



Justice Committee

Oral evidence: Criminal Cases Review Commission, HC 850

Tuesday 20 January 2015

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Written evidence from witnesses:

- Professor Michael Zander QC [CCR 02](#)

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Members present: Sir Alan Beith (Chair); Rehman Chishti; Jeremy Corbyn; John Howell; and John McDonnell.

Questions 45-76

Witnesses: **Lord Runciman**, Chair, and **Professor Michael Zander QC**, Member, Royal Commission on Criminal Justice (Runciman Commission), gave evidence.

Q45 Chair: Lord Runciman and Professor Zander, thank you very much for agreeing to come here to give us the benefit of your knowledge and experience on this issue. I reckon it is 24 years, Lord Runciman, since you produced your report, and 18 since the main part of it was implemented, so it is particularly good of you to give us evidence about it. Professor Zander, I know that you have just come back from America and that you have not had access to any of your papers or records, so if you want to supplement your responses in written form subsequently please feel free to do so. I start by asking what were the central risks causing miscarriages of justice in the system, about which the Royal Commission was concerned, and which led to its creation. What were the key risks?

Lord Runciman: I find it very easy to answer that question because there were, and no doubt still are, a variety of reasons for which there was good reason to think that a verdict had been handed down that a reasonable jury, properly instructed, would not have handed down. I certainly cannot answer that question in a single well-crafted phrase, but perhaps Michael Zander can.

Professor Zander: I cannot either, no. I am pretty sure that what led to the setting up of the Royal Commission, although it is a long time ago, was concern about the terrible miscarriages of justice that had emerged. They were all IRA cases as it happens, and the announcement of the Royal Commission was made on the day that the Birmingham Six case was concluded, with the quashing of those six convictions. There had been a build-up over several years of deep worry that there was something seriously wrong. What turned out to be mainly wrong at that time, which I do not think is quite the problem at the

moment, was really serious malpractice by the police, fabricating evidence in particular. The Birmingham Six case was a classic example. The Government, though very reluctantly I think, decided that something had to be done, and we were asked to look into it.

Q46 Chair: Obviously, the discovery of new evidence that evidence had been fabricated would pass the Court of Appeal test, but you have expressed concern that there are issues that do not pass the Court of Appeal test. You have said that the court “should not shirk” the task of scrutiny of the jury’s decision “on the constitutional ground that it must abide by the jury’s decision”. I rather loosely refer to it as the Bingham doctrine, as set out. Do you stand by that view? How could a change be brought about in which the Court of Appeal was more ready to question the jury’s decision?

Professor Zander: That is a very difficult question to answer. I do not know the answer, because the Court of Appeal has had a particular view of jury decisions for over 100 years. It is basically the same position that they adopted in 1907, when the Court of Criminal Appeal was first set up in the wake of what was then a terrible miscarriage of justice incident.

The Court of Appeal has always taken the view that they do not want to get involved with jury decisions. They simply wash their hands. I do not mean in every single case, but that is the basic posture. They do not want to be involved in reviewing jury decisions, and they have a justification for it. The one that they put forward is: “It’s not our job to do that. Our constitution puts the responsibility for decision making on the jury, so it is not for us to review it, except in certain circumstances. Yes, we’ll do it in certain circumstances, but basically not.” One can understand why they are reluctant to go that way; reviewing jury decisions is burdensome, because they have to review the evidence.

My own take on this is that they have always been wrong, and committee after committee, including ours, have said they were wrong; they have to grasp the nettle. That is their job—it is a safety net job. How does one achieve that? I am not sure. Obviously if this Committee said that something needs to be done, as the Donovan Committee said, as the Runciman Commission said and as lots of experts have said, people would listen; but would they do anything? I do not know.

My own feeble suggestion is that maybe there is the possibility of a new approach arising from this Committee’s report. For example, you might say that perhaps the Lord Chancellor could invite the Lord Chief Justice and the chairman of the CCRC to set up a committee of former or present members of the Court of Appeal, former or present members of the CCRC and independent experts, with a lay chairman, to try to hammer out a way forward. It is absolutely crucial. The whole issue of what is wrong with the system is, fundamentally, the attitude of the Court of Appeal to jury decisions.

Q47 Chair: In an earlier response, Lord Runciman—I am not sure if I remember your words correctly—you referred to one of the routes into the jury’s decision, which is whether the jury

was properly directed, and that was something the Court of Appeal was prepared to investigate.

Lord Runciman: Indeed, yes. Perhaps I could comment. This is a personal recollection, coming as I did from outside. I was struck all the time that we were meeting by how ingrained was the reluctance of the judiciary ever to come down into the arena, as they tend to put it. Judges then did not like, and I suspect that they still do not, being put in the position that they, sitting on the bench, should be required to do what Michael Zander and others—I am not offering a view of my own—would like to see them do, which is to be very much readier to second-guess the jury, if you want to put it that way. But it is a slightly odd state of affairs, because I do not think that anybody who was devising a system of criminal justice from scratch would think that the best way of getting the right decisions was to choose 12 people, theoretically taken at random from the electoral register, and ask them to pronounce, under guidance from the bench.

For what it is worth, and this is purely anecdotal, the one time, many years before, when I found myself sitting on a jury—it was at the Old Bailey—little knowing that I would ever have anything to do with the criminal justice system, I was very struck by the fact that only three or four members of the jury entered into the discussion at all, and what they were largely concerned with was trying to get the feel of the direction in which the judge was going to guide them. They were perfectly well aware, and rightly, that no jury was going to be equipped from the start with the kind of knowledge and experience that, in a perfect world, they would have before arriving at a verdict on the facts under the guidance of the trial judge. As I say, I cannot speak with any authority on this, although I understand the feeling, but it is a pity that juries do not get more explicit directions from judges in really testing cases.

Professor Zander: May I add a word? I am a passionate defender of the jury—to the last breath, as it were—but they sometimes get it wrong; and very rarely, and I am not talking about a large number of cases, the crucial issue of what happens when the jury gets it wrong arises.

On the judge's direction issue, the Court of Appeal is excellent. It handles all those problems without any difficulty at all. It is not process problems that the Court of Appeal has difficulty with; it is in the rare cases where the jury manifestly or pretty clearly gets it wrong. That is the real nub of the matter. Understandably, the CCRC says, "If the Court of Appeal won't look at it, we can't refer it"—and they don't.

Q48 Chair: Is it possible, do you think, to resurrect the lurking doubt principle, or is it too vague a principle?

Professor Zander: Lord Bingham, in the case of *Pearson*, expressed a kind of lurking doubt proposition or formula. I thought that I had brought it with me, but I did not; I am sure it is available.

Chair: I think we have it somewhere.

Professor Zander: Lord Judge, in the case of *Pope* fairly recently, said that it would be in the most exceptional circumstances that the court would adopt a lurking doubt. I

understand that, and the Royal Commission did not recommend that the court should proceed on a lurking doubt. It said that it should proceed on a serious doubt—a serious doubt—quite different from a lurking doubt. We consciously did not adopt the lurking doubt proposition. Whatever anyone says, I do not think there is any way that the Court of Appeal will ever, generally speaking, accept the lurking doubt principle. It is too slippery, too vague, too elusive; but a serious doubt is a very different matter.

Q49 John Howell: What hopes did you have for what the CCRC could expect to achieve, in comparison with the old C3 division of the Home Office?

Lord Runciman: There is no doubt that many more meritorious cases have been investigated by the CCRC than would ever have been investigated by the Home Office under the old rules.

Professor Zander: That is putting it very mildly.

Lord Runciman: Yes. That is what I was trying to do.

Chair: Would you like to put it less mildly?

Professor Zander: C3 was a tiny operation, with half a dozen civil servants, and they regarded their role as extremely limited. They said, “We’re the Home Office. We can’t investigate cases properly.” The main thrust of the Royal Commission’s recommendation was that we had to have a body that could do serious investigation.

Lord Runciman: And it must be independent of the Court of Appeal. That was crucial.

Professor Zander: Of course, but independent of everybody.

Lord Runciman: There was some resistance. I remember informal meetings with the Lord Chief in which it was clear that it was not automatically going to be assumed to be a recommendation that would go through on the nod, but my recollection is quite clear on this: we were absolutely unanimous not only that there should be a new body with the remit and powers of investigation that we recommended, but that its independence from the Court of Appeal, although it is not of course itself a court, was an absolute—a line in the sand, if you want.

Professor Zander: What was very striking to me was that virtually all the witnesses—I do not remember any judicial opposition—were, to my mind, 100% in favour, including a whole slew of former Home Secretaries who came along and said, “Of course. Take it away from us, please.”

Q50 John Howell: What did you envisage as the yardstick for success of the CCRC?

Lord Runciman: Again, I find that a difficult question to answer in the terms in which you put it. I would be rather more inclined to put it the other way around. Given that there were a great many cases, some of which were evidently meritorious and were being looked at, what might lead us to think that our recommendations were flawed? With the

benefit of hindsight, we would have worded them differently, and I can envisage what that might have been. There is, and always will be in such a system, the risk of a slew of non-meritorious cases not being sifted out. There is always a risk that the review body will be under-resourced, not just in budgetary terms but in terms of the powers to investigate. I certainly remember that one of the things I was most concerned with at the time was that the new body should be well staffed, in the sense that it would attract people who wanted it on their CVs; in other words, that there should be a direct personal incentive for the people who were going to run the system to make sure that it worked well.

Q51 John Howell: You commented on the need for the CCRC to be independent of the courts. Is it not true, though, that it is subservient to the Court of Appeal?

Lord Runciman: It is subservient in the sense that it is not itself a court, and nor should it be. It is also, of course, not independent in the sense that, ultimately, it is answerable to Parliament. That is a good thing, too. Michael can tell you how it has worked out in much more detail, as the names of the cases are not known to me. I have not followed them in detail, but there was bound to be a build-up over the years of dialectic between the CCRC and the Court of Appeal. I am not surprised to hear Michael saying that in his view—I am sure it is widely shared—the line taken by Lord Judge has turned out to be more restrictive than we would have hoped.

Professor Zander: We urged the Court of Appeal to be less restrictive, and they have not been less restrictive.

Can I go back to the independence question? No one is fully independent. The Lord Chief Justice is not fully independent—he is paid from the public purse and so on—yet in all important respects he is completely independent. There is no such thing as complete independence, but sufficient independence. In the way that the CCRC was set up by Parliament, it certainly fulfils the concept of independence that we had in mind. There is no question about that. Yes, it is subservient to the Court of Appeal in the sense that the statute requires that it have regard to how the Court of Appeal is going to deal with cases, by saying that only cases that have a real possibility of success should be referred, which I think was exactly the right test. We did not, in fact, lay that down in our report. Indeed, when I looked back at the papers, I could not see any evidence that we had ever discussed it. I don't think we ever discussed it. We just assumed that there would be a sensible way forward in that regard. The real possibility test seems to me exactly the right test.

Q52 John Howell: Can I pick you up on the real possibility test? If you had proposed a test for referrals by the CCRC, what would it have been? Does the real possibility test cause the CCRC's investigations to focus purely on whether the Court of Appeal would overturn a case, rather than on whether there was a real miscarriage of justice?

Professor Zander: No. First, the CCRC will decide whether a case is worth investigating. The first major piece of research on this subject has recently come forward. Dr Steven Heaton has done a masterly job in his PhD; he is a mature student now aged 58, who is doing a PhD after retirement. He has done what I think is a really important piece of work,

which is central to this Committee's investigation. It is now available on Google, and I can give the secretariat all the details. He looked at a large sample of cases that were randomly selected from the CCRC's cases, and discovered that about 90% of applications to the CCRC are not going to go anywhere; they have no hope whatsoever. It is a little more than 90%. People in prison are writing to the CCRC saying, "I am innocent. Please do something about it," but in 90% of cases there is no possibility of the CCRC doing anything, because nothing is advanced by way of reasoning—no evidence, no material, nothing to go on.

Those cases are discarded, so we are actually talking about the 10%, of which 3.5% are referred. In other words, the CCRC is saying that these cases are within the real possibility test. Then there are the other 6.5% of cases, the other 6% to 7% of all the applications that come pouring in, where the CCRC is struggling: "Do we refer, or do we not refer? There is something serious to look at here, and we will investigate it," and they investigate. One of the important things that Steven Heaton looked at is whether they investigate and how they investigate. They investigate thoroughly, and then they review. They put it to three commissioners. In cases that reach that level of seriousness, three commissioners have to decide whether or not to refer.

Dr Heaton drew on a sample of something like 147 cases where they did not refer, although they were in the category where three commissioners had to look at them. He asked: "Do I think there were any cases which they should have referred?" He looked at all the details—all the investigations and all the materials. He said: "There were 26 cases where I was actually worried—seriously worried about the case. I was worried about whether there was a miscarriage of justice, and in every single one I came to the conclusion that the CCRC was right not to refer them." That was a very interesting conclusion. It was right not to refer them, because of the real possibility test; there would not have been a possibility. Given the Court of Appeal's attitude, those convictions would not have been quashed. He looked at all of them and said, "Although I was worried about these 26 cases, I think that it was understandable, and possibly even right, that the CCRC did not refer them." That is a very important finding in a really serious piece of research.

Q53 John Howell: The majority of cases that the Royal Commission report said that the CCRC should focus on were serious Crown court cases. Did you envisage that the CCRC would have a role with less serious magistrates decisions?

Lord Runciman: We took a deliberate decision not to look into the magistrates courts. I think we were right, if only for the purely practical reason that eight hours a day for two years was barely enough to produce a report that we could all stand by, which focused deliberately on serious cases. It may well be the fact that similar attention may need to be given—it might be a good idea—to what happens in the magistrates courts, but we never considered it, and I think I can say that we were determined not to.

Professor Zander: I would add to that. My own guess is that, if we had looked at whether the CCRC or the body should deal with sentencing cases and magistrates court cases, I believe we would have said no, because we would have thought that they were not sufficiently serious. Dr Heaton has come up with a good solution to that, which is that most of those cases are too trivial and the CCRC should not be spending its time on them,

but there are a few that are very serious, and which raise important points of principle, so put the applicant to the test. If it is a magistrates court case, or a sentencing case, put the applicant to the test of establishing first that it is in the public interest that it should go to the Court of Appeal, and only secondly whether it has merits. Have a prior public interest test, and that will eliminate almost all of those cases. They would not be able to sustain them, and the CCRC would then be relieved of the burden of looking at them, except in a case where they were satisfied that it was in the public interest.

Q54 John Howell: What steps would be needed to protect defendants if the CCRC were just to concentrate on more serious and deserving cases?

Professor Zander: Protect defendants in what respect?

John Howell: In relation to them having a case that was likely to be heard at the moment by the CCRC.

Professor Zander: Do you mean in the category of sentencing or magistrates court cases?

John Howell: Yes.

Chair: They are not necessarily trivial in the lives of the person concerned. There may be loss of character, or loss of prospect of employment in their normal field of employment, if at all.

Professor Zander: I would be reluctant to exclude them because, as you say, some are important cases, certainly important in the lives of the people concerned. It is only that one is weighing up the problem of the CCRC, and what is its main job—serious cases, clearly—because of resources: the appalling resources problem and the appalling delays. One has to make nasty choices.

Lord Runciman: I would focus on the jury. As I said in my opening remarks, my view is that we were not going to try to prescribe a precise form of words that might be enacted in statute by Parliament at a later stage. To my mind, the notional test, and sometimes the actual test, is if you have a retrial. If there is serious reason to think that the jury got this one wrong, that would be the ideal solution, as it were. Sometimes there are retrials, and I am sure that Michael could give you illuminating cases where there have been, just as there are some cases where you cannot, but, in theory, the test would be that a retrial with a reasonable jury properly directed would have returned a different verdict. That, in theory, is a conclusive test.

Q55 Rehman Chishti: May I return to the point about magistrates courts? In terms of comparing them with jury verdicts, the slight difficulty is that in the magistrates court sometimes you get decisions given by district judges and not lay benches. You already have an automatic right of appeal from the magistrates court to the Crown court, so on that basis they already have it.

Professor Zander: Yes, absolutely.

Q56 John McDonnell: I want to be clear about the argument about the success of the CCRC so far. For some of the witnesses that we have seen, there has been a sense of frustration that it has not gone further. If you look at some of the statistics that have been produced for us, in comparison with C3, and bearing in mind the scale of resources devoted to the CCRC, their performance does not look dramatically different, which is quite surprising to many of us who were involved in some of the earlier cases, such as the Birmingham Six.

We'll talk about the resource issue in a minute, but is the logic of your argument that you agree with the real possibility test, because the CCRC has to operate in the real world, but that the stumbling block still remains the Court of Appeal? Your argument, therefore, is that there needs to be consideration of two issues, the first being the serious doubt argument and the second the performance of juries. Is that what you are saying? I am sorry to take you back to an earlier question, but I want to get the logic of your argument clear.

Professor Zander: It is a vital point, and I am trying to make sure that I focus exactly on the issue that you raise. First, as to the “relative success” of cases now, as compared with C3, the number of applications to the CCRC is hugely greater than the number of applications to the Home Office. At the moment, it is about double; there were about 800 or 900 a year to the Home Office, and there are currently something like 1,800 to the CCRC. The number of cases does not actually indicate their merit; as I said, 90% of them, according to Heaton’s research, are not going to have any hope at all.

I do not think that we can draw any conclusions whatsoever from the ratio of cases referred by the Home Secretary under C3, and CCRC now, under the Criminal Appeal Act. The Home Secretary under C3 did not have a real possibility test; he could refer. Whenever the political pressure was so great that he could not resist, he referred. That was really what it came to. You needed a Ludovic Kennedy or a “Rough Justice” programme to get momentum for the Home Secretary to do anything about it. After the CCRC was established, “Rough Justice”, Ludovic Kennedy et al faded away. They said the CCRC was going to do it all, so that kind of pressure did not exist any more. Now the pressure is, “Get the CCRC to do something,” and the CCRC has to look to the Court of Appeal. I am not sure that I have quite answered the question, but I hope I have.

Chair: It is also the case, as evidenced by the research you described, that large numbers of people make submissions on the basis that they are innocent, some of whom may well be innocent.

Professor Zander: Of course.

Chair: But they have nothing to offer the CCRC as a basis for taking the matter forward.

Professor Zander: Nothing to offer; absolutely. We do not know whether they are innocent or not, but if they do not provide some new material for the CCRC to act on—generally speaking it almost always has to be something new—the CCRC cannot do anything.

Q57 John McDonnell: One of the issues that we are finding is the difference between those that are represented and those that are not represented in their submissions. Can I take you back to the second part of my question? With regard to the Court of Appeal, is this the logjam that we are experiencing?

Professor Zander: There always has been, yes, and always will be.

Q58 John McDonnell: Is that the issue with regard to, as you said, the possibly overdue respect for the jury system?

Professor Zander: Yes.

Q59 John McDonnell: Is it also the issue with regard to real possibility? Are those the two issues that need to be addressed?

Professor Zander: I don't think the real possibility test is an issue.

John McDonnell: Serious possibility.

Professor Zander: No—I am sorry, but I am glad now to have spotted what the question is. I'm sorry I missed it. The real possibility test is fine: how the CCRC should decide a case and whether it should be referred. That is the real possibility test. Is there a real possibility that the Court of Appeal will do something about the case? The serious doubt issue is when should the Court of Appeal review or be prepared to quash a jury verdict where there is nothing new, no fresh evidence. They will sometimes look at fresh evidence, and they sometimes quash convictions on the grounds of fresh evidence, although in those cases, if at all possible, they ought to order a retrial. That is fine, and they order a retrial much more frequently than they did. Perhaps I could give you the figures, if you do not have them. I have the 2013 figures: total appeals determined, 341; appeals refused, 231; appeals allowed, 110; retrials ordered, 40. In 40 cases out of 110, they ordered a retrial; in 70, they did not. That is much more use of retrials than occurred at the time before the Runciman Commission, but it is not quite enough. They ought to be ordering more retrials.

Then there is the category of case where there is nothing new. There is no fresh evidence; there is just the question of whether the jury got it wrong. Do we think the jury got it wrong? That is the serious doubt. They should not act unless they have a serious doubt, not a lurking doubt. They should act only if they have a serious doubt, and generally speaking they don't. They do not want to.

Q60 John McDonnell: Is that an area you think needs to be explored?

Professor Zander: It would be very helpful if it could be explored, yes.

Lord Runciman: May I answer the point about the difference between the old regime—the Home Office and C3—and now? Under the old system, one of the things that struck

me about people who were already serving sentences in prison—we visited prisons and talked to such people—was the difficulty that they evidently had in getting the right kind of advice. Some of the problem was not new but went back immediately to the aftermath of the trial, but a lot of it was to do with the difficulty of never being seen. They could never get somebody from the Home Office to come down and listen to their case. Again, this is purely anecdotal, but I well remember it. I can still picture two or three of the characters that I talked to, who gave me the sense that they were left completely helpless. The idea was that, in principle, there was an arm of Government that would listen to their convinced case, but they never had the chance to put it, or, if they did, they were never advised how to put it properly. Again, Michael will know more than I, but I think that can be regarded as the bad old days in comparison with what happens now.

Professor Zander: Yes and no. Legal aid, of course, is not easily available after somebody has been convicted and has lost his appeal. That is the category of case that we are looking at. After the appeal has failed, what happens then? You are languishing in prison, and you claim to be innocent. Do you get the help of lawyers? Sometimes yes, often acting pro bono; a lot of the cases are handled pro bono, and often a huge amount of work is being done by lawyers who are doing it without proper or any remuneration. That has always been and probably always will be an unhappy situation.

Lord Runciman: I do not want to dissent from the point that legal aid is crucial if these potentially testing cases are to be properly handled.

Q61 John McDonnell: That does not answer the question with regard to resources. As we get further and further away from the famous cases and the establishment of the CCRC, there has been a decline in resources, as we have seen. The first issue is how we address that. The second issue is whether the CCRC should devote more of its resources to investigations than at present, particularly the use of its powers to instruct police officers and others to investigate.

Professor Zander: We will probably both have difficulty in answering that question. The resources issue is always fundamental, and is never going to go away. Whether the CCRC has a little more money or a little less, they are always going to have insufficient money. The fact that the budget went down as a result of Government action was terrible and the fact that it went back up again was good, as far as it went; but the CCRC will always be very short of resources. The question is how best to manage in that situation. The question is then whether they should spend more time on this or that. I have never looked at the way in which they work, but Dr Heaton has, as has Carolyn—sorry, I have lost her name; she is an Oxford professor. I know that you heard from her.

Chair: Carolyn Hoyle.

Professor Zander: Yes, Carolyn Hoyle. Thank you. Dr Heaton's work is important. His 400-page thesis is now available, and there is a lot of information about how they actually operate an investigation. His conclusion is that they do a very good job, considering everything they do. That is the kind of research one was waiting for, because otherwise we would just say, "Do they or don't they?" He looked at a large randomly selected sample, and found that they did a good job, and I am happy to accept that. I do not mean that they

always do a good job, but given the difficulties of life they do a pretty good job. Should they spend more time on this or that? I do not know.

Q62 John McDonnell: There have been calls, as you know, in support of the expansion of the section 17 powers, particularly with regard to the private sector, which have been generally supported in the evidence that we have seen. Do you think that some safeguards should be put in place, with the expansion of those powers?

Professor Zander: I am strongly of the opinion, like everybody else, that section 17 has to be extended, and I do not understand why the Government have failed to do it. It is so simple to do. The argument that they do not have time for the legislation is frankly ridiculous—totally ridiculous. All it needs is one extra clause in a criminal justice Bill. There will always be criminal justice Bills, so it does not make any sense. It is important that it happens, and that it happens soon.

Q63 John McDonnell: Should there be some oversight of the exercise of those powers?

Professor Zander: I do not think so. The CCRC is a responsible body, and I do not see a problem. In Scotland, they have the power and it has not given rise to any difficulty. They should definitely have the power. If problems arise as a result, we will find out what those problems are, people will make representations, and the legislation could be amended, but I see no need to worry about that.

Q64 John McDonnell: Professor Zander, you raised the issue in your evidence of the use of section 16, and the royal prerogative of mercy. On what basis should the CCRC make a reference on those grounds?

Professor Zander: Desperation; total desperation. In other words—

John McDonnell: When all else has failed.

Professor Zander: Yes, when all else has failed. The classic case is Cooper and McMahon, the famous Luton post office murder case, which was referred back to the Court of Appeal six times. First, it came by way of appeal, which failed. There were then four successive Home Secretary references, all of them rejected, and at the end of which the Home Secretary of the day, Willie Whitelaw, released the two men from prison. They subsequently died, and the two cases were referred back to the CCRC and back to the Court of Appeal, which quashed the convictions. There were six references back, and I have made a note of the timing. They were referred back in 1973, 1975, 1976 and 1978. Those were the ones that failed. In 2003, the two men having died, the convictions were quashed. The original convictions were in something like 1969—so it was desperation. Willie Whitelaw had come to the conclusion that the Court of Appeal simply refused to budge. It was a terrible case; those men were never involved in the murder and they ought not to have been in prison, so he released them. He got them out, but Home Secretaries

had given the Court of Appeal four chances. That is the classic case that illustrates the problem.

John McDonnell: It is where evidence has been ruled inadmissible by the Court of Appeal.

Professor Zander: For whatever reason. It may be a case where the jury simply got it wrong. We now can see that that jury got it wrong. I do not know what the reason would be, but for one reason or another the Court of Appeal will not budge, yet the CCRC is convinced that it is a real case. It is going to be a tiny number of cases.

John McDonnell: You'll give us a legal definition of desperation, will you?

Q65 Chair: Why do you think the Commission has been so reluctant to proceed with this?

Professor Zander: I do not know—timidity, I am afraid. Maybe; I don't know. I do not know if they have had any such cases—I have not looked—but if there was such a case and they did not do it, there would be worry about whether it was a good idea. I have not discussed it with them and I do not know.

Q66 Jeremy Corbyn: Would you make a specific recommendation on access to legal aid for cases going to the review body? The point you were making about access to advice being usually pro bono often means that the best connected, most articulate and most public cases get support and therefore get back into the system, whereas others with no connections, no public image, simply do not.

Professor Zander: I do not know whether you have enough evidence on this. I cannot give you solid evidence on it, but I would very much welcome a sentence or two saying, "We would like to think that deserving cases get legal advice." The way forward may be to give the CCRC the possibility of saying, "This looks like a case that should be assisted by independent lawyers. At the moment, there are no independent lawyers. Can something be done about it?" Perhaps the CCRC could have a little fund for helping. I do not know. I think the Lord Chancellor's Department would be very worried about a recommendation that anyone who applies to the CCRC should be given a lawyer because, as I said, 90% of those cases are hopeless. That would not make any sense, but in the 10% of cases it is important that people be helped. The CCRC will do the job that they do, and do it well, but the assistance of lawyers acting for the defendant is important.

Q67 Rehman Chishti: I want to move on to something that was touched on earlier. How could the CCRC claim more of a leadership role in preventing the miscarriage of justice and ensuring that the criminal justice system remains efficient and effective?

Professor Zander: I do not know whether Lord Runciman wants to say anything. I certainly would say a little about it. It would be very useful if the CCRC could do a little bit more than they do. They do a bit, but if they saw themselves as a significant player in

this area, stepping into that role, as it were, there are lots of things they could do. In their annual report, they could make a particular play for saying, “In this area we notice problems,” or they could have a conference. They have conferences about their own role, but they don’t have conferences, as far as I know, on what is wrong with the criminal justice system or why so many cases are coming to their attention that should have been handled better at the trial level or the appeal level. They ought to be the lead player in this area, and recognised by everybody to be, not only in investigating individual cases but in looking at the system, and there are lots of ways in which they could do that. I understand of course that their resources are devoted mainly to individual cases—naturally, that is their main function; but a subsidiary function could be some general review, some general contribution, some identification of particular problems that they see from their caseload.

Q68 Rehman Chishti: Do you mean things like the failure of the defence?

Professor Zander: Why do the defence fail so often? In many cases, it is the result of poor work by the defendant’s lawyers, and the Court of Appeal is not particularly sympathetic to that. If you come along to the Court of Appeal and say, “My lawyers handled the case badly. Please quash my conviction,” they say, “No.” They will not look at that at all. In extreme cases, and there have been a few, the failure of the lawyers has resulted in a conviction being quashed, but it is difficult to get that one past the Court of Appeal.

Lord Runciman: I do not have anything to add.

Q69 Rehman Chishti: Professor Zander, on this point, you mentioned new evidence earlier, saying that the court should be more willing to push for a new trial, but the CCRC has the ability to refer cases to the Court of Appeal without fresh evidence or arguments, in exceptional circumstances. At this point in time, it is not clear if that has ever been done. Linked to that is the point that I am trying to grapple with. The reluctance on the part of the CCRC mirrors the reluctance on the part of the Court of Appeal to overturn jury verdicts. If there is reluctance in both parts, where do we go?

Professor Zander: Where do we go, indeed? The prime mover is the Court of Appeal. The CCRC is looking at a case where there is nothing new. Let us assume that it is the rare case—we are talking about a very rare case—where the CCRC says, “There is serious doubt about this conviction. Although there is nothing new, we have the power to refer it. Should we refer it? No, because the Court of Appeal won’t do anything about it.” The Court of Appeal is the crux of the matter.

Q70 Rehman Chishti: To clarify that, even if the Court of Appeal is the problem, if the CCRC genuinely felt that there was a real miscarriage of justice, is there not a duty on them to say, irrespective of what the Court of Appeal may or may not do, that it is that rare case? Otherwise, those rare cases will never come to light.

Professor Zander: Absolutely. That is precisely what I said. Section 13(2) ought to be used in a few cases, and the fact that it has never been used is extraordinary.

Q71 Rehman Chishti: Has there never been a rare case that the CCRC thought should be referred?

Professor Zander: If I were a member of the CCRC I might know the answer to that question, but I don't know the answer. You could ask Dr Heaton whether he has ever come across a case—but the answer is that we know, because he says in his research that there were 26 cases that he was worried about, which were not referred, and he understands why they were not referred. Would any of those 26 cases have been referred if the Court of Appeal were more receptive? That is the question I would ask Dr Heaton.

Lord Runciman: I come back to the point that I was making earlier. I can only answer for what we had in mind at the time, recognising as we did that the reaction of the Court of Appeal to the cases that would come up could not be predicted. The fear was that it would be too restrictive, and I am not surprised to be told that there are strong, well-informed views to the effect that it has been too restrictive.

It is an obvious problem, which has been touched on already. I do not know the cases, but I would be unsurprised if there were not some difficult decisions that the CCRC has to take when they know that they are not going to get anywhere with lurking doubt—rephrased or not as the case may be—but they are nevertheless genuinely concerned. Do they then go ahead, or not? That is a pragmatic decision, which I am sure takes place case by case. I can see that it might lead on to what we did not consider at all at the time, which is what you might call a PR role for the new body, drawing its own conclusions from cases where its recommendation was not upheld by the Court of Appeal, and drawing public attention to what it felt, in that case at least, were the failings of the system. However, that is not something we considered at all; it certainly did not cross my mind and I don't believe it crossed anybody else's mind. We were just concerned that there should be an independent body, set up along the lines that we recommended.

Professor Zander: The CCRC is in a difficult position. It has to tread a very careful line. It must not antagonise the Court of Appeal to the extent that the court just rejects anything that comes along from the CCRC. It has done that pretty well; it has established a good reputation. The Court of Appeal has a high regard for the CCRC, but there have been some cases where the Court has said, in effect, "This case should not have been referred." They have said that either in terms or in effect. That is the kind of case where the CCRC will draw back a bit: "Oh, we shouldn't have referred it." That is a matter of opinion, but if the Court of Appeal says that they should not have referred it—in other words, "You're wasting our time"—it is a real problem for the CCRC.

Q72 Rehman Chishti: For clarification, if there are no cases, the Court of Appeal may say that there is no demand for dealing with this and, therefore, the system we have at the moment works well; whereas if a number of cases are being pushed forward by this reputable organisation, and it then points out that there is an inherent problem—the point you made—the pressure builds and something has to be done. At the moment, it seems that there is no demand, and therefore the system is okay, but we know that it is not.

Professor Zander: Yes. I understand that point.

Lord Runciman: It depends where you draw the line. How far beyond okay is perfection?

Rehman Chishti: If there is reluctance on both parts to refer or to accept cases, and therefore the pressure is not kept on by referring some cases where there is a real miscarriage of justice—pushing them to do something—it puts them in a position where they have to do something rather than just pushing away a problem that needs to be resolved.

Professor Zander: Yes. Finally, in a case of desperation, as we have already said, they could ultimately refer it back to the Home Secretary, which is very unsatisfactory, but it is a final safety valve.

Q73 Rehman Chishti: Should the CCRC have a limited power to disclose the results of its investigations, to improve public confidence in the criminal justice system?

Professor Zander: The nub of that question is whether, when they turn down a reference, they have good reasons for turning it down. The answer is often yes, they have very good reasons; for example, they have come to the conclusion that the individual who claims to be innocent is probably not innocent. In other words, they have actually turned up evidence suggesting that the application is not well founded. That is a very good reason for not referring it, but is it a good reason for publicising it? Tricky—very tricky.

In other cases, where that is not the situation, they do not refer for all sorts of reasons—for instance, the new evidence is not quite strong enough. Should that be publicised? I am not sure about that. I have not really thought about it properly. My thinking on the subject is not developed at all, but I would be concerned. I would need a lot of thought, and also some talk with the relevant people, particularly at the CCRC, on what is really involved in publicising. How much danger would there be? How much advantage could there be? Some of the public campaigns were notorious cases. Hanratty was a good one—a hugely notorious case—but when eventually the body was exhumed it turned out that Hanratty was indeed guilty: the DNA was there. There was a gigantic campaign, and a lot of people, including myself, were convinced that the defendant was not guilty, yet he was guilty. The fact that there is a big campaign does not mean that it is well founded.

Lord Runciman: The only point that I would make in answer to that question is that I was very conscious of the cases; a lot of them were historic, of course—before the Police and Criminal Evidence Act. To some extent, we are in a new world, and the better for it. Nevertheless, there are issues raised when a body with serious investigative powers is able to dig around and find not necessarily fresh evidence almost in a self-demonstrative way, but a whole range of considerations that might call the verdict into question. It is difficult, unless there is one simple clear-cut issue, which there seldom is, to mount anything approaching a public campaign on the strength of that, for that very reason. I personally would be wary, as I think about it in response to your question, about saying that the CCRC should put a lot more out in the open for the media and the public at large to comment on. Well, watch out!

Q74 Rehman Chishti: Does the criminal justice system require another review, similar to the Royal Commission?

Professor Zander: Everybody always requires a fresh review. Every thing requires a fresh review, but I do not think that anyone is going to set up another royal commission. First, there is no appetite for royal commissions these days, although ours was extraordinary in producing its report in two years. When Lord Runciman agreed to it, I couldn't believe it. I wrote to him at the very start and said that it would not be possible in two years, but I think we finished on the very day the two years were up. There is always going to be a lot to review, and worth reviewing, but personally at this point I am not pressing for one.

Q75 Chair: Looking back, do you think that there are things you recommended that were not implemented, and which have weakened the system by not having been implemented?

Professor Zander: There were 352 recommendations. To investigate which of them were implemented and which were not would take a lot of time. I have never done it. I have thought of doing it, but I have not actually done it. Maybe one of these days I will, but I am not aware of any particular recommendations. The only ones I strongly disagreed with the Government for not implementing were our right of silence recommendations, but that has long gone by, and it is not going to be reopened. I do not know the answer.

Lord Runciman: I certainly do not have evidence on which to base an answer. We were well aware that it was unlikely that the Government, of whatever complexion, would not indulge in a little bit of cherry-picking, and that some of the things we said would be more politically or generally acceptable than others—perhaps rightly. Our concern was that our recommendations, taken as a body, should be seen as such, and that Parliament should have a very good reason for saying yes to this or no to that, because we were so aware of the way in which each part of the whole process, from the moment of arrest to the exhaustion of appeal, was connected one with one another.

I was told subsequently that more of our recommendations were accepted by the Government of the day than those of any other royal commission since the second world war. It would be unrealistic to be getting too close to perfection, if I can put it that way. That was certainly an okay piece of information, which I was pleased to have.

Professor Zander: Most of the recommendations were implemented.

Q76 Rehman Chishti: Could I go back to the point raised earlier about the jury system? There may be some cases where a jury has been properly directed but has got it wrong. You gave your views earlier, but I just want to tie things up. Earlier, you said you thought that we should get the Lord Chief Justice and the chairman of the CCRC together and have a committee to look into that. Is that the best way forward to address this?

Professor Zander: I do not know which way forward would advance matters. That occurred to me the other day as a possibility, but whether the Lord Chancellor would think

it a good idea, and whether the Lord Chief Justice and the chairman of the CCRC would think it a good idea, I have no idea. It may be.

Chair: The other route would be the President of the Court of Appeal ruling in a case, actually refining the doctrine.

Professor Zander: Yes, indeed, but it would have to refine it in a magisterial way, saying, “We have had a change of heart. For the last 100 years we have got this wrong.”

Chair: Courts do not like to do that.

Professor Zander: They do not do that. No, they absolutely do not do that. That is completely pie in the sky.

Lord Runciman: I would come back to the same point that I made earlier. We are talking about change of a mindset that is deeply embedded in the legal profession of this country. I do not quite know how you change that. I suspect that it will continue to be a problem unless and until the Court of Appeal is prepared to move a little way back.

Perhaps it was the Pendleton case that you were thinking of, Michael, where Lord Bingham was certainly prepared to take what I think—this is a personal view—was a wiser view than Lord Judge. That goes a little way back to lurking doubt. That is a dreadful phrase; we did not use it, and it risks being seriously misleading. What on earth does “lurking doubt” mean? If we are right in thinking that a change of mindset is needed, goodness knows how you bring it about.

Chair: Lord Runciman and Professor Zander, thank you very much indeed for your help this morning.