

## A rough guide to avoiding an Attorney-General's reference

In “*Bad Ref! Are the number of Attorney-General's References undermining their purpose?*” we considered whether the A-G's Reference was really fulfilling the function for which it was originally intended. The purpose of this article is to highlight some practical difficulties and pitfalls, with some suggestions to avoid being on the receiving end of a Reference. As any practitioner will attest, representing an Offender at a Reference is a far from pleasant experience; one almost feels like saying, “*it's not my fault that my mitigation produced a good sentence for the lay-client*”, a submission unlikely to find sympathy in the Court of Appeal. Successful mitigation reflects successful advocacy, but References can arise from slips in procedure: the former is to be commended, the latter may be avoided.

One aspect that caused considerable problems within the Reference procedure was an advance indication of sentence prior to plea being entered. It was far from uncommon for Judges to give an indication of the likely sentence and whilst these ‘informal indications’ had been the subject of considerable adverse comment dating back to *R. v. Turner* (1970) 54 Cr. App. R. 352, the practice continued.

The question then arose as to what regard the Court of Appeal could or should give on a Reference, in a case where the Trial Judge had given an indication of sentence which led to a plea of guilty. There were many conflicting decisions: by way of example only, in *Attorney-General's Reference (No.17 of 1998) (R. v. Stokes)* [1999] 1 Cr. App. R. (S.) 357, *The Times*, 12th October 1998 the Court of Appeal observed that the fact that a Judge had given an informal indication of likely disposal, and consequent on that an offender had pleaded guilty, did not preclude a Reference being made to the Court. This view was in contrast to *Attorney-General's Reference (No.40 of 1996) (R. v. Robinson)* [1997] 1 Cr. App. R. (S.) 357 and *Attorney-General's Reference (Nos. 80 and 81 of 1999) (R. v. Thompson & Rodger)* [2000] 2 Cr. App. R. (S.) 138 where it was held to be “*almost abusive*” for the Attorney-General to seek leave to refer sentences which were unduly lenient in circumstances where the judge had given an indication of his view and the Prosecution had taken no exception to it. The only common thread was the distaste expressed by the Court in relation to an indication of sentence being given at all.

These criticisms led the Attorney-General to issue guidance on the acceptance of pleas in December 2000; one aspect of this was that a Prosecutor should not do anything that could be construed as acquiescence towards a particular sentence, and that where appropriate the Prosecutor should remind the Court of the power to seek to refer a case. It certainly seemed that it was the perceived acquiescence that caused major problems (see *Attorney-General's*

*reference (No. 44 of 2000) (R. v. Peverett)* [2001] 1 Cr. App. R. (S.) 132 (where Prosecution Counsel positively encouraged a plea bargain) and *Attorney-General's reference (Nos. 86 & 87 of 1999) (R. v. Webb, R. v. Simpson)* [2001] 1 Cr. App. R. (S) 141). In the latter case, however, the Reference was successful as the Court of Appeal distinguished the case from *No. 44 of 2000* on the basis that whilst the Trial Judge had given an indication, the convictions entered did not stem from it (as the Defendants were convicted following a trial) and the Defendants had therefore not done anything to their detriment based on the indication.

Further unsuccessful attempts were still made to refer cases: *Attorney-General's reference (Nos. 8, 9 & 10 of 2002) (R. v. Mohammed, R. v. Habib, R. v. Hussain)* 2003] 1 Cr. App. R. (S.) 57 where an unduly lenient sentence was left undisturbed as a result of a judicial indication of a non-custodial sentence to which Prosecution counsel did not indicate dissent, and guilty pleas were entered on that basis; *Attorney-General's reference (No. 89 of 2004) (R. v. Cox)* *The Times*, 10th January 2005, where a concession having been made by 'responsible counsel' for the Prosecution in the Crown Court it was said not to be open to the Attorney-General to invite the Court of Appeal to sentence on a different factual basis. It would appear that the Court of Appeal considered that the crucial issue to consider was whether the offender had been given a legitimate expectation as to his sentence (*Attorney-General's reference (No. 19 of 2004) (R. v. Charlton)* [2005] 1 Cr. App. R. (S.) 18).

Since then the Court of Appeal has endorsed a mechanism whereby a Defendant is able to formally seek an advance indication of sentence; *R. v. Goodyear* [2005] 2 Cr. App. R. 20, and the Attorney-General has revised and up-dated his guidance (see now *Attorney-General's guidelines on the acceptance of pleas (revised 2009)*).

One might have hoped that the creation of the *Goodyear* indication might have improved matters; that hope was not to be. In the case of *Attorney-General's reference (No. 48 of 2006) (R. v. Farrow)* [2007] 1 Cr. App. R. (S.) 558 the Court of Appeal considered that even where an offender had pleaded following a *Goodyear* indication the Court of Appeal would not be prevented from considering any Reference by the Attorney-General merely because prosecuting counsel failed to remind the Court of the possibility of a Referral. Indeed, the Court 'reminded itself' that there was also a positive duty on Defence Advocates to, "advise his client that any sentence indication given by the judge remains subject to the entitlement of the Attorney-General to refer an unduly lenient sentence to the Court of Appeal".

It might be thought that the Court considered there to be a difference between the failure to mention the possibility of a Reference and the actual involvement of the Prosecution in the sentencing process. Wish that it was so easy: a case in point is *Attorney-General's reference (Nos. 25 and 26 of 2008) (R. v. Waters, R. v. McCarry)* [2009] 1 Cr. App. R. (S.) 648 where Prosecution counsel at trial had acquiesced in a Judge's mistaken indication as to the appropriate starting point when fixing a minimum term for an offence of murder - it remained

open to the Attorney-General to refer the sentence to the Court of Appeal as being unduly lenient where the offender had done nothing in reliance on the acquiescence.

This is perhaps in contrast to in *Attorney-General's reference (No. 79 of 2009) (R. v. Haines)* *The Times*, 17th March 2010 where it was not open to the Attorney-General to refer a sentence as being unduly lenient to assert that the judge proceeded on a wrong factual basis where it had been open to the Prosecution to have corrected it at trial but they had not sought to do so, though it may be that this case will be considered to have been decided on its own facts (no full transcript is available). One summary records, "*Where the sentencing judge had accepted a submission that a defendant had pleaded guilty at the earliest opportunity, that submission not having been opposed by the Prosecution, the point could not be re-opened on a reference by the Attorney-General*".

Neither of these cases were referred to in *Attorney-General's reference (Nos. 46 & 47) (R. v. Greaney, R. v. Westbrook)* [2010] EWCA Crim 3297 (indeed from the report no authorities were referred to); in this case the Court of Appeal allowed a reference where the Judge identified the wrong starting point in the relevant Definitive Guideline, and gave too much credit for a late plea. What is unknown from the report is the extent of the involvement of Prosecuting Counsel. To many practitioners it will seem almost incredible that the Prosecution could not have been positively involved in these parts of the sentencing process.

For a case where no proper basis of plea was provided and prosecuting counsel appears not to have considered the basis offered in mitigation, see *Attorney-General's reference (No. 50 of 2010) (R. v. Khan)* [2010] EWCA Crim 2872): Counsel for the Attorney-General could not, "*avoid accepting and [the Court of Appeal] cannot avoid making passing reference to the fact that the court was not well served by the advocates appearing on behalf of the Crown and indeed in due course [the Court] had to say he seems not all that well to have been served by the advocate appearing on behalf of the defence either*" (ouch).

## So how can a practitioner seek to avoid having a case Referenced?

Whilst accepting that this may appear to be course prescribed by a 'counsel of perfection', and drawing upon the wisdom of previous articles, it seems that the following will at least provide some protection for the lay client and for Counsel:

- (i) Prepare a written Basis of Plea;
- (ii) Make sure that the Basis is 'realistic';
- (iii) If prosecuting, carefully consider that basis and make appropriate representations as soon as possible;

- (iv) Seek agreement as to the correct Guideline where possible and direct the Judge to it (explaining any differences of opinion);
- (v) In the event that a Goodyear indication is sought and the Judge indicates a sentence out of line with what might be anticipated, prosecutors should remind the Judge of the Attorney-General's powers to refer a case, and defending Counsel must tell their client of that power.
- (vi) If Prosecuting and something is advanced in Mitigation that is palpably wrong (e.g. timing of plea or character), do not sit demurely on your hands: say something.

If having done all that, the Defence Advocate gets 'a result': put that down to great advocacy and learn from it!

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