

FORMAL MEMORANDUM

DEVELOPMENT OF LAW

Introduction

1. This policy applies to all cases, including those where the conviction or sentence is challenged on the basis of a development in the common law.
2. The principles applied by the Court of Appeal in considering the granting of leave in these circumstances are set out in *R v Jogee* [2016] UKSC 8 at paragraph 100. Essentially, the Court has power to grant exceptional leave to appeal out of time if substantial injustice is demonstrated, but it will not do so simply because the law that was applied has now been declared to have been mistaken.
3. Section 16C of the Criminal Appeal Act 1968¹ gives the Court of Appeal a power² to dismiss appeals against conviction which are based only on a development of law point following a reference by the Commission, if the Court of Appeal would not have granted exceptional leave to appeal out of time (had the appellant been entitled to make such an application):

(1) This section applies where there is an appeal under this Part following a reference by the Criminal Cases Review Commission under section 9(1)(a), (5) or (6) of the Criminal Appeal Act 1995 or section 1(1) of the Criminal Cases Review (Insanity) Act 1999.

(2) Notwithstanding anything in section 2, 13 or 16 of this Act, the Court of Appeal may dismiss the appeal if—

(a) the only ground for allowing it would be that there has been a development in the law since the date of the conviction, verdict or finding that is the subject of the appeal, and

¹ Inserted on 14 July 2008 by s.42 of the Criminal Justice and Immigration Act 2008 and SI 2008/1586. The corresponding legislation in respect of Northern Ireland is s.13B of the Criminal Appeal (Northern Ireland) Act 1980.

² The section does not relate to sentence referrals, or to other convictions on the same indictment referred as part of a package under the little-used sections 9(4) and 10(4) of the 1995 Act. The new section applies where the change of law would be the only ground for allowing an appeal.

- (b) the condition in subsection (3) is met.
(3) The condition in this subsection is that if—
(a) the reference had not been made, but
(b) the appellant had made (and had been entitled to make) an application for an extension of time within which to seek leave to appeal on the ground of the development in the law,
the Court would not think it appropriate to grant the application by exercising the power conferred by section 18(3).”
4. In a sentence only referral, the Court does not have the power to dismiss the appeal on the basis of their finding that there is no substantial injustice, as they do with references against conviction under Section 16C³.
 5. The test for substantial injustice was set out in *R v Johnson and others* [2016] EWCA Crim 1613. In determining whether the high threshold of substantial injustice has been met, the Court will primarily and ordinarily have regard to the strength of the case advanced that the change in the law would, in fact, have made a difference. The Court in *Johnson* stated that it was not necessary to consider the length of time that has elapsed since the conviction.
 6. However, *R v Ordu* [2017] EWCA Crim 4 clarified that whilst it was not necessary for the Court in *Johnson* to consider cases where a sentence had long since been served, the continuing impact of a wrongful conviction on an application will be highly material in determining whether its continuation involves a substantial injustice. The Court dismissed the appeal in *Ordu* as it found that quashing the conviction would make no real difference to the applicant’s life, and that it was therefore impossible to say that a substantial injustice would occur if it remained.

The Commission’s approach

Conviction Cases

7. In all cases where a development of law might raise a real possibility that the conviction is unsafe, the Commission must have regard to the Court’s practice in dealing with applications for exceptional leave to appeal out of time. Consideration of the below is integral to the real possibility test in such cases;

³ But see reference to *Neuberg* below

- The public interest in finality to litigation.
 - The public interest that defendants should not be convicted of offences which they are not proved to have committed (see *Coutts* [2006] UKHL 39, para 12).
 - The legal significance of the development and the strength of the case that it would have made a difference to the jury's finding of guilt.
 - The need to show something more than the fact that the conviction is unsafe. It must also be established, perhaps by reference to the circumstances since conviction, that a substantial injustice would be done if it were not quashed.
 - Whether the applicant was guilty of other, though less serious, criminal conduct, or whether the development in the law would have resulted in a total acquittal.
 - The operation of s.16C of the Criminal Appeal Act 1968 (as inserted by s.42 of the Criminal Justice and Immigration Act 2008).
8. The Court will consider substantial injustice first and safety second, but in reality, the two are inextricably linked. If a substantial injustice is found it will be rare that the conviction remains safe (but not necessarily vice versa).
9. Sentencing remarks will not be relied upon when considering the safety of the conviction.
10. Regard will *not* be had to the number of applications that may be received as a result of the development.

Sentence Cases

11. The Court said in *R v Neuberg* [2016] EWCA Crim 1927, at paragraph 50, that when reviewing a sentence only referral based on a change in the law, it is the essential duty of the CCRC to consider the law in relation to substantial injustice, and to apply that law when considering whether to refer the case to the court.

Change-of-law cases where the applicant has not previously appealed

12. Where an application is based on a change in the case law relating to the criteria for liability of the substantive offence and the applicant has not previously appealed or applied for leave to appeal, the Commission will advise the applicant of his/her right to apply to the Court of Appeal for an

extension of time to apply for leave to appeal in accordance with the procedure outlined by the Court of Appeal in *Ramzan* [2006] EWCA Crim 1947.

13. Where an applicant has been refused an extension of time to apply for leave to appeal under the Court's procedure and then applies to the Commission, a referral based on a change in the law will be possible only where there is new argument or evidence not previously considered by the Court of Appeal or there are exceptional circumstances, and where the Commission finds there is a real possibility of substantial injustice.