Criminal Appeal (Amendment) Bill

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BILL

TO

To amend the Criminal Appeal Act 1968 to allow, notwithstanding the date of conviction, leave to appeal where there has been a change in the law which is material to the conviction and the application is served before the conviction is spent.

Amend section 18 Initiating Procedure

Insert subsection 18(4):

18 Initiating procedure

(1) A person who wishes to appeal under this Part of this Act to the Court of Appeal, or to obtain the leave of that court to appeal, shall give notice of appeal or, as the case may be, notice of application for leave to appeal, in such manner as may be directed by rules of court.

(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.

(4) The time for giving notice shall be extended by the Court of Appeal and shall be granted where notice is for leave to appeal against a conviction for an offence which no longer exists or an offence which has changed in a way which is material to the applicant's conviction, including the availability of a defence which did not previously exist and one of the following conditions are met:

(i) the application for leave to appeal was served before the conviction is spent; or
(ii) there is some other compelling reason that the Court of Appeal finds it is in the interests of justice to do so.

PROPOSED CRIMINAL APPEAL (AMENDMENT BILL)
EXPLANATORY NOTES

THIS IS A PRIVATE MEMBERS BILL BROUGHT BY JOINT ENTERPRISE NOT GUILTY BY ASSOCIATION (JENGbA)

<u>These Explanatory Notes:</u>

- Relate to the proposed Criminal Appeal (Amendment) Bill.
- Have been prepared by Charlotte May Henry on behalf of JENGbA.
- Provide information on the existing legislation and common law in relation to criminal appeals and how the proposed legislation will remedy the gap in this area of law.
- Use as a contextual example, the recent abolition of Parasitic Accessorial Liability, to illustrate the issues caused by the gap within existing legislation.

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A Preface from JENGbA

JENGbA (Joint Enterprise Not Guilty by Association) give thanks to Felicity Gerry QC for her invaluable advice on the scope and wording of the amendment, without which the Private Members Bill would not have been possible. JENGbA are also thankful to the academics who provided feedback on the amendment during the consultation process. We are especially thankful to Dr Matthew Dyson who provided detailed feedback during this process.

A Foreword from Felicity Gerry QC

I am pleased to have helped Charlotte Henry to draft this proposed Bill. Whilst cases involving multi-handed murder are often unsympathetic and cause trauma to families affected, there is also a serious public interest in the effective working of the criminal justice system in England and Wales. Miscarriages of Justice can also seriously affect individuals and families. This proposed Bill seeks to amend the Criminal Appeal Act to ensure access to justice for meritorious cases, including those of general public importance. It is perhaps remarkable that progress in criminal justice is so slow but, in my view, these proposals which Charlotte has sensibly combined with the request for feedback, are an important part of the debate over how the criminal justice system in England and Wales can be the subject of oversight and bear a level of accountability.

Overview of the Criminal Appeal (Amendment) Bill

1. Currently, to apply for permission to appeal (herein after referred to as "leave") against a criminal conviction, the applicant must serve their application within 28 days following the date of conviction. All other applications are out of time and at the discretion of the judiciary.

2. The impact of this time constraint is greatest felt when an applicant seeks to appeal against conviction on the basis of a change in the law which is material to their conviction as these cases are more likely to be out of time.

3. Those who appeal within time will have their appeal upheld where the conviction is *'unsafe'* i.e., the person might reasonably not have been convicted had the law been correctly applied. Comparatively those appealing out of time and on the basis of a change in the law, must pass an additional appeal hurdle known as the *'substantial injustice'* test i.e., the person would not have been convicted had the law been correctly applied.

4. Subsequently, the substantial injustice test is far more onerous than the safety test and it arguably violates the applicant's rights enshrined within Article 6 of the European Convention on Human Rights.

5. The aim of this proposed amendment is to remove the 28-day time limit and provide for compulsory leave to appeal where there has been a change in the law which is material to the conviction and either (i) the application for leave is served before the conviction is spent or (ii) there is some other compelling reason why it is in the interests of justice to do so.

6. These conditions uphold the principle of finality and recognise that law must be allowed to alter with the changing needs of society without detriment to justice.

Joint Enterprise Not Guilty by Association

About JENGbA

7. Joint Enterprise Not Guilty by Association (JENGbA) is a grassroots campaign founded in 2010 by Gloria Morrison and Janet Cunliffe. The primary aim of JENGbA at the time of its foundation was to abolish a type of joint enterprise known as Parasitic Accessorial Liability (PAL).

8. JENGbA bring this Private Members Bill in light of law reform which abolished PAL. For the purpose of this Private Members Bill, we are only concerned with Parasitic Accessorial Liability (PAL) as a contextual example to illustrate the issues caused by the gap within existing appeal legislation. We intend that the scope of the Bill will affect all those who wish to apply for leave to appeal out of time on the basis of a change in the law.

Parasitic Accessorial Liability

9. Those who commit crime do not necessarily do so alone, but may be supported, fortified and emboldened by others. This is known as Joint Enterprise which is an everyday phrase to describe the situation where two or more people are convicted for the same offence and the boundaries which have developed through common law have limited its application to three contexts.

    i. Joint Principals: A principal offender is one who fulfils the physical conduct of the offence, the *actus reus* coupled with whatever mental element the law requires of him at the time of the conduct, the *mens rea*. It follows therefore that liability as joint principals is where D1 and D2 commit an offence, both fulfilling the *actus reus* and *mens rea* for that offence. For murder this would be both striking the fatal blow while intending death or at least serious harm.

ii. Assisting and Encouraging: This is enshrined within the Accessory and Abettors Act 1861 and encompasses the situation whereby the principal offender commits an offence and the secondary offender, intentionally aids, abets, counsels or procures the principal to do so.

iii. Parasitic Accessorial Liability: This encompasses the situation whereby two or more people set out to commit an offence (crime A) either as joint principals or as assisters or encouragers, and one of their group go on to commit a further crime (crime B). All those that participated in crime A, will be liable for crime B as a secondary offender, if they foresaw the possibility that crime B might occur.

10. PAL originated from the 1985 Privy Council decision in *Chan Wing-Siu* [1985] AC 168, was first adopted into English law in *R v Hyde* [1991] 1 QB 134, and was later applied in a number of cases, most importantly by the House of Lords in *R v Powell and English* [1997] UKHL 57. PAL was shrouded in controversy as it was irrelevant to consider whether the secondary offender possessed the requisite intent for the crime, and it was this lack of mental culpability which drew significant attention.

11. For example, the Law Commission have published two reports on the issue – Assisting and Encouraging Crime (Law Com No 131, 1993) and Participating in Crime (Law Com No 305, 2007). The Justice Select Committee of the House of Commons launched an inquiry in 2011 accumulating in a 2012 report (Eleventh Report of Session 2010-12, HC 1597, 2012) and 2014 follow-up report (Fourth Report of Session 2014-15, HC 310, 2014).

12. The accumulation of each academic, political and public contribution over the preceding three decades finally resulted in successful law reform in the form of *R v Jogee* [2016] UKSC 8.

13. Abolishing PAL and reinstating the principles of accessorial liability the Supreme Court in *Jogee* held that the law had taken a *'wrong turn'* in Chan Wing-Sui: foresight is no more than evidence of intent and is not to be equated with it.[1]

14. In particular the Court in *Jogee* held:

'It will be apparent from what we have said that we do not consider that the Chan Wing-Siu principle can be supported, except on the basis that it has been decided and followed at the highest level. In plain terms, our analysis leads us to the conclusion that the introduction of the principle was based on an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments.'[2]

15. Like all change of law cases, all those convicted under PAL who are out of time must pass the *'substantial injustice'* test to be granted leave to appeal. This issue was recognised by the Supreme Court in *Jogee*:

'The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as laid down in Chan Wing-Siu and in Powell and English...where a conviction has been arrived at by faithfully applying the law as it stood at the time, it can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time. That court has power to grant such leave, and may do so if substantial injustice be demonstrated, but it will not do so simply because the law applied has now been declared to have been mistaken.'[3]

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[1] *R v Jogee* [2016] UKSC 8 at para. 83

[2] *R v Jogee* [2016] UKSC 8 para [83]

[3] *R v Jogee* [2016] UKSC 8 para [100]

Policy and Legal Background

Existing Legislation

16. The right to appeal is enshrined within section 1 Criminal Appeal Act 1968 which reads:

    (1) A person convicted of an offence on indictment may appeal to the Court of Appeal against his conviction.

    (2) An appeal under this section lies only— (a) with the leave of the Court of Appeal; or (b) if, within 28 days from the date of the conviction, the judge of the court of trial grants a certificate that the case is fit for appeal

17. Once permission to appeal has been granted and the appeal is heard, the grounds for allowing it are enshrined within Section 2 Criminal Appeal Act 1968 which reads:

    (1) Subject to the provisions of this Act, the Court of Appeal— (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and (b) shall dismiss such an appeal in any other case.

18. The initiating procedure is enshrined within section 18 Criminal Appeal Act 1968 which reads:

    (1) A person who wishes to appeal under this Part of this Act to the Court of Appeal, or to obtain the leave of that court to appeal, shall give notice of appeal or, as the case may be, notice of application for leave to appeal, in such manner as may be directed by rules of court.

    (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.

19. An applicant must therefore apply for leave to appeal within 28-days following the date of conviction and where they apply for leave to appeal beyond the 28-day time constraint they are known as *'out of time'* applicants and must apply for an extension of time, the success of which is at the discretion of the judiciary.

20. When leave to appeal is granted, the applicant (thereafter referred to as an appellant) will have their appeal upheld, where the conviction is *'unsafe.'*

21. To demonstrate the conviction is unsafe, requires the appellant to demonstrate that the error of law or emergence of fresh evidence, now corrected or known, might reasonably have made a difference to the jury's verdict.

Legal Reform and Extensions of Time

22. When a person applies for leave to appeal and they are out of time i.e., beyond the 28-day time constraint, they must apply for an extension of time.

23. Where the applicant applies for leave to appeal out of time (requiring an extension of time) and the applicant is also appealing based on a change in the law, the judiciary have demanded the applicant satisfy the *'substantial injustice'* test. The substantial injustice test has existed in different forms.

24. In *R v Mitchell* [1977] 1 WLR 753, 757, the Court considered three factors when deciding whether a substantial injustice would be caused if the applicant were not granted an extension of time. Firstly, the Court considered the strength of the case against the applicant

for the offence appealed against. Secondly, the Court considered the strength of the case against the applicant for all other offences. Thirdly, the Court considered whether the applicant continued to suffer the consequences of the conviction.

25. Following a consideration of these three points the court held:

'So the situation is this, the defendant has been sentenced to a term of imprisonment of three years for an offence which on the facts was not a crime… The next matter which makes this something of an extraordinary case is this: this man is in prison. It is true he is serving a concurrent sentence, as I have endeavoured to point out, of nine months for other offences, but that sentence, assuming that he has earned his full remission, should by now be over or almost over. If we were to refuse him the extension of time in which to appeal against conviction, we should be keeping him in prison, so to speak, when we as a court were convinced that he had not committed an offence.'[4]

26. Whilst the court identified three factors which it considered would exacerbate injustice, it was unclear from the decision whether each factor was a necessary ingredient of substantial injustice. When considering the strength of the case against the applicant for the offence convicted of, it was particularly unclear what the standard to be satisfied by the applicant was e.g., was the applicant in fact innocent, likely to be innocent or might reasonably be innocent. The Court concluded that the applicant was in fact innocent of the offence and all other offences, but it was silent on whether this was a standard to be met to satisfy the substantial injustice test, or merely the conclusion when considering the strength of the case against the applicant.

27. In *Hawkins* [1997] 1 Cr App R 234, the Court appeared to take a narrow view and demanded that the applicant prove factual innocence of the offence he was convicted of and all other offences. The Court did not consider the consequences of the conviction when determining whether a substantial injustice would be caused. Subsequently, the substantial injustice test as interpreted in Hawkins was very onerous.

[4] *R v Mitchell* [1977] 1 WLR 753, 757, at p 756-757

28. Despite the test onerously interpreted in *Hawkins* and which was ambiguously laid in *Mitchell*, the test has more recently been decided in a much fairer way.

29. In *R v R* [2006] EWCA Crim 1974; [2007] 1 Cr App R 150, the Court considered a number of applications for leave to appeal out of time following the House of Lords decision in R v Saik [2006] UKHL 18; 2 WLR 993, which raised the mens rea for the offence of conspiracy to launder money from one of suspicion, to knowledge that the money was the proceeds of crime or intention that it would be. When considering whether to grant leave to appeal out of time, the Court first applied the safety test rather than the substantial injustice test.[5] It was only after deciding that the conviction was an unsafe one, that the Court considered whether a substantial injustice would be done. This was procedurally different from *Hawkins*, which did not consider the safety of the conviction before considering whether a substantial injustice would be done.

30. In determining whether a substantial injustice would be done, the Court considered the strength of the case against applicant all other offences but applied no higher standard than the safety for these also. Ultimately the Court refused the extension for leave because;

    '[i]n every case virtually all the money-handling events were agreed to have taken place. Either the source of the money was admitted to be illicit or the Judge directed the jury that it must be sure it was'[6] and since the substantive offence only required suspicion rather than knowledge or intent, the applicants would *'have been convicted of substantive offences of great gravity.'*[7]

31. Subsequently, it was only the fact that the applicant would have been guilty of the substantive offence of money laundering rather than the inchoate offence of conspiracy to money launder, that the Court did not find a substantial injustice and refused leave to appeal out of time. For the avoidance of doubt at this approach, the Court of Appeal stated;

[5] R v R [2006] EWCA Crim 1974; [2007] 1 Cr App R 150 at paras 27 – 29
[6] R v R [2006] EWCA Crim 1974; [2007] 1 Cr App R 150 at para 11
[7] R v R [2006] EWCA Crim 1974; [2007] 1 Cr App R 150 at para 39

'For the avoidance of doubt, it is our view that where the sole or principal point taken by an applicant is that his convictions, though lawful and proper at the time, should now be regarded as unsafe because a new decision has altered everyone's understanding of the law, his application should be referred by the Registrar directly to the Full Court, so that the merits of it can be investigated, with representation, perhaps on both sides, and a reasoned decision made whether or not there is substantial injustice'.[8]

32. Similarly, in *Cottrell and Fletcher* [2007] EWCA Crim 2016, when applying the substantial injustice test, the Court demanded no higher standard than safety when considering the strength of case against the applicant for the offence he was convicted of. Here the Court had to consider the application for an extension of time for leave to appeal of Cottrell who sought leave to appeal based on a change in the law in House of Lords in *R v J* [2005] 1 AC 562, which prohibited a conviction of indecent assault to circumvent the 12-month time limit to bring a conviction in rape allegations.

33. Applying the substantial injustice test, the Court first considered the strength of the case against the applicant for the conviction he was appealing against. This analyses again only demanded the standard of safety i.e., whether the applicant might reasonably not have been convicted. Refusing the extension of leave, the Court stated:

'We can now return to Cottrell's application, which is well out of time. The complainant was groomed by the applicant and she fell in love with him. He was in fact guilty of indecent assault on her, not only because full intercourse took place, but because he had touched and handled her indecently. Her seduced consent to sexual activity provided no defence. But for the practice now deemed impermissible Cottrell could have been indicted for indecent assault in relation to under-age sexual activity, and from the jury verdict it is clear that he would have been convicted. It would be a manifest injustice to the complainant if he were able to take advantage of that part of the change of law which suited him, without having to accept the inevitable consequences of the process which would have applied to this case if the erroneous practice had been recognised earlier, and the necessary

[8] R v R [2006] EWCA Crim 1974; [2007] 1 Cr App R 150 at para 40

adaptations to it adopted. This case falls well within the long-established principles which this court has applied to extensions of time in change of law cases. The only possible ground of appeal is based on the change of law. The refusal of this application will produce no injustice. Therefore it is refused.'[9]

34. In *R v Uthayakumar*; *R v Clayton* [2014] EWCA Crim 123, the applicants had been convicted of causing death by unlicensed driving contrary to s.3ZB Road Traffic Act 1988. At the time of the conviction, it was enough that the driver was unlicensed, however following the Supreme Court decision in *R v Hughes* [2013] 1 WLR 2461; [2014] 1 Cr App R 6, which decided that *'something open to proper criticism in the driving of the defendant'* was required, the applicants sought to appeal out of time.

35. Here an application of leave was granted out of time, because the applicants had a defence available to them which was *'far from fanciful and might well succeed before a jury'*[10] and no higher standard was demanded when considering the strength of case against the applicants. This wording bares striking similarity to the safety test for in time appeals. The consequences of the conviction upon the applicants were also considered by the Court which considered the seriousness of the conviction when it determined it *'cannot ignore the fact that both appellants were advised to plead guilty to a very serious offence of causing someone's death, an offence of homicide, on the basis that each had no defence. That was wrong. They do have a defence.'*[11]

36. In *R v McGuffog* [2015] EWCA Crim 1116, 2015 WL 3795724, the applicant similarly plead guilty to causing death by unlicensed driving contrary to s.3ZB Road Traffic Act 1988 and applied for leave to appeal on the basis of *R v Hughes* [2013] 1 WLR 2461; [2014] 1 Cr App R 6. Here the Court applied the substantial injustice test and held:

[9] *Cottrell and Fletcher* [2007] EWCA Crim 2016 at para 59
[10] *R v Uthayakumar*; *R v Clayton* [2014] EWCA Crim 123 at para 21
[11] *R v Uthayakumar*; *R v Clayton* [2014] EWCA Crim 123 at para 20

'the court will not grant an extension of time based solely upon a change in the law unless a substantial injustice has taken place. If, for example, on the facts the applicant could as easily have been charged with another offence, the court will be unlikely to grant the extension.'[12]

37. Applying that test to the case the Court concluded:

'it is possible to envisage circumstances in which a jury might conclude that there was an act or omission of the applicant not amounting to carelessness that might have avoided this accident, the respondent has frankly conceded that, if the trial were to take place today, the applicant would not be convicted. Nonetheless, he continues to suffer the remoter consequences of his conviction although he has already served his sentence. In our view, it is not merely the change in the law that is creating an injustice to this applicant but also the remoter consequences of it with which he continues to live.'[13]

38. Subsequently the Court concluded that the applicant was in fact innocent like the applicant in *Hawkins*, but it was the consequences of the conviction that caused the Court to find a substantial injustice would be caused if they did not grant the extension of leave and allow an appeal.

39. Following the decision in *Jogee* (discussed above), the Court of Appeal in *R v Johnson* [2016] EWCA Crim 1613, heard a batch of test cases in order to determine what would constitute a substantial injustice for those convicted by PAL. In October 2016, the Court of Appeal handed down their judgement and held:

40. *'In determining whether that high threshold has been met, the court will primarily and ordinarily have regard to the strength of the case advanced that the change in the law would, in fact, have made a difference. If crime A is a crime of violence which the jury concluded must have involved the use of a weapon so that the inference of participation*

[12] R v McGuffog [2015] EWCA Crim 1116, 2015 WL 3795724 at para 13
[13] R v McGuffog [2015] EWCA Crim 1116, 2015 WL 3795724, at para 14 -15

with an intention to cause really serious harm is strong, that is likely to be very difficult. At the other end of the spectrum, if crime A is a different crime, not involving intended violence or use of force, it may well be easier to demonstrate substantial injustice. The court will also have regard to other matters including whether the applicant was guilty of other, though less serious, criminal conduct. It is not, however, in our view, material to consider the length of time that has elapsed. If there was a substantial injustice, it is irrelevant whether that injustice occurred a short time or a long time ago. It is and remains an injustice'.[14]

41. This interpretation is therefore almost indistinguishable from the approach taken in *Hawkins* as both demanded the applicants prove their innocence of the conviction and it also considered liability for other offences. The only distinction to be drawn is the standard required when considering the strength of the case against the applicant for other offences.

42. Though the Court in *Hawkins* and *Johnson* both considered liability for less serious offences, the standard applied by the Court in *Johnson* was fairer as the applicant would fail to demonstrate substantial injustice only if they would have been convicted of other offences. Comparatively, the Court in *Hawkins*, held that even an arguable case that the applicant might be liable for other offences was sufficient to find that the substantial injustice test was not satisfied.

43. Despite the approach of the Court in *Johnson* which like *Hawkins* followed the narrow and more onerous interpretation of the test, the application of substantial injustice thereafter in other change of law cases has not followed suit.

44. In *R v Ordu* [2017] EWCA Crim 4, the applicant had been convicted of possessing false identity documents contrary to s.25(1), (2) and (6) of the Identity Cards Act 2006. Following a change in the law, the applicant now had a defence available to him and therefore applied for leave to appeal out of time. When deciding whether to grant the extension of time, the Court recognised the leading authority of *Johnson* and cited with

[14] R v Johnson [2016] EWCA Crim 1613 at para 21

approval the passage from *Mitchell* provided above. However, unlike the Court in *Johnson*, which demanded the applicant prove the change in the law would in fact have made a difference, the Court in *Ordu* took a different view.

45. Referring to the passage in *Mitchell*, the Court determined that the strength of the case against the applicant was merely *'one example of the kind of consideration which may lead to the grant of an extension of time in a change of law case. If it had sufficed that Mitchell had been wrongly convicted as the law was by then understood, it would not have mattered whether he was in prison or not, but it plainly did matter.'*[15]

46. Instead, the Court held that *'the continuing impact of a wrongful conviction on an application will be highly material in determining whether its continuation involves a substantial injustice.'*[16] The Court determined that the applicant was not suffering from the continuing consequences of the conviction and subsequently the application was refused.

47. The Court in *Ordu* did not consider the strength of the conviction against the applicant except in the context of safety and while applying the test set out in *R v. Boal* (1992) 95 Cr. App. R. 272; [1992] Q.B. 591; [1992] 2 W.L.R. 890 CA. This test is one which is applied when considering the safety of the conviction following a guilty plea by the appellant. The *Boal* test necessitates that there be a *clear injustice* i.e. that the appellant was deprived of a defence which would probably have succeeded. The Court recognised that the *Boal* and *Johnson* tests are *'ostensibly similar verbal formulations but they are different things',*[17] as the first is applied when considering safety and the second is applied when considering whether to grant leave.

48. Importantly, the Court in *Ordu* rejected the view that the substantial injustice test as derived in *Johnson*, was necessarily the correct application for other offences and rather, that decision *'expressly contemplates a situation with which the court in Johnson was*

[15] *R v Ordu* [2017] EWCA Crim 4 at para 19
[16] *R v Ordu* [2017] EWCA Crim 4 at para 20
[17] *R v Ordu* [2017] EWCA Crim 4 at para 26

concerned, namely people who had been convicted of murder'.[18] The Court opined that if the applicant sought leave to appeal against a conviction for murder, *'it is unnecessary to consider what the continuing impact of the conviction on the applicant is, or how long ago it occurred. This is because they had all been convicted of murder and were subject to life sentences. In many cases they were still detained, but even if they had been released the impact of a life sentence is highly significant. If that sentence had been imposed on someone who was not guilty of murder this would clearly be a substantial injustice and that would be so whenever the sentence had been imposed.'*[19]

49. Subsequently, the Court in *Ordu* distinguished the case from the applicants in *Johnson* who were serving life sentences for murder and would automatically satisfy the substantial injustice test if it only demanded the applicant be suffering the consequences of the conviction. It is likely not the PAL application of law which is the catalyst for the harsher interpretation in *Johnson*, but murder convictions generally.

50. Although *Johnson* appeared unequivocal in relation to murder convictions, JENGbA had hoped that perhaps greater clarity on the interpretation of substantial injustice would be gained from a successful application for leave out of time. However, it took two years for the fortuitous PAL applicant to successfully surpass the test in *Johnson*, and for several months thereafter the judgment was embargoed to preserve the integrity of the intended retrial.

51. In *R v Crilly* [2018] EWCA Crim 168, the PAL applicant had participated in the burglary of a house owned by a 71-year-old man. In deciding the case, the Court began by identifying the test as determined in *Johnson* i.e., that substantial injustice would only be demonstrated if the change in the law would in fact have made a difference.[20] In considering the factual matrix of the case, the Court determined that crime A was more akin to a robbery (rather than burglary) as the participation continued after the initial

[18] *R v Ordu* [2017] EWCA Crim 4 at para 21
[19] *R v Ordu* [2017] EWCA Crim 4 at para 21
[20] R v Crilly [2018] EWCA Crim 168 at para 38

physical confrontation with the homeowner and subsequently the offence was at the middle of the spectrum as the crime involved the use of force albeit without a weapon. Applying the test, the Court concluded:

'It is in that context we consider whether Jogee compliant directions would have made a difference and whether a refusal of exceptional leave would cause a substantial injustice. We are satisfied we should grant exceptional leave. The case against the applicant was to all intents and purposes a case about his foresight. Foresight may be evidence of intent but it does not equate to intent. The evidence against him was not so strong that we can safely and fairly infer the jury would have found the requisite intent to cause really serious bodily harm had the issue been left to them by the judge.'[21]

52. Unlike the test the Court purported to apply i.e., that Crilly must demonstrate that he would not have been convicted, the test handed down by LJ Hallett was whether the Court could '*safely and fairly infer the jury would have found the requisite intent to cause really serious bodily harm'.* This is plainly not the same and this writer would go so far as to say it was the reverse i.e., that Crilly demonstrate that he might not have convicted. JENGbA do not suppose that this *ratio* is an intentional departure from *Johnson*, but it is interesting that the only person yet to successfully surpass the substantial injustice hasn't had the test applied in line with the *Johnson* authority. If anything can be taken from the decision, it is probably that it supports the notion that the *Johnson* interpretation, in the PAL context, is theoretically impossible to pass.

53. It is submitted by JENGbA that the *Johnson* interpretation is theoretically impossible to pass in cases where the applicant had been convicted of murder by PAL. In *R v Anwar* [2016] EWCA Crim 551, the Court held *'the same facts which would previously have been used to support the inference of mens rea before the decision in Jogee will equally be used now.'*[22] Therefore, since nothing more evidentially is required post-Jogee, how can the applicant prove that the change in the law would have made a difference? Moreover, a

[21] R v Crilly [2018] EWCA Crim 168 at para 42
[22] R v Anwar [2016] EWCA Crim 551 at para 20

consideration of whether the applicant was guilty of other, though less serious offences, would also be a blow in the PAL context as those convicted of murder under PAL would at least be guilty of unlawful act manslaughter.

Human Rights Implications

54. Arguably the gap in the current legislation and the substantial injustice test violates the applicants' Article 6 European Convention on Human Rights.

55. Article 6 Right to a Fair Trial reads:

'(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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests 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 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.'

56. It is submitted that the substantial test arguably infringes upon the applicant's *'right to a fair and public hearing'* contained within Article 6(1) ECHR. This right further encompasses the right of effective access to a court which we submit has been totally extinguished by the application of the substantial injustice test.

57. This is supported by the decision of the Grand Chamber in *Omar v France*, (App. 43/1997/827/1033), 29 July 1998 GC. Here the Court stated that;

'the right to a court, of which the right of access is one aspect (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no. 18, p. 18, § 36), is not absolute; it may be subject to limitations permitted by implication, particularly regarding the conditions of admissibility of an appeal (see the Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, pp. 24–25, § 57). However, these limitations must not restrict exercise of the right in such a way or to such an extent that the very essence of the right is impaired. They must pursue a legitimate aim and there must be a reasonable proportionality between the means employed and the aim sought to be achieved.'[23]

58. It is submitted that requiring the applicant to satisfy the substantial injustice test i.e., demonstrate that the applicant would not have been convicted, in order to be granted leave to appeal, impairs the very essence of the *'right of access'* to a court. Moreover, this legal bar reverses the presumption of innocence applicable during trial under Article 6 ECHR. During trial it is for the Crown to prove beyond reasonable doubt that the defendant is

[23] *Omar v France* at §34; also relying upon: *Fayed v. the United Kingdom* judgment of 21 September 1994, Series A no. 294-B, pp. 49–50, § 65; the *Tolstoy Miloslavsky v. the United Kingdom* judgment of 13 July 1995, Series A no. 316-B, pp. 78–79, § 59; the *Bellet v. France* judgment of 4 December 1995, Series A no. 333-B, p. 41, § 31; and the *Levages Prestations Services v. France* judgment of 23 October 1996, Reports of Judgments and Decisions 1996-V, p. 1543, § 40

guilty whereas under this interpretation of substantial injustice, it is instead demanded of the applicant to prove that they are innocent.

Common Law Reform of the Substantial Injustice Test

59. From a review of the above material, it should be abundantly clear to the reader that the correct interpretation of substantial injustice is uncertain at best.

60. Three relevant factors have been identified by the Court: (1) the strength of case against the applicant for the conviction appealed against; (2) the strength of case against the applicant for other, though less serious offences; (3) whether the applicant continued to suffer the consequences of the conviction.

61. In *Mitchell*, all three factors were considered by the Court, but the standard to be met for the first two was unclear. In *Hawkins* and *Johnson* only the first two factors were considered and the standard to be achieved when considering strength of case against the applicant was proof that the change in the law would in fact have made a difference to the jury's verdict. In the majority of cases, the first and second factors were also considered but the standard to be achieved was only one of safety i.e., that the change in the law might reasonably have made a difference to the jury's verdict. In those case requiring only safety, there was a further consideration upon whether the applicant continued to be suffering the consequences of the conviction.

62. Despite the desperate need for clarification, reaching the Supreme Court has proved a difficult feat. The Supreme Court does not have jurisdiction to hear the cases of applicants which have not first had an appeal decided by the Court of Appeal and since the substantial injustice test is one which is required to be passed before leave to appeal is granted, once failed, the applicant is not within the jurisdiction of the Supreme Court.

63. In *R v Garwood* [2017] EWCA Crim 59, one of the applicants in *Johnson* applied to the Court of Appeal for a certification of a question of law in relation to substantial injustice

and for leave to appeal to the Supreme Court. The Court of Appeal heard oral arguments from Tim Maloney QC who submitted that the application for leave was heard before the full Court and subsequently there was very little which was procedurally different between that application for leave and an appeal. This submission was rejected.

64. The same was tried again in *R v Henry and R v Johnson* (applications UKSC 2018/0022) where Felicity Gerry QC sought to certify a question of law and leave to appeal to the Supreme Court. Here the applicants submitted that the substantial injustice test violated their rights under Article 6 ECHR (as above) and the UKSC ought to certify a question and grant leave without the applicants having been granted leave to appeal to the Court of Appeal. The applicants relied on the Human Rights Act 1998 and the *'right to effective remedy'* within Article 13 ECHR. It was submitted that the Criminal Appeal Act 1968 must read in a way to allow an appeal to the Supreme Court, in order to afford the Member State opportunity to consider the human rights arguments nationally before the applicant petitioned the European Court of Human Rights for remedy. This, it was submitted, would ensure the rights within the ECHR were actual rather than theoretical. On 25th July 2018, leave to appeal was refused with reliance on Dunn v UK (2013) 56 EHRR SE5.

65. Whilst those who had been refused leave to appeal to the Court of Appeal were out of jurisdiction of the Supreme Court, those who appeal had been referred by the Criminal Case Review Commission (the "CCRC") were not. Referrals by the CCRC to the Court of Appeal under section 9(2) Criminal Appeal Act 1995, are treated procedurally as having bypassed the leave procedure and are heard as full appeals.

66. In *R v Towers* [2019] EWCA Crim 198, the CCRC referred the case of Jordan Towers to the Court of Appeal. Here Henry Blaxland QC submitted that the correct interpretation of substantial injustice does not demand any higher standard than the safety test[24] and rather the correct test demands only a consideration of whether the applicant continued to suffer the consequences of that conviction.[25] The appeal was dismissed.

[24] R v Towers [2019] EWCA 198 (Crim) at para 41
[25] R v Towers [2019] EWCA 198 (Crim) at para 42

67. Following this, the applicant submitted an application to certify a question of general public importance and for leave to appeal to the Supreme Court [26]. The arguments advanced by Mr Blaxland QC were largely the same as on appeal i.e., that the first assessment when determining whether an extension of time should be granted is a consideration of the safety of the conviction, followed by a consideration of whether the applicant is suffering the consequences of the conviction. This was reiterated by the Court as follows:

'[T]hat there is nothing in Jogee to suggest that, as part of the consideration of 'substantial injustice', the court should impose an enhanced safety test. Thus, he goes on, an assessment of the strength of the case is not relevant to substantial injustice and that the test of substantial injustice should be confined to the consequences of the conviction for the applicant in which context the seriousness of the charge, whether the applicant is still serving a sentence of imprisonment and whether the applicant would have been convicted of an alternative offence are the relevant features'.[27]

68. Refusing to certify the question the Court concluded that *'the decision in Johnson is founded on established principles which, in our judgment, the Supreme Court in Jogee fully recognised'*[28] but in any case, since the application of Johnson was restricted to applications for leave on the basis of *Jogee*, it was not a matter of general public importance *'however significant it undoubtedly is to all those convicted of murder before the decision in Jogee'*.[29]

69. Subsequently, the substantial injustice test cannot be challenged at the Supreme Court for remedy. At first leave to appeal to the Supreme Court was refused due to jurisdiction issues and once those were surmounted, a certificate was not granted as the Court of Appeal determined the substantial injustice test was a matter of settled law and in any case, the

[26] R v Towers [2019] EWCA Crim 664
[27] R v Towers [2019] EWCA Crim 664 at para 4
[28] R v Towers [2019] EWCA Crim 664 at para 11
[29] R v Towers [2019] EWCA Crim 664 at para 12

Johnson interpretation was not a matter of general public importance as it was only applicable to those convicted of murder by PAL.

Competing interests

70. It is recognised that there are public policy reasons for restricting the time in which someone can appeal.

71. The first is the principle of finality which prohibits the challenge of convictions past a certain point so that the trial verdict is final. The reasons for this are well founded. If appellants were permitted unfettered appeals, the validity of the convictions would be subjected to endless re-examination which would overburden the Court of Appeal. These largely meritless appeals would cause a severe impact on the criminal justice budget and the system generally which would certainly lose its efficiency. Moreover, the emotional impact on victims because of the denial of closure would hardly be fair.

72. The second is the necessity for law to change with the society that it governs. As society progresses, the morality of the people within society usually alters. Change in moral compass, along with other change (such as advancements in technology and medicine) necessitates law reform. In order for society to function, law reform must be efficient. If the right to appeal were unfettered by time, Parliament and the Judiciary might show an overabundance of caution and law would stagnate.

The Consultation & Amendment

73. In January 2021, JENGbA launched a consultation process where we surveyed the opinions of law and criminology academics across national universities. The survey was circulated to over 100 academics and we received responses from 15 academics affiliated to the following universities: University of Cambridge, University of Oxford, The London

School of Economics and Political Science, Cardiff University, University of York, University of Winchester, University of Hertfordshire and University of Greenwich.

74. The wording of the amendment that we requested feedback on was the following:

"*The Court of Appeal shall grant leave, at any time, where the following conditions apply: (i) the Supreme Court has reversed or reinterpreted one of its decisions on any point material to the conviction or declared an authority or line of authorities on any such material point to be erroneous; or (ii) the legislative provision under which the person was convicted has been repealed and not replaced; and (iii) the person convicted continues to suffer the ill effects of the conviction or there is some other compelling reason that it is in the interests of justice for leave to be granted."*

75. Out of the 15 academics who participated in the consultation, 100% agreed with the purpose of the Private Members Bill i.e., abolish the substantial injustice test as interpreted in *Johnson*.

76. Criticism of the amendment centred on whether the 'ill-effects' test was an appropriate pre-requisite for leave. The ill-effects test was intended to reflect the consequences test applied as an interpretation of substantial injustice. The majority of the participants took the view that the 28-day time limit should be removed in change of law cases and this should be unfettered by any condition such as ill-effects. Some of those that agreed with a pre-requisite for leave, did not agree that demonstrating an ill-effect was the desirable condition as it was too vague. When asked what should constitute an ill-effect, the majority of participants believed societal stigma should be enough, some participants believed an unspent conviction should be enough and one participant believed imprisonment should be demanded.

77. Following the consultation, the amendment within the Private Members Bill has changed to reflect the advice of the participants. A short report on the consultation can be found at Annex One to these Explanatory Notes.

Concluding Remarks

78. Those serving notice to appeal out of time (beyond 28-days from the date of conviction) and are appealing based on a change in the law, must surpass the substantial injustice test in order to be allowed an appeal. Those appealing out of time following the law reform in *R v Jogee* [2016] UKSC must pass the substantial injustice test as interpreted in *R v Johnson* [2016] EWCA Crim 1613. This interpretation is very onerous and tantamount to proving innocence of the offence appealed against.

79. The interpretation of substantial injustice has not always been so onerous, with extensive support for in the authorities for a test which only demands the applicant continue to be suffering the consequences of the conviction.

80. The Court in *Ordu* determined that a more onerous test was desirable for *Jogee* applicants because these applicants would automatically pass the consequences test by virtue of their convictions for murder and resultant life sentences.

81. Whilst there are legitimate policy reasons for restricting appeals, it is unacceptable that the barrier to appeals has been set so high for *Jogge* applicants. The *Johnson* test cannot be justified on the grounds that applicants would automatically surpass the consequences interpretation of substantial injustice. The common law test has been artificially and unjustly raised by the judiciary and must be replaced with a fairer statutory test.

82. The Joint Enterprise (Appeal) Bill contains an amendment to the Criminal Appeal Act 1968 which removes the 28-day time limit to appeal for change of law cases on the condition that leave to appeal is served before the conviction is spent. Requiring the conviction to be unspent has jurisprudential support within the authorities concerned with interpreting substantial injustice. This is because it is a consequence of the conviction which could satisfy the fairer interpretations of substantial injustice.

83. This condition filters out those convicted of less serious offences, thereby protecting the Court of Appeal from becoming overburdened and the public purse from frivolous expense. The amendment strikes a fair balance because it will only operate while the conviction is unspent thereby allowing law to alter with the changing needs of society and uphold the principle of finality without detriment to justice.