Liberty’s response to the Office for Criminal Justice Reform:

“Quashing Convictions”

December 2006
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Liberty (The National Council for Civil Liberties) is one of the UK’s leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty’s policy papers are available at

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Introduction

1. In the paper “Quashing Convictions” the Government states that it has decided that it wants to change the law so that the Court of Appeal (Criminal Division) can never quash a criminal conviction where it is satisfied that the appellant committed the offence. The Government does not seek views on the underlying policy decision, which it treats as a foregone conclusion - beyond question. The paper instead asks for views on technical questions about how this policy could best be achieved. We do not respond to these technical questions as we disagree with the policy decision taken by the Government. This short document explains why we believe the Government should abandon its current policy position.

2. It is argued that this policy is a necessary part of the Government’s commitment to “rebalancing the Criminal Justice System in favour of the victim and the law-abiding majority.”¹ While no doubt powerful political rhetoric, such platitudes do not in Liberty’s view provide a satisfactory foundation on which to reform the criminal justice system. The “imbalance” and public concern that the Government claims it is addressing appears, on closer inspection, to be nothing more than a mirage. Furthermore, as our consideration of the Government’s position on quashing convictions demonstrates, in reality policies advertised as part of this “rebalancing” exercise often result in serious damage to important constitutional principles, a lack of accountability where public powers are seriously abused and doubtful overall public benefits.

Preliminary Issues

3. We consider below the substantive arguments against the Government’s policy position on quashing convictions. Before turning to these, however, we consider how this issue has been presented in the paper and in the political comments which accompanied its publications. We fear that the way in which this issue has been dressed-up could all

¹ Foreword by the Home Secretary
too easily distort the decision about whether or not the proposed change in the law is appropriate.

**A Sense of Perspective**

4. On reading the consultation paper and the political statements which accompanied its publication, one could easily get the impression that this is an issue which affects many cases each year; that hundreds of people are escaping justice on the basis of minor technicalities. In reality this is far from true. While this consultation no doubt raises important constitutional issues (discussed below), it would affect not more than a handful of cases. The majority of convictions that are quashed on appeal do not involve cases in which the Court of Appeal is satisfied as to the appellant’s guilt. This law change, while risking serious damage to the integrity of the Criminal Justice System (the “CJS”) and important constitutional principles, would, in reality, be merely tinkering at the edges in terms of the Government’s aims of rebalancing the CJS “in favour of the victim and the law-abiding majority”.

5. Even in the small number of cases which are in question here, the Court of Appeal will frequently order a retrial. The Court already does this where the interests of justice require. Where a retrial is ordered, the Government’s primary arguments in favour of prohibiting the Court quashing the conviction in the first place fall away. If found guilty at the retrial, the person concerned would not evade punishment and justice would not be denied to the victim and the public. The Government’s current proposals would prevent a conviction being quashed where there has been serious abuse of process even where, once quashed, the Court of Appeal would currently order a retrial. We accept that, in some cases, a retrial might not be possible or could be stressful or burdensome for witnesses. We do not, however, consider that these factors outweigh the public interest in quashing a conviction and ordering a retrial where this is necessary to maintain the

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22 The Partial Regulatory Impact Assessment itself states that the potential number of individual convictions affected “will be very small, probably fewer than 20 each year” (para 44)
3 The consultation paper states that this happens in a third of cases
4 Section 7 of the Criminal Appeal Act 1968
integrity of the criminal justice system and to punish serious abuse of process or illegality on the part of the prosecution or police.

**Minor Technicalities or Serious Failings**

6. It is suggested that the convictions are being quashed, where the court is satisfied as to the defendant’s guilt, on the basis of minor procedural errors. In reality, those cases in which this power to quash convictions is used involve very serious failings either before or at trial, serious illegality on the part of the prosecution or police. The kinds of cases in which this power is used are a far cry from minor technicalities. This is illustrated by a consideration of the cases referred to in the paper:

- **R v. Mullen:** Mullen was tried in 1990 and convicted of conspiracy to cause explosions. In order to face trial in the UK he had to be returned from Zimbabwe, where he had moved with his family. The UK authorities chose not to seek his lawful extradition from Zimbabwe to the UK as this would give Mullen the chance to seek legal advice and to challenge his deportation in the Zimbabwean courts or to seek to be transferred to Ireland instead of the UK. Rather than running the risk and delays that would be associated with a legal challenge, the S.I.S encouraged the Zimbabwean authorities unlawfully to render Mullen to the UK, with no legal process. The UK colluded in the deportation being effected in such a way as to deny him access to a lawyer and had, thereby, acted in breach of both Zimbabwean and public international law. As the Court stated, the State’s actions were “so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed.” Had the trial judge been aware of the circumstances of the appellant’s return to the UK he would have stayed the proceedings as an abuse of process. This was not possible as the truth of the means by which Mullen was transferred to the UK was not disclosed to the defence until after conviction.

- **R. v Smith:** At the trial, the prosecution failed to adduce enough credible evidence which, if believed and uncontradicted, would suffice to prove the case against

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5 [2000] Q.B. 520  
6 [1999] 2 Cr. App. R. 238
Smith. The defendant was therefore entitled to be acquitted on the basis that there was no case for the defendant to answer. Despite a submission to this effect by the defendant, the trial judge failed to throw the case out. The obligation to throw a case out in such a case is, of course, vital to fundamental principles of justice such as the presumption of innocence, the idea that the prosecution bears the burden of establishing guilt, and the right against self-incrimination. During his cross-examination, which he should never have been subjected to, Smith admitted guilt.

7. It is instructive that many of those cases, cited in the paper as evidence of the Court of Appeal quashing convictions where guilt is not in question, did not in reality result in a conviction being quashed. In *R v. Togher*, for example, the Court of Appeal refused to quash a conviction even though it was based on a guilty plea which the defendants stated they would not have made had the prosecution complied with the obligation to disclose information to the defence. The defendants stated that, if this evidence had been disclosed, they would have contested their guilt and avoided conviction. The Court stated that “the shortcomings on the part of the prosecution are not of the category of misconduct which would justify interfering with the defendant’s freely entered pleas of guilty.” The Court described the case law on its ability to quash convictions in these kinds of cases as “closely confined”:

“The reason for this is that in the majority of improprieties in connection with bringing proceedings can be satisfactorily dealt with by the Court exercising its power of control over the proceedings. It has to be a situation where it would be inconsistent with the administration of justice to allow the pleas of guilty to stand.”

We understand that the trend of the Court of Appeal has in fact been to move away from allowing appeals based on irregularities of the trial process in cases where there has been extremely strong evidence of guilt.

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7 *R v Galbraith* [1981] 2 All ER 1060, 73 Cr App Rep 124, CA
8 [2001] 1 Cr. App. R. 33
9 Ibid, para 59
10 Ibid, para 33
11 Consultation response by the CCRC
8. The Court of Appeal has decided that section 2 of the Criminal Appeal Act 1968, as amended by the Criminal Appeal Act 1995, allows it to quash convictions, in some narrow circumstances, even where it is satisfied as to the defendant’s guilt. The consultation paper suggests that this is a development which was not intended by Parliament. The paper thereby implies that the Government’s policy position would not represent a change of approach by the elected limbs of government but rather a response to unacceptable judicial activism. In reality, the current law would be more accurately described as a long-established legal position, the continuation of which was clearly intended by Parliament when it changed the wording of section 2 in 1995.

9. Before its amendment by the Criminal Appeal Act 1995, a long string of case law had established that section 2 of the Criminal Appeal Act 1968 allowed the Court of Appeal, in certain limited circumstances, to quash a conviction even where the appellant was guilty of the offence of which s/he was convicted. The reason for the change of law in 1995 was not dissatisfaction with the approach taken by the courts to this question but rather clarification of the wording of section 2 of the 1968 Act. At the second reading of the 1995 Bill, for example, the then Home Secretary, Michael Howard, stated that the new test “clarifies the terms of the existing law” and “restates the existing practice of the Court of Appeal.” In subsequent cases, the Court of Appeal has acknowledged that the

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12 This provided that provided that an appeal should be allowed if (a) the conviction was unsafe or unsatisfactory, (b) a wrong decision had been made on any question of law, or (c) there was a material irregularity in the course of the trial, subject to the proviso that the Court could dismiss an appeal if it was satisfied that no miscarriage of justice had occurred.
13 Some of this case law is set out in the Court of Appeal’s decision in *R v. Mullen* [2000] QB 520. Indeed, the statutory provisions themselves clarified that a decision could be quashed where the conviction was “unsatisfactory” (even if not “unsafe”).
14 The Royal Commission on Criminal Justice considered the section in its report published in 1993 (CM 2263, 1993). It concluded that the Court of Appeal seldom distinguished between “unsafe” and “unsatisfactory”, that there was considerable overlap between the three paragraphs and that the proviso was arguably redundant. The majority recommended replacing the test with a simple test, whether the conviction “is or may be unsafe.”
15 HC Debates 6th March 1995, col. 24
16 Despite an initial divergence of opinion in *Chalkley* [1998] 2 Cr.App.R 79

\textbf{A Loss of Faith in the Criminal Justice System}

10. Liberty does not dispute the importance of maintaining public faith in the CJS. We have, for example, supported the thrust of Government policies designed to tackle demonstrable and justified public concerns about confusing sentencing practices.\footnote{See Liberty’s response to the Home Office consultation \textit{Making Sentencing Simpler}} The paper states that these proposed reforms are also necessary to prevent judicial outcomes which “are damaging to public confidence in the criminal justice system”.\footnote{Foreword} In this context we are not convinced that a change of law is needed to maintain public confidence. No evidence is provided to support the suggestion that the current legal position has, in fact, given rise to a loss of public faith. Indeed, the current state of the law on quashing convictions does not seem to have prevented a rise in public confidence in the CJS, reported in a recent DCA publication (\textit{Delivering Simple, Speedy, Summary Justice}).\footnote{July 2006, para 1.11} One suspects that if there were a loss of faith in the CJS, connected to the law on quashing convictions, the real cause of this would be the political spin surrounding this latest policy, rather than pre-existing public perceptions. As we explain below the current power for the courts to quash decisions where there has been a very serious abuse of process during or prior to trial is, in the long term, vital to maintaining confidence in the integrity of the CJS.

\textbf{Substantive Arguments}

11. Leaving aside the rhetoric, the Government’s policy position boils down to the following substantive argument:

“to quash a conviction where there is strong evidence of guilt, without ordering a retrial, will bring the criminal justice system into disrepute, rather than protect its
integrity. According to that argument it is wrong to punish the public and deny justice to the victim in this way; if the system or those who operate it are at fault it is they and not the public which should be punished or required to learn lessons.”21

It is for this reason that the Government believes that the courts should not have the power to quash convictions where it is satisfied that the appellant committed the offence. In the remainder of this response, we set out the substantive reasons why we do not agree with this position. Some of our counter-arguments are based on points of principle, others on practical considerations.

**The Case for Retaining Judicial Discretion**

12. The issue at stake in this consultation is not as black and white as the Government would like to suggest. As we discuss below there are compelling reasons why, in some exceptional cases, it would be appropriate for the Court of Appeal to quash a conviction even when there is clear evidence of guilt. A blanket statutory prohibition on quashing convictions in such cases would only be acceptable if justice were no more than a question of determining the guilt of the appellant. We do not agree with this oversimplistic assertion. In a case such as *Mullen*, for example, we believe that justice required the conviction to be quashed, even though the Court did not doubt Mullen’s guilt. Liberty does not, however, take the opposite extreme position that the guilt of the appellant is irrelevant to justice and that justice is purely a question of procedural propriety and ensuring that those in power comply with the law. As the Court of Appeal has stated in *Randall* “[i]t would emasculate the trial process, and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice.”22 For this reason we would not support a statutory formulation which meant that any procedural error or illegality by the State led to the conviction being quashed.

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21 Para 26
13. Rather than legislation which takes an absolutist position on either side, we believe this to be an area where the only sensible way to proceed is to trust the Court of Appeal to make sensible decisions on a case by case basis. Such decisions will no doubt be difficult, often requiring the Court to balance conflicting and important interests: protection of the rule of law, justice for the appellant and also, importantly, justice for victims and society as a whole. No doubt there will be cases where the Government and/or Liberty would have reached a different decision to the Court of Appeal. It is, however, only the courts that have the independence and impartiality, and which are in the position to perform, the necessary balancing act on a case by case basis.

14. The current test under section 2 has the benefits both of simplicity and flexibility. As the Court’s approach in practice demonstrates, section 2 enables it to apply the safety test in the light of its overall sense of justice and not on the basis of technicalities. For example, it rightly permits the Court of Appeal to allow convictions to stand where there has been an irregularity that clearly would not have affected a jury’s decision. While we may take issue with individual decisions of the Court of Appeal and the way that certain lines of case law have developed, the framework, section 2, is sound. It does not in our view need amending.

*The Integrity of the CJS and Constitutional Principles*

15. In those rare cases where the Court of Appeal has quashed a conviction, notwithstanding clear evidence of guilt, it has cited a range of compelling reasons why it could not allow the conviction to stand. A consideration of the reasons cited in individual cases demonstrates the responsible and thoughtful manner in which the Court has approached the difficult balance required by section 2 of the 1968 Act. The factors cited explain why, even where there is clear evidence of guilt, it will sometimes be appropriate to quash a conviction.

16. The Court of Appeal’s explanation of how it reached the decision to quash the conviction in *Mullen* warrants lengthy citation:
“The court recognises the immense degree of public revulsion which has, quite properly, attached to the activities of … the I.R.A. and other terrorist organisations … Against that, however, the conduct of the security services and police in procuring the unlawful deportation of the defendant in the manner which has been described represents, in the view of this court, a blatant and extremely serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts. The need to discourage such conduct on the part of those who are responsible for criminal prosecutions is a matter of public policy to which … very considerable weight must be attached … Additionally, the need to encourage the voluntary disclosure before trial of material and information in the hands of the prosecution relevant to the defence is a further matter of public policy to which it is also necessary to attach great weight … In these circumstances, we have no doubt that the discretionary balance comes down decisively against the prosecution of this offence. This trial was preceded by an abuse of process which, had it come to light at the time, as it would have done had the prosecution made proper voluntary disclosure, would properly have justified the proceedings then being stayed.”

It is clear that in Mullen many factors stacked up against the public interest in rejecting the appeal and allowing the conviction to stand (maintaining the rule of law, discouraging seriously unlawful activity by agents of the state and encouraging full disclosure by the prosecution). The Court explained that the abuse which enabled the trial to take place meant that it was “offensive to justice and propriety to try the defendant at all”. Accordingly, and in our view rightly, the Court considered that “in the highly unusual circumstances of that case, the conviction was unsafe as it was unlawful, resulting as it did from a trial which should never have taken place.”

17. In reality, the current proposals have misunderstood and/or downplayed the wider constitutional role of the Court of Appeal in appeals against criminal convictions. In the case of R v. Hickey, Roch LJ explained the proper role of the Court as follows:

24 Ibid, 537
25 Ibid, 540
“This Court is not concerned with guilt or innocence of the appellants; but only with the safety of their convictions. This may, at first sight, appear an unsatisfactory state of affairs, until it is remembered that the integrity of the criminal process is the most important consideration for the courts which have to hear appeals against conviction. Both the innocent and the guilty are entitled to fair trials. If the trial process is not fair; if it is distorted by deceit or by material breaches of the rules of evidence or procedure, then the liberties of all are threatened.”

The current proposals would restrict the Court’s power to ensure the integrity of the criminal process and, in some cases, to ensure that the defendant has received a fair trial. We also fear that it would undermine the moral standing of the Court of Appeal if it allowed a conviction to stand which resulted from serious illegality or a serious breach of procedural safeguards by another limb of the State.

18. Rose LJ explained that the decision to quash the conviction in *Mullen* “arises from the court’s need to exercise control over executive involvement in the whole prosecution process”. The courts play an important constitutional role in checking abuses of power and illegality by the Executive. Dicey identified equality before the law as a key element of the rule of law and described this as meaning that: “With us, every official, from the Prime Minister down to a Constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen”. Those who enforce the law should also obey the law and should not benefit from breaches of it. It would be contradictory for the state to take advantage of a breach of the law which it itself has committed. The proposed change in the law would disturb the existing separation of powers by restricting the power for the Court to check serious illegality and abuse of process by the Executive in cases such as *Mullen*. While it is clear why the Executive would prefer the courts not to have this power, Liberty would expect both

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26 CA, July 30, 1997
27 Ibid, 537
Parliaments and the courts to resist any attempts to remove this important constitutional check on the Executive.

19. These broader constitutional roles for the judiciary are a feature of democracies around the world. In many contexts the US Supreme Court, for example, takes a more robust position than the UK courts on the question of how illegality and abuse of process by prosecution and the police should be dealt with. It has, for example, held that evidence obtained in breach of constitutional safeguards is inadmissible. Mr Justice Clark’s explanation of the reason for this exclusionary principle in US law provides a powerful reminder of the constitutional responsibilities borne by the courts which will, inevitably in some cases, outweigh the public interest in convicting the guilty:

“There are those who say … that under our constitutional exclusionary principle doctrine ‘[t]he criminal is to go free because the constable has blundered’… In some cases this will undoubtedly be the result. But … ‘there is another consideration – the principle of judicial integrity’… The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly that its failure to observe its own laws, or worse. Its disregard of the charter of its own existence … ‘Our Government is the potent, the omnipotent teacher. For good or ill, it teaches the whole people by its example … If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy’ … The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest.”

20. The Government’s response to such arguments is that the Court should not punish victims of crime and the public in general by quashing the conviction of a person who the Court itself believes to be guilty. We consider that it is wrong to blame the Court of Appeal, and the current state of the law, when a guilty person goes free in a case such as Mullen. The blame for this outcome would, more fairly, be ascribed to the state body

29 367 U.S. 643 (1961)
responsible for the serious illegality or procedural impropriety that resulted in the Court quashing the decision. Using legal deportation means to bring Mullen before the courts may have caused delays for the S.I.S. It would, however, have shown respect for the rule of law and public international law. Furthermore, there is no reason to suspect that, had the police and S.I.S complied with the law, Mullen would not have been justly convicted of the offences he committed. The reason the State colluded in the unlawful rendition of Mullen was to prosecute him for the offence. If the resulting conviction were allowed to stand this would implicitly vindicate the methods used to bring Mullen before the courts.

Determining Guilt – a Role for the Court of Appeal?

21. In our legal system the determination of guilt or innocence is not a question for judges sitting in the Court of Appeal (Criminal Division) but for the first instance court and the jury.\(^{30}\) This is still the case, notwithstanding attempts to remove juries from some categories of case, most recently serious fraud trials. The paper acknowledges this, stating “the Court of Appeal are not in the same position as the jury and may not always be able to form a view on whether the appellant has committed the offence.”\(^{31}\) The paper goes on to state that the law change would only apply where the Court of Appeal has formed a view of guilt or innocence, suggesting that the Court would not be required to determine guilt any more than at present. This is unrealistic. If the power of the Court of Appeal to quash convictions were expressly restricted by reference to the Court’s determination of guilt or innocence, the Court would be required to make such determinations in many more cases than at present. This would represent a fundamental change of the Court of Appeal’s role and the usurpation of the role of judiciary in determining guilt. It could also have an unfortunate practical result. If the Court of Appeal more frequently determined that a finding of guilt at first instance was incorrect, public faith in first instance trials and the ability of the jury to decide guilt would inevitably be undermined. The result would be more appeals against convictions and lower public confidence in the CJS.

\(^{30}\) Cf R v Hickey 1997
\(^{31}\) P.4
22. In many of the cases that are targeted by these proposals the issue in question was whether the prosecution was an abuse of process. In *Mullen*, for example, the trial judge would have stayed the proceedings as an abuse of process had he been aware of the circumstances of Mullen’s unlawful rendition. As Rose LJ explained in the Court of Appeal, this was clearly a case where a stay of proceedings would have been called for because the state’s actions were “so unworthy or shameful that it was an affront to the public conscience to allow the prosecution to proceed.” If, as the majority of the Royal Commission considered, it is illogical for the Court of Appeal to exercise powers in respect of deficiencies in a prosecution that are not available to the trial judge, it is equally illogical to deny the Court powers to address an abuse of process that are available to the judge at first instance. We are concerned that, once the Court of Appeal’s power to quash a conviction outright where there has been serious malpractice on the part of state authorities is removed, the next step will be to take that power away from the courts of first instance. The power to stay proceedings as an abuse of process is an important constitutional safeguard which should not be restricted or removed.

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32 Lord Steyn in *R v Latif* [1996] 1 W.L.R. 104