

**Response by the Criminal Cases Review Commission
("CCRC") to
"The Court of Appeal and the Criminalisation of Refugees" by
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The research in question was instigated by the CCRC in order to better understand the fate of "no-appeal" applicants convicted of relevant offences who applied the Commission after the Court of Appeal decision in *R v Nori and YY* [2016] EWCA Crim 18. The CCRC welcomes the completion of the project and addresses its conclusions below.

Background

1. The CCRC has for a number of years been concerned about the wrongful conviction of refugees prosecuted for offences relating to their entry to the UK. These have tended to be people fleeing from serious persecution, often from countries where it was impossible for them to obtain a legitimate passport or exit visa, and seeking safety in (or through) the UK. On arrival here they found themselves arrested, convicted and imprisoned for not having the right travel documents, and denied the legal protection afforded to them by national and international law.
2. The first four convictions of this type were referred to appeal courts by the CCRC in October 2005. In fact, all four were magistrates' court convictions, so the referrals were made to the Crown Court. It was in 2007 that the first case of this kind was referred, by the CCRC, to the Court of Appeal Criminal Division. By the end of 2017/18, the CCRC had

referred a total of 57 convictions of this nature to either the Crown Court or Court of Appeal.

3. The CCRC spotted the pattern of inadequate understanding and application of the relevant defences in this type of case and took wide-ranging action.
4. Initially, the CCRC's action focussed on providing information, and sometimes training, to charitable and voluntary organisations and to statutory bodies most likely to be in contact with the individuals who might be wrongly convicted. By 2013, close to 90 applications had been received by the CCRC involving cases of this type.
5. In 2012, the CCRC commenced a strategy intent on prevention, i.e. seeking to influence all relevant parts of the Criminal Justice System to avoid such wrongful convictions from occurring in the first instance. That action included:
 - (i) Liaison with the Crown Prosecution Service, proposing a proactive review of relevant conviction cases. In practice, the CPS limited this to a sample 'trawl' of 12 months' worth of cases from a single court centre.
 - (ii) Liaison with the Crown Prosecution Service, in respect of its Guidance on these types of cases.
 - (iii) Highlighting the issue to the Judicial College, for dissemination of information to the judiciary.
 - (iv) Provision of information, directly from the CCRC, to the Resident Judges at key Court Centres.
 - (v) Liaison with the Justices' Clerk Association, for dissemination of information within the magistrates' courts.

- (vi) Provision of information, directly from the CCRC, to the Legal Advisors at key magistrates' courts.
- (vii) Liaison with the Solicitors Regulation Authority, prompting a themed investigation by that organisation.
- (viii) Liaison with the Chartered Institute of Legal Executives and the Bar Standards Board, to highlight the problems in the quality of some legal advice in this area of law.
- (ix) CCRC-authored information articles published in the Law Society Gazette and Counsel magazine.
- (x) Multi-centred training events delivered for defence lawyers in key geographical areas, in partnership with the Crown Prosecution Service and Garden Court Chambers.
- (xi) Liaison for distribution of information on Prison and Probation intranets.
- (xii) Liaison with the relevant Chief Officer, via the Association of Chief Police Officers (as it was), for dissemination of information to police investigators.
- (xiii) Liaison with the relevant Directors General at the Home Office for distribution of information to border force investigators.
- (xiv) Highlighting the problem to the Equality and Human Rights Commission.

'Exceptional circumstances'

6. In most, if not all, of the applications to the CCRC in cases of this type, the applicants pleaded guilty to the offence after being incorrectly advised to do so; the vast majority made no attempt to appeal.. In the absence of an application for

appeal, or for leave to appeal, the CCRC is bound by statute (the Criminal Appeal Act 1995) to identify 'exceptional circumstances' which would justify making a reference of the conviction to the appeal court. This requirement is in addition to the CCRC finding a real possibility that the conviction would not be upheld.

7. The statute provides no definition for 'exceptional circumstances'. The CCRC, therefore, has its own policy and guidance on the topic, which is informed by relevant appeal court decisions from time to time.
8. In the type of case that is the subject of this paper, there came a point when the CCRC applied an assumption of exceptional circumstances to the cases on a 'common nexus' basis, i.e. if an applicant was convicted of this type of offence, the case was regarded as satisfying the exceptional circumstances test. We recognised that this approach would not have an 'indefinite shelf life'. Before the Court of Appeal issued its judgment in *R v Nori and YY* [2016] EWCA Crim 18, internal meetings had begun to review the position and the comments of the Court in *Nori* were not a surprise. It is also worth noting that, by the time the *Nori* judgment was published, the CCRC was already receiving far fewer applications of this type that it had in recent years.
9. An area of particular concern to the CCRC is that we should not cast adrift applicants (and potential applicants) in cases of this type. Before *Nori*, we had established a 'routine' approach to these cases, pulling together the necessary information in the knowledge of what types of information are required. This work generally required considerable and

diligent inquiry. After *Nori*, there was discussion with the CCRC about the degree to which the Criminal Appeal Office would do this. It was anticipated that the Office would be likely to appoint counsel to the case who would be expected to obtain the relevant information and prepare the case for appeal. The CCRC noted that a lack of appropriately expert solicitors in this context might be something that would cause difficulty, having regard to the level of liaison and communication that the CCRC finds necessary in these types of cases.

10. In the immediate 'wake' of *Nori*, the CCRC took a strategic approach to managing the applications that we had already received in relation to cases of this type. For instance, in respect of cases where the CCRC had not yet begun the case review, we created a specific bundle of what we believed would be relevant and helpful information to enable the applicant to pursue their own appeal.
11. It is important to note that the CCRC's post-*Nori* approach expressly recognised that, from then on, we needed to take account of any exceptional circumstances arising in individual cases. Where evidence suggests that this may not have happened, that is of serious concern, particularly in cases where the applicant was not legally represented, and the CCRC will now look again at those cases. We will also take steps to ensure consistency in our future approach to exceptional circumstances in such cases.
12. The CCRC instigated the research in question to better understand what has been happening in this area. It is of very real concern to us that it appears the majority of

applicants to the CCRC who were advised, and equipped, by us to make a direct application for leave from the Court of Appeal have not pursued that route. The CCRC is confident that it went beyond taking all reasonable steps to ensure that all applicants had the information they would need to apply for leave to appeal in this type of case. The three interviews carried out by the researchers provide some insight into the potential reasons why most have not done so. Consideration also needs to be given to the potential explanation(s) for why most individuals chose not to contact the researchers either. The CCRC will certainly take note of the issues and apply them in its future consideration of such cases and in particular of its consideration of exceptional circumstances.

13. Later in 2018, the Court of Appeal will commence a pilot of an EasyRead style Notice of Grounds ('NG') form. The CCRC will, of course, be interested in the impact of that in this type of case and across all unrepresented cases.

'Substantial injustice'

14. It is worth noting that, in addition to *Nori*, the CCRC does not underestimate the impact of *R v Ordu* [2017] EWCA Crim 4, in convictions secured in the Crown Court before *R v Asfaw* [2008] 1 AC 1061. In these cases, the applicant/appellant will – in addition to satisfying the other legal tests – need to show 'substantial injustice'. The CCRC is very aware of the inequity between individuals who happen to have been convicted at the Crown Court and those convicted in the magistrates court, i.e. that those

convicted at the magistrates' court do not face this additional hurdle.