

CCRC

Criminal • Cases • Review • Commission

**Guidance For
Legal Representatives**

Criminal Cases Review Commission Guidance for Legal Representatives

This document is designed to help legal representatives who may be approached in relation to applications to the CCRC in the following circumstances:

- You may be asked to represent someone convicted of a criminal offence, or the family member of such a person, in preparing an application to the CCRC.
- You may be contacted as a result of an application made by a former client.
- You may be asked for advice by a victim of crime who has learned that the person convicted of the offence against them has applied to the CCRC.

1. Acting in an Application

We welcome all applications, whether or not the applicant is legally represented. It is hoped that this guidance will make it clear how an application prepared by a legal representative should be laid out and what it should contain to best assist us and ensure an effective and timely review.

Our Powers

We can consider all convictions and sentences from the criminal courts of England, Wales and Northern Ireland. We can also consider convictions arising after October 1st 2009 from the Military Court and the Civilian Service Court.

We can consider a conviction, sentence or a verdict of not guilty by reason of insanity.

The Commission cannot overturn a conviction or reduce a sentence. Our role is to refer appropriate cases back to the appeal courts where the matter must then be decided. Once the Court of Appeal or Crown Court has been notified of a Commission referral, we have no further involvement in proceedings. In the Court of Appeal, any Commission referral by-passes the Single Judge and goes directly to the Full Court.

We may refer a conviction if:

1. there is a real possibility the conviction would be overturned if it were referred; and
2. this real possibility arises from evidence or argument which was not put forward at trial or appeal (or there are exceptional circumstances); and
3. the applicant has already appealed or applied unsuccessfully for permission to appeal (or there are exceptional circumstances).

We may refer a sentence if:

1. there is a real possibility that the sentence would be reduced if it were referred; and
2. this real possibility arises from information or argument on a point of law which was not put forward at trial or appeal; and
3. the applicant has already appealed or applied unsuccessfully for permission to appeal (or there are exceptional circumstances).

We may **not** consider:

1. Cautions
2. Fines enforcement
3. Compensation for a wrongful conviction
4. Civil proceedings
5. County Court proceedings
6. Deportation/asylum issues (though we **will** consider criminal convictions arising from such matters)
7. Criminal injuries compensation decisions
8. Criminal cases from Scotland, the Channel Islands or the Isle of Mann.
9. Matters in which the applicant was a victim of crime (although note that we do have obligations under the 'Victims' Code', see below)

Real Possibility and Fresh Evidence

The key points we consider in deciding an application are whether there is a 'real possibility' the appeal court would overturn a conviction, sentence or finding and whether this real possibility is due to evidence or argument (or in the case of sentences, evidence or information) which was not put forward in the trial or appeal. We generally refer to this as the need for 'fresh evidence'.

'Real possibility' was assessed by the High Court in the case of *R v CCRC ex parte Pearson* [2000] 1 Cr.App.R. 141 as being "more than an outside chance or a bare possibility but which may be less than a probability or 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."

Exceptional Circumstances

Under s.13(1)(c) of the Criminal Appeal Act 1995, an appeal must have been determined or formally abandoned or permission to appeal refused before we can consider a case unless there are 'exceptional circumstances'. It is enough for an application to have been formally abandoned or, in the Court of Appeal, refused by the Single Judge (though a renewed application to the Full Court should be seriously considered before an application is made to the Commission).

We interpret 'exceptional circumstances' as circumstances where an applicant can only make progress with our assistance. Examples include where the applicant has pleaded guilty in the magistrates' court (and has no other route to appeal) or in some circumstances where public body material needs to be obtained, which the applicant is unable to obtain directly because of, for instance, the sensitivity of the material.

As it is possible for a defendant to apply for permission to appeal out of time to both the Crown Court and the Court of Appeal, we do not accept that an appeal being 'out of time' amounts to exceptional circumstances.

For further information, please see the CCRC Formal Memorandum on Exceptional Circumstances. This document should be carefully considered before making an application to the Commission where there has been no appeal/ application for leave to appeal. This document is available, along with all other CCRC Formal Memoranda on casework policies and procedures, online at www.ccrcc.gov.uk/publications/ccrc-casework-policies

Application

We consider the merits of all eligible applications for review where there has already been an appeal.

We have an 'Easy Read' application form. Ideally this form should be completed for each application. The form must be signed by the applicant. The form itself is not essential, but it is preferred as it makes clear the information that we require. If a form is not submitted, we will need the application to contain written confirmation from the applicant that the application is being submitted with his or her authority. It is expected that you will attach as many pages as are necessary to properly set out the applicant's submissions, but the submissions should be relevant and concise.

Copies of any documents that you feel will assist should be enclosed with the application form. Examples of such documents are transcripts, witness statements, medical reports and advice from counsel. If documents cannot be obtained, a list of the documents you believe are needed should be provided so that, if we agree, they can be obtained using our statutory powers. If it is likely we will need to speak to the original legal representatives, a waiver of privilege signed by the applicant should also be provided.

An application to us should be made as soon as possible, though it should be supported by substantive submissions. In order to conduct a thorough review, we may need to consider defence, prosecution or court files from the original trial or some other documentation. These files will often be destroyed after a certain length of time which can make a review much harder or even impossible.

Request for Priority

We automatically give a degree of priority to some types of cases, such as those in which the applicant is still in custody for the offence that is the subject of the application and, if the application is for review of sentence only, where the applicant has less than two years to serve.

You can request that an application is expedited. The CCRC's Formal Memorandum on Priority Ranking and Ordering of Cases (available at the web address above) contains more information on this, including the criteria to be applied.

Submissions

We expect to receive (from legal representatives) clear and targeted submissions that address why a conviction is unsafe or sentence manifestly excessive or wrong in law. We cannot simply re-investigate a case from the beginning in the hope of finding a flaw that has not previously come to light.

We expect you to have considered the information provided by your client and to forward only those submissions that you believe may form, possibly with investigation by us, the basis of a referral.

We are aware that applicants often cite defence incompetence in the course of the trial as a reason why a conviction is unsafe. It is expected that if such submissions are made, you will have contacted the solicitor and barrister who acted at the trial for their responses in accordance with the directions of the Court of Appeal in *R v Achogbuo* [2014] EWCA Crim 567. and that their response will be sent to us along with a waiver of privilege.

We do not require an application to be 'appeal ready'. Indeed, even if an application is supported by, for example, relevant witness statements or expert evidence, it is highly likely that we will make our own enquiries. It may well be that an application will contain unsubstantiated assertions that can only be checked by use of our statutory powers to obtain disclosure.

If all/part of the application suggests that we should, for instance, conduct witness interviews, obtain expert evidence or carry out major investigations, then we expect to receive cogent arguments as to what evidence might result and how that would impact on the safety of the conviction (or appropriateness of sentence).

However, it is expected that the initial application will contain all of the points that the applicant wishes us to consider. It is recognised that further points may arise in the course of a review or while a case is waiting to be allocated but if a very brief original application is received and further extensive submissions are received some months later, we reserve the right to allocate that application a place in the queue based on the date of receipt of the substantive submissions.

In order to carry out a review effectively and efficiently, we need to understand what the issues are from the outset of the review. If numerous new submissions continue to be made throughout the course of a review, that objective is made more difficult, in some instances *much* more difficult (potentially putting relevant material at risk of being destroyed through application of standard retention policies before we are able to secure it). In such circumstances, we may invite the application to be withdrawn until all the submissions are settled. If the application is not temporarily withdrawn, we may decide to make a decision on the basis of submissions received to date and that any additional submissions will be treated as a fresh application (being placed in the queue in accordance with the date of the receipt of the submissions).

Our Review

The CCRC is inquisitorial rather than adversarial and does not work for either side in a case. It is not uncommon for our enquiries to turn up some new evidence that assists the defence and some that assists the prosecution and all material will be taken into account.

We will carry out whatever investigations we consider to be necessary to address an applicant's submissions or any issues in the case that we identify ourselves. If extensive enquiries or interviews under caution are required, we may instruct the police to conduct an investigation on our behalf.

We will not usually meet with you unless this is necessary as part of the review.

When an application is received, the case is placed in a queue based on the date of receipt of the submissions. While the application is in the queue, we will give consideration to which public body materials (e.g. CPS file, court files, police file etc.) may be needed and this will be preserved or obtained as required. Where appropriate, some investigative work might be carried out whilst the case awaits allocation to a Case Review Manager.

When the case reaches the head of the queue, it is assigned to a Case Review Manager who will consider the submissions received and also make any enquiries that arise in the course of the review. The Case Review Manager will make a recommendation to a Commissioner or a committee of three Commissioners as to whether or not the case should be referred. It is the Commissioner or committee who will make the final decision. Case Review Managers come from a variety of backgrounds in the criminal justice system, including solicitors, barristers, investigators and forensic scientists.

If the Commissioner or committee believe that the application should be refused, a decision document will be issued, which will contain the reasons why we do not intend to make a referral. In relation to disclosure of the material relied upon, the principles of *R v Secretary of State for the Home Department ex parte Hickey & Ors (No.2)* [1995] 1 All ER 489 are applied. This means we will provide you with the relevant material to allow you to make your best response to our decision but will not necessarily provide you with copies of every document we have considered. It is also important to be aware of the fact that under s.23 of the Criminal Appeal Act 1995, it is a criminal offence for us to disclose information obtained in the course of a review unless it falls within a statutory exception (s.24). Disclosure can be further restricted by the impact of s.25. For further information, please see the CCRC Formal Memorandum on Disclosure by the Commission at www.ccr.gov.uk/publications/ccrc-casework-policies.

We have a discretion not to refer a case even if the 'real possibility' test is satisfied. Examples of when this discretion could be exercised would be when the real possibility applies to only one of a number of offences of a similar nature and degree of severity or where even if the conviction were to

be overturned, the Court of Appeal would substitute an alternative conviction for another offence. For further information, see the Formal Memorandum on Discretion in Referrals at www.ccrc.gov.uk/publications/ccrc-casework-policies

In many cases, and whenever there is relevant material obtained by our enquiries, we will invite a response to the initial non-referral decision from the applicant. A number of applicants do not seek legal advice until this stage. If extensive further submissions are received that are not connected to the earlier submissions, we may treat these further submissions as a re-application and this re-application may be placed in the queue. We generally allow 20 working days for further submissions (40 days in very large cases), although this may be extended on reasoned request. Please see the Formal Memorandum on Extensions for Further Representations at the web address given above.

We will consider any request for particular enquiries to be made or for transcripts or reports to be obtained but it will be for the Case Review Manager or Commissioner(s) to make the final decision as to how the review will be conducted.

Once a case is referred, we have no involvement in the appeal proceedings. It should be noted that leave of the Court is required to add any grounds not contained in the referral.

Challenging our Decision

Once a final decision not to refer has been made, there is no direct route of appeal against this decision. However, it is possible to challenge our decision by way of judicial review. *R v CCRC ex parte Pearson* [2000] 1 Cr.App.R. gives details of the approach which the High Court will take in reviewing our decisions. Further information is available in the CCRC Formal Memorandum on Judicial Review – Policy and Procedure at the web address above.

If it is felt that a member of staff has acted improperly, that we have breached our policies or procedures or fallen below the standards expected of a public body, a complaint may be made. Complaints should be made in writing. A complaint form is available on request. Such a complaint will be investigated by a member of staff not involved in the original review. A Formal Memorandum on the CCRC complaints procedure is available at the web address above.

Legal Aid Funding

Applicants to us are eligible for free standing Advice and Assistance under the Own Client Crime Contract 2015 if the applicant is financially eligible and the 'sufficient benefit' test has been met. We have no involvement in funding issues. The requirements of the contract are as follows:

- 10.18 You must take instructions from the client to establish whether the case is one which the CCRC could consider. You must bear in mind that the CCRC is a last resort and an application to the

- CCRC may only be made if the client has either appealed against the original conviction or leave to appeal has been refused.
- 10.19 If your client's case is suitable to be heard by the CCRC, you must consider whether the case may be able to meet the referral criteria applied by the CCRC.
- 10.20 Once the basic information has been obtained by way of a statement from the client, you must carry out an initial screening of the case to determine whether an application to the CCRC should be made. This process enables you to screen out weak claims which would not meet the CCRC's referral criteria. Although the information at this stage may be very limited, the decision as to whether the costs of further investigation are justified must be made by you in the light of the available information and using your professional skill and common sense.
- 10.21 If a client qualifies for advice and assistance, initial case screening will normally be carried out within 20 units (two hours). It may not be possible to complete case screening within this time if the client is located at a distant prison. The initial case screening will cover taking instructions, considering any relevant papers or records (if any are available at that stage) and the provision of initial advice as to law and procedure. You must reject a case following initial screening if there is no reasonable prospect that it will meet the CCRC referral criteria. Clearly uncertainty over the merits at the initial screening stage would not necessarily result in you refusing to take forward an application, particularly where you consider that further investigations are necessary to establish whether the referral criteria are met.
- 10.22 If you seek a transcript of part or all of the evidence, then a specific justification must be provided.
- 10.23 You may instruct counsel in CCRC matters where it falls outside your expertise and it is reasonable for you to seek specialist advice from counsel or solicitor with higher court advocacy rights. The expense of any disbursement or counsel's advice will count towards costs for the purposes of calculating whether an extension to the upper limit is necessary.
- 10.24 It may be necessary for you to exceed the upper limit depending on the individual circumstances of the case. In these circumstances, an application must be made by you to the director in accordance with this specification. There is no other form of Legal Aid available for this type of work although the CCRC will, in considering the application, make what further enquiries it considers appropriate to enable it to investigate the case and reach a decision.

If the case is referred, any application for Legal Aid for the court proceedings should be made to the Crown Court or Court of Appeal in the normal way.

Other routes

There are alternative routes for reviewing a conviction or sentence, namely:

1. Application for permission to appeal out of time
2. Judicial review of a summary (magistrates' court) trial or the Crown Court appeal arising from it.
3. Applying to re-open a summary conviction under s.142 of the Magistrates' Courts Act 1980.
4. Application for a case to be stated.
5. A Sexual Offences Prevention Order ('SOPO') can be varied or quashed by way of an application to the Crown Court.

Deceased applicants

If the person convicted of the criminal offence has died, a third party can make an application to us. In order for such a case to come before the Court of Appeal, there must be someone who will be approved by the Court for the purpose. This requires the applicant to fall within the following categories:

1. The widow or widower
2. The 'personal representative' within the meaning of the Administration of Estates Act 1925
3. Any other person appearing to the Court to have, by reason of a family or other similar relationship with the dead person, a substantial financial or other interest in the determination of the appeal.

There is no time limit on us referring a case on behalf of a deceased person.

For further information, please see the CCRC Formal Memorandum on Applications in Respect of Deceased Persons at www.ccr.gov.uk/publications/ccrc-casework-policies

2. Past Client Making an Application

We may wish to view defence files or discuss a case with the trial representatives. If this is the case, we will provide a waiver of privilege from the applicant to you.

If the application contains criticism of you and we consider this may be a valid submission, you will be notified of this in the course of the review and will be given the opportunity to respond.

If we request a meeting with you, we will travel to a location that is convenient for you.

It is our view that you have a professional duty to assist in a review of a case in which you have acted. A failure to co-operate may be reported to the Solicitors' Regulation Authority or the Bar Standards Board.

3. Advising Victims

The Code of Practice for Victims of Crime came into effect in 2006 and was updated in 2013. Under the code, we have specific responsibilities to victims of crime. The code applies to any case where there is an identifiable victim, irrespective of the seriousness of the case. If a person dies as a result of criminal conduct, his/her family spokesperson is entitled to receive services under the code.

A decision as to whether or not a victim should be informed of a review will be made at the start of the case. This decision will be kept under review throughout the case. We do not usually contact a victim if the review is unlikely to come to his/her attention as a result of enquiries or media interest unless it becomes apparent that the application is to be referred. Only in exceptional cases will the victim not be informed if we decide to refer a case.

Further information can be obtained from the CCRC Formal Memorandum on Victims of Crime – CCRC Contact with Victims at www.ccr.gov.uk/publications/ccrc-case-work-policies

4. Conclusion

It is hoped this information assists you in your dealings with the CCRC. If there are any further issues, we are always happy to help and there is a helpline staffed by Case Review Managers which may be contacted on 0121 233 1473 between 9.00 a.m. and 5.00 p.m. each weekday.