



Neutral Citation Number: [2019] EWHC 183 (Admin)

Case No: CO/1154/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2019

Before:

LADY JUSTICE NICOLA DAVIES DBE
MR JUSTICE NICOL

Between:

THE QUEEN on the application of MICHAEL GEORGE LYONS	<u>Claimant</u>
- and -	
CRIMINAL CASES REVIEW COMMISSION	<u>Defendant</u>

Edward Fitzgerald QC and Arthur Blake (instructed by Somers & Blake) for the Claimant
Sam Karim QC and Ben Williams (instructed by Criminal Cases Review Commission) for
the Defendant

Hearing date: 15 January 2018

Approved Judgment

Lady Justice Nicola Davies DBE:

1. In judicial review proceedings the claimant seeks to challenge the decision of the Criminal Cases Review Commission (“CCRC”) made on 5 December 2017 to refuse to make a reference in respect of two convictions of the claimant to the Court of Appeal Criminal Division pursuant to section 9 of the Criminal Appeal Act 1995 (“the 1995 Act”). On 23 July 2010 the claimant was convicted at the Wood Green Crown Court of the rape of a woman, CP, on 30 June 2002 and the sexual assault by digital penetration of a woman, TOR, on 31 January 2005. He was sentenced to a total term of ten years’ imprisonment.

The legal framework

2. Pursuant to sections 9 to 12 of the 1995 Act, where a person has been convicted on indictment or by a Magistrates’ Court in England and Wales or Northern Ireland the CCRC may at any time refer the resulting conviction, verdict, finding or sentence to the Court of Appeal, Crown Court or County Court as appropriate.
3. The conditions for the making of such a reference are identified in section 13 of the 1995 Act:

“13. Conditions for making of references.

- (1) A reference of a conviction ... shall not be made under any of sections 9 to 12B unless—
 - (a) the Commission consider that there is a real possibility that the conviction ... would not be upheld were the reference to be made,
 - (b) the Commission so consider—
 - (i) in the case of a conviction ... because of an argument ... not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it...”
4. The approach which the CCRC must adopt to such references is set out in *R v Criminal Cases Review Commission ex parte Pearson* [1999] 3 All ER 498, [2000] 1 Cr App R 141 at page 149D-E in the judgment of Lord Bingham CJ:

“Thus the Commission's power to refer under section 9 is exercisable only if it considers that if the reference were made there would be a real possibility that the conviction would not be upheld by the Court of Appeal. The exercise of the power to refer accordingly depends on the judgment of the Commission, and it cannot be too strongly emphasised that this is a judgment entrusted to the Commission and to no one else. Save in exceptional circumstances, the judgment must be made by the Commission, in a conviction case, on the ground of an argument or evidence which has not been before the Court

before, whether at trial, on application for leave to appeal or on appeal. In the absence of such exceptional circumstances, the Commission cannot therefore invite the Court to review issues or evidence upon which there has already been a ruling. Resort to the Commission must ordinarily follow and not precede resort to the Court of Appeal.”

The “real possibility” test is explained at pages 149F-150A:

“The ‘real possibility’ test prescribed in section 13(1)(a) of the 1995 Act as the threshold which the Commission must judge to be crossed before a conviction may be referred to the Court of Appeal is imprecise but plainly denotes a contingency which, in the Commission's judgment, is more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty. The Commission must judge that there is at least a reasonable prospect of a conviction, if referred, not being upheld. The threshold test 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 burdened with a mass of hopeless appeals; if, on the other hand, the Commission were not to refer any case unless it judged the applicant's prospect of success on appeal to be assured, the cases of some deserving applicants would not be referred to the Court and the beneficial object which the Commission was established to achieve would be to that extent defeated. The Commission is entrusted with the power and the duty to judge which cases cross the threshold and which do not.”

5. In *R (Charles) v Criminal Cases Review Commission* [2017] EWHC 1219 (Admin) Gross LJ provided further clarification of the role to be performed by the CCRC:

“65. The question is not straightforward. First, as already seen, the exercise of the power to refer, including its predictive element, is a matter for the judgment of the CCRC, not the Court – and is not to be usurped by the Court. Secondly, the CCRC has a discretion not to refer, even when the threshold conditions are satisfied. Thirdly, in many cases (perhaps most but I do not know) the issue for the CCRC will not give rise to ‘bright-line’ decisions on substantive criminal law at all; for instance, cases where a reference is sought on grounds of fresh evidence or an alleged failure to give proper disclosure. Fourthly, questions of some awkwardness could arise as to the role of this Court and that of the CACD were this Court purportedly to decide unsettled issues of substantive criminal law definitively for itself. All of this points towards the Court being slow to intervene where the CCRC has taken a tenable and not irrational view, whatever the Court's own view might be. That said, I would be unwilling to say that there could not

be cases where the CCRC's decision was vitiated by an error of substantive law – though it may well be that in such a case the matter could simply be disposed of by the conclusion (*ex hypothesi* readily arrived at) that the CCRC's decision was not tenable.”

6. From the above it can be seen that the Divisional Court will be slow to intervene unless the claimant can identify some clear error of law within the decision challenged. It is not for this court to fall into the trap identified by Lord Woolf CJ in *Mills and Poole v Criminal Cases Review Commission* [2001] EWHC 1153 (Admin), namely:

“14. ... It is important that this court does not fall into the trap of forming a view as to how the Court of Appeal would react and then concluding that this is what the Commission should necessarily have concluded, since this would be to usurp the Commission’s function. Decisions of the Commission cannot be quashed merely because a court on a judicial review might have or indeed would have come to a different view of the significance of the material or the prospects of success.”

The factual background

7. CP complained to the police on 1 July 2002. She stated that she had attended the claimant’s flat with a number of other women. CP had consented to the claimant administering a massage and acupuncture, however during the course of the “treatment” he removed her underwear and had sexual intercourse with her. No allegation of force or violence was made but CP alleged she had protested and that the sexual intercourse was non-consensual. On 1 July 2002 she was examined by Dr Gray, a forensic medical examiner, who made a contemporaneous note of her examination but did not make a written statement. In her note Dr Gray recorded that she observed redness inside CP’s vagina but no clear evidence of rape. The claimant was arrested on 2 July 2002 and was interviewed by the police. The possessions and clothing of the claimant were subjected to forensic testing, negative results were obtained. The decision was taken by the police not to charge the claimant.
8. TOR alleged that digital penetration of her vagina had occurred during a consensual treatment session on 31 January 2005. The claimant was touching her legs, standing between them, he brushed his hands on the outside of her underwear and very smoothly placed his fingers in TOR’s vagina. Asked what he was doing, he said he was feeling her energy pulse. She told him to stop and he did. At the time she made no complaint of sexual assault. On 3 February 2005 TOR described what had occurred to her therapist.
9. A number of other women also made allegations of rape and sexual assault by the claimant. In 2009 a criminal trial was held in which a number of female complainants, which included CP and TOR, alleged that the claimant had committed sexual offences against them between 1998 and 2008. The jury was unable to reach verdicts at the conclusion of the trial, as a result a retrial was held.

10. The claimant's case was that he was a healer and teacher of Buddhism who had become the victim of a vindictive internet campaign. The complainants were cross-examined upon the basis that the claimant had spent time with them, given them therapeutic treatments, but there had not been sexual contact of any kind with them. The claimant did not give evidence at his retrial. He called about 50 witnesses, some of whom gave evidence directly relevant to the circumstances of the alleged offences, some testified to his good character and therapeutic abilities. The jury returned guilty verdicts in respect of the rape of CP and the sexual assault of TOR. Of the remaining counts, the claimant was acquitted or the jury were unable to agree upon a verdict.
11. The claimant applied for leave to appeal against both conviction and sentence. Following refusal by the single judge he renewed his applications and in respect of conviction presented four submissions to the Court of Appeal, namely that:
 - The judge misdirected the jury on the issue of consent;
 - The judge should not have allowed the prosecution to adduce bad character evidence;
 - The judge misdirected the jury on the issue of the bad character evidence;
 - The judge unduly inhibited the defence from developing the "internet campaign" aspect of the claimant's case.

On 2 March 2012 the Court of Appeal refused the renewed applications – see [2012] EWCA Crim 659.

12. Subsequent to the appellate procedure the claimant applied to the CCRC for a review of the two convictions. He did so upon a number of grounds, not all of which are pursued in these proceedings. The relevant submissions made on behalf of the claimant were summarised by the CCRC as follows:

“CP: The forensic evidence, when properly and fully understood, is more strongly suggestive that CP's symptoms were indicative of thrush, which is not sexually transmitted, than was presented to the jury.”

“TOR: New information about TOR's history and personality presents a picture of her that is significantly different to the picture that was presented to the jury. This new information undermines the credibility of certain aspects of TOR's evidence.”

CP: the forensic evidence

13. The forensic evidence was that of Dr Wendy Gray, who had examined CP on 1 July 2002 at the request of the police. In respect of the genitalia Dr Gray noted that the vulva was generally tender, there was intense redness and irregularity of the surface of the left side of the vestibule and the fossa navicularis. No secretion was present in the vagina. At the time of the examination Dr Gray made her notes and drawings on the forensic medical examination template (“FME”). On 1 September 2009 she made a

witness statement which was based on the contents of the FME. At the first trial Dr Gray's evidence as contained in her witness statement was read. At the retrial Dr Gray was called by the prosecution to give evidence.

14. At the first trial CP stated in evidence that following Dr Gray's examination she had been told by the police to go to an STD clinic for further tests. CP said that she had a "very, very, very bad case of thrush". Not in evidence at the first trial but contained within the medical records are the facts that on 2 July 2002 CP attended the Sexual Health Department Clinic at University College Hospital, Mortimer Market Centre, where she was examined by a doctor. Laboratory tests instigated by the doctor confirmed a diagnosis of thrush. The doctor who examined CP also noted bruising in the area of the vagina. The doctor was not available to give evidence at the retrial.
15. At the retrial Dr Gray gave evidence as to her findings at the time of the FME. She was asked about her examination of the genital area, in particular the intense redness and irregularity on the left side of the vestibule. Her evidence included the following:

"A. First of all what I do is examine the outer genital area which is called the vulva, there was general tenderness, there was an area of intense redness and also the surface was irregular, that was on the left side of the vestibule so this is the area within the labia...

A. ... tenderness is something that is difficult to assess so by itself I would not place any particular relevance on that in a forensic context...

Q. ...Can you explain to us please about the tenderness?

A. This is something that the patient tells you. As far as the examination findings what I saw when I examined this patient was intense redness and also irregular surface which in the areas of those two findings coincided, they were in the same area so on the left side and also behind the vaginal opening.

...redness can have many, many causes, it can be associated with rubbing or scratching, it can be associated with irritation such as due to bubble baths, due to tight clothing – due to infection and also it can be due to trauma. In this case the irregular surface in the same area indicates that there was some superficial damage of what we call the mucosa, it is like the skin but it does not have the same protective layer on the external aspect so my feeling was that this was due to some sort of rubbing or trauma though how it was caused it is not possible to be more specific than that.

Q. So in this case it is not possible to be more specific, what about sexual intercourse or penetration by a finger or something like that?

A. Certainly I mean it has been well documented in the medical literature and in my forensic and clinical experience that sexual intercourse both consensual and non-consensual produces redness and contact or rubbing with a finger or indeed any object can produce similar findings and it is not possible to distinguish what caused it. Typically with sexual intercourse the redness is located in the area behind the vagina, if there is redness or trauma that is where it is usually found.

Q. And it was there in this case?

A. It was non-symmetrical in that it was only confined to the left side.

Q. Is there any significance of that?

A. Well I think if you have a medical condition relating to redness, irritation it will tend to be generalised so you will see it on both sides and this was, you know – I have described this as intense redness so it was a very obvious finding.”

16. In cross-examination Dr Gray accepted that she could not age the redness. Her evidence included the following:

“Q. ...I think you said ... ‘redness can have many causes, it can be associated with rubbing, scratching, irritation due to bubble bath or something like that, tight clothing, trauma’. Is that correct?

A. Yes that is right.

Q. And you were asked specifically in relation to what you saw and you said how it was caused is simply not possible to say?

A. That is correct.

Q. ...could sexual intercourse have caused it and you said yes it could?

A. And I think to clarify it, it would not necessarily need to be penetration of the vagina it could be just attempted penetration.

Q. It could be penetration, it could be attempted penetration, it could be rubbing with a finger?

A. Yes.

Q. Or attempted penetration of the finger?

A. Yes.

Q. Or it could be any of the other causes that you described which I read out to you a few minutes ago?

A. Yes.”

17. Defence counsel concluded his cross-examination but Dr Gray then volunteered the following:

“...I think my last answer might have been misleading because I have only been asked about the redness and the findings were not only redness but also irregularities which in my opinion was due to very superficial damage of the same area and as I said before this was not generalised it was localised just to the left side and behind the vagina and for that reason my opinion is this is most likely due to trauma, albeit very minor rather than due to irritation which would be more likely to cause generalised redness.”

As a result, defence counsel asked further questions:

“Q. ...The point you made is that if somebody is suffering from a medical condition then it tends to be generalised ... is that right?

A. That is correct.

Q. And so what you are saying is that what you saw was not generalised, it was localised?

A. Yes.

Q. And therefore if the general proposition is accepted then the infection caused redness hence it was a generalised but this is not what you saw?

A. That is correct.

Q. ...as a general proposition you say a medical condition tends to be generalised, yes?

A. It depends on the medical condition, if you are talking about skin and vulval conditions there is a variety, some are generalised, some are localised, it depends on what the pathology is.

Q. And so when you said if you have a medical condition it tends to be generalised that must be viewed in that context?

A. I think my wording was if it is irritation due to a medical condition that would be generalised.

Q. ...in terms of what you said about it was not possible to say how it was caused – a variety of things could cause it and we went through those?

A. My opinion is this is due to superficial damage due to rubbing or other minor trauma.”

Dr Gray would not accept that the rubbing had been caused by tight jeans and stated:

“A. I would very rarely exclude something 100 percent but I think that trauma by localised rubbing would be the most likely cause and I do not think that rubbing by clothing was likely.”

18. In re-examination Dr Gray said that she would have asked CP questions about current or recent symptoms such as “itching, discharge, dryness, soreness”. She did not record CP’s answer but had written “no” in her notes.
19. By the time of the retrial the claimant’s legal team knew of CP’s previous evidence of thrush and were in possession of the microbiology report from UCH which identified the presence of thrush. Unsurprisingly, they instructed their own medical expert, Professor Payne-James. At the trial a discussion took place between prosecution, defence counsel and the judge as to whether defence counsel could question CP as to the existence of thrush. The judge had previously acceded to a defence application to exclude the findings of the doctor at UCH because they included a finding of bruising in the vaginal area. In the discussion as to what questions could be asked the judge informed defence counsel that he would not prevent him from raising the topic of thrush in cross-examination of Dr Gray “in order to explain away redness and other injuries which are depicted in the body diagram of the complainant”. The judge stated that, if defence counsel took that course, it opened up re-examination by the prosecution and concluded that it was a “matter for strategy and tactical approach” by defence counsel.
20. In the event, defence counsel elected not to question the complainant or Dr Gray about the presence of thrush. Subsequent to the claimant’s retrial and conviction the defence instructed another medical expert, Dr Soliman, a senior gynaecologist with a special interest in the management of female lower genital tract diseases. The report of Dr Soliman was included in the documentation sent to the CCRC, its contents being relied upon as part of the claimant’s application. In particular reliance was placed on the opinion of Dr Soliman when she stated:

“Regarding the evidence given by Dr. Gray in respect of the redness observed in the vagina of CP. I have in particular considered Dr. Gray’s evidence that in her opinion the redness was not borne out of a ‘medical condition’ because it was seen, on the occasion of 1st July 2002, on one side of the vagina. This statement is wrong and is misleading. Any redness due to a medical condition that affects the surface of the skin or mucosa normally starts on one side and then spreads.”

Dr Soliman concluded her report as follows:

“With regards to my instructions and based on the materials that I have so far been supplied with, I am of the following opinion:

- (1) The localised genital redness and soreness described by Dr. Gray and later the subject matter of investigation by Dr. Sarmadjeva are wholly consistent and diagnostic of a thrush infection being present in [CP]’s genitalia.
- (2) That the evidence given by Dr. Gray at trial to the effect that it was her opinion the redness was not borne out of a ‘medical condition’ because on the occasion of its being viewed it was one sided, is both wrong and misleading.
- (3) Any redness due to a medical condition that affects the surface of the skin or mucosa normally starts on one side and then spreads.

The description contained in the notes of Dr. Sarmadjeva of 2nd July 2002 accompanied by the information provided to her, are wholly in keeping with thrush. Further it is self-evident that the microscopy tests performed on that day revealed that [CP] had a picture of full blown thrush on 2nd July 2002.”

21. The submissions now made by the claimant are:
 - i) Dr Gray failed to include in her evidence the crucial fact of the pathology finding of thrush and any contribution it could have made to the presence of redness in the vaginal area. By reason of this, her methodology was flawed;
 - ii) It is the opinion of Dr Soliman that the evidence given by Dr Gray was misleading because it omitted the pathological finding and its relevance as a causative factor of the redress;
 - iii) The CCRC did not confront Dr Soliman’s criticism of the flawed methodology and thus their decision is unfair and/or unreasonable in that it failed to have regard to a relevant factor or failed in its reasons to address a key point.
22. It is the defendant’s case that the CCRC was entitled to reach the view not to exercise its discretion to refer the matter in respect of CP’s conviction. The facts and additional evidence did not create a real possibility of the Court of Appeal not upholding the conviction. In respect of CP and the submission now made in respect of the presence of thrush this was an argument before the court at the retrial. The issue of thrush was not raised with Dr Gray by defence counsel because of a tactical decision taken by him. Thus, the claimant’s application to the CCRC would not meet the provisions of section 13(1)(b) of the 1995 Act and thus no referral could or should be made. The reality of the case in respect of CP was that of two conflicting scenarios. CP gave evidence and was cross-examined at length, the claimant chose not to give evidence. This was a fact of which the CCRC was entitled to take account.

23. The CCRC noted that the claimant's case at trial was a total denial of any form of sexual activity with any of the complainants. In this context it stated that:

“The fact that Mr Lyons chose not to give evidence is bound to feature prominently in the Commission's application of the statutory 'real possibility' test. Mr Lyons did not present his own account to the jury or expose his own credibility to cross-examination. ...this is not a strong position from which to mount 'further and better' challenges to the credibility of CP and TOR, who were both cross-examined extensively (at two trials) by counsel for Mr Lyons. The Commission takes the view that new evidence or argument would have to be particularly compelling, against this background, for it to establish a real possibility of a successful appeal against conviction.”

24. Addressing the specific submissions relating to CP the CCRC noted the report of Dr Soliman, in particular her conclusions set out at [20] above.

25. At [25] the Commission stated:

“25. ...In the Commission's view, the prosecution case depended very substantially on the view that the jury took of CP's evidence, and to a much smaller extent on the evidence of Dr Gray, who, as can be seen in the following extract from her evidence, readily acknowledged the limits of what she could say:

‘As far as the examination findings [are concerned], what I saw when I examined this patient was intense redness and also irregular surface which in the areas of those two findings coincided, they were in the same area so on the left side and also behind the vaginal opening.

...Redness can have many, many causes, it can be associated with rubbing or scratching, it can be associated with irritation such as due to bubble baths, due to tight clothing, due to infection and also it can be due to trauma. In this case the irregular surface in the same area indicates that there was some superficial damage of what we call the mucosa, it is like the skin but it does not have the same protective layer on the external aspect so my feeling was that this was due to some sort of rubbing or trauma though how it was caused it is not possible to be more specific than that.’ (Transcript of Dr Gray's evidence-in-chief, p53G).

26. Dr Gray also said that she could not age the redness she observed, that it was not possible to say how the redness was caused, and that the redness could have been caused by any of the causes listed above (transcript of Dr Gray's evidence under cross-examination, p74).

27. Dealing with questions about what inferences, if any, could be drawn from the fact that the redness was one-sided, Dr Gray added, ‘Well I think that if you have a medical condition relating to redness, irritation it will tend to be generalised so you will see it on both sides ...’. However, under cross-examination on this point, Dr Gray conceded that some skin and vulval conditions are localised and some are generalised.

28. Responding to defence counsel’s proposition that localised rubbing could be ‘something as simple as scratching’, Dr Gray said, ‘you could have scratching in that area but again if there was scratching that would likely to be due to some form of irritation which would be the first thing and then that would be a generalised condition.’ (Transcript of Dr Gray’s evidence, p79B).

29. In re-examination Dr Gray emphasised that she was describing ‘injury of a very minor degree’.”

26. The CCRC noted that defence counsel could have called Professor Payne-James who had prepared various reports for the defence. In particular it noted that in Professor Payne-James’ report dated 13 April 2010 the Professor expressed the view that “The localised genital redness and soreness are consistent with but not diagnostic of candida (thrush) infection of the genitalia.”
27. At [34] the CCRC stated that it “does not consider that the submissions that have been made on Mr Lyon’s behalf on this issue undermine the prosecution case or advance the defence case to any significant degree.” At [42] the CCRC referred to the requirement of the claimant to “establish a real possibility of a successful appeal against conviction.”
28. In the report of 5 December 2017, made in response to further submissions from the claimant, further comments are made upon the evidence of Drs Gray, Soliman and Professor Payne-James but they do not take this application any further.

Discussion

29. The question for this court in respect of both convictions is whether (a) the CCRC has applied the correct legal test and (b) whether in the light of the new information (taken together with the existing information) the CCRC was entitled to have reached the decision not to refer the claimant’s case to the Court of Appeal.

CP

30. By the time of the retrial, as the CCRC were aware, the claimant’s legal team were in possession of pathology evidence which showed the presence of thrush in the vagina of CP. They had instructed their own medical expert who in his written report, as identified by the CCRC, expressed the view that the localised redness and soreness were consistent with, but not diagnostic of, thrush infection of the genitalia. At the time of the discussion between prosecution counsel, defence counsel and the judge relating to any cross-examination on the issue of thrush, [19] above, it is clear from

the transcript that Professor Payne-James was present at court and thus available for consultation with the claimant's counsel. Counsel was in the possession of the relevant information and/or advice, he had the advantage of his medical expert present to provide information as required. Notwithstanding the informed position in which he found himself, defence counsel chose not to question Dr Gray upon the issue of the presence of thrush. This was clearly a tactical decision. Given those facts and applying them to the conditions for the making of a reference set out in section 13(1)(b) of the 1995 Act, the claimant's application would fall foul of the subsection because the argument/issue of the presence of thrush in the vagina of CP was specifically raised at trial, the decision not to pursue it was that of the defence. On this basis alone a referral would not have been made, there were no exceptional circumstances to justify such a course.

31. Applying the "real possibility" test the issue arises as to whether at any hearing before the Court of Appeal the court would admit into evidence the report of Dr Soliman. In order to do so the court would consider the provisions of section 23 of the Criminal Appeal Act 1968 which, so far as material states:

"(1) For the purposes of an appeal ... under this Part of the Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice –

...

(c) receive any evidence which was not adduced in the proceedings from which the appeal lies.

...

(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to—

(a) whether the evidence appears to the Court to be capable of belief;

(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings."

32. In my view the claimant would fail on an application to the court to admit this evidence because there can be no reasonable explanation for the failure to adduce this evidence at the retrial, still less would it afford a ground for allowing the appeal. The defence had their own expert who had provided an opinion upon which Dr Gray could be cross-examined as to the presence of thrush and its possible/probable causal connection with the localised genital redness and soreness. Professor Payne-James

was at court and therefore in a position to directly comment on the evidence of Dr Gray and instruct the defence team in accordance with his opinion. There was no need for a second medical opinion, the defence team had the relevant expertise and information. They chose not to call Professor Payne-James at the trial who could have given the evidence contained in his report. In my view, given these facts, there is no likelihood of the Court of Appeal admitting the new evidence of Dr Soliman.

33. It is right, as the claimant submitted, that the governing test is what is “necessary or expedient in the interests of justice”. Nonetheless, the court is expressly required to have regard to the factors listed in section 23(2). In effect, the CCRC came to the view that the Court of Appeal would not be likely to agree to admit the evidence of Dr Soliman. That is an example of the type of judgment of the CCRC which it is entitled to make and which this court must not second guess.
34. As to the evidence of Dr Gray, she introduced the fact that redness can be due to infection. It is of note, a point identified by the CCRC, that in expressing a view she took account of the redness in conjunction with the irregular surface in the same area indicating some superficial damage. Dr Soliman focused only upon the redness she did not comment on the combination of redness and the irregular surface of the area.
35. As to whether a medical condition was causative of the redness the Dr Gray’s first answer on this point was that such a condition will “tend to be generalised so you will see it on both sides”. When cross-examined as to the causation of the redness, defence counsel repeated the doctor’s answer as to the causes of redness but omitted from his question the fact of infection. When Dr Gray was asked in relation to what she saw, how it was caused, she said it was not possible to say. It was following his cross-examination that Dr Gray volunteered the information that her answers as to causation related not only to the redness but coupled with it the irregularities in the same area. It is of note that in the subsequent questions by defence counsel in respect of causation relating to a medical condition the phrase “tends to be generalised” was included in four questions that he posed to the doctor.
36. At [25-29] the CCRC summarised the evidence of Dr Gray. At [23] they identified the relevant conclusion of Dr Soliman. Dr Gray did not state that the redness was not borne out of a medical condition because it was one sided. More than once she stated that redness resulting from a medical condition “tends” to be generalised rather than localised. Further, and unlike Dr Soliman who did not address this issue in her criticism of Dr Gray, she linked the redness with the irregularities in the same surface area, in expressing a view upon causation. It is correct to say that Dr Gray did not include in her evidence the fact of the pathological finding of thrush. However, she did refer to infection and explained why the combination of the two features identified above led to her expressed opinion on causation. Her methodology cannot properly be described as flawed. If it was unacceptable to the defence, Dr Gray could have been cross-examined upon it, she was not. To describe Dr Gray’s evidence as wrong and misleading, does not fairly reflect her caveat, namely “tends” to be generalised, nor the linking of the redness with of the irregular surface.
37. The CCRC were entitled to and did take account of the fact that the defence could have called their expert who had expressed the view that the localised genital redness and soreness were consistent with but not diagnostic of thrush. In the circumstances their conclusion that the claimant’s submissions did not undermine the prosecution

case or advance the defence case to any significant degree were founded on the evidence as given at retrial and cannot be described as unfair or irrational.

38. Posing the question “Was the CCRC entitled to reach the view that it did?” my unequivocal answer is yes. The CCRC applied the correct test, namely that of “real possibility”. The new evidence of Dr Soliman inaccurately overstated the evidence of Dr Gray and, moreover, evidence as to CP’s symptoms being consistent with thrush could have been obtained at the time of the retrial. It does not begin to create a real possibility that the claimant’s conviction for the rape of CP would not be upheld on appeal. Accordingly, the first challenge to the findings of the CCRC is dismissed.

TOR

39. At the start of examination-in-chief TOR was asked her occupation, she said she was a teacher. In answer to further questions she said she was brought up as a Catholic but was interested in different religions including Buddhism.
40. During the course of TOR’s evidence she said that she had been to see her therapist shortly after the event involving the claimant. She was asked if she would agree with the proposition that at the time she was talking to her therapist about the event she was not alleging an assault or a sexual assault, those were not the words she was using. TOR replied “Probably not because I did not know that somebody putting their fingers into your vagina was actually penetration, at the time I was unaware of that as quite a lot of people are”. The question was asked “And so from what you have described as an odd event or a strange event turned into a sexual assault?”, TOR answered “It did not turn into one; it actually was one, just because I didn’t have the actual label for it at the time.”
41. Subsequent to the retrial the defence obtained new information in the form of two statements. The first by a journalist, Jill Foster, who describes an erotic writing workshop given by TOR in 2003. The second by Julia Gash, a business woman, who stated that she set up the workshop with TOR. Ms Gash stated that TOR engaged in “predatory sexual behaviour”. The essence of the claimant’s submission is that the picture painted by the subsequent information is of a sexually experienced woman, sufficiently experienced to give erotic writing workshops and to engage in predatory sexual behaviour. This is relevant evidence to undermine TOR’s assertion that she was unaware of the legal situation regarding sexual assault.
42. The claimant’s submission to the CCRC in respect of TOR was wider. On the narrower point now pursued by the claimant, the CCRC stated that it did not consider that there is “a real possibility that the Court of Appeal would agree that evidence about TOR’s previous sexual experience was of any relevance to the facts in issue”. I agree. The proposed new evidence did not contradict or undermine the evidence which TOR gave at trial. I also agree with the CCRC’s conclusion that there is no real possibility that the Court of Appeal would admit the evidence of Ms Foster or Ms Gash. Accordingly, this second challenge to the decision of the CCRC is also dismissed.
43. In consequence, I would dismiss the application for judicial review.

Mr Justice Nicol:

44. I agree.