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Article

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Wrongful Convictions of Refugees and Asylum Seekers: responses by the Criminal Cases Review Commission¹

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Summary

The Criminal Cases Review Commission (CCRC) reviews possible miscarriages of justice in England, Wales and Northern Ireland when applicants have exhausted other avenues of appeal, with a view to referring unsafe convictions back to the appeal court.⁵ This article considers the CCRC's handling of applications from refugees and asylum seekers who claim to have been wrongly convicted of entering the United Kingdom (UK) illegally. These cases commonly relate to people who could not obtain travel documents lawfully and were erroneously advised by defence lawyers that they should plead guilty. The article first examines the sources of these wrongful convictions by reviewing CCRC referrals to the appeal court. It then reviews the CCRC's wider engagement with other criminal justice agencies in an effort to prevent further wrongful convictions of refugees and asylum seekers. The failing of the criminal justice agencies to properly protect refugees and asylum seekers reflects a wider anxiety about the negative effects of immigration, and the societal appetite to use punitive measures to control immigration. The article concludes by arguing that the CCRC's campaign was effective, and demonstrates the importance of inter-agency communication in preventing miscarriages of justice.

Protection for refugees and asylum seekers – in law and in practice

The core principle of the 1951 Refugee Convention is non-refoulement, which asserts that refugees should not be returned to a country where they face serious threats to their lives or freedom. Once refugees enter their destination country, Article 31(1) of the Convention protects them from being punished for breaking immigration rules:

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⁵ While most CCRC cases are referred back to the Court of Appeal, convictions from the Magistrates' Courts are referred back to the Crown Court. Many of the 'asylum cases' fall into this category and so here we refer to the appeal court, to include both.

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

The Convention therefore guarantees that refugees entering a contracting state will not be returned to their country of origin, and that they will not be punished for violating immigration laws upon entry. This protection extends to those with a confirmed refugee status as well as to 'presumptive refugees' (or asylum seekers) – people who have not yet had this status granted by a state but are in the process of seeking it.⁶ The protection does not extend to migrants who do not come 'directly' from a persecuting state, fail to present themselves 'without delay' to authorities, or fail to show good cause for illegal entry.

The UK has been a signatory to the Refugee Convention since 1954,⁷ and the Convention was incorporated into domestic law under section 31 of the Immigration and Asylum Act 1999. The Act was introduced after the landmark case of *Adimi*.⁸ In this case, three asylum seekers were convicted of using false documents under the Forgery and Counterfeiting Act 1981 and two with the further offence of attempting to obtain air services by deception under the Criminal Attempts Act 1981. The court quashed their convictions, concluding that punishing illegal entry goes against the principle of Article 31, which was intended to provide 'immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law'.⁹ Section 31 (1) of the 1999 Act provides a statutory defence against a list of identity- and immigration-related offences relevant to refugees and asylum seekers.¹⁰ While the 1999 Act provides a statutory defence, it does not prohibit the CPS from starting criminal proceedings against asylum seekers, as long as their cases are not concluded

⁶ The term 'presumptive refugees' was used in *R v Uxbridge Magistrates Court ex parte Adimi* [1999] EWHC Admin 765.

⁷ United Nations High Commissioner for Refugees, 'States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol' (no date) <<http://www.unhcr.org/uk/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>>.

⁸ *R v Uxbridge Magistrates Court ex parte Adimi* [1999] EWHC Admin 765.

⁹ *Ibid*, para 15.

¹⁰ Section 31 (3) provides a list of offences that benefit from a defence under the Immigration and Asylum Act 1999. They include forgery and connected offences under Part 1 of the Forgery and Counterfeiting Act 1981, seeking to obtain or obtaining leave to enter the UK by deception under Section 24A of the Immigration Act 1971, possessing false or making alterations to genuine leave documents under section 26(1)(d) of the Immigration Act 1971, and possessing false identity documents with improper intention and without reasonable excuse under Sections 25(1) and (5) of the Identity Card Act 2006 (for offences committed up until 21 January 2011) and section 4(1) and 6(1) of the Identity Documents Act 2010 (for offences committed after 21 January 2011). Home Office, 'Section 31 Immigration and Asylum Act 1999: Defence against Prosecution' (2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/488492/S3_1_Def_against_prosv4.0_EXT_clean.pdf>.

before their refugee status is determined.¹¹ In this sense, the incorporation of Article 31 into the 1999 Act, which was to provide a statutory defence rather than to guarantee immunity from prosecution, has been described as having ‘restricted domestic effect’.¹²

Five years after the Refugee Convention was formally recognised under domestic law in the Immigration and Asylum Act 1999, the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 was introduced. Section 2 of the 2004 Act created an offence of a person not having an immigration document at a leave or asylum interview upon entering the UK.¹³ According to the CPS, this legislation is intended to discourage people from concealing their identity by destroying their immigration documents en route in order to increase their chances of remaining in the UK.¹⁴

An interesting question arises as to how the 2004 Act is interpreted in light of Article 31 of the Refugee Convention and section 31 of the Immigration and Asylum Act 1999. In the case of *Kapoor and Ors*,¹⁵ the appeal court held that section 2 of the 2004 Act ‘merely controls or regulates the entitlement to be in the UK and therefore cannot be relied upon as the immigration law which has been breached.’¹⁶ This means Article 31 and section 31 are not applicable to offences under section 2 of the 2004 Act and do not provide a defence.¹⁷ In other words, a person who has a successful asylum claim can still be found guilty under section 2 of the 2004 Act.

There are separate statutory defences available, however, under the 2004 Act. They include being a European Economic Area national or being a family member of a European Economic Area national; having a reasonable excuse for not being in possession of a document; proving that a false immigration document has been used throughout the journey to the UK; or having travelled to the UK without any immigration documents (sections 2(4) and 2(5) of the 2004 Act). In *Soe Thet v DPP*,¹⁸ the court – extending the reach of the 2004 Act – held that Thet had a reasonable excuse for not being in possession of a genuine travel document because he had been a political prisoner in Burma and had been unable to obtain a passport in his country. Similarly, a lack of issuing facility or

¹¹ Ana Aliverti, *Crimes of Mobility: Criminal Law and the Regulation of Immigration* (Routledge 2014).

¹² Gary Christie, ‘Prosecuting the Persecuted in Scotland: Article 31 (1) of the 1951 Refugee Convention and the Scottish Criminal Justice System’ (2016), p 1, <http://www.scottishrefugeecouncil.org.uk/assets/0001/0783/SRC_Article_13_Report_2016_FINAL.pdf>.

¹³ The offences under Section 2 the 2004 Act carry a maximum penalty of two years’ imprisonment on indictment or a fine, or both. The length of imprisonment for a guilty plea with no aggravating features has ranged from 2 to 10 months. Crown Prosecution Service, ‘Legal Guidance – Immigration’ (no date) <http://www.cps.gov.uk/legal/h_to_k/immigration/>.

¹⁴ *Ibid.*

¹⁵ *Kapoor and Ors* [2012] EWCA Crim 435.

¹⁶ Crown Prosecution Service, *Legal Guidance – Immigration*.

¹⁷ *Ibid.*

¹⁸ *Soe Thet v Director of Public Prosecutions* [2006] EWHC 2701 (Admin).

not knowing where to go for a genuine passport is also considered a defence under the 2004 Act, according to the case of *Mohammed and Osman*.¹⁹

Overall, refugees' and asylum-seekers' legal protection (from punishment for illegal entry and presence) *appears* to be in place. While these individuals are not immune from *prosecution*, Article 31 of the Refugee Convention has been incorporated into domestic law by way of *statutory defence* under section 31 of the Immigration and Asylum Act 1999. The 2004 Act also allows prosecution of those not able to present their immigration documents at asylum interviews, but again offers a statutory defence within that same Act.

In practice, however, there was a punitive turn from the late 1990s, under the Labour government, towards prosecuting and criminalising migrants. Between 1997 and 2010, when the Labour government was in power, 84 new immigration-related offences were created compared to only 70 offences during the 91 years from 1905 to 1996.²⁰ Coupled with these new laws, the UK Border Agency was set up in 2008 to enforce the law and tackle abuse in the asylum system.²¹ The increased reliance on criminal law in dealing with migration resulted in a 54% increase in immigration-related charges in the magistrates' courts between 2004 and 2005.²² These charges were largely linked to people failing to produce a valid passport upon entry.

The increased criminalisation of migrants – both at legislative and enforcement levels – represents a widespread desire to control and criminalise migration, and the portrayal of migrants as *deviant*. It marks a shift in our society, towards what David Garland²³ has called the *Culture of Control* – the increased public desire for more punitive measures met with the expansion of formal social control. As we will see in the following section, many refugees and asylum seekers were prosecuted and convicted under these new laws *even* in cases where they had a statutory defence.²⁴ This steady stream of cases led the Criminal Cases Review Commission (CCRC), in 2012, to express concern that 'hundreds of asylum

¹⁹ *Mohammed and Osman* [2007] EWCA Crim 2332.

²⁰ Aliverti, *Crimes of Mobility*.

²¹ Christie, 'Prosecuting the Persecuted in Scotland'.

²² Aliverti, *Crimes of Mobility*, p. 50.

²³ David Garland D, *Culture of Control: Crime and Social Order in Contemporary Society* (2001, Oxford: Oxford University Press).

²⁴ The judgment of *Mateta & Ors* ([2013] EWCA Crim 1372) provides guidance on this defence, and its complexities in applying it in practice. However, in the same judgment, it makes clear that defence lawyers often failed to raise the existence of such a defence due to incorrect assumptions about the nature of the case. In paragraph 30 in *Mateta* 'It is sufficiently clear from the attendance notes compiled by the applicant's solicitors, along with their response to the Grounds of Appeal and the contents of the brief to counsel, that the availability of the defence under s. 31 was never raised with the applicant, on the basis of the incorrect assumption that there was no potential defence to the charge.'

seekers and refugees' may have been wrongly convicted after being advised to plead guilty to offences relating to their entry to the UK.²⁵

Reactive responses to 'asylum cases' by the CCRC

The CCRC, a non-governmental body, was established in March 1997 under section 8 of the Criminal Appeals Act 1995. It reviews possible miscarriages of justice in England, Wales and Northern Ireland.²⁶ Those who believe they have been wrongly convicted, and have exhausted other avenues of appeal, can apply to the CCRC to have their case reviewed; in most cases, for this to happen, there must be a new argument or evidence not raised at trial or on appeal that presents a realistic chance that the appeal court would overturn the conviction.²⁷ The CCRC is the only body with the power to refer cases back to the appeal court for a re-hearing and a final decision on whether a conviction should be upheld or quashed. It thus works as a last resort for those who believe they have been wrongly convicted. The CCRC accepts applications related to any criminal conviction from the Crown or Magistrates' Courts, but their referrals to the appeal court are comprised mainly of convictions for serious offences such as homicide, sexual assault, and robbery.²⁸

This section focuses on the CCRC's handling of 'asylum cases', in which refugees or asylum seekers have been convicted of entering the UK with a false identification document or no document at all. While CCRC referrals back to the appeal court have historically involved more serious offences, as noted above, the number of asylum case referrals has risen in the last four years and currently occupies a large proportion of referrals.²⁹ Between April 2015 and March 2016, the CCRC reviewed in total 1,797 cases and referred 33 cases (about 1.8 per cent) to the appeal court.³⁰ Of these 33 cases, nine were asylum cases.³¹ We argue that asylum cases are distinct from other CCRC cases in two ways: the resources committed by the CCRC to reviewing these cases; and the 'success' rate

²⁵ Yewa Holiday, 'CCRC Concern over Advice Given to Refugees' (*Law Society Gazette*, 14 June 2012) <<http://www.lawgazette.co.uk/law/ccrc-concern-over-advice-given-to-refugees/66102.fullarticle>>.

²⁶ This article does not deal with the Scottish Criminal Cases Review Commission, established in 1999.

²⁷ Under 'exceptional circumstances', the CCRC can waive the requirement for a previous appeal and for fresh evidence or argument. Criminal Cases Review Commission, 'Formal Memorandum Exceptional Circumstances' (2015) <<http://www.ccrcc.gov.uk/wp-content/uploads/2015/01/Exceptional-Circumstances.pdf>>. The CCRC reviews both convictions and sentences; this article focuses on the review of convictions.

²⁸ Criminal Cases Review Commission, 'Annual Report and Accounts 2015/16' (2016), p 11 <http://www.ccrcc.gov.uk/wp-content/uploads/2015/01/CCRC-1926236-v1-56042_Criminal_Cases_Review_AR_v0_6_Final.pdf>.

²⁹ Criminal Cases Review Commission, 'Annual Report and Accounts 2014/15' (2014), p 19 <<http://www.ccrcc.gov.uk/wp-content/uploads/2015/07/CCRC-Annual-Report-and-Accounts-2014-15.pdf>>.

³⁰ Criminal Cases Review Commission, 'Annual Report and Accounts 2015/16', p 80. Of the 33 cases, seven were referred for a review of sentence only.

³¹ *Ibid*, p 20.

of CCRC referrals measured by the proportion of convictions quashed by the appeal court.

Asylum case applications: Atypical cases for the CCRC?

Asylum cases not only account for a rising proportion of CCRC referrals but also have a higher probability of being quashed by the appeal court. By the end of March 2016, the CCRC had referred a total of 43 asylum cases. Of these, 32 convictions were quashed, 3 upheld, 2 abandoned, and 6 were pending (see Table, below). Excluding pending and abandoned cases, the appeal court had quashed 32 of 35 cases referred by the CCRC, some 91 per cent of cases. In comparison, 68 per cent of all other ('non-asylum') convictions referred by the CCRC had been quashed (378 of 560) from its establishment in 1997 to August 2016.³²

³² For all cases, the CCRC has referred a total of 603 CCRC referrals, of which 410 appeals were allowed. Criminal Cases Review Commission, 'Case Library – CCRC Case Statistics' (no date) <<http://www.ccrcc.gov.uk/case-statistics/>>. The figures include sentence-only referrals.

Table: CCRC asylum cases referred back to the appeal court

Case No.	CCRC receipt of application	CCRC Referral Date	Cour of Appeal - Date	Court of Appeal Decision	Our sample	Application- Allocation (months)	Allocation - Referral (months)	Application - Referral (months)
1	2014	28-Jan-16	N/A	Pending				
2	2014	10-Feb-16	N/A	Pending				
3	2014	10-Feb-16	N/A	Pending				
4	2014	17-Feb-15	07-May-15	Abandoned				
5	2014	24-Mar-15	07-May-15	Quashed				
6	2014	24-Mar-15	07-May-15	Quashed				
7	2014	22-Apr-15	03-Jul-15	Quashed				
8	2014	24-Mar-15	17-Dec-15	Quashed				
9	2014	24-Mar-15	17-Dec-15	Quashed				
10	2013	13-Jul-15	N/A	Pending				
11	2013	20-Mar-15	14-May-15	Quashed				
12	2013	15-Oct-15	N/A	Pending				
13	2013	15-Sep-14	07-Oct-14	Quashed				
14	2013	10-Apr-14	18-Jul-14	Quashed				
15	2013	23-May-14	11-Jul-14	Quashed				
16	2012	15-Jan-16	N/A	Pending				
17	2012	17-Mar-15	07-May-15	Quashed				
18	2012	29-May-15	26-Feb-16	Upheld				
19	2012	24-Sep-15	26-Feb-16	Upheld				
20	2012	01-Dec-14	22-Jul-15	Quashed				
21	2012	14-Oct-14	18-Jun-15	Quashed				
22	2012	24-Jun-14	17-Dec-14	Quashed	X	12	7	19
23	2012	26-Nov-13	26-Jun-14	Quashed	X	1.5	14	15.5
24	2012	12-Jun-13	30-Jul-13	Quashed	X	1.5	6	7.5
25	2012	17-Apr-13	30-Jul-13	Quashed	X	5	2	7
26	2012	28-Mar-13	30-Jul-13	Quashed	X	6	4.5	10.5
27	2012	28-Mar-13	17-Jun-13	Quashed	X	2	5	7
28	2012	28-Mar-13	17-Jun-13	Quashed	X	2.5	4	6.5
29	2012	12-Jun-13	30-Jul-13	Quashed	X	1.5	6	7.5
30	2012	12-Apr-13	17-Jun-13	Quashed	X	0.5	6.5	7
31	2012	28-Mar-13	30-Jul-13	Abandoned	X	1	6	7
32	2012	30-Mar-12	30-Apr-12	Quashed	X	1 day	0	1 day
33	2011	29-Mar-12	30-Apr-12	Quashed	X	2	1.5	3.5
34	2011	29-Mar-12	01-Jun-12	Quashed	X	2	1	3
35	2011	20-Mar-12	18-Jun-12	Quashed	X	2	10	12
36	2009	21-Mar-11	05-Jun-11	Quashed		6	13	19
37	2009	08-May-13	16-Dec-14	Upheld	X	6	42	48
38	2008	10-Aug-10	14-Dec-10	Quashed	X	5.5	17	22.5
39	2008	10-Aug-10	14-Dec-10	Quashed	X	5.5	17	22.5
40	2007	18-Jun-07	11-Jul-07	Quashed	X	4.5	0.5	5
41	2003	22-Jun-05	28-Oct-05	Quashed	X	13	10	23
42	2002	22-Jun-05	28-Oct-05	Quashed	X	24	8	32
43	2002	22-Jun-05	28-Oct-05	Quashed	X	24	8	32

Sources: Criminal Cases Review Commission, 'CCRC Annual Reports and Accounts' 2006/07 through 2015/16; Criminal Cases Review Commission, 'Case Library' (no date) <<http://www.ccrc.gov.uk/case-library/>> accessed 30 August 2016; Laurie Elks, *Righting the Miscarriages of Justice: Ten Years of the Criminal Cases Review Commission* (Justice, 2008), p 264; fieldwork notes.

Notes:

- 'Our sample' refers to the cases analysed in detail for this article. For these cases, records including the application, case record, submission to the appeal court, internal correspondence and minutes of

meetings were reviewed. Interviews with caseworkers and commissioners and other CCRC personnel were also carried out on some of these cases.

- 'Allocation' refers to the assignment of a case to a caseworker.

Another factor that distinguishes the asylum cases from other CCRC cases is the time taken to review applications, both from 'receipt of the application' to 'allocation to a caseworker', and from 'allocation' to the 'decision to refer' the case back to the appeal court.³³ The CCRC has come under sustained criticism over the past decade or so for being too slow in its investigation of applications. Indeed, delays were a source of critique in the House of Commons Justice Committee on the CCRC in 2015, with discussion focusing on the increasing delays over recent years.³⁴ Yet, the asylum cases seem to run counter to this trend. Cases that were first reviewed by the CCRC in 2002 took on average 32 months from application to referral (see Table). The time spent on such cases between 2003 and 2009 averaged 23 months.³⁵ But by 2011 and 2012, when the number of asylum cases rapidly increased, the CCRC was able to refer these cases in, on average, 9 months – less than half of the time it took in 2003–2009.³⁶ Most of these applicants were 'at liberty', having already served their sentences, and this 9-month turnaround was considerably faster than the majority of other cases handled. During that time the CCRC had an 18-month target for allocating 'at liberty' cases to a caseworker, with the time taken for actually investigating a case typically adding on at least another six to twelve months.³⁷

The quicker turnaround for asylum cases since 2011 reflects both quicker allocation of applications to a caseworker and a more efficient review process. The change can be dated back to around 2008 and 2009 when caseworkers³⁸ with the responsibility for screening³⁹ applications became keenly aware of the many similarities in asylum case applications. A caseworker referred to one asylum case during screening as 'another Thet + Osman type case'.⁴⁰ In 2011, notes made during screening of another case included the statement: 'it relates to false document offences committed as part of seeking asylum in the UK.'

³³ We focused on the time spent on cases which were referred to the Court of Appeal, and Table does not include cases where referrals were not made.

³⁴ House of Commons Justice Committee, 2015, Criminal Cases Review Commission: Twelfth Report of Session 2014-15, 17 March 2015, <http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/850.pdf>

³⁵ The exception is Case 40, which took five months.

³⁶ This calculation excludes Case 32 as an outlier.

³⁷ Criminal Cases Review Commission, 'Annual Report and Accounts 2011/12'(2012), p 11. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229065/0390.pdf>.

³⁸ While both Commissioners and caseworkers are involved in decision making at the CCRC for the purpose of this article, both groups are referred to as caseworkers so as not to risk identification of specific personnel.

³⁹ As with all applications to the CCRC, these cases are first subject to a reasonably quick review by an experienced member of staff, a review referred to as 'screening'. Only if 'screening' fails to identify possible avenues to investigate, will the application be rejected at this stage. Where there are possible grounds, a more thorough review will be conducted by a caseworker. Note, in all examples, the female pronoun is used.

⁴⁰ The quotation is taken from the 'Case Records' (case 38 in the Table).

[Name of caseworker] is our expert in this area'⁴¹ – another instance of asylum cases being viewed as a distinct category, where particular expertise is developing in the organisation. This caseworker was assigned to 7 out of 11 cases that the CCRC received between 2002 and 2011, and continued to be consulted in other subsequent cases.⁴²

Accumulation of expertise on comparable cases had the effect of reducing the time spent in preparing a case for a referral (as well as in deciding which cases had no grounds for a referral, though we do not deal with such cases here). By 2011, after six cases had been referred to the appeal court, previous referral documents were used as templates for further cases. In May 2011, a CCRC 'Casework Guidance Note' titled 'Asylum and Immigration Issues in Casework', was written by the same experienced caseworker mentioned above, and provided an overview of relevant laws and advice on how to approach these cases. Once asylum cases had been identified by the CCRC as a distinct category, they were processed efficiently, delivering speedy justice for refugees and asylum seekers.

Amassing critical expertise

The ability to identify an 'asylum case', however, did not come easily. Similar to other criminal justice agencies, the CCRC made several errors before being able to spot asylum cases in new applications and track past cases they had previously turned down. They had initially rejected three cases (30, 34 and 41 in the Table) during screening. In two cases the applicants reapplied and their case was reviewed and referred; in another case the CCRC later proactively subjected the case to a second review and referred it. Case 41 refers to an application from 2003, before the 2004 Act was in place. It was one of the earliest cases; only two other asylum cases were being reviewed by the CCRC at the time, and these had not yet been referred. These cases demonstrate that the CCRC – like other key stakeholders such as defence lawyers and the CPS – was also not yet fully familiar with the law as well as the political and geographical contexts of such cases. The CCRC had at that stage not fully realised that these early cases – in which the 1999 Act and the 2004 Act had not provided the protection as intended – were not sporadic, but were indicative of a larger cluster of cases where refugees and asylum seekers had been wrongly advised by defence lawyers and hence wrongly convicted.

More puzzling, however, are the two cases that were screened out years later, in 2011, when the CCRC was clearly familiar with such asylum cases and had developed some expertise in dealing with them. When case 34 was initially rejected at screening in March 2011, seven CCRC referrals of asylum cases had resulted in quashed convictions and one was awaiting a decision by the appeal court. Case 34 was initially rejected because the applicant had not already

⁴¹ The quotation is taken from page 3 of the 'Case Records' (case 33 in the Table).

⁴² The caseworker provided input into cases 27, 30 and 31 in the Table before leaving the CCRC in September 2013.

appealed his conviction.⁴³ When the applicant's legal representative reapplied to the CCRC, a different caseworker identified the error made in reviewing the first application and prioritised the application for an immediate review. She noted, 'We ought to have recognised the referral issue when dealing with the previous application and have caused unnecessary delay.'⁴⁴ The third case that the CCRC had erroneously screened out (case 30) was identified after an internal review of previously rejected cases conducted in 2012, at a stage when the CCRC realised that there were systemic problems with such cases. These cases were screened out due to applicants' pleading guilty in a Magistrates' Court case.

The CCRC originally thought that these applicants should appeal their convictions to the appeal court before writing to the CCRC. Later, it realised that since the applicants had pleaded guilty in a Magistrates' Court, rather than in the Crown Court, they were unable to appeal their convictions other than through a referral by the CCRC under section 108 of the Magistrates' Court Act 1980. Hence, the initial rejections had been in error. As for the treatment of guilty pleas, before the wave of asylum cases reached the CCRC, it regularly turned down cases where applicants had pleaded guilty at trial based on case law which views guilty pleas as a sign of acceptance of, and remorse for, the crime committed.⁴⁵ It referred guilty plea cases back to the appeal courts only under limited circumstances, for example, where the plea was entered under duress, where there was erroneous legal advice, and where the guilty pleas were a result of an erroneous ruling on a point of law by the trial judge.⁴⁶ Therefore, in asylum cases, the CCRC was able to argue that applicants had pleaded guilty because they mistakenly believed, based on poor advice from their lawyers, that they had no defence.⁴⁷

Accepting guilty pleas allows for a speedy trial as well as sparing witnesses and victims the trauma of giving evidence at court. However, it also carries the risk of compromising principles such as the presumption of innocence, and the burden of proof resting with the prosecution – both of which can negatively affect defendants. Vulnerable defendants are more likely to suffer the negative consequences of incentives for timely guilty pleas, such as those who are unable to make an informed choice, or those who do not have sufficient funds to hire a good lawyer.⁴⁸ While defence lawyers should not be excused for their erroneous

⁴³ While ordinarily those who believe themselves to be wrongly convicted need to exhaust their direct appeals before applying to the CCRC, applications can, in 'exceptional circumstances' be considered from those who have not done so.

⁴⁴ 'Case Record', p 3, case 34, Table.

⁴⁵ *R v Boal* [1992] 95 Cr App R 272.

⁴⁶ Criminal Cases Review Commission, 'Response by the Criminal Cases Review Commission', 2016. <<http://www.ccrcc.gov.uk/wp-content/uploads/2016/06/CCRC-Sentencing-Council-consultation-April-2016.pdf>>.

⁴⁷ Criminal Cases Review Commission, 'Statement of Reasons' (2012), para 61 (case 34 in Table).

⁴⁸ Andrew Ashworth & Mike Redmayne, *The Criminal Process* (4th ed.), chapter 10 (OUP, 2010)

advice, asylum cases highlight that the system which relies on guilty pleas plays a role in the wrongful conviction of these vulnerable defendants.⁴⁹

The CCRC dealt admirably with these three ‘missed’ cases. It has been transparent with applicants about these mistakes, noting in one referral document, for example, that an applicant ‘was informed, incorrectly – for which the Commission apologises.’⁵⁰ These missed cases remind us of biases that operate at all levels of decision-making, including the CCRC. We may expect organisations to apply a normative theory of decision-making, where all relevant information is gathered and a decision is reached in a rational and logical manner.⁵¹ Studies have shown, however, that deviations from the normative model of decision-making are widespread and human decision-making involves biases.⁵² In the field of marketing, ‘emotional buying’ and ‘stereotype perceptions of supplier country’ are examples of biases that routinely operate.⁵³ While these biases may work as useful heuristics to help make quicker and ‘good enough’ decisions, they could also lead to bad decisions especially if biases are not acknowledged.

In asylum cases, the CCRC may have been influenced by what Tversky and Kahneman called the ‘reference point bias’.⁵⁴ During decision-making, certain information (‘anchors’) can sometimes dominate judgements. An ‘anchor’ can frame what is relevant to consider and what solutions are worth considering. The existence of guilty pleas or the political and legislative discourse that portrayed migrants as ‘deviant’ since the late 1990s may have operated as anchors, leading those responsible for screening to miss these unsafe convictions until they were identified as a distinct category of cases.

Asylum cases as ‘slam dunk’ referrals?

In comparison to the total referral rate of 1.8 per cent for all cases (see section *Reactive responses to ‘asylum cases’ by the Criminal Cases Review Commission*,

⁴⁹ The CCRC responded cautiously in April 2016 to the Sentencing Council’s proposal on reduction in sentence for ‘early’ guilty pleas. Currently, a sentence reduction of a third must be entered at the ‘first reasonable opportunity’ which is interpreted differently by judges. The Sentencing Council is proposing that defendants must plead guilty the first time they are asked for their plea.

⁵⁰ Criminal Case Review Commission, ‘Statement of Reasons’, p 7 for case 34 in the Table.

⁵¹ Paul Anthony Samuelson, *Foundations of Economic Analysis*, (Harvard University Press, 1947).

⁵² Deviations from the rational decision-making has been documented in finance, accounting and marketing, for example. Robert J Shiller, ‘From efficient markets theory to behavioral finance’, *Journal of Economic Perspectives*, 2003, Vol. 17 No. 1, pp. 83-104; Klaus Backhaus & Franz-Karl Koch, ‘Behavioral industrial marketing research in Germany and the United States – a comparison’, *Journal of Business Research*, 1985, Vol. 13 No. 5, pp. 375-82; Michael H Birnbaum & Linda G Hynan, ‘Judgments of salary bias and test bias from statistical evidence’, *Organizational Behavior and Human Decision Processes*, 1986, Vol. 37 No. 2, pp. 266-79.

⁵³ Craig R Carter, Lutz Kaufmann, & Alex Michel, ‘Behaviourial supply management: a taxonomy of judgement and decision-making biases’, *International Journal of Physical Distribution and Logistics Management*, 2007, Vol. 37, No. 8, pp. 631-669.

⁵⁴ Amos Tversky and Daniel Kahneman, ‘Judgment under uncertainty: heuristics and biases’, *Science*, 1974, No. 185, pp. 1124-31.

above), the CCRC's referral rate for asylum cases is high, at 27 per cent.⁵⁵ It might seem that asylum cases provided a chance for the CCRC to increase its low referral rate for which it has been criticised.⁵⁶ Once an application has passed the initial screening stage, the CCRC conducts a detailed review to determine whether the applicant's conviction was unsafe. In such cases, this review focuses on information about the applicant, her country of origin, and her journey to the UK: What was the political/human rights situation in that country? What biographical and contextual data is available on the applicant, and what were her reasons for fleeing her country? Did she travel directly to the UK and, if not, where did she stop during transit, and for how long?

The information is appraised with reference to statutory defences available under the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 and the Immigration and Asylum Act 1999. The CCRC might, for example, review what constitutes a 'reasonable excuse' for not being in possession of a legitimate travel document under the 2004 Act, as relevant to *Soe Thet v DPP*; or the meaning of 'coming directly' to the UK under the 1999 Act, as relevant to *Adimi* and confirmed in *Asfaw* and *Mateta*.⁵⁷ The proportion of cases where convictions were quashed following a CCRC referral is testament to the CCRC's ability to make a case to the appeal court that a statutory defence exists.⁵⁸

One possible response to this high success rate is to argue that the CCRC has referred only 'slam dunk' cases; that there must be a considerable number of cases that they are equivocal about and therefore that they reject. The organisation has long been criticised by Michael Naughton and others for being too 'deferential' to the appeal court and being afraid to refer cases that may be

⁵⁵ According to the CCRC, it has to date received between 150 and 170 asylum applications. Twenty-one per cent is calculated by using 160 asylum case applications divided by the total number of referrals.

⁵⁶ House of Commons Justice Committee, 2015, p 8.

⁵⁷ *Soe Thet v Director of Public Prosecutions* [2006] EWCH 2701 (Admin); *R v Uxbridge Magistrates Court ex parte Adimi* [1999] EWHC Admin 765; *R v Asfaw* [2008] UKHL 31; *R v Mateta & and Ors* [2013] EWCA Crim 1372.

⁵⁸ Yewa Holiday has written extensively on the issues raised in the CCRC asylum cases, including: 'A Place of Greater Safety: The Prosecution of Refugees for Passport Offences' (*Border Criminologies*, University of Oxford, 26 February 2014) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2014/02/place-greater>>; 'CCRC Concern over Advice Given to Refugees' (*The Law Society Gazette*, 14 June 2012) <<http://www.lawgazette.co.uk/law/ccrc-concern-over-advice-given-to-refugees/66102.fullarticle>>; 'In Defence of Refugees' (*The Law Society Gazette*, 16 September 2013) <<http://www.lawgazette.co.uk/law/in-defence-of-refugees/5037642.fullarticle>>; 'Penalising Refugees: When Should the CJEU Have Jurisdiction to Interpret Article 31 of the Refugee Convention?' (*EU Law Analysis*, 2014) <<http://eulawanalysis.blogspot.co.uk/2014/07/penalising-refugees-when-should-cjeu.html>>. 'Prosecuting the Persecuted: The Impact of Wrongful Convictions for Refugees' (*The Justice Gap*, 23 January 2014) <<http://thejusticegap.com/2014/01/prosecuting-persecuted-impact-wrongful-convictions-refugees/>>; 'Syrian Asylum Seekers without Passports to Appeal UK Convictions' (*The Justice Gap*, 23 April 2015) <<http://thejusticegap.com/2015/04/syrian-asylum-seekers-without-passports-to-appeal-uk-convictions/>>.

rejected.⁵⁹ This does not seem to be the case with asylum cases. Here, it has referred cases that challenged the existing interpretation of section 31 of the 1999 Act and section 2 of the 2004 Act. For example, it has attempted, in several referrals (e.g. cases 24, 29, 33, 35 and 41 in Table), to test the 'liberal interpretation' confirmed in *Asfaw* of what constitutes 'coming directly' to the UK.⁶⁰ While Article 31 of the Refugee Convention requires refugees to come 'directly' from their country of origin, the term 'directly' has been interpreted to allow transits to an intermediate country. The elements to consider are the length of the stay in the intermediate country, the reasons for delaying the trip to their final destination, and whether or not the refugee sought or found protection *de jure* or *de facto* from the persecution from which he or she was seeking to escape.

One case that stands out – which was upheld by the Court of Appeal Criminal Division – concerned an Ethiopian national who entered Britain using his own passport on a visitor's visa (case 37). He later claimed asylum, stating he fled the country due to fear of repercussions from his membership of the Oromo Liberation Front. He did this, however, under a different name and lied during the asylum interview, resulting in his claim being rejected. He was charged with seeking leave to remain in the United Kingdom as a refugee by deception.⁶¹ Although the applicant had legally entered and been legally present in the UK, therefore not meeting the definition of a refugee or an asylum seeker, the CCRC attempted to push the current interpretation of the law on defence available under section 31 of the 1999 Act. It supplied medical evidence, which was consistent with torture, and highlighted the risks associated with returning the applicant to Ethiopia.

A generous interpretation of the Real Possibility Test

Academics differ on the purpose of the CCRC as a casework organisation. As noted above, the CCRC has been criticised for being too legalistic and retrospective, focusing too narrowly on the 'real possibility test'. This statutory test for referral, under section 13(1)(a) of the Criminal Appeal Act 1995, requires the CCRC to *only* refer cases where there is a 'real possibility' that the conviction would be considered unsafe by the Court of Appeal by presenting an argument or evidence not raised at trial. Critics argue that this due process model makes the CCRC too deferential and compromises its independence from the Court of

⁵⁹ Michael Naughton, 'The Criminal Cases Review Commission: Hope for the Innocent?' (2007, Palgrave Macmillan); House of Commons, 'Justice – Twelfth Report: Criminal Cases Review Commission' (2015) <<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/85002.htm>>; Richard Nobles and David Schiff, 'The Criminal Cases Review Commission: Reporting Success?' *The Modern Law Review*, 2001, pp. 280-299.

⁶⁰ Holiday, 'CCRC Concern over Advice Given to Refugees'.

⁶¹ *R v Eyasu Mulugeta, Farhiya Mohamed Issa, Bahram Firouzi* [2015] EWCA Crim 6. Case 37 concerns Eyasu Mulugeta.

Appeal, as it must always second-guess the Court's decisions.⁶² It is also argued that the strict application of the real possibility test may assist in the quashing of convictions of the factually guilty, and in some cases may be unable to refer potentially factually innocent cases that are unable to satisfy the real possibility test.⁶³ Others have noted the risks of focusing too much on factual innocence, and pressed the need for due process.⁶⁴ The above case of an Ethiopian national suggests that in asylum cases, great efforts were made by the CCRC to protect vulnerable applicants; it did so by referring to the appeal court cases that did not meet its usual standard of the real possibility test and by attempting to stretch the interpretation of the current case law and legislation.

The next section goes beyond the CCRC's handling of individual cases as a 'reactive'⁶⁵ organisation in correcting miscarriages of justice that have already occurred. It examines more widely the purpose of the CCRC as an organisation that could *prevent* future miscarriages of justice and provide helpful feedback to other criminal justice agencies.

Keeping the system honest: Proactive responses by the CCRC

The vision statement on the CCRC's website lists three elements of its role: 'to enhance public confidence in the criminal justice system', 'to give hope and bring justice to those wrongly convicted', and 'to contribute to reform and improvements in the law based on our experience.'⁶⁶ The second point suggests the CCRC is a case-based organisation, whereas the first and third points indicate a much wider role, highlighting the organisation's commitment to improve the justice system as whole. While the CCRC has no legal obligation to carry out wider engagement activities under the Criminal Appeal Act 1995, it is better placed than any other body to do so, as it sees failings across the whole criminal process – from the police, through prosecution service, defence counsel, and the courts.

The House of Commons Justice Select Committee recently pointed out that the CCRC is not using its unique position sufficiently to feed back into the criminal

⁶² Michael Naughton, 'The Criminal Cases Review Commission: Innocence versus safety and the integrity of the criminal justice system', *Criminal Law Quarterly*, 2012, vol. 58, pp. 207-244; Clive Walker, 'Miscarriages of Justice and the Correction of Error', in McConville, M. & Wilson, G. (eds.) *The Handbook of the Criminal Justice Process*, pp. 505-524, (OUP, 2002).

⁶³ Ibid.

⁶⁴ Hannah Quirk, 'Identifying Miscarriages of Justice: Why Innocence in the UK is Not the Answer' *Modern Law Review*, 2007, 70(5) pp. 759-777; Carolyn Hoyle, 'Compensating Injustice: The Perils of the Innocence Discourse' in Young, S.M., Hunter, J., Roberts, P., and Dixon, D (eds), *The Integrity of Criminal Process: From Theory into Practice*, (Hart, 2016).

⁶⁵ Nobles and Schiff 'The Criminal Cases Review Commission: Reporting Success?', p.292 used the term 'reactive' to describe the work of the CCRC.

⁶⁶ Criminal Cases Review Commission, 'Who We Are' (no date) <<http://ccrc.wpengine.com/about-us/who-we-are/>>.

justice system.⁶⁷ The same point was made by Laurie Elks – an ex-caseworker at the CCRC in his book *Righting the Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission*. He argued that there has been ‘very limited debate within the Commission about the directions of criminal justice policy and meetings of the Commission members have been predominantly concerned with internal and organisational issues.’⁶⁸ The CCRC also reiterated this traditional stance in the 2015/16 Annual Report, which stated that ‘the Commission is fundamentally a caseworking organisation which seeks first and foremost to deal with cases in a fair and timely manner.’⁶⁹

The fact that the CCRC views itself primarily as a casework organisation may be attributed to the history of the establishment of the organisation. The Runciman Commission, following a series of high profile wrongful convictions, such as the *Birmingham Six* case, recommended the establishment of an independent organisation to review allegations of miscarriages of justice.⁷⁰ Young and Sanders argue, however, that the Runciman Commission did not recommend the creation of an independent review body (now the CCRC) in order to improve the overall standard of the criminal justice system.⁷¹ The Runciman Commission understood that ‘fundamentals of the system were sound, and that what was needed was fine tuning in certain key areas.’⁷² If we take the view that wrongful conviction cases are ‘the occasional products of a special set of circumstances’⁷³, the CCRC may be right to see itself as a casework organisation without the need to correct systemic practices of other criminal justice agencies.

Nevertheless, the CCRC has revealed a recent appetite for going beyond a narrow remit. Its 2015/16 Annual Report details plans to design a system to capture lessons learnt from casework and share them with all relevant parts of the justice system,⁷⁴ with the sections on ‘*feeding back to the criminal justice system*’ and ‘*feeding back in the future*’ focusing mainly on asylum cases. Indeed, within the criminal justice system, the CCRC is not alone in responding to external pressure in expanding its remit. For example, the CPS originally saw itself as a casework organisation: deciding which cases should be prosecuted and presenting cases at court.⁷⁵ However, in response to a 2002 government report – *Justice for All* – which argued that victims should be at the heart of the criminal

⁶⁷ House of Commons, ‘Justice – Twelfth Report: Criminal Cases Review Commission’ (2015) <<http://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/850/85002.htm>>., para 52. The second author gave evidence to the Justice Select Committee to that effect.

⁶⁸ Laurie Elks, *Righting the Miscarriages of Justice? Ten Years of the Criminal Cases Review Commission* (2008, Justice).

⁶⁹ Criminal Cases Review Commission, ‘Annual Report and Accounts 2015/16’, p 34.

⁷⁰ Royal Commission on Criminal Justice, Report, Cm 2263 (HMSO, 1993). <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/271971/2263.pdf>

⁷¹ Richard Young and Andrew Sanders, ‘The Royal Commission on Criminal Justice: A Confidence Trick?’, *Oxford Journal of Legal Studies*, 1994, 14(3) pp. 435-448.

⁷² *Ibid.* p. 436.

⁷³ *Ibid.* p.447.

⁷⁴ Criminal Cases Review Commission, ‘Annual Report and Accounts 2015/16’, p 35.

⁷⁵ Crown Prosecution Service, ‘What we do’ (no date) <<http://www.cps.gov.uk/about/>>.

justice system, the CPS expanded its remit to provide support and assistance to victims and prosecution witnesses.⁷⁶ Victims and witnesses are kept up to date about their cases, victims's views are solicited, and in some cases they can discuss their cases directly with prosecutors. While it is beyond the scope of this article to examine the legitimacy of putting victims' needs central to the criminal justice system, the CPS' expanded remit created tensions between its role as representing the state and its new role as becoming a voice for victims. For the CCRC, going beyond casework, in asylum cases, meant engaging directly in *critical* dialogue with other criminal justice agencies.

The CCRC – in pursuing its wider remit – asserted that these wrongful convictions represent ‘a failure by all of those involved, police, UKBA, prosecutors, defence lawyers, and the courts, to understand and apply the criminal law correctly’.⁷⁷ It criticised the CPS and defence lawyers in particular. Employees, including the chairman, have written regularly for legal magazines and newspapers. This started in June 2012 with an article in the *Law Society Gazette* entitled ‘CCRC Concern over Advice Given to Refugees’, followed by two more articles in the same magazine in October 2012 and September 2013.⁷⁸ In December 2013, the CCRC's press releases about asylum case referrals began to make clear that the CCRC was actively trying to raise awareness of the issue.⁷⁹

In addition to raising awareness through the media, the CCRC wrote directly to key stakeholders with the aim of preventing unsafe convictions of asylum cases. In September 2011, letters were sent to the CPS and the UK Border Agency alerting them to cases the CCRC had reviewed and referred back to the appeal court.⁸⁰ The CCRC gave presentations to the Criminal Bar Association in April 2012, defence lawyers in September 2012, relevant NGOs in August 2012, and prisons between June and October 2012.⁸¹ It also communicated with the Solicitors Regulation Authority in 2014⁸² and again in 2015 to raise concerns about the conduct of solicitors.⁸³

In an article published by *The Guardian* in 2014, the CCRC urged defence lawyers not to advise clients to plead guilty ‘inappropriately’ and the CPS not to ‘bring prosecutions unnecessarily or wrongly’.⁸⁴ It has also used referral documents to the appeal court to assert the incompetency of the CPS. In one case, the CPS had

⁷⁶ Ibid; Andrew Sanders, ‘The CPS – 30 years on’, *Criminal Law Review*, 2016, vol.2, 82-98.

⁷⁷ Criminal Cases Review Commission, ‘Annual Report and Accounts 2013/2014’, p 7–8.

⁷⁸ Holiday, ‘Victims of Human Trafficking and the CCRC’ (*Law Society Gazette*, 25 October 2012) <<http://www.lawgazette.co.uk/law/victims-of-human-trafficking-and-the-ccrc/67995.fullarticle>>; Holiday, ‘CCRC Concern over Advice Given to Refugees’; Holiday, ‘In Defence of Refugees’; Foster, ‘Wrongful Prosecutions’.

⁷⁹ Criminal Cases Review Commission, ‘Commission Refers the Conviction of Busani Zondo’ (2013) <<http://www.ccr.gov.uk/commission-refers-the-conviction-of-busani-zondo/>>.

⁸⁰ Notes from internal CCRC correspondence minutes of meetings.

⁸¹ Ibid.

⁸² Notes from internal CCRC correspondence minutes of meetings.

⁸³ Criminal Cases Review Commission, ‘Annual Report and Accounts 2015/16’, p 35.

⁸⁴ Richard Foster, ‘Wrongful Prosecutions Add to Refugee Woe’ (*The Guardian*, 24 February 2014) <<https://www.theguardian.com/law/2014/feb/24/wrongful-prosecutions-refugee-woe>>.

prosecuted a Somali national even though it was clear that Somalia had not had a passport-issuing authority since 1991 and that the defendant would have been unable to produce a valid passport upon entry to the UK. The CCRC criticised the CPS for their decision to prosecute when there should have been 'no realistic prospect of success' and for taking 'advantage of the error of the defence in advising a guilty plea'.⁸⁵

The organisation that appears to have been the most responsive is the Solicitors' Regulation Authority, which made a commitment to look into the quality of advice given to defendants seeking asylum.⁸⁶ In January 2016, the Authority published a report on current practices concerning asylum-related legal advice.⁸⁷ They are also investigating a number of serious allegations concerning the competency of certain individual lawyers. The Law Society issued a new practice note in December 2015 entitled 'Statutory Defences Available to Asylum Seekers Charged with Document Offences.'⁸⁸ The UK Border Agency confirmed that their guidance team had studied the note and – in November 2013 – had already taken steps to bring it to the attention of investigators. The CCRC was invited to one of their Senior Investigators Forums to 'bolster' the point.⁸⁹ The CPS was rather more difficult to budge. They refused to do a retrospective 'trawl' of past cases due to financial constraints, but they did, eventually, update their guidance in relation to section 31 of the 1999 Act in February 2013.⁹⁰ Overall, evidence of the impact of the CCRC's wider engagement can be seen in the increased number of such applications, particularly in 2013/14.⁹¹ Refugees as well as their legal representatives have contacted the CCRC after reading the various articles.⁹² More recently, applications to the CCRC concerning asylum cases have been declining which suggests that these cases are either not being prosecuted or properly defended.

Conclusion

⁸⁵ Criminal Cases Review Commission, 'Statement of Reasons' (2012), para 17–18, para 54 (case 34 in Table).

⁸⁶ The Solicitors Regulation Authority wrote: 'We are currently reviewing a number of matters referred by the Criminal Cases Review Commission concerning the quality of advice given to defendants seeking asylum. Using the findings from these reviews, we expect to publish ethics guidance on the handling of cases where asylum may be relevant to the client's defence.' Solicitors Regulation Authority, 'Risk Outlook 2014/2015, Autumn 2014 Update' (2014) <<https://www.sra.org.uk/risk/outlook/risk-outlook-autumn-2014-update.page>>.

⁸⁷ Solicitors Regulation Authority, 'Quality of Legal Services for Asylum Seekers' (2016) <<http://www.sra.org.uk/sra/how-we-work/reports/asylum-report.page#findings>>.

⁸⁸ Law Society, 'Statutory Defences Available to Asylum Seekers Charged with Document Offences' (2015) <<http://www.lawsociety.org.uk/support-services/advice/practice-notes/statutory-defences-available-to-asylum-seekers-charged-with-document-offences/>>.

⁸⁹ Interview with a former caseworker on 13 February 2014.

⁹⁰ Interview with a senior manager on 29 September 2014.

⁹¹ Criminal Cases Review Commission, 'Annual Report and Accounts 2014/15', p 13.

⁹² Interview with a former caseworker on 13 February 2014.

To put the blame on defence lawyers as the cause of miscarriages of justice in asylum cases would be too simplistic. It is true that had defence lawyers been aware of the statutory defence available, the wrongful conviction of asylum seekers and refugees could have been prevented. This article, however, has argued that these asylum cases demonstrate a wider organisational bias influencing decision-making across all criminal justice agencies. The wrongful convictions of asylum seekers and refugees reflect, to some extent, a shift in society towards what David Garland⁹³ has called the *Culture of Control* – the increased public desire for more punitive measures met with the expansion of formal social control. The widespread political and public desire to control and criminalise migration, and the portrayal of migrants as *deviant*, may have operated as ‘anchors’, leading criminal justice agencies to overlook their statutory protection and move away from a ‘due process model’ to a ‘crime control model’ in asylum cases.⁹⁴ Behind the failure of defence lawyers, a host of other agencies were also under the influence of the ‘cimmigration’⁹⁵ anchoring.

Asylum cases began to present challenges for the CCRC in the mid-2000s. They were, in part, the product of the large number of immigration-related offences created by the Labour government. The UK Border Agency, tasked with ‘cracking down’ on abuse of immigration rules, relied on criminal law instead of dealing with migrants administratively. The CPS proceeded with prosecutions where there was no case to answer, and defence lawyers failed to advise their clients of their defence under Article 31 of the 1991 Act and section 2 of the 2004 Act. The courts wrongly convicted refugees and asylum seekers, causing further harm to these vulnerable people who had fled intolerable living conditions in their country of origin.

When asylum cases first reached the CCRC, it also failed to notice the ‘anchors’ and erred by rejecting some of these cases. After some errors, the Commission became aware of systemic failings by criminal justice agencies and responded efficiently and effectively, referring 43 convictions back to the appeal court, most of which were quashed. It has been criticised for delays in its work and the timidity of its approach to referrals. These asylum case referrals, however, are a powerful counter to this. They show the CCRC fulfilling its remit to identify potential miscarriages of justice and feed back into the criminal justice system in order to improve due process in an exemplary fashion.

The wider significance of the proactive approach taken by the CCRC speaks to the importance of communication – or the lack thereof – between all criminal justice and related agencies. Focusing on the CPS, Sanders has recently drawn attention to the lack of effective communication between the CPS and the police over the last 30 years.⁹⁶ There are also wide variations within prosecution and

⁹³ Garland D, *Culture of Control: Crime and Social Order in Contemporary Society*.

⁹⁴ Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968).

⁹⁵ Juliet Stumpf, ‘The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power’, *American University Law Review* 56, no. 2 (December 2006), pp: 367-419.

⁹⁶ Sanders, ‘The CPS – 30 years on’.

regulatory agencies – CPS, Health and Safety Executive, Office of Fair Trading or environment agency – in their attitudes to prosecution.⁹⁷ For cases involving death, while the CPS's 'default setting'⁹⁸ is to prosecute, the Health and Safety Executive prosecutes only 1 per cent of work-related deaths.⁹⁹ The 'fragmentation' of prosecution policies demonstrates the absence of a clear principle on prosecution and poor inter-agency communication.¹⁰⁰

The CCRC's initiative in communicating *directly* and *critically* with criminal justice and related agencies in asylum cases, however, was not its usual style of correcting miscarriages of justice. In other cases, it generally preferred not to criticise agency practices; in cases that it did criticise, it did so indirectly in the statement of reasons for individual cases. The reluctance of criminal justice agencies to criticise another agency is not unique to the CCRC. The CPS has also failed to take a strong stance against police malpractice.¹⁰¹ It remains to be seen whether the CCRC's proactive approach in asylum cases marks a new beginning for the CCRC as a proactive organisation or a one-off initiative. Whichever the case, the CCRC was right to speak up and remind all the agencies about the protection asylum seekers and refugees are entitled to under the 1951 Refugee Convention.

The response from criminal justice agencies to the CCRC's campaign to raise awareness of 'asylum cases' has overall been positive. Asylum case applications to the CCRC have recently declined, and criminal justice agencies have tried to put in place changes to reduce the chance of further wrongful convictions. This reinforces the view that the CCRC is in a unique position to feed back into the criminal justice system, and that criminal justice agencies will be responsive.

⁹⁷ Richard Young and Andrew Sanders, 'The Ethics of Prosecution Lawyers', *Legal Ethics*, 7(2), pp. 190-209, 2004.

⁹⁸ Sanders, 'The CPS – 30 years on', *Criminal Law Review*, p.89.

⁹⁹ Young and Sanders, p.197.

¹⁰⁰ *Ibid*, p.199.

¹⁰¹ The police shooting of Jean Charles de Menezes and the death of Sean Riggs after being put in a cage in a police station car park are two examples where the CPS was reluctant to criticise its peers (see Sanders, 'The CPS – 30 years on', *Criminal Law Review*, p92).