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# Archbold Review

## Cases in Brief

*Appeal—sending of related summary charges to Crown Court to take guilty plea—Crime and Disorder Act 1988 s.51(3)—whether appeal lay to Court of Appeal—whether judicial review available*

**WILSON, SENIOR AND CONJOINED CASES [2019] EWCA Crim 2410; 3 December 2019**

The Court of Appeal considered four conjoined cases in order to determine the jurisdictional issue of the route of appeal against conviction for a summary offence which had been sent to the Crown Court under the Crime and Disorder Act 1988 s.51(3) (sending to the Crown Court of summary offences related to an offence sent under subs.(1)), when a guilty plea had been entered following conviction for the offence on indictment. Three cases involved guilty pleas to offences of driving with a higher than prescribed proportion of a controlled drug in the blood, where the prosecution did not contest that the Randox analysis was false; and the fourth was of driving while disqualified where the prosecution accepted there had been no disqualification.

(1) The Court of Appeal's jurisdiction was wholly statutory. The jurisdiction under the Criminal Appeal Act 1968 s.1 in relation to appeals against conviction related solely to convictions on indictment. Summary offences contained in a schedule served pursuant to s.51(3) of the 1998 Act were not convictions on indictment. This limitation on the jurisdiction of the Court of Appeal was illustrated by the wording of s.9 of the 1968 Act, which specifically extended the jurisdiction to appeals against sentence to summary offences, but it did not do so for appeals against conviction. Similarly, Sch.3, para.6, which dealt with the relevant procedure in respect of the summary offences before the Crown Court, provided for the setting aside of a conviction for the summary offence where a conviction for the related indictable offence was allowed, but conferred no jurisdiction for an appeal against the conviction (on a plea of guilty) for the summary offence.

(2) Decisions of the Crown Court were subject to the supervision of the High Court, except for those "relating to trial on indictment" (Senior Courts Act 1981 ss.28 and 29(3)). However, an appeal by way of case stated would not be an appropriate route by which to challenge a conviction on the ground that fresh evidence rendered the convictions unsafe – the conviction was not wrong in law or in excess of jurisdiction (Senior Courts Act 1981 s.28(1)). The question of whether the High Court was able to intervene if a decision did not involve an error in law, there was no unfairness on the part of the tribunal, and malpractice on the part of the prosecution was not alleged was addressed in *R v Bolton Justices, ex parte Scally* [1991] 1 QB 537. The criteria in that case for such an intervention were made out. The prosecution conceded that the three Randox cases were analogous to fraud, in the sense identified in *Scally*, in that the evidence, as was now known, would not make out the offence with which each man was charged, the fault lay entirely with the prosecution, and the accused were denied a proper opportunity to decide whether to plead guilty or not guilty. Indeed, they were wrongly denied a complete defence. There was also no real dispute as to the facts and there was a certainty of acquittal (cf *R (Wilmot) v Taunton Dene & West Somerset Magistrates' Court* [2013] EWHC 1399 (Admin), [18] and [19], where the Court had not been prepared to extend the principle to situations in which there was a material dispute about the facts). The same principles applied to the disqualification case.

(3) The court sat as a Divisional Court, gave permission to apply for judicial review, dispensed with formalities, abridged time as necessary and granted the applications, quashing the convictions in three cases. In relation to S (a Randox case), the Court of Appeal, without considering the jurisdictional issue, had previously allowed an appeal

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against conviction ([2018] EWCA Crim 837). That order remained valid until or unless set aside (see *Interfact Ltd v Liverpool City Council; Budimir* [2011] QB 744, [39], citing the dictum of Lord Scarman in *Cain* [1985] AC 46 [1985] AC 46, 55). Although the Court of Appeal should have reconstituted as a Divisional Court, it was unnecessary to reopen S's appeal. The decision of the Court of Appeal quashing his conviction stood, which was for all material purposes the same as granting an order in the High Court quashing the conviction. There was no material injustice that required remedy.

*Appeal—rights of appeal from the High Court—"in a criminal cause or matter"—test*

**IN RE MCGUINESS' APPLICATION FOR JUDICIAL REVIEW [2020] UKSC 6; 19 February 2020**

The court considered the use of "in a criminal cause or matter" in a provision (Judicature (Northern Ireland) Act 1978 s.41(1)) allowing an appeal from the Northern Ireland High Court to the Supreme Court (and therefore similar in effect to the use of the phrase in the Senior Courts Act 1981 s.18(1)).

(1) "In a criminal cause or matter" had been used in two different statutory contexts: in connection with rights of appeal, including in the Northern Ireland legislation and its equivalent in England and Wales, and in the different context of the availability of the special closed procedure dealing with secret intelligence material, in Justice and Security Act 2013 s.6. *R (Belhaj) v Director of Public Prosecutions (No 1)* [2018] UKSC 33; [2019] AC 593 was concerned with the latter context. Caution was required in working out the extent to which the judgments in *Belhaj* provide guidance regarding the meaning of the phrase in the context of rights of appeal. The principle of consistent interpretation of statutory words and phrases across statutes (*Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402, 411), only applied where the language and context of the statutory provisions being compared were the same. In *Belhaj*, all the justices accepted that, for the purposes of the *Barras* principle, the statutory context of s.13 of the 2013 Act was different from the statutory context of the right of appeal provisions.

(2) *Amand v Home Secretary* [1943] AC 147 remained the leading decision regarding the meaning of "criminal cause or matter" in the context of rights of appeal. Three points were to be made: (a) the interpretation of the phrase directed attention to the nature of the underlying proceedings, rather than focussing on some categorisation of the proceedings in the High Court; (b) "the word 'matter' does not refer to the subject-matter of the proceeding, but to the proceeding itself," (per L Wright). It was not sufficient for the underlying proceeding to relate to a subject-matter which might be broadly described as "criminal"; the proceeding itself had to be criminal in nature; (c) to be a criminal matter, two conditions must be met: the applicant must be put in jeopardy of criminal punishment; and such jeopardy had to be "the direct outcome" of the proceeding.

(3) Although the House of Lords in *Amand* was not giving an exhaustive definition of the phrase, it identified the paradigm case which was covered by it. Any extension beyond that type of case would require to be clearly justified. The history and procedural context of s.18(1) and the Northern Ireland provision showed that the rights of appeal from a High Court decision in a criminal cause or matter were directed primarily to maintaining the coherence of the legal system, and by contrast in all other cases appeal rights were directed to ensuring that errors at first instance in individual cases could be rectified. It was to be inferred that the intention was that the phrase defined a reasonably tightly drawn category of cases focused directly on the process for bringing and determining criminal charges.

(4) Accordingly, M's judicial review of the relevant authorities' understanding of a prison sentence imposed on a person did not amount to "a criminal cause or matter".

(5) The court disagreed with the conclusion in *R (McAtee) v Secretary of State for Justice* [2018] EWCA Civ 2851; [2019] 1 W.L.R 3766 that a case concerning the implementation of an IPP sentence, and a declaration of incompatibility with Convention rights under the Human Rights Act 1998 relating thereto, was "a criminal cause of matter" for rights of appeal purposes. The judgment erroneously relied on *Belhaj* in interpreting s.18(1). The proceedings had nothing to do with the bringing of criminal charges against M. An application for a declaration of incompatibility was an exercise in review of the statute book and was distinct from the criminal process itself, although the possibility of an overlap with criminal proceedings could not be ruled out (for instance, if the application arose from a failed argument in a court below the High Court, or as in *R (Pretty) v Director of Public Prosecutions (Secretary of State for the Home Department intervening)* [2001] UKHL 61; [2002] 1 AC 800).

*Bail—decision making—after long period of release under investigation*

**R (IQBAL) v CROWN COURT AT CANTERBURY [2020] EWHC 452 (Admin); 18 February 2020**

I, arrested for a major class A drug importation, was released under investigation under the Police and Criminal Evidence Act 1984 s.30A for about two years ("quite inexplicably", the Crown Court judge was to observe), charged by postal requisition and then remanded in custody at the magistrates' court. He sought judicial review of the decision of the judge in chambers to maintain the remand in custody imposed by a district judge on the basis of a real and substantial risk that he would fail to surrender if granted bail. I principally relied on the judge's failure to give adequate reasons for discounting his surrender and repeated attendance at a police station while released under investigation.

(1) It was not a case where the judge had to proceed on the basis that she was considering whether or not a change of custody status was justified – rather her task was to consider, by reference to the relevant legislative framework, whether or not it was necessary to impose custody at that stage. Her reasons were tailor-made, clear and reasoned and well within the bounds of reasonableness.

(2) The court did not accept that the judge was in any way bound by the police decision to release I under investigation. Anecdotally, I's counsel had informed the court that defence solicitors advised their clients as a matter of course that, absent a material change of circumstances and provided that the client had complied with attendance requirements on the police and the courts, the courts would effectively honour the previous police decision. If this were indeed a practice, there was no proper or principled basis for it. The decision on bail, when a defendant was brought

to court, fell to be made afresh and independently on the up-to-date facts of each case. It was not a question of "overturning" a previous police decision on bail.

*Human trafficking—Modern Slavery Act 2015 s.45 defence—effect on prior use of abuse of process rulings to comply with UK international obligations*

**R v DS [2020] EWCA Crim 285; 28 February 2020**

(1) The Court of Appeal, allowing a prosecution appeal against an order that proceedings be stayed as an abuse of process, authorised the anonymous reporting of three substantive paragraphs of the judgment. The whole judgment may be disclosed to judges and counsel appearing in other cases to which the judgment is relevant.

(2) The jurisdiction to stay proceedings as an abuse of process was an important but limited power of a criminal court. Is should not be widened to meet particular needs unless there was a very clear reason. The result of the enactment of the Modern Slavery Act 2015, and the statutory defence in s.45, was that the responsibility for deciding the facts relevant to the status of DS as a victim of trafficking was unquestionably that of the jury. Formerly, there was a lacuna in that regard, which the courts sought to fill by expanding somewhat the notion of abuse of process, which required the judge to make relevant decisions of fact. That was no longer necessary, and cases to which the 2015 Act applied should proceed on the basis that they will be stayed if, but only if, an abuse of process as conventionally defined – that a fair trial was not possible, or that it would be wrong to try the defendant because of some misconduct by the state in bringing about the prosecution – were to be established.

[To request a full copy of this judgment, complete a copy of form EX107 (transcript request form available here: https://www.gov.uk/government/publications/order-a-transcript-of-court-or-tribunal-proceedings-formex107) explaining who you are and why you require a copy of the judgment. The completed form can be emailed to cao.generaloffice@hmcts.x.gsi.gov.uk and this office will obtain any necessary permissions in order for the judgment to be released to the requestor or advise if the request has been refused.]

*Magistrates' courts—judicial review of preliminary ruling—approach of Administrative Court—food safety*

**R (TESCO STORES LIMITED) v BIRMINGHAM MAGISTRATES' COURT [2019] EWHC 3755 (Admin); 11 December 2019**

T renewed its application for judicial review, following refusal on the papers, of the magistrates' court's preliminary ruling that provisions of European law upon which a domestic criminal offence relied created a rule of law that a product sold after the "use by" date was unsafe, rather than merely a rebuttable presumption (EU Food Information for Consumers Regulation No 1169/2011 Art.24(1), with EU General Principles of Food Law and Food Safety Regulation No 178/2002 Art.14; Food Safety and Hygiene (England) Regulations 2013 reg.19). There was, in addition, a due diligence defence available to T, even if the provisions created a rule of law (reg.12 of the 2013 Regulations). T had expert evidence that the food involved was not factually unsafe at the relevant time. The interested party prosecutor, Birmingham City Council, opposed the application.

(1) It was clear that the court had jurisdiction to judicially review an interlocutory decision of a Magistrates' Court or Crown Court; although it was a jurisdiction which it would rarely exercise when the trial was continuing and to do so would result in an interruption of that trial: *R (Parashar) v Sunderland Magistrates' Court* [2019] EWHC 514 (Admin). The cases in which attempts to do so had been deprecated (e.g *R v Rochford Justices ex parte Buck* (1978) 68 Cr.App.R 114, *Hoar Stevens v Richmond Magistrates' Court* [2003] EWHC 2660 (Admin) and *Crown Prosecution Service v Sedgemoor Justices* [2007] EWHC 1803 (Admin)) concerned evidential issues such as disclosure and admissibility which had occurred during the course of the trial. In this case, there was no extant trial. The issues determined by the magistrates' court were not essentially evidential or concerned with the management of the trial, and were identified as suitable to be preliminary issues because they were issues of law that were capable of discrete consideration and of wider importance than the facts of the case itself. The factors identified in *Parashar* [42]-[43] as potentially justifying the Divisional Court's intervention (that it was properly arguable that the ability of the defendant to present his or her defence was so compromised that an unfair trial was inevitable; that there was an important point of principle of wider application; or that there was some other exceptional feature) were not to be regarded as a rigid categorisation. The Divisional Court must look at all of the relevant circumstances and determine whether, by exercising its power to consider a judicial review of an interlocutory decision of a criminal court, it could further the overriding objective of dealing with cases justly, which included consideration of managing cases efficiently and cost effectively. But such interventions would be exceptional, that is, rare.

(2) Birmingham City Council objected on the basis (principally) that there was an alternative remedy in an appeal to the Crown Court following a trial at which T could deploy the due diligence defence. The alternative remedies were patently inferior. They required trial of due diligence (estimated at seven days, both sides represented by QCs), which would be wasted if the judicial review of the preliminary ruling were successful; if the due diligence defence were unsuccessful, an appeal would mean considerable further delay. If the due diligence defence were successful, there would be no determination of the point of law in the preliminary ruling. The balance was firmly in favour of the judicial review proceeding.

# SENTENCING CASE

*Low-value shoplifting*

**HARVEY [2020] EWCA Crim 354, 11 March 2020**

Between 9 August 2018 and 1 August 2019, the appellant pleaded guilty at Cheltenham Magistrates Court to one offence of fraud by false representation, fourteen offences of theft (all shoplifting) and two driving offences. On 1 August 2019 all matters were committed to the Crown Court for sentence under s.3 of the Powers of the Criminal Courts (Sentencing) Act 2000 (PCC(S)A 2000). On 20 August 2019 he was sentenced to a total term of 45 months' imprisonment (sentences of between nine months' and 18 months' imprisonment were imposed for each of the shoplifting offences).

The Appellant had committed the shoplifting offences on fourteen different days between 24 June and 1 December

2018. The prosecution commenced proceedings against him in relation to them through eight separate postal requisitions; some relating to only one offence, others up to five offences. The appellant pleaded guilty to all offences contained within each postal requisition at the same appearance at the magistrates' court. On 1 August 2019, when he was committed for sentence, he then pleaded guilty to eight offences of shoplifting which had been charged in three separate postal requisitions.

An issue arising on appeal was whether any of the theft offences were low-value shoplifting offences under s.22A of the Magistrates Court Act 1980 (MCA 1980). If they were, they were summary only offences and the Crown Court's sentencing powers would have been limited to the sentencing powers of the Magistrates' Court. Low-value shoplifting is defined in s.22A (3) of the MCA 1980. As regards value, they are thefts where the value of the stolen goods does not exceed £200. When determining value, there can be aggregation of values where two or more offences of low-value shoplifting are charged on the same occasion (22A(3)(a) and (4)(b)). The court therefore had to consider the meaning of "*charged on the same occasion*".

The Court concluded that "*charged on the same occasion*" should be construed as referring to when the accused appears before the Magistrates' Court to answer the charges. This was for two reasons: (i) the use of the same phrase in s.22(11) of the MCA 1980 (paras [16]-[20] of the judgment) and (ii) a purposive interpretation of s.22A of the MCA 1980 (paras [21]-[24] of the judgment).

Adopting this approach, only one of the shoplifting offences was a summary-only offence. The other offences had been properly committed pursuant to s.3 of the PCC(S)A 2000. The sentence imposed on the summary-only offence was quashed and replaced with one of four months' imprisonment. The Court also concluded that the total sentence imposed was manifestly excessive, and that the appropriate total sentence was 30 months' imprisonment. This sentence was substituted by quashing one of the shoplifting sentences and substituting a sentence of 30 months' imprisonment for that offence. All other sentences were then ordered to run concurrently to this sentence, resulting in a total overall sentence of 30 months' imprisonment.

# Features

## The new law on releasing terrorist offenders: is it acceptable in principle, and if so, will it achieve its intended purpose?

By Elaine Freer[1]

The Terrorist Offenders (Restriction of Early Release) Act was passed in record time and came into force on 26 February, the date of Royal Assent. Its speedy progress to the statute book was Parliament's reaction to two acts of terrorism committed by men who had been released automatically at the halfway point of relatively short custodial sentences for terrorist offences, and had then perpetrated extremism-inspired attacks on members of the public. In the case of the first attack, at Fishmongers' Hall in London, the consequences were the deaths of two civilians. In the second attack, on a high street in Streatham, London, no-one was fatally injured, though members of the public were stabbed. In both cases, the offenders were shot dead by armed police.

The new Act aims to ensure that those who are serving custodial sentences for terrorist offences serve a greater proportion of their custodial sentence, and can only be released having served two-thirds of their sentence, with the approval of the Parole Board. The Act's provisions extend to Scotland, though their sentencing regime is not considered within this article. It applies retroactively and media reports suggest that this change would immediately affect around 50 individuals currently in prison.[2]

It is argued in this article that the retroactive element of this Act may be open to legal challenge, and even if it is not, the Act seems unlikely to achieve what the Government and public appear to hope and expect of it. This is because it seems to be based on the assumption that detaining those convicted of terror offences for longer will, without more, mean that they are less likely to commit a terrorist attack on their release than if they had been released at the point for which the legislation previously provided. As explained later, this is questionable; and whether it is true or not, requiring the Parole Board to make a decision on their release will necessarily increase the pressure on that, already overstretched, process.

This article begins with a brief recent history of early release provisions in England and Wales.

### A brief recent history of early release

It has long been accepted in England and Wales that those who are sentenced to immediate imprisonment do not serve the entire length of the sentence they receive within custody. Even where a defendant is given a mandatory or discretionary life sentence, they will be given a tariff period which they must serve. Until 2002 this was set by the Home Secretary. Since *Anderson v Secretary of State*[3] declared that practice unlawful, leading to the enactment of a provision within the Criminal Justice Act 2003, this has been set by

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2 https://www.theguardian.com/politics/2020/feb/11/emergency-legislation-prisoners-terror-offences [accessed 11th February 2020].

3 [2003] 1 AC 837.

the sentencing judge. That means that they usually serve a term considerably shorter than the remainder of their life, apart from in the most serious cases where a whole life order is imposed (Criminal Justice Act 2003, Sch.21, para.4(1)). Where an offender is released having served a proportion of their sentence, they will be "on licence" for the remainder of their sentence length, and liable to recall to prison. Under s.238 of the Criminal Justice Act 2003, the sentencing judge can make recommendations about conditions to be attached to the licence period in respect of any offender who received a sentence of at least 12 months.

Although the legislation is not straightforward, as different rules on early release apply to different types and lengths of fixed-term (or determinate) sentences, the starting point is currently s.244 of the Criminal Justice Act 2003. Section 244(1)(3) provides that a prisoner serving one custodial sentence will be released after serving half of their sentence.[4] A prisoner serving an extended sentence will serve two-thirds of that term before release (s.246A). Different rules apply for a prisoner who is serving two or more concurrent or consecutive sentences (with no release between the two sentences if they were given on different dates – s.263(1)(b) and s.264(1)(b)). Prisoners serving concurrent terms will be released once the custodial period of the longest term has been served (s.263(2)). Prisoners serving consecutive terms are subject to more complex rules. They cannot be released until they have served the aggregate of the length of the custodial periods. The custodial periods are calculated by reference to s.264(6):

> (a) in relation to an extended sentence imposed under s.226A or 226B, two-thirds of the appropriate custodial term determined by the court under that section;
>
> (b) in relation to an extended sentence imposed under s.227 or 228, one-half of the appropriate custodial term determined by the court under that section;
>
> (c) in relation to a sentence imposed under s.236A, one-half of the appropriate custodial term determined by the court under that section; and
>
> (d) in relation to any other sentence, one-half of the sentence.

In summary, therefore, with the exception of those who are given tariff periods as part of a mandatory or discretionary life sentence, who will serve the entirety of the tariff period, and may be detained beyond that if the Parole Board do not approve their release, no prisoner will serve the entire period to which they are sentenced.

In cases where early release is automatic on the expiry of the custodial period, some prisoners will be released even earlier, usually on Home Detention Curfew ("HDC") in line with the Home Detention Curfew Policy Framework.[5] This means that they are required to be at an address known to the police and with electronic monitoring during certain hours. This is permitted where the offender received a sentence that was at least six weeks (s.246(2)(a)), of which they have served a period of at least four weeks (s.246(2)(b)(i)) and at least half of the period to which they were sentenced (s.246(2)(b)(ii)). This does not apply to offenders who received an extended sentence (s.246(4)(a) of the Criminal Justice Act 2003), or a sentence of imprisonment of four years or more (s.246(4)(aa)). Prior to 6 January 2020, no prisoner could be released on HDC more than 135 days before the end of the requisite custodial period (as defined above) (s.246(1)(a)). On 6 January 2020, The Criminal Justice Act 2003 (Early Release on Licence) Order 2019 came into effect, extending that period to 180 days before the end of the requisite custodial period. It is worth noting that those who have been convicted of terrorism are presumed as unsuitable for early release on HDC.[6]

Release at either the halfway or two-thirds point (depending on the nature of the original sentence) is usually automatic. Currently, only prisoners who are serving life, indeterminate (IPP), or extended sentences, or those who received a fixed-term sentence of four years or more, given before 3 December 2012 for a serious violent or sexual crime committed before 4 April 2005, have to make an application to the Parole Board to be considered for release.[7]

## What the Act provides

The new Act amends the Criminal Justice Act 2003, by inserting a s.247A – "Eligibility for release on licence of terrorist prisoners".[8] The section applies to any prisoner who has been imprisoned for a fixed term (s.247A(1)(a)) for an offence specified in s.247A(2)(a)–(c). This includes sentences for offences under counter-terrorism legislation which are itemised in the new Sch.19ZA to the CJA 2003. That Schedule contains:

- 32 separate substantive offences taken from the Terrorism Act 2000; the Anti-Terrorism, Crime and Security Act 2001, and the Terrorism Act 2006;
- three offences relating to breaches of orders imposed under the Counter-Terrorism Act 2008; the Terrorism Prevention and Investigation Measures Act 2011 and the Counter-Terrorism and Security Act 2015; and
- in relation to any listed offence: attempts, conspiracies, incitement, secondary participation or any offence under Pt 2 of the Serious Crime Act 2007 where the person intended or believed the offence would be committed.

## Legal and theoretical criticisms

To assess the likely effect of, and any possible challenge to, this legislation, it is necessary to consider three main aspects. Firstly, as previously mentioned, the alteration is designed to apply even to those who are already serving sentences. This raises issues of the lawfulness of retroactivity. Secondly, all relevant offenders must now be referred to the Parole Board before they can be released early. Thirdly and finally, this legislation rests upon a presumption that keeping these individuals in prison for longer will mean that on their release after the longer-term they will have a reduced risk of perpetrating another terrorist attack compared with the risk they would have posed on release at the

4 Though note the Release of Offenders (Alteration of Relevant Proportion of Sentence) Order 2020; this has had the effect of causing the phrase "one half" in ss.244 and 264 to be read as "two-thirds" for those offenders who have been convicted of serious violent or sexual offences and sentenced to more than seven years in custody. (Made under powers conferred on the Secretary of State by ss.267, 330(3) and 330(4) of the Criminal Justice Act 2003.)

5 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/790670/home-detention-curfew-pf.pdf [accessed 18th February 2020].

6 Ibid, at para.4.3.5.

7 https://www.gov.uk/getting-parole [accessed 18th February 2020].

8 It is to be hoped that the introduction of the Sentencing Code will address the problem of increasingly convoluted section and schedule numbers caused by multiple amendments to Acts containing sentencing provisions.

halfway point of their custodial term. This article will now address those three points in greater detail.

**1) Retroactivity**

It is normally thought to be a general principle of justice in English law that new laws only operate prospectively insofar as they impose new penalties or obligations.

This position has been endorsed by the ECtHR, which has indicated that it takes a strict stance to the preservation of defendants' rights under Art.7 of the Convention.

Article 7(1) provides that:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

The first part of Art.7(1) provides no impediment to the Act – there is no punishment being meted out for something that was not an offence when it was committed. The second part, however, could potentially be engaged: is serving two-thirds of a sentence when you had anticipated serving half a "heavier penalty"?

The term "penalty" has been given an autonomous meaning in the context of Art.7. It does not apply to those ancillary matters that have a preventative function.[9] But by contrast, it has been held to include confiscation orders as they are punitive; as in *Welch v UK*, where the applicant had been subjected to a confiscation order only some time after he had been sentenced for drugs offences[10]. However, although confiscation has been treated as a penalty, the requirement to pay a significant sum on pain of imprisonment was held not to be a "heavier penalty" under Art.7.

In *Uttley*,[11] the House of Lords had to consider whether 12 years' imprisonment imposed under one sentencing regime was a heavier penalty than 12 years' imprisonment imposed under a different regime. Between the commission of the offences prior to 1983, and Mr Uttley's prosecution and sentencing in 1995, the Criminal Justice Act 1991 (CJA 1991) had been enacted.

The practical effect was summarised by Lord Phillips in his leading opinion (at [4]):

> Had the respondent been sentenced to 12 years' imprisonment under the old [pre-CJA 1991] regime he would, subject to good behaviour have been released on remission after serving two-thirds of his sentence, which would then have expired. That would have been the effect of section 25(1) of the Prison Act 1952 and rule 5 of the Prison Rules 1964 (SI 1964/388), which remained applicable up to the introduction of the 1991 Act. In accordance with the provisions of the 1991 Act, the respondent was released on 24 October 2003 after serving two-thirds of his sentence, but he was released on licence, the terms of which will remain in force until he has served three-quarters of his sentence, that is for a year. Those terms place the respondent under supervision and impose certain restrictions on his freedom.

Mr Uttley, through an application for judicial review, sought a declaration that the provisions of the CJA 1991, which would make his release subject to licence, were incompatible with Art.7 (1) of the European Convention on Human Rights.[12]

The Court of Appeal reversed the High Court's decision,[13] holding that any "ordinary observer" would view the sentence under the new regime as being a harsher penalty than the same length of sentence under the old regime due to the licence conditions.[14] The Court of Appeal consequently granted the declaration of incompatibility with Art.7 that Mr Uttley sought.

The House of Lords unanimously allowed the appeal by the Secretary of State for the Home Department, holding that there was no incompatibility with Art.7, based largely on the argument that a sentence longer than 12 years would have been permissible (the maximum sentence being life imprisonment for the offences Mr Uttley had committed).

This now causes an uncomfortable position. The effect on the prisoners who will be released after two-thirds of their sentence instead of half is plain – they will be serving an extra period of time in prison which they had expected to be serving at liberty on licence. The difference is stark. As the Court of Appeal observed in *Uttley*, it is hard to see how it could be argued that that would not be seen by any prisoner (or indeed any informed member of the public) as a harsher penalty. Even if they could have been sentenced to a longer term of imprisonment the point remains that they were not, and have spent their imprisonment expecting release after serving one half of their sentence. Thus, the case law establishes a position that appears to run contrary to common sense and human experience.

The question that now arises is whether being released on licence after a longer period in prison instead of a shorter one is the same in principle as the difference between being released without conditions and being released on licence (as in *Uttley*). Both situations concern relative restrictions on liberty. However, it could surely be argued that the difference between liberty on licence and continued detention is far starker than that between release without conditions and release on licence. I would suggest that this is not a spurious argument, and one that could result in a challenge to the new Act on Human Rights Act grounds.

Indeed, the Independent Reviewer of Terrorism suggests that such a retroactive change creates an uncomfortable precedent, and suggests that those prisoners currently serving should still be released at the point that they expected to be.[15]

**2) Referral to the Parole Board before release**

Section 238(2) Criminal Justice Act 2003 states:

> It is the duty of the Board to advise the Secretary of State with respect to any matter referred to it by him which is to do with the early release or recall of prisoners.

The effect of the new Act will be to bring a greater number of cases under this provision, since by s.247A(3)(a), any "terrorist prisoner" would be referred to the Parole Board after they had served "the requisite custodial period". The "requi-

9 It was held in *Ibbotson v UK* 27 EHRR CD332 that registration requirements in the Sex Offenders Act 1967 were not a "penalty" as they were preventative in nature, likewise Football Banning Orders in *Gough v Chief Constable of Derbyshire Police* [2002] EWCA Civ 331.

10 *Welch v United Kingdom* (1995) 20 EHRR 247.

11 *R (Uttley) v Secretary of State for the Home Department* [2004] UKHL 38.

12 *R (Uttley) v Secretary of State for the Home Department*, at [6]; [2003] EWHC 950 (Admin).

13 [2003] EWCA Civ 1130; [2003] 1 W.L.R 2590.

14 Ibid, at p.2600.

15 https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2020/02/200219-re-Emergency-Act.pdf, paras 35-36 [accessed 21 February 2020].

site custodial period" is defined by reference to the original sentence they received (s.247A(8)(a)-(c)), but essentially amounts to two-thirds of a determinate custodial sentence (s.247A(8)(b)), or the determinate custodial part of any other sentence (e.g. an extended sentence) (s.247A(8)(a)). Where a terrorist prisoner has been referred to the Parole Board and their release has not been directed, they must have their release reconsidered by the Parole Board within two years of that refusal (s.247A(3)(b)).

Pursuant to the Parole Board Rules 2019,[16] which apply to any case referred to the Parole Board on or after 22 July 2019, there is now a power to release any offender on the basis solely of the papers, including those serving life sentences, who had previously been excluded from release on the papers.

It is no secret that the Parole Board is already overworked: in the third quarter of 2019 (July to September), it saw a 22% increase in its number of active cases as compared to the previous year's third quarter (July to September 2018), from 7104 cases to 8641.[17] Whilst the current number of prisoners to whom the new Act would apply is modest, it could obviously increase in future.

Furthermore, there is no power, where a terrorist offender has been given a determinate sentence, for them to be detained past the end of that determinate period. Therefore, although the Parole Board could prevent their early release, it remains the case that unless a longer period in prison will lead to a reduction in their radicalisation, delaying their release means that any further terrorist acts are not prevented, merely pushed further into the future.

This resurrects a question to which the English system has yet to find a satisfactory answer. IPP sentences under the Criminal Justice Act 2003 caused many people to be detained far past the point at which they could reasonably be said to be dangerous, simply because the relevant courses that they needed to complete to satisfy the Parole Board were not available to them. Their repeal in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 was widely welcomed. But we are now left without any satisfactory response where a person's risk remains very high despite a period of imprisonment, or becomes much higher whilst they are in prison as a result of radicalisation within custody. They cannot currently be detained past the end date of their determinate sentence.

### 3) Assumed reduction in risk

Theoretically, there are two main possible justifications which could be advanced for detaining terrorist offenders for a greater proportion of their sentence. The first would be that the longer period of imprisonment amounted to a more severe punishment, which was effective in quelling further terrorist activity on release. The second would be that the longer period of imprisonment allowed the participation of the offender in effective de-radicalisation programmes which are shown by research and evaluation to have positive effects in reducing radicalised behaviour.

It is argued that neither of these justifications are presently made out, leaving a gap in the underlying rationale of this legislation. As things stand, there are no de-radicalisation programmes whose positive effects are supported by an evidential base. As noted by the Radicalisation Awareness Network practitioners' working paper: *Dealing with radicalisation in a prison and probation context*[18]:

> Despite some very good research projects in the prison and probation setting, knowledge and data on people being or becoming radicalised during prison and probation are limited. Data is also lacking on the evaluation and effectiveness of programmes and interventions.

Sarah Marsden, writing for CREST (Centre for Research and Evidence on Security Threats),[19] also notes that:

> … we know relatively little about how effective these intervention programmes are as few have been independently evaluated. In the UK, the Probation Services and the National Offender Management Service have developed some expertise in this area, involving in-house intervention packages and community mentors supporting the work of Offender Managers.
>
> It is extremely difficult to interpret the likelihood someone will re-engage with a violent group following an intervention, and we lack a clear understanding of what "success" looks like in this context. In the criminal justice system, the dominant model with non-extremist offenders assesses risk based on empirically validated factors linked to the likelihood of reoffending. However, these have proven inadequate for those involved in violent extremism, as the risk factors are very different.

Without greater knowledge of the possibilities for rehabilitating those who have been radicalised and convicted of terror offences, it seems impossible to argue that a longer period of imprisonment will reduce the risk of them committing a terrorist act in future.

### Conclusion

Article 7 ECHR aside, I would argue that, unless it can be shown that detaining these offenders for the extra period of their custodial sentence, being the difference between one half and two-thirds, could lead to a significant reduction in their likelihood of committing a further terrorist offence on their eventual release, then it is without foundation. It simply delays the time at which a still-radicalised offender commits a further terrorist act. Even if the need for Parole Board approval of release at two-thirds leads to some offenders having to serve their entire term of imprisonment the same argument still applies, as these offenders will have to be released at the end of the full term of their sentence, whether or not their risk has reduced. Presently, there is no evidence to suggest that longer in custody, be that two-thirds, or the full term, would have averted the attacks in London in November 2019 and February 2020, as against merely delaying them. Even if this Act serves to pacify an understandable public concern about the risk posed by terrorist offenders on their release, in reality, it does little to reduce that risk.

16 Available at: https://www.gov.uk/government/publications/the-parole-board-rules-2019 [accessed 15 February 2020].

17 https://www.gov.uk/government/publications/parole-board-quarterly-statistics-2019-2020 [accessed 15 February 2020].

18 *https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/radicalisation_awareness_network/ran-news/docs/ran_p_and_p_practitioners_working_paper_en.pdf*, at p.4 [accessed 21 February 2020].

19 *https://crestresearch.ac.uk/comment/marsden-reintegrating-extremists-deradicalisation-and-desistance/* [accessed 21 February 2020].

# Reappraising Special Advocates

By John Jackson[1]

It is now over 20 years since the Special Immigration Appeals Commission (SIAC) was established to hear immigration and asylum appeals from decisions of the Secretary of State which relied on information that should not be made public in the interests of national security. By far the most innovative aspect of the SIAC Act 1997 was the provision in s.6 for the appointment of a "person who would represent the interests of the appellant" in any proceedings before the Commission from which the appellant and any legal representative of his are excluded. At the time it was claimed that the numbers of cases involving so-called special advocates would be very small indeed.[2] But as the types of cases involving closed procedures have grown over the years, so has the use of special advocates. They have been involved in cases challenging counter-terrorism measures such as preventive detention, control orders, terrorism prevention investigation measures (TPIMs) and asset-freezing and they have appeared in parole hearings, employment disputes, care proceedings and even planning inquiries.[3] Special advocates can now appear in any type of civil litigation where closed procedures are ordered under the Justice and Security Act 2013 and they may also be used exceptionally as special counsel in criminal and civil proceedings to represent the interests of excluded parties in PII applications and in applications for anonymity orders. Although the numbers of cases in which special advocates appear may still be comparatively small,[4] they may now be said to have gained a firm foothold within legal practice.

Yet their rise has not been universally welcomed. Lord Steyn once described the imposition of a special advocate on a prisoner in a parole hearing where the prisoner and his legal representatives knew nothing of the case against him as undermining the very essence of elementary justice.[5] Much of the concern has centred on the question of whether special advocates are able, as the European Court of Human Rights has put it,[6] to counterbalance "the lack of full disclosure and the lack of a full, open adversarial hearing" by putting arguments on behalf of the detainee during the closed hearings, or, as the Supreme Court of Canada has put it,[7] whether they are able to perform as a "substantial substitute" for personal participation by the excluded person and his counsel.

Unease about them is not only confined to concerns that they do not provide enough compensation for the use of closed procedures that strike at the heart of the core adversarial values of open and natural justice. There is also a concern that they subvert the whole notion of advocacy itself because of the way in which they have to operate. Special advocates are appointed by the Attorney General to act in the interests of an excluded party but they do so in a different capacity from ordinary advocates as they do not act *for* the parties they represent and are not responsible to them. A key feature of the system is that once they have received the closed material they are unable to communicate with the excluded party or their representatives save with the permission of the court. Lord Bingham once famously said that:

> a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession.[8]

Baroness Kennedy put it more starkly when she said that to call the special advocate an advocate "is a denial of what the role of advocacy is all about".[9] The whole purpose of advocacy is that on behalf of your client, you are able to contest the allegation made and to do it acting as the spokesperson for that person, so when the special advocate is denied the opportunity of speaking with the person, he or she is no longer an advocate for the person.

Over the years a number of improvements have been made to the special advocate system, often at the behest of special advocates who have been consistent critics of the procedures they operate under. The appointment procedures used to be quite opaque but recruitment exercises now take place regularly in England and Wales and Northern Ireland for advocates to be appointed to a special advocate panel on the basis of an open competition and excluded parties are now able to select from the panel the person they would like to act as their special advocate.

Special advocates are now supported by the Special Advocates' Support Office (SASO) which is located within the Government Legal Department but operates quite separately from other parts of the Department. Special advocates may request whatever assistance they require from SASO much as they would from an instructing solicitor although SASO does not give instructions to special advocates on how to handle the case. The lack of an adequate database of closed judgments, however, inhibits their access to relevant case law and their dissemination of it amongst themselves. Another difficulty identified by special advocates is their lack of access to independent expertise and evidence to assist them in challenging the closed material. Although special advocates are permitted to call witnesses, this rarely happens. The government side is reluctant to allow extra persons to read closed material and the cost, delay and issues of funding involved in getting new witnesses security-cleared make this impractical.[10]

Apart from testing and making submissions on the closed material, one of the important tasks of special advocates is to argue for more of the closed material to be opened up.

1 University of Nottingham. His book, *Special Advocates in the Adversarial System* (2019) was published last year by Routledge.

2 See HL Deb 5 June 1997, vol 580, col 751 (Lord Williams of Mostyn).

3 For a full list of the types of special advocate cases opened between April 2015 and March 2018, see Jackson, n.1, p.58.

4 According to the Special Advocates' Support Office, 44 special advocate cases were opened between April 2017 and March 2018 and a total of 302 cases were opened between 2010 and March 2018. See Jackson, n.1, 57-8.

5 *Roberts v Parole Board* [2005] UKHL 45, [2005] 2 AC 738 [88].

6 *A v UK* (2009) 49 EHRR 29 [220].

7 *Canada v Harkat* 2014 SCC 37, [2014] 2 SCR 33 [47].

8 *R v H and C* [2004] UKHL 3, [2004] 2 AC 135 [22].

9 HL Deb 15 Feb 2006, vol 678, col 1224.

10 See *Special Advocate's Note* reproduced in Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Review of Control Orders Legislation 2010,* Ninth Report of Session (2009-10), HL 64, HC 395) Written Evidence 58-9.

Human rights law now requires that in certain categories of cases and certainly when an individual's liberty is at stake, the excluded party be given a core gist of the case against them in order that they can give effective instructions to the special advocate.[11] But special advocates have pointed out that in practice disclosure can be a long drawn out "iterative" process whereby very minimal disclosure takes place at first and then when the special advocate is in closed proceedings more disclosure may be made. Excluded parties may continue to communicate with the special advocate once she is in closed but it is obviously better if they are able to give any instructions to the special advocate in a two-way exchange.

Despite repeated complaints by special advocates that the restrictions on communications that are placed upon them limit the effectiveness of their function, the non-communication rule has remained strict. The court may authorise communications but special advocates have an anxiety that in making applications to communicate with excluded parties, they will give notice to the Secretary of State of exactly what their case is.[12] One innovation that has been implemented has been to erect a "Chinese wall" between government counsel and those who would clear the proposed communication.[13] But it would seem special advocates remain cautious about giving away any of their case strategy to the government side. In order to keep excluded parties as informed as possible about what is going on in the case, it is now common practice for the Secretary of State and special advocates to consider what may be said to the open representatives after any closed hearing and following any closed ruling or decision.[14] The open representatives may respond if necessary but this is no substitute for two-way consultation.

Another function that special advocates can perform which may be viewed as an extension of their disclosure role is to ensure that open judgments are as transparent as possible so that excluded parties are as fully informed about the reasons for decisions as possible. This requires that special advocates be given access to draft open and closed judgments before they are issued so that they may not only respond to government objections to the open content of judgments but can also make applications for opening up aspects of the closed judgments. SIAC has issued a Practice Note to the effect that draft closed judgments shall be sent to the special advocate at the same time as the draft open judgments are sent for security checking.[15]

The role of special advocates is continuing to evolve and practices are developing which make it easier for them to perform their functions. In the absence of access to closed hearings, it is very hard to gauge how effective they are. While special advocates have been cautious about making claims in this respect, some judges with considerable experience of closed procedures have been more positive about the contribution special advocates can make.[16] A recent examination of the SIAC database of open judgments in cases involving special advocates between 2003 and 2017 found that out of a total number of 107 appeals, reviews or bail applications, 21 were successful (a success rate of 19.6 per cent).[17] Where it was possible to do so, an estimate was then made as to whether the decisions in these successful cases were based on mainly open or closed evidence and it was found that 9 out of 19 successful outcomes (47 per cent) were based on closed or a mix of open and closed evidence. It is impossible to know what precise contribution special advocates made towards achieving these outcomes but it seems that SIAC is not simply "rubber-stamping" government cases based on closed evidence and that the arguments of special advocates are most likely listened to.

This suggests that if we are to have closed procedures, special advocates do play a role in mitigating unfairness. This will not allay the concerns of those who fundamentally object to the very concept of the special advocate. But the idea of counsel representing the interests of particular parties without being responsible personally to them seems to be gaining ground in other contexts. Defendants representing themselves in criminal proceedings relating to a number of offences may now no longer cross-examine complainants in their case and if they refuse to engage a lawyer to conduct the cross-examination on their behalf the court may appoint counsel to do so in their interests but without being responsible personally to them.[18] Similarly, there are currently proposals in the Domestic Abuse Bill to prohibit cross-examination by parties in family proceedings and again where the party is not represented for the court to consider whether it is necessary in the interests of justice to appoint counsel to cross-examine a witness in the interests of the party without being responsible to the party. One can also point to other situations where the interests of justice may call for the appointment of a lawyer to represent the interests of parties without being responsible to them. We have seen that special counsel may be appointed exceptionally in PII hearings. In certain Scandinavian countries, it is mandatory to appoint a special counsel where applications are made by the prosecution in the absence of the defence for the non-disclosure of certain kinds of sensitive information and so-called "privacy" advocates are appointed to represent parties when warrants are sought for certain surveillance measures such as telephone tapping, bugging or camera surveillance.[19]

If, as seems to be the case, lawyers are increasingly being appointed to represent the interests of parties without being responsible to them, this raises the question to whom *are* they responsible. If they are appointed by the court, it may be said they are then responsible to the court. But it is important to distinguish the position of such advocates from that of an amicus who is appointed to assist the court. Advocates appointed to represent the interests of a party have a particular mandate and it is important not to blur the lines between their role and the amicus role as there may be occasions when the two roles conflict. It would seem that there is an accountability gap here which needs to be filled. Like other legal professionals, special advocates and special counsel remain bound by the codes of ethics observed by their professional bodies. But the question is whether as the role of special advocates becomes more established there needs to be a more tailored code setting

11 *A v UK* (2009) 49 EHRR 29.
12 M. Chamberlain, "Special Advocates and Procedural Fairness in Closed Proceedings" (2009) 28 CJQ 314, 321.
13 SASO, *A Guide to The Role of Special Advocates & the Special Advocates' Support Office* (2nd edn GLD 2019) [67].
14 *Practice Note for Proceedings before SIAC*, 30 April 2014 [20].
15 *Practice Note for Proceedings before SIAC*, 5 October 2016 [26].
16 M. Chamberlain, "Special Advocates and Amici Curiae in National Security Proceedings in the United Kingdom" (2018) UTLJ 496, 505-7.
17 Jackson, n.1 above, 215-7.
18 Youth Justice and Criminal Evidence Act 1999 s.38.
19 Jackson, n.1 above, 75-6.

out the standards required which would then be monitored by the professional bodies. SASO's recently published open manual envisages a role for the profession in resolving disputes over questions of conflict of interest which may arise when "information owners" assert that a special advocate cannot be considered for nomination in a case due to a conflict of interest.[20] As special advocates appear to have come of age and are now a permanent feature of legal practice, perhaps it is time for the professional bodies to take greater responsibility for developing their role and monitoring their performance.

20 SASO, n.13 above, [55]-[56].

# "Protecting our boys"

Three legal issues arising from the use of the armed forces in peace-keeping operations have attracted much discussion. One is the prosecution, following a series of investigations and reinvestigations, of soldiers now accused of crimes committed many years before. The second is the pursuit of civil claims against the government, many of them allegedly bogus. The third is the prosecution and conviction for murder (and mandatory life sentence) of soldiers who in the heat of the moment misjudge the degree of force that it is reasonable to use: the classic example being the *Clegg* case in 1993, where the House of Lords refused to accept these extenuating circumstances as justifying a conviction for manslaughter instead of murder[1]. All three issues were discussed in a consultation paper published by the Ministry of Defence last summer[2]. A pledge to "tackle vexatious legal claims that undermine our Armed Forces" then appeared in the Conservative Party's 2019 election manifesto and on 18 March a Bill was introduced with a view to fulfilling it[3].

Part I of this Bill makes an attempt to deal with the first of the three issues by creating a statutory presumption against the exercise of the discretion to prosecute in respect of offences allegedly committed in this context over five years ago, and sets out factors which the decision-maker is required to bear in mind when considering whether to prosecute in such a case – one of which is

> … where there has been a relevant previous investigation and no compelling new evidence has become available, the public interest in finality (as regards how the person is to be dealt with) being achieved without undue delay[4].

As a further limit on the institution of prosecutions in cases over five years old, Clause 5 would also make such prosecutions subject to the Attorney-General's consent. Part II of the Bill contains a set of parallel provisions designed to limit civil claims (including those brought under the Human Rights Act).

Though the text of the Bill is long, its scope is limited. A list of criminal offences are excluded altogether from the protection it provides and it applies only to legal proceedings arising out of peace-keeping operations outside the United Kingdom. So in its present form it would not limit prosecutions arising from events in Northern Ireland. And although the possible creation of a new partial defence, reducing murder to manslaughter, for soldiers using excessive force in the heat of the moment was floated in last summer's consultation paper, there is nothing – or almost nothing – to address this issue.

The list of factors which Clause 3 would require decision-makers to consider before prosecuting for an offence that allegedly took place over five years ago includes

> the adverse effect (or likely adverse effect) on the person of the conditions the person was exposed to during deployment on the operations mentioned in section 1(3)(b), including their experiences and responsibilities (for example, being exposed to unexpected or continuous threats, being in command of others who were so exposed, or being deployed alongside others who were killed or severely wounded in action).

But if errors of judgement arising from stresses of this sort are a valid reason for not prosecuting for an offence allegedly committed five years ago or more, are they not an equally good reason for not prosecuting for a recent one? And if they justify not prosecuting at all, would they not equally justify a partial defence reducing murder, with its mandatory life sentence, to manslaughter?

As it stands, the law in this country deals harshly with soldiers, or indeed armed police officers, who misjudge the level of force it is reasonable to use in keeping the peace or enforcing the law. This seems particularly so if the person was, or thought he was, carrying out an order which he believed himself to be legally obliged to obey; because in English law it is generally accepted that superior orders are no defence.

This is in sharp contrast to the position in many other countries – including some which all but the most extreme of xenophobes would normally consider to be as civilised as ours. The French criminal code, for example, provides a general defence for "a person who performs an action commanded by a lawful authority, unless the action is manifestly unlawful."[5] Further thought, surely, could usefully be given to these issues here.

JRS

1 [1995] 1 A.C. 482.

2 *Legal Protections for Armed Forces Personnel and Veterans serving in operations outside the United Kingdom (July 2019); online at* file:///C:/Users/User/Dropbox/Archbold%20Review%20(current,%202020)/MOD_consultation_document-FINAL.pd

3 The Overseas Operations (Service Personnel and Veterans) Bill 2020.

4 Clause 3(2)(b).

5 *Code pénal*, art.122-4 (2).

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