

“QUASHING CONVICTIONS”
THE RESPONSE OF THE CRIMINAL CASES REVIEW COMMISSION
(11 DECEMBER 2006)

1. This is the unanimous response of the Chairman and Commissioners of the Criminal Cases Review Commission.
2. The Criminal Appeal Act 1968 and the Criminal Appeal Act 1995 will be referred to the “the 1968 Act” and “the 1995 Act” respectively.

A. The Current Statutory Test and its Background

3. The Consultation Paper seeks views on three alternative options for revising the test of safety to be applied by the Court of Appeal in reviewing criminal convictions. The present test is out in section 2 of the 1968 Act as amended by the 1995 Act. The Consultation Paper also solicits “other proposals ... which could achieve the aim set out at the end of paragraph 31 [of the Consultation Paper] in a just and proportionate manner”. The Commission notes that the Government does not request views on the necessity for reform. We think it right, however, to examine the premises adopted by the Consultation Paper.

4. Paragraph 31 of the Consultation Paper reads:

The dominant and settled legal interpretation of the statutory test in the Criminal Appeal Act 1968 (as amended) appears to mean that the Court of Appeal *may* quash a conviction if they are dissatisfied with some aspect of procedure at the original trial, even if the person pleaded guilty or the Court are in no doubt that he committed the offence for which he was convicted. The Government believes that the law should not allow people to go free where they were convicted and the Court are satisfied they committed the offence. (Emphasis added)

5. The Consultation Paper suggests that the problem identified by paragraph 31 is a consequence of the new test of “safety” introduced by the amendment of section 2 of the 1968 Act by the 1995 Act. Thus, the Government propounds as one of its Options (Option A) the reinstatement of the proviso contained in the 1968 Act.

6. Section 2 of the 1968 Act reads:

Except as provided by this Act, the Court of Appeal shall allow an appeal against conviction if they think -

(a) that the [conviction] should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or

(b) that the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or

(c) that there was a material irregularity in the course of the trial,

and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred.

7. It is a matter of some importance that the proviso stated that the Court of Appeal *may* dismiss an otherwise meritorious appeal if they considered that no miscarriage of justice had occurred; it was not bound to do so.

8. The safety test set out above was substituted by the following test of safety in the 1995 Act:

(1) Subject to the provisions of this Act, the Court of Appeal -

(a) shall allow an appeal against conviction if they think that the conviction is unsafe; and

(b) shall dismiss such an appeal in any other case.

9. In the Commission's view, it is a trite statement that the amendment was not intended to and did not substantively amend section 2 and that, although the proviso is no longer expressly stated, the Court routinely applies the considerations contained in the proviso in determining whether or not a conviction is safe.

10. The effect of the amendment was discussed in the parliamentary debates preceding the introduction of the 1995 Act.¹ In moving the Second Reading of the Criminal Appeal Bill, the Home Secretary said of this section -

In substance, it restates the existing practice of the Court of Appeal and I am pleased to note that the Lord Chief Justice has already welcomed it.²

In the Standing Committee, the Minister of State said:

The Lord Chief Justice and members of the senior judiciary have given the test a great deal of thought and they believe that the new test re-states the existing practice of the Court of Appeal.³

¹Now admissible for the purpose of construing the purpose of statutes: *Pepper (Inspector of Taxes) v Hart* [1993] AC 593

² Hansard, vol. 256, para. 24 (March 6, 1995).

³ Standing Committee B, March 21, 1995, col. 26

11. The point was also considered in an influential article by the late Professor Sir John Smith⁴:

When we look at the Report of the Royal Commission we find that the new short formula was intended to do all the work of the old; and because the [Royal] Commission recommended "is or may be unsafe", which many people thought and presumably still think (however misguidedly) made a difference, there remains a doubt about the effect of the omitted words. It is only when we turn to the parliamentary debates that we find clear evidence of what the new provision is intended to do.

Then, after citing the ministerial statements quoted above, he continued:

The importance of these reported statements is that, if the Court should consider that the new section is ambiguous and that it is necessary to resort to the debates, they will find that Parliament passed the clause on being assured that it restated existing practice; so that it is Parliament's intention that that practice should continue.

12. Most importantly, the matter has been the subject of express consideration by the Court of Appeal in a number of cases, including the judgment of the Court (following reference by the Commission) in *Davis, Johnson and Rowe* [2001] 1 Cr.App.R. 115 where it was stated:

It seems to be generally accepted that the 1995 amendment was not intended to disturb the previous practice of the Court. That was certainly the view of the Royal Commission on Criminal Justice (CM 2263 1993), which recommended the change, and of the then Secretary of State for Home Affairs and the Lord Chief Justice see Hansard (House of Commons) (6 March 1995) columns 53-55 and Hansard (House of Lords) (15 May 1995) columns 310-312. The reformulation was the subject of comment in *R v Graham & Others* (1997) 1 Cr.App.R 302. Giving the judgment of the court Lord Bingham LCJ stated at p.308:

"This new provision, the subject of a penetrating analysis by Sir John Smith QC in [1995] Crim.L.R 920, is plainly intended to concentrate attention on one question: whether in the light of any arguments raised or evidence adduced on appeal the Court of Appeal considers a conviction unsafe. If the court is satisfied despite any misdirection of law or any irregularity in the conduct of the trial or any fresh evidence, that the conviction is safe, the court will dismiss the appeal. But if, for whatever reason, the court concludes that the appellant was wrongly convicted of the offence charged or is left in doubt whether the appellant was rightly convicted of that offence or not, then it must of necessity consider the conviction unsafe. The court is then subject to a binding duty to allow the appeal."

⁴ [1995] Crim.L.R 920

13. The Commission refers to this background to show that if the law is considered by the Government to be unsatisfactory, this cannot be attributed to the amendment of the law effected by the 1995 Act. The statutory framework stands effectively where it has been since 1968 (and indeed a proviso in similar terms dates back to the first Criminal Appeal Act of 1907). The proviso continues in effect to be applied by the Court of Appeal (on a discretionary basis) in considering whether a conviction is unsafe. If the Government is concerned to “rebalance” the Criminal Justice System, as stated in the Home Secretary’s foreword, by amending the section 2 test, it effectively seeks to disturb a discretion that has rested with the Court for many years.

14. It appears that the Government recognises this state of affairs (without expressly acknowledging it) in its comments regarding Option A which would be to reinstate a proviso similar to that contained in the 1968 Act. The Consultation Paper observes:

The Government does not rule out Option A, but considers it suffers from a number of disadvantages. In particular, it appears from the experience of the proviso that the concept of “miscarriage of justice” itself requires considerable interpretation and that this legal process may overlay and obscure the essential matter of the guilt of the appellant. It should also be borne in mind that by the time Parliament deleted the proviso in what was to become the Criminal Appeal Act 1995, most commentators considered that the proviso, as then worded, added nothing of significant value to the test itself. (paragraph 34)

15. The Commission finds the last part of the quoted passage puzzling. The proviso conferred on the Court the *discretion* to uphold a conviction, notwithstanding material irregularity, where there had been no miscarriage of justice. The Commission is aware of no commentary to suggest that the proviso did not achieve its intended effect. The thrust of the paragraph is that the Government wishes to rebalance the law to *compel* the Court of Appeal to uphold convictions in such circumstances. The proviso did not have that effect but it was never intended that it should do so.

16. In effect, Option A appears to the Commission to be a nullity. From the perspective adopted by the Consultation Paper, it would still leave the Court to apply the vagaries of “judicial interpretation” which, in the Government’s view, “may overlay and obscure the essential matter of the guilt of the appellant”.

17. It appears that the Government’s underlying concern and proposals for change stem from its dissatisfaction with the direction taken by judicial interpretation and it is to this that we now turn.

B. Judicial Interpretation of the Safety Test since 1995.

18. The Commission does not consider it arguable that the Court's disposition to allow appeals on technical grounds, unrelated to the guilt or innocence of the applicant, has increased in recent years. Indeed, the trend has been strongly towards applying the safety test against appeals based on "material irregularities" or other technicalities. Indeed, the weight of authority to support the Commission's view is so overwhelming that this submission would become overweighted with citations if the Commission were to seek to illustrate this point with more than a very small fraction of recent cases.

19. A case in point is the recent decision of the Court in *Clarke and McDaid* [2006] EWCA Crim 1196 where the issue in the appeal was whether a conviction was rendered unsafe owing to a defect in the indictment. The Court stated:

As Mr Perry has submitted, it appears, therefore, that even before the decisions in *Soneji* and *Sekhon* not every defect in an indictment would necessarily render it invalid, although the earlier authorities consistently made it clear that the absence of a valid indictment had the effect of rendering the trial proceedings of no legal effect. That conclusion was reached because the primary focus of the court in each of the cases was on whether the breach was of a 'mandatory' statutory provision. As we have set out above, the sea-change wrought by the decisions in *Soneji* and *Sekhon* is that the court should concentrate in future on, first, the intention of Parliament (viz. was it intended that a procedural failure should render the proceedings invalid) and, second, *the interests of justice and particularly whether the procedural failure caused any prejudice to any of the parties, such as to make it unjust to proceed further*. (Emphasis added)

20. A similar approach is generally now taken where the issue before the Court is whether the jury has been correctly directed on a legal point. The approach currently taken by the Court is illustrated by the decision on a recent Commission reference, *Boyle and Ford* [2006] EWCA Crim 2101:

Each case depends on its own circumstances. The essential question is whether any misdirection identified has caused an injustice and whether the Court of Appeal is satisfied that the verdict was safe. In reaching a decision as to the safety of the verdict it may assist to analyse first how the case was left to the jury by virtue of the direction given and then second to analyse how it would have been left to the jury if a proper direction had been given. The court should then assess, whether having regard to the jury's verdict on the direction as given, the jury would have been bound to convict if a proper direction had been given.

21. A similar approach is generally taken by the Court in cases where the appellant seeks to take advantages in changes of legal interpretation

subsequent to the date of conviction. In *Whomes, Steele and Corry* [2006] EWCA Crim 195, the issue was the effect of legal changes of interpretation on the sufficiency of a direction given by the trial judge. The Court cited with approval the dictum of Lord Bingham CJ in *Hawkins* [1997] 1 Cr App R 234, 240:

It is plain, as we read the authorities, that there is no inflexible rule on this subject, but the general practice is plainly one which sets its face against the re-opening of convictions in such circumstances. Counsel submits – and in our judgement correctly submits – that the practice of the Court has in the past, in this and comparable situations, been to eschew undue technicality and ask whether any substantial injustice has been done.

And it endorsed the practice of the Court in refusing leave to appeal where appeals are made on such basis. As to the misdirection that occurred in the instant case, the Court stated:

Very likely, the judge’s directions would be different if the matter were to be tried now. However, in the circumstances of this case, we do not think that any injustice whatsoever resulted from the directions which were given.

22. The Consultation Paper considers at paragraphs 19 to 24 whether the introduction of the European Convention on Human Rights into domestic law has resulting in an increasing number of appeals being allowed on “fair trial” considerations. The Commission generally concurs with the discussion and the conclusions of the Consultation Paper, and notes in particular the following:

- The Court of Appeal has drawn a clear distinction between the test of fairness for the purposes of Article 6 of the Convention and safety for the purposes of section 2. The position is well summarised in *Davis, Rowe and Johnson*:

We are satisfied that the two questions must be kept separate and apart. The ECHR is charged with inquiring into whether there has been a breach of a convention right. This court is concerned with the safety of the conviction. That the first question may intrude upon the second is obvious. To what extent it does so will depend upon the circumstances of the particular case. We reject [the] contention that a finding of a breach of Article 6.1 by the ECHR leads inexorably to the quashing of the conviction. Nor do we think it helpful to deal in presumptions. The effect of any unfairness upon the safety of the conviction will vary according to its nature and degree.

- A distinction has also been made between the right to a fair trial guaranteed by Article 6 and the subsidiary rights, breach whereof will not necessarily affect the safety of the conviction. As the House of Lords expressed the matter in *R v Forbes* [2001] 2 WLR 1:

Reference was made in argument to the right to a fair trial guaranteed by Article 6 of the ECHR. That is an absolute right. But as the Privy Council pointed out in *Brown* [2001] 2 WLR 817, the subsidiary rights comprised within that Article are not absolute, and it is always necessary to consider all the facts and the whole history of the proceedings in a particular case to judge whether a defendant's right to a fair trial has been infringed or not. If on such a consideration it is concluded that a defendant's right to a fair trial has been infringed, a conviction will be held to be unsafe within the meaning of section 2 of the Criminal Appeal Act 1968.

23. The dictum of the Court of Appeal in *Togher* [2001] 3 All ER 463 should be understood in this context. Lord Woolf LCJ stated:

we consider that if a defendant has been denied a fair trial it will almost be inevitable that the conviction will be regarded as unsafe.

But it appears plain both in the light of the dicta in *Togher* and in the light of subsequent jurisprudence that it is a breach of the broader "absolute" right to a fair trial which necessarily affects the safety of the conviction, not a breach of a "subsidiary" right which, as stated by *Forbes* must be assessed in the light of the whole history of proceedings.

24. In broad terms, the Commission would endorse the conclusion expressed in the Consultation Paper (paragraph 23) that there is little evidence that reference to Article 6 of the ECHR is resulting in an increase in the number of convictions being quashed. The Commission's experience has been that the commencement of the Human Rights Act occasioned a large number of applications founded on the supposition that breaches of subsidiary Convention rights gave rise to grounds for appeal. It appears to the Commission that it is now very widely recognised that such submissions will not give rise to successful appeals and fewer submissions are now made to the Commission on that basis.

25. The foregoing paragraphs and cases are merely illustrative of the principle that the Court of Appeal routinely applies the safety test in the light of its overall sense of justice and not on the basis of technicalities.

26. The Commission would agree that there are a very small number of cases, not cases involving the "integrity of the system" – discussed below – where the Court has quashed a conviction notwithstanding clear evidence of guilt. *Smith* [1999] 2 Cr App R 238, cited at paragraph 15 of the Consultation Paper (where a judge erroneously rejected a submission of "no case to answer"), is a case in point. The Commission for its own part notes that – in applying the "real possibility" test – there are occasions where gross procedural flaws may lead to the quashing of a conviction. An example is *Caley-Knowles and*

Jones [2006] EWCA Crim 1611, a case in which the respective judges failed to leave the verdicts to the jury. However, the Commission's belief is that such cases are rare and do not come near to supporting the estimate that 20 convictions a year would no longer be quashed if the proposed change of the law were made. Moreover, it appears to the Commission that the trend of the appellate jurisprudence is quite strongly against allowing appeals founded on procedural flaws. In the passage quoted at paragraph 19 above, reference is made to *the sea-change wrought by the decisions in Soneji and Sekhon* in dealing with appeals concerning invalid indictments with a greater emphasis on *the interests of justice and particularly whether the procedural failure caused any prejudice to any of the parties*. This appears to the Commission be the prevailing approach of the Court of Appeal.

C. "The Integrity of the System" – The *Togher* and *Mullen* cases

27. Paragraphs 25-26 of the Consultation Paper read:

25. The Court will also quash a conviction where there has in their view been a serious failure to respect the integrity of the criminal justice system. However, this may have little or no bearing on the safety of the conviction in the ordinary sense of that expression. Thus, in the *Mullen* case [2004] UKHL 18, the Court of Appeal "condemned the abuse of executive power which had led to his apprehension and abduction [from Zimbabwe] in the only way it effectively could", even though it "identified no failure in the trial process" (judgment by Lord Bingham of Cornhill). Before 1995 it would have been open to the Court to hold Mullen's conviction "unsatisfactory" by reason of the events preceding trial; Rose LJ said the 1995 Act embodied the earlier practice of the Court, and that Mullen's conviction could be quashed as "unsafe". However, the majority view of the 1985 Royal Commission appears to have been that an appeal should not be allowed in such circumstances, if guilt was clear.

26. On this view to quash a conviction where there is strong evidence of guilt, without ordering a retrial, will bring the criminal justice system into disrepute, rather than protect its integrity.

28. The Commission observes that the Consultation Paper adopts the premise that the Court of Appeal would have had a discretion before 1995 to treat the conviction as unsatisfactory but not unsafe,⁵ but that its discretion had been removed by the amendment effected by the 1995 Act. The Commission's view is that the decision that fell to be made by the Court was unchanged by the 1995 Act, and that it is overwhelmingly likely that, on the same facts, the judgment would have been same had this appeal been decided prior to the amendment of the Act.

⁵ An assumption which tends to contradict the observation at paragraph 34 of the Consultation Paper that the proviso added "nothing of significant value".

29. The decision of the Court of Appeal has to be considered in the light of the facts of the case. Rose LJ, in the judgement of the Court of Appeal, put it as follows:

This court is firmly of the view that it must have been appreciated by the S.I.S., and probably by the police in Britain, that the vital element in the operation, the insulation of the defendant from any legal advice following his detention, was in breach of specific provisions of the law of Zimbabwe, or, at the least, was contrary to the defendant's entitlement as a matter of human rights. In summary, therefore, the British authorities initiated and subsequently assisted in and procured the deportation of the defendant, by unlawful means, in circumstances in which there were specific extradition facilities between this country and Zimbabwe. In so acting they were not only encouraging unlawful conduct in Zimbabwe, but they were also acting in breach of public international law.

Finally, the events leading to the deportation as now revealed in the summary for disclosure were concealed from the defendant until last year.

In all these circumstances, can it now be said that the conduct of the British authorities in causing the defendant to be deported in the manner in which he was, and in prosecuting him to conviction was, to use the words of Lord Steyn in *R v Latif* [1996] 1 WLR 104, 113, "so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed"?

This court recognises the immense degree of public revulsion which has, quite properly, attached to the activities of those who have assisted and furthered the violent operations of the IRA and other terrorist organisations. In the discretionary exercise, great weight must therefore be attached to the nature of the offence involved in this case. Against that, however, the conduct of the security services and police in procuring the unlawful deportation of the defendant in the manner which has been described represents, in the view of this court, a blatant and extremely serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts. The need to discourage such conduct on the part of those who are responsible for criminal prosecutions is a matter of public policy to which, as appears from *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42 and *R v Latif* [1996] 1 WLR 104, very considerable weight must be attached.

30. Mullen had his conviction quashed by the Court of Appeal because, notwithstanding the evidence of his guilt and the public revulsion against the activities of which he was convicted, a *gross and extremely serious affront to the rule of law* made it appropriate for the Court in exercise of its discretion to quash the conviction. The Commission observes that the Government takes objection to the failure of the Court of Appeal to order a re-trial of Mullen in the light of the evidence of his guilt. But that overlooks the fact that in Mullen's case, exceptionally, his production for trial was the outcome of knowing and illegal acts of government and to have ordered his retrial would have been to permit the prosecuting authorities to benefit from their own illegal actions. In fact, it would have reproduced precisely the same issue that led the

Court to quash the conviction on the first occasion. The circumstances of Mullen's case are exceedingly rare and it is part of the function of the Court of Appeal, in such an extreme case, to concentrate the mind of the executive branch of government on the requirement to act within the law.

31. Generally, such cases of *gross and extremely serious affront* are rare and there have been many changes to the criminal justice system in the past 20 years to ensure that this remains the case. Nevertheless, illegal abuse of executive power has not been unknown in the cases considered by the Commission. The *London City Bond cases*, of which the leading case (preceding the involvement of the Commission) was *Early and others* [2002] EWCA Crim 1904, are examples. Her Majesty's Customs and Excise (HMCE) made use of "participating informants" who in effect were instructed to assist the appellants to carry on a VAT diversion fraud in order to enable HMCE to establish a better case for prosecution. The issue came before the trial judge as to what matters should be disclosed to the defendants and what was protected from disclosure by Public Interest Immunity (PII). HMCE actively misled the judge when he was carrying out this exercise, most particularly by concealing the role of the participating informants. The outcome was that the judge, in performing the "balancing exercise" required of him, was deprived of the information he needed to ensure justice to the defendants in a criminal trial.⁶

Rose LJ set out the Court's approach in the following terms:

Judges can only make decisions and counsel can only act and advise on the basis of the information with which they are provided. The integrity of our system of criminal trial depends on judges being able to rely on what they are told by counsel and on counsel being able to rely on what they are told by each other. This is particularly crucial in relation to disclosure and PII hearings. Accordingly... when defence counsel advised Rahul, Nilam and Percy as to plea, they were entitled to assume that full and proper disclosure had already been made. ... Furthermore, in our judgment, if, in the course of a PII hearing or an abuse argument, whether on the voir dire or otherwise, prosecution witnesses lie in evidence to the judge, it is to be expected that, if the judge knows of this, or this court subsequently learns of it, an extremely serious view will be taken. It is likely that the prosecution case will be regarded as tainted beyond redemption, however strong the evidence against the defendant may otherwise be.

32. The *Early* case (and others which followed it) concerned a prosecuting authority (HMCE) which at that time was clearly acting in breach of legal requirements and in a manner seriously prejudicial to the rights of defendants to a fair trial. It was in those extreme circumstances that the Court quashed the convictions.

⁶ The famous *Matrix Churchill* case raised somewhat similar issues.

33. The Court's practice is not to treat every significant default on the part of the prosecution as justifying the quashing of the conviction. The Court considers the effect of the default on the operation of justice. For instance, in *Togher*, one of the "problematic" judgments referred to in the Consultation Paper, the Court found that there had been serious defaults on the part of the prosecution (again HMCE) but concluded that -

the shortcomings on the part of the prosecution are not of the category of misconduct which would justify interfering with the defendants' freely entered pleas of guilty.

and added:

[The defendants] were never ignorant of any evidence which went directly to their innocence or guilt. They were only unaware of material which could, but for their pleas, have been used in order to attack the credibility of the prosecution witnesses. Ignorance of this nature does not justify reopening their pleas of guilty.

34. It appears that the Consultation Paper regards as preferable (from a public policy perspective) the authority of *Chalkley* [1998] QB 848 shortly after the amendment of section 2 had come into effect. In *Chalkley*, the defendant had pleaded guilty after it was ruled that illegally obtained tape recordings were admissible in evidence against him, and the Court of Appeal ruled that he was bound by his guilty plea. The Commission observes that the Court in *Chalkley*, considering the amendment of section 2, observed that

the new provision, in confining the test to one of safety of the conviction, may be, in this respect, narrower than before, depending on whether the word "unsatisfactory" signified an additional and independent ground for quashing a conviction or merely another way of saying "unsafe".

In concluding that the defendants were bound by their pleas of guilty, the Court apparently took the view that it should not follow previous authorities (owing to the amendment of section 2) requiring the Court to consider the impact of any material irregularities in the proceedings. The Commission simply observes that the interpretation of section 2 in *Chalkley*, apparently desired by the Government, was not merely stated to be wrong in *Mullen* and *Togher* but appears to be contrary to the intention of the 1995 Act, as stated above.

35. The question centrally posed by the Consultation Paper, however, is not what the correct interpretation of the law now is, but what it should be in the future. The Government desires an amendment of the law to the effect that where "there is strong evidence of guilt" even so flagrant an

abuse of executive power as occurred in *Mullen* should not stand in the way of a conviction being upheld on appeal, or, at the minimum, the ordering of a re-trial.

36. The Commission for its part considers that where there has been a departure from proper practice or procedure so fundamental or gross as to undermine the integrity of the criminal process, violate its basic values or constitute an affront to justice, the Court should retain its present discretion to quash the conviction and to decline to order a re-trial. In stating this view, the Commission is not arguing simply from the standpoint of abstract constitutional principle. It appears to the Commission trite that “procedural requirements” – such as adherence to the rules governing interrogation of suspects, disclosure of unused material, and the submission of PII material to the trial judge – have been established to prevent miscarriages of justice. If the legislation were to enshrine the principle that any irregularity could be overlooked – provided that the convicted persons are deemed plainly guilty – this would inevitably cause collateral damage to the criminal justice process by which innocent defendants would be more likely to be convicted.
37. The Commission would add that to change the law in the manner proposed – so as to *remove* the present discretion – would represent a major disturbance of the current constitutional separation of powers. The ability of the judiciary to check the executive, by restraining acts done on the basis of abuse of power, is long-standing and constitutionally important. The Commission notes that when the judiciary operates its constitutional checks, it serves as a signal to the executive to examine and reform its practice. Thus, the *Matrix Churchill* case (albeit finally resolved by a judicial tribunal) prompted a review of the practice relating to Public Interest Immunity, whilst the *London City Bond* and other cases caused the Government to transfer Customs prosecutions to a new independent prosecuting authority.
38. Finally, it is plainly the case that if the law were amended in the manner proposed, the Commission would cease to have any locus in dealing with cases of abuse of executive power since, if there were also strong evidence of guilt, there would be no “real possibility” that the convictions would be overturned. It would therefore be a consequence of the amendment of the law that, where executive misconduct came to light in a case which had already gone to appeal, there would be no means of bringing the matter back for further judicial scrutiny.

Option B

40. Option B is stated as follows:

replace the proviso with another formulation, designed to achieve the same end, and perhaps addressing more directly the Court's view (where they have reached one) of the guilt of the appellant.

41. This proposal is explained in paragraph 37 of the Consultation Paper in the following way:

A change to the Court of Appeal test along these lines would make no difference where the Court, for whatever reason, are unable to reach their own view on the guilt or otherwise of the appellant. The change would address those cases where the Court of Appeal form the view that the appellant is guilty of the offence. And it would be only in those cases that there would be no power to quash the conviction, despite the impact that the new evidence or other basis for appeal might have had upon the trial jury. In short, where the Court believe that the appellant committed the offence there would exist a "safety valve", preventing a further miscarriage of justice on purely procedural grounds.

42. In considering this proposal, it is important to bear in mind that the Court of Appeal *currently* considers the evidence of guilt in deciding whether any material irregularity affects the safety of a conviction. There are innumerable authorities to illustrate this point but for present purposes we refer to two cases arising from referral by the Commission.

43. In *Whomes, Steele and Corry*, the lynchpin of the prosecution case was the evidence of the witness N that he had driven the first two defendants to and from the scene where the murder had taken place. The Commission referred on the basis of very clear evidence that N had negotiated with the media for the sale of his story (in a case which had excited much public attention) and that it appeared likely that he had a financial interest in the outcome of the trial. Although the Commission found no evidence that the prosecuting authorities (who had N in custody as a protected witness at the material time) had any knowledge of N's dealings with the media, the Court of Appeal in its judgment expressly allowed for the possibility that they might have done.

44. In dealing with the media payments, the Court of Appeal reviewed the relevant authorities before concluding:

Plainly, each case needs to be considered in the light of its own individual circumstances. It is a feature of the present case that, unlike in *Austin*,⁷ it has not been established and there is no material to suggest that Nicholls has fabricated any evidence relating to the appellants.

⁷ unreported, 17 May 1996, 95/2096/Z5

With those matters in mind, we turn to the central question identified in Pendleton, namely “whether the conviction is safe and not whether the accused is guilty”. It seems to us that the following matters are of particular significance. (Emphasis added)

And having reviewed the weight of evidence against the defendants, the Court concluded:

For all these reasons, we have come to the firm conclusion that what has been established about Nicholls’ contacts with the media does not undermine the safety of the convictions of the appellants. We have had careful regard to all the new evidence which is before this Court on this issue and have been careful to distinguish between that which is properly before the Court as evidence and that which others, who are not before the Court, may have said. There is no other proper way upon which to consider these matters.

45. Turning to the question of possible complicity or non-disclosure of the prosecuting authorities, in relation to N’s media activities the Court continued:

We are prepared to assume, without finding, that one or more police officers ... knew in 1996 that Nicholls was liaising with the media with a view to making arrangements which would lead to financial reward. However, that assumption does not enable or entitle us to proceed to a conclusion that that or those police officer or officers were acting in bad faith by not taking steps to ensure that their knowledge was shared with the defence. It is common ground that not every failure to disclose automatically gives rise to an unfair trial. As we are not persuaded that any police officer has been shown to have acted in bad faith, and in the light of the conclusion we have reached about the safety of the convictions when considered in the light of what is now known about Nicholls’ media contacts, we do not consider that the trial can properly be characterised as unfair. Moreover, even if there was a defect in relation to the trial, that has now been reviewed by this Court on the present appeal. That that is a proper function of this Court is apparent from *Edwards v United Kingdom* (1992) 15 EHRR 417 and *Craven* [2001] 2 Cr App R 181. It is a function which has survived the coming into force of the Human Rights Act 1998. Standing back and taking a careful view of the trial and this appeal, we are entirely satisfied that there was no operative unfairness which affects the safety of the convictions.

46. In *Underwood* [2003] EWCA Crim 1500, the matter occasioning reference was the non-disclosure of previous criminal convictions on the part of a prosecution witness, L, who had given evidence that Underwood had confessed to the offence of murder, L’s being the only direct (as opposed to circumstantial) evidence against Underwood.⁸

47. In upholding the conviction, the Court stated:

⁸ It seems likely that the non-disclosure was not due to any default of the prosecution in this particular case but this is not material to the *ratio* of the judgment.

28...We take the law from paragraph 7 of *Farrell*⁹ where Lord Bingham of Cornhill CJ said this:

“7. Thus we have a clear and simple case in which the convictions of the prosecution witness were not disclosed when they should have been as a result of inadvertence or oversight. What is the effect of such non-disclosure if a defendant is convicted and evidence of convictions on the part of the prosecution witness then comes to light? There is no simple and straightforward answer to that question. The answer will depend on the weight of evidence in the case, apart from the evidence of the witness whose convictions have not been disclosed. The greater the weight of the other evidence the less significance, other things being equal, the non-disclosure is likely to have had. The answer will also depend on the extent to which the credibility and honesty of the prosecution witness whose convictions have not been disclosed is at the heart of the case. If, as here, the prosecution witness whose convictions have not been disclosed is the only witness against a defendant, and his credibility and honesty are squarely in issue, and the jury are led to believe that that witness is of good character when such is not the case, then there is strong ground for contending that the conviction is unsafe. That is the conclusion to which we find ourselves driven on this appeal and we accordingly feel constrained to allow the appeal and quash the conviction.”

Mr Atkinson submitted that the credibility and honesty of Lewis did, indeed, go to the heart of the case. What, he asked, was more at the heart of the case than a confession made by a killer to someone whom he thought to be a friend? He buttressed the argument by saying that Lewis, who gave his evidence at the end of the first day and must have thus left a resounding impression on the jury at a critical time of the case, was the only live witness of consequence; the other evidence was all circumstantial and the conviction was, therefore, inevitably unsafe.

We disagree. The submission overlooks the Lord Chief Justice’s observation that there is no simple and straightforward answer to the question of what is to happen if evidence of previous convictions of a prosecution witness come to light after the trial. As he said:

“The greater the weight of the other evidence the less significance, other things being equal, the non-disclosure is likely to have had.”

Accordingly it cannot be the case that if an important witness’s convictions are not disclosed, the conviction must inevitably be quashed. As Lord Bingham said later in *R v Pendleton* [2002] 1 WLR 72, para 19, it is for this court to determine whether the conviction is unsafe and in any case of difficulty to test its provisional view by asking whether the new evidence (here the previous convictions) if given at the trial might reasonably have affected the decision of the trial jury to convict.

⁹ 20th March 2000, unreported.

48. The Court continued by reciting the elements of the prosecution case against Underwood before concluding:

For all these reasons, in our judgment the prosecution had a completely compelling case, even if L had been successfully discredited.

49. These two cases exemplify the Court of Appeal adopting precisely the approach that the Government favours and, in the Commission's view, they call into question whether the re-balancing advocated by the Government is in fact required. In the Commission's experience, far from being isolated cases, these judgments reflect the current approach of the Court. It was undoubtedly the case following high-profile non-disclosure cases in the early 1990s, such as *Ward* (1993) 96 Cr App R 1, that the Court took a far more "absolute" approach to trial irregularities such as non-disclosure or witness inducements and would have been much more likely to have quashed convictions due to such considerations. But the Court, applying the present safety test, and possibly influenced by external factors such as the changes to the disclosure regime effected by statute,¹⁰ has already "rebalanced" its approach and now routinely considers "material irregularities" in the light of the overall weight of evidence in deciding whether or not convictions should be upheld.

50. The question therefore arises whether Option B would affect current practice, and the Commission observes that this would depend entirely on the way the new statutory test was worded. The Commission notes however that paragraph 37 of the Consultation Paper states:

The change would address those cases where the Court of Appeal form the view that the appellant is guilty of the offence. And it would be only in those cases that there would be *no power* to quash the conviction, *despite the impact that the new evidence or other basis for appeal might have had upon the trial jury*. In short, where the Court believe that the appellant committed the offence there would exist a "safety valve", *preventing* a further miscarriage of justice on purely procedural grounds. Emphasis added.

51. If paragraph 37 is to be taken at face value, the Court would be *bound* to uphold a conviction in the face of material irregularity if they *believe that the appellant committed the offence* and not to consider "jury impact" at all.

52. The Commission considers that such a formulation would conflict with the Court of Appeal's position as a court of review and not a court of re-trial. As the matter was stated by Lord Bingham in the decision of the House of Lords in *Pendleton*:

¹⁰ The Criminal Procedure and Investigations Act 1996 and the Codes of Practice made thereunder.

the test advocated by counsel in *Stafford* ... does have a dual virtue ... First, it reminds the Court of Appeal that it is not and should never become the primary decision-maker. Secondly, it reminds the Court of Appeal that it has an imperfect and incomplete understanding of the full processes which led the jury to convict. The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe.

53. The Commission suggests (as the Court of Appeal itself suggested in *Underwood*) that where there is a material irregularity in the trial proceedings, the same jury impact approach should be applied. To take the facts of *Underwood*, if the jury had appreciated that an important prosecution witness had a number of criminal convictions for dishonesty, might they have taken a different view of the overall strength of the prosecution case? If the Court of Appeal is satisfied (as they were in *Underwood*) that the outcome would certainly have been no different had the material irregularity not occurred, then the Court will uphold the conviction. But if the Court (on the facts) is uncertain how the information would have affected the jury's consideration of the evidence, then it is surely right that the Court should quash the conviction – but ordering a retrial where it is appropriate and practicable to do so. To compel the Court of Appeal (which has not seen the witnesses or heard all the evidence) to assert its own assessment in the face of such uncertainty would be totally contrary to the Court's role, as described in the passage quoted above.
54. The present formulation allows for a flexibility of approach. In a case of “no difficulty” the Court will uphold the conviction but in a case of difficulty, it will quash the conviction, ordering a retrial where it is appropriate and practicable to do so.
55. The Government goes some way towards recognising this issue in its discussion of Option C at paragraph 38 of the Consultation Paper where it states:

the Government wishes to make it clear that it considers that a retrial by a judge sitting with a jury remains the appropriate outcome where the Court of Appeal consider an appeal should be allowed and have, for whatever reason, not felt able to form a clear view as to the appellant's guilt.

However, it fails to recognise that there is a category of cases where *a clear view as to the appellant's guilt* cannot be achieved without reconstituting the trial process.

56. The Commission predicts that if the Government attempts to give effect to Option B, as explained by paragraph 37, by providing that the Court should be *prevented* from quashing convictions where it “believes that the applicant has committed the offence”, it will lead to uncertainty in the criminal appeal process. It seems to the Commission neither just nor plausible that the Court of Appeal (or the House of Lords in its final appellate role) would readily assent to the proposition that it should be prevented from quashing convictions in cases where there exists a real possibility that the trial would have “gone the other way” if the material irregularity had not occurred.

57. Furthermore, there appears to be a real danger that Option B would perpetuate miscarriages of justice in certain cases. It should be appreciated that Option B, as explained by paragraph 37, embraces the following three-part proposition:

- If the Court *forms the view* that the appellant committed the offence;
- It may not quash the conviction;
- Irrespective of the view that it takes of the “jury impact” of the new evidence.

It should not be overlooked that, in forming its view, the Court is generally confined to a paper review and has no opportunity to see how the performance of witnesses has affected the trial outcome. The Court repeatedly stresses that it will not look behind the jury’s verdict. If, for instance, it is suggested the performance at trial of a defence expert witness played a significant part in the outcome of trial, the Court emphasises that such considerations are of no concern to it in assessing the safety of the conviction. (See for example dicta in *Kai-Whitewind* [2005] EWCA Crim 1092.)

58. Faced with the transcripts of trial, and the verdict of the jury, the Court may in some cases too readily form its own view that the appellant is “plainly guilty” and it is widely considered that this is what happened in some of the miscarriage of justice cases that preceded the establishment of the Royal Commission on Criminal Justice under the chairmanship of Lord Runciman in 1990.

59. The present system does not preclude the perpetuation of miscarriages of justice but, as the House of Lords stated in *Pendleton*, it does require the Court of Appeal, in cases of difficulty, to test the impact of the

evidence on a hypothetical jury before reaching its own conclusion.¹¹ The Commission can see no merit in proscribing this approach, which is what Option B apparently would set out to do.

60. The Commission therefore submits that Option B has not been sufficiently thought through in the Consultation paper and should not be adopted.

Option C

61. Option C is formulated by the consultation paper in the following terms:

recast the test and the task of the Court of Appeal so as to require a substantial re-examination of the evidence (akin to the task of the jury).

62. The Government recognises the objection to this Option at paragraph 38 of the Consultation Paper quoted above and the Commission concurs with these conclusions.

Summary and Conclusions

63. The Commission has been uniquely placed in observing the developments of the legal interpretation of the safety test as set out in the amended section 2. The Commission can refer a conviction only if it considers that there is a “real possibility” that the Court of Appeal would conclude that the conviction was unsafe. The Commission concludes, without hesitation:

- that the Court of Appeal interprets the safety test in a manner consistent with the pre-1995 law as Parliament intended;
- that the trend of the Court’s decisions has been very strongly away from allowing appeals based on irregularities of the trial process in cases where there has been extremely strong evidence of guilt;
- that cases where convictions are quashed, in the face of such evidence, owing to material irregularities, are very small in number and do not justify the Government’s (unexplained) estimate that

¹¹ The authorities which have followed *Pendleton* such as *Hakala* [2002] EWCA Crim 730 and the decision of the Privy Council in *Dial and Dottin* [2005] UKPC 4 have emphasised that the “jury impact” test must however be based on a review of the entirety of the evidence considered by the jury, and not taking the new evidence in isolation.

some 20 appeal cases a year would no longer be quashed in the event of the implementation of the proposals.

64. The Commission does not consider, for reasons which have been set out above, that any one of the Options put forward should be adopted or is required.
65. The Commission views with disquiet the proposal that abuse of power should effectively cease in the future to provide a ground for appeal. The Commission emphasises that such cases are infrequent, and that historical causes for concern such as abuse of Public Interest Immunity procedures and withholding of information in Customs prosecutions appear to have been substantially addressed by changes in prosecution arrangements. The Commission considers with concern, however, that the changes now proposed would effectively prevent judicial consideration of abuse-of-power cases,. The removal of this judicial oversight would represent a gross violation of the present constitutional settlement for the separation of powers.
66. The Commission repeats the observation that if legislation removes abuse-of-power as a ground of appeal, the Commission will have no practical scope for referring such cases when they arise.
67. The Commission recognises that the Government has sought views on the alternative proposals for reform, and not on the desirability of reform. However, the Commission would hope that the Government will further reflect on the necessity of its proposals in the light of this submission.
68. Please direct any queries concerning this document to the Chairman's Office, Criminal Cases Review Commission, Alpha Tower, Suffolk Street Queensway, Birmingham, B1 1TT. Tel: 0121 633 1890. Fax: 0121 633 1804.

11 December 2006