

Appealing convictions and sentences after the Court of Appeal

A defendant's right to appeal following a magistrates or crown court conviction is widely recognised across the entire criminal justice system. What is much less well-known is what options are available should a defendant's appeal be unsuccessful. There will always be cases where a defendant or counsel are sincerely of the view that there has been a miscarriage of justice in a particular matter, whether it be the conviction itself is unsafe, or the sentence passed is manifestly excessive. This view may be taken immediately after a failed appeal, or years down the line where new evidence has come to light, shining a different perspective over the case as a whole. But what can they do about it? The jury returned their verdict, the single judge and full Court of Appeal turned them down, what route do they have to have their case looked at again?

The answer lies with the Criminal Cases Review Commission. The CCRC is an independent body established by the Criminal Appeals Act 1995 and began reviewing criminal convictions in March 1997. The history to the establishment of the CCRC is rooted within various high-profile miscarriage of justice cases such as the Birmingham Six, the Guildford Four and Judith Ward. These cases outlined serious weaknesses in the criminal justice system as a whole and highlighted key issues such as non-disclosure, false confessions, police misconduct and many others. It was decided by a Royal Commission in the 90s that an independent body was required to enable investigations into these matters to be conducted for cases in the future.

Despite the importance of their work, the CCRC are not universally known across the CJS. I have met criminal practitioners who have never heard of the CCRC or the unique function they perform, and those who have heard of them are not aware of the process of making an application, or the test which is to be applied. Having worked at the CCRC for almost two years, I hope to provide in the main body of this article some insight into the Commission- how they operate, what is required for them to refer a case back to the courts for an appeal, and the variety of work I had exposure to whilst working there.

When the CCRC was established in statute, they were given the power to refer criminal convictions and sentences back to the crown court/Court of Appeal for a further appeal. Provided that the conviction was a) criminal and b) in England, Wales or Northern Ireland, anyone can apply to the CCRC- free of charge. However, note the words 'further appeal' -the general rule of thumb when reviewing cases is that the individual concerned has to have already tried to appeal their case through the courts themselves unless there are exceptional circumstances why not. This is an extremely high threshold and could not be passed by stating that they had a negative advice on appeal, or that they would have to apply to appeal out of time.

There is no list of what would and would not constitute exceptional circumstances, each case is to be judged on its merits. However, the standard advice is to try to appeal first, if you can. Despite this, the CCRC do receive a high number of cases where there has been no previous appeal- there are various reasons for this, one of which is that on a standard appeal, there is the possibility of the court making a 'loss of time order' if they consider your appeal to be completely without merit. If the CCRC refers a case back to the courts, there is no possibility of a loss of time order being made against you. However

again, the concern over a loss of time order being made against you would not constitute an exceptional circumstance.

The statute also established a test that the Commission has to apply when reviewing cases- whether there is a **'real possibility'** that the conviction would be quashed or the sentence reduced if they were to refer it. Much like a great number of important tests written into statute, there is no useful definition to hand when applying the real possibility test. The test was considered in the case of *R v CCRC (ex parte Pearson)* by Lord Bingham who said that it meant;

"... more than an outside chance or a bare possibility, but which may be less than a probability or a likelihood or a racing certainty. The Commission must judge that there is at least a reasonable prospect of a conviction, if referred, not being upheld."

Despite the best intentions of Lord Bingham to clarify the meaning of 'real possibility', there remains no simple or straightforward way of applying the test. So, what can create a real possibility? The applicant has to have something new for a case to be referred. That something new then has to give the conviction a real possibility of being quashed/sentence being changed. Again, there is no set list of what can constitute something new, but it has to be something which has not been considered at trial or on appeal. This could be a change in the law, such as with joint enterprise after *R v Jogee*, developments in science such as DNA, the discovery of new evidence such as a witness that had never come forward and many other examples. If an application is simply a regurgitation of failed trial or appeal submissions with nothing new to support them, then there would be no grounds for a referral.

My employment at the CCRC was in the form of a sponsored internship by the Kalisher Trust. The Trust, amongst its other important educational programmes, sponsors various internships in criminal law across the UK and beyond, hoping (and succeeding!) to assist aspiring criminal barristers in pursuing successful careers at the Bar. They play an invaluable role in giving real life, hands-on experience in criminal cases and advocacy, particularly to those from less traditional backgrounds. The internship was initially for 12 months, which was then extended to finish in line with the commencement of my pupillage.

It involved working closely with the Case Review Managers in reviewing applications which ranged from the most minor traffic offences in the magistrates and reviewing the law around Notices of Intended Prosecutions (NIPs), to incredibly serious and high-profile cases in the crown courts such as murder, fraud and historic sexual abuse. The tasks ranged as widely as the cases which I was involved with, whether it be conducting legal research and identifying/advising on relevant case law for example on IPPs, reviewing disclosure by the police and the prosecution in cases where disclosure (or lack thereof) is being raised as an issue, reviewing defence/prosecution files as well as appeal documents, liaising with experts and reading subsequent reports on issues such as diminished responsibility and new DNA evidence or assisting in the preparation of documents for judicial review.

The internship provided extensive opportunities to draft legal documents containing complex legal arguments- for example in a case concerning joint enterprise murder, applying the judgments in *R v Jogee* and *R v Johnson* to the particular facts. As applicants to the CCRC are generally unrepresented, the legal arguments which can quite often contain complex law, have to be drafted in such a way that

is understandable to lay individuals, which is a skill that I hope to replicate in my advocacy in the magistrates court, and also in my future written advocacy.

There were also numerous opportunities to engage in interviews with applicants in prison. The individuals had already been convicted and were serving sentences for very serious crimes and therefore were particularly vulnerable. This provided invaluable experience of communicating with vulnerable individuals, of which many, if not all, future clients will be and taking instructions as to their case/application. As with the drafting of legal arguments above, it has also strengthened my ability to explain key aspects of law and procedure in a way which is understandable to those not legally qualified.

The nature of the work required a thorough understanding of appellate law both to the Court of Appeal and re-hearings in the crown court, as well as the drafting of reasoning on issues such as disclosure and bad character. As a pupil in my first six months, I am already finding that many of the skills I obtained and exposure to cases at the CCRC are assisting me in my pupillage and hopefully will continue to do so throughout my practice.

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