

THE HIGH COURT'S JURISDICTION IN RELATION TO CRIMINAL PROCEEDINGS

SUMMARY OF LAW COMMISSION REPORT LC 324

Background

The usual way for the prosecution or defence to challenge a decision of the Crown Court in a trial on indictment is by appeal to the Criminal Division of the Court of Appeal. There are, however, two less common ways of challenging a decision of the Crown Court: by way of judicial review, and by appeal by way of case stated.

Judicial review and the Crown Court

Judicial review is not a right of appeal and does not involve a rehearing of the merits of the decision being challenged. It is a challenge at common law to the fairness of the way in which the decision was made. A person may not seek judicial review if he or she could pursue a statutory appeal. Anyone seeking judicial review first has to obtain permission from the High Court.

The High Court has power of judicial review over the Crown Court, but it is limited. It does not include "matters relating to trial on indictment". The reason for this limitation is that it is in the interests of justice for trials to proceed without being delayed by appeals and applications to the High Court.

The problem which we address lies in knowing what "matters relating to trial on indictment" means. The lack of clarity has led to uncertainty and needless litigation. There are also some situations in which a party to a trial cannot challenge a ruling but, in the view of the Law Commission, they ought to be able to.

Appeal by way of case stated and the Crown Court

The prosecution or the defence in a criminal case in the Crown Court may ask the Crown Court to state a case for consideration by the High Court where the party claims there has been an error of law. As with challenge by way of judicial review, this is not permitted in "matters relating to trial on indictment". Again, it is not clear from the case law what this limitation means. In addition, the possibility of appealing to the High Court by way of case stated seems an unnecessary complication.

The reference to the Law Commission

The Law Commission was asked to consider the power of judicial review of the High Court over the Crown Court in criminal proceedings, as provided in section 29(3) of the Senior Courts Act 1981, because interpretation of that section had resulted in confusion and anomalies. We were also asked to examine the provision providing for appeal by way of case stated from the Crown Court to the High Court.

The terms of reference envisaged a transfer of the supervisory jurisdiction of the High Court over the Crown Court to the Criminal Division of the Court of Appeal.

In July 2005 we published a scoping paper setting out the preliminary issues.

The proposals in the consultation paper

In October 2007 we published a consultation paper in which we proposed removing appeal from the Crown Court to the High Court by way of case stated. This proposal met with broad agreement.

We also proposed getting rid of the High Court's supervisory power of judicial review over the Crown Court in criminal proceedings, and creating a new statutory appeal from the Crown Court to the Court of Appeal. Consultees thought this proposal had a number of difficulties, and we therefore looked at it again.

Our report

Our report, which is published on 27 July 2010, contains recommendations, and a draft Bill. In brief, we recommend:

- abolishing appeal by case stated from the Crown Court to the High Court in criminal proceedings;
- reforming the law on judicial review of the Crown Court in criminal proceedings so that judicial review of decisions in a trial on indictment is barred from the time the case goes to the Crown Court for trial to the end of the trial, with an exception where the judge refuses bail; and
- two new statutory appeals.

Our general approach

In the report we simplify the variety of appeals which can be pursued from the Crown Court in criminal proceedings by recommending the abolition of appeal by way of case stated.

We also clarify the circumstances in which there can be judicial review of a decision in a trial on indictment. Our position is that justice requires trials to progress without being interrupted or delayed by appeals, but that if the consequences of a decision in the course of the trial are serious and of a kind that cannot be undone, then an immediate right of challenge is justified.

Reform of judicial review

Once the trial has ended, a challenge by way of judicial review will not hold it up, and we therefore recommend that the bar on judicial review for trials on indictment should not apply after the end of the trial. For example, if a defendant is acquitted but the Crown Court judge refuses the defendant an order for costs, that refusal could be the subject of an application for permission for judicial review under the Law Commission recommendations.

One exception to the bar on judicial review before the end of the trial: if bail is refused

Our view is that liberty is an important right, and a refusal of bail during a trial is the kind of decision which has serious consequences which cannot be undone by, for example, an acquittal at the end of the trial. Therefore, in our recommendations for reform of judicial review we make an exception for refusals of bail: it will be possible for a defendant, or a witness, to seek judicial review if the judge refuses bail and the defendant/witness is not able in law to renew the application for bail at the Crown Court. (Under the current law a witness has no right of judicial review in these circumstances, and a defendant only has that right at an early stage of the proceedings or following conviction.)

A new statutory appeal for children and young persons

The law allows a judge to restrict reporting which might lead to identification of a child or young person in a Crown Court trial. If the judge refuses to restrict reporting then under the current law it is doubtful whether there is any way that the child or young person can challenge that refusal.

If a child or young person is identified in reports of the proceedings, there is no way in which that information, once made public, can be retrieved. We consider, therefore, that this is another situation in which the importance of the right justifies a right of appeal, even though that might mean holding up the trial. We recommend a specific right of appeal to the Criminal Division of the Court of Appeal for a child or young person if the judge refuses to make reporting restrictions for that child or young person.

A new statutory appeal where there is an immediate and real risk to life

Rarely, a judge's ruling in a trial on indictment has the potential to involve a real and immediate risk to someone's life. An example would be where a judge rules that a defendant must disclose his or her defence statement to a co-defendant, as a result of which it is clear to the co-defendant that the defendant helped the police, and the co-defendant threatens the defendant's life. Under the current law, there cannot be judicial review of the judge's decision. (There have been cases where defendants have tried to get round this problem by seeking judicial review of the prosecutor's decision to continue with the prosecution.)

Our view is that this is one of the situations where the consequences of the decision could be irreversible and that, therefore, there should be an opportunity to challenge the legality of the decision by way of appeal to the Criminal Division of the Court of Appeal. The person who wants to appeal would have to have made representations to the Crown Court judge about the decision in the first place and would also have to obtain leave to appeal.

For more information – contact Christina Hughes, criminal law team, 020 3334 0278