

SECTION 25(4)

RIGHT TO REVIEW OF CONVICTION AND SENTENCE

Section 25

- (4) Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law.

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POLICY TRIGGERS: DO I NEED TO CONSIDER SECTION 25(4)?

You will need to consider s. 25(4) in assessing legislation, a policy or a program where it:

- amends or alters the statutory rights or procedures under which a person convicted of an offence is able to appeal against or seek review of the conviction or sentence;
- amends or alters the criteria under which legal aid is granted for criminal appeals.

These policy triggers are not comprehensive.

DISCUSSION

Sub-section (4) of s. 25 of the Charter protects the right to have a conviction and sentence for a criminal offence reviewed by a higher court. This is a widely accepted civil and political right and reflects article 14(5) of the ICCPR.

When does section 25(4) apply?

Sub-section (4) of s. 25 applies where a person has been convicted of committing a criminal offence. This includes where the accused has been found to have committed an offence but a conviction has not been recorded.

What does it mean?

Sub-section (4) of s. 25 recognises that a person convicted of a criminal offence has the right to appeal against the conviction and the sentence imposed. The right applies to all offences, not simply the most serious.²⁶⁵

An appeal carries with it the same protections that are afforded the accused at trial, including, for example, the right to adequate time and facilities, and access to an interpreter, and the right to have the appeal or review heard without delay.²⁶⁶ The reason for this is that a criminal charge is not finally determined until all avenues of appeal have been exhausted.²⁶⁷

²⁶⁵ *UN Human Rights Committee, General Comment 13, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003) [17].*

²⁶⁶ *Evans v. Trinidad and Tobago*, Human Rights Committee, Communication No. 908/2000, UN Doc. CCPR/C/77/D/908/2000 (5 May 2003) [6.3].

²⁶⁷ *Delcourt v. Belgium* (1970) 11 Eur Court HR (ser A) [25]; (1979-80) 1 EHRR 355 [25].

This right means that a person convicted of a criminal offence must be provided with an opportunity to seek review by a higher court of the conviction made against him or her and any sentence imposed.²⁶⁸

Higher court

A person convicted of a criminal offence must be given an opportunity for an appeal or review of the conviction and the sentence, and the appeal or review must be heard by a court or tribunal that is higher than the court or tribunal that made the original decision. It is not sufficient that the conviction or sentence is confirmed by the same judge.²⁶⁹ However, the court hearing the appeal or conducting the review may be a different division of the same court providing it is differently constituted, such as the Court of Appeal of the Supreme Court of Victoria.

The court hearing the appeal or conducting the review must have the power to overturn, replace or affirm the conviction or sentence.

Nature of the appeal

The right to an appeal must be given substance so that it is an effective right of appeal or review.²⁷⁰ The mere presence of an appeal process may not be sufficient if the person is unable adequately to present his or her case to a higher court. A dismissal of an application for leave to appeal without any written reasons being given would violate this right.²⁷¹ An effective appeal requires a 'collective judicial decision' that is arrived at after a hearing that should be held in public.²⁷²

268 *Reid v. Jamaica*, Human Rights Committee, Communication No. 355/1989, UN Doc. CCPR/C/51/D/355/1989 (20 July 1994).

269 *Salgar de Montejo v. Colombia*, Human Rights Committee, Communication No. 64/1979, UN Doc. CCPR/C/15/D/64/197 (24 March 1982).

270 *Reid v. Jamaica*, Human Rights Committee, Communication No. 355/1989, UN Doc. CCPR/C/51/D/355/1989 (20 July 1994 [14.3]; *Taito v. R* (2002) 19 CRNZ 224 [12].

271 *Taito v. R* (2002) 19 CRNZ 224.

272 *Taito v. R* (2002) 19 CRNZ 224, 236.

The right will usually require that there is an oral hearing, although this may depend on the nature of the proceedings and the scope of the appeal.²⁷³ For example, if the issues are not complex and it would not unreasonably prejudice the accused, in the interests of expediency it is possible that the appeal could be heard by the court 'on the papers', without any oral hearing.

This right does not require the appeal court to conduct a retrial of the factual issues, and does not require that any further evidence be led.²⁷⁴ However, a right to judicial review instead of appeal might fall short of the requirements of sub-section (4) of s. 25.²⁷⁵

In international human rights law, the opportunity to 'seek leave to appeal' is ordinarily not considered sufficient. However, if the hearing of an application for leave to appeal entails a full review of the evidence and the law, the requirements in s. 25(4) would probably be met.²⁷⁶

Multiple appeals

The right under s. 25(4) is only to one appeal or review. However, if there is provision for more than one appeal within the court hierarchy, the convicted person must be given a fair opportunity to pursue each of those appeals.²⁷⁷

273 See *Taito v. R* (2002) 19 CRNZ 224 and *Monnell and Morris v. United Kingdom* (1987) 115 Eur Court HR (ser A); (1988) 10 EHRR 205.

274 *Perera v. Australia*, Human Rights Committee, Communication No. 536/1993, UN Doc. CCPR/C/53/D/536/1993 (28 March 1995); *H T B v. Canada*, Human Rights Committee, Communication No. 534/1993, UN Doc. CCPR/C/49/D/534/1993 (3 November 1993).

275 *Domukovsky v. Georgia*, Human Rights Committee, Communications Nos 623/1995, 624/1995, 626/1995, 627/1995, UN Doc. CCPR/C/62/D/626/1995 (29 May 1998).

276 *Lumley v. Jamaica*, Human Rights Committee, Communication No. 662/1995, UN Doc. CCPR/C/65/D/662/1999 (30 April 1999).

277 *Henry v. Jamaica*, Human Rights Committee, Communication No. 230/1987, UN Doc. CCPR/C/43/D/230/1987 (19 November 1991).

REASONABLE LIMITS ON THE RIGHT TO REVIEW OF CONVICTION AND SENTENCE

As with all of the human rights protected by the Charter, the right of a person convicted of a criminal offence to have the conviction and sentence reviewed by a higher court may be subject to reasonable limitations that can be demonstrably justified in a democratic society in accordance with s. 7 of the Charter. You should refer to Part 2 of these Charter Guidelines for further information on s. 7.

KEY POINTS TO REMEMBER

- Section 25(4) applies to persons who have been convicted of a criminal offence.
- A person convicted of a criminal offence has a right to appeal to a higher court and legislation, policies and programs must take account of this right.

MEASURES TO IMPROVE COMPLIANCE

To improve compliance with s. 25(4), ensure that:

- policy, programs and legislation establish a statutory framework for appeals against conviction and sentence in all criminal matters;
- legislation clearly sets out what avenues of appeal exist following a conviction;
- procedures for lodging an appeal are established including a reasonable timeframe for lodging an appeal;
- legislation provides that the appellant can make oral submissions unless there are good reasons for restricting the form of appeal to one that is done simply 'on the papers' (without an oral hearing).

RELATED RIGHTS AND FREEDOMS

When considering whether legislation, a policy, or a program might give rise to an issue under s. 25(4), you should also consider the following additional rights and freedoms:

- the right to a fair hearing (s. 24);
- the right to the relevant minimum guarantees in criminal proceedings (s. 25(2));
- the rights of children in criminal proceedings (ss. 23 and 25(3));
- the right to recognition and equality before the law (s. 8).

HISTORY OF THE SECTION

Section 25(4) is modelled on article 14(5) of the ICCPR.

Similar rights exist in comparative law. Refer to Appendix H for further information.

BIBLIOGRAPHY

Case Law

1. *Delcourt v. Belgium* (1970) 11 Eur Court HR (ser A).
2. *Monnell and Morris v. United Kingdom* (1987) 115 Eur Court HR (ser A).
3. *Spencer v. Wellington District Court* [2000] 3 NZLR 102.
4. *Taito v. R* (2002) 19 CRNZ 224.

United Nations Human Rights Committee Jurisprudence

5. *Domukovsky v. Georgia*, Human Rights Committee, Communications Nos 623/1995, 624/1995, 626/1995, 627/1995, UN Doc. CCPR/C/62/D/626/1995 (29 May 1998).

6. *Evans v. Trinidad and Tobago*, Human Rights Committee, Communication No. 908/2000, UN Doc. CCPR/C/77/D/908/2000 (5 May 2003).
7. *H T B v. Canada*, Human Rights Committee, Communication No. 534/1993, UN Doc. CCPR/C/49/D/534/1993 (3 November 1993).
8. *Henry v. Jamaica*, Human Rights Committee, Communication No. 230/1987, UN Doc. CCPR/C/43/D/230/1987 (19 November 1991).
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12. *Salgar de Montejo v. Colombia*, Human Rights Committee, Communication No. 64/1979, UN Doc. CCPR/C/15/D/64/197 (24 March 1982).

Other Sources

13. *UN Human Rights Committee, General Comment 13*, Article 14 (Twenty-first session, 1984), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev.6 at 135 (2003).