

DISCRETION IN REFERRALS

CASEWORK POLICY

Introduction

1. As the Court of Appeal (*Clark* [2001] EWCA Crim 884, *Smith (Wallace Duncan)* [2004] EWCA Crim 631) and *R v Luckhurst (deceased)* [2010] EWCA Crim 2618 and the Divisional Court (*R (Saxon) v CCRC* [2001] EWHC Admin 505 and *R (Westlake) v CCRC* [2004] EWHC 2799) have acknowledged, the Commission has a discretion whether or not to refer a case to the appropriate appeal court even where the statutory conditions for referral are satisfied.
2. By contrast, those statutory conditions found in sections 13 and 14(2) of the Criminal Appeal Act 1995 have a mandatory quality: no reference is possible unless the conditions are met.
3. If a case meets all the statutory criteria, it will not normally be necessary to discuss the Commission's discretion. Once the Commission has found that the "real possibility" test is satisfied, it will rarely be appropriate to decide against referral, but in some cases it will be necessary to consider whether a referral is appropriate notwithstanding a real possibility.
4. The discretion not to refer must be exercised in accordance with public law principles: the decision must be lawful, fair and reasonable; each case must be considered on its individual merits; all relevant factors must be considered, and the irrelevant disregarded; the reasoning must be set out fully; and the applicant must have an opportunity to comment specifically before the decision is finalised.
5. Nothing in this memorandum seeks to limit or circumscribe the Commission's discretion and it should consider exercising the discretion not to refer in any appropriate case, having regard to the public interest and the private interest, which need to be balanced.

General considerations

6. The Commission will have regard to the following factors in considering whether to exercise its discretion not to refer:
 - The public interest, including the cost to the public purse involved in an appeal¹ and in correction of an injustice.
 - The age and seriousness of the conviction, and whether the convicted person is deceased².
 - The interests of third parties.
 - Whether the defendant was denied a basic constitutional right.
 - Whether the prosecution constituted an abuse of process or affront to justice.
 - Other remedies already secured.
7. The above list is illustrative only and is in no sense meant to be comprehensive.
8. There may be rare cases where the Commission considers that an admission is made by an applicant in such circumstances that, even if there were a real possibility of the convictions being quashed, it should consider exercising its discretion not to refer in the public interest. For example, the applicant complains with some justification of a serious irregularity or abuse of process, but admits his guilt publicly. The issue for the Commission is whether it would constitute an affront to justice to refer the case in such circumstances.

Benefit resulting from a referral

9. The Commission will also consider whether any benefit would accrue either to the criminal justice system or to the applicant if the case were referred. In assessing benefit, regard may be had to a variety of factors, including the relevant issues, seriousness of the offence, nature and severity of the sentence, age of the conviction and its impact on the applicant – such as loss of job opportunities, loss of reputation, personal sense of injustice, effect on family. Benefit is not limited to monetary considerations or effect

¹ Which has greater relevance in circumstances where the convicted person is deceased – see paragraph 22 of *R (Westlake) v CCRC* [2004] EWHC 2799

² See, for example, paragraph 22 of *R (Westlake) v CCRC* [2004] EWHC 2799 and paragraph 54 of *R v Luckhurst (deceased)* [2010] EWCA Crim 2618

on the sentence and includes self-respect and standing in one's family or the community. An important public interest consideration is that, generally speaking, people should remain convicted only of those offences where the conviction is "safe". Some guidance was offered to the Commission by Lord Woolf LCJ in *Smith (Wallace Duncan)* [2004] EWCA Crim 631, para 29, when he said:

"The Commission's role is to refer those cases to this Court where the Commission considers that there may have been some real injustice or there are other exceptional circumstances which justify referring the case. If a conviction will not be upheld but the conviction of another offence will be substituted, usually there will be no purpose in making a reference in relation to the conviction. The position as to sentence may be different in some cases."

10. Absence of benefit might, for example, be demonstrated if a referral of a conviction could not affect the totality of the sentence because the applicant has other similar convictions from the same trial in respect of which there is no real possibility of their being quashed. Similarly, there may be little benefit to an applicant if there is every prospect that the Court of Appeal would quash the conviction, but then substitute a conviction for another offence under section 3 or 3A of the Criminal Appeal Act 1968. If, however, there might be a material effect on a sentence (for example, the removal of a particular obligation such as a compensation order), a referral would be a meaningful rather than an abstract exercise.
11. Likewise, if the referral of the conviction or sentence would affect the sentencing options of a court when dealing with the applicant in the future, a real benefit may arise.

Procedure

12. In some cases, the discretion whether or not to refer will arise only once it is clear that the statutory conditions have been met, and this will only become clear once the review has been completed, but there will also be cases where it is clear on their face, or during the review process, that even if the statutory conditions are met, a referral may be unlikely. Such a case should immediately be referred to a Commissioner to consider the exercise of discretion. If the Commissioner concludes that it is not a proper case for the exercise of the discretion, the review and decision-making process will continue as normal. A case committee may be convened to decide the issue where appropriate.

Discretion in referrals

This document will be reviewed and updated when necessary.

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13. Where a Commissioner or case committee has considered factors relevant to the exercise of the discretion not to refer, or even where it has merely considered if it is a suitable case for consideration of discretion, the Statement of Reasons should normally cover the point in appropriate detail.