**OUTER HOUSE, COURT OF SESSION**

**[2021] CSOH 51**

**P914/20**

OPINION OF LORD ARTHURSON

In the petition

PAUL VINCENT KELLY

Petitioner

against

SCOTTISH CRIMINAL CASES REVIEW COMMISSION

Respondents

**Petitioner: Bain QC; Paterson Bell**
**Respondents: Pirie, Advocate, Scottish Criminal Cases Review Commission**

18 May 2021

**Introduction**

[1] On 13 July 2016, following a 13 week trial on indictment at Glasgow High Court, the petitioner was convicted of six charges related to the sexual abuse of three children during periods libelled between 5 May 1981 and 31 July 1983 at St Ninian's School, Falkland, Fife. He was in addition convicted of a single charge of assault against one of the three children. In due course the petitioner was sentenced, on an *in cumulo* basis, to a period of 10 years imprisonment. He remains a serving prisoner. The petitioner subsequently sought to appeal against his conviction on a variety of merits–based grounds. Leave to appeal was refused in respect of all grounds of appeal at both first and second sift stages.

[2] The petitioner thereafter applied to the respondents seeking a review of his conviction. The sole ground of review advanced was that of defective representation. In a Statement of Reasons issued on 28 February 2020 ("SoR") the respondents set out the basis upon which they declined to make a reference upon this ground of review. The respondents were of the view that the petitioner had not suffered a miscarriage of justice. On behalf of the petitioner a request was made that the respondents' decision be reviewed. In a brief Supplementary Statement of Reasons dated 31 July 2020 ("SSoR"), the respondents stated that their view had not altered and that none of the matters raised by the petitioner had met the test for defective representation.

[3] The petitioner has raised a petition seeking reduction of the respondents' decisions and for an order in terms of section 45(b) of the Court of Session Act 1988 ordaining the respondents to reconsider his case.

**Submissions for the petitioner**

[4] Senior counsel for the petitioner, adopting a detailed note of argument, submitted that the petitioner was not consulted by his trial senior counsel and defence agent in relation to defence witnesses who would or would not be called on his behalf at the trial. The petitioner had provided an extensive list of potential defence witnesses. He had paid his agents £10,000 specifically for defence witness costs such as travel and accommodation expenses. In not being consulted about the calling of the defence witnesses, whom he had wished to call, senior counsel submitted that those representing him at his trial did not properly put forward his defence to the jury. The principal witnesses who were not called were SJ and RD. By letter dated 22 October 2020, post-dating the respondents' decisions, agents for the petitioner advised the respondents that the potential for SJ being a witness

had first been raised with the petitioner's trial agents in January 2016; accordingly, the narrative provided at paragraph 30 of the SoR to the effect that SJ had not been named by the petitioner during trial preparation as a potential witness was factually incorrect. Further, in a hand written list of defence witnesses prepared by the petitioner's trial agent, the final name on the list, given by surname only, referred to SJ. Senior counsel submitted that the evidence of SJ, had it been led, would have assisted the defence materially in respect that it would have bolstered support for the evidence of GMcQ, a defence witness who was led at trial. SJ would have provided an explanation concerning the circumstances in which boys visited the petitioner's room and slept overnight therein. SJ would have confirmed that no sexual or physical abuse took place in the room while he was present. RD had been identified by the petitioner as a witness in an email to his trial agents at the end of June 2015. His evidence contradicted the evidence of one of the children who was a complainer in charges in respect of which the jury had returned convictions; had RD given evidence senior counsel at the trial would have been able to point the jury to an independent source directly contradicting the evidence of that complainer. RD would also have provided support for the evidence of GMcQ. The petitioner's trial agents had failed to cite and call RD against a background of what they claimed to be tracing difficulties. As a matter of fact, however, while the trial was ongoing the petitioner had himself obtained a home address for RD through a local authority. With minimal effort therefore the witness RD could have been located, precognosced, and cited as an additional defence witness.

[5] Senior counsel listed six further witnesses whom the petitioner had advised that he had wished called to give evidence on his behalf, namely GM, MB, MH, CB, EE and BB. These potential witnesses were pupils and teachers at the school who would have given evidence to the general effect that they had not seen or heard of any abuse of any kind at any

time on the part of the petitioner. Senior counsel submitted that these witnesses would have been highly significant in a case in which the Crown proceeded upon the doctrine of mutual corroboration. Referring to *PGT* v *HMA [2020] HCJAC 14* at paragraphs 19 to 23, senior counsel submitted that the evidence of witnesses undermining the Crown case in such a way would have been available for the jury's consideration at large rather than in isolation. The respondents had failed to consider the cumulative impact of the absence of such available and relevant evidence.

[6] Senior counsel thereafter turned to consider the application for review presented to the respondents on behalf of the petitioner. The gravamen of the application was that there had been a miscarriage of justice in terms of defective representation, the petitioner having been thereby deprived of his right to a fair trial because his defence had not been presented to the court. His trial counsel and agents had acted in a way that was contrary to the petitioner's instructions and did not lay before the court the defence which the petitioner wished to be put forward. There had been a failure to trace, cite, precognosce, and lead witnesses to promote his defence. The petitioner had not been consulted or advised about decisions made in respect of, *inter alia*, the calling of witnesses at his trial. The cumulative effect of these failures on the part of his trial counsel and agent had resulted in important exculpatory testimony not being led and his defence not being properly presented to the jury. His instructions to those representing him at the trial had been disregarded. These failures had resulted in a miscarriage of justice. Prior to the trial the petitioner had anticipated a full and robust defence case, which had simply not materialised.

[7] Senior counsel submitted that the respondents had used the label "counsel's discretion" to cover all aspects of the criticisms made of the petitioner's trial counsel and agent. Senior counsel submitted that although convenient, this label would prove to be the

undoing of the respondents and their rationale in this case. In the SoR at paragraphs 29 and 33 the respondents had concluded that the decision of counsel not to take steps to secure RD and SJ as witnesses for the defence was a reasonable exercise of counsel's discretion. In respect of the decision of trial counsel not to seek to present the evidence of RD to the jury, it was submitted that the respondents' consideration of the explanation provided by trial counsel was superficial and inadequate. Further, insofar as trial counsel had stated to the respondents that the decision not to call SJ had been discussed with the petitioner, senior counsel noted that there had been no mention by the trial agent of discussing SJ with the petitioner or of any meeting between trial counsel and the petitioner to discuss this matter. It was additionally submitted, with regard to the potentially available evidence of MH, CB, EE, GM and MB, that the respondents' consideration of the explanation provided by those advising the petitioner at trial relative to these witnesses was superficial and inadequate in the absence of a specific exploration of why it was that the petitioner's express instructions had not been followed.

[8] In the petitioner's reconsideration request following receipt of the SoR, particular focus had been placed upon the lack of consultation with the petitioner about the calling or otherwise of SJ and RD. Senior counsel submitted that the SSoR made clear that the respondents had not revisited the petitioner's position on this issue, nor had they explained why they had accepted trial counsel's position over the petitioner's, other than advising that they were relying on statements made by trial counsel and a review of the defence file. The respondents had not considered the question of defective representation from the stand-point of the cumulative effect of failing to call RD and SJ, whose combined evidence would have challenged critical aspects of the crown case advanced at trial.

[9] Senior counsel proceeded to address certain matters arising subsequent to the challenged decisions of the respondents. Following retrieval of the defence file from the respondents those acting for the petitioner had ascertained that there were no notes of any meetings between the petitioner and his trial counsel and agent discussing RD or SJ. Senior counsel further referred to an affidavit dated 8 April 2021 from the solicitor advocate dealing with the application to the respondents; to an opinion dated 15 March 2021 prepared by a highly experienced criminal defence senior counsel; and to extracts from the speech made to the jury by senior counsel at the trial on 11 July 2016 setting out the material advanced by her to undermine the Crown case in respect of two of the complainers. It was submitted that what was not available to counsel conducting the trial and addressing the jury was the evidence of a series of witnesses, a compelling body of evidence, undermining the Crown case which could and should have been deployed on behalf of the petitioner at the trial.

[10] In inviting the court to pronounce decree of reduction of the challenged decisions, senior counsel submitted that the respondents had, in declining to make a reference, improperly exercised the discretion conferred upon them in that their decisions (a) were based upon a material error of law in relation to the test for defective representation; (b) resulted from a failure to take into account relevant and material considerations; (c) had no proper factual basis available to them upon which they made their decisions; and (d) their decisions were unreasonable and ones that no reasonable decision maker could have reached: *Sheridan* v *SCCRC 2019 SLT* 586 at paragraph 72.

[11] In so far as the respondents had accepted that the decision whether or not to take steps to secure the attendance of RD and SJ, or to call additional witnesses, were matters falling within counsel's discretion, senior counsel submitted that the exercise of discretion and independent judgement involved (i) the comparison and evaluation of possible courses

of conduct and (ii) the acting or making of a decision after the various possibilities had been considered. In this case there could have been no proper exercise of counsel's discretion in relation to the steps taken to secure the attendance of RD, as nothing had in fact been done to that end until after the conclusion of the trial. In respect of SJ, there was no question of the exercise of counsel's discretion to take steps to secure his attendance, SJ having as a matter of fact attended at the trial. The respondents had therefore reached the conclusion that the decisions made in respect of RD and SJ were ones within counsel's discretion in circumstances where they had no proper factual basis to do so. The decisions made in relation to SJ, RD and the other witnesses were not purely tactical or matters of professional judgement, it was submitted, particularly where there was an instruction and an expectation on the part of the petitioner that these witnesses would be called. The respondents had failed to appreciate this point concerning the disregard of the petitioner's instructions. The respondents had not applied the correct test in relation to defective representation in a case of this nature as set out in *Burzala* v *HMA 2008 SLT 61* at paragraph 33.

[12] Senior counsel further submitted that the respondents' decisions were in any event unreasonable and indeed ones that no reasonable decision maker could have reached. The respondents had failed to have regard to the following matters, namely that the petitioner was not given the opportunity to discuss the issue of witnesses or indeed any form of tactics with his trial counsel and agent; that those representing him at the trial had acted contrary to his instructions and had not laid before the court the defence which he had wished to advance and had invested in financially; and that the respondents had failed to have regard to the combined effect of the absence of the evidence of RD, SJ and the other witnesses referred to. Reference was made to an affidavit of the petitioner himself dated 2 April 2021 for the proposition that it was clear that his instructions had not been followed at the trial.

[13] While senior counsel referred principally to the passage in *Burzala,* cited *supra,* for the proposition that the respondents had erred in law by failing to apply the correct test, the following additional citations were also made: *Grimason* v *HMA [2020] HCJAC 53 at paragraph 25* and *DS* v *HMA 2008 SCCR 929* at paragraphs 42 to 44.

**Submissions for the respondents**

[14] Counsel for the respondents submitted that each decision under review in the present case amounted to a lawful response to the material then before the respondents. The approach of the petitioner was in effect to ask the court to become an original decision maker rather than a reviewing one. The determinations of the respondents, as the specialist tribunal, could only be susceptible to review by the court on conventional grounds: *Sheridan, supra,* paragraph 72. None of the grounds advanced had been made out. The respondents had directed themselves correctly on the applicable law, and, having done so, had applied that law to the material and submissions before them, all in a way that had properly been open to them.

[15] The statutory scheme under the Criminal Procedure (Scotland) Act 1995 gave discretion to the respondents to refer a case to the High Court on the grounds "that they believe – (a) that a miscarriage of justice may have occurred; and (b) that it is in the interests of justice that a reference should be made": section 194C(1) of the 1995 Act. The phrase "they believe" was, counsel submitted, a classic conferral of judgment by Parliament on a specialist decision maker, operating with a very broad discretion.

[16] The law which the court required to apply in reviewing the decisions of the respondents was well-settled: *Sheridan, supra,* at paragraphs 77, 79 and 80. From these passages counsel drew out the following propositions: it is primarily for an applicant to

recover evidence to advance a case put forward to the respondents; the respondents are entitled to focus on what that applicant is saying to it as the outline basis of a prospective appeal; any failure to recover evidence which an applicant has not asked for is not an error of law; and the respondents are entitled to reach a view on materiality and take that into account when dealing with requests made by an applicant.

[17] The law which the respondents required to apply in making the decisions under review was located in the dicta of the court in defective representation appeals in the following cases: *Hughes* v *Dyer 2010 JC 203* paragraphs 7, 8, 9 and 11, *Anderson* v *HMA 1996 JC 29 at 43 and 44*, *Woodside* v *HMA 2009 SCCR 350* paragraph 45 to 51 and 53, *and DS*, *supra*, paragraph 44. Counsel sought to advance from these dicta the following propositions: (i) a defective representation appeal is not to be regarded as a performance appraisal in which the court decides whether this line of evidence or that should have been pursued: *Woodside,* paragraph 45; (ii) whether there has been defective representation is a narrow question of precise and limited scope: *Woodside,* paragraph 45; (iii) there are two ways in which the test in *Anderson* at 43 (defence not presented to the court) can be passed, namely (a) where the representative acted contrary to instructions and did not lay the defence before the court, or (b) where the defence was laid before the court, but the defence was conducted in a way that no competent defence counsel could reasonably have conducted it: *Hughes*, paragraph 9, citing *Burzala*, *supra*, paragraph 33; (iv) in respect of (iii)(a), "instructions" refers to instructions on the line of defence: *Hughes* paragraphs 8 and 11, *Anderson, 44* and *Woodside,* paragraph 47; a refusal by a representative to lead defence evidence which an appellant had ordered that representative to lead is insufficient; rather, a failure to present a line of defence is required: *Hughes*, paragraphs 7 to 9 and 11; and a "line of defence" is the reason for an acquittal rather than the evidence in respect of that reason: *Hughes*, paragraph 11, *Woodside*

paragraph 47 *and DS* paragraph 44; (v) in respect of (iii)(b), this refers to decisions by counsel that are contrary to reason, and the court in this exercise recognises a variety of matters, namely that the examination of some witnesses carries the risk that they give harmful evidence; that criminal advocacy calls for tactical and strategic decisions; that these decisions may have to be made in difficult circumstances; that the trial representative may be better placed than an appellant in respect of how the line of defence is to be most effectively presented; and that experienced practitioners may reasonably disagree about what evidence may reasonably be led: *Hughes* paragraphs 9 and 11 and *Woodside* paragraphs 46, 48- 51 and 53; and, (vi) if the above requirements are not satisfied, there is no authority to the effect that a failure to discuss tactics with an appellant amounts to defective representation.

[18] Counsel observed that the principles expressed in *Burzala*, paragraph 33, were quoted in *Hughes*, paragraph 9 and paraphrased in *Woodside*, paragraph 45. The respondents in setting out their SoR had cited *Hughes* and in their SSoR had cited *Woodside*.

[19] Counsel proceeded at this stage to develop a further short chapter of his submission, contending that reasonableness can only be assessed on the basis of the material that the decision maker had available to it at the time that it made its decision. Logic and the nature of the supervisory jurisdiction to which such petitions are individual applications required this to be so: *Tsiklauri* v *Secretary of State for the Home Department [2020] CSIH 31* at paragraph 13. Rule of law values also required this: *Fardous* v *Secretary for the Home Department [2015] EWCA Civ 931* at paragraph 42. In any event, the court should be wary of trespassing on the jurisdiction of a tribunal competent to determine the matter in issue: *MIAB* v *Secretary of State for the Home Department 2016 SC 871* at paragraph 73. As a matter of law, however, no limit having been placed in the statutory structure set out in the 1995 Act

on the number of applications that an applicant can make to the respondents, the post-decision material relied on by senior counsel for the petitioner could of course be put of new before the respondents in a fresh application. Accordingly, an alternative remedy exists, counsel submitted.

[20] Turning to the challenged decisions themselves, in respect of the SoR, from paragraph 44 it was clear that the correct overall test had been identified and applied by the respondents, namely the putting in evidence of the petitioner's defence. The self-directions in terms of *Hughes* expressed at paragraphs 22 and 42 were correct in respect of the applicable law, and in applying the law the respondents had taken into account the material referred to in the petitioner's application: paragraphs 14 and 16. The respondents had made their own enquiries, speaking to the petitioner's trial solicitor and senior counsel, and had reached a view on the witnesses SJ, RD and the other witnesses at paragraphs 24 to 41. From paragraph 43 it was plain that there was no suggestion that the petitioner's defence had not been put; indeed, at paragraph 44 the respondents had gone so far as to state that "the applicant's defence was fully prepared and put in evidence". The respondents had at paragraph 43 further concluded that the decision not to call the witnesses was a reasonable exercise of trial counsel's professional and practical judgement in presenting the instructed defence.

[21] In submitting that the conclusions reached by the respondents were within a reasonable range of responses to the facts before them, counsel observed, under reference to the terms of the SoR, that the trial had been a long and complicated one (paragraphs 2 and 3); the petitioner had given evidence denying the charges (paragraph 6); the petitioner's co-accused and acquitted former co-accused had given evidence in his defence (paragraph 7); there was an overlap between the potential evidence of SJ and RD and the

actual evidence given at the trial by GMcQ and AC (paragraphs 6, 16 and 24); and some Crown witnesses had given evidence of the petitioner's good character (paragraph 41). Counsel further referred to the police statement of RD denying any allegation of having taken part in abuse instigated by the petitioner but recalling that the petitioner and teachers at the school would take pupils into their rooms to sleep at night and commenting "I just thought these were guys who didn't have a mum or dad but it's only now when you think about it you realise something was wrong, but this just seemed normal at the time." Counsel also noted the potential risk in bringing RD to give evidence (paragraph 28) and in calling SJ, bearing in mind the similarity of SJ's evidence with that of GMcQ (paragraph 32). Counsel further noted the availability to the respondents of the comments of the trial judge in respect of what SJ and RD could have added. The trial judge had referred to the position of RD as somewhat mixed and stated that it might well have been dangerous to call him as a witness in any event. The trial judge had further expressed a view that the evidence of SJ would not have advanced matters particularly.

[22] With regard to the SSoR, counsel submitted that the decision expressed at paragraph 5 therein was one which was open to the respondents having taken into account the further submissions referred to at paragraph 2. This supplementary decision, in terms of which the respondents adhered to their earlier decision, was accordingly a lawful one.

**Discussion and decision**

[23] The kernel of the petitioner's application to this court for review of the challenged decisions of the respondents, his senior counsel made clear, was located in the *dictum* of the Court in *Burzala, supra*, at paragraph 33. In that passage, shorn of reference to the authorities

cited therein, the Court stated the position thus, in the context of an explanation as to why the scope for an appeal on the ground of defective representation is limited in nature:

> "The limitations are clearly established. Such an appeal, like any other, can only succeed if there has been a miscarriage of justice. That can only be said to have occurred if the conduct of the defence has deprived the appellant of his right to a fair trial. That, in turn, can only be said to have occurred if the appellant's defence was not presented to the court. That may be so if the appellant's counsel or solicitor acted contrary to instructions and did not lay before the court the defence which the appellant wished to put forward. It may also be so if the defence was conducted in a way in which no competent counsel or solicitor could reasonably have conducted it; and that has been illustrated by reference to counsel having made a decision that was 'so absurd as to fly in the face of reason', or 'contrary to the promptings of reason and good sense'."

[24] It is of note that in the same passage the Court in *Burzala* went on to make clear that the way in which the defence is conducted is a matter for the professional judgement of counsel and that criticism of strategic or tactical decisions as to how that defence should be presented will not be sufficient to support a defective representation appeal if these decisions were reasonably and responsibly made by counsel in accordance with his or her professional judgement. The passage relied on by senior counsel for the petitioner in the present case must accordingly be considered against the background of the Court's clear and practical exposition of the limitations on the scope for a defective representation appeal. It was contended for the petitioner that his representatives had in this case acted contrary to instructions and had not laid before the court the defence which he had wished to put forward. Senior counsel for the petitioner argued that the use of the label "counsel's discretion" by the respondents was, in terms, simply not good enough, submitting that the exercise of discretion and independent judgement involves the comparison and evaluation of possible courses of conduct, and the active making of a decision only after such possibilities have been duly considered. Senior counsel submitted that in the present case such a comparative course could simply not have been embarked upon, the effective

absence from the evidence of the witnesses RD and SJ in particular being due to failure on the part of those representing the petitioner at the trial.

[25] I have concluded that this approach to the issues raised in the petitioner's case is misconceived. In *Hughes*, *supra*, the Court at paragraph 8, in considering the correct understanding of the nature of instructions given to counsel for the proper presentation of a party's case, stated the applicable law to be as follows:

> "In our view this means that counsel in terms of his duty to represent his client in a professional manner and to the best of his ability, and to protect his client's interest, cannot be under any duty to obey instructions from his client, whether express or implied, to call particular witnesses to give evidence, unless failing to do so would ignore, or have a material effect on, his responsibility to present the appellant's line of defence. This conclusion is clearly supported both by the relevant authorities and by the Faculty of Advocates' Guide to Professional Conduct. For the sake of completeness we again note that there is no suggestion here that the appellant's line of defence was not put before the court."

[26] The Court in *Hughes* of course proceeded in the next paragraph to cite the *dicta* set out in *Burzala* at paragraph 33, noting as it did so that the same point had been made in *Burzala*, albeit more generally. Senior counsel's submission in the present case, however, amounted to a contention that if those representing an accused at trial had received funding to secure the attendance of witnesses and that the accused had indicated an express wish that witnesses X and/or Y be led as part of the defence case, then counsel at the trial had in effect no right to decline to lead such a witness whom she or he was expressly instructed or expected to lead. This is the very elephant trap identified by the court in *Hughes*, in which the Court made crystal clear that such a premise or contention cannot as such form the basis of a claim for defective representation: *Hughes*, paragraph 9.

[27] The correct question that requires to be considered in a case such as this is whether the line of defence was fully laid before the court, the decision not to call a witness being within the ambit of the presentation of the line of defence, referred to in *Hughes* at

paragraph 11 as "counsel's 'instruction'", and as such subject to his or her professional judgement and assessment. The Court in *Woodside* at paragraph 47 put matters thus: "The question for us is whether that defence was put before the jury in all its essentials, it being accepted on the appellant's behalf that he himself gave evidence on all the material points".

[28] I am satisfied that on the material before them the respondents were entitled to conclude that the line of defence was indeed placed before the jury in the course of the petitioner's trial in 2016. The question as to whether the line of defence was presented to the jury is intrinsically connected to the fundamental issue at large before the respondents within their purview as the specialist tribunal upon which Parliament has conferred a particular review role within the statutory scheme set out in terms of the 1995 Act, namely whether there may have been a miscarriage of justice. Put short, I have concluded that none of the conventional grounds of illegality referred to in *Sheridan*, at paragraph 72, as articulated in the submissions advanced for the petitioner, have been made out. The respondents have reached clear conclusions on the key question of miscarriage of justice, applying the correct test in the context of a defective representation claim such as this, and given full and cogent reasons in respect of the material available in the review exercise before them.

[29] In the passages concerning the grounds for judicial review set out in the petitioner's note of argument, the petitioner more than once states in express terms that the respondents "wrongly" accepted that the decision as to whether or not to take steps to secure the attendance of the witnesses SJ and RD at trial, or to call additional witnesses in connection with putting that defence, were both factors that fell within counsel's discretion. Having considered the submissions developed by senior counsel on the proposed review grounds, I am content to characterise the complaints advanced on behalf of the petitioner as being in

their substance a disagreement on the merits. The following passage in *Sheridan* at paragraph 73 can accordingly be said to apply to the present petition in such circumstances:

> "Although lip service is paid at an early stage in the petition, and sporadically throughout it, to the test in *Wordie Property Co (supra),* what the petition consists of in substance is little more than a contention that …. the respondents' decisions were wrong. This is dressed up behind frequent references to certain matters amounting to an 'error of law' on part of the respondents in circumstances in which no such error is visible."

[30] I have concluded that no error of law has been demonstrated in the present petition on any of the purported bases contended for on behalf of the petitioner. While the petition has very properly been framed in the language of a legality challenge, time and again in the course of the arguments advanced for the petitioner at the substantive hearing, it appeared to me that the court was in terms being asked to decide whether any reasonable respondent (the Commission) could decide that any reasonable counsel (the petitioner's trial counsel) could decide not to call the witnesses referred to in the petition in the particular circumstances that the petitioner's senior counsel faced amid the heat and dust of a lengthy and complex criminal trial. In so far as it was submitted that these witnesses would materially have assisted the defence at trial and provided a body of evidence upon which the petitioner's trial counsel could have relied when deploying submissions to the jury, in my view what this amounts to is really a disagreement, albeit as it was presented a profound one, which has been characterised in the petition, erroneously in my opinion, as an error of law. The petitioner was in this way asking this court, which had not heard the evidence, to take in hindsight a view about the weight that certain evidence which was not led would have carried with the jury at the trial. This cannot be the function of a court of review in a petition of this kind.

[31] The respondents' exercise of judgment on the issue of a potential miscarriage of justice on the material before it was accordingly a reasonable one, and in these circumstances I have concluded that the petitioner's legality challenge fails. The respondents, being the specialist tribunal charged by Parliament with forming a view on whether there may or may not have been a miscarriage of justice, have appropriately dealt with the material before them, fully considered and engaged with that material, correctly self-directed themselves on the relevant law and duly applied the applicable law in a way that cannot be faulted.

[32] In concluding that each of the decisions under review constituted a lawful response to the petitioner's application, I wish finally to deal with the short point raised by counsel for the respondents to the effect that any assessment of the reasonableness of a respondent's decision must be carried out solely on the basis of the material available to that decision maker at the time of any challenged decision. This point was made in the context of senior counsel for the petitioner seeking to rely on a significant amount of post-decision material. While the respondents' point, advanced on the basis of a variety of strands of authority, was in my view unanswerable, it may be of some comfort to the petitioner to note that the 1995 Act statutory scheme in respect of the respondents places no limit on the number of applications that can be made, and, as was made clear in the respondents' covering letter accompanying the SSoR, the petitioner would appear to have even now an opportunity to apply of new to the respondents with any fresh material that he might wish to found upon.

[33] In summary the position in this case can be stated as follows. The respondents' decision in its SoR, adhered to in its SSoR, to conclude that the decision by senior counsel at the petitioner's trial not to call the witnesses referred to in the petition was a reasonable exercise of trial counsel's judgement (SoR paragraph 43) was a lawful response which was

open to the respondents to make on the material before them. It was further open to the respondents to characterise the *de quo* of the petitioner's criticisms in this case as falling into the category of a performance appraisal (SSoR paragraph 5), thereby being irrelevant to any ground of review advanced on defective representation. I am therefore in these whole circumstances satisfied that the respondents were entitled to decline to make a referral.

**Disposal**

[34] The petition accordingly falls to be refused. I propose to sustain the respondents' second and third pleas-in-law to that effect. All questions of expenses will meantime be reserved.