



Criminal Cases Review Commission

CASEWORK POLICY

Policy Title: **The Discretion to Refer**

Reference: **CW-POL-07**

Version: **1.0**

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The CCRC’s Quality Statement

The CCRC is committed to achieving high-quality case reviews as quickly as possible. In order to achieve this, we operate under a Quality Management System; please see ‘Q-POL-01 CCRC Quality Policy’ for further information. Our policy documents are available on our website: www.ccrcc.gov.uk.

If you or someone you represent has difficulty accessing the internet then please contact us via 0300 456 2669 (calls charged at local rate) and we will send a hardcopy of the relevant policy free of charge.

This is a quality-controlled document. Significant changes from the last issue are in grey highlight: like this. Significant deletions are shown as: [text deleted].

Introduction

This policy details the CCRC’s discretion in deciding not to refer a case to the appeal court even though the legal criteria for allowing a referral have been satisfied.

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Key Points

- 1) The CCRC is unable to refer a case to the appeal court unless the legal statutory criteria in the Criminal Appeal Act 1995 have been met.
- 2) However, the CCRC has a discretion not to refer a case to the appropriate appeal court even where the legal statutory criteria for referral are satisfied.
- 3) The discretion not to refer will be exercised in accordance with public law principles. The CCRC will also have regard to various factors including the public interest, the age and seriousness of the conviction, and whether the convicted person is deceased.
- 4) The use of the discretion will be decided by a Commissioner.
- 5) The reasons for using the discretion to not refer a case will be stated in the decision document.

Definitions

Key Word	Meaning
EWCA Crim	England and Wales Court of Appeal (Criminal Division)
EWHC Admin	England and Wales High Court (Administrative Court)

1 General Information

- 1.1 The CCRC is unable to refer a case to the appeal court unless the legal statutory criteria¹ in the Criminal Appeal Act 1995 have been met.
- 1.2 If a case meets all of the legal statutory criteria, it will not normally be necessary to discuss the CCRC's discretion. Once the CCRC 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 even though there is a real possibility that the conviction, verdict, finding or sentence would not be upheld if the case were referred to the appeal court.
- 1.3 As the Court of Appeal² and the Divisional Court³ have acknowledged, the CCRC has a discretion not to refer a case to the appropriate appeal court even where the legal statutory criteria for referral are satisfied.

¹ Sections 13 and 14(2). See [Appendix 1](#) for further information.

² *Clark* [2001] EWCA Crim 884, *Smith (Wallace Duncan)* [2004] EWCA Crim 631, *R v Luckhurst (deceased)* [2010] EWCA Crim 2618.

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- 1.4 The discretion not to refer will be exercised in accordance with public law principles:
- I. The decision must be lawful, fair, and reasonable.
 - II. Each case must be considered on its individual merits.
 - III. All relevant factors must be considered, and the irrelevant factors disregarded.
 - IV. The reasoning must be set out fully; and
 - V. The applicant must have an opportunity to comment specifically before the decision is finalised.
- 1.5 Nothing in this policy seeks to limit the CCRC'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.

2 General Considerations

- 2.1 The CCRC will have regard to the following factors in considering whether to exercise its discretion not to refer:
- I. The public interest, including the cost to the public purse involved in an appeal⁴ and in correction of an injustice.
 - II. The age and seriousness of the conviction, and whether the convicted person is deceased.⁵
 - III. The interests of third parties.
 - IV. Whether the defendant was denied a basic constitutional right.
 - V. Whether the prosecution constituted an abuse of process or affront to justice.
 - VI. Other remedies already secured.

³ *R (Saxon) v CCRC* [2001] EWHC Admin 505, *R (Westlake) v CCRC* [2004] EWHC 2799).

⁴ Which has greater relevance in circumstances where the convicted person is deceased - see paragraph 22 of *R (Westlake) v CCRC* [2004] EWHC 2799.

⁵ 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.

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- 2.2 The above list is illustrative only and is not meant to be comprehensive.
- 2.3 There may be rare cases where the CCRC 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 CCRC is whether it would constitute an affront to justice to refer the case in such circumstances.

3 Benefit Resulting from a Referral

- 3.1 The CCRC 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 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 CCRC by Lord Chief Justice Woolf:⁶

“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.”

- 3.2 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

⁶ *Smith (Wallace Duncan)* [2004] EWCA Crim 631, paragraph 29.

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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 exercise.

- 3.3 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.

4 Procedure

- 4.1 In some cases, the discretion not to refer will arise only once it is clear that the legal statutory criteria 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 legal statutory criteria are met, a referral may be unlikely. Such a case will 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.
- 4.2 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 will normally cover the point in appropriate detail.

Appendices

1 [Criminal Appeal Act 1995 \(excerpt\)](#)

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Relevant CCRC Documents

Q-MAN-01 CCRC Quality Manual
Q-POL-01 CCRC Quality Policy

Legal Documents (available for free from www.legislation.gov.uk)

Criminal Appeal Act 1968
Criminal Appeal Act 1995

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Case Law

Clark [2001] EWCA Crim 884

R v Luckhurst (deceased) [2010] EWCA Crim 2618

R (Saxon) v CCRC [2001] EWHC Admin 505

R (Westlake) v CCRC [2004] EWHC 2799

Smith (Wallace Duncan) [2004] EWCA Crim 631

Document Control

Document author: Head of Legal

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Version History

Date Issued	Version	Brief Details of Change	DCR
15/07/2021	1.0	First Issue	21/04

Appendix 1 - Criminal Appeal Act 1995 (excerpt)

****The law stated below is provided here for information only. It is correct at the time this policy document was published. However, you should always check the www.legislation.gov.uk website for the latest version of the law****

13 Conditions for making of references

- (1) A reference of a conviction, verdict, finding or sentence 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, verdict, finding or sentence would not be upheld were the reference to be made,
 - (b) the Commission so consider -
 - (i) in the case of a conviction, verdict or finding, because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it, or
 - (ii) in the case of a sentence, because of an argument on a point of law, or information, not so raised, and

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- (c) an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused.
- (2) Nothing in subsection (1)(b)(i) or (c) shall prevent the making of a reference if it appears to the Commission that there are exceptional circumstances which justify making it.

14 Further provisions about references

- (2) In considering whether to make a reference of a conviction, verdict, finding or sentence under any of sections 9 to 12B the Commission shall have regard to -
 - (a) any application or representations made to the Commission by or on behalf of the person to whom it relates,
 - (b) any other representations made to the Commission in relation to it, and
 - (c) any other matters which appear to the Commission to be relevant.

*****END OF DOCUMENT*****

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