Law Commission
Reforming the law

Scoping Paper – Judicial Review of Decisions of the Crown Court

CHALLENGES TO CROWN COURT DECISIONS
Discussion Paper

CONTENTS

		Page
PART 1:	**Introduction**	**1**
PART 2:	**History**	**4**
PART 3:	**Appeals by way of case stated: section 28 (1) and (2) of the Supreme Court Act 1981**	**11**
PART 4:	**The High Court's judicial review jurisdiction over decisions in the Crown Court**	**15**
PART 5:	**The High Court's judicial review jurisdiction over decisions in the Crown Court – simplification and modification**	**30**
PART 6:	**How should the transfer of High Court jurisdiction over Crown Court decisions be effected?**	**36**
PART 7:	**Implications of proposed transfer of the High Court's jurisdiction upon the magistrates' courts and courts martial**	**45**
PART 8:	**Discussion issues**	**49**
APPENDIX:	**Extracts**	**53**

CHALLENGES TO CROWN COURT DECISIONS

The transfer of judicial review and case stated jurisdiction from the High Court to the Court of Appeal (Criminal Division)

DRAFT TERMS OF REFERENCE

The Law Commission is asked to consider:

(a) the origins and nature of, and the limitations upon the High Court's criminal jurisdictions by case stated and judicial review over the Crown Court, as set out in sections 28 and 29 of the Supreme Court Act 1981 and in particular sections 28(2) and 29(3) thereof;

(b) how those jurisdictions are best transferred to the Court of Appeal simplified and, if appropriate, modified;

(c) the implications of (a) and (b) for the High Court's criminal jurisdiction over the magistrates' court, and for courts martial;

and to make recommendations.

Discussion Paper

PART 1
INTRODUCTION

1.1 Appeals against conviction in the Crown Court and against sentence in the Crown Court lie[1] to the Court of Appeal (Criminal Division), referred to in this paper as the CACD. Also, the High Court exercises a supervisory jurisdiction over certain Crown Court decisions. It may judicially review those decisions of the Crown Court which do *not* relate to a trial on indictment.[2] The High Court may also give an opinion on a case stated by the judge of the Crown Court, on a matter that does *not* relate to trial on indictment.[3]

1.2 The Auld Review[4] was critical of the present system of appeal from the Crown Court, which involves overlapping jurisdiction and forms of appeal. It

[1] Either with leave of a single judge of the CACD or, on the certificate of the trial judge that the case is fit for appeal.

[2] See Part 2 for a history of this jurisdiction and Part 4 for the present law and its problems.

[3] See Part 2 for a history of this jurisdiction and Part 3 for the present law and its problems.

[4] *Review of the Criminal Courts of England and Wales 2001.*

recommended that there should be a single form of appeal and procedure combining the best of both jurisdictions,[5] which would lie to the CACD. "The Court [of Appeal] should be invested as far as necessary for this purpose with the High Court's present powers on appeal by way of case stated or judicial review".[6]

1.3 This paper looks at the issues that arise in connection with the recommended transfer of the High Court's criminal jurisdiction over decisions in the Crown Court, to the CACD

OUR AIMS

1.4 We aim to prepare a Bill, which will implement recommendations 306 and 307[7] of the Auld Review which make detailed recommendations for the transfer of the High Court's criminal jurisdiction over decisions in the Crown Court, to the CACD. The jurisdiction which will need to be transferred to achieve this, is limited to the case stated and judicial review jurisdiction over matters in the Crown Court "*not* relating to trial on indictment".

1.5 The question whether a matter is, or is not, one relating to trial on indictment has given rise to much, quite complex, case law.[8] The meaning of this phrase has been considered five times by the House of Lords during the past twenty years.[9] This is not a problem in respect of *appellate* decisions in the Crown Court. Such decisions cannot relate to trial on indictment, as the case in issue will have been dealt with summarily in the magistrates' court. In respect of first instance decisions of the Crown Court however, the extent of this jurisdiction is nebulous.

1.6 Some suggestions are made in Part 5 of measures aimed to resolve some of these difficulties. We welcome comments and views on these and, on the various discussion issues set out in the final part of this paper.

1.7 Our terms of reference also ask us to consider the implications of this transferred jurisdiction for the High Court's criminal jurisdiction over magistrates' courts.[10]

5 *Ibid,* chapter 12, para 37 and 43.

6 See Auld Review, chapter 12, para's 37 and 43.

7 The Government has accepted, in principle, recommendations 306 and 307 (which are set out in Appendix A of this paper). See Justice for All, July 2002, Cm 5563, which states that these recommendations will be taken forward, subject to discussion of the detailed arrangements with senior judiciary.

8 See Appendix B.

9 See para 4.4–4.7, below.

10 The Auld Review addresses concerns that the three partially overlapping routes of appeal against decisions in magistrates' courts involve undesirable anomalies and complexities. Under the rejected recommendation 305, the right of appeal from magistrates' courts to the High Court by appeal by way of case stated or by a claim for judicial review would have been abolished. In its place would have been a single avenue of appeal to the Crown Court. Supervisory jurisdiction currently exercised by the High Court over the magistrates' courts (case stated and judicial review) would have "be[come] exercisable in criminal matters by the Court of Appeal on appeal from the Crown Court". Access to High Court Judges would have been limited to a second stage of appeal from a decision in the magistrates' courts. (Chapter 12, paras 24-30).

The Government has rejected the Auld Review recommendations, for the removal of the multiple avenues of appeal from magistrates' courts.[11] Accordingly, the separate High Court jurisdiction over magistrates' courts, described in Part 7 of this paper, can be expected to continue to exist, along side the reforms prompted by recommendations 306 and 307.

STRUCTURE

1.8 This paper is in eight parts. There is an overview of the history of the High Court's case stated and judicial review jurisdiction in Part 2. The present law relating to appeals from the Crown Court to the High Court, by way of case stated, under section 28 of the Supreme Court Act 1981 (the 1981 Act) is dealt with in Part 3. We consider whether this jurisdiction needs to be clarified and modified for transfer to the CACD.

1.9 Part 4 outlines the present law relating to judicial review of Crown Court decisions, under section 29(3) of the Supreme Court Act 1981 (the 1981 Act) and problems experienced with the bar on judicial review jurisdiction, namely "matters relating to trial on indictment." Various questions are raised concerning how this jurisdiction may be clarified and modified before transfer to the CACD. Part 5, also considers simplification and modification of the High Court's criminal jurisdiction before any transfer.

1.10 In Part 6 we consider how the High Court's criminal jurisdiction over decisions in the Crown Court can be transferred to the CACD.

1.11 In Part 7, we consider the implications of the proposed transfer of jurisdiction, for the High Court's criminal jurisdiction over magistrates' courts, and over courts-martial.

1.12 Finally, discussion issues raised in Parts 3 to 7 are listed in full in Part 8 of the paper.

[11] See Justice for All, 2002. Cm 5563. The Government also rejected the Auld Review recommendation 302, which would have abolished the right of appeal to the Crown Court by way of re-hearing. The Government commented about recommendation 302 and 305, "we consider that the existing arrangements work satisfactorily".

PART 2
HISTORY

THE HISTORY OF SECTIONS 28(2)(a)[1] AND 29(3)[2] OF THE SUPREME COURT ACT 1981.

Superior and inferior courts dealing with criminal cases

2.1 From the middle ages until the mid-to-late twentieth century,[3] broadly criminal cases in England and Wales were dealt with across three levels of court.[4] The highest level was the Assize Court. Specially appointed judges travelled from county to county to hold court in "Assize towns".[5] Assize courts were generally presided over by High Court judges. Sometimes a serjeant-at-law, or even a prominent layman would preside. Powers over the assizes were derived from a commission of *Oyer and Terminer* (to hear and determine the accused's offences) and *Gaol Delivery* (to deliver from the county gaols, and try all those awaiting trial).[6] The powers exercised by this superior court were not subject to any supervision from the High Court.[7]

2.2 The middle level court was the Quarter Sessions. Initially, "worthy men" (transformed by statute into justices of the peace in 1361) were appointed to keep the peace. By statute enacted early in the fifteenth century, the justices were to meet quarterly or more often if needed. These meetings became known as Quarter Sessions.[8] Their jurisdiction extended at common law to all indictable offences except perjury and forgery, with discretion to reserve more difficult cases for Assizes. Statutory limitations on powers of justices were first imposed in

[1] See Appendix A.

[2] *Ibid.*

[3] With the establishment of the Crown Court (a superior court of record) under the Courts Act 1971.

[4] See the Royal Commission on Assizes and Quarter Sessions 1966–1969, Cmnd 4153, para's 4 – 5.

[5] *The Royal Commission on Assizes and Quarter Sessions 1966-1969,* Cmnd 4153, para 13.

[6] R Walker and R Ward, *Walker and Walker's English Legal System* (7th ed 1994) p 135. At the time of the Royal Commission there were, in addition, three centres where the criminal workload was very heavy (London, Liverpool and Manchester). Permanent courts presided over by two tiers of judges were set up. In London this was the Central Criminal Court, "the Old Bailey"; those in Liverpool and Manchester were "Crown Courts". (*Ibid,* para's 4-5).

[7] Commenting on this position, see Lord Shaw in *R v Crown Court, ex parte Brownlow* [1980] 1 QB 530, at 544F-544H:

> It would have been a derogation of their status and function in this judicial office of high consequence to be subject to review of any court.

Under the Supreme Court of Judicature (Consolidation) Act 1925, sections 18, 56, 70 and 73, Courts of assize, oyer and terminer, and gaol delivery, were part of the High Court. See Archbold, *Criminal, Pleading Evidence and Practice* (37th edition 1969).

[8] *Ibid,* para 23.

1842.[9] The powers of the Quarter Sessions were extended during the twentieth century.[10] By the time of the Royal Commission (1966 – 1969) most Quarter Sessions were normally presided over by a legally qualified judge.[11]

2.3 As an inferior court, the jurisdiction of the Quarter Sessions was, with the exception of judgments on indictment,[12] subject to review by the supervisory jurisdiction of the High Court.[13] The exception relating to judgments on indictment appears to have been based on the fact that trials on indictment were trials "according to the course of the common law".[14] It was not an absolute exception. Very rarely indeed, the High Court would exercise a supervisory jurisdiction in cases of a trial on indictment.[15] In contrast, in the exercise of its appellate jurisdiction, Quarter Sessions dealt with summary adjudications from the Magistrates' Court. Accordingly, its decisions in appeal cases were subject to review.[16]

2.4 The lowest level of court was the Magistrates' Court, where most criminal cases were prosecuted. Of the remaining few percent, the less serious were normally sent on to the Quarter Sessions and the most serious would always be sent on to the criminal side of the Assizes.[17] The Magistrates' Court, a court of summary jurisdiction, was an inferior court. Its jurisdiction was therefore also subject to judicial review by the High Court.

[9] This excluded murder, treason and any felony for which one not previously convicted of felony could be sentenced to life imprisonment.

[10] The Larceny Act 1916, for example, empowered justices to try cases of burglary, although this offence was punishable with life imprisonment. See para 28 of the Report of the Royal Commission, *op cit.*

[11] Each of the 58 administrative counties of England and Wales had its own county Quarter Sessions and London had five Quarter Sessions in greater London plus 93 Borough Quarter Sessions. Lay magistrates participated in the county Quarter Sessions but not in the borough Quarter Sessions. (see para's 24 and 94 of the Report of the Royal Commission, *op cit.* At times senior judges from the High Court and Court of Appeal would preside, sitting in the capacity of Deputy Chairman.

[12] See, for example, *Unwin* (1839) 7 Dowl 578, and *Middlesex JJ, ex p DPP* [1952] 2 All ER 312. See also Robert Ward "Judicial Review and Trials on Indictment: section 29(3) of the Supreme Court Act 1981" [1990] PL 50 at 51.

[13] An appellate order of Quarter Sessions reversing a conviction could, for example, be quashed by the High Court on certiorari: see *Allen* (1812) 15 East 333; *Ridgeway* (1822) 1 D & R 132; *Spencer* (1839) 9 A & E 485; *Boultbee* (1836) 4 A & E 498; *Clare* JJ [1905] 2 Ir 510; *Hanson* (1821) 4 B & Ald 519; *Theede* (1733) 2 Barn KB 16.

[14] See *Wilson* [1844] 6 QB 620, *per* Williams J, at 627:

> There appears to be no distinction as to the common law felonies which it was entitled to try: and if it is entrusted with such power, the cases cited show that it may proceed according to the ordinary common law course.

See also Gordon's casenote in [1953] 69 LQR 175, at 176.

[15] For example, in *R v Inner London Quarter Sessions* [1970] 2 WLR 95, the High Court granted an order of mandamus in respect of a decision of a deputy chairman of the Quarter Sessions who had purported to quash an indictment.

[16] See the cases cited in footnote 13 above.

[17] The Royal Commission on Assizes and Quarter Sessions 1966–1969, Cmnd 4153*,* para 4 – 5.

The history of judicial review

2.5 From the twelfth century, the Crown exercised an inherent supervisory power to control inferior bodies and courts.[18] This regal power was initially exercised in the King's Council, *Curia Regis.*[19] The Kings Bench Division, of the High Court acquired the power, when that common law court broke away from the King's Council.[20]

2.6 Supervision was effected by the use of prerogative writs, including writs of prohibition, mandamus and certiorari.[21] In 1838, those writs were replaced by orders of the same name.[22] These orders are now known respectively as prohibitory orders, mandatory orders and quashing orders;[23] they are issued in the Administrative Court, a part of the Queen's Bench Division of the High Court.[24] This supervisory jurisdiction and the procedure for invoking it are known as "judicial review".[25]

The history of the appeal by way of case stated

2.7 The jurisdiction of the High Court to decide upon a case stated by Quarter Sessions was a common law jurisdiction. Lord Goddard CJ in *Rex v Somerset Justices, ex parte Ernest J Cole & Partners LTD. and another*[26] explained:

> … the ancient history of quarter sessions shows that they were given power to consult the judges of assize. In fact, they were told not to proceed with a case of difficulty until the justices came into the county, which, of course, was equivalent to telling them that they could, and ought in proper cases, to consult the justices of assize before deciding a case of difficulty. Then it became the practice, instead of consulting the judge of assize, to consult the court of King's Bench; and whether they consulted that court or not was always a matter entirely for their discretion.[27]

[18] See R Walker and R Ward, *Walker and Walker's English Legal System* (7th ed 1994) p 1.

[19] *Ibid,* p 131.

[20] See R Walker and R Ward, *Walker and Walker's English Legal System* (7th ed 1994) p 131-133.

[21] Originally there were five such writs: Prohibition, mandamus, certiorari, habeas corpus and quo warranto. Various forms of the writ of habeas corpus still exist.

[22] See the Administration of Justice (Miscellaneous Provisions) Act 1938, section 7**.** The *writs* of prohibition, mandamus and certiorari were replaced by *orders* of prohibition, mandamus and certiorari.

[23] See the Civil Procedure (Modification of Supreme Court Act 1981) Order 2004.

[24] Practice Direction (Administrative Court: establishment) [2000] 1 WLR 1654, *per* Woolf, CJ. Following a review of the Crown office list, undertaken by Sir Jeffrey Bowman, the Crown Office side of the Queen's Bench Division was re-named the Administrative Court in 2000.

[25] See section 31 of the Supreme Court Act 1981, part 54 of the Civil Procedure Rules and the Civil Procedure (Amendment No 4) Rules 2000, SI 2000/2092.

[26] [1950] 1 KB 519.

[27] *Ibid* at p 521.

2.8 Neil LJ, in *Loade and others v Director of Public Prosecutions*[28] referred to *R v Chantrell*[29] in which the origins of this jurisdiction had been considered, saying:

> It appears from that case and from other authorities that at one time it was the practice when a court of Quarter Sessions had a case of difficulty to seek the opinion of the judge of assize[30] …
>
> Later … it became the practice for the Quarter Sessions, instead of adjourning the matter to the assizes, and then deciding the case which the justices thought difficult in the presence of the judge of assize, to state a case in writing, and then to decide it according to the opinion of the judge given upon the case. This practice continued in being as late as 1734.[31]

2.9 The procedure governing an appeal from a court of Quarter Sessions to the High Court by way of case stated was put on a statutory basis by section 2 of the Supreme Court of Judicature (Procedure) Act 1894. This section was reproduced in almost identical terms in section 25 of the Supreme Court of Judicature (Consolidation) Act 1925.

2.10 Neil LJ continued:

> In 1925 for the first time a new right was given to a party to criminal proceedings which had been heard on appeal by Quarter Sessions, to appeal further by case stated to the High Court. This reform was introduced by section 20 of the Criminal Justice Act 1925.[32]

The Crown Court of England and Wales

2.11 The Crown Court of England and Wales was established by the Courts Act 1971 (the 1971 Act) as a superior court of record.[33] This court took over the jurisdiction of the former Assizes and that of the Quarter Sessions, including its appellate jurisdiction.

2.12 The High Court retained a case stated jurisdiction over decisions in criminal cases. Subject to section 10(1) of the 1971 Act,[34] any party to proceedings may question any order, judgment or other decision of the Crown Court on the ground

[28] [1990] 1 QB 1052.

[29] (1874-5) LR 10 QB 587.

[30] [1990] 1 QB 1052 at p 1060.

[31] [1990] 1 QB 1052 at p 1061. Two features of this old practice were noted. First the question whether or not to consult the High Court was a matter entirely for the justices in Quarter Sessions themselves. The parties could not compel the justices to state a case, nor could the High Court order the court of Quarter Sessions to consult the High Court. Secondly the High Court would only hear a case until the court of Quarter Sessions had reached a final decision.

[32] [1990] 1 QB 1052 at pp 1062-1063.

[33] Section 4.

[34] See Appendix A.

that it is wrong in law or in excess of jurisdiction. The limit in section 10(1) relates to:

> a judgment or other decision relating to trial on indictment (section 10(1)(a)), and any decision under the Betting, Gaming and Lotteries Act 1963, the Licensing Act 1964 and the Gaming Act 1968 which, by any provision of any of those Acts, is to be final (section 10(1)(b)).

2.13 The High Court also retained a judicial review jurisdiction over criminal cases. We have seen that the Quarter Sessions' appellate jurisdiction was subject to judicial review by the High Court. The 1971 Act made provision, in section 10, for the continuation of this supervisory jurisdiction, despite the status of the Crown Court as a superior court of record.

2.14 Section 10(5) of the 1971 Act provides:

> [I]n relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court is declared to have all such jurisdiction to make orders of mandamus, prohibition or certiorari as the High Court possesses in relation to the jurisdiction of an inferior court.

The Supreme Court Act 1981

2.15 The provisions found in section 10 of the 1971 act are now found, in essence, in sections 28 and 29 of the Supreme Court Act 1981. Each of those provisions limits the High Court jurisdiction to decisions other than those relating to trial on indictment.

The reason for the limits found in sections 28(2) and 29(3)

2.16 Each of these limitations appears to derive from a common origin. The judicial review powers and case stated powers of the High Court originated at common law. The High Court and Assize Court[35] exercised this supervisory jurisdiction, over the Quarter Sessions. The jurisdiction of the Assize Court was not subject to such supervisory jurisdiction. Nor was a decision of the Quarter Sessions in a judgment on indictment, generally subject to judicial review.

2.17 On the creation of the Crown Court in 1971, that single court assumed the jurisdiction of both the Assizes and the Quarter Sessions. Section 10 of the 1971 Act substantially reproduced the effect of the pre-Act law relating to judicial review and appeals by way of case stated against decisions in the Quarter Sessions. By excluding *all* decisions relating to trial on indictment from this

[35] Indeed, under the Supreme Court of Judicature (Consolidation) Act 1925, sections 18, 56, 70 and 73, Courts of assize, oyer and terminer, and gaol delivery, were part of the High Court. See Archbold, *Criminal, Pleading Evidence and Practice* (37th ed 1969).

jurisdiction however, it excluded the exceptional Quarter Sessions case on indictment where formerly the High Court might have intervened.[36]

2.18 Walker and Walker's *English Legal System,* commenting on section 29(3), explain:

> The reason for this provision is historical: the Crown Court took over the appellate jurisdiction of the old courts of Quarter Sessions, which were inferior courts and thus subject to judicial review. However, the application of section 29(3) has proved less than easy. [37]

2.19 In a similar vain, in *R v Crown Court at Ipswich, ex parte Baldwin,*[38] Donaldson LJ said of section 10 of the Courts Act 1971:

> The section does not apply to a judgment or other decision relating to trial on indictment, so in other words what the section is concerned with is what used to be the old Quarter Sessions jurisdiction which is now assumed by the Crown Court.[39]

2.20 More recently, the courts have interpreted section 29(3) in a wider way. As Walker and Walker point out, the test formulated by the House of Lords "would have the effect of permitting judicial review where an order was made affecting a person other than the defendant, or where the court was acting under a different jurisdiction".[40]

2.21 It is note-worthy however that the current Court Service web-site[41] describes the judicial review jurisdiction of the Administrative court thus:

> Judicial review - of decisions of inferior courts and tribunals, public bodies and persons exercising a public function. Criminal cases may arise from decisions of magistrates' courts or the Crown Court when it is acting in its appellate capacity.

Judicial overview of the historic status of the bar to judicial review in section 10(5) of the Courts Act 1971.

2.22 This historic status and its relevance is described in some detail by Shaw LJ in *R v Crown Court, ex parte Brownlow:*[42]

[36] *R v Inner London Quarter Sessions* [1970] 2 WLR 95 provides a rare example of the exercise of such jurisdiction.

[37] See R Walker and R Ward, *Walker and Walker's English Legal System* (7th ed 1994), p 126.

[38] A Note on this case is reported at [1981] 1 All ER 596.

[39] *Ibid* at 596.

[40] See R Walker and R Ward, *Walker and Walker's English Legal System* (7th ed 1994) p 127. See cases listed in Appendix B, para 1.3.

[41] www.courtservice.gov.uk.

[42] [1980] 1 QB 530, at 544C-544H.

[T]here are formidable historical and practical justifications for this immunity [the section 29(3) bar]. The Courts Act 1971 abolished the courts of assize and the courts of quarter session. It established in their place the Crown Court which embodied both their jurisdictions. One was that of a superior court of record while the other was that of an inferior court. The Crown Court is declared by section 4 of the Act to be a "superior court of record"; but its composite jurisdiction is still subject to the historical distinctions which existed before the Act came into operation. In its jurisdiction relating to trial on indictment, the Crown Court is the direct heir of the assize courts wherein the judges held the commission of the sovereign to hold courts of general *gaol delivery* and of *oyer and terminer*. It would have been a derogation of their status and function in this judicial office of high consequence to be subject to the review of any court. The verdict of a jury if adverse to an accused might be reviewed in the Court of Criminal Appeal when that court was created by the Criminal Appeal Act 1907 which made possible appeals against conviction or sentence. Apart from this statutory intervention there was only a consultative recourse to the Court of Crown Cases Reserved. The authority of judges of assize in the trial of cases on indictment was paramount and their decisions could not be questioned. Nor can the authority of Crown Court judges be questioned now in matters relating to their jurisdiction to try cases on indictment. Theirs must be not only the first but also the last word. A judge of assize could revoke or review or modify any order or decision he had made before the trial of an accused had been finally disposed of; but he was not subject to external oversight. It would have been inconsistent with the status and dignity of judges who presided over and controlled the trial of persons indicted for criminal offences to be subject to external control at every stage from committal until verdict. It would be no less invidious and inappropriate in the case of a judge of the Crown Court in the discharge of those same functions which have devolved upon him."

PART 3
APPEALS BY WAY OF CASE STATED: SECTION 28(1) AND (2) OF THE SUPREME COURT ACT 1981

INTRODUCTION

3.1 This part outlines the High Court case stated jurisdiction under section 28 of the Supreme Court Act 1981. It considers whether this jurisdiction should be clarified and/or modified for its transfer to the CACD.

SECTION 28 OF THE SUPREME COURT ACT 1981

3.2 Section 28(1) grants to any party to proceedings in the Crown Court the right to have a case stated by the court to the High Court. Section 28(1), (2) and (4) of the Supreme Court Act 1981 state:

> (1) Subject to subsection (2), any order, judgment or other decision of the Crown Court may be questioned by any party to the proceedings, on the ground that it is wrong in law or is in excess of jurisdiction, by applying to the Crown Court to have a case stated by that court for the opinion of the High Court.
>
> (2) Subsection (1) shall not apply to-
>
> > (a) a judgment or other decision of the Crown Court relating to trial on indictment; or
> >
> > (b) any decision of that court under the Betting, Gaming and Lotteries Act 1963, the Licensing Act 1964, the Gaming Act 1986 or the Local Government (Miscellaneous) Provisions Act 1982 which, by any provision of any of those Acts is to be final.
>
> (3) … .
>
> (4) In subsection (2)(a) the reference to a decision of the Crown Court relating to trial on indictment does not include a decision relating to an order under section 17 of the Access to Justice Act 1999.[1]

GROUNDS

3.3 Section 28 permits parties to proceedings to question certain decisions of the Crown Court on the ground that a decision is wrong in law or in excess of

[1] See Appendix A for s.17 of the Access to Justice Act 1999 which, subject to regulations under subsection (3), provides for the making of Recovery of Defence Costs Orders (RDCOs).

jurisdiction. This is done by applying to the Crown Court to have a case stated for the opinion of the High Court.[2]

REMEDIES

3.4 The High Court may, if it thinks fit, cause a case to be sent back for amendment. It will hear and determine the question arising on the case (or amended case) and shall –

(a) reverse, affirm or amend the determination in respect of which the case has been stated; or

(b) remit the matter to the court with the opinion of the High Court, and make such other order in relation to the matter (including as to costs) as it thinks fit.[3]

LIMITS TO THE JURISDICTION

3.5 In *Loade and others v Director of Public Prosecutions*[4] it was held that an appeal by way of case stated under section 28 could not be made as an interlocutory application. Appeals by way of case stated could only be made after a final determination, in a criminal matter.[5]

3.6 An application to state a case cannot be made concerning "a judgment or other decision of the Crown Court relating to trial on indictment", under section 28(2)(a). Section 28(2)(a) has not generated the interpretative problems experienced with section 29(3).[6] The reason for this probably lies in the fact that interlocutory applications cannot be made under section 28.[7] As such judicial review is the only option available if a party wishes to challenge a decision in the High Court, mid-trial.

3.7 Finally the bar in section 28(2)(a) does not operate in relation to any order which was made under section 17 of the Access to Justice Act 1999. Section 28(4) has the effect of enabling appeals to be made by case stated, in cases involving costs. Prior to the amendment introduced in section 28(4),[8] this was not possible.[9]

2 In *R v St. Albans Crown Court, ex parte Cinnamond* [1981] 1 QB 480. It was held that a sentence was so excessive it constituted an error of law.

3 Section 28A(2) and (3) of the Supreme Court Act 1981.

4 [1990] 1 QB 1052.

5 However it can review a civil matter in exceptional circumstances.

6 See Part 4 below.

7 *Loade and others v Director of Public Prosecutions* [1990] 1 QB 1052.

8 See section 26 of the Access to Justice Act 1999 and schedule 4.

9 This was because, *prime facie,* a costs order is a matter "relating to trial on indictment". See Part 4 para 4.45-4.50 for discussion on costs.

Additional limit arising out of Auld Review recommendation 306

3.8 The magistrates' courts only conduct summary trials. Therefore, whenever proceedings in the Crown Court are appellate proceedings, they will not involve any decision "relating to trial on indictment". As such, the bar in section 28(2) would not operate in respect of appellate proceedings in the Crown Court.

3.9 Recommendation 306 of the Auld Review[10] requires that the case-stated jurisdiction in respect of decisions in the Crown Court should be limited, in cases where that court exercised appellate jurisdiction. It recommends that permission to appeal in such cases should only be granted "in a case involving an important point of principle or practice or where there is some other compelling reason for the Court to hear it".

3.10 The ability to appeal by case stated from a decision in the Crown Court could thus turn on whether the decision to be challenged was made by the court sitting as a court of first instance, or as an appellate court. This is anomalous.

3.11 It would be possible for a judge in case A, exercising first instance jurisdiction, and a judge in case B, exercising an appellate jurisdiction, to err in precisely the same way, causing the same kind of injustice, but a remedy may only be available in respect of case A.[11]

WHAT JURISDICTION SHOULD BE TRANSFERRED TO THE CACD?

3.12 We have not identified any significant problems with the working of section 28(2)(a) of the 1981 Act. Accordingly, we see no need to simplify this jurisdiction.

3.13 To guard against any interlocutory applications being made under the transferred jurisdiction, we propose that the principle stated in *Loade and others v Director of Public Prosecutions*[12] should be expressly stated in the transferring legislation.

3.14 To meet the requirements of recommendation 306 of the Auld Review,[13] the limitation described above in paragraph 3.9 would have to be enacted.

DISCUSSION ISSUE ONE:

Modification of jurisdiction

(1) The case stated appeal process cannot be used at an interlocutory stage. Should this be preserved by express statutory provision?

(2) Permission to appeal:

(a) Where the Crown Court exercises its appellate jurisdiction, do policy reasons[14] warrant the different criteria

[10] Accepted in principle by Government.

[11] A comparable anomaly could arise in respect of a claim for judicial review.

[12] [1990] 1 QB 1052.

[13] Accepted in principle by Government.

recommended in the Auld review for the grant of permission to appeal by way of case stated?[15]

(b) Should the transferred jurisdiction be modified further to address this anomaly? How might that be achieved?

(3) Should there be any other modification to the case stated jurisdiction in the Crown Court?

[14] To generally limit appeals in cases decided in the magistrates' courts to a single tier of appeal.

[15] The Auld Review recommends a more restrictive test for permission to appeal where the decision in issue was a decision of the Crown Court in the exercise of its appellate jurisdiction. In such cases permission should only be granted "in a case involving an important point of principle or practice or where there is some other compelling reason for the court to hear it".

PART 4
THE HIGH COURT'S JUDICIAL REVIEW JURISDICTION OVER DECISIONS IN THE CROWN COURT

INTRODUCTION

4.1 This part outlines the jurisdiction under section 29 of the Supreme Court Act 1981 and the problems associated with this. We discuss the lack of clarity of the bar in section 29(3), "matters relating to trial on indictment", and how that bar might operate to deny a party a remedy where one may be expected. We also consider how this jurisdiction should be clarified and modified should it be transferred to the CACD.

APPLICATION FOR JUDICIAL REVIEW: SECTION 29(3) OF THE SUPREME COURT ACT 1981

4.2 Section 29(3) gives jurisdiction to the High Court over criminal matters in the Crown Court, where otherwise it would have none, due to the status of the Crown Court as a superior court of record.[1] It provides:

> In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make orders of mandatory, prohibiting or quashing orders as the High Court possesses in relation to the jurisdiction of an inferior court.[2]

Section 29(6) provides:

[1] See s 4 of the Courts Act 1971 and s 45 of the Supreme Court Act 1981.

[2] Section 29(1A) of the 1981 Act provides:

> The High Court shall have jurisdiction to make mandatory, prohibiting and quashing orders in those classes of case in which, immediately before 1 May 2004, it had jurisdiction to make orders of mandamus, prohibition and certiorari respectively.

In 2000 there were 4,247 applications for permission to apply for judicial review. In criminal, housing and other matters (excluding immigration matters) there were 1,583 applications. Of these 523 were allowed. Judicial Statistics Annual reports 2000.

In 2001 there were 4,732 applications for permission to apply for judicial review. In criminal, housing and other matters (excluding immigration matters) there were 2,288 applications. Of these 893 were allowed. Judicial Statistics Annual reports 2001.

In 2002 there were 5,377 applications for permission to apply for judicial review. In criminal, housing and other matters (excluding immigration matters) there were 1,891 applications. Of these 648 were allowed. Judicial Statistics Annual reports 2002.

In 2003 there were 5,949 applications for permission to apply for judicial review. In criminal, housing and other matters (excluding immigration matters) there were 1,828 applications. Of these 611 were allowed. Judicial Statistics Annual reports 2003.

> In subsection (3) the reference to the Crown Court's jurisdiction in matters relating to trial on indictment does not include its jurisdiction relating to orders under section 17 of the Access to Justice Act 1999.[3]

4.3 The case law on section 29(3) has focused on the limit of the High Court judicial review jurisdiction; judicial review is barred in "matters relating to trial on indictment". The meaning of the bar has been considered five times by the House of Lords in the following cases:

(1) *Re Smalley*;[4]

(2) *Re Sampson*;[5]

(3) *Re Ashton*;[6]

(4) *R v Manchester Crown Court, ex Parte DPP*; [7] and

(5) *R v DPP, ex parte Kebilene and others.*[8]

House of Lords rulings on "matters relating to trial on indictment"

4.4 The House of Lords has been careful to provide only guidance as to the meaning of section 29(3) and not an exclusive definition. Particular emphasis has been put on the policy reason behind section 29(3). This is the need to avoid delays to trials on indictment. The case law supplies pointers that are not intended to replace the words of the statute.

(1) In *Re Smalley,*[9] the House of Lords held that a Crown Court order could not be reviewed if it affected the conduct of the trial in any way.

(2) In *Re Sampson,*[10] the House of Lords held that where the Crown Court order is an integral part of the trial process it could not be reviewed.

(3) *Re Smalley*[11] and *Re Sampson*[12] were both considered by the House of Lords in *Re Ashton.*[13] It was held that an order by the Crown Court, that a

[3] Section 29(4) of the 1981 Act has the effect of allowing judicial review in certain cases involving costs, where previously there was none.

[4] [1985] AC 622.

[5] [1987] 1 WLR 194.

[6] [1994] 1 AC 9.

[7] [1993] 1 WLR 1524.

[8] [2000] 2 AC 326.

[9] [1985] AC 622.

[10] [1987] 1 WLR 194.

[11] [1985] AC 622.

[12] [1987] 1 WLR 194.

[13] [1994] 1 AC 9.

trial on indictment should be stayed as an abuse of process, is one which clearly affects the conduct of the trial. The order relates to a trial on indictment and cannot be judicially reviewed.

(4) In *R v Manchester Crown Court, ex parte DPP* [14] the House of Lords offered the following guidance:

> "Is the decision sought to be reviewed one arising in the issue between the Crown and the defendant formulated by the indictment (including the costs of such issue)?" If the answer is "Yes," then to permit the decision to be challenged by judicial review may lead to delay in the trial: the matter is therefore probably excluded from review by the section.[15]

(5) In *R v DPP, ex parte Kebilene and others*[16] Lord Hobhouse in the House of Lords offered a further clarification. He stated:

> If the substance of what it is sought to review is the answer to some issue between the prosecution and the defence arising during a trial on indictment that issue may not be made the subject of judicial review proceedings.[17]

4.5 The High Court in *R v Manchester Crown Court, ex parte H (a minor) and Another*[18] held:

> The subject matter of the order sought to be challenged is obviously a very important factor when considering whether section 29(3) of the Supreme Court Act 1981 applies. But it is not … the sole determinative factor. Indeed … there are other factors for consideration, including when in relation to the course of the trial or proceedings a section 39 order is made.[19]

4.6 In *R v Chelmsford Crown Court, ex parte Chief Constable of Essex*[20] it was held that the limitation found in section 29(3) cannot be avoided by means of choosing a declaratory order instead of one of the prerogative orders. This reasoning can be equally applied to the limitation in section 28(2) of the 1981 Act.[21]

[14] [1993] 1 WLR 1524.

[15] *Ibid* at p 1531.

[16] [2000] 2 AC 326.

[17] *Ibid* at p 394.

[18] [2000] 1 WLR 760.

[19] *Ibid* at p 768.

[20] [1994] 1 WLR 359.

[21] Section 29(1) of the 1981 Act only confers on the High Court such prerogative powers as it had before the 1981 Act. Before that Act, the High Court had no prerogative powers over the jurisdiction of the Crown Court in matters relating to trial on indictment. Accordingly, it was accepted that, but for section 29(3), the High Court would have no prerogative powers

4.7 A list of matters which have been considered to relate to trial on indictment, and those considered not to do so, are listed in Appendix B. It should be noted that bail is no longer regarded as a matter relating to trial on indictment and therefore may be reviewed.[22]

The European Convention of Human Rights

ARTICLE 6 ECHR[23]

4.8 Article 6 of the ECHR is relevant to this jurisdiction as it gives basic rights to a defendant in criminal proceedings. The European Court has put limits on criminal proceedings at a national level,[24] however the Court also defers to national court proceedings.[25] When determining whether there has been a breach of Article 6 the European Court will look at each individual national system separately.[26]

Problems with the current High Court jurisdiction over decisions of the Crown Court

4.9 The problems with the current High Court judicial review jurisdiction over decisions of the Crown Court concern the lack of clarity generated by the section 29(3) bar, and the lack of remedies available to certain parties when the bar operates.

Uncertainty

4.10 The meaning of the phrase "matters relating to trial on indictment" in the bar contained in section 29(3), has caused great confusion and much case law. The list of matters regarded by the courts as "relating to trial on indictment", and those not so regarded,[27] are evidence of this. In *R v Manchester Crown Court, ex parte H,*[28] Rose LJ commented that:

> The meaning of the words in [section 29(3)], 'matters relating to trial on indictment', has, in recent years, attracted perhaps more judicial

over the Crown Court at all. As such section 29(3) of the 1981 Act *grants* the *limited* extent of review power that vests in the High Court.

22 See *R v M,* Divisional Court [2005] EWHC 363, although in *Croydon, ex parte Cox* [1997] 1 Cr App R 20, the Divisional Court had held that a refusal of bail was not susceptible to judicial review. The rationale of that decision was the viability of an alleviative remedy (an application to a High Court judge, pursuant to section 22(1) of the Criminal Justice Act 1967.) The right to apply to a High Court Judge was abolished by section 17(3) of the Criminal Justice Act 2003.

23 See Appendix A.

24 *Hauschildt v Denmark* (1990) 12 EHRR 266, *Ekbetani v Sweden* (1991) 13 EHRR 504, *Stanford v UK* (1994) A/282, *Granger v UK* (1990) 12 EHRR 469.

25 *Gregory v UK* (1997) 25 EHRR 577.

26 *Ekbetani v Sweden* (1991) 13 EHRR 504.

27 Appendix A.

28 [2000] 1 WLR 760.

> consideration, in not always apparently reconcilable decisions, than any other statutory provision.[29]

4.11 Rose LJ had said earlier in this case:

> It is … now time for Parliament to introduce, as a matter of urgency, clarifying legislation which addresses the problems arising not only from section 29(3) of the Supreme Court Act 1981 itself, but also from its relationship with other legislation, in particular, section 39 of the Act of 1933 [Children and Young Persons Act], and the provisions of section 159 of the Criminal Justice Act 1988 … which confer, solely in relation to orders restricting publication, a right of appeal to the Court of Appeal (Criminal Division). There is no such right of appeal conferred against a refusal to restrict publication or a decision discharging publication.[30]

It is clear that clarification is required.

Lack of remedy

4.12 We have identified three categories of case in which the bar in section 29(3) may lead to a lack of a proper remedy:

(1) certain Crown Court decisions made in breach of a convention right;

(2) certain Crown Court orders issued against third parties; and

(3) the acquitted defendant who wishes to challenge certain costs orders or decisions as to costs.

(1) CROWN COURT DECISIONS WHICH MAY BREACH A CONVENTION RIGHT

4.13 In a limited number of cases the operation of section 29(3) may result in a breach of a convention right.

4.14 Section 8(1) of the Human Rights Act 1998 states:

> In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

4.15 Where section 29(3) operates to exclude the High Court's review powers section 8 is ineffective as a means of providing a remedy. This may result in a breach of Article 13 of the ECHR, which states:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

[29] *Ibid* at 766C.

[30] [2000] 1 WLR 760 at 765H-766A.

4.16 The meaning of "the Convention rights" in section 1 of the Human Rights Act 1998 ("HRA"), omits the "right to an effective remedy" set out in Article 13 of the ECHR. When introducing the Human Rights Bill, the government's view of remedies for breach of a Convention right was that its obligations under article 13 were met by the passing of the HRA itself, and in particular by the remedies provision in section 8.[31] This purpose of section 8 is addressed in the House of Lords judgment in *Re S (Children)(Care Order: Implementation of Care Plan)*. [32] Lord Nicholls stated:

> The domestic counterpart to article 13 is section 7 and 8 of the Human Rights Act, read in conjunction with section 6. This domestic counterpart to article 13 takes a different form from article 13 itself. Unlike 13, which declares a right …, sections 7 and 8 provide a remedy. Article 13 guarantees the availability at the national level of an effective remedy to enforce the substance of Convention rights. Sections 7 and 8 seek to provide that remedy in this country. The object of these sections is to provide English law [with] the very remedy article 13 declares is the entitlement of everyone whose rights are violated.[33]

4.17 However, sections 7 and 8 cannot achieve that object if section 29(3) operates to bar review of a Crown Court decision made in breach of a Convention right.

4.18 Where a defendant (D) has a Convention right infringed under the ECHR, D has a right to a remedy. In English law, section 8 of the HRA normally provides for this. However, section 8 empowers the court to grant relief or remedy "*within its powers* as it considers just and appropriate." Where section 29(3) operates, the High Court has no power to review the decision of a Crown Court on a matter relating to trial on indictment, even if it results in a breach of a Convention right.

[31] The Lord Chancellor stated:

> [The Bill] gives effect to Article 13 by establishing a scheme under which convention rights can be raised before our domestic courts. To that end, remedies are provided in Clause 8. If the concern is to ensure that the Bill provides an exhaustive code of remedies for those whose convention rights have been violated, we believe that Clause 8 already achieves that and that nothing further is needed.
>
> We have set out in the Bill a scheme to provide remedies for violation of convention rights and we do not believe that it is necessary to add to it. *Hansard* (HL) 18 November 1997, vol 583, col 475.

He continued:

> At present, I cannot conceive of any state of affairs in which an English court, having held an Act to be unlawful because of its infringement of a convention right, would under Clause 8(1), be disabled from giving an effective remedy. I believe that the English law is rich in remedies and I cannot conceive of a case in which English law under Clause 8(1) would be unable to provide an effective remedy. *Hansard* (HL) 18 November 1997, vol 583, col 479.

[32] [2002] 2 AC 291.

[33] *Ibid* at p 318, para 61.

4.19 The effect of section 29(3) is that it renders section 8 HRA 1998 ineffective in this narrow category of case. Therefore there would remain a breach of the substantive right and of article 13 ECHR.

4.20 However it does not follow that there should be judicial review of all decisions. In the case of *R (o/a Regentford Ltd) v Canterbury,* Walker LJ states:

> It does not seem to me permissible to argue that because some of the decisions that are suggested [in this case] might involve breaches of the Convention and some might not, that therefore section 29(3) must be read so as to allow for review of *all* decisions.[34]

4.21 We would agree with this interpretation of section 3 HRA 1998 and its application to section 29(3). However his Lordship continued:

> In my view the interpretation previously placed on section 29(3) cannot be said to be incompatible with a Convention right. All that can be said is that in some cases it may be that breach of a Convention right by a trial judge may not be capable of review. That does not bring about a further independent breach of a Convention right. [35]

In light of Walker LJ's view at paragraph 4.20 above one would have expected his finding in this passage to be qualified by "unless there exists a breach of a Convention right, which would cause article 13 to be engaged."

4.22 If there is a breach of a Convention right caused by an order of a trial judge this should be remedied as required by article 13 ECHR. If there is no remedy, because of the section 29(3) bar, then this is a breach of an applicant's right to a remedy as contained in article 13. The pre-HRA principles apply, as article 13 has not been incorporated into the English law by the HRA.

4.23 Indeed, Walker LJ, earlier in his judgment stated:

> It is true that Article 13 has not been incorporated into English law, but not to provide a remedy would seem to run the risk or rendering the United Kingdom in breach of its Treaty obligations, something which the English courts should strive to the avoid.[36]

4.24 In conclusion, in some cases section 29(3) has the potential to cause a breach of article 13 ECHR. However for this to occur the order sought to be reviewed must itself result in a breach of a Convention right *other than* article 13.

[34] [2001] ACD 40 at para 21 (emphasis added).

[35] *Ibid* at para 22.

[36] *Ibid* at para 19.

EXAMPLES OF CROWN COURT ORDERS THAT MAY VIOLATE A CONVENTION RIGHT OTHER THAN ARTICLE 13 ECHR

Article 6 ECHR[37]

4.25 *R v Manchester Crown Court, ex parte H (a minor) and another*[38] concerned the discharge of an order under section 39 of the Children and Young Persons Act 1933,[39] after the trial had concluded. The applicants sought judicial review of the discharge order in the High Court.

4.26 Rose LJ found that "the present order, lifting anonymity, was made not at the beginning of the trial to influence its conduct, but after verdict and sentence."[40] The order discharging the original order under section 39 of the Children and Young Persons Act 1933 was not a matter relating to trial on indictment and was reviewable by the High Court.

4.27 Rose LJ distinguished this, however, from an order made at the outset of a trial to safeguard the anonymity of a witness, intending to influence the conduct of the trial by affording protection to the witness outside the court. His Lordship held that if this were the case he would "have no difficulty in identifying such an order as one relating to trial on indictment."[41]

4.28 In the same case Forbes J considered that an order to discharge a section 39 order, at the end of a criminal trial, is one, which impinges upon the welfare of the child and could breach article 6 ECHR.[42]

4.29 Section 4(2) and section 11 of the Contempt of Court Act 1981[43] are similar to section 39 of the Children and Young Persons Act 1933. They are intended to

[37] See Appendix A.

[38] [2000] 1 WLR 760.

[39] Section 39(1) of the Children and Young Persons Act 1933 provides:

> In relation to any proceedings in any court … the court may direct that:
>
> > (a) no newspaper report of the proceedings shall reveal the name, address, or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in the proceedings, either as being the person, by or against or in respect of whom the proceedings are taken, or as being a witness therein… except in so far (if at all) as may be permitted by the direction of the court.

[40] [2000] 1 WLR 760 at p 768.

[41] *Ibid.*

[42] Forbes J held:

> It seems to me that to discharge a section 39 order at the end of a criminal trial is plainly an order which concerns and impinges upon the welfare of the juvenile defendant. [2000] 1 WLR 760 at p 771.

[43] Section 4(2) of the Contempt of Court Act 1981 states:

> In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the

restrict media coverage of a trial to ensure the proper "administration of justice", including that the trial is a fair one. [44]

4.30 As such, where a trial judge refuses to make an order or lifts or revokes an order made under section 39,[45] section 4(2) or section 11 at the beginning or during a trial this could result in an unfair trial. No appeal lies to the Court of Appeal against a refusal or revocation.[46] There is an argument that because of Rose LJ's judgment in *R v Manchester Crown Court, ex parte H*[47] neither could there be review.[48] In any of these cases the defendant has no remedy against the decision; the lack of a remedy in this case may breach article 13 ECHR.

> publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose.

Section 11 of the contempt of Court Act 1981 states:

> In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it is so withheld.

[44] At common law, a contempt of court is an act or omission calculated to interfere with the due administration of justice. The Contempt of Court Act 1981 is also based on this common law principle. See Archbold, *Criminal Pleading, Evidence and Practice* (2005) at p 2413.

See Forbes J's judgment in *R v Manchester Crown Court, ex parte H* [2000] 1 WLR 760 at p 770.

Further Rose LJ commented*;*

> It may well be, if Parliament considers these matters, that it will also be necessary for them to consider the impact of article 6 of the ECHR. That is an aspect of this matter which has not been argued before this court. It may be that if the decision of the Divisional Court in *R v Winchester Crown Court, ex parte B (a minor)* is correct, so that there is no right of challenge even on behalf of a young person to a decision which may affect his or her welfare there will be consequences by virtue of article 6. At p 766.

[45] Note that section 39(3) of the Children and Young Persons Act 1933 provides that the provisions of section 39 will apply to proceedings "other than criminal proceedings."

This was inserted by the Youth Justice and Criminal Evidence Act 1999, s 28 Schedule 2 para 2(1). The date to be enforced will be appointed by the Secretary of State: Youth Justice and Criminal Evidence Act 1999, s 68(3). See Archbold, *Criminal Pleading, Evidence and Practice* (2005) at para 4.27 and 4.29.

[46] There can be an appeal against the making of a section 4 or 11 order under section 159 of the Criminal Justice Act 1998. Section 159 states:

> (1) A person aggrieved may appeal to the Court of Appeal, if that court grants leave, against-
>
> > (a) an order under section 4 or 11 of the Contempt of Court Act 1981 made in relation to a trail on indictment.

[47] [2000] 1 WLR 760.

[48] *Ibid* at p 767.

Article 5 ECHR[49]

4.31 In *R v Maidstone Crown Court, ex parte Harrow London Borough Council*[50] the Crown Court purported to make a supervision order under section 5 of the Criminal Procedure (Insanity) Act 1964. The defendant had entered a plea of "not guilty by reason of insanity" but no jury had been empanelled to try that issue (because it was uncontentious). Without a special verdict by the jury, there was no statutory authority to make such an order. The local authority applied for judicial review.

4.32 The Divisional Court held that in order to decide whether the matter was one 'relating to trial on indictment' it was necessary to consider not only the nature of the order made but the circumstances in which it was made. If the order had been made after the return of a special verdict, it would have been a matter relating to a trial on indictment and could not be reviewed. However because the court acted without jurisdiction, the High Court's power of judicial review was not excluded by section 29(3). The court was strongly moved by the consideration than an alternative decision would have left a patently irregular order unchangeable.

4.33 However, this decision is controversial. The case law conflicts as to whether the High Court has jurisdiction to review an order of the Crown Court which purports to relate to trial on indictment but is made beyond its jurisdiction.

4.34 *R v Chester Crown Court, ex parte Cheshire County Council*[51]was considered by Mitchell J in *ex parte Harrow LBC.*[52] In this case a submission that the section 29(3) exclusion did not operate where the Crown Court was acting wholly without jurisdiction was rejected by Rose LJ:

> [H]ad it been Parliament's intention that a Crown Court purporting to exercise a jurisdiction which it did not have should be subject to judicial review by this court one would have expected Parliament to say so.[53]

4.35 Rose LJ also explained that such a provision would place the Crown Court in a similar position to that of the county court or magistrates' court, adding:

> It is because, historically, the Crown Court is not an inferior court, as those courts are, that a distinction is to be found in the way in which their decisions are susceptible to judicial review.[54]

[49] See appendix B.

[50] [2000] QB 719.

[51] [1996] 1 FLR 651.

[52] [2000] QB 719.

[53] [1996] 1 FLR 651 at 657.

[54] *Ibid.* Rose LJ also noted that the chief constable in *R v Chelmsford Crown Court, ex parte Chief Constable of Essex* [1994] 1 WLR 359 (discussed in separate minute of 17 December 2004), had been a person affected by the Crown Court's decision, who was

4.36 In *ex parte Harrow,* Mitchell J also considered the case of *Cain.*[55] Here, the House of Lords construed the provision in section 40(1) of the Powers of Criminal Courts Act 1973, which provides that there is no appeal against the making of a criminal bankruptcy order. The court held this provision to be subject to an implied limitation. This was that an appeal would lie where the issue was that the court, in making the order, had exceeded the power conferred on it by Parliament.

4.37 The reasoning in *ex parte Harrow LBC* focussed on a residual jurisdiction of the High Court to review decisions taken outside of jurisdiction. On that basis judicial review of the decision in issue was allowed, on the particular facts, there being no other remedy available. This case highlights the potential for difficulty with the proposed transfer from the High Court of its limited judicial review jurisdiction over decisions of the Crown Court to the CACD. The latter court is a creature of statute; it has no residual power. Its powers are only those conferred by statute.[56]

Excess of jurisdiction and article 5 ECHR

4.38 In *Beet and other v UK; Lloyd and others v UK*[57] the magistrates' courts had sentenced the applicants to a period of imprisonment due to wilful or culpable neglect to pay various taxes and court-imposed fines. The ECtHR found that the order of the magistrates' courts "had to be regarded as having been made in excess of their jurisdiction within English domestic law."[58] As such:

> The detention of the applicants was, as a result, unlawful and in breach of article 5.1.[59]

4.39 This case establishes that if an applicant is deprived of his liberty by an order made in excess of jurisdiction this is a breach of article 5(1). The applicant is therefore entitled to a remedy under article 13 ECHR.

4.40 The applicant is also entitled to a remedy under article 5(5) EHCR, which is a Convention right within the meaning of the HRA. Article 5(5) ECHR states:

> Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

unable to obtain a remedy (declaration as to the validity of a disclosure order in relation to inadmissible statements).

55 [1985] AC 46.

56 See *Jefferies* [1969] 1 QB 120, in which it was held that the powers of the Court of Appeal (Criminal Division) derive from statute and were confined to those given by statute. There is no inherent jurisdiction, the appeal itself being a creature of statute. See also Kennedy LJ, in *Vijay Patel* [2005] EWCA Crim 977, para 7, "this Court, being a creature of statute, has simply no jurisdiction to deal with the matter now brought to our attention".

57 *The Times* 10 March 2005.

58 *Ibid* at para 1.

59 *Ibid*.

Therefore if an applicant is deprived of this liberty by an order in excess of jurisdiction he is entitled to a remedy under the HRA.[60]

4.41 If a court decides that the section 29(3) operates in a case of "excess jurisdiction", judicial review would be barred. In this case there would be a breach of both article 5.5 and article 13.

(2) THIRD PARTIES

4.42 In some cases, because of the operation of section 29(3), a third party against whom an order has been made can neither appeal against the order nor have it judicially reviewed. This will occur where the order is one that affects the conduct of the trial, or is otherwise regarded as falling within the section 29(3) bar, under the House of Lords pointers given in paragraphs 4.4 to 4.7 above.[61]

4.43 This is illustrated by the facts and ruling in *R v Sheffield Crown Court, ex parte Brownlow.*[62] Two police officers had been committed for trial on indictment on charges of assault occasioning actual bodily harm. Some days before trial they applied to the judge for an order directing the prosecution to inform the defence whether any members of the jury panel had criminal convictions and, if so, to give details of the convictions. The judge ordered the Chief Constable of South Yorkshire to supply the solicitors for the defence and for the prosecution with the names of the jury panel, and full details of any criminal convictions recorded against any member of the panel.

4.44 The Chief Constable sought an order of certiorari to quash the judge's order. The Court of Appeal held that the High Court had no jurisdiction to entertain the application, as it was a matter "relating to trial on indictment." The Chief Constable, a third party, was left without remedy. Lord Bridge in *Re Smalley*[63] disagreed with both Lord Denning MR's and Lord Shaw's earlier interpretation of section 29(3) in *Brownlow*.[64] He regarded the former as too narrow[65] and the latter, too broad.[66] He stated however that an order relating to jury vetting, was an order affecting the conduct of the trial thus was barred from review.[67] An order

[60] Schedule 1 article 5(5).

[61] Where a third party order is collateral to the issue on the indictment, the claimant will be able to establish that the order is not subject to the bar. (See for example *In re Smalley* [1985] AC 622, an order estreating a recognisance given by a third party could be reviewed by the High Court.)

[62] [1980] QB 530.

[63] [1985] AC 622.

[64] *Ibid* at p 643.

[65] Lord Denning, at p 540 had suggested that the words "relating to trial on indictment" should be read as equivalent to "in the course of trial on indictment".

[66] Shaw LJ, at p 545, used the expression "closely related to trial on indictment".

[67] Lord Bridge stated:

> I think the decision of the majority in that case was right that the order in question, potentially affecting, as it did, the composition of a jury for a forthcoming trial, was, as Shaw LJ put it, at p 545, "closely related to trial on indictment," or as I would prefer to say, was an order affecting the conduct of the trial.

relating to the composition of the jury could also be regarded as an integral part of the trial process.[68]

(3) COSTS

Ordering a convicted defendant to pay prosecution costs

4.45 An order against a defendant, to pay, or contribute to payment of *prosecution* costs is regarded as part of a defendant's sentence. As such it can be appealed by way of an appeal against sentence to the Court of Appeal.[69]

Ordering a publicly funded defendant to contribute to defence costs

4.46 An order against a defendant to pay, or contribute towards defence costs, formerly by a legal aid contribution[70] or currently to pay all or part of the cost of representation funded by the Legal Service Commission,[71] is not part of the sentence. By virtue of sections 28(4) and 29(6) of the 1981 Act,[72] however, such orders may now be challenged in the High Court. Formerly, that was not possible, as such orders are regarded as an integral part of the trial process, so caught by the bar in section 28(2) and 29(3).[73]

The acquitted defendant seeking payment of own costs

4.47 It is to be noted that, a pre-requisite for any challenge to an order for payment towards *defence costs,* reliant on either section 28(4) or 29(6) of the 1981 Act, is that such costs were publicly funded.

4.48 A privately funded defendant would appear to be unable to challenge a refusal by the court to make a defendant's costs order (for the payment of *defence* costs out

[68] See *Re Sampson* [1987] 1 WLR 194.

[69] See *Hayden* (1974) 60 Cr App R 304: such an order is a "sentence" within the definition of sentence in s 50 of the Criminal Appeal Act 1968. The power to order payment of prosecution costs under s 18 of the Prosecution of Offences Act 1985, arises on conviction for an offence, or dismissal of an appeal against conviction or sentence. As such the need for a conviction, in order to be able to challenge a prosecution costs order does not present a problem.

[70] See *Hayden* (1974) 60 Cr App R 304 in which Lord Bridge, CJ explained at p 306:

> First of all, the power to order a contribution to be made by an accused person towards his own legal aid costs is not an order which is contingent on conviction. It is a power enjoyed by the Court whether the accused is convicted or acquitted, and consequently it does not seem to us to come within the definition of sentence, as I have endeavoured to explain it, in section 50 of the Act of 1968.

[71] See s 50(3) of the Criminal Appeal Act 1968, as amended:

> An order under section 17 of the Access to Justice Act 1999 is not a sentence for the purposes of this Act.

[72] See s 24 of the Access to Justice Act 1999, and sch 4, para 22, which added these provisions to the 1981 Act.

[73] See in *Re Sampson* [1987] 1 WLR 194 "a legal aid contribution order, like any other order with regard to costs which the Crown Court may make at the conclusion of a trial on indictment, is an integral part of the trial process," *per* Lord Bridge at p 199.

of central funds).[74] No appeal will lie to the Court of Appeal where a defendant is acquitted. In any event, the refusal to make such an order would not form part of any sentence. Further, there is no right to challenge the refusal in the High Court.[75]

The acquitted defendant against whom a costs order has been made

4.49 Part II of Regulations made under section 19 of the Prosecution of Offences Act 1985,[76] authorise a court to make a costs order against either party where it is satisfied that an unnecessary or improper act or omission caused the costs to be incurred. Unlike the provisions in Part IIA of those regulations (wasted costs orders against representatives) and Part IIB (third party costs order), no provision is made for an appeal to the Court of Appeal against such an order. Where such an order is made against a defendant who is acquitted, again that defendant would appear to be without a remedy, for the reasons given in the foregoing paragraph.

Conclusion

4.50 There appears to be a remedies gap in respect of both a refusal to award costs out of Central Funds in favour of an *acquitted* privately funded defendant, and an order that such a defendant pay costs incurred by the prosecution.[77] Commenting on this gap in *Regentford,* Waller LJ said:

> It is not as it seems to me altogether satisfactory that a defendant who obtains no order for costs or for that matter had an order for costs made against him after acquittal has no remedy even if the judge was "plainly wrong". [78]

SUMMARY: WHAT JURISDICTION SHOULD BE TRANSFERRED TO THE CACD?

4.51 The observations of the House of Lords on section 29(3) have led us to the view that the issue of substance, which the exclusionary words in section 29(3) describe,[79] appears to be unsuited to rigid definition.

4.52 Further it is clear that there have been significant problems with the operation of section 29(3).

[74] See s 16 of the Prosecution of Offences Act 1985.

[75] *R (o/a Regentford Ltd) v Canterbury* [2001] ACD 40. Note, ss 28(4) and 29(6) are confined to publicly funded cases under the Access to Justice Act 1999.

[76] The Costs in Criminal Cases (General) Regulations 1986 (SI 1986 no 1335).

[77] This gap could be closed by revision of the relevant Costs Regulations, to include a right of appeal similar to that provided in Parts IIA and IIB of the regulations.

[78] *R (o/a Regentford Ltd) v Canterbury* [2001] ACD 40, para 19. Waller LJ continued: "if … a judge has clearly impugned the innocence of a defendant after acquittal by a jury, the order made by the judge would have infringed a Convention right (se *Sekanina v Austria* (1994) 17 EHHR 21, … 30), and there would apparently be no remedy."

[79] "In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment …"

4.53 Finally recommendation 306[80] of the Auld Review[81] requires that the availability of judicial review of decisions in the Crown Court be limited, where that court has exercised its appellate jurisdiction. The issues discussed in paragraphs 3.8 to 3.11 concerning this point and case stated appeals apply equally here. They give rise to a comparable discussion issue, which is repeated below.

DISCUSSION ISSUE TWO:

Clarification and modification of jurisdiction

(1) How can the relevant jurisdiction of the Crown Court, which is currently subject to review by the High Court, be described with greater clarity?[82]

(2) Is the scope of the current jurisdiction too wide or too narrow?

(3) Should the limit on judicial review jurisdiction be modified so that it will not operate in breach of article 13 ECHR?

(4) Are there particular types of decision which should be subject to judicial review? Examples might be:

(a) a refusal to award costs out of Central Funds in favour of an *acquitted* defendant and/or an order that such a defendant pay costs incurred by the prosecution;

(b) any particular decisions affecting a third party.

(5) Permission to claim judicial review:

(a) Where the Crown Court exercises its appellate jurisdiction, do policy reasons[83] **warrant the different criteria recommended in the Auld review for the grant of permission to claim judicial review?**[84]

(b) Should the transferred jurisdiction be modified further to address this anomaly? How might that be achieved?

(6) Are there any other modifications to the judicial review jurisdiction which are favoured?

[80] See Appendix A. (Auld Review, Chapter 12 para 37.)

[81] Accepted in principle by Government.

[82] Of particular concern is the bar on judicial review in s. 29(3).

[83] To generally limit appeals in cases decided in the magistrates' courts to a single tier of appeal.

[84] The Auld Review recommends a more restrictive test for permission to claim judicial review, where the decision in issue was a decision of the Crown Court in the exercise of its appellate jurisdiction. In such cases permission should only be granted "in a case involving an important point of principle or practice or where there is some other compelling reason for the courts to hear it".

relating to the composition of the jury could also be regarded as an integral part of the trial process.[68]

(3) COSTS

Ordering a convicted defendant to pay prosecution costs

4.45 An order against a defendant, to pay, or contribute to payment of *prosecution* costs is regarded as part of a defendant's sentence. As such it can be appealed by way of an appeal against sentence to the Court of Appeal.[69]

Ordering a publicly funded defendant to contribute to defence costs

4.46 An order against a defendant to pay, or contribute towards defence costs, formerly by a legal aid contribution[70] or currently to pay all or part of the cost of representation funded by the Legal Service Commission,[71] is not part of the sentence. By virtue of sections 28(4) and 29(6) of the 1981 Act,[72] however, such orders may now be challenged in the High Court. Formerly, that was not possible, as such orders are regarded as an integral part of the trial process, so caught by the bar in section 28(2) and 29(3).[73]

The acquitted defendant seeking payment of own costs

4.47 It is to be noted that, a pre-requisite for any challenge to an order for payment towards *defence costs,* reliant on either section 28(4) or 29(6) of the 1981 Act, is that such costs were publicly funded.

4.48 A privately funded defendant would appear to be unable to challenge a refusal by the court to make a defendant's costs order (for the payment of *defence* costs out

[68] See *Re Sampson* [1987] 1 WLR 194.

[69] See *Hayden* (1974) 60 Cr App R 304: such an order is a "sentence" within the definition of sentence in s 50 of the Criminal Appeal Act 1968. The power to order payment of prosecution costs under s 18 of the Prosecution of Offences Act 1985, arises on conviction for an offence, or dismissal of an appeal against conviction or sentence. As such the need for a conviction, in order to be able to challenge a prosecution costs order does not present a problem.

[70] See *Hayden* (1974) 60 Cr App R 304 in which Lord Bridge, CJ explained at p 306:

> First of all, the power to order a contribution to be made by an accused person towards his own legal aid costs is not an order which is contingent on conviction. It is a power enjoyed by the Court whether the accused is convicted or acquitted, and consequently it does not seem to us to come within the definition of sentence, as I have endeavoured to explain it, in section 50 of the Act of 1968.

[71] See s 50(3) of the Criminal Appeal Act 1968, as amended:

> An order under section 17 of the Access to Justice Act 1999 is not a sentence for the purposes of this Act.

[72] See s 24 of the Access to Justice Act 1999, and sch 4, para 22, which added these provisions to the 1981 Act.

[73] See in *Re Sampson* [1987] 1 WLR 194 "a legal aid contribution order, like any other order with regard to costs which the Crown Court may make at the conclusion of a trial on indictment, is an integral part of the trial process," *per* Lord Bridge at p 199.

PART 5
THE HIGH COURT'S JUDICIAL REVIEW JURISDICTION OVER DECISIONS IN THE CROWN COURT – SIMPLIFICATION AND MODIFICATION

INTRODUCTION

5.1 We have seen that there are problems associated with the judicial review jurisdiction that is to be transferred to the CACD. There are problems with its description and with its substance. In addition, as a consequence of the transfer of this jurisdiction to the CACD, the inherent jurisdiction will be lost, because the CACD is a creature of statute.[1]

5.2 It would be wrong to transfer this jurisdiction without trying to resolve these problems. Before addressing them, we outline briefly the principles of judicial review in issue, the policy for restricting High Court powers of review of decisions in the Crown Court, and two options for restricting the timing of claims for review under the transferred jurisdiction.

THE HIGH COURT'S JUDICIAL REVIEW JURISDICTION OVER CROWN COURT DECISIONS

5.3 The principles of judicial review lie in a well-established body of case law as a procedure for obtaining one or more of the established legal remedies.[2] This project is concerned with the means of identifying those decisions of the Crown Court which are subject to such review by the High Court, for the purpose of issuing a quashing order, a prohibiting order, or a mandatory order, and transferring that jurisdiction to the CACD. The CACD will be required to exercise the jurisdiction formerly exercised by the High Court in respect of such decisions. It is not intended to alter the principles for judicial review in any way.

The judicial review principles

5.4 The High Court will grant relief on a claim for judicial review, in its discretion under section 29(3) where;[3]

(1) the Crown Court has exceeded its jurisdiction;

[1] See para 4.36, above.

[2] Any of the prerogative orders, namely the quashing order, the prohibiting order, the mandatory order and habeas corpus; an injunction and a declaration. Only the first three of these are available under section 29 of the 1981 Act.

[3] Archbold, *Criminal Pleading, Evidence and Practice* (2005) at p 981. "Where human rights are engaged, however, a stricter test than Wednesbury unreasonableness will be applied. The High Court will not simply substitute its own view, but it will subject the decision under review to a degree of scrutiny appropriate to the interest to be protected. In particular, it will need to be satisfied as to the proportionality of the decision." *Ibid*

(2) the Crown Court has acted in breach of the rules of natural justice;

(3) there is an error of law on the face of the record;[4] or

(4) the decision of the Crown Court is *Wednesbury*[5] unreasonable or, where a Convention right is engaged, "applying an objective test whether the decision-maker could reasonably have concluded that the interference was necessary to achieve one or more of the legitimate aims recognised by the convention".[6]

The three remedies available under section 29(3) are mandatory, prohibiting and quashing orders.

5.5 The underlying policy of section 29(3) is sound.[7] It provides an important limitation, without which there would be a serious risk of undue delay arising in the course of criminal trials. Such delay could lead to violation of article 6 of the ECHR.[8]

5.6 The judicial criticism of section 29(3) is that "the wording and issue 'matter relating to trial on indictment' are unhelpful and sterile".

5.7 Only in a limited category of case, will the CACD need power to review decisions of the Crown Court prior to completion of the trial. Where the issue concerned is collateral to the trial of the defendant and its review will not cause substantial delay to proceedings, interlocutory review may be appropriate. Any decisions, which fall within the pointers given by the House of Lords, need to be excluded from that review jurisdiction.

Options for controlling the availability of this head of jurisdiction transferred to the CACD

5.8 When considering how the timing of a challenge to a Crown Court decision should be limited, the approach taken could be of a flexible type or one that is more restrictive.

A flexible approach

5.9 An example of the flexible approach would be a clause such as:

[4] For the purposes of making a quashing order for error on the face of the record, the "record" is not restricted to the formal order but extends to the reasons given by the judge in his oral judgment and set out in the official transcript thereof. See *R v Crown Court at Knightsbridge, ex p International Sporting Club (London) Ltd* [1982] QB 304.

[5] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

[6] *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, considered in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

[7] Exempting from that jurisdiction decisions which are integral to the trial on indictment,

[8] "In the determination of … any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time …"

> Save in exceptional circumstances, no claims shall be made to the CACD to challenge any decision in a criminal matter until after the conclusion of the trial, in the absence of express statutory provision permitting such a claim.

5.10 Such a clause would confer discretion on the judge considering the application permission to decide whether, in any particular case, exceptional circumstances exist.

A restrictive approach

5.11 Alternatively, a rigid form of restriction could be achieved by use of the following type of clause:

> Except where statute provides otherwise, no claim shall be made to the CACD to challenge any decision in a criminal matter until after the conclusion of the trial.

5.12 A provision of this kind could, for example, prevent an early challenge to a trial judge's refusal to stay proceedings. It could however allow early applications to challenge a refusal of bail, provided there was a relevant express statutory provision. Its rigidity would mean that only those eventualities already anticipated, and provided for by statute, could benefit from early consideration by the court. That rigidity could however be made subject to the Discussion Issue 2(3) option.[9]

SIMPLIFICATION AND MODIFICATION OF THE HIGH COURT'S JUDICIAL REVIEW JURISDICTION FOR THE PURPOSE OF TRANSFER

5.13 Uncertainty about the way in which section 29(3) works has led to much court time being taken up with arguments about venue and jurisdiction. Greater certainty has been achieved in respect of certain types of decision in the following ways.

Current statutory solutions to problems with section 29(3)

Express statutory provision – stating whether or not the section 29(3) bar operates in respect of particular types of decision

5.14 The extent to which the section 29(3) bar operates, has been limited by sections 28(4) and 29(6) of the 1981 Act. Section 28(4) provides that: "the reference to a decision of the Crown Court relating to trial on indictment does not include a decision relating to an order under section 17 of the Access to Justice Act 1999". A similar provision in section 29(3), provides that "the reference to the Crown Court's jurisdiction in matters relating to trial on indictment does not include its jurisdiction relating to orders under section 17 of the Access to Justice Act 1999."

5.15 Section 22(13) of the Prosecution of Offences Act 1985 is similar in its effect. It provides that, for the purpose of section 29(3) of the 1981 Act, the jurisdiction

[9] See Part 4 for this discussion issue.

conferred on the Crown Court by section 22 of the 1985 Act shall be taken to be part of its jurisdiction in matters other than those relating to trial on indictment.[10]

5.16 Express statutory provision has also ensured that prerogative orders are available as a remedy in respect of challenges in the High Court, to bail decisions made in the magistrates' courts and in the Crown Court.[11] Section 17(6)(b) of the Criminal Justice Act 2003[12] makes express provision to that effect, while other provisions within section 17 have abolished various inherent powers and statutory powers of the High Court to entertain an application in relation to bail.

5.17 Thus, one way of avoiding uncertainty would be to specify, within the power conferring provision, particular decisions which fall within its powers by stating that they are deemed to lie outside of any bar on jurisdiction, and *vice versa*.

5.18 Another way of achieving the same result, would be to address the issue of remedies in the context of amending particular statutes, in order to meet a given need. Particular statutes could be amended to provide expressly that they either fall inside, or outside of the jurisdiction conferred.

Provision of a right of appeal

5.19 Another option is that found in the sections 4 and 11 of the Contempt of Court Act 1981. These provide for a right of appeal against particular orders (the postponement of reporting, under section 4, and the prohibition of publication of a name, under section 11).

Conclusion

5.20 The Auld Review recommends that there should be a single form of appeal and procedure combining the best of both jurisdictions. As such the approach taken in the Contempt of Court Act 1981 may, at first sight, be thought preferable. There is however a disadvantage to taking only this approach. If it were to take the place of any general power-conferring provision, there would be a risk that worthy applicants might be left without remedy. Particular rights of appeal, such as those conferred in the Contempt of Court Act 1981 can only be provided for by legislation after the need for such has become apparent.

5.21 In contrast, a power-conferring provision of the more general type, found in section 29(3), would not have that disadvantage. The disadvantage of uncertainty that such a general provision would have may be addressed by statutory clarification. The statute, or an order issued under it, could specify whether or not a particular type of order is liable to review. In our view, the interests of justice could be met either by this approach, or by a combination of these two approaches.

[10] See for eg *R v Maidstone Crown Court, ex parte Hollstein* [1995] 3 All ER 503.

[11] See *R (o/a M) v Isleworth Crown Court,* Crown Office 286/05 and *R (o/a Rozo) v Snaresbrook Crown Court and others* [2005] EWHC 75.

[12] Section 17(6)(b) provides that "Nothing in this section affects – …(b) any right of a person to apply for a writ of habeas corpus or any other prerogative remedy."

Problems with the substance of the jurisdiction

5.22 These problems have been discussed in Part 4. Option 2(3) of the Discussion Issues could provide a solution to the problem that the section 29(3) bar could leave a person without a remedy for a breach of a Convention right. The problems faced by the acquitted defendant unable to challenge a costs order, or the refusal of a costs order, could be dealt with by adding such a defendant to the list of cases that expressly fall within the category of jurisdiction transferred to the CACD. Similarly, were any category of case identified in which a third party would be left without remedy, where justice requires that one should be made available, it too could be added to the list of cases that expressly fall within the category of jurisdiction transferred to the CACD.

Problems associated with the loss of an inherent jurisdiction by reason of the Court of Appeal being a creature of statute

5.23 Part 4, Discussion Issue 2(3), suggests as an option, modification of the bar in section 29(3) for the purposes of transfer, so that it will not operate in breach of article 13.[13] Such modification would address, in part, concerns about a loss of inherent jurisdiction. It would allow the CACD to rely upon an enlarged review jurisdiction, in any case where, without that enlargement, a breach of a Convention right would be left without remedy.

5.24 In a case where, formerly, the High Court might have needed to rely on its inherent jurisdiction, the CACD may have the benefit of the proposed enlarged jurisdiction. The CACD would have enlarged powers to enable it to review a Crown Court decision if otherwise a breach of Convention right would be left without remedy. This option could thus provide the flexibility that would otherwise be lost, due to the loss of an inherent jurisdiction. Having regard to the breadth of the rights protected by articles 5 and 6 of the ECHR we believe that the Discussion Issue 2(3) option will provide an adequate substitute for the inherent jurisdiction that will be lost.

DISCUSSION ISSUE THREE:

Simplification of judicial review jurisdiction

(1) How should the timing of claims for judicial review be limited?

(a) By way of a flexible provision of the type suggested in paragraph 5.9 above? or

(b) By way of the stricter type of provision, suggested in paragraph 5.11 above?

(2) Should examples be included in the power transferring statute to clarify the extent of jurisdiction transferred?[14] If so:

[13] See discussion issue 2(3) at the conclusion to Part 4 of this paper.

[14] A list of the types of case in respect of which the jurisdiction would be available could be included in the statute.

(a) should the list of examples be merely illustrative of the meaning of "matters relating to trial on indictment"; or

(b) should the list of examples provide an exhaustive list?

(3) How else could the relevant High Court judicial review jurisdiction be simplified?

PART 6
HOW SHOULD THE TRANSFER OF HIGH COURT JURISDICTION OVER CROWN COURT DECISIONS BE EFFECTED?

INTRODUCTION

6.1 Primary legislation will be required to transfer the relevant High Court case stated and judicial review jurisdiction to the CACD. It will need to empower the CACD and to dis-empower the High Court. Practical matters relating to locus standi, time limits and requirements for leave to appeal and for permission to make a claim, will also need to be addressed.

JUDICIAL POWERS

Conferring additional powers on the CACD

Case stated

6.2 The CACD will need to be empowered:

(1) To hear and determine questions arising on cases stated by the Crown Court for its opinion;

(2) To reverse, affirm or amend the decision in respect of which the case has been stated and to remit the matter to the Crown Court with the opinion of the CACD.

Judicial review

6.3 Judicial review is not, in a strict sense, a form of appeal. It is concerned with reviewing not the merits of the decision in respect of which the claim is made, but the decision making process itself.[1] In this way it differs from an ordinary appeal. The reviewing court does not substitute its own decision for that of the court under review. It will be necessary to confer power on the CACD to exercise this review jurisdiction, and to issue mandatory, prohibiting and quashing orders.

Abolition of certain High Court jurisdiction

6.4 The High Court jurisdiction to:

(1) give an opinion on a case stated by the Crown Court, and to

(2) issue mandatory, prohibiting and quashing orders in respect of decisions in the Crown Court,

[1] See *Halsbury's Laws of England,* Fourth Edition 2001 Reissue, vol 1(1) para 59.

will need to be abolished by statute. However, the High Court may need to retain a residual judicial review jurisdiction. There may be cases in which the CACD would wish to refer a matter to the civil courts. This may be desirable, for example, where the issues in the case necessitate the hearing of evidence as to rights of ownership of property.

PRACTICAL MATTERS

Locus standi before the CACD

Case stated

6.5 In respect of Crown Court decisions, case stated jurisdiction concerns challenges by any party to proceedings, on the ground that the decision is wrong in law or in excess of jurisdiction. Where a challenge concerns factual difficulties, the High Court has said that it is preferable for an appeal to be made by way of case stated rather than by judicial review.[2]

6.6 Under the transferred jurisdiction, this remedy should continue to be available to "any party to proceedings".

Judicial review

6.7 To obtain permission to make a claim for judicial review in the High Court, the applicant must have "sufficient interest" in the matter to which the claim relates.[3] Fordham describes the judicial approach to "sufficient interest" in this way:[4]

> First, that the general approach of the Court to standing is a liberal one. Secondly, that financial interest may be sufficient but will seldom if ever be necessary. Thirdly, that public interest considerations favour the testing of the legality of executive action. Fourthly, that it would be against the public interest if there were a "vacuum" (or lacuna) of unchecked illegality for want of a challenger with standing. Fifthly, that the Courts seek to strike a balance, distinguishing broadly between busybodies and those with a legitimate grievance or interest. Sixthly, that one factor which may in some situations count against a claimant is where there is obviously a better placed challenger who is not complaining.

6.8 The concept of "sufficient interest" is thus broader than the current rules in the CACD regarding parties to proceedings before that court. It may, in criminal cases, extend to a third party surety for a defendant,[5] a third party owner against

[2] *R v Crown Court at Ipswich, ex parte Baldwin* [1981] 1 All ER 596.

[3] Section 31(3) of Supreme Court Act 1981 states:

> No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

[4] M Fordham, *Judicial Review Handbook* (3rd ed 2001), at p 607.

[5] *Re Smalley* [1985] AC 622.

whom a forfeiture order is made,[6] and an acquitted defendant against whom a binding over order is made.[7]

6.9 The transfer of jurisdiction should not deprive any of those who, at present, have *locus standi* before the High Court, of a comparable right. We suggest that under a transferred jurisdiction, those with "sufficient interest" in the matter to which the claim relates, should be eligible to seek permission from a single judge of the CACD to pursue the claim in that court.

Time limits

6.10 Different time limits apply in respect of challenges to decisions in the Crown Court, depending on the nature of that challenge and the Court that will consider it:

(1) An application to the Crown Court for the judge to state a case for the opinion of the High Court must be made in writing, **within 21 days** after the decision in issue.[8]

(2) Notice of appeal, or of application for leave to appeal to the CACD must be given **within 28 days** from the date of conviction, verdict, sentence or finding appealed against.[9]

(3) Judicial review claims must to be made promptly. CPR54.5 provides that the claim form must be filed (a) promptly; and (b) in any event **not later than 3 months** after the grounds to make the claim first arose. This rule does not apply where any enactment specifies a shorter time limit.[10]

(4) *Statutory review provisions*

> A prominent feature of many modern statutes is a provision which allows judicial review to be sought only within a short period of time, usually six weeks, and which thereafter bars it completely.

[6] *R v Maidstone Crown Court, ex parte Gill* (1987) 84 Cr App R 96.

[7] *R v Inner London Crown Court, ex parte Benjamin* (1987) 85 Cr App R 267.

[8] Crown Court Rules 1982, rule 26 (1). After making an application the applicant must forthwith send a copy of the application to the parties to the proceedings. (rule 26(3)).

[9] See s18(2) and (3) of the Criminal Appeal Act 1968:

> (2) Notice of appeal, or of application for leave to appeal, shall be given within twenty-eight days from the date of the conviction, verdict or finding appealed against, or in the case of appeal against sentence, from the date on which sentence was passed or, in the case of an order made or treated as made on conviction, from the date of the making of the order.
>
> (3) The time for giving notice under this section may be extended, either before or after it expires, by the Court of Appeal.

[10] See HWR Wade and CF Forsyth, *Administrative Law,* (9th ed 2004) at p 727.

6.11 The transferred judicial review powers of the CACD will be conferred by statute. As such, a comparison may be made with statutory review, where statutes provide that claims for judicial review, must be made within a specified shorter period of time than that allowed under CPR 54.5. Usually, the shorter period specified is one of six weeks and the statutes primarily, but not exclusively, relate to compulsory acquisition and use of land.[11] There has been some criticism of statutory time limits as being too short.[12] However, when considering the particular purpose of the intended transferred judicial review jurisdiction of the CACD, those arguments can be distinguished. One would not expect such challenges to a judicial decision to give rise to any need for investigation by the citizen. Further, legal advice on the issue should be available as an integral part of the proceedings. In those circumstances we would suggest that the time limits for applications and claims to the CACD might be harmonised at 28 days.

Leave to appeal / permission to claim

Introduction

6.12 Almost all appeals before the CACD require either leave of the court (which a single judge is empowered to give) or a certificate from the trial judge that the case is fit for appeal.[13] The prime facie test to be applied is "whether the court feels the need to hear the prosecution on the merits".[14]

6.13 As observed in Parts 1, 3 and 4, the Auld Review recommends[15] the narrowing of the test for granting leave to appeal in cases where the Crown Court is exercising an appellate jurisdiction. Permission in such cases should only be given in "a case involving an important point of principle or practice or where there is some other compelling reason for the Court to hear it." No such change has been recommended in relation to challenges to decisions of the Crown Court as a court of first instance.[16]

Case stated

6.14 There is no requirement for leave in respect of an application under section 28 of the 1981 Act, for the Crown Court to state a case for the opinion of the High Court. A Crown Court judge may, however, if of the view that the application is

[11] *Ibid.*

[12] For example, in *Smith v East Elloe Rural District Council* [1956] AC 736, Lord Radcliffe described the six week time limit in connection with a compulsory purchase order alleged to have been issued in bad faith, as "pitifully inadequate" (at 769). In 1971, in Law Com Working Paper No 40 (1971), para 123, the Law Commission proposed that there should be a general time limit of one year for actions seeking judicial review of administrative acts. The final report on remedies in 1976 abandoned that proposal. Law Com No 73, Cmnd. 6407 (1976) para 7.

[13] Appeal in cases of contempt under section 18A of the Criminal Appeal Act 1968 provide an exception. Such appeals may be brought as of right, by way of notice, given in accordance with rules of court.

[14] Archbold, *Criminal Pleading, Evidence and Practice,* para 7.235.

[15] See Recommendation 306; Appendix A.

[16] See Recommendation 307; Appendix A.

frivolous, refuse to state a case.[17] Frivolous means "futile, misconceived, hopeless or academic".[18]

6.15 Thus, in order to pursue such a case, the party bringing the appeal will need to satisfy the trial judge that he or she should state a case.[19] Should the trial judge refuse to state a case, the applicant may seek to claim judicial review of that refusal. The judicial review claim could only be made with permission from the High Court (or on transfer, from the Court of Appeal).

6.16 Under a transferred jurisdiction, apart from the change required by the Auld Review recommendation 306,[20] there may be no need to introduce any requirement of leave, given the role played by the trial judge, in deciding whether or not to state a case.

Judicial Review

6.17 A claim for judicial review can only be made with permission[21] of the court. The test for whether permission should be given is, 'whether an arguable case has been shown'.

INTER PARTES APPLICATIONS FOR PERMISSION

6.18 Prior to changes brought about by CPR 54, an application for leave to claim judicial review was made *ex parte*. Now, the claim form must be served on "the defendant and … unless the court otherwise directs, any person the claimant considers to be an interested party."[22] This change is designed:

> to ensure in the interests of efficiency that permission is not granted in inappropriate cases. The test for whether permission should be granted remains whether an arguable case has been shown [23]

6.19 This may be contrasted with the usual case in the CACD. There, a single judge will first consider the application for leave to appeal on the papers, which include the defendant's Grounds of Appeal and any relevant transcripts. As noted above,

[17] Crown Court Rules 1982, rule 26(6).

[18] *R v Mildenhall Magistrates' Court, ex p Forest Heath DC,* (1997) 161 JP 401 (CA Civ Div).

[19] In addition to the power of the trial judge to refuse to state a case where the application is regarded as futile there is a further power vested in the Crown Court to control the bringing of such appeals. Under rule 26(12) if a judge decides to state a case, the Crown Court may order the applicant, before the case stated is delivered to him, to enter before an officer of the Crown Court into a recognizance, conditioned to prosecute the appeal without delay.

[20] Where it is sought to challenge a decision of the Crown Court in its appellate capacity, "all such appeals should be subject to the permission of the Court of Appeal, which it should only give in a case involving an important point of principle or practice or where there is some other compelling reason for the Court to hear it."

[21] The change in nomenclature, substituting the word "permission" for leave was implemented through Part 54 of the Civil Procedure Rules, which replaces RSC Order 53.

[22] CPR 54(7).

[23] HWR Wade and CF Forsyth, *Administrative Law,* (9th ed 2004) at p 656.

> [T]he prime facie test to be applied in deciding whether to grant leave to appeal is whether the court feels the need to hear the prosecution on the merits … There are cases where the court finds it convenient to invite the prosecution to attend even though it is not clear whether their assistance will be required.[24]

6.20 Having regard to the different nature of judicial review claims and the reasons put forward for the change, it may be best for there to be this difference in procedure under the transferred jurisdiction. Applications for permission to claim judicial review could be dealt with as *inter partes* proceedings, while applications for leave to appeal would continue to be dealt with in the present way.

RENEWED APPLICATIONS

6.21 Prior to Lord Woolf's civil justice reforms,[25] implemented after the Bowman report into the Crown Office,[26] the system in the Divisional Court for dealing with applications for leave was broadly comparable to that in the CACD. Applications for leave were generally considered, on the papers, by a single High Court judge.[27] After refusal, an application could be renewed before a Divisional Court for an oral application.[28]

6.22 The rules governing challenge to a refusal of permission to apply for judicial review have been changed by Part 54 of the Civil Procedure Rules (CPR) which makes no provision for *renewed* applications.[29] The claimant may however, request *reconsideration* of the decision at an oral hearing.[30] Any further challenge

[24] *Archbold, Criminal Pleading, Evidence and Practice* (2005) para 7-235.

[25] *Access to Justice: The Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (1997).

[26] *Review of the Crown Office List* (LCD, 2000).

[27] Section 31(3) of the Supreme Court Act 1981 states:

> No application for judicial review shall be made unless the [permission] of the High Court has been obtained in accordance with rules of court.

Where a claim is transferred to the administrative court, CPR 54.4 states: The court's permission to proceed is required in a claim for judicial review … transferred to the Administrative Court.

[28] RSC Order 53 r.3(4)(a) stated:

> "Where the application for permission is refused by the judge … the claimant may renew it by applying-
>
> (a) in any criminal cause or matter, to a Divisional Court of the Queen's Bench Division.

This was treated as allowing a right of renewal even following an oral hearing: see *R v Secretary of State for the Home Department, ex parte Kingdom of Belgium* 15th February 2000 unrep. In the CACD, after refusal of leave to appeal by a single judge (who will have considered the application on the papers) the application can be renewed at an oral hearing before the Full Court.

[29] See Richard Fisher, "Permission for Judicial Review in Criminal Cases" [2001] JR 74.

[30] CPR 54.12(3).

could only be by way of an appeal.[31] It appears that no such appeal will lie in criminal cases. This is because of section 18(1)(a) of the 1981 Act, which excludes any right of appeal to the Court of Appeal from any judgment of the High Court in any criminal cause or matter other than contempt.

6.23 Whether this consequence was intentional is not known. There is criticism of the requirement for permission, as changed by CPR 54, in Wade and Forsyth's *Administrative Law*.[32] They refer to the justification for this being "that it enables many unmeritorious cases to be disposed of summarily if an arguable case cannot be shown".[33] The authors comment:

> It [the leave requirement] is notably absent from the statutory judicial review procedures which impose six-week time limits, and from corresponding procedures in other jurisdictions.[34]

They conclude:

> It would be open to grave objection if the applicant did not enjoy the right of appeal against a refusal of leave.

6.24 The authors note that in the Administration of Justice Bill 1985, clause 43, the government proposed to abolish this right of appeal, but after much protest the clause was dropped.

6.25 We believe that, under any transferred jurisdiction to the CACD, an applicant who seeks permission to claim judicial review should, as is the case with those who apply for leave to appeal in the CACD, be able to renew their application. Whether or not renewal should be dealt with as a reconsideration of the case, at an oral hearing, before a single judge (as the rules currently permit in the Administrative Court); or as a renewed application for permission before the Full Court, may need to depend on the nature of the case. The current practice in the Administrative Court is for the single judge, on refusing permission, to indicate whether the case is suited for reconsideration by a single judge or the Divisional Court.

Transfer power

6.26 As considered in paragraph 6.4 above, it may be desirable for the CACD to be empowered to transfer a case from the CACD to one of the civil courts where it is of the view that the issues in the case make this appropriate.

[31] Under CPR 52.15

[32] HWR Wade and CF Forsyth, *Administrative Law,* (9th ed 2004) at p 657.

[33] *Ibid.*

[34] *Ibid.* In Scotland, there is no requirement for leave: see [1987] PL at 315. Nor is the requirement found in the judicial review procedures of New Zealand, Canada or Australia. The Administrative Review Council has concluded in Australia that the requirement is wrong for "sound reasons of both principle and pragmatism". Report No 26, 1986, para 66.

DISCUSSION ISSUE FOUR

6.27 Transfer of case stated and judicial review jurisdiction to the CACD:

(1) Should the CACD be given a residual power to transfer a matter to the civil courts where it is of the view that the issues in the case make such courts the most appropriate forum?[35]

(2) Should an applicant who wishes to claim judicial review in the CACD have "sufficient interest in the case"?[36]

(3) Should the time limits for applications and claims before the CACD be harmonised, specifying the time limit at 28 days? [37]

(4) Is there any need to introduce a requirement of leave to appeal in respect of appeals by case stated under the transferred jurisdiction, other than to the extent required by the Auld Review in respect of the appellate jurisdiction of the Crown Court?[38]

(5) Should applications for permission to claim judicial review be dealt with differently from applications for leave to appeal? Should the former proceed in all cases on an *inter partes* basis?[39]

(6) Should applications for permission to claim judicial review be renewable:

(a) at an oral hearing before the full court of the CACD in the event of refusal by a single judge? or

(b) at an oral hearing *either* before a single judge, or before the full court, depending upon the complexity of the case and the interests of justice? [40]

(7) The transfer of jurisdiction from the High Court to the CACD may reduce the caseload of the Crown Office and increase that of the Criminal Appeal Office.

(a) Would such an increase in the workload of the Criminal Appeal Office and of the judiciary of the CACD be manageable?

[35] See paras 6.4 and 6.25 above.

[36] See para 6.9 above. The meaning of "sufficient interest" would be a matter for the court / single judge considering applications for permission.

[37] Whether the application relates to leave appeal against conviction or sentence under the current procedures or, under the transferred jurisdiction, to an appeal by way of cases stated or a claim for judicial review. (See para 6.10–6.11, above)

[38] See paras 6.12–6.16, above.

[39] See paras 6.17–6.20, above

[40] See paras 6.21–6.25, above.

(b) What impact would this have on the working of the Crown Office and Divisional Court?

(8) Are there any additional concerns about the transfer of jurisdiction?

CONCLUSION

6.28 A draft Bill will be required which has the following seven aims:

(1) The current principles of judicial review should remain unchanged by the Bill;

(2) The extent of judicial review jurisdiction over decisions in the Crown Court should be (a) simplified and (b) expressed clearly in the Bill.

(3) The extent of judicial review jurisdiction over decisions in the Crown Court should be modified to ensure compliance with Convention rights under the HRA and article 13 of the ECHR.

(4) Jurisdiction to review decisions of the Crown Court, formerly vested in the High Court, should be abolished.

(5) Jurisdiction to give an opinion on a case stated by the Crown Court, formerly vested in the High Court, should be abolished.

(6) Jurisdiction to review decisions of the Crown Court, according to sub-paragraphs (2) and (3) above, should be vested in the CACD.

(7) Jurisdiction to give an opinion on a case stated by the Crown Court, after completion of the trial, should be vested in the CACD.

PART 7
IMPLICATIONS OF PROPOSED TRANSFER OF THE HIGH COURT'S JURISDICTION UPON THE MAGISTRATES' COURTS AND COURTS MARTIAL

INTRODUCTION

7.1 As seen in Part 2, historically the High Court has been, and remains vested with jurisdiction to review decisions of inferior courts. Both the magistrates' courts and courts-martial are inferior courts and subject to that authority. In this Part we will briefly outline the jurisdiction of the High Court over these courts. We will then consider any implications that our proposals for transfer may have upon that jurisdiction.

HIGH COURT JURISDICTION OVER THE MAGISTRATES' COURTS AND OVER COURTS-MARTIAL

Magistrates' Courts

7.2 The magistrates' court is a court of inferior jurisdiction.[1] "One of the distinctive features of inferior courts is that they are amenable to the supervisory jurisdiction of the High Court exercised by prerogative order."[2] As such, a decision of the magistrates' court may be challenged by way of an application to the High Court for judicial review. The High Court will consider whether the magistrates' court has failed to exercise its jurisdiction properly or whether it has come to some error of law which appears on the face of the record and may issue one or more of the established remedies.[3]

7.3 Any person who was a party to proceedings, or any person who is aggrieved by the conviction, order, determination or other proceeding of the court, can appeal by way of case stated to the High Court from the magistrates' courts. An appeal can be made on the grounds that the decision of the magistrates' court was wrong in law or in excess of jurisdiction.[4]

[1] The superior courts are *inter alia* the House of Lords, Court of Appeal, High Court, Crown Court and the Judicial Committee of the Privy Council.

[2] See generally para's 2.1–2.6 of this paper and R Walker and R Ward, *Walker and Walker's English Legal System* (7th ed 1994) p 141.

[3] A mandatory, prohibiting or quashing order.

[4] See section 111(1) of the Magistrates' Court Act 1980 states:

> Any person who was a party to any proceeding before a magistrates' court or is aggrieved by the conviction, order, determination or other proceeding of the court may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the justices composing the court to state a case for the opinion of the High Court on the question of law or jurisdiction involved; but a person shall not make an application under this section in

7.4 In general, case stated is preferable to judicial review as a means of examining justices' decisions. This is particularly so where the case is one of factual difficulties as the case stated sets out the facts found by the justices.[5] Judicial review is reserved for cases where legislation has provided no alternative remedy.[6]

Courts-Martial

7.5 Section 29(1A) of the Supreme Court Act 1981 provides that the High Court shall have jurisdiction to make mandatory, prohibiting and quashing orders in those classes of case in which, immediately before 1st May 2004, it had jurisdiction to make orders of mandamus, prohibition and certiorari respectively. This class of cases includes courts-martial decisions, as they are courts of inferior jurisdiction. The general principles relating to the grounds for judicial review and available remedies have been described in Part 5.[7]

Limits to the availability of judicial review

7.6 Section 29(3A) of the 1981 Act (introduced by section 23(1)(3) of the Armed Forces Act 2001)[8] provides that the High Court shall have no jurisdiction to make mandatory, prohibiting or quashing orders in relation to the jurisdiction of a court-martial in matters relating to –

a) Trial by court-martial for an offence, [9]

b) Appeals from a Standing Civilian Court.[10]

respect of a decision against which he has a right of appeal to the High Court or which by virtue of any enactment passed after 31st December 1879 is final.

Under section 108 of this Act, an appeal lies against sentence and conviction to the Crown Court. Appeals against conviction are by way of re-hearing.

In 2000 there were 95 appeals by way of case stated from the magistrates' courts to the High Court. Judicial Statistic Annual Report 2000.

In 2001 there were 112 appeals by way of case stated from the magistrates' courts to the High Court. Judicial Statistic Annual Report 2001.

In 2002 there were 109 appeals by way of case stated from the magistrates' courts to the High Court. Judicial Statistic Annual Report 2002.

In 2003 there were 96 appeals by way of case stated from the magistrates' courts to the High Court. Judicial Statistic Annual Report 2003.

5 *R v Crown Court at Ipswich, ex parte Baldwin* [1981] 1 All ER 596.

6 *R v Ealing Justices, ex parte Scrafield* [1994] RTR 195.

7 See para 5.4.

8 SI 2002/345, brought this into force on 28 February, 2002.

9 In this subsection "court-martial" means a court-martial under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.

10 The Armed Forces Act 1976, ss 6-8, sch 3, makes provision for the establishment of standing civilian courts for the trial outside the UK of certain categories of civilians. (Halsbury's Statutes, Fourth edition, volume 3, p 12).

7.7 This provision refers to matters relating to trial for an offence, rather than trial on indictment. This difference in language appears to reflect the difference in that used in criminal proceedings in courts-martial.[11]

7.8 The MOD has told us that the Services regard section 29(3A) as effective. Prior to its enactment,[12] "counsel would often seek judicial review of decisions of a judge-advocate during the court-martial, causing delay. Now all such matters just go on appeal post–trial (if they have merit)".[13]

IMPLICATIONS OF PROPOSED TRANSFER

Implications of proposed transfer for High Court jurisdiction over Magistrates' Courts

7.9 In view of the Government's rejection of recommendation 305 of the Auld Review,[14] we expect the High Court's jurisdiction over the magistrates' courts to continue. Judges in the High Court will exercise judicial review power and give opinions on cases stated by magistrates' courts. Judges in the CACD will exercise comparable powers in respect of challenges to Crown Court decisions.

7.10 Lord Auld's view that "there should be one avenue and form of appeal for each court"[15] will not become law. In contrast, the implementation of recommendation 306, with the transfer of High Court jurisdiction over appellate decisions in the Crown Court to the CACD, will increase the role of the CACD. Notably, the CACD will acquire jurisdiction over cases that began in the magistrates' court, where an issue, giving rise to a claim for judicial review, or a case stated opinion, has arisen on appeal to the Crown Court.[16]

7.11 The exercise of judicial review powers and the power to give an opinion on a case stated will be split between the High Court and the CACD, depending upon the level of court in which the decision to be challenged was given. Formerly, all such criminal jurisdiction was exercised in the High Court.

DISCUSSION ISSUE FIVE

7.12 Implications of the proposed transfer, upon the High Court jurisdiction over magistrates' courts.

[11] See for example section 99A of the Army Act 1955.

[12] Prior to 2002 there was no restriction on the High Court's powers of judicial review over decisions in the court-martial (an inferior court).

[13] Letter dated 22 April 2005 from MOD Legislation Team to Law Commission, Criminal Law Team.

[14] "There should be no right of appeal from the Magistrates' Division (magistrates' courts) to the High Court by way of an appeal by way of case stated or by a claim for judicial review".

[15] Chapter 12, para 29.

[16] Albeit, subject to limits upon the grant of permission, to cases involving an important point of principle or practice or where there is some other compelling reason for the Court to hear it.

(1) What problems, if any, may result from the proposed arrangements which will involve a concurrent exercise of comparable jurisdictions by these two courts?

DISCUSSION ISSUE SIX

7.13 Implications of proposed transfer for the High Court's criminal jurisdiction over courts-martial.

(1) Would the removal of High Court jurisdiction over all challenges to decisions in the Crown Court have any impact on the existing limited High Court jurisdiction over courts-martial?

(2) Is the current description of the review jurisdiction of the High Court in relation to the jurisdiction of a courts-martial sufficiently clear?[17]

(3) Does the MOD have any special considerations to raise?

[17] *Viz.* The High Court shall have no jurisdiction to make mandatory, prohibiting or quashing orders in relation to the jurisdiction of a court-martial in matters relating to –

a) trial by court-martial for an offence; or

b) appeals from a Standing Civilian Court.

PART 8
DISCUSSION ISSUES

8.1 The Criminal Law Commissioner and his team would welcome your views on the following discussion issues:

CASE STATED JURISIDICTION OVER CROWN COURT DECISIONS

DISCUSSION ISSUE ONE:

Modification of jurisdiction

(1) The case stated appeal process cannot be used at an interlocutory stage. Should this be preserved by express statutory provision?

(2) Permission to appeal:

(a) Where the Crown Court exercises its appellate jurisdiction, do policy reasons[1] warrant the different criteria recommended in the Auld review for the grant of permission to appeal by way of case stated?[2]

(b) Should the transferred jurisdiction be modified further to address this anomaly? How might that be achieved?

(3) Should there be any other modification to the case stated jurisdiction in the Crown Court?

JUDICIAL REVIEW JURISDICTION OVER CROWN COURT DECISIONS

DISCUSSION ISSUE TWO:

8.2 Clarification and modification of jurisdiction

(1) How can the relevant jurisdiction of the Crown Court, which is currently subject to review by the High Court, be described with greater clarity?[3]

(2) Is the scope of the current jurisdiction too wide or too narrow?

(3) Should the limit on judicial review jurisdiction be modified so that it will not operate in breach of article 13 ECHR?

[1] To generally limit appeals in cases decided in the magistrates' courts to a single tier of appeal.

[2] The Auld Review recommends a more restrictive test for permission to appeal where the decision in issue was a decision of the Crown Court in the exercise of its appellate jurisdiction. In such cases permission should only be granted "in a case involving an important point of principle or practice or where there is some other compelling reason for the court to hear it".

[3] Of particular concern is the bar on judicial review in s 29(3).

(4) Are there particular types of decision which should be subject to judicial review? For example:

(a) a refusal to award costs out of Central Funds in favour of an *acquitted* defendant and/or an order that such a defendant pay costs incurred by the prosecution;

(b) any particular decisions affecting a third party.

(5) Permission to claim judicial review:

(a) Where the Crown Court exercises its appellate jurisdiction, do policy reasons[4] warrant the different criteria recommended in the Auld review for the grant of permission to claim judicial review?[5]

(b) Should the transferred jurisdiction be modified further to address this anomaly? How might that be achieved?

(6) Are there any other modifications to the judicial review jurisdiction which are favoured?

TRANSFER OF CASE STATED AND JUDICIAL REVIEW JURISDICTION

8.3 It is proposed to transfer both case stated and judicial review jurisdiction to the CACD.[6]

Discussion issue three:

(1) How should the timing of claims for judicial review be limited?

(a) By way of a flexible provision of the type suggested in paragraph 5.9? or;

(b) By way of the stricter type of provision, suggested in paragraph 5.11?

(2) Should examples be included in the power transferring statute to clarify the extent of jurisdiction transferred?[7] If so:

[4] To generally limit appeals in cases decided in the magistrates' courts to a single tier of appeal.

[5] The Auld Review recommends a more restrictive test for permission to claim judicial review, where the decision in issue was a decision of the Crown Court in the exercise of its appellate jurisdiction. In such cases permission should only be granted "in a case involving an important point of principle or practice or where there is some other compelling reason for the court to hear it".

[6] The Court of Appeal (Criminal Division) will be herein after referred to as the CACD.

[7] A list of the types of case in respect of which the jurisdiction would be available could be included in the statute.

(a) should the list of examples be merely illustrative of the meaning of "matters relating to trial on indictment"; or

(b) should the list of examples provide an exhaustive list?

(3) How else could the relevant High Court judicial review jurisdiction be simplified?

DISCUSSION ISSUE FOUR

8.4 Further matters concerning the transfer of case states and judicial review jurisdiction to the CACD.

(1) Should the CACD be given a residual power to transfer a matter to the civil courts where it is of the view that the issues in the case make the such courts the most appropriate forum?[8]

(2) Should an applicant who wishes to claim judicial review in the CACD have "sufficient interest in the case"?[9]

(3) Should the time limits for applications and claims before the CACD be harmonised, specifying the time limit at 28 days? [10]

(4) Is there any need to introduce a requirement of leave to appeal in respect of appeals by case stated under the transferred jurisdiction, other than to the extent required by the Auld Review in respect of the appellate jurisdiction of the Crown Court?[11]

(5) Should applications for permission to claim judicial review be dealt with differently from applications for leave to appeal, the former proceeding in all cases on an *inter partes* basis?[12]

(6) Should applications for permission to claim judicial review be renewable:

(a) at an oral hearing before the full court of the CACD in the event of refusal by a single judge? or

(b) at an oral hearing either before a single judge, or before the full court, depending upon the complexity of the case and the interests of justice?[13]

[8] See paras 6.4 and 6.25 above.

[9] See para 6.9 above. The meaning of "sufficient interest" would be a matter for the court / single judge considering applications for permission.

[10] Whether the application relates to leave appeal against conviction or sentence under the current procedures, or, under the transferred jurisdiction, to an appeal by way of cases stated or a claim for judicial review. (See para 6.10–6.11, above)

[11] See para's 6.12–6.16, above.

[12] See para's 6.17–6.20, above

(7) The transfer of jurisdiction from the High Court to the CACD may reduce the caseload of the Crown Office and increase that of the Criminal Appeal Office.

(a) Would such an increase in the workload of the Criminal Appeal Office and of the judiciary of the CACD be manageable?

(b) What impact would this have on the working of the Crown Office and Divisional Court?

(8) Are there any additional concerns about the transfer of jurisdiction?

DISCUSSION ISSUE FIVE

8.5 Implications of the proposed transfer, upon the High Court jurisdiction over magistrates' courts.

(1) What problems, if any, may result from the proposed arrangements which will involve a concurrent exercise of comparable jurisdictions by these two courts?

DISCUSSION ISSUE SIX

8.6 Implications of proposed transfer for the High Court's criminal jurisdiction over courts-martial.

(1) Would the removal of High Court jurisdiction over all challenges to decisions in the Crown Court have any impact on the existing limited High Court jurisdiction over courts-martial?

(2) Is the current description of the review jurisdiction of the High Court in relation to the jurisdiction of a courts-martial sufficiently clear?[14]

(3) Does the MOD have any special considerations to raise?

Law Commission
22 July 2005

[13] See paras 6.21 – 6.25, above.

[14] *Viz.* The High Court shall have no jurisdiction to make mandatory, prohibiting or quashing orders in relation to the jurisdiction of a court-martial in matters relating to –

a) trial by court-martial for an offence; or

b) appeals from a Standing Civilian Court.

APPENDIX A
EXTRACTS

The Courts Act 1971, section 10(1);

The Supreme Court Act 1981, sections 28 and 29;

The Access to Justice Act 1999, section 17;

Recommendations 306 and 307 from the Auld Review;

Article 5 of the European Convention for Human Rights;

Article 6 of the European Convention for Human Rights.

THE COURTS ACT 1971:

Section 10

(1) Subsections (2) and (3) below have effect as respects any order, judgment or other decision of the Crown Court –

a) other than a judgment or other decision relating to trial on indictment, and

b) other than any decision under the Betting, Gaming and Lotteries Act 1963, the Licensing Act 1964 and the Gaming Act 1968 which, by any provision of any of those Acts, is to be final.

(2) Any decision as respects which this subsection has effect may be questioned by any party to the proceedings on the ground that it is wrong in law or is in excess of jurisdiction.

(3) The decision shall be questioned by applying to the Crown Court to have a case stated by the Crown Court for the opinion of the High Court.

(4) Section 99(1)(b) of the Judicature Act 1925 (rules about appeals to the High Court) shall apply as if any case stated under this section were an appeal.

(5) In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make orders of mandamus, prohibition or certiorari as the High Court possesses in relation to the jurisdiction of an inferior court.

(6) So much of any enactment, other than the enactments mentioned in subsection (1)(b) above, as provides, in relation to any quarter sessions jurisdiction transferred by this Act to the Crown Court, that the decision of quarter sessions shall be final, or final and conclusive, or that it shall not be questioned by certiorari or in any other manner, shall cease to have effect.

THE SUPREME COURT ACT 1981:

Section 28

(1) Subject to subsection (2), any order, judgment or other decision of the Crown Court may be questioned by any party to the proceedings, on the ground that it is wrong in law or is in excess of jurisdiction, by applying to the Crown Court to have a case stated by that court for the opinion of the High Court.

(2) Subsection (1) shall not apply to-

(a) a judgment or other decision of the Crown Court relating to trial on indictment; or

(b) any decision of that court under the Betting, Gaming and Lotteries Act 1963, the Licensing Act 1964, the Gaming Act 1968 or the Local Government (Miscellaneous Provisions) Act 1982 which, by any provision of any of those Acts, is to be final.

(3) Subject to the provisions of this Act and to rules of court, the High Court shall, in accordance with section 19(2) have jurisdiction to hear and determine-

(a) any application, or any appeal (whether by way of case stated or otherwise), which it has power to hear and determine under or by virtue of this or any other Act; and

(b) all such other appeals as it had jurisdiction to hear and determine immediately before the commencement of this Act.

(4) In subsection 2(a) the reference to a decision of the Crown Court relating to trial on indictment does not include a decision relating to an order under section 17 of the Access to Justice Act 1999.[1]

Section 29:

(1) The orders of mandamus, prohibition and certiorari shall be known instead as mandatory, prohibiting and quashing orders respectively.

(1A) The High Court shall have jurisdiction to make mandatory, prohibiting and quashing orders in those classes of case in which, immediately before 1st May 2004, it had jurisdiction to make orders of mandamus, prohibition and certiorari respectively.

(2) Every such order shall be final, subject to any right of appeal therefrom.

[1] See below.

(3) In relation to the jurisdiction of the Crown Court, other than its jurisdiction in matters relating to trial on indictment, the High Court shall have all such jurisdiction to make mandatory, prohibiting or quashing orders as the High Court possesses in relation to the jurisdiction of an inferior court.

(3A) The High Court shall have no jurisdiction to make mandatory, prohibiting or quashing orders in relation to the jurisdiction of a court-martial in matters relating to-

(a) trial by court-martial for an offence, or

(b) appeals from a Standing Civilian Court:

and in this subsection “court-martial” means a court-martial under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957.

(4) The power of the High Court under any enactment to require justices of the peace or a judge or officer of a county court to do any act relating to the duties of their respective offices, or to require a magistrates’ court to state a case for the opinion of the High Court, in any case where the High Court formerly had by virtue of any enactment jurisdiction to make a rule absolute, or an order, for any of those purposes, shall be exercisable by [mandatory order].

(5) …

(6) in subsection (3) the reference to the Crown Court’s jurisdiction in matters relating to trial on indictment does not include its jurisdiction relating to orders under section 17 of the Access to Justice Act 1999.

THE ACCESS TO JUSTICE ACT 1999:

Section 17:

(1) An individual for whom services are funded by the Commission as part of the Criminal Defence Service shall not be required to make any payment in respect of the services except where subsection (2) applies.

(2) Where representation for an individual in respect of criminal proceedings in any court other than a magistrates' court is funded by the Commission as part of the Criminal Defence Service, the court may, subject to regulations under subsection (3), make an order requiring him to pay some or all of the cost of any representation so funded for him (in proceedings in that or any other court).

(3) Regulations may make provision about-

(a) the descriptions of individuals against whom an order under subsection (2) may be made,

(b) the circumstances in which such an order may be made and the principles to be applied in deciding whether to make such an order and the amount to be paid,

(c) the determination of the cost of representation for the purposes of the making of such an order,

(d) the furnishing of information and evidence to the court or the Commission for the purpose of enabling the court to decide whether to make such an order and (if so) the amount to be paid,

(e) prohibiting individuals who are required to furnish information or evidence from dealing with property until they have furnished the information or evidence or until a decision whether to make an order, or the amount to be paid, has been made,

(f) the person or body to which, and manner in which, payments required by such an order must be made and what that person or body is to do with them, and

(g) the enforcement of such an order (including provision for the imposition of charges in respect of unpaid amounts).]

RECOMMENDATIONS FROM AULD REVIEW

Recommendation 306:

Where it is sought to challenge the decision of the Crown Division (Crown Court) sitting in its appellate capacity:

1. There should be no right of challenge to the High Court by appeal by way of case stated or by claim for judicial review.

2. Instead, appeal should lie to the Court of Appeal under its general appellate jurisdiction enlarged, if and as necessary, to cover matters presently provided by the remedies of appeal by way of case stated or claim of judicial review – and for which the Court should be suitably constituted.

3. And all such appeals should be subject to the permission of the Court of Appeal, which it should only give in a case involving an important point of principle or practice or where there is some other compelling reason for the Court to hear it.

Recommendation 307:

Where it is sought to challenge the decision of the Crown Division (Crown Court) as a court of first instance or of the District Division:

1. There should be no right of challenge to the High Court by appeal by way of case stated or by claim for judicial review.

2. And instead, appeal should lie only to the Court of Appeal under its general appellate jurisdiction enlarged, if and as necessary, to cover matters presently provided by the remedies of appeal by way of case stated or claim of judicial review – and for which the Court should be suitably constituted. [Note, the limitation under recommendation 306, item 3, does not apply in relation to challenges concerning the jurisdiction of the Crown Court in its original capacity.]

ARTICLE 5 OF THE ECHR

Article 5(1) states:

Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed and offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

ARTICLE 6 OF THE ECHR

Article 6 states:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

APPENDIX B - CASES ON JUDICIAL REVIEW OF CROWN COURT DECISIONS

Matters relating to trial on indictment

1.1 The following are matters which have been held to relate to trial on indictment and therefore cannot be judicially reviewed:[2]

(1) a refusal to award costs after an acquittal;[3]

(2) an order discharging a jury;[4]

(3) an order in relation to the taking of steps to vet a jury panel;[5]

(4) an order that an indictment lie on the file marked "not to be proceeded with without leave";[6]

(5) the refusal of a Crown Court judge to grant legal aid;[7]

(6) the decision of a judge to order a defence solicitor, personally, to pay the costs occasioned by the granting of a defence application for an adjournment;[8]

(7) a witness summons issued under section 2(1) of the Criminal Procedure (Attendance of Witnesses) Act 1965;[9]

(8) a refusal to fix a date for trial until a certain event occurred, such as the trial of another matter;[10]

(9) an order to stay a criminal trial on the ground of abuse of process;[11]

(10) a warrant of imprisonment ordering a defendant to serve his sentence consecutively to a term he was then serving, where the judge had not said the sentence was consecutive, is not revisable;[12]

2 Archbold, *Criminal Pleading, Evidence and Practice* (2005) at p 980-981.

3 *Ex parte Meredith*, (1973) 57 Cr App 451; c.f. a refusal to award costs after the Crown offered no evidence, *R v Wood Green Crown Court, ex parte DPP* [1993] 1 WLR 723. See n 30 and n 47 below.

4 *Ex parte Marlowe* [1973] Crim L R 294.

5 *R v Sheffield Crown Court, ex parte Brownlow* [1980] QB 530.

6 *R v Central Criminal Court, ex parte Raymond* (1986) 83 Cr App R 94.

7 *R v Chichester Crown Court, ex parte Abodunrin* (1984) 79 Cr App R 293.

8 *R v Smith* [1975] QB 531. But now see Solicitors Act 1974, s.50(3).

9 *Ex parte Rees, The Times* 7 May 1986.

10 *R v Southwark Crown Court, ex parte Ward* [1996] Crim L R 123.

11 *Re Ashton* [1994] 1 AC 9.

12 *R v Lewes Crown Court, ex parte Sinclair* [1992] Crim L R 886.

(11) a refusal to grant a further extension of time in which to prefer a bill of indictment;[13]

(12) the arraignment of the defendant, and the conduct of a plea and directions hearing generally;[14]

(13) an order that social services files on prosecution witnesses be seen by all legal representatives to assist the court, in the absence of an *amicus curiae*, by allowing them to reach agreement on which documents should be disclosed;[15]

(14) a refusal to allow a private individual to conduct a private prosecution in person;[16]

(15) a decision as to whether there had been a proper extradition procedure in relation to an indictment and therefore whether the trial should proceed;[17]

(16) a decision on a dismissal application of a charge sent for trial under section 51 of the Crime and Disorder Act 1998.[18]

(17) a legal aid contribution order made at the end of the trial was an integral part of the trial and as such was a matter which related to trial on indictment under section 29(3) and could not be judicially reviewed.[19]

In light of Lord Bridge's dicta in *Re Sampson*[20] it has been concluded that the following orders relating to costs could not be judicially reviewed:

(a) An acquitted D[21] against whom a costs order is made,[22] or in whose favour one is refused.[23]

[13] *R v Isleworth Crown Court, ex parte King* [1992] COD 298.

[14] *R v Leeds Crown Court, ex parte Hussain* [1995] 1 WLR 1329, except where, as in *R v Maidstone Crown Court, ex parte Hollstein* [1995] 3 All ER 503 and *R v Maidstone Crown Court, ex parte Clarke (Paul)* [1995] 1 WLR 831, the Divisional Court regards the arraignment as "unreal."

[15] *R v Chester Crown Court*, *ex parte Cheshire County Council, The Times* 23 October 1995.

[16] *R v Southwark Crown Court, ex parte Tawfick, CPS Intervening*, *The Times* 1 December 1994.

[17] *R (Rogerson) v Stafford Crown Court* [2002] Crim L R 318.

[18] *R (o/a) of Snelgrove v Woolwich Crown Court* [2004] EWHC 2172.

[19] *Re Sampson* [1987] 1 WLR 194, Lord Bridge also stated that "any other order with regard to costs which the Crown Court may make at the conclusion of a trial on indictment" relates to a trial on indictment and cannot be judicially reviewed. (*Ibid,* at p 198).

[20] [1987] 1 WLR 194.

[21] As opposed to a convicted D. In *Hayden* (1974) 60 Cr App R 304, it was held that an order that D pay the whole or any part of the costs of the prosecution, or a compensation order was a "sentence" within the definition of section 50 of the Criminal Appeal Act 1968. An appeal against which lies to the Court of Appeal (Criminal Division).

(b) An acquitted D who wishes to challenge a legal aid contribution order.[24]

(c) A convicted D who wishes to challenge a legal aid contribution order made at the end of the trial process.[25]

Matters not relating to trial on indictment

1.2 The following are matters which have been held not to relate to trial on indictment which can be judicially reviewed:[26]

(1) an order estreating the recognisance of a surety for a defendant who failed to surrender to his trial at the Crown Court;[27]

(2) a forfeiture order under section 27 of the Misuse of Drugs Act 1971 made against the owner of property who was not a defendant in the criminal proceedings;[28]

(3) an order committing an acquitted defendant to prison unless he agrees to be bound over;[29]

(4) an order made, after conviction, discharging an order made under section 39 of the Children and Young Persons Act 1933.[30]

1.3 In *R v Manchester Crown Court, ex parte DPP*,[31] Lord Browne-Wilkinson identified two categories into which cases, which can be judicially reviewed, fall. These were;[32]

(1) where the order was made under a wholly different jurisdiction e.g. binding over an acquitted defendant, as in *R v Inner London Crown Court, ex parte Benjamin;*[33]

[22] See fn 130 above.

[23] *R (o/a Regentford Ltd) v Canterbury* [2001] ACD 40.

[24] *Re Sampson* [1987] 1 WLR 194. Note provisions in sections 28(4) and 29(6) of the 1981 Act, however, by virtue of which Recovery of Defence Costs Orders made under the Access to Justice Act 1999 may be challenged.

[25] *Hayden* (1974) 60 Cr App R 304.

[26] Archbold, *Criminal Pleading, Evidence and Practice* (2005) at p 979.

[27] *Re Smalley* [1985] AC 622.

[28] *R v Maidstone Crown Court, ex parte Gill* (1987) 84 Cr App R 96.

[29] *R v Inner London Crown Court, ex parte Benjamin* (1987) 85 Cr App R 267.

[30] *R v Manchester Crown Court, ex parte H (a minor) and another* [2000] 1 WLR 760.

[31] [1993] 1 WLR 1524.

[32] [1993] 1 WLR 1524 at p 1531.

[33] (1987) 85 Cr App R 267.

(2) or the order sought to be reviewed has been made against someone other than the defendant. Examples included:

(d) estreating a recognisance given by a third party, *In re Smalley*;[34]

(e) an order forfeiting a motor car belonging to someone other than the defendant which had been used by the defendant in the course of drug dealing, *R v Maidstone Crown Court, ex parte Gill.*[35]

[34] [1985] AC 622.

[35] (1987) 84 Cr App R 96.