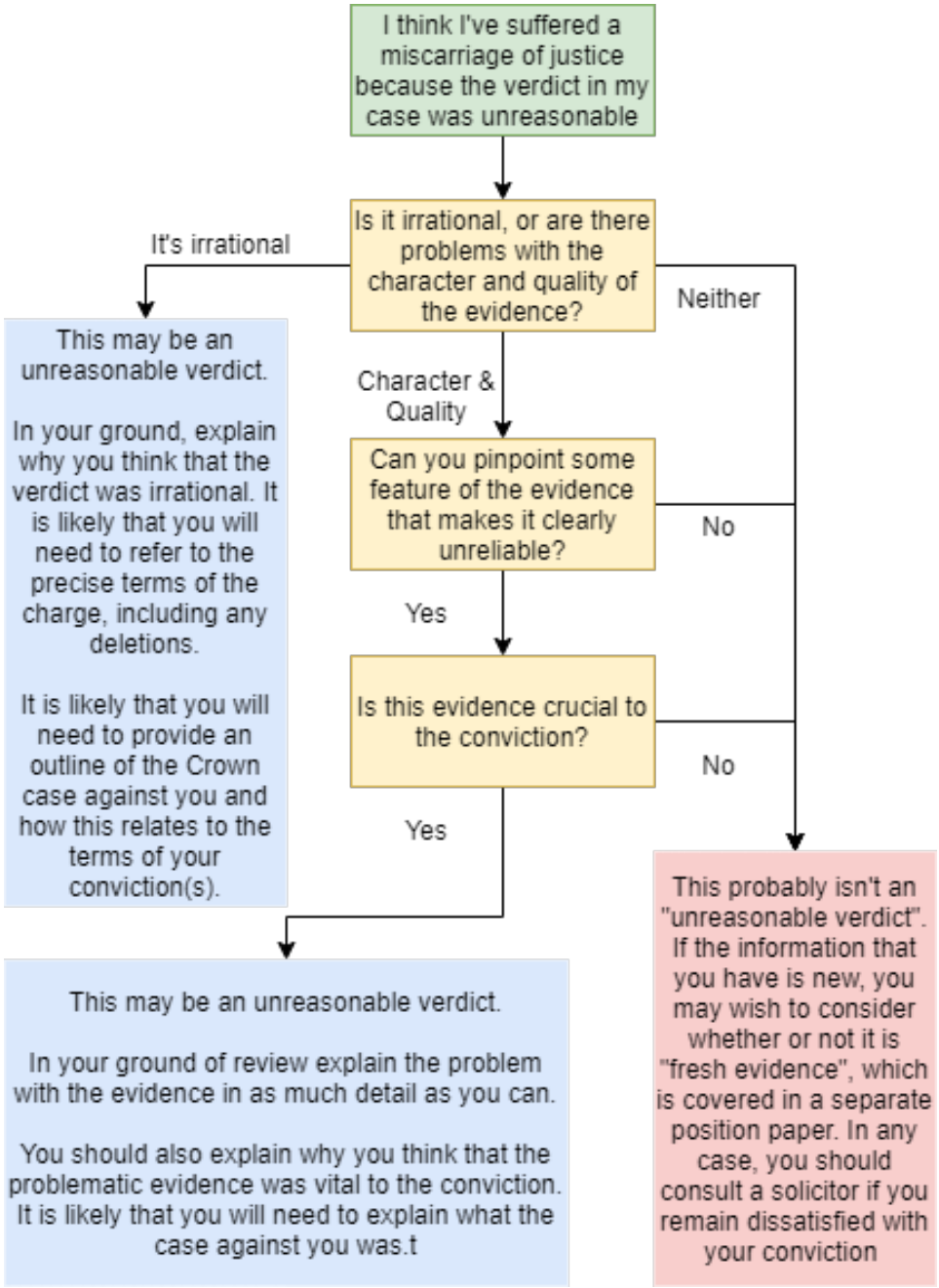
Submission Guidance:

Unreasonable Verdict

This paper is intended to provide guidance for those thinking of applying to the Commission on the basis that the verdict of the trial court was unreasonable. It sets out, in brief outline, the Commission's understanding of the key principles of law. It then explains the information that the Commission is likely to require in different categories of case. For a fuller explanation of the Commission's understanding of this area of law, see the Commission's more detailed position paper.

Unreasonable Verdict – in Brief

- An "unreasonable verdict" is a decision to convict that no reasonable jury could have reached.
- The court applies a very high standard to these grounds of appeal.
- It is very difficult to convince the court that Crown evidence is so poor that it should interfere with a conviction.
- If the jury's verdict is obviously irrational (cannot be rationally explained), the ground may succeed.
- It is possible to challenge the verdict of a sheriff or JP as well.


I think I've suffered a miscarriage of justice because the verdict in my case was unreasonable
Is it irrational, or are there problems with the character and quality of the evidence?
It's irrational
Neither
Character & Quality
This may be an unreasonable verdict.
In your ground, explain why you think that the verdict was irrational. It is likely that you will need to refer to the precise terms of the charge, including any deletions.
It is likely that you will need to provide an outline of the Crown case against you and how this relates to the terms of your conviction(s).
Can you pinpoint some feature of the evidence that makes it clearly unreliable?
No
Yes
Is this evidence crucial to the conviction?
No
Yes
This probably isn't an "unreasonable verdict". If the information that you have is new, you may wish to consider whether or not it is "fresh evidence", which is covered in a separate position paper. In any case, you should consult a solicitor if you remain dissatisfied with your conviction
This may be an unreasonable verdict.
In your ground of review explain the problem with the evidence in as much detail as you can.
You should also explain why you think that the problematic evidence was vital to the conviction. It is likely that you will need to explain what the case against you was.t

Position Paper:

Unreasonable Verdict

This paper sets out, in broad terms, the Commission's approach when dealing with this area of law.

Introduction

1. Many people apply to the Commission alleging that the verdict of guilty recorded against them was unreasonable. As a ground of referral it is less common; the Commission has referred just four applications on this ground, most notably that of Abdelbaset Ali Mohmed Al Megrahi. Mr Al Megrahi abandoned his appeal before the matter was determined by the Court[1]. A second referral, that of Dominic Ferrie, led to an unsuccessful appeal[2]. The third referral was decided under reference to a different ground of review[3]. The fourth such case is discussed below, at paragraph 10.

2. The ground of appeal was first established, along with the Court of Criminal Appeal in Scotland, by the Criminal Appeal (Scotland) Act 1926[4]. The Court could "if they [thought] that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence". In practice the interpretation of the ground was extremely strict.[5]

3. While the ground of appeal was retained in the Criminal Procedure (Scotland) Act 1975, it disappeared from statute when the 1975 Act was amended by the Criminal Justice (Scotland) Act 1980 and a single ground of appeal - that there had been a miscarriage of justice - was introduced. Although it was always envisaged that an unreasonable jury verdict could constitute a miscarriage of justice there was a dearth of successful appeals. This led the Sutherland Committee to recommend that the Court's power to quash a conviction where the jury had returned an unreasonable verdict be re-

[1] http://news.bbc.co.uk/1/hi/scotland/south_of_scotland/8205528.stm
[2] 2011 SCL 8
[3] http://news.bbc.co.uk/1/hi/scotland/tayside_and_central/7619299.stm
[4] Section 2(1).
[5] In *Webb v HM Advocate* 1927 JC 92 it was held that an appeal should only be allowed if the verdict was "so flagrantly wrong that no reasonable jury discharging their duty honestly under proper direction would have given it".

introduced into legislation in an attempt to encourage its use[6]. This recommendation was implemented by the Crime and Punishment (Scotland) Act 1997, which amended the relevant legislation accordingly.

The Commission's Position

4. The Commission's starting point is section 106(3)(b) of the Criminal Procedure (Scotland) Act 1995 (as amended), which provides::

> "… a person may bring under review of the High Court any alleged miscarriage of justice, which may include such a miscarriage… based on – (b) the jury's having returned a verdict which no reasonable jury, properly directed, could have returned."

5. The question of whether the jury returned a verdict which no reasonable jury, properly directed, could have returned must be addressed by assessing the principles laid down in the leading cases, particularly *King v HMA*[7] and *E v HMA*[8], which can be summarised as follows:

- The test under section 106(3)(b) is objective and an appellant who relies on it must establish that, on the evidence led at trial, no reasonable jury could have been satisfied beyond reasonable doubt that he was guilty[9].
- A miscarriage of justice is not identified simply because, in any given case, the court might have entertained a reasonable doubt on the evidence[10].
- A jury can reasonably reject evidence precisely because that evidence is inconsistent with the Crown evidence that it has decided to accept[11].
- In light of section 106(3)(b), the issue of reasonable doubt is not at all times within the "exclusive preserve" of the jury, and the court has to assess the reasonableness of the verdict with the benefit of its collective knowledge and experience[12]. Situations may arise in which the jury's

[6] *Criminal Appeals and Alleged Miscarriages of justice*, Cmnd 3245, para 2.71.
[7] 1999 SCCR 330
[8] 2002 SCCR 341
[9] *King* at page 333
[10] *King* at page 334
[11] *King* at page 342
[12] *E* at page 351

judgment on a question of credibility or reliability "simply cannot be supported on a consideration…of what occurred at the trial."[13]

- In making that assessment, the Court must keep in mind that the jury saw and heard the witnesses: the meaning and significance of a witness's evidence may not always be fully conveyed on the printed page; but the Court must also consider whether, on the facts of the case before it, it is at any serious disadvantage to the jury in those respects[14]. The court will, in assessing the evidence do so "through the lens of judicial experience which serves as an additional protection against unwarranted conviction."[15]
- As part of that assessment "it is no doubt correct in broad terms to say… that the evidence must reach a 'base line' of quality".[16] For an appeal of this kind to succeed, the Court requires to be satisfied that there was no "cogent framework of evidence" that the jury were entitled to accept as credible and reliable and which would have entitled them to return the verdict which they did.[17]
- The test for unreasonable verdict is applied strictly. Such appeals will only succeed in the "most exceptional circumstances".[18] The court in *MacKinnon*[19] observed that, in order for that appeal to have succeeded, it would have required to conclude that "the evidence was so grossly riddled with deficiencies, contradictions and inconsistencies that no reasonable jury, properly directed, could have stamped it with the description of being reliable or credible."

6. A distinct category of "unreasonable verdict" arises where it may be said that the verdict of the jury is irrational in the sense that it cannot be reconciled with the case before them. The leading authority is *Rooney v HMA*[20], in which the appellant had been convicted of charges (1) and (3) on an indictment, but not of charge (2), although the other co-accused were found guilty of this charge. The court accepted that the verdict

[13] *Jenkins v HMA* 2011 SCCR 575 at paragraph 42
[14] *E* at page 352
[15] *R v Biniaris* [2000] 1 SCR 381, cited in the opinion of the court in *Gage v HMA* [2012] HCJAC 14
[16] *McDonald v HMA* 2010 SCCR 619, per Lord Carloway, as cited in *MacKinnon and Millar v HMA* [2015] HCJAC 6, paragraph 5
[17] *Wilson v HMA* 2010 SCL 1041, paragraph 23, as cited in *MacKinnon and Millar v HMA*, paragraph 6
[18] *Harris v HMA* 2012 SCCR 234 at paragraph 67
[19] At paragraph 10
[20] 2007 SCCR 49

lacked rationality in view of the fact that the case against the appellant was prosecuted on the basis of concert. As a consequence his conviction on charge (3) was quashed. The verdict was unreasonable because it was internally inconsistent[21]. Similarly, in *Climent v HMA*[22], the court held the jury's verdict a miscarriage of justice on the basis that it could not be reconciled with the manner in which the trial judge had charged the jury.[23] These cases may be contrasted with *Maxwell v HMA*[24], in which the jury had convicted the appellant of travelling with the intention of engaging in unlawful intercourse with a 15 year old, but held another charge related to actual intercourse with the same 15 year old not proven. The appellant argued that the only live issue at the trial was the age of the girl. The court indicated that if this were the case, there would have been force in the contention that the verdict was unreasonable. That was not, in fact, the position. The sexual intercourse offence required corroboration of the act itself. This was supported by a different body of evidence than the travelling/grooming offence. It was not irrational for the jury to take a discriminating approach to the charges.

7. Appeals subsequent to *E v HMA* on the basis that the jury's verdict was unreasonable as a result of the weakness of the Crown case have not generally met with success. Most appeals on these grounds relate to alleged inconsistencies in respect of the evidence of one or more witness and identification evidence in particular is a common focus. There are very many examples of such unsuccessful challenges to the credibility and reliability of Crown witnesses, including *Kerr v HMA*[25], *Toal v HMA*[26], *McDonald v HMA*[27], *Affleck v HMA*[28], *Gage v HMA*[29] and *Henry v HMA*[30]. The latter four cases all arose from submissions about the quality of identification evidence. Both *Gage* and *Affleck* were Commission referrals, although in neither case had the Commission itself referred the case to the court on this particular ground[31].

[21] See the commentary in SCCR at page 58
[22] 2015 SCL 965
[23] *Contra Ferrie v HMA* 2011 SCL 8
[24] 2017 SCL 947
[25] 2004 SCCR 319
[26] 2012 SCCR 735
[27] 2010 SCCR 619
[28] 2010 SCCR 782
[29] 2012 SCCR 254
[30] 2012 SCCR 768
[31] Prior to the introduction in 2010 of ss194D(4A)-(4F) of the 1995 Act, successful applicants to the Commission were not restricted by the content of the Commission's statement of reasons when drafting the notes of appeal in subsequent court proceedings. (On which, see *Megrahi v HMA* 2008 SLT 1008.)

8. The case of *Jenkins v HMA*[32] provides a useful contrast to those mentioned in the foregoing paragraph. In that case, a murder conviction turned on an eyewitness identification. The witness had been shown a picture of some men from a social networking site and had identified the appellant's nephew as the assailant with "100%" certainty. At a subsequent VIPER parade[33] the witness had again "showed interest" in the image of the appellant's nephew, but identified a police stand-in as either the perpetrator of the murder or a convincing lookalike. At a second VIPER, which included a picture of the appellant, he had failed to make a positive identification. Subsequently, he had attended at the local Sheriff Court on an unrelated matter. There, the appellant was called in relation to a separate charge of breach of the peace. The witness had recognised the appellant (again with "100%" certainty) as the assailant. By this stage, the witness knew that the appellant was in custody for the murder, and also knew his name. At trial, the witness had identified the appellant in the dock. The trial judge told the jury that they could only convict the appellant of charge two if they believed that the dock identification was credible and reliable. The court at appeal held that no reasonable jury could have considered the witness's evidence reliable.

9. Shortly thereafter, in *McNally v HMA*[34], the court found itself considering another case with some superficial similarities to *Jenkins.* On that occasion, it declined to quash the conviction, reiterating that the test in such cases was a high one. Whilst the circumstances in *Jenkins* were "not necessarily unique", the case was "truly exceptional on its facts and circumstances". Vital evidence in that case had been "grossly riddled with deficiencies, contradictions and inconsistencies". Nothing in *Jenkins* should be taken as a departure from the statements of the law found in cases such as *King.*

Summary Cases

10. Section 175 of the 1995 Act, the summary counterpart to s106, has no provision analogous to s106(3)(b). It would, self-evidently, not be possible to scrutinise the decision making of the "jury" in a process in which a justice or sheriff has acted as finder of fact. It is, nonetheless, competent to challenge the decision making of the finder of fact in summary procedure. In *Aien v Dunn*[35], the appeal was framed in such a way as to argue

[32] 2011 SCCR 575
[33] An ID parade conducted using video images.
[34] 2013 SCCR 139
[35] 2016 SCL 690

that "no reasonable sheriff properly directed could have returned a verdict of guilty." Nonetheless, the Sheriff Appeal Court decided the case by focusing on specific weaknesses that it considered that it had detected in sheriff's reasoning and the supposed inadequacy of her explanations. This is in line with the approach taken in cases such as *Petrovich v Jessop*[36]. The court has however, on very rare occasion, considered the "character and quality" of the evidence at trial in broader terms. In *Ballantyne v Mackinnon*[37], for example, a case that echoes *Jenkins*, the court held that it was not open to the sheriff to accept the identification evidence from the main Crown witnesses, which was of manifestly poor quality. The Commission framed its own referral in the case of Carol Kirk[38] in a similar fashion. That appeal was unsuccessful for procedural reasons. The court subsequently allowed the appeal[39] that arose from the Commission's second reference.

Date of Approval: December 2020
Date of Review: December 2021

[36] 1990 SLT 594
[37] 1983 SCCR 97
[38] *Kirk v PF Stirling* [2017] HCJAC 66
[39] Unreported, 15 May 2019