



Criminal Cases Review Commission

CASEWORK POLICY

Policy Title: **Development of Law as a Ground for Referral**

Reference: **CW-POL-15**

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 applies to all cases, including those where the conviction or sentence is challenged on the basis of a development in the common law.

Key Points

This policy deals with a lot of case law. It is not possible to summarise key points; this document must be read in its entirety to appreciate the context.

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Definitions

Key Word	Meaning
EWCA Crim	England and Wales Court of Appeal (Criminal Division)
UKHL	UK House of Lords (replaced by the UKSC in 2009)
UKSC	UK Supreme Court (the highest court in the UK since 2009)

1 General Information

- 1.1 The principles applied by the Court of Appeal in considering the granting of leave in cases where the conviction or sentence is challenged on the basis of a development in the common law, are set out in *R v Jogee* [2016] UKSC 8 at paragraph 100. Essentially, the Court has the power to grant exceptional leave to appeal out of time if substantial injustice (see [paragraph 1.4](#) below) is demonstrated, but it will not do so simply because the law that was applied has now been declared to have been mistaken.
- 1.2 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 CCRC, 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). Section 16C of the Criminal Appeal Act 1968 is provided in [Appendix 1](#).
- 1.3 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 16C.³
- 1.4 Substantial Injustice
- 1.4.1 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

¹ 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 Criminal Appeal Act 1995. The new section applies where the change of law would be the **only** ground for allowing an appeal.

³ But see the reference to *Neuberg* at paragraph 2.2 below.

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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.

- 1.4.2 However, *Ordu v R* [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.

2 The CCRC's Approach

2.1 Conviction Cases

- 2.1.1 In all cases where a development of law might raise a real possibility that the conviction is unsafe, the CCRC 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:

- I. The public interest in finality to litigation.
- II. The public interest that defendants should not be convicted of offences which they are not proved to have committed.⁴
- III. 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.
- IV. 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.

⁴ See *R v Coutts* [2006] UKHL 39, paragraph 12.

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V. 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.

VI. The operation of s.16C of the Criminal Appeal Act 1968.

2.1.2 The Court will consider substantial injustice (see [paragraph 1.4](#) above) first and safety second, but in reality, the two are inseparably linked. If a substantial injustice is found it will be rare that the conviction remains safe (but not necessarily vice versa).

2.1.3 Sentencing remarks will not be relied upon when considering the safety of the conviction.

2.1.4 Regard will **not** be had to the number of applications that may be received because of the development.

2.2 Sentence Cases

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 (see [paragraph 1.4](#) above), and to apply that law when considering whether to refer the case to the court.

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

2.3.1 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 CCRC 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 *R v Ramzan and others* [2006] EWCA Crim 1947.

2.3.2 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 CCRC, a referral based on a change in the law will be possible only where there is:

- a) new argument or evidence not previously considered by the Court of Appeal, or

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b) there are exceptional circumstances⁵

and where the CCRC finds there is a real possibility of substantial injustice (see [paragraph 1.4](#) above).

Appendices

1 [Section 16C of the Criminal Appeal Act 1968](#)

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Relevant Documents

Q-MAN-01 CCRC Quality Manual
Q-POL-01 CCRC Quality Policy
CW-POL-06 Exceptional Circumstances

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

Criminal Appeal Act 1968
Criminal Appeal Act 1995
Criminal Appeal (Northern Ireland) Act 1980
Criminal Cases Review (Insanity) Act 1999

Case Law

Ordu v R [2017] EWCA Crim 4
R v Coutts [2006] UKHL 39
R v Jogee [2016] UKSC 8
R v Johnson and others [2016] EWCA Crim 1613
R v Neuberg [2016] EWCA Crim 1927
R v Ramzan and others [2006] EWCA Crim 1947

Document Control

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15/07/2021	1.0	First Issue	21/04

⁵ See 'CW-POL-06 Exceptional Circumstances' for further information.

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Appendix 1 - Section 16C of the Criminal Appeal Act 1968

****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****

16C Power to dismiss certain appeals following references by the CCRC

- (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
 - (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).

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