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Appeals, referrals and substantial injustice

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[R. v Cottrell \(Steven\) \[2007\] EWCA Crim 2016; \[2007\] 1 W.L.R. 3262 \(CA \(Crim Div\)\)](#)
[R. v Mitchell \(Alvin Lorenzo\) \[1977\] 1 W.L.R. 753 \(CA \(Crim Div\)\)](#)
[R. v Clark \(Brian James\) \[2001\] EWCA Crim 884; \[2002\] 1 Cr. App. R. 14 \(CA \(Crim Div\)\)](#)
[R. v Bentley \(Derek William\) \(Deceased\) \[2001\] 1 Cr. App. R. 21 \(CA \(Crim Div\)\)](#)
[R. \(on the application of Director of Revenue and Customs Prosecutions\) v Criminal Cases Review Commission \[2006\] EWHC 3064 \(Admin\); \[2008\] 1 All E.R. 383 \(DC\)](#)

*Crim. L.R. 152 Introduction

In an article published in 2005,¹ Nobles and Schiff examined the reception by the Court of Appeal (Criminal Division) (CACD) of the Criminal Cases Review Commission (CCRC). The authors considered a number of cases referred to the court by the Commission with a view to identifying which aspects of the Commission's practices have caused concern to the court and why. One identified difficulty was the impaired ability of the CACD to regulate workloads. The authors stated:

" A further difficulty, and one apparently overlooked during the parliamentary passage of the 1995 [Criminal Appeal] Act, was the extent to which the Court of Appeal controls its ordinary workloads through the combination of leave requirements, time-limits, and stringent requirements when applicants seek leave to appeal out of time ... The Court of Appeal cannot refuse to hear cases [referred by the CCRC] that would ordinarily have failed to obtain leave, or impose the conditions which often apply when leave is granted (most notably any restriction of the appeal to the grounds accepted at the application for leave) ... The court has responded by expressing its concerns over aspects of both the procedures of the CCRC, and the manner in which it has exercised its discretion to refer cases to the court." ²

One particular area of concern that has arisen (and one which has now been the subject of parliamentary intervention) is where an applicant applies to the CACD for an extension of time seeking leave to appeal, or applies to the CCRC for a referral to the CACD, consequent upon developments in the common law, often referred to as a " change of law" . The Criminal Justice and Immigration Act 2008 (CJIA) has amended the Criminal Appeal Act 1995 by inserting a new s.16C which provides:

***Crim. L.R. 153 " 16C** Power to dismiss certain appeals following references by the CCRC

(1) This section applies where there is an appeal under this Part following a reference by the Criminal Cases Review Commission under section 9(1)(a), (5) or (6) of the Criminal Appeal Act 1995 or section 1(1) of the Criminal Cases Review (Insanity) Act 1999.

(2) Notwithstanding anything in section 2, 13 or 16 of this Act, the Court of Appeal may dismiss the appeal if--

(a) the only ground for allowing it would be that there has been a development in the law since the date of the conviction, verdict or finding that is the subject of the appeal, and

(b) the condition in subsection (3) is met.

(3) The condition in this subsection is that if-- (a) the reference had not been made, but (b) the appellant had made (and had been entitled to make) an application for an extension of time within which to seek leave to appeal on the ground of the development in the law, the Court would not think it appropriate to grant the application by exercising the power conferred by section 18(3)."

The provision is clearly aimed at appeals resulting from a referral by the CCRC based on a change of law. It aims to suppress the mischief that might arise where the CCRC refers a case to the CACD in circumstances where the court itself would not have granted an extension of time for leave to appeal had the applicant gone directly to the court notwithstanding that the change of law was such as to render the applicant's conviction unsafe--a mischief that I would respectfully suggest was more imagined than real. I will argue that enactment of this provision was neither necessary nor is it likely to be effective. In order to appreciate and understand the provision it is necessary to examine in more detail the background that led to its enactment.

The right to appeal

Ordinarily, an appeal against conviction can only be made within 28 days following conviction³ and written grounds of appeal must be submitted. Unless the trial judge has granted a certificate that the case is fit for appeal, leave is required, and the initial decision to grant or refuse leave is usually taken on the papers by a single judge. The 28-day time period may be extended,⁴ but this is a matter of discretion and the applicant is required to show good reason for an extension. If an appeal is unsuccessful (either because leave is refused or leave is granted and the appeal is dismissed), there is no opportunity for a further appeal, even if there is new or fresh evidence, save in the most limited of circumstances.⁵

***Crim. L.R. 154** The CCRC can, at any time, refer to the CACD the conviction and/or sentence of any person tried in the Crown Court.⁶ The statutory framework within which the CCRC operates directs that ordinarily, the CCRC must not make a reference unless (1) an appeal has been decided, or leave to appeal has been refused; and (2) there is a real possibility that the conviction would not be upheld because of an argument or evidence not raised at trial or on appeal.⁷ In exceptional cases, the CCRC can still refer a case despite the fact that the case has not previously been the subject of an appeal or an application for leave to appeal, or despite the fact that the applicant relies on an argument or evidence which may have already been considered and rejected at an earlier appeal or application for leave to appeal.⁸ Once referred, the CACD must treat the reference in the same manner as any other appeal, i.e. the CACD has to approach the reference as if leave were not required or, if it were, then as if leave had been granted. The reference of a case can be made on the CCRC's own initiative or after an application made by the convicted person⁹ and, once referred, is treated for all purposes as an appeal against conviction and/or sentence.¹⁰ Importantly, no time limits are imposed by the Criminal Appeal Act for references made by the CCRC.

It has been apparent over recent years that a degree of tension has arisen between the referral processes of the CCRC and the CACD's own policy and practice in granting (or perhaps more accurately, not granting) leave to appeal out of time pursuant to a development in or "change of law". In *Kansal (Yash Pal) (No.2)* Rose L.J. stated:

" [Refusing leave to appeal based solely on changes to the common law] in our judgment, reflects the public interest that there be finality in litigation and it is an approach which has also helped this court to concentrate its limited resources on determining more meritorious appeals arising from more recent convictions.... [I]t appears that Parliament, consciously or unconsciously, has completely emasculated that approach. If so, the consequential prospective workload for the CCRC and for this court is alarming." ¹¹

In reality, however, this so-called tension may have been based on a number of false assumptions and misplaced fears.

Change of law cases--problems and fears

The English courts follow (and have always followed) the practice of retrospective overruling in accordance with the "declaratory theory" of common law; the judges, it is said, do not make or change the law but merely carry out the function of declaring it.¹² But new and unforeseen situations arise, societal attitudes to concepts **Crim. L.R. 155* and behaviour change, standards and measures of fairness develop, decisions previously accepted and followed may be challenged and when scrutinised, earlier interpretations and rulings may be "declared" by the courts to have been made in error. In so doing, theory denies that the judges make "new" law. Instead, they are simply stating what the common law is (and always has been) and correcting earlier pronouncements that were made in error. The theory has been the subject of criticism, and there are examples of the judges themselves labelling it as a "fiction".¹³ Nonetheless, the theory endures and presents a difficult problem when considering appeals based on developments in common law.

It is not at all surprising that those convicted on the basis of laws since developed and reinterpreted, the earlier interpretation now being declared incorrect, assert that their convictions are unjust. Is there any real distinction between D who, years after conviction, has his case referred to the CACD on the basis of new evidence that establishes he did not commit the crime, and E who, years after conviction, has his case referred on the basis of a new understanding of the law which establishes that what he did was not a crime? D could not appeal effectively at the time because the evidence was not known to him, or did not exist. E could not appeal effectively as the law, as then wrongly understood, precluded such an appeal. It is submitted that there is no real distinction at all.

A good starting point is the decision of the CACD in *Bentley*,¹⁴ where the appellant's conviction for murder was quashed because of major flaws in the trial judge's summing-up, in particular, in respect of the burden and standard of proof rather than on the basis of any change of law which had occurred in the intervening 45 years between conviction and appeal. Nonetheless, in dealing with this case Lord Bingham C.J. stated:

"Where, between conviction and appeal, there have been significant changes in the common law (as opposed to changes effected by statute) ... the approach indicated requires the court to apply legal rules ... which were not and could not reasonably have been applied at the time. This could cause difficulty in some cases but not, we conclude, in this."¹⁵

So, in determining the safety of a conviction, the court must apply the common law as at the date of appeal as the court knows no other law. At the time of *Bentley*, Professor J.C. Smith in a commentary in the *Criminal Law Review* wrote:

"None of this is new of course. In principle, it has always been with us. The coming of the Criminal Cases Review Commission has highlighted the problem. It is perhaps fortunate that it takes some determination and effort to get a case on its feet, so only those arousing strong feelings in someone are likely to be pursued. It is rather a depressing thought that so many, perhaps a majority of the convictions in our courts are 'unsafe' --i.e. wrong in law."¹⁶

**Crim. L.R. 156* One of the fears generated by the approach taken in *Bentley* and of which Professor Smith was no doubt mindful, was the potential large number of applications the CACD and CCRC might be faced with. But have the CACD and CCRC actually been overwhelmed with applications from disgruntled applicants who feel they have suffered an injustice? The evidence would suggest not. In *Johnson*, Lord Woolf C.J. stated:

"The decision of this court in *Bentley* was commented upon by a distinguished academic (Professor Sir John Smith) who suggested that if the approach indicated by Lord Bingham CJ was followed, then this court could be swamped with applications from many years past suggesting that convictions were unsafe when at the time they were perfectly proper. We consider that those comments were unnecessarily pessimistic. There has been no such flood of cases before this court."¹⁷

Nonetheless, later cases demonstrate that the CACD remains fearful at the prospect of being overwhelmed by applications, either directly from an applicant asking for an

extension of time seeking leave to appeal or by referrals from the CCRC, consequent upon a change of law. These fears were further fuelled following the decision in *R. (on the application of the Director of Revenue and Customs Prosecutions) v CCRC*.¹⁸ In this case the claimant director applied for a judicial review of the CCRC's decision to refer a conviction to the CACD in the light of a change of law that, in the CCRC's opinion, made it a real possibility that the CACD would conclude that the conviction was unsafe. An issue which arose on the judicial review was whether the CCRC was generally bound to have regard to the practice of the CACD in relation to the granting of extensions of time and the granting of leave to appeal when determining upon a referral. The Administrative Court affirmed the CCRC's discretion and stated that the CCRC was under "no obligation to have regard to, still less to implement, the practice of the CACD" on extensions of time; there was no obligation to consider whether or not there was a real possibility that the CACD would extend time. In his commentary on *R. (on the application of the Director of Revenue and Customs Prosecutions) v CCRC*, Professor Ormerod, treading in the footsteps of Professor Smith, raised the prospect of thousands of convictions going back to the CACD or applications being made to the CCRC because of changes in the common law. Professor Ormerod stated:

"The practical consequences are potentially overwhelming for the CCRC ... [T]he CACD's response, borne out of the necessity to avoid that consequence, has been to refuse leave to appeal out of time where the sole basis for the appeal is the change in law, unless the defendant would suffer a 'substantial injustice' as a result ... Even more disturbingly, every conviction for criminal damage between 1981 (*Caldwell* [1982] A.C. 341) and 2004 (*G* [2004] 1 A.C. 1034) when the subjective approach to recklessness was reintroduced will be challengeable ... How will the CCRC cope? Of course, not all of the convictions will be regarded by the CCRC as carrying a 'real possibility' of **Crim. L.R. 157* being quashed. There must be many thousands that would, and one must therefore ask how will the CACD cope?"¹⁹

But again, it should be asked whether or not these fears have proved to be well-founded. To take just one example used by Professor Ormerod, we can consider the decision in *G*²⁰ which reintroduced the subjective approach to recklessness, declaring the earlier decision in *Caldwell*²¹ to have been in error. Between 1982 and 2003 when *Caldwell* governed, many thousands of juries and magistrates must have been misdirected upon the true basis of the law until the decision in *G*. If ever a change of law could be expected to generate a flood of disaffected applicants knocking at the doors of the CCRC and CACD then it would be hard to imagine a better example. This has not, however, proved to be the case. As yet, not one single case has been referred to the CACD by the CCRC as a result of this development in the law.²²

The suggestion that the CACD and/or CCRC would be completely overwhelmed with an unmanageable workload following a change of law does not seem to be supported by the available evidence and, it is submitted, the introduction of s.16C cannot fairly be attributed to the need to protect either the CACD or the CCRC from a flood of disgruntled and unmeritorious applicants.

Can a more convincing rationale for the introduction of s.16C be found by examining the CACD's own policy and practice in the way applications for extensions of time seeking leave to appeal are dealt with?

Leave to appeal out of time--CACD practice

The well-established practice of the CACD is to refuse an application for leave to appeal out of time consequent upon a change in common law *unless* the CACD is of the opinion that "substantial injustice" would be done to the applicant. In *Mitchell*, Lane L.J. (as he then was) stated:

"It should be clearly understood, and this Court wants to make it even more abundantly clear, that the fact that there has been an apparent change in the law or, to put it more precisely, that previous misconceptions about the meaning ... have been put right, does not afford a proper ground for allowing an extension of time in which to appeal against a conviction."²³

In *Hawkins*,²⁴ the appellant had been convicted of deception offences prior to the decision of the House of Lords in *Preddy*.²⁵ The decision of the House of Lords in the latter case made it clear that the circumstances upon which Hawkins had been convicted did not satisfy the required legal elements of the offence, yet the CACD refused Hawkins leave to appeal. Lord Bingham C.J. stated:

" That practice may on its face seem harsh ... It is plain, as we read the authorities, that the ... general practice is plainly one which sets its face ***Crim. L.R. 158** against the reopening of convictions recorded in such circumstances. [T]he practice of the Court has in the past, in this and comparable situations, been to ... ask whether any substantial injustice has been done." ²⁶

The cases are unequivocal that the mere fact that the common law has changed is not of itself sufficient reason to exercise the discretion for an extension of time in the applicant's favour. Something more must be demonstrated and this pertains to making out a case of " substantial injustice" . What, then, will constitute substantial injustice?

The meaning of this crucial concept remains somewhat elusive although it may be instructive to examine some of the cases where the CACD has granted an extension, presumably because it was satisfied that, in the circumstances, it would have constituted a substantial injustice to the applicant to refuse it.

In *Mitchell*,²⁷ the applicant stood convicted of possessing cannabis with intent to supply. The subsequent decision in *Goodchild*²⁸ corrected a misconception relating to the definition of cannabis in s.37(1) of the Misuse of Drugs Act 1971 which meant the applicant had not, in fact, committed the offence. He made an application for an extension of time in which to seek leave to appeal against conviction consequent upon the development in *Goodchild*. The CACD granted the application for extension for two reasons: first, the applicant had already appealed, within time, against sentence. Lane L.J. stated:

" [I]f we were to refuse the extension of time which is prayed for in order to allow this man to appeal against conviction, we should be faced with the totally unreal task of endeavouring to determine what the correct sentence was for an offence which had not been committed. That is not a task we would relish." ²⁹

Secondly, the applicant was in prison. Lane L.J. stated:

" If we were to refuse him the extension of time in which to appeal against conviction, we should be keeping him in prison, so to speak, when we as a Court were convinced that he had not committed an offence. That again is not an attractive proposition, and it is one from which this Court resiles." ³⁰

Indeed, it surely must be a substantial injustice to keep a person confined in prison for an offence that the CACD now acknowledges was not actually committed.

Following the decision of the House of Lords in *Kennedy (No.2)*,³¹ two applications for extensions of time were made in the cases of *Byram*³² and *Keen*.³³ In both cases the applications were granted on the basis that there would be a ***Crim. L.R. 159** " substantial injustice" if they were not, and the convictions for manslaughter were quashed. In *Keen*, Hughes L.J. stated:

" It will not normally constitute a substantial injustice if the defendant has been convicted some time ago, after a fair trial, upon a proper application of the law as it was then understood. It will especially not do so if there would have been other charges which would have been investigated had the new law been known at the time, indeed sometimes ones to which there would have been no answer." ³⁴

In the instant case the application was granted as the case in the court below " was conducted on an incorrect basis in law" , making it exceptional and meriting an extension. In *Keen*, the CACD cited with approval the judgment in *Byram* where, again, an application for an extension of time was granted and a conviction for manslaughter arising from a guilty plea was subsequently quashed as the plea was " tendered and accepted and the entire proceedings were conducted on what now emerges was a fallacious basis" .

Nonetheless, the situations which may give rise to a finding that a substantial injustice

would arise if an extension of time were not granted remain largely undefined, it being a matter of discretion for the CACD. But like all discretions, the discretion must be exercised reasonably and fairly. In *Clark*,³⁵ the CACD was dealing with a CCRC referral of convictions on a guilty plea for obtaining property by deception.³⁶ The referral was made following the change of law decision in *Preddy*³⁷ but, importantly perhaps, before the CACD had been given the power to substitute a conviction for an alternative offence where the conviction arose from a guilty plea.³⁸ The CACD observed that had there been a power to substitute a conviction, the CCRC could (and perhaps should) have exercised its own discretion not to refer in such circumstances, just as the CACD itself would have refused an extension of time in such circumstances. However, as substitution was not possible at the relevant time and as the quashing of some of the convictions would have serious implications for the liability of the applicant to confiscation proceedings, the CACD considered that the decision to refer the convictions was "an entirely appropriate exercise of the Commission's discretion".

So the CACD has indicated that where it would now be able to substitute an alternative conviction of comparable gravity to that of which the applicant now stands convicted, an application for an extension of time seeking leave to appeal will not be granted as there is no substantial injustice caused to the applicant by a refusal. It appears that the CACD may still take the view that, in some circumstances, there will be no substantial injustice caused even though substitution of an alternative conviction is not possible. In *Ramzan (Amer)*,³⁹ the applicant's conviction for conspiracy was referred to the CACD by the CCRC following the change of law ***Crim. L.R. 160** decision by the House of Lords in *Saik*.⁴⁰ In *Ramzan (Amer)*, Hughes L.J. made the following observation:

"Because it has a bearing on other cases, it is necessary for us to say that we would not have granted leave to appeal out of time... [A]lthough his conviction for conspiracy cannot stand, he must, on his own admissions, coupled with the verdict of the jury, have committed at the very least a number of substantive offences ... of great gravity. We are unable to detect any injustice, substantial or otherwise, in holding that if he were an applicant for leave, he should not now be granted, as a matter of discretion, leave to appeal out of time against a conviction which was arrived at by applying correctly the law as it stood at the time."⁴¹

Is it possible to identify any coherent governing principles that guide the CACD in determining whether or not there is a substantial injustice to the applicant? From the cases, it is possible to identify two general propositions.

- If there is an alternative offence of comparable gravity for which a comparable sentence would be imposed which may be substituted under ss.3 and 3A of the Criminal Appeal Act 1968 the CACD will not exercise its discretion to extend time.
- If the evidence which the jury must have accepted establishes the commission of an offence of comparable gravity for which a comparable sentence would be imposed, albeit that this may not be substituted under ss.3 and 3A, the CACD will not exercise its discretion to extend time.

In both situations the CACD, in determining whether or not to grant an application for an extension of time seeking leave to appeal, is likely to conclude that there would be no substantial injustice caused to the applicant by refusing the application.

In several cases,⁴² express reference has also been made to the approximate contemporaneity between the conviction in a case where an extension has subsequently been granted and proceedings before the CACD or House of Lords which have resulted in a change of law of relevance to those cases. But should contemporaneity be regarded as a relevant consideration when the CACD comes to examine whether or not a substantial injustice would be suffered by the applicant if an extension were not to be granted? If the CACD is exercising a discretion which must be exercised rationally and fairly, it would be difficult to argue that serendipity or happenstance operates both fairly and rationally. In cases which arise prior to leave being granted for appeal to the House of Lords, counsel both in advising his client on the issue of a plea, on trial tactics if that plea is not guilty, and subsequently on the issue of appeal, will have been influenced by the understanding of the law which pertained at the time. If that understanding is subsequently shown to have been

in error, it is difficult to see how the client has not been prejudiced if the nature of the error may have had relevance to the issue of plea, or to trial tactics or to consideration of an application for leave to appeal. The administration of justice benefits from early guilty pleas and from pointless applications for leave **Crim. L.R. 161* to appeal not being made. Where counsel, relying upon authority in the CACD advises on plea and an appeal in a way which subsequently is falsified by a change of law, the fairness of the criminal process would be undermined were a defendant, who was convicted prior to that change of law, to be denied the opportunity to have that conviction overturned simply because everyone who advised him at the time, as well as counsel for the Crown, the judge and the jury operated on a false understanding of the law.

If it is a miscarriage of justice for someone to be convicted of something he did not do, it must equally be a miscarriage of justice for someone to be convicted of something which it subsequently transpires was not a crime, especially so if the two propositions set out above do not apply. The passage of time does not, in any way, minimise or negate the injustice. Nor can it be argued that the defendant in such a case has had a fair trial, as a prerequisite of a fair trial is for justice to be administered in accordance with the law. Where a trial judge misdirects a jury on the law, a defendant has the opportunity of appealing on that basis, but where the trial judge directs the jury on the basis of a misunderstanding of the law emanating from the CACD, such an appeal may not be possible. If, subsequently, the jurisprudence of the CACD is declared by the House of Lords to be in error, the potential consequences of that error to be corrected cannot rationally be contingent upon the length of time that has passed between the conviction and the correction of the error in the House of Lords. The consequences of a wrongful conviction to the individual are ongoing and do not evaporate with the passage of time. A criminal record will still exist with ongoing implications for a person's employment, freedom of travel and treatment before the criminal courts both in terms of the character provisions in the Criminal Justice Act 2003 and the sentencing options available on conviction.

Thus, while the bare fact of a change of law in itself may not be enough to justify an extension of time for leave to appeal, the consideration of substantial injustice must surely be a matter for individualised determination on a case by case basis.

In *Cottrell and Fletcher*,⁴³ the CACD made it clear that the court's practice was a matter that the CCRC must consider when determining referrals. The CACD stated:

" In reality we cannot conceive of any circumstances in which the law and practice laid down in this Court can be ignored by the Commission when it is exercising its judgment whether to refer a conviction to the court. They are ' so obviously material' to the decision to be made by the Commission that it would be contrary to the intention of Parliament for them to be disregarded ... It would indeed be disturbing, and we believe productive of public disquiet, if the Commission were to adopt an approach to change of law cases which conflicted with the approach of the court." ⁴⁴

The CCRC sets out its policy on cases involving discretion in *Formal Memorandum: Discretion in Referrals*.⁴⁵ In paras 13-15 of the Memorandum, the CCRC specifically **Crim. L.R. 162* addresses the issue of change of law cases and identifies a number of considerations to be taken into account when deciding upon the issue of referral. The nonexhaustive list of considerations includes: " The practice of the Court of Appeal, Criminal Division in relation to applications for an extension of time in which to appeal based on a change in the law."

Indeed, prior to the decision of the Administrative Court in *R. (on the application of the Director of Revenue and Customs Prosecutions) v CCRC*,⁴⁶ the CCRC did consider the CACD's policy when determining referrals reliant upon discretion, and following the decision in *Cottrell and Fletcher*, reinstated this as a relevant consideration; the only reason it had been removed was because the Administrative Court had so directed. It seems self-evident that a clear and understandable statement of the CACD's practice, including the meaning of " substantial injustice" , is essential in order for the CCRC to carry out its function effectively.

Albeit that the CCRC undertook in the hearings of *Cottrell and Fletcher*⁴⁷ always to consider the CACD's practice on granting extensions when deciding whether or not to refer

convictions following a change of law, were the CCRC to misunderstand or misapply that practice when exercising its discretion, this would result in the court potentially being obliged to quash a conviction in circumstances where it would not have granted an extension had the applicant approached the CACD directly. Such a situation might arise where the court concluded that the applicant had *not* suffered any substantial injustice, but was unable to substitute a conviction for another offence under s.3 or s.3A of the Criminal Appeal Act 1968. The court found itself in this very position in *Ramzan (Amer)* ⁴⁸ where R had his conviction for conspiracy to commit money laundering offences referred to the CACD by the CCRC following the change of law decision by the House of Lords in *Saik*. ⁴⁹ At the same hearing, a number of other applicants appeared together with R, each applying for an extension of time in which to seek leave to appeal. All pleaded the same "change of law" point that had formed the basis of the CCRC's decision to refer R's case back to the CACD. The CACD was, following the CCRC's referral, obliged to consider R's appeal as though leave had been given⁵⁰ and, in the light of *Saik*, R's conviction was found to be unsafe and quashed accordingly. However, all those other applicants who made direct application to the same court seeking leave to appeal out of time were unsuccessful. The CACD made it clear that if R had been applying for leave to appeal out of time, that application also would not have been granted.⁵¹

A further illustration can be seen in the cases of *Caley-Knowles and Jones (Iorwerth)*. ⁵² These cases were referred to the CACD by the CCRC following the decision of the House of Lords in *Wang* ⁵³ which held that a judge should never direct a jury to convict. The CACD found the convictions to be unsafe and they **Crim. L.R. 163* were quashed accordingly, yet in the later appeals of *Cottrell and Fletcher*, ⁵⁴ the CACD intimated that the present constitution of the court considered that had the appellants in *Caley-Knowles and Jones (Iorwerth)* been applicants seeking extensions of time rather than referrals from the CCRC, the court had grave doubts whether it would have granted them in either case. These cases show that the CACD is willing to acknowledge that a conviction is unsafe but also declare that had the applicant not been referred to the CACD by the CCRC, but had instead applied direct to the court for an extension of time in which to seek leave to appeal, that application would not have been granted.

It seems a strange quirk that a system of justice permits the CACD to acknowledge that a conviction is unsafe but then go on to say that if the person with the unsafe conviction were to apply to the CACD for permission to appeal, that application would be refused.

One valid point of distinction can, perhaps, be made between those cases where a change of law means that the applicant was convicted of something that was not, in truth, a crime and those cases where the applicant was convicted following a procedural "regularity" which is later condemned as an irregularity. The former is clearly unjust but the latter may not be obviously so, especially where the irregularity does not impact upon the substantive merits of the case. Nonetheless, the latter situation, as the House of Lords recognised in *Wang*, may have significant constitutional implications relating to trial by one's peers or to decisions of whether or not to commence proceedings at all. The criminal trial process represents the full panoply of state power being focused against the accused. In one sense the decisions in *Wang* and *Caley-Knowles* might be seen as revealing an irregularity that is "technical" in nature and not one that goes to the substantive merits of the individual case but neither is posited on pedantry in respect of technical issues for pedantry's sake but rather seeks to redress the balance in favour of the citizen by recognising the constitutional context in which the criminal trial is located.

The legislative response in section 16C

Despite the reality of the CCRC referring relatively few cases based on a change of law,⁵⁵ the fear of "floodgates" and the desire for "finality" seem to have been sufficiently persuasive to generate a legislative response. As noted at the outset, the CJIA has now amended the CAA 1968 with a new s.16C.⁵⁶ The provision was first introduced into the Criminal Justice and Immigration Bill during committee stage in the House of Lords. The initial impetus for inclusion appears to have come from the judiciary and it passed through the remaining parliamentary stages largely without comment or controversy.⁵⁷

**Crim. L.R. 164* It is the aim of s.16C to free the CACD from its current obligation to treat

referrals from the CCRC in change of law cases as though leave to appeal out of time had been granted, in circumstances where the CACD would not have given such leave to appeal had the applicant approached it directly. In other words, it attempts to ensure the CCRC referral process cannot bypass or usurp the CACD's own policies and practices in change of law cases. On close analysis, however, it seems the circumstances in which s.16C will operate to achieve this aim are somewhat limited.

The section empowers the CACD to dismiss an appeal following a CCRC referral if the only ground for allowing it would be that there has been a development in the law *and* the condition in s.16C(3) is met. The condition is in the nature of a "hypothetical" created by the word "if" at the end of the first line of s.16C(3) and requires the CACD to postulate what its own response would have been if the CCRC referral had not been made but, instead, the applicant had made an application for an extension of time to seek leave to appeal consequent upon the change of law.

Where an applicant to the CCRC has previously appealed (or applied for leave to appeal), the CCRC will, in any case raising a change of law issue, give due consideration to the practice of the CACD on granting extensions of time for leave to appeal. In such a case, the CCRC will first consider whether there is a "real possibility" that the CACD would quash the conviction on the basis of a change of law. If there is such a real possibility, the CCRC will next consider whether it should exercise its discretion not to refer the conviction. In considering its discretion, a relevant factor which the CCRC must take into account, as the court made clear in *Cottrell and Fletcher*, is the court's practice on granting extensions in change of law cases. In the case of applicants who have not previously appealed (or applied for leave to appeal), where a change of law issue is the subject of the application to the CCRC, the CCRC's policy is to advise applicants of their entitlement to apply to the CACD for an extension of time to apply for leave to appeal in accordance with the procedure outlined by the CACD in *Ramzan (Amer)*.⁵⁸ It follows that the situation provided for by s.16C should not, therefore, in the normal course of events, arise at all.

In cases where an applicant applies to the CCRC on the basis of a change of law and that applicant *has* previously appealed or applied for leave to appeal, the CCRC will have to consider the CACD's practice on granting extensions in such circumstances and, in particular, the question whether the applicant would have suffered a "substantial injustice" were such an extension not to have been granted. This is an area of heavy responsibility as if the CCRC comes to a conclusion on this matter with which the CACD disagrees, the CACD will no longer be obliged to quash the conviction (as it was in *Ramzan (Amer)*⁵⁹), but may instead dismiss the appeal notwithstanding that the change of law might render the conviction unsafe.⁶⁰

***Crim. L.R. 165** The key issue is whether or not the CACD would have granted an extension rather than whether the conviction is unsafe.⁶¹

The CACD has often argued that there is a continuing public imperative that so far as possible, there should be finality and certainty in the administration of criminal justice.⁶² But justice should not only be done, but be seen to be done, and be administered in accordance with the law. Where there is error in the courts' understanding of the law, potential injustice results. The CACD's function in dealing with criminal appeals should be to rectify past injustices by quashing convictions which are unsafe and, in the process, to avoid future injustices by correcting misconceptions and misunderstandings of the substantive criminal law. Section 16C appears to have been an unnecessary and, arguably, ineffective response to largely misplaced fears. Finality of litigation and administrative efficiency should not be the pre-eminent values underpinning a legal system, particularly where the final decision in a particular case can be shown by reason of subsequent developments in case law to have been patently wrong.

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¹ R. Nobles and D. Schiff, "The Criminal Cases Review Commission: establishing a workable relationship with the Court of Appeal" [2005] Crim. L.R. 173.

2. Nobles and Schiff, "The Criminal Cases Review Commission" [2005] Crim. L.R. 173, 175.
3. Criminal Appeal Act 1968 ss.1 and 18.
4. Criminal Appeal Act 1968 s.18(3).
5. *Pinfold* [1988] Q.B. 462 CA (Crim Div). The limited circumstances identified by the court were, first, where the decision on the original appeal can be regarded as a nullity; secondly, where owing to a defect in the procedure the first appeal is dismissed, e.g. the appellant was not notified of the appeal or counsel has been unable to attend.
6. Criminal Appeal Act 1995 s.9.
7. Criminal Appeal Act 1995 s.13(1).
8. Criminal Appeal Act 1995 s.13(2).
9. Criminal Appeal Act 1995 s.14.
10. Criminal Appeal Act 1995 ss.9(2)(3) and 11(2)(3).
11. *Kansal (Yash Pal) (No.2)* [2001] EWCA Crim 1260; [2001] 2 Cr. App. R. 30.
12. In *Munster v Lamb* (1883) L.R. 11 Q.B.D. 588 CA, Brett M.R. stated: "The judges cannot make new law by new decisions; they only endeavour to declare what the common law is and has been from the time when it first existed ... they seem to be laying down a new law, whereas they are merely applying old principles to a new state of facts". For a general discussion on the declaratory theory see Terence Ingman, *The English Legal Process*, 11th edn (2006), p.193.
13. e.g. in *Jones v Secretary of State for Social Services* [1972] A.C. 944 HL, Lord Reid described the theory as a "fairy tale"; in *Re Spectrum Plus Ltd* [2005] UKHL 41; [2005] 2 A.C. 680, Lord Nicholls stated the theory was "at odds with reality".
14. *Bentley* [2001] 1 Cr. App. R. 21 CA (Crim Div).
15. *Bentley* [2001] 1 Cr. App. R. 21 CA (Crim Div) at 24.
16. [1999] Crim. L.R. 330.
17. *Johnson* [2001] 1 Cr. App. R. 26 CA (Crim Div) at 32. Similarly, the annual reports of the CCRC and the CACD's annual reviews since 2001 do not indicate any flood of such cases.
18. *R. (on the application of the Director of Revenue and Customs Prosecutions) v the CCRC* [2006] EWHC 3064; [2007] 1 Cr. App. R. 30.
19. [2007] Crim. L.R. 383.
20. *G* [2003] UKHL 50; [2004] 1 Cr. App. R. 21.
21. *Caldwell* [1982] A.C. 341 HL.
22. Confirmed by John Wagstaff, Legal Adviser, CCRC.
23. *Mitchell* (1977) 65 Cr. App. R. 185 CA (Crim Div).
24. *Hawkins* [1997] 1 Cr. App. R. 234 CA (Crim Div).
25. *Preddy* [1996] 2 Cr. App. R. 524 HL.
26. *Hawkins* [1997] 1 Cr. App. R. 234 CA (Crim Div) at 237.
27. *Mitchell* (1977) 65 Cr. App. R. 185 CA (Crim Div).
28. *Goodchild* (1977) 64 Cr. App. R. 100 CA (Crim Div).
29. *Mitchell* (1977) 65 Cr. App. R. 185 CA (Crim Div) at 189.
30. *Mitchell* (1977) 65 Cr. App. R. 185 CA (Crim Div) at 189.
31. *Kennedy (No.2)* [2007] UKHL 38; [2008] 1 Cr. App. R. 19. The House of Lords held that the act of self-administration of a Class A drug by a fully informed and responsible adult severed the chain of legal causation so that the supplier of the drug could not be found guilty of manslaughter.
32. *Byram* [2008] EWCA Crim 516.
33. *Keen* [2008] EWCA Crim 1000.
34. *Keen* [2008] EWCA Crim 1000.
35. *Clark* [2001] EWCA Crim 884; [2002] 1 Cr. App. R. 14.
36. Formerly contained in the Theft Act 1968 s.15.
37. *Preddy* [1996] A.C. 815 HL.
38. Criminal Appeal Act 1968 s.3A--added by the Criminal Justice Act 2003 s.316(3), and brought into force on September 1, 2004.
39. *Ramzan (Amer)* [2006] EWCA Crim 1974; [2007] 1 Cr. App. R. 10.
40. *Saik* [2006] UKHL 18; [2006] 2 Cr. App. R. 26.
41. *Ramzan (Amer)* [2006] EWCA Crim 1974; [2007] 1 Cr. App. R. 10.
42. See, e.g. *Cottrell* [2007] EWCA Crim 2016, [2008] 1 Cr. App. R. 7; *Byram* [2008] EWCA Crim 516 and *Keen* [2008] EWCA Crim 1000.
43. *Cottrell and Fletcher* [2007] EWCA Crim 2016; [2008] 1 Cr. App. R. 7.
44. *Cottrell and Fletcher* [2007] EWCA Crim 2016; [2008] 1 Cr. App. R. 7.
45. See http://www.ccrcc.gov.uk/documents/DISCRETION_IN_REFERRALS_INCLUDING_APPLICATIONS_BASED_ON_A_CHANGE_IN_THE_LAW.pdf [Accessed December 21, 2008].
46. *R. (on the application of the Director of Revenue and Customs Prosecutions) v CCRC* [2006] EWHC 3064; [2007] 1 Cr. App. R. 30.
47. *Cottrell and Fletcher* [2007] EWCA Crim 2016; [2008] 1 Cr. App. R. 7.
48. *Ramzan (Amer)* [2006] EWCA Crim 1974; [2007] 1 Cr. App. R. 10.
49. *Saik* [2006] UKHL 18; [2006] 2 Cr. App. R. 26. in which the House of Lords corrected a misunderstanding on the mens rea requirement for the offence.
50. Criminal Appeal Act 1995 s.9.
51. *Ramzan (Amer)* [2006] EWCA Crim 1974; [2007] 1 Cr. App. R. 10.
52. *Caley-Knowles and Jones (Iorwerth)* [2006] EWCA Crim 1611; [2007] 1 Cr. App. R. 13.
53. *Wang* [2005] UKHL 9; [2005] 2 Cr. App. R. 8.
54. *Cottrell and Fletcher* [2007] EWCA Crim 2016; [2008] 1 Cr. App. R. 7.
55. Between 1999 and 2008, there were very few referrals based on a "development of law". A review of the CCRC's published data reveals some 12 cases of significance. Of these nine applicants had their conviction quashed with two being ordered for retrial, two applicants had their convictions upheld, and one applicant had his conviction for murder quashed and substituted with a conviction for affray.
56. See p.152 above.
57. See the House of Lords debate reported in *Hansard*, HL, col.1285 (April 21, 2008), where Lord Lloyd of Berwick acknowledged that it was the judiciary who first suggested that this issue should be addressed by legislation. Lord Lloyd stated that he and the President of the QBD, Sir Igor Judge, discussed and agreed upon a form of words for the clause that the President and he believed met the perceived problem. The final version of the clause was moved at third reading in the Lords by Lord Davidson of Glen Cova.
58. See *Formal Memorandum: Discretion in Referrals*.
59. *Ramzan (Amer)* [2006] EWCA Crim 1974; [2007] 1 Cr. App. R. 10.
60. As the CACD indicated its decision was likely to have been in *Caley-Knowles and Jones (Iorwerth)* [2006] EWCA Crim 1611; [2007] 1 Cr. App. R. 13 had the appellants applied for an extension rather than to the CCRC--see p.162 above.
61. Additionally, s.16C has made what was a matter of policy and practice a matter of law, opening the door for a potential appeal on its meaning to the House of Lords.
62. See, e.g. *Kansal (Yash Pal) (No.2)* [2001] EWCA Crim 1260; [2001] 2 Cr. App. R. 30.

