

#### 4.18 *Service of appeal notice Requirements*

*Criminal Practice Directions 2015 EWCA Crim 1567 para 39C.51*

##### **Direct Lodgement**

para 39C.5 With effect from 1st October 2018, Forms NG and Grounds of Appeal which are covered by Part 39 of the Criminal Procedure Rules (appeal to the Court of Appeal about conviction or sentence) are to be lodged directly with the Criminal Appeal Office and not with the Crown Court where the appellant was convicted or sentenced. This Practice Direction must be read alongside the detailed guidance notes that have been produced to accompany the new forms.<sup>2</sup>

From this date the Crown Court will no longer accept Forms NG and will return them to the sender. Forms NG and Grounds of Appeal should only be lodged once. They should, where possible, be lodged by email. Applications should not be lodged directly onto the Digital Case System. Applications must be lodged at the following address: [criminalappealoffice.applications@hmcts.x.gsi.gov.uk](mailto:criminalappealoffice.applications@hmcts.x.gsi.gov.uk)

If you do not have access to an email account, you should post Form NG and the Grounds of Appeal to: The Registrar, Criminal Appeal Office, Royal Courts of Justice, Strand, London WC2A 2LL. Once an application has been effectively lodged, the Registrar will confirm receipt within 7 days.

##### **Service**

39C.6 Legal representatives should make sure they provide their secure email address for the purposes of correspondence and service of document.<sup>3</sup> The date of service for new applications lodged by email will be the day on which it is<sup>4</sup> 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.

##### **Completing the Form NG**

39C.7 All applications must be compliant with the relevant Criminal Procedure Rules, particularly those in Part 39. A separate Form NG should be completed for each substantive application which is being made. Each application (conviction, sentence and confiscation order) has its own Form NG and must be drafted and lodged as a stand-alone application.

Note: There is a new Form NG to be used from 1 October 2018, see [www.banksr.com](http://www.banksr.com) Other Matters Other Documents Court of Appeal. Ed.

#### 4.68 *Partial leave/Adding a ground of appeal*

*Criminal Practice Directions 2015 EWCA Crim 1567 para 39C.45* Where the appellant wants to rely on a ground of appeal that is not identified by the appeal notice, an application under Criminal Procedure Rules 2015 Rule 36.14(5) is required. In *R v James and Others 2018 EWCA Crim 285* the Court of

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<sup>1</sup> As inserted by *Criminal Practice Directions 2015 Amendment No 7 2018 EWCA Crim 1760*

<sup>2</sup> See [www.banksr.com](http://www.banksr.com) Other Matters Other Documents Criminal Practice Directions and [www.banksr.com](http://www.banksr.com) Other Matters Other Documents Court of Appeal

<sup>3</sup> Perhaps the author meant 'documents'.

<sup>4</sup> Perhaps the author meant 'they are'.

<sup>5</sup> As inserted by *Criminal Practice Directions 2015 Amendment No 7 2018 EWCA Crim 1760*. In force 1/10/18

Appeal identified as follows the considerations that obtain and the criteria that the court will apply on any such application.

(a) as a general rule all the grounds of appeal that an appellant wishes to advance should be lodged with the appeal notice, subject to their being perfected on receipt of transcripts from the Registrar.

(b) the application for permission to appeal under section 31 of the Criminal Appeal Act 1968 is an important stage in the process. It may not be treated lightly or its determination in effect ignored merely because fresh representatives would have done or argued things differently to their predecessors. Fresh grounds advanced by fresh representatives must be particularly cogent.

(c) as well as addressing the factors material to the determination of an application for an extension of time within which to renew an application for permission to appeal, if that is required, on an application under Criminal Procedure Rules Rule 36.14(5) [see 4.36] the appellant or his or her representatives must address directly the factors which the court is likely to consider relevant when deciding whether to allow the substitution or addition of grounds of appeal. Those factors include (but this list is not exhaustive):

(i) the extent of the delay in advancing the fresh ground or grounds;

(ii) the reasons for that delay;

(iii) whether the facts or issues the subject of the fresh ground were known to the appellant's representatives when they advised on appeal;

(iv) the interests of justice and the overriding objective in Part 1 of the Criminal Procedure Rules.

(d) [Not listed. About *R v McCook* 2014 duties, transcripts and respondent's notices and adding nothing new.]

(e) while an application under **Criminal Procedure Rules 36.14(5)** will not require "exceptional leave", and hence the demonstration of substantial injustice should it not be granted, the hurdle for the applicant is a high one nonetheless. Representatives should remind themselves of the provisions of paragraph 39C.2 above.

(f) permission to renew out of time an application for permission to appeal is not given unless the applicant can persuade the court that very good reasons exist. If that application to renew out of time is accompanied by an application to vary the grounds of appeal, the hurdle will be higher still.

(g) any application to substitute or add grounds will be considered by a fully constituted court and at a hearing, not on the papers.

(h) on any renewal of an application for permission to appeal accompanied by an application under Criminal Procedure Rules 36.14(5), if the court refuses those applications it has the power to make a loss of time order or an order for costs in line with *R v Gray and Others* [2014] EWCA Crim 2372. By analogy with *R v Kirk* [2015] EWCA Crim 1764 (where the court refused an extension of time) the court has the power to order payment of the costs of obtaining the respondent's notice and any additional transcripts.

#### **4.77 *Shall not be dealt with more severely***

*R v Suffi* 2018 EWCA Crim 1750 D pleaded to harassment (5 years' extended sentence (2 years' custody 3 years' extended licence)), perverting the course of justice (5 years concurrent) and two driving whilst disqualified offences (4 months concurrent). Held. The extended sentence was unlawful and the [longer] determinate sentence concurrent to an extended sentence was poor sentencing practice. We would wish

to make a 5-year extended sentence (4 years' custody 1 year's extended licence), which would be lawful, and a reduced 4 years for the perverting count. Sadly, we can't. Currently D would be released after 2½ years (half the 5-year term) when the custodial term of the extended sentence would have been served. The proposed sentence would release D after 32 months (two-thirds of 4 years). The proposed sentence would treat D more severely. *R v Thompson and Others* 2018 applied.

#### **4.83 Direction for loss of time**

**Criminal Practice Directions 2015 EWCA Crim 1567 para 39E.16** Both the Court and the single judge have power, in their discretion, under the Criminal Appeal Act 1968 sections 29 and 31, to direct that part of the time during which an applicant is in custody after lodging his notice of application for leave to appeal should not count towards sentence. When leave to appeal has been refused by the single judge, it is necessary to consider the reasons given by the single judge before making a decision whether to renew the application. Where an application devoid of merit has been refused by the single judge he may indicate that the Full Court should consider making a direction for loss of time on renewal of the application. However, the Full Court may make such a direction whether or not such an indication has been given by the single judge.

39E.2 The case of *R v Gray & Others* 2014 EWCA Crim 2372 makes clear “that unmeritorious renewal applications took up a wholly disproportionate amount of staff and judicial resources in preparation and hearing time. They also wasted significant sums of public money... The more time the Court of Appeal Office and the judges spent on unmeritorious applications, the longer the waiting times were likely to be....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 Offenders Act 1985. “

39E.3 Further, applicants and counsel are reminded of the warning given by the Court of Appeal in *R v Hart and Others* 2006 EWCA Crim 3239, 2007 1 Cr. App. R. 31 and should ‘heed the fact that this court is prepared to exercise its power ... The mere fact that counsel has advised that there are grounds of appeal will not always be a sufficient answer to the question as to whether or not an application has indeed been brought which was totally without merit.’

39E.4 Where the Single Judge has not indicated that the Full Court should consider making a Loss of Time Order because the defendant has already been released, the case of *R v Nolan* 2017 EWCA Crim 2449 indicates that the Single Judge should consider what, if any, costs have been incurred by the Registrar and the Prosecution and should make directions accordingly. Reference should be made to the relevant Costs Division of the Criminal Practice Direction.

#### **4.91 Defendant retried etc.**

***R v Betts* 2017 EWCA Crim 1909, 2018 1 Cr App R (S) 28 (p 201)** D was convicted of causing death by dangerous driving. He was sentenced to 3½ years. His conviction was quashed and he was retried and reconvicted. D was then sentenced to 44 months. The Judge was told that he was limited to the 3½ years and he reduced the sentence to 3½ years. The defence argued that because of [presumably] the extra delay and additional other mitigation the sentence should be less than 3½ years. Held. The Judge's task was not to start with the first sentence. His approach to put the first sentence out of his mind was correct. The only relevance of the previous sentence was the second sentence could not be more severe than the first sentence. We reject all the grounds of appeal.