

RESEARCH & DEVELOPMENT – REPEAT APPLICATIONS

1.0 Introduction

Repeat applications are 2nd and subsequent applications from the same applicant in respect of the same conviction.

1.1 As part of the Commission’s ongoing research and development activities an internal review of repeat applications was undertaken. The aim of this review was to monitor the efficacy of Persistent and Repeated Applications Register, better understand trends in repeated applications generally and identify any additional, potential ways to reduce or better manage such applications.

1.2 To facilitate this research a full review of applications classified as repeat applications received over the past 5 years was undertaken in order to identify the following key information:

- Percentage of total applications classed as repeat applications
- Percentage of such applications accepted for review
- Reasons for accepting/ rejecting such applications
- Whether any accepted repeat applications result in a referral to the High Court.
- The impact of the Persistent and Repeated Applications Register.

1.3 This information was then used to analyse the nature of those applications, the reasons for accepting or rejecting them, the likelihood of success and the impact of the Register.

1.4 Upon consideration of the main findings from this research a summary of same was inserted within the 2014-15 Annual Report and it is proposed that the full review will be available via the Commission’s website.

2.0 Commission Statistics

2.1 During the sample period the Commission received a total of 832 applications of which 208 were classed as repeat applications i.e one quarter of the applications received. These 832 applications provided the following core data:

| | 2010-11 | 2011-12 | 2012-13 | 2013-14 | 2014-15 |
|--|---------|---------|---------|---------|---------|
| Total applications received | 168 | 139 | 196 | 155 | 174 |
| Repeat applications | 42 | 32 | 51 | 48 | 35 |
| % of repeat applications | 25% | 23% | 26% | 31% | 20% |
| Repeat application accepted for review | 15 | 5 | 10 | 11 | 6 |
| % of repeat applications accepted | 36% | 15.6% | 19.6% | 23% | 17% |
| Repeat applications resulting in referral | 1 | 1 | 0 | 2 | 1 |

3.0 Repeat applications – reasons for refusal

No new grounds – this means that there is nothing substantively different about the grounds put forward in the repeat application from those previously put to the Commission

No stateable grounds – this means that the application does not disclose any identifiable ground that might persuade the High Court that a miscarriage of justice may have occurred

No stateable Cadder ground – In its decision in *Cadder v HMA* [2010] UKSC 43, issued in October 2010, the Supreme Court held that to detain and interview an accused without offering legal advice and then to rely upon admissions made during interview was a breach of the accused’s human rights. However, the Commission did not consider that such a ground was stateable in every case where this had happened e.g. when no relevant admissions were made or where the interview pre-dated the enactment of the Scotland Act 1998.

No plausible grounds guilty plea and no plausible def[ective] rep[resentation] ground – The tests for withdrawal of a guilty plea or defective representation (an *Anderson* ground) are very high and unless some plausible basis is provided for believing that these test might be met the Commission will not accept such grounds for review.

Repeat of appeal grounds – the grounds for review are the same, or substantially the same, as those rejected by the appeal court and no cogent reason is given for disagreeing with the outcome of the appeal process.

Incompetent application – e.g. there was no conviction or the applicant was convicted outwith Scotland.

Want of insistence - The application is not insisted upon e.g. further information is sought but not provided, or permission to obtain defence papers, which the Commission considers necessary to its review of the case, is denied by the applicant.

Abandoned appeal – an attempt has been made to appeal but then abandoned for no good reason.

Not in the I[nterests] o[f] J[ustice] – it is not in the interest of justice generally – this is an open ended category but might include a matter such as an applicant convicted of 10 housebreakings who has fresh evidence of alibi in relation to one of the housebreaking but even a successful appeal in respect of that one charge which would be unlikely to impact his overall sentence.

| Reason for refusal | 2010-11 | 2011-12 | 2012-13 | 2013-14 | 2014-15 |
|------------------------------------|----------|----------|----------|----------|----------|
| No new grounds | 15 | 8 | 18 | 12 | 9 |
| No stateable grounds | 1 | 6 | 10 | 9 | 7 |
| No stateable Cadder ground | 4 | 4 | | | |
| No plausible grounds guilty plea | 3 | 3 | 2 | 3 | |
| No plausible def rep ground | | | 1 | 1 | 2 |
| No plausible fresh evidence ground | | 1 | | | |
| Repeat of appeal grounds | 2 | 4 | 6 | 5 | 3 |
| Incompetent application | 1 | | 1 | | |
| Want of Insistence | 1 | | | | |
| No appeal | | | 2 | 2 | 3 |
| Abandoned appeal | | 1 | | 2 | 1 |
| Not in the IoJ | | | 1 | 2 | 3 |
| | 27 cases | 27 cases | 41 cases | 36 cases | 28 cases |

3.1 Over the 5 year period “no new grounds” is the most common reason for refusing a repeat application. In 2010-11 and 2012-13 this accounted for around ½ of all refusals. In the other 3 years it accounted for around 30% of refusals.

3.2 The next most common reason is “no stateable grounds” which has accounted for between 20% and 25% of refusals since 2011-12. If “no stateable Cadder ground” is factored in to the relevant years (2010-11 and 2011-12) this brings the earlier year almost into line with 19% and reflects the height of the Cadder applications in 2011-12 with a combined total (for

“no stateable grounds” and “no stateable Cadder ground”) of 37%. This is the only year in which any other (combined) ground has exceeded “no new grounds” in percentage of repeat applications refused.

- 3.3 Over the 5 year period analysed, refusal for “repeat of appeal grounds” has remained at a fairly steady percentage of reasons for refusal (range 7% - 15%).
- 3.4 Analysis of the data also indicated a decline in refusal based upon “no plausible ground for withdrawal of guilty plea” but an increase in percentage of refusals based upon “no plausible defective representation grounds”, which may reflect the more detailed information and consideration which occurs at stage 1. However, each of these reasons occur in just a few cases each year and are of little statistical significance. The reasons “no appeal” and “not in the interests of justice” only feature since 2011-12 but now recur regularly.

4.0 Repeat applications – reasons for acceptance

New Cadder ground – As above such grounds were accepted for review if the applicant was interviewed without legal advice when such was required and admissions were made which were relied upon in convicting him.

Appeal exhausted – The initial applications were refused as the applicant could still apply for a late appeal. Here such applications had been made but refused by the High Court.

Fresh evidence – the application disclosed fresh information which, if confirmed/ supported, might be significant enough to suggest that a miscarriage of justice may have occurred.

| Reason for subsequent acceptance | 2010-11 | 2011-12 | 2012-13 | 2013-14 | 2014-15 |
|---|----------|---------|----------|----------|---------|
| New Cadder ground | 10 | 1 | 3 | 1 | 1 |
| Appeal exhausted | 2 | 2 | | 1 | |
| Fresh evidence | 3 | | 4 | 2 | 1 |
| Supreme Court appeal not impedement | | 1 | | | |
| Special circumstances re mental health | | 1 | | | |
| Other change in law | | | 1 | 1 | |
| Further information re ground | | | 2 | 1 | 3 |
| New ground not appealed | | | | 4 | |
| Commission's powers req'd | | | | 1 | |
| Cogent reason given to disagree with appeal court | | | | | 1 |
| | | | | | |
| | 15 cases | 5 cases | 10 cases | 11 cases | 6 cases |

- 4.1 The decision in *HMA v Cadder* resulted in an increase in number of applications to the Commission from both new applicants and those who had applied previously to it. The decision was well publicised and the pattern of repeat applications accepted on this basis reflects the pattern of submission of this ground generally. From a high of 67% of all subsequent acceptances in 2010-11, this has only accounted for 1 case in each of the past 2 years and, it may be assumed, may cease to be a factor in the coming year or two (such applications being likely to be rejected as not in the interests of justice (finality and certainty) given the delay in submitting such a ground that has been so well publicised).
- 4.2 Other change in law cases feature only occasionally in repeat applications subsequently accepted. Similarly infrequent are the number of cases subsequently accepted as “appeal exhausted” where the Commission has effectively told an applicant to seek an extension of time before making a further application (2 in 2010-11 and 2011-12 and 1 in 2013-14) although such cases may also fall to be rejected as either a “repeat of appeal grounds” or

“no stateable grounds”. The stage 1 procedure has developed in recent years and a greater effort made to indicate if the Commission considers the underlying appeal point is not stateable in the course of the initial application albeit the main reason for refusal will be “no appeal”.

- 4.3 The most significant finding, even bearing in mind the very small number of relevant cases, since 2012 is that repeat applications are being accepted due to “further information re the ground” or bringing a “new ground not appealed”.
- 4.4 However, the consistent reality is that the highest percentage of repeat applications accepted for further review are cases which have previously been subject to a full review and either refused or, in one case at least, referred:

| Reason for original refusal | 2010-11 | 2011-12 | 2012-13 | 2013-14 | 2014-15 |
|--|---------|---------|---------|---------|---------|
| Accepted cases not referred after full review | 9 | 1 | 4 | 3 | 2 |
| Accepted & referred | | | 1 | | |
| No stateable ground (incl Cadder) | 2 | | 2 | 3 | 2 |
| Accepted in respect of sentence now seeking review of conviction | 1 | | | | |
| No appeal | 1 | 3 | | 1 | 1 |
| Referral pending at High Court | 1 | | | | |
| Closed as live appeal ongoing | 1 | | 1 | | |
| Appeal o/standing at Supreme Court | | 1 | | | |
| No plausible ground re guilty plea | | | 1 | | |
| Repeat of appeal grounds | | | 1 | 3 | |
| Abandoned appeal | | | | 1 | |
| Not in the interests of justice | | | | | 1 |
| | | | | | |

- 4.5 The two main reasons why a subsequently accepted repeat application was originally refused are that “no stateable ground” has been provided or that there had been “no appeal”.
- 4.6 **However, the number of such cases is extremely limited with a high of 15 cases in 2010-11 and a low of 5 cases in 2011-12.**

5.0 Repeat applications – resulting in a referral

- 5.1 Each of the repeat applications – E.G. in 2010-11, Marcus Brooks in 2011-12, Craig Both and S.T. in 2013-14 – were second applications to the Commission.
- 5.2 E.G. had been previously subject to a full review and this 2nd related to a new Cadder ground. It was accepted on that basis and the resulting referral was successful at appeal.
- 5.3 Marcus Brooks was refused at 1st application as no appeal had been taken and was accepted at 2nd application after his application for extension of time to lodge an appeal had been refused by the High Court. The resulting referral was successful at appeal.

- 5.4 Craig Boath's first application was refused as no stateable grounds had been submitted. His 2nd application, based upon the successful appeal by a co-accused on a common point, was accepted, referred and was successful at appeal.
- 5.5 S.T.'s first application was refused as no stateable grounds had been submitted. His 2nd application, in which further specification of his original point had been given, was accepted, referred but was unsuccessful at appeal.
- 5.6 Again, the numbers are very small and it is difficult to provide meaningful analysis.

6.0 Repeated and Persistent Applications Register

In its 2013-14 annual report the Commissions reported:

Persistent and Repeated Applications

In recent times we experienced a significant increase in the number of repeat applications most of which were submitted by a few applicants and contained grounds or information the same, or substantially the same, as those considered previously. Detailed consideration of such applications takes time and resource whilst containing no basis for the Commission to change its earlier decision. At a time of high case levels, limited staffing and a reducing budget the Commission is concerned that resources are focussed on valid applications and concluding such cases without undue delay. Now, following submission of 3 repeat applications, an applicant may be placed upon the Persistent and Repeated Applications Register and any further applications will not be registered or considered at stage 1 unless they set out different grounds and information. We intend to monitor the effect of this policy but early indications are positive.

- 6.1 Since the inception of the Repeated and Persistent Applications Register on 26 April 2013 7 applicants have been placed on the register.
- 6.2 In the course of the 5 year period reviewed, 23 applications were received from those 7 applicants prior to their registration. This represents 11% of applications categorised as repeat applications and is broken down as follows:

| | 2011-12 | 2012-13 | 2013-14 | 2010-11 | 2014-15 |
|---|---------|---------|---------|---------|---------|
| Repeat applications | 42 | 32 | 51 | 48 | 35 |
| Repeat applications received from applicants subsequently registered | 6 | 1 | 10 | 3 | 3 |
| % of total repeat applications made by those applicants | 14% | 3% | 19% | 6% | 8% |

6.0 Findings

Reasons for refusal or acceptance of repeat applications

- 6.1 Repeat applications are most likely to be refused on the basis that no new grounds have been submitted or that the grounds submitted are not considered stateable. It is apparent

that simple repetition of unmeritorious grounds will not result in such an application being accepted – as the “Frequently Asked Questions” attached to the stage 1 statement of reasons clearly states, for a further application to be accepted “new matters” require to be raised or stateable grounds identified.

- 6.2 Consideration could perhaps be given to providing further detail of what is expected from a subsequent application, possibly including examples. Likewise, where an application is substantially the same as the appeal grounds applications will be rejected where no cogent basis is given for disagreeing with the outcome of the appeal process, thought should perhaps also be given to adding a question about this to the “Frequently Asked Questions” sheet, including some examples of what “cogent reason” might be such as inaccuracy in the trial judge’s report in respect of a critical issue.
- 6.3 While the management of repeat applications has improved and less time now spent on these, where possible, continued efforts should be made to reduce their number and/ or ensure that applicants and their representatives understand the reason for that refusal and basis upon which a subsequent application might be accepted.

Repeat applications referred to the High Court for determination

- 6.5 The number of such applications is only 4 (i.e. less than 2%) and, with the exception of S.T. the reasons for accepting these are self-evident. In the case of S.T. it must be assumed that if all the information contained in the 2nd application had been contained in the 1st then the original application would have been accepted and referred.
- 6.6 Such applications are so infrequent that they provide no justification for believing that persistence will “pay-off” for applicants.

Repeated and Persistent applications Register

- 6.6 The introduction of the Register has provided a useful management tool to address the issue of a certain type of applicant. It is a transparent policy and registration may be challenged in accordance with that policy. To date only one such challenge has been taken (and not upheld).
- 6.7 The number of applicants registered to date is suggestive of a tool being used responsibly and in appropriate circumstances. The policy is sufficiently flexible that further applications from these individuals will still receive attention and whether a new/ stateable issue has been raised will be given due consideration each time a further application is received – without the necessity for a full stage 1 review.
- 6.8 It is anticipated that the Register will continue to expand moderately as other persistent applicants reach the criteria for registration.

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