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A Guide to Commencing Proceedings in the Court of Appeal

Criminal Division

Foreword by the Lord Chief Justice of England and Wales

In recent years the Court of Appeal Criminal Division has faced increased complexity in appeals, not only against conviction but also against sentence, particularly in the light of the plethora of recent sentencing legislation. Additionally, the jurisdiction of the Court has expanded to encompass a variety of diverse applications and appeals by the defence, the Crown and other interested parties.

This guide provides invaluable advice as to the initial steps for commencing proceedings in the Court of Appeal Criminal Division generally and in relation to perhaps unfamiliar provisions.

The first and most important step is, of course, the preparation of the grounds of appeal. The Rules prescribe the form and content of the Notice and Grounds of Appeal. Practitioners are also required to summarise the facts and outline their arguments concisely. Well drafted grounds of appeal assist the single Judge when considering leave and serve to shorten any hearing before the full Court. Ill prepared and prolix documents necessarily lead to wasted time spent on preparation and unnecessarily protracted hearings.

It is important that we all take seriously our responsibility to ensure the effective progression of cases and keep delay to a minimum. Once an application or appeal is commenced, the responsible officer at the Criminal Appeal Office will be available to assist with any queries on practice or procedure.

The Court could not deal with this volume of work efficiently without the support of the Registrar and his staff in the Criminal Appeal Office. Their experience and expertise is invaluable and can always be relied on by those who use the Court, not least those who are unfamiliar with its practice and procedures.

Judge C.J.

October 2008

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Introduction

Since the publication of the last Guide to Proceedings in the Court of Appeal (Criminal Division), the court's jurisdiction has increased. It hears appeals not only against conviction and sentence, but also against various interlocutory rulings, as well as other appeals and applications.

This guide provides practical information about how to commence and conduct proceedings before the court. Once proceedings are commenced, an application will have its own unique reference number and a case progression officer who can help with any difficulties or queries about procedure.

The guide is set out as follows:

- A. General principles of practice and procedure when applying for leave to appeal conviction and sentence.
- B. Guidance on appeals against rulings made in preparatory hearings.
- C. Guidance on prosecution appeals against 'terminating' rulings.
- D. Brief guidance on other appeals in bullet point form showing:
 - the type of appeal,
 - the relevant section of the statute
 - the relevant Criminal Procedure Rules
 - who can apply
 - the forms to be used and time limits
 - respondents' notices,
 - whether representation orders are available
 - whether leave to appeal is required
- E. Guidance on applications for a retrial for a serious offence.

A list of all up to date forms referred to in this guide may be accessed from the HMCS website at www.hmcourts-service.gov.uk or the Criminal Procedure Rules Committee website at www.justice.gov.uk/criminal/procrules. Where the Criminal Procedure Rules do not provide for a specific form, this guide indicates the appropriate form to be used.

This guide was prepared under my direction by the staff of the Criminal Appeal Office, but principally by Ms Alix Beldam and Ms Susan Holdham. It describes the law and practice of the Court as at 1st October 2008.

Master Venne
Registrar of Criminal Appeals

Terminology

The Criminal Appeal Act 1968 refers to 'leave to appeal'. This is now referred to as 'permission to appeal' in the Criminal Procedure Rules 2007. This guide keeps to the terminology used by the Act.

Also consistently with the Act, an 'appellant' is referred to without distinction, but it should be borne in mind that it is the accepted practice of the Criminal Appeal Office (CAO) to refer to a person who has served notice of appeal but not been granted leave to appeal as an 'applicant' and use the term 'appellant' to refer to a person who has been granted leave to appeal.

Any reference to Counsel should be read as including a Solicitor Advocate as appropriate.

A General principles of practice and procedure when applying for leave to appeal conviction and sentence

AI Advice and Assistance

AI-1 Provision for advice or assistance on appeal is included in the trial representation order issued by the Crown Court. Solicitors should not wait to be asked for advice by the defendant. Immediately following the conclusion of the case, the legal representatives should see the defendant and counsel should express orally his final view as to the prospects of a successful appeal (whether against conviction or sentence or both). If there are no reasonable grounds of appeal, that should be confirmed in writing and a copy provided then, or as soon as practicable thereafter, to the defendant by the solicitor. If there are reasonable grounds, grounds of appeal should be drafted, signed and sent to instructing solicitors as soon as possible. Solicitors should immediately send a copy of the documents received from counsel to the defendant.

AI-2 Prior to the lodging of the notice and grounds of appeal by service of Form NG, the Registrar has no power to grant a representation order. Also, the Crown Court can only amend a representation order in favour of fresh legal representatives if advice on appeal has not been given by trial legal representatives and it is necessary and reasonable for another legal representative to be instructed. Where advice on appeal has been given by trial legal representatives, application for funding may only be made to the Legal Services Commission (LSC).

AI-3 Once the Form NG has been lodged, the Registrar is the authority for decisions about representation orders, in accordance with the principle that the Court before which there are proceedings is the Court with power to grant a right to representation (Schedule 3 of the Access to Justice Act 1999 affirmed by Regulation 10 of the Criminal Defence Service (General) (No2) Regs 2001).

A1-4 Where, in order to settle grounds of appeal, work of an exceptional nature is contemplated or where the expense will be great, legal representatives should submit a Form NG with provisional grounds of appeal and with a note to the Registrar requesting a representation order to cover the specific work considered necessary to enable proper grounds of appeal to be settled.

A2 Form NG and Grounds of Appeal

A2-1 Where counsel has advised an appeal, solicitors should forward the signed grounds of appeal to the Crown Court accompanied by Form NG and such other forms as may be appropriate. It should be noted that Form NG and grounds of appeal are required to be served within the relevant time limit in all cases, whether or not leave to appeal is required (e.g. where a trial Judge's certificate has been granted). However, on a reference by the Criminal Cases Review Commission (CCRC), if no Form NG and grounds are served within the required period, then the reference shall be treated as the appeal notice: Rule 68.5(2).

A2-2 Grounds must be settled with sufficient particularity to enable the Registrar, and subsequently the Court, to identify clearly the matters relied upon. A mere formula such as 'the conviction is unsafe' or 'the sentence is in all the circumstances too severe' will be ineffective as grounds and time will continue to run against the defendant.

A2-3 Rule 68.3(1) sets out the information that must be contained in the appeal notice. The notice must:

- (a) specify:
 - (i) the conviction, verdict, or finding,
 - (ii) the sentence, or
 - (iii) the order, or the failure to make an order about which the appellant wants to appeal;
- (b) identify each ground of appeal on which the appellant relies, numbering them consecutively (if there is more than one) and concisely outlining each argument in support;

- (c) identify the transcript that the appellant thinks the court will need, if the appellant wants to appeal against a conviction;
- (d) identify the relevant sentencing powers of the Crown Court, if sentence is in issue;
- (e) where the Criminal Cases Review Commission refers a case to the court, explain how each ground of appeal relates (if it does) to the reasons for the reference;
- (f) summarise the relevant facts;
- (g) identify any relevant authorities;
- (h) include or attach any application for the following, with reasons -
 - (i) permission to appeal, if the appellant needs the court's permission,
 - (ii) an extension of time within which to serve the appeal notice,
 - (iii) bail pending appeal,
 - (iv) a direction to attend in person a hearing that the appellant could attend by live link, if the appellant is in custody,
 - (v) the introduction of evidence, including hearsay evidence and evidence of bad character,
 - (vi) an order requiring a witness to attend court,
 - (vii) a direction for special measures for a witness,
 - (viii) a direction for special measures for the giving of evidence by the appellant;
- (i) identify any other document or thing that the appellant thinks the court will need to decide the appeal.

A2-4 There is now a requirement for the grounds of appeal to set out the relevant facts and nature of the proceedings concisely in one all encompassing document, not separate grounds and advice. The intended readership of this document is the Court and not the lay or professional client. Its purpose is to enable the single Judge to grasp quickly the facts and issues in the case. In appropriate cases, draft grounds of appeal may be perfected before submission to the single Judge (*see further below para A5*).

A2-5 Any document mentioned in the grounds should be identified clearly, by exhibit number or otherwise. Similarly, if counsel requires an original exhibit or shorthand writer's tape recording, he should say so well in advance of any determination or hearing.

A2-6 Counsel should not settle or sign grounds unless they are reasonable, have some real prospect of success and are such that he is prepared to argue them before the Court. Counsel should not settle grounds he cannot support because he is 'instructed' to do so by a defendant.

A2-7 Procedure in relation to particular grounds of appeal

A2-7.1 Applications to call Fresh Evidence

A Form W and a statement from the witness in the form prescribed by s.9 of the Criminal Justice Act 1967 should be lodged in respect of each witness it is proposed to call. The Form W should indicate whether there is an application for a witness order. The Registrar or the single Judge may direct the issue of a witness order, but only the Court hearing the appeal may give leave for a witness to be called.

The Court will require a cogent explanation for the failure to adduce the evidence at trial. A supporting witness statement or affidavit from the appellant's solicitor should be lodged in this regard. (*Gogana* (The Times 12/07/1999))

If there is to be an application to adduce hearsay and/or evidence of bad character or for special measures, then the appropriate forms should be lodged: Rule 68.7(1).

A2-7.2 Complaints against trial counsel as a ground of appeal

Where a ground of appeal explicitly criticises trial counsel and/or trial solicitors, the Registrar will institute the 'waiver of privilege' procedure. The appellant will be asked to 'waive privilege' in respect of instructions to and advice at trial from legal

representatives. If he does waive privilege, the grounds of appeal are sent to the appropriate trial representative(s) and they are invited to respond. Any response will be sent to the appellant or his fresh legal representatives for comment. All these documents will be sent to the single Judge when considering the application for leave. The single Judge may draw inferences from any failure to participate in the process. 'Waiver of privilege' is a procedure that should be instigated by the Registrar and not by fresh legal representatives, who should go no further than obtaining a waiver of privilege from the appellant: *Doherty and McGregor* [1997] 2 Cr.App.R. 218.

A2-7.3 Insufficient weight given to assistance to prosecution authorities

Where a ground of appeal against sentence is that the Judge has given insufficient weight to the assistance given to the prosecution authorities, the 'text' which had been prepared for the sentencing Judge is obtained by the Registrar. Grounds of appeal should be drafted in an anodyne form with a note to the Registrar alerting him to the existence of a 'text'. The single Judge will have seen the 'text' when considering leave as will the full Court before the appeal hearing and it need not be alluded to in open court.

A3 Time Limits

A3-1 Notice and grounds should reach the Crown Court within 28 days from the date of the conviction in the case of an application for leave to appeal against conviction and within 28 days from the date of sentence in the case of an application for leave to appeal against sentence [s.18 Criminal Appeal Act 1968 & Rule 68.2(1)]. On a reference by the CCRC, Form NG and grounds should be served on the Registrar not more than 56 days after the Registrar has served notice that the CCRC has referred a conviction and not more than 28 days in the case of a sentence referral: Rule 68.2(2).

A3-2 A confiscation order (whether made under the Criminal Justice Act 1988, the Drug Trafficking Act 1994 or the Proceeds of Crime Act 2002) is a sentence [s.50 Criminal Appeal Act 1968]. Where sentences are passed in separate proceedings on different dates there may be two appeals against sentence. Thus, there may be an appeal against the custodial part of a sentence and an appeal against a confiscation order. (*Neal* [1999] 2 Cr.App.R. (S) 352)

A3-3 An application for extension of the 28 day period in which to give notice of application for leave to appeal or notice of appeal must always be supported by reasons why the application for leave was not submitted in time. It is not enough merely to tick the relevant box on Form NG.

A3-4 Such an application should be submitted when the application for leave to appeal against either conviction or sentence is made and not in advance. Notwithstanding the terms of s.18(3) Criminal Appeal Act 1968, it has long been the practice of the Registrar to require the extension of time application to be made at the time of service of the notice and grounds of appeal. This practice is now reflected by Criminal Procedure Rule 65.4.

A4 Transcript and notes of evidence

A4-1 In conviction cases, transcripts of the summing up and proceedings up to and including verdict are obtained as a matter of course. Similarly, the transcript of the prosecution opening of facts on a guilty plea and the judge's observations on passing sentence are usually obtained in sentence cases. There is now an obligation under Rule 68.3(2) for counsel to identify any further transcript which counsel considers the court will need and to provide a note of names, dates and times to enable an order to be placed with the shorthand writers. Whether or not any further transcript is required is a matter for the judgment of the Registrar or his staff.

A4-2 Transcript should only be requested if it is essential for the proper conduct of the appeal in the light of the grounds. If the Registrar and counsel are unable to agree the extent of the transcript to be obtained, the Registrar may refer that matter to a Judge. In some cases the Registrar may propose that counsel agree a note in place of transcript.

A4-3 In certain circumstances the costs of unnecessary transcript could be ordered to be paid by the appellant. Where transcript is obtained otherwise than through the Registrar, he may disallow the cost on taxation of public funding.

A5 Perfection of grounds of appeal

A5-1 The purpose of perfection is (a) to save valuable judicial time by enabling the Court to identify at once the relevant parts of the transcript and (b) to give counsel the opportunity to reconsider his original grounds in the light of the transcript. Perfected grounds should consist of a fresh document which supersedes the original grounds of appeal and contains *inter alia* references by page number and letter (or paragraph number) to all relevant passages in the transcript.

A5-2 In conviction or confiscation cases, the Registrar will almost certainly invite counsel to perfect grounds in the light of the transcript obtained, to assist the single Judge or full Court. Where counsel indicates a wish to perfect grounds of appeal against sentence, the Registrar will consider the request and will only invite perfection where he considers it necessary for the assistance of the single Judge or full Court.

A5-3 If perfection is appropriate, counsel will be sent a copy of the transcript and asked to perfect his grounds within 14 days. In the absence of any response from counsel, the existing notice and grounds of appeal will be placed before the single Judge or the Court without further notice. If counsel does not wish to perfect his grounds, the transcript should be returned with a note to that effect.

A5-4 If, having considered the transcript, counsel is of opinion that there are no valid grounds, he should set out his reasons in a further advice and send it to his instructing solicitors. He should inform the Registrar that he has done so, but should not send him a copy of that advice. Solicitors should send a copy to the appellant and obtain instructions, at the same time explaining that if the appellant persists with his application the Court may consider whether to make a loss of time order. (*see further below A-13*)

A6 Respondent's Notice

A6-1 The Criminal Procedure Rules 2007 provide for the service of a respondent's notice. Under Rule 68.6(1) the Registrar may serve the appeal notice on any party directly affected by the appeal (usually the prosecution) and must do so in a CCRC case. That party may then serve a respondent's notice if it wishes to make representations and must do so if the Registrar so directs: Rule 68.6(2). The respondent's notice should be served within 14 days (Rule 68.6(4)) on the appellant, the Registrar and any other party on whom the Registrar served the appeal notice (Rule 68.6(3)). The respondent's notice must be in the specified form [Form RN], in which a respondent should set out the grounds of opposition (Rule 68.6(5)) and which must include the information set out in Rule 68.6(6).

A6-2 In practice, this procedure primarily applies prior to consideration of leave by the single Judge in both conviction and sentence cases. The Attorney General and the Registrar, following consultation with representatives from the Crown Prosecution Service (CPS) and the Revenue and Customs Prosecution Office (RCPO), have agreed guidance on types of cases and/or issues where the Registrar should consider whether to serve an appeal notice and direct or invite a party to serve a respondent's notice before the consideration of leave by the single Judge. Examples of when the Registrar might **direct** a respondent's notice include where the

grounds concern matters which were the subject of public interest immunity (PII), allegations of jury irregularity, criticism of the conduct of the judge and complex frauds. Cases where it might be appropriate for the Registrar to **invite** a respondent's notice include, for example, homicide offences, serious sexual offences, cases with national profile or high media interest, cases of violence or domestic violence.

A6-3 In conviction cases where leave has been granted or where the application for leave has been referred to the full Court, the Crown is briefed to attend the hearing and required to submit a respondent's notice/skeleton argument. In relation to sentence cases where leave has been granted, referred or an appellant is represented on a renewed application, the sentence protocol set out in para.11.1 of the Consolidated Criminal Practice Direction will apply. In those cases, a respondent's notice/skeleton argument will have to be served when the Crown indicates a wish to attend or when the Registrar invites or directs the Crown to attend.

A7 Referral by the Registrar

A7-1 Leave to appeal is required in all cases except where the trial Judge or sentencing Judge has certified that the case is fit for appeal (ss.1(2) and 11(1A) Criminal Appeal Act 1968 as amended) or where the case has been referred by the CCRC. The appellant must obtain leave to pursue grounds not related to the Commission's reasons for referral: s.14(4B) Criminal Appeal Act 1995 amended by s.315 Criminal Justice Act 2003.

A7-2 Where leave to appeal is required and the Registrar has obtained the necessary documents, he will refer the application(s) either (a) to a single Judge for decision under s. 31 Criminal Appeal Act 1968 or (b) directly to the full Court, in which case a representation order is usually granted for the hearing. However, the Registrar will not grant a representation order when the presence of counsel is not required, e.g. where the application refers solely to an

amendment of the number of days to be credited as 'remand time' and the figure is agreed by the parties. Where an application is referred to the full Court by the Registrar because an unlawful sentence has been passed or other procedural error identified, a representation order will ordinarily be granted, but counsel should be aware that the Court may make observations for the attention of the determining officer that a full fee should not be allowed on taxation.

A7-3 Where leave to appeal is not required, e.g. on appeal by certificate of the trial Judge, the Registrar will usually grant a representation order for the hearing. On a reference from the CCRC, it is the Registrar's usual practice to grant a representation order in the first instance, to solicitors for them to nominate and instruct counsel to settle grounds of appeal. Once counsel's details are known, a further representation order will be granted to cover the preparation (including settling grounds) and presentation of the appeal by counsel and further work by solicitors, as necessary in light of the grounds.

A8 Bail pending appeal

A8-1 Bail may be granted (a) by a single Judge or the full Court or (b) by a trial or sentencing Judge who has certified the case fit for appeal. In the latter case, bail can only be granted within 28 days of the conviction or sentence which is the subject of the appeal and may not be granted if an application for bail has already been made to the Court of Appeal.

A8-2 An application to the Court of Appeal for bail must be supported by a completed Form B, whether or not the application is made at the same time as the notice and grounds are served. The completed Form B must be served on the Registrar and the prosecution at least 24 hours before any application is made to enable the Crown to make representations (either written or oral) about the application and any conditions.

A8-3 An application for bail will not be considered by a single Judge or the Court until notice of application for leave to appeal or notice of appeal has first been given. In practice, Judges will also require the relevant transcripts to be available so they may take a view as to the merits of the substantive application.

A8-4 It is the practice of the Court, if bail is granted, to require a condition of residence. An application for variation of conditions of bail may be determined by the Registrar (if unopposed) or a single Judge.

A9 Consideration of the applications by single Judge

A9-1 Normally a single Judge will consider the application for leave to appeal together with any ancillary applications, e.g. for bail or representation order, without hearing oral argument. Counsel may request an oral hearing, but it is only in very rare circumstances that the Registrar would consider it appropriate to grant a representation order for the proceedings before a single Judge at an oral hearing, but counsel may appear to argue the applications before the single Judge where instructed to do so, usually appearing either pro bono or privately funded. Oral applications for leave and bail are usually heard at 9.30a.m. before the normal court sittings. Counsel appears unrobed. If counsel considers that an application may take longer than 20 minutes, the Registrar must be informed.

A10 Powers of the single Judge

A10-1 The single Judge may grant the application for leave, refuse it or refer it to the full Court. In conviction cases and in sentence cases where appropriate, the single Judge may grant limited leave i.e. leave to argue some grounds but not others. If the grounds upon which leave has been refused are to be renewed before the full Court, Counsel must notify the Registrar within 14 days. In the absence of any notification of renewal, it will be assumed that the grounds upon which leave was refused will not be pursued.

The single Judge may also grant, refuse or refer any ancillary application.

All Grant of leave or reference to full Court

All-1 Where the single Judge grants leave or refers an application to the Court, it is usual to grant a representation order for the preparation and presentation of the appeal. This is usually limited to the services of counsel only, in which event counsel will be assigned by the Registrar. In such a case the Registrar will provide a brief but does not act as an appellant's solicitor. Counsel who settled grounds of appeal will usually be assigned. However, the Registrar may assign one counsel to represent more than one appellant if appropriate. If it is considered that a representation order for two counsel and/or solicitors is required, counsel should notify the Registrar and provide written justification in accordance with the Criminal Defence Service (General) (No.2) Regulations 2001.

All-2 If solicitors are assigned, it should be noted that by virtue of General Regulation 13 Criminal Defence Service (General) (No 2) Regulations 2001, a representation order can only be issued to a solicitor if he holds a General Criminal Contract (Crime Franchise) with the LSC. A solicitor not holding such a franchise may apply to the LSC for an individual case contract (by virtue of which the solicitor is employed on behalf of the LSC to represent an appellant in a given case). Such a contract is sufficient for the purposes of General Regulation 13.

All-3 In some circumstances, the Registrar may refer an application to the full Court. This may be because there is a novel point of law or because in a sentence case, the sentence passed is unlawful and regardless of the merits, the sentence should be amended. A representation order for counsel is usually granted. Counsel for the prosecution usually attends a Registrar's referral.

A12 Refusal by the single Judge

A12-1 Where the single Judge refuses leave to appeal, the Registrar sends a notification of the refusal, including any observations which the Judge may have made, to the appellant, who is informed that he may require the application to be considered by the Court by serving a renewal notice [Form SJ-Renewal] upon the Registrar within 14 days from the date on which the notice of refusal was served on him.

A12-2 A refused application which is not renewed within 14 days lapses. An appellant may apply for an extension of time in which to renew his application for leave: Rule 65.5(2) and s.31 Criminal Appeal Act 1968. The Registrar will normally refer such an application to the Court to be considered at the same time as the renewed application for leave to appeal. An application for extension for time in which to renew must be supported by cogent reasons.

A12-3 If it is intended that counsel should represent the appellant at the hearing of the renewed application for leave to appeal, whether privately instructed or on a *pro bono* basis, such intention must be communicated to the CAO in writing as soon as that decision has been made. Whilst a representation order is not granted by the Registrar in respect of a renewed application for leave, counsel may apply at the hearing to the Court for a representation order to cover that appearance. In practice, this is only granted where the application for leave is successful.

A13 Directions for loss of time

A13-1 S.29 Criminal Appeal Act 1968 empowers the Court to direct that time spent in custody as an appellant shall not count as part of the term of any sentence to which the appellant is for the time being subject. The Court will do so where it considers that an application is wholly without merit. Such an order may not be made where leave to appeal or a trial judge's certificate has been granted, on a reference by the C.C.R.C or where an appeal has been abandoned.

A13-2 The mere fact that counsel has advised that there are grounds of appeal will not be a sufficient answer to the question as to whether or not an application has indeed been brought which was wholly without merit. *Hart & others* [2006] EWCA Crim 3239.

A13-3 The Form SJ, on which the single Judge records his decisions, and the reverse of which is used by appellants to indicate their wish to renew, includes:

- a box for the single Judge to initial to indicate that that the full Court should consider loss of time if the application is renewed and
- a box for the applicant to give reasons why such an order should not be made, whether or not an indication has been given by a single Judge.

A14 Abandonment

A14-1 An appeal or application may be abandoned at any time before the hearing without leave by completing and lodging Form A. An oral instruction or letter indicating a wish to abandon is insufficient.

A14-2 At the hearing, an application or appeal can only be abandoned with the permission of the Court: Rule 65.13(2). An appeal or application which is abandoned is treated as having been dismissed or refused by the full Court, as the case may be: Criminal Procedure Rule 65.13(4)(c).

A14-3 A notice of abandonment cannot be withdrawn nor can it be conditional. A person who wants to reinstate an application or appeal after abandonment must apply in writing with reasons: Criminal Procedure Rule 65.13(5). The Court has power to allow reinstatement only where the purported abandonment can be treated as a nullity (see *Medway* (1976) 62 Cr.App.R.85; *Burt*, The Independent, December 3, 2004; *Grant* (2005) 149 S.J.1186)

A15 Case Management Duties

A15-1 Criminal Procedure Rule 65.2 gives the Court and parties the same powers and duties of case management as in Part 3 of the Rules. In accordance with those duties, for each application received, the Registrar nominates a case progression officer, (the ‘responsible officer’). There is also a duty on the parties actively to assist the court to progress cases. Close contact between counsel and solicitors and the responsible officer is encouraged in order to facilitate the efficient preparation and listing of appeals, especially in complex cases and those involving witnesses.

A15-2 Powers exercisable by the single Judge and the Registrar are contained in s.31 Criminal Appeal Act 1968 (*as amended by s.87 Courts Act 2003, s.331 & Sched.32 Criminal Justice Act 2003 and Sched.8 Criminal Justice and Immigration Act 2008*). These powers include the power to make procedural directions for the efficient and effective preparation of an application or appeal and the power to make an order under s.23(1)(a) CAA 1968 for the production of evidence etc. necessary for the determination of the case.

A15-3 Procedural directions given by the Registrar may be appealed to a single Judge. Those given by a single Judge, including a single Lord Justice, are final.

B Interlocutory Appeals against rulings in Preparatory Hearings

Appeal against a ruling under s.9 of the Criminal Justice Act 1987 or a decision under s.35 of the Criminal Procedure and Investigations Act 1996 [Part 66 Criminal Procedure Rules 2007]

B1 Where a judge has ordered a preparatory hearing, he may make a ruling as to the admissibility of evidence; any other question of law relating to the case or any question as to the severance or joinder of charges. (s.9(3)(b) (c) & (d) CJA 1987/s.31(3)(a) (b) & (c) CPIA 1996)

B2 Under s.9(11) CJA 1987/s. 35(1) CPIA 1996 the defence or the prosecution may appeal to the CACD (and ultimately to the House of Lords) against such a ruling, but only with the leave of the trial Judge, single Judge or the full Court. As to the scope of a judge's powers in relation to a preparatory hearing and thus the extent of appeal rights: see the decision of the House of Lords in *H* [2007] UKHL 7 on appeal from [2006] EWCA Crim 1975.

B3 If the trial date is imminent and the application is urgent, the Registrar should be notified so that he may consider referring the application directly to the full Court and make arrangements for listing.

B4 If an application for leave to appeal is made to the trial Judge, it should be made orally immediately after the ruling, or within two business days by serving a notice of an application on the appropriate officer of the Crown Court and all parties directly affected: Rule 66.4. Notice of appeal or application for leave to appeal [Form NG (Prep)] is to be served on the Registrar, the Crown Court and the parties within five business days of the ruling or the trial Judge's decision whether to grant leave: Rule 66.2.

B5 The notice and grounds of appeal having been served on the other parties, grounds of opposition should be served in a respondent's notice [Form RN (Prep)] within five business days of service of the appeal notice: Rule 66.5.

B6 Defence representatives are usually covered by the Crown Court representation order if one is in force. (Paragraph 2(2), Schedule 3, Access to Justice Act 1999)

B7 If the relevant time limits are not complied with, the court has power to grant an extension of time, but cogent grounds in support of the application will be required. Where a single Judge refuses leave to appeal or an extension of time within which to serve a notice, the application may be renewed for determination by the full Court by serving the notice of refusal, appropriately completed, upon the Registrar within five business days of the refusal being served (Rule 66.7).

C Appeals by a Prosecutor against a ‘terminating’ ruling

S.58 Criminal Justice Act 2003 [Part 67 Criminal Procedure Rules 2007]

C1 S.58 Criminal Justice Act 2003 gives the prosecution a right of appeal in relation to a ‘terminating’ ruling: in effect where the prosecution agrees to the defendant’s acquittal if the appeal against the ruling is not successful. (Y [2008] EWCA Crim 10) This is wide enough to encompass a case-management decision (C [2007] EWCA Crim 2532).

C2 There is no right of appeal in respect of a ruling that the jury be discharged or a ruling in respect of which there is a right of appeal to the Court of Appeal by virtue of another enactment (s.57(2)). The prosecution should therefore consider whether there is a right of appeal under s.9 CJA 1987 or s.35 CPIA 1996.

C3 The prosecution must inform the Court that it intends to appeal or request an adjournment to consider whether to appeal (s.58(4)), which will be until the next business day (Rule 67.2(2)). The judge has a discretion to adjourn for longer if there is a real reason for doing so. (H [2008] EWCA Crim 483) The prosecution can then ask the trial Judge to grant leave to appeal (Rule 67.5), although leave to appeal can be granted by the trial Judge, the single Judge or the full Court. The Crown must give the undertaking (as to the defendant’s acquittal if the appeal is abandoned or leave to appeal is not obtained) at the time when it informs the Court of its intention to appeal. The failure to give it then is fatal to an application to the Court of Appeal for leave: s.58(8); LSA [2008] EWCA Crim 1034.

C4 Whether or not leave is granted, the trial Judge must then decide if the appeal is to be expedited and if so, adjourn the case. If he decides that the appeal should not be expedited, then he can adjourn the case or discharge the jury (s.59). Leave should be granted only

where the trial Judge considers there is a real prospect of success and not in an attempt to speed up the hearing of the appeal. (*JG* [2006] EWCA Crim 3276)

C5 Whether the appeal is expedited or not affects the time limits for service of the notice of appeal [Form NG (Pros)] and respondent's notice [Form RN(Pros)]. If expedited, the appeal notice must be served the next business day after the decision, if not expedited, it must be served within five business days. Similar time limits apply to the service of the respondent's notice. Defence representatives are usually covered by the Crown Court representation order if one is in force (such proceedings being considered incidental within Paragraph 2(2), Schedule 3, Access to Justice Act 1999). If the relevant time limits are not complied with, the court has power to grant an extension of time.

C6 Expedition does not impose time limits on the Registrar or Court of Appeal. However, if leave has not been granted by the trial Judge, the application may be referred to the full Court by the Registrar to enable the application and appeal to be heard together to ensure that the matter is dealt with quickly.

C7 The Registrar endeavours to list prosecution appeals where a jury has not been discharged as quickly as possible. He is unlikely to be able to list an appeal in less than a week from the ruling because it is necessary for the prosecution to obtain transcripts, papers to be copied and the judges to read their papers. It is of great assistance if it is anticipated that there is to be an appeal against a ruling where the jury has not been discharged, that a telephone call is made to the Registrar or CAO General Office (020 7947 6011) notifying the office even before the appeal notice is sent, so that the List Office may be put on notice. The listing of an urgent appeal invariably means that other cases have to be removed from the list.

D Other Appeals

D1 Prosecution appeal against the making of a confiscation order or where the court declines to make one (save on reconsideration of benefit)

- S.31 Proceeds of Crime Act 2002.
- Parts 71 and 72 Criminal Procedure Rules.
- From 1st April 2008 only the prosecution can appeal.
- Proceedings are commenced by serving a Form PoCA 1 on the defendant and the Crown Court within 28 days of the decision appealed against. [Article 3(2)(a) Proceeds of Crime Act (Appeals under Part 2) Order 2003]
- A respondent's notice PoCA 2 is to be served on the Registrar of Criminal Appeals and the appellant not later than 14 days after receiving PoCA 1.
- An undischarged Crown Court representation order will cover advice and assistance on the merits of opposing the appeal and drafting the respondent's notice, otherwise an application for a representation order can be made to the Registrar [s.12(2)b and s.26 Access to Justice Act 1999]. In any event, where an application for a representation order is made on PoCA 2, the Registrar will consider a representation order for the hearing.
- Leave to appeal can be granted by a single Judge or the full Court.

D2 Appeal in relation to a restraint order

- S.43 Proceeds of Crime Act 2002.
- Parts 71 and 73 Criminal Procedure Rules.

- The prosecution or an accredited financial investigator can appeal a refusal to make a restraint order. A person who applied for an order or who is affected by the order can apply to the Crown Court to vary or discharge the order and then appeal that decision to the Court of Appeal.
- Proceedings are commenced by serving a form PoCA 3 on the Crown Court within 14 days of the decision being appealed. PoCA 3 must then be served on any respondent, and on any person who holds realisable property to which the appeal relates, or is affected by the appeal, not later than seven days after the form is lodged at the Crown Court. The documents which are to be served with PoCA 3 are set out in Rule 73.2(3).
- A respondent's notice PoCA 4 is to be served on the Registrar of Criminal Appeals not later than 14 days after the respondent is notified that the appellant has leave to appeal or notified that the application for leave and any appeal are to be heard together. PoCA 4 is then to be served on the appellant and any other respondent as soon as is practicable and not later than seven days after it was served on the Registrar.
- An application for a restraint order can be made as soon as a criminal investigation has begun. The proposed defendant may not have been charged: s.40 Proceeds of Crime Act 2002. This affects the type of public funding.

If a defendant has been charged with a criminal offence connected to the restraint order then the restraint proceedings are regarded as incidental to the criminal proceedings and are treated as criminal proceedings for funding purposes [Reg.3(3)(c) Criminal Defence Service (General)(No2) Regulations 2001] and the Registrar can grant a representation order if a defendant appeals a decision on an application to vary or discharge the restraint order.

If the prosecution apply for a restraint order in the Crown Court before the subject of the restraint order has been charged with a criminal offence and the subject of that order wishes to appeal

a decision on an application to vary or discharge the restraint order then civil legal aid may be available as these proceedings fall within para.3 Schedule 2 Access to Justice Act 1999. The Legal Services Commission should be contacted for funding within the Community Legal Service scheme.

Similarly, a person affected by the order who wishes to appeal a decision on an application to vary or discharge the restraint order should apply to the Legal Services Commission for funding within the Community Legal Service scheme.

- Leave to appeal can be granted by a single Judge or full Court.

D3 Appeal in relation to a receivership order

- S.65 Proceeds of Crime Act 2002.
- Parts 71 and 73 Criminal Procedure Rules.
- An appeal can be brought by
 - a) The person who applied for the order
 - b) A person who is affected by the order or
 - c) The receiver.

The orders against which an appeal will lie are

- 1) The appointment or non-appointment of a receiver
 - 2) The powers of a receiver
 - 3) An order giving a direction to a receiver and
 - 4) The variation or discharge of a receivership order
- Proceedings are commenced by serving a Form PoCA 3 on the Crown Court within 14 days of the decision being appealed. PoCA 3 must then be served on any respondent and on any person who holds realisable property to which the appeal relates, or is affected by the appeal, not later than seven days after the form is lodged at the Crown Court. The documents which are to be served with PoCA 3 are set out in Rule 73.2(3).

- A respondent's notice PoCA 4 is to be served on the Registrar of Criminal Appeals not later than 14 days after the respondent is notified that the appellant has leave to appeal or is notified that the application for leave and any appeal are to be heard together. PoCA 4 is then to be served on the appellant and any other respondent as soon as is practicable and not later than seven days after it was served on the Registrar.
- If a defendant has been charged with a criminal offence connected to a receivership order then the receivership proceedings are regarded as incidental to the criminal proceedings and are treated as criminal proceedings for funding purposes [Reg.3(3)(c) Criminal Defence Service (General)(No2) Regulations 2001] and the Registrar can grant a representation order if a defendant appeals a decision relating to a receivership order.

If a management receivership order or an application for such an order is made in the Crown Court before the a criminal offence has been charged and a person affected by the order (including the proposed defendant) wishes to appeal a decision then civil legal aid may be available as these proceedings fall within para.3 Schedule 2 Access to Justice Act 1999. The Legal Services Commission should be contacted for funding within the Community Legal Service scheme.

- Leave to appeal can be granted by a single Judge or the full Court.

D4 Appeal against an order of the Crown Court in the exercise of its jurisdiction to punish for contempt – usually a finding of contempt or sentence for contempt

- S.13 Administration of Justice Act 1960.
- Part 68 Criminal Procedure Rules.
- Anyone dealt with by the Crown Court for contempt may appeal.
- Proceedings are commenced by lodging a Form NG at the Crown Court not more than 28 days after the order to be appealed.

- The Registrar may direct a respondent's notice Form RN or the Crown may serve one if they wish to make representations to the Court.
- An undischarged Crown Court representation order will cover advice and assistance on appeal. The Registrar will usually grant a representation order for the hearing: s.12(2)(b) Access to Justice Act 1999.
- No leave to appeal is required. The appeal is as of right.
- Appeals occur most frequently when an appellant wishes to appeal a sentence for failing to appear at the Crown Court as the failing to appear is dealt with as if it were contempt.

D5 Appeal against a minimum term set or reviewed by a High Court judge

- Para. 14 of Schedule 22 Criminal Justice Act 2003.
- Part 68 Criminal Procedure Rules.
- A defendant with a mandatory life sentence imposed before 18th December 2003 who has had his minimum term set or reviewed by a High Court judge can appeal.
- Proceedings are commenced by service of Form NG (MT) on the Registrar not more than 28 days after the decision.
- The Registrar may direct a respondent's notice Form RN or the Crown may serve one if they wish to make representations to the Court.
- An application for a representation order can be made to the Registrar [s.12(2)(b) Access to Justice Act 1999].
- Leave to appeal is required and can be granted by the full Court or a single Judge: Part 2 Para.8 Criminal Justice Act 2003 (Mandatory Life Sentences: Appeals in Transitional Cases) Order 2005 (S.I. 2005/2798).

D6 Attorney General's reference of an unduly lenient sentence

- S.36 Criminal Justice Act 1988.
- Part 70 Criminal Procedure Rules.
- The Attorney General can refer sentences only in relation to specific offences or sentences [ss.35 & 36 Criminal Justice Act 1988 and Criminal Justice Act 1988 (Reviews of Sentencing) Order 2006] including a minimum term, set or reviewed by a High Court Judge [Para 15. Schedule 22 Criminal Justice Act 2003]
- Although Rule 70.3(1) implies there is a specific form to commence proceedings, in practice a standard letter with supporting documents is sent by the Attorney General's Office no more than 28 days after sentence.
- If the defendant wishes to make representations to the court he must serve a respondent's notice within 14 days of the Registrar serving the application upon him. Again, there is no specific form designated.
- Representation orders are not issued to respond to an Attorney General's reference but a defendant who appears by counsel is entitled to his reasonable costs from central funds. The cost of instructing leading counsel in addition to or instead of junior counsel is generally not considered reasonable unless there is a compelling reason. It is advisable to consult with the Registrar before leading counsel is instructed.
- The leave of the Court of Appeal is required.

D7 Attorney General's reference of a point of law on an acquittal

- S.36 Criminal Justice Act 1972.
- Part 70 Criminal Procedure Rules.

- The Attorney General can refer a point of law to the Court of Appeal for an opinion on the acquittal on indictment of the defendant.
- Although Rule 70.3(1) implies there is a specific form to commence proceedings, there is no such form and Rule 70.3 sets out what should be included in the reference. The defendant should not be identified.
- There is no time limit.
- If the defendant wishes to make representations to the court he must serve a respondent's notice within 28 days of the Registrar serving the application upon him. Again there is no specific form.
- Representation orders are not issued to respond to an Attorney General's reference but a defendant who appears by counsel is entitled to his reasonable costs from central funds.
- Leave is not required.

D8 Appeal against a finding of unfitness to plead or a finding that the accused did the act or made the omission charged

- S.15 Criminal Appeal Act 1968.
- Part 68 Criminal Procedure Rules.
- The accused can appeal (by the person appointed to represent the accused) against
 - a finding of unfitness to plead (but not fitness to plead as the defendant can appeal any subsequent conviction in the usual way on the basis he was not fit to plead) or
 - that he did the act or made the omission charged or
 - both findings.

The appeal does not lie until both findings have been made.

- Proceedings are commenced by the service of Form NG on the Crown Court not more than 28 days after the finding made which the accused wishes to appeal.
- The Crown should serve a respondent's notice Form RN if directed by the Registrar or if they wish to make representations to the Court.
- There does not appear to be any statutory provision empowering the grant of a representation order. S.19 Prosecution of Offences Act 1985 refers to costs from central funds being available to cover the fees of a person appointed by the Crown Court under s.4A of the Criminal Procedure (Insanity) Act 1964. In *Antoine* ([1999] 2 Cr.App.R 225 Court of Appeal) this was interpreted to include the costs of an appeal. S.16(4) Prosecution of Offences Act 1985 provides that where the Court of Appeal allows an appeal under Part I of the Criminal Appeal Act 1968 against... a finding under the Criminal Procedure (Insanity) Act 1964 that the appellant is under a disability, or that he did the act or made the omission charged against him... the court may make a defendant's costs order in favour of the accused.
- Leave to appeal may be granted by the Crown Court Judge, a single Judge or the full Court.

D9 Appeal against a verdict of not guilty by reason of insanity

- S.12 Criminal Appeal Act 1968.
- Part 68 Criminal Procedure Rules.
- The defendant can appeal a verdict of not guilty by reason of insanity.
- Proceedings are commenced by the service of Form NG on the Crown Court not more than 28 days after the verdict.

- The Crown should serve a respondent's notice Form RN if directed by the Registrar or if they wish to make representations to the Court.
- There does not appear to be any statutory provision empowering the grant of a representation order. S.16(4) Prosecution of Offences Act 1985 provides that where the Court of Appeal allows an appeal then the court may make a defendant's costs order. If the appeal is not allowed costs from central funds should be available on the same basis as was allowed in *Antoine* (above) in the absence of any statutory provision.
- Leave to appeal may be granted by the Crown Court Judge, a single Judge or the full Court.

D10 Appeal against the order following a verdict of not guilty by reason of insanity or a finding of unfitness to plead

- S.16A Criminal Appeal Act 1968.
- Part 68 Criminal Procedure Rules.
- An accused who, as a result of a verdict of not guilty by reason of insanity or a finding of fitness to plead has a hospital order, interim hospital order or supervision order made against him may appeal against the order.
- Proceedings are commenced by the service of Form NG on the Crown Court not more than 28 days after the order.
- The Crown should serve a respondent's notice Form RN if directed by the Registrar or if they wish to make representations to the Court.

- There does not appear to be any statutory provision empowering the grant of a representation order. S.16(4) Prosecution of Offences Act 1985 provides that where the Court of Appeal allows an appeal then the court may make a defendant's costs order. If the appeal is not allowed costs from central funds should be available on the same basis as was allowed in *Antoine* (above) in the absence of any statutory provision.
- Leave to appeal may be granted by the Crown Court Judge, a single Judge or the full Court.

D11 Appeal against review of sentence

- S.74(8) Serious Organised Crime and Police Act 2005.
- Part 68 Criminal Procedure Rules.
- A defendant or specified prosecutor may appeal.
- Proceedings are commenced by serving a Form NG (RD) on the Crown Court not more than 28 days after the review.
- A respondent's notice Form RN should be served if directed by the Registrar or if the respondent wishes to make representations to the Court.
- An application for a representation order can be made to the Registrar: s.12(2)(b) Access to Justice Act 1999.
- Leave to appeal can be granted by the single Judge or full Court [Serious Organised Crime and Police Act 2005 (Appeals under s.74) Order 2006/21]

D12 Appeal against an order for trial by jury of sample counts

- S.18 Domestic Violence, Crime and Victims Act 2004.
- Part 66 Criminal Procedure Rules.
- The defendant can appeal.

- An application for the jury to try some counts as sample counts and the judge to try the remainder if the jury convict, must be determined at a preparatory hearing and s.18 confers rights of interlocutory appeal. A Form NG (Prep) must be served on the Crown Court, the Registrar and any party directly affected not more than five business days after the order or the Crown Court Judge granting or refusing leave. (*For applications to the Crown Court Judge see Part B above*)
- A respondent's notice Form RN (Prep) should be served if the Court directs or the Crown (or any party affected) wants to make representations to the court.
- Defence representatives are usually covered by the Crown Court representation order if one is in force. [Paragraph 2(2), Schedule 3, Access to Justice Act 1999]
- The Crown Court Judge, single Judge or full Court can grant leave to appeal.

D13 Appeal against an order relating to a trial to be conducted without a jury where there is a danger of jury tampering

- S.45(5) and (9) Criminal Justice Act 2003 amending s.9(11) Criminal Justice Act 1987 and s.35(1) Criminal Procedure and Investigations Act 1994.
- Part 66 Criminal Procedure Rules.
- The prosecution can appeal the refusal to make an order; the defence can appeal the making of an order.
- A Form NG (Prep) must be served on the Crown Court, the Registrar and any party directly affected not more than five business days after the order or the Crown Court Judge granting or refusing leave. (*For applications to the Crown Court Judge see Part B above*)

- A respondent's notice Form RN (Prep) should be served if the Court directs or the Crown (or any party affected) wants to make representations to the Court.
- Defence representatives are usually covered by the Crown Court representation order if one is in force. [Paragraph 2 (2), Schedule 3, Access to Justice Act 1999]
- Leave is required. The Crown Court Judge, single Judge or full Court can grant leave to appeal.

D14 Appeal against an order that a trial should continue without a jury or a new trial take place without a jury after jury tampering

- S.47 Criminal Justice Act 2003.
- Part 66 Criminal Procedure Rules (relating to appeals against an order made in a preparatory hearing notwithstanding the ruling will not have been in the context of a preparatory hearing).
- The defendant can appeal.
- A Form NG (Prep) must be served on the Crown Court, the Registrar and any party directly affected not more than five business days after the order or the Crown Court Judge granting or refusing leave. (*For applications to the Crown Court Judge see Part B above*)
- A respondent's notice Form RN (Prep) should be served if the Court directs or the Crown (or any party affected) wants to make representations to the court.
- Defence representatives are usually covered by the Crown Court representation order is one is in force. [Paragraph 2 (2), Schedule 3, Access to Justice Act 1999]
- The Crown Court Judge, single Judge or full Court can grant leave to appeal.

D15 Appeal against orders restricting or preventing reports or restricting public access

- S.159 Criminal Justice Act 1988
- Part 69 Criminal Procedure Rules
- A person aggrieved may appeal.
- Applications against orders restricting reporting shall be made within 10 business days after the date on which the order was made by Form NG (159) on the Registrar, the Crown Court, the prosecutor and defendant and any other affected person. Applications against orders to restrict public access must be made the next business day after the order was made. If advance notice of an order restricting public access is given, then advance notice of an intention to appeal may be made not more than five business days after the advance notice is displayed.
- A person on whom an appeal notice is served should serve a respondent's notice Form RN (159) within three business days if he wishes to make representations to the Court or the Court so directs.
- The Court may make such order as to costs as it thinks fit (s.159(5)(c) Criminal Justice Act 1988), but not out of central funds – *Holden and others v. CPS No.2* [1994] 1 AC 22.
- A single Judge or the full Court can grant leave to appeal: s.31(2B) Criminal Appeal Act 1968.
- Applications for leave to appeal and appeals in relation to reporting restrictions may be heard in private (Rule 65.6 (1)). Applications for leave to appeal and appeals relating to restricting public access must be determined without a hearing (Rule 65.6(3)).

DI6 Appeal against a wasted costs order and appeal against a third party costs order

- Regulation 3C (costs wasted) and 3E (third party costs) Costs in Criminal Cases (General) Regulations 1986.
- A legal or other representative against whom a wasted costs order has been made in the Crown Court or a third party against whom a third party costs order has been made may appeal.
- Notice of appeal should be served on the Crown Court within 21 days of the order being made. There is no specific form. The notice should be served on any interested party (including, if appropriate, the Ministry of Justice).
- Any interested party can make representations orally or in writing.
- There is no power to grant a representation order or to order costs out of central funds as these proceedings are civil in nature.
- Leave to appeal is not required.

DI7 Appeal relating to Serious Crime Prevention Orders

- S.24 Serious Crime Act 2007.
- Part 68 Criminal Procedure Rules.
- A person subject to the order, an applicant authority or anyone given the opportunity to make representations at the Crown Court about the making, refusal to make, variation or non-variation of an order may appeal.
- Proceedings are commenced by the service of Form NG (SCPO) on the Crown Court not more than 28 days after the order.
- A respondent's notice Form RN (SCPO) should be served if directed by the Registrar or if the respondent wishes to make representations to the Court.

- Proceedings before the Crown Court or the Court of Appeal relating to serious crime prevention orders and arising by virtue of ss.19, 20, 21 or 24 of the Serious Crime Act 2007 are criminal proceedings for the purposes of s.12(2)(g) of the Access to Justice Act 1999 [see Criminal Defence Service (General) (No.2) (Amendment) Regulations (SI 2008/725)]. Accordingly, the Registrar may grant a representation order to a person subject to the order. A person who made representations at the Crown Court can apply to the LSC for funding. The Court has discretion to order costs as it thinks fit. [Part 3 Orders as to Costs Serious Crime Act 2007 (Appeals under s.24) Order 2008/1863]
- Leave to appeal can be granted by the Crown Court Judge, full Court or single Judge [Art.9 Serious Crime Act 2007 (Appeals under s.24) Order 2008/1863]

D18 Appeal against the non-making of a football banning order

- S.14A(5A) Football Spectators Act 1989.
- Part 68 Criminal Procedure Rules.
- The prosecution can appeal.
- The appeal notice should be served on the Crown Court within 28 days of the decision not to make an order. However, there is no designated form.
- A respondent's notice should be served if directed by the Registrar or if the respondent wishes to make representations to the Court. However, again there is no designated form.
- An application for a representation order may be made to the Registrar – s12(2)(b) Access to Justice Act 1999.
- Currently, the Court of Appeal has been given no powers to deal with these appeals.

E Application for a Retrial for a Serious Offence

E1 Application by a prosecutor to quash an acquittal and seek a retrial for a qualifying offence

S.76(1) Criminal Justice Act 2003 [Part 41 Criminal Procedure Rules]

E1-1 There must be new and compelling evidence and it must be in the interests of justice for the acquitted person to be re-tried for a qualifying offence as listed in Part 1 Sch. 5 Criminal Justice Act 2003. (Ss.78 and 79 Criminal Justice Act 2003 see *Dunlop* [2006] EWCA Crim 1354 and *Sanjuliano* [2007] EWCA Crim 3130)

E1-2 Proceedings can begin in one of two ways:

(1) By serving notice of the application under s.76 on the Court of Appeal and within two days serving the notice on the acquitted person (s.80). This notice charges him with the offence. It requires the personal written consent of the Director of Public Prosecutions (DPP) (s.76(3)).

If the acquitted person is not in custody the prosecution can ask the Crown Court to issue:

- i) A summons for the acquitted person to appear before the Court of Appeal for the hearing of the application or
- ii) A warrant for his arrest (s.89(3)).

Once arrested on the warrant the acquitted person must be brought before the Crown Court within 48 hours (s.89(6)).

(2) An acquitted person may be charged with the offence before an application under s76 has been made. This may be after an arrest in an investigation authorised by the DPP (s 85(2)) or where no authorisation has been given, after arrest under a warrant issued by a justice of the peace. (s87(1)). Having been charged, the

acquitted person must be brought before the Crown Court to consider bail within 24 hours (s.88(2)). He can then be remanded in custody or on bail for 42 days whilst an application under s.76 is prepared: s.88(6) unless an extension is granted under s.88(8). Once a notice of application under s.76 has been served, stating that the acquitted person has previously been charged with the offence, the acquitted person must be brought before the Crown Court to consider bail within 48 hours of the notice being given to the Registrar, if the acquitted person is already in custody under s.88 (above) (s.89(2)).

E1-3 Thus in either case, bail is dealt with largely by the Crown Court. The Court of Appeal only considers bail on the adjournment of the hearing of the application under s.76 (s.90 (1)).

E1-4 The notice [Form Notice of a s.76 application required by s.80(1) CJA 2003] should where practicable be accompanied by the witness statements which are relied on as the new and compelling evidence, the original witness statements, unused statements, indictment, paper exhibits from the original trial, any relevant transcripts from the original trial and any other documents relied on: Rule 41.2(2).

E1-5 An acquitted person who wants to oppose a s.76 application must serve a response [Form Response of the acquitted person under s.80 CJA 2003] not more than 28 days after receiving the notice: Rule 41.3(2).

E2 Application by a prosecutor for a determination whether a foreign acquittal is a bar to a trial and if so, an order that it not be a bar

S.76(2) Criminal Justice Act 2003 [Part 41 Criminal Procedure Rules]

E2-1 The prosecution can apply, with the personal written consent of the DPP (s.76(3)) for a determination whether an acquittal

outside the UK is a bar to the acquitted person being tried in England and Wales and if it found to be so, an order that the acquittal not be a bar. Proceedings can begin in the same way as for an application under s.76(1).

E3 Application for restrictions on publication relating to an application under s.76

S.82 Criminal Justice Act 2003 [Part 41 Criminal Procedure Rules]

E3-1 An application can be made by the DPP for reporting restrictions. This can be made after a notice of an application for a re-trial has been made and may also be made by the court of its own motion (s.82(5)). An application can also be made by the DPP for reporting restrictions before a notice of an application for a retrial if an investigation has been commenced: s.82(6). The application for reporting restrictions must be served on the Registrar [Form Application for restrictions on publication under s.82 CJA 2003] and (usually) the acquitted person (Rule 41.8(1)).

E3-2 A party who wants to vary or revoke an order for restrictions on publication under s.82(7) may apply to the Court of Appeal in writing at any time after the order was made. (Rule 41.9(1))

E4 Representation orders

E4-1 The Registrar will usually grant a representation order to the acquitted person for solicitors and counsel to respond to any of the above applications.

A Guide to Commencing Proceedings in the Court of Appeal
Criminal Division

