

Bail in the time of COVID-19 – an update

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By [Samuel Skinner](#)

Two new cases have been published since our last blog post on the issue of bail during the Corona Crisis. They are: [Perry v USA](#) (unreported) and [Chelsea Football Club Ltd v Nichols \[2020\] EWHC 827 \(QB\)](#).

In addition, prosecuting authorities have been relying on an older case of [R v Qazi and Hussain](#) [2010] EWCA Crim 2579 in responding to bail applications based on COVID-19.

Perry v USA

In [Perry v the USA](#) (unreported but can be found via [2020] 4 WLUK 70) Perry renewed his bail application in extradition proceedings, and the application was heard by Dove J sitting in the Administrative Court. Perry argued that his asthma and sleep apnoea put him into a vulnerable category of potential victims of COVID-19. It was argued in response that there was no evidence Perry was vulnerable to COVID-19.

Dove J had this to say about prison conditions:

“Prison conditions - The prison conditions were not irrelevant. On the basis of advice from Public Health, asthmatics were more vulnerable to Covid-19. The prison itself and the prison service were not parties to the appeal and had not had a chance to put their side forward in the midst of the coronavirus crisis. The court would proceed on the basis that the prison service, in compliance with its duty of care, would take care of prisoners in accordance with existing guidance and that prisoners would be afforded proper protection. Those matters should be taken up with the prison authorities rather than having a dispositive impact on the instant application. The court was satisfied that there were clear and demonstrable grounds to believe that the appellant would fail to surrender to bail. The proposed conditions were not capable of obviating the risks and challenges evidenced by the appellant’s previous behaviour”.

Chelsea Football Club Ltd v Nicholls

In [Chelsea Football Club Ltd v Nichols \[2020\] EWHC 827 \(QB\)](#), Chamberlain J considered an application for discharge from prison following a contempt of court in civil proceedings.

The judge said this about COVID-19 in prisons, and conditions to be imposed on an offender when released from prison:

“Two factors of greatest weight in this application are the fact that Mr Nichols has two health conditions which increase the risk to his health if he were to contract Covid-19 and the MOJ's announcement in relation to convicted prisoners. Taken together, these factors mean that, given that Mr Nichols has already served 5 weeks' imprisonment in circumstances more onerous than anticipated, the state's interest in upholding the rule of law is outweighed by another important interest – that of removing a prisoner at increased risk of suffering serious health complications should he contract Covid-19 from the prison estate. The latter is both a private interest of Mr Nichols's and also, more significantly for present purposes, a public interest, because it serves to avoid increased strain on the NHS at a time when it is already under great strain. It also serves to lessen pressure on those responsible for running the prisons when they too are under considerable strain caused by manpower shortages connected with Covid-19.

Convicted prisoners who are to be released following the MOJ's announcement are to be released upon conditions, including electronic tagging. Similar conditions could be imposed on contemnors, by accepting undertakings as conditions of discharge. I do not, however, consider it necessary or appropriate to accept such undertakings in this case for two reasons. First, any such condition would entail supervision by already stretched public authorities. Secondly, such supervision is not required in Mr Nichols's case, given that his pre-existing health conditions provide a powerful incentive to remain at home until at least the date on which he would otherwise have been released, so as to avoid contracting Covid-19”.

R v Qazi and Hussain

The case of [R v Qazi and Hussain \[2010\] EWCA Crim 2579](#) may be of relevance. Qazi sought a reduced sentence owing to his complex medical condition because it was difficult to give him the care he needed in prison. Whilst he was awaiting his appeal his health deteriorated and there was evidence that he was at high risk of developing life-threatening infections. The points decided by the Court of Appeal, which have potential relevance for bail decisions, were:

- That the executive has planned for prisoners with severe medical conditions in public sector prisons to be treated in accordance with their Convention rights. The executive is responsible for the effectiveness of those plans and it is the duty of the Secretary of State to release a prisoner if a breach of his article 3 right cannot be remedied in custody.
- If the medical arrangements are maintained and work in practice, a sentencing court does not need to enquire into the facilities in prison for the treatment of a medical condition.
- It is only where the very fact of imprisonment itself might expose the offender to a real risk of an article 3 breach that the court will be called upon to enquire into whether sentencing a person to custody will mean a breach of article 3. This will be exceptionally rare, and the court will require detailed medical evidence served in advance of the hearing on all parties.

It is likely that further relevant cases will be decided, as custody time limits may soon become a significant issue for the courts.

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