

APPEALING TO THE COURT OF APPEAL CRIMINAL DIVISION: TIPS FOR PRACTITIONERS

5KBW Seminar 22nd May 2024

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Registrar of Criminal Appeals



Responsibilities of the Registrar (s.21 CAA1968)

- To take all necessary steps for obtaining a hearing of any appeal of which notice is given to him/her
- To obtain and lay before the Court of Appeal in proper form all documents exhibits and other things which appear necessary for the proper determination of the appeal or application

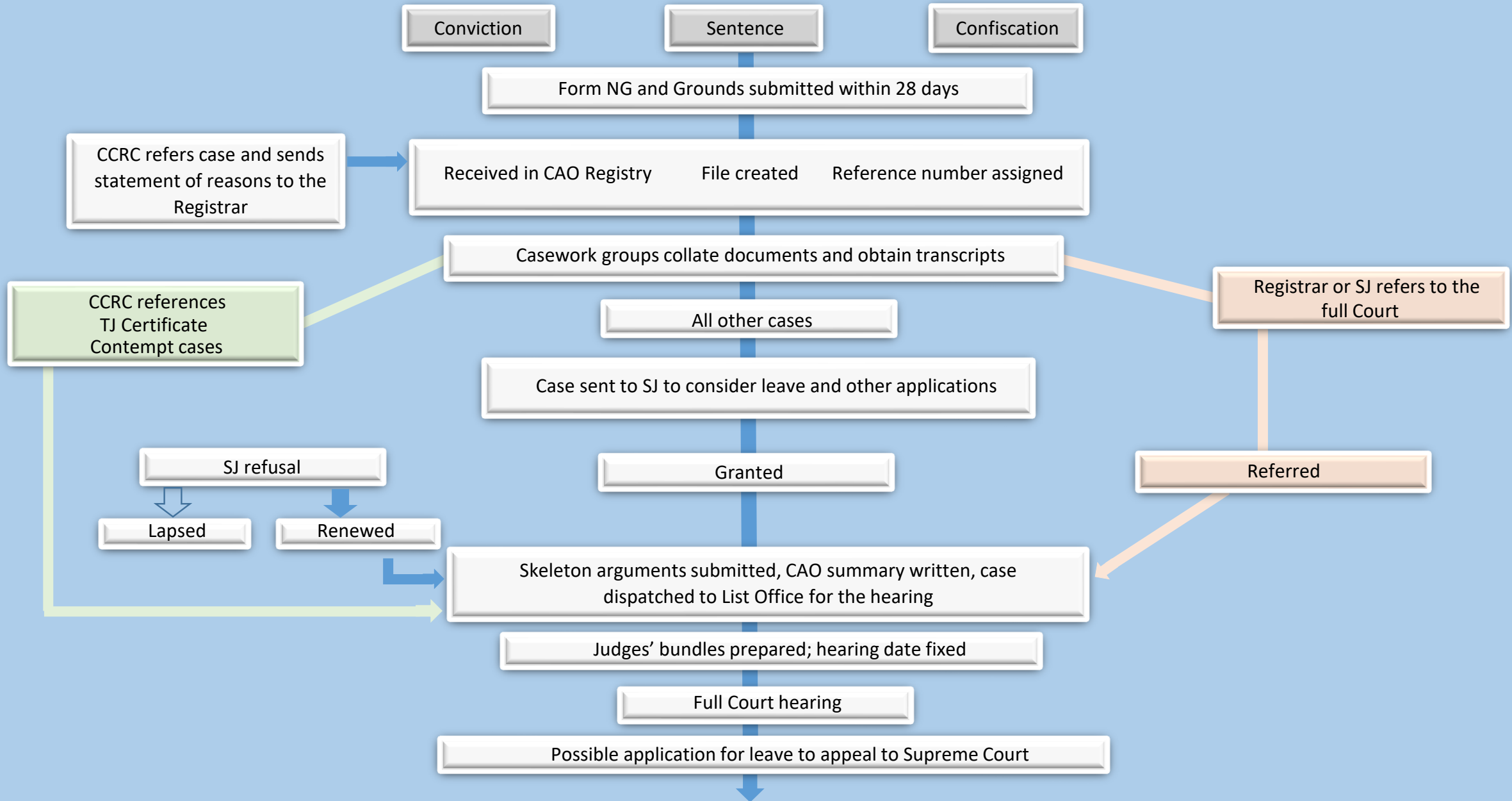
Registrar's Powers under statute

- S.20 CAA 1968 To refer a groundless application to the full court for summary determination
- S.31A CAA 1968 (powers of court under Part 1)
 - (a) To extend the time within which notice of appeal or of application for leave to appeal may be given.
 - (b) To order a witness to attend for examination.
 - (c) To vary the conditions of bail granted to an appellant by the Court of Appeal or the Crown Court (but only where he is satisfied the respondent does not object: s.31A(3)) and
 - (d) To make orders under s.23(1)(a) for the production of any document or thing
- S.31B CAA 1968 (procedural directions)
- Listing directions including determining applications to vacate
- To grant legal aid (ss.16 & 19 LASPO 2012; Reg. 18 of SI 2013/614)
- To give live link directions under s.51 CDA 1998

Powers and duties under Criminal Procedure Rules

- Appeal to the | Court of Appeal General Rules (CrimPR Part 36)
 - Duty of active case management as under Part 3: CrimPR 36.2
 - Power to vary requirements: CrimPR 36.3
- Specific for various types of appeal/application (CrimPR Parts 37-43)
 - Part 37: Appeal to the Court of Appeal against Ruling at Preparatory Hearing
 - Part 38: Appeal to the Court of Appeal against Ruling Adverse to Prosecution
 - Part 39: Appeal to the Court of Appeal about Conviction or Sentence
 - Part 40: Appeal to the Court of Appeal about Reporting Restrictions or Public Access Restriction
 - Part 41: Reference to the Court of Appeal of Point of Law or Unduly Lenient Sentence
 - Part 42: Appeal to the Court of Appeal in Confiscation and Related Proceedings
 - Part 43: Appeal or Reference to the Supreme Court

Case progression flowchart



The Criminal Appeal Office

➤ Legal and administrative staff

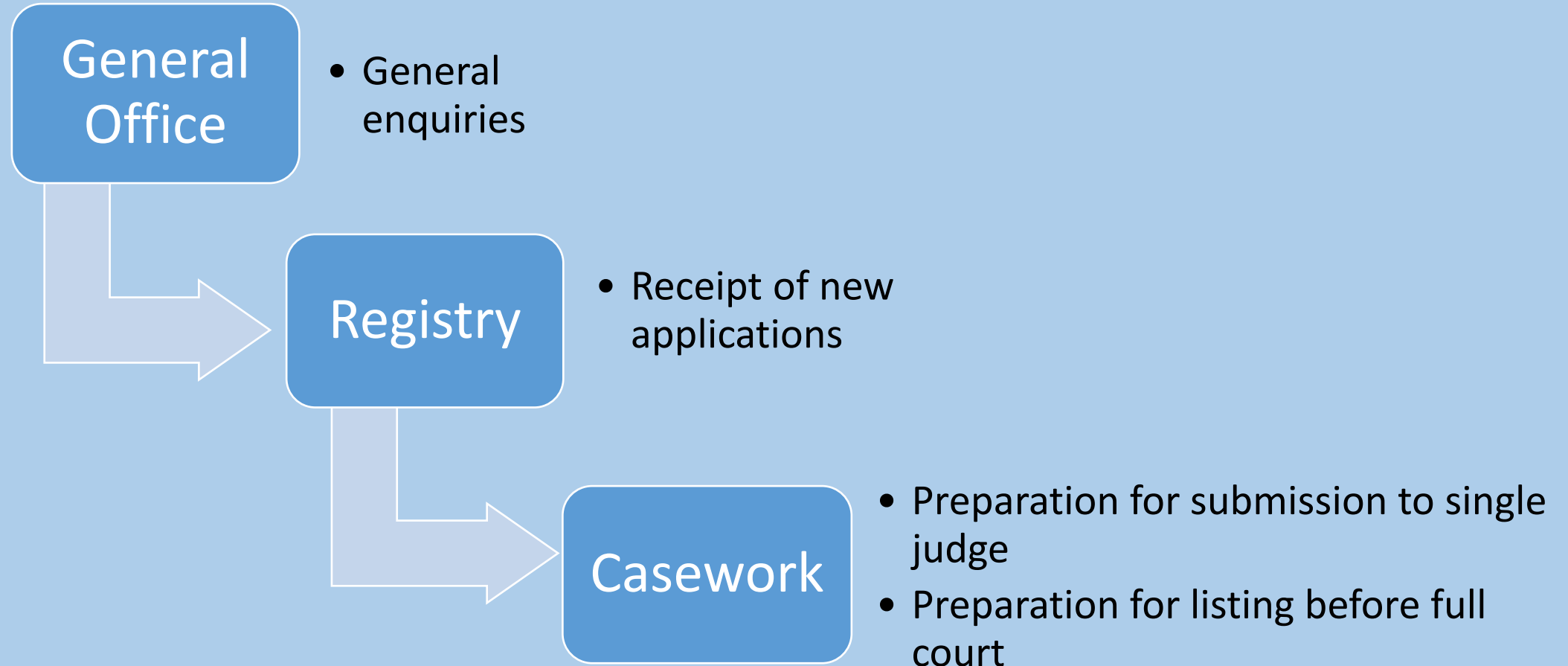
- Exercise case management powers on behalf of Registrar (*CrimPR 2.5*)
- Give procedural advice to appellants/applicants and legal representatives
- Support the judiciary in relation to legal issues and procedural queries from appellants/applicants and legal representatives

➤ Prepare applications for consideration by a single judge

➤ Prepare summaries in accordance with CPD 2023 10.6 for use by the court, compile court bundles and give time estimates for hearing

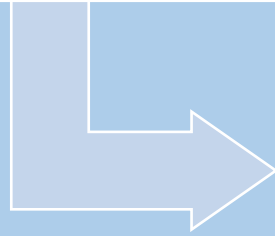
➤ Act as the “eyes and ears” of the Registrar

Structure of Criminal Appeal Office



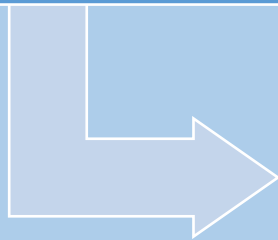
List Office

- Allocation to single judge
- Fixing hearing before full court
- Court Clerks



Finished cases

- Breaking up files



Costs

- Assessing and paying claims for remuneration

Casework Groups' Structure

A Group

- Sentence only
- Administrative staff
- Consult lawyer as necessary

B Group

- Conviction only / Conviction and sentence
- Lawyers
- Administrative support staff

Advising on Appeal

- Duty to settle only Grounds which are reasonable, have some real prospect of success and are such that the advocate is prepared to argue them before the court
- The advocate should not settle grounds he cannot support because he is “instructed” to do so by a defendant: *R. v Achogbuo* [2014] EWCA Crim 567; Crim PR 39.3; CPD 10.4.1
 - Fresh representatives: duty to comply with *McCook* [2014] EWCA Crim 734 and associated authorities
 - Application to listen to audio: see post script in *Lake* [2023] EWCA Crim 710
- LIP can submit own Notice and Grounds (will receive assistance from Registrar’s staff in terms of the process & procedure) or own Grounds *in addition* to those submitted by counsel
- Where advocate can no longer support Grounds (e.g. having received & reviewed transcripts) : notify Registrar and applicant who can decide whether to proceed as a LIP

Lodging Notice of Appeal/Application for Leave to Appeal Conviction or Sentence (CrimPR 39.2-3 & CPD 10.4.6)

- Time limits - 28 days from the date of conviction, sentence, verdict, finding or decision that is being appealed (s.18 CAA 1968 / Crim PR 39.2(1))
- Direct lodgement CrimPR 39.2
 - Form NG lodged with Criminal Appeal Office by email [*DO NOT UPLOAD ANYTHING TO DCS*]
 - Requirement for separate forms for each substantive application (conviction, sentence, confiscation order) together with any other appropriate forms e.g. Form B (bail), Form W (leave to call evidence from a witness)
- Up-to-date forms and guidance:

<http://www.justice.gov.uk/courts/procedure-rules/criminal/forms>

<http://www.justice.gov.uk/courts/procedure-rules/criminal/docs/october-2015/2018-appeal-forms/ng-guidance.pdf>

- The guidance specifies the subject of the email should be in the format: Form NG - surname of applicant - name of Crown Court where convicted or sentence / Naming conventions for attachments
- Electronic service is to applications@criminalappealoffice.justice.gov.uk or applications@criminalappealoffice.justice.gov.uk.cjsm.net
- Service of Notice and Grounds of Appeal cannot be effected by uploading to DCS
- Legal representatives should provide their secure email address for the purposes of correspondence and service of documents
- The date of service for new applications lodged by email will be the day on which it is sent, if that day is a business day and if sent no later than 2:30pm on that day, otherwise the date of service will be on the next business day after it was sent (CrimPR 4.11)

Appeal Notice

Information which must be contained in the Appeal Notice - CrimPR 39.3(1)

- Details of the conviction/ sentence / order etc. about which the applicant wants to appeal
- Identify the transcript which the Court will need
- Identify the relevant sentencing powers of the Crown Court if sentencing is in issue
- Include any other related applications (e.g. extension of time, bail, special measures, extension of time)
- Identify any other document or thing the court will need to decide the appeal

Grounds of Appeal: structure, content and format

CrimPR 39.3(2); CPD 10.4.1

- Advice and Grounds in one document (*draft for the court not the client*)
- Concise; presented in A4 page size, not less than 12 point font; in 1.5 line spacing
- Include in no more than the first two pages a summary of the grounds
- In each ground identify the decision/event to which the ground relates & summarise facts relevant to that ground but only to the extent necessary to make clear what is in issue
- Concisely outline each argument in support of each ground
- Number each ground consecutively
- Identify any relevant authority & how it relates to the ground
- Separate list of authorities (CPD 10.8.9-10.8.12) plus electronic copy unless on list of Frequently Cited Authorities (available on judiciary.uk)
- Registrar has power to return non-complaint documents for revision
- Court can refuse permission to appeal on ground so poorly presented as to render it unarguable

Application for Extension of Time

- Considered with the substantive application; notwithstanding s.18(3) CCA 1968; this has long been Registrar's practice & is now reflected in CrimPR 36.4
- Extension will be granted if in interests of justice to do so and court will examine merits of the underlying grounds, *Thorsby [2015] EWCA Crim 1*; *JH [2023] EWCA Crim 795*
- Reasons for delay must be provided, *R v Wilson [2016] EWCA Crim 65*; *R v James & others [2018] EWCA Crim 285*; *Paterson [2022] EWCA Crim 456*; *Khodomoradi (Kazem) [2022] EWCA Crim 37*; a chronology may assist the court
- An application based on a change of law lodged out of time, will require exceptional leave to appeal out of time; by demonstrating the applicant would otherwise suffer substantial injustice. *R. v Johnson & Ors [2016] EWCA Crim 1613*, *R. v Ordu [2017] EWCA Crim 4*

Perfecting grounds of appeal and obtaining Respondent's Notice

- Conviction applications
 - PGs invited in all cases
 - Once PGs received, RN usually directed or invited
- Sentence applications
 - Request to PG considered by a senior manager
 - Will be granted only if single judge would be assisted by PGs
 - RN may be directed or invited by Registrar
- Check transcript is accurate and complete: *Sakin* [2021] EWCA Crim 411 at [75] to [79];
- Notice to the prosecution:
 - See CPD 10.2

Leave to Appeal – s.31 CAA 1968

- Once all transcript and relevant documents obtained, papers prepared for submission to a single judge or to the Registrar to consider referral and/or directions
- Usually considered on the papers by single Judge together with ancillary applications (e.g. bail)
- Oral hearing: written application advancing exceptional reasons why an oral hearing is required, request will be considered by judge considering with substantive application
- Limited leave to appeal on some grounds only (conviction and sentence) may be granted
 - *R v Cox and Thomas [1999] 2 Cr. App. R. 6*
 - *R v Hyde [2016] EWCA Crim. 1031.*
- Where limited leave granted, Representation Order will cover only grounds on which leave has been granted, whether by single judge or full court

Referral to full court by Registrar

- Examples of circumstances where Registrar may refer application to full court:
 - Appeal unopposed by prosecution
 - Sole ground of appeal is jury irregularity and court must consider whether to order investigation by CCRC under s.23A CAA 1968
 - Novel point of law or new legislation
 - Need for guidance on approach to sentence
 - Grounds argue for suspended sentence because of caring responsibilities (*Petherick* issues raised)

Renewal of application or ground following refusal by SJ

- Registrar sends notification of the refusal, including any observations which the Judge may have made, to the applicant.
- 14 days from the date on which the notice of refusal was served on him to renew the application or refused grounds
- Applicant or legal representative can renew by serving renewal notice (Form SJ-Renewal)
- Generally Representation Order is not granted for a renewed application, although Registrar does have power and may grant in exceptional circumstances
- A refused application lapses if it is not renewed within 14 days.
- Applicant may apply for an extension of time in which to renew his application for leave (CrimPR 36.3 – 36.5 and s.31 CAA 1968) must be supported by cogent reasons

Varying Notices of Appeal

R v James and Others [2018] EWCA Crim 285

The Court (VP CACD, Sweeney J and Russell J) gave general guidance in relation to this issue (*paragraph 38 of the judgment*):

- As a general rule, all the Grounds of Appeal an applicant wishes to advance should be lodged with the Notice of Appeal/ Application
- The 'section 31' stage is an important stage in the process and should not be 'bypassed.' solely on the basis that fresh representatives would have done or argued things differently from the trial lawyers.
- Applications to advance fresh Grounds that have not in been considered by the single Judge must be accompanied by an application to "vary" the notice of appeal.
- In deciding whether to vary the Grounds of Appeal, the full Court will take into account a number of factors such as the extent of the delay in advancing the new ground/s, the reason for the delay in advancing the new ground/s and whether the issues / facts giving rise to the new Grounds were known to the applicant's representative at the time he or she advised the applicant regarding any available Grounds of Appeal.
- Now contained in CrimPR 36.14(5)

Preparation for Full Court hearing

- SJ leave granted / SJ or Registrar referral:
 - Representation order issued
 - Brief prepared and sent to advocate
- CAO officer prepares summary and index for court bundle
- Legal representative sent summary and index to check
 - Content of bundle
 - Time estimate for court hearing
 - Practical issues e.g. interpreter, intermediary
- List Office fixes date for hearing
 - Contact List Office if time marking required, request to be made for participation by CVP
 - Appellants in custody usually attend via video link
 - List Office will also fix video conference pre- and post-appeal where appellant in custody

Powers of CACD: Conviction Appeal

Principal powers :

- To allow the appeal and quash the conviction or dismiss the appeal (s.2: the test being whether the court thinks the conviction is unsafe);
- Instead of allowing or dismissing the appeal to substitute a conviction for an alternative offence (s.3 and s.3A);
- In certain circumstances to substitute a finding of not guilty by reason of insanity or finding of unfitness to plead and that he did the act/made the omission charged (s.6);

Supplemental powers if appeal allowed:

- To re-sentence where the appellant remains convicted of related offences (s.4).
- To order a retrial (s.7) and if so
 - to order custody or release on bail pending retrial (s.8(2));
 - to order the retention pending the retrial of any property or money forfeited, restored or paid by virtue of the original conviction or any order made on that conviction (s.8(2));
 - to grant leave to arraign out of time or quash the order for retrial (s.8(1), (1A) and (1B)).

Power to direct investigation by CCRC:

On an appeal or application against conviction the court has the supplemental power to order the Criminal Cases Review Commission to investigate any relevant matter, where the investigation is likely to result in the court being able to resolve it and it cannot be resolved without such investigation (s.23A).

Powers of CACD: Sentence Appeal

- When dealing with an appeal against sentence, the court is seised of all sentences passed in the same proceedings (s.11(2)).
- Principal power of the court is to quash any sentence or order and in its place pass such sentence or order as they think appropriate and as the court below had power to make. This wide discretion is fettered only by the proviso that, taking the case as a whole, the appellant must not be more severely dealt with (s.11(3)).
- The familiar test that the sentence must be “manifestly excessive or wrong in principle” does not in fact appear in the statute, but for many years has been the principle upon which the court acts (see e.g. *R. v Sherehewsky* 28 T.L.R. 364; *R. v Grumbs* 19 Cr. App. R. 74).

Legal Aid

- Initial advice and assistance under Crown Court Representation Order where advice is positive; submit bill to Costs Office at CACD
- Registrar has no power to grant Representation Order before Notice of Application lodged *Tredget (Peter) [2022] EWCA Crim 1894*
- Once Notice of Appeal lodged requests for RO should be made to Registrar not LAA (s16(1) & 19(1) LASPO 2012)
- Legal Aid not means tested in CACD but RDCO may be made
- Representation Orders routinely for advocate only to prepare and present the application/ appeal
 - Advocate assigned by the Registrar:

Registrar does not take instructions from appellant and instruct advocate. If such work is necessary, advocate should apply for extension of Representation Order to cover solicitors.
 - Applications for leading or two counsel must address Reg.18 Criminal Legal Aid (Determinations by a Court and Choice of Representative) 2013 (SI 2013/614)
- ROs for solicitors to carry out specific work, e.g. conference, witness statements, instruct expert - lodge advice/ note from advocate in support
- No power to grant prior authority; Registrar can be asked to give an indication

Loss of Time Order/Order for Costs (s.29; CPD 10.5)

- To direct that any time spent in custody pending the determination of an appeal shall not count towards sentence, except where leave to appeal has been granted, the trial judge granted a certificate or the Criminal Cases Review Commission referred the case to the Court of Appeal (s.29).
- The Vice President of the Court of Appeal Criminal Division observed in *R v Gray & Ors [2014] EWCA Crim 2372* that “the only means the court has of discouraging unmeritorious applications which waste precious time and resources is by using the powers given to us by Parliament in the Criminal Appeal Act 1968 and the Prosecution of Offences Act 1985”.
- On Form SJ, the single Judge does not make a loss of time order but can initial the box to indicate that the full Court consider such an order.
- Irrespective of whether the single Judge initials the box, the full Court can still consider making such an order if they take the view that the application is wholly without merit. This is the case irrespective of whether the applicant is legally represented and whether the grounds advanced were settled by his legal advisors.
- Representations why such an order should not be made can be included on Form SJ – Renewal (Part 3A)
- For applicants that are not in custody, consideration can be given as to whether an order for costs should be made.

My Two Top Tips

- CPD 2023 Part 10. Appeals to the Court of Appeal (Criminal Division)
 - 10.1.1 Parties must comply with the guidance set down by the Registrar in the Court of Appeal Office guide. (Guide to proceedings in the Court of Appeal, Criminal Division available on judiciary.uk)
- Keep in touch, always quoting CAO Reference (e.g. 2024/1234/A1 or 202401234 A1), if necessary speak to responsible officer
 - Post single judge:
 - A Group – Responsible Officer remains unchanged
 - B Group – Summary writer becomes Responsible Officer

Any questions?



THE USE OF FRESH EVIDENCE AS A GROUND OF APPEAL

(NOW AND IN THE FUTURE)

PAUL TAYLOR KC



ADVISING ON / RESPONDING TO A FRESH EVIDENCE APPEAL

ULTIMATE QUESTION:

**HOW DOES THE FRESH EVIDENCE UNDERMINE
THE SAFETY OF THE CONVICTION?**

ISSUES FOR THE APPEAL LAWYER

1. Identify the **live** issues at trial
2. Analyse how the new material changes the evidential landscape that was placed before the jury
3. Argue how the fresh evidence undermines the safety of the conviction:
 - a. Does it undermine the prosecution case?
 - b. Does it bolster the defence case?

WHAT IS “FRESH EVIDENCE”? (1)

s.23(1) CRIMINAL APPEAL ACT 1968 (as amended):

- “any evidence which was not adduced in the proceedings from which the appeal lies”
- It can relate to matters that occurred either prior to the trial or subsequently.
- Applies to appeals against conviction and sentence.

[Sentence – e.g. [Vowles](#) [2015] EWCA Crim 45; [WHD](#) [2024] EWCA Crim 99.]

PARAMETERS OF FRESH EVIDENCE (1)

KAI-WHITWIND [2005] 2 Cr App R 457

- Should be something “new”
- Adds something significant to the evidence given at trial.
- More than "substantial enhancement" of earlier evidence.

PARAMETERS OF FRESH EVIDENCE (2)

DANGER! (For appellants)

- “One trial principle”
- “the obligation on a defendant to utilize all available defences at trial and not tactically holding any back for use at the appeal stage:”
- “expert shopping”

[See [Erskine](#) [2009] 2 Cr App R 29 [39]; [AUV](#) [2024] EWCA Crim 11; [Dickson](#) [2023] EWCA Crim 1002]

WHAT IS “FRESH EVIDENCE”? (2)

Section 23(1) CAA 1968.

- Includes “any document, exhibit or other thing connected with the proceedings”.

[See s.23(1A) – Can order production to Court, appellant, respondent]

- “order any witness to attend for examination”

[See s.23(4): “order the examination of any witness... to be conducted, ...before any judge or officer of the Court or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court.”

EXAMPLES OF FRESH EVIDENCE

Psychiatric reports

- [Challen](#) [2019] EWCA Crim 916; [Hobson](#) [1998] 1 Cr App R 31; [Samuels](#) [2023] EWCA Crim 1103

Forensic science

- [Malkinson](#) [2023] EWCA Crim 954 (DNA)

Judgments in civil proceedings

- [Dorling](#) [2016] EWCA Crim 1750

Subsequent criminal/ disciplinary convictions

- [Edwards](#) [1996] 2 Cr App R 345; [Peterkin](#) [2024] EWCA Crim 309; [Thompson](#) [2024] NICA 30

Admissions to third parties

- [SBCR](#) [2012] EWCA Crim 1433; [Parejo](#) [2007] EWCA Crim 2707

Tribunal / Home Office decisions (Modern slavery)

- [AFU](#) [2023] EWCA Crim 23

WHO CAN ADDUCE FRESH EVIDENCE?

- **APPELLANT**
- **PROSECUTION**
- *Hanratty* [2002] 2 Cr App R 419 (30) [94]
- *But note limits: Fitzgerald* [2006] EWCA Crim 1655; *Bamber* [2002] EWCA Crim 2912; *Aslam* [2014] EWCA Crim 1292].

SECTION 23 CRIMINAL APPEAL ACT 1968

(1) For the purposes of an appeal or an application for leave to appeal, under this Part of this Act the Court of Appeal may, **if they think it necessary or expedient in the interests of justice—**

.....

- [*Order / receive fresh evidence*]

“INTERESTS OF JUSTICE”

- *Hanratty* [2002] 2 Cr App R 419 (30),
“...it is clear that the overriding consideration for this Court in deciding whether fresh evidence should be admitted on the hearing of an appeal is whether the evidence will assist the Court to achieve justice. **Justice can equally be achieved by upholding a conviction if it is safe or setting it aside if it is unsafe.**”
- *Benedett and Labrador* [2003] 1 WLR 1545 PC :
“...the discretionary...power to receive fresh evidence represents a potentially very significant safeguard against the possibility of injustice...”

CONSIDERATIONS

- (2) The Court of Appeal shall, in **considering** whether to receive any evidence, have **regard** in particular to—
- (a) whether the evidence appears to the Court to be **capable of belief**;
 - (b) whether it appears to the Court that the evidence **may afford any ground for allowing the appeal**;
 - (c) whether the evidence would have been **admissible** in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
 - (d) whether there is a **reasonable explanation** for the failure to adduce the evidence in those proceedings.

THE APPROACH OF THE COURT OF APPEAL

Pendleton [2002] 1 WLR 72 HL.

Lord Bingham v Lord Hobhouse?

- Significant limits on how far an appellate court could seek to determine jury's reasoning.
- *Clear cases* v “*a case of any difficulty*”

JURY IMPACT TEST...

For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking **whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe.**”

See **Parrie Jacob** [2023] EWCA Crim 445: “...whether there is a **realistic prospect** that the jury would have reached a different conclusion”

THREE APPROACHES TO THE FRESH EVIDENCE

Safety – via the Jury Impact Test

Safety only – ignore the Jury Impact Test.

Safety – reference to the Jury Impact Test –

but

then Court analyses the jury's potential reasoning processes.

BAR COUNCIL RESPONSE TO LAW COMMISSION ISSUES PAPER

- *...there is some evidence that the CACD has adopted rather too robust an approach to the “jury impact” test.*

POMFRETT [2010] 2 Cr App R 28 (1)

- Appellant convicted of offences in relation to VAT fraud.
- Following conviction prosecution accepted that they had wrongly failed to disclose c.30,000 pages.
- It was agreed that the jury impact test applied.
- The CACD had “**seen only a fraction of the evidence** in this very long trial and... **we do not know the detailed process of reasoning by which the jury reached their verdict.**”
- And “**that with the additional material the landscape of the case...would have been significantly different** and the appellant’s defence would have been advanced in a different context.”

POMFRETT [2010] 2 Cr App R 28 (2)

However...

the CACD concluded that:

“Taking everything together, we cannot see a sustainable basis for concluding that the additional material might reasonably have affected the jury’s decision.”

Dorling [2015] EWCA Crim (1)

- Murder appeal by way of CCRC reference
- Basis for the reference/ appeal was fresh material undermining the credibility of three trial prosecution witnesses [D, C, and Mc].
- Crown accepted that it was now unable to rely on evidence of D.
- CACD found that there was now much stronger material undermining their credibility. Consequently, a significant amount of evidence before the jury simply disappeared.
- “...in the light of the fresh evidence **this would have been a very different case [at trial] which would require a different approach.**”

Dorling [2015] EWCA Crim (2)

However...

the court then effectively excised the impugned evidence of D, C and Mc from consideration, and decided itself that the remaining evidence would, when considered in isolation from the discredited evidence, be sufficient to support the conviction.

The appeal was rejected:

“We remind ourselves of our task. It is for us to consider the safety of the conviction, not for us to unravel the mysteries of the jury room.”

WHEN IS THE COURT LIKELY TO INTERVENE?

- Where it goes directly to the central issue in the case
- Where evidence arose from prosecution non-disclosure
- Where it reflects advances in medical or forensic science
- Where it relates to matters independent of the appellant

QUESTIONS FOR APPELLATE LAWYERS (1)

1. What were the issues that the jury had to consider (eg. Credibility)?
2. Did the prosecution or judge in summing up stress parts of the case that are now undermined by the fresh evidence?
3. Would the new evidence have opened up lines of cross-examination that were never pursued by the defence at trial?

QUESTIONS FOR APPELLATE LAWYERS (2)

4. Would the new evidence have affected the trial judge's rulings on admissibility of prejudicial evidence or directions in the summing up?
5. Does the new evidence affect evidence seen at trial as corroborating identification?
6. And ultimately, how does the new evidence undermine the prosecution's case on these issues, and thus the safety of the conviction?

QUESTIONS FOR APPELLATE LAWYERS (3)

7. If the fresh evidence goes only to one of several counts, how would the quashing of that count affect the others?
8. Demonstrate that fresh evidence is central to the main issues in the case at trial
9. Some indicators from the jury at trial may assist

FRESH EVIDENCE – THE FUTURE?



Law
Commission
Reforming the law

Is there evidence that the Court of Appeal's approach to assessing the safety of a conviction following the admission of fresh evidence or the identification of legal error hinders the correction of miscarriages of justice?



The Bar Council

- We recognise that appeals based on fresh evidence necessarily require the CACD to trespass into the territory of the jury....
- **The question is to what extent should the CACD be permitted to do so, and how should this task be undertaken.**
- We respectfully note and emphasise the warnings set out by Lord Bingham in *Pendleton* [19], and we acknowledge the need for the “jury impact” test in some form.



The Bar Council

[T]he Law Commission might consider whether the CACD should ask itself something such as:

- *Might the new material (or removal of previously available material)*
 - (a) *reasonably have affected the decision of the trial jury to convict; or*
 - (b) *significantly affected the way in which the defence and/or prosecution cases were advanced at trial?*

If either applies, the Court should quash the conviction as unsafe and consider ordering a retrial

- Such a formulation would capture:
 - (a) cases in which the prosecution case was obviously and fundamentally weakened, albeit in a way that would not have affected the presentation of the case. Such cases would plainly be susceptible to a finding that the conviction was or may be unsafe. ..
 - (b) cases in which the changed evidential picture may well have affected the way in which the trial as a whole was conducted.
- In the latter instance, there is likely to be no reliable guide to what would have happened in such a circumstance, and it would therefore arguably be inappropriate for the CACD to speculate as to what an imaginary jury, trying what was in effect a completely different trial, may have made of matters.

5 KBW
BARRISTERS