



## Position Paper

Defective representation

### Introduction

1. Defective representation is the most commonly submitted ground for review in applications to the Commission. It is also one of the most frequent grounds for referral (see e.g. Mark Paterson (allowed on other grounds – defective representation not considered); Gary Polland (refused); James Kinsella (refused); DS (refused) & Joseph Wallace (allowed – narrow ground that solicitor did not challenge the failure to serve a statutory notice upon the applicant/ registered keeper of the vehicle). To date, only one referral has been successful on this ground – i.e. Joseph Wallace.
2. All persons accused of a criminal law offence have the right to a fair trial<sup>1</sup>. Where the inadequacy of the accused's representation is such as to deprive him of the right to a fair trial this may amount to a miscarriage of justice. Prior to the decision in *Anderson v HMA*<sup>2</sup> this could not form the basis of an appeal.

### The Commission's Position

3. The Commission notes that the principles set out in *Anderson* as to defective representation have no application in the context of a prosecution resolved by a plea of guilty<sup>3</sup>.
4. In addressing a claim of defective representation, the Commission applies the following principles derived from previous decisions of the High Court:
  - The conduct of an accused's defence can be said to amount to a miscarriage of justice only where it has deprived him of a fair trial<sup>4</sup>

<sup>1</sup> Article 6 of the European Convention on Human Rights and Fundamental Freedoms

<sup>2</sup> 1996 JC 29

<sup>3</sup> *Pickett v HMA* 2007 SCCR 389, at para 56. See position paper on pleas of guilty

<sup>4</sup> *Anderson v HMA*; *E v HMA* 2002 SCCR 34; *Jeffrey v HMA* 2002 SCCR 822

- A fair trial is denied to an accused where his defence was not presented to the court because counsel “either disregarded his instructions or conducted the defence in a way in which no competent counsel could reasonably have conducted it”<sup>5</sup>. Alternative formulations for the latter part of this test employed by the High Court, which the Commission considers are all equivalent, include counsel having made a decision that: was “so absurd as to fly in the face of reason”<sup>6</sup>; was “contrary to the promptings of reason and good sense”<sup>7</sup>; and, one “which no reasonable counsel could have taken”<sup>8</sup>.
- Criticism of “strategic or tactical decisions” as to how the defence should be presented will not be sufficient to support an appeal on the ground of defective representation if those decisions were reasonably and responsibly made by counsel in accordance with his professional judgement. Accordingly, a failure to present a particular line will not found an appeal if the decision not to do so is within the scope of the reasonable judgement of counsel involved<sup>9</sup>. Counsel is not bound to present a line of defence that he considers untenable in law. If he advises his client in these terms, it is a matter for the client whether to accept this advice or seek alternative representation<sup>10</sup>.
- An accused’s right to adequate presentation of his case extends to the manner in which the case is developed and prepared pre-trial<sup>11</sup>. Failure to properly investigate a case, to precognose witnesses or to pursue particular lines of defence may result in the accused being denied a fair trial<sup>12</sup>. Lawyers preparing for trial have to bring a “professional and practical judgement” to the extent to which matters require investigation. It is “not every single, conceivable or remote stone which must be turned in preparation for trial”; regard must be had to what is reasonable and practical. A “counsel of perfection” is not the relevant test even where it can be demonstrated that a defence enquiry could have revealed an answer favourable to the defence<sup>13</sup>. For an appeal to succeed on

<sup>5</sup> *SD v HMA* [2014] HCJAC 17; *Grant v HMA* 2006 SCCR 365

<sup>6</sup> *McBrearty v HMA* 2004 JC 122 at paragraph 36

<sup>7</sup> *McIntyre v HMA* 1998 SCCR 379

<sup>8</sup> *McEwan v HMA* 2010 SCL 557

<sup>9</sup> *Grant v HMA*

<sup>10</sup> *SB v HMA* [2015] HCJAC 56

<sup>11</sup> *Garrow v HMA* 2000 SCCR 771; *Hemphill v HMA* 2001 SCCR 361 and *E v HMA*

<sup>12</sup> *McIntosh v HMA (No 2)* 1997 SCCR 389

<sup>13</sup> *Urquhart v HMA* 2009 SCCR 339

this basis, it will be necessary to demonstrate the specific information which proper investigation would have uncovered<sup>14</sup>.

5. It is plain from the authorities that the circumstances in which a claim of defective representation will be upheld are defined narrowly<sup>15</sup> and will occur only where the circumstances are exceptional in nature<sup>16</sup>.

6. Specific examples – successful at appeal:

- Where counsel changed the line of defence, thus departing from the client’s instructions and evidence (instructed that witnesses were lying, counsel submitted that they were honest but suffering from false memory syndrome) - *JB v HMA*<sup>17</sup>;
- A failure to pursue a defence that child witnesses were being manipulated by the accused’s estranged wife - *E v HMA*;
- A failure to lead an instructed alibi – *Winter v HMA*<sup>18</sup>; and
- On two occasions that the defence failed to seek expert medical evidence which might have supported the accused’s accounts of events, even though his account was put before the court – *Garrow v HMA & Hemphill v HMA* (which are the cases which applied the formulation “not properly presented” – more recent cases suggest that this could only apply where a defence is simply not put or put in a way no competent counsel could have done.)

7. Specific examples – refused at appeal:

- A failure to attack the character of a Crown witness – *Anderson v HMA*, *Grant v HMA*, *Kelly v HMA*<sup>19</sup> *Lindsay v HMA*. Matters are different if such attacks are necessary for a specific line of defence instructed by the accused: see *E v HMA*;
- A failure to call witnesses in support of an incrimination defence – *McIntyre v HMA*<sup>20</sup>;
- A failure to lodge a defence of alibi when that would have disclosed a previous conviction - *L v HMA*<sup>21</sup>;

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<sup>14</sup> *Lindsay v HMA* 2008 SCCR 391

<sup>15</sup> see e.g. *Anderson v HMA* at page 44

<sup>16</sup> e.g. *Anderson* at page 40

<sup>17</sup> 2009 SCCR 301

<sup>18</sup> 2002 SCCR 720

<sup>19</sup> 2006 SCCR 9

<sup>20</sup> 1998 SCCR 379

<sup>21</sup> 2004 SCCR 713

- A failure to seek a trial within a trial – *Wardrop v HMA*<sup>22</sup>;
- A failure to lead evidence of allegedly improper conduct at an identification parade – *Scott v HMA*<sup>23</sup>;
- A failure to include certain matters in a s275<sup>24</sup> application – *Robson v HMA*<sup>25</sup>;
- Whether to advise the accused to give evidence on his own behalf - *Lindsay v HMA*;
- A failure on the part of the solicitor to instruct the senior counsel of the appellant’s choice – *Addison v HMA*<sup>26</sup>
- Whether counsel is obliged to follow an instruction from the accused to call a specific witness - parade - *Hughes v Thomson*<sup>27</sup>; and
- A decision not to put a prior statement to a complainer which would have “extended but not changed the nature of her evidence” – *Jeffrey v HMA*<sup>28</sup>.

## Special Considerations

8. In considering a claim of defective representation at stage 2 the Commission will, in the ordinary course of events, begin the stage 2 review by requesting the defence papers. There are often delays or difficulties in obtaining these papers. The legal officer should make clear from the outset that the request includes all correspondence files. The correspondence files frequently contain valuable information on the approach of the defence to the preparation and presentation of their case.
9. Thereafter, the Commission may undertake the following steps:
  - correspondence/ interviews with solicitors and counsel – this will involve varying degrees of formality from a short telephone call or letter to a tape recorded interview. In some cases it will be necessary to seek support for the representative’s position;
  - investigations to identify information which more detailed preparation of the defence would have uncovered – e.g interviewing witnesses not called, instructing expert reports etc

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<sup>22</sup> 2005 SCCR 226

<sup>23</sup> 2008 SCCR 110

<sup>24</sup> Under the pertinent section of the 1995 Act, an application to have evidence admitted in spite of the general prohibition in s274 on material relating to the character and sexual behaviour of the complainer.

<sup>25</sup> [2014] HCJAC 8

<sup>26</sup> [2014] HCJAC 110

<sup>27</sup> 2010 SCCR 492

<sup>28</sup> 2002 SLT 1407

10. It will be necessary in any referral to (i) set out a *prima facie* case that on the information available to trial counsel the defence was not put before the court, and that in consequence there was a miscarriage; (ii) specify the allegation on all material points and (iii) provide objective support for it<sup>29</sup>.

**Date of Approval:** 8 July 2016

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<sup>29</sup> *Grant v HMA, DS v HMA* 2008 SCCR 929 and *Addison v HMA*