

## CRIMINAL PRACTICE DIRECTIONS 2015 DIVISION IX

### APPEAL

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#### **CrimPR Part 34 Appeal to the Crown Court**

##### **CPD IX Appeal 34A: APPEALS TO THE CROWN COURT**

34A.1 On an appeal against conviction CrimPR 34.3 requires the appellant and respondent to supply information needed for the effective case management of the appeal, but allows the Crown Court to relieve the appellant – not the respondent – of that obligation, in whole or part.

34A.2 The court is most likely to exercise that discretion in an appellant's favour where he or she is not represented and is unable, without assistance, to provide reliable such information. The notes to the standard form of appeal notice invite the appellant to answer the relevant questions in that form to the extent that he or she is able, explaining that while the appellant may not be able to answer all those questions nevertheless any answers that can be given will assist in making arrangements for the hearing of the appeal. Where an appellant uses the prescribed form of easy read appeal notice the court usually should assume that the appellant will not be able to supply case management information, and that form contains no questions corresponding with those in the standard appeal notice. In such a case relevant information will be supplied by the respondent in the respondent's notice and may be gleaned from material obtained from magistrates' court records by Crown Court staff.

**CPD IX Appeal 34B: APPEAL TO THE CROWN COURT: INFORMATION FROM THE MAGISTRATES' COURT**

- 34B.1 CrimPR 34.4 applies when a defendant appeals to the Crown Court against conviction or sentence and specifies the information and documentation that must be made available by the magistrates' court.
- 34B.2 In all cases magistrates' court staff must ensure that Crown Court staff are notified of the appeal as soon as practicable: CrimPR 34.4(2)(b). In most cases Crown Court staff will be able to obtain the other information required by CrimPR 34.4(3) or (4) by direct access to the electronic records created by magistrates' court staff. However, if such access is not available then alternative arrangements must be made for the transfer of such information to Crown Court staff by electronic means. Paper copies of documents should be created and sent only as a last resort.
- 34B.3 On an appeal against conviction, the reasons given by the magistrates for their decision should not be included with the documents; the appeal hearing is not a review of the magistrates' court's decision but a re-hearing. There is no requirement for the Notice of Appeal form to be redacted in any way; the judge and magistrates presiding over the rehearing will base their decision on the evidence presented during the rehearing itself.
- 34B.4 On an appeal solely against sentence, the magistrates' court's reasons and factual finding leading to the finding of guilt should be included, but any reasons for the sentence imposed should be omitted as the Crown Court will be conducting a fresh sentencing exercise. Whilst reasons for the sentence imposed are not necessary for the rehearing, the Notice of Appeal form may include references to the sentence that is being appealed. There is no requirement to redact this before the form is given to the judge and magistrates hearing the appeal.

**CrimPR Part 39 Appeal to the Court of Appeal about conviction or sentence  
CPD IX Appeal 39A: APPEALS AGAINST CONVICTION AND SENTENCE – THE PROVISION OF NOTICE TO THE PROSECUTION**

- 39A.1 When an appeal notice served under CrimPR 39.2 is received by the Registrar of Criminal Appeals, the Registrar will notify the relevant prosecution authority, giving the case name, reference number and the trial or sentencing court.
- 39A.2 If the court or the Registrar directs, or invites, the prosecution authority to serve a respondent's notice under CrimPR 39.6, prior to the consideration of leave, the Registrar will also at that time serve on the prosecution authority the appeal notice containing the grounds of appeal and the transcripts, if available. If the

prosecution authority is not directed or invited to serve a respondent's notice but wishes to do so, the authority should request the grounds of appeal and any existing transcript from the Criminal Appeal Office. Any respondent's notice received prior to the consideration of leave will be made available to the single judge.

39A.3 The Registrar of Criminal Appeals will notify the relevant prosecution authority in the event that:

- (a) leave to appeal against conviction or sentence is granted by the single Judge; or
- (b) the single Judge or the Registrar refers an application for leave to appeal against conviction or sentence to the Full Court for determination; or
- (c) there is to be a renewed application for leave to appeal against sentence only.

If the prosecution authority has not yet been served with the appeal notice and transcript, the Registrar will serve these with the notification, and if leave is granted, the Registrar will also serve the authority with the comments of the single judge.

39A.4 The prosecution should notify the Registrar without delay if they wish to be represented at the hearing. The prosecution should note that the Registrar will not delay listing to await a response from the Prosecution as to whether they wish to attend. Prosecutors should note that occasionally, for example, where the single Judge fixes a hearing date at short notice, the case may be listed very quickly.

39A.5 If the prosecution wishes to be represented at any hearing, the notification should include details of Counsel instructed and a time estimate. An application by the prosecution to remove a case from the list for Counsel's convenience, or to allow further preparation time, will rarely be granted.

39A.6 There may be occasions when the Court of Appeal Criminal Division will grant leave to appeal to an unrepresented applicant and proceed forthwith with the appeal in the absence of the appellant and Counsel. The prosecution should not attend any hearing at which the appellant is unrepresented. *Nasteska v. The former Yugoslav Republic of Macedonia (Application No.23152/05)* As a Court of Review, the Court of Appeal Criminal Division would expect the prosecution to have raised any specific matters of relevance with the sentencing Judge in the first instance.

39A.7 Where there is a renewed application for leave to appeal against a sentence imposed for an offence involving a fatality, the Crown Prosecution Service has indicated that it wishes to be represented at all sentence appeals in order to ensure that they are in a

position, if appropriate, to make representations as to the impact of the offence upon the victim and their family. In those circumstances, if the court is minded to grant the application for leave to appeal the court should consider adjourning the hearing of the appeal to allow prosecution counsel to attend and for the victim's family to be notified and attend if they so wish.

**CPD IX Appeal 39B: LISTING OF APPEALS AGAINST CONVICTION AND SENTENCE IN THE COURT OF APPEAL CRIMINAL DIVISION (CACD)**

- 39B.1 Arrangements for the fixing of dates for the hearing of appeals will be made by the Criminal Appeal Office Listing Officer, under the superintendence of the Registrar of Criminal Appeals who may give such directions as he deems necessary.
- 39B.2 Where possible, regard will be had to an advocate's existing commitments. However, in relation to the listing of appeals, the Court of Appeal takes precedence over all lower courts, including the Crown Court. Wherever practicable, a lower court will have regard to this principle when making arrangements to release an advocate to appear in the Court of Appeal. In case of difficulty the lower court should communicate with the Registrar. In general an advocate's commitment in a lower court will not be regarded as a good reason for failing to accept a date proposed for a hearing in the Court of Appeal.
- 39B.3 Similarly when the Registrar directs that an appellant should appear by video link, the prison must give precedence to video-links to the Court of Appeal over video-links to the lower courts, including the Crown Court.
- 39B.4 The copy of the Criminal Appeal Office summary provided to advocates will contain the summary writer's time estimate for the whole hearing including delivery of judgment. It will also contain a time estimate for the judges' reading time of the core material. The Listing Officer will rely on those estimates, unless the advocate for the appellant or the Crown provides different time estimates to the Listing Officer, in writing, within 7 days of the receipt of the summary by the advocate. Where the time estimates are considered by an advocate to be inadequate, or where the estimates have been altered because, for example, a ground of appeal has been abandoned, it is the duty of the advocate to inform the Court promptly, in which event the Registrar will reconsider the time estimates and inform the parties accordingly.
- 39B.5 The following target times are set for the hearing of appeals. Target times will run from the receipt of the appeal by the Listing Officer, as being ready for hearing.

39B.6

<b>NATURE OF APPEAL</b>	<i>FROM RECEIPT BY LISTING OFFICER TO FIXING OF HEARING DATE</i>	<i>FROM FIXING OF HEARING DATE TO HEARING</i>	<b>TOTAL TIME FROM RECEIPT BY LISTING OFFICER TO HEARING</b>
Sentence Appeal	14 days	14 days	28 days
Conviction Appeal	21 days	42 days	63 days
Conviction Appeal where witness to attend	28 days	52 days	80 days

39B.7 Where legal vacations impinge, these periods may be extended. Where expedition is required, the Registrar may direct that these periods be abridged.

39B.8 “Appeal” includes an application for leave to appeal which requires an oral hearing.

**CPD IX Appeal 39C: APPEAL NOTICES CONTAINING GROUNDS OF APPEAL**

39C.1 The requirements for the service of notices of appeal and the time limits for doing so are as set out in CrimPR Part 39. The Court must be provided with an appeal notice as a single document which sets out the grounds of appeal. Advocates should not provide the Court with an advice addressed to lay or professional clients. Any appeal notice or grounds of appeal served on the Court will usually be provided to the respondent.

39C.2 Advocates should not settle grounds unless they consider that they are properly arguable. Grounds should be carefully drafted; the court is not assisted by grounds of appeal which are not properly set out and particularised in accordance with CrimPR 39.3. The grounds must:

- i. be concise; and
- ii. be presented in A4 page size and portrait orientation, in not less than 12 point font and in 1.5 line spacing.

Appellants and advocates should keep in mind the powers of the court and the Registrar to return for revision, within a directed period, grounds that do not comply with the rule or with these directions, including grounds that are so prolix or diffuse as to render them incomprehensible. They should keep in mind also the court’s powers to refuse permission to appeal on any ground that is so poorly presented as to render it unarguable and thus to exclude it from consideration by the court: see CrimPR 36.14.

Should leave to amend the grounds be granted, it is most unlikely that further grounds will be entertained.

39C.3 Where the appellant wants to appeal against conviction, transcripts must be identified in accordance with CrimPR 39.3(1)(c). This includes specifying the date and time of transcripts in the notice of appeal. Accordingly, the date and time of the summing up should be provided, including both parts of a split summing up. Where relevant, the date and time of additional transcripts (such as rulings or early directions) should be provided. Similarly, any relevant written materials (such as route to verdict) should be identified.

39C.4 Where the appellant wants to rely on a ground of appeal that is not identified by the appeal notice, an application under CrimPR 36.14(5) is required. In *R v James and Others* [2018] EWCA Crim 285 the Court of Appeal identified as follows the considerations that obtain and the criteria that the court will apply on any such application:

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

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

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

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

(ii) the reasons for that delay;

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

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

(d) on the assumption that an appellant will have received advice on appeal from his or her trial advocate, who will have settled the grounds of appeal in the original appeal notice or who will have advised that there are no reasonably arguable grounds to challenge the safety of the conviction:

(i) fresh representatives should comply with the duty of due diligence explained in *McCook* [2014] EWCA Crim 734. Waiver of privilege by the appellant is very likely to be required.

(ii) once the trial lawyers have responded, the fresh representatives should again consider with great care their duty to the court and whether the proposed fresh grounds should be advanced as reasonably arguable and particularly cogent.

(iii) the Registrar will obtain, before the determination of the application under CrimPR 36.14(5), transcripts relevant to the fresh grounds and, where required, a respondents' notice relating to the fresh grounds.

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

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

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

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

### **Direct Lodgement**

39C.5 With effect from 1<sup>st</sup> October 2018, Forms NG and Grounds of Appeal which are covered by Part 39 of the Criminal Procedure Rules (appeal to the Court of Appeal about conviction or sentence) are to be lodged directly with the Criminal Appeal Office and not with the Crown Court where the appellant was convicted or sentenced. This Practice Direction must be read alongside the detailed guidance notes that have been produced to accompany the new forms, which are available at: <http://www.justice.gov.uk/courts/procedure-rules/criminal/forms>. From this date the Crown Court will no longer accept Forms NG and will return them to the sender. Forms NG and Grounds of Appeal should only be lodged once. They should, where possible, be lodged by email. Applications should not be lodged directly onto the Digital Case System. Applications must be lodged at the following address:

[criminalappealoffice.applications@hmcts.x.gsi.gov.uk](mailto:criminalappealoffice.applications@hmcts.x.gsi.gov.uk)

If you do not have access to an email account, you should post Form NG and the Grounds of Appeal to:

The Registrar, Criminal Appeal Office, Royal Courts of Justice, Strand, London WC2A 2LL.

Once an application has been effectively lodged, the Registrar will confirm receipt within 7 days.

### **Service**

39C.6 Legal representatives should make sure they provide their secure email address for the purposes of correspondence and service of document. The date of service for new applications lodged by email will be the day on which it is sent, if that day is a business day and if sent no later than 2:30pm on that day, otherwise the date of service will be on the next business day after it was sent.

### **Completing the Form NG**

39C.7 All applications must be compliant with the relevant Criminal Procedure Rules, particularly those in Part 39. A separate Form NG should be completed for each substantive application which is being made. Each application (conviction, sentence and



confiscation order) has its own Form NG and must be drafted and lodged as a stand-alone application.

### **CPD IX Appeal 39D: RESPONDENTS' NOTICES**

39D.1 The requirements for the service of respondents' notices and the time limits for doing so are as set out in CrimPR Part 39. Any respondent's notice served should be in accordance with CrimPR 39.6. The Court does not require a response to the respondent's notice.

### **CPD IX Appeal 39E: LOSS OF TIME**

39E.1 Both the Court and the single judge have power, in their discretion, under the Criminal Appeal Act 1968 sections 29 and 31, to direct that part of the time during which an applicant is in custody after lodging his notice of application for leave to appeal should not count towards sentence. When leave to appeal has been refused by the single judge, it is necessary to consider the reasons given by the single judge before making a decision whether to renew the application. Where an application devoid of merit has been refused by the single judge he may indicate that the Full Court should consider making a direction for loss of time on renewal of the application. However, the Full Court may make such a direction whether or not such an indication has been given by the single judge.

39E.2 The case of *R v Gray & Others* [2014] EWCA Crim 2372 makes clear "that unmeritorious renewal applications took up a wholly disproportionate amount of staff and judicial resources in preparation and hearing time. They also wasted significant sums of public money... The more time the Court of Appeal Office and the judges spent on unmeritorious applications, the longer the waiting times were likely to be...The only means the court has of discouraging unmeritorious applications which waste precious time and resources is by using the powers given to us by Parliament in the Criminal Appeal Act 1968 and the Prosecution of Offenders Act 1985."

39E.3 Further, applicants and counsel are reminded of the warning given by the Court of Appeal in *R v Hart and Others* [2006] EWCA Crim 3239, [2007] 1 Cr. App. R. 31, [2007] 2 Cr. App. R. (S.) 34 and should 'heed the fact that this court is prepared to exercise its power ... The mere fact that counsel has advised that there are grounds of appeal will not always be a sufficient answer to the question as to whether or not an application has indeed been brought which was totally without merit.'

39E.4 Where the single judge has not indicated that the Full Court should consider making a Loss of Time Order because the defendant has

already been released, the case of *R v Terence Nolan* [2017] EWCA Crim 2449 indicates that the single judge should consider what, if any, costs have been incurred by the Registrar and the Prosecution and should make directions accordingly. Reference should be made to the relevant Costs Division of the Criminal Practice Direction.

### **CPD IX Appeal 39F: SKELETON ARGUMENTS**

- 39F.1 Advocates should always ensure that the Court, and any other party as appropriate, has a single document containing all of the points that are to be argued. The appeal notice must comply with the requirements of CrimPR 39.3. In cases of an appeal against conviction, advocates must serve a skeleton argument when the appeal notice does not sufficiently outline the grounds of the appeal, particularly in cases where a complex or novel point of law has been raised. In an appeal against sentence it may be helpful for an advocate to serve a skeleton argument when a complex issue is raised.
- 39F.2 The appellant's skeleton argument, if any, must be served no later than 21 days before the hearing date, and the respondent's skeleton argument, if any, no later than 14 days before the hearing date, unless otherwise directed by the Court.
- 39F.3 Paragraphs XII D.17 to D.23 of these Practice Directions set out the general requirements for skeleton arguments. A skeleton argument, if provided, should contain a numbered list of the points the advocate intends to argue, grouped under each ground of appeal, and stated in no more than one or two sentences. It should be as succinct as possible. Advocates should ensure that the correct Criminal Appeal Office number and the date on which the document was served appear at the beginning of any document and that their names are at the end.
- 39F.4 A skeleton argument must comply with the requirements of these Practice Directions and, if applicable, of the court. The Criminal Appeal Office may refuse to accept service of a document that fails to comply and instead return that document to the advocate for amendment.

### **CPD IX Appeal 39G: CRIMINAL APPEAL OFFICE SUMMARIES**

- 39G.1 To assist the Court, the Criminal Appeal Office prepares summaries of the cases coming before it. These are entirely objective and do not contain any advice about how the Court should deal with the case or any view about its merits. They consist of two Parts.
- 39G.2 Part I, which is provided to all of the advocates in the case, generally contains:

- (a) particulars of the proceedings in the Crown Court, including representation and details of any co-accused,
  - (b) particulars of the proceedings in the Court of Appeal (Criminal Division),
  - (c) the facts of the case, as drawn from the transcripts, appeal notice, respondent's notice, witness statements and / or the exhibits,
  - (d) the submissions and rulings, summing up and sentencing remarks.
- 39G.3 The contents of the summary are a matter for the professional judgment of the writer, but an advocate wishing to suggest any significant alteration to Part I should write to the Registrar of Criminal Appeals. If the Registrar does not agree, the summary and the letter will be put to the Court for decision. The Court will not generally be willing to hear oral argument about the content of the summary.
- 39G.4 Advocates may show Part I of the summary to their professional or lay clients (but to no one else) if they believe it would help to check facts or formulate arguments, but summaries are not to be copied or reproduced without the permission of the Criminal Appeal Office; permission for this will not normally be given in cases involving children, or sexual offences, or where the Crown Court has made an order restricting reporting.
- 39G.5 Unless a judge of the High Court or the Registrar of Criminal Appeals gives a direction to the contrary, in any particular case involving material of an explicitly salacious or sadistic nature, Part I will also be supplied to appellants who seek to represent themselves before the Full Court, or who renew to the full court their applications for leave to appeal against conviction or sentence.
- 39G.6 Part II, which is supplied to the Court alone, contains
- (a) a summary of the grounds of appeal and
  - (b) in appeals against sentence (and applications for such leave), summaries of the antecedent histories of the parties and of any relevant pre-sentence, medical or other reports.
- 39G.7 All of the source material is provided to the Court and advocates are able to draw attention to anything in it which may be of particular relevance.

**CPD IX Appeal 39H: CRIMINAL APPEAL OFFICE BUNDLES & INDEXES FOR FULL COURT HEARINGS**

- 39H.1 To assist the full Court, the Criminal Appeal Office will, in most instances, prepare indexed bundles containing the documents and

material which the Registrar considers necessary to understand and determine the appeal for each member of the constitution.

- 39H.2 The Registrar will not provide bundles where a party or the parties have been directed to prepare and lodge indexed bundles, or where an advocate has lodged indexed bundles of their own volition. Where an appellant who is not privately represented is directed to lodge indexed bundles, a Representation Order will usually be granted by the Court or the Registrar for this purpose.
- 39H.3 Where bundles are prepared by the Criminal Appeal Office, a copy of the index will be provided to the appellant, or if the appellant is represented, to the advocate. If the advocate or appellant considers that there is additional material which it is necessary to include in the bundle, they must notify the Registrar of this in writing.
- 39H.4 Where indexed bundles are lodged in response to a direction to do so, or of an advocate's own volition, unless otherwise directed, four copies of the indexed bundle should be lodged with the Registrar in good time before the hearing and in accordance with any direction as to the time by which they should be lodged. The bundles should contain only documents and material which are necessary for the proper understanding of, and determination of, the issues involved in the appeal. The index and order of documents / material in the bundles should follow the order of the Registrar's template *Index to Judge's Bundles* available from the Registrar on request.

**CrimPR Part 44 Request to the European Court for a preliminary ruling  
CPD IX Appeal 44A: REFERENCES TO THE EUROPEAN COURT OF JUSTICE**

- 44A.1 Further to CrimPR 44.3 of the Criminal Procedure Rules, the order containing the reference shall be filed with the Senior Master of the Queen's Bench Division of the High Court for onward transmission to the Court of Justice of the European Union. The order should be marked for the attention of Mrs Isaac and sent to the Senior Master:

c/o Queen's Bench Division Associates Dept  
Room WG03  
Royal Courts of Justice  
Strand  
London  
WC2A 2LL

- 44A.2 There is no longer a requirement that the relevant court file be sent to the Senior Master. The parties should ensure that all appropriate documentation is sent directly to the European Court at the following address:  
The Registrar  
Court of Justice of the European Union

Kirchberg  
L-2925 Luxemburg

- 44A.3 There is no prescribed form for use but the following details must be included in the back sheet to the order:
- i. Solicitor's full address;
  - ii. Solicitor's and Court references;
  - iii. Solicitor's e-mail address.
- 44A.4 The European Court of Justice regularly updates its Recommendation to national courts and tribunals in relation to the initiation of preliminary ruling proceedings. The current Recommendation is 2012/C 338/01:  
<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:338:0001:0006:EN:PDF>
- 44A.5 The referring court may request the Court of Justice of the European Union to apply its urgent preliminary ruling procedure where the referring court's proceedings relate to a person in custody. For further information see Council Decision 2008/79/EC [2008] OJ L24/42:  
<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:024:0042:0043:EN:PDF>
- 44A.6 Any such request must be made in a document separate from the order or in a covering letter and must set out:
- iv. The matters of fact and law which establish the urgency;
  - v. The reasons why the urgent preliminary ruling procedure applies; and
  - vi. In so far as possible, the court's view on the answer to the question referred to the Court of Justice of the European Union for a preliminary ruling.
- 44A.7 Any request to apply the urgent preliminary ruling procedure should be filed with the Senior Master as described above.