



Position Paper

Referrals to the High Court:
The Commission's
Statutory Test

Introduction

1. Since its inception in 1999, the Commission has applied the same statutory test in determining whether or not to refer its applications to the High Court. The provision in question is section 194C of the Criminal Procedure (Scotland) Act 1995¹, which is expressed in the following terms:

“(1) The grounds upon which the Commission may refer a case to the High Court are that they believe-

(a) that a miscarriage of justice may have occurred; and

(b) that it is in the interests of justice that a reference should be made”

2. Whilst its wording remains unaltered², the practice of the Commission in applying this test has evolved since it was brought into force. In its early years, the Commission had little recourse to the second part of its statutory test. The decision making in most cases centred on the question as to whether or not a miscarriage of justice may have occurred³. In more recent times, however, a greater number of cases have been refused at stage 1⁴. During a stage 1 review⁵, the Commission focuses on considerations relevant to the interests of justice – primarily various procedural impediments to referral – which are discussed below. The “interests of justice” test has, more recently, begun to attract an increasing level of judicial attention, in cases such as *Kelly v HMA*⁶, *Gordon v SCCRC*⁷ and *Carberry v HMA*⁸.

¹ “the 1995 Act”

² The statutory addition introduced by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 is discussed below, at paragraph 14.

³ In 2000-2001, for example, the Commission closed 63 cases in total. Of these, 42 received a “full Legal Officer review”. (Second Annual Report at page 15) This is equivalent to a modern “stage 2” review.

⁴ This may be attributed in part to legal and procedural changes, but is also related to an increasing volume of repeat applications, most of which are refused at stage 1: see below at paragraph 18

⁵ On the difference between a stage 1 and a stage 2 review, see the Commission’s Case Handling Procedures and below, a paragraph 18

⁶ 2010 SLT 967

⁷ [2013] CSOH 13

⁸ 2013 SCCR 587

Departing from its earlier view⁹ that the interpretation of the test was a matter for the Commission, the court has provided guidance, which the Commission is obliged to take account of in reaching its decision.

3. This paper is intended to provide an insight into the manner in which the Commission interprets and applies its statutory test.¹⁰

The Commission's Position

Miscarriage of Justice

4. "Miscarriage of justice" is the sole ground of appeal against conviction or sentence available to the accused in Scots criminal procedure. Sections 106 and 175, the relevant provisions of the 1995 Act, make specific mention of appeals based on an unreasonable verdict of the jury¹¹ and on fresh evidence¹², but it is clear that this is not intended to limit the possible categories of miscarriage. In *Harper v HMA*¹³, the court had the following to say on the matter:

"No doubt it would be difficult or impossible and unwise to attempt a comprehensive definition of the concept of miscarriage of justice; it is sufficient to say that it may cover a wide variety of situations in which, for one reason or another, the court concludes that justice has not been done, in the particular circumstances of a case."

5. The court in *Pickett v HMA*¹⁴ echoed this sentiment, expressing the view that the term "probably cannot be comprehensively defined"¹⁵. In the past, the Commission has addressed a number of criteria that it considered satisfied the sole ground of appeal. As well as fresh evidence and the unreasonable verdict of

⁹ Discussed at paragraph 12

¹⁰ Whilst the same could be said of any of the Commission's position papers, it is, the Commission believes, particularly important in this instance to bear in mind that it is not feasible to provide in this format a comprehensive statement of this area of the law. Furthermore, the views expressed in this position paper are those of the Commission at the date at which the paper was approved by the Board. These are, inevitably, subject to refinement or change should new circumstances arise.

¹¹ For obvious reasons, this is mentioned only in s106, which deals with solemn (jury) trials. On unreasonable verdict, see the Commission's position paper.

¹² On this topic, see the Commission's position paper

¹³ 2005 SCCR 245 at paragraph 33

¹⁴ 2007 SCCR 389

¹⁵ There is, the Commission observes, a large body of decided cases, indeed the majority of reported Scots criminal law, in which the main question at issue is whether or not a miscarriage of justice has occurred in the particular circumstances of the case. Further information about the "miscarriage of justice" grounds that the Commission encounters most frequently may be found in the remaining body of Commission position papers. Standing the degree to which the focus elsewhere is on the miscarriage of justice test, the Commission has chosen to devote more attention in this paper to the latter half of its statutory test.

the jury the Commission has referred cases on the basis of possible defective representation, judicial misdirection, non-disclosure, and oppression, among other grounds.

6. Section 194C(1)(a) of the 1995 Act is drafted in terms echoing the provisions of s106, but for the fact that the Commission must be satisfied only that a miscarriage of justice *may* have occurred. As the Commission accepted in its submissions to the court in *BM v SCCRC*¹⁶, the phrase “miscarriage of justice” in s106 ought to denote the same concept as the identical form of words in s194C(1)(a). It is thus the case that, on every occasion on which the Commission believes that the High Court *would* hold a miscarriage of justice to have occurred the Commission will also conclude that this part of its test is satisfied.
7. The Commission is, equally, entitled to conclude on the merits that it *does not* believe that a miscarriage of justice has occurred. If it reaches this view, then it follows that the criterion in s194(1)(a) is not satisfied¹⁷.
8. The discretion afforded to the Commission under s194C(1)(a) is, however, broader than the foregoing paragraphs might imply. The test that the Commission is bound to apply is not whether a miscarriage of justice *has* occurred, but whether it *may* have done. Although it is true that the Commission must consider the relevant case law and must endeavour to apply the appropriate legal tests, the Commission is not constrained absolutely by the approach that the High Court has taken in the past to the case under review or to similar cases. The Commission may consider this part of the test is satisfied where, for example:
 - a. the available authorities are in conflict and require clarification
 - b. the Commission is persuaded that the court in an applicant’s original appeal has made a material error in fact or law¹⁸.
 - c. the Commission believes that there is a real possibility that the court may wish to depart from earlier contrary authority¹⁹

¹⁶ 2006 SCCR 433

¹⁷ *Raza v SCCRC* 2007 SCCR 403 at paragraph 8. The court in *Raza* rejected the petitioner’s submission that the Commission ought to adopt an arguability standard when determining whether or not it believed that there may have been a miscarriage of justice.

¹⁸ See, for example, *Jordan v HMA* 2008 SCCR 618; *Cochrane Petr* 2006 SCCR 213

¹⁹ See, for example, *McCormack v HMA* [2005] HCJAC 38

- d. the Commission takes the view that fresh evidence advanced to it may not be wholly satisfactory, but could benefit from further examination in adversarial court process
 - e. the Commission considers that it has identified a category of miscarriage of justice hitherto unrecognised by the court
9. In relation to this latter group, the decision in *Harper* is of some interest. The Commission referred that case to the court on the basis that, having considered the available evidence, including some that was not heard at trial²⁰, it considered that a reasonable doubt existed as to the applicant's guilt. In so doing, the Commission acknowledged that its referral was "not perhaps based on one of the specific grounds which the court has previously recognised as being capable of leading to the conclusion that there has been a miscarriage of justice, such as 'fresh evidence', 'defective representation' or 'unreasonable jury verdict'." Responding to this, the court observed that it had never been the case that a "general concern" or "unease" could suffice as a ground upon which to disturb a conviction²¹. In refusing the appeal, the court held that, even if it had been convinced that a reasonable doubt existed as to the applicant's guilt, s106 did not empower it to conduct a "general review of jury decisions". The court had no power to quash a conviction "on [the] basis that the verdict in the case was unsatisfactory in the light of the evidence".
10. The Commission does not take this to mean that the categories of potential miscarriage of justice are fixed. Where, however, the Commission does consider a potentially innovative ground, it will be necessary to determine whether the argument has provided a basis upon which the court might conclude that justice has not been done.

Interests of Justice

11. The second part of the Commission's test is no more amenable to straightforward definition than the first.
12. In early decisions arising from Commission references, the High Court approached this part of the Commission's test with a degree of reticence. The first mention in

²⁰ Although not evidence that would have passed the test for "fresh evidence": see the Commission's position paper on the subject.

²¹ At paragraph 33

the recorded cases of the interests of justice test may be found in *Crombie v Clark*²², in which the bench observed that they did “not think that it is necessary or indeed appropriate for [them] to make any comment, the matter being one for the commission and not for [them].” A few years later, in *Campbell v HMA*²³, the court accepted that it had been in the interests of justice for the Commission to refer the case to the court without feeling the need to analyse the question.

13. The court began to deviate from this position in *Hunt v Aitken*²⁴ and *Kelly v HMA*. In both cases, the court expressed surprise that the Commission appeared to have paid little attention to the procedural history at the appellate stage when deciding whether or not to refer the case.

14. In 2010, an amendment introduced by the “emergency legislation”²⁵ passed in the wake of the decision in *Cadder v HMA*²⁶ introduced a new provision to s194C of the 1995 Act, which was in the following terms:

(2) In determining whether or not it is in the interests of justice that a reference should be made, the Commission must have regard to the need for finality and certainty in the determination of criminal proceedings

15. The same legislation also introduced s194DA, which granted a new power to the court to reject a Commission reference where it considered that it is not in the interests of justice that the appeal should proceed.

16. In *RM v HMA*²⁷, the first decision to analyse s194DA in detail, the court, noting that the Commission had generally discharged its duties appropriately, held that it “cannot be right...simply to duplicate the Commission's function and give effect to [its] own view” on the question of interests of justice. Instead, the court took the view that the correct approach was to apply a test similar to that found in judicial review proceedings. The court would interfere with the Commission's conclusion “only where the Commission has demonstrably failed in its task; for example, by failing to apply the statutory test at all; by ignoring relevant factors; by considering irrelevant factors; by giving inadequate reasons, or by making a decision that is perverse.”

²² 2001 SCCR 231

²³ 2004 SCCR 220 at paragraph 48

²⁴ 2008 SCCR 919

²⁵ Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010

²⁶ 2010 SCCR 951

²⁷ 2013 SCCR 79

17. As a result of the introduction of S194DA, the situation has changed relatively quickly from one in which the court effectively declined jurisdiction over the question to another in which the interests of justice has become a live issue in every appeal arising from a Commission referral.
18. As noted in the introduction, the Commission adopts a two stage procedure during its review process. During stage 1²⁸, it focuses on the “interests of justice”, particularly from the perspective of various procedural and technical impediments to review. If the Commission concludes at this stage that it would not be in the interests of justice to refer a case to the High Court, it will issue a short “Stage 1 Statement of Reasons”, setting out its reasons for reaching this conclusion. If the Commission does not reach this conclusion, the case advances to stage 2. The Commission will reconsider where the interests of justice lie before taking any decision at stage 2. The matters that the Commission considers at each stage tend to vary. The Commission has, accordingly, considered the two stages separately in this paper. There is, however, one matter that applies equally at both stages 1 and 2, and it is to this that the Commission first turns.

Cooperation with the Review: the Applicant’s Role

19. As a matter of course, the Commission expects and requires the full cooperation of its applicants at all points during the review process. This may include, but is not limited to:

- clarification of the grounds of review
- making available defence papers and any other relevant materials or electronic devices that the applicant may hold
- giving statements
- making himself available to assist the preparation of any report the Commission considers appropriate and co-operating fully with any such report
- providing biological samples

²⁸ At stage 1, the Commission considers the application form and any supporting material and the court/appeal papers.

20. The Commission requires any person who applies on his own behalf to sign a mandate permitting his legal representatives to disclose information to the Commission. A failure to do so will result in the case being refused at stage 1.
21. The Commission is independent of all parties and actors in the criminal justice system, including the applicant. Nonetheless, there is, undeniably, a particular nexus between the applicant and the Commission while a review is ongoing. The Commission's process is almost invariably initiated by the convicted person or another individual with a close personal relationship to him²⁹. The Commission's staff provide the applicant with regular progress updates, and the Commission will eventually issue one or more statements of reasons to the applicant. Moreover, it is the applicant who potentially stands to gain from the outcome of the review³⁰. In requesting that the Commission review his case, the applicant is maintaining that he has suffered a miscarriage of justice. The Commission takes the view that, if this assertion is made in good faith, then the applicant ought to be prepared to assist the Commission in its attempts to obtain as full a picture of the case as is possible. An applicant who fails to assist in this regard is likely to present the Commission with the impression that there is, at the least, a want of insistence. The Commission generally takes the view that it is not in the interests of justice to refer to the High Court a case in which an applicant has deliberately or negligently prevented the Commission from properly discharging its statutory function. In such a situation, the Commission may elect to discontinue the review.
22. The Commission appreciates that, where an application comes from a third party as a result of the death or incapacity of the convicted person, that third party may not be in a position to provide the Commission with all of the information that the convicted person might have done. Nonetheless, in such a case the Commission expects full cooperation.

Stage 1

23. There are a number of procedural questions that the Commission will consider in every application during the stage 1 process. These are issues that, by themselves,

²⁹ On this issue, see *SCCRC Petrs* 2015 SCCR 333

³⁰ As noted above, the absence of any potential benefit to the applicant is likely to prove fatal to the chances of referral.

may be enough to persuade the Commission that it would not be in the interests of justice to refer the case to the High Court. A list of these follows:

- Is the application competent?
 - The Commission *will not* accept a case for stage 2 review if it cannot competently review the matter.
 - The Commission's statutory function is restricted to the review of convictions and sentences originating from Scots criminal law and procedure. The Commission has no power to review anything else.

- Is an appeal outstanding?
 - The Commission *will not* accept a case for stage 2 review if there is an outstanding appeal.
 - The Commission's powers are limited to the ability to refer a case to the High Court to enable a fresh appeal to be heard. No purpose would be served by reviewing a conviction or sentence if appeal proceedings have not yet been determined.

- Has the applicant attempted to appeal?
 - The Commission *generally will not* accept a case for review unless the applicant has already exhausted his rights of appeal.
 - The Commission exists to provide an exceptional remedy for those who believe that they have suffered a miscarriage of justice. Where there remains the possibility of resolving such a matter through the ordinary appeal process, it is, in the Commission's view, preferable that this be followed. The High Court has made clear³¹ that it expects the Commission to explain its reasons for referring any cases in which the normal appeal procedure has not been followed.
 - The Commission *may* accept for stage 2 review a case in which the applicant has not followed the normal appeal procedure if there are

³¹ *Qv Hunt v Aitken, Kelly v HMA & Carberry v HMA*

exceptional circumstances to justify this decision. If, for example, the Commission's powers are required in order to investigate an issue that has arisen in a case, the Commission may accept the case for stage 2 review notwithstanding the absence of an attempt to appeal.

- Has the applicant failed to pursue an appeal?
 - The Commission *generally will not* accept a case for stage 2 review where the applicant has abandoned or otherwise failed to pursue an appeal without good reason for doing so.
 - The Commission takes the view that it is not generally in the interests of justice to provide a second chance to challenge an alleged miscarriage of justice where an applicant has failed to take advantage of an earlier opportunity to do so. In such a case, the Commission usually considers legal finality to be an important consideration.
 - The Commission is *more likely* to consider it to be in the interests of justice to accept a case in which the applicant has failed to pursue a previous appeal where the proposed grounds of review differ substantially from the grounds advanced in the earlier process.

- Are the applicant's grounds a repeat of those already considered at appeal?
 - The Commission *generally will not* accept a case if the application simply repeats grounds that the court has already considered during an appeal.
 - The interests of justice are not well served by referring to the court cases in which the appeal stands no prospect of success³². If a matter has already been conclusively settled, no purpose would be served by referring it back to the court.
 - The Commission *may* accept such a case where the applicant provides a reasoned explanation for his belief that the High Court has made an error in fact or law, provided that this appears to be *prima facie* statable and plausible.

³² *Carberry v HMA*

- Are the applicant’s grounds a repeat of grounds already considered by the Commission?
 - The Commission *generally will not* accept a case for stage 2 review if the application simply repeats grounds of review that have already been considered by the Commission.
 - The Commission *may* accept such a case where the applicant provides a reasoned explanation for his belief that the Commission has made an error in fact or law, provided that this appears *prima facie* plausible.

- Does the application disclose grounds of review that are both statable and plausible?
 - The Commission *generally will not* accept a case for stage 2 review unless the application contains one or more identifiable grounds of review that might persuade the High Court that a miscarriage of justice may have occurred. The Commission *will not* investigate factual claims if they are, *prima facie*, wholly implausible or irrelevant.
 - No purpose is served by reviewing a conviction unless there are grounds upon which to do so.
 - The Commission *may* accept such a case for review where it has itself identified a statable ground of review during the stage 1 process.

24. Although these are the key issues covered by the stage 1 process, the Commission may also take into account the factors discussed in the following section in order to reach a determination. If the Commission believes at stage 1 that it has enough information to conclude that it would not be in the interests of justice to refer a case to the High Court, it will refuse the case.

Stage 2

25. Given the huge variety in the circumstances of the cases in the Commission’s workload, it is not possible to provide a comprehensive summary of the factors that the Commission considers relevant when it comes to a decision as to whether or not it would be in the interests of justice to refer a case to the High Court. Nonetheless,

it is possible to identify certain factors that are relevant, some that may be relevant and others that are never relevant to the Commission. Where a factor is relevant, a question arises as to the weight to place upon it in reaching a decision. Whilst this will again depend upon the individual circumstances of the case, some factors tend to be of more importance than others. In the list below, the Commission sets out the most common factors³³ considered in taking the decision, provides an explanation of the rationale and, where appropriate, an indication of the weight usually attached to the factor.

*The following factors are **always relevant**:*

- **Benefit to the applicant**
 - The Commission will consider the effect that a successful challenge to the applicant's conviction or sentence is likely to have upon him. This may be a practical effect, particularly in relation to any outstanding prison sentence. Where appropriate, the Commission will also take into account the likely effect on an applicant's reputation/employment prospects and any possible psychological benefits. In this latter regard, the Commission is more likely to be persuaded that it is in the interests of justice to refer a case in which the sentence has already been served where the applicant is a first offender or has no analogous convictions. Where an application is made on behalf of a deceased person, the Commission may consider the effect that a successful appeal is likely to have on the convicted person's family members.
 - The Commission exists to provide an exceptional remedy for those who maintain that they have suffered a miscarriage of justice. The resources of the criminal justice system are finite. To refer to the court cases in which even a successful outcome was likely to provide no real benefit would be to waste public funds.
 - The weight that the Commission attaches to this factor will usually depend on the level of benefit that would be derived from a successful appeal.
- **Gravity of the offence**

³³ nb This list is not intended to be exhaustive.

- The more serious the offence, the more likely the Commission is to consider it to be in the interests of justice to refer a conviction to the court where it believes that a miscarriage of justice may have occurred.
- As Lord Bingham of Cornhill observed in *R v Coutts*³⁴, “[i]n any criminal prosecution for a serious offence there is an important public interest in the outcome”. It would appear to the Commission that the public interest in achieving the proper outcome increases with the gravity of the charge.
- The Commission appreciates, however, that, particularly for a first offender, a relatively minor conviction may have a disproportionate effect. The Commission will consider the context surrounding any conviction, regardless of how minor it may appear.
- **The procedural history**
 - In *Carberry v HMA*, the court, citing *Hunt v Aitken*, observed that “regard must be had to what has gone on in any prior appellate proceedings involving the same case” when determining whether or not it is in the interests of justice to make a reference to the High Court. The court emphasised the need for finality in the criminal justice system.
 - Procedural issues are generally at the heart of the Commission’s decision making at stage 1. The procedural history of the case will, nonetheless, be a factor when the Commission comes to its view on the interests of justice at the end of the stage 2 process.
 - Insofar as it is aware of it, the Commission will consider the whole procedural history of the case, including, where appropriate, the manner in which the applicant’s representatives conducted his appeal³⁵.
- **The age of the case**
 - The Commission is more likely to consider it to be in the interests of justice to refer a case to the High Court where the conviction is relatively recent.
 - This approach is derived from the requirement that the Commission consider the need for finality in the criminal process

The following factors may be relevant:

- **Acquiescence (or lack thereof)**

³⁴ [2006] 1 W.L.R. 2154

³⁵ See *Lilburn v HMA* [2015] HCJAC 50 at paragraph 39

- Where a substantial period of time has passed since conviction, the Commission will consider the steps (both formal and informal) that the applicant has taken to challenge it. In cases in which the applicant has not taken any such steps, the Commission will seek an explanation for this.
- The Commission will generally consider legal finality to be an important consideration in situations in which the applicant has had ample time and opportunity in which to challenge his conviction, but has failed to do so.
- **Substantive justice**
 - The Commission exists to provide a remedy for those who claim to have suffered a miscarriage of justice, not as a secondary appellate court³⁶. The Commission considers itself entitled, in deciding whether or not it is in the interests of justice to refer a case, to consider whether, despite any defects or problems that may have arisen, the outcome of the process was just. Such a determination will militate against making a reference to the High Court. The court has approved this approach in cases such as *Cochrane v HMA* and *Gordon v SCCRC*.
- **Procedural justice**
 - Although far less prevalent than the previous consideration, there are occasions on which the Commission considers some procedural breakdown to be so serious as to affect its decision on the interests of justice.
 - If the Commission were to conclude that the manner in which a conviction had been secured had brought the justice system into disrepute, it would consider this to be a strong factor favouring referral³⁷.
- **The public interest**
 - In *Cadder v HMA*, the Supreme Court expressed the hope that the Commission would consider the public interest in deciding whether or not to make a reference.

The following factors are never relevant:

- **Any protected characteristic**
 - As a public body, the Commission is required to comply with the Equality Act 2010, which prohibits discrimination on the grounds of age, disability, gender, gender reassignment, pregnancy & maternity, race, religion or

³⁶ See, for example, *Raza v HMA*

³⁷ *Qv R v Latif* [1996] 2 Cr App R 92 *per* Lord Steyn at page 101

belief and sexual orientation³⁸. The Commission would never consider one of these characteristics to be relevant when determining whether or not it is in the interests of justice to refer a case to the High Court.

- **Lack of clarity in case law**

- In *Carberry v HMA*, the court rejected the submission that an absence of clear legal authority on the point in issue suggested that it was in the interests of justice to hear the appeal. The court interpreted “certainty” in s194C(2) in a narrow sense.
- Whilst an uncertain legal position might not have any influence on the interests of justice question, the Commission may, as noted above³⁹, consider it to be relevant when it decides whether or not there may have been a miscarriage of justice.

26. In reaching a conclusion at stage 2 as to whether or not it is in the interests of justice to make a reference, the Commission will first determine the factors that are relevant to the case at hand, and then the weight to be placed on each of them. The Commission will, thereafter, decide whether or not the relevant factors on balance favour referral.

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³⁸ For more information, see the Commission’s Equality Duty Mainstreaming Report <http://www.sccrc.org.uk/viewfile.aspx?id=580>

³⁹ At paragraph 8(a)