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# FOREIGN LAW BRIEF

## ENGLAND & WALES: THE CRIMINAL CASES REVIEW COMMISSION AND CASES OF MISCARRIAGES OF JUSTICE

**November 1, 2000**

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**Abstract**

In the 1980s the English Court of Appeal quashed convictions in several high profile cases of terrorism involving a number of Irish defendants. These and other cases of miscarriage of justice impelled the government to appoint a Royal Commission on Criminal Justice to examine and recommend changes in appeal procedures and the investigation of alleged cases of miscarriages of justice once appeal rights have been exhausted. The Commission recommended the setting up of an independent review body to investigate such cases. The Criminal Appeal Act 1995 established a Criminal Cases Review Commission which began functioning in 1997. The Act authorizes the Commission to refer cases to the Court of Appeal if it considers that there is a 'real possibility that the conviction…would not be upheld.' This Foreign Law Brief reports on the work of the Commission and assesses its progress.

## I. Background and Analysis

### *A. Appeals in Criminal Cases*

Until 1907 there was little scope in England for the judicial review of convictions for indictable offenses tried before a jury. Based on a notion of the "inscrutability" of jury verdicts, the official attitude was voiced by an Attorney General who said: "It is contrary to the policy of the criminal law in England, to allow an appeal in cases of felony." It was only after a protracted debate in the early twentieth century that the Court of Criminal Appeal, now succeeded by the Court of Appeal Criminal Division ("Court of Appeal" or "CA"), was constituted in 1907, following public apprehension generated by two cases of defendants who were revealed to have been wrongfully convicted. Until then, a petition to the Home Secretary, the executive responsible for administering the royal prerogative of mercy, was the main source for asserting the innocence of convicted persons who claimed that a miscarriage of justice had occurred. The two cases also raised the concern whether the Home Secretary could adequately cope with alleged cases of miscarriages of justice. The establishment of the Court of Appeal, however, did not stifle the debate on the means for correcting the errors of juries in criminal trials. Under the Criminal Appeals Act 1907, section 4(1), the Court of Appeal was required to review convictions and to dismiss the appeal if there was "no substantial miscarriage of justice." From the inception of the proviso, the Court gave it a very limited meaning and commentators noted a reluctance on its part to consider whether the jury has reached a wrong decision. In 1936 a parliamentary select committee was sought to be established to inquire into cases of miscarriages of justice, but the proposal was declined on grounds that such cases receive the most careful consideration and the committee would not serve any useful purpose.

Even after the Court of Appeal was instituted, the role of the Home Secretary in the appellate process was retained by virtue of the power granted to him to refer a case back to the Court of Appeal at any time. This intervention by the Home Secretary remained crucial in cases of allegations of miscarriages of justice when all appeal rights had been exhausted. In 1968, a highly critical report of the manner in which the Home Secretary responded to petitions asserting the innocence of convicted prisoners was produced by Justice, a branch of the International Commission of Jurists. The issue was taken up again in a book published in 1973 claiming that miscarriages of justice occurred regularly and that obtaining a remedy was not an easy matter. The cases of wrongfully convicted persons were highlighted in 1982 in a series of programs produced by the British Broadcasting Service called *Rough Justice.* A further two series were commissioned by the broadcaster and the issue reached a level of public awareness which made the House of Commons Home Affairs Committee decide to hold an inquiry into the procedures followed by the Home Office in investigating allegations of possible miscarriages of justice. The report issued by the Committee expressed concern at the lack of independent scrutiny of complaints of wrongful conviction.

Justice issued another report entitled *Miscarriages of Justice* in 1989, just a few months before the

decision of the Court of Appeal overturning convictions in the first of a series of "Irish Cases" known as the "Guilford Four," the "Maguire Seven" and the "Birmingham Six." The cases involved 17 defendants, all but two of whom were Irish, who were thought to have carried out terrorist bombings of public houses in Birmingham, Guilford, and Woolwich, England. The Birmingham Six were convicted on the basis of four confessions and forensic evidence, the Guilford Four solely on the basis of confessions, and the Maguire Seven, comprising four members of a single family, were convicted for possession of explosives based on forensic evidence.

In 1989 the Court of Appeal found the convictions of the Guilford Four to be "unsafe" based on exculpating evidence which had stayed in police files for fifteen years without anyone having considered it. The Birmingham Six soon followed the Guilford Four to freedom. They too had continued to claim their innocence and their public campaign was led by a prominent church leader, two senior members of the judiciary, a Member of Parliament, and two former Home Secretaries. The police were found to have falsified evidence and to have used violence and threats against the defendants to force their confessions, and prison officers were found to have meted out summary punishments. In the case of the Maguire Seven, several grounds were found to regard their convictions as unsound and they too were released in 1991.

### *B. Role of the Executive*

It has been noted that the Home Secretary's role in referring cases of miscarriages of justice to the Court of Appeal was limited by custom rather than by statute. Section 17(1) of the Criminal Appeal Act 1968 conferred an unfettered discretion by providing that the Home Secretary could, at any time, refer a case to the Court of Appeal "if he thinks fit." Yet, the practice was established to treat the power as an exceptional one, normally to be activated only when fresh evidence had come to light which was not before the trial court . During the course of the inquiry into the Guilford and Woolwich bombing cases, the then Home Secretary stated:

> A Home Secretary must never allow himself to forget that he is an elected politician, and that under our system the process of justice must be kept separate from the political process. … it is not open to the Home Secretary simply to substitute his own view of the case for that of the courts. It would be an abuse of his powers if he were to act as though he or those who might advise him constituted some private court of law.
>
> A different situation arises of course if new evidence…is produced, which was not available at the trial or before the Court of Appeal. In any civilised system of justice there must be a means whereby a case can be reopened so that new matters can be assessed alongside the old evidence by due process of law. This distinction between new evidence and differences of opinion about old evidence has governed the way which my predecessors have used the powers… to refer cases to the Court of Appeal. [Windlesham 392-393].

The judicial investigations into the convictions of the Guilford and Woolwich bombings had concluded that neither the Court of Appeal, nor the Home Office, was the right body to investigate alleged miscarriages of justice and recommended that a new independent machinery be created to carry out investigations of alleged miscarriages of justice and report the findings to the Court of Appeal.

It became clear that the Home Secretary's self-imposed requirement of new evidence, or other consideration of substance which was not before a trial court, had obstructed the correction of cases of miscarriages of justice, particularly in the Irish Cases. The defendants in those cases had been convicted of the most serious offenses and had spent 200 years in prison before their convictions were quashed. As a result, public confidence in post-conviction procedures had plummeted and the cases proved to be of crucial significance in making the government of the day decide to appoint a Royal Commission on Criminal Justice, for the first time in ten years, to investigate the effectiveness of the system and to make recommendations for changes. In particular, the Royal Commission was also asked to consider whether changes were needed concerning the role of the Court of Appeal in considering new evidence on appeal, including directing the investigation of allegations, and the arrangements for investigating allegations of miscarriages of justice when appeal rights have been exhausted.

### *C. Report of Royal Commission*

Almost all those who gave evidence before the Commission argued that the arrangements for considering allegations of miscarriages of justice should be changed, with the responsibility for reopening cases being removed from the Home Secretary and transferred to a new body, independent of both the courts and the executive. In making the case for the body, the Commission referred to a 1988 case in which the Court of Appeal held that it had no jurisdiction to entertain a second appeal even though new evidence had emerged since the dismissal of the first appeal. Noting that the Court could consider the case again only if the Home Secretary used his power of reference, the Commission produced statistics showing that the Home Secretary did not often exercise the reference power because the "civil servants advising him operate within strict self-imposed limits." It was also thought that the Home Secretary's role was incompatible with the constitutional separation of powers between the courts and the executive. The scrupulous observance by the Home Secretary of the constitutional principle resulted in a reluctance to inquire deeply enough into the cases brought before him, the Royal Commission noted.

The role envisaged for a new review body by the Royal Commission was to consider allegations put to it that a miscarriage of justice may have occurred, and the approach to be adopted after the conviction had been upheld or leave to appeal denied. If the cases seemed to call for it, the body would ensure that an investigation was launched, with a power to supervise the investigation, including requiring the police to follow up lines of inquiry that seemed promising. No judicial powers were recommended for the body and it would be required to refer a case to the Court of Appeal if the investigation indicated that there were reasons for supposing that a miscarriage of justice might have occurred. The Court would consider it as though it were an appeal referred to by the Home Secretary. In cases in which in the body's view the investigation did not reveal any grounds to allow a reference to be made, for example when fresh material confirmed the correctness of the conviction, the applicant would be given an explanation with reasons.

While the review body was recommended to be independent of the government, the Royal Commission thought it necessary that funds would be provided by the government and that a minister should be responsible for appointing its members and be accountable to Parliament for its activities. The minister should be made responsible to answer to Parliament any suggestion that the body was inadequately resourced or not properly constituted for the task it was required to perform. Operational independence was recommended for the body while requiring it to submit an annual report to the minister, who in turn would submit it to Parliament.

The Royal Commission found arguments to be cogent that the new review body be independent of the Court of Appeal, and that it should not be placed within the court structure. The body would provide the Court with the supporting material, but without making a recommendation or conclusion as to whether or not a miscarriage of justice had occurred. It would be for the Court to treat it as an appeal in the normal way and ensure that the defense and prosecution received a copy of the statement of the reasons for the appeal. It would continue to be open to the appellant to raise before the Court of Appeal any issues of law of fact or mixed issues, regardless of whether the issue was covered in the papers sent to the court by the body.

In order for the body to be seen to be independent of the courts in the performance of its functions, the Royal Commission recommended that the chairman, who would be chosen for his or her personal qualities rather than for any particular qualifications or background, should not be a serving member of the judiciary. The other members of the review body, it was suggested, should consist of both lawyers and lay persons.

With regard to the selection of cases for further investigation by the body, the Royal Commission was reluctant to call for specific criteria to be applied and thought it better to allow it to devise its own selection rules and procedures.

### *D. Criminal Cases Review Commission*

In all the Royal Commission made 352 recommendations in its Report and the Government initially accepted only thirty of them, but included in them was the recommendation for establishing a body to review cases of alleged miscarriages of justice. A discussion paper issued in 1994 added two additional proposals, one to allow the new body to also review cases in which there were doubts about the technical validity of a sentence or that it was based on substantially wrong information, and second, to allow the review in cases of wrongful convictions in summary (non-jury) trials held in the Magistrates' courts.

The Criminal Appeal Act 1995 ("CAA 1995"), section 8, established a body corporate to be known as the Criminal Cases Review Commission ("the Commission"), independent of the Crown, consisting of not fewer than eleven members. To be appointed on the recommendation of the Prime Minister, at least one-third of the members must be legally qualified and two-thirds must be persons who have knowledge or experience of the criminal justice system, and in particular, the investigation of offenses and the treatment of offenders. Further particulars relating to the appointment of members of the Commission are provided in Schedule 1 of the Act.

The applications for membership of the Commission were publicly solicited, and the candidates tested for their analytical skills. The lay element in the Commission is also innovative compared to the civil servants who were responsible for reviewing petitions in the Home Office. In the White Paper the Government had submitted that "the most important qualifications…are likely to be an ability to assess and interpret facts and behavior; patience and sensitivity; and an open minded determination to get to the root of what are often complex and enigmatic problems." After its appointment, the Chief Executive of the Commission insisted that 'we have a team of people who are very committed to rooting out miscarriages.' Commentators, however, note that the membership of the Commission is heavily drawn from prosecuting authorities and also largely reflects a white, male, and middle class background.

The Commission is authorized to refer to the Court of Appeal convictions and sentences on indictment or summary trials in England & Wales and in Northern Ireland. (A separate review body has also been set up in Scotland.) The reference must be treated for all purposes as an appeal by the convicted person.

Under section 13(1) of the CAA 1995, the Commission may refer a conviction to the Court of Appeal if there is an argument or evidence, not raised previously in court proceedings, which makes the Commission consider that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made. Under this criteria, considered to be stringent, a case could be referred to the Court if, for example, incompetent advocacy prevented an important issue from being put to the jury at trial, provided there is a realistic, not a mere, possibility that the conviction will not be upheld. The inclusion of the word 'argument' in section 13, however, "broadens the grounds for reference unquantifiably." [Windlesham 431]. The Government prevailed in ensuring that a reference can be made only if the argument or evidence was not previously considered by the courts.

Section 14 of the CAA 1995 grants the Commission a wide power to refer a conviction, etc., either after an application by or on behalf of the convicted person or without such an application having been made. The authority to consider a case without any application having been made represents a change in emphasis from the Home Office's reluctance to encourage application to one more dedicated to rooting out miscarriages of justice.

The Commission, however, has not been given the power to appoint its in-house investigative staff on grounds that such a "mini police force" would be duplicating work which could, and should, be done by the police. Any re-investigations sought by the Commission are therefore carried out by the police. Under section 19, the Commission can appoint an investigating officer and insist that the officer be from a force different from the one which carried out the original investigation. The section also provides that the Commission can direct that a particular officer not be appointed and if it is dissatisfied with the officer's performance, it can ask for removal. However, the actual appointment of the officer is entrusted to the Chief Constable of the police force responsible for the original investigation.

With further reference to the role of the police, it is noted that a large number of the applications alleging miscarriage of justice do not provide new arguments that could be made before a court, but make points which require further investigation. The theme running through these cases is the failure of the police to conduct a proper investigation, yet the "the 1995 Act takes a trusting attitude to the police" [Walker & Starmer 239]. Public perception of the police, important in establishing the adage that justice should be seen to be done, is apparently that of a lack of confidence, particularly when the police investigate themselves. Additionally, a major judicial inquiry into the murder of a young black Londoner reported in February 1999 found that "professional incompetence, institutional racism and failure of leadership" allowed the murderers to escape justice [Lawrence Inquiry]. The effectiveness of the Commission's investigations will, therefore, depend on the level of supervision and direction provided to the police. It is suggested that a real scrutiny of the role of the police could be established if members of the Commission actively participate in the re-investigation by, for example, accompanying the investigating officer in interviews and briefings [Walker & Starmer 240].

The requirement that the Commission refer cases to the Court of Appeal for reconsideration

means that it remains clearly subordinate to the Court. The manner in which the Court of Appeal interprets its role in cases of miscarriages of justice will be crucial in the working of the reform. In the past, the judicial attitude to the promotion of appeals has often been hostile on grounds that there would also be an increase in undeserving appeals and damage caused to public confidence in the judicial system, the latter based on the notion of finality of appeals and especially of a jury verdict. The Court of Appeal has thus considerably under-used its powers, a reluctance which was evident in the recent cases of miscarriages. The Royal Commission had recognized that the Court should be readier to overturn jury verdicts than previously and suggested that grounds of appeal in the Criminal Appeal Act 1968 be redrafted. However, beyond the issue of redrafting of the grounds, it is the exercise by the Court of its powers that will determine the success of the work of the new Commission. As stated: "Though a convicted person might have an improved opportunity to present his case at the referral stage, this matters little if the Court of Appeal continue to turn their face against the possibility that a jury can make substantial errors which justice demands be corrected." [Walker & Starmer 243].

### *E. Parliamentary Scrutiny*

Parliament has maintained a close watch of the new Commission. In October 1997 and December 1998, the Home Affairs Committee of the House of Commons took written and official evidence about its operations from the Chairman, Chief Executive, and lawyers who had dealt with it. As a result of the issues raised and based on the concern of the extent to which the Commission was failing to keep up with the applications submitted, in February 1999, the Committee examined the body further during a visit to its headquarters and in oral evidence of the issue from the Home Secretary. The Committee's Report includes key statistics describing the activity of the Commission to the end of February 1999. Of the 2,325 applications received from April 1997, a total of 1,727 were identified as eligible for review, 40 of which were referred to the Court of Appeal, while 1,428 were still under consideration. Of the 40 referred to the Court, 8 convictions were quashed and 2 sentences reduced, and 27 were awaiting consideration.

Considering that the Commission is still in its early days, the Committee thought it was premature to form final judgments, but some preliminary assessments were made, among which are:

- There may be some problems with the test for referral to the Court of Appeal provided in section 13(1)(a) of the CAA 1995 requiring the Commission to consider "that there is a real possibility that the conviction ... would not be upheld were the reference to be made." The words "real possibility" gave rise to a range of possible interpretations, and an argument was made to the Committee that it was undesirable to have a test based on requiring the Commission to predict what the Court of Appeal would do; it was proposed that the test should instead be "that there had in fact been a miscarriage of justice." The Commission opposed this change and submitted some ideas for amending the test. The Committee recommended that a formal review of the wording of the test in the CAA 1995 take place after the Commission has been in operation for five years.

- With reference to the extent to which the Commission has to rely on the police to conduct investigations on its behalf, the Committee accepted that investigations by police forces have so far proved satisfactory. However, in order for the whole process to command confidence, it was recommended that the Commission must be ready to make full use of its powers to use non-police investigators.

- The overall conclusion of the Committee was that the reversal of some long-standing miscarriages of justice has been a good start and that the Commission had impressively dealt with the limited number of cases it had examined. However, there are major problems, including a growing backlog, and the Committee expressed the view that it was possible to process most cases with greater speed. It suggested that the key is to identify critical issues at an early stage and then to examine those in detail without being sidetracked by matters of less importance.

### *F. Other Assessments*

Some commentators have noted that the Commission is perhaps the first organization in any country established to reexamine criminal cases, with the power to make the highest court review them, and to produce the evidence or arguments that could lead to the conviction being overturned. As such, it has no precedents to guide it as to what it can and should do within the confines of a narrowly drawn statute and limited funding. Organizations and lawyers representing prisoners strongly support its existence but are critical of its cautious approach in referring cases to the appeal court. Liberty, a civil rights organization, considers it contrary to the principle of providing an effective remedy if the Commission deals with 'simpler' cases at the expense of more complicated ones in order to produce an attractive 'resolution' rate with the effect that the complex cases are not being dealt with. A lawyer who has 30 clients alleging miscarriages of justice does not want the Commission to usurp the Court of Appeal's functions by seeking 100 percent certainty in order to refer a case.[Jon Robins 10] He questions the Commission's perceived willingness to tackle high profile cases, in many cases concerning people who have died. Another lawyer comments that those who are still serving sentences should be considered more deserving of review than those who have died. Others believe that the Commission is a victim of its own success and more cases are brought before it because it has demonstrated that it can do it. They also urge the Government to commit more funds. In turn, the Commission notes that only one in five applications is supported by a lawyer, making its work more difficult. It has stepped up a campaign for more lawyers to be trained in representing clients before the Commission.

The relationship between the Commission and the Court of Appeal is also another major concern because the Commission has no power to overturn a conviction or sentence and it is still the Court that is the final arbiter. If the Court of Appeal will not exercise its power more widely, it is thought that a realization by the Commission that some cases are unlikely to succeed will make it adapt its referral pattern accordingly. In practice, it may be likely to continue the Home Office practice of referring back only those cases that have concrete fresh evidence rather than the cases in which there is 'lurking doubt' about the safety of the conviction on the merits of the facts. This assertion is countered by the argument that section 13(1) of the CAA 1995 sufficiently empowers the Commission to refer cases in which there is a real possibility that the conviction, verdict, or sentence will not be upheld.

A strong argument is made that the work of the Commission will damage the principle of finality

which produces public confidence in the criminal process. However, as noted by a highly regarded jurist, Lord Atkin, in 1933, 'Finality is a good thing, justice is better.' [Walker & Starmer 246]. Real finality in criminal proceedings, it is stated, is not something that should be manufactured, but should result from judgments of quality.

A 1999 decision by a Queen's Bench Divisional Court (consisting of two judges, including the Lord Chief Justice) in the first judicial challenge to a decision of the Commission provides an important bearing on the operation of the Commission and its relationship with the courts. In *R. v. Criminal Cases Review Commission, ex parte Maria Pearson,* [1999] 3 All E.R. 498 (QBD DC)] an appeal was brought against the Commission's decision not to refer a conviction to the Court of Appeal. It held that the decision not to refer the case was fairly and squarely within the area of judgment entrusted to the Commission, and that the Court would be exceeding its function were it to hold that a decision of the Commission was objectively right or wrong. The Divisional Court concluded that to go further would be to usurp the function which Parliament has, quite deliberately, accorded to the judgment of the Commission. The decision provides useful pointers for the work of the Commission.

- The exercise of the power to refer cases depends on the judgment of the Commission, and to no one else.

- The "real possibility" test prescribed in section 13(1) of the CAA 1995 is carefully chosen. If the Commission were almost automatically to refer all but the most obviously threadbare cases, its function would be mechanical rather than judgmental and the Court of Appeal would be faced with a mass of hopeless appeals; on the other hand, if the Commission could only refer cases in which it judged an applicant's prospects of success on appeal to be assured, cases of deserving applicants would not be referred and the beneficial purpose for which the Commission was set up would be defeated.

- The "real possibility" test denotes a contingency which, in the Commission's judgment, is more than an outside chance or bare possibility, but which might be less than a probability, or a likelihood, or a racing certainty.

- It is acknowledged that the judgment of the Commission requires an unusual decision because it requires a prediction of the view which another body (the Court of Appeal) may take. It involves the Commission asking itself a double question: If the reference is made, is there a real possibility that the Court of Appeal will receive the fresh evidence? If so, is there a real possibility that the Court of Appeal will not uphold the conviction.

### *G. Statistics*

Provisional figures to July 31, 2000 (posted on the website www.ccrc.gov.uk) show the following data on applications received by the Commission:

| | |
|---|---|
| Total | 3,470 |
| Open | 934 |
| Actively being worked on | 455 |

| | |
|---|---|
| Completed (inc. ineligible) | 2,081 |
| Referred to Court of Appeal (CA) | 94 |
| Heard by CA | 42 |
| Convictions quashed by CA | 32 |
| Convictions upheld by CA | 9 |

### *F. Conclusion*

It has been recognized that criminal trials in England and Wales before judge and jury may on occasion result in wrongful convictions. A spate of such cases, particularly involving Irish defendants alleged to have been responsible for acts of terrorism in the 1970s, has led to a radical reform in the creation of an independent non-judicial body to review court verdicts. The Commission receives applications in alleged cases of miscarriages of justice; it can also consider a case without application and is authorized to refer them to the Court of Appeal if there is a real possibility that new evidence or new arguments would enable the Court to quash the conviction. The threshold for applications, the finding by the Commission of a "real possibility" that the conviction would be overturned by the Court, is controversial. It is critical that the Commission find a delicate path in reviewing and investigating a mounting number of applications and in keeping in wary view the attitude of the Court of Appeal which retains final authority in determining whether a conviction was wrongfully obtained.

## **II. Congressional Action** (106th Congress)

**S. 2463 (Sponsor ?)**

National Death Penalty Moratorium Act of 2000. Institutes a moratorium on the imposition of the death penalty at the Federal and State level until a National Commission on the Death Penalty studies its uses and policies ensuring justice, fairness, and due process are implemented. Section 202, concerning the Duties of the Commission, requires among the matters to be studied by the Commission to include "[w]hether innocent persons have been sentenced to death and the reasons these wrongful convictions have occurred." The Bill was referred to **[what committees? any hearings? current status?]**

**H.R. 4078 (Sponsor), S. 2073 (Sponsor?), and S. 2690 (Sponsor?)**

Innocence Protection Act of 2000. A Bill to reduce the risk that innocent persons may be executed, and for other purposes. Section 101(a)(7), concerning Findings and Purposes, states that "[t]he advent of DNA testing raises serious concerns regarding the prevalence of wrongful convictions, especially wrongful convictions arising out of mistaken eyewitness testimony." Also referenced is a 1996 Department of Justice study indicating that in "approximately 20 to 30 percent of the cases referred for DNA testing, the results excluded the primary suspect. Without DNA testing, many of these individuals might have been wrongfully convicted." H.R. 4078 was referred to the House Judiciary Committee, Subcommittee on Crime. S. 2073 and S. 2690 were referred to the Senate Judiciary Committee. **[any hearings? current status?]**

**Chronology of Events**

7/31/2000 Total of 3,470 applications received by the Commission

3/23/1999 Home Affairs Committee publishes report on work of Commission

12/15/1998 Commission tells Home Affairs Committee of two-year wait for applications

7/21/1998 Commission receives 1,380 applications in its first year

2/21/1998 First conviction is quashed by Court of Appeal

9/23/1997 Commission refers first conviction to Court of Appeal

3/31/1997 Commission starts handling casework

7/19/1995 Criminal Appeal Act 1995 is enacted

7/1993 Report of Royal Commission is presented to Parliament

3/14/1991 Court of Appeal allows appeals against conviction of six men, the Birmingham Six, convicted of murder following two bomb explosions in Birmingham in 1974; Home Secretary announces establishment of a Royal Commission on Criminal Justice

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