36 CRIME

36 Crime Criminal Updates

Spring 2021

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Welcome to the 36 Crime Criminal Updates: Spring 2021

Christopher Donnellan Q.C.

Head of 36 Crime

As we approach the Spring of 2021 we can see the light at the end of the current lockdown tunnel. Many trials for serious offences have now been successfully managed with Covid-secure measures in place. We have learnt new ways of delivering justice, and it is to be hoped that the experience of virtual hearings by CVP will continue to be used after the pandemic is over to make the process of criminal justice run more efficiently.

In this Update we have included articles by some of the recent practitioners who have joined 36 Crime. **Beheshteh Engineer** has recently completed a secondment to the CPS Extradition Unit and is well placed to provide an overview of the current extradition landscape. **Diana Wilson** and **Sebastian Walker** provide a helpful guide to relying on human rights in criminal proceedings with illustrations of the approach the criminal courts will take to the employment of rights-based defences.

The other articles provide a commentary on two important developments in the last few months. **John Hallissey and I** address the impact of the increase in periods to be served before release from imprisonment for offenders sentenced for serious violent and sexual offence. The first article addresses the immediate impact of the provision and the unfairness for those whose sentence was delayed beyond the commencement date by the impact of the first covid lockdown, and the second shows how the same principle has been extended to the calculation of the minimum term in discretionary life sentences.

Arthur Kendrick provides a thoughtful analysis of the decision to permit the use of material obtained from Encrochat encrypted communication devices. Are we moving towards permitting use of intercepted communication material?

I would like to thank **Catherine Rose** for preparing the Crime Group Newsletters for the last two years, and to **Tom Parker** for taking over the reins.

Finally, a warm congratulations to our newest Silk, **Simon Ash Q.C.,** who in these Covid times, on 15th March 2021, was officially appointed Queen's Counsel. We look forward to a formal Silk Ceremony later in the year.

The Impact of Brexit on Extradition Law

Beheshteh Engineer

Barrister

At the coal face of Westminster Magistrates' Court there is an eerie silence. Of course, a lot of that is to do with remote working. But there is something else going on. On 1 January 2021 the UK lost access to the Schengen Information System II database ('SIS II'). This obscure sounding database has resulted in a mere 4.6 million alerts for the benefit of UK law enforcement. It was the tool which meant police would know if someone they arrested for a domestic matter was also a Requested Person ('RP') wanted for a European Arrest Warrant ('EAW'). Lacking this facility, arrest numbers for EAWs have shrunk, but they have certainly not evaporated.

Additionally, the UK's departure from the EU has resulted in a re-shaping of the extradition landscape in a way not seen since the Extradition Act 2003 ('EA 2003') came into force. The UK's extradition regime can now be found in a tranche of legal documents; while in practical terms the new 'arrest warrant' scheme is identical to the EAW regime, there are some differences to be aware of. It is also important to know where such differences can be found in law.

Where to begin? For those in court, a handy pocket guide of the main provisions applicable may assist.

An overview of the extradition landscape

European Union (Withdrawal) Act 2018: this Act essentially retains limited parts of EU law (which previously applied in the UK) and confirmed that it continues to have effect after the end of the transition period, subject to modifications.

Withdrawal Agreement[1]:

- Part III, Title V addresses 'ongoing police and judicial cooperation in criminal matters.'
- Article 185: makes plain that Part III applies from the end of the transition period. (This was also confirmed in *Polakowski* [2021] EWHC 53 (Admin) at paragraphs 34-37.)
- Article 62(1)(b): where the RP is arrested before 11pm on 31 December 2020, the matter proceeds under the Framework Decision 2002/584/JHA (i.e. under the 'old' system).

European Union (Withdrawal Agreement) Act 2020:

- This Act amended the 2018 Act and implements the Withdrawal Agreement.
- Section 5 takes the *'rights, powers, liabilities, obligations, restrictions, remedies and procedures'* as found in the Withdrawal Agreement and gives them effect in UK law. This provision has been deliberately drafted to be as broad as possible: practitioners should take note of this when attempting to challenge specific provisions in the agreement.

Trade and Cooperation Agreement ('the TCA')[1]:

- Part III is concerned with 'law enforcement and judicial cooperation in criminal matters'.
- Title VII is entitled 'surrender', containing the following provisions:
    - Article LAW.SURR.79: the 'arrest warrant' process (similar to the old system) and provides an opt-in to the framework list (a departure from the old system);
    - Article LAW.SURR.77: proportionality to apply in both accusation and conviction warrant cases,
    - Article LAW.SURR.89: contains the 'rights of the requested person';
    - Articles LAW.SURR.82-83: political offence and nationality exemptions.
- Article LAW.SURR.112: an EAW issued before the end of the transition period but executed afterwards will proceed under the TCA regime. This means that where the requested person is arrested after 11pm on 31/12/20 in respect of an EAW, the matter proceeds under the TCA.

European Union (Future Relationships) Act 2020:

- This Act implements the Trade and Cooperation Agreement into UK law.
- Section 11: re-designates Member States as Part 1 territories (through S.I. 2003/3333).
- Section 12: amends the EA 2003 to require dual criminality to be proved in almost all cases.
- Section 29: is a general implementation provision for the rest of the TCA. This section is similar to section 5 of the European Union (Withdrawal Agreement) Act 2020 (see above).

Polakowski [2021] EWHC 53 (Admin):

- The defence argued that as a result of the UK's departure from the EU there was no longer a legal basis for the surrender process for those currently before the Court pursuant to an EAW request. Argued originally as a *habeas corpus* application, the Court instead considered it as an application for permission to apply for judicial review and refused permission [11-12].
- It held that the starting point for any analysis must be domestic law. The Court found that not only was there no provision within domestic law to invalidate the extradition process after 11pm on 31 December 2020 but in fact that various amendments to the law had been made to ensure the continuity of the process after this date [15-33].
- Where an RP was arrested before 11pm on 31 December 2020, Part 1 of the Extradition Act 2003 (unamended) and the Framework Decision apply i.e. the request is governed by the 'old' system.

Which regime does my case fall under?

This depends on the date of arrest.

- An EAW was issued, and the RP arrested before 11pm on 31 December 2020: **old system**.
- An Arrest Warrant is issued, and the RP is arrested after 11pm on 31 December: **TCA regime**.
- If the EAW was issued before 11pm on 31/12/20 but the RP was arrested afterwards:
    - The **TCA regime applies**, under Article LAW.SURR.112.
    - **Part 1 of the Extradition Act applies** as amended (for example, dual criminality must be proven).

Issues to look out for under the TCA regime

- New rights of RPs: Article LAW.SURR.89 includes two new rights for the requested person: 1) the right to be given a translation of the warrant in their native language, 2) the right to be informed of their right to legal representation in the executing state. This is a procedural point.
- Proportionality: the language found in Article LAW.SURR.77 suggests that a proportionality test similar to that found in section 21A of the Extradition Act 2003 applies in respect of both accusation and conviction matters.

These two examples, and no doubt others, are likely to be the subject of future challenges, as everyone - police, judges and practitioners alike - all set to work at this new, but familiar coal face.

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[1] Full title is the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019.

[2] Full title is the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community of the One Part and the United Kingdom of Great Britain and Northern Ireland, of the Other Part.

Beheshteh *joined both the 36 Crime and 36 Extradition teams as of March 2021, having completed a six-month secondment at the CPS Extradition Unit and, prior to that, having practised crime at the Independent Bar. Beheshteh is continuing to develop her criminal practice and building upon the experience she gained while on secondment at the CPS Extradition Unit.*

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Human Rights Arguments in Criminal Proceedings

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A number of recent cases have illustrated how the courts are likely to dispose of human rights arguments in criminal proceedings. In particular, the cases of *Scottow v CPS* [2020] EWHC 3421 (Admin), *DPP v Ziegler* [2019] EWHC 71 (Admin), and *R v Thacker* [2021] EWCA Crim 97, have illustrated the potential for the rights contained in Articles 8 to 11 of the ECHR to be of relevance to criminal proceedings. We discuss below how to advance these arguments and the important factors that will determine their success.

Relying on human rights in criminal proceedings

ECHR rights cannot be pleaded in the abstract. Simply raising freedom of speech, for example, will not suffice to avoid criminal liability. There are four questions that practitioners ought to ask themselves when considering advancing (or responding to) ECHR arguments in criminal proceedings (see Fig, 1 below for a flow chart).

1. Is the right in fact engaged?
2. Is the interference one prescribed by law? (This is likely in criminal cases).
3. Is the interference necessary in a democratic society? (This will ordinarily be where the most significant argument arises, and requires consideration of the proportionality of the interference and of the competing rights of others).
4. What remedy is the defence seeking? It may be that an application will be made to exclude evidence under s78 PACE or to stay proceedings as an abuse of process. Often, however, these are not realistic possibilities, and the preferred route will be to rely on the duty under section 3 of the Human Rights Act 1998 (HRA) for the court to interpret legislation in a way which is compatible with the ECHR. Consideration will need to be given to whether the defence will ask the court to give a heightened meaning to certain words, invite a particular interpretation of the legislation, or read in a defence to the effect that the relevant section will not apply where to create an offence would be a breach of a person's Convention rights. In all cases, seeking a declaration of incompatibility will be a last resort.

Scottow v CPS [2020] EWHC 3421 (Admin)

The question for the court in *Scottow* was whether ten tweets Scottow made – as comments on a Twitter thread to which the complainant was notified – constituted an offence contrary to s.127(2) of the Communications Act 2003 (some earlier tweets were ruled not to be part of a continuing act and so out of time). So far as relevant, s.127(2) of the Communications Act 2003 provides:

> *A person is guilty of an offence if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, he—*
> *(a) ..*
> *(b) …*
> *(c) persistently makes use of a public electronic communications network.*

The prosecution's case was, in effect, that Scottow had been "trolling" the complainant, a transgender activist, and that the tweets constituted an offence under s.127(2) of the 2003 Act. The defence advanced arguments in relation to statutory interpretation in light of Article 10 ECHR and the HRA.

Overturning Scottow's conviction the Divisional Court observed that '*the prosecution and the Judge had insufficient regard to the legal context, which is all-important'* [22] and that, in relation to the consideration of Article 10 (freedom of expression), there had been '… *an unstructured approach that lacks the appropriate rigour… Neither prosecution nor Judge considered whether some more demanding interpretation of s.127 or addressed the question of what legitimate aim was pursued, or, more importantly, whether the conviction of this defendant on these facts was necessary*' [43].

The court held that the legislative history of the offence showed that it was enacted to control abuse of a public communication network. It was not intended by Parliament to criminalise forms of expression, the content of which is no worse than annoying or inconvenient in nature, or such as to cause unnecessary anxiety. The court instead concluded that the focus of the enactment was purpose and persistency, not the content of the communications. It must be *the* purpose and not solely *a* purpose of the communication to cause annoyance, anxiety or inconvenience **by virtue of the persistence** rather than its content. The court did so without explicit regard to Article 10, preferring to then test the prosecution against the requirements of Article 10(2) rather than give the words a heightened meaning in the abstract.

The court considered that, whilst the protection of the complainant from persistent and unacceptable offence was a legitimate aim, prosecution in respect of the messages sent was not necessary in a democratic society as, *inter alia*, the messages were public conversation on a topic of legitimate public interest which had not been regarded as offensive or objectionable until the author was identified by the complainant.

Warby J stated:

> *'No convincing, relevant or sufficient reasons have been given for the decision to prosecute Ms Scottow under s 127 for those messages, and there was and is in my judgment no pressing social need to do so. A prosecution and conviction on these facts would represent a grossly disproportionate and entirely unjustified state interference with free speech'* [47].

Bean LJ said '*In short, I do not consider that under s 127(2)(c) there is an offence of posting annoying tweets. I would reach that conclusion as a matter of domestic statutory interpretation without reference to the Human Rights Act, but once one takes Article 10 into account the position is even clearer*' [54].

DPP v Ziegler [2019] EWHC 71 (Admin)

In *DPP v Ziegler* the Divisional Court took a similar approach to construing s.137 of the Highways Act 1980. These were two appeals by way of case stated by the prosecution. In one case the appeal was allowed, in the other it was refused as it was lodged out of time.

Section 137(1) of the 1980 Act provides, so far as relevant: "*(1) If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence …*"

The Divisional Court was asked to consider the application of that section to protests. The first to fourth defendants had laid in the middle of an approach road, locking their arms on to a bar in the middle of a box designed to make disassembly, removal and arrest more difficult. It took the police 90 minutes to remove them. The fifth to eighth defendant had suspended themselves by ropes from a bridge above both carriageways of a nearby A-road. The police closed the road to traffic for safety reasons, and the defendants were removed from the bridge 78 minutes after the incident took place.

The court held, in a decision currently subject to appeal to the Supreme Court, that the lower court had been right to conclude that they were obliged to read and give effect to s.137 of the 1980 Act in a way which is compatible with articles 10 and 11 of ECHR. Therefore, a person who was lawfully exercising his rights under Articles 10 and 11 had a lawful excuse but, conversely, if any interference with those rights would have been proportionate, the person would not have been acting with lawful excuse for the purposes of s.137. The court carefully analysed the ECHR and domestic law and noted that the convention rights are not a 'trump card' circumventing regulations relating to the use of highways, but remain a significant consideration.

The court stated:

> '*We allow the appeal in relation to the first to fourth defendants on the ground that the assessment as to proportionality by the District Judge was in all the circumstances wrong. This is because (i) he took into account certain considerations which were irrelevant; and (ii) the overall conclusion was one that was not sustainable on the undisputed facts before him, in particular that the carriageway to the Excel Centre was completely blocked and that this was so for significant periods of time, between approximately 80 and 100 minutes*' [129].

R v Thacker [2021] EWCA Crim 97

This is the so called 'Stansted 15 case' and related to the 15 appellants breaching the security perimeter fence at Stansted Airport, entering a restricted area and taking actions to halt a particular flight removing/deporting some 60 people to West Africa. Their actions included building a tripod which they locked onto near the nose of the plane. There was significant disruption including the closure of a runway. They were prosecuted for an offence of intentional disruption of services at an aerodrome, contrary to s1(2)(b) of the Aviation and Maritime Security Act 1990 – a serious offence. This case was ultimately decided in favour of the appellants on the basis of statutory interpretation with regard to the fact it was implementing an international treaty. That said, the court also ruled on the applicability of the defences of duress of circumstances, necessity and prevention of crime which were defences removed from the consideration of the jury by the trial judge.

The court ruled that those defences do not extend to acts of self-help, civil disobedience or protest and the judge was right to withdraw the defences from the jury. The fact that the protesters considered the deportation process to be objectional or illegal did not entitle them to take the law into their own hands. The appellants could not attempt to avail themselves of a 'higher law' to justify direct action against government policy [90-103].

Conclusions

The cases of *Scottow* and *Ziegler* provide illustrations of the approach the criminal courts will take to the employment of rights-based defences. They demonstrate that human rights arguments are not to be considered a "trump card" but are more than simply a significant consideration. They show how such arguments require careful consideration of proportionality – and therefore specificity of argument and pleading. Further the courts will often look to resolve the matter by reference to domestic interpretation.

Whilst conclusions on each case are necessarily fact specific, the more serious the substantive offending – in terms of its impact on the rights of others – the less likely the court will find that criminalising the acts is disproportionate. In this respect, it is worth drawing attention to the court's observations in *Ziegler* at [53]:

> *… the essence of the rights in question* [those under Articles 10 and 11] *is the opportunity to persuade others. … However, persuasion is very different from compulsion. Where people are physically prevented from doing what they could otherwise lawfully do, such as driving along a highway to reach their destination, that is not an exercise in persuasion but is an act of compulsion. This may not prevent what is being done falling within the concept of expression but it may be highly relevant when assessing proportionality under para.(2) of arts 10 and 11.*

The judgments in *Scottow, Ziegler and Thacker* demonstrate that the courts distinguish clearly between defendants actively using their convention rights (protest, free speech etc.) as opposed to those who use the ECHR as an excuse to commit criminal offences and take direct action to oppose government policy and compel compliance with their objectives. ECHR arguments in these circumstances are bound to fail.

Diana *represented the defence in Scottow v Crown Prosecution Service.*

Diana *recently joined 36 Crime. Before returning to the UK criminal Bar in 2017, Diana worked as a Legal Officer in the Royal Air Force, then as Legal Officer, Trial Counsel, and Special Prosecutor in the EULEX Missions in Kosovo and International Tribunals in The Hague including the Special Tribunal for Lebanon. Her experience includes leading on complex, grave and lengthy high-profile trials.*

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Sebastian *is the current pupil at 36 Crime. Prior to coming to the Bar, he worked for four years at the Law Commission and the Attorney General's Office. At the Law Commission Sebastian was the lead lawyer on the Law Commission's Sentencing Code project. Sebastian is also the author of a number of practitioner-texts and journal articles, and his academic work has previously been cited by the Court of Appeal (Criminal Division).*

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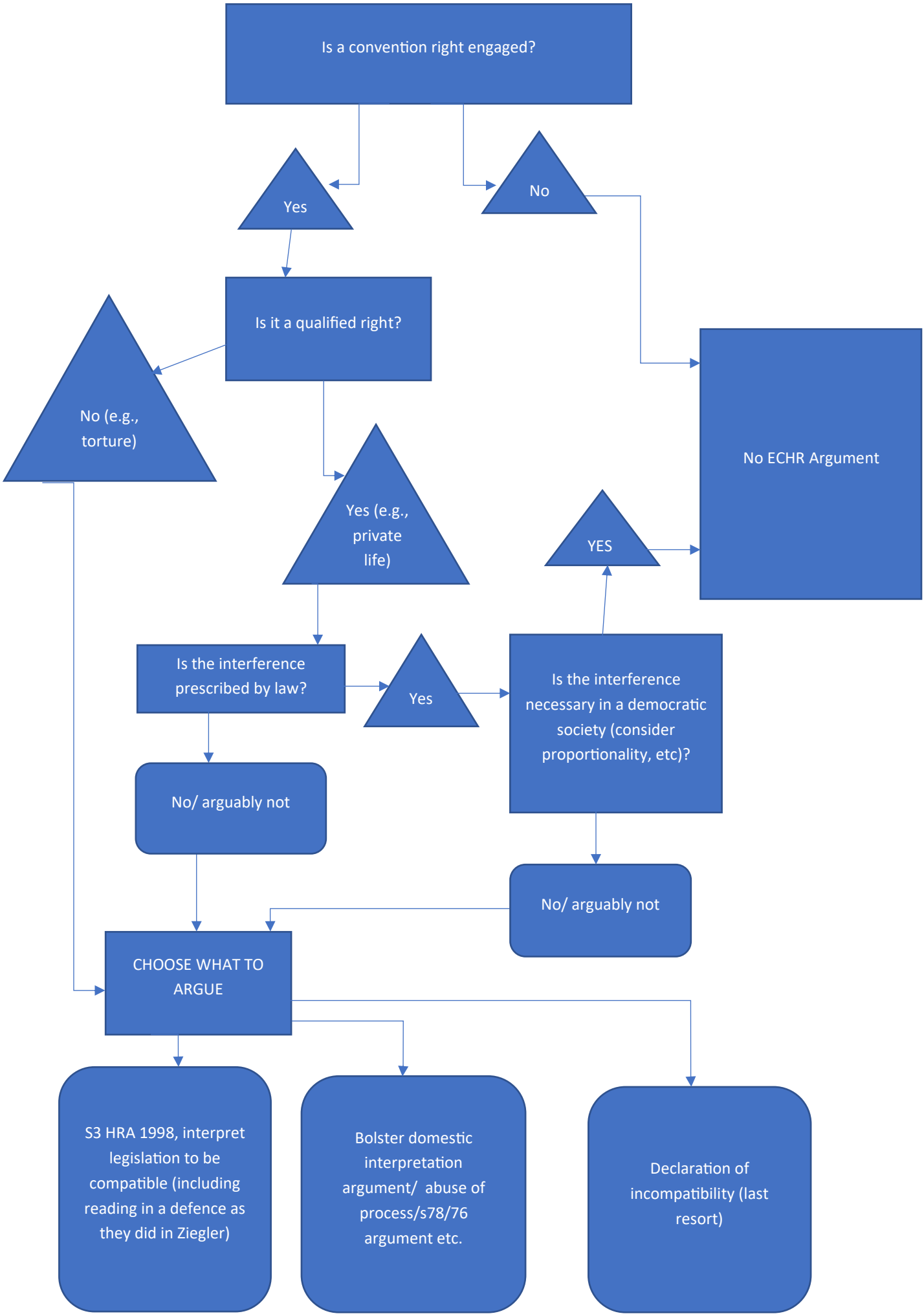
Fig. 1 - Flowchart



Lost in Transmission

Arthur Kendrick

Barrister

Case Note: A, B, D & C v R [2021] EWCA Crim 128

In a hotly anticipated judgment,[1] the Court of Appeal have confirmed that EncroChat material provided to the NCA is admissible in evidence. The general prohibition on the use of intercept evidence in criminal proceedings was held not to apply to this material. The main issue for the Court was the construction of section 4 of the Investigatory Powers Act 2016 ("the Act"), in particular whether the material had been taken while "being transmitted" or was recovered while being "stored".

Background

EncroChat is an end-to-end encrypted communications system that relies on the use of specially adapted devices to "ensure" privacy of messaging sent between users. The system was compromised in early 2020 by a Joint Investigation Team comprised of French and Dutch law enforcement ("the JIT"), who had successfully disseminated malware via an update server (located in France) that caused each EncroChat device to send data held on the device to the police, both for the preceding 7 days, and on an ongoing basis.

The NCA were provided with copies of the data, pursuant to a European Investigation Order ("EIO"), the legality of which was discussed in detail in *R(C) v DPP* [2020] EWHC 2967 (Admin).[2] This appeal concerns the admissibility of the material provided.

The Appeal

The issues for the Court were substantially narrower than the wide-ranging arguments that had been raised at first instance, which included s78 PACE arguments and an application to stay proceedings as an abuse of process. The scope for relitigating those issues may be limited given the Court's pronouncement that: "those involved should not be surprised if the trial judges deal with them rather more briskly" [at 6].

The key question for the Court boiled down to the correct construction of section 4 of the Act:

- The appellants argued that messages had been intercepted while "being transmitted" (section 4(4)(a)) and were therefore inadmissible in criminal proceedings pursuant to the exclusionary rule regarding intercept evidence contained in section 56 of the Act.
- The respondents submitted that the messages had been recovered from storage (section 4(4)(b)), and were therefore covered by the Targeted Equipment Interference warrant that had been obtained by the NCA; evidence obtained under such a warrant is admissible under an exception to section 56 (Sch 3, para 2 read together with section 6(1)(c)).

It should be noted that the Court rejected supplementary arguments by the appellants that the request for data had amounted to an unlawful request for assistance contrary to section 9 or 10 of the Act [see paragraphs 71-78]. The Court also declined to deal with a submission by the respondents relating to whether the prohibition on intercept evidence would apply at all, the relevant conduct having occurred in France, undertaken by entities other than the NCA, preferring that question to be determined when "truly necessary to the outcome" [at 53].

Decision

The Court noted that the definitions contained in the Act were not technical in nature and must work "whatever the technical features of the system in question". The Court stated that its task was to determine "as a matter of ordinary language" whether the communication was being "transmitted" or "stored" (both "ordinary English words") [at 55].

The Court explained why previous decisions under prior statutory regimes were unhelpful. In particular, the Court noted that the definition of "storage" contained in the Regulation of Investigatory Powers Act 2000 ("RIPA") section 2(7) limits the concept to "in a manner which enables the intended recipient to collect it or otherwise have access to it", there being no such limitation in section 4(4) of the 2016 Act [at 59].

The "answer" to the appeal is set out at paragraphs 60-67. Section 4(4)(b) had extended the concept of "storage", and the only relevance of the distinction between 4(4)(a) ("being transmitted") and (b) ("stored") was the type of warrant required, and the admissibility of the product of such a warrant. The Court explained that the definitions of "transmission" and "stored" are not mutually exclusive, rejecting the appellants' contention that the Court should first consider whether a message was "being transmitted" (section 4(4)(a)), and, if the answer was "yes", stop there [at 61].

To work out whether the messages were "stored" (and therefore fell within the purview of section 4(4)(b)), the Court turned to the judge's finding that the communications were extracted directly from the handset of the user, noting that this is, in effect, like any other handset download, albeit one done remotely [at 63]. The Court therefore found it unnecessary to determine when transmission starts and ends, although rejected the contention that transmission starts when a user presses send. The Court noted that data actually transmitted by an EncroChat device was encrypted, but what had been recovered was unencrypted, and must therefore have been taken from storage [at 66]. The Targeted Equipment Interference warrant was the correct warrant, and the product admissible [at 67].

Discussion

Taking a step back from the intricacies of the wording of the Act (the Court's interpretation of which seems sound), one cannot help but feel that hairs are being split. The difference between, on the one hand, intercepting a message that has left a device's radio transmitter and, on the other, obtaining a precise copy of that same message in the moments it was stored in the temporary memory of that device immediately after pressing "send" seems slim. The information obtained by law enforcement in both instances would appear to be effectively indistinguishable.

Part of the Court's reasoning was that the process used was "like any other means of downloading the content of a mobile phone handset" [at 63]. However, there is a key difference between the methods used here and a "normal" phone download: in this instance, the JIT has not provided details of precisely how the malware extracted the data [see para 34].

In a "normal" phone download, the procedures are well known, the functioning of the equipment/program can be commented on by a defence expert or a download can be re-performed if it is suggested that anything has gone wrong (as it sometimes does) during the downloading process. Given the position of the JIT, it would seem that none of that could be done here. One wonders where this leaves the defendant who is sure that the messaging attributed to them cannot be correct, and the only explanation is some issue with how the data has been obtained.

Further, the ramifications of this decision in the context of internet-based communication may be considerable. This judgment was expressly on the basis that the devices were part of a "public telecommunications system" [at 18]. The logic of this judgment (that the communication was in storage) would appear to apply equally to a data packet held temporarily on a server as it makes its way from one device to another. If that would be admissible via the same route as EncroChat evidence, the "prohibition" on the use of intercept evidence begins to look increasingly flimsy. Of course, this may be precisely what parliament intended (as the Court acknowledged at paragraph 24).

The traditional justification for the ban on intercept evidence is that to intercept it and admit it into evidence in a CPIA-compliant fashion would be resource intensive and jeopardise the effectiveness of the techniques used.[3] Perhaps those considerations apply less to the method used in this case: it can hardly have come as a surprise to anyone that malware could be used to compromise a supposedly secure communication system. But criminals may be slower to rely on such systems in the future, or will be more circumspect in their language if they choose to do so. No doubt this was considered before the results of the EncroChat hack were used to launch prosecutions, but it may be that, as a consequence, the future intelligence value of monitoring "secure" communications is substantially lessened.

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[1] Notwithstanding a perhaps lower threshold for entertainment in Lockdown 3.

[2] Discussed here: https://36group.co.uk/content/files/winter-2020-newsletter-final1.pdf

[3] See Intercept as Evidence, December 2014 Cmnd 8989 – referred to at paragraph 8 of this judgment.

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Two Thirds, or Not Two Thirds, that is the question…

John Hallissey

Barrister

Case Note: R v Tristan Patel and others [2021] EWCA Crim 231

On 6th February 2020 (in a pre-covid world, or at least a pre-covid UK) The Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2020 (2020/158) was made. The order was to come into force on 1st April 2020 and to apply to sentences passed on or after the day it came into force.

The effect of the order is that any defendant aged 18 or over sentenced to:

1. A term of 7 years or more;
2. For an offence for which life imprisonment may be imposed; and,
3. Which is listed in schedule 15 of the CJA 2003;

must now serve two-thirds of his sentence in custody before the Secretary of State is required to release him.

Those sentenced for such an offence before the commencement of the order would, of course, have been released automatically after having served half of their sentences.

At the time the order was made Criminal Law Week (CLW/20/07/16) criticised the manner in which the order was made - by non-textual modification - and expressed a concern that amending legislation in that way made it more likely that the order would be missed by lawyers and judges. Whether or not it was the manner of the amendment that was to blame, the fact that the order was coming into force seems to have been less widely known than one might perhaps have hoped.

Between the making of the order on 6th February 2020 and the coming into force of the order on 1st April 2020 the covid pandemic and the first lockdown hit. The rules requiring individuals to self-isolate began to take effect in March and, by 23rd March, the UK had entered its first lockdown.

Pubs shut their doors, a couple walking their dog in the Peak District were followed by a police drone and courts closed, leading to the adjournment of countless cases, including sentences.

As a result, a number of defendants who would otherwise have been sentenced before the 2020 order came into force had their sentences adjourned to a time after the 2020 order had come into force and so found themselves required to serve two-thirds rather than half of their sentences.

Over 2 days in February 2021 the Court of Appeal heard a number of conjoined appeals from defendants in that position. 13 appellants sought to persuade the Court of Appeal that their sentences ought to be adjusted to ensure that they spent the same amount of time in custody as they would have done had they been sentenced before the order came into force.

The law was against them from the outset.

The Court of Appeal has consistently held that judges, when passing sentence, must pass the appropriate sentence for the offence without having regard to the release regime. The Crown in these appeals relied upon a line of authority beginning with Bright [2008], Giga [2008] and Round [2009], which confirmed the general principle, and then a series of cases that demonstrated the way in which that principle had been applied:

- *Burinskas* [2014] demonstrated that the principle applied even where a change in the release regime resulted in anomalies;
- *Francis* [2014] demonstrated that the principle applied when sentence had been adjourned, through no fault of the defendant, to a time when a new, less-favourable regime applied;
- *Dunn* [2012] demonstrated that the principle applied even where the sentencing judge raised an expectation of a particular regime applying; and,
- *Khan* [2020] demonstrated that the principle continued to apply even where the release regime had been altered after the defendant was sentenced.

As the arguments developed in the Court of Appeal, two central submissions from the various appellants came to the fore:

(1). Hughes LJ in *Round* had set out the general principle in this way:

> "*Our clear conclusion is that it is not wrong in principle for a judge to refuse to consider early release possibilities when calculating his sentence or framing the manner or order in which they are expressed to be imposed. We are quite satisfied that it is neither necessary, nor right, nor indeed practicable, for a sentencing court to undertake such examinations. Ordinarily, indeed, it will be wrong to do so, although there may be particular cases in which an unusual course is justified*" [49].

Many of the appellants relied upon that last line; the suggestion that there may be cases in which an unusual course is justified; and sought to apply it to their own cases. The difficulty with that submission was that every appellant's case had been adjourned to after the commencement of the order for slightly different reasons. The impact of the covid closures was felt in every case, to a greater or lesser extent, but there were myriad reasons for the cases having been adjourned to dates that put them at risk of a covid adjournment: Lawrence's case had to be adjourned from February 2020 to obtain reports considering dangerousness, Blackley and DM were not sentenced in January 2020 because a psychological report was required, Fisher was convicted in September 2019 but had to await the outcome of a co-defendant's re-trial and so on. For the court to have put each of these cases in the '*unusual course*' category would have been to have stretched the principle to breaking point.

Ultimately, the court in these appeals took the view that Hughes LJ's approach was effectively, 'never say never'. This court took the same approach, leaving open the possibility that there may be circumstances in which the general principle might be set aside, but not finding those circumstances in any of these cases: *"Nothing in the authorities explicitly rules out the possibility that there may be exceptional cases where it is appropriate to take account of the impact of the early release provisions"* [37]. Quite what those exceptional circumstances might be is difficult to envisage. With the single exception of determining the minimum term for a life sentence (now under s323 Sentencing Act 2020) no court has yet identified a concrete situation in which it would be appropriate for a judge to take account of the release regime.

(2). The second central argument relied on by the appellants was the notion of a legitimate expectation. It was argued that the appellants had a legitimate expectation of being sentenced before the 2020 order came into force, that they had been placed in a worse position through no fault of their own, and that the Court of Appeal ought therefore to ameliorate the impact of the order. The Court in these appeals did not need to delve into the long line of authority dealing with legitimate expectation in various circumstances. The point was answered, in precisely these circumstances, in Dunn. There, a judge on being told, beyond the 56 day slip-rule limit, that a defendant would serve two-thirds rather than half of his sentence encouraged the defendant to appeal and said to him:

> *"This is highly procedural, but we do not want you being disadvantaged many years down the line. We want you to be able to be released at the earliest possible opportunity, subject to your progress in custody. This is a procedural anomaly. It is going to be resolved".*

Dunn duly appealed and his appeal was duly dismissed, with Saunders J saying:

> *"The question for us remains whether the appeal should nevertheless be allowed as the appellant's expectation had been raised by the judge that the result of the appeal would be that this court would correct what the judge believed had been an error on his part. We have had the benefit of full argument that the judge did not. Indeed, the stance of the prosecution at the time the matter was referred back to him was to encourage the judge to express himself in the way that he did. We do not think we should give effect to the error made by the judge. Indeed we do not think that it does create the sort of injustice suggested on behalf of the appellant."* [11 and 12]

The principle, then, remains sound. When passing sentence, the task of the judge is to pass the appropriate sentence for the offence committed, without regard to the release regime. It looks increasingly unlikely that there are, or will be, any 'exceptional case' that allow that principle to be set aside.

Two-thirds or not two-thirds? Two-thirds!

John Hallissey *and* ***John Cammegh QC*** *were both involved in Patel & Ors*

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The Tariffs for Discretionary Life Sentences Are Set to Get Longer

Christopher Donnellan QC

Barrister

In January 2020, Carlos Racitalal embarked on a short campaign of terror. On 4 separate days he attacked four innocent members of the public. First, he drove his car at a child in a supermarket car park; two weeks later, he attacked a mother with a knife from behind as she walked home with her two young children, causing a wound to the back of her head; two days later, he launched a sustained and vicious attack on an elderly vulnerable man, using a large knife to cause serious wounds to the head; finally, a further two days later, shortly after dark, he came up behind a 10 year old child and cut through the child's neck, mercifully missing a major blood vessel by the narrowest of margins. In November 2020, the jury convicted him of attempted murder for each occasion. He was obviously a dangerous offender. He gave no explanation. The Judge, Linden J, passed a discretionary life sentence. He had regard to the notional determinate sentence that would be appropriate, and to Schedule 21 of the CJA 2003, as is required by the Sentencing Guidelines Council's *Definitive Guidelines for Attempted Murder (2009)*. This offence was level 1: starting point 30 years and a range of 27-35 years. The Judge took a notional determinate starting point of 45 years and passed a total sentence of Life Imprisonment with a minimum term of 22.5 years, less the 289 days served. All perhaps as expected.

However, on 1st April 2020 the **Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2019**, ("Release Provisions") altered the early release provisions for serious violent and sexual offenders. Attempted murder is a relevant violent offence.

The effect of paragraph 3 Release of Prisoners (Alteration of Relevant Proportion of Sentence) Order 2019 was that section 244(3)(a) of the Criminal Justice Act 2003 was modified. In relation to any sentence passed after 1 April 2020 paragraph 3 provides:

> *"In section 244 of the 2003 Act (duty to release prisoners), the reference to one-half in subsection (3)(a) is to be read, in relation to a prisoner sentenced to a term of imprisonment of 7 years or more for a relevant violent or sexual offence, as a reference to two-thirds."*

You may ask, what have the release provisions for determinate sentences got to do with it? The Judge was passing a discretionary Life sentence. The determinate consideration is a device to reach a proportionate tariff. Further, the SGC guidelines (still applicable) specifically requires regard to Schedule 21 of the CJA 2003, no doubt, you may think, to keep such sentences in proportion to the sentence that might be imposed in the event that the attempt had been successful.

This therefore raised the question: should Carlos Racitalal's minimum term have been set at two-thirds (as opposed to one half) of the notional sentence, in line with the changes to the release provisions?

After the absence of consideration of the release provisions was flagged up, the sentence was reconsidered under the slip rule. By that time the judgment in **Attorney General's references No 688 of 2019 (McCann) and No 5 of 2020 (Sinaga) [2020] EWCA Crim 1676** ("McCann") was handed down on 10 December 2020 and this had a bearing on the understanding of the impact of the changes introduced by paragraph 3 of the 2019 Order. The observations at para 62-66 are pertinent. As Lord Burnett CJ said (para 66):

> "*The position, therefore, is that the significant changes to the release provisions which have either been recently implemented or are awaiting implementation will have a considerable impact on the position of individuals convicted of a wide range of serious offences.*"

There was no significant argument raised with the Judge during the slip rule hearing about the impact on the tariff setting exercise necessarily being kept in proportion to the application of Schedule 21.
The Judge addressed the application of the release provision to the discretionary tariff in the following way: First, he considered Section 82A Powers of the Criminal Courts (Sentencing) Act 2000, (now effectively reproduced as section 323 Sentencing Act 2020), which provides that, where a life sentence is passed which is not a whole life order, the sentencing judge should order that the early release provisions of section 28(5)-(8) of the Crime (Sentences) Act 1997 shall apply after a "*specified minimum term of imprisonment*" which requires to be served. Subsection (3) states that the specified minimum term "*shall be such as the court considers appropriate*" taking into account:

(a) the seriousness of the offence(s);
(b) the provisions relating to crediting periods in custody; and
(c) the early release provisions.

As to (c) he considered **R v Burinskas; AG's Reference (No 27 of 2013)** [2014] EWCA Crim 334; [2014] 1 WLR 4209, where Lord Thomas CJ said at paragraph 33: " *The effect of* section 82A *is to require the sentencing judge to identify the sentence that would have been appropriate had a life sentence not been justified and to reduce that notional sentence to take account of the fact that had a determinate sentence been passed the offender would have been entitled to early release.*". Section 244(1) of the 2003 Act provides that as soon as a relevant fixed term prisoner has served the "*requisite custodial period*" it is the duty of the Secretary of State to release him on licence. Generally one half: Section 244(3)(a). Lord Thomas went on to say in **Burinskas**: "*34. When imposing a discretionary life sentence judges reduce the notional sentence by one half to reach the minimum term. That approach was endorsed in R v Szczerba [2002] 2 Cr App R (S) 387, although the court said there might be cases in which, exceptionally, the reduction might be less than one half. When R v Szczerba was decided any prisoner serving a sentence of four years or more (a "long-term prisoner") was eligible for release at the halfway point of his sentence, but not entitled to release until the two thirds point. The courts did not change their approach when, by operation of* section 244(1) and section 249(1) of the CJA 2003 *, all prisoners serving determinate sentences became entitled to release at the halfway point of their sentences…*"

In **McCann and Singga** the Court of Appeal confirms the court would normally order a minimum term of half, but exceptional circumstances may make more than half appropriate: (see paras 55-60). The reason for the reluctance of the courts to reduce the notional determinate sentence by less than half is explained by Mantell LJ in **R v Adams and Harding** [2000] 2 Cr App Rep (S) 274: "*[3]. The determinate part of the sentence is that which is necessary to reflect punishment, retribution and the need for deterrence. [4]* ***The determinate part of the sentence should not be enlarged with a view to protecting the public: that is achieved by the imposition of the life sentence.***"

The Judge sentencing Carlos Racitalal took the view that in the light of paragraph 34 of the judgment of Lord Thomas in **Burinskas**, other than in exceptional circumstances, the specified minimum term in the context of a life sentence will be the equivalent to the earliest point at which the offender would have been eligible for release if a determinate sentence had been passed for the same offence. He did not see that the prisoner's entitlement to release which was effected by paragraph 3, of itself, affected the rationale for the principle or its application. He then addressed the issue arising from the imposition of a life sentence not a determinate sentence:

> "It *might be argued that a basis would be that the sentence is indeterminate, rather than a determinate one. But the difficulty with this argument is that the minimum period of imprisonment in the context of a determinate sentence achieves certain sentencing aims – punishment, retribution and deterrence – whereas the fact that a life sentence is passed achieves other sentencing aims – the protection of the public - as Mantell LJ pointed out in* ***Adams and Harding****. There is no logical basis for saying that because a life sentence is imposed to protect the public the specified minimum term should be lowered below what it would otherwise be. Parliament has concluded that in a case such as the present it is necessary that a prisoner serves two thirds of any determinate sentence in order to reflect punishment, retribution and deterrence. There is no reason why a lesser period would apply in the context of a life sentence for the same offence*."

The minimum term was increased to the equivalent of two-thirds of the notional determinate figure with a small discount for the delay in correcting the sentence, and was revised to 29.5 years (less days served on remand).

If he had succeeded in killing all 4 victims, with the finding of the requisite intention to kill, there is no doubt that a Mandatory Life sentence starting point under schedule 21 would have been at least 25 years (taking a knife) or 30 years, there being insufficient to attract the whole life order consideration. Even allowing for the aggravating feature of multiple deaths, would the tariff for killing have been much above the tariff imposed? Is this a precursor to further increasing the periods of incarceration for offenders, and further postponing the consideration of release on life licence by a Parole Board for those, particularly when sentenced at a young age, who may mature and after a commensurate period of punishment eventually obtain release upon licence if or when it is safe to do so?

Christopher Donnellan QC *and* ***Kevin Barry*** *prosecuted R v Racitalal before Mr Justice Linden and Jury at Leicester Crown Court.*

Christopher *is head of the 36 Crime team. He has extensive experience in defending and prosecuting serious crime including murder, manslaughter, and death by driving. He has particular expertise in health and safety cases involving death in the workplace and transport industry.*

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