



HM Attorney General for Jersey

From the office of the Lieutenant-Governor

Referrals by HM Lieutenant-Governor of criminal convictions and sentences to the Court of Appeal (Article 43 Court of Appeal (Jersey) Law 1961)

Introduction

- 1) Article 43 of the Court of Appeal (Jersey) Law 1961 gives HM Lieutenant-Governor power to refer criminal convictions and sentences to the Court of Appeal.
- 2) The purpose of this guidance is to set out the system which the Lieutenant-Governor will use to consider applications under Article 43, to refer cases to the Court of Appeal, and the legal test against which applications will be assessed for merit.

The Article 43 power

- 3) The power to refer under Article 43 only arises:
 - a) where a person has been convicted of a criminal offence in the Royal Court; and
 - b) the person has a basis for (i) appealing their conviction under at least one of the grounds of appeal set out in Article 26 of the Court of Appeal (Jersey) Law, or (ii) appealing against sentence on the grounds that it was wrong in principle or manifestly excessive, or (iii) for appealing against both conviction and sentence, to the Court of Appeal; and
 - c) generally speaking, the person has already appealed their conviction and/or sentence to the Court of Appeal and their appeal was either dismissed or leave to appeal was refused.

In addition, there may be wholly exceptional and thus very rare circumstances in which a referral can be made under Article 43 even though no appeal has previously been brought to the Court of Appeal.

- 4) Article 43 appears in the Court of Appeal Law itself under the title in bold ‘**Prerogative of Mercy.**’ This is apt to mislead. The Article 43 power is **not** an exercise of the Prerogative of Mercy, which is a quite different and ancient power of pardon exercised by the Crown directly without recourse to a court of law. The Prerogative of Mercy does not quash a conviction, it merely remits the punishment flowing from conviction. By contrast the Article 43 power is a statutory power to refer a case for a decision or opinion by a court of law. All that Article 43 says about the Prerogative of Mercy is that it remains unaffected by Article 43.

The circumstances in which an application for referral is likely to be appropriate

- 5) A referral is likely to be an exceptional remedy. It is not an opportunity for an unsuccessful appellant to appeal on the grounds that they are not satisfied with the decision of the Court of Appeal or Privy Council.

The circumstances in which a referral is likely to be made

- 6) The Lieutenant-Governor will only refer a case to the Court of Appeal in the following circumstances:
- a) in respect of either conviction or sentence, where no appeal has previously been brought, but exceptional circumstances justify it, (see below), **and** there is a **real possibility** that the conviction or sentence would not be upheld;
 - or
 - b) in respect of conviction, where there is a new argument or fresh evidence not previously raised **and** an appeal against conviction has previously been determined or leave to appeal has been refused, **and** there is a **real possibility** that the conviction would not have been upheld;
 - c) in respect of sentence, where there is a new argument or fresh information not previously raised **and** appeal against sentence has been determined or leave to appeal has been refused, **and** there is a **real possibility** that the sentence would not have been upheld;
 - d) in applications to which paragraph 6(b) and (c) apply the Lieutenant-Governor will need to be satisfied that there was good reason for the new argument or fresh evidence or information not being presented at the original appeal or application for leave to appeal.

Exceptional circumstances where no appeal has previously been brought

- 7) Examples of exceptional circumstances may include:
- a) new scientific knowledge which casts doubt on expert or scientific evidence given at trial.
 - b) co-defendants have already had their case referred under Article 43 for reasons that affect the Applicant's case.
 - c) the Applicant was prevented from appealing by serious threats against them or their family.
 - d) the Applicant has been unable to bring an appeal because they have not been able to obtain access to information held by a public organisation.
- 8) Nonetheless, the Court of Appeal has power under Rules 21 and 22 of the Criminal Appeal Rules 1961 to permit criminal appeals to be brought out of time. In a case where there is no obstacle to bringing an appeal directly to the Court of Appeal, other than that it is out of time under the rules of court, the Lieutenant-Governor would expect an unsuccessful application for leave to appeal out of time to have been made to the Court of Appeal before an application to the Lieutenant-Governor for referral under Article 43.

The process

- 9) Applications should be made in writing to the Office of the Lieutenant-Governor, Government House, St Saviour's Hill, St Saviour, JE2 7GH.
- 10) Applications should initially include the following information:
- a) the Applicant's name and address;
 - b) the name and address of the Applicant's Jersey lawyer;
 - c) the conviction and/or sentence in respect of which referral is sought;
 - d) the date of the conviction and/or sentence.
- i) Conviction Applications:
- (a) indictment
 - (b) transcript of evidence (if any)
 - (c) summing-up
 - (d) advice and grounds of appeal

- (e) contentions filed on appeal
- (f) single Judge's ruling (if any)
- (g) full Court judgment

ii) Sentence Applications:

- (a) prosecution summary of facts and conclusions including copies of any Social Enquiry and other reports
- (b) defence bundle
- (c) transcript of hearing (if available)
- (d) the Judge's sentencing remarks
- (e) advice and grounds of appeal
- (f) contentions filed on appeal
- (g) single Judge's ruling (if any)
- (h) full Court judgment

- e) Where the Applicant is serving a custodial sentence, the earliest date their sentence will expire.
 - f) Where no appeal has previously been brought, the reason why it has not, and the reason why no application for leave to appeal out of time has been brought or, if it has been brought and refused, a copy of the single judge's or full court's reasons for refusing leave.
 - g) The basis upon which the referral is requested (setting out clearly the new argument or fresh evidence or information) and the ground of appeal which it is said arises as a consequence under Article 26 of the Court of Appeal Law 1961.
 - h) The reason why the new argument or fresh evidence or information was not before the Court of Appeal when it considered the Applicant's appeal or application for leave to appeal.
 - i) The names and addresses and contact details of any witnesses who it is said can provide fresh evidence and the nature of the evidence it is said they can give.
- 11) A legal opinion setting out these matters and explaining how it is said they justify a referral, applying the 'real possibility' test, is likely to be of assistance in most cases, but is not mandatory.

- 12) A failure to provide the information at paragraph 10 when the application is first made will lead to delay in consideration of the matter.
- 13) Once the application is submitted, the Office of the Lieutenant-Governor will ensure that all material required to consider the merits of the application is obtained. This may require information to be provided by the Applicant, the prosecution, the Royal Court, or any other relevant source. Applicants may be required, where necessary, to waive legal professional privilege before the application can be considered further. Information from the Applicant themselves may be required to be given on affidavit.
- 14) Once the necessary material is to hand, the application will be screened by the Lieutenant-Governor's Case Work Manager. Within two months of receiving the application, the Case Work Manager will notify the Applicant whether their case has been:
 - a) allocated to Counsel to review; or
 - b) assessed as raising no exceptional circumstances under 7(a); or
 - c) assessed as raising no fresh issues under 7(b) or 7(c).

In making the assessment, the Case Work Manager or the Lieutenant-Governor is free to consult with the Attorney General or Solicitor General for advice save in circumstances where they have been personally involved in the conduct of the prosecution. The Lieutenant-Governor is also entitled to seek the advice of the Attorney General or Solicitor General at any stage of the process if the Lieutenant-Governor thinks fit.

- 15) In the event of a referral to Counsel for review, the Case Work Manager will nominate a lawyer (United Kingdom or Channel Island qualified) of not less than ten years standing, to assess whether or not the case should be referred to the Court of Appeal. Counsel is expected to provide their opinion to the Lieutenant-Governor's Decision Making Committee within two months. The Decision Making Committee consists of the Case Work Manager, Counsel who provided the advice and a further independent lawyer qualified in the United Kingdom or the Channel Islands of not less than ten years standing appointed by the Lieutenant-Governor. The Decision Making Committee shall, acting by a majority, recommend to the Lieutenant-Governor whether or not the Counsel should be referred to the Court of Appeal.

- 16) The final decision of whether to refer a case to the Court of Appeal shall be taken by the Lieutenant-Governor.
- 17) All communications with the Applicant or any other person with a contentious interest in the case will be conducted through the Office of the Lieutenant-Governor.
- 18) If the Lieutenant-Governor comes to the view that there are no grounds to refer the case the Lieutenant-Governor will provide the Applicant and every other interested party from whom the Lieutenant-Governor wishes to receive representations with a Provisional Decision Notice to that effect, setting out the reasons.
- 19) The Applicant (and any other party from whom the Lieutenant-Governor has invited to make representations) will have 20 working days in which to submit a response to the Provisional Decision Notice, if they wish.
- 20) If no response is made within 10 working days, the Lieutenant-Governor will issue a Final Decision Notice, with reasons for the decision.
- 21) If a response is made within 10 working days, the Lieutenant-Governor will consider it before issuing a Final Decision Notice with reasons for the decision.
- 22) If the final decision is to refer the case to the Court of Appeal, then the Final Decision Notice will set out the reasons for the referral. Where the decision is to refer, the Final Decision Notice will be sent to the Attorney General and the Judicial Greffe (Court of Appeal), in addition to the Applicant.
- 23) The Lieutenant-Governor's role ends upon issuing the Final Decision Notice.

25 November 2022