

**The Law Commission**  
**Consultation Paper No 184**

**THE HIGH COURT'S JURISDICTION IN  
RELATION TO CRIMINAL PROCEEDINGS**

**A Consultation Paper**

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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This consultation paper, completed on 1 October 2007, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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## THE LAW COMMISSION

# THE HIGH COURT'S JURISDICTION IN RELATION TO CRIMINAL PROCEEDINGS

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# **PART 1**

## **INTRODUCTION**

### **TERMS OF REFERENCE**

- 1.1 The Law Commission has been asked to consider:
- (a) the origins and nature of, and the limitations upon, the High Court's criminal jurisdictions by case stated and judicial review over the Crown Court, as set out in sections 28 and 29 of the Supreme Court Act 1981 and in particular sections 28(2) and 29(3) thereof;
  - (b) how those jurisdictions are best transferred to the Court of Appeal, simplified and, if appropriate, modified;
  - (c) the implications of (a) and (b) for the High Court's criminal jurisdiction over the magistrates' court, and for courts-martial;

and to make recommendations.

### **UNDERSTANDING THE TERMS OF REFERENCE**

#### **The origins, nature of and limitations upon the High Court's jurisdictions over the Crown Court**

##### ***Inferior and superior courts***

- 1.2 The distinction between inferior and superior courts is important because from the twelfth century the Crown exercised an inherent supervisory power to control inferior but not superior courts. The regal power was initially exercised in the King's Council, the Curia Regis. The King's Bench Division of the High Court acquired the power when that common law court broke away from the King's Council.
- 1.3 Supervision was effected by the use of prerogative writs of prohibition, mandamus and certiorari. In 1838, these writs were replaced by orders of the same name. These orders are now known respectively as prohibitory orders, mandatory orders and quashing orders.<sup>1</sup> They are issued in the Administrative Court, a part of the Queen Bench Division of the High Court.<sup>2</sup> This supervisory jurisdiction and the procedure for invoking it are known as 'judicial review'.

<sup>1</sup> See the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004.

<sup>2</sup> Practice Direction (Administrative Court: Establishment) [2000] 1 WLR 1654, by Lord Woolf CJ. Following the Review of the Crown Office List undertaken by Sir Jeffery Bowman, the Crown Office side of the Queen's Bench Division was re-named the Administrative Court in 2000.

### **Inferior courts and superior courts prior to 1971**

- 1.4 Prior to 1971, criminal cases in England and Wales were heard in three different levels of courts.<sup>3</sup> The lowest level comprised magistrates' courts. Most criminal cases were (and continue to be) tried in magistrates' courts. Magistrates' courts are courts of summary jurisdiction and, being inferior courts, were and are subject to the inherent supervisory jurisdiction of the High Court.
- 1.5 The highest level comprised the Assize Courts ('Assizes'). Assizes were superior courts of record in which defendants were tried *on indictment* before a judge and jury. The most serious offences were tried at Assizes.
- 1.6 The middle level courts comprised Quarter Sessions. Quarter Sessions exercised two distinct jurisdictions. Like Assizes, they exercised a *first instance jurisdiction* which consisted of trying defendants on indictment for indictable offences. They also exercised an *appellate jurisdiction* by hearing the appeals of defendants who had been convicted and/or sentenced by magistrates' courts. Whichever jurisdiction they exercised, Quarter Sessions were inferior courts.

### **Challenging decisions of inferior courts and superior courts prior to 1971**

#### ***Judicial review***

##### QUARTER SESSIONS

- 1.7 As Quarter Sessions were inferior courts, it might be thought that all decisions of Quarter Sessions would be susceptible to the inherent supervisory jurisdiction of the High Court. It is clear that this was so in relation to decisions of Quarter Sessions when exercising their appellate jurisdiction. However, decisions of Quarter Sessions when trying defendants on indictment were an exception. The general rule was that such decisions were not amenable to judicial review. However, it was not an absolute rule. On rare occasions, the High Court would, by granting an order of *mandamus*, exercise a supervisory jurisdiction in relation to a decision of Quarter Sessions made in a trial on indictment.<sup>4</sup>

##### ASSIZES

- 1.8 Assizes, being superior courts of record, were not subject to judicial review by the High Court. Instead, with leave, a defendant could appeal to the Court of Criminal Appeal against conviction and/or sentence. The prosecution could not appeal against an acquittal.

<sup>3</sup> See the Royal Commission on Assizes and Quarter Sessions 1966-1969, Cmnd 4153, paras 4 to 5.

<sup>4</sup> Eg, *R v London County Quarter Sessions Chairman, ex parte Downes* [1954] 1 QB 1; *R v Assistant Recorder of Kingston-upon-Hull, ex parte Morgan* [1969] 2 QB 58, *R v Inner London Quarter Sessions, ex parte Metropolitan Police Commissioner* [1970] 2 QB 80. It is doubtful whether the High Court could grant an order of certiorari – see *R v London County Quarter Sessions Chairman, ex parte Downes* [1954] 1 QB 1, 7, by Lord Goddard CJ and *R v Manchester Crown Court, ex parte Director of Public Prosecutions* [1993] 1 WLR 1524, 1527, by Lord Browne-Wilkinson.

## **Case stated**

### QUARTER SESSIONS

- 1.9 In addition to hearing applications for judicial review, the High Court had jurisdiction to hear appeals by case stated from decisions made by Quarter Sessions. Before 1894 this jurisdiction was, with two exceptions, a common law jurisdiction. It originated in the practice of Quarter Sessions, when it had a case of difficulty, to seek orally the opinion of a judge of Assizes. The practice developed in two ways. First, it became the practice to make the request in writing. Secondly, by the early nineteenth century, Quarter Sessions stated the case for the opinion of the Court of King's Bench.<sup>5</sup>
- 1.10 There were two important features of the early practice, the second of which remains a feature of the current law. First, Quarter Sessions could not be compelled to state a case. Secondly, the High Court resisted the attempts of Quarter Sessions to state a case before Quarter Sessions had reached a final decision.<sup>6</sup>
- 1.11 The procedure governing an appeal from Quarter Sessions by way of case stated was put on a statutory footing by section 2 of the Supreme Court of Judicature (Procedure) Act 1894.<sup>7</sup> A further development took place with the enactment of section 20 of the Criminal Justice Act 1925. According to Lord Justice Neill,
- ... for the first time a new right was given to a party to criminal proceedings which had been heard on appeal by quarter sessions, to appeal further by case stated to the High Court.<sup>8</sup>
- 1.12 Appeal by case stated enabled any party to the proceedings before Quarter Sessions to appeal to the High Court on the basis that the decision of Quarter Sessions was erroneous in law. In stating a case, Quarter Sessions would recite its findings of fact and ask the High Court whether, in the light of those findings, its decision was correct in law.

### ASSIZES

- 1.13 Being a superior court, decisions of Assizes could not be challenged by appeal by case stated.

<sup>5</sup> See *Loade v DPP* [1990] 1QB 1052, 1060.

<sup>6</sup> *R v Sutton Coldfield* (1874) LR 9 QB 153.

<sup>7</sup> Appeal by case stated in relation to decisions of magistrates' courts originated with the Summary Jurisdiction Act 1857, s 2.

<sup>8</sup> *Loade v DPP* [1990] 1 QB 1052, 1062.

## **The establishment of the Crown Court in place of Assizes and Quarter Sessions**

- 1.14 The Courts Act 1971 ('the 1971 Act') abolished Assizes and Quarter Sessions. In their place, it established the Crown Court of England and Wales as a superior court of record.<sup>9</sup> Magistrates' courts were unaffected by the 1971 Act and, accordingly, all criminal trials in England and Wales now take place either in the Crown Court or in magistrates' courts.<sup>10</sup>

## **The jurisdictions exercised by the Crown Court in relation to criminal proceedings**

- 1.15 The jurisdiction which the Crown Court exercises in relation to criminal proceedings is of three kinds:
- (1) A first instance jurisdiction. Broadly, this is the equivalent of the jurisdiction previously exercised by Assizes and Quarter Sessions when the latter tried defendants on indictment. Defendants are tried *on indictment*.<sup>11</sup> The trial will usually be conducted before a judge and jury.<sup>12</sup> The number of cases tried on indictment is small in comparison to the number tried in magistrates' courts. However, all the most serious offences are tried on indictment.
  - (2) An appellate jurisdiction. This is the equivalent of the jurisdiction previously exercised by Quarter Sessions when hearing appeals from magistrates' courts against conviction and/or sentence. The Crown Court's appellate jurisdiction consists, for the most part, of hearing appeals by defendants against conviction and/or sentences of magistrates' courts. In addition, it hears appeals against decisions by magistrates' courts to refuse or grant bail and appeals in relation to custody time limits.

<sup>9</sup> Supreme Court Act 1981, s 45(1).

<sup>10</sup> Unless the defendant is a member of the armed forces or is a civilian who has a connection with the armed forces or a member of the armed forces – see Part 7 below.

<sup>11</sup> The exception is where a defendant is unfit to plead, see Part 2, paras 2.58 to 2.60 below.

<sup>12</sup> There are exceptions. In cases of jury tampering, a Crown Court judge can order that the trial be conducted or continued without a jury – Criminal Justice Act 2003, ss 44 & 46. Where a jury convicts a defendant of an offence which can be regarded as a sample of other offences to be tried, a judge may order that the other offences be tried without a jury if of the view that the number of offences is such that a trial by jury would be impracticable – Domestic Violence, Crime and Victims Act 2004, ss 17 to 20. Finally, if and when Criminal Justice Act 2003, s 43 is implemented, it will be possible for a serious or complex fraud trial to be conducted without a jury if the complexity or length of the trial is likely to make the trial so burdensome upon the jury that the interests of justice require serious consideration to be given to conducting the trial without a jury.

- (3) A committal for sentence jurisdiction. This consists of sentencing those defendants who, having been convicted by magistrates' courts of triable either way offences<sup>13</sup> or, in the case of children and young persons, of 'specified' violent or sexual offences<sup>14</sup> are committed to the Crown Court for sentence because the magistrates believe that their sentencing powers are insufficient.
- 1.16 The Crown Court is a superior court of record regardless of which jurisdiction it is exercising.

***Aspects of the Crown Court's first instance jurisdiction***

- 1.17 The modern emphasis on the importance of effective trial management means that, in cases tried on indictment, Crown Court judges frequently make important decisions and rulings both before and after the jury is sworn. The decisions and rulings can and do cover a broad range of issues. They range from whether charges should be dismissed, whether proceedings should be stayed on grounds of abuse of process, rulings as to admissibility of evidence, rulings as to the severance or joinder of charges and rulings on questions of law. In addition, there are ancillary issues, for example, the issuing of witness summonses, the grant or refusal of bail and the extension of custody time limits.
- 1.18 A feature of recent years has been the extent to which Parliament has permitted challenges to some of these decisions and rulings even though the challenges may have the effect of:
- (1) delaying the time when the jury starts to hear the evidence;<sup>15</sup> or
  - (2) interrupting the trial after the jury has begun to hear the evidence.<sup>16</sup>
- 1.19 Parliament has done so by providing specific statutory rights of appeal, usually subject to the granting of leave, to the Court of Appeal (Criminal Division) ('the Court of Appeal') rather than to the High Court.<sup>17</sup>
- 1.20 Two points should be noted. First, it remains the case that many judicial decisions and rulings made in trials on indictment cannot be appealed to the Court of Appeal. Secondly, Parliament has been more generous to the prosecution than to the defence. The following example illustrates both points.

<sup>13</sup> See Part 2, para 2.4 below.

<sup>14</sup> See Part 2, para 2.8 below.

<sup>15</sup> Criminal Justice Act 1967, s 9(11); Criminal Procedure and Investigations Act 1996, s 35(1). See Part 2, paras 2.70 to 2.89 below.

<sup>16</sup> Criminal Justice Act 2003, s 62, although s 62, which enables the prosecution to appeal against certain rulings made after the jury has begun to hear the evidence, has not yet been implemented. See Part 2, paras 2.90 to 2.92 below.

<sup>17</sup> The Criminal Appeal Act 1966 created the Court of Appeal (Civil Division) and the Court of Appeal (Criminal Division). The latter replaced the Court of Criminal Appeal.

- 1.21 A judge may have to consider a defence application that the proceedings should be stayed on the grounds that they constitute an abuse of the process of the court. If the judge grants the application, the ruling is a ‘terminating’ ruling in the sense that it is a ruling which causes the prosecution case to collapse. Parliament has recently enacted that the prosecution may, with leave, appeal to the Court of Appeal against all ‘terminating’ rulings made in cases tried on indictment.<sup>18</sup> By contrast, if the judge refuses the application, the defendant cannot appeal to the Court of Appeal.<sup>19</sup> The only way, unless and until he or she is convicted, that the defendant can seek to challenge the decision is by applying to the *High Court* for judicial review. As will become apparent, section 29(3) of the Supreme Court Act 1981 is an obstacle to such an application.<sup>20</sup>

### **The High Court’s jurisdiction in relation to criminal proceedings in the Crown Court**

#### ***The High Court’s jurisdiction in relation to decisions of the Crown Court exercising its appellate and sentencing jurisdictions***

- 1.22 When, in 1971, it established the Crown Court as a superior court, Parliament granted to the High Court the jurisdiction that it had previously exercised in relation to decisions made by Quarter Sessions when exercising its appellate jurisdiction. Section 10(2) and section 10(5) of the 1971 Act enabled decisions made by the Crown Court when exercising its appellate and committal for sentence jurisdictions to be challenged by appeal by case stated and judicial review respectively. The wording of section 10(2) and section 10(5) was replicated in sections 28(1) and 29(3) respectively of the Supreme Court Act 1981.

#### ***The High Court’s jurisdiction in relation to decisions of the Crown Court exercising its first instance jurisdiction***

- 1.23 Decisions made by the Crown Court when exercising its first instance jurisdiction posed greater difficulty. The creation of the Crown Court by the 1971 Act brought together business from both inferior courts (Quarter Sessions) and from superior courts (Assizes). The High Court had never had any jurisdiction in relation to Assizes. On the other hand, the High Court, albeit rarely, had previously entertained applications for judicial review of decisions made by Quarter Sessions when exercising its jurisdiction of trying cases on indictment.<sup>21</sup> Further, at common law and, subsequently, under section 2 of the Supreme Court of Judicature (Procedure) Act 1894, appeal by case stated was available in relation to decisions made by Quarter Sessions when trying cases on indictment.

<sup>18</sup> Criminal Justice Act 2003, ss 57 to 61. Of course, an appeal against a ‘terminating’ ruling does not delay the hearing of evidence in a criminal trial because the effect of the ruling is either that there should be no trial or that the trial should cease, for example, a ruling at the conclusion of the evidence for the prosecution that there is no case for the defendant to answer. On ‘terminating’ rulings see Part 2, paras 2.63 to 2.69 below.

<sup>19</sup> Although on one view, the position has changed as a result of the decision of the House of Lords in *H* [2007] UKHL 7, [2007] 2 WLR 364 – see Part 2, paras 2.70 to 2.89 below.

<sup>20</sup> *R (Snelgrove) v Woolwich Crown Court* [2004] EWHC 2172 (Admin), [2005] 1 WLR 3223.

<sup>21</sup> See para 1.7 above.

1.24 In establishing the Crown Court, Parliament placed a restriction on the High Court's jurisdiction in relation to decisions made by the Crown Court when exercising its first instance jurisdiction. Section 10(1)(a) of the 1971 Act precluded appeal by case stated of a 'judgment or other decision *relating to trial on indictment*' (emphasis added). In relation to judicial review, section 10(5) provided:

In relation to the jurisdiction of the Crown Court, *other than its jurisdiction in matters relating to trial on indictment*, the High Court shall have all such jurisdiction to make orders of mandamus, prohibition, or certiorari as the High Court possesses in relation to the jurisdiction of an inferior court.

1.25 The wording of section 10(1)(a) and section 10(5) of the 1971 Act was replicated in sections 28(2)(a) and 29(3) respectively of the Supreme Court Act 1981.

'RELATING TO TRIAL ON INDICTMENT'

1.26 In settling on the phrase 'relating to trial on indictment', Parliament's intention may have been to ensure that *no* decisions made by the Crown Court when exercising its first instance jurisdiction should be susceptible to challenge in the High Court. In other words, the intention was to create an absolute bar in such cases. Such an intention would have accorded with the fact that, previously, decisions of Assizes could not be challenged in the High Court. It would also have been consistent with the fact that, previously, judicial review of decisions made by Quarter Sessions when exercising its first instance jurisdiction was, if not unknown, very rare.<sup>22</sup>

1.27 However, as interpreted by the courts, the phrase 'relating to trial on indictment' does not create an absolute bar.<sup>23</sup> The courts have held that certain decisions made by the Crown Court in cases tried on indictment are capable of being challenged in the High Court. The reasons for doing so are not difficult to identify. A defendant who is convicted and sentenced following a trial on indictment in the Crown Court can, with leave, appeal against conviction and/or sentence to the Court of Appeal.<sup>24</sup> However, an appeal to the Court of Appeal against conviction and sentence does not assist a defendant who is acquitted but is then committed to prison unless he or she agrees to be bound over to keep the peace.<sup>25</sup> Likewise, an appeal against conviction and sentence will not assist a third party to the proceedings who is adversely affected by a Crown Court's decision or ruling. An example would be an order for forfeiture of a surety's recognisance for bail following the failure of the defendant to surrender to his or her bail at the Crown Court.

<sup>22</sup> See para 1.7 above.

<sup>23</sup> Note s 10(6) of the 1971 Act, which specifically addressed matters that previously had been final in quarter sessions.

<sup>24</sup> Criminal Appeal Act 1968, ss 2 and 9.

<sup>25</sup> By contrast, a convicted defendant who is bound over to keep the peace can appeal against the order because it is a 'sentence' within the meaning of the Criminal Appeal Act 1968, s 50, for the purpose of Criminal Appeal Act 1968, s 9: *Williams (Carl)* [1982] 1 WLR 1398.

- 1.28 Since 1971 there have been profound changes both in the way that the criminal justice system is organised and managed and in the way that the rights and duties of the prosecution and the defendant (and his or her representatives) are understood. Furthermore, greater sensitivity has developed towards the interests of third parties to criminal proceedings. These are parties whose interests in criminal proceedings stem from, for example, their role as witnesses, or as members of victims' families, of the media, or of organisations who may be required to provide information to the courts in individual cases.
- 1.29 Consequently, it is not surprising that the courts have been reluctant to interpret the expression 'matters relating to trial on indictment' as imposing a total ban on the High Court entertaining challenges to decisions of the Crown Court exercising its first instance jurisdiction.<sup>26</sup>
- 1.30 However, in declining to interpret the expression as imposing a blanket ban, the courts have had to confront a fundamental problem which was identified by Lord Browne-Wilkinson in *R v Manchester Crown Court, ex parte Director of Public Prosecutions*.<sup>27</sup> He described the expression as "extremely imprecise".<sup>28</sup> The courts have struggled to identify clear criteria for deciding which decisions are 'matters relating to trial on indictment'. The meaning of the expression has generated a considerable body of case law, including five decisions of the House of Lords in the last twenty years.<sup>29</sup> In *R v Manchester Crown Court, ex parte H*, Lord Justice Rose commented that:

The meaning of the words ... 'matters relating to trial on indictment' has, in recent years, attracted perhaps more judicial consideration, in not always apparently reconcilable decisions, than any other statutory provision.<sup>30</sup>

<sup>26</sup> The parallel development is something that we have already referred to, namely the increasing willingness of Parliament to provide some rights of appeal to the Court of Appeal even though such appeals may delay the progress of trials: see paras 1.18 to 1.19 above.

<sup>27</sup> [1993] 1 WLR 1524.

<sup>28</sup> Above, at 1528.

<sup>29</sup> *Re Smalley* [1985] AC 622, *Re Sampson* [1987] 1 WLR 194, *R v Manchester Crown Court, ex parte Director of Public Prosecutions* [1993], *Re Ashton* [1994] 1 AC 9, *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326.

<sup>30</sup> [2000] 1 WLR 760, 767.

- 1.31 A thread of principle can be discerned in some of these decisions. In particular, the underlying policy which appears to have informed the interpretation of sections 28(2) and 29(3) of the Supreme Court Act 1981 is that trials should not be delayed unduly by satellite litigation. This policy has an important place in our proposals for reform but we do not believe that it should be the only policy or principle to inform reform. The efficiency with which criminal trials are conducted and concluded should not be the only consideration in determining which decisions of the Crown Court exercising its first instance (or appellate) jurisdiction should be amenable to challenge. Protecting citizens from the wrongful deprivation of their liberty, securing their rights under the European Convention on Human Rights and Fundamental Freedoms ('ECHR') and securing due process in criminal proceedings are also important principles that should be at work in determining the scope of review.

## **THE PROBLEMS WITH THE CURRENT LAW**

### **The meaning of 'relating to trial on indictment'**

- 1.32 The imprecision of the expression 'relating to trial on indictment' has given rise to frequent and costly litigation. In addition, on occasions, it has resulted in a person being without a proper and adequate remedy under domestic law, even where that person's rights under the ECHR have been violated.<sup>31</sup>

### **Lack of clarity and simplicity**

#### ***Different avenues for challenging decisions of the Crown Court depending on which jurisdiction the Crown Court was exercising***

- 1.33 The current structure and procedures for challenging decisions made in criminal proceedings are unduly complex and lack an adequately principled basis. As we explain in Part 2, the main avenue for appealing decisions or rulings of the Crown Court exercising its first instance jurisdiction is by appeal to the Court of Appeal. There are a number of different statutes enabling parties to do so. Thus, a convicted defendant may, with leave, appeal against conviction and sentence.<sup>32</sup> Both the prosecution and the defendant can appeal against certain interlocutory rulings made in what are known as 'preparatory hearings'.<sup>33</sup> The prosecution can appeal against 'terminating' rulings.<sup>34</sup> There are other examples.
- 1.34 The High Court also has jurisdiction in relation to the Crown Court's first instance jurisdiction. However, as already noted, the scope of its jurisdiction is limited to matters which do not 'relate to trial on indictment' and the extent of its jurisdiction is uncertain because of the expression's lack of precision.

<sup>31</sup> See Part 3, paras 3.17 to 3.19 below,

<sup>32</sup> Criminal Appeal Act 1968, ss 2 and 9.

<sup>33</sup> See Part 2, paras 2.70 to 2.89 below.

<sup>34</sup> See Part 2, paras 2.63 to 2.69 below.

- 1.35 The position is reversed when it comes to challenging decisions made by the Crown Court when exercising its appellate jurisdiction. Such decisions can only be challenged by resorting to the High Court either by appeal by case stated or by an application for judicial review. The Court of Appeal has no jurisdiction in relation to the Crown Court's exercise of its appellate or committal for sentence jurisdictions.
- 1.36 Whatever, the historical reasons for distinguishing the ways in which decisions of the Crown Court can be appealed or reviewed, the time has come to consider making one court responsible for scrutinising decisions of the Crown Court in criminal proceedings irrespective of which jurisdiction the Crown Court was exercising.

***Different avenues for challenging decisions of the Crown Court exercising its appellate jurisdiction***

- 1.37 The current law provides two means of challenging decisions made by the Crown Court when exercising its appellate jurisdiction: appeal to the High Court by case stated and applications to the High Court for judicial review. There are significant differences between the two. A claim for judicial review can only be made with permission whereas, once a case has been stated, the High Court must hear the appeal. The time limits for making the challenge are different. Evidence may be received, usually on affidavit, in applications for judicial review whereas evidence is not received in appeals by cases stated.
- 1.38 In his Review of the Criminal Courts of England and Wales in 2001,<sup>35</sup> Lord Justice Auld criticised the present system because it permits these separate but overlapping means of challenging decisions. He observed: "Choosing the most appropriate route and form of relief in the High Court is not always straightforward".<sup>36</sup> In *R (P) v Liverpool City Magistrates*,<sup>37</sup> Mr Justice Collins observed:
- ... I recognise that there are some conflicting authorities, which do not make it necessarily easy to decide whether judicial review or case stated is appropriate in the circumstances of a given case.<sup>38</sup>
- 1.39 Nevertheless, Mr Justice Collins added that generally a failure to apply for case stated where that was the appropriate remedy would result in a refusal of leave to apply for judicial review.<sup>39</sup>

<sup>35</sup> [www.criminal-courts-review.org.uk](http://www.criminal-courts-review.org.uk)

<sup>36</sup> Review of the Criminal Courts of England and Wales (2001), ch 12, para 24.

<sup>37</sup> [2006] EWHC 887 (Admin), (2006) 170 JP Reports 453.

<sup>38</sup> Above, [6].

<sup>39</sup> See further Part 2, paras 2.41 to 2.42 below.

### ***Different avenues for appealing decisions of magistrates' courts***

1.40 The procedures for challenging decisions made by magistrates' courts are even more complex. We will describe these procedures in detail in Part 2. For present purposes, it is sufficient to point to the fact that, for convicted defendants, there are three potential avenues for challenging decisions made by magistrates' courts:

- (1) appeal against conviction and sentence to the Crown Court;
- (2) appeal by case stated to the High Court;
- (3) application to the High Court for judicial review.

1.41 Lord Justice Auld, in describing the current structure, observed:

All this is very confusing and makes for duplicity of proceedings, much unnecessary jurisprudence on the extent of and the differences between the respective jurisdictions, both as to which should be used and in what order.<sup>40</sup>

### **RECOMMENDATIONS MADE BY LORD JUSTICE AULD**

1.42 Lord Justice Auld recommended that, in relation to all decisions of the Crown Court, there should be a single form of appeal and procedure combining the best of both jurisdictions (the High Court and the Court of Appeal), which should lie to the Court of Appeal.<sup>41</sup>

1.43 With regard to magistrates' courts, he said that there was no justification for retaining the current right that a defendant has to appeal to the Crown Court against conviction and/or sentence by way of rehearing. Instead, he recommended that there should be a single route of challenge to all decisions made by magistrates' courts.<sup>42</sup> This would consist of an appeal to the Crown Court provided leave was obtained. The Court of Appeal would have a supervisory jurisdiction over the appeal proceedings in the Crown Court.

1.44 If Lord Justice Auld's recommendations were implemented, the High Court would cease to have any supervisory jurisdiction in relation to both the Crown Court and magistrates' courts. Instead, challenges to decisions of the Crown Court and magistrates' courts in connection with criminal proceedings would be heard by courts whose work, unlike the High Court, is either entirely or mainly concerned with criminal proceedings.

<sup>40</sup> Review of the Criminal Courts of England and Wales (2001), ch 12 para 29.

<sup>41</sup> Above, Recommendation 307.

<sup>42</sup> Above, Recommendations 302 and 305.

## **AN OVERVIEW OF OUR MAIN PROVISIONAL PROPOSALS<sup>43</sup>**

### **The role of the High Court**

- 1.45 We are provisionally proposing that the High Court should cease to have any jurisdiction in relation to criminal proceedings in the Crown Court. Instead, all challenges to decisions of the Crown Court should be by appeal to the Court of Appeal.

### **Appeal by case stated and judicial review**

- 1.46 We are provisionally proposing that appeal by case stated and judicial review should cease to be avenues for challenging decisions made by the Crown Court in criminal proceedings.

### **Challenging convictions and sentences**

- 1.47 We are provisionally proposing that sections 1 and 9 of the Criminal Appeal Act 1968 (which currently govern appeals against convictions and sentences following trials on indictment) should be extended to include convictions and sentences arising from the exercise by the Crown Court of its appellate jurisdictions.
- 1.48 This would mean that all convictions and sentences of the Crown Court would be subject to the same appeal regime. Any appeal against conviction and/or sentence would lie to the Court of Appeal subject to leave being granted by the Court of Appeal or a certificate from the Crown Court that the case was fit for appeal.<sup>44</sup>

### **Challenging acquittals**

- 1.49 Our provisional proposals would have no impact on acquittals in cases tried on indictment. With regard to acquittals resulting from appeals by rehearing in the Crown Court, our provisional proposals turn on whether or not an acquittal results from a 'terminating' ruling.<sup>45</sup>

### ***Acquittals that result from 'terminating' rulings***

- 1.50 We believe that if an acquittal results from a 'terminating' ruling, the prosecution should be able to appeal to the Court of Appeal against the ruling. Accordingly, we are provisionally proposing that section 58 of the Criminal Justice Act 2003, which currently enables the prosecution to appeal against 'terminating' rulings made in trials on indictment, should be extended to cover 'terminating' rulings made by the Crown Court when exercising its appellate jurisdiction.<sup>46</sup>

<sup>43</sup> See the flowchart on page 84 below.

<sup>44</sup> See Part 4, paras 4.7 to 4.27 below.

<sup>45</sup> On the meaning of 'terminating' ruling, see Part 2, paras 2.63 to 2.69 below.

<sup>46</sup> See Part 4, paras 4.28 to 4.31 below.

### ***Acquittals that do not result from ‘terminating’ rulings***

- 1.51 We believe that the prosecution should no longer be able to seek to overturn acquittals that do not result from ‘terminating’ rulings. Instead, we believe that, as with trials on indictment, the Attorney-General should be able to refer a point of law arising from an acquittal to the Court of Appeal for its opinion. However, the opinion of the Court of Appeal, even if favourable to the Attorney-General, should leave the acquittal undisturbed. Accordingly, we are provisionally proposing that section 36 of the Criminal Justice Act 1972 should be extended to enable the Attorney-General to refer points of law to the Court of Appeal following an acquittal by the Crown Court when exercising its appellate jurisdiction.<sup>47</sup>

### **Challenging determinations, judgments, orders and rulings other than convictions, sentences and acquittals**

#### ***The means of challenge***

- 1.52 We are provisionally proposing that all challenges to determinations, judgments, orders and rulings made by the Crown Court in criminal proceedings (other than convictions, sentences and acquittals) should be way of a new statutory appeal to the Court of Appeal.<sup>48</sup> This new statutory appeal would replace appeal by case stated and application for judicial review to the High Court.<sup>49</sup>

#### ***Leave to appeal***

- 1.53 We are provisionally proposing that the new statutory appeal should be subject to the Crown Court granting leave to appeal.<sup>50</sup>

#### ***Grounds for appealing***

- 1.54 We are provisionally proposing that the new statutory appeal should enable the Court of Appeal to entertain appeals on the grounds that a determination, judgment, order or ruling:

- (1) is wrong in law;
- (2) involves a serious procedural or other irregularity; or
- (3) is one that no competent and reasonable tribunal could properly have made.<sup>51</sup>

<sup>47</sup> See Part 4, paras 4.32 to 4.39 below.

<sup>48</sup> See Part 4, paras 4.55 to 4.75 below.

<sup>49</sup> However, the new statutory appeal would not apply to judgments, orders or rulings in respect of which Parliament has already provided a statutory appeal to the Court of Appeal.

<sup>50</sup> See Part 4, para 4.56 below.

<sup>51</sup> See Part 4, paras 4.57 to 4.59 and para 4.71 below.

### ***Circumstances in which the new statutory appeal may be invoked***

#### DECISIONS MADE BY THE CROWN COURT IN CASES TRIED ON INDICTMENT

1.55 We believe that the circumstances in which a person would be able to invoke the new statutory appeal to challenge a decision should depend on what stage in the proceedings the decision was made. We have identified three different stages:

- (1) decisions made after the jury has been discharged;
- (2) decisions made after the jury has been sworn<sup>52</sup> but before it has been discharged; and
- (3) decisions made before the jury has been sworn.

#### *Decisions made after the jury has returned been discharged*

1.56 An example of a decision made after a jury has been discharged is a refusal to award a privately funded defendant who has been acquitted his or her costs out of central funds. If challenges to decisions made after the jury has been discharged were generally permitted, this would neither delay nor interrupt the trial. Accordingly, we see no reason for imposing any restrictions on invoking the statutory appeal other than a leave requirement.

1.57 We are provisionally proposing that, subject to obtaining the leave of the Crown Court, an appeal should lie to the Court of Appeal at the instance of any person directly affected by a determination, judgment, order or ruling (other than one which is a 'sentence' for the purposes of the Criminal Appeal Act 1968 or in respect of which an appeal lies to the Court of Appeal by virtue of any other enactment) which is made after the jury has been discharged on the ground that:

- (1) it is wrong in law;
- (2) it involves a serious procedural or other irregularity; or
- (3) it is one that no competent and reasonable tribunal could properly have made.<sup>53</sup>

#### *Decisions made after the jury is sworn and before it is discharged*

1.58 In contrast to decisions made after the jury has been discharged, allowing appeals forthwith against decisions made after the jury has been sworn and before it is discharged will usually result in the interruption of the trial. An example of a decision made after the jury has been sworn and before it has been discharged, where an appeal would lead to interruption, is as follows:

<sup>52</sup> In this paper, a reference to the jury being sworn is a reference to the process in which each juror takes the oath or affirmation.

<sup>53</sup> See Part 5, paras 5.38 to 5.40 below.

D has a number of previous convictions. The prosecution had not intended to adduce the convictions at the outset of the trial. However, while in the witness box, D makes an attack on the character of the key prosecution witness. The prosecution applies for leave to adduce evidence of the convictions under section 101(1)(g) of the Criminal Justice Act 2003. The defence opposes the application under section 101(1)(3) of the 2003 Act. The trial judge rules that the bad character evidence is to be admitted.

1.59 We believe it is important that, once the jury has started to hear evidence, interruptions to the trial should be kept to a minimum. Permitting appeals to be made forthwith should only be tolerated in order to ensure that fundamental rights are effectively secured and protected.

1.60 Accordingly, we are provisionally proposing that, subject to obtaining the leave of the Crown Court, an appeal should lie forthwith to the Court of Appeal at the instance of a defendant or a third party against a determination, judgment, order or ruling made after the jury has been sworn and before it is discharged where:

- (1) unless the defendant or directly affected third party is allowed to appeal forthwith, he or she would have no adequate remedy, and
- (2) the determination, judgment, order or ruling is one which:
  - (a) affects the liberty of the defendant or the third party; or
  - (b) the defendant or third party seeks to challenge as being unlawful by virtue of section 6(1) of the Human Rights Act 1998.<sup>54</sup>

1.61 We are not provisionally proposing that the prosecution should be able to invoke the new statutory appeal in order to challenge decisions made after the jury has been sworn and before it returns its verdict.<sup>55</sup>

*Decisions made before the jury is sworn*

1.62 An example of a decision made before the jury is sworn is a judicial ruling refusing a defence application for the indictment to be quashed on the grounds that it alleges no offence known to law. In contrast to decisions made after the jury has been sworn, allowing persons to appeal forthwith against decisions made before the jury is sworn may delay the time when the jury starts to hear the evidence but it will not interrupt the trial.

<sup>54</sup> See Part 5, paras 5.41 to 5.64 below. Of course, the appeal would have to allege that the decision was wrong in law, involved a serious procedural or other irregularity or was one that no competent and reasonable tribunal could properly have made.

<sup>55</sup> See Part 5, para 5.42 below.

- 1.63 For reasons that we explain in Part 5,<sup>56</sup> we believe that this is an important difference. We recognise this difference by making provisional proposals that, if implemented, would allow more scope for permitting a defendant or third party to appeal forthwith against a determination, order or ruling made before the jury is sworn.
- 1.64 We are provisionally proposing that, subject to obtaining the leave of the Crown Court, an appeal should lie forthwith to the Court of Appeal at the instance of a defendant or a directly affected third party against a determination, order or ruling made before the jury is sworn where:
- (1) unless the defendant or directly affected third party is allowed to appeal forthwith, he or she would have no adequate remedy; or
  - (2) the defendant or directly affected third party, even if unable to appeal forthwith, would have an adequate remedy but the potential advantages of permitting an appeal forthwith are such as to make it the right course.<sup>57</sup>
- 1.65 We are not provisionally proposing that the prosecution should be able to invoke the new statutory appeal to challenge decisions made before the jury is sworn.<sup>58</sup>

*Alternative proposals*

- 1.66 We recognise that some may believe that selecting the moment when the jury is sworn as the 'cut-off' point between two different tests is not free from difficulty. Accordingly we set out alternative proposals under which the 'cut-off' point is the day on which the trial proper is listed to start.<sup>59</sup>

DECISIONS MADE BY THE CROWN COURT WHEN EXERCISING ITS APPELLATE JURISDICTION

- 1.67 When hearing an appeal by rehearing against a conviction or sentence of a magistrates' court, the Crown Court is composed of a Crown Court judge sitting with magistrates. There is no jury. Accordingly, the scheme that we are provisionally proposing for cases tried on indictment cannot be applied in its entirety to cases where the Crown Court is exercising its appellate jurisdiction.

*Decisions made by the Crown Court after it has determined the appeal*

- 1.68 With regard to decisions made by the Crown Court after it has determined an appeal against conviction or sentence, our provisional proposals replicate those we are making in respect of trials on indictment.

<sup>56</sup> See Part 5, paras 5.34 to 5.37 below.

<sup>57</sup> See Part 5, paras 5.69 to 5.88 below. Again, the appeal would have to allege that the decision was wrong in law, involved a serious procedural or other irregularity or was one that no competent and reasonable tribunal could properly have made.

<sup>58</sup> See Part 5, para 5.70 below.

<sup>59</sup> See Part 5, paras 5.90 to 5.101 below.

1.69 We are provisionally proposing that, subject to obtaining the leave of the Crown Court, an appeal should lie to the Court of Appeal at the instance of any person directly affected by a determination, judgment, order or ruling (other than one which is a 'sentence' for the purposes of the Criminal Appeal Act 1968 or in respect of which an appeal lies to the Court of Appeal by virtue of any other enactment) which is made after the Crown Court has determined an appeal on the ground that:

- (1) it is wrong in law;
- (2) it involves a serious procedural or other irregularity; or
- (3) it is one that no competent and reasonable tribunal could properly have made.<sup>60</sup>

*Decisions made before the Crown Court has determined the appeal*

1.70 In our view, because of the listing arrangements and the composition of the Crown Court when hearing an appeal by way of rehearing, decisions made before the determination of an appeal are likely to be made at a time equivalent to the period, in a trial on indictment, before the jury is sworn.

1.71 Accordingly, we are provisionally proposing that, subject to obtaining the leave of the Crown Court, an appeal should lie forthwith to the Court of Appeal at the instance of a defendant or directly affected third party against a determination, judgment, order or ruling made before the Crown Court has determined an appeal by rehearing where:

- (1) unless the defendant or directly affected third party is allowed to appeal forthwith, he or she would have no adequate remedy, and
- (2) the determination, judgment, order or ruling is one which:
  - (a) affects the liberty of the defendant or the third party; or
  - (b) the party seeks to challenge as being unlawful by virtue of section 6(1) of the Human Rights Act 1998.<sup>61</sup>

**Magistrates' courts and the Court Martial**

1.72 We are not making any provisional proposals in relation to magistrates' courts and the Court Martial. However, in accordance with our terms of reference, we do consider the implications of our proposals in relation for decisions of the Crown Court for both magistrates' courts and the Court Martial.<sup>62</sup>

<sup>60</sup> See Part 5, paras 5.109 to 5.120 below.

<sup>61</sup> See Part 5, paras 5.109 to 5.118 and paras 5.121 to 5.122 below. Again, the appeal would have to allege that the decision was wrong in law, involved a serious procedural or other irregularity or was one that no competent and reasonable tribunal could properly have made.

<sup>62</sup> See Part 6 (Magistrates' Courts) and Part 7 (The Court Martial) below.

## **STRUCTURE OF PAPER**

- 1.73 In Part 2, we set out and explain the different avenues under the current law for challenging determinations, orders and rulings made by magistrates' courts and the Crown Court in criminal proceedings.
- 1.74 In Part 3, we consider the relevance of the ECHR.
- 1.75 In Part 4, we set out and explain our provisional proposals for the framework under which the High Court's jurisdiction in relation to criminal proceedings in the Crown Court should be transferred to the Court of Appeal.
- 1.76 In Part 5, we set out our provisional proposals regarding the circumstances in which resort to the new statutory appeal that we are proposing should be permitted.
- 1.77 In Part 6, we consider the implications of our provisional proposals for proceedings in magistrates' courts.
- 1.78 In Part 7, we consider the implications of our provisional proposals for the Court Martial and related courts.
- 1.79 Part 8 contains a list of our provisional proposals.
- 1.80 Part 9 contains a list of specific questions for consultees.
- 1.81 The Appendix contains a summary of some empirical evidence.

# **PART 2**

## **CHALLENGING DECISIONS MADE IN CRIMINAL PROCEEDINGS – THE CURRENT LAW**

### **CRIMINAL PROCEEDINGS IN ENGLAND AND WALES**

#### **Trials of defendants aged 18 and over**

- 2.1 Although all criminal proceedings in England and Wales involving defendants aged 18 and over must begin in a magistrates' court,<sup>1</sup> not all criminal trials take place in magistrates' courts. Criminal trials take place in either magistrates' courts or in the Crown Court. Whether a criminal trial takes place in a magistrates' court or in the Crown Court depends to a considerable extent on the nature of the offence with which the accused is charged.
- 2.2 'Summary offences' are those which must be tried in magistrates' courts by justices of the peace.<sup>2</sup> Summary offences are not necessarily trivial offences. They include assaulting a police officer in the execution of his or her duty, driving while disqualified and driving with excess alcohol. Each can attract a custodial sentence of up to six months. Further, trials in magistrates' courts can involve very difficult questions of law.<sup>3</sup>
- 2.3 'Indictable-only offences' are those which must be tried on indictment before a judge and jury in the Crown Court. Examples of such offences are murder, rape, kidnapping, and causing death by dangerous driving. A person charged with such an offence appears initially in a magistrates' court but is sent forthwith to the Crown Court for trial.<sup>4</sup> The only major issue that the magistrates' court may have to determine is whether the defendant should be sent to the Crown Court in custody or on bail.
- 2.4 The third category of offences ('triable either-way offences') consists of offences that can be tried either in a magistrates' court or in the Crown Court. Examples of such offences are theft, dangerous driving and malicious and unlawful wounding. On appearing initially in a magistrates' court, the defendant is asked whether it is his or her intention to plead guilty or not guilty. If the latter, the magistrates will then decide whether the defendant should be tried in the magistrates' court or whether the alleged facts of the offence make the offence so serious that it ought to be tried in the Crown Court. If they decide that it ought to be tried in the Crown

<sup>1</sup> In *R v Hereford Magistrates' Court ex parte Rowlands* [1998] QB 110, 116, Lord Bingham described magistrates' courts as "the work-horses of the criminal justice system in England and Wales".

<sup>2</sup> Justices of the peace can be lay justices (someone without formal legal qualifications) or a District Judge (Magistrates' Court): Courts Act 2003, ss 9 and 25. The majority of justices of the peace are lay justices.

<sup>3</sup> An example is *Jones* [2006] UKHL 16, [2007] 1 AC 136 where, amongst other issues, a District Judge had to decide whether there was a crime of 'aggression' under customary international law and, if so, whether it had been incorporated into domestic law.

<sup>4</sup> Crime and Disorder Act 1998, s 51.

Court, the defendant is committed for trial to the Crown Court. If they decide that the offence can be tried in the magistrates' court, the defendant is offered an election. He or she can elect to be tried in the Crown Court in which case the defendant is committed for trial to the Crown Court. Alternatively, the defendant can consent to being tried in the magistrates' court.<sup>5</sup> If a trial in a magistrates' court results in a guilty verdict, the magistrates' court must commit the defendant to the Crown Court for sentence if it considers that its powers of sentencing are insufficient.<sup>6</sup>

### **Trials of defendants aged under 18**

- 2.5 A defendant under 18 ('a child or young person'), unless he or she is charged jointly with an adult, appears initially in a Youth Court. Youth Courts are part of the magistrates' court system.
- 2.6 The division of offences into summary only, indictable-only and triable either-way does not apply in cases involving children or young persons. The law in this area is very complex but, at the risk of over-simplification, the starting point is that, unless charged with murder or manslaughter, a child or young person should be tried in the Youth Court.
- 2.7 However, if a child or young person is charged with an offence which in the case of an adult is punishable with a term of imprisonment of 14 years or more, a Youth Court should decline jurisdiction and, instead, commit the defendant to the Crown Court for trial if it is of the opinion that, if convicted, it ought to be possible to sentence the defendant to a custodial sentence of more than two years.
- 2.8 In addition, a Youth Court must decline jurisdiction if:
  - (1) the defendant is charged with a 'specified violent offence' or a 'specified sexual offence'<sup>7</sup>; and

<sup>5</sup> Some triable either-way offences are *transferred* rather than committed to the Crown Court. These are sexual offences or offences involving violence or cruelty where a child is to be called as a witness at the trial. If the Director of Public Prosecutions is of the opinion that there is sufficient evidence on which a reasonable jury properly directed could convict the defendant, he may serve a notice of transfer. Provided he or she does so before the magistrates' court starts to determine where the case is to be tried, the case is automatically transferred to the Crown Court for trial: Criminal Justice Act 1991, s 53(1). A similar regime applies where the triable either-way offence charged reveals a case of fraud of such seriousness or complexity that the management of the case should be taken over without delay by the Crown Court: Criminal Justice Act 1987, s 4.

<sup>6</sup> Currently the maximum sentence which magistrates may impose for a single offence is 6 months' imprisonment: Magistrates' Courts Act 1980, s 32. Sections 154 and 282 of the Criminal Justice Act 2003 increase this limit to 12 months' imprisonment. However, they have not yet been brought into force. There is no appeal against a decision by a magistrates' court to commit a defendant to the Crown Court for sentence: *R v London Sessions, ex parte Rogers* [1951] 2 KB 74.

<sup>7</sup> Schedule 15 to the Criminal Justice Act 2003 lists 153 specified violent and sexual offences.

- (2) it appears to the Youth Court that, if convicted of the offence, the defendant would satisfy the criteria for receiving a sentence of detention for life, detention for public protection or an extended sentence because he or she or she poses a significant risk to members of the public of serious harm occasioned by the commission of further specified violent or sexual offences.<sup>8</sup>

2.9 The rules governing jurisdiction combined with the fact that a child or young person has no right to elect to be tried in the Crown Court means that relatively serious offences can be and are tried in Youth Courts.

## **CHALLENGING DECISIONS OF MAGISTRATES' COURTS<sup>9</sup>**

### **Appealing against or seeking a review of a conviction and/or sentence<sup>10</sup>**

2.10 A defendant who is convicted and sentenced in a magistrates' court has three potential avenues for challenging the conviction and/or sentence:

- (1) an appeal to the Crown Court against conviction and/or sentence;
- (2) an appeal to the High Court by case stated;
- (3) an application to the High Court for judicial review.

### ***Appeal to the Crown Court against conviction and/or sentence<sup>11</sup>***

2.11 A defendant convicted in the magistrates' court can appeal against conviction and/or sentence to the Crown Court.<sup>12</sup> Leave to appeal does not have to be obtained. Any appeal has to be lodged within 21 days of the date that the defendant was sentenced in the magistrates' court although the Crown Court can extend the period for appealing. The appeal takes the form of a rehearing before a Crown Court judge sitting with at least two and not more than four justices of the peace.<sup>13</sup> When the Crown Court hears an appeal from a magistrates' court against conviction and/or sentence, the Crown Court is acting in its appellate

<sup>8</sup> If the offence, as well as being a 'specified' violent or 'specified' sexual offence, is also a 'serious' offence, the defendant may be sentenced to detention for life or detention for public protection – Criminal Justice Act 2003, s 226. If the specified offence is not also a 'serious' offence, the defendant may be sentenced to an extended sentence but not detention for life or detention for public protection: Criminal Justice Act 2003, s 228. An offence is a 'serious' offence if in the case of an adult it is punishable by imprisonment for life or for a determinate period of 10 years or more: Criminal Justice Act 2003, s 224(2).

<sup>9</sup> For the avoidance of doubt, 'magistrates courts' includes Youth Courts.

<sup>10</sup> See the flowchart on page 59 below.

<sup>11</sup> In 2005 there were 12,843 appeals to the Crown Court against conviction and/or sentence. Of the 12,805 appeals disposed of, 3,651 were allowed while 1,886 involved a variation.

<sup>12</sup> The right to appeal to the Crown Court against conviction only applies if the defendant pleaded not guilty in the magistrates' court: Magistrates' Courts Act 1980, s 108(1)(b). 'Sentence' does not include an order for costs or an order for the destruction of an animal pursuant to the Protection of Animals Act 1911, s 2.

<sup>13</sup> Supreme Court Act 1981, s 74. Rule 63.8 of the Criminal Procedure Rules 2005 sets out certain special circumstances where this rule need not be adhered to.

capacity.<sup>14</sup> The Crown Court may affirm, reverse or vary any part of the magistrates' decision appealed against or may remit the matter back to the magistrates' court with its opinion as to how the matter should be disposed of.<sup>15</sup>

### ***Appeal to the High Court by case stated***<sup>16</sup>

- 2.12 Section 111(1) of the Magistrates' Courts Act 1980 enables a defendant convicted and sentenced in a magistrates' court to appeal to the High Court on the grounds that the conviction and/or sentence 'is wrong in law or in excess of jurisdiction'. It is referred to as appeal by case stated because the defendant applies to the justices of the peace who convicted him or her to state a case for the opinion of the High Court. The application to the justices to state a case must be made within 21 days after the day on which the decision of the magistrates' court was given. In contrast to appeals to the Crown Court, there is no power to extend the time limit.
- 2.13 The justices may decline to state a case but only if they are of the opinion that the application is 'frivolous'.<sup>17</sup> If the justices refuse to state a case, the defendant may apply for judicial review and seek a mandatory order compelling the justices to state a case.<sup>18</sup> Once the justices have stated a case, the High Court must hear and determine the appeal.<sup>19</sup>

### POWERS OF HIGH COURT ON APPEAL BY CASE STATED

- 2.14 The High Court can reverse, affirm or amend the determination in respect of which the case has been stated or remit the matter to the magistrates' court with its opinion.<sup>20</sup> Accordingly, the High Court can uphold a conviction or can overturn a conviction. A more difficult question is whether the High Court, if it overturns a conviction, can order a re-trial. In *Griffith v Jenkins*<sup>21</sup> the House of Lords held that the High Court has a discretion whether or not to order a re-trial, provided always that a fair trial is still possible. With regard to how the discretion should be exercised, Lord Bridge observed:

<sup>14</sup> See Part 1, para 1.15(2) above.

<sup>15</sup> Supreme Court Act 1981, s 48(2).

<sup>16</sup> In 2005 the High Court received a total of 93 appeals by case stated from magistrates' courts. During that year the High Court determined 79 such appeals. 39 appeals were allowed and 40 were dismissed. In 2006 the High Court received a total of 97 appeals by case stated from magistrates' courts.

<sup>17</sup> Magistrates' Courts Act 1980, s 111(5).

<sup>18</sup> Magistrates' Courts Act 1980, s 111(6).

<sup>19</sup> Supreme Court Act 1981, s 28A(3).

<sup>20</sup> Supreme Court Act 1981, s 28A(3)(a) and (b).

<sup>21</sup> [1992] 2 AC 76. In doing so, the House of Lords overruled *Maydew v Flint* (1985) 80 Cr App R 49 and *Rigby v Woodward* [1957] 1 WLR 250. The relevant provision in force when the House of Lords decided *Griffith v Jenkins* was the Summary Jurisdiction Act 1957, s 6. However, in all relevant respects, it was identical to the Supreme Court Act 1981, s 28A(3)(a) and (b).

In some ... cases to order a rehearing may appear inappropriate or oppressive. But this must depend on how the proceedings have been conducted, the nature of the error vitiating the conviction, the gravity of the offence and any other relevant considerations.<sup>22</sup>

### ***Application to the High Court for judicial review***

- 2.15 In contrast to appeal by case stated, an application for judicial review requires leave.<sup>23</sup> The application must be made promptly and in any event within three months from the date when grounds for the application first arose.
- 2.16 An application for judicial review is “not an appeal as such but a collateral challenge to the decision-making process”.<sup>24</sup> A defendant challenging his or her conviction by a magistrates’ court will seek a quashing order because the effect of such an order is to quash the conviction. If the High Court does quash the conviction, it may remit the case to the magistrates’ court together with a direction to reconsider it and to reach a decision in accordance with the findings of the High Court.<sup>25</sup> It is clear that, in remitting a case to the magistrates’ court, the High Court can direct that there should be a retrial.<sup>26</sup>

### ***Which avenue to choose?***

- 2.17 Although it might be thought that a convicted defendant is spoilt for choice, the fact that there are three potential avenues for appealing against conviction and sentence can make for a difficult decision.

#### APPEAL TO THE CROWN COURT OR APPEAL BY CASE STATED TO THE HIGH COURT?

- 2.18 In *R v Hereford Magistrates’ Court, ex parte Rowlands* (‘*Rowlands*’), Lord Chief Justice Bingham said of appeal to the Crown Court by way of rehearing:

This is the ordinary avenue of appeal for a defendant who complains that the magistrates’ court reached a wrong decision *of fact*, or wrong decision of mixed fact or law.<sup>27</sup>

- 2.19 Of appeal by case stated, Lord Bingham observed:

<sup>22</sup> [1992] AC 76, 84.

<sup>23</sup> Supreme Court Act 1981, s 31(3).

<sup>24</sup> *R v Peterborough Magistrates’ Court, ex parte Dowler* [1997] QB 911, 916 by Henry LJ.

<sup>25</sup> Supreme Court Act 1981, s 31(5).

<sup>26</sup> *R v Hereford Magistrates’ Court, ex parte Rowlands* [1998] QB 110, 117.

<sup>27</sup> [1998] QB 110, 118 (emphasis added).

This is the ordinary avenue of appeal for a convicted defendant who contends that the justices erred *in law*: the usual question posed for the opinion of the High Court is whether on the facts found the justices were entitled to convict the defendant; but sometimes the question is whether there was any evidence upon which the justices could properly convict the defendant, which has traditionally been regarded as a question of law.<sup>28</sup>

- 2.20 That said, it is clear that a defendant who is alleging that his or her conviction and/or sentence involved an error of law can appeal to either the Crown Court or the High Court. However, if the defendant does appeal to the High Court by case stated, his or her right of appeal to the Crown Court ceases.<sup>29</sup> By contrast, if the defendant chooses to appeal to the Crown Court and the appeal is unsuccessful, he or she may appeal by case stated to the High Court against the decision of the Crown Court.<sup>30</sup>

#### APPEAL TO THE CROWN COURT OR APPLY TO THE HIGH COURT FOR JUDICIAL REVIEW?

- 2.21 In *Rowlands*<sup>31</sup> the issue was whether a convicted defendant is precluded from applying for judicial review because he or she has a right of appeal to the Crown Court. The general rule is that judicial review should not be granted where an alternative and equally effective remedy exists.<sup>32</sup> An applicant is expected to exhaust all other remedies before seeking judicial review. Otherwise, the court may in the exercise of its discretion deny relief. In three cases prior to *Rowlands*, the High Court had indeed refused relief.<sup>33</sup> However, in each case the defendant had either already lodged an appeal to the Crown Court by the time he or she applied for judicial review or had appealed to the Crown Court and then withdrawn that appeal.
- 2.22 In *Rowlands*, the defendant had sought an adjournment of her trial in order to enable two defence witnesses to attend court to give evidence on her behalf. The adjournment was refused and she was convicted. She sought judicial review of the conviction on the grounds of procedural irregularity. The application was resisted because it was said that she had an alternative and effective remedy, namely appeal to the Crown Court.

<sup>28</sup> Above (emphasis added).

<sup>29</sup> Magistrates' Courts Act 1980, s 111(4).

<sup>30</sup> Supreme Court Act 1981, s 28.

<sup>31</sup> [1998] QB 110.

<sup>32</sup> *R v Inland Revenue Commissioners, ex parte Preston* [1985] AC 835, 852, by Lord Scarman; *R v Epping and Harlow General Commissioner, ex parte Goldstraw* [1983] 3 All ER 257, 262, by Lord Donaldson MR.

<sup>33</sup> *R v Mid-Worcestershire Justices, ex parte Hart* [1989] COD 397; *R v Peterborough Magistrates' Court, ex parte Dowler* [1997] QB 911; *R v Battle Justices, ex parte Shepherd* (1983) 147 JP Reports 372.

- 2.23 The High Court quashed the conviction. Lord Chief Justice Bingham said that a party complaining of procedural unfairness or bias in the magistrates' court should not be denied leave to move for judicial review and left to whatever rights he or she may have in the Crown Court. He continued:

Secondly, the decision whether or not to grant relief by way of judicial review is always, in the end, a discretionary one. Many factors may properly influence the exercise of discretion, and it would be both foolish and impossible to anticipate them all. ... We do not, however, consider that the existence of a right of appeal to the Crown Court, particularly if unexercised, should ordinarily weigh against the grant of leave to move for judicial review, or the grant of substantive relief, in a proper case.<sup>34</sup>

#### APPEAL BY CASE STATED TO THE HIGH COURT OR APPLY TO THE HIGH COURT FOR JUDICIAL REVIEW?

- 2.24 It is not only convicted defendants who have to decide whether to mount a challenge by appeal by case stated or by an application for judicial review. The prosecution and other persons aggrieved by a decision of the magistrates' court may be faced with the same dilemma. Accordingly, we consider this issue separately below,<sup>35</sup> having first outlined the avenues open to the prosecution should they wish to challenge decisions made by magistrates' courts.

#### **Appealing against or seeking review of an acquittal**

- 2.25 In contrast to a defendant who is challenging a conviction by a magistrates' court, the prosecution cannot seek to challenge an acquittal by appealing to the Crown Court. However, the prosecution can challenge the acquittal by:
- (1) appealing to the High Court by case stated;
  - (2) applying to the High Court for judicial review.

<sup>34</sup> [1998] QB 110, 125.

<sup>35</sup> See paras 2.41 to 2.42 below.

### ***Appeal to the High Court by case stated***

- 2.26 Section 111(1) of the Magistrates' Courts Act 1980 enables any person who was a party to any proceeding before a magistrates' court (or is a person aggrieved by any order or determination of the court) to appeal to the High Court by way of case stated on the ground that the decision was wrong in law or in excess of jurisdiction. Accordingly, acquittals that are alleged to be wrong in law or in excess of jurisdiction can be challenged. This includes acquittals resulting from successful defence submissions that on the prosecution evidence there is no case for the defendant to answer or that the proceedings should be stayed as an abuse of process.<sup>36</sup>
- 2.27 Subject to two qualifications, the general features of appeal by case stated are no different where it is the prosecution challenging an acquittal rather than a defendant challenging a conviction. The first qualification is that the justices have no power to refuse to state a case if the application is made by or under the direction of the Attorney-General.<sup>37</sup> The second qualification concerns the exercise of the discretion to order a rehearing should the High Court hold that the acquittal was wrong in law or in excess of jurisdiction. In *Griffith v Jenkins*,<sup>38</sup> Lord Bridge said that the question whether the High Court has the *power* to order a rehearing ought not to receive different answers according to whether it is the prosecutor or the defendant who is appealing. However, with regard to the exercise of the *discretion* to order a rehearing, he said that this could depend on whether it is the prosecution or the defendant who has successfully appealed. In particular:

... where errors of law by justices have led to an acquittal which is successfully challenged and where the circumstances of the case are such that a rehearing is the only way in which the matter can be put right, I apprehend that the court will normally, though not necessarily, exercise its discretion in favour of that course.<sup>39</sup>

<sup>36</sup> A ruling that there is no case for the defendant to answer or that proceedings should be stayed are 'terminating' rulings because they cause the prosecution case to collapse. The prosecution has always been able to challenge such rulings made by a magistrates' court (or by the Crown Court exercising its appellate jurisdiction) by appeal by case stated on the basis that the ruling involved an error of law. For a recent example see *DPP v P* [2007] EWHC 946 (Admin), (2007) 171 JP Reports 349. By contrast, the prosecution has only been able to challenge 'terminating' rulings made in trials on indictment since the implementation of Criminal Justice Act 2003, ss 57 to 61: see paras 2.63 to 2.69 below.

<sup>37</sup> Magistrates' Courts Act 1980, s 111(5).

<sup>38</sup> [1992] 2 AC 76.

<sup>39</sup> Above, at 84. By contrast, in *DPP v P* [2007] EWHC 946 (Admin), (2007) 171 JP Reports 349, the High Court held that a District Judge had been wrong to stay proceedings on the grounds of abuse of process but, because of the time that had elapsed, it ordered that the stay should remain in place.

### ***Application to the High Court for judicial review***

- 2.28 It appears that an acquittal by a magistrates' court can only be challenged by an application for judicial review if it was the result of a trial which was, in fact, a nullity.<sup>40</sup>

### **Appealing against or seeking review of ancillary orders made or not made following conviction or acquittal**

- 2.29 Following conviction and sentence, on the one hand, or acquittal, on the other hand, a magistrates' court may make or refuse to make ancillary orders. An example of the making of an ancillary order following conviction would be a decision by the Youth Court to order the lifting of restrictions preventing the press from publishing details of a defendant who is a child or young person. An example of a refusal to make an ancillary order following acquittal would be the refusal to award a privately funded defendant his or her costs out of central funds. Such decisions can be challenged by appeal by case stated or, with leave, by an application for judicial review.

### **Appealing against or seeking review of interlocutory decisions**

- 2.30 Interlocutory decisions should be contrasted with final decisions. A decision by a magistrates' court to convict a defendant is a final decision as is a decision to acquit a defendant. An ancillary order (or a refusal to make such an order) made following conviction and sentence or acquittal is also a final decision. The making of such decisions and orders coincides with the conclusion of the proceedings in the magistrates' court.
- 2.31 By contrast, interlocutory decisions or orders are those decisions or orders made prior to the decision to convict or acquit the defendant. One example would be a decision taken on the day fixed for trial to grant the prosecution an adjournment because their witnesses are unavailable. Another example would be a refusal to stay proceedings on the grounds that the prosecution had not made proper disclosure of evidence.
- 2.32 Interlocutory decisions or orders made by magistrates' courts cannot be challenged by appealing to the Crown Court<sup>41</sup> or by appealing to the High Court by case stated.<sup>42</sup> In addition, there are authorities which suggest that the High Court has no jurisdiction to entertain an application for judicial review of interlocutory decisions made by magistrates' courts.<sup>43</sup> The reason has been articulated by Lord Justice Kennedy:

<sup>40</sup> *R v Dorking Justices, ex parte Harrington* [1984] AC 743; *R v Hendon Justices, ex parte Director of Public Prosecutions* [1994] QB 167. Earlier authorities had suggested that it was not possible to challenge any acquittal by a magistrates' court by judicial review, eg *R v Sutton Justices, ex parte Director of Public Prosecutions* [1992] 2 All ER 129.

<sup>41</sup> Section 108 of the Magistrates' Courts Act 1980 enables a defendant to appeal to the Crown Court but only following conviction.

<sup>42</sup> *Streames v Copping* [1985] QB 920.

<sup>43</sup> *R v Rochford Justices, ex parte Buck* (1979) 68 Cr App R 114; *R (Hoare-Stevens) v Richmond Magistrates' Court* [2003] EWHC 2660, [2004] *Criminal Law Review* 474.

It is of the utmost importance that the course of a criminal trial in the Magistrates' Court should not be punctuated by applications for an adjournment to test a ruling in this court, especially when in reality if the case proceeds the ruling may turn out to be of little or no importance. ... I am satisfied that even when, as here, there is an important substantive point which arises during a trial this court should not and indeed cannot intervene. The proper course is to proceed to the end of the trial and then to test the matter, almost certainly by way of case stated.<sup>44</sup>

However, we believe the better view is that the High Court does have jurisdiction but it is a jurisdiction which, subject to one qualification,<sup>45</sup> it will only exercise very sparingly. This is a view supported by more recent authority.<sup>46</sup>

### ***Challenging decisions accepting or declining jurisdiction***

2.33 Unlike the Crown Court, magistrates' courts<sup>47</sup> have to make important decisions as to whether they should accept or decline jurisdiction to try or sentence defendants. Such decisions occur in four contexts:

- (1) a defendant aged 18 or over is charged with a triable either-way offence<sup>48</sup> and indicates an intention to plead not guilty;
- (2) a child or young person is charged with an offence in respect of which the youth court has the power to commit him for trial to the Crown Court;<sup>49</sup>
- (3) a defendant aged 18 or over is convicted of or indicates an intention to plead guilty to a triable either-way offence; and
- (4) a child or young person is convicted of a 'specified violent offence' or 'specified sexual offence'.

In (1) and (2), the decision determines where the defendant will be tried. In (3) and (4), it determines where the defendant will be sentenced.<sup>50</sup> A decision by a magistrates' court as to where a defendant will be tried or sentenced cannot be appealed to the Crown Court.

<sup>44</sup> *R (Hoare-Stevens) v Richmond Magistrates' Court* [2003] EWHC 2660 (Admin) at [18], [2004] *Criminal Law Review* 474.

<sup>45</sup> See paras 2.33 to 2.35 below.

<sup>46</sup> See, eg, *R (Watson) v Dartford Magistrates' Court* [2005] EWHC 905 (Admin), [2005] *New Law Journal* 827 and *R (CPS) v Sedgemoor Magistrates' Court* [2007] EWHC 1803 (Admin), [2007] All ER (D) 24 (Jul).

<sup>47</sup> Including youth courts.

<sup>48</sup> See para 2.4 above.

<sup>49</sup> See paras 2.7 to 2.8 above.

<sup>50</sup> If a child or young person is convicted by a youth court of an offence which is not a 'specified violent offence' or 'specified sexual offence', a youth court has no power to commit him or her to the Crown Court for sentence.

- 2.34 Are such decisions interlocutory decisions? It might be thought that the answer depends on the decision arrived at. On this view, if the court declines jurisdiction, the proceedings in the magistrates' court are concluded and the decision is final. Conversely, if the court accepts jurisdiction, the proceedings are not concluded. Such an approach would be undesirable. It would mean that a defendant would be able to challenge a decision to decline jurisdiction because the effect of such a decision would be to terminate the proceedings in the magistrates' court. By contrast, the prosecution would not be able to challenge a decision to accept jurisdiction because the effect of such a decision would be a continuation of the proceedings in the magistrates' court. This would be particularly unfortunate if the decision related to a child or young person. This is because a youth court, having accepted jurisdiction, cannot subsequently commit the defendant for sentence to the Crown Court.
- 2.35 We believe that the better view is that all decisions as to jurisdiction are interlocutory decisions. This is because a decision in committal proceedings<sup>51</sup> not to commit a defendant for trial is not a final decision.<sup>52</sup> By analogy, it must be the case that decisions as to jurisdiction are also interlocutory decisions and, as such, they cannot be challenged by appeal by case stated. However, they represent the main exception to the rule that the High Court will only sparingly grant judicial review of interlocutory decisions made by magistrates' courts. In practice, the High Court has demonstrated a willingness to grant judicial review of decisions of magistrates' courts to decline or accept jurisdiction, particularly in cases where the defendant is a child or young person.<sup>53</sup>

#### **Challenging decisions made in committal proceedings**

- 2.36 If a magistrates' court does decline jurisdiction in respect of a triable either-way offence, it then has to decide whether there is sufficient evidence on which to commit the defendant to the Crown Court for trial. The proceedings in which it decides that issue are called committal proceedings. The purpose of committal proceedings is to ensure that no one stands trial at the Crown Court unless there is a prosecution case on which a jury, properly directed, *could* convict him or her.
- 2.37 In fact, in the overwhelming majority of cases, magistrates' courts do not consider the evidence. This is because a magistrates' court is entitled to commit a defendant for trial without considering the evidence provided the defendant is legally represented and there is no defence request for the court to consider a submission that the evidence is insufficient.<sup>54</sup>

<sup>51</sup> See paras 2.36 to 2.40 below.

<sup>52</sup> *Atkinson v United States of America Government* [1971] AC 197.

<sup>53</sup> For a recent example see *R (R) v Manchester City Youth Court* [2006] EWHC 564 (Admin), (2006) 170 JP Reports 217.

<sup>54</sup> Magistrates' Courts Act 1980, s 6(2).

- 2.38 However, if the defendant is not legally represented or there is a submission that the evidence is insufficient, a magistrates' court must consider the evidence.<sup>55</sup> Nowadays, there is no oral evidence in committal proceedings. All the evidence consists of written statements, depositions, documents and exhibits.<sup>56</sup>
- 2.39 The High Court has been very reluctant to permit a challenge by way of judicial review of decisions taken in the course of committal proceedings. In *Neill v North Antrim Magistrates' Court*,<sup>57</sup> the House of Lords held that a decision committing the defendant to the Crown Court for trial was susceptible to judicial review. However, relief should only be granted where there had been a material irregularity as a result of which the defendant had suffered real prejudice.
- 2.40 In *R v Bedwellty Justices, ex parte Williams*,<sup>58</sup> the House of Lords held that a committal for trial could only be quashed in judicial review proceedings if:
- (1) there had been no admissible evidence before the magistrates' court of the defendant's guilt; or
  - (2) where the committal had been so influenced by inadmissible evidence as to amount to an irregularity having substantial adverse consequences for the defendant.<sup>59</sup>

#### **Appeal by case stated or apply for judicial review?**

- 2.41 If the decision of a magistrates' court is an interlocutory decision, any challenge must be by way of judicial review. It is only if the decision is a final decision that a choice may have to be made.
- 2.42 In *R (P) v Liverpool City Magistrates*,<sup>60</sup> the defendant was convicted of knowingly causing her child not to attend school.<sup>61</sup> She sought judicial review of her conviction on the ground that the magistrates' court had misdirected itself by ruling that she bore the burden of proving that she had reasonable justification for not ensuring the attendance of her son at school. Mr Justice Collins, having observed that the challenge should have been by case stated and not judicial review, observed:

<sup>55</sup> Above, s 6(1).

<sup>56</sup> See Magistrates' Courts Act 1980, s 5A and the Criminal Procedure Rules, r 10.3.

<sup>57</sup> [1992] 1 WLR 1220.

<sup>58</sup> [1997] AC 225.

<sup>59</sup> If a magistrates' court declines to commit a defendant to the Crown Court on the grounds that the evidence is such that no reasonable jury, properly directed, could convict the defendant, the prosecution can apply to a judge of the High Court for a voluntary bill of indictment. If the application is granted, the defendant can be tried on indictment notwithstanding the decision of the magistrates' court. Very exceptionally, the prosecution might wish to apply for a voluntary bill of indictment instead of committal proceedings.

<sup>60</sup> [2006] EWHC 887 (Admin), (2006) 170 JP Reports 453.

<sup>61</sup> Contrary to the Education Act 1996, s 444(1A).

Judicial review is obviously more appropriate where, for example there is an issue of fact which may have to be raised and decided and which the justices cannot have decided for themselves.

Those rather cryptic observations are intended to relate to a situation where it is alleged that there has been unfairness in the way that the justices conducted the case, obviously where for example it is suggested that there was bias in the manner in which they conducted themselves, or the defendant in question was prevented from properly putting his or her case, or the clerk to the justices interfered in a way in which he should not have interfered.

There are cases in the books of judicial review which cover that sort of situation. Generally speaking, where it is alleged that justices have misdirected themselves or got the law wrong in their approach to a decision, case stated is the appropriate way of dealing with it. Generally speaking, a failure to go by way of case stated in such a situation *is likely to result in a refusal of permission for judicial review* on the basis that it is the wrong way of dealing with it.<sup>62</sup>

In other words, the repercussions of making the wrong choice can be serious. A person who is refused leave to apply for judicial review may find that the time limit for appealing by case stated or, in the case of a convicted defendant, for appealing to the Crown Court has expired.<sup>63</sup>

### **Appeal from the High Court to the House of Lords**

- 2.43 An appeal lies to the House of Lords at the instance of the prosecutor or the defendant from any decision of the High Court in any criminal cause or matter. It is necessary to obtain leave of the House of Lords or the High Court. Leave will not be granted unless the High Court certifies that a point of law of general public importance is involved in its decision and it appears to that Court or the House of Lords that the point is one that ought to be considered by the House.<sup>64</sup>

<sup>62</sup> [2006] EWHC 887 (Admin), (2006) 170 JP Reports 453, [6] to [8] (emphasis added).

<sup>63</sup> However, see *R (Gillan) v DPP* [2007] EWHC (Admin), [2007] 1 WLR 2214.

<sup>64</sup> Administration of Justice Act 1960, s 1(1)(a) and (2). Any right of appeal to the Court of Appeal from the High Court in any criminal matter is specifically excluded by Supreme Court Act 1981, s 18(1)(a).

## **CHALLENGING DECISIONS OF THE CROWN COURT<sup>65</sup>**

- 2.44 In Part 1,<sup>66</sup> we referred briefly to the three jurisdictions which the Crown Court can exercise. First, it can exercise a first instance jurisdiction. The Crown Court exercises this jurisdiction in relation to all offences that are triable only on indictment<sup>67</sup> and also in relation to triable either-way offences where a magistrates' court has declined jurisdiction or the defendant has elected to be tried on indictment.<sup>68</sup> In addition, it exercises this jurisdiction in cases where a youth court has declined jurisdiction in relation to a child or young person.<sup>69</sup> Where the Crown Court exercises its first instance jurisdiction, the trial is on indictment before a judge and jury.
- 2.45 Secondly, it can exercise an appellate jurisdiction. It exercises this jurisdiction where a defendant who has been tried and convicted in a magistrates court<sup>70</sup> appeals against conviction and/or sentence. The proceedings are by way of rehearing before a judge and justices of the peace and the trial is not on indictment.
- 2.46 Thirdly, it can exercise a committal for sentence jurisdiction in cases where a magistrates' court has committed a defendant to the Crown Court for sentence because it is of the view that its sentencing powers are insufficient.

### **Challenging decisions of the Crown Court made when exercising its appellate jurisdiction**

#### ***Challenging final decisions, including the making of (or the refusal to make) ancillary orders consequent on conviction or acquittal***

- 2.47 Unlike challenges to decisions made by magistrates' courts, there is no need to distinguish between the avenues available to a defendant for challenging a conviction and/or sentence and those available to the prosecution for challenging an acquittal.

<sup>65</sup> See flowchart on page 59 below.

<sup>66</sup> See Part 1, para 1.15 above.

<sup>67</sup> See para 2.3 above.

<sup>68</sup> See para 2.4 above.

<sup>69</sup> See paras 2.7 to 2.8 above.

<sup>70</sup> Including a youth court.

#### APPEAL BY CASE STATED

- 2.48 Both the prosecution and the defendant can appeal by way of case stated on the basis that the decision was wrong in law or in excess of jurisdiction.<sup>71</sup> Subject to one qualification, the general features of appeal by case stated for challenging decisions of magistrates' courts<sup>72</sup> apply equally to when the challenge is to a decision of the Crown Court exercising its appellate jurisdiction. The qualification is that only the parties to the proceedings in the Crown Court can appeal by case stated. A person who is directly affected by the decision but was not a party cannot appeal by case stated although he or she may be able to apply for judicial review<sup>73</sup> as a person with 'sufficient interest'.
- 2.49 In 2005 there were only 14 appeals by way of case stated against decision of the Crown Court acting in its appellate capacity.<sup>74</sup> Of these, seven were appeals by the defendant against conviction, three were appeals by the defendant against sentence, two were appeals by the prosecution against an acquittal that resulted from a 'terminating' ruling, one was by the prosecution against an acquittal that was not the result of a 'terminating' ruling and one concerned an order admitting the defendant to hospital after he was found unfit to plead.

#### APPLICATION FOR JUDICIAL REVIEW

- 2.50 Both the prosecution and the defence can apply for judicial review of final decisions made by the Crown Court when exercising its appellate jurisdiction. Again, the general features of judicial review as described above in relation to challenging decisions of magistrates' courts apply to such applications.
- 2.51 In 2005 there were 30 applications to the High Court for judicial review of Crown Court decisions made when exercising its appellate capacity. Only 10 of those were given leave, of which 6 were successful. Out of the 30 applications, 29 constituted appeals against conviction or sentence.<sup>75</sup> The impression is that appeals by case stated and applications for judicial review are used interchangeably for challenging convictions and sentences arising from rehearings in the Crown Court.

#### ***Appealing against or applying for review of interlocutory decisions***

#### APPEAL BY CASE STATED

- 2.52 Appeal by case stated is not available to challenge interlocutory decisions made by the Crown Court exercising its appellate jurisdiction.<sup>76</sup>

<sup>71</sup> Supreme Court Act 1981, s 28(1).

<sup>72</sup> See paras 2.12 to 2.14 above.

<sup>73</sup> Supreme Court Act 1981, s 29(3).

<sup>74</sup> See Appendix, Table A.

<sup>75</sup> See Appendix, Table B.

<sup>76</sup> *Loade v DPP* [1990] 1 QB 1052.

## APPLYING FOR JUDICIAL REVIEW

- 2.53 As with interlocutory decisions made by magistrates' courts, the better view is that the High Court has jurisdiction to hear an application for judicial review of an interlocutory decision made by the Crown Court acting in its appellate capacity but will exercise the jurisdiction very sparingly.<sup>77</sup>

## **Challenging decisions of the Crown Court made when exercising its first instance jurisdiction**

### ***Appeal to the Court of Appeal***

#### APPEALING AGAINST CONVICTION AND SENTENCE

- 2.54 A person convicted following a trial on indictment may appeal against conviction and/or sentence to the Court of Appeal.<sup>78</sup> However, unlike an appeal to the Crown Court following conviction and sentence by a magistrates' court, an appeal from the Crown Court to the Court of Appeal requires either the leave of the Court of Appeal or a certificate from the trial judge that the case is fit for appeal.<sup>79</sup> The appeal does not take the form of a rehearing.
- 2.55 There is now a single basis for allowing an appeal against conviction, namely that the conviction is unsafe. The Court of Appeal must quash any conviction if of the view that it is unsafe<sup>80</sup> and must dismiss any appeal if not of that view.<sup>81</sup>

#### APPEALING IN CASES WHERE THE DEFENDANT'S FITNESS TO PLEAD IS AN ISSUE

- 2.56 This is a complex and difficult area. The Criminal Procedure (Insanity) Act 1964 ('the 1964 Act') governs the procedure where an accused is considered to be under such a disability that it would be unfair for him to be tried in the usual way. In such a case, the trial judge conducts a hearing pursuant to section 4 of the 1964 Act to determine whether the accused is fit to plead.

### *Defendant found fit to plead*

- 2.57 If the judge determines that the defendant is fit to plead, the trial proceeds as a trial on indictment in the normal way. There is no right of appeal against a finding of fitness to plead. However, following a finding that the defendant is fit to plead, if the defendant is subsequently convicted, he or she may appeal to the Court of Appeal against conviction on the ground that the preliminary fitness to plead hearing was open to objection for error of law.<sup>82</sup>

<sup>77</sup> In relation to magistrates' courts, see the discussion at paras 2.30 to 2.35 above.

<sup>78</sup> Criminal Appeal Act 1968, ss 1(1) and 9(1) respectively.

<sup>79</sup> Criminal Appeal Act 1968, ss 1(2), and 11(1) and (1A).

<sup>80</sup> If the conviction is quashed, the Court of Appeal may order a retrial if it is in the interests of justice to do so: Criminal Appeal Act 1968, s 7(1).

<sup>81</sup> Criminal Appeal Act 1968, s 2(1).

<sup>82</sup> *Podola* [1960] 1 QB 325.

### *Defendant found unfit to plead*

- 2.58 If a judge determines that the defendant is unfit to plead, the proceedings continue but it is no longer a trial on indictment.<sup>83</sup> The next stage is a hearing pursuant to section 4A of the 1964 Act.<sup>84</sup> At this hearing, a jury determines whether or not the defendant 'did the act or made the omission charged against him as the offence'. A finding that the defendant did the act or made the omission is not a 'conviction' for the purposes of section 1(1) of the Criminal Appeal Act 1968. However, where a defendant has been found to be unfit to plead and to have done the act or made the omission, he or she may, with leave, appeal to the Court of Appeal under section 15 of the 1968 Act against either or both findings.
- 2.59 Following a finding of unfitness to plead and a finding that the defendant did the act or made the omission charged, the Crown Court may, pursuant to section 5 of the 1964 Act, make:
- (1) a hospital order;
  - (2) a supervision order; or
  - (3) an order for absolute discharge.
- 2.60 Such orders are not 'sentences' for the purposes of section 9(1) of the Criminal Appeal Act 1968. Accordingly, until recently, it was not possible to appeal to the Court of Appeal against the making of such orders. However, Parliament has recently enacted that, with leave, a defendant who is made the subject of a hospital order<sup>85</sup> or a supervision order may appeal to the Court of Appeal against the order.<sup>86</sup>

### CHALLENGING AN ACQUITTAL

- 2.61 The general rule is that the prosecution cannot seek to overturn an acquittal following a trial on indictment. However, there are two important exceptions to the general rule. The first allows the prosecution to make an application to the Court of Appeal to quash certain acquittals, while the second allows the prosecution to appeal against 'terminating rulings' to the Court of Appeal.

<sup>83</sup> *R v M, R v Kerr, R v H* [2001] EWCA Crim 2024, [2002] 1 WLR 824, [17] (affirmed by the House of Lords on other grounds [2003] UKHL 1, [2003] 1 WLR 411); *R v DPP, R v Grant* [2001] EWCA Crim 2611, [2002] QB 1030, [10]; *R (Young) v Central Criminal Court* [2002] EWHC 548 (Admin), [2002] 2 Cr App R 12.

<sup>84</sup> Just as there is no appeal against a finding of fitness to plead, there is no appeal against a finding of unfitness to plead.

<sup>85</sup> Including an interim hospital order.

<sup>86</sup> Domestic Violence, Crime and Victims Act 2004, s 25, inserting a new s 16A into the Criminal Appeal Act 1968.

### *Retrials for serious offences*

- 2.62 Blackstone wrote that it is a “universal maxim of the common law of England that no man is brought into jeopardy of his life or limb more than once for the same offence”.<sup>87</sup> However, since 4 April 2005, there has been an important exception to that principle. The prosecution can apply to the Court of Appeal for an order quashing a person’s acquittal for a ‘qualifying offence’<sup>88</sup> of which he or she has been acquitted following a trial on indictment. An application for a retrial shall only be granted if there is ‘new and compelling evidence’ against the acquitted person and it is in the interests of justice for him or her to be retried.<sup>89</sup> If the application is granted, the acquitted person can be retried for the offence.<sup>90</sup>

### *Appeals against ‘terminating’ rulings<sup>91</sup>*

- 2.63 Section 58 of the Criminal Justice Act 2003 enables the prosecution to appeal against judicial rulings<sup>92</sup> made in trials on indictment if the ruling has the effect of terminating the trial.<sup>93</sup> At first blush, section 58 appears to allow the prosecution, with leave, to appeal against *any* ruling made by a judge in relation to an offence for which the defendant is being tried provided:

- (1) the ruling is made before the judge starts summing up to the jury;<sup>94</sup> and
- (2) the prosecution informs the Crown Court that it agrees that, in respect of the offence(s) to which the ruling being appealed relates, the defendant ‘should be acquitted’<sup>95</sup> of the offence(s) if leave to appeal is not obtained or the appeal is abandoned.

Section 58(12) provides that, if leave is not obtained or the appeal is abandoned, the judge or the Court of Appeal must order the acquittal of the defendant. In addition, section 61(3) provides that if the appeal does proceed and the Court of Appeal upholds the judge’s ruling, it must order the acquittal of the defendant.

<sup>87</sup> *4 Commentaries*, pp 335 to 336.

<sup>88</sup> An offence listed in Part 1 of sch 5 to the Criminal Justice Act 2003.

<sup>89</sup> Criminal Justice Act 2003, s 77.

<sup>90</sup> Criminal Justice Act 2003, s 76.

<sup>91</sup> The time limits for making such an appeal are extremely tight. Prior to 1 October 2007, the normal course of events would be for the prosecution to apply for an adjournment in which to consider whether to appeal the ruling. An adjournment would ordinarily be granted for one business day or longer if the interests of justice required it (Criminal Procedure Rules, Part 66). Currently the prosecution is expected, under normal circumstances, either to inform the Court of any decision to appeal immediately, or to do so after an adjournment of one day (Criminal Procedure Rules, Part 67). The clear policy aim behind the rules is to minimise the period of uncertainty experienced by the defendant in waiting for the appeal to be resolved.

<sup>92</sup> Including case management rulings made prior to trial – *Clarke*, 9 October 2007 (unreported).

<sup>93</sup> Criminal Justice Act 2003, ss 57 to 61. Previously, the prosecution had been unable to appeal against such rulings made in trials on indictment.

<sup>94</sup> Accordingly, no appeal lies under s 58 against a misdirection in a judge’s summing up to the jury or against an acquittal resulting from such a misdirection.

<sup>95</sup> Criminal Justice Act 2003, s 58(8).

- 2.64 The discussion of section 58 in Archbold<sup>96</sup> is preceded by the expression ‘terminating rulings’ but that expression is not to be found in section 58. It was originally in the Bill but it was dropped from the Bill during the third reading in the House of Lords. The Home Office Explanatory Notes make clear that the Government’s intention was that the section should cover “both rulings that are formally terminating and those that are de facto terminating in the sense that they are so fatal to the prosecution case that, in the absence of a right of appeal, the prosecution would offer no or no further evidence”.<sup>97</sup> Examples of formally terminating rulings are rulings by the judge at the close of the prosecution case that there is no case for the defendant to answer<sup>98</sup> and rulings that the trial should be stayed on grounds of abuse of process. An example of a de facto terminating ruling would be a ruling that the defendant’s confession was inadmissible in a case where the only evidence against the defendant is the confession. In each case, the ruling is one which “collapses the prosecution case, so that unless the prosecution successfully appeals, the issues of guilt or innocence will not go to the jury”.<sup>99</sup>
- 2.65 The decision of the Court of Appeal in *Thompson and Hanson*<sup>100</sup> supports the view that it is only ‘terminating’ rulings that can be appealed under section 58 and, further, that for a ruling to be a ‘terminating’ ruling, it must be one that, if not reversed on appeal, would necessarily result in the defendant’s acquittal. In *Thompson and Hanson* both defendants were charged with an indictable only offence and were sent forthwith from a magistrates’ court to the Crown Court for trial.<sup>101</sup> In such cases, once the defendant is served with the documents containing the evidence on which the charge is based, he or she, *prior to entering a plea*,<sup>102</sup> may apply (‘a schedule 3 application’) for the charge to be dismissed (and, if an indictment has been preferred, for the count in the indictment to be quashed). The judge shall dismiss the charge (and quash the count) if the evidence is such that a properly directed jury could not convict the defendant of the charge (or count).<sup>103</sup> If the charge is dismissed (and the count quashed), no further proceedings can be brought on the charge or count except by means of the prosecution preferring a voluntary bill of indictment.<sup>104</sup>

<sup>96</sup> *Criminal Pleading, Evidence and Practice* (2007) para 7-244.

<sup>97</sup> Para 276.

<sup>98</sup> If the judge makes the ruling, he or she will direct the jury to return a verdict of not guilty. Accordingly, the defendant is acquitted on the verdict of the jury, albeit a verdict directed by the judge.

<sup>99</sup> R Ward and O M Davies, *The Criminal Justice Act 2003: A Practitioner’s Guide* (2003) p 149.

<sup>100</sup> [2006] EWCA Crim 2849, [2007] 1 WLR 1123.

<sup>101</sup> See para 2.3 above.

<sup>102</sup> That is, prior to arraignment. According to Glidewell LJ in *R v Maidstone Crown Court, ex p Clark* [1995] 1 WLR 831, at 837, ‘arraignment’ is “a word meaning no more than reading the counts in an indictment to a defendant or defendants, and asking them to plead to those counts”.

<sup>103</sup> Crime and Disorder Act 1998, sch 3, para 2.

<sup>104</sup> See n 59 above in relation to voluntary bills of indictment.

2.66 Thompson and Hanson applied for the charge to be dismissed and the count quashed. The application was successful and the Crown sought to appeal to the Court of Appeal. That court held that it had no jurisdiction to hear the appeal. It did so because the effect of the dismissal of the charge and the quashing of the count had not resulted in the defendants' acquittal. According to Lord Justice Rix:

A Schedule 3 application to dismiss can only be made before arraignment. The result of a successful Schedule 3 application is the dismissal of the charge and, if an indictment has been preferred, the quashing of the relevant count. Neither of these amounts to an acquittal. If it were, it would not be possible to prefer a voluntary bill of indictment. Nor is it easy to see how the dismissal of a charge or the quashing of an indictment leaves anything in being on which an acquittal can be premised.<sup>105</sup>

He noted that the prosecution were not without a remedy because they could prefer a voluntary bill of indictment.<sup>106</sup>

2.67 The decision leaves some unanswered questions. The case concerned a specific procedure by which defendants who are sent for trial in respect of an indictable-only offence can apply for the charge to be dismissed. The application centres on the sufficiency of the evidence. There are, however, other applications, not concerned with the sufficiency of the evidence, which, if successful, will prove fatal to the prosecution's case. An example is an application to stay the proceedings for abuse of process. Such an application can be made both by those sent for trial for indictable-only offences and those committed for trial for either-way offences. Does such an application, if successful, result in an acquittal? The answer is crucial because, according to *Thompson and Hanson*, it is only rulings that result in acquittals that are 'terminating' rulings and, therefore, capable of being appealed to the Court of Appeal.

2.68 The general rule is that an acquittal is dependent upon a jury verdict of not guilty. Accordingly, where a defendant who has not entered a plea, and therefore has not been put in the charge of a jury, applies successfully for proceedings to be stayed, it would seem that the ruling staying the proceedings is not an acquittal. However, in *Thompson and Hanson*, Lord Justice Rix appeared to suggest otherwise:

... the charge or indictment would remain, albeit under a stay. If the defendant had not been arraigned, that could still occur, the Crown could offer no evidence and an acquittal would thus be effected.<sup>107</sup>

<sup>105</sup> [2006] EWCA 2849, [2007] 1 WLR 1123, [33].

<sup>106</sup> The general principle is that a person can stand trial on indictment only if or she has been *committed* by a magistrates' court to the Crown Court for trial. There are exceptions to the general principle. Serious or complex fraud cases and certain violent or sexual offences against children can be transferred to the Crown Court for trial in indictment. Indictable-only offences are *sent* rather than committed to the Crown Court. Another exception is the voluntary bill of indictment: see n 59 above.

<sup>107</sup> [2006] EWCA 2849, [2007] 1 WLR 1123, [33].

Although he does not refer to it, presumably he had in mind section 17 of the Criminal Justice Act 1967. Section 17 constitutes an exception to the general rule that an acquittal is dependent upon a jury verdict. It provides that where a defendant pleads not guilty and the prosecution offers no evidence the court may order that a verdict of not guilty be recorded without the defendant being put in charge of a jury. The verdict has the same effect as if the defendant had been acquitted on the verdict of a jury. Lord Justice Rix appears to be treating a ruling to stay proceedings as a 'terminating' ruling irrespective of whether the ruling is made prior to arraignment.

*The powers of the Court of Appeal hearing an appeal under section 58*

2.69 The Court of Appeal can confirm, reverse or vary the ruling. However, it has only limited powers to reverse a ruling. The Court of Appeal cannot reverse the ruling simply because it would have come to a different conclusion on the merits. In order to do so, it must be satisfied that:

- (1) the ruling was wrong in law;
- (2) the ruling involved an error of law or principle; or
- (3) the ruling was a ruling that it was not reasonable for the judge to have made.<sup>108</sup>

APPEALS AGAINST RULINGS MADE IN 'PREPARATORY HEARINGS'

*The power to order preparatory hearings*

2.70 'Preparatory hearings' are confined to certain trials on indictment. The hearing, which must take place before the jury is sworn, marks the beginning of the trial.<sup>109</sup> Unless he or she has previously done so, the defendant enters a plea to the charge(s) at the start of the hearing.<sup>110</sup>

2.71 In *H*, Lord Nicholls said:

... in deciding whether to order a preparatory hearing, judges will always have in mind that the underlying object of a preparatory hearing is to conduct *part of the trial* before the jury is sworn because of the benefits this course is likely to have. The preparatory hearing procedure is not intended to be the means for deciding questions which can and should be decided *in advance of the trial*.<sup>111</sup>

2.72 A judge *must* order a preparatory hearing in every case tried on indictment:

<sup>108</sup> Criminal Justice Act 2003, s 67.

<sup>109</sup> Criminal Justice Act 1987, s 8(1); Criminal Procedure and Investigations Act 1996, s 30(a). As a consequence, save in exceptional circumstances, the judge who conducts the preparatory hearing must also conduct the trial: *R v Southwark Crown Court, ex parte Customs and Excise Commissioners* [1993] 1 WLR 764, 772.

<sup>110</sup> Criminal Justice Act 1987, s 8(2); Criminal Procedure and Investigations Act, s 30(b).

<sup>111</sup> [2007] UKHL 7, [2007] 2 WLR 364, [7] (emphasis in the original). Lord Rodger makes the same point at [62].

- (1) which is a case in which at least one of the offences charged against at least one of the defendants is a terrorism offence,<sup>112</sup> or
- (2) which is a case:
  - (a) in which at least one of the offences charged against at least one of the defendants is an offence carrying a maximum of at least 10 years' imprisonment; and
  - (b) it appears to the judge that that evidence on the indictment reveals that conduct in respect of which that offence is charged has a terrorist connection.<sup>113</sup>

2.73 A judge *may* order a preparatory hearing:

- (1) in serious or complex fraud cases;<sup>114</sup>
- (2) in complex, serious or lengthy cases;<sup>115</sup> and
- (3) in cases where the prosecution wishes to apply for the trial to be conducted without a jury on the grounds that there is a danger that, in the event of a jury being sworn, jury tampering would take place.<sup>116</sup>

provided that he or she is satisfied that: 'substantial benefits' will accrue from holding the hearing 'for the purpose' of:

- (1) identifying issues which are likely to be material to the determinations and findings which are likely to be required during the trial;
- (2) if there is to be a jury, assisting the jury's comprehension of those issues and expediting the proceedings before them;
- (3) determining an application for the trial to be conducted without a jury because of the danger of jury tampering;
- (4) assisting the judge's management of the trial; or
- (5) considering questions as to the severance or joinder of charges.<sup>117</sup>

<sup>112</sup> Criminal Procedure and Investigations Act 1996, s 29(1B). 'Terrorism offence' is defined in s 29(6).

<sup>113</sup> Criminal Procedure and Investigations Act 1996, s 29(1C).

<sup>114</sup> Criminal Justice Act 1987, s 7(1).

<sup>115</sup> Criminal Procedure and Investigations Act 1996, s 29(1).

<sup>116</sup> Criminal Procedure and Investigations Act 1996, s 29(1A).

<sup>117</sup> Criminal Justice Act 1987, s 7(1) and Criminal Procedure and Investigations Act 1996, s 29(2).

- 2.74 In *H*, the majority of the House of Lords said that the specified purposes that enable a judge to hold a preparatory hearing should be given a broad and purposive interpretation.<sup>118</sup> In particular, Lord Mance clearly envisaged that a ruling that had the effect of precluding a trial from taking place before a jury was capable of being a ruling serving one or more of the purposes specified in section 29(2) of the Criminal Procedure and Investigation Act 1996.<sup>119</sup>

*What rulings can be made as part of a preparatory hearing?*

- 2.75 In *H*, their Lordships were divided on this question. Section 9(3) and (4) of the Criminal Justice Act 1987 and section 31(3) and (4) of the Criminal Procedure and Investigations Act 1996 specify the powers that a judge may exercise at preparatory hearings in complex or serious fraud cases or complex, serious or lengthy cases respectively. In *H*, the majority<sup>120</sup> held that the sections provided an exhaustive statement of the judge's powers. In contrast, the minority<sup>121</sup> said that once a preparatory hearing has been validly ordered, the judge has the power as *part of* the preparatory hearing to make any ruling that a trial judge would have the power to make in the absence of the jury.<sup>122</sup> This included the power to make rulings on issues that should have been resolved prior to the holding of the preparatory hearing.

*Which rulings made at preparatory hearings are amenable to appeal?*

- 2.76 The preparatory hearing regime has its own appeal procedure. This procedure enables both the prosecution and the defendant, with leave, to appeal to the Court of Appeal against certain rulings and orders made by the judge in the course of a preparatory hearing.<sup>123</sup> Pending the determination of the appeal, the judge can continue with the preparatory hearing, but no jury can be sworn until the appeal has been determined (or abandoned).<sup>124</sup>
- 2.77 Not every ruling made in the course of a preparatory hearing is amenable to appeal. The ruling must be one that which determines:

- (1) any question as to the admissibility of evidence;
- (2) any other question of law relating to the case;<sup>125</sup>

<sup>118</sup> For example, Lord Nicholls said at [2007] UKHL 7, [2007] 2 WLR 364, [7] that they should be "interpreted generously".

<sup>119</sup> Above, [99].

<sup>120</sup> Lords Hope, Rodger and Mance.

<sup>121</sup> Lords Nicholls and Scott.

<sup>122</sup> The majority did not question that the judge could make such rulings while holding a preparatory hearing but, in their view, such rulings would not be made *as part of* the preparatory hearing.

<sup>123</sup> Criminal Justice Act 1987, s 9(11) and Criminal Procedure and Investigations Act 1996, s 35(1).

<sup>124</sup> Criminal Justice Act 1987, s 9(13) and Criminal Procedure and Investigations Act 1996, s 36(2).

<sup>125</sup> On the meaning of 'question of law relating to the case', see further paras 2.86 to 2.89 below.

- (3) any question as to the severance or joinder of charges; or
- (4) whether or not the trial should be conducted without a jury because of the danger of jury tampering.<sup>126</sup>

2.78 On a number of occasions the Court of Appeal has had to consider whether it had jurisdiction to entertain an appeal against a ruling made at a preparatory hearing. In this paper, it is neither necessary nor profitable to conduct an exhaustive examination of the extensive Court of Appeal jurisprudence. In *H*,<sup>127</sup> Lord Rodger described the case law as “a maze”<sup>128</sup> while Lord Scott referred to the “impenetrable thicket of interpretation that has grown up”.<sup>129</sup> For the most part, the Court of Appeal’s general approach has been narrow and restrictive. Generally, it has taken the view that for a ruling to be susceptible to appeal the direct objective of the ruling must have been for one or more of the purposes set out in the Criminal Procedure and Investigations Act 1996, section 29(2).<sup>130</sup> The fact that an incidental effect of the ruling was the achievement of one or more of those purposes is not sufficient.<sup>131</sup>

2.79 In *H*, Lord Mance pointed to a particular feature of the Court of Appeal jurisprudence, namely that it appears to distinguish between cases where the ruling sought would facilitate trial on the charges indicted and those where the ruling sought would preclude or terminate trial on such charges.<sup>132</sup> In general, the Court of Appeal has not been prepared to entertain appeals against the latter. Thus, a ruling refusing to stay proceedings on the grounds of abuse of process,<sup>133</sup> a ruling refusing to quash one of several counts,<sup>134</sup> a ruling refusing to quash an indictment<sup>135</sup> and a ruling that proceedings had to be stayed or dismissed because, even if the prosecution proved all the facts alleged in their case, the jury would not be entitled to convict<sup>136</sup> have all been held not to be susceptible to appeal.

<sup>126</sup> Criminal Justice Act 1987, s 9(11) and Criminal Procedure and Investigations Act 1996, s 35(1).

<sup>127</sup> [2007] UKHL 7, [2007] 2 WLR 364.

<sup>128</sup> Above, at [50].

<sup>129</sup> Above, at [30].

<sup>130</sup> Para 2.73 above.

<sup>131</sup> *Gunawardena* [1990] 1 WLR 703; *Moore* (unreported), 5 February 1991; *Jennings* (1994) 98 Cr App R 308; *Maxwell* (unreported), 9 February 1995; *Hedworth* [1997] 1 Cr App R 421; *Van Hoogstraten* [2003] EWCA Crim 3642, [2004] *Criminal Law Review* 498.

<sup>132</sup> [2007] UKHL 7, [2007] 2 Cr App R 6. [85].

<sup>133</sup> *Gunawardena* [1990] 1 WLR 703; *Claydon* [2004] 1 WLR 1575.

<sup>134</sup> *Moore* (unreported) 5 February 1991.

<sup>135</sup> *Hedworth* [1997] 1 Cr App R 421.

<sup>136</sup> *Van Hoogstraten* [2003] EWCA Crim 3642, [2004] *Criminal Law Review* 498.

- 2.80 The approach of the Court of Appeal has some merit. A preparatory hearing can only be ordered if substantial benefits would accrue for one or more of the specified purposes. The specified purposes appear to presuppose that there will be a trial before a jury. It is not obvious that a ruling, for example staying the proceedings, that has the effect of terminating the trial before the jury is sworn comes within one or more of the specified purposes. On the other hand, it might be thought that any ruling, even if it is one that terminates the trial before the jury is sworn, serves to expedite the proceedings before the jury because, had it not been made at the preparatory hearing, it would have had to have been made after the jury was sworn. The difficulty is that on this argument it is hard to envisage any ruling that would not expedite the proceedings before the jury.
- 2.81 By contrast, the Court of Appeal has been prepared to entertain appeals against rulings made in relation to unsuccessful defence applications made under either section 76 or section 78 of the Police and Criminal Evidence Act 1984 to exclude evidence on which the prosecution proposed to rely.<sup>137</sup> A successful application under section 76 or section 78 to exclude evidence can, although it need not, have the effect of terminating the trial. In some cases, the prosecution will be able to proceed, albeit with a weakened case. In other cases, the ruling may be fatal to the prosecution case. For example, if the defendant's confession constituted the only evidence against the defendant and it was ruled inadmissible, the ruling would in effect be a terminating ruling.
- 2.82 What may distinguish rulings made in relation to applications under section 76 or 78, on the one hand, and rulings made, for example, in relation to applications to stay proceedings for abuse of process, on the other hand, is that while the latter *without more* terminate the proceedings, the former still require a decision on the part of the prosecution whether or not to offer no evidence. In other words, a ruling favourable to the defence on a section 76 or 78 application never *in itself* terminates the trial.
- 2.83 In *H*, Lord Mance was critical of the Court of Appeal jurisprudence. He thought that it displayed too much caution and had unduly constrained the opportunities for appealing against rulings made at preparatory hearings. Instead, he said that his preferred approach was that, provided a preparatory hearing had been properly ordered, the judge has the power to make rulings determining any question as to the admissibility of evidence, any question of law relating to the case or any question as to severance or joinder of charges irrespective of whether the ruling serves any of the specified purposes. Further, such rulings made at validly held preparatory hearings are amenable to appeal even if, should the appeal be successful, the trial would be precluded or terminated entirely or in relation to any particular count(s).<sup>138</sup>

<sup>137</sup> *Moore* (unreported) 5 February 1991; *Smith (Wallace)* [1994] 1 WLR 1396; *Sawtell* (unreported) 13 September 2000; *R* (unreported) 22 February 2000; *Claydon* [2001] EWCA Crim 1359, [2004] 1 WLR 1575.

<sup>138</sup> [2007] UKHL 7, [2007] 2 WLR 364, [91]. Whether their other Lordships would go so far as Lord Mance is unclear.

- 2.84 However, Lord Mance implicitly acknowledged that not everyone might agree with his preferred view. His alternative view was it should suffice if a ruling served at least one of the specified purposes irrespective of whether that was “the direct or dominant object of the application”.<sup>139</sup>
- 2.85 The importance of Lord Mance’s speech should not be underestimated. It marks a significant departure from the narrow approach that was the hallmark of the Court of Appeal jurisprudence. In particular, on his preferred approach, it would no longer be a requirement that for a ruling to be capable of being appealed it must serve at least one of the specified purposes. However, the extent to which his speech operates as a release from the previous constraints depends, at least in part, on how ‘question of law relating to the case’ is interpreted.

*The meaning of ‘any question of law relating to the case’*

- 2.86 In *H*, the defendant had applied for disclosure of documents in the possession of the prosecution. At the preparatory hearing, the judge refused the application. The House of Lords held unanimously that, on the facts of the instant case, the ruling on disclosure was not a ruling on a ‘question of law relating to the case’ and so could not be appealed.<sup>140</sup> Lord Hope, echoing what Lord Bingham had said in *Shayler*,<sup>141</sup> said that the words ‘relating to the case’ were words of limitation. Lord Rodger, acknowledging that the provenance of the preparatory hearing regime had been the Report of the Fraud Trials Committee 1986 chaired by Lord Roskill, said:

The point to notice at present is that the committee envisaged that any preparatory hearing would take place *after* the relevant essential work of preparation for the trial had been completed. Therefore the judge would determine questions of law relating to the case, as fully prepared for trial, not questions of law relating to the essential preparations for the trial of the case.

Today at least, sorting out problems relating to the disclosure of prosecution material forms an important part of the essential preparations for trial.<sup>142</sup>

- 2.87 Lord Rodger added that a broad interpretation of ‘a question of law relating to the case’, embracing applications for disclosure, would have:

<sup>139</sup> Above, at [92]. Whether or not they would agree with Lord Mance’s preferred view, the speeches of Lord Scott [32] and Lord Rodger [54] at least lend support to Lord Mance’s alternative view.

<sup>140</sup> Their Lordships acknowledged that in certain circumstances a ruling on disclosure could involve determining ‘a question of law relating to the case’, for example, if the ruling on disclosure depended on resolving a question of law relating to the scope of the indictment.

<sup>141</sup> [2002] UKHL 11, [2003] 1 AC 247, [17]. Lord Bingham said that the expression ‘relating to the case’ was a “limitation” which had to be “strictly observed”.

<sup>142</sup> [2007] UKHL 7, [2007] 2 WLR 364, [62] to [63] (emphasis in original).

... the extraordinary effect that there would be no right of appeal from a judge's decision on an application for disclosure if it were made and decided before any preparatory hearing, but there would be a right of appeal if the application were made and decided at a preparatory hearing. I am unable to think of any good reason why Parliament would have intended to penalise an accused person who made a prompt application by denying him an opportunity to appeal which, on this hypothesis, would be available to a more sluggardly accused who waited until the preparatory hearing. In law, as in nature, the early bird should get the worm.<sup>143</sup>

- 2.88 If a ruling on disclosure of evidence does generally not determine a 'question of law relating to the case', what rulings do? According to Lord Scott, the focus should not be on the nature of the ruling that is sought to be appealed but rather "on the nature of the question that has been determined".<sup>144</sup> According to Lord Scott:

The judicial determination of almost any question is capable of raising an issue of law. The judge may have made an error of law in his approach to the application. He may have produced a determination that no judge properly directing himself could have produced or that offends against some principle of law. But it does not, in my opinion, follow that he has determined a "question of law relating to the case".<sup>145</sup>

- 2.89 However, this still leaves ample scope for argument as to what is meant by 'question of law relating to the case'. In particular, does a judge in ruling on an application to stay proceedings for abuse of process determine such a question?

#### APPEALING AGAINST EVIDENTIARY RULINGS RELATING TO PROSECUTION EVIDENCE

- 2.90 Under the current law, both the prosecution and the defence can appeal against rulings on admissibility of evidence if the ruling is made at a preparatory hearing. Further, the prosecution can also appeal against a ruling on admissibility of evidence if the ruling is a 'terminating' ruling. However not all cases qualify for a preparatory hearing and not all rulings on admissibility of evidence which are adverse to the prosecution are 'terminating' rulings. They may merely weaken the prosecution case.
- 2.91 Section 62 of the Criminal Justice Act 2003 provides the prosecution with enhanced opportunities for challenging judicial rulings on admissibility of evidence. It has not yet been implemented but, if and when it is, the prosecution will be able, subject to obtaining leave, to appeal against a ruling which:

- (1) relates to the admissibility or exclusion of prosecution evidence;

<sup>143</sup> Above, [65].

<sup>144</sup> Above, [41].

<sup>145</sup> Above. Lord Nicholls [13] and Lord Rodger [59] expressed themselves in similar terms.

- (2) is made before the opening of the defence case;
- (3) 'significantly weakens' the prosecution case; and
- (4) relates to a 'qualifying offence'.

The prosecution would be able to appeal against such a ruling irrespective of whether it was made at a pre-trial hearing or in the course of the trial after the jury had been sworn.<sup>146</sup>

*The powers of the Court of Appeal to reverse an evidentiary ruling*

2.92 As with appeals against 'terminating' rulings, the Court of Appeal would only be able to reverse an evidentiary ruling if the ruling:

- (1) was wrong in law;
- (2) involved an error of law or principle; or
- (3) was one that it was not reasonable for the judge to have made.<sup>147</sup>

MISCELLANEOUS STATUTORY APPEALS

2.93 Parliament has legislated in order to provide statutory appeals to the Court of Appeal in relation to specific orders. For example:

- (1) Courts have the power to make orders under section 4(2) of the Contempt of Court Act 1981 restricting the publication in the press of matters relating to the trial (such as the name of a witness) or orders restricting public access to a trial. Such orders, if made in trials on indictment, may be challenged in the Court of Appeal by virtue of section 159 of the Criminal Justice Act 1988.<sup>148</sup> There is, however, no appeal under section 159 against a refusal to order that proceedings be held in camera,<sup>149</sup>

<sup>146</sup> All cases tried on indictment, even if they do not qualify for a preparatory hearing, are preceded by a Plea and Case Management Hearing ('PCMH') at which a Crown Court judge can make rulings which are binding unless discharged or varied in the course of the trial: CPIA 1996, s 40. Like preparatory hearings, PCMHs are held before a jury is empanelled. However, unlike preparatory hearings, the PCMH does not constitute the start of the trial. Accordingly, the judge who conducts a PCMH does not have to be the judge who conducts the trial once the jury has been empanelled.

<sup>147</sup> Criminal Justice Act 2003, s 67.

<sup>148</sup> The section reversed *R v Central Criminal Court ex p Crook*, *The Times*, 8 November 1984, in the light of the ruling by the European Commission in *Hodgson D Woolf Productions and National Union of Journalists v UK* [1988] 10 EHRR CD503.

<sup>149</sup> S [1995] 2 Cr App R 347.

- (2) As noted above,<sup>150</sup> a defendant can appeal against the making of a hospital or supervision order following a finding of unfitness to plead in a case where the jury has also found that the defendant did the act or made the omission in question.<sup>151</sup>
- (3) Where a defendant is convicted of certain violent or public order offences related to their attendance at a football match,<sup>152</sup> the court must make an order banning them from attending future matches if satisfied that there are reasonable grounds to believe that it would help prevent violence or disorder at those matches.<sup>153</sup> Where the Crown Court fails to make such an order, the prosecution can appeal the failure to the Court of Appeal.<sup>154</sup>

#### REFERRING AN ACQUITTAL

- 2.94 Where a defendant has been acquitted after a trial on indictment the prosecution can make an Attorney General's reference to the Court of Appeal.<sup>155</sup> The Court of Appeal will give its opinion on the legal point for the benefit of subsequent cases. However, the opinion, even if favourable to the prosecution, does not affect the acquittal. Accordingly, it is not an exception to the general rule that the prosecution cannot seek to overturn a jury verdict to acquit a defendant.

#### REFERRING AN UNDULY LENIENT SENTENCE

- 2.95 The prosecution may, with leave, challenge sentences for certain offences<sup>156</sup> by way of an Attorney General's reference.<sup>157</sup> This is a reference to the Court of Appeal on the ground that the sentence imposed by the court was 'unduly lenient'. The Court of Appeal has the power to increase the sentence.

#### ***Appealing to or seeking review by the High Court***

- 2.96 In Part 1<sup>158</sup> we explained that, by virtue of sections 28(1) and 29(3) of the Supreme Court Act 1981, the High Court has a jurisdiction that it would otherwise not have. It can entertain appeals by way of case stated and applications for judicial review in respect of decisions made by the Crown Court, even though the latter is a superior court of record.
- 2.97 However, section 28(2) provides:

Subsection (1) shall not apply to –

<sup>150</sup> See para 2.60.

<sup>151</sup> Criminal Appeal Act 1968, s 16A, as inserted by the Domestic Violence, Crime and Victims Act 2004, s 25.

<sup>152</sup> As listed in the Football Spectators Act 1989, sch 1.

<sup>153</sup> Football Spectators Act 1989, s 14A(2).

<sup>154</sup> Above, s 14A(5A).

<sup>155</sup> Criminal Justice Act 1972, s 36.

<sup>156</sup> As listed in the Criminal Justice Act 1988 (Reviews of Sentencing) Order 2006, sch 1.

<sup>157</sup> Criminal Justice Act 1988, s 36.

<sup>158</sup> See Part 1, para 1.22 above.

- (a) a judgment or decision of the Crown Court relating to trial on indictment; or
- (b) ...

2.98 Section 29(3) provides:

In relation to the jurisdiction of the Crown Court, *other than its jurisdiction in matters relating to trial on indictment*, the High Court shall have all such jurisdiction to make mandatory, prohibiting and quashing orders as the High Court possesses in relation to the jurisdiction of an inferior court.<sup>159</sup>

2.99 Accordingly, while the High Court has a general jurisdiction to review decisions of the Crown Court when exercising its appellate jurisdiction, it has no jurisdiction in relation to a decision made by the Crown Court when exercising its first instance jurisdiction if the decision 'relates to trial on indictment'.

#### THE INTERPRETATION OF 'RELATING TO TRIAL ON INDICTMENT'

2.100 The mere fact that a decision is made during the course of a case tried on indictment does not necessarily mean that it 'relates to trial on indictment'. The House of Lords has given 'pointers' as to how the phrase 'relating to trial on indictment' should be interpreted but it has not formulated a definitive test. The pointers indicate that review of a decision should be excluded if the decision:

- (1) affected the conduct of the trial in any way;<sup>160</sup>
- (2) was an integral part of the trial process;<sup>161</sup>
- (3) was an issue arising between the Crown and defendant formulated by the indictment;<sup>162</sup> or
- (4) is in substance the answer to some issue between the prosecution and the defence arising during a trial on indictment.<sup>163</sup>

<sup>159</sup> Emphasis added.

<sup>160</sup> *Re Smalley* [1985] AC 622, 643, by Lord Bridge, and *Re Ashton* [1994] 1 AC 9, 20, by Lord Slynn.

<sup>161</sup> *Re Sampson* [1987] 1 WLR 194, 196 to 198, by Lord Bridge.

<sup>162</sup> *R v Manchester Crown Court, ex p DPP* [1993] 1 WLR 1524, 1530, by Lord Browne-Wilkinson. It was further held in this case that if the decision was truly collateral to the indictment and a review would not delay the trial, judicial review would not necessarily be excluded.

<sup>163</sup> *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326, 394, by Lord Hobhouse.

*The policy consideration underlying the interpretation of 'relating to trial on indictment'*

- 2.101 In interpreting the expression, the courts have emphasised the word 'trial' in the phrase 'relating to trial on indictment' and also the policy reason for the exclusion, namely that appeal or review should not be available if it would delay the proceedings, particularly if there are other remedies available. However, the case law is not entirely consistent.

DECISIONS THAT HAVE BEEN HELD TO BE ONES 'RELATING TO TRIAL ON INDICTMENT'

- 2.102 The law has developed on a case by case by case basis within the parameters of the 'pointers' expressed by the House of Lords. The following are matters that have been held to relate to trial on indictment and, therefore, are not reviewable:

- (1) a refusal to award an acquitted defendant his or her costs out of central funds;<sup>164</sup>
- (2) an order discharging a jury;<sup>165</sup>
- (3) an order in relation to the taking of steps to vet a jury panel;<sup>166</sup>
- (4) an order that an indictment lie on the file marked "not to be proceeded with without leave";<sup>167</sup>
- (5) the refusal of a Crown Court judge to grant legal aid;<sup>168</sup>
- (6) the decision of a Crown Court judge to order a defence solicitor personally to pay the costs occasioned by the granting of a defence application for an adjournment;<sup>169</sup>
- (7) a refusal to fix a date for trial until a certain event occurred, such as the trial of another matter;<sup>170</sup>
- (8) a decision to quash an indictment for want of jurisdiction to try an offence;<sup>171</sup>
- (9) an order to stay criminal proceedings on the grounds of abuse of process;<sup>172</sup>

<sup>164</sup> *Ex parte Meredith* [1973] 1 WLR 435; *R v Canterbury Crown Court, ex p Regentford Ltd* [2001] HRLR 18.

<sup>165</sup> *Ex parte Marlowe* [1973] *Criminal Law Review* 294.

<sup>166</sup> *R v Sheffield Crown Court ex parte Brownlow* [1980] QB 530.

<sup>167</sup> *R v Central Criminal Court ex parte Raymond* [1986] 1 WLR 710.

<sup>168</sup> *R v Chichester Crown Court ex parte Abodunrin* (1984) 79 Cr App R 293.

<sup>169</sup> *R v Smith* [1975] QB 531. However see now Solicitors Act 1974, s 50(3).

<sup>170</sup> *R v Southwark Crown Court, ex parte Ward* [1996] *Criminal Law Review* 123.

<sup>171</sup> *R v Manchester Crown Court, ex parte DPP* [1993] 1 WLR 1524.

<sup>172</sup> *Re Ashton* [1994] 1 AC 9.

- (10) an order refusing to stay criminal proceedings on the grounds of abuse of process;<sup>173</sup>
- (11) the issue of a witness summons under section 2(1) of the Criminal Procedure (Attendance of Witnesses) Act 1965;<sup>174</sup>
- (12) a decision pursuant to section 4(3) of the Criminal Procedure (Attendance of Witnesses) Act 1965 to remand a witness in custody until such time as the court may appoint for receiving his evidence;<sup>175</sup>
- (13) a refusal to grant a further extension of time in which to prefer a bill of indictment;<sup>176</sup>
- (14) a legal aid contribution order made at the conclusion of a trial;<sup>177</sup>
- (15) a decision not to dismiss a charge which had been sent for trial under section 51 of the Crime and Disorder Act 1998;<sup>178</sup>

DECISIONS THAT HAVE BEEN HELD BE ONES NOT 'RELATING TO TRIAL ON INDICTMENT'

2.103 The following are matters that have been held *not* to relate to trial on indictment and, therefore, are reviewable:

- (1) an order for forfeiture of a surety's recognizance for bail where a defendant failed to surrender to his trial at the Crown Court;<sup>179</sup>
- (2) a forfeiture order under section 27 of the Misuse of Drugs Act 1971 made against the owner of property who was not a defendant in the criminal proceedings;<sup>180</sup>
- (3) an order committing an acquitted defendant to prison unless he agrees to be bound over;<sup>181</sup>

<sup>173</sup> *R (Salubi) v Bow Street Magistrates' Court* [2002] EWHC 919, [2002] 1 WLR 3073.

<sup>174</sup> *Ex parte Rees*, *The Times* 7 May 1986.

<sup>175</sup> *R (TH) v Wood Green Crown Court* [2006] EWHC 2683 (Admin), [2007] 1 WLR 1670.

<sup>176</sup> *R v Isleworth Crown Court, ex parte King* [1992] COD 298.

<sup>177</sup> *Re Sampson* [1987] 1 WLR 194. Lord Bridge also stated (at 198) that "any other order with regard to costs which the Crown Court may make at the conclusion of a trial on indictment" relates to trial on indictment and cannot be challenged.

<sup>178</sup> *R (Snelgrove) v Woolwich Crown Court* [2004] EWHC 2172 (Admin), [2005] 1 WLR 3223; *R (O) v Central Criminal Court* [2006] EWHC 256 (Admin), [2006] All ER (D) 201 (Jan). Subsequently, the Court of Appeal has held that a decision to dismiss a charge sent for trial under section 51 is not a 'terminating' ruling and so cannot be appealed by the prosecution to the Court of Appeal: *Thompson and Hanson* [2006] EWCA Crim 2849, [2007] 1 WLR 1123. The prosecution's remedy is to prefer a voluntary bill of indictment.

<sup>179</sup> *Re Smalley* [1985] AC 622.

<sup>180</sup> *R v Maidstone Crown Court, ex p Gill* [1986] 1 WLR 1405.

<sup>181</sup> *R v Inner London Crown Court, ex p Benjamin* [1987] 85 Cr App R 267.

- (4) following conviction, orders made under section 39 of the Children and Young Persons Act 1933 to protect the anonymity of a child who was a defendant in the proceedings or an order discharging such an order;<sup>182</sup>
- (5) an order that a defendant convicted on indictment whose legal representation was publicly funded should pay some or all of the costs of his or her representation;<sup>183</sup>
- (6) a bail decision “at an early stage of criminal proceedings”;<sup>184</sup>
- (7) a decision as to the manner in which the Crown Court deals with an application for bail (for example, whether or not to sit in public);<sup>185</sup>
- (8) decisions and orders made following a finding of unfitness to plead;<sup>186</sup>
- (9) a decision or order made without jurisdiction;<sup>187</sup> and
- (10) a third party application for a declaration.<sup>188</sup>

Sub-paragraphs (1) to (5) denote specific discrete areas and are self-explanatory. Sub-paragraphs (6) to (10) encompass a wider jurisdiction and are examined in more detail below.

### *Bail*

- 2.104 Before the enactment of the Criminal Justice Act 2003, the High Court had an original and inherent jurisdiction to grant bail to a defendant who had been refused bail by a magistrates’ court or by the Crown Court. This was so whether the Crown Court had dismissed a statutory appeal from a refusal of bail by a magistrates’ court or had itself refused bail in the course of exercising its first instance or appellate jurisdiction.<sup>189</sup> In exercising its inherent jurisdiction, the High Court considered the application for bail on its merits. The High Court had no inherent jurisdiction to entertain applications by the prosecution against decisions by either the Crown Court or magistrates’ courts to grant bail.

<sup>182</sup> *R v Manchester Crown Court, ex parte H* [2000] 1 WLR 760.

<sup>183</sup> *Patel* [2005] EWCA Crim 977.

<sup>184</sup> *R (M) v Isleworth Crown Court and Her Majesty’s Customs and Excise* [2005] EWHC 363 (Admin), [2005] All ER (D) 42 (Mar).

<sup>185</sup> *R (Malik) v Central Criminal Court and Another* [2006] EWHC 1539 (Admin), [2006] 4 All ER 1141.

<sup>186</sup> *R v H, R v M, R v Kerr*, [2001] EWCA Crim 2024, [2002] 1 WLR 824, [17]; *R v Grant* [2001] EWCA Crim 2611, [2002] QB 1030, [10].

<sup>187</sup> *R v Maidstone Crown Court, ex parte Harrow London Borough Council* [2000] QB 719.

<sup>188</sup> *R (TB) v The Combined Court at Stafford* [2006] EWHC 1645 (Admin), [2007] 1 WLR 1524.

<sup>189</sup> *R v Reading Crown Court, ex parte Malik* [1981] QB 451.

- 2.105 Section 22 of the Criminal Justice Act 1967 provided the High Court with a statutory jurisdiction, in addition to its inherent jurisdiction, to entertain an appeal on the merits against the refusal by a magistrates' court to grant bail. Accordingly, in cases where magistrates' courts refused bail, the High Court had a concurrent jurisdiction to consider applications for bail on the merits.
- 2.106 Lord Justice Auld, in his Review of the Criminal Courts of England and Wales,<sup>190</sup> said that he could see no justification for this concurrent jurisdiction. Against this background, section 17(1) of the Criminal Justice Act 2003 restricted section 22 of the Criminal Justice Act 1967 to cases where the High Court itself was hearing an appeal by way of case stated from a lower court. At the same time, sections 17(2) and (3) abolished the inherent jurisdiction of the High Court in relation to bail. In other words, the High Court's jurisdiction to entertain applications for bail on the merits was abolished.
- 2.107 Prior to the enactment of section 17, it had been held that judicial review was generally unavailable to challenge any refusal of bail by the Crown Court.<sup>191</sup> This was consistent with the general principle that the High Court will normally refuse judicial review where there is an alternative effective remedy. The High Court's inherent jurisdiction to entertain an appeal on the merits was an alternative effective remedy.
- 2.108 The abolition by section 17(2) and (3) of the inherent jurisdiction meant that there was no longer an effective alternative remedy against a refusal by the Crown Court to grant bail. It can be argued that since there was no longer an alternative effective remedy, the possibility of judicial review of Crown Court decisions refusing bail was opened up. Indeed, section 17(6) provides that nothing in the section affects "the right of any person to apply for a writ of habeas corpus or any other prerogative remedy".
- 2.109 In *R (M) v Isleworth Crown Court ('Isleworth')*<sup>192</sup> the High Court held, first, that the effect of section 17(6) was indeed to open up decisions of the Crown Court on bail to judicial review, although judicial review of such decisions would be reserved for very exceptional cases. Subsequently, it was held in *R (AW) v Kingston upon Thames Crown Court*<sup>193</sup> that "only in a rare case should the High Court interfere with the decisions of experienced Crown Court judges". There have in fact, following *Isleworth*, been a number of judicial reviews of bail decisions.<sup>194</sup>

<sup>190</sup> Review of Criminal Courts in England and Wales (2001), ch 10, para 86.

<sup>191</sup> *Re Herbage*, *The Times* 25 October 1985; *R v Croydon Crown Court, ex p Cox* [1997] 1 Cr App R 20.

<sup>192</sup> [2005] EWHC 363 (Admin), [2005] All ER (D) 42 (Mar).

<sup>193</sup> [2005] EWHC 703 (Admin), [2005] All ER (D) 321 (Apr).

<sup>194</sup> In addition to *R (AW) v Kingston-Upon-Thames Crown Court* (above), see *R (Allwin) v Snaresbrook Crown Court* [2005] EWHC 742 (Admin), [2005] All ER (D) 40 (Apr) and *R (Shergill) v Harrow Crown Court* [2005] EWHC 648 (Admin), [2005] All ER (D) 39 (Apr).

- 2.110 Secondly, the High Court proceeded on the footing (which was said to be “common ground” between the parties in the case) that section 29(3) of the 1981 Act had no application to a bail decision taken “at an early stage of criminal proceedings” tried on indictment. It is difficult to see on this test at what precise point section 29(3) would begin to have an exclusionary effect and how, in terms of language or policy, the application of section 29(3) could depend on the stage which the trial on indictment had happened to reach.<sup>195</sup>
- 2.111 However, it is understandable why, despite the relevant provisions of the Criminal Justice Act 2003 and section 29(3) of the Supreme Court Act 1981, the High Court should be anxious to retain some control over bail decisions of the Crown Court against which there is no statutory appeal. The liberty of the citizen is at stake and a seriously flawed refusal of bail could well constitute a breach of article 5 of the ECHR.
- 2.112 More recently, in *R (Malik) v Central Criminal Court*,<sup>196</sup> the High Court granted an application for judicial review by a defendant who had unsuccessfully applied for his bail application to be heard in open court. The High Court considered section 29(3) and concluded that it was not a bar to granting judicial review. Mr Justice Gray said that while the High Court cannot entertain challenges to refusal of bail on the merits, it can entertain a “jurisdictional issue such as the present one”.<sup>197</sup>

*Decisions and orders following a finding of unfitness to plead*

- 2.113 The Court of Appeal has held that, following a finding that the defendant is unfit to plead, the trial ceases to be one that is tried on indictment.<sup>198</sup> Everything that follows is not a trial on indictment.<sup>199</sup> Accordingly, neither a finding by the jury that the defendant did the act or made the omission charged nor the resulting hospital, supervision or absolute discharge order are matters ‘relating to trial on indictment’.

<sup>195</sup> A point made by Mr Justice Collins in *R (Shergill) v Harrow Crown Court* [2005] EWHC 648 (Admin) at [6].

<sup>196</sup> [2006] EWHC 1539 (Admin), [2006] 4 All ER 1141.

<sup>197</sup> Above, [16].

<sup>198</sup> *R v H, R v M, R v Kerr*, [2001] EWCA Crim 2024, [2002] 1 WLR 824 (affirmed by the House of Lords on other grounds [2003] UKHL 1, [2003] 1 WLR 411); *R v Grant* [2001] EWCA Crim 2611, [2002] QB 1030, [10]; *R (Young) v Central Criminal Court* [2002] EWHC 548 (Admin), [2002] 2 Cr App R 12.

<sup>199</sup> It follows that, once a judge has found that the defendant is unfit to plead, there is no power to hold a preparatory hearing prior to the hearing at which the jury determines whether the defendant did the act or made the omission charged: *R v H, R v M, R v Kerr*, above, and *R (Young) v Central Criminal Court*, above.

- 2.114 This explains why the High Court, in entertaining applications for judicial review in two recent cases, made no reference to section 29(3). In *R (Hasani) v Blackfriars Crown Court ('Hasani')*,<sup>200</sup> the defendant had been found unfit to plead and had been found to have done the act charged. For the purposes of determining the appropriate disposal, the judge ordered reports on the defendant. The reports indicated that the defendant was now fit to plead. Counsel for the defendant submitted that the judge should grant the defendant an absolute discharge. The judge rejected the submission and instead ordered that the defendant should be arraigned. The defendant sought judicial review of that order.
- 2.115 The High Court rejected the defence submission that the trial judge was required to make an order disposing of the case. Nevertheless, it granted judicial review. It did so because, before ordering that the defendant should be arraigned, the judge had not held a second fitness to plead hearing. This was a procedural error that the High Court corrected by ordering a second fitness to plead hearing. If at the second hearing, the judge found that the defendant was fit to plead, he could order arraignment.
- 2.116 In *R (Jones) v Isleworth Crown Court, ('Jones')*<sup>201</sup> the defendant, who had been found unfit to plead and to have done the act charged, was made the subject of a hospital order with a restriction order. The defendant applied for judicial review on the grounds that the evidence did not entitle the judge to form the view that there was a risk of serious harm to the public unless a restriction order was made. The High Court entertained the application but declined to grant judicial review.<sup>202</sup>
- 2.117 In both *Hasani* and *Jones*, the High Court, rightly, made no reference to section 29(3). In each case what was being challenged was a decision made following a finding of unfitness to plead. Accordingly, the decisions were not matters 'relating to trial on indictment'.
- 2.118 We explained above how defendants can appeal to the Court of Appeal in cases where they have been found unfit to plead. Under the current law, therefore, a defendant found unfit to plead and found to have done the act or made the omission charged has two avenues for challenging the latter finding and any subsequent hospital or supervision order. He or she can appeal to the Court of Appeal or appeal by case stated to the High Court.<sup>203</sup>

<sup>200</sup> [2005] EWHC 3016 (Admin), [2006] 1 WLR 1992.

<sup>201</sup> [2005] EWHC 662 (Admin), [2005] MHLR 93.

<sup>202</sup> When *Jones* was decided, Criminal Appeal Act 1968, s 16A (inserted by Domestic Violence, Crime and Victims Act 2004, s 25) which, amongst other things, enables a person to appeal against the making of a hospital order was not yet in force.

<sup>203</sup> It seems unlikely that an application for judicial review would be entertained. This is because of the general principle that judicial review will not normally be available where there is another effective remedy. However, in the unlikely event of a challenge to an order for absolute discharge, judicial review would lie because such an order cannot be appealed to the Court of Appeal.

2.119 In *R v Grant*,<sup>204</sup> the defendant was charged with murder. She was found unfit to plead and the jury found that she did the act charged as murder, namely stabbing the deceased. A hospital order was made. The defendant wished to challenge the finding that she had done the act charged. In particular, she wished to challenge the ruling by the judge that she was not entitled to ask the jury to consider defences of lack of intent and provocation. The judge certified that the case was fit for appeal to the Court of Appeal pursuant to section 15 of the Criminal Appeal Act 1968. He also stated a case for the opinion of the High Court. The issues came before a court constituted both as the Court of Appeal and as a Divisional Court. The court accepted that it had jurisdiction to entertain both appeals.

*Orders made without jurisdiction*

2.120 In *R v Maidstone Crown Court, ex parte Harrow London Borough Council, ('Harrow LBC')*<sup>205</sup> the defendant was charged with arson. It was agreed both that he was fit to plead and that, at the time of the offence, he had been legally insane. He entered a plea of 'not guilty by reason of insanity'. Where such a plea is entered, it is open to a jury, if they find that the defendant did the act or made the omission charged and at the time was legally insane, to return a special verdict of 'not guilty by reason of insanity'.<sup>206</sup> Following such a verdict, the court, pursuant to section 5 of the 1964 Act, can make a hospital order, a supervision order or an order for absolute discharge. The judge made a supervision order but he did so without first empanelling a jury to return the special verdict of not guilty by reason of insanity. The defendant had no wish to challenge the order. However, the local authority entrusted with the responsibility for supervising the defendant did wish to do so.<sup>207</sup>

2.121 Unlike a finding of unfitness to plead, the entering of a plea of not guilty by reason of insanity does not transform the nature of the trial. It remains a trial on indictment. Accordingly, it was difficult to claim that the purported making of the supervision order was not a matter 'relating to trial on indictment'.

2.122 The supervision order had clearly been made without jurisdiction. After a comprehensive review of the authorities, Mr Justice Mitchell concluded that, although the order would ordinarily not have been reviewable, the High Court had jurisdiction to grant judicial review:

<sup>204</sup> [2001] EWCA Crim 2611, [2002] QB 1030.

<sup>205</sup> [2000] QB 719.

<sup>206</sup> Trial of Lunatics Act 1883, s 2(1).

<sup>207</sup> At the time *Harrow LBC* was decided, the defendant had no right to appeal against the making of a hospital or supervision order. He would now be able to do so by virtue of the implementation of Domestic Violence, Victims and Crime Act 2004, s 25. However, the issue that arose in the case is still a live issue where it is a third party and not the defendant who wishes to challenge the making of the order.

The issue of 'jurisdiction' is not the same as an issue relating to the quality of a decision or order which the Crown Court did have jurisdiction to take or to make. The word 'quality' embraces questions as to whether (jurisdiction apart) the decision/order was right or wrong and whether, if there was a discretion, it was properly exercised.<sup>208</sup>

The High Court had a residual discretion to supervise the Crown Court in respect of a matter relating to trial on indictment if, in the absence of any alternative remedy, the challenge was on the ground that the decision had been made without jurisdiction. Mr Justice Mitchell said that it was undesirable to proffer a test for determining whether or not a challenge goes essentially to jurisdiction.

- 2.123 In *R (Kenneally) v Crown Court at Snaresbrook ('Kenneally')*,<sup>209</sup> the defendant was charged on indictment with indecent assault. He suffered from a mental illness but was fit to plead. He pleaded not guilty. Insanity was not an issue. He was remanded in custody. Section 48 of the Mental Health Act 1983 ('the 1983 Act') permits the Secretary of State to direct the transfer of a prisoner detained on remand to a hospital for medical treatment. The Secretary of State made a direction in respect of the defendant. Where such a direction has been made, section 51(5) of the 1983 Act enables the Crown Court, provided certain medical conditions are satisfied, to make a hospital order in the case of a person awaiting trial without convicting him. However, in order to do so, it must appear to the court that 'it is impracticable or inappropriate to bring the detainee before the court'. The judge made a hospital order on the basis that it was 'inappropriate' to bring the defendant before the court. The defendant challenged the order by a claim for judicial review.
- 2.124 The High Court said that there had been a failure on the part of the judge to have any test in mind when scrutinising what was meant by 'inappropriate'. Accordingly, the order had been made without jurisdiction. Following *Harrow LBC*, the order was amenable to review and would be quashed.<sup>210</sup>

<sup>208</sup> [2000] QB 719, 742.

<sup>209</sup> [2001] EWHC Admin 968, [2002] QB 1169.

<sup>210</sup> Pill LJ would have also granted judicial review on a wider basis, namely that the making of the order was not a matter 'relating to trial on indictment'. However both Rafferty and Tomlinson JJ were not prepared to go that far.

2.125 However, in *R (CPS) v Guildford Crown Court*,<sup>211</sup> the CPS sought to quash a sentence which, it was agreed, the trial judge had had no jurisdiction to pass. Lord Phillips, the Lord Chief Justice, specifically rejected the proposition that *Harrow LBC* and *Kenneally* laid down a general proposition that the High Court had jurisdiction to review sentences made by the Crown Court without jurisdiction. He said that the High Court had had jurisdiction in those cases because they were “very special cases where there had not been a trial on indictment”. The general rule remained that a sentence passed at the end of an ordinary trial, even if it had been made in excess of jurisdiction, was one ‘relating to trial on indictment’ and therefore precluded from review by section 29(3) of the 1981 Act.

*A third party application for a declaration*

2.126 In *R (TB) v The Combined Court at Stafford*,<sup>212</sup> B had been the main prosecution witness in a trial involving allegations of sexual offences committed against her. B, who was 14 years’ old at the time of the alleged offences, was undergoing psychiatric treatment prior to the trial. The Crown Court, on the application of the defence, issued a witness summons ordering the Director of the Child and Mental Health Services of a National Health Service Trust to produce B’s medical and hospital records. The defence believed that the records might undermine her credibility as a witness. B was not informed of the application and was not given the opportunity to make representations. The records were disclosed and the trial held. Following the conclusion of the trial, B applied for judicial review. She sought a declaration that the Crown Court acted unlawfully in not notifying her of service of the application for a witness summons and by not allowing her to make representations.

2.127 The High Court held that it had jurisdiction to hear B’s application for a declaration. Lord Justice May said that the ‘limitation’ in section 29(3) was designed to prevent trials on indictment being delayed by interlocutory appeals. It was not intended to prevent an application which would not interrupt a trial and where there was no other form of relief. B’s application would not interrupt the trial (it had finished) and B had no other remedy.

<sup>211</sup> [2007] EWHC 1798 (Admin), *The Times* 16 July 2007.

<sup>212</sup> [2006] EWHC 1645 (Admin), [2007] 1 WLR 1524.

2.128 No party to the proceedings questioned whether the High Court had jurisdiction to entertain the application. Lord Justice May was in no doubt that there was jurisdiction. He referred to the fact that B was seeking a declaration and not a prohibitory, mandatory or quashing order. However, in reaching its decision, the High Court was not referred to *R v Chelmsford Crown Court, ex parte Chief Constable of Essex*<sup>213</sup> in which was held that the High Court has no jurisdiction to grant a declaration in respect of a decision of the Crown Court. Sections 28(1) and 29(3) grant to the High Court a jurisdiction in relation to Crown Courts that it would otherwise not have. Each grants to the High Court a jurisdiction to make prohibitory, mandatory or quashing orders. There is no mention of the remedy of declaration.<sup>214</sup>

**Challenging decisions of the Crown Court made when exercising its committal for sentence jurisdiction**

2.129 With leave, a defendant can appeal to the Court of Appeal against a sentence passed by the Crown Court when exercising its committal for sentence jurisdiction.<sup>215</sup>

2.130 It will be a very rare occurrence when a defendant wishes to challenge a ruling made before sentence is passed. The High Court has held that it has jurisdiction to entertain an application for judicial review to challenge such a ruling.<sup>216</sup>

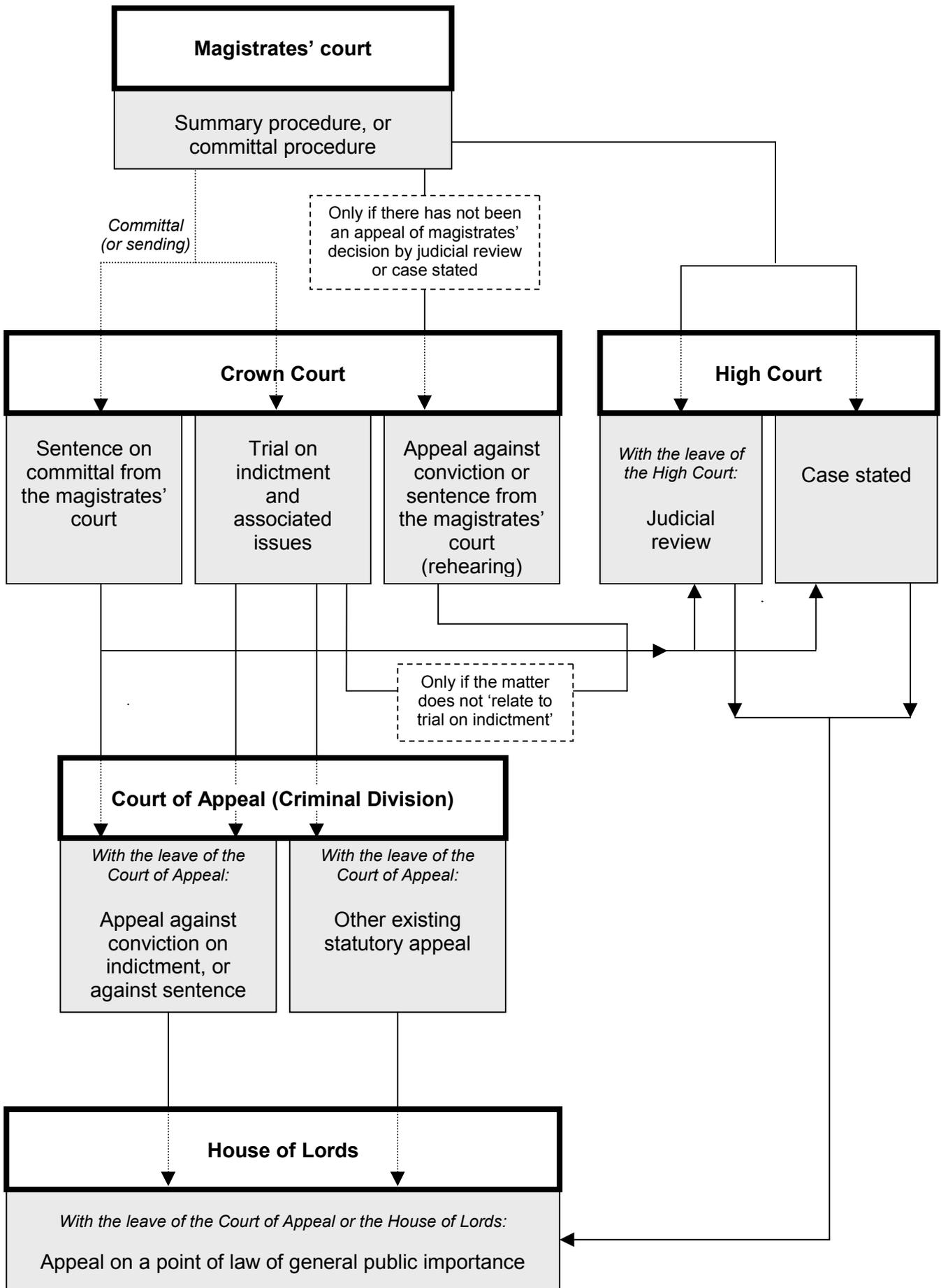
<sup>213</sup> [1994] 1 WLR 359.

<sup>214</sup> With effect from 2 April 2007, the Criminal Procedure Rules provide that, before issuing a witness summons, a court must be satisfied that it has taken proper account of the rights of any person the production of whose medical or other confidential records is being sought. Such a person must have had the opportunity to make representations.

<sup>215</sup> Criminal Appeal Act 1968, s 10(2).

<sup>216</sup> *R (Gillan) v DPP* [2007] EWHC 380 (Admin), [2007] 1 WLR 2214.

**CURRENT STRUCTURE OF APPEALS IN THE CRIMINAL COURTS,**



# **PART 3**

## **THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS**

### **THE PURPOSE OF THIS PART**

- 3.1 Many decisions made by the Crown Court in the course of a trial on indictment engage Convention rights. These may be the Convention rights of the defendant<sup>1</sup> or of a third party to the proceedings.<sup>2</sup>
- 3.2 The purpose of this Part is to examine whether the current scheme of appeals and reviews allows adequate supervision of these types of decisions. The starting point for this investigation is whether that system operates in compliance with articles 6 and 13 ECHR.<sup>3</sup> We then go on to consider, in broader terms, the impact of section 29(3) on the effective and efficient protection of Convention rights in the course of a trial on indictment.

### **COMPLIANCE WITH ARTICLES 6 AND 13 ECHR**

#### **The scheme for protection of Convention rights in UK law**

- 3.3 Section 6(1) of the Human Rights Act 1998 ('HRA') makes it 'unlawful for a public authority to act in a way which is incompatible with a Convention right'. For the purposes of section 6(1), a court or tribunal is a 'public authority'.<sup>4</sup>
- 3.4 As well as conferring the right to enforce Convention rights in domestic law, the HRA was designed to provide a comprehensive system of remedies for breaches of Convention rights. Although article 13 has not been directly incorporated by the HRA into domestic law, the Government considered that the United Kingdom's obligations under article 13 were met by the enactment of the HRA itself, and of sections 7 to 9 in particular. During the course of Parliamentary debate, the Lord Chancellor, Lord Irvine, stated:

<sup>1</sup> Eg, in *Hussain v United Kingdom* (2006) EHRR 22 the refusal by a Crown Court judge to make a defendant's costs order was found to breach article 6(2) ECHR (the presumption of innocence).

<sup>2</sup> Eg, in *R (Gazette Media) v Teeside Crown Court* [2005] EWCA Crim 1983, [2005] EMLR 34 the Crown Court made an order under s 39 of the Children and Young Persons Act 1933 restricting publication of reports of proceedings in which the defendants or the victims could be identified. The article 8 rights of the defendants and victims had to be balanced against the article 10 rights of the media company.

<sup>3</sup> Which guarantee, respectively, the right to a fair trial in the determination of civil rights and obligations and an effective remedy before a national authority of breaches of Convention rights.

<sup>4</sup> Human Rights Act 1998, s 6(3)(a).

[The Bill] gives effect to Article 13 by establishing a scheme under which convention rights can be raised before our domestic courts. To that end, remedies are provided in clause 8. If the concern is to ensure that the Bill provides an exhaustive code of remedies for those whose convention rights have been violated, we believe that Clause 8 already provides that and nothing further is needed.<sup>5</sup>

3.5 Where a person claims that they are a victim of an act by a public authority which is unlawful under section 6(1) HRA, section 7 HRA allows them to argue as much before an appropriate court or tribunal.<sup>6</sup> Where the unlawful act is a judicial act, proceedings under section 7(1)(a) may be brought only by exercising a right of appeal, an application for judicial review or by such other form as may be prescribed by rules.<sup>7</sup> Therefore, a defendant appealing a conviction or sentence, or a person with an existing right to apply for judicial review, may challenge a decision of the Crown Court on the grounds that it is unlawful under section 6(1) HRA.

3.6 Further, the House of Lords has held that section 6(1) HRA represents a 'civil right' for the purposes of article 6(1) ECHR, which guarantees the right to a fair hearing in the determination of civil rights. In *Re S (Children) (Care Order: Implementation of Care Plan)*, Lord Nicholls said:

Although a right guaranteed by article 8 is not *in itself* a civil right within the meaning of article 6(1), the Human Rights Act has now transformed the position in this country. By virtue of the Human Rights Act article 8 rights are now part of the civil rights of parents and children for the purposes of article 6(1). This is because now, under section 6 of the Act, it is unlawful for a public authority to act inconsistently with article 8.<sup>8</sup>

3.7 In effect, there is a right to have public authorities act compatibly with Convention rights, referred to in this Part as 'the section 6(1) civil right'. By analogy with Lord Nicholls' reasoning, therefore, when the Crown Court makes an order which determines a Convention right of any person it is determining the section 6(1) civil right of that person. Under article 6(1) ECHR, that person is entitled to a 'fair hearing' in respect of that determination.

<sup>5</sup> *Hansard* (HL) 18 November 1997, vol 583, col 575.

<sup>6</sup> Section 7(1)(a) HRA allows a person to bring a free-standing challenge based on Convention rights; s 7(1)(b) allows a party to rely on Convention rights in existing legal proceedings.

<sup>7</sup> Human Rights Act 1998, s 9(1). The latter includes a claim for damages, pursuant to Part 7 of the Civil Procedure Rules. See, for example, *See R(TH) v Wood Green Crown Court* [2006] EWHC 2683 (Admin), [2007] 1 WLR 1670.

<sup>8</sup> [2002] UKHL 10, [2002] 2 AC 291 (emphasis in original).

- 3.8 However, section 9(2) HRA provides that any rule of law which prevents a decision or ruling of a court from being the subject of judicial review is unaffected. This preserves the exclusionary rule in section 29(3) of the 1981 Act, namely that a matter 'relating to trial on indictment' cannot be judicially reviewed by the High Court, regardless of whether an alleged violation of a right under the ECHR is in issue. In some cases, then, the Crown Court may make a decision which determines a person's Convention rights, but which cannot be challenged in another court.<sup>9</sup>

**What is required by article 6 ECHR in the context of Crown Court determinations of Convention rights?**

- 3.9 As described above,<sup>10</sup> any person whose Convention rights are being determined by a decision of the Crown Court is entitled to a 'fair hearing' in respect of that determination.
- 3.10 A precondition of a 'fair hearing' before a court is the right of access to the court. In *Ashingdane v United Kingdom*<sup>11</sup> the European Court of Human Rights said:

In its *Golder* judgment of 21 February 1975, the Court held that 'Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal'. This 'right to a court', of which the right of access is an aspect, may be relied on by anyone who considers on arguable grounds that an interference with the exercise of his (civil) rights is unlawful and complains that he has not had the possibility of submitting that claim to a tribunal meeting the requirements of article 6(1).

- 3.11 However, there is no requirement that, where a court is making such a determination, access must be in the form of standing before the court. It is sufficient, as an alternative, that there is a right to challenge the determination in the form of a review or appeal.<sup>12</sup> Indeed, *Zander v Sweden*<sup>13</sup> suggests that where the determination of one individual's rights also incidentally determines the civil rights of a third party, the appropriate satisfaction of the third party's article 6 rights would be by way of judicial review.

<sup>9</sup> Although an application for damages under Part 7 of the Civil Procedure Rules is available regardless of whether the matter 'related to trial on indictment': see *R (TH) v Wood Green Crown Court* [2006] EWHC 2683 (Admin), [2007] 1 WLR 1670.

<sup>10</sup> See paras 3.6 to 3.7.

<sup>11</sup> (1985) 7 EHRR 528, 546.

<sup>12</sup> *Albert and Le Compte v Belgium* (1983) 5 EHRR 533, 546 and *Tsfayo v United Kingdom* [2007] HLR 19, [13].

<sup>13</sup> (1994) 18 EHRR 175.

- 3.12 This is not to say, however, that the right to an appeal or review is *always* required by article 6. On the contrary, it has long been established that article 6 “does not ... compel the contracting States to set up courts of appeal or cassation.”<sup>14</sup> In other words, article 6 is satisfied so long as standing is available *either* in the original proceedings *or* in the course of a review or appeal.<sup>15</sup>

### **Does section 29 operate in compliance with article 6(1) ECHR?**

#### ***Defendants***

- 3.13 The primary purpose of a trial on indictment is the determination of the criminal charge against the defendant. As such, the court will already be subject to the requirements of a fair *criminal* trial that are set out in article 6 ECHR. For that reason, when the court makes a decision which determines the defendant’s section 6(1) civil right, it will, as a matter of course, be complying with the procedural guarantees of article 6. The defendant will be present and will be able to make representations before the decision is made. Some such decisions will ‘relate to trial on indictment’<sup>16</sup> and will therefore be immune from challenge in a higher court, due to the operation of section 29(3) of the 1981 Act. However, the fact that the defendant will have received a ‘fair hearing’ in the making of the original order means that the requirements of article 6(1) will have been fulfilled. In other words, even if the original decision breaches the defendant’s Convention rights in some way, the fact that the decision is not amenable to challenge does not give rise to a *further* breach of article 6(1).<sup>17</sup>

<sup>14</sup> *Delcourt v Belgium* (1979-80) 1 EHRR 355, 366. There is separate provision, in Article 2 of Protocol 7 ECHR, for the right to appeal against a criminal conviction.

<sup>15</sup> It might be thought that compliance with article 13, which guarantees the right to an effective remedy for breaches of Convention rights before a national authority, ought to be examined. However, the European Court of Human Rights said in *Kudla v Poland* (2002) 35 EHRR 11 that “where the Convention right asserted by the individual is a ‘civil right’ recognised under domestic law [in this instance, the section 6(1) civil right] ... the protection afforded by article 6(1) will also be available. In such circumstances the safeguards of article 6(1), implying the full panoply of judicial procedure, are stricter than, and absorb, those of article 13 ... in such cases there is no legal interest in re-examining the same subject matter of complaint under the less stringent requirements of article 13.”

<sup>16</sup> For example, the refusal to make a defendant’s costs order (*Ex p Meredith* (1973) 1 WLR 435 and *R v Canterbury Crown Court, ex p Regentford Ltd* [2001] HRLR 18), which could breach article 6(2) ECHR (*Hussain v UK* (2006) 43 EHRR 22).

<sup>17</sup> See *R v Canterbury Crown Court, ex p Regentford* [2001] HRLR 18, [22], by Waller LJ.

### ***Third parties***

- 3.14 By contrast, any determination of the section 6(1) civil right of a third party is, by definition, incidental to a trial on indictment. *R (TH) v Wood Green Crown Court*<sup>18</sup> provides an example. In that case, H was to be a prosecution witness. His repeated failure to attend led to him being remanded in custody under section 4(3) of the Criminal Procedure (Attendance of Witnesses) Act 1965. In the course of the trial, the prosecution successfully applied to treat him as a hostile witness. Consequently, counsel was appointed to act for him for the purposes of potential contempt of court proceedings and in connection with his remand in custody. He later sought judicial review of the decision to remand him in custody, arguing that it was contrary to his right to liberty under article 5(4) ECHR. The High Court held that the matter ‘related to trial on indictment’ and therefore could not be judicially reviewed. However, applying the analysis of the requirements of article 6(1) set out above,<sup>19</sup> it is clear that the requirements of article 6(1) in respect of his section 6(1) civil right were adequately fulfilled. This is because H had standing at the original hearing and counsel to represent him: he had a ‘fair hearing’ in much the same way he would have done if he had been a defendant in the trial.
- 3.15 A second example involving the determination of the section 6(1) civil right of a third party is *R (TB) v Combined Court at Stafford*.<sup>20</sup> In that case, B, aged 14, was the main witness in a trial on indictment. She had a history of mental illness which, the defence said, might undermine her credibility as a witness. In a public interest immunity hearing, the judge ordered the relevant NHS Trust to disclose her medical records to the defence. B was not notified of the hearing and was not represented at it. On an application for judicial review of the order, it was not argued that the matter ‘related to trial on indictment’. Lord Justice May addressed the point briefly but was satisfied that the court has jurisdiction<sup>21</sup> and went on to find that the failure to allow B to make representations before the order was made breached her rights under article 8. In that case, the requirements of article 6(1) were fulfilled by virtue of the fact that judicial review was available under section 29. Further, the Criminal Procedure Rules were later modified so as to ensure that a party in B’s position would in future have the opportunity to make representations to the court before the making of the order for disclosure.<sup>22</sup>

<sup>18</sup> [2006] EWHC 2683 (Admin), [2007] 1 WLR 1670.

<sup>19</sup> See paras 3.9 to 3.12.

<sup>20</sup> [2006] EWHC 1645 (Admin), [2007] 1 WLR 1524.

<sup>21</sup> Above at [14].

<sup>22</sup> Criminal Procedure Rules 2005, r 28.6(3).

- 3.16 It is not inconceivable that a case may arise where neither standing before the court making the original order nor judicial review of that decision is available to a third party (because the matter ‘relates to trial on indictment’). In such a case, there would be a breach of the requirements of article 6(1).<sup>23</sup> However, no such case has yet arisen in the case law. Further, there are a number of provisions in the Criminal Procedure Rules which allow a third party in such a position to make representations to the original court making the decision.<sup>24</sup> If a situation did arise where neither standing nor review were available, it would be possible to amend the Criminal Procedure Rules to allow for standing, as occurred after the decision in *R(TB) v Combined Court at Stafford*.<sup>25</sup> Therefore we believe that the current system, taken as a whole, operates compatibly with article 6(1) ECHR.

### THE POLICY IMPLICATIONS OF THE SECTION 29 EXCLUSION

- 3.17 As described above, the exclusion of matters ‘relating to trial on indictment’ from the review jurisdiction of the High Court does not breach the procedural requirements contained in article 6(1) of the ECHR. However, the *practical* effect of the exclusionary words is that many decisions which breach Convention rights (of both defendants and third parties) cannot be rectified in the domestic courts, even though, by virtue of section 6(1) HRA, the original order was unlawful under domestic law. Commenting on this state of affairs in *R v Canterbury Crown Court ex parte Regentford*,<sup>26</sup> Lord Justice Waller said:

...it is not as it seems to me altogether satisfactory that a defendant who obtains no order for costs or for that matter has an order for costs made against him after an acquittal has no remedy even if the judge was ‘plainly wrong’. Furthermore, if one imagines for a moment that a judge has clearly impugned the innocence of a defendant after acquittal by a jury, the order made by the judge would have infringed a Convention right (see *Sekanina v Austria* (1994) 17 EHRR 221 in particular paragraph 30), and there would apparently be no remedy.

- 3.18 In *R (Shields) v Crown Court at Liverpool*<sup>27</sup> Lord Justice Brooke commented, in similar terms:

<sup>23</sup> As described in paras 3.9 to 3.12 above.

<sup>24</sup> Examples include standing to apply for the revocation or variation of a reporting restriction by a person who, in the opinion of the court, is directly affected by it (r 16.5), and standing in public interest applications for those who were involved in the evidence coming to the attention of the prosecutor (r 25.5).

<sup>25</sup> Discussed at para 3.15 above.

<sup>26</sup> [2001] HRLR 18, [19]. The case concerned an acquitted defendant who was refused costs. The defendant sought to argue that the decision impugned his innocence, contrary to article 6(2) HRA, but was unable to do so because the decision ‘related to trial on indictment’.

<sup>27</sup> [2001] EWHC Admin 90, [58].

... unless and until Parliament decides to remove the anomaly that an acquitted defendant has no right of appeal against the refusal of a defendant's costs order, however unjust the refusal may be, he has no Convention right of challenge to this decision in an English court, and he is still bound to go to Strasbourg if he wishes to make the assertion he sought to raise unsuccessfully in the Administrative Court. However unsatisfactory this may be, this seems to represent the law as it stands today.

- 3.19 The 'anomaly' referred to by Lord Justice Brooke applies not just to a refusal to make a defendant's costs order, but to *all* orders that affect the Convention right of a defendant or third party, unless that order can be addressed in an appeal against conviction or sentence. However, an appeal against conviction is only available to a convicted defendant, and not to an acquitted defendant or a third party. Further, the breach of a Convention right may be peripheral to any conviction or sentence rather than integral to it.<sup>28</sup> Accordingly, it is likely that appeals against conviction or sentence address some but not all breaches of Convention rights that occur in the course of a trial of indictment. Contrary to the general objectives behind the HRA, some breaches that 'relate to trial on indictment' cannot, at present, be rectified in the domestic courts.

<sup>28</sup> Affecting, for example, the liberty of the defendant during the trial or the anonymity of a child defendant.

# **PART 4**

## **PROPOSALS: (1) A NEW FRAMEWORK**

### **INTRODUCTION**

- 4.1 In this Part we seek to identify the most appropriate framework for enabling the Court of Appeal to exercise the jurisdiction which the High Court currently exercises in relation to criminal proceedings in the Crown Court. Whether or not, within that framework, the scope of that jurisdiction should be enhanced or curtailed is considered in Part 5.
- 4.2 In theory, it would be possible to transfer to the Court of Appeal the power which the High Court has to hear appeals by way of case stated and to entertain applications for judicial review of decisions of the Crown Court. However, we believe that it is neither necessary nor desirable to do so. We begin by considering whether appeal by case stated should have any part to play in a new framework.

### **CASE STATED**

#### **The current use of appeal by case stated as a means of challenging decisions of the Crown Court**

- 4.3 Appeal by case stated is not commonly used as a means of challenging decisions of the Crown Court.<sup>1</sup> There are a number of reasons:
- (1) section 28(2) of the 1981 Act precludes appeal by case stated against a decision of the Crown Court ‘relating to trial on indictment’;
  - (2) even if the decision of the Crown Court is not one ‘relating to trial on indictment’, an appeal by case stated lies only:
    - (a) on the ground that a decision is ‘wrong in law or is in excess of jurisdiction’;<sup>2</sup>
    - (b) at the conclusion of the trial;<sup>3</sup> and
    - (c) at the instance of a party to the proceedings.<sup>4</sup>

It follows that appeal by case stated cannot be used to challenge an interlocutory decision made by the Crown Court and cannot be used by third parties to proceedings in the Crown Court.

<sup>1</sup> In 2004 to 2006 there were 12, 15 and 15 applications respectively. By contrast, appeal by case stated is frequently used to challenge decisions made by magistrates’ courts.

<sup>2</sup> Supreme Court Act 1981, s 28(1).

<sup>3</sup> *Loade v DPP* (1990) 1 QB 1052.

<sup>4</sup> Supreme Court Act 1981, s 28(1).

***Case stated as a means of challenging decisions made in trials on indictment***

- 4.4 Taken together, the restrictions are such that only in rare cases will an appeal by case stated lie against a decision of the Crown Court exercising its first instance jurisdiction.<sup>5</sup> In *Smith v Crown Prosecution Service*<sup>6</sup> the defendant appealed by way of case stated to the High Court against his conviction following a trial on indictment. An incorrect procedure had been followed at a preliminary hearing. The trial judge corrected the error before the start of the trial. The appellant claimed the procedural error rendered all that followed a nullity. The High Court held it had no jurisdiction to hear an appeal by way of case stated against a conviction following a trial on indictment.
- 4.5 Likewise, the prosecution cannot appeal by way of case stated against an acquittal following a trial on indictment. Instead, as we noted in Part 2,<sup>7</sup> the prosecution can make an Attorney General's reference in respect of a point of law arising from an acquittal or against an unduly lenient sentence.<sup>8</sup>

***Case stated as a means of challenging decisions of the Crown Court made when exercising its appellate or committal for sentence jurisdictions***

- 4.6 Appeals by way of case stated against decisions of the Crown Court exercising its appellate and committal for sentence jurisdictions, while not very rare, are infrequent. Between 1999 and 2006 (inclusive) the highest number of such appeals was in 2001 when there were 21.

**Replacing appeals by case stated as a means of challenging conviction or sentence**

***Conviction***

- 4.7 The most frequent use of appeal by case stated against decisions made by the Crown Court when exercising its appellate jurisdiction is by defendants seeking to challenge a conviction. If the High Court is of the opinion that a conviction is wrong in law, it will remit the case to the Crown Court with a direction to quash the conviction. It may, but need not, direct that there should be a retrial.
- 4.8 The Criminal Appeal Act 1968 governs appeals against convictions in cases tried on indictment. The Court of Appeal must allow an appeal and quash a conviction if of the opinion that the conviction is 'unsafe'.<sup>9</sup> It may order a retrial if it is in the interests of justice to do so.<sup>10</sup>

<sup>5</sup> It is for this reason that the leading authorities on the meaning of 'relating to trial on indictment' are cases where the challenge was by way of judicial review rather than appeal by case stated.

<sup>6</sup> [2005] EWHC 3506 (Admin), [2005] All ER (D) 186 (Nov).

<sup>7</sup> See paras 2.94 to 2.95 above.

<sup>8</sup> Under the Criminal Justice Act 1972, s 36 and the Criminal Justice Act 1988, s 36, respectively.

<sup>9</sup> Criminal Appeal Act 1968, s 2(1)(a).

<sup>10</sup> Criminal Appeal Act 1968, s 7(1).

- 4.9 In our view, if appeal by case stated were to be abolished, appeals against convictions by the Crown Court when exercising its appellate jurisdiction could be adequately accommodated by extending the scope of the Criminal Appeal Act 1968 to cover such convictions. Subject to having to obtain leave,<sup>11</sup> defendants would not be adversely affected.

#### PERVERSE GUILTY VERDICTS

- 4.10 A perverse guilty verdict is one that is unsupported by the evidence. Appeal by case stated can be used to challenge a perverse guilty verdict of the Crown Court when exercising its appellate jurisdiction. The Crown Court when exercising that jurisdiction gives reasons for its decision and they include a recital of its findings of fact. If the defendant alleges that the evidence cannot support the findings of fact, he or she can appeal by case stated on the ground that the conviction is 'wrong in law'. The case that is stated for the opinion of the High Court will include the Crown Court's findings of fact and the evidence on which they were based.<sup>12</sup>
- 4.11 When a jury returns its verdict following a trial on indictment, it neither gives reasons for its verdict nor recites its findings of fact. This has not prevented the Court of Appeal from overturning convictions following a trial on indictment when there is a 'lurking doubt' as to whether a jury's verdict can be supported by the evidence.<sup>13</sup> The 'lurking doubt' renders the conviction 'unsafe'.
- 4.12 The Crown Court when exercising its appellate jurisdiction always gives reasons, including its findings of fact, for the decision that it has arrived at. Accordingly, as the Court of Appeal is able to quash perverse verdicts of guilty returned by a jury, it would undoubtedly be able to do so in respect of a perverse verdict of guilty returned by the Crown Court when exercising its appellate jurisdiction.

#### **Sentence**

- 4.13 A defendant who is convicted in a trial on indictment may, subject to obtaining leave, appeal to the Court of Appeal against the sentence imposed.<sup>14</sup> An appeal may succeed if:
- (1) the sentence is not justified by law;
  - (2) the sentence has been passed on the wrong factual basis;
  - (3) irrelevant matters have been taken into account or relevant matters have not;
  - (4) the sentence is manifestly excessive or wrong in principle.<sup>15</sup>

<sup>11</sup> See paras 4.21 to 4.27 below.

<sup>12</sup> In an appeal by case stated that does not seek to challenge the findings of fact, the case stated for the opinion of the High Court should not refer to the evidence that the Crown Court received.

<sup>13</sup> *Cooper* [1969] 1 QB 267, 271, by Widgery LJ.

<sup>14</sup> Criminal Appeal Act 1968, s 9.

<sup>15</sup> *Newsome and Browne* [1970] 2 QB 711, 718.

4.14 A defendant who is sentenced by the Crown Court when exercising its appellate jurisdiction may not appeal against the sentence to the Court of Appeal.<sup>16</sup> A defendant wishing to challenge such a sentence must apply to the High Court for judicial review or appeal to the High Court by case stated on the grounds that the sentence 'is wrong in law or is in excess of jurisdiction'.<sup>17</sup> This is a more demanding test to satisfy than having to show that a sentence is 'manifestly excessive'. In *R v Director of Public Prosecutions, ex parte McGeary* ('*McGeary*'),<sup>18</sup> the defendant appealed to the Crown Court against a sentence imposed by a magistrates' court. The Crown Court increased the sentence. The defendant sought judicial review of the Crown Court's decision.

4.15 Lord Chief Justice Bingham said:

... speaking for myself I have no doubt that, if I were sitting as a member of the Court of Appeal, Criminal Division, this is a sentence with which I would wish to interfere.<sup>19</sup>

However he said that, on an application to the High Court for judicial review, the decision should not be interfered with simply because it was unduly severe. Rather, in order to succeed, the applicant was required to satisfy a "much more stringent test".<sup>20</sup> Specifically, it would have to be established that the sentence was wrong in law or in excess of jurisdiction. Although the severity of the sentence was capable of founding such a conclusion, the severity would have to be "of such an order as to indicate a mistake of law."<sup>21</sup>

4.16 In *McGeary* the challenge was by way of an application for judicial review. However, the High Court made it clear that the test that had to be applied was that which governs appeal by case stated, namely was the sentence wrong in law or in excess of jurisdiction. The decision is authority for the proposition that merely because a sentence is 'manifestly excessive' does not mean that it is wrong in law or in excess of jurisdiction.

4.17 Accordingly, extending the Criminal Appeal Act 1968 to include appeals against sentences imposed by the Crown Court when exercising its appellate jurisdiction would result in an appeal against sentence being successful if the Court of Appeal considered the sentence to be 'manifestly' excessive, even if not so excessive as to be wrong in law.

<sup>16</sup> See Criminal Appeal Act 1968, s 10(1).

<sup>17</sup> Supreme Court Act 1981, s 28(1).

<sup>18</sup> [1999] 2 Cr App R (S) 263.

<sup>19</sup> Above, 269.

<sup>20</sup> Above.

<sup>21</sup> Above, 266.

## ANTI-SOCIAL BEHAVIOUR ORDERS

- 4.18 An anti-social behaviour order ('ASBO') can be made following a conviction for an offence or as a free-standing order where there has been no conviction for a substantive offence. A defendant can appeal against an ASBO which is made following his or her conviction at a trial on indictment or on committal for sentence because "sentence" for the purposes of sections 9 and 10 of the Criminal Appeal Act 1968 includes "any order made by a court when dealing with an offender".<sup>22</sup> ASBOs made by the Crown Court when exercising its appellate jurisdiction may be challenged by appeal by case stated or judicial review. If the Criminal Appeal Act 1968 were extended to cover all sentences imposed by the Crown Court, the Court of Appeal would have jurisdiction to hear appeals against all ASBOs imposed by the Crown Court.
- 4.19 Applications for free-standing ASBOs are made to a magistrates' court. Such applications are civil in nature<sup>23</sup> and so too is any appeal to the Crown Court against the making of such an order. Challenges to the decision of the Crown Court in respect of these types of ASBOs are made to the High Court by way of judicial review or case stated. As these are civil proceedings, they fall outside the scope of this project.
- 4.20 **We provisionally propose that all appeals against convictions and/or sentences of the Crown Court (whether exercising its first instance jurisdiction, its appellate jurisdiction or its committal for sentence jurisdiction) should lie to the Court of Appeal. The Criminal Appeal Act 1968 should be extended to cover convictions and sentences of the Crown Court exercising its appellate jurisdiction.**

### *Leave to appeal*

- 4.21 Appeal by case stated to the High Court does not require leave. By contrast an appeal to the Court of Appeal under the Criminal Appeal Act 1968 requires either the leave of the Court of Appeal or a certificate of the trial judge that the case is fit for appeal.
- 4.22 Lord Justice Auld recommended that all appeals to the Court of Appeal against decisions of the Crown Court when exercising its appellate jurisdiction should be subject to the permission of the Court of Appeal. He recommended that permission should only be granted in a case involving an important point of principle or practice or when there was some other compelling reason.<sup>24</sup>
- 4.23 We agree with Lord Justice Auld that appeals to the Court of Appeal against decisions of the Crown Court exercising its appellate jurisdiction should be subject to leave (permission) being granted by the Court of Appeal. It would be a valuable filter, thereby preventing unmeritorious appeals with the consequent saving of time and costs. However, at this stage, we are not persuaded that it should be an enhanced leave requirement.

<sup>22</sup> Criminal Appeal Act 1968, s 50: *P (Shane Tony)* [2004] EWCA Crim 287, [2004] 2 Cr App R (S) 63, [34].

<sup>23</sup> *R (McCann) v Crown Court at Manchester* [2002] UKHL 39, [2003] 1 AC 787.

<sup>24</sup> Review of the Criminal Courts of England and Wales (2001) ch 12 para 37.

#### AN ENHANCED LEAVE REQUIREMENT FOR APPEALING AGAINST CONVICTION

- 4.24 We accept that a strong case can be made for having an enhanced leave requirement in order to appeal against a conviction by the Crown Court when exercising its appellate jurisdiction. The defendant will already have been convicted by a magistrates' court and his or her appeal to the Crown Court will have failed. A second opportunity for appealing might be thought to be too generous. On the other hand, the appeal in the Crown Court takes the form of a rehearing. Effectively, a fresh trial takes place. Therefore, the issues in the retrial at the Crown Court will not necessarily have been the same as those in the original trial at the magistrates' court. The evidence at the rehearing may have been different and this in turn may have given rise to different legal issues. The defendant may have been convicted in the magistrates' court not because of unfavourable rulings on points of law but because the findings of fact were adverse to the defendant. At the rehearing, the defendant's conviction may have been the result not of unfavourable findings of fact but because of adverse legal rulings.<sup>25</sup>

#### AN ENHANCED LEAVE REQUIREMENT FOR APPEALING AGAINST SENTENCE

- 4.25 A sentence passed by the Crown Court when exercising its appellate jurisdiction will not be the first imposed on the defendant in the course of the proceedings. The sentence passed by the Crown Court may or may not be greater than that originally imposed by the magistrates' court. If it is no greater than that imposed by the magistrates' court, we recognise the force of the argument for an enhanced leave requirement. The argument has less force if the sentence passed by the Crown Court is greater than that passed by the magistrates' court.<sup>26</sup>
- 4.26 **We provisionally propose that all appeals against convictions and/or sentences of the Crown Court when exercising its appellate jurisdiction should require the leave of the Court of Appeal.**
- 4.27 **We seek the views of consultees on whether there should be a more stringent leave requirement than that currently contained in s11(1) of the Criminal Appeal Act 1968:**
- (1) for cases where a conviction results from the Crown Court exercising its appellate jurisdiction; and/or**
  - (2) for cases where a sentence is imposed by the Crown Court exercising its appellate jurisdiction.**

<sup>25</sup> An example is *R (Hayes) v Chelmsford Crown Court* [2003] EWHC 73 (Admin), (2003) 167 JP Reports 65. The defendant appealed against conviction. At the date set for his appeal, the defendant failed to attend. However, counsel for the defendant informed the court that her client was adamant that he was not guilty and wished to be represented on appeal. The Crown Court dismissed the appeal without hearing any prosecution evidence. On appeal by case stated, the High Court allowed the defendant's appeal.

<sup>26</sup> A sentence passed by the Crown Court when exercising its *committal for sentence* jurisdiction can, with leave, be appealed to the Court of Appeal: Criminal Appeal Act 1968, s 10(2) – see Part 2, paras 2.129 to 2.130 above.

### ***Replacing prosecution appeals by case stated against acquittals***

#### APPEALING AGAINST ACQUITTALS THAT RESULT FROM 'TERMINATING' RULINGS

- 4.28 Currently, the prosecution can appeal by case stated against a 'terminating' ruling made by the Crown Court when exercising its appellate jurisdiction.<sup>27</sup> If the appeal succeeds, the High Court can order a retrial. In 2005, two of the three appeals by case stated brought by the prosecution were in respect of 'terminating' rulings. If appeal by way of case stated were abolished without more, the prosecution would no longer be able to use that route to challenge 'terminating' rulings made by the Crown Court when exercising its appellate jurisdiction.
- 4.29 This would result in such 'terminating' rulings being treated differently from all other 'terminating' rulings. Section 58 of the Criminal Justice Act 2003 enables the prosecution, with leave, to appeal to the Court of Appeal against 'terminating' rulings made in trials on indictment. The prosecution can appeal against a 'terminating' ruling whether the offence to which the ruling relates is triable only on indictment or is triable either-way.<sup>28</sup> If a 'terminating' ruling in relation to a triable either-way offence tried on indictment is amenable to appeal, we believe that it should also be amenable to appeal if made by the Crown Court when allowing a defendant's appeal against conviction by a magistrates' court of a triable either-way offence.
- 4.30 Admittedly, a 'terminating' ruling made by the Crown Court when hearing an appeal against a conviction by a magistrates' court may relate to a summary offence and not a triable either-way offence. We do not believe that the fact that the offence is merely a summary offence should prevent the prosecution from being permitted to challenge a 'terminating' ruling. The prosecution can by case stated appeal against or, alternatively, seek judicial review of a 'terminating' ruling made by a magistrates' court irrespective of whether the offence to which the ruling relates is a triable either-way or a summary offence. It would be anomalous if the prosecution could not do so because the Crown Court makes the 'terminating' ruling when hearing an appeal against conviction. Consider the following scenario.

D1 and D2 are on trial in a magistrates' court charged with a summary offence. At the close of the prosecution case, both make submissions of no case to answer. D1's submission is successful. D2's submission is unsuccessful and he is convicted by the magistrates' court.

<sup>27</sup> See Part 2, para 2.48 above.

<sup>28</sup> It is not within our terms of reference to consider whether section 58 should be confined to 'terminating' rulings which relate to offences that are triable *only* on indictment.

The prosecution believe that the ‘terminating’ ruling leading to D1’s acquittal involved an error of law. They successfully challenge the acquittal by appealing by case stated to the High Court. The High Court quashes the acquittal and remits the case to the magistrates’ court for the trial to continue. Meanwhile, D2 appeals to the Crown Court against his conviction. At the close of the prosecution case, he makes the same submission of no case to answer. This time he is successful.

In our view, if the prosecution are able to challenge the ‘terminating’ ruling made by the magistrates’ court in relation to D1, they also ought to be able, as they are under the current law, to challenge the terminating ruling made by the Crown Court in relation to D2.

- 4.31 **We provisionally propose that section 58 of the Criminal Justice Act 2003 should be extended so as to apply to all ‘terminating’ rulings made by the Crown Court irrespective of whether the ruling was made in relation to an offence tried on indictment.**

#### APPEALING AGAINST ACQUITTALS THAT DO NOT RESULT FROM ‘TERMINATING’ RULINGS

- 4.32 Under the current law, the prosecution can, on grounds of error of law or excess of jurisdiction, challenge and overturn in the High Court an acquittal by the Crown Court when exercising its appellate jurisdiction, regardless of whether the acquittal resulted from a ‘terminating’ ruling. For example, in *Vehicle and Operator Services Agency v Greenfarms Ltd*<sup>29</sup> the defendant had been charged with using a heavy goods vehicle on a road without a licence.<sup>30</sup> The issue at the appeal by way of rehearing in the Crown Court was whether the vehicle in question was a heavy goods vehicle or an agricultural tractor. The decision as to the type of vehicle was integral to the determination of guilt. The Crown Court held that the vehicle was an agricultural tractor and acquitted the defendant. The prosecution appealed by way of case stated. The High Court found that the Crown Court did not have sufficient evidence to entitle it to find that the vehicle was an agricultural tractor. The High Court quashed the acquittal and returned the case to the Crown Court for a guilty verdict to be entered. In this case, the acquittal was the result of a ruling which, for practical purposes, brought the case to an end. However, it was not a ‘terminating’ ruling in the sense required by section 58 of the Criminal Justice Act 2003.

<sup>29</sup> [2005] EWHC 3156 (Admin), [2006] RTR 20.

<sup>30</sup> Contrary to the Goods Vehicle (Licensing of Operators) Act 1995, ss 2(1)(b) and (5).

- 4.33 If appeal by way of case stated were abolished, without more, the prosecution would no longer be able to challenge an acquittal resulting from such circumstances. Although this would curtail the prosecution's ability to challenge acquittals, it would promote consistency. It would mean that an acquittal by the Crown Court when exercising its appellate jurisdiction would be treated in the same way as an acquittal following a trial on indictment. Unless the acquittal is the result of a 'terminating' ruling, the prosecution cannot appeal in order to overturn an acquittal following a trial on indictment. Instead, the prosecution can refer any point of law that has arisen in the case to the Court of Appeal.<sup>31</sup> However, the opinion of the Court of Appeal, while clarifying the point of law, does not affect the jury's verdict.
- 4.34 Accordingly, under the current law, a defendant convicted following a trial on indictment is in a more favourable position compared to a person convicted by the Crown Court when exercising its appellate jurisdiction. The disparity would be removed if the prosecution could no longer seek to overturn an acquittal by the Crown Court when exercising its appellate jurisdiction and, instead, were confined to referring to the Court of Appeal a point of law arising from the acquittal, but with the acquittal remaining unaffected. There is, however, a counter-argument.
- 4.35 We noted above<sup>32</sup> that a jury gives no reasons for its verdict and does not state its findings of fact. Even if an Attorney General's reference is successful on a point of law, the Court of Appeal does not go on to examine whether, had the jury been properly directed, they would still have acquitted the defendant. In practical terms, this is because it would in any event be a moot point, as the Court of Appeal has no power to overturn an acquittal and order a retrial under these circumstances. Even if the Court of Appeal *did* have this power, however, it would often be very difficult to determine whether the acquittal resulted from the incorrect direction or whether the jury would have acquitted in any event because they had decided that the prosecution evidence did not come up to proof on the facts.
- 4.36 By contrast, the Crown Court when exercising its appellate jurisdiction does give reasons for its decision and does recite its findings of fact. Therefore, if the Attorney General was able to refer a point of law arising from an acquittal by the Crown Court exercising its appellate jurisdiction, the Court of Appeal, if ruling in the Attorney's favour, would be in a position to form a view as to whether the acquittal should stand.
- 4.37 We have not found this an easy issue. We are conscious that there has been a long-standing reluctance to set aside a jury's verdict because the trial judge has made an error in the course of the trial. There is not the same antipathy against setting aside an erroneous acquittal by the Crown Court on an appeal by rehearing (or an acquittal by a magistrates' court).

<sup>31</sup> Administration of Justice Act 1972, s 36.

<sup>32</sup> See para 4.11 above.

- 4.38 However, on balance, we have concluded that the prosecution should not be able to appeal against an acquittal of the Crown Court when exercising its appellate jurisdiction. Instead, the Attorney General should be able to refer a point of law arising from the acquittal to the Court of Appeal for its opinion. However, as with an Attorney General's reference following an acquittal in a case tried on indictment, the opinion of the Court of Appeal, even if favourable to the Attorney General, should leave the acquittal undisturbed.
- 4.39 **We provisionally propose that section 36 of the Criminal Law Act 1972 should be extended so as to permit the Attorney General, following an acquittal by the Crown Court when exercising its appellate jurisdiction, to refer to the Court of Appeal a point of law which has arisen in the case.**

***Replacing prosecution appeals by case stated against sentence***

- 4.40 If the prosecution is of the view that a sentence imposed on the defendant by the Crown Court exercising its appellate jurisdiction involved an error of law or was in excess of jurisdiction, it can appeal by way of case stated against the sentence. However, this only occurs in exceptional cases.<sup>33</sup> We do not believe that removing the prosecution's ability to do so would constitute serious erosion of the prosecution's rights.
- 4.41 By virtue of section 36 of the Criminal Justice Act 1988, the Attorney General, with leave of the Court of Appeal, can refer to the Court of Appeal certain sentences imposed following a trial on indictment which he or she believes to be unduly lenient. If the Court of Appeal agrees that a sentence is unduly lenient, it can increase it. It would be possible to extend the scope of section 36 so as to allow references in respect of sentences imposed by the Crown Court when exercising its appellate jurisdiction.
- 4.42 However, we do not believe such an extension would be warranted. It is important to recognise that under the current law the Attorney General's power to refer an unduly lenient sentence only operates in respect of a limited number of offences that are tried on indictment.<sup>34</sup> Those offences include all offences triable on indictment only, together with a limited number of triable either-way offences. As the Attorney General's power to refer a sentence is currently confined to such offences tried on indictment, it would be anomalous if he or she were able to refer sentences passed in respect of offences originally deemed suitable for trial in the magistrates' court.<sup>35</sup>

<sup>33</sup> In 2005 there were no such appeals by case stated (see Appendix, Table A).

<sup>34</sup> See the Criminal Justice Act 1988 (Reviews of Sentencing) Order 2006, SI 2006 No 1116.

<sup>35</sup> Whether the Attorney General should, with leave, be able to refer any unduly lenient sentence imposed following a trial on indictment is an issue that does not fall within our terms of reference.

- 4.43 In any event, we believe that it is highly unlikely that the Attorney General would wish to invoke section 36 to challenge a sentence passed by the Crown Court when exercising its appellate jurisdiction.<sup>36</sup>

### **Conclusion**

- 4.44 We believe that appeal by way of case stated to the High Court as a means of challenging decisions of the Crown Court should be abolished. Instead, all appeals against conviction or sentence in cases where the Crown Court has exercised its appellate jurisdiction should lie to the Court of Appeal under the Criminal Appeal Act 1968. In order to achieve this, the Criminal Appeal Act 1968 should be amended so as to extend its remit to all criminal matters tried in the Crown Court. In addition, section 58 of the Criminal Justice Act 2003 (prosecution appeals against 'terminating' rulings) and section 36 of the Criminal Justice Act 1972 (Attorney General's reference on a point of law) should be amended so as to apply to all criminal proceedings in the Crown Court. However, the Attorney General's power to refer an unduly lenient sentence should not be modified to apply to sentences passed by the Crown Court in the exercise of its appellate jurisdiction.
- 4.45 The number of appeals lodged by way of case stated from the Crown Court to the High Court each year between 1999 and 2006 (inclusive) ranged between 12 and 21.<sup>37</sup> Therefore, we do not believe that our proposals would result in a significantly increased workload for the Court of Appeal, particularly as any appeals against conviction and/or sentence would require leave whereas, currently, an appeal by case stated to the High Court does not require leave.
- 4.46 **We provisionally propose that section 28(1) of the Supreme Court Act 1981 be amended so as to preclude all orders, judgments or other decisions of the Crown Court made in criminal proceedings being challenged by way of appeal by case stated to the High Court.**

### **JUDICIAL REVIEW**

- 4.47 In the previous section, we said that if existing statutory provisions were extended to cover decisions made by the Crown Court when exercising its appellate jurisdiction, it would be possible to dispense with appeal by case stated as a means of challenging decisions of the Crown Court. The issue is far less straightforward in relation to judicial review.

<sup>36</sup> In this connection, it is notable that the maximum sentence the Crown Court can pass when acting in its appellate capacity is the same as the maximum sentence available to the magistrates' court (Supreme Court Act 1981, s 48(2)). The current maximum sentences are 6 months' imprisonment for a single offence or 12 months' imprisonment for two or more offences triable either way: Magistrates' Courts Act 1980, ss 32 and 133 respectively.

<sup>37</sup> For the years 2004 to 2006 (inclusive), the respective numbers were 12, 15 and 15.

## **The current use of judicial review as a means of challenging decisions of the Crown Court**

### ***Judicial review of decisions of the Crown Court when exercising its appellate jurisdiction***

- 4.48 In 2005 there were 30 applications for judicial review of decisions made by the Crown Court when exercising its appellate jurisdiction. Of these, 29 were challenges by the defendant against conviction and/or sentence. As a means of challenging decisions made by the Crown Court when exercising its appellate jurisdiction, judicial review is being used almost entirely for the purpose of challenging convictions or sentences. Accordingly, as with appeal by case stated, extending the scope of the Criminal Appeal Act 1968 would mean that judicial review would no longer be required in order for the defendant to challenge convictions and sentences made by the Crown Court when exercising its appellate jurisdiction.

### ***Judicial review as a means of challenging decisions made by the Crown Court when exercising its first instance jurisdiction***

- 4.49 We explained above that the restrictions that operate in relation to appeal by case stated mean that in practice it is very rarely employed as a means of challenging decisions made by the Crown Court when exercising its first instance jurisdiction. One of those restrictions, albeit a significant one, applies to judicial review, namely that judicial review cannot be used to challenge a matter 'relating to trial on indictment'. However, the other restrictions do not apply to judicial review.
- 4.50 As a result, in contrast to appeal by case stated, judicial review is capable of being used to challenge interlocutory decisions and it is not confined to the parties to criminal proceedings. Any person with a 'sufficient interest' in a decision can apply for judicial review. An added advantage to the party seeking to challenge a decision is that the time limits for applying for judicial review are more generous than the time limits for appealing by case stated.
- 4.51 Further, whereas appeal by case stated is confined to cases involving an error of law or excess of jurisdiction, judicial review has a wider scope. It can be used to challenge not only decisions involving errors of law and excess of jurisdiction but also decisions which are irrational and those that involve procedural impropriety.
- 4.52 Accordingly, despite the constraining influence of section 29(3) of the Supreme Court Act 1981, the scope of judicial review, as a means of challenging decisions made by the Crown Court when exercising its first instance jurisdiction, is far greater in comparison to the scope of appeal by case stated. Consequently, unlike appeal by case stated, judicial review can be, and is currently, used to challenge decisions made by the Crown Court, other than convictions and sentences, made by the Crown Court when exercising its first instance jurisdiction.

4.53 For this reason it is not possible simply to propose that existing statutory provisions should be extended to all Crown Court proceedings and that section 29 should be repealed. The Court of Appeal will require a means of performing the role, whether or not enhanced, that the High Court currently performs when it hears applications for judicial review of decisions and rulings made by the Crown Court when exercising its first instance jurisdiction.

4.54 There are two possibilities:

- (1) the Court of Appeal is given the power to hear all applications for judicial review which would currently be heard in the High Court;
- (2) there should be a new statutory appeal, based on judicial review principles, to the Court of Appeal.

### **A new statutory appeal to the Court of Appeal**

4.55 This is our provisionally preferred option. We believe that it is preferable because:

- (1) in recent years, Parliament's favoured route for enabling challenges to be made to decisions of the Crown Court has been by providing rights of appeal rather than through the judicial review regime;<sup>38</sup>
- (2) the current system has recently been described as appearing, at times, to be "a thicket of technical procedural obstacles".<sup>39</sup> A new statutory appeal is consistent with the aim of streamlining the criminal justice system.

### ***The main features of the new statutory appeal***

#### **A LEAVE REQUIREMENT**

4.56 All applications to the High Court for judicial review require leave. In 2005, there were 91 applications for judicial review of decisions and rulings of the Crown Court, with leave being granted in 37 cases. The requirement of leave serves as a valuable filter and, in our view, the new statutory appeal should be subject to leave being granted by the Crown Court.<sup>40</sup>

#### **THE OPERATIVE PRINCIPLES**

4.57 A statutory appeal need not necessarily provide for an appeal on the merits of a decision. It may instead be structured so as to reflect the principles underlying judicial review. This can be achieved by specifying limited grounds on which the appeal may succeed. Section 67 of the Criminal Justice Act 2003 provides a potential model. Section 67 permits the Court of Appeal to reverse a 'terminating' ruling or an 'evidentiary' ruling only if satisfied:

<sup>38</sup> Eg, the prosecution right of appeal against 'terminating' rulings (Criminal Justice Act 2003, s 58) and the regime for appealing decisions made in preparatory hearings (Criminal Justice Act 1967, s 9(11), and Criminal Procedure and Investigations Act 1996, s 35(1)).

<sup>39</sup> *R (TH) v Wood Green Crown Court* [2006] EWHC 2683 (Admin), [2007] 1 WLR 1670, [2], by Wilkie J.

<sup>40</sup> On the proposed leave requirement, see further Part 5, para 5.52 below.

- (1) that the ruling was wrong in law;
- (2) that the ruling involved an error of law or principle; or
- (3) that the ruling was a ruling that it was not reasonable for the judge to have made.

4.58 At the same time, we do not believe that section 67 provides a perfect model. We appreciate that there would be advantages in adopting an existing statutory provision, especially when it sets out the grounds for challenging certain judicial rulings made in criminal proceedings. Further, it might be thought that the grounds for challenging judicial rulings made in criminal proceedings ought to be consistent irrespective of whether the ruling is a 'terminating' or 'evidentiary ruling', on the one hand, or some other ruling, on the other hand.

4.59 However, there appears to be some duplication between (1) and (2). Further, with regard to (3), we incline to the view that it is more expansive than is necessary or desirable. Accordingly, we believe that the grounds for appealing under the statutory appeal that we are provisionally proposing should be that the decision or ruling was:

- (1) wrong in law;
- (2) involved a serious procedural or other irregularity; or
- (3) was one that no competent and reasonable tribunal could properly have made.

#### POWERS OF THE COURT OF APPEAL

4.60 Currently, the High Court's powers of relief, in judicial review applications, are by prerogative orders (mandatory, quashing or prohibition). By contrast, the Court of Appeal on an appeal against conviction can either allow or dismiss the appeal.<sup>41</sup> On hearing an appeal against a ruling made at a preparatory hearing, the Court of Appeal may confirm, reverse or vary the ruling.<sup>42</sup> It has the same powers in relation to appeals by the prosecution against 'terminating' rulings. Subject to one qualification, we believe that the powers that the Court of Appeal has when hearing appeals against rulings made at preparatory hearings and appeals against 'terminating' rulings would be sufficient to give adequate relief to challenges that would previously have been dealt with by the High Court on applications for judicial review.

<sup>41</sup> Criminal Appeal Act 1968, s 2(1).

<sup>42</sup> Criminal Justice Act 1987, s 9(14); Criminal Procedure and Investigations Act 1996, s 35(3).

- 4.61 The qualification mentioned above is as follows. If, when determining a judicial review application, the High Court quashes a decision it may then remit the case to the Crown Court with its opinion for the Crown Court to make a further decision.<sup>43</sup> For example, in *R (Wiggins) v Harrow Crown Court*<sup>44</sup> the High Court held that the decision to refuse bail was unreasonable. It quashed the decision and remitted the matter to the Crown Court for the latter to give further consideration to the issue in the light of the High Court's judgment. This is an appropriate course of action where the Crown Court is still the court that is best placed to make the decision whether or not to grant bail.
- 4.62 Another example is *R v Leeds Crown Court ex parte Briggs (No 2)*.<sup>45</sup> In that case, the High Court, in quashing a decision of the Crown Court to extend custody time limits, remitted the matter to the Crown Court for reconsideration. It did so because it felt that, with the limited information that it had, it was impossible for the High Court properly to evaluate the merits of the application. A trial judge is in possession of the facts and is better placed to give the issue further consideration. For that reason, it is important to allow the Court of Appeal to reverse a ruling of the Crown Court and, in doing so, to remit the matter to the Crown Court for the a Crown Court judge to consider the matter further in the light of the Court of Appeal's opinion.

***Decisions and rulings of the Crown Court that should not be amenable to appeal by virtue of the new statutory appeal***

- 4.63 In Part 5, we consider which decisions and rulings made by the Crown Court ought to be amenable to appeal by virtue of the new statutory appeal. However, at this juncture, it is clear that certain matters should fall outside its scope.
- 4.64 In discussing appeal by case stated, we made provisional proposals for extending the ambit of the Criminal Appeal Act 1968, section 58 of the Criminal Justice Act 2003 and section 36 of the Criminal Justice Act 1972. These proposals would, in our view, cater adequately for Crown Court decisions involving conviction, sentence or acquittal. Accordingly, such matters would fall outside the new statutory appeal that we are provisionally proposing.
- 4.65 In addition, appeals should not lie under the new statutory appeal in respect of Crown Court decisions and rulings from which an appeal lies to the Court of Appeal by virtue of any other enactment. Thus, it would not be possible to invoke the new statutory appeal in order to appeal against rulings on admissibility of evidence or a question of law relating to the case which are made as part of a validly ordered preparatory hearing. Parliament has already provided for a statutory appeal in respect of such rulings.<sup>46</sup>

<sup>43</sup> Supreme Court Act, s 31(5).

<sup>44</sup> [2005] EWHC 882 (Admin).

<sup>45</sup> [1998] 2 Cr App R 424.

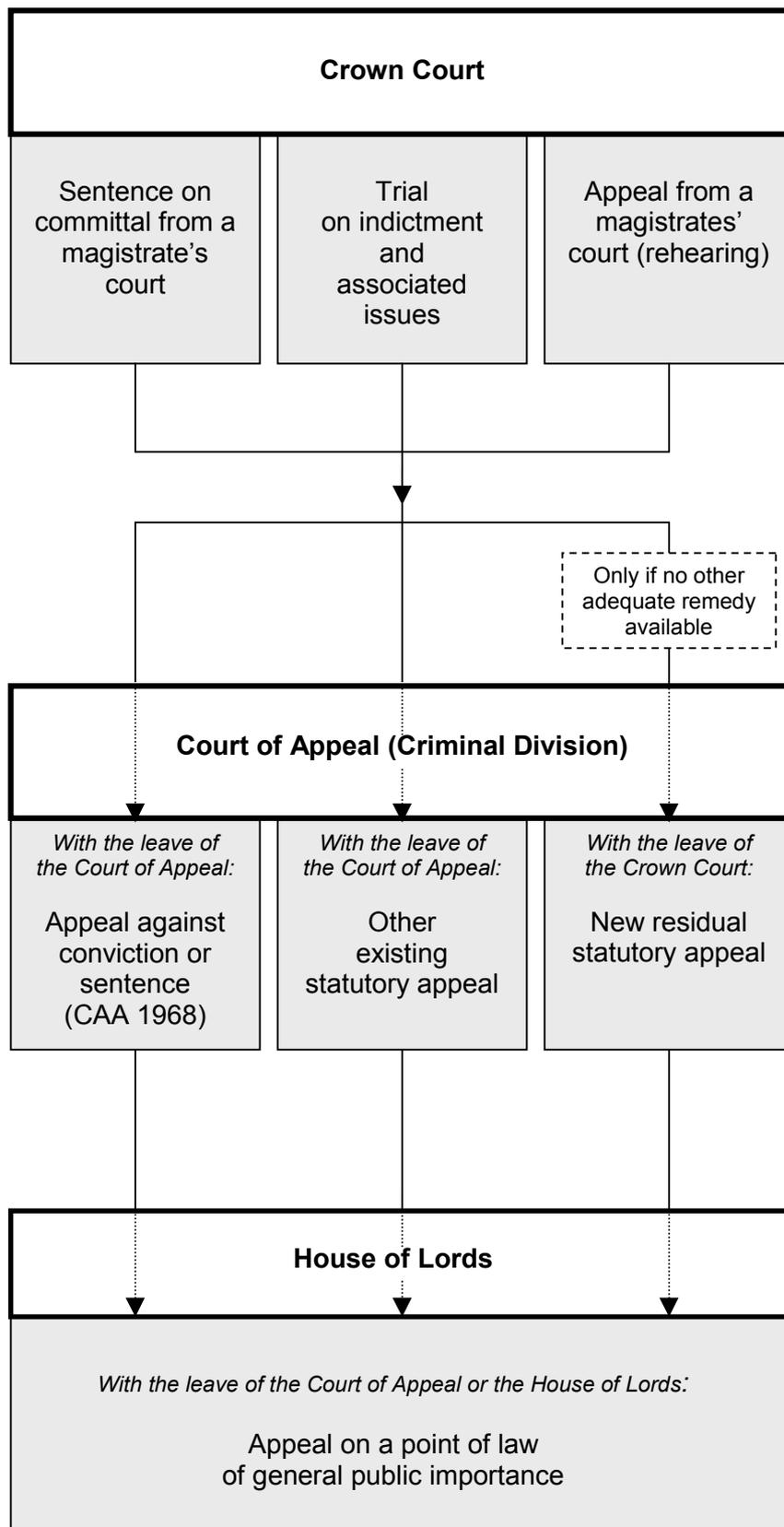
<sup>46</sup> Criminal Justice Act 1987 ss 7 to 9 and Criminal Procedure and Investigations Act 1996, ss 31 to 36.

## Conclusion

- 4.66 Transferring the jurisdiction which the High Court currently exercises by judicially reviewing decisions of the Crown Court in criminal proceedings to the Court of Appeal, without modification, would only serve to complicate the range of procedures available in the criminal courts. The system would be less complicated if, instead, the High Court's jurisdiction by way of judicial review was integrated into the existing framework of appeals operating in the Court of Appeal.
- 4.67 We believe that a new statutory appeal to the Court of Appeal should replace judicial review as a means of challenging decisions (other than convictions, sentences and acquittals) made by the Crown Court in criminal proceedings. The statutory appeal would operate on the principles of judicial review but the Court of Appeal would not be given the power to make the prerogative orders made by the High Court in judicial review cases. The Court of Appeal should be given the powers to confirm, reverse or amend a decision of the Crown Court and, if reversing a decision, the power to remit the case to the Crown Court with its opinion for a further decision to be made. The new statutory appeal should be subject to a leave requirement.
- 4.68 We are fortified in our view by Lord Justice Auld's recommendations. Recommendation 307 of his Review of the Criminal Courts of England and Wales 2001 states:
307. Where it is sought to challenge the decision of the Crown Division (Crown Court) as a court of first instance....:
- 307.1 there should be no right of challenge to the High Court by appeal by way of case stated or by claim for judicial review; and
- 307.2 instead, appeal should lie only to the Court of Appeal under its general appellate jurisdiction enlarged, if and as necessary, to cover matters presently provided by the remedies of appeal by way of case stated or of claim for judicial review – and for which the Court should be suitably constituted.
- 4.69 The new statutory appeal that we are proposing would operate as a residual category of appeal. That is, one of the conditions for appealing by this route would be that an appeal does not lie to the Court of Appeal by virtue of any other enactment. We recognise that the resulting system would continue to contain a number of different statutory appeals to the Court of Appeal rather than a single, unified appeal procedure applicable regardless of the nature of the decision being challenged. However, we believe that proposing a broader appeal to absorb other existing statutory appeals would be beyond our terms of reference which relate solely to the High Court's jurisdiction by way of judicial review and appeal by case stated in relation to criminal proceedings.
- 4.70 **We provisionally propose that section 29(3) of the Supreme Court Act 1981, by virtue of which certain determinations, orders, judgments or other decisions of the Crown Court may be challenged by way of application for judicial review to the High Court, should be repealed.**

- 4.71 **We provisionally propose that there should be a new statutory appeal to the Court of Appeal to enable the Court of Appeal to entertain challenges to decisions and rulings of the Crown Court on the grounds that the decision or ruling:**
- (1) is wrong in law;**
  - (2) involves a serious procedural or other irregularity; or**
  - (3) is one that no competent and reasonable tribunal could properly have made.**
- 4.72 **We provisionally propose that the new statutory appeal should be subject to leave being granted by the Crown Court.**
- 4.73 **We provisionally propose that the new statutory appeal should not be capable of being invoked to challenge:**
- (1) a conviction, sentence or acquittal arising out of any proceedings in the Crown Court; and**
  - (2) any decision or ruling of the Crown Court against which an appeal lies to the Court of Appeal by virtue of any other enactment.**
- 4.74 **We provisionally propose that the Court of Appeal, when determining a statutory appeal, should not have the power to make prerogative orders but instead should be able to confirm, reverse or vary a decision.**
- 4.75 **We provisionally propose that the Court of Appeal, when determining a statutory appeal, should have the power to reverse a decision and remit the case to the Crown Court with its opinion for a further decision to be made.**

**PROPOSED STRUCTURE OF APPEALS FROM THE CROWN COURT**



## **PART 5**

# **PROPOSALS: (2) THE CIRCUMSTANCES IN WHICH RESORT TO THE NEW STATUTORY APPEAL SHOULD BE PERMITTED**

### **INTRODUCTION**

- 5.1 In Part 4 we provisionally proposed that there should be a new statutory appeal to the Court of Appeal. It would enable challenges to be made on specified grounds against decisions and rulings made by the Crown Court in criminal proceedings.<sup>1</sup> In this Part we consider the circumstances in which resort to the new statutory appeal should be permitted. We begin by considering the extent to which the landscape has changed since the creation of the Crown Court in 1971.

### **A CHANGED LANDSCAPE SINCE 1971**

#### **The move to more extensive rights of appeal**

- 5.2 Before Parliament created the Crown Court in 1971, the avenues available for challenging judicial decisions and rulings made in cases tried on indictment were extremely limited. The prosecution had no rights of appeal. Defendants tried on indictment could appeal to the Court of Criminal Appeal against conviction and/or sentence but had no rights of appeal against interlocutory decisions and rulings made prior to or in the course of the trial.
- 5.3 It was against this background of very limited rights of appeal to the Court of Appeal that Parliament, in creating the Crown Court, provided that the latter should be subject to the jurisdiction of the High Court only when the matter sought to be challenged was not one 'relating to trial on indictment'.<sup>2</sup> Precisely what Parliament intended to exclude from challenge is debatable. What is clear is that, for many years following the enactment of the 1971 Act, the High Court was not prepared to contemplate that Parliament intended a complete bar on challenges to decisions and rulings made in the course of trials on indictment. However, it did adopt an expansive interpretation of 'relating to trial on indictment'. As a result, the bar, if not total, was wide ranging.

<sup>1</sup> Apart from convictions, sentences and acquittals, on the one hand, and any decision or ruling in respect of which an appeal to the Court of Appeal would lie by virtue of any other enactment, on the other hand.

<sup>2</sup> Courts Act 1971, s 10(1) and (5) subsequently repealed and substituted by Supreme Court Act 1981, ss 28(2) and 29(3).

- 5.4 However, since 1971, Parliament has increasingly provided for challenges by both the prosecution and, to a lesser extent, the defence against decisions and rulings (both final and interlocutory) of the Crown Court when exercising its first instance jurisdiction. Significantly, for the most part it has done so by providing rights of appeal, nearly always subject to leave being obtained,<sup>3</sup> to the Court of Appeal rather than by extending the jurisdiction of the High Court.<sup>4</sup>
- 5.5 Complementing the increase in the number of statutory appeals, in more recent years the High Court has retreated from the more expansive interpretation of the words 'relating to trial on indictment' and has shown a greater willingness to entertain applications for judicial review.<sup>5</sup>

### **The emphasis on effective case management**

- 5.6 The increased willingness of Parliament and the High Court to permit appeals against Crown Court decisions and rulings must be viewed against a significant change of culture since 1971 with regard to how criminal proceedings should be conducted. The modern emphasis is on effective case management in furtherance of an overriding objective, namely that criminal cases should be dealt with justly.<sup>6</sup> This involves seeking to ensure that the case for the prosecution and for the defence is dealt with fairly and effectively, together with a recognition of the rights of defendants, particularly their rights under article 6 of the ECHR.<sup>7</sup>
- 5.7 The Criminal Procedure Rules 2005 set out a range of obligations on the criminal courts in relation to case management.<sup>8</sup> All criminal cases must be actively managed in order, amongst other things, to ensure the early identification of the real issues, the early setting of a timetable for the progress of the case, monitoring of progress and compliance with directions, discouraging delay and avoiding unnecessary hearings.

<sup>3</sup> An exception is a reference under Administration of Justice Act 1972, s 36 by virtue of which, following an acquittal, the Attorney General may refer a point of law to the Court of Appeal. However, even if the Court of Appeal determines the point of law in the Attorney General's favour, the acquittal is unaffected.

<sup>4</sup> Criminal Justice Act 1972, s 36; Criminal Justice Act 1987, ss 7 to 9; Criminal Justice Act 1988, ss 36 and 159; Criminal Procedure and Investigations Act 1996, ss 29 to 36; Criminal Justice Act 2003, Part 9.

<sup>5</sup> *R (M) v Isleworth Crown Court and Her Majesty's Customs and Excise* [2005] EWHC 363 (Admin), [2005] All ER (D) 42 (Mar); *R v Maidstone Crown Court, ex parte Harrow London Borough Council* [2000] QB 719; *R (TB) v The Combined Court at Stafford* [2006] EWHC 1645 (Admin), [2007] 1 WLR 1524; *R (Malik) v Central Criminal Court and Another* [2006] EWHC 1539 (Admin), [2006] 4 All ER 1141.

<sup>6</sup> Criminal Procedure Rules 2005, r 1.1.

<sup>7</sup> Above, r 1(2)(b) and (c).

<sup>8</sup> Found in Part 3 in respect of the Crown Court and magistrates' courts and Part 65 in respect of the Court of Appeal.

- 5.8 One mechanism for achieving effective case management is the Plea and Case Management Hearing ('PCMH').<sup>9</sup> Each case that is to be tried on indictment in the Crown Court must have at least one PCMH. In a context in which effective case management is such an important goal, it is noteworthy that it is not possible to appeal against directions given at a PCMH.

***The emergence of preparatory hearings and statutory pre-trial hearings***

- 5.9 In addition to the PCMH, there are preparatory hearings and statutory pre-trial hearings. In Part 2, we considered preparatory hearings in some detail.<sup>10</sup> Statutory pre-trial hearings were established by the Criminal Procedure and Investigations Act 1996.<sup>11</sup> They can be held in any case being tried on indictment.<sup>12</sup> At a pre-trial hearing, the judge may make rulings on any question of admissibility of evidence or any other question of law relating to the case. Such rulings are of binding effect unless and until varied in the course of the trial.
- 5.10 Preparatory hearings and statutory pre-trial hearings have an important part to play in effective case management. They enable rulings on important issues such as the admissibility of evidence, whether to stay proceedings for abuse of process, whether a certain defence is open to the defendant, severance or joinder of charges, and the quashing of indictments and counts to be made before a jury is sworn. In *Shayler*, Lord Bingham referred to the advantages of preparatory hearings:

Jurors and witnesses, summonsed to court for the trial, can be spared hours or days of frustrating inaction while issues of law are argued out in their absence. The risk of sudden adjournments can be reduced.<sup>13</sup>

- 5.11 The significance of preparatory hearings and pre-trial hearings lies in part in the range of decisions and rulings that can be made at such hearings. However, equally important is the fact that they enable important judicial rulings affecting the conduct of the trial to be made at an earlier stage in the proceedings than had previously been the case. In particular, the rulings can be made prior to the jury being sworn. When Parliament created the Crown Court in 1971, the opportunities for interlocutory rulings before the jury had been sworn were few and far between. Accordingly, it is perhaps not surprising that at that time there were no rights of appeal to the Court of Appeal against interlocutory decisions. Similarly, in establishing the Crown Court, it is likely that Parliament saw no need for the High Court to be able to review decisions made by the Crown Court prior to the start of the trial.

<sup>9</sup> Practice Direction (Criminal Proceedings: Consolidation), para IV 41 [2002] 1 WLR 2870 (as substituted by Practice Direction (Criminal Proceedings: Case Management) [2005] 1 WLR 1491.

<sup>10</sup> Paras 2.70 to 2.89 above.

<sup>11</sup> Sections 39 to 40.

<sup>12</sup> Although a pre-trial hearing takes place before a jury is sworn, the hearing does not, unlike a preparatory hearing, mark the beginning of the trial.

<sup>13</sup> [2002] UKHL 11, [2003] 1 AC 247, [16]. Lord Bingham's observations apply equally to pre-trial hearings.

## THE POSSIBILITY OF FORMULATING THE NEW STATUTORY APPEAL IN SIMILAR TERMS TO SECTION 29 OF THE 1981 ACT

- 5.12 In Part 2,<sup>14</sup> we described the interpretation of the exclusionary words ‘relating to trial on indictment’, which currently govern the scope of the High Court’s jurisdiction over the Crown Court. It would be possible to apply the same exclusionary words to the proposed statutory appeal from the Crown Court to the Court of Appeal. The existing case law would then inform the interpretation of the scope of the new statutory appeal. However, for a number of reasons, we do not believe that it would be desirable to retain the current exclusionary words.

### Indistinct origins

- 5.13 Firstly, as we explained in Part 1,<sup>15</sup> the rationale behind the use of the phrase ‘relating to trial on indictment’ in the 1971 Act is unclear. It may reflect the fact that, historically, the High Court had never had jurisdiction to review decisions of the Assizes<sup>16</sup> and that theoretically it would be inappropriate for the High Court to review the ‘equivalent’ decisions of the Crown Court. If so, Parliament may have intended to exclude *all* decisions made by the Crown Court under its first instance jurisdiction from review by the High Court. However, it has been clear from the cases that have interpreted the exclusionary words that such a wide exclusion would be inappropriate. Further, as we are proposing the transfer of the High Court’s jurisdiction to the Court of Appeal, this is no longer a relevant consideration.

### Vagueness of the current test

- 5.14 Secondly, the phrase ‘relating to trial on indictment’ is “extremely”<sup>17</sup> and “needlessly”<sup>18</sup> imprecise. In applying the statutory language, the House of Lords has not set out a definitive test to determine whether or not a matter ‘relates to trial on indictment’, but has instead restricted itself to setting out ‘pointers’ as ‘guidance’ on how the phrase should be construed.<sup>19</sup> However, the pointers themselves have proven difficult to apply. For example, in *R (Lipinski) v Wolverhampton Crown Court*,<sup>20</sup> Mr Justice Stanley Burton had to decide whether a bail decision was a matter ‘relating to trial on indictment’. He concluded that “I find the question of jurisdiction in this case exceedingly difficult...the two pointers given by the House of Lords seem to point in different directions”. In any event, the pointers are not definitive, but operate as mere guidance. The courts must therefore decide, on a case by case basis, whether a particular matter ‘relates to trial on indictment’.

<sup>14</sup> See Part 2, paras 2.100 to 2.127 above.

<sup>15</sup> See Part 1, para 1.26 above.

<sup>16</sup> See Part 1, para 1.8 above

<sup>17</sup> Lord Browne-Wilkinson, *R v Manchester Crown Court, ex parte Director of Public Prosecutions* [1993] 1 WLR 1524, 1528.

<sup>18</sup> Auld LJ in his *Review of the Criminal Courts of England and Wales 2001*, ch 12, [42].

<sup>19</sup> Set out in Part 2, para 2.100 above.

<sup>20</sup> [2005] EWHC 1950 (Admin).

- 5.15 This 'case by case' approach has led the High Court to develop its jurisdiction in a piecemeal way, having regard to the context of all the facts of the case in front of them. Consequently, for example, an order prohibiting the publication of a witness' name made under section 4 of the Contempt of Court Act 1981 'relates to trial on indictment'<sup>21</sup> but an order (or the discharge of an order) in relation to the anonymity of a child defendant made under section 39 of the Children and Young Persons Act 1933 does not.<sup>22</sup> In the abstract, equally persuasive arguments could be mounted to say that neither, or both, of the decisions in the above examples 'relate to trial on indictment'. Because the current test is so vague, it is often difficult to anticipate in advance whether any given decision falls within the scope of the High Court's review jurisdiction. This, in turn, has generated a large volume of case law.<sup>23</sup>

### **Over-exclusion**

- 5.16 A third problem with the current test is that it is so wide as to exclude many matters which ought to be reviewable. For example, the refusal of a defendant's costs order 'relates to trial on indictment'. However, an erroneous refusal to make such an order may cause significant hardship to an acquitted defendant and at the same time may breach article 6(2) ECHR.<sup>24</sup> No other means of correcting the decision is available. Reviewing such orders would not delay or interrupt the trial, as the issue would only arise following an acquittal. However, such relevant policy considerations are not reflected in the current test.
- 5.17 Of course, it does not follow from the fact that there are problems with the current test that challenges to decisions of the Crown Court ought to be allowed without restriction. There are other considerations which strongly suggest that some decisions ought to be excluded from the scope of any new statutory appeal. Some of these considerations, such as the disadvantages of delay to a trial and the undesirability of duplicating existing avenues of appeal, are obliquely reflected in the current interpretation of the phrase 'relating to trial on indictment'. We believe it is necessary to bring these competing policy considerations to the fore in order to formulate a new and better test for the proposed statutory appeal.

<sup>21</sup> *R v Central Criminal Court ex parte Crook*, *The Times* 8 November 1984.

<sup>22</sup> *R v Manchester Crown Court ex parte H and D* [2000] 1 WLR 760.

<sup>23</sup> See Part 2, paras 2.102 to 2.103 above.

<sup>24</sup> See Part 3, n 1.

## RELEVANT PRINCIPLES

### The 'minimal delay' principle

- 5.18 One of the aims of effective case management is the elimination of unnecessary delay in the conduct of criminal proceedings. Delay to criminal trials can seriously compromise the interests of justice, especially when the trial is before a jury. If it cannot be accurately predicted when a trial before a jury will be ready to commence, the interests of defendants, victims, and witnesses may be adversely affected. The passage of time can affect the ability of witnesses to recall events. The greater the delay in a jury starting to hear the evidence, the greater the strain on defendants, victims and witnesses. A trial the start of which is delayed may have a disproportionate effect on a defendant who is in custody awaiting his or her trial. In addition, delay in starting one trial may have a knock-on effect if it delays the start of other trials.

### The 'waste avoidance' principle

- 5.19 For the purposes of this paper, there is a very important difference between preparatory hearings and statutory pre-trial hearings. Parliament has provided that certain rulings made as part of a preparatory hearing can be appealed to the Court of Appeal even though any appeal will inevitably delay the time when a jury can be sworn and will start to hear the evidence. Despite the incursion on the minimal delay principle, Lord Bingham has highlighted the advantage of allowing an appeal:

... perhaps most important of all, the risk that the trial will be conducted on what an appellate court later rules to be a mistaken legal basis, leading to the necessarily undesirable consequence of a retrial, can be minimised if not eliminated ...<sup>25</sup>

- 5.20 Leaving aside terrorism cases and cases where it is alleged that there is a danger of jury tampering, preparatory hearings can only be ordered in serious or complex fraud cases or in other cases which are complex, serious or lengthy. By providing for appeals against interlocutory rulings made in preparatory hearings, Parliament is endorsing what we refer to as the 'waste avoidance' principle. It is the principle that the more serious, complex or lengthy a trial, the more important it is to ensure that the time, effort and resources devoted to it are not wasted. They may be wasted if the trial proceeds on the basis of a mistaken ruling as to a key proposition of law or as to the admissibility of crucial evidence. Accordingly, Parliament has enacted that certain rulings made in the course of preparatory hearings can be appealed prior to the jury being sworn. Although this may delay the continuation of the proceedings, the compensating advantage is that the scope for challenging and rectifying a ruling may avoid the greater waste of time resulting from a complex, serious or lengthy trial proceeding on a false legal basis, with the consequent danger that there may have to be a retrial.

<sup>25</sup> *Shayler* [2002] UKHL 11, [2003] 1 AC 247, [16].

5.21 The advantage that Lord Bingham referred to in relation to preparatory hearings<sup>26</sup> is one that it might be thought would also result if appeals against rulings made at statutory pre-trial hearings were allowed. However, Parliament has not been prepared to allow appeals against such rulings, providing instead that they can be varied in the course of the trial itself if it is in the interests of justice to do so. It has distinguished between kinds of case in this way because it is in the context of rulings made at preparatory hearings (held principally when the case is going to be a long or complex one) that the 'waste avoidance' principle operates with most force. It trumps the 'minimum delay' principle.

5.22 By contrast, the less complex, serious or lengthy the case, the less compelling the argument for tolerating delay in exchange for the advantages of preventing a case from proceeding on a false basis. In other respects, however, it might be thought that the 'waste avoidance' principle retains its potency. In any case, irrespective of whether it is complex, serious or lengthy, the result of it proceeding on a false legal basis is that there may have to be a retrial. The resources involved in a retrial may not be as great if the case is not complex, serious or lengthy. However, the stress caused by a retrial for the defendant, alleged victim and witnesses may be just as great. Nevertheless, in this context, the minimal delay principle under the current law trumps the 'waste avoidance principle'.

***A constraint on the 'waste avoidance' principle***

5.23 Even in the context of complex, serious or lengthy trials, there has been, and may still be depending on how the decision of the House of Lords in *H*<sup>27</sup> is interpreted, a limit to the application of the 'waste avoidance' principle. Prior to the decision in *H*, some decisions and rulings made at preparatory hearings could not be challenged even though on the 'waste avoidance' principle they should have been made amenable to challenge. The most obvious examples are decisions refusing to stay proceedings on grounds of abuse of process and decisions refusing to quash an indictment.<sup>28</sup> However, it is possible that, following *H*, such decisions can now be appealed.

<sup>26</sup> See para 5.19.

<sup>27</sup> [2007] UKHL 7, [2007] 2 WLR 364. See paras 2.79 to 2.89 above.

<sup>28</sup> *Gunarwardena* [1990] 1 WLR 703; *Hedworth* [1997] 1 Cr App R 421. By contrast, the prosecution can now appeal against decisions to stay proceedings or to quash an indictment: Criminal Justice Act 2003, s 58.

### The 'minimal interruption' principle

- 5.24 The 'minimal interruption' principle is meant to ensure that once a jury has been sworn and starts to hear the evidence, the proceedings should be subject to minimal interruption. The rationale underlying the 'minimal interruption' principle is more complex than that underpinning the 'minimum delay' principle. Both principles seek to ensure that the interests of defendants, victims and witnesses should not be adversely affected. If it cannot be accurately predicted how long a trial will last because there is no way of knowing how much time will be taken up by adjournments, the interests of defendants, victims and witnesses will be adversely affected. They should all be entitled to know, within reason, approximately how long it will last. As we have previously said, a trial that overruns may also have a knock-on effect by delaying the start of other trials.
- 5.25 However, there is a further rationale for the 'minimum interruption' principle. Once a trial has begun to run in the sense of the jury hearing evidence, it is important that, as far as possible, the jury hears all the evidence without interruption. If the 'thread' of each side's case cannot adequately be maintained during the course of the trial, because of constant or lengthy interruptions, there is a risk that some members of the jury will not attain or retain an adequate grasp of the evidence or the issues.
- 5.26 Preparatory hearings and statutory pre-trial hearings are essential to the safeguarding of the 'minimum interruption' principle. They enable judges to make rulings on legal submissions that would otherwise have to be made after the jury has been sworn. They are as conducive to the principle of minimal interruption as they are to the principle of minimal delay.
- 5.27 However, consistent with effective case management, some judicial rulings, even in complex, serious or lengthy cases, are better made, or *can* only be made, once the jury has been sworn and has started to hear the evidence. Examples are whether the proceedings should be stayed on grounds of delay<sup>29</sup> and whether certain bad character evidence should be admitted.<sup>30</sup> The trial judge may be in a far better position to make a ruling with the benefit of evidence placed before the jury. Accordingly, the 'minimum interruption' principle recognises that sometimes it is appropriate for proceedings before the jury to be interrupted for rulings on points of law to be obtained.<sup>31</sup> However, the regime of preparatory hearings and statutory pre-trial hearings is designed to ensure that such interruptions are as few as possible.

<sup>29</sup> In *Smolinski* [2004] EWCA Crim 1270, [2004] 2 Cr App R 40, the Court of Appeal held that in cases involving historic allegations it is preferable for an application for a stay to be made after the evidence of the complainant.

<sup>30</sup> See the example in Part 1, para 1.58 above.

<sup>31</sup> Some rulings may be made at the conclusion of the evidence for both prosecution and defence, for example a ruling in a murder trial that there was evidence of a provoked loss of self-control.

5.28 Accordingly, interrupting proceedings before the jury for the purpose of obtaining legal rulings is compatible with the 'minimum interruption' principle. However the same cannot be said of adjournments for the purpose of allowing one or other party to *appeal* against such rulings. Any justification for such adjournments must be sought elsewhere.

5.29 Parliament and the courts have accorded great respect to the 'minimum interruption' principle. The principle underlies the reluctance of the High Court to entertain applications for judicial review of interlocutory decisions made by the Crown Court and magistrates' courts. It is an important reason, albeit not the only reason, why Parliament excluded matters 'relating to trial on indictment' from the jurisdiction of the High Court. The landscape may have changed since 1971 but, subject to one qualification, neither Parliament nor the courts have been minded to encroach on the 'minimum interruption' principle.<sup>32</sup>

### **The 'fair trial' principle**

5.30 Effective case management does not exist in a vacuum. Its purpose is to achieve the overriding objective, namely that all criminal cases are dealt with justly. That includes dealing with the parties fairly and recognising the rights of a defendant, in particular his or her right to a fair trial.

5.31 The defendant's right to a fair trial is guaranteed by article 6 of the ECHR and there is a body of national and international jurisprudence interpreting the content of that right. However, in referring to the 'fair trial' principle we have something much broader in mind. A trial is unfair if either the prosecution or the defence is unable to rely on relevant, admissible evidence of importance to their case or if they must proceed on an understanding of the law they know to be unsound. A trial is also unfair if, for example, the impartiality of the jury is likely to have been compromised through 'jury tampering', but the judge has wrongly decided that the risk of this having happened is negligible,<sup>33</sup> or if, for no good reason, the proceedings take the form of a closed hearing from which the public are excluded.<sup>34</sup>

<sup>32</sup> The qualification is Criminal Justice Act 2003, s 62. When implemented, it will allow the prosecution to appeal against an evidentiary ruling made after the jury has been sworn if the ruling 'significantly weakens' the prosecution case. By contrast, Criminal Justice Act 2003, s 58 (which enables the prosecution to appeal against 'terminating' rulings), is not inconsistent with the 'minimum interruption' principle. Although such rulings may be made after the jury had been sworn, they are rulings which, unless successfully appealed against, bring to an end the jury's involvement.

<sup>33</sup> Criminal Justice Act 2003, ss 44 to 48.

<sup>34</sup> *R (Malik) v Central Criminal Court* [2006] EWHC 1539 (Admin), [2006] 4 All ER 1141.

- 5.32 A trial, or an impending trial, can also bring unfairness in its wake for parties affected by it. A defendant may be kept in custody before or during the trial when he or she should not be, or for longer than he or she should be. A witness may find that the prosecution or the defence has obtained an order for disclosure of his or her medical records, without giving him or her the chance to object.<sup>35</sup> The media may find that they have been unjustifiably ordered not to reveal a piece of information relating to a trial which it would be in the public interest to report.<sup>36</sup>
- 5.33 Clearly, there may be a tension between the ‘fair trial’ principle and one or more of the other principles to which we have referred. If there was an opportunity prior to the conclusion of the trial to challenge every judicial ruling on the grounds that it impacted on the ‘fair trial’ principle, there would be a danger that trials would be delayed or interrupted to an unacceptable extent.

### **PROVISIONAL PROPOSALS IN RELATION TO CASES TRIED ON INDICTMENT<sup>37</sup>**

#### **The significance of the stage in the proceedings at which a decision or ruling is made**

- 5.34 The extent, if any, to which permitting an appeal against a decision or ruling will result in infringement of the ‘minimal delay’ or the ‘minimal interruption’ principles depends, at least in part, on the stage in the proceedings that the decision or ruling in question is made. Appeals against decisions and rulings made after a trial has concluded do not give rise to either delay or interruption of that trial. By contrast, appeals against decisions and rulings made after the jury has been sworn, if heard prior to the conclusion of the trial, will usually cause interruption to the trial. Appeals against decisions and rulings made before the jury is sworn will not interrupt the trial. They may, but will not inevitably, cause delay to the proceedings.
- 5.35 In 1971, when it restricted the High Court’s jurisdiction to matters not ‘relating to trial on indictment’, Parliament chose not to afford any formal recognition to the fact that decisions and rulings can be made at different stages in criminal proceedings. In one respect, Parliament was doing no more than reflecting the reality of judicial practice prior to 1971. As we have noted,<sup>38</sup> in those days judges at Assizes were not accustomed to making many rulings prior to the jury being sworn. In particular, the doctrine of abuse of process was in its infancy and there were very few applications to stay proceedings for abuse of process. Accordingly, the danger of criminal proceedings being delayed by challenges to such rulings was not an issue in the way that it is today.

<sup>35</sup> *R (TB) v Combined Court at Stafford* [2006] EWHC 1645 (Admin), [2007] 1 WLR 1524.

<sup>36</sup> Criminal Justice Act 1988, s 159.

<sup>37</sup> In Part 4, we proposed that there should be a new statutory right of appeal. In the paragraphs that now follow, we delineate the circumstances in which the appeal may be exercised. A Table illustrating the proposals is on page 122.

<sup>38</sup> See para 5.11 above.

- 5.36 However, the same could not be said of rulings made after the jury had been sworn. Even in 1971, such rulings would have been a not infrequent occurrence. Parliament's wish to prevent challenges to such rulings is understandable in the light of the 'minimal interruption' principle. It is more difficult to explain why Parliament was anxious to ensure that decisions and rulings made after the discharge of the jury should not be amenable to challenge. Such decisions threaten neither the 'minimal delay' principle nor the 'minimum interruption' principle. This may go some way to explaining the conflicting decisions in relation to such decisions and rulings. For example, it is not obvious why a refusal to make a defendant's costs order in favour of an acquitted defendant is a matter 'relating to trial on indictment'<sup>39</sup> whereas an order committing an acquitted defendant to prison unless he agrees to be bound over is not.<sup>40</sup>
- 5.37 We believe that the stage in the proceedings at which the impugned decision or ruling is made should be accorded more weight than it has previously been given. One way of doing so is to specify different criteria for being able to invoke the new statutory appeal depending on what stage in the proceedings the impugned decision or ruling was made.

#### **Decisions and orders made after the jury has been discharged**

- 5.38 Decisions and orders made after the jury has been discharged can affect the defendant, the prosecutor and third parties. Examples include a refusal to award an acquitted defendant his or her costs out of central funds, an order discharging an anonymity order previously made in respect of a child or young person, a refusal to award a private prosecutor his or her costs out of central funds, a forfeiture order made under section 27 of the Misuse of Drugs Act 1971 in respect of the property of a third party and an order that an indictment lie on the file 'not to be proceeded with without leave'.
- 5.39 We believe that, because such decisions and orders do not adversely impact on either the 'minimum delay' principle or the 'minimum interruption' principle, they should be amenable to appeal subject to obtaining the leave of the Crown Court. In contrast to our other proposals,<sup>41</sup> because an appeal would not interrupt or delay the trial we are not proposing any further limitation on the exercise of the right of appeal.
- 5.40 **We provisionally propose that, subject to obtaining leave from the Crown Court, any person directly affected by a determination or order made after the jury has been discharged in a trial on indictment (other than a determination or order which is a 'sentence' for the purposes of the Criminal Appeal Act 1968 or against which an appeal lies to the Court of Appeal by virtue of any other enactment) should be able to appeal to the Court of Appeal on the grounds that the determination or order:**

**(1) is wrong in law;**

<sup>39</sup> *Ex parte Meredith* (1973) 57 Cr App R 451.

<sup>40</sup> *R v Inner London Crown Court, ex parte Benjamin* [1987] 85 Cr App R 267.

<sup>41</sup> See paras 5.63, 5.88, 5.100 and 5.101 below.

- (2) involves a serious procedural or other irregularity; or
- (3) is one that no competent and reasonable tribunal could properly have made.

**Decisions and rulings made after the jury has been sworn and prior to the jury being discharged**

5.41 In relation to decisions and rulings made after the jury has been sworn and prior to the jury being discharged, there is a need to distinguish between the prosecution, on the one hand, and defendants and third parties, on the other hand.

***Prosecution appeals***

5.42 In our view, the prosecution should not be able to invoke the new statutory appeal in order to challenge decisions and rulings made after the jury has been sworn and prior to the jury being discharged. Parliament has comparatively recently considered the circumstances in which the prosecution should be permitted to appeal against such decisions and rulings. It has provided that the prosecution may appeal against:

- (1) ‘terminating’ rulings made prior to the judge starting his or her summing up to the jury;<sup>42</sup> and
- (2) if and when section 62 of the Criminal Justice Act 2003 is implemented, evidentiary rulings which significantly weaken the prosecution case.

We see no reason why the new statutory appeal should extend prosecution rights of appeal given that such rights have recently been settled by Parliament.

***Appeals by defendants***

THE STARTING POINT

5.43 In accordance with the ‘minimum interruption’ principle, we believe that the appropriate starting point is that defendants should not be entitled to resort to the new statutory appeal in order to challenge decisions and rulings made after the jury has been sworn and before the jury is discharged. The importance of a jury being able to hear the evidence without interruption is such that there should be compelling reasons for allowing defendants to mount interlocutory appeals prior to the conclusion of the trial.

5.44 We have found support for the starting point that we are proposing in the observations of Justice Frankfurter in the United States Supreme Court in *Cobbledick v United States*:<sup>43</sup>

<sup>42</sup> Parliament has expressly provided that an order discharging a jury is not a ‘terminating’ ruling.

<sup>43</sup> *Cobbledick v United States* (1940) 309 US 323.

These considerations of policy [that is, against interlocutory appeals] are especially compelling in the administration of justice ... . An accused is entitled to scrupulous observance of constitutional safeguards. But encouragement of delay is fatal to the vindication of the criminal law. Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal.

- 5.45 We have also found some support in the observations of Justice Kirby on the position in Australian law:

Criminal procedure in our tradition is generally strict ... . Rules of practical common sense and flexibility, which have become increasingly acceptable in civil trials, must be viewed with reservation and care in the context of criminal trials.<sup>44</sup>

However, we emphasise that we are citing Justice Frankfurter and Justice Kirby merely as support for our starting point. We now consider the extent to which there should be exceptions to the starting point.

#### EXCEPTIONS TO THE STARTING POINT

- 5.46 In most cases a convicted defendant who is aggrieved by a decision or ruling made after the jury is sworn has an adequate remedy by being able to appeal against conviction to the Court of Appeal. In particular, a convicted defendant will be able to mount arguments based on his or her rights under article 6 ECHR (the right to a fair trial in determination of a criminal charge). Further, on an appeal against conviction the Court of Appeal is able to consider whether any decision or ruling was wrong, and it can also assess the effect of any wrong decision or ruling in the light of all the evidence placed before the jury. The Court of Appeal, on an appeal against conviction, is well placed to evaluate the safety of a conviction. It is also worth noting that the courts have given a broad interpretation to the term 'safety of conviction' itself. In *Mullen*,<sup>45</sup> for example, the Court of Appeal held that a prosecution brought in abuse of process gave rise to an 'unsafe' conviction, in spite of the fact that no complaint had been made about the conduct of the trial itself.<sup>46</sup>

<sup>44</sup> *R v Birlut* (1995) 39 NSWLR 1.

<sup>45</sup> [2000] QB 520, applying *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] 1 AC 42.

<sup>46</sup> However, see cl 26(2) of the Criminal Justice and Immigration Bill which provides that a conviction is not unsafe if the Court of Appeal is satisfied that the appellant is guilty of the offence. This is subject to cl 26(3) which provides that the Court of Appeal is not precluded from allowing an appeal against conviction where it would be incompatible with the defendant's rights under the ECHR to dismiss the appeal.

5.47 However, there will be cases where an appeal against conviction and/or sentence, even if successful, would not constitute an adequate remedy in respect of an adverse decision or ruling made in the course of the trial before the jury. An example is a decision to refuse bail. A defendant wrongly refused bail may ultimately be acquitted or, if convicted, receive a non-custodial sentence. Under the current law, decisions refusing bail have given rise to difficulty. For example, as we explained in Part 2,<sup>47</sup> the High Court has held that it has jurisdiction to entertain applications for judicial review in respect of bail decisions taken at “an early stage of criminal proceedings”. However, not only do the words “early stage” lack precision<sup>48</sup> but deprivation of liberty is a serious matter irrespective of whatever stage in the proceedings it occurs.

5.48 Accordingly, we believe that the starting point should admit of limited exceptions. We say ‘limited’ because the primacy of the ‘minimal interruption’ principle ought not to be diluted beyond what is necessary. We believe that, subject to obtaining leave, a defendant should be able to invoke the new statutory appeal in order to appeal forthwith against a decision or ruling made after the jury has been sworn and before it is discharged only if:

- (1) unless the defendant is allowed to appeal forthwith, he or she would have no adequate remedy;<sup>49</sup> and
- (2) the determination, order, judgment or ruling is one:
  - (a) which directly determines the liberty of the defendant; or
  - (b) which the defendant seeks to challenge as unlawful by virtue of section 6(1) of the Human Rights Act 1998.

If the above criteria were satisfied, a defendant would be able to appeal forthwith irrespective of whether the appeal would have the effect of significantly interrupting the continuation of the trial. This would be justified because of the importance of what is at stake: personal liberty and breaches of rights under the ECHR.

<sup>47</sup> See Part 2, paras 2.104 to 2.112 above, in particular para 2.110.

<sup>48</sup> And, arguably, detract from the question as to whether or not a matter ‘relates to trial on indictment’: see Mr Justice Collins’ comments to this effect in *R (Shergill) v Harrow Crown Court* [2005] EWHC 648 (Admin), [6].

<sup>49</sup> On the meaning of ‘adequate’ remedy see paras 5.50 to 5.51 below.

5.49 Under our proposal, a defendant seeking to argue that a decision or ruling made after the jury is sworn is unlawful under section 6(1) HRA 1998 would only be able to appeal prior to the jury being discharged if he or she could demonstrate the absence of any other ‘adequate’ remedy. This is particularly important in cases where a defendant, taking the view that the trial is going badly, either absents him or herself temporarily from the trial or, in the course of the trial, dispenses with the services of his or her legal advisers. If, as a consequence, the trial judge makes a ruling which the defendant claims jeopardises the right to fair a fair trial under article 6 of the ECHR,<sup>50</sup> his or her remedy should be by way of appeal against conviction rather than by an interlocutory appeal.

*‘Adequate’ remedy*

5.50 For the purposes of the scheme that we are provisionally proposing, a defendant would be deemed to have an ‘adequate’ remedy if he or she could resort to a specific statutory appeal in respect of the ruling or decision to be challenged.

5.51 In addition, an appeal against conviction would be an ‘adequate’ remedy in respect of an adverse decision or ruling provided:

- (1) no adverse effect would materialise from the decision or ruling in the event of the defendant being acquitted; and
- (2) no adverse effect, other than the sentence passed following conviction, would materialise from the decision or ruling if an appeal against conviction was successful.

An example where an appeal against conviction would be an ‘adequate’ remedy is a ruling by the judge that the defendant’s confession is admissible. An example where an appeal against conviction would not be an ‘adequate’ remedy is a ruling by the judge that the press can publish the name of a child defendant. We do not believe that it should be open to a defendant to argue that a right of appeal is not an adequate remedy merely because the continuation of the trial in itself has adverse effects, for example costs, mental stress or potential loss of employment.

*No appeal against a refusal of leave*

5.52 In Part 4,<sup>51</sup> we said that, in order to invoke the new statutory appeal, defendants would have to obtain the leave of the Crown Court. We have considered whether, if leave is refused, defendants should be able to renew their applications to the Court of Appeal. On balance, we believe that they should not. If they were able to do so, it would result in the delay to and interruption of trials that our proposals are designed to prevent.

<sup>50</sup> For example, a ruling that the trial should proceed in the absence of a defendant who has absconded. If the defendant is subsequently arrested, he or she should not be able to challenge the ruling unless and until he or she is convicted.

<sup>51</sup> See para 4.56 above.

5.53 Further, although logically the Crown Court judge making the decision or ruling will believe that the decision made is the correct one, he or she is well placed to judge objectively whether or not there is a potentially competing argument that ought to be adjudicated by a higher court. In deciding whether or not to grant leave, the judge would be mindful that the party seeking leave will not be able to make a second leave application to the Court of Appeal.

#### OTHER POSSIBLE CRITERIA FOR BEING ABLE TO APPEAL FORTHWITH<sup>52</sup>

5.54 We have considered whether there should be a broader exception which would enable a defendant to appeal forthwith if the appeal would not ‘significantly’ interrupt the trial. However, on balance we are not persuaded that there should be this additional exception. We believe that, once a jury has been sworn, it is unhelpful to categorise interruption as either being significant or insignificant. First, significant is a subjective concept and there will be a risk of inconsistent decisions by trial judges as to whether giving leave for an interlocutory appeal will result in a ‘significant’ interruption to the trial. Secondly, even what might be thought to be a short interruption of the trial is likely to be significant in its impact on the jury’s ability to follow and retain the evidence. Accordingly, we believe that interlocutory appeals should be neither encouraged nor tolerated merely because it is said that they would not cause ‘significant’ delay whatever that may mean.

5.55 We have also considered whether there should be a broader exception that would enable a defendant to appeal forthwith if ‘it was in the interests of justice’. However, we do not favour this approach. In our view, a test which would enable a defendant to appeal forthwith in cases where there would be no other adequate remedy and where his or her liberty or ECHR rights are threatened is sufficient to ensure that the interests of justice are properly recognised. Further, the test that we have suggested is focused and precise as opposed to a more open- textured ‘interests of justice’ test. If the latter were to be the test, again there would be a risk of inconsistent decisions by trial judges on which there would be no decisions by the appellate courts to provide future guidance. Further, in our view, such a test would be likely to result in the merits of the impugned decision having a disproportionate influence on the decision whether or not to grant leave for an interlocutory appeal.

#### ***Appeals by third parties***

5.56 Parliament has provided only limited rights of appeal to third parties in relation to criminal proceedings in the Crown Court. The most important example is section 159 of the Criminal Justice Act 1988 which provides that any person, subject to obtaining leave, may appeal to the Court of Appeal against orders restricting reporting of or public access to trials on indictment.

5.57 We believe that third parties should enjoy the same level of protection as defendants against erroneous decisions. Accordingly, a third party should be able to invoke the new statutory appeal in order to appeal against a decision or ruling made after the jury has been sworn and before it is discharged if:

<sup>52</sup> Although we do not favour either of the alternative options that we set out below, we are seeking consultees’ views on them: see para 5.64 below.

- (1) unless he or she is able to appeal forthwith, he or she would have no other adequate remedy in respect of the decision or ruling; and
- (2) the decision or ruling is one:
  - (a) which affects the liberty of the third party; or
  - (b) which the third party seeks to challenge as unlawful by virtue of section 6(1) of the Human Rights Act 1998.

5.58 An example of a situation where we believe that a third party might under our proposals be able to invoke the new statutory appeal is that which arose in *R (TH) v Wood Green Crown Court*.<sup>53</sup> The trial judge remanded a prosecution witness in custody by virtue of a power conferred on the trial judge by section 4(3) of the Criminal Procedure (Attendance of Witnesses) Act 1965. The witness sought to challenge that ruling. The Divisional Court found that the ruling was one 'relating to trial on indictment' and could not be challenged. It was further indicated that there was no need to 'read down' section 29(3) under section 3 of the Human Rights Act 1998 so as to provide a remedy by way of judicial review.

5.59 In addition, Mr Justice Wilkie said that the witness had a remedy in that it was open to him to apply for habeas corpus. If this is correct, the decision would be unaffected by our proposal because the third party would have another adequate remedy. Mr Justice Wilkie relied on *R v Maidstone Crown Court, ex parte Clark*<sup>54</sup> as authority for the proposition that the writ of habeas corpus was available. However, in that case the observations in relation to the writ of habeas corpus were unnecessary as both members of the Divisional Court held that judicial review was available.<sup>55</sup>

5.60 In *R v Secretary of State for the Home Department ex parte Cheblak* ('*Cheblak*'), Lord Donaldson contrasted the writ of habeas corpus with the remedy of judicial review:

*A writ of habeas corpus* will issue where someone is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and is unlawful. *The remedy of judicial review* is available where the decision to be impugned is within the powers of the person taking it but, due to a procedural error, misappreciation of the law, a failure to take account of relevant matters, a taking account of irrelevant matters or the fundamental unreasonableness of the decision or action, it should never have been taken.<sup>56</sup>

<sup>53</sup> [2006] EWHC 2683 (Admin), [2007] 1 WLR 1670.

<sup>54</sup> [1995] 1 WLR 831.

<sup>55</sup> That said, one member of the court, Curtis J, was in no doubt that habeas corpus and judicial review were both available. By contrast, Glidewell LJ said that habeas corpus was available if, contrary to the view he held, judicial review was not available.

<sup>56</sup> [1991] 1 WLR 890, 646 (emphasis in original).

This might suggest that, in cases where bail is refused, whether the writ of habeas corpus is available depends on whether or not the decision was made without any lawful authority. An example of a case where the decision was made without lawful authority is *R (Culley) v Crown Court Sitting at Dorchester*<sup>57</sup> where the decision to remand the defendant in custody was made more than 24 hours after he had been arrested for being in breach of bail conditions.<sup>58</sup> Although the defendant's successful challenge was by way of judicial review, it was perhaps a decision amenable to challenge by writ of habeas corpus because the decision to refuse to grant bail was, exceptionally, one made without lawful authority.

5.61 In *R v Secretary of State for the Home Department, ex parte Muboyayi*<sup>59</sup> Lord Donaldson said that it was clearly established that where the power to detain is dependent upon the existence of a particular state of affairs – what he termed a 'precedent fact' – and the existence of that fact is challenged, a challenge may be made by means of an application for writ of habeas corpus even if there were other procedures available.<sup>60</sup> However, he also said that he stood by the statement of principle that he made in *Cheblak*.

5.62 In *Cheblak* the detention depended upon an administrative decision and not a judicial decision. In such a case, the court would wish to have the flexibility to examine the underlying administrative decision which it would not have if it was simply considering the writ of habeas corpus. Accordingly, we believe that it open to argument as to whether the writ of habeas corpus is available as a remedy in all cases where bail is refused. Under our proposals, the statutory appeal would be a potential remedy in cases where the writ of habeas corpus was not available to challenge a refusal to grant bail.

5.63 **We provisionally propose that:**

- (1) a defendant or a directly affected third party,**
- (2) subject to obtaining the leave of the Crown Court,**
- (3) may appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling made after the jury has been sworn and before it is discharged (other than one against which an appeal lies by virtue of any other enactment),**
- (4) on the grounds that the determination, judgment, order or ruling:**
  - (a) is wrong in law;**
  - (b) involves a serious procedural or other irregularity; or**

<sup>57</sup> [2007] EWHC 109 (Admin), 171 JP 373.

<sup>58</sup> Under Bail Act, s 7(3) any decision must be made before 24 hours have elapsed.

<sup>59</sup> [1992] 1 QB 244.

<sup>60</sup> Above, 254 to 255. Lord Donaldson referred to the speeches of their Lordships in the decision of the House of Lords in *R v Secretary of State for the Home Department, ex parte Khawaja* [1984] AC 74.

(c) is one that no competent and reasonable tribunal could properly have made,

(5) if:

(a) unless he or she is able to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; and

(b) the determination, judgment, order or ruling is one:

(i) which affects the liberty of the defendant or the third party; or

(ii) which the defendant or third party seeks to challenge as unlawful by virtue of section 6(1) of the Human Rights Act 1998.

5.64 **We seek the views of consultees as to whether a defendant or third party should also be able to appeal forthwith if:**

(a) the appeal would not ‘significantly’ interrupt the proceedings; and/or

(b) it would be ‘in the interests of justice’.

#### **Decisions or rulings made on challenges to jurors**

5.65 In a trial on indictment, the defendant may challenge all or any of the jurors for cause before they are sworn.<sup>61</sup> If a challenge is successful, the person or persons challenged will not be sworn.

5.66 On a challenge to a juror, it is the trial judge who decides whether the challenge has been made out.<sup>62</sup> For the purposes of our scheme, we believe that any decision made by a judge on a challenge to all or any of the jurors should be treated as a decision made after the jury has been sworn.

5.67 In addition, a judge has the power “to stand a juror by” in limited circumstances.<sup>63</sup> Likewise, should a judge exercise this power, we believe that his or her decision should be treated as a decision made after the jury has been sworn.

5.68 **We provisionally propose that decisions and rulings made by the trial judge in relation to the composition of the jury should be treated as having been made after the jury has been sworn.**

<sup>61</sup> Juries Act 1974, s 12(1)(a).

<sup>62</sup> Above, s 12(1)(b).

<sup>63</sup> *Ford* [1989] QB 868; *Smith* [2003] EWCA Crim 283, [2003] 1 WLR 2229; *Tarrant* [1998] Criminal Law Review 342.

### **Decisions and rulings made prior to the jury being sworn**

5.69 A difficulty lies in the uncertainty regarding the extent to which decisions and rulings made at preparatory hearings before the jury is sworn are already amenable to challenge under the existing law. This difficulty is unlikely to be resolved until the Court of Appeal has the opportunity to apply the decision of the House of Lords in *H*.<sup>64</sup> In the meantime, the most that can be said with confidence is that:

- (1) both the prosecution and defence can appeal against some decisions and rulings made as part of preparatory hearings;
- (2) the prosecution, but not the defence, can appeal against 'terminating' rulings, whether or not made at a preparatory hearing, made before the jury is sworn; and
- (3) if and when section 62 of the Criminal Justice Act 2003 is implemented, the prosecution will be able to appeal against an 'evidentiary' ruling, made before the jury is sworn if the ruling significantly weakens the prosecution case. The prosecution will be able to do so irrespective of whether the ruling was made at a preparatory hearing.

### ***Prosecution appeals***

5.70 We do not believe that the prosecution should be able to use the new statutory appeal in order to challenge decisions and rulings made prior to the jury being sworn. Our reasons are the same as those we set out in relation to decisions and rulings made after the jury has been sworn and before the trial is concluded.<sup>65</sup>

### ***Appeals by defendants and third parties***

5.71 As with decisions and rulings made after the jury has been sworn, many decisions and rulings made before the jury is sworn and which are adverse to the defendant, are capable of being remedied by an appeal against conviction. It might be thought, therefore, that our proposals would be identical to those for decisions and rulings made after the jury has been sworn.

5.72 However, this would underestimate the importance that we believe should attach depending on whether a judicial decision or ruling is made before or after the jury is sworn. In our view, the *starting point* should be the same irrespective of whether a decision or ruling is made before or after the jury is sworn, namely that the ruling should not be amenable to challenge by virtue of the new statutory appeal. However, in the case of decisions and rulings made before the jury is sworn, there is room for more flexible and nuanced exceptions to the starting point.

<sup>64</sup> [2007] UKHL 7, [2007] 2 Cr App R 6. See the discussion in Part 2, paras 2.70 to 2.89 above.

<sup>65</sup> See para 5.42 above.

#### THE SIGNIFICANCE OF THE JURY BEING SWORN

- 5.73 The swearing in of the jury is a significant event in any criminal trial. It marks the point at which the trial is ready to start in the sense of the evidence relating to the case being put in the public domain. To coincide with the jury being sworn, witnesses will have been warned to attend court and the defendant, unless he or she absconds, will be present in court. From this point on, the majority of any appeals against interlocutory decisions will, if permitted, necessarily interrupt and delay the giving of and reception of evidence. As we said, this can affect the ability of the jury to follow the evidence and the issues.
- 5.74 The same is not true of interlocutory appeals that take place before the jury is sworn. By definition, since the jury has not been sworn, such interlocutory appeals do not impact on the jury's ability to follow the case. Rather, interlocutory appeals which take place before the jury is sworn may delay the time when it comes for the jury to start hearing the evidence but they do not interrupt the giving and reception of evidence.
- 5.75 Further, interlocutory appeals in respect of decisions and rulings made before the jury is sworn will not necessarily delay the giving and reception of evidence. The time for swearing in a jury in relation to a particular trial depends on a number of factors. These will include whether the case is ready for trial but also factors such as the availability of witnesses, the availability of a court room and the availability of a particular judge. The result is that important decisions and rulings can be made long before the time comes for the jury to be sworn. In such cases, permitting an interlocutory appeal against the ruling may not give rise to any delay.

#### AFFORDING DUE WEIGHT TO THE 'WASTE AVOIDANCE' PRINCIPLE

- 5.76 There will be cases, however, where permitting an interlocutory appeal against a decision or ruling made before the jury is sworn will significantly delay the time when it comes for the jury to be sworn. In 1987 and 1996 Parliament enacted legislation which showed that it was prepared to tolerate such delay in cases which were of such complexity, seriousness or length that substantial benefits for specified purposes would be likely to result from holding a preparatory hearing.<sup>66</sup> As we indicated above, in such cases Parliament acknowledged that the 'minimum delay' principle should be qualified by the 'waste avoidance' principle. It recognised that delay resulting from an interlocutory appeal could be advantageous in the long-term. A transfer of the High Court's jurisdiction to the Court of Appeal provides an opportunity for affording greater scope to the 'waste avoidance' principle in cases where judicial decisions and rulings are made prior to the jury being sworn but are not made as part of a preparatory hearing.

<sup>66</sup> Significantly, the 'specified purposes' are jury orientated.

- 5.77 Affording due weight to the ‘waste avoidance’ principle does not mean that defendants should be able as a matter of course to use the new statutory appeal to challenge decisions and rulings made before the jury is sworn. However a blanket ban merely because there is another adequate means of challenging a decision or ruling, while justified in the case of rulings made after the jury has been sworn, is counterproductive in the case of rulings made before the jury has been sworn.
- 5.78 In *Bava*,<sup>67</sup> the defendant was charged with conspiracy to defraud and to facilitate illegal immigration in to the UK, along with 19 other defendants. This followed an operation against what was said to be one of the largest networks of illegal immigration, fraud and forgery of passports in the UK. The defendant had the benefit of a Representation Order. However, he said that his relationship with his solicitors had broken down. Leicester Crown Court refused either to transfer the Representation Order or, following its voluntary revocation by the claimant, to grant a fresh Representation Order.
- 5.79 An appeal to the High Court against the refusal was not possible. The judge’s decisions were not made as part of a preparatory hearing.<sup>68</sup> An application for judicial review of this decision was abandoned. That was understandable. In other cases, it has been held that the refusal of a judge to grant legal aid,<sup>69</sup> and the revocation by the judge of a legal aid certificate,<sup>70</sup> are both matters relating to trial on indictment. So, the likelihood is that the decision of Leicester Crown Court would also have been found to relate to trial on indictment and not to be amenable to review.
- 5.80 We make no criticism of the merits of the judge’s decision on the facts. The issue we wish to highlight is a broader one. The judge’s decision meant that at his trial the defendant would not be legally represented. If convicted, he could appeal against conviction on the basis that his trial was unfair and the conviction unsafe because he lacked legal representation. In such a case, we believe that the possibility of challenging the judge’s decisions should not be excluded merely because the defendant can appeal against conviction.

<sup>67</sup> Leicester Crown Court, 6 September 2006 (Reference 20067111), before HH Judge Pert QC, unreported.

<sup>68</sup> Following the decision of the House of Lords in *H* [2007] UKHL 7, [2007] 2 WLR 364, decisions in relation to Representation Orders are unlikely to be held to be decisions which determine ‘a question of law relating to the case’. In any event, decisions relating to Representation Orders are as likely to be made in cases that do not qualify for a preparatory hearing.

<sup>69</sup> *R v Chichester Crown Court, ex p Abodunrin* (1984) 79 Cr App R 293.

<sup>70</sup> *R v Isleworth Crown Court, ex p Willington* [1993] 1 WLR 713.

5.81 In this sort of case, there should be the opportunity to balance the arguments for and against allowing an interlocutory appeal. On the one hand, it should be permissible to take into account whether, and to what extent, an interlocutory appeal would delay the start of the trial before the jury. It would also be legitimate to consider any material that tended to suggest that the defendant was seeking to delay the start of the trial. On the other hand, it should also be permissible to take account of not only the fact that, in the event of an appeal against conviction being successful, a retrial might be ordered but also whether there is a real possibility that the orderly and efficient conduct of the trial itself would be threatened, thereby elongating the length of the trial and possibly prejudicing the interests of all concerned. Taking account of all the factors, an interlocutory challenge should lie if the potential advantages of permitting the decision to be tested prior to a jury being sworn are such as to justify the bringing of an appeal forthwith.

5.82 Following the decision in *H*,<sup>71</sup> it may be that a refusal to stay proceedings can be appealed forthwith to the Court of Appeal if made as part of a preparatory hearing. We believe that a refusal to stay proceedings should in some circumstances be amenable to appeal even if not made as part of a preparatory hearing. A refusal to permit an interlocutory challenge, when the judge's decision to refuse the application was unreasonable, risks the later quashing of the conviction on appeal. The quashing of a conviction means that the costs of holding the trial, which may be very substantial indeed, will have been wasted, along with the time of all involved. Further, the defendant and witnesses will needlessly have been subjected to the considerable rigours of a criminal trial, whilst the expectations of the victim(s), or their families, following the conviction, will not be met. This *may* mean that the 'waste avoidance' principle is breached by not allowing an interlocutory appeal. Again, the question is: are the potential advantages of permitting the decision to be tested prior to a jury being sworn such as to justify permitting an appeal forthwith?

#### CONCERN REGARDING INCONSISTENT DECISIONS

5.83 We acknowledge that there is the potential for inconsistent decisions on whether the potential advantages are such as to justify the bringing of an appeal forthwith. Further, there would be no opportunity for the appellate courts to provide guidance because the decision of the trial judge on whether or not to grant leave would be final. Against this, we believe that the risk of inconsistent decisions should not be exaggerated. Each case will depend on its particular circumstances and the judge will be ideally placed to identify and weigh the different factors.

#### CONCERN REGARDING DELAY AND SATELLITE LITIGATION

5.84 There will, of course, always be a concern that to permit interlocutory challenges to judicial rulings such as a refusal to stay proceedings on grounds of abuse of process may lead to the inexorable proliferation of such challenges. However, a number of factors should allay such fears.

<sup>71</sup> [2007] UKHL 7, [2007] 2 Cr App R 6.

- 5.85 First, the new statutory appeal that we are proposing is not an appeal on the merits. For the appeal to succeed the decision or ruling must have been wrong in law, involved a serious procedural or other irregularity or been one that no competent and reasonable tribunal could properly have made. In this regard, it will be recalled that the Divisional Court has said, in the context of an application for judicial review of a decision to refuse bail, that, “only in a rare case should the High Court interfere with the decisions of experienced Crown Court judges”.<sup>72</sup>
- 5.86 Secondly, the new statutory appeal would require the leave of the Crown Court. Further, not only would the leave of the Crown Court be required, the decision whether or not to grant leave would be final. As with decisions and rulings made after the jury has been sworn, it would not be open to a defendant to renew an application for leave before the Court of Appeal because, again, it would lead to the delay that our proposals are designed to prevent.<sup>73</sup>
- 5.87 Thirdly, in cases where the defendant has an adequate alternative remedy, he or she should only be able to resort to the new statutory interlocutory appeal if the ‘waste avoidance’ principle dictates that such an appeal is the right course. A robust balancing of the ‘waste avoidance’ and the ‘minimal delay’ principles should prevent inordinate amounts of satellite litigation.
- 5.88 **We provisionally propose that:**
- (1) a defendant or directly affected third party,**
  - (2) subject to obtaining the leave of the Crown Court,**
  - (3) may appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling (other than one against which an appeal lies by virtue of any other enactment)<sup>74</sup> made before the jury has been sworn,**
  - (4) on the grounds that it is:**
    - (a) wrong in law;**
    - (b) involves a serious procedural or other irregularity; or**
    - (c) one that no competent and reasonable tribunal could properly have made,**

<sup>72</sup> *R (AW) v Kingston upon Thames Crown Court* [2005] EWHC 703 (Admin). The case concerned a judge’s decision about bail, but this comment seems to us to be of general application.

<sup>73</sup> See paras 5.52 to 5.53 above.

<sup>74</sup> This would include rulings made at preparatory hearings. Appeals against such rulings would continue to be governed by the relevant provisions of the Criminal Justice Act 1987 and the Criminal Procedure and Investigations Act 1996.

(5) if:

- (a) unless he or she is able to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; or
- (b) he or she, even if unable to appeal forthwith, would have an adequate remedy in respect of the determination, judgment, order or ruling but the potential advantages of permitting an appeal forthwith are such as to make it the right course.

5.89 The above proposal, when taken together with those at paragraph 5.40 and paragraph 5.63, would cover the whole of the period from when a case is sent, committed or transferred to the Crown Court to when it has been disposed of by the Crown Court. In the next section, we set out alternative proposals to those in paragraph 5.63 and 5.88 which would, if taken with the proposal in paragraph 5.40, would cover the same period.

**An alternative ‘cut-off’ point: the day that the trial proper is listed to start**

5.90 We recognise that there may be a difficulty with selecting the point where the jury is sworn as the ‘cut-off’ point between two different tests. Under the proposals in paragraphs 5.63 and 5.88, a more stringent test comes into play once the jury is sworn and, if the parties are mindful of that fact, there may be what might be thought to be unwelcome consequences.

5.91 Further, we acknowledge that it might be thought that the scheme we have set out above is based on the premise that a failure to start the criminal trial proper is less important than an interruption during the trial. We acknowledge that there is no guarantee that merely because the trial proper is listed to start on a particular day and that witnesses have been warned to attend on that day, the first thing that will occur on that day is the swearing in of the jury. Rather, prior to the swearing of jurors, either the prosecution or the defence may seek and obtain rulings from the trial judge. Under the scheme that we have proposed, this opens up the prospect of the judge being asked to and granting leave to appeal forthwith against the ruling on the grounds that the potential advantages of permitting an appeal forthwith make it the right course.

5.92 This does cause us some concern. The effectiveness of the criminal justice system depends to a large part on the willingness of witnesses to attend court and give evidence. Witnesses who attend court do so in the expectation that they will at least start to give their evidence on the day that they have been asked to attend. Nothing is more frustrating for witnesses than being informed that a trial will not be proceeding and that they can expect to be asked to return to court on a later date to give their evidence. If the trial proper does not start on the appointed day, this means that the whole process will have to be re-run at a later date, with witnesses who may have been reluctant but were prepared to appear, now more aggrieved, apprehensive or reluctant.

- 5.93 In addition, trials are often also scheduled to accommodate the availability of expert witnesses and if the start of the trial (in the sense of evidence being given) is postponed, not only will the expert have turned up needlessly but a new date will have to be found that fits the availability of the expert and other witnesses. If witnesses get to know that the trial proper might not start on the appointed day, that will be a further incentive for the reluctant witness to avoid attendance.
- 5.94 In cases tried on indictment, our understanding is that it is not uncommon for parties to make applications for legal rulings on the very day that the trial proper is expected to start and in advance of the jury being sworn. Our understanding is that substantial issues that should be dealt with at pre-trial hearings are not always dealt with<sup>75</sup> or, if they are, there is nothing to prevent a party seeking a new ruling from the trial judge. It might be said that the scheme that we have set out above would, if implemented, further encourage parties to do so because under that scheme there is more scope for challenging decisions and rulings made before the jury is sworn.
- 5.95 We do not doubt that a judge who, prior to the jury being sworn, made a ruling or decision which was adverse to a defendant (or third party), would, in deciding whether or not to grant leave to appeal forthwith, take into account the fact that witnesses were in attendance and expecting to give evidence. If the judge refused leave to appeal forthwith, the start of the trial proper would not be delayed because under our proposals, the defendant or third party would not be able to renew the application to the Court of Appeal. However, there would remain the possibility of the judge granting leave despite the decision or ruling being made on the day when the trial proper was expected to start.
- 5.96 Accordingly, there is a need to consider whether there is an alternative option to the jury being sworn for distinguishing between decisions and rulings to which the new statutory appeal would apply. One option would be to focus instead on the day that the trial proper is listed to start. If this option were adopted, the distinction would be between decisions and rulings made on or after day on which the trial proper was listed to start, on the one hand, and those made before the day the trial proper was listed to start, on the other hand. The former would be subject to the more stringent regime that we proposed<sup>76</sup> while the latter would be subject to the 'softer' regime.<sup>77</sup> One advantage might be that this would enhance the role of pre-trial hearings. Another would be that the parties would be encouraged not to wait until the start of the trial proper to seek pre-trial rulings.

<sup>75</sup> In part, this may be because counsel who attend the pre-trial hearings may not be fully versed in the case and are apprehensive about doing anything that may prejudice counsel who will conduct the actual trial.

<sup>76</sup> See para 5.63 above.

<sup>77</sup> See para 5.88 above.

- 5.97 However, this option is not free from difficulty. First, an application, although made prior to the day that the trial proper was listed to start, might nevertheless be made after witnesses had been warned to attend court. If the judge granted leave to appeal against his or her ruling on the application, the problems already referred to would remain.<sup>78</sup> That said, in some respects, they would exist in a less attenuated form. It is better for witnesses to know in advance that a trial has been postponed rather being told on the day that the trial proper was due to start.
- 5.98 Secondly, we are aware of the common practice by which some trials are not listed to start on a fixed date but are in a 'warned' list. A scheme whereby the date that the trial proper is listed to start is determinative of whether a more or less stringent appeal regime applies may be capable of operating satisfactorily where there is a fixed date for the start of the trial. We would welcome consultees' views as to whether it is capable of operating satisfactorily where a trial is in the 'warned' list.

### ***Conclusion***

- 5.99 At paragraph 5.40 we set out a provisional proposal relating to appeal against a decision or ruling made after the jury has been discharged. At paragraph 5.63 we set out a provisional proposal relating to appeal against a decision or ruling made after the jury has been sworn but before it has been discharged, for which we propose a more tightly-drawn regime. In paragraphs 5.65 to 5.87 we considered what the position should be as regards appealing against decisions and rulings made before the jury is sworn and we set out our provisional proposal at paragraph 5.88. It provides for a more generous regime. For ease of exposition, we set out here two alternative proposals to those at paragraphs 5.63 and 5.88 respectively.

### ***Alternative Provisional Proposals***

- 5.100 **As an *alternative* to the provisional proposal in paragraph 5.63, we provisionally propose:**
- (1) a defendant or a directly affected third party,**
  - (2) subject to obtaining the leave of the Crown Court,**
  - (3) may appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling made on or after the day on which the trial proper is listed to start (other than one against which an appeal lies by virtue of any other enactment),**
  - (4) on the grounds that the determination, judgment, order or ruling:**
    - (a) is wrong in law;**
    - (b) involves a serious procedural or other irregularity; or**

<sup>78</sup> See paras 5.91 to 5.92 above.

- (c) is one that no competent and reasonable tribunal could properly have made,
- (5) if:
- (a) unless he or she is able to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; and
  - (b) the determination, judgment, order or ruling is one:
    - (i) which affects the liberty of the defendant or the third party; or
    - (ii) which the defendant or third party seeks to challenge as unlawful by virtue of section 6(1) of the Human Rights Act 1998.

5.101 As part of the alternative option, and as an *alternative* to the provisional proposal in paragraph 5.88 we provisionally propose:

- (1) a defendant or directly affected third party,
  - (2) subject to obtaining the leave of the Crown Court,
  - (3) may appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling (other than one against which an appeal lies by virtue of any other enactment)<sup>79</sup> made before the day on which the trial proper is listed to start,
  - (4) on the grounds that it is:
    - (a) wrong in law;
    - (b) involves a serious procedural or other irregularity; or
    - (c) one that no competent and reasonable tribunal could properly have made,
- (5) if:
- (a) unless he or she is able to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; or

<sup>79</sup> This would include rulings made at preparatory hearings. Appeals against such rulings would continue to be governed by the relevant provisions of the Criminal Justice Act 1987 and the Criminal Procedure and Investigations Act 1996

- (b) he or she, even if unable to appeal forthwith, would have an adequate remedy in respect of the determination, judgment, order or ruling but the potential advantages of permitting an appeal forthwith are such as to make it the right course.<sup>80</sup>

#### **DECISIONS IN RELATION TO CUSTODY TIME LIMITS**

- 5.102 Custody time limits are meant to ensure that defendants do not spend an inordinate length of time in custody before the start of their trial.<sup>81</sup> A custody time limit can, on application by the prosecution, be extended but only if the court is satisfied that the need for the extension is due to some good and sufficient cause and that the prosecution has acted with all due diligence and expedition.<sup>82</sup>
- 5.103 Parliament has specifically provided that decisions made by the Crown Court in relation to custody time limits are not matters that relate to trial on indictment.<sup>83</sup> Accordingly, such decisions are currently amenable to judicial review by the High Court. Under our proposals, the High Court would no longer have jurisdiction to entertain such applications. Instead, the defendant would need to invoke the new statutory appeal procedure.
- 5.104 Since decisions in relation to custody time limits are inevitably made before a jury is sworn, under our proposals which focus on the time when the jury is sworn a defendant would be able to invoke the new statutory appeal because, in the absence of such an appeal, there would be no other adequate remedy.<sup>84</sup>
- 5.105 The situation would be more complicated if the alternative proposals focusing on the day on which the trial proper is listed to start were to be adopted. If, for one reason or another, the jury was not sworn on that day and the start of the trial was postponed, there might be an application for the further extension of the custody time limit. Assuming that it was granted, the decision would have been made on or after the day listed for the trial proper to start. Accordingly, the defendant, if wishing to invoke the statutory appeal procedure, would have to satisfy the more stringent regime that we propose<sup>85</sup> in respect of decisions or rulings made on or after the day on which the trial proper is listed to start. However, we do not envisage that this would be problematic. The decision is one that affects the defendant's liberty and there is no other adequate remedy.<sup>86</sup>

<sup>80</sup> For the avoidance of doubt, the alternative provisional proposals set out in paras 5.100 to 5.101 would operate together with the proposal set out in para 5.40.

<sup>81</sup> In cases tried on indictment, other than those where there is a preparatory hearing, the start of a trial occurs "at the time when a jury is sworn to consider the issue of guilt or fitness to plead or, if the court accepts a plea of guilty before a the time when a jury is sworn, when that plea is accepted": Prosecution of Offences Act 1985, s 22(11A).

<sup>82</sup> Prosecution of Offences Act 1985, s 22(3).

<sup>83</sup> Above, s 22(13).

<sup>84</sup> Unless a writ of habeas corpus was available – see the discussion at paras 5.58 to 5.62 above.

<sup>85</sup> See para 5.100 above.

<sup>86</sup> See n 84 above.

5.106 Accordingly, we believe that our provisional proposals, whether those that focus on the time when the jury is sworn or those that focus on the day that the trial proper is listed to start, would adequately cater for cases where the defendant wishes to challenge a decision to extend a custody time limit. However, apart from cases where the impugned decision or ruling is made after the jury has been discharged, our proposals do not permit the prosecution to invoke the new statutory appeal. Under the current law, the prosecution can seek judicial review of a decision refusing to extend a custody time limit. We believe that it is important that the prosecution retains the ability to do so, in which case special provision would need to be made to that effect.

5.107 **We provisionally propose that special provision should be made to enable the prosecution to invoke the new statutory appeal in order to challenge decisions relating to custody time limits.**

### **TRIALS ON INDICTMENT WITHOUT A JURY**

5.108 In Part 1 we referred to the fact that in certain circumstances a trial on indictment can take place without a jury.<sup>87</sup> We invite consultees' views as to whether special provision should be made for such cases and, if so, what form that provision should take.

### **PROVISIONAL PROPOSALS IN RELATION TO CASES TRIED BY THE CROWN COURT WHEN EXERCISING ITS APPELLATE JURISDICTION<sup>88</sup>**

#### **The current position**

5.109 In 2005 there were 14 appeals by case stated against decisions of the Crown Court made when exercising its appellate jurisdiction, of which 13 were appeals against conviction, sentence or acquittal. In 2005, there were 30 applications for judicial review of decisions made by the Crown Court when exercising its appellate jurisdiction, of which 29 were challenges to conviction and/or sentence.

5.110 In Part 4 we provisionally proposed that a defendant convicted by the Crown Court when exercising its appellate jurisdiction should no longer be able to challenge the conviction and/or sentence by appealing by case stated or by applying for judicial review to the High Court. Instead, we provisionally proposed that the Criminal Appeal Act 1968 should be extended to enable him or her to appeal to the Court of Appeal.

5.111 We also provisionally proposed that, save where the acquittal resulted from a 'terminating' ruling, the prosecution should no longer be able to seek to overturn acquittals by the Crown Court when exercising its appellate jurisdiction. Instead, the Attorney-General should be able to refer a point of law arising from an acquittal by the Crown Court exercising its appellate jurisdiction in the same way that he or she can in the case of acquittals resulting from trials on indictment.

<sup>87</sup> See Part 1 n 12 above.

<sup>88</sup> A Table illustrating the proposals is on p 123.

5.112 In the light of the fact that appeal by case stated and judicial review are used predominantly to challenge convictions, sentences or acquittals, we question the need for the new statutory appeal to apply in relation to decisions and rulings made by the Crown Court when exercising its appellate jurisdiction. It might be otherwise if judicial review were being used frequently to challenge interlocutory decisions of the Crown Court when exercising its appellate jurisdiction. However, just as the use of judicial review as a means challenging interlocutory decisions made by magistrates' courts is discouraged, the same is true in relation to interlocutory decisions made by the Crown Court when exercising its appellate jurisdiction.

**Reasons for discouraging interlocutory appeals against decisions made by the Crown Court when exercising its appellate jurisdiction**

5.113 The reasons for discouraging interlocutory appeals against decisions and rulings of the Crown Court when exercising its appellate jurisdiction are not difficult to identify. First, just as trials in magistrates' courts are expected to proceed swiftly and without interruption, so too are appeals in the Crown Court against decisions of magistrates' courts. It is after all a rehearing of the summary trial before the magistrates' court.

5.114 Secondly, we have previously emphasised the important distinction in trials on indictment between decisions and rulings made after the jury is sworn and those made before the jury is sworn.<sup>89</sup> In trials on indictment the judge and the jury perform distinct roles. Importantly, the judge can perform part of his or her role prior to the jury being sworn. This is not the case where the Crown Court is exercising its appellate jurisdiction.

5.115 When hearing an appeal from a magistrates' court, the Crown Court usually consists of a Crown Court judge and two justices of the peace. Since the appeal is by way of rehearing, between them they perform two roles. The first is the role that a Crown Court judge performs at a trial on indictment and which magistrates perform at a trial in a magistrates' court. In this role, they will make rulings on questions of admissibility of evidence and questions of law. In performing this role, the lay justices must accept the ruling of the Crown Court judge.<sup>90</sup>

5.116 The second role is the role which the jury performs at a trial on indictment and which magistrates perform at a trial in a magistrates' court. In this role they will make findings of fact, apply the relevant law to those findings and return a verdict.

<sup>89</sup> Alternatively, the distinction between decisions and rulings made on or after the day on which the trial proper is listed to begin and those made before that day.

<sup>90</sup> *Orpin* [1975] QB 283.

5.117 Unlike trials on indictment, there are no preparatory hearings and no pre-trial hearings. Although the justices must defer to the judge on issues of law, the judge cannot at a pre-trial hearing make binding rulings on admissibility of evidence and questions of law. Such rulings can only be made when the Court is properly constituted. The listing arrangements, reflecting the involvement of magistrates in such appeals, are necessarily such that the Court will not be properly constituted until the day the trial is due to start. Accordingly, unlike in a trial on indictment, there is no opportunity for important decisions and rulings affecting the conduct of the trial to be made in advance of the finders of fact being assembled to hear the case. Accordingly, rulings and decisions made in advance of verdict are made at a time which, if it were a trial on indictment, would be after the jury had been sworn.<sup>91</sup>

### **Conclusions**

5.118 We said above<sup>92</sup> that we questioned the need for the new statutory appeal to apply in relation to decisions and rulings made by the Crown Court when exercising its appellate jurisdiction. Nevertheless on balance we believe that, to a limited extent, such decisions and rulings ought to be amenable to challenge by invoking the new statutory appeal.

### ***Decisions and orders made by the Crown Court after it has determined an appeal***

5.119 We believe that a determination or order made by the Crown Court after it has returned its verdict in an appeal by way of rehearing should be amenable to appeal under the new statutory appeal that we are recommending. If a defendant acquitted after a trial on indictment should be able to challenge a refusal to make a defendant's costs order, so too should a defendant who is acquitted by the Crown Court on his or her appeal conviction. As with cases tried on indictment, such appeals will not interrupt or delay the proceedings.

5.120 **We provisionally propose that, subject to obtaining leave from the Crown Court, any person directly affected by a determination or order made by the Crown Court after it has determined an appeal by way of rehearing (other than a determination or order which is a 'sentence' for the purposes of the Criminal Appeal Act 1968 or against which an appeal lies to the Court of Appeal by virtue of any other enactment) should be able to appeal to the Court of Appeal on the grounds that the determination or order:**

- (a) is wrong in law;**
- (b) involves a serious procedural or other irregularity; or**
- (c) is one that no competent and reasonable tribunal could properly have made.**

<sup>91</sup> Alternatively, on or after the day on which the trial proper is listed to start.

<sup>92</sup> See para 5.112 above.

***Decisions and rulings made by the Crown Court before it has determined the appeal***

5.121 The arguments for discouraging appeals against interlocutory decisions and rulings made by the Crown Court when exercising its appellate jurisdiction are in our view essentially sound. We have suggested above that any decisions and rulings made in advance of verdict will usually be made at a time when, if it were a trial on indictment, would be after the jury had been sworn. In relation to trials on indictment, we have made a provisional proposal that would enable a defendant or third party in limited circumstances to challenge a decision or ruling made after the jury had been sworn. We believe that our proposals should be consistent and that a defendant or third party in an appeal by way of rehearing should have the same opportunity to challenge a decision or ruling made in the course of the rehearing. However, they should not have the wider rights of challenge that a defendant or third party in a trial on indictment has in relation to decisions and rulings that are made before the jury has been sworn.

5.122 **We provisionally propose that:**

- (1) a defendant or a directly affected third party (but not the prosecution),**
- (2) subject to obtaining the leave of the Crown Court,**
- (3) may appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling made by the Crown Court prior to determining an appeal by way of rehearing,**
- (4) on the grounds that the determination, judgment, order or ruling:**
  - (a) is wrong in law;**
  - (b) involves a serious procedural or other irregularity; or**
  - (c) is one that no competent and reasonable tribunal could properly have made,**
- (5) if:**
  - (a) being unable to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; and**
  - (b) the determination, judgment, order or ruling is one:**
    - (i) which affects the liberty of the defendant or the third party; or**
    - (ii) which the defendant or third party seeks to challenge as unlawful by virtue of section 6(1) of the Human Rights Act 1998.**

## **HOW MUCH WORK WOULD BE GENERATED FOR THE COURT OF APPEAL BY VIRTUE OF THE PROVISIONAL PROPOSALS?**

### **The work generated by the abolition of appeal by case stated**

- 5.123 In 2005 there was one appeal by case stated against a decision of the Crown Court exercising its first instance jurisdiction. In 2006 there were no such appeals. In 2005 and 2006 there were 14 and 15 appeals by case stated respectively against decisions of the Crown Court exercising its appellate jurisdiction. The majority were appeals against conviction and/or sentence but, in addition, there were prosecution appeals against acquittals, including acquittals resulting from 'terminating' rulings.
- 5.124 Under our proposals, the appeals against conviction and/or sentence would lie to the Court of Appeal by virtue of the Criminal Appeal Act 1968 while the appeals against 'terminating' rulings acquittals would be to the Court of Appeal by virtue of section 58 of the Criminal Justice Act 2003. In contrast to appeal by case stated, leave would have to be obtained. The increase in the Court of Appeal's workload would be very small and would be offset by the corresponding reduction in the High Court's workload.

### **The work generated by a new statutory appeal to the Court of Appeal instead of judicial review by the High Court**

- 5.125 In 2005 there were 91 applications to the High Court for judicial review of Crown Court decisions. Of these, only 37 were granted leave and, ultimately, only 18 were successful.<sup>93</sup>
- 5.126 Of the 91 applications, 30 were cases where the Crown Court was acting in its appellate jurisdiction. Of those, only 10 were granted leave, of which only 6 were successful. Out of those 30 applications, 29 constituted appeals against conviction and/or sentence.<sup>94</sup>

<sup>93</sup> See Appendix, Table D.

<sup>94</sup> See Appendix, Table B.

- 5.127 Of the remaining 61 applications, 54 concerned cases tried on indictment.<sup>95</sup> Leave was granted in 27 of these cases and 12 were ultimately successful. Nearly half, 26 of the 54 applications, were applications for judicial review of a decision to refuse bail. Leave was granted in 17 of the 26 cases; of which eight were ultimately successful. Of the remaining 28 applications: 10 concerned appeals against conviction or sentence (only one of which obtained leave); 10 concerned custody time limits (5 of which obtained leave); two concerned fitness to plead proceedings (both of which were granted leave); two concerned procedural irregularities (one of which was granted leave);<sup>96</sup> one concerned an abuse of process claim; one an anonymity order; one concerned listing; and one concerned contempt proceedings. None of the latter four obtained leave.<sup>97</sup>
- 5.128 Based on the 2005 figures, a simple transfer of the High Court's judicial review jurisdiction in relation to criminal proceedings in the Crown Court would increase the Court of Appeal's work by an additional 37 substantive hearings. Following a simple transfer, there would be over 90 extra applications for leave to appeal, about half of which would be appeals against conviction or sentence. To put this into context, there were over seven thousand applications for appeal to the Court of Appeal (Criminal Division) in 2005.<sup>98</sup>
- 5.129 Under our provisional proposals, the increase in the work of the Court of Appeal would be greater than the above would suggest. This is because the new statutory appeal would enable defendants and third parties to appeal to the Court of Appeal against some decisions and rulings made in trials on indictment which are currently immune from challenge.

<sup>95</sup> The remaining seven cases have been excluded from the evaluation. At the time of the collection of the data these cases had not been heard or did not involve a trial on indictment or an appeal from the magistrates' court; for example an application for disclosure under section 9 of the Police and Criminal Evidence Act 1984.

<sup>96</sup> Cases where a procedural irregularity affects the safety of the conviction can be remedied on appeal against conviction.

<sup>97</sup> See Appendix, Table C.

<sup>98</sup> Department for Constitutional Affairs, *Judicial Statistics Annual Report 2005*.

- 5.130 However, there are grounds for believing that any increase in numbers would not make the Court of Appeal's new business unmanageable. First, the circumstances in which the new statutory appeal could be invoked are, in the main, tightly circumscribed. Challenges to decisions and rulings made in trials on indictment after the jury has been sworn<sup>99</sup> and before the jury is discharged are limited to cases where there is no other adequate remedy and, even then, only if a person's liberty or Convention right is in issue. Admittedly, it would be possible to challenge a decision or ruling made before the jury is sworn<sup>100</sup> even if there was another adequate remedy. However, it would only be possible to do so if the potential advantages of permitting the decision or ruling to be tested prior to a jury being sworn<sup>101</sup> are such as to make the bringing of the appeal the right course. If the Crown Court did grant leave, it would be because it was persuaded that there were potentially real advantages in granting leave for an interlocutory appeal.
- 5.131 Secondly if, as we are provisionally proposing, only the Crown Court is able to grant leave to appeal under the new statutory appeal, the Court of Appeal's time would not be taken up by determining applications for leave. The Court of Appeal will only hear appeals which, the Crown Court will already have decided, meet the criteria for leave to appeal.
- 5.132 Thirdly, we believe that the number of cases where a person would seek to appeal against an order or determination made by the Crown Court after verdict is likely to be small. In any event, some such orders can be challenged even under the existing law, albeit, if made following a trial on indictment, the challenge has to be by recourse to the High Court.
- 5.133 Fourthly if, as we are provisionally proposing, appeal by case stated were to be abolished, some of the increase in the work of the Court of Appeal would be offset by a reduction in the work of the High Court.
- 5.134 Finally, although our proposals would permit the Attorney General to refer a point of law to the Court of Appeal following an acquittal in an appeal by way of rehearing, we believe that the number of cases in which he or she would wish to do so would be very small.

#### **AN OVER-ELABORATE SCHEME?**

- 5.135 We acknowledge that the scheme that we are provisionally proposing is elaborate in the sense that there are different proposals depending on what stage in the proceedings an impugned decision or ruling is made. We have adopted this approach because we believe that different considerations apply depending on what stage in the proceedings the decision or ruling is made.

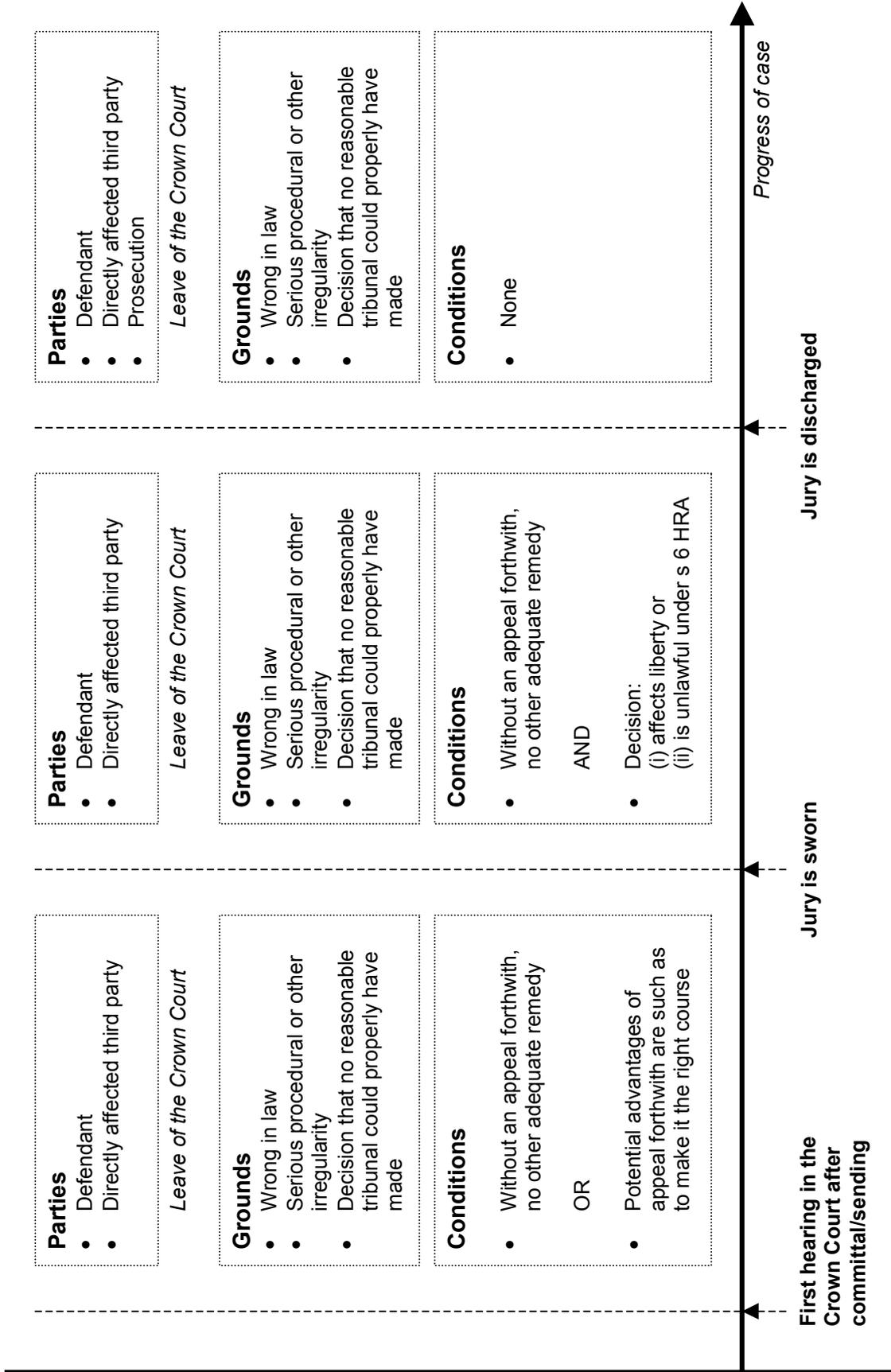
<sup>99</sup> Or, alternatively, on or after the day on which the trial proper is listed to start.

<sup>100</sup> Or, alternatively, before the day on which the trial proper is listed to start.

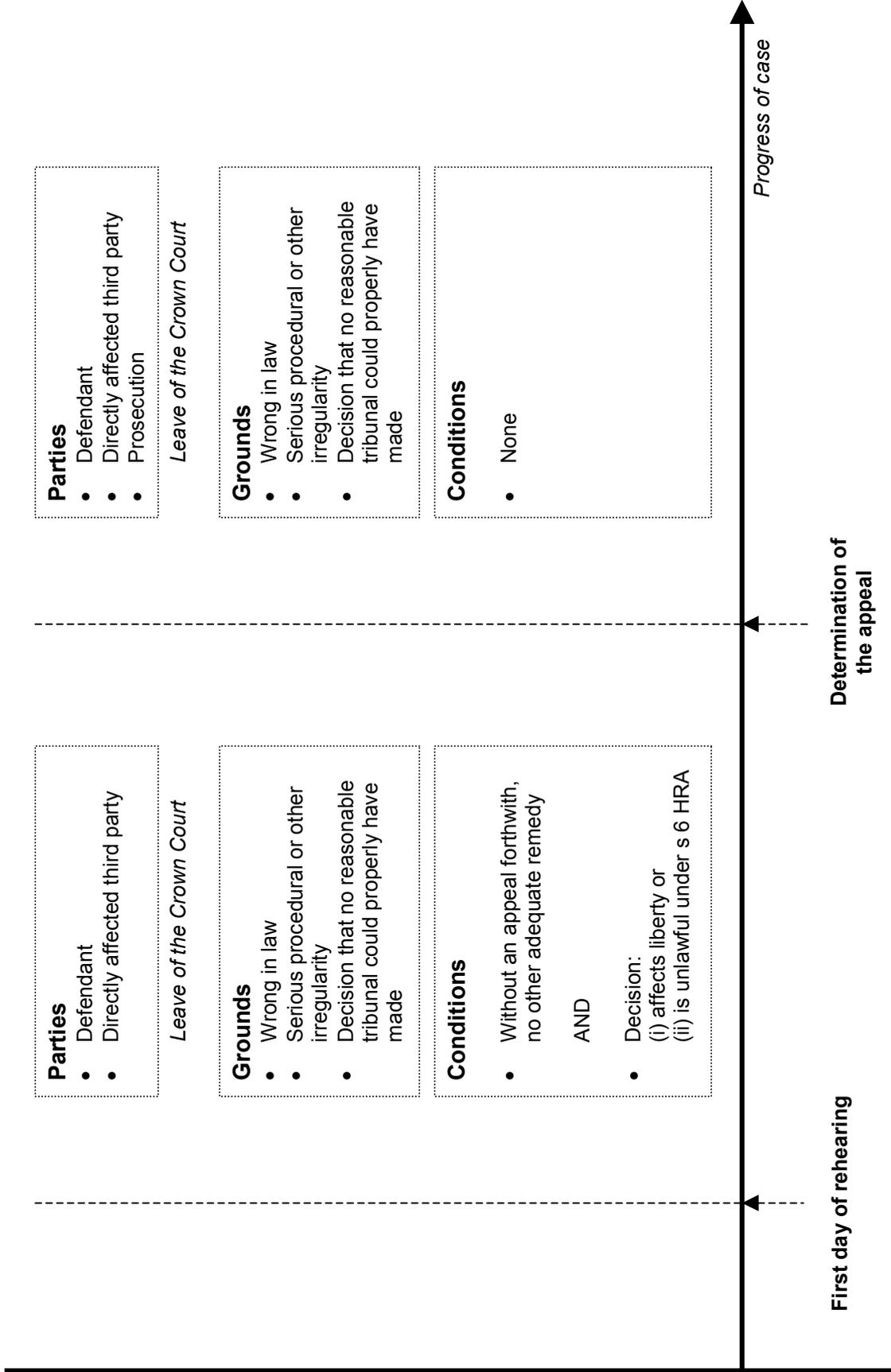
<sup>101</sup> Above.

5.136 Importantly, the different stages are clearly demarcated by hard-edged criteria. There should be no room for argument regarding the stage at which a decision or ruling was made. Thus, there will be no room for doubt as to whether a jury has been discharged. It will also be immediately apparent whether or not the jury has been sworn. We also believe that, under the alternative proposals, there should generally be no doubt as to what day the trial proper is listed to start, although we would like the views of consultees with regard to cases where the trial is in the 'warned' list. We believe that, in practice, clearly demarcated routes will serve the public and practitioners better than an apparently simpler but vaguer scheme.

**AVAILABILITY OF THE PROPOSED STATUTORY APPEAL AT EACH STAGE OF PROCEEDINGS  
IN THE CROWN COURT WHEN EXERCISING ITS FIRST INSTANCE JURISDICTION**



**AVAILABILITY OF THE PROPOSED STATUTORY APPEAL AT EACH STAGE OF PROCEEDINGS  
IN THE CROWN COURT WHEN EXERCISING ITS APPELLATE JURISDICTION**



# **PART 6**

## **MAGISTRATES' COURTS**

### **INTRODUCTION**

- 6.1 In this Part, we are not making any provisional proposals. This is because our terms of reference have asked us simply to consider the implications for magistrates' courts of our proposals for challenging decisions made by the Crown Court. Accordingly, we seek to identify some key issues that would arise in relation to challenging decisions made by magistrates' courts if the High Court ceased to have any jurisdiction in relation to criminal proceedings in the Crown Court.
- 6.2 In Part 2,<sup>1</sup> we explained that under the current law there are three avenues for challenging decisions made by magistrates' courts:
- (a) appeal to the Crown Court against conviction and/or sentence;
  - (b) appeal to the High Court by case stated;
  - (c) application to the High Court for judicial review.

All three avenues are available to convicted defendants but only (b) and (c) are open to acquitted defendants, the prosecution and third parties.

- 6.3 In Part 1,<sup>2</sup> we noted that Lord Justice Auld had been critical of the current system for challenging decisions made by magistrates' courts. In particular, he said that there was no justification for retaining the defendant's right to appeal against conviction and/or sentence to the Crown Court by way of rehearing. Instead, he recommended that there should be a single route of challenge to decisions made by magistrates' courts. This would consist of an appeal to the Crown Court subject to leave being obtained from a Crown Court judge.
- 6.4 However, for the purposes of this paper, we have to assume that for the foreseeable future defendants will continue to have the right to appeal by way of rehearing, irrespective of whether the High Court continues to have any jurisdiction in relation to criminal proceedings in magistrates' courts. We also have to assume that an appeal by way of rehearing would continue to be determined by the Crown Court constituted by a Crown Court judge sitting with justices of the peace.

<sup>1</sup> See Part 2, paras 2.10 to 2.42 above.

<sup>2</sup> See Part 1, paras 1.41 to 1.44 above.

## **THE IMMEDIATE IMPLICATIONS**

### **The anomalous status of the High Court's supervision of criminal proceedings in magistrates' courts**

- 6.5 The most obvious outcome of our provisional proposals would be that criminal proceedings in magistrates' courts and the Court Martial would be the only criminal proceedings that would remain subject to the supervisory jurisdiction of the High Court.<sup>3</sup>
- 6.6 An important part of the policy underlying the transfer to the Court of Appeal of the High Court's jurisdiction over criminal proceedings in the Crown Court is to streamline the system in order to ensure that all challenges to decisions and rulings made by the Crown Court are heard by a single court.
- 6.7 It might be thought to be contrary to that policy if the High Court were to retain jurisdiction in relation to criminal proceedings in magistrates' courts. First, jurisdiction over criminal proceedings in magistrates' courts would continue to be split between the High Court and the Crown Court. This would not be consistent with an overall policy of streamlining the system for challenging decisions made in criminal proceedings. Secondly, the Court of Appeal (Criminal Division) deals exclusively with criminal proceedings, whereas criminal proceedings form only a small part of the High Court's work. If the High Court's jurisdiction over the Crown Court is removed but its jurisdiction over magistrates' courts remains, there will be an even smaller number of criminal cases subject to the jurisdiction of the High Court.

### **Leave to appeal**

- 6.8 The statutory appeal that we have provisionally proposed for challenging decisions made by the Crown Court in criminal proceedings would always require the leave of the Crown Court. By contrast, two of the existing avenues for challenging decisions of magistrates' courts – appeal by way of rehearing and appeal by case stated – do not require the obtaining of leave.

### **Prosecution appeals against acquittals by magistrates' courts**

- 6.9 Under the current law, the prosecution, by appealing by case stated or applying for judicial review to the High Court, can seek to overturn acquittals by the Crown Court exercising its appellate jurisdiction and acquittals by magistrates' courts. By contrast, under the current law, in cases that have been tried on indictment, the prosecution can only seek to overturn an acquittal if the acquittal resulted from a 'terminating' ruling.

<sup>3</sup> On the Court Martial, see Part 7 below.

- 6.10 In Part 4,<sup>4</sup> we provisionally proposed that appeal by case stated and application for judicial review should be abolished in relation to decisions made by the Crown Court when exercising its appellate jurisdiction. We further proposed that the prosecution should not be able to invoke the new statutory appeal in order to overturn an acquittal unless it resulted from a ‘terminating’ ruling.<sup>5</sup> As a result, the prosecution would no longer be able to seek to overturn an acquittal of the Crown Court when exercising its appellate jurisdiction, unless the acquittal resulted from a ‘terminating’ ruling. Instead, the Attorney General should be able to refer a point of law to the Court of Appeal just as he or she can in cases tried on indictment. The latter could rule in favour of the Attorney General but the verdict of the Crown Court would stand.
- 6.11 Accordingly, if our proposals were implemented, acquittals by magistrates’ courts would be the only acquittals that the prosecution could seek to overturn by a successful appeal on a point of law.

### **THE LONGER TERM IMPLICATIONS**

- 6.12 The discussion in this section is based on the premise that the High Court’s jurisdiction in relation to criminal proceedings in magistrates’ courts would no longer be justified if the High Court’s jurisdiction in relation to criminal proceedings in the Crown Court were to end.<sup>6</sup> The question arises: what should replace the High Court’s jurisdiction in relation to criminal proceedings in magistrates’ courts? There are two main options:
- (a) a statutory appeal to the Crown Court; or
  - (b) a statutory appeal to the Court of Appeal.

### **A new statutory appeal to the Crown Court**

- 6.13 It would be possible to provide for a new statutory appeal to the Crown Court modelled on the statutory appeal to the Court of Appeal that we have provisionally proposed in Parts 4 and 5 for challenging decisions made by the Crown Court. If so, an appeal would lie to the Crown Court on the grounds that a decision made by a magistrates’ court was wrong in law, involved an error of law or of principle or was unreasonable. It would be necessary to obtain the leave of a judge of the Crown Court.<sup>7</sup>
- 6.14 Given the limited grounds on which the new statutory appeal could be brought, the Crown Court hearing the appeal could properly be constituted by a judge sitting alone. Depending on the nature and importance of the case, it could be a High Court Judge, Circuit Judge or Recorder.

<sup>4</sup> See Part 4, paras 4.46 and 4.69 above.

<sup>5</sup> See Part 4, paras 4.38 to 4.39 above.

<sup>6</sup> We appreciate that some might dispute the premise.

<sup>7</sup> In contrast to appeal by way of case stated under the current law.

### ***The scope of a new statutory appeal to the Crown Court***

- 6.15 If there were to be a new statutory appeal for challenging decisions and rulings made by magistrates' courts, consideration would have to be given to which decisions and rulings should be capable of being appealed. In particular, should convictions and sentences, on the one hand, and acquittals, on the other hand, continue to be amenable to challenge?

#### CONVICTION AND SENTENCE

- 6.16 Abolishing appeal by case stated and judicial review as means of challenging decisions and rulings made by magistrates' courts and replacing them by a new statutory appeal would provide the opportunity for considering whether there should continue to be overlapping avenues for challenging convictions and sentences. Lord Justice Auld was strongly of the view that there should not be. However we said above that, contrary to the recommendation made by Lord Justice Auld, we have to assume that for the foreseeable future a defendant convicted and sentenced by a magistrates' court will continue to have the right to appeal by way of rehearing against conviction and/or sentence.
- 6.17 The right of appeal by way of rehearing enables a defendant to appeal against conviction and/or sentence irrespective of whether the appeal is on the merits or on a point of law, or both. If he or she is appealing solely on a point of law, although the appeal is by way of rehearing, it does not inevitably follow that there has to be oral evidence. If both parties agree, all the relevant facts can be proved by formal admissions<sup>8</sup> or by written statements.<sup>9</sup> On the other hand, even if all the facts are proved by formal admissions or written statements and the sole issue is one of law, the appeal cannot be heard by a Crown Court judge sitting alone. He or she has to sit with justices of the peace. It might be thought that this is not a good use of judicial resources.
- 6.18 If a defendant were able to invoke the new statutory appeal to challenge a conviction and/or sentence on the grounds that it was wrong in law or in principle or was unreasonable, the position, subject to one qualification, would be no different from what it is now.<sup>10</sup> There would be no streamlining of the system of appeals against convictions and sentences of magistrates' courts.
- 6.19 On the other hand, if the new statutory appeal were to apply to convictions and sentences, it would enable appeals that were grounded solely on points of law to be decided by a court consisting of a Crown Court judge sitting without lay justices. However, this advantage would be diluted if defendants who were challenging convictions on the grounds that they were wrong in law regularly chose to do so by appealing by way of rehearing rather than by the new statutory appeal.

<sup>8</sup> Criminal Justice Act 1967, s 10.

<sup>9</sup> Criminal Justice Act 1967, s 9.

<sup>10</sup> The qualification is that the new statutory appeal would require the leave of a Crown Court judge whereas, under the current law, an appeal by case stated does not require leave.

- 6.20 Would there be a danger that, in cases where a defendant wished to challenge a conviction or sentence on the grounds that it was wrong in law, he or she would choose to do so by appealing by way of rehearing because that avenue of appeal does not require leave? One cannot be certain but we believe that, in deciding which avenue of appeal to adopt, it is likely that a defendant would be more influenced by the findings of fact made by the magistrates than by any concerns he or she had over whether leave would be granted.
- 6.21 Nowadays, magistrates have to give reasons for their decisions and a convicted defendant will know the magistrates' findings of fact. If they are generally favourable to the defendant, we believe that he or she would probably prefer to proceed by way of the new statutory appeal. If the defendant appealed by way of rehearing, there would be a risk that the Crown Court's findings of fact might not be so favourable. By contrast, if the magistrates' findings of fact were generally adverse to the defendant, an appeal by way of rehearing would be more attractive, with the added bonus that leave to appeal would not have to be obtained.
- 6.22 It may well be, therefore, that having the two avenues of appeal operating side by side would not be problematic, particularly if provision was made so that whichever avenue of appeal a convicted defendant chose to proceed under, he or she was precluded from pursuing the other.<sup>11</sup>

#### ACQUITTAL

- 6.23 The issue here is not overlapping avenues of appeal but whether the prosecution should continue to be able to seek to overturn an acquittal by a magistrates' court on the ground that it is wrong in law or is in excess of jurisdiction. This was not an issue which Lord Justice Auld addressed.
- 6.24 In Part 4, we said that we believed that it should no longer be possible for the prosecution to overturn an acquittal by the Crown Court exercising its appellate jurisdiction unless the ruling resulted from a 'terminating' ruling.<sup>12</sup> The prosecution does not often appeal against acquittals by the Crown Court when exercising its appellate jurisdiction, even taking into account acquittals resulting from 'terminating' rulings. No doubt, this reflects the fact that in most cases that turn on points of law, defendants appeal against conviction by way of case stated rather than to the Crown Court by way of rehearing. By contrast, it is not unusual for the prosecution to challenge an acquittal by a magistrates' court on the grounds that it is wrong in law or in excess of jurisdiction.

<sup>11</sup> A similar rule currently operates whereby if a defendant appeals a decision of a magistrates' court in the High Court by case stated, he or she is precluded from appealing by way of rehearing in the Crown Court: Magistrates' Courts Act 1980, s 111(4).

<sup>12</sup> See Part 4, paras 4.32 to 4.39 above.

- 6.25 It might be thought that, at the very least, the prosecution should be able to challenge and overturn an acquittal by a magistrates' court to the same extent that it can do so in respect of an acquittal by the Crown Court when exercising its appellate jurisdiction. On this view, if the prosecution can challenge and overturn an acquittal resulting from a 'terminating' ruling by the Crown Court when exercising its appellate jurisdiction, it should also be able to do so when a magistrates' court makes a 'terminating' ruling that is wrong in law or in principle.
- 6.26 The recent case of *P*<sup>13</sup> is an example of the prosecution appealing by way of case stated against a 'terminating' ruling made by a magistrates' court. The defendant was aged 13. In June 2005 he appeared in the Crown Court. In the course of those proceedings, professional reports agreed that he had an IQ in the lowest centile of the population and did not have the capacity to participate in a criminal trial. The prosecution agreed that he was unfit to plead and the proceedings were stayed. In April, the defendant appeared in a Youth Court charged with various offences. A District Judge stayed the proceedings. The High Court allowed the prosecution appeal holding that the issue of the child's ability to participate effectively had to be decided afresh.<sup>14</sup>
- 6.27 If, as we have provisionally proposed, acquittals by the Crown Court exercising its appellate jurisdiction should not be open to challenge and being overturned if they do not result from a 'terminating' ruling, a key issue will be whether acquittals by magistrates' courts should be treated any differently. If and when this issue is considered, relevant considerations include the increasing number of District Judges (Magistrates' Court) compared to a few years ago together with the fact that even lay justices now undergo a great deal of training and are advised by full-time and legally qualified clerks.

#### DECISIONS AND ORDERS MADE AFTER THE CONCLUSION OF A TRIAL

- 6.28 We have provisionally proposed that any person aggrieved by a determination or order made after the conclusion of a trial on indictment or of an appeal in the Crown Court by way of rehearing should, subject to obtaining leave, be able to appeal to the Court of Appeal on the grounds that the determination or order is wrong in law, involves an error of law or of principle or is unreasonable.
- 6.29 If there were to be a new statutory appeal to the Crown Court in respect of criminal proceedings in magistrates' courts, we see no reason why it should not be possible to make similar provision for an appeal from magistrates' courts to the Crown Court.

<sup>13</sup> [2007] EWHC 946 (Admin), (2007) 171 JP 349.

<sup>14</sup> It is true that the High Court, although allowing the appeal, ordered that the stay should remain in place. It did so because of the length of time that had elapsed since the relevant events occurred and care proceedings had since been commenced.

## INTERLOCUTORY DECISIONS

- 6.30 Interlocutory decisions made by magistrates' courts pose greater difficulty. In Part 2,<sup>15</sup> we said that, although under the current law interlocutory decisions made by magistrates courts were amenable to judicial review, generally the High Court has been reluctant to entertain applications. The exception has been in cases where the impugned decision is whether or not to accept jurisdiction to try or sentence a defendant.<sup>16</sup> We envisage that any new statutory appeal to replace judicial review would have to cater for such cases.
- 6.31 In Part 5, we made provisional proposals which, in relation to interlocutory decisions made by the Crown Court, differ according to whether the impugned decision is one made by the Crown Court when exercising its first instance jurisdiction, on the one hand, or its appellate jurisdiction, on the other hand. In relation to the former, we proposed that the scope for challenging a decision made before the jury is sworn should be wider than that for challenging a decision made after the jury is sworn. By contrast, in relation to the latter, our proposals make no distinction according to whether the decision was made before or after the jury is sworn. This is to reflect the fact that only exceptionally will the Crown Court make decisions or rulings in advance of constituting itself for the hearing of the appeal from the magistrates' court.
- 6.32 It might be thought that magistrates' courts are more akin to the Crown Court exercising its appellate jurisdiction than its first instance jurisdiction. Magistrates trying a case in a magistrates' court perform the same roles as a Crown Court judge and justices of the peace do when hearing an appeal by way of rehearing in the Crown Court. In neither case do they generally make rulings on admissibility of evidence, points of law and applications to stay proceedings in advance of the day when they convene to start hearing the oral evidence in the trial.
- 6.33 However, the same is not true of District Judges (Magistrates' Court). Just as Crown Court judges can and do make decisions and rulings at hearings held before the jury is sworn, so a District Judge (Magistrates' Court) will sometimes hold a pre-trial hearing to determine issues including the admissibility of evidence, points of law and applications to stay proceedings.
- 6.34 Therefore, it is arguable that any new statutory appeal to the Crown Court should be consistent with proposals for challenging interlocutory decisions made by the Crown Court in trials on indictment. If so, as under the current law, it would only be very rarely that an interlocutory decision or ruling made by a magistrates' court after it had begun to hear evidence could be challenged prior to the conclusion of the trial. However, there would be greater scope for challenging interlocutory decisions made prior to the magistrates' court starting to hear the evidence.

<sup>15</sup> See Part 2, para 2.32 above.

<sup>16</sup> See Part 2, paras 2.33 to 2.35 above.

- 6.35 There is one other consideration that is particularly important in the context of trials in magistrates' courts. It is frequently the case that on the day that a trial is listed to start, either the prosecution or the defence seeks an adjournment. If it is the defendant who seeks the adjournment and the application is refused, he or she, if convicted, can appeal by way of rehearing. Alternatively, if the decision to refuse the application was unreasonable, the defendant may apply for judicial review to quash the conviction and, if successful, hope to persuade the High Court not to remit the case for a retrial.
- 6.36 If the prosecution seeks an adjournment and the application is refused, the decision to refuse it may or may not constitute a 'terminating' ruling. If the application is granted, a new trial date will be set. Here the ability to challenge the interlocutory decision is of great importance to the defendant. In *R (Watson) v Dartford Magistrates' Court*,<sup>17</sup> the defendant was charged with a number of road traffic offences. He pleaded not guilty and a trial date was fixed. A few days before the trial date, the prosecution applied to break the fixture because witnesses were unavailable. The application was refused. On the day fixed for trial, the prosecution renewed the application. On this occasion it was granted.
- 6.37 The defendant applied for judicial review. The prosecution resisted the application on the grounds that it was premature. The High Court accepted that as a general rule, it will not entertain an application in respect of an interlocutory decision of a magistrates' court until the proceedings have been concluded. However, the general rule admitted of exceptions. There had been no change of circumstances between the first decision to refuse the application for an adjournment and the second decision granting it. The High Court granted relief by prohibiting the prosecution from adducing evidence of those witnesses whose unavailability was responsible for the application for the adjournment.
- 6.38 We have cited this case because it seems to us to be an example of a case where, as under the current law, a decision made prior to a magistrates' court starting to hear the evidence ought in certain circumstances to be amenable to challenge by way of statutory appeal.

#### ***Appealing from the Crown Court to the Court of Appeal***

- 6.39 If there were to be a new statutory appeal to the Crown Court against decisions made by magistrates' courts, consideration would have to be given to the circumstances in which an appeal should lie from the Crown Court to the Court of Appeal. In this regard, Lord Justice Auld recommended an appeal from the Crown Court to the Court of Appeal subject to obtaining leave of the Court of Appeal which should only be granted if there was an important point of principle or practice or some other compelling reason.

<sup>17</sup> [2005] EWHC 905 (Admin), [2005] *New Law Journal* 827.

### **A new statutory appeal to the Court of Appeal**

- 6.40 This would be the alternative to a statutory appeal to the Crown Court. With one exception, it would mean that challenges to all decisions made in criminal proceedings would be by way of appeal to the Court of Appeal. It might be thought that this would result in a more streamlined system of appeal. However, the exception is a significant one. There would be still be right of appeal against conviction and/or sentence to the Crown Court by way of rehearing.
- 6.41 Further, even if appeal against conviction and/or sentence to the Crown Court were abolished, providing a statutory appeal to the Court of Appeal rather than the Crown Court would require very careful consideration. The Court of Appeal already deals with a very large number of criminal appeals. Further, it is likely that a sizeable proportion of appeals would relate to relatively minor offences. It may be thought that hearing such appeals would not be an efficient use of the valuable time of senior judges.
- 6.42 In addition, a statutory appeal to the Court of Appeal rather than the Crown Court would have implications for the speed with which such appeals were heard. The appeals would have to compete, in terms of priority, with appeals from decisions of the Crown Court. It would be neither surprising nor unreasonable if the latter were afforded priority. By contrast, if the statutory appeal was to the Crown Court, the likelihood is that appeals would be heard more promptly.

### **EXTRADITION PROCEEDINGS**

- 6.43 Extradition is:

... the handing over by one country of a person who is alleged to have committed a crime or who has been convicted of a criminal offence to another country which has jurisdiction to deal with the crime.<sup>18</sup>

Extradition proceedings are classified as a type of summary hearing. They are criminal proceedings for the purposes of legal representation under the Access to Justice Act 1999. The general right to bail under the Bail Act 1976 applies. They are conducted by District Judges (Magistrates' Courts) who have been designated by the Lord Chancellor for the purpose. The judge will normally sit at Horseferry Road Magistrates' Court but can sit elsewhere.<sup>19</sup> Extradition proceedings are governed by the Extradition Act 2003. Appeals under the Extradition Act 2003 numbered 46 in 2005 and 70 in 2006. The issue of where such appeals ought to be heard is therefore an important one.

<sup>18</sup> Archbold, *Magistrates' Courts Criminal Practice* (2007) para 3-1.

<sup>19</sup> Before its closure, Bow Street Magistrates' Court had traditionally been the centre in England and Wales for outward extradition proceedings.

### **Challenging a decision made in extradition proceedings<sup>20</sup>**

- 6.44 An appeal may be made by the state requesting extradition ('the requesting state') against a decision to discharge a person facing extradition and by the person concerned against an order for extradition.<sup>21</sup> In either case the appeal is to the High Court. An appeal may be brought on a question of law or fact.<sup>22</sup> The High Court may allow the appeal or dismiss the appeal.<sup>23</sup> If the High Court allows a person's appeal against an order for his or her extradition, it must order the person's discharge and quash the extradition order.<sup>24</sup> If the High Court allows the requesting state's appeal, it must quash the order discharging the person, remit the case to the District Judge (Magistrates' Court) and direct him or her to proceed as he or she would have been required to do if he or she had decided the relevant question differently at the extradition hearing.<sup>25</sup>
- 6.45 If the High Court's jurisdiction in relation to criminal proceedings in magistrates' courts were to cease, special consideration would need to be given to extradition proceedings. On one view, they are not criminal proceedings in that they are not conducted for the purpose of determining whether a person is guilty of a criminal offence. On this view, it would be possible for the High Court to retain its jurisdiction even if it ceased to have jurisdiction in relation to criminal proceedings in magistrates' courts.
- 6.46 The alternative view is that extradition proceedings are inextricably linked to criminal proceedings that have either commenced in a foreign jurisdiction or will commence if the person is extradited. If this view is preferred, consideration would have to be given as to whether challenges to decisions made in extradition proceedings should lie to the Court of Appeal or to the Crown Court.

### **DECISIONS RELATING TO CRIMINAL MATTERS MADE PRIOR TO OR INSTEAD OF THE INSTITUTION OF CRIMINAL PROCEEDINGS**

- 6.47 It is important to remember that if the High Court's existing jurisdiction in relation to decisions made by magistrates' courts is replaced by a new statutory appeal to either the Crown Court or the Court of Appeal, the High Court would still retain a jurisdiction to review some decisions made in respect of criminal matters. For example, it is not uncommon for the Director of Public Prosecutions or the police to make decisions prior to or instead of criminal proceedings being instituted in magistrates' courts. It would still be possible to apply to the High Court for judicial review of such decisions.

<sup>20</sup> Extradition cases are divided into two categories: Part 1 and Part 2 cases. The difference in procedure is that the Secretary of State for Home Affairs has a role to play in Part 2 cases whereas there is a fast track procedure for Part 1 cases without the need for any intervention by the Secretary of State at any stage. The following account states the position in respect of Part 1 cases. However, as with Part 1 cases, any appeal against a decision in a Part 2 case lies to the High Court.

<sup>21</sup> Extradition Act 2003, ss 26 (1) and 28(1).

<sup>22</sup> Extradition Act 2003, ss 26(3) and 28(4).

<sup>23</sup> Extradition Act 2003, ss 27(1) and 29(1).

<sup>24</sup> Extradition Act 2003, s 27(5).

<sup>25</sup> Extradition Act 2003, s 29(5).

# PART 7

## THE COURT MARTIAL AND RELATED TRIBUNALS

### INTRODUCTION

- 7.1 In this Part, as with magistrates' courts, we are not making any provisional proposals. Instead, we confine ourselves to identifying the issues that would arise were the High Court's jurisdiction in relation to criminal proceedings in the Crown Court to be abolished. We begin by providing a brief account of the structure of criminal proceedings for military personnel and civilians attached to or residing with military personnel contained within the Armed Forces Act 2006 ('the 2006 Act').<sup>1</sup>

### THE STRUCTURE OF MILITARY PROCEEDINGS FOR MILITARY PERSONNEL

#### Key concepts

#### *'A person subject to service law'*

- 7.2 Every member of the regular forces is subject to service law.<sup>2</sup> In addition, some members of the reserve forces are also subject to service law.<sup>3</sup>

#### *'A civilian subject to service discipline'*

- 7.3 A person who is not subject to service law may instead be 'a civilian subject to service discipline'. Such persons include:
- (1) a person in one of Her Majesty's aircraft in flight;
  - (2) a person in one of Her Majesty's ships afloat;
  - (3) a person employed by or in the service of the Government of the United Kingdom:
    - (a) whose sole or main role is to work in support of Her Majesty's forces, and
    - (b) is in a designated area;
  - (4) a person residing with or staying with a person subject to service law in a designated area.<sup>4</sup>

<sup>1</sup> The Armed Forces Act 2006 was given Royal Assent on 8 November 2006. At the time of writing, the provisions of the Act setting out the scheme described below are not yet in force. However, it is anticipated that full implementation of the Act will be complete by the end of 2008. See further: <http://www.mod.uk/DefenceInternet/AboutDefence/CorporatePublications/LegalPublications/ArmedForcesAct2006/>

<sup>2</sup> Armed Forces Act 2006, s 367(1).

<sup>3</sup> Armed Forces Act 2006, s 367(2).

### **'Service offences'**

- 7.4 Section 50(2) of the 2006 Act lists 'service offences'. They include any offence under Part 1 of the 2006 Act. Part 1 contains a number of offences some of which by their nature can only be committed by those subject to service law, for example hazarding of ship,<sup>5</sup> giving false air signals<sup>6</sup> and dangerous flying.<sup>7</sup> For the purposes of this paper, a more important offence is that of 'criminal conduct'.

#### **'CRIMINAL CONDUCT'**

- 7.5 An offence of 'criminal conduct' can be committed by a person subject to service law or a civilian subject to service discipline. A person commits the offence if he or she does any act that:

- (1) is punishable by the law of England and Wales; or
- (2) if done in England and Wales would be so punishable.<sup>8</sup>

Accordingly, the offence of 'criminal conduct' covers all criminal offences under the law of England and Wales ranging from the most serious to the trivial.

### **Jurisdiction to try 'service offences'**

#### **Summary Justice**

##### **SUMMARY HEARING**

- 7.6 A summary hearing is an informal hearing for determining charges of minor offences against those who are subject to service law<sup>9</sup> and who are:

- (1) officers below the rank of commander, lieutenant-colonel or wing commander; or
- (2) persons of or below the rank or rate of warrant officer.

- 7.7 The hearing is presided over by a commanding officer. There are no lawyers involved and the rules of criminal evidence do not apply. A commanding officer has the power to impose a maximum sentence of 28 days' imprisonment or, if he or she has extended powers of punishment, 90 days' imprisonment.<sup>10</sup>

<sup>4</sup> Armed Forces Act 2006, s 370 (1) and sch 15, Part 1. A 'designated area' is an area that is 'outside the British Isles and has been designated by an order made by the Secretary of State': sch 15, para 12.

<sup>5</sup> Armed Forces Act 2006, s 31.

<sup>6</sup> Armed Forces Act 2006, s 32.

<sup>7</sup> Armed Forces Act 2006, s 33.

<sup>8</sup> Armed Forces Act 2006, s 42(1). Part 1 includes inchoate offences of "criminal conduct" – attempting to commit criminal conduct (s 43), conspiring to commit criminal conduct (s 45) and inciting criminal conduct (s 46). There is also secondary liability for aiding, abetting, counselling or procuring criminal conduct (s 47).

<sup>9</sup> See para 7.2 above. Accordingly, a summary hearing cannot hear a charge against 'a civilian subject to service discipline'.

<sup>10</sup> Armed Forces Act 2006, s 133(1).

7.8 Section 53(1) of the 2006 Act lists the 'service offences' that are capable of being dealt with at a summary hearing, one of which is 'criminal conduct'. However, an offence of criminal conduct is only capable of being dealt with at a summary hearing if the corresponding offence under the law of England and Wales is listed in Schedule 1 to the 2006 Act. The offences listed in Schedule 1 include:

- (1) theft;
- (2) taking a motor vehicle without the lawful authority of its owner;
- (3) possession of a controlled drug;
- (4) making off without payment;
- (5) criminal damage;
- (6) common assault;
- (7) battery;
- (8) driving with excess alcohol;
- (9) assault occasioning actual bodily harm;
- (10) possessing an offensive weapon in a public place;
- (11) fraud;
- (12) possession of a bladed article or pointed instrument in a public place and
- (13) attempting to commit any of the above offences which are indictable only or triable either-way offences.<sup>11</sup>

7.9 Before hearing the charge summarily, the commanding officer must give the accused the opportunity of electing trial by the Court Martial.<sup>12</sup> Where a commanding officer considers that his or her powers of punishment would not be adequate, the case can be sent to be tried by the Court Martial.

<sup>11</sup> Armed Forces Act 2006, s 53(3). For the meaning of 'indictable-only' and 'triable either-way' offences, see Part 2, paras 2.3 to 2.4 above.

<sup>12</sup> Armed Forces Act 2006, s 129(1).

#### THE SUMMARY APPEAL COURT

- 7.10 A person in respect of whom a charge has been heard at a summary hearing and a finding that the charge has been proved has been recorded may appeal to the Summary Appeal Court against the finding or against the punishment awarded.<sup>13</sup> The respondent to the appeal is the Director of Service Prosecutions.<sup>14</sup> The Summary Appeal Court may sit in any place, whether within or outside the United Kingdom.<sup>15</sup>
- 7.11 The appeal is heard by way of a rehearing. The rehearing is presided over by a judge advocate and two officers (or an officer and a warrant officer), who can quash the finding or reduce the sentence. An accused is entitled to legal representation, for which legal aid is available. This court operates in the same way as a Crown Court does when exercising its appellate jurisdiction.
- 7.12 The appellant or the respondent may question any decision of the Summary Appeal Court on the ground that it is wrong in law or is in excess of jurisdiction by applying to the Summary Appeal Court to state a case for the opinion of the High Court.<sup>16</sup> As part of its inherent supervisory jurisdiction over inferior courts, the High Court also has jurisdiction to hear applications for judicial review of decisions made by the Summary Appeal Court, including a refusal by the Summary Appeal Court to state a case.

#### THE SERVICE CIVILIAN COURT

- 7.13 Subject to certain exceptions, the Service Civilian Court has jurisdiction to try any 'service offence'<sup>17</sup> committed outside the British Islands by 'a civilian subject to service discipline'.<sup>18</sup> The exceptions include an offence of 'criminal conduct'<sup>19</sup> where the corresponding offence under the law of England and Wales is an indictable-only offence.<sup>20</sup>

<sup>13</sup> Armed Forces Act 2006, s 141.

<sup>14</sup> Armed Forces Act 2006, s 141(4).

<sup>15</sup> Armed Forces Act 2006, s 140(2).

<sup>16</sup> Armed Forces Act 2006, s 149(2).

<sup>17</sup> See paras 7.4 to 7.5 above.

<sup>18</sup> Armed Forces Act 2006, s 51. For the meaning of 'civilian subject to service discipline', see para 7.3 above.

<sup>19</sup> See paras 7.4 to 7.5 above.

<sup>20</sup> For the meaning of 'indictable-only' offence, see Part 2, para 2.3 above.

- 7.14 The Service Civilian Court may sit in any place other than in the British Islands.<sup>21</sup> It consists of a single judge advocate.<sup>22</sup> Before the accused enters a plea, the Court must decide whether it or the Court Martial should try the charge. The court must consider the nature of the case, the seriousness of the offence, whether its powers of punishment would be sufficient, any relevant circumstances and the representations of the accused and the prosecutor.<sup>23</sup> If the Court decides that it should try the charge, it must then afford the accused the opportunity to elect trial by the Court Martial.
- 7.15 If the Service Civilian Court does hear the charge and the accused is convicted, the Court has the power to impose a maximum sentence of 12 months' imprisonment for any one offence and a maximum of 65 weeks' imprisonment where consecutive terms are imposed for two or more offences.<sup>24</sup>
- 7.16 As with defendants convicted by magistrates' courts, a person convicted by the Service Civilian Court may appeal as of right against conviction and/or sentence. The appeal is heard by Court Martial<sup>25</sup> and is by way of a rehearing.<sup>26</sup> Any finding made or sentence passed by the Court Martial replaces the finding or sentence of the Service Civilian Court.
- 7.17 In contrast to defendants convicted by magistrates' courts, appeal by case stated does not lie to challenge a conviction or sentence of the Service Civilian Court. However, judicial review of a decision of a Service Civilian Court is available by virtue of the High Court's inherent supervisory jurisdiction over lower courts. To date, the procedure does not appear to have been exercised.

### **The Court Martial**

- 7.18 The Court Martial has jurisdiction to try any 'service offence'.<sup>27</sup> The jurisdiction of the Court Martial is similar to that of the Crown Court. It hears cases at first instance and, as noted above, it also hears appeals by rehearing from the Service Civilian Court. The Court Martial may sit in any place, whether within or outside the United Kingdom.<sup>28</sup>

<sup>21</sup> Armed Forces Act 2006, s 277(2).

<sup>22</sup> Armed Forces Act 2006, s 278(1).

<sup>23</sup> Armed Forces Act 2006, s 279(3).

<sup>24</sup> Armed Forces Act 2006, s 283.

<sup>25</sup> Armed Forces Act 2006, s 285(1). An appeal against conviction does not lie if the accused pleaded guilty.

<sup>26</sup> Armed Forces Act 2006, s 286(2).

<sup>27</sup> Armed Forces Act 2006, s 50(1). For the meaning of 'service offence', see paras 7.4 to 7.5 above.

<sup>28</sup> Armed Forces Act 2006, s 154(2).

- 7.19 A judge advocate presides over the Court Martial, officiating in the same way as a judge of the Crown Court.<sup>29</sup> The judge advocate will give rulings and directions on questions of law, procedure or practice.<sup>30</sup> The Court Martial also consists of at least three but not more than five 'lay members' who must be officers or warrant officers who are qualified for membership.<sup>31</sup> They fulfil the same role as the members of a jury in a trial on indictment. In addition, each officer has an equal vote to the judge advocate on the sentence. If there is an equality of votes on the sentence, the judge advocate has the casting vote.<sup>32</sup>

### **The Court Martial Appeal Court**

- 7.20 A person convicted by the Court Martial may, with the leave of the Court Martial Appeal Court appeal against his or her conviction and, if he or she is a civilian subject to service discipline may also, with leave, appeal against sentence.<sup>33</sup> The Court Martial Appeal Court is effectively a third limb of the Court of Appeal and has similar powers to the Court of Appeal (Criminal Division).<sup>34</sup> An appeal from the Court Martial Appeal Court lies to the House of Lords only on a point of law of general public importance.<sup>35</sup>

### **Appeal by case stated**

- 7.21 A person may appeal by case stated to the High Court against a decision of the Summary Appeal Court on the grounds that it is wrong in law or in excess of jurisdiction. Appeal by case stated to the High Court is not available to challenge decisions of the Service Civilian Court or the Court Martial.

### **Judicial review**

- 7.22 Until relatively recently, any decision made by the Court Martial or the Service Civilian Court could be judicially reviewed under the High Court's inherent jurisdiction. On 28 February 2002, section 29(3A) of the 1981 Act<sup>36</sup> came into force restricting the jurisdiction of the High Court to entertain such applications for judicial review. As amended by the Armed Forces Act 2006,<sup>37</sup> it now reads:

The High Court shall have no jurisdiction to make mandatory, prohibiting or quashing orders in relation to the jurisdiction of the Court Martial in matters relating to-

- (a) trial by the Court Martial for an offence, or

<sup>29</sup> It follows that the judge advocate is not entitled to vote on the issue of guilt or innocence: Armed Forces Act 2006, s 160(2).

<sup>30</sup> Armed Forces Act 2006, s 159(1).

<sup>31</sup> Armed Forces Act 2006, s 155(1) and (3).

<sup>32</sup> Armed Forces Act 2006, s 160(4).

<sup>33</sup> Courts-Martial (Appeals) Act 1968, s 8(1). This includes an appeal against *sentence* imposed by the Court Martial when hearing an appeal by rehearing from the Service Civilian Court: Armed Forces Act 2006, s 287(4)

<sup>34</sup> An example of a leading case is *Clarkson* [1971] 1 WLR 1402.

<sup>35</sup> Courts-Martial (Appeals) Act 1968, s 39.

<sup>36</sup> Inserted by Armed Forces Act 2001, s 23.

<sup>37</sup> Sch 16, para 93.

(b) appeals from the Service Civilian Court.

- 7.23 The restriction of the High Court's jurisdiction over court-martial proceedings in subsection (3A) is broader than the equivalent restriction in subsection (3) relating to trials on indictment in the Crown Court.<sup>38</sup> Subsection (3A) prevents review of all matters relating to trial by the Court Martial for an *offence*, whereas subsection (3) allows review of Crown Court matters, *except* those relating to trial on indictment. They are not, therefore, equivalent provisions. For the restriction in subsection (3) to be as broad as the restriction in subsection (3A), subsection (3) would have to prevent review of matters relating to *trial by the Crown Court for an offence*.
- 7.24 However, subsection (3A) is not a blanket restriction on 'all decisions of the Court Martial', rather it is a restriction to matters relating to trial by the Court Martial. There is no reason why the boundaries of subsection (3A) should not be tested in the same way as those of subsection (3). However, it appears that since the commencement of subsection (3A), there have been no applications for judicial review of a decision by the Court Martial. This may be accounted for by the fact that there are significantly fewer cases in the Court Martial than in the Crown Court. Further, it would be unlikely that any application for judicial review would be made where a similar application had already been made and failed under subsection (3). It is also conceivable that subsection (3A) is perceived as precluding all applications for judicial review of a decision of the Court Martial.

## **EFFECT OF OUR PROVISIONAL PROPOSALS**

### **Introduction**

- 7.25 It might be thought that if the High Court's jurisdiction over criminal proceedings in the Crown Court were to be transferred to the Court of Appeal, this would have no implications for military criminal proceedings. Appeal by case stated is not available to challenge decisions made by the Court Martial and the Service Civilian Court while the availability of judicial review to challenge decisions made by the Court Martial or the Service Civilian Court has not been tested since the introduction of subsection (3A). However, the fact that there has not hitherto been an application for judicial review of a decision made by the Court Martial or the Service Civilian Court does not preclude one ever being brought. Further, decisions made by the Summary Appeal Court can be challenged by appeal by case stated and judicial review. Therefore, there is still a need to consider which court would be best placed to hear such challenges should the High Court's jurisdiction in relation to criminal proceedings in the Crown Court be abolished.

<sup>38</sup> It should be noted that subsection (3A) excludes matters on appeal from the Service Civilian Court. By contrast, rehearings in the Crown Court on appeal from magistrates' courts are not excluded by subsection (3).

### **Statutory appeals**

- 7.26 A defendant convicted by the Court Martial can appeal against conviction, and in some cases sentence, to the Court Martial Appeal Court.<sup>39</sup> However, there are certain statutory appeals which although available in respect of Crown Court decisions are not available in respect of the same decisions if made by the Court Martial. For example, statutory provisions which enable the prosecution to appeal in respect of 'terminating' rulings and statutory provisions permitting appeals against reporting and public access restrictions do not apply to the Court Martial.<sup>40</sup>
- 7.27 If the High Court's jurisdiction in relation to criminal proceedings in the High Court were to be abolished, consideration would need to be given as to whether the new statutory appeal that we have provisionally proposed should also apply in respect of equivalent decisions made by the Court Martial. Trials of military personnel before the Court Martial are the equivalent of Crown Court trials for non-military personnel. For many offences there is an overlapping and co-terminous jurisdiction between the two courts. There would be a need to consider whether different appellate procedures could be justified. Arguably, if the new statutory appeal were to be restricted to decisions made by the Crown Court, military personnel would be disadvantaged.

### **Appeals from summary hearings**

- 7.28 The Summary Appeal Court hears appeals by way of a rehearing from summary hearings. The Court exercises an equivalent jurisdiction to that of the Crown Court when the latter is exercising its appellate jurisdiction. In Part 6, we said that we had to assume that the right of a defendant convicted by a magistrates' court to appeal to the Crown Court against conviction and/or sentence would continue. If so, it would be consistent for the Summary Appeal Court to continue to hear appeals by rehearing against the findings of guilt in summary hearings. Arguably, there is an additional reason. It is important that an accused retains access to a hearing by an independent and impartial tribunal, as required by article 6(1) of the ECHR. In contrast to trials in magistrates' courts, summary hearings are not independent tribunals. Instead, they are presided over by senior officers.

<sup>39</sup> Courts-Martial (Appeals) Act 1968, s 8(1).

<sup>40</sup> Part 9 of the Criminal Justice Act 2003 and Criminal Justice Act 1988, s 159. The provisions in respect of preparatory hearings under s 35 of the Criminal Procedure and Investigations Act 1996 and s 9 of the Criminal Justice Act 1987 have not been extended to the Court Martial. Therefore, appeals from these hearings equally do not apply.

### **The High Court's jurisdiction over the Summary Appeal Court**

- 7.29 The High Court has jurisdiction over the Summary Appeal Court by way of appeal case stated and judicial review. The provisional proposals in Part 4 of this paper would transfer the High Court's jurisdiction in relation to criminal proceedings in the Crown Court to the Court of Appeal. If those proposals were implemented but no modification were made to the jurisdiction of the High Court over the Summary Appeal Court, the High Court would retain jurisdiction in relation to criminal proceedings in both magistrates' courts and in the Summary Appeal Court. This suggests that consideration would need to be given as to whether the High Court's jurisdiction in relation to proceedings in the Summary Appeal Court should be transferred to either the Court Martial or, alternatively, the Court Martial Appeal Court.

### **The Service Civilian Court**

- 7.30 The Service Civilian Court is effectively the magistrates' court for civilians working for or residing with the armed forces abroad. Under the current law, a person convicted by the Service Civilian Court may appeal by a rehearing to the Court Martial against conviction and/or sentence. Consideration would need to be given as to whether in addition to an appeal by rehearing, there should be a statutory appeal to either the Court Martial or the Court Martial Appeal Court.

## **PART 8**

# **LIST OF PROVISIONAL PROPOSALS**

### **A NEW FRAMEWORK**

- 8.1 We provisionally propose that all appeals against convictions and/or sentences of the Crown Court (whether exercising its first instance jurisdiction, its appellate jurisdiction or its committal for sentence jurisdiction) should lie to the Court of Appeal. The Criminal Appeal Act 1968 should be extended to cover convictions and sentences of the Crown Court exercising its appellate jurisdiction.

**[paragraph 4.20]**

- 8.2 We provisionally propose that all appeals against convictions and/or sentences of the Crown Court when exercising its appellate jurisdiction should require the leave of the Court of Appeal.

**[paragraph 4.26]**

- 8.3 We provisionally propose that section 58 of the Criminal Justice Act 2003 should be extended so as to apply to all ‘terminating’ rulings made by the Crown Court irrespective of whether the ruling was made in relation to an offence being tried on indictment.

**[paragraph 4.31]**

- 8.4 We provisionally propose that section 36 of the Criminal Law Act 1972 should be extended so as to permit the Attorney-General, following an acquittal by the Crown Court when exercising its appellate jurisdiction, to refer to the Court of Appeal a point of law which has arisen in the case.

**[paragraph 4.39]**

- 8.5 We provisionally propose that section 28(1) of the Supreme Court Act 1981 be amended so as to preclude all orders, judgments or other decisions of the Crown Court made in criminal proceedings being challenged by way of appeal by case stated to the High Court.

**[paragraph 4.46]**

- 8.6 We provisionally propose that section 29(3) of the Supreme Court Act 1981, by virtue of which certain determinations, orders, judgments or other decisions of the Crown Court may be challenged by way of application for judicial review to the High Court, should be repealed.

**[paragraph 4.70]**

- 8.7 We provisionally propose that there should be a new statutory appeal to the Court of Appeal to enable the Court of Appeal to entertain challenges to determinations, judgments, orders or rulings of the Crown Court on the grounds that the decision or ruling:

- (1) is wrong in law;

- (2) involves a serious procedural or other irregularity; or
- (3) is one that no competent and reasonable tribunal could properly have made.

[paragraph 4.71]

8.8 We provisionally propose that the new statutory appeal should be subject to leave being granted by the Crown Court.

[paragraph 4.72]

8.9 We provisionally propose that the new statutory appeal should not be capable of being invoked to challenge:

- (1) a conviction, sentence or acquittal arising out of any proceedings in the Crown Court; and
- (2) any other decision or ruling of the Crown Court against which an appeal lies to the Court of Appeal by virtue of any other enactment.

[paragraph 4.73]

8.10 We provisionally propose that the Court of Appeal, when determining a statutory appeal, should not have the power to make prerogative orders but instead should be able to confirm, reverse or vary a decision.

[paragraph 4.74]

8.11 We provisionally propose that the Court of Appeal, when determining a statutory appeal, should have the power to reverse a decision and remit the case to the Crown Court with its opinion for a further decision to be made.

[paragraph 4.75]

## **THE CIRCUMSTANCES IN WHICH RESORT TO THE NEW STATUTORY APPEAL SHOULD BE PERMITTED**

### **Crown Court exercising its first instance jurisdiction**

#### ***Decisions and orders made after the jury has been discharged***

8.12 We provisionally propose that, subject to obtaining leave from the Crown Court, any person directly affected by a determination or order made after the jury has been discharged in a trial on indictment (other than a determination or order which is a 'sentence' for the purposes of the Criminal Appeal Act 1968 or against which an appeal lies to the Court of Appeal by virtue of any other enactment) should be able to appeal to the Court of Appeal on the grounds that the determination or order:

- (1) is wrong in law;
- (2) involves a serious procedural or other irregularity; or

- (3) is one that no competent and reasonable tribunal could properly have made.

[paragraph 5.40]

***Decisions and rulings made after the jury has been sworn and before it has been discharged***

8.13 We provisionally propose that:

- (1) a defendant or a directly affected third party,
- (2) subject to obtaining the leave of the Crown Court,
- (3) may appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling made after the jury has been sworn and before it is discharged (other than one against which an appeal lies by virtue of any other enactment),
- (4) on the grounds that the determination, judgment, order or ruling:
  - (a) is wrong in law;
  - (b) involves a serious procedural or other irregularity; or
  - (c) is one that no competent and reasonable tribunal could properly have made,
- (5) if:
  - (a) being unable to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; and
  - (b) the decision or ruling is one:
    - (i) which affects the liberty of the defendant or the third party; or
    - (ii) which the defendant or third party seeks to challenge as being unlawful by virtue of section 6(1) of the Human Rights Act 1998.

[paragraph 5.63]

8.14 As an alternative, we provisionally propose that:

- (1) a defendant or a directly affected third party,
- (2) subject to obtaining the leave of the Crown Court,
- (3) may appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling made on or after the day on which the trial proper is listed to start (other than one against which an appeal lies by virtue of any other enactment),

- (4) on the grounds that the determination, judgment, order or ruling:
  - (a) is wrong in law;
  - (b) involves a serious procedural or other irregularity; or
  - (c) is one that no competent and reasonable tribunal could properly have made,
- (5) if:
  - (a) unless he or she is able to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; and
  - (b) the determination, judgment, order or ruling is one:
    - (i) which affects the liberty of the defendant or the third party;  
or
    - (ii) which the defendant or third party seeks to challenge as unlawful by virtue of section 6(1) of the Human Rights Act 1998.

**[paragraph 5.100]**

***Decisions and rulings made before the jury is sworn***

8.15 We provisionally propose that:

- (1) a defendant or a directly affected third party,
- (2) subject to obtaining the leave of the Crown Court,
- (3) may appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling (other than one against which an appeal lies by virtue of any other enactment) made before the jury has been sworn,
- (4) on the grounds that the determination, judgment, order or ruling:
  - (a) is wrong in law;
  - (b) involves a serious procedural or other irregularity; or
  - (c) is one that no competent and reasonable tribunal could properly have made,
- (5) if:
  - (a) being unable to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; or

- (b) he or she, even if unable to appeal forthwith, would have an adequate remedy in respect of the determination, judgment, order or ruling but the potential advantages of permitting an appeal forthwith are such as to make it the right course.

[paragraph 5.88]

8.16 As an alternative, we provisionally propose that:

- (1) a defendant or directly affected third party,
- (2) subject to obtaining the leave of the Crown Court,
- (3) may appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling (other than one against which an appeal lies by virtue of any other enactment)<sup>1</sup> made before the day on which the trial proper is listed to start,
- (4) on the grounds that it is:
  - (a) wrong in law;
  - (b) involves a serious procedural or other irregularity; or
  - (c) one that no competent and reasonable tribunal could properly have made,
- (5) if:
  - (a) unless he or she is able to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; or
  - (b) he or she, even if unable to appeal forthwith, would have an adequate remedy in respect of the determination, judgment, order or ruling but the potential advantages of permitting an appeal forthwith are such as to make it the right course.

[paragraph 5.101]

### ***Composition of juries***

8.17 We provisionally propose that decisions and rulings made by the trial judge in relation to the composition of the jury should be treated as having been made after the jury has been sworn.

[paragraph 5.68]

<sup>1</sup> This would include rulings made at preparatory hearings. Appeals against such rulings would continue to be governed by the relevant provisions of the Criminal Justice Act 1987 and the Criminal Procedure and Investigations Act 1996

### ***Custody time limits***

- 8.18 We provisionally propose that special provision should be made to enable the prosecution to invoke the new statutory appeal in order to challenge decisions relating to custody time limits.

[paragraph 5.107]

### **Crown Court exercising its appellate jurisdiction**

#### ***Decisions and orders made by the Crown Court after it has determined an appeal***

- 8.19 We provisionally propose that, subject to obtaining leave from the Crown Court, any person directly affected by a determination or order made by the Crown Court after it has determined an appeal by way of rehearing (other than a determination or order which is a 'sentence' for the purposes of the Criminal Appeal Act 1968 or against which an appeal lies to the Court of Appeal by virtue of any other enactment) should be able to appeal to the Court of Appeal on the grounds that the determination or order:

- (1) is wrong in law;
- (2) involves a serious procedural or other irregularity; or
- (3) is one that no competent and reasonable tribunal could properly have made.

[paragraph 5.120]

#### ***Decisions and rulings made by the Crown Court before it has determined an appeal***

- 8.20 We provisionally propose that:

- (1) a defendant or a directly affected third party,
- (2) prior to the determination of an appeal by way of rehearing in the Crown Court,
- (3) subject to obtaining the leave of the Crown Court,
- (4) may appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling made by the Crown Court prior to determining an appeal by way of rehearing,
- (5) on the grounds that the determination, judgment, order or ruling:
  - (a) is wrong in law;
  - (b) involves a serious procedural or other irregularity; or
  - (c) is one that no competent and reasonable tribunal could properly have made
- (6) if:

- (a) being unable to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; and
- (b) the determination, judgment, order or ruling is one:
  - (i) which affects the liberty of the defendant or the third party; or
  - (ii) which the defendant or third party seeks to challenge as being unlawful by virtue of section 6(1) of the Human Rights Act 1998.

**[paragraph 5.122]**

## **PART 9**

# **LIST OF QUESTIONS FOR CONSULTEES**

### **QUESTIONS ARISING FROM PART 4: THE NEW FRAMEWORK**

- 9.1 Do consultees agree that section 28(1) of the Supreme Court Act 1981 should be amended so as to preclude all orders, judgments or other decisions of the Crown Court made in criminal proceedings being challenged by way of appeal by case stated to the High Court?

**[paragraphs 4.3 to 4.46]**

- 9.2 Do consultees agree that section 29(3) of the Supreme Court Act 1981 by virtue of which certain orders, judgments or other decisions of the Crown Court may be challenged by way of application for judicial review to the High Court should be repealed?

**[paragraphs 4.47 to 4.70]**

- 9.3 Do consultees agree that the Criminal Appeal Act 1968 should be amended so as to enable all appeals against convictions and/or sentences of the Crown Court (whether exercising its first instance jurisdiction, its appellate jurisdiction or its sentencing jurisdiction) to lie to the Court of Appeal?

**[paragraphs 4.7 to 4.20]**

- 9.4 Do consultees agree that extending the Criminal Appeal Act 1968 to enable defendants to challenge convictions and sentences of the Crown Court when exercising its appellate jurisdiction would be an adequate substitute for challenging such convictions and sentences by case stated and judicial review?

**[paragraphs 4.7 to 4.20]**

- 9.5 Do consultees agree that an appeal to the Court of Appeal against conviction or sentence following a rehearing in the Crown Court should require leave (thereby aligning such cases with those tried on indictment)?

**[paragraphs 4.21 to 4.26]**

- 9.6 Do consultees believe that there should be a more stringent leave requirement than that currently contained in the Criminal Appeal Act 1968 in cases where a conviction results from or a sentence is imposed by the Crown Court exercising its appellate jurisdiction?

**[paragraphs 4.24 to 4.27]**

- 9.7 Do consultees agree that section 58 of the Criminal Justice Act 2003 should be extended so as to apply to all 'terminating' rulings made by the Crown Court irrespective of whether the ruling was made in relation to an offence being tried on indictment?

**[paragraphs 4.28 to 4.31]**

9.8 Do consultees agree that section 36 of the Criminal Justice Act 1972 (Attorney-General's reference on a point of law following acquittal) should be extended so as to permit the Attorney-General, following an acquittal by the Crown Court when exercising its appellate jurisdiction, to refer to the Court of Appeal a point of law which has arisen in the case?

**[paragraphs 4.32 to 4.39]**

9.9 Do consultees agree that if the prosecution is unable to overturn an acquittal of the Crown Court when exercising its first instance jurisdiction (other than one resulting from a 'terminating' ruling), it should also be unable to overturn an acquittal of the Crown Court when exercising its appellate jurisdiction?

**[paragraphs 4.32 to 4.39]**

9.10 Do consultees agree that section 36 of the Criminal Justice Act 1988 (Attorney-General's reference of an unduly lenient sentence following a trial on indictment) should **not** be extended to sentences imposed by the Crown Court when exercising its appellate jurisdiction?

**[paragraphs 4.40 to 4.43]**

9.11 Do consultees agree that there should be a new statutory appeal to the Court of Appeal to enable the Court of Appeal to entertain challenges to determinations, judgments, orders or rulings made by the Crown Court on the grounds that the decision or ruling:

- (1) is wrong in law;
- (2) involves a serious procedural or other irregularity; or
- (3) is one that no competent and reasonable tribunal could properly have made?

**[paragraphs 4.55 and 4.57 to 4.59]**

9.12 Do consultees agree that the new statutory appeal should be subject to leave being granted by the Crown Court?

**[paragraph 4.56]**

9.13 Do consultees agree that the new statutory appeal should not be capable of being invoked to challenge any conviction, sentence or acquittal arising out of any proceedings in the Crown Court?

**[paragraph 4.64]**

9.14 Do consultees agree that the new statutory appeal should not be capable of being invoked to challenge any decision or ruling of the Crown Court against which an appeal lies to the Court of Appeal by virtue of any other enactment?

**[paragraph 4.65]**

- 9.15 Do consultees agree that the Court of Appeal, when determining the proposed statutory appeal, should not have the power to make prerogative orders but instead should be able to confirm, reverse or vary a decision?

[paragraph 4.60]

- 9.16 Do consultees agree that the Court of Appeal, when determining the proposed statutory appeal, should have the power to reverse a decision and remit the case to the Crown Court with its opinion for a further decision to be made?

[paragraphs 4.61 to 4.62]

## **QUESTIONS ARISING FROM PART 5: THE CIRCUMSTANCES IN WHICH RESORT TO THE NEW STATUTORY APPEAL SHOULD BE PERMITTED**

### **Crown Court exercising its first instance jurisdiction**

#### ***Decisions and orders made after the jury has been discharged***

- 9.17 Do consultees agree that, subject to obtaining leave from the Crown Court, any person directly affected by a determination or order made after the jury has been discharged in a trial on indictment (other than a determination or order which is a 'sentence' for the purposes of the Criminal Appeal Act 1968 or against which an appeal lies to the Court of Appeal by virtue of any other enactment) should be able to appeal to the Court of Appeal on the grounds that the determination or order:

- (1) is wrong in law;
- (2) involves a serious procedural or other irregularity; or
- (3) is one that no competent and reasonable tribunal could properly have made?

[paragraphs 5.38 to 5.40]

#### ***Decisions and rulings made after the jury has been sworn and before it has been discharged***

- 9.18 Do consultees agree that:
- (1) a defendant or directly affected third party
  - (2) subject to obtaining the leave of the Crown Court,
  - (3) should be able to appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling made after the jury has been sworn and before it has been discharged (other than one against which an appeal lies by virtue of any other enactment),
  - (4) on the grounds that the determination, judgment, order or ruling:
    - (a) is wrong in law;
    - (b) involves a serious procedural or other irregularity; or

- (c) is one which no competent and reasonable tribunal could properly have made,
- (5) if
- (a) being unable to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; and
  - (b) the determination, judgment, order or ruling is one which:
    - (i) affects the liberty of the defendant or third party; or
    - (ii) the defendant or third party seeks to challenge as being unlawful by virtue of section 6(1) of the Human Rights Act 1998.

**[paragraphs 5.43 to 5.63]**

9.19 Alternatively, do consultees agree that:

- (1) a defendant or a directly affected third party,
- (2) subject to obtaining the leave of the Crown Court,
- (3) may appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling made on or after the day on which the trial proper is listed to start and before the jury is discharged (other than one against which an appeal lies by virtue of any other enactment),
- (4) on the grounds that the determination, judgment, order or ruling:
  - (a) is wrong in law;
  - (b) involves a serious procedural or other irregularity; or
  - (c) is one that no competent and reasonable tribunal could properly have made,
- (5) if:
  - (a) unless he or she is able to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; and
  - (b) the determination, judgment, order or ruling is one which:
    - (i) affects the liberty of the defendant or the third party; or
    - (ii) the defendant or third party seeks to challenge as unlawful by virtue of section 6(1) of the Human Rights Act 1998.

**[paragraphs 5.90 to 5.100]**

9.20 Do consultees believe that a defendant or directly affected third party should also be able to appeal forthwith against a determination, judgment, order or ruling made after the jury has been sworn<sup>1</sup> and before it is discharged if:

- (1) the appeal would not 'significantly' interrupt the proceedings before the jury; and/or
- (2) it would be in the 'interests of justice'?

[paragraphs 5.54 to 5.55]

9.21 'Do consultees agree that a defendant or third party has an 'adequate' remedy in respect of a determination, judgment, order or ruling if:

- (1) he or she can resort to a specific statutory appeal in respect of the determination, judgment, order or ruling; or
- (2) no adverse effect:
  - (a) would materialise from the determination, judgment, order or ruling in the event of the defendant being acquitted; and
  - (b) no adverse effect, other than any sentence passed following conviction, would materialise from the determination, judgment, order or ruling if the appeal against conviction was successful?

[paragraphs 5.50 to 5.51]

***Decisions and rulings made before the jury is sworn***

9.22 Do consultees agree that:

- (1) a defendant or a directly affected third party
- (2) subject to obtaining the leave of the Crown Court
- (3) should be able to appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling made before the jury has been sworn (other than one against which an appeal lies by virtue of any other enactment),
- (4) on the grounds that the determination, judgment, order or ruling:
  - (a) is wrong in law;
  - (b) involves a serious procedural or other irregularity; or
  - (c) is one that no competent and reasonable tribunal could properly have made;
- (5) if:

<sup>1</sup> Or alternatively, made on or after the day listed for the trial proper to start and before the jury is discharged.

- (a) being unable to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; or
- (b) he or she, even if unable to appeal forthwith, would have another adequate remedy in respect of the determination, judgment order or ruling but the potential advantages of permitting an appeal forthwith are such as to make it the right course?

**[paragraphs 5.69 to 5.88]**

9.23 Alternatively, do consultees agree that:

- (1) a defendant or directly affected third party,
- (2) subject to obtaining the leave of the Crown Court,
- (3) may appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling (other than one against which an appeal lies by virtue of any other enactment)<sup>2</sup> made before the day on which the trial proper is listed to start,
- (4) on the grounds that it is:
  - (a) wrong in law;
  - (b) involves a serious procedural or other irregularity; or
  - (c) one that no competent and reasonable tribunal could properly have made,
- (5) if:
  - (a) unless he or she is able to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; or
  - (b) he or she, even if unable to appeal forthwith, would have an adequate remedy in respect of the determination, judgment, order or ruling but the potential advantages of permitting an appeal forthwith are such as to make it the right course.

**[paragraphs 5.90 to 5.101]**

***Renewal of application for leave***

9.24 Do consultees agree that in all cases, if the Crown Court refuses an application for leave to appeal, a defendant or third party should not be able to renew the application to the Court of Appeal?

**[paragraphs 5.52 to 5.53]**

<sup>2</sup> This would include rulings made at preparatory hearings. Appeals against such rulings would continue to be governed by the relevant provisions of the Criminal Justice Act 1987 and the Criminal Procedure and Investigations Act 1996

***Prosecution appeals***

- 9.25 Do consultees agree that, apart from decisions relating to custody time limits, the prosecution should not be able to invoke the new statutory procedure in order to challenge any determination, judgment, order or ruling made prior to the jury being discharged?

[paragraphs 5.42 and 5.70]

***Composition of jury***

- 9.26 Do consultees agree that decisions and rulings made by the trial judge in relation to the composition of the jury should be treated as having been made after the jury has been sworn?

[paragraphs 5.65 to 5.68]

***Custody time limits***

- 9.27 Do consultees agree that the prosecution should be able to invoke the new statutory appeal in order to challenge any decision relating to custody time limits?

[paragraphs 5.102 to 5.107]

***Cases tried on indictment without a jury***

- 9.28 Do consultees believe that special provision should be made for cases tried on indictment without a jury. If 'yes', what form should such provision take?

[paragraph 5.108]

**Crown Court exercising its appellate jurisdiction**

***Decisions and orders made by the Crown Court after it has determined an appeal***

- 9.29 Do consultees agree that, subject to obtaining leave from the Crown Court, any person directly affected by a determination or order made by the Crown Court after it has determined an appeal by way of rehearing (other than a determination or order which is a 'sentence' for the purposes of the Criminal Appeal Act 1968 or against which an appeal lies to the Court of Appeal by virtue of any other enactment) should be able to appeal to the Court of Appeal on the grounds that the determination or order:

- (1) is wrong in law;
- (2) involves a serious procedural or other irregularity; or
- (3) is one that no competent and reasonable tribunal could properly have made?

[paragraphs 5.113 to 5.120]

***Decisions and rulings made by the Crown Court before it has determined an appeal***

- 9.30 Do consultees agree that
- (1) a defendant or a directly affected third party
  - (2) subject to obtaining the leave of the Crown Court
  - (3) should be able to appeal forthwith to the Court of Appeal against any determination, judgment, order or ruling made by the Crown Court prior to determining an appeal by way of rehearing
  - (4) on the grounds that the determination, judgment, order or ruling
    - (a) is wrong in law;
    - (b) involves a serious procedural or other irregularity; or
    - (c) is one that no competent and reasonable tribunal could properly have made
  - (5) if:
    - (a) being unable to appeal forthwith, he or she would have no adequate remedy in respect of the determination, judgment, order or ruling; and
    - (b) the determination, judgment, order or ruling is one which:
      - (i) affects the liberty of the defendant or third party; or
      - (ii) the defendant or third party seeks to challenge as being unlawful by virtue of section 6(1) of the Human Rights Act 1998.

**[paragraphs 5.113 to 5.118 and 5.121 to 5.122]**

**QUESTIONS ARISING FROM PARTS 6 AND 7: MAGISTRATES' COURTS AND THE COURT MARTIAL**

- 9.31 We invite the views of consultees on the implications for magistrates' courts and the Court Martial of our proposals. In particular we would welcome the views of consultees if they disagree with the way that we have set out the implications or if they believe that we have overlooked some implications.

# APPENDIX

## APPEALS BY WAY OF CASE STATED AND JUDICIAL REVIEW APPLICATIONS TO THE HIGH COURT FROM THE CROWN COURT IN 2005

**TABLE A**

*Appeals by way of case stated from the Crown Court to the High Court*

Type of appeal	Number of appeals
Appeal against conviction	7
Appeal against sentence by defendant	3
Appeal against terminating ruling by prosecutor	2
Appeal against hospital order (unfit to plead hearing)	1
Appeal against acquittal by prosecutor	1
Appeal concerning a case tried on indictment	1
Total	15

**TABLE B**

*Judicial review applications from rehearings in the Crown Court*

Type of application	Number of applications	Leave not granted	Leave granted	Successful applications
Conviction or sentence	29	20	9	5
Procedural irregularity at sentencing hearing	1	0	1	1
Total	30	20	10	6

**TABLE C*****Judicial review applications from trials on indictment in the Crown Court***

Type of application	Number of applications	Leave not granted	Leave granted	Successful applications
Refusal of bail application	26	9	17	8
Appeal against conviction or sentence	10	8	2	0
Refusal to extend custody time limits	10	5	5	1
Fitness to plead orders/ rulings	2	0	2	2
Procedural irregularities	2	1	1	1
Abuse of process	1	1	0	0
Anonymity order	1	1	0	0
Listing	1	1	0	0
Refusal of pre-trial hearing to dismiss charges	1	1	0	0
Total	54	27	27	12

**TABLE D*****Total judicial review applications from the Crown Court***

Type of application	Number of applications	Leave not granted	Leave granted	Successful applications
Refusal of bail application	26	9	17	8
Appeal against conviction or sentence	39	28	11	5
Refusal to extend custody time limits	10	5	5	1
Fitness to plead orders/ rulings	2	0	2	2
Procedural irregularities	3	1	2	2
Abuse of process	1	1	0	0
Anonymity order	1	1	0	0
Listing	1	1	0	0
Refusal of pre-trial hearing to dismiss charges	1	1	0	0
Total	84*	47	37	18

\* The total judicial review applications from the Crown Court in 2005 were 91. However, we have excluded 7 applications from this analysis as at the time the cases were examined they had either not yet been heard or were not connected with a trial. For example, an application for disclosure under section 9 of the Police and Criminal Evidence Act 1984.