Criminal Law Week

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Issue 27 **22 July 2020**

New cases

(digesting all cases reported for the first time since the previous issue)

Evidence and procedure

1. Abuse of process – *R. (Kombou) v Crown Court at Wood Green* [2020] EWHC 1529 (Admin), unreported, 12 June 2020, DC.

(1) *R. v Scott (Keith) and others*, CLW/20/01/1, [2019] EWCA Crim 205, [2020] 4 W.L.R. 2, CA, makes clear that a prosecuting authority, when deciding whether to commence a prosecution, must not be influenced by the prospect of a financial benefit accruing to it as a result of a confiscation order. The Home Office's Asset Recovery Incentivisation Scheme (ARIS), which provides that the investigating authority and the prosecuting authority both receive 18.75% of the funds recovered under a confiscation order, is capable of giving rise to a serious conflict of interest on the part of a prosecuting authority, or to the appearance of such a conflict. The authority must be scrupulous to ensure that a decision to prosecute is not motivated, and does not appear to be motivated, by the prospect of financial gain. It is not, however, the case that a decision to prosecute will inevitably be open to successful challenge if it might eventually lead to a confiscation order from which the prosecuting authority will benefit or if the possibility that a confiscation order might be made has been considered prior to a decision to prosecute being taken. There is a crucial distinction between investigators legitimately considering the possibility of confiscation proceedings, and the decision-maker being improperly motivated to decide in favour of prosecution by the prospect of financial gain to the authority. There is force in the argument that, when deciding whether a prosecution would be in the public interest, it may be legitimate to consider whether a breach of planning enforcement has resulted in a financial benefit of which the offender could be stripped by the court if he were prosecuted and convicted, but which he would otherwise be able to retain. When considering the suggested appearance of improper motivation of the decision to prosecute, it is important to remember that the yardstick is the view of an observer who is both fair-minded and informed. In this context, it means an observer invested with the knowledge that ARIS is a system introduced by the government, not a private

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Up to date to

The following sources have been digested to the date or part indicated; entries in bold indicate that a further issue or part has been published and digested since the previous issue:

[2020] A.C. 664 (part 6)
[2020] Q.B. 702 (part 6)
[2020] Ch. 420 (part 6)
[2020] Fam. 266 (part 6)
[2020] 1 W.L.R. 2954 (part 27)
[2020] 3 W.L.R. 232 (part 27)
[2020] 4 W.L.R. 92
[2020] 3 All E.R. 448 (part 5)
[2020] 2 Cr.App.R. 11 (part 2)
[2020] 2 Cr.App.R.(S.) 24 (part 2)
(2020) 71 E.H.R.R. 5 (part 1)
[2020] R.T.R. 23 (part 4)
[2020] S.T.C. 1379 (part 27)
[2020] 1 F.L.R. 1398 (issue 12)
[2020] B.C.C. 442 (issue 165)
[2020] Costs L.R. 349 (part 2)
[2020] Crim.L.R. 768 (issue 8)
***The Times*, 17 July 2020**
[2020] 5 Archbold Review (29 June)
[2020] A.C.D. 65 (part 3)
(2020) 170 N.L.J. 7895 (17 July 2020)
(2020) 163(6) S.J. (June/July)
[2020] L.S. Gazette, 13 July
[2020] C.L.J. 199 (March)
(2020) 136 L.Q.R. 512 (July)
(2020) 83 M.L.R. 928 (July)
(2020) 84 J.C.L. 270 (number 3)

Criminal Law Week digests case reports and comments of significance to the criminal law practitioner in the following sources: (full text reports) the Law Reports (Appeal Cases (A.C.), Queen's Bench (Q.B.), Chancery (Ch.) and Family (Fam.)), the Weekly Law Reports (W.L.R.), the All England Reports (All E.R.), the Criminal Appeal Reports (Cr. App.R.), the Criminal Appeal Reports (Sentencing) (Cr.App.R.(S.)), the European Human Rights Reports (E.H.R.R.), the Road Traffic Reports (R.T.R.), Simon's Tax Cases (S.T.C.), Lloyd's Law Reports: Financial Crime (Lloyd's Rep. F.C.), the Family Law Reports (F.L.R.), British Company Cases (B.C.C.), and the Costs Law Reports (Costs L.R.); (summary reports and journals) *The Times*, the Criminal Law Review (Crim.L.R.), Archbold Review, the Administrative Court Digest (A.C.D.) (formerly the Crown Office Digest (C.O.D.)), the New Law Journal (N.L.J.), the Solicitors' Journal (S.J.), the Law Society Gazette (L.S. Gazette), the Cambridge Law Journal (C.L.J.), the Law Quarterly Review (L.Q.R.), the Modern Law Review (M.L.R.), and the Journal of Criminal Law (J.C.L.).

arrangement devised by the prosecuting authority for its own advantage, that legal consequences, in terms of the powers of the court, follow upon conviction, that those legal consequences may bring financial consequences for the offender, and that any financial benefit to the prosecuting authority accrues only after, and as a result of, the court's exercise of its powers.

(2) In the instant case, the defendant had unsuccessfully applied to vacate his guilty plea to an offence of failing to comply with an enforcement notice, contrary to section 179(2) of the *Town and Country Planning Act* 1990, on the ground that, if the prosecuting agency had disclosed evidence (that had since been disclosed) at the magistrates' court hearing, the defence would have been able to make a successful abuse of process application, because the prosecution had been driven by an improper motive: the prospect of gain from a confiscation order. Having found that the decision to prosecute was not driven by an improper motive for gain and was independent, fair and objective, the judge had not erred by not finding an appearance of an improper motive. Further, the judge was correct to consider the merits of the abuse of process argument when deciding whether she should exercise her discretion to allow the defendant to vacate his guilty plea. The jurisdiction of the court to stay a prosecution as an abuse of process in circumstances of prosecutorial impropriety is not confined to cases in which the impropriety touches directly upon the ingredients of the offence charged.

Comment:

Criminal practitioners will shake their heads in wonder. The claimant was prosecuted after he had complied with the enforcement order. That fact set alarm bells ringing amongst his legal team. Who took the decision to prosecute? Was it influenced by the prospect of ARIS?

Although, at [62] and [63], the court acknowledged that a local authority is required to the follow the Code for Crown Prosecutors (CLW/18/39/29) and is subject to the same duties

as other prosecuting authorities, these citations of principle, once stated, were traduced.

The code is predicated upon the decision to prosecute being taken by a lawyer independent of the investigation. Here, the decision that it was in the public interest to prosecute was taken by the head of the planning department, a non-lawyer. His departmental funding derived in part from ARIS. The salary of the lawyer with nominal conduct of the case was paid out of ARIS, as was the salary of the financial investigator. To characterise this structure as "independent, fair and objective" is surely an abuse of language.

It was not the only abuse. The claimant, rightly suspecting that the local authority had conducted some pre-summons enquiries under the *Proceeds of Crime Act* 2002 (CLW/02/32/5), sought disclosure of them because they were likely to support his abuse of process application. Two district judges made disclosure orders to which the authority responded by denying that considerations of confiscation had ever taken place. Consequently, the claimant abandoned his abuse application and pleaded guilty. During the resulting confiscation proceedings, it transpired that officers of the planning department, together with the authority's financial investigator, had been investigating the defendant with a view to a confiscation order for nearly two years prior to the issue of the summons. The extent of the investigation included the obtaining of three production orders under section 345 of the 2002 Act in respect of the claimant. Such orders could only have been made if there were an ongoing formal confiscation investigation as of the date of the application.

How did the court address such flagrant breaches of the duty to disclose? At [96], Holroyde LJ observed:

> "We do not share [defence counsel's] view of the importance of the material which was belatedly disclosed … we accept that it showed that a number of Enfield's officers were considering whether there would be confiscation proceedings and what benefit [the claimant] might be ordered to repay, and we accept that Mr Higham [the head of the planning department] was copied in to some of the correspondence. We do not however see that it provided any material support for the assertion that Mr Higham was or may have been improperly influenced in his decision as to prosecution by consideration of financial gain for Enfield."

So when considered alongside a decision to prosecute made by an officer not authorised under the Code to make it, and who had earlier been in receipt of ARIS-related material and whose department benefited from ARIS, the fact that the claimant, his legal team and the magistrates' court were misled mattered not at all.

As a criminal cause or matter, the only appeal lay to the Supreme Court, which required the instant court to certify. They refused. They are not required to give reasons and did not.

Mark Bowen, guest comment (Shearman Bowen)

2. Bad character – *R. v Umo* [2020] EWCA Crim 284, [2020] Crim.L.R. 728, CA, 28 February 2020.

The appellant's co-accused, B, was involved in dealing Class A drugs, assisted by N. N was robbed of mobile telephones, money and drugs that "belonged" to B. The prosecution case was that B asked the appellant, U, to help trace the people responsible for the robbery of N, and that U provided B with a revolver, which she had been hiding on his behalf, to be used in a revenge attack. The prosecution alleged that U had tried to use M, with whom she shared accommodation and who was called as a prosecution witness at trial, to provide or obtain information on the identity of those responsible for the robbery of N. M did not assist and instead contacted the police in May 2018 to complain she had been assaulted by U, who she claimed was angry at her lack of cooperation. At trial, the judge refused permission under section 100(1)(b) of the *Criminal Justice Act* 2003 (CLW/03/45/40) to adduce bad character evidence in relation to M that was said to show that she was prepared to invent false allegations of a serious criminal nature and to blackmail

the intended victim of those fictitious allegations. The evidence comprised a text message and the bank account details of the potential blackmail victim.

M's credibility was clearly a matter in issue in the proceedings and it was of substantial importance in the context of the case as a whole. It provided prima facie evidence that M was prepared to blackmail a "key worker" by threatening to report a false allegation to the police of a sexual nature if he failed to transfer a substantial sum of money to her bank account. The judge erred in concluding that the allegation was not evidence of a false complaint and that it was simply an "allegation". The account of the blackmail victim and the text message were both pieces of "hard evidence". The judge was right, however, to consider whether the evidential dispute was capable of resolution by the jury. That is an important factor in such circumstances. Although he correctly considered whether the evidence would have substantial probative value in relation to M's credibility, he wrongly determined that the issue was irresolvable. In the circumstances, the judge had erred in refusing to admit the bad character evidence. U's convictions were, accordingly, unsafe.

Key cases cited: Considered – *R. v Braithwaite*, CLW/10/25/1, [2010] EWCA Crim 1082, [2010] 2 Cr.App.R. 18, CA; *R. v Dizaei*, CLW/13/14/3, [2013] EWCA Crim 88, [2013] 1 W.L.R. 2257, CA; *R. v Luckett* [2015] EWCA Crim 1050, unreported, 14 May 2015, CA.

***Archbold* 2020 reference**: 2003 Act, s.100, § 13-20.

Commentary by Matt Thomason at [2020] Crim.L.R. 730.

3. Duplicity – *R. v Morgan and Cole* [2020] EWCA Crim 378, [2020] 2 Cr.App.R. 9, CA, 13 March 2020.

The defendants were the parents of an infant child who died aged nine weeks. The cause of death could not be established conclusively, but there were features indicating an asphyxia mechanism. He had a bite mark to his right forearm and three rib fractures in his left ribcage. The defendants were prosecuted for a number of offences, including cruelty to a child, contrary to section 1 of the *Children and Young Persons Act* 1933. The particulars in respect of those counts were that each respective defendant had committed the offence by "inflicting, or encouraging the infliction of, the bite mark and/or the fractured ribs or failing to prevent the infliction of those injuries". They were both convicted of, inter alia, that offence.

It is settled law that, although, if more than one offence is alleged in a single count it is bad for duplicity, it is nonetheless lawful to include in a single count multiple acts included in one activity: *DPP v Merriman* [1973] A.C. 584, HL. In the instant case, the cruelty counts were not bad for duplicity. The inclusion of the two separate injuries within the counts fell within the scope contemplated by rule 10.2 of the *Criminal Procedure Rules* 2015 (SI 2015/1490) (CLW/15/28/20) and practice direction 10A.11 and 10A.14 of the *Criminal Practice Directions* 2015, CLW/15/35/2, [2015] EWCA Crim 1567, unreported, 29 September 2015, Lord Thomas CJ. On the prosecution case, the injuries were sustained during a course of conduct within the family flat in the context of two young parents failing properly to care for the well-being of their baby. The victim on each occasion was the same. The location was the same. Although the precise mechanism by which injury was inflicted was different, the context and motivation were likely the same. The incidents took place over a short period and the defence advanced by each defendant to each incident was the same.

***Archbold* 2020 references**: 1933 Act, s.1, § 19-375; 2015 rules, r.10.2, Appendix B-141; CrimPD 10A.11 and 10A.14, Appendix B-151.

Sentence

General principles

4. Age of offender – *R. v Adan* [2020] EWCA Crim 272, [2020] 2 Cr.App.R.(S.) 24, CA, 19 February 2020.

The appellant (aged 17 at the time of the first offence, 18 at sentence/subject to a youth rehabilitation order for possession of a bladed article at the time of the offending/resisted attempts to be diverted from gang life) was a senior member of a gang involved in a long running dispute with a rival gang. Following his friend's death as a result of that dispute, the appellant and two others fired two live rounds at members of the rival gang. They

did not hit anyone but, as they left the scene, the firearms were brandished at cars obstructing their path. All three had brandished at least one of two handguns during the incident. Two to three months later the appellant was caught running two drug lines, dealing heroin and crack cocaine. He was in control of the lines, receiving orders for drugs over the phone and arranging for runners, including some vulnerable persons, to deliver the drugs. The appellant pleaded guilty to two offences of conspiracy to supply Class A controlled drugs while still 17. He was convicted after trial, shortly after his 18th birthday, of possessing a firearm with intent to endanger life and possessing an imitation firearm with intent to cause fear of violence. He was sentenced to an extended sentence of 15 years' detention in a young offender institution with an extended licence period of three years in respect of possessing a firearm with intent to endanger life, with concurrent, lesser sentences on the other counts.

The judge, although sentencing an 18-year-old, should have taken as his starting point the sentence that would have been imposed on the appellant as a 17-year-old. In the circumstances of this case, it would not be appropriate to depart from that sentence simply because the appellant had attained the age of 18 by the time his trial was heard. He was at least as mature as others of his chronological age and perhaps more mature and insightful than many of them. However, he was recruited into gang culture at a very young age. In such circumstances, a judge faces a difficult task in assessing the inter-relationship between the youth and immaturity that may lead an adolescent to aspire to gang membership, and the criminality that may thereafter become entrenched as a result of gang membership. Such criminality may of course be relevant to an assessment of dangerousness and to a decision as to the form of sentence necessary to protect the public. But in the assessment of the seriousness of an offence, a young offender is usually treated more leniently than a mature adult offender, and it may well be unfair to deny a young offender the benefit of that approach on the basis that he displays attitudes that themselves reflect his exposure to malign influences when he is young and impressionable. In the case of a mature adult offender, the total custodial term for offences as serious as these would have been in the range of 18 to 20 years. The appellant should have received a total custodial term roughly equivalent to two-thirds of the appropriate adult sentence. An extended sentence of 13 years' detention in a young offender institution with an extended licence period of three years would be substituted.

5. Disparity – *R. v Lothian* [2020] EWCA Crim 249, [2020] 2 Cr.App.R.(S.) 16, CA, 28 January 2020.

The victim had gone to meet A (no age given/nine convictions for 15 offences, including attempted street robbery, and possession of a BB gun for which he was still on licence), for a chat. A was in the passenger seat of a car driven by F (no age given/no relevant convictions) and the victim got into the backseat. The appellant (no age given/14 convictions for 27 offences, including robbery, two burglaries, a theft from the person, discharging noxious liquid gas, and possession of a prohibited weapon and an offensive weapon) and a further individual then immediately got in on either side of the victim, trapping him in. The car started moving, preventing the victim from escaping. They demanded money from him and threatened him with a screwdriver, stabbing him with it repeatedly in the leg and hand, as well as hitting him with fists and elbows. They took his phone, ring and neck chain, and made him call his 15-year-old brother to put the money he had at home outside his house. A knife was put to his throat to prevent him from speaking in a language other than English. The offenders retrieved £300 to £400 from the victim's house, but were convinced he had more money and drugs. They continued to threaten him, trying to use a drill on his legs (which jammed), assaulting him and threatening him with the screwdriver and a butterfly knife. Around an hour and forty-five minutes after he had got into the car, he was thrown out of it, injured and bleeding. He had 14 superficial stab wounds, 11 to his upper thigh and three to his hand, as well as minor cuts, fractures to the cheek and nose, bruising, and a chipped tooth. A and the appellant were convicted of kidnapping, causing grievous bodily harm with intent and robbery. A was sentenced to an extended sentence of 11 years' imprisonment and

four years of extended licence, and the appellant was sentenced to 12 years' imprisonment. F pleaded guilty to kidnap and causing grievous bodily harm with intent, and received seven years and six months' imprisonment.

There was no disparity between the sentence imposed on the appellant and that imposed on his co-offenders, A and F, that could cause right-thinking members of the public to consider that something had gone wrong with the administration of justice in the sentencing of this appellant. Although *R. v Round*; *R. v Dunn*, CLW/10/01/5, [2009] EWCA Crim 2667, [2010] 2 Cr.App.R.(S.) 45, CA, and *R. v Burinskas (Att.-Gen.'s Reference (No. 27 of 2013))*; *R. v Phillips (Anthony)*; *R. v Ahmad (Goran Kamal)*; *R. v Hanson (John)*; *R. v Donegan (David)*; *R. v Smith (Paul Simon)*; *R. v Matthews (Michael Richard)*; *R. v Coleman (Barry Tyrone) (Practice Note)*, CLW/14/14/6, [2014] EWCA Crim 334, [2014] 1 W.L.R. 4209, CA, are authority for the principle that early release, licence and their various ramifications should be left out of account upon sentencing, that principle is aimed at the passing of the extended sentence itself, indicating that, when imposing an extended sentence, that reality should not be dissipated by adjusting the sentence so as to take from its effect. It is far from saying that, in comparing sentences, the court should ignore the reality. Whilst A was the instigator and prime mover, the appellant was a willing and full partner in what happened and, unlike A, sat with the victim in the back seat where the majority of the violence was inflicted. Moreover, whilst A had far more recent convictions and many of the appellant's convictions were from when he was young, both had appalling records; comparisons between them were invidious.

Key cases cited: Considered – *R. v Fawcett* (1983) 5 Cr.App.R.(S.) 158, CA.

Comment:

The court in the instant case seems to have confused even further the rules about considering the effect of release provisions in sentencing. If, as held in *Burinskas*, a court imposing an extended sentence must impose the same custodial term that it would impose if it were imposing a determinate sentence, how could it be a defence to an argument of disparity by offender B to say that offender A received an extended sentence if A received a substantially shorter custodial term than B in the same circumstances? It would be, under the current law, inappropriate for the judge to have reduced A's custodial term because the judge was imposing an extended sentence, and the right-thinking member of the public must be considered to be imbued with that knowledge. While it was not decisive in this case, it is suggested that the appellant was correct to say that the nature or effect of the extended sentence (i.e. the extended licence period and the differing release provisions) imposed on A should be ignored when considering any disparity between the custodial terms imposed on A and B.

Sebastian Walker

6. Guilty plea – appropriate credit for plea that was late owing to the mental health of the offender: see § 7 below.

7. Mental health – *R. v Woods* [2020] EWCA Crim 84, [2020] 2 Cr.App.R.(S.) 14, CA, 21 January 2020.

The appellant (aged 34/31 convictions for 76 offences, including 27 for commercial burglaries/traumatic childhood/introduced to criminality at young age by uncles who took him on burglaries/index offence took place nine days after release from prison/long-term partner expecting their first child) broke into a mobile phone shop at night and forced the safe open. The alarm having gone off, he was apprehended shortly thereafter with £4,600 in cash and mobile phones worth some £5,000. He had also caused approximately £2,500 in damage to the premises. In police interview, he made full admissions, except he claimed not to have known that the shop was a phone shop. No plea was indicated in the magistrates' court, but he pleaded guilty to commercial burglary at the plea and trial preparation hearing at the Crown Court. He was sentenced to 30 months' imprisonment, which included a 25% discount for the guilty plea.

The appellant suffered from a mental and behavioural disorder, secondary to polysubstance misuse, and an emotionally unstable personality disorder, and had discussed suicide recently before the index offence with his GP and partner. He was in very poor emotional shape when he appeared at the magistrates' court, and had also mentioned killing himself to his solicitor. He was evidently depressed and not thinking clearly. There was never an intention to go to trial and, by declining to enter a guilty plea immediately, he was simply cutting off his nose to spite his face. A full reduction of one-third for plea should have been given in those circumstances. Moreover, having regard to the guidance given in *R. v PS*; *R. v Dahir*; *R. v CF*, CLW/20/02/9, [2019] EWCA Crim 2286, [2020] 4 W.L.R. 13, CA, the fact that the appellant was in the throes of a moderately severe depressive illness was capable of amounting to a significant mitigating factor under the guideline for non-domestic burglary (CLW/11/37/16) reducing culpability. Some further reduction should be made on that basis. A sentence of two years' imprisonment would be substituted.

***Archbold* 2020 reference**: Sentencing Council's guideline on burglary offences, Appendix S-17.11 to S-17.14.

Particular offences

8. Affray – *R. v Israel* [2020] EWCA Crim 222, [2020] 2 Cr.App.R.(S.) 22, CA, 18 February 2020.

The appellant (aged 38/three previous convictions in 2006 for 12 offences, including breaches of an antisocial behaviour order, disorderly behaviour, resisting a constable and breach of a court order) had been in a bar all day. He was drunk and loud. At about 7 pm, he was refused service. He became threatening and aggressive, and was asked to leave. This led to an altercation in which someone hit a door supervisor in the face with a glass that broke, causing a deep, penetrative injury near his eye, for which he required stitches. The appellant was convicted of affray and sentenced to 12 months' imprisonment.

The judge said that the affray would not have fallen within the highest category in magistrates' court guideline for affray (CLW/17/04/9), namely, "fight involving a weapon/throwing objects, or conduct causing risk of serious injury". However, the affray as a whole did involve conduct causing risk of serious injury, as was evidenced by the injury that was sustained. A sentence for affray has to reflect not merely the individual's own conduct, but the affray as a whole, especially in the case of someone like the appellant who started the incident. In any event, the judge was right that the magistrates' court guideline for affray (CLW/17/04/9) does not apply in the Crown Court, save on appeal or committal for sentence. There was no merit to the argument that the judge ought to have imposed a sentence within the second category of the guideline. The sentence was not excessive, let alone manifestly excessive.

***Archbold* 2020 reference**: Sentencing Council's magistrates' court sentencing guidelines, Appendix S-11.74.

Comment:

The offender in this case was sentenced prior to the coming into force of the Sentencing Council's guideline for affray (CLW/19/38/15). This appeal, however, provides confirmation that the Sentencing Council's magistrates' court guidelines do not apply in the Crown Court. Clearly, where those guidelines provide for committal to the Crown Court, they provide little in the way of assistance, but, where a guideline provides a sentencing starting point and category range (perhaps because the offender has only been convicted of a lesser alternate offence or elected trial in the Crown Court rather than being sent), it would seem to be highly persuasive. It is hard to see why, if a guideline indicates that a certain sentencing range is appropriate for the seriousness of the offence in the magistrates' court, a sentence in excess of that range would be commensurate with that seriousness in the Crown Court.

Sebastian Walker

9. Assault occasioning actual bodily harm – *R. v Burnham* [2020] 2 Cr.App.R.(S.) 20, CA, 14 February 2020.

A car was stolen from the employer of the applicant (aged 21 at sentence/of previous good character/good work record). He and eight or more others found what they believed to be the car and pulled their vehicles up, blocking it in. The applicant approached the car and started banging on the driver side window, punching it so that it smashed and hitting the occupant. Others also started to attack the occupant, punching and kicking him whilst dragging him out of the car. The victim had a prosthetic leg, which detached as he was dragged out of the car. The group then took the car and drove off. The car in fact belonged to the victim and was not stolen. The applicant pleaded guilty to assault occasioning actual bodily harm and was sentenced to eight months' imprisonment.

The judge could not be faulted for placing this offence into category 1 of the guideline (CLW/11/11/22). The victim was particularly vulnerable by virtue of his prosthetic limb and being alone in his car at night. Whilst the applicant was unaware of the disability, the vulnerability of the victim was not dependent on whether the applicant knew of his particular difficulties. Had the victim been targeted because of his disability, a longer sentence would have been appropriate. The assault was also sustained and so there were two factors indicating greater harm. The case was one of higher culpability as the applicant had played a leading role within the group and someone, albeit not the applicant, had used a shod foot as a weapon. The applicant was the lead of the group, the first out the car and the first to attack, and, thus, bore responsibility for the totality of the attack on the victim, not just the limited role he played. The offence was also premeditated in that violence was planned from the outset. Finally, the sentence imposed was not excessive and, despite a number of factors that might justify suspension being present, the judge was right to conclude that this case required immediate imprisonment as punishment. Deciding whether a sentence should be suspended is not a mathematical exercise counting the number of factors in favour of suspension against those in favour of imposing an immediate sentence. It is for the judge to decide what weight to give each factor in each individual case.

Key cases cited: Considered – *R. v Hussain and O'Leary*, CLW/20/12/10, [2019] EWCA Crim 1542, [2020] 1 Cr.App.R.(S.) 32, CA.

***Archbold* 2020 reference**: Sentencing Council's guideline on assault, Appendix S-16.11 to S-16.14.

10. Burglary – appellant suffering from depressive illness at the time of the offence: see § 7 above.

11. Conspiracy to burgle – *R. v Owen and Hamilton* [2020] EWCA Crim 255, [2020] 2 Cr.App.R.(S.) 18, CA, 12 February 2020.

The appellants, O (aged 64/seven convictions for 18 offences, including eight theft and kindred offences, but no convictions since 2008/hardworking/chronic pulmonary disruptive disorder/wife was unwell) and H (aged 58 at time of sentencing/34 convictions for 117 offences, including 52 for theft and kindred offences), were members of a gang who unsuccessfully attempted to steal tobacco worth approximately £12 million, in the course of which a security guard was bound, threatened with a sledgehammer, kicked and thrown into a toilet (albeit by other members of the gang). The plan was thwarted because the four cabs driven by the gang could not be coupled to the trailers containing tobacco. H pleaded guilty to, inter alia, conspiracy to commit burglary with intent to steal involving a non-dwelling, and O was later convicted of the same offence. O was sentenced to nine years' imprisonment and H to seven years' imprisonment respectively.

It is permissible in an appropriate case to sentence substantially above the upper range within the guideline for non-domestic burglary (CLW/11/37/16): see, e.g., *R. v Stanton and Wildman*, CLW/14/19/5, [2013] EWCA Crim 1456, [2014] 1 Cr.App.R.(S.) 56, CA. This was a serious case, involving greater harm and where every single one of the factors indicating higher culpability were present (save that the appellants were not themselves armed), including a "significant degree of planning or organisation". While neither O nor H were ringleaders, both were plainly integrally involved and were part of an enterprise that involved a security guard being

threatened and assaulted. It was, therefore, a case where a departure from the sentencing range for a category 1 offence was warranted. Nonetheless, the starting point adopted had been too high, particularly given that nothing was taken, so that there had been no financial loss. A sentence of seven-and-a-half years' imprisonment would be substituted for O, and six years for H.

***Archbold* 2020 reference**: Sentencing Council's guideline on burglary offences, Appendix S-17.11 to S-17.14.

12. Drugs – *R. v Greenfield* [2020] EWCA Crim 265, [2020] 2 Cr.App.R.(S.) 19, CA, 13 February 2020.

(1) The legal principles identified in *R. v Cairns*, CLW/13/19/4, [2013] EWCA Crim 467, [2013] 2 Cr.App.R.(S.) 73, CA, *R. v Cuni*; *R. v Gonzalez*; *R. v Byberi*; *R. v Abazi*; *R. v Cera*; *R. v Elezi*, CLW/18/29/12, [2018] EWCA Crim 600, [2018] 2 Cr.App.R.(S.) 18, CA, and *R. v Williams*; *R. v Thorne*; *R. v Morris*; *R. v Bailey*, CLW/19/29/7, [2019] EWCA Crim 279, [2019] 2 Cr.App.R.(S.) 15, CA, are relevant to appeals, and applications to appeal, against sentences imposed in relation to conspiracies to supply Class A drugs. In particular, it is well established that the Court of Appeal will not interfere with findings of fact made by the judge following a *Newton* hearing (*R. v Newton*, 77 Cr.App.R. 13, CA), provided that the correct principles of law, including the criminal burden and standard of proof, have been applied, and unless the judge has made a finding that no reasonable finder of fact could have reached. Where a judge has sentenced many defendants for their roles in a large conspiracy to supply drugs, the Court of Appeal will be similarly slow to interfere with the judge's assessment of the different roles of the various conspirators and the nature and extent of each person's involvement. The guideline for offences of supplying or offering to supply a controlled drug (CLW/12/04/12), which are to are treated as applying to offences of conspiracy to supply, provide that, where the operation is on the most serious and commercial scale, involving a quantity of drugs significantly higher than category 1, for which the indicative quantity for heroin or cocaine is 5kg, sentences of 20 years and above may be appropriate depending on the role of the offender. Sentences of more than 30 years are reserved for very exceptional cases. There is bound to be an element of bunching in the range of sentences between 20 and 30 years, as the scope to differentiate for amounts and roles is very compressed, with the result that sentences on different offenders will be nearer to each other than might otherwise be the case. For such very serious offences, many factors that might otherwise mitigate sentence are less important.

(2) Sentencing for such offences does not involve a mathematical exercise or determination that requires precision and specific findings of fact about the quantities of drugs supplied. While it may be necessary to make a finding, with some degree of precision, of the minimum quantity of drugs that the judge can be sure was supplied for the purpose of placing on offender within a category within the guideline, when one is considering sentencing for a quantity of drugs that is significantly higher than the guideline categories, the exercise becomes a much more evaluative one, in which the quantity of drugs is only one relevant factor, albeit an important one. The judge will have to weigh up a variety of factors, including the quantity supplied as best he can determine it, but also the particular role of the offender in the conspiracy, how far up the supply chain he was, the geographical scope of the operation, the length of time for which it continued, the number of different drugs involved and the number of separate conspiracies in which the offender participated. The guideline does not indicate what quantity counts as "significantly higher" than category 1, and, again, the matter should not be approached on a mathematical basis by analysing how the quantities change between different categories within the guideline. There is a question of judgement involved.

***Archbold* 2020 reference**: Sentencing Council's guideline on drug offences, Appendix S-18.9 to S-18.14.

13. Firearms – possession with intent to endanger life by a 17-year-old gang member, aged 18 at the time of sentence: see § 4 above.

14. Kidnapping (robbery and assault occasioning actual bodily harm) – *Att.-Gen.'s Reference (R. v Iqbal)* [2020] EWCA Crim 376, [2020] 2 Cr.App.R.(S.) 21, CA, 14 February 2020.

The offenders, UI (aged 33/of previous good character/ three children now in the care of her mother) and SI (aged 28/of previous good character), were sisters who came to believe that the victim (with whom they had attended a hen party) had posted embarrassing videos on social media of them at a nightclub. UI arranged to meet the victim for a meal. When they met, SI was with her and the three drove out into the countryside. They pulled over in a dark layby and began assaulting the victim, punching her in the head, pulling her hair and kicking her. They told her she needed to be taught a lesson and took her phone and passwords, as well as spraying a bottle of liquid (not acid) on her. They forcefully cut her hair (which was initially about 24 to 26 inches long) with scissors down to two inches long. When SI went to get a shaver out of the car to shave off her eyebrows, the victim managed to escape. UI and SI were convicted of kidnapping, robbery and assault occasioning actual bodily harm. UI was sentenced to 18 months' imprisonment on each count concurrent and SI to 30 months' imprisonment.

The judge erred by taking the assault as the lead offence on the basis, as he put it, "that this is what the incident was all about". This artificially restrained the sentence. On any view, the assault on the victim was significantly aggravated by the kidnapping and the robbery. The nature and impact of the assault were rendered substantially more serious than otherwise would have been the case by the way the victim was taken to an isolated place where she was unable to secure any help or easily escape. Category 3 street robbery has a starting point of four years' imprisonment, with a range of three to six years in the guideline (CLW/18/26/18), and, although there are many offences of kidnapping that are more serious, this was not in or close to the least serious bracket exemplified by cases such as *Att.-Gen.'s Reference (R. v Abbas)*, CLW/18/12/10, [2017] EWCA Crim 2015, [2018] 1 Cr.App.R.(S.) 33, CA. In identifying a lead offence for the purposes of sentencing, this case was better described as an incident of kidnapping during the course of which the victim was interrogated, frightened, degraded, assaulted and robbed. Bearing in mind the judge's conclusion that SI had shown markedly less remorse and the mitigation available to them, particularly the impact on UI's three children, concurrent sentences of three years' imprisonment would be substituted for UI, and concurrent sentences of four years' imprisonment for SI. This was grave offending that required an appropriate custodial sentence in the public interest, notwithstanding the hardship that may cause to three young individuals.

***Archbold* 2020 reference:** Sentencing Council's guideline on robbery, Appendix S-25.3 to S-25.7.

15. Robbery – *R. v Solari* [2020] EWCA Crim 231, [2020] 2 Cr.App.R.(S.) 15, CA, 28 January 2020.

The appellant (aged 29/of previous good character and the sole carer for two children) was the willing participant in a robbery of some £100,000 from the bookmaker's shop of which she was the manager. The robbery was carried out by two associates of the appellant, each of whom was wearing a mask and carrying what appeared to be a gun concealed inside a bag. One also carried an iron bar. The appellant feigned distress, but the robbery was timed to take place while the appellant's co-worker was away and when the amount of money in the shop was higher than normal after a Bank Holiday weekend. The two associates along with a third man, the getaway driver, were each charged with robbery and having an imitation firearm with intent, although the getaway driver was acquitted of the latter offence. The appellant was charged only with robbery. Having pleaded not guilty, she was sentenced to 12 years' imprisonment.

There could be no criticism of the judge's conclusion that the appellant played a leading role in the robbery, even if the whole plan was not her idea. It was perfectly legitimate for the trial judge to conclude that she and the two co-defendants who entered the bookmakers, with whom she had been in contact with on the days leading up to and the day of the robbery, each played a leading role. However, the judge should not have made a finding that she knew a firearm would be used. While such a conclusion may have been justified on the evidence he heard, she was not charged with any firearms offence and, therefore, was deprived of the decision of the jury on the issue. The decision in *R. v Eubank*, CLW/01/17/50, [2001] EWCA Crim 891, [2002] 1 Cr.App.R.(S.) 4, CA, supports the proposition

that, if the prosecution case is that a defendant has knowledge of the involvement of a firearm in an offence, a suitable count should be included on the indictment. Given the appellant's leading role in the robbery and her abuse of her position as a valued and trusted employee, the judge nevertheless had ample grounds for placing her in the high culpability category and was right to regard this as a category A2 case within the guideline for professionally planned commercial robberies (CLW/16/04/12), with a resulting starting point of nine years and a sentencing range of seven to 14 years. However, the starting point before adjusting for mitigating factors should have been a little in excess of nine years with a downward adjustment then being made to reflect her previous good character and responsibilities to her children, resulting in a sentence of seven-and-a-half years in total. A sentence of that duration would be substituted.

***Archbold* 2020 reference**: Sentencing Council's guideline on robbery, Appendix S-25.9 to S-25.12.

16. Sexual activity with a child – *Att.-Gen.'s Reference (R. v Ivan)* [2020] EWCA Crim 301, [2020] 2 Cr.App.R.(S.) 17, CA, 11 February 2020.

The offender (aged 20 at the time of the offending/of previous good character) had met the victim (aged 13) in his local town and begun messaging her. Over a period of a few weeks, the two met up frequently usually before or after school in his car. The victim told the offender that she was 13 and began referring to him as her boyfriend. The offender then started asking her for sex, which she initially resisted on the grounds that she was too young, but then gave into, concerned he would break up with her otherwise. On four occasions, over a period of a few weeks, he picked the victim up from school in his car, drove to a car park and had vaginal sex to completion with the victim. He also requested that she send him images of her naked breasts and vagina, but she refused. The offender pleaded guilty to four offences of engaging in sexual activity with a child, contrary to section 9 of the *Sexual Offences Act* 2003 (CLW/03/43/17). He was sentenced to 15 months' imprisonment, suspended for 24 months, with a rehabilitation activity requirement of up to 20 days.

It was clear that this offending fell within the highest category of harm (category 1) for the purpose of the guideline (CLW/13/46/27); the issue was whether the offending fell into culpability category A. Some of the matters identified as potential culpability A factors, a degree of planning and a disparity of the age, are not inherently hard-edged criteria. They are made so by the qualifier: the use of the word "significant". Grooming, too, involves the exercise of a judgement as to whether the activity of the offender was such as to constitute a high culpability factor. In the case of solicitation of sexual images, it is not generally a request that is refused that will make the offender of higher culpability but a request that is accepted. The conclusion of the judge that the case fell out of the category range of category 1B, but not into the category range of category 1A before consideration of mitigation (including the long delay in deciding to prosecute this young offender) and credit for guilty plea, was unobjectionable. He did not take the view that the nature and extent of culpability factors, either individually or collectively, took the offending into category A culpability, or were of comparable culpability with, for example, the use of alcohol or drugs to facilitate the crime or the use of threats or blackmail to procure it. The sentence was lenient, but not unduly or objectionably so.

***Archbold* 2020 references**: 2003 Act, s.9, § 20-75; Sentencing Council's guideline on sexual offences, Appendix S-20.45 to S-20.48.

Comment:

The court's conclusion that an unsuccessful request for sexual images will not normally place a case into culpability category A for the purposes of the guideline merited some further consideration and elucidation.

Of course, guideline factors are not to be interpreted as legislation, and have to be seen in their context and interpreted by reference to their purpose. In this regard the court was right to conclude that it will not be just any evidence of grooming (a thoroughly ambiguous word) that will

justify placing a case into culpability category A, and that something further must be present to justify a finding of higher culpability.

The reference to solicitation in the guideline is in fact a reference to "Sexual images of victim recorded, retained, solicited or shared" and it is noteworthy that in all the other cases (recording, retention and sharing) a sexual image will in fact have been obtained. However, it is submitted that it does not follow from that, in relation to the "solicitation" of sexual images – a factor that is, as the court observed "hard edged" – that it will only be successful solicitation that will merit a finding of higher culpability. It is important to emphasise that this factor is a culpability factor and not a harm factor, and requires a focus on the intent of the offender, and not whether he was in fact successful in causing that harm. When an offender solicits sexual images from a child, he is attempting to persuade the child to provide him with indecent images, the very making and possession of which is illegal. Whilst a single request for a sexual image by a 15-year-old to his similarly aged girlfriend will be unlikely to merit a finding of higher culpability, there is clearly a world of difference in relation to the much older offender who consistently pressures a child for sexual images, threatening to end the relationship if the child does not provide them. Whether or not the images were in fact provided cannot be decisive in determining whether the case is one of higher culpability; that the child has not provided the images clearly does not reduce the offender's culpability. The question is where the line should be drawn, namely what degree of pressure will merit a finding of higher culpability in such a case.

Sebastian Walker

Particular sentences or orders

17. Extended sentences – *R. v Baker*; *R. v Richards* [2020] EWCA Crim 176, [2020] 2 Cr.App.R.(S.) 23, CA, 19 February 2020.

Where an offender is already subject to an indeterminate sentence for which he has been recalled to prison, it is necessary for a judge to consider whether it is appropriate to impose an extended sentence, without taking into account the fact that the offender has been recalled on licence and ignoring the delayed early release provisions. Following *R. v Smith (Nicholas)*, CLW/11/28/16, [2011] UKSC 37, [2011] 1 W.L.R. 1795, SC, and *R. v J (M)*, CLW/12/07/25, [2012] EWCA Crim 132, [2012] 1 W.L.R. 3055, CA, any decision as to risk must be made on the basis that the offender is "at large" and has not been recalled. The imposition of an extended sentence in such cases is not wrong in principle, nor necessarily an inappropriate exercise of discretion.

Key cases cited: Disapproved – *R. v Turner and Stevenson* [2019] EWCA Crim 1529, unreported, 28 February 2019, CA. Considered – *R. (Sturnham) v Parole Board and anor (No. 2)*, CLW/13/26/4, [2013] UKSC 47, [2013] 3 W.L.R. 281, SC; *Brown v Parole Board for Scotland and ors*, CLW/17/40/3, [2017] UKSC 69, [2018] A.C. 1, SC; *R. (Stott) v Secretary of State for Justice*, CLW/18/44/3, [2018] UKSC 59, [2020] A.C. 51, SC.

Comment:

The court's reasoning in this case leaves something to be desired. It concerned two appellants who challenged the imposition of extended sentences upon them, given that they were already serving imprisonment for public protection (IPP) and a life sentence respectively, on two grounds: (1) that an extended sentence was unavailable or inappropriate as there was no need for an extended licence period given they were subject to indefinite licence; and (2) that it was inappropriate as it would have resulted in the appellants serving a longer period of time owing to the release arrangements for prisoners serving extended sentences.

In relation to the first ground, by treating the decisions in *Smith* and *J (M)* as determinative of the

point, the court seemingly failed to appreciate, first, that those decisions were principally concerned with how to make the assessment of dangerousness under section 225(1) of the 2003 Act, a finding neither appellant challenged here, and, secondly, the difference between the test for imposing an extended sentence (the sentence under challenge in the instant case) and the test for imposing an IPP (an IPP being the sentence subject to challenge in *Smith* and *J (M)*). Under the regime at the time of those decisions, an IPP could be imposed wherever an offender was dangerous and a life sentence was not appropriate. The appellants sought to argue here, it is submitted persuasively, that the test for an extended sentence is different, as by virtue of section 226A(7), a further period of extended licence must be necessary for an extended sentence to be imposed. The court did not reach a clear conclusion on that point, nor did they satisfactorily address the distinction between whether an offender was dangerous and whether an extended sentence was required to protect the public. Further, the court did not address any of the arguments as to why a judge might conclude that an extended licence period is necessary in relation to an offender serving an indeterminate sentence, such as it being impossible to determine whether that sentence will be quashed on appeal.

In relation to the second ground, in holding that a judge should consider whether an additional licence period is necessary for the protection of the public whilst ignoring the consequences of the new early release regime as regards release from the custodial term, the court seems to create an impossible task. How is a judge properly to assess what extended licence period is necessary without having regard to the period of licence that the offender will or may serve regardless? Is a judge meant to ignore the fact that, if she imposes an extended sentence, there is a chance the offender may be released without having any licence period but the extended licence?

By attempting to answer definitively one question, this decision seems to have created many more, and it must be wondered, considering the real practical impacts of these questions, whether these issues will find themselves in the Supreme Court sooner rather than later.

Sebastian Walker

18. Minimum sentence (drugs) – *R. v McDonald* [2020] EWCA Crim 56, [2020] 2 Cr.App.R.(S.) 13, CA, 16 January 2020.

The appellant (aged 49/199 previous offences, including, relevantly, two convictions relating to the supply of Class A drugs for street dealing/on licence for one of those offences at time of index offence/traumatic childhood/drug addiction since the age of 14/registered carer for partner) was observed by police officers seemingly engaged in drug-dealing. When he was stopped, he threw his bike at the police officer and tried to get away. He was found to be in possession of a Kinder egg that contained 13 separate bags of crack cocaine of 87% purity, with a total weight of 1.01g and a total street value of £130. There were also three separate bags of heroin at 29% purity, with a total weight of 0.88g and a total street value of £65. Also seized from the appellant on that occasion were a mobile phone, a further single wrap of crack cocaine, and four £20 notes. He said that he had just "scored" from the other man. He pleaded guilty on the morning of a retrial to two counts of possession with intent to supply Class A drugs, on the basis that both the crack cocaine and heroin were intended for consumption by himself and his girlfriend only, and that he did not intend to supply to anybody else. Applying the minimum term provisions in section 110 of the *Powers of Criminal Courts (Sentencing) Act* 2000 (CLW/00/21/23), the appellant was sentenced to six years and three months' imprisonment.

Section 110(2) of the 2000 Act clearly requires two elements to be satisfied before a derogation from the minimum term can be justified in any particular case: first, there must be particular circumstances relating to any of the offences or to the offender; and secondly, those circumstances would make imposition of the

minimum sentence unjust. As *Att.-Gen.'s Reference (R. v Marland)*, CLW/18/37/6, [2018] EWCA Crim 1770, [2018] 2 Cr.App.R.(S.) 51, CA, makes clear, the comparison with a sentence that might otherwise have been passed under the guideline is relevant to the second of these requirements, once particular circumstances relating to the offences or the offender have been made out. Social supply cannot of itself be such a particular circumstance. There must be more. The minimum sentence provisions make no distinction between commercial or street dealing and social supply to partners or friends. Here, the qualifying convictions were both recent, the appellant was on licence at the time of the index offence, and both the previous offences were for street dealing not social supply. Other than the basis of plea, there were no particular circumstances relating to the appellant's offences or to the appellant himself. As *Marland* emphasised, normal circumstances are not to be regarded as particular circumstances.

Key cases cited: Considered – *R. v Isles* [2019] EWCA Crim 605, unreported, 2 April 2019, CA.

***Archbold* 2020 reference**: 2000 Act, s.110, § 5A-653.

Miscellaneous

19. Human rights (private and family life) – *Sutherland v HM Advocate* [2020] UKSC 32, unreported, 15 July 2020, SC.

The Supreme Court unanimously upheld the decision of the High Court of Justiciary ([2019] HCJAC 61).

The right to private life under Article 8 of the European Convention on Human Rights of the appellant, who had been convicted of a number of offences related to sexually motivated communications with a child, on the basis of text communications and images sent to what he believed was a 13-year-old boy, but was actually a profile created by an adult "paedophile hunter" referred to as a "decoy", had not been interfered with in the circumstances of the case. First, because, in the absence of any question of state surveillance or interception of communications, and where all that was in issue was the balance of the interests of the appellant and of the (fictional) child who was the intended recipient of the relevant communications, the (criminal) nature of the communications from the appellant was not such as was capable of making them worthy of respect for the purposes of the application of the convention. Secondly, because, while he may have enjoyed a reasonable expectation of privacy in relation to his communications for the purposes of Article 8 so far as concerned the possibility of police surveillance or intrusion by the wider public, the appellant had no reasonable expectation of privacy in relation to the recipient of his communications, with the result that he enjoyed no relevant protection under Article 8 as regards their disclosure to and use by the respondent and the other public authorities. The decoy was, therefore, entitled to provide to the police evidence about them that he had in his knowledge and in his possession and, once the decoy had provided that information to the police, the appellant had no legitimate interest under the convention, or any reasonable expectation of privacy, that would prevent the police from acting on that evidence or passing it on to the public prosecutor with a view to its use in a prosecution of the appellant. Given that the appellant's Article 8 rights were not engaged, the state owed the appellant no obligations under Article 8 in relation to the use of the evidence. On the contrary, under the scheme of the convention, the possibility of effective prosecution of serious crimes committed in relation to children is part of the regime of deterrence that a state is required to have in place to protect them.

Key cases cited: Distinguished – *Benedik v Slovenia*, unreported, 24 April 2018, ECHR. Considered – *R. v G (Secretary of State for the Home Department intervening)*, CLW/08/24/5, [2008] UKHL 37, [2009] 1 A.C. 92, HL; *KU v Finland*, CLW/09/20/21, (2009) 48 E.H.R.R. 52, ECHR; *Re JR38*, CLW/15/25/5, [2015] UKSC 42, [2016] A.C. 1131, SC.

***Archbold* 2020 reference**: ECHR, Art. 8, § 16-137.

20. Mental health – *Birmingham City Council v SR*; *Lancashire County Council v JTA* [2019] EWCOP 28, [2020] 3 All E.R. 438, Court of Protection (Lieven J), 17 July 2019.

Although the Supreme Court ruled in *M v Secretary of State for Justice*, CLW/18/44/5, [2018] UKSC 60, [2019] A.C. 712 that patients subject to restriction orders under sections 37 and 41 of the *Mental Health Act* 1983

cannot be made subject to a conditional discharge that authorises their further detention in the community (i.e. a deprivation of their liberty), regardless of their consent, that case specifically did not consider the powers of the Court of Protection under Schedule A1 to the *Mental Capacity Act* 2005 (CLW/05/15/16) to deprive such a patient, who lacks capacity and who has been, or it is contemplated will be, conditionally discharged under the 1983 Act, of his liberty (e.g. by authorising a residence and care plan at a named placement in the community). There was nothing in *M*, or in the 2005 Act in light of *M*, that would prevent the Court of Protection authorising a deprivation of liberty in such a case, if that were in a patient's best interests.

Key cases cited: Considered – *DN v Northumberland Tyne & Wear NHS Foundation Trust* [2011] UKUT 327 (AAC), [2011] M.H.L.R., Upper Tribunal (Administrative Appeals Chamber).

***Archbold* 2020 references**: 1983 Act, ss.37 and 41, §§ 5A-1189 and 5A-1201.

New Legislation

(digesting statutes and statutory instruments issued up to 17 July 2020)

Statutory instruments

Core criminal practice

21. Terrorism Act 2000 (Proscribed Organisations) (Amendment) (No. 2) Order 2020 (SI 2020/743)

The *Terrorism Act* 2000 (CLW/00/29/64) makes provision in respect of proscribed organisations, which are specified in Schedule 2 to that Act, and in sections 11 to 13 creates offences relating to membership of, and support for, proscribed organisations, and the wearing of clothing or articles in such a way as to arouse reasonable suspicion that the person wearing such clothing or articles is a member or supporter of a proscribed organisation. This order adds "Feuerkrieg Division" to the list of proscribed organisations in Schedule 2.

Into force: 17 July 2020.

Enabling provision: s.3(3).

***Archbold* 2020 references**: ss.3 and 11 to 13, and Sched. 2, §§ 25-14 and 25-17 to 25-19a.

Regulatory and quasi-criminal practice

22. Civil Procedure (Amendment No. 3) Rules 2020 (SI 2020/747)

This instrument makes various amendments to the *Civil Procedure Rules* 1998 (SI 1998/3132) (CLW/99/05/16). Of particular note, rule 77.7 is substituted so that an application for an order quashing a tainted acquittal under section 54(3) of the *Criminal Procedure and Investigations Act* 1996 must be made no later than 28 days after the issue of the certificate under section 54(2) of that Act. Part 81, dealing with applications and proceedings in relation to contempt of court, including contempt in the face of the court and interference with the due administration of justice, is substituted with the aim of streamlining and simplifying the process for such proceedings, with related consequential amendments made to various other rules.

Into force: for the purposes of this digest, 1 October 2020.

Enabling provisions: *Civil Procedure Act* 1997, ss.1 and 2, and Sched. 1.

***Archbold* 2020 reference**: 1996 Act, s.54, § 4-196.

23. Co-operative and Community Benefit Societies and Credit Unions (Arrangements, Reconstructions and Administration) (Amendment) and Consequential Amendments Order 2020 (SI 2020/744)

This order, inter alia, amends the *Co-operative and Community Benefit Societies and Credit Unions (Arrangements, Reconstructions and Administration) Order* 2014 (SI 2014/229) (CLW/14/06/19) to apply (with modification) to relevant co-operative and community

benefit societies the moratorium procedure in Part A1 of the *Insolvency Act* 1986 and the restructuring plan scheme in Part 26A of the *Companies Act* 2006 (CLW/06/45/17 & CLW/06/46/34) for companies in financial difficulties, both of which were inserted by the *Corporate Insolvency and Governance Act* 2020 (CLW/20/24/35), and both of which contain offences. Part 3 of Schedule 4 to the 2020 Act, which makes temporary modifications to the moratorium procedure during the coronavirus pandemic some of which affect the offences in Part A1 of the 1986 Act, is also applied with modification.

Into force: 18 July 2020.

Enabling provisions: *Co-operative and Community Benefit Societies Act* 2014 (CLW/14/18/8), ss.118 and 147; 2020 Act, ss.47 and 49(2), and Sched. 4, para. 92.

24. Health Protection (Coronavirus, International Travel) (England) (Amendment) (No. 2) Regulations 2020 (SI 2020/724)

These regulations amend, with transitional provision, the *Health Protection (Coronavirus, International Travel) (England) Regulations* 2020 (SI 2020/568) (CLW/20/21/9), which, inter alia, require persons arriving in England from outside the common travel area (viz the UK, Republic of Ireland, Isle of Man, and the Channel Islands) and other than from an exempt country or territory to self-isolate for a period of 14 days following their arrival (reg. 4), to remove Serbia from the list of exempted countries or territories. SI 2020/568 contains a number of summary offences, including in relation to contravention of regulation 4.

Into force: 11 July 2020.

Enabling provisions: *Public Health (Control of Disease) Act* 1984, ss.45B, 45F(2) and 45P(2).

25. Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations 2020 (SI 2020/750)

These regulations, which are due to expire at the end of 17 January 2021 subject to saving provision, permit local authorities to give directions imposing prohibitions, requirements or restrictions in relation to specified premises, events and public outdoor spaces if certain conditions are met, to control and prevent the spread of coronavirus. The subject of a direction has a right of appeal to the magistrates' court or to make representations to the Secretary of State. The regulations also permit the Secretary of State to direct a local authority to make such a direction. The regulations contain enforcement powers (reg. 12), and create summary offences in relation to the contravention, without reasonable excuse, of a direction given under these regulations, the obstruction of a person carrying out functions under the regulations or failure to comply with a direction, reasonable instruction or prohibition notice issued under the enforcement powers (reg. 13). Such an offence may be dealt with, in relation to persons aged 18 or over, by way of fixed penalty notice. There are consequential amendments to related legislation.

Into force: 18 July 2020 at 12.01 am.

Enabling provisions: *Public Health (Control of Disease) Act* 1984, ss.45C(1), (3)(c), (4)(d), 45F(2) and 45P.

26. Motor Vehicles (International Motor Insurance Card) (Amendment) Regulations 2020 (SI 2020/735)

These regulations amend the *Motor Vehicles (International Motor Insurance Card) Regulations* 1971 (SI 1971/792) to change the requirements in relation to international motor insurance cards used by motorists visiting Great Britain, in particular to permit those cards to be presented in Great Britain in electronic as well as paper form. These regulations also amend the *Motor Vehicles (Third Party Risks) Regulations* 1972 (SI 1972/1217) to enable motorists visiting Great Britain from Andorra and Serbia to evidence motor insurance by way of a document issued by the insurer of the vehicle, and to allow that document to be in electronic as well as paper form for all visitors. Under section 165 of the *Road Traffic Act* 1988, inter alia, a person driving a motor vehicle on a road must, on being so required by a constable, produce the relevant certificate of insurance, or such other evidence that the vehicle is not or was not being driven in contravention of section 143 of the 1988 Act, failure to comply with which requirement is an offence: s.165(3). Section 143 makes it an offence to use, or to permit or cause another person to use, a motor vehicle on a road or other public place unless there is in force in

relation to the use of the vehicle by that person a valid insurance policy.

Into force: in relation to the changes allowing documentation to be in electronic form, "IP completion day" (currently 11 pm on 31 December 2020); otherwise, 4 August 2020.

Enabling provisions: 1988 Act, ss.160(1) and (2)(e), and 165(2)(a).

***Archbold* 2020 references**: 1988 Act, ss.143 and 165, §§ 32-170 and 32-198.

27. Official Feed and Food Controls (England) (Amendment) Regulations 2020 (SI 2020/738)

These regulations amend, inter alia, references to EU legislation in interpretive and offence-related provisions in the *Official Feed and Food Controls (England) Regulations* 2009 (SI 2009/3255) (CLW/09/46/41).

Into force: 5 August 2020.

Enabling provision: *European Communities Act* 1972, s.2(2).

28. Yemen (Sanctions) (EU Exit) Regulations 2020 (SI 2020/733)

In light of the UK's withdrawal from the EU, these regulations replace the EU sanctions regime in relation to Yemen. They revoke and replace, subject to transitional provision, Council Regulation (EU) No. 1352/2014 concerning restrictive measures in view of the situation in Yemen, the *Yemen (European Union Financial Sanctions) Regulations* 2014 (SI 2014/3349) (CLW/15/01/16) and the *Export Control (Yemen Sanctions) Regulations* 2015 (SI 2015/1586) (CLW/15/30/7). A further consequential amendment is made to the *United Nations and European Union Financial Sanctions (Linking) Regulations* 2017 (SI 2017/478) (CLW/17/13/15). They establish a new regime, with substantially the same effect as the EU sanctions regime, for the purposes of compliance with relevant UN obligations and for promoting peace, stability, security, respect for human rights and related purposes in Yemen. Notably, these regulations:

- confer power on the Secretary of State to designate persons who are, or have been, involved in, inter alia, the commission of a serious human rights violation or abuse, obstruction of the delivery or distribution of, or access to, humanitarian assistance in Yemen, obstruction of or undermining the successful completion of political transition and the peaceful resolution of armed conflicts in Yemen and any other acts that threaten the peace, security or stability of Yemen. Regulation 10 further provides that each person for the time being named for the purposes of paragraph 11 of UN Security Council Resolution 2140 (2014) and paragraph 14 of UN Security Council Resolution 2216 (2015) are designated persons for certain purposes. Persons designated by the UN are listed on the UN Security Council consolidated list and designations will also be publicised on gov.uk: Pt 2.
- create similar offences of dealing with the funds or economic resources, or making funds or economic resources available to or for the benefit, of designated persons as existed under the 2014 regulations: Pt 3.
- provide that a designated person is an excluded person for the purposes of section 8B of the *Immigration Act* 1971, the effect being that the person is banned from travelling to or via the UK, and that any permission to stay in the UK that they may have is cancelled: Pt 4.
- impose trade restrictions in relation to designated persons in respect of military goods and military technology. Further trade sanctions that are imposed by these regulations prohibit the provision of technical assistance, armed personnel, financial services or funds, or related brokering services, where such provision enables or facilitates the conduct of armed hostilities: Pt 5.
- make provision for exceptions and licences that may apply or be available in respect of prohibitions and requirements under these regulations: Pt 6.
- impose obligations on "relevant firms", "relevant institutions", designated persons and licensees

relating to reporting, record-keeping and the provision of information: Pt 7.

- provide that contravention, or circumvention, of any of the prohibitions and a number of the licensing, and other information, reporting and recording, requirements in these regulations, is an offence: see reg. 49 for the penalties. Further, numerous offence-creating and related provisions of the *Customs and Excise Management Act* 1979 are applied throughout these regulations, as well as various enforcement powers under that Act. Chapter 1 of Part 2 of the *Serious Organised Crime and Police Act* 2005 (CLW/05/14/12), relating to investigatory powers, is also applied for the purposes of enforcing financial sanctions imposed under these regulations.
- confer powers on specified maritime enforcement officers to stop and search ships in international and foreign waters for the purpose of enforcing specified trade sanctions and to seize relevant goods found on board ships: Pt 9.

Into force: in accordance with regulations yet to be made under section 56 of the *Sanctions and Anti-Money Laundering Act* 2018 (CLW/18/20/18).

Enabling provisions: 2018 Act, ss.1(1)(a), (c) and (3), 3(1)(a), (b)(i) and (d)(i), 5, 9(2), 10(2) to (4), 11, 13, 15(2)(a) and (b), (3), (4)(b), (5) and (6), 16, 17, 19, 20, 21(1), 54(1) and (2), 56(1), and 62(4) and (5), and Sched. 1, paras 2(a)(i), 4(a)(i), 5(a)(i), 6(a)(i), 10(a)(i), 11(a)(i), 13(a), (g), (k), (m) and (w), 14(a), 17(a), 20, 21 and 27.

Cases previously reported elsewhere

(i.e. cases reported since the last issue, but previously reported elsewhere; cases are digested only once in CLW (save where correction/modification is required as a result of a later report); previous reports are in brackets (fully cross-referenced for change of names))

Pwr and ors v DPP [2020] 2 Cr.App.R. 11 (CLW/20/22/1, [2020] EWHC 798 (Admin), *The Times*, 12 June 2020, [2020] 5 Archbold Review 2; *sub nom. Pwr v DPP* [2020] Crim.L.R. 731)

R. v Barton and Booth [2020] 2 Cr.App.R. 7 ([2020] 5 Archbold Review 3; *sub nom. R. v Barton and anor*, CLW/20/17/10, [2020] EWCA Crim 575, *The Times*, 16 June 2020)

R. v Gillings [2020] 2 Cr.App.R. 8 (*sub nom. R. v Gillings (Keith)*, CLW/20/17/2, [2019] EWCA Crim 1834, [2020] 4 W.L.R. 67)

R. v Harvey (Daniel) [2020] 2 Cr.App.R. 10 (CLW/20/12/4, [2020] EWCA Crim 354, [2020] 4 W.L.R. 50; *sub nom. R. v Harvey* [2020] 3 Archbold Review 3)

R. v Hilton [2020] 1 W.L.R. 2945, *The Times*, 13 July 2020 (CLW/20/25/5, [2020] UKSC 29)

R. (DN (Rwanda)) v Secretary of State for the Home Department [2020] 3 All E.R. 353 (CLW/20/08/17, [2020] UKSC 7, *The Times*, 16 March 2020, (2020) 170 N.L.J. 7877(15); *sub nom. R. (DN (Rwanda)) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2020] 2 W.L.R. 611)

R. (Mohamed and anor) v Waltham Forest London BC (Secretary of State for Housing, Communities and Local Government intervening); *Same v Wimbledon Magistrates' Court (Same intervening)* [2020] 1 W.L.R. 2929 (*sub nom. R. (Mohamed) v London Borough of Waltham Forest and conjoined applications*, CLW/20/25/2 & 3, [2020] EWHC 1083 (Admin), [2020] 5 Archbold Review 1)

Notes and articles on recent cases

National Crime Agency, Re [2020] Crim.L.R. 739 (Karl Laird & Peter Hungerford-Welch) (proceeds of crime/disclosure order) (CLW/20/09/7, [2020] EWHC 268 (Admin), [2020] 1 Cr.App.R. 30, [2020] 2 Archbold Review 7, [2020] A.C.D. 48)

National Crime Agency v Hajiyeva [2020] Crim.L.R. 736 (Karl Laird) (unexplained wealth order) ([2020] 2 Cr.App.R. 5, (2020) 170 N.L.J. 7888(15); *sub nom. Hajiyeva v National Crime Agency*, CLW/20/08/22, [2020] EWCA Civ 108)

National Crime Agency v Hussain [2020] Crim.L.R. 744 (Rudi Fortson QC) (unexplained wealth order) (CLW/20/11/8, [2020] EWHC 432 (Admin), [2020] A.C.D. 56; *sub nom. National Crime Agency v Hussain and ors* [2020] 1 W.L.R. 2145, (2020) 170 N.L.J. 7888(15))

Pwr v DPP [2020] Crim.L.R. 731 (Karl Laird) (terrorism/strict liability/human rights) (*sub nom. Pwr and ors v DPP*, CLW/20/22/1, [2020] EWHC 798 (Admin), [2020] 2 Cr.App.R. 11, *The Times*, 12 June 2020, [2020] 5 Archbold Review 2)

R. v Abbott; *R. v Hawker*; *R. v Harrison*; *Secretary of State (intervening)* [2020] Crim.L.R. 752 (Lyndon Harris) (surcharges) (*sub nom. R. v Abbott*; *R. v Hawker*; *R. v Harrison*, CLW/20/16/3, [2020] EWCA Crim 516; *sub nom. R. v Abbott* [2020] 4 Archbold Review 3)

R. v Gabbai (Edward) [2020] Crim.L.R. 755 (Matt Thomason) (rape/character

of complainant/cross-admissibility of complainants' evidence/inconsistent verdicts) (CLW/20/17/1, [2019] EWCA Crim 2287, [2020] 4 W.L.R. 65)

R. v McCarthy [2020] Crim.L.R. 749 (Lyndon Harris) (sentence/causing grievous bodily harm with intent/consent) ([2020] 2 Cr.App.R.(S.) 5; *sub nom. R. v McCarthy (Brendan)* CLW/20/12/7, [2019] EWCA Crim 2202, [2020] 4 W.L.R. 45)

R. v Szewczyk [2020] Crim.L.R. 763 (Rudi Fortson QC) (having bladed article in public place) (CLW/19/43/4, [2019] EWCA Crim 1811, [2020] 1 W.L.R. 492, [2020] 1 Cr.App.R. 18)

R. (Tesco Stores Ltd) v Birmingham Magistrates' Court [2020] Crim.L.R. 760 (Peter Hungerford-Welch) (food safety) ([2020] 4 Archbold Review 2; *sub nom. R. (Tesco Stores Ltd) v Birmingham Magistrates' Court and anor*, CLW/20/15/2, [2020] EWHC 799 (Admin))

Articles

(a listing of articles of practical interest published in any of the publications digested in this publication (as to which, see the "Up-to-date to" box))

An Analysis of Disclosure Failings in Murder Appeals against Conviction 2006–2018; Paul Dargue ([2020] Crim.L.R. 707)

Racism in the Criminal Justice System; David Ormerod ([2020] Crim.L.R. 659)

Resetting the *PACE* (Pt 2); Michael Zander QC ((2020) 170 N.L.J. 7895(17)) (police interviews/Code C/coronavirus/live links)

Terrorist Precursor Offences: Evaluating the Law in Practice; Andrew Cornford ([2020] Crim.L.R. 663)

This is how we roll; Lucy McCormick ((2020) 170 N.L.J. 7895(15) (*Electric Scooter Trials and Traffic Signs (Coronavirus) Regulations and General Directions* 2020)

Young Suspect Perspectives: An Exploration of the Factors Affecting the Uptake of Legal Advice by Children in Police Custody; Miranda Bevan ([2020] Crim.L.R. 686)


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