lenient view . . . "

LL –"Whatever, yes, I am guilty, whatever you say Puddles, I'll do probation, tag, reporting, I am finished with a life of crime forever. I am a changed man. I am starting work on Monday, I just got my CSCS card"

DJ P – " . . . or 1 day served . . . "

SS – "Can't really drop the Encompassing the Death of the Sovereign can I?"

DJ P - " Why not, she's been dead a year."

SS - " No realistic prospect of conviction, then."

Two hours later Wanda Rabbit (Legal Advisor) tucks a printout of the results into the top pockets of our somnolent heroes thus saving the children, a romance and two careers.

The defendants head joyfully back to Marks & Spencer.

Karen Komodo-Dragon is none too pleased at seeing that six months' compliance seems to have been achieved in a mere weekend but there is not much she can do about it.

Tuesday, back at the Crown Court.

No-one seems to have missed them on Monday – funny, that . . .

It is Felix's turn to dive bomb the Judge.

Dedicated to Bob Dynowski and Louisa Zroudi