THE LONDON ADVOCATE

THE NEWSLETTER OF THE LONDON CRIMINAL COURTS SOLICITORS' ASSOCIATION

NUMBER 104 AUTUMN 2023

In my introduction to the last edition I gave a cautious welcome to the new Lord Chancellor, Alex Chalk, who then followed up his positive legal aid announcements with a commitment to invest in the court estate, to increase sitting days to address the ever-growing backlog in the Crown Courts, to encourage community penalties over short prison sentences and to reduce the time before many convictions are spent. Quite the list. And yet…

The backlog shows no sign of shrinking (Max Hill the departing DPP, expects the problem to last for years) but still the government insists on misidentifying the root causes as either Covid or the bar strike; prisons have reached capacity with no real proposals for reform (the idea of renting cells in foreign prisons doesn't qualify, I'm afraid – and there are still over 1000 serving IPP sentences); the court estate continues to crumble.

Of course, a radical increase in funding is long overdue, but alongside that we need a change of mindset and tone from the government to address the ever-decreasing appeal of working within the criminal justice system. This applies not just to practitioners, but to court administrators, prison officers, judges, security staff. The stripping away of legitimacy, respect and, yes, status over many years is bound to hinder improvements even if there is more investment. This kind of fundamental change of direction, which is going to take time and commitment, needs more than just an eager new face at the Cabinet table.

After five years, this is my last edition as editor of The Advocate. I hope you've enjoyed the issues I've put together over what has been, on any view, an eventful period (not just for those working in the CJS): from the viewpoint of 2023, 2018 was a very different place. In this edition we have articles on the usual eclectic range of relevant topics: unrepresented defendants, bursting prisons, Interpol, youth sentencing, Proceeds of Crime Act proceedings, and counter-shoplifting vigilantism!

My parting warm thanks go the many generous contributors of articles, commentaries and reviews, in particular Bruce Reid who has been ever present. Also to my colleagues on the LCCSA committee, with special mention to the Presidents I have had the pleasure of working with: Jon, Kerry, Mark, Hesham and Fadi. Each has had their own style, but a common trait has been absolute tirelessness in service of the Association's members. I have no doubt that the next President, Ed Jones, will maintain that most honourable tradition.

Ed Smyth, editor

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LCCSA NEWS

UNITE

The committees of the LCCSA and the CLSA have decided to urge their members to exercise their voices collectively and join the trade union Unite.

The committees believe that only the collective force of our numbers can make a critical difference in the fight for legal aid, for our professional futures and for the fair trial rights of our clients.

Legal aid has been described as the forgotten pillar of the welfare state. Unlike workers in the other pillars- health, education and social security -legal workers have not yet had a major union fighting for their pay and conditions on a large scale and in a way that is both professional and coordinated.

The Law Society does important lobbying work and takes legal challenges to block unlawful decision making. The professional membership bodies and individual firms have been sounding the alarm for years about the devastating effect that cuts and lack of investment have had on the justice system.

In spite of these efforts, pressures on legal workers have increased whilst pay rates have stagnated or gone backwards. Recruitment, retention and the mental and

physical health of lawyers and legal workers are at an all-time low. This situation cannot continue.

The fight for access to justice and the wellbeing of all who strive to deliver it is too important not to take t to the Ministry of Justice and the LAA.

For this reason, the committees of the LCCSA and CLSA agreed to encourage firms to recognise and members to join unite the union so as to strengthen the collective voice and unity.

The decision to recommend Unite comes after months of consultation with trade unions. This was the best option because:

1. Unite has an established legal branch with funds to commit to our cause;
2. Unite is the largest trade union in the country - you would be joining millions of others;
3. Unite is focused on large scale wins and is hungry to succeed in the legal sector, specifically for legal aid workers.
4. Unite is highly resourced and can offer organisers and campaign tools to help us speak directly to the Government.
5. Unite can coordinate industrial action if the membership, us, vote for it.

Join Unite today and fight for your jobs, your pay, your conditions and equal access to justice for all. Please do write to us to confirm you have joined so we know how successful this message has been and if you have any questions please do not hesitate to contact the lead on our trade unions subcommittee, Zachary Whyte.

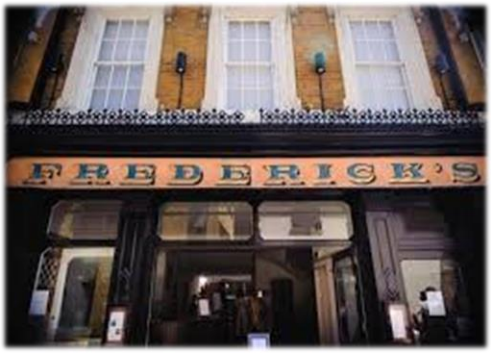
CLOTHES AT COURT FOR REMANDED DEFENDANTS

The London RJs Prison's group has been doing some work with PECS on the often-vexed problem that occurs when family supporters bring a "court suit" to court and ask for it to be passed on to a prisoner of what to wear during a trial. This raises significant security concerns and usually a refusal and sometimes a stand-off.

PECS have therefore issued a guidance note which we share here HMPPS Incentives Policy Framework and Prisoners Property | Lccsa.

LCCSA AGM AND DINNER

President, Fadi Daoud and the LCCSA Committee, invite you to join them at the LCCSA AGM, which will take place on Monday November 13th 2023 at **Frederick's** (106 Camden Passage, Islington, London N1 8EG – a short walk from Angel tube) from 6:30pm.



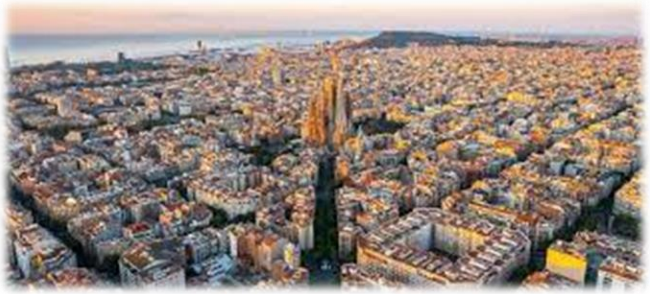
The AGM is open to all LCCSA Members and will see the election of the new President and 2023-24 committee. The AGM will be followed by a 3-course dinner and drinks, from 7:30pm and we are honoured this year that our Guest Speaker this year will be the incoming Director of Public Prosecutions, Stephen Parkinson.

The cost of dinner and wine is £60pp. Please contact **Sara** for payment details and let her know of any dietary requirements. Places are limited.

CONFERENCE REPORT

What happened in Barcelona stays in Barcelona! Well not all of it...

I was a first timer at the autumn conference, hopefully it won't be the last: what a great time was had.



I should start with the thank yous, and the serious stuff: Thank you to 5 St Andrews Hill for sponsoring the conference, for sending such a convivial bunch, and of course for contributing to the essential CPDs. The brave souls from 5SAH provided training to a motley crew of bleary-eyed lawyers on the Saturday morning. Against the odds, we were all gripped, managed to stay awake, and even absorbed, thanks to an engaging, even humorous, set of experts who lectured us on topics from extradition, modern slavery and sentencing to… confiscation and SARS and DAMLs (if you know, you know).

Thank you also to Sara Boxer our wonderous administrator , and her expert Barcelonan contacts, whose arrangements were superb and seamless. Even a

coach tour of the city was provided, with the obligatory left-behinders providing some amusement.

Within the busy itinerary, thankfully room was left for a perfect amount of extra-curricular activity.

The hotel Melia had a few more stars than certainly I am used to. The rooftop pool and terrace were "enjoyed" by conference delegates. Many misspent youths apparently revisited. A good time was had by all, maybe not so much by the other guests at the hotel, but hey, we hardly noticed them!

For myself, and a couple of committee colleagues in the "Presidential" category, the more spiritual existentialist sunrise sea swims were the perfect start to the days. A few cold bottles of Alberino accompanied superb tapas and paellas which punctuated the weekend.

In truth, I was less than enthusiastic at the thought of a long weekend with a bunch of lawyers, how wrong could I have been. It was an absolute blast!

COMMITTEE MEETINGS

The LCCSA committee meets on the second Monday of each month at 6:00pm, usually at Kingsley Napley. All members are welcome to attend (in person or remotely) and if you wish to participate please contact the editor or Sara Boxer.

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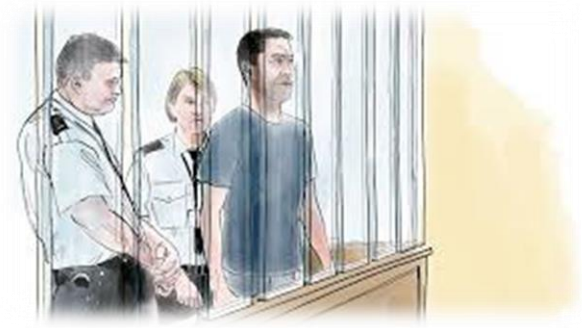
ARTICLES

THE LONE DEFENDANT – FACING PRISON WITHOUT A LAWYER

Penelope Gibbs, director of Transform Justice, describes how new data illustrates the growing problem of unrepresented defendants, and the challenges the situation poses for the effective administration of justice

How would you cope with defending yourself in a trial which could end with your own imprisonment? It's little known that judges in magistrates' courts can imprison adults for up to six months for one offence and more for multiple offences. The decision on conviction and sentence is made by a bench of two or three magistrates or by a single district judge (no jury is involved). All defendants faced with a possible prison sentence can use a lawyer for free for their first appearance in the magistrates' court, but can't have a free lawyer for subsequent hearings unless their income is below £22,325 pa.

Our whole criminal justice system is designed to be an adversarial "contest" between lawyers, a defence lawyer representing the person accused and a prosecution lawyer representing the interests of the state. The language and process is complex – observers, defendants and witnesses often find it hard to know what is going on when lawyers *are* there. So it's a tall order for anyone to represent themselves, to know whether the charge against them is the right one, whether to plead guilty or not guilty, how to argue for a particular sanction if convicted. Transform Justice published research on unrepresented defendants in 2016 and have championed the interests of unrepresented defendants ever since.



We were hampered in 2016 by a lack of data. There was no court data at all on unrepresented defendants. Now the data is there thanks to the Common Platform, a new digital case file system. The Centre for Public Data has analysed some very interesting numbers which indicate the problem is much worse than it was, or than anyone thought. Ideally every defendant faced with getting a criminal sanction in the courts would have a lawyer. But its particularly important for those facing imprisonment either on remand or sentence – they're facing a life-changing experience in an institution in crisis. Violence in prison is rife and many prisoners are locked up 22 hours a day. Anyone who serves a prison sentence acquires a life-long criminal record. The new data shows that half of all those at risk of receiving a prison sentence in the magistrates' court are unrepresented at every stage of the process. This includes over two thirds of those accused of driving when over the alcohol limit or of having taken illegal drugs, of driving when disqualified and of failing to surrender to court/police bail.

At least one in five defendants are unrepresented for every category of serious offence. Those accused of "indictable only" offences will be tried in the Crown Court but it is critical that they're represented at the early stages of the process – in police custody and in the magistrates' court – to prevent a miscarriage of justice. Yet these figures show that 29% of those accused of rape and 20% of those accused of murder are unrepresented in the magistrates' court.

Transform Justice has recruited courtwatchers to observe London magistrates' courts. Their figures of cases where the defendant is unrepresented are slightly lower than the national picture – on average one in five are unrepresented. Courtwatcher Dhillon Shenoy recently observed a case which highlights why people are unrepresented and how the courts adapt. A woman was accused of four offences – driving without insurance, possession of cannabis and a class B drug and obstructing a section 23 search (as in stop and search) by the police. Being convicted of just one of these could have landed her in prison. She arrived at court expecting to be represented but communication with legal aid lawyers had broken down and she learnt that they would not be coming. She hadn't had access to any of her own case papers since she thought she had a lawyer. She was on benefits, neurodivergent and with mental health problems. Despite this, she was encouraged by the judge to defend herself in her own trial. The judge said she could apply for an adjournment but he didn't have to grant it, and if she represented herself the case would be dealt with by the end of the day. I think this type of pressure on defendants is wrong, but in the event the judge and the prosecutor appear to have done their absolute best to support the woman. The charge of possession of class B (in fact ADHD medication) was dropped, she was acquitted of the cannabis possession charge, given a conditional discharge for obstructing the section 23 search and fined for driving without insurance. Dhillon particularly praised the prosecutor Lydia Marshall Bain for her fair approach.

It is impossible to know whether the outcome would have been different had the defendant been represented. But I really worry that such a complex trial (involving cross examining a police officer) was held when the defendant was "vulnerable and fragile" and "very distressed throughout the hearing". Its traumatic enough to face a trial in the magistrates' court without learning you must represent yourself at only a few minutes notice.

Ironically, the tool for providing this new data on unrepresented defendants – the new digital case file system called the Common Platform – is also increasing the discrimination they face. It will contain all the case files for a hearing, including disclosure, and is accessible to any professional participant in the process. But it has been designed to exclude the unrepresented defendant. So they have no digital access to the files a defence lawyer would see. This disadvantages all those unrepresented defendants who work better digitally then reading paper files, but also means that, in reality, unrepresented defendants often don't receive any case papers before their hearings – merely the instruction to turn up.

This new data is a revelation. Most people accused of imprisonable offences have the right to free legal advice. Previous research suggests most unrepresented defendants would prefer to have a lawyer. So why aren't they getting one? And what are the results of so many people defending themselves? Our 2016 research suggested justice outcomes were different – that unrepresented defendants were less likely to get their charge downgraded, more likely to make the wrong plea given the evidence, and less likely to be able to mitigate their sentence if convicted. Maybe now the data can tell us whether this is the case.

NB the raw data on unrepresented defendants was a response to a parliamentary question from shadow courts minister Alex Cunningham.

Transform Justice aims to demystify the criminal justice system and increase awareness of the ways it could be improved, and to ensure that evidence about what works to reduce crime and prevent reoffending should be at the heart of policy decisions and embedded in practice by those working in the criminal justice sector.

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NOTHING TO SEE HERE, JUST NO MORE PRISON PLACES…

Grace Khaile and Zayd Ahmed of Mountford Chambers comment on the recent, depressing-but-unsurprising news that the prisons are full and that sentencing courts must react accordingly.

The Senior Presiding Judge, Edis LJ, has sent a letter to all members of the judiciary stating that from the week commencing 16th October 2023, the sentencing of offenders who are on bail where custody is likely to be imposed, should be adjourned. The prison estate is full.

Those working in the criminal justice system, including the judiciary, lawyers, prison service, and probation, have noted the increase in prison populations over a number of years, long before Covid and the Action by the Criminal Bar.

On 20th March this year, guidance issued by the Sentencing Council entitled '*the application of sentencing principles during a period when the prison population is very high'* noted that due to the high prison populations, the courts should consider suspended sentences instead of short custodial sentences until the emergency state has been lifted, affirming the leading Court of Appeal case of *R v Arie Ali [2023] EWCA Crim 232*. In September this year, the government asked to use 400 police cells

temporarily to house prisoners due to the surge in defendants on remand, and those sentenced to immediate custodial sentences.

The systematic underfunding of the justice system is the primary cause of this unprecedented situation – limited sitting days and refusal to invest meaningfully in the Prison Estate being the obvious examples – but it is not the only cause. Sentences have been increasing gradually over the last two decades, the average custodial sentence for either-way and indictable offences increasing by 86% from 15.5 months in 2002, rising to 24.6 months by 2022 according to research by the Sentencing Academy.

The situation has been compounded by the Government's failure to tackle the residual effects of Imprisonment for Public Protection (IPP) sentences, abolished in 2012, rejecting the recommendations made by the House of Commons Justice Committee. Likewise, additional pressure has been placed on prisons through the reforms to the Criminal Justice Act 2003, which require a significant proportion of prisoners to serve two thirds rather than half of their sentence (more on this here).

The infrastructure of prisons in England and Wales has also significantly contributed to the overpopulation of prisons. The majority of the busiest prisons were built in the Victorian era; at the time they were intended to house a single prisoner per cell. Today, prisons house two or three prisoners, or even more, in each cell whilst the conditions deteriorate. The failure to improve existing, and build new, prison places whilst seeing a substantial increase in the imposition of custodial sentences does not aid the overpopulation issue.

The issue of overcrowded prisons has become a pressing concern almost unheard of in modern society. As prison populations continue to swell, the consequences of having prisons at or beyond capacity are far-reaching and affect not only those in custody but also society as a whole.

What does this mean for the criminal justice system?

1. Deterioration of Prison Conditions – overcrowding can lead to heightened tension and violence within prisons. When facilities are packed beyond capacity, it becomes challenging for staff to maintain order and safety. Those detained may be more likely to experience violence and abuse. This can be seen in the increase in the number of deaths in prisons in the twelve months up to June 2023, which has increased by 9% on the previous year; the number of suicides by 26% and statistics show that the suicide rate in female prisons which has always been high is now at 52%.
2. Rehabilitation – Inevitably, efforts to prioritise safety have led to opportunities for rehabilitation being curtailed, as staff.
3. Delays in Justice – with no prison places left, defendants on bail and victims are those most affected by the delays in sentencing. Without defendants being sentenced, some victims will not have the closure they need. Likewise, defendants will also find themselves in a position where they can't move on and make progress as they have a custodial sentence likely to be imposed upon them leaving them in limbo.

Conclusion

It is evident that Government intervention is needed in order to address the issue.

Prison overpopulation has been ignored for far too long and detracts from the objectives of the criminal justice system; it requires urgent attention and reform.

Grace Khaile is a probationary tenant at Mountford Chambers. Her practice largely consists of criminal defence but a small amount of prosecution work as a grade 1 prosecutor, she has a particular interest and focus on youth justice, serious crime, and terrorism matters.

Zayd Ahmed is a criminal and extradition barrister who represents both children and adults charged with a full range of criminal offences. He is also a dual qualified duty solicitor. He is chair of the young criminal bar association and an elected member of the Bar Council.

https://www.mountfordchambers.com/

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INTERPOL: LOOKING TO THE NEXT CENTURY

As INTERPOL celebrates a milestone anniversary in 2023, Will Hayes and Georgina Woodward of Kingsley Napley consider some of the underlying

issues with the Red Notice system and what this means for the next 100 years.

INTERPOL was founded in 1923 at the second International Criminal Police Congress in Vienna, Austria. The event was attended by representatives from 20 countries. Gradually, the sophistication of INTERPOL increased and the first Red Notice was issued in 1947 in relation to a Russian man accused of murdering a police officer. Since then, INTERPOL has developed in ways inconceivable to those who were involved in its conception in 1923. The agency has expanded to encompass 195 member states and it issues more than 10,000 Red Notices every year, and at least 12,000 more informal diffusion notices.

Despite the work INTERPOL has done to increase cross-border cooperation and bring criminals to justice, it has long been a target for criticism.

Operating in the dark

Since its inception, INTERPOL has never been renowned for its transparency. The vast majority of INTERPOL Red Notices are not public – currently, only about 7,000 Red Notices are published on INTERPOL's website, despite more than 11,000 being issued in 2022 alone.

In practice it is notoriously difficult for those subject to a Red Notice to gain clarity over the progress of any challenges to the validity of the Red Notice naming them, or even to know that they have been named. An individual can make a direct request to INTERPOL to determine if they are the subject of a Red Notice or if any other data concerning them is held on INTERPOL's files. However, this results in the authorities in the requesting state being consulted and asked whether they consent to the information being disclosed. If they refuse, the individual is left in a state of limbo.

Last year, INTERPOL published key operational data including the number of applications for Red Notices it had received and rejected, as well as the number of Red Notices actually published. As we wrote at the time, this was an encouraging step towards improving transparency. However, the data did not distinguish between Red Notices INTERPOL refused to issue and Red Notices which were issued but then cancelled after being found to be non-compliant.

A tool of oppression?

The predominant criticism of INTERPOL's Red Notice system has been that it can be abused by persons in the requesting state for illegitimate purposes, such as pressuring business rivals in civil litigation or intimidating political opponents abroad.

The lack of transparency is no doubt one factor which contributes to this unsatisfactory position. A closer look at the inner workings of INTERPOL reveals two others.

Weak or lacking scrutiny: Requests for Red Notices are supposed to be reviewed by the Notices and Diffusions Task Force, to ensure compliance with INTERPOL's own rules and constitution, before they are issued. However, INTERPOL is a notoriously under-resourced and under-staffed body meaning that this review may be carried out with a light touch – if it happens at all. The consequences of this lack of scrutiny can be devastating to the subject of a Red Notice even if it is later cancelled.

For illustration, Uyghur activist Idris Hasan was arrested in Morocco in July 2021 following the issuing of an INTERPOL Red Notice requested by China. INTERPOL subsequently cancelled the notice, but Hasan has remained imprisoned for over 2 years in Tiflet.

Lack of independence: The inherent structure of INTERPOL means that it is reliant on international cooperation in order to carry out its functions. This means that the relationship between member states and INTERPOL is one of co-dependence. There is also a distinct lack of external, independent scrutiny of the agency. Its decisions are final, and although there is a framework for challenging Red Notices, this is entirely within the INTERPOL sphere – there is no possibility of challenge to a court or other external body. Furthermore, despite being based in France, INTERPOL benefits from immunity from legal action in that country, and elsewhere.

Reasons for optimism

There appears to be an appetite for change at INTERPOL. In addition to the unprecedented disclosure of Red Notice data in 2022, there have been a number of reforms over the last 10 years. These have included the adoption of a refugee policy in 2015, a review of the Red Notice process between 2016 and 2019, endorsement of a data processing policy in 2017, and increased financial

support for NCBs, at member country-level, between 2016 and 2019. In 2016, INTERPOL also established the Notices and Diffusions Task Force, made up of lawyers, police officers and operational specialists, to review requests for Red Notices and existing notices. It has also continued to refine the rules and processes of the Commission for the Control of INTERPOL's Files (CCF), which INTERPOL describes as "an independent body that ensures that all personal data processed through INTERPOL's channels conforms to the rules of the Organization". The Task Force, along with an increasingly robust CCF, should bring more scrutiny, integrity and consistency to the Red Notice system.

The agency received its first real increase to statutory contributions (obligatory annual payments made by member countries) since 2009 in November 2021, and will receive an additional 7 million euros of funding in 2023 and an additional 10 million euros in 2024. However, the majority of INTERPOL's funding (55.5% in 2022) continues to come from voluntary sources; this includes contributions from private entities and non-governmental organisations, as well as government agencies from member countries.

The steps INTERPOL has taken towards improving its transparency, although small, do at least represent a move in the right direction.

Looking towards the next 100 years

Undoubtedly, there are issues with the operation of INTERPOL. However, it remains a unique body designed to facilitate information sharing and international police cooperation worldwide. As noted, reforms are taking place which indicate a positive attitude towards change, albeit the pace of progress in this area is slow.

With mounting international pressure, in order to survive – and thrive – INTERPOL will have to seriously consider more significant and wholescale reforms. These should include:

1. The instigation of a new external body, entirely independent of INTERPOL, with the remit to review challenges to INTERPOL's decisions (for example, a refusal by the CCF to delete a Red Notice), and the power to quash decisions;
2. Committing to publishing comprehensive, granular data, on an annual basis, regarding Red Notice decisions; and
3. Improvements to bring about quicker decisions by the CCF when considering applications for access to data held on INTERPOL's files (currently up to four months) and deletion of Red Notices and other data (currently up to nine months).

It is important to remember that INTERPOL does not operate in a vacuum – it is reliant on support from its member states. Even with the recent increases in funding, average statutory contributions from the majority of member states amounted to less than 30,000 euros per country in 2022. In order for there to be meaningful change, there will need to be meaningful, mandatory financial contributions from member states.

Will Hayes is a senior associate in the criminal litigation team with a practice focussing predominantly on serious and complex crime, extradition and INTERPOL Red Notices.

He was called to the Bar in 2013 and completed pupillage at a leading set of criminal chambers. Since joining Kingsley Napley in 2017, he has gained extensive experience representing individuals and corporate clients in all types of criminal cases.

Georgina Woodward is a trainee solicitor at Kingsley Napley currently sitting in Criminal Litigation having previously completed her second seat in Real Estate and her first seat in Regulatory.

https://www.kingsleynapley.co.uk/

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THE TREATMENT OF CHILDREN AND YOUNG PEOPLE IN THE CRIMINAL JUSTICE SYSTEM: THE CORRECT APPROACH

In this article, Kate Goold (partner at Bindmans) emphasises how challenging for courts are sentencing exercises involving children and young people, with particular reference to the important recent case of ZA.

The courts must balance the principal aim of the youth justice system (i.e. to prevent offending by children and young people) with a consideration of the welfare of the young person. In the words of Gandhi, 'the true measure of any society can be found in how it treats its most vulnerable members'.

ZA [2023] EWCA 596 concerned the correct approach to sentencing children and young people, especially when they are tried together with older co-accused.

The following checklist was provided by the judges:

1. The court listing should ensure that there is sufficient time for the judge to read and consider all reports and prepare sentencing remarks in language that is age-appropriate
2. Consideration should be given to listing separately, and as a priority, the sentence of any child or young person jointly convicted with adult co-defendants
3. The courtroom itself should be set up to ensure that the child or young person is treated appropriately (i.e. as a vulnerable defendant entitled to proper support). If possible, the judge should be seated at a level with the child or young person, who should be able to sit near to counsel, with their guardian or other support seated next to them
4. Counsel must expect to submit (and upload to the case management system well in advance of the sentencing hearing) full sentencing notes identifying all relevant sentencing guidelines, in particular any youth-specific ones. Material considerations should be addressed in an individualistic way for each defendant separately
5. The contents of the pre-sentence report and any expert reports are crucial. Courts should consider these reports bearing in mind the general principles at section 1 of the overarching youth guidelines, together with any youth-specific offence guideline, carefully working through each
6. It will generally be unhelpful to go straight to paragraph 6.46 of the overarching youth guideline (which suggests that an appropriate custodial sentence for a youth may be half to two-thirds of the adult sentence) without having first directed the court to general principles canvassed earlier in that guideline, as well as to any youth-specific guideline. The stepped approach in the relevant guideline should be followed
7. If the court considers that the custody threshold has been passed, the court must consider whether a Youth Referral Order with Intensive Supervision and Surveillance could be imposed instead. The court must explain why if it cannot

It might be helpful to remind the court of certain matters that must be addressed when sentencing children or young people in the Crown Court. These may include considerations that help facilitate the effective participation of the child or young person, such as having their presence in court in person or over a video link, having a parent or key worker present, court dress, use of first names, familiarisation, positioning in court, adequate breaks during the hearing and the use of age-appropriate language.

Many may feel such guidance is long overdue, and this case demonstrates the court's acknowledgment of the fact that children and young people are vulnerable, and cases involving them require special care.

This has recently been reinforced by the courts in their ruling about the way a child was treated by the police. The court in *ST v The Chief Constable of Nottinghamshire Police* [2022] EWHC 1280 confirmed that the duty to consider the vulnerabilities of children and young people extends to the police. The appellant, in this case, was 14 years old and was arrested at home at 5.30am, and then held in an adult cell in the police station for six hours before being interviewed and released on bail. He was never charged with an offence and the allegation related to a relatively old matter that had already been investigated by the school, so there was clearly no requirement for a 'dawn raid' and arrest. The court criticised the police's 'reprehensible and lamentable' conduct and set out the following principles:

1. The use of the power of arrest must be fully justified and the police, before exercising it, must consider whether their necessary objectives could be met using less intrusive means
2. The best interests of the child must be factored into the police's assessment of the necessity of arrest. The power of arrest must only be exercised after adequate consideration of the welfare of the child
3. The arrest must be necessary and not merely convenient
4. The welfare of the child is a material consideration when assessing whether the arrest of a child is necessary at a particular time
5. The timing and place of arrest are not matters of police discretion and are relevant when assessing the necessity of arrest
6. Where there exists a need to search a child's home address, this does not automatically mean that arrest is necessary. Officers should consider alternatives like a search warrant, or asking for the permission of the owner of the arrest (i.e. a parent) to carry out a voluntary search

There appears to be a risk that as soon as a child becomes an 'accused', those involved in the criminal justice system lose sight of the fact that they are dealing with a vulnerable young person and require all the protections available. This 'guidance' from the court and

strong words in *ST* are welcome but long overdue. The youth of an accused person must always be in the forefront of everyone's mind when dealing with them in this stressful and complicated environment.

With almost 30 years' experience as a criminal solicitor, Kate Goold has extensive expertise in defending complex and serious crime and extradition including all aspects of business crime and fraud, money laundering, restraint and confiscation and cross-border investigations. Kate's work has been recognised in the independent legal directories, Chambers and Partners and Legal 500, where she is ranked Tier 1 for her extradition work in their 2021 guide.

https://www.bindmans.com/

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THE IMPORTANCE OF APPLYING THE HEARSAY RULES CORRECTLY IN ASSET RECOVERY CASES IN THE MAGISTRATES COURT

Those practicing regularly in the magistrates' courts will be all too aware of the increasing use of Account Freezing and Forfeiture Orders (AFFOs). James Fletcher and John McNamara of 5 St Andrews Hill caution against being lulled into false sense of security by the summary jurisdiction: such cases can be factually and legally complicated.

As law enforcement continues to bring AFFOs with increasingly complex allegations at their heart, it is important for practitioners to ensure that the correct rules of evidence are followed.

AFFO proceedings are dealt with in the magistrates' court as a hearing on complaint.[1] They are civil proceedings, and as such the Civil Evidence Act 1995 (CEA) applies in so far as the admissibility of hearsay evidence.[2] However, as allowed by section 12 CEA there are specific rules in relation to hearsay evidence for these proceedings, namely the Magistrates' Court (Hearsay Evidence in Civil Proceedings) Rules 1999.

Those rules provide that a party who wishes to give hearsay evidence should serve a notice not less than 21 days prior to the hearing, such a notice should explain who gives the evidence, what is said to be hearsay and why that person will not be called (rule 3).

The court may, on application, allow another party to call and cross-examine the person who made the statement. That application must be served on all parties not less than 7 days after the date of service of the hearsay notice, and provide reasons why the statement maker should be cross-examined (rule 4).

On a strict application of the law, that rule does not require the party who sought the hearsay evidence to call the witness. It is for the other party to call that witness for the purposes of cross-examination. While it may be that practical arrangements would be made by the party for whom that individual was a witness, there is no legal requirement for that to occur.

This issue has been considered in *Dyson Limited v Qualtex (UK) Limited* 2004 EWHC 1508 (Pat). In that case the rules in question were Civil Procedure Rules, which mirror almost exactly the Magistrates Rules on hearsay evidence. At paragraph 9 Mann J held:

"… Prima facie, (the Claimant) is entitled to make hearsay evidence part of his case. That is s1 of the 1995 Act. It cannot be a ground for objection to the admission of (the witness') statement that it is hearsay … it is open to (the defendant) to make his application [for] an order giving (the defendant) liberty to call the maker of the statement (i.e. the witness) himself so that the witness can be cross-examined on the contents of the statement. In other words, it gives (the defendant) a liberty or permission or opportunity. It leaves open the question of how that is to be brought about. If the witness is ready, willing and available, then of course there is no problem. He or she will attend and will be cross-examined. If that party is not ready and willing but is in the jurisdiction, then it seems to me that it must be the case that the party seeking to cross-examine (i.e. the party who did not originally intend to call that witness) can serve a witness summons on that witness to compel his or her attendance. …… but that witness summons is, of course, addressed to the witness and not to the other party.""

Mann J went on at §10 to confirm that:

"There is no obligation on the original party serving the statement to produce the witness. That is not imposed, as I see it, by any of the rules."

For this reason, practitioners who get permission to call witnesses to be cross-examined should ensure that they obtain relevant contact details of the witness from the other party so that they can inform the witnesses to attend court and apply for a summons if necessary. Alternatively, they should reach an understanding with

the other party that it will ensure their witnesses attend to be cross-examined.

Fairness

Clearly the court will be concerned with the issue of fairness. At first blush, it may seem unfair to a respondent in proceedings which allege some type of criminality to be prevented from cross-examining those making such allegations. However, the right to cross-examination is not absolute. The fairness derives from the opportunity to call the statement maker, and seek a witness summons if necessary.

An additional consideration of fairness may arise in circumstances where hearsay evidence is served so late in proceedings that no hearsay notice can be provided within the time limit required by the rules. In that scenario the serving party may ask the court to substitute a different period of time for service[3].

Practitioners should be aware that even where there has been non-compliance with the rules, under the CEA the evidence would still be admissible, but the court may hear representations as to the weight, if any, that can be attached to such evidence[4].

Parties wishing to prevent the last-minute service of evidence would be wise to seek early directions from the court which prevent further evidence from being admitted without leave of the court pursuant to the court's case management powers.[5]

[1] Section 52 Magistrates' Court Act 1980

[2] Section 11 Civil Evidence Act 1995

[3] Rule 3(2) of the Magistrates' Court (Hearsay Evidence in Civil Proceedings) Rules 1999

[4] Section 4 Civil Evidence Act 1995

[5] Rule 5(5) The Magistrates' Courts (Freezing and Forfeiture of Money in Bank and Building Society Accounts) Rules 2017

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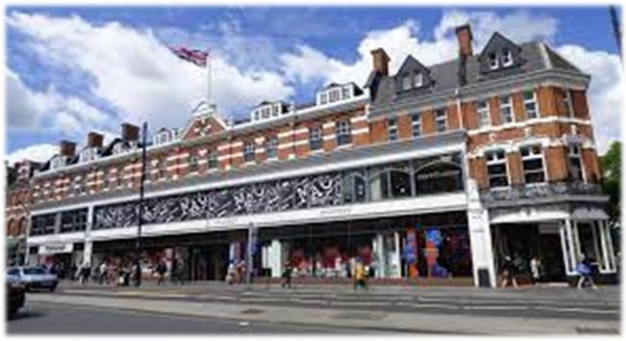
BRUCE REID

"THE RELIEF OF MORLEY'S"

Is a reformed 'small boats' policy the answer to the current shoplifting epidemic?

(Calvin Church-Mouse gives the Weekly Staff Briefing at Morley's Department store in Brixton.)



CC-M - Now girls and boys; tasks for today! Difficult customer interface problem coming up but nothing The Morley's Team can't solve! We have reliable information that there is going to be a steaming attack and we need to be ready for it!

(As the Team listen they are increasingly alarmed that a "Career in the exciting, fast-moving world of retail" seems to have 'unarmed combat' buried in the small print.)

CC-M - It's the third week of the month and no-one can live on Universal Credit. The baby-mothers and dealers are circling; not to mention the lack of free school meals in the holidays and kids growing out of shoes, It's a Perfect Storm. So, we can expect a concerted shoplifting attack! We must be ready!

(Someone grumbles; "What about the police, the Nick's just round the corner……?")

CC-M - " No help there – half the Met are on a disciplinary and the other half are investigating them, besides there's an attack on the Lingerie Department at M & S down the road; Sergeant Fergus Ferret and his crew are stuck there - we are on our own!

(At 9.30 there is an unusually large crowd waiting at the door….

As Conchita Chinchilla opens it she is swamped in the rush for the perfume counter as the 'customers' start to pillage the place. The staff fight back, mano a mano over the Oil of Olay. Conchita spots a woman stuffing some 'Chanel No 5' down her bra…)

CC – Would Madam like to try a sample?

Shoplifter – Er, why…. Certainly…..

(Conchita gives her a double blast between the eyes and she stumbles out blinded.)

CC-M - Conchita! Don't waste valuable ammo! Use the 'Devon Violets' instead!

CC – (Muttering) - Madre De Dios! That's got to be a War Crime! (As she reaches for the perpetual Special Offer known amongst the staff as 'Eau De Rodenticide' and returns to the fray.)

(The battle rages: the untrained team resist with spirit but are slowly beaten back in the onslaught. Stock disappears before their very eyes. Conchita distinguishes herself with the use of eyebrow threader as an impromptu garrotte but it is plain they are losing.)

CC-M - Hold firm, Team", but his voice betrays the bitter sound of despair.

(But then……)

"Slava Ukraini!!!!!"

"Splatt! Grunt! Kerrrpow! Groan!"

(It's Borysko Boar, shelf stacker at Nour's Cash and Carry in the Market. He storms in the door, grabs a junkie in each fist and hurls them firstly into a mutual head-butt and then the door, which he had thoughtfully closed behind him. The Defenders take heart.

But the struggle is still in doubt, what can one man do against so many?

"God Is Great!!!!" as the door is hurled back open, and there stand the Afghans 'Ghazi' Gazelle and Ali Angora: they've lost stock as well and they are hopping mad.)

CC-M - It's the rest of the Brixton Market Crew! That's the Ramzy's Fish Boys! Rally, Team we can do this! Get some non-stick pans from the Kitchen Department! Up and at 'em!

(A slap in the face with a wet fish acquires a different meaning when it's a double whammy one/two on each cheek from a 2 pound sea bass. The Ramzy Boys are ready to rumble.

A polystyrene box of almost fresh mackerel is hurled over the melee to the beleaguered defenders who gleefully take them up and a fish-for-all ensues.

"Wussier than the Taliban. Eh, Bro-Bro?" - Ghazi frisbees a frozen crab at someone, knocking them cold.

Whumph! Ooof! Aaargh!"

" Crappy like Russki cannon fodder, Ghazi!"

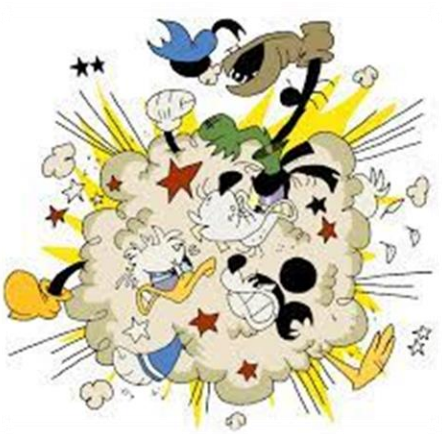
"Oww! Yaroosh! Garoo!"

Now the veg sellers arrive – Yam Gals, Beatrice Boa (Lesbian, Ugandan – you can guess the backstory) and Winsome Weasel (Non-binary, Jamaican, long-expired Tourist visa) pitch in with a twin tuber attack.

"The beloved staple food of the tropics is a versatile vegetable that needs careful cooking to yield its delicious earthy secrets" (Nigel Slater –'The Guardian' cookery columnist)

Raw; it's a soil-embossed billy club…

"Scraunch! Blatt! Leggo! Stoppit!"



"Yam! Bam!, Thank you Maam!" yells Calvin in encouragement. As the yam-fisted assault bears immediate fruit, so to speak.

Beatrice and Winsome appreciate the sentiment, but mark him down as being in need of a bit of diversity training if he wants to avoid buying a dozen brown avocados next Saturday.

The tide turns; the dispossessed are forced slowly back in a blizzard of unfamiliar vegetables and dead things from the sea but it's still in the balance; Steaming is a game of 90 minutes and it's a tough relegation battle….. But then: a blood curdling cry turns mascara to mush.

" Jai Maa Kali! Ayo Gorkhali!"*

Everyone hits the deck. Fast.

Not surprising at the sight of a 5-foot Nepali with a 4-foot khukri, whirling it above his head like rotor blade. He advances down the aisles threatening terminal topiary to anything over two feet tall. Everyone studies the ground intently from a distance of half an inch.)

CC-M – Arjun Argali. High quality chef; here on a pukka work visa that the Home Office proceeded to 'lose'. Now he swipes the heads off 6 chickens in a row every day to keep in practice. Not much call for ritual buffalo slaughter…… Conchita! Duck, you idiot!!!! What do you think this is? A nail parlour.?!?

CC – Thought that was the job I signed up for……

(she checks her scrunchie a little apprehensively.

Arjun has settled it.

The steamers stay prone, Calvin and his Team slowly rise and survey the damage.)

CC - How do we keep them here till Fergus arrives?

CC-M – We don't - you just use this." He picks up a miraculously intact bottle of 'Chanel No, 5' and gives two quick generous dabs behind the ears to the nearest flattened shoplifter. Carmen is puzzled but follows suit on the rest.

(Calvin's phone rings: "Calvin, its Fergus Ferret, you OK Bro?. We're sorted for lingerie, the sweat-box looks like its hosting Ru Paul's Drag Race and we're on our way, hang on in there!")

CC-M - Chill, Sarge, saved by 'Market Forces'. Just get the 'Super' to issue a Community Protection Notice forbidding the wearing of Chanel No 5 in a public place and you can pick them up at your leisure.

(He raises an eyebrow at Conchita)

Just think, none of them can get a NINO, but if some of that lot hadn't braved the Channel in a pedalo there wouldn't be a 'Morleys' any longer.

*Literally; *"Victory to the Goddess Mahakali – The Gurkhas are upon you!"* Generally uttered when a lone soldier charges a machine gun post in a hail of bullets and wins.

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