SWEET & MAXWELL

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Archbold Review

Cases in Brief

Appeal—reference from the Criminal Cases Review Commission—leave to pursue grounds not based on reasons for reference—Criminal Appeal Act 1995 s.14(4B)

WINZAR [2020] EWCA Crim 1628; 4 December 2020

After the Criminal Cases Review Commission referred the conviction of W to the Court of Appeal, a significant part of the case upon the basis of which the reference had been made was abandoned by W as a result of the receipt of further medical evidence. Although the remainder of the case as referred was, as W accepted, insufficient to undermine the safety of the conviction, it provided a platform for an application for permission to appeal on other grounds, pursuant to the Criminal Appeal Act 1995 s.14(4B) (Court of Appeal may give leave for a ground of appeal not related to a reason for a reference). There was nothing in s.14(4B) that precluded the Court of Appeal from considering an application for permission to pursue grounds that had already been considered and rejected by the CCRC in considering whether to refer the case, and, further, there was nothing in the statutory provisions or the authorities that required W to demonstrate substantial injustice, as was required in "change of law" cases. Nonetheless, the CCRC's inquisitorial role and its investigative powers created a particularly high hurdle. Such fresh grounds would need to effectively establish an error in the analysis already undertaken. Pragmatically, the court heard all the evidence *de bene esse* on a rolled up basis before dismissing the appeal, rather than considering leave to amend under s.14(4B) in advance.

Human trafficking—decisions of the competent authority as to whether a person had been trafficked—admissibility in criminal proceedings

DPP v M [2020] EWHC 3422 (Admin); 15 December 2020

The district judge had been right to conclude that the statutory defence in the Modern Slavery Act 2015 s.45 was made out in respect of M, a 15-year-old; and she was entitled to take into account the decision of the competent authority that M had been trafficked in finding that M had discharged the evidential burden which arose in relation to s.45(4)(b) and (c).

(1) The court reviewed authorities on the use of competent authority decisions in relation to the pre-2015 Act trafficking abuse of process jurisdiction, and the admission of both a competent authority decision and the findings of the First-tier Tribunal (Immigration and Asylum Chamber) by the Court of Appeal under Criminal Appeal Act 1968 s.23 in *R v S(G)* [2018] EWCA Crim 1828, [2019] 1 Cr.App. R. 7. The court in *S(G)* declined to determine whether these would be admissible in the Crown Court. Gross LJ stated that, had they been available at trial, it was overwhelmingly likely that the Crown would have been required to make admissions as to their conclusions ([68] and [69]).

(2) It followed that the admissibility in a trial of a decision of the competent authority was not clearly and finally determined by the authorities. Given the form of the district judge's decision, the admissibility of the competent authority's decision (and the full decision memorandum) was in issue in M's case. An admission was made under the Criminal Justice Act 1967 s.10, but the parties disputed what was covered by the terms of the admission (only the facts upon which it was based, or the decision itself), and the court found that the admission was ambiguous. The court concluded that the decision was properly admissible. The Crown's core argument was that it was not admissible as non-expert opinion evidence. Expert evidence per se may be admissible as to trafficking status: expert evidence was admissible when the subject matter was something

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on which the ordinary person without particular experience in the relevant area could not form a sound judgment without the assistance of a witness with such experience. The factors relevant to trafficking or exploitation were not necessarily within the knowledge of the ordinary person. Expert evidence on which factors were relevant, and on the assessment of such factors, must be admissible. The decision maker would have relevant expertise. While the competent authority decision maker would not have prepared their minute of decision with a view to its being used as expert evidence, that did not of itself prevent its admission. The decision maker would be acting under a duty and would be aware of the likelihood that the conclusive grounds decision would be used in proceedings of some kind, whether in a court or a tribunal. That the decision maker would not anticipate giving oral evidence illustrated the force of Gross LJ's observations in *S(G)* about admissions.

(3) The court rejected Crown counsel's submission that admission of competent authority decisions would have "significant implications in terms of prosecutorial practice". The weight of a decision would vary, and a prosecutor would be in a position to assess its weight, as he or she would of any other piece of evidence. The decision made by a prosecutor as to whether the defendant had satisfied the evidential burden and, if so, whether the prosecution can disprove the statutory defence would depend on an assessment of all of the available material.

The court considered the following authorities (in addition to *SG)*): *Joseph* [2017] EWCA Crim 36, [2017] 1 Cr.App.R. 33; *R v L(C)* [2013] EWCA Crim 991, [2013] 2 Cr.App.R. 23; *R v N* [2019] EWCA Crim 984; *R v DS* [2020] EWCA Crim 285; *DC(Albania)* [2019] UKUT 351 (IAC); *MS (Pakistan) v Secretary of State for Home Department* [2020] UKSC 9, [2020] 1 W.L.R. 1373; *B v Merton Borough Council* [2003] EWHC 1689 (Admin), [2003] 4 All E.R. 480; *M v Hammersmith Youth Court* [2017] EWHC 1359 (Admin); *Bradshaw* (1986) 82 Cr.App R. 79; and *Brennan* [2014] EWCA Crim 2387, [2015] 1 W.L.R 2060.

Human trafficking—decisions of the competent authority as to whether a person had been trafficked—admissibility in criminal proceedings

R v BTT [2021] EWCA Crim 4; 7 January 2021

B's applications for an extension of time, leave to appeal and to admit fresh evidence, based on grounds of appeal relating to the defence in the Modern Slavery Act 2015 s.45 were referred to the full court by the Registrar. The court had no hesitation in admitting as fresh evidence under Criminal Appeal Act 1968 s.23 the decisions of the Home Office, as the competent authority, and that of the Upper Tribunal judge, on appeal from the First-tier Tribunal (Immigration and Asylum Chamber), for the same reasons as the Court gave for admitting in evidence similar material in *GS* [2018] EWCA Crim 1824, [2019] 1 Cr.App.R 7 at [67] to [69]. The court was referred by B's counsel to the Divisional Court decision in *DPP v M* [2020] EWHC 3422 (Admin) (see above) which went further and found that the decision of the competent authority would be admissible at trial. In the light of the court's decision to refuse B's application for leave to appeal, the court did not need to determine whether that decision by the Divisional Court was correct.

Improper use of public electronic communications network—Communications Act 2003 s.127(2)—nature of offence; European Convention on Human Rights Art.10—application

SCOTTOW v CPS [2020] EWHC 3421 (Admin); 16 December 2020

(1) On a prosecution arising out of a number of tweets posted on Twitter, the prosecution and the district judge had been wrong to treat an offence contrary to the Communications Act 2003 s.127(2)(c) (an offence "if, for the purpose of causing annoyance, inconvenience or needless anxiety to another, [a person] … (c) persistently makes use of a public electronic communications network") as if it were a lesser version of harassment contrary to the Protection from Harassment Act 1997, with a less demanding threshold – a kind of "harassment-lite" – in which it was enough to prove an intent to cause offence of the relevant kind. Section 127 was one of a group of sections headed "Offences relating to networks and services". Read in context, these provisions were not intended by Parliament to criminalise forms of expression, the content of which was no worse than annoying or inconvenient in nature, or such as to cause anxiety for which there was no need. First, the crime was only committed by conduct that is "for the purpose" of causing annoyance, inconvenience or anxiety. Secondly, it could only be committed by the "persistent" use of a "public telecommunications network". The mischief aimed at by Parliament when it passed s.127 was not as broad as causing offence online (the court referred to the legislative history, and objects, as set out in *Director of Public Prosecutions v Collins* [2006] UKHL 40, [2006] 1 W.L.R 2223 [6]-[7], per Lord Bingham). The wording, legislative history, and context made it apparent that the mischief was not the communication of information or ideas that offended the recipient, or even the communication of messages that have offence as a purpose. Its object was to prohibit the abuse of the facilities afforded by a publicly funded network by repeatedly exploiting those facilities to communicate with another for no other purpose than those specified. The focus was not on the content of any communication, but rather its purpose and the way in which that purpose was put into effect. Repeated instances of prank calls, silent calls, heavy breathing, and other common forms of nuisance phone call, containing no meaningful content, would fall within the scope of s.127(2)(c). These examples indicated the kind of behaviour the legislation was intended to prohibit.

(2) Even considering the content of the messages, the district judge approached European Convention on Human Rights Art.10 wrongly, having appeared to have considered that a criminal conviction was merited for acts of unkindness and name-calling unless they could be justified as making a contribution to a "proper debate". The notion of a "debate of general interest" was however a feature of privacy jurisprudence. In relation to the disclosure of private facts, where the Court must strike a balance between Art.8 and Art.10, "the decisive factor … is an assessment of the contribution which the information would make to a debate of general interest": *ZXC v Bloomberg LP* [2020] EWCA Civ 611, [2020] 3 W.L.R [106]. This was not the case here. Undertaking the necessary assessment (*Connolly v Director of Public Prosecutions* [2007] EWHC 237 (Admin), [2008] 1 W.L.R 276), the court concluded that prosecution for the tweets in question represented a grossly disproportionate and entirely unjustified state interference with free speech.

Police powers—summary arrest—Police and Criminal Evidence Act 1984 s.24(4)—test of "necessity"; approach of the court

REAY AND SHERLOCK v CHIEF CONSTABLE OF NORTHUMBRIA POLICE [2020] EWHC 3246 (Admin); 27 November 2020

(1) The issue on appeal (from R and S's civil action in the County Court) was whether the county court judge had been right to conclude that the arrest without warrant of R and S, at or before a demonstration, had been objectively necessary (Police and Criminal Evidence Act 1984 s.24(4)). The relevant reasons were the preventive reasons set out in s.24(5)(c). The test was a practical and contextual one. The question whether there was a feasible alternative to arrest arose (cf Code G, and the notes thereto). The test did not mean that there must be no feasible or viable alternative, or that arrest must be a matter of last resort. Rather, it must be the practical and sensible option. While it may not require interrogating a suspect as to whether he will attend a police station voluntarily, it was at least relevant to see whether that was a practical alternative. If a suspect was expected to be cooperative, an arrest could not be reasonably necessary unless the suspect then refused to cooperate. In many instances, the alternatives would require no more than a cursory consideration. But a belief not based on some evaluation of the options was unlikely to be found to be based on reason. A judge should hesitate to second guess the operational decisions of experienced police officers, but there must be a rational justification for an officer to reject alternatives to arrest (*Hayes v Chief Constable of Merseyside Police* [2011] EWCA Civ 911, [2012] 1 W.L.R. 517; *R (L) v Chief Constable of Surrey Police* [2017] EWHC 129 (Admin), [2017] 1 W.L.R. 2047; *Commissioner of Police v MR* [2019] EWHC 888 (QB) and *Rashid v Chief Constable of West Yorkshire* [2020] EWHC 2522 (QB) considered).

(2) The function of the court was to hold the police to account, but not to subject the process of arrest to the rigour of a public law reasons challenge. The test of necessity was a high bar, more than simply "desirable" or "convenient" or "reasonable". It was both uniquely momentous as a summary deprivation of liberty, and uniquely important operationally. Though there was technically no philosophical room for manoeuvre in a binary decision as to necessity, the job of the court was not an abstract thought experiment, but a distinctively practical balancing exercise. The demonstrators' appeal was dismissed.

Perjury—mens rea—recklessness or failure to care as to truth of statement; prosecution—evidential test—material taken into account when assessing potential defences

R (PURVIS) v DPP [2020] EWHC 3573 (Admin); 23 December 2020

(1) In deciding that a police officer should not be charged with perjury, the CPS lawyers making and reviewing the decision erroneously proceeded on the basis that the officer had to be either deliberately dishonest, in which case the offence would have been made out, or making an honest mistake, in which case it would not. The formulation of the offence in Perjury Act 1911 s.1 included the elements that the accused made "a statement … which he knows to be false or does not believe to be true"), and this approach therefore ignored the third possibility, that the maker of the statement did not know it was false, but neither did he positively believe it to be true. In other words, the third possibility was that the statement was made recklessly, without thought at all, or not caring whether or not the statement was true.

(2) A CPS lawyer considering the evidential test in the full code test was required to consider any defence available, and was entitled to consider how evidence had fared when tested by cross-examination in police disciplinary proceedings, regardless of whether those proceedings would be admissible in evidence before a jury. In so concluding, the court agreed with counsel's submissions that the Court of Appeal frequently assessed the strength of defences overlooked at the Crown Court by reference to, for example, First-tier Tribunal decisions and "reference to competent authorities' findings (which were inadmissible in the Crown Court, but invaluable as barometers of the merits of defences)."

[*Comment: for developed argument on the admission of competent authority decisions on trafficking, see* DPP v M, *and* R v BTT *above. The observation in* Purvis's *case that such decisions were not admissible was obiter, and the court appears not to have been referred to* DPP v M.]

Sexual assault—Sexual Offences Act 2003 s.3—mens rea

ATTORNEY-GENERAL'S REFERENCE (CRIMINAL JUSTICE ACT 1972) (NO 1 OF 2020) [2020] EWCA Crim 1665; 10 December 2020

The only issue in the trial of D for sexual assault was whether, when he kissed a stranger on the lips on a train, the touching was "sexual" as defined in the Sexual Offences Act 2003 s.789(b). Kissing could be not of its nature sexual but was capable of being so, and was so, either because of the circumstances or the purpose of (here) D. The judge at the trial at which D was acquitted was wrong to rule that it was a necessary ingredient of the offence for the Crown to prove that the defendant had intended the touching to be sexual, and to direct the jury accordingly. D's submissions relied on *R v JAS* [2015] EWCA Crim 2254, a case concerning s.8, causing a minor to engage in sexual activity. There, Macur LJ suggested that the jury should have been directed to decide whether they were sure that J's invitation to the minor complainant was "sexually motivated" and "with a view to sexual gratification". However, in that case, it seemed that the issue in s.78(b) was whether J's purpose was sexual, and thus the court's reference to sexual motivation was directed at the particular factual issue in that case. It was not authority for the proposition that sexual motivation was a free-standing ingredient of the offence. The court rejected an argument to the contrary advanced in the supplement to *Rook and Ward on Sexual Offences: Law and Practice* (5th Edition), at 2.80 (noting that the alternative was argued in the main work).

SENTENCING CASE

Sentencing offenders with mental disorders

NELSON [2020] EWCA Crim 1615, 2 December 2020

In 2012 the appellant had been sentenced for offences of racially aggravated assault occasioning actual bodily harm and criminal damage, assault by beating and threats to kill. The offences were committed in 2011. His personal circumstanc-

es are set out at [2]-[5] of the judgment. The judge found that the appellant was suffering from a mental disorder within the meaning of s.45A(2)(b) of the Mental Health Act 1983 (MHA 1983) and found him to be dangerous. He was sentenced to an IPP with a minimum term of three years with a hospital direction with a limitation direction under s.45A of the MHA 1983 for the offence of making threats to kill. (Concurrent sentences of imprisonment were imposed for the racially aggravated assault and the criminal damage. No separate penalty was imposed for the assault by beating).
In 2020 leave to appeal was given and fresh psychiatric evidence was provided (see [23]-[30] of the judgment for details). It was submitted on the appellant's behalf that the new medical evidence demonstrated that the s.45A hybrid order would create problems for both the appellant and the public; that the hybrid order with an IPP was wrong in principle and manifestly excessive and that the appropriate order was a hospital and restriction order through ss.37-41 of the MHA 1983.
The Court applied the questions set out in *Vowles* [2015] EWCA Crim 45 to determine whether the fresh evidence meant that the hospital and restriction order was the only proper order to be made. The first question was the extent to which the offender requires treatment for their mental disorder. The Court concluded that the appellant required treatment and that it was necessary and appropriate to make a hospital order under s.37 of the MHA 1983. The second question was the extent to which the offending was attributable to the mental disorder. The Court concluded that the appellant's offending was mainly due to the mental disorder from which he suffered, and that his residual culpability was limited. The third question was the extent to which punishment was required. The Court determined that there was less need for punishment because the appellant's culpability was so much adversely affected by his mental disorder. He had also been detained in hospital for nine years. The fourth question was which release regime best protected the public. The first concern identified about the current sentence was that release from hospital would entail the appellant being sent to prison, an environment identified as likely to lead to a relapse of his delusional disorder (see [36]). The second concern was that when released from prison he would be supervised by a probation officer rather than a team of mental health experts reporting to the hospital and Secretary of State for Justice (see [38]).
The Court concluded that the proper order to protect the public and assist the appellant's recovery was a s.37/41 order. The s.45A order was quashed and a s.47/41 order was imposed.

Case in Depth

R v Thomas [2019] EWCA Crim 1958, [2020] R.T.R. 33

By Matthew Hodgetts[1]

Facts
The appellant was convicted of committing acts tending and intended to pervert the course of justice. The Crown's case was that he had lied twice to the police about who was driving a car recorded by an automatic camera speeding at 84 mph along a road with a 70 mph speed limit. The appellant said that he had been with a group of people travelling back from a rave. There were six of them and they had taken turns driving. Since there were only five seats in the car, someone had had to sit on a lap. He did not know all of the people he was with. Therefore when the notices of intended prosecution arrived he had to ask around for the names of the drivers. The prosecution argued that the photograph taken by the speed camera showed only one person in the car and that therefore the appellant was not being truthful.
At trial the appellant was examined by his own counsel as follows:

> Q. And in terms of your work, would you have been affected if you were to receive three points on your licence?
>
> A. No, not at that time, no.
>
> Q. And would receiving three points result in you being disqualified?
>
> A. No, not that I'm aware of.
>
> Q. Is it also correct that you have no previous convictions?
>
> A. No, none at all. Never been in trouble with the police ever.
>
> Q. And you also have no cautions as well?
>
> A. Nothing.

In fact, at the time of the speeding offence, he had six points on his licence. The Crown sought to adduce this fact as bad character evidence in order to correct a false impression said to have been given by the appellant.
The Criminal Justice Act 2003, s.101 provides:

> (1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if— […]
> …
> (f) it is evidence to correct a false impression given by the defendant.

This is supplemented by s.105:

> (1) For the purposes of section 101(1)(f)—
>
> (a) the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant. …

1 Matthew Hodgetts is a barrister at 23 Essex Street Chambers.

The defence countered that Thomas had given true answers and that no false impression had been made. The recorder at trial considered that the defence had put in issue the number of points on the licence. He said (incorrectly) that defence counsel had asked about the number of points. He ruled that the appellant had given a false impression about this and that the number in fact on the licence went to motive to lie about who was driving, there being quite a difference between someone who had no points and someone who had six.

Decision

Thomas appealed on two grounds. Firstly, he said that the recorder's decision to allow the Crown to cross-examine him on the number of points then on his licence was erroneous. Secondly, the recorder was said to have "descended into the arena" and conducted a hostile cross-examination of the appellant.

In a brief passage on the first ground, the Court of Appeal agreed with the defence submission that no materially misleading impression had been given by the appellant's answers to his counsel's questions. The recorder, it said, mischaracterised the questions asked. The appellant had not said that he had no points. Rather, in response to a carefully phrased question from his own counsel he had simply said that getting three points would not affect his licence or his work.

Furthermore, the recorder's direction to the jury, it said, gave the impression that his evidence-in-chief had been misleading and that he had to be corrected by prosecuting counsel. In his direction the recorder had said:

> [The appellant] said that - in answer to the question, 'In terms of your work, would you have been affected by three points on your licence?', his answer was, 'Not that I'm aware of'. He has no previous convictions and has never been in any trouble, no cautions. We were told subsequently that he had, at the time, six points on his licence.

The Court of Appeal considered this phrasing may have left the jury with the impression that the appellant had not been entirely forthcoming in his evidence-in-chief.

Dealing with the second ground at greater length, the Court of Appeal also held that the appellant had not had a fair trial due to the inappropriate nature and frequency of the recorder's interventions. The conviction was unsafe on both grounds and would be quashed.

Comment

The Court of Appeal in this case took an unduly narrow view of what it is for an assertion to be misleading. Whilst it is true that the recorder had summarised the examination-in-chief incorrectly it did not follow that because the appellant's evidence on a specific point had been strictly true it had not therefore been misleading. The reference in s.105 (1) (a) to assertions which are "false or misleading" would be entirely redundant if only false words leading to false impressions could open gateway (f).

In fact, misleading impressions can be readily created by saying things that are literally true. A listener can be easily misled by making assumptions about the meaning of technical words or about the intentions of the person speaking. In ordinary conversation we assume that key information relevant to what we are talking about is not being withheld. Imagine your spouse calling out: "It's dinner-time!" Life would be incredibly tedious if each day you had to clarify, "Are you just telling me it's 6 o'clock – or is dinner actually ready? And whose dinner – mine or the dog's?" – and so on. Instead, we assume that the other person is telling us all the relevant information, i.e. that we would be explicitly told "whilst it is dinner-time I haven't actually cooked anything" if that were the case.

Where those assumptions lead the listener into error a literally true utterance will be misleading. For example, "I have never been sentenced to imprisonment" is literally true of someone who has been detained in a young offender institution but it is obviously misleading. Similarly, it might be true to say, "I have no convictions for theft," (only burglary) but that too is misleading.

It is not hard to see what the misleading impression was in this case. The line of questioning directly foreshadowed a submission that Thomas had no greater motive to lie than anyone else in order to avoid a speeding penalty. "What were three points to him?" the jury might have thought.

It would have been for the jury to decide whether they thought having six points in fact gave Thomas a motive to lie. He certainly was at a greater risk of disqualification than someone with no points. At the very least he might have wanted to avoid the Damoclean sword of having nine points. If they had known about the six points it is possible that the jury might have been persuaded that the appellant was still not at any real risk of disqualification and so discounted them. However, without knowing he had six points then they would have proceeded – as we all do – on the assumption that they had been told all the information relevant to their decision. But they had not been. The impression the appellant had given about himself was therefore misleading, notwithstanding that what he had said was strictly true. The fact that counsel's question about the effect of three points was "carefully phrased" did not prevent the reply from being misleading. Indeed it was the careful construction of the question that meant a specific answer about a specific scenario was misleading about the appellant's position more generally. By sailing so close to the wind, it had caught it.

Even if the Court of Appeal was right that the recorder's bad character ruling was erroneous, surely that should not have ended matters. Firstly, the risk of disqualification having been raised, prosecuting counsel could not have been criticised for following up on it. The obvious question was: would the appellant's licence have been affected had he received, say, six points for the speeding offence? A magistrates' court certainly would have had the power to impose six points for speeding at 84 mph. The judgment gives us little further information but the appellant's own account of carrying passengers, some necessarily not properly restrained, would be an aggravating factor if proved, for example. Such cross-examination would inevitably have led to the jury learning about the six points on the appellant's licence. Secondly, evidence going to motive or why the offence was committed "has to do with the facts of the offence" under s.98(a) and so is not bad character evidence in any event.[2] This makes it particularly difficult to see in what regard the conviction could have been regarded as unsafe on the first ground.

2 *Sule* [2012] EWCA Crim 1130; *Lunkulu* [2015] EWCA Crim 1350.

Quite aside from whether his evidence was misleading, part of it must have been straightforwardly false. The appellant had been asked to confirm that he had no previous convictions or cautions but went further and said that he had "never been in trouble with the police ever". He might have avoided convictions in the past but he could not have obtained six penalty points without being "in trouble with the police" (or possibly some other government enforcement agency). This issue was overlooked by the Court.

All this aside, the appellant's evidence was misleading in a broader sense. If an accused decides to tell the jury about his character as it pertains to some issue in the trial (his honesty or lack of violence, for example), he has not generally been allowed to hide the less helpful parts (even if they are not otherwise admissible).

For example, in *Garrett*[3] the accused was charged with possession of criminal property. His admission that his youthful violence had stopped him getting into the Army and that since then he had been a victim of crime himself on a few occasions was held to be misleading because it did not sit well with his more recent convictions for dishonesty and violence. Accordingly, it was right that the prosecution had been permitted to refer to them. Similarly, the applicant in *Farhad*[4] had previous convictions for violence. In denying involvement in a shooting, he admitted that he was "no angel" who bought and smoked cannabis but was just "a bony kid" – "How could I have helped [in such a crime]?" he asked rhetorically. These partial admissions to previous wrongdoing created a false impression, which entitled the jury to know the full extent of his previous convictions for violence.

Here Thomas's evidence had gone further than in either of these cases. Rather than merely offering up a little bad character, he told the jury in very broad terms about his good character (lack of convictions and so forth). Yet it was not wholly good. It may be that many prosecutors would not ordinarily concern themselves with penalty points – but penalty points were central to this case.

If telling the jury about the least problematic parts of your character whilst skirting around more serious matters is misleading, it is hard to see that what the defendant did in this case was any less so. With due respect, this is a decision that should be confined to its own facts.

3 [2015] EWCA Crim 757.

4 [2019] EWCA Crim 1129.

Feature

Intermediaries in criminal proceedings – a role in need of clarification?

By John Taggart[1]

Introduction

The Youth Justice and Criminal Evidence Act 1999 (YJCEA) introduced a range of special measures to facilitate the evidence gathering process in criminal courts for those considered "vulnerable". Perhaps the boldest of all the special measures, as it involved the introduction of a new human actor to the criminal justice system, is known as "the intermediary".[2] The role has effected a culture change in how the criminal justice system deals with vulnerable witnesses.[3]

The YJCEA makes it plain that the accused is excluded from the special measures regime.[4] Consequently, any application for intermediary assistance for a vulnerable defendant must be dealt with under common law, applying the court's inherent jurisdiction to ensure a fair trial.[5] Intermediaries who assist suspects and defendants through this route are termed "non-registered intermediaries" while those operating under the legislation for witnesses are known as "registered intermediaries". The Witness Intermediary Scheme, which matches the skills of an intermediary to the needs of the witness, is operated and managed on behalf of the Ministry of Justice (MOJ) by the National Crime Agency. Although s.104 of the Coroners and Justice Act 2009 provided a statutory basis for defendant intermediaries for evidence only, this provision has yet to be implemented.[6] In the absence of in-force legislation, judges in England and Wales have "stepped in to fill the gap and permit defendant intermediaries where they are necessary for a fair trial".[7] As a result, what has emerged since is a "two-tiered" intermediary provision with unequal provision of intermediaries between witnesses and defendants.[8]

This short piece examines some of the recent jurisprudence relating to intermediaries and argues that it has done little to clarify the role's scope in practice. It also reflects on some of the key findings from my doctoral research in which I interviewed judges and intermediaries working with both witnesses and defendants in the criminal justice system.[9] Looking forward, I raise some key questions about how the intermediary role should be integrated into criminal justice procedures.

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2 Section 29.

3 The duties of intermediaries are outlined in the Criminal Procedure Rules (October 2020) Pt 18, r.18.3. In practice, much of the role is to provide advice or to intervene when miscommunication may occur for any reason. Intermediaries only relay questions in relatively rare, specific circumstances.

4 Section 17(1).

5 Section 33BA of the Coroners and Justice Act 2009 amended the YJCEA to provide a statutory basis for defendant access to intermediaries, however this has never been implemented.

6 This provision was intended to enable the effective participation of the defendant: Hansard, Coroners and Justice Bill Deb 10 March 2009 col 585; YJCEA 1999, ss.33BA(5) and 33BA(6).

7 Penny Cooper and David Wurtzel, "A Day Late and a Dollar Short: In Search of an Intermediary Scheme for Vulnerable Defendants in England and Wales" [2013] *Criminal Law Review* 1, 18.

8 Ibid.

9 My sample consisted of 27 intermediaries (20 in England and Wales and seven in Northern Ireland) and four judges in Northern Ireland (two Crown Court judges and two magistrates).

Recent case law

In recent years, there has been an increase in the number of cases before the Appellate Courts involving intermediaries and their role in criminal proceedings. The majority of these decisions has concerned the appointment and role of defendant intermediaries which, considering the role's lack of regulation and formal guidance, continues to pose problems in terms of trial fairness and effective participation. Examined discretely, these decisions ostensibly provide important guidance on the intermediary role, both registered and non-registered, and reflect the growing influence of the intermediary as a criminal justice actor. However, when read together, these judgments complicate an already poorly understood role.[10] Perhaps of even more concern is that these decisions reflect a glaring divide between the judicial conception of the intermediary role and that of intermediary practitioners themselves.

Several of these cases have focused on the length of defendant intermediary appointment i.e. whether appointments should be made for "evidence only" or for the full duration of the trial. The amendment to the Criminal Practice Directions in April 2016 which outlines that "Directions to appoint an intermediary for a defendant's evidence will thus be rare, but for the entire trial extremely rare…" suggested a serious curtailment to defendant intermediary appointments which was confirmed in the case of *Rashid*.[11] Subsequently, in the case of *Biddle*, the Court of Appeal reinforced the judicial discretion in deciding whether intermediaries should be appointed for the whole of a trial.[12] In *Thomas,* the Court largely echoed this, but emphasised the need for intermediary applications to be "addressed carefully, with sensitivity and with caution to ensure the defendant's effective participation".[13] The more recent case of *TI v Bromley Youth Court*, however, signals a potential change in judicial attitude to defendant intermediary appointments with the "rarity" provision of the Criminal Practice Directions directly questioned.[14] How these key appellate decisions can be reconciled, and whether the number of defendant intermediary appointments will now increase, remains to be seen.[15]

But the question of the "role" of the intermediary is much more complex and goes beyond the matter of duration of appointment. Despite the fact that much of intermediary practice is now governed by the Criminal Practice Directions[16] and the Criminal Procedure Rules,[17] the intermediary has generally been regarded as a peripheral figure within the context of the adversarial criminal trial. The case of *Grant Murray* saw this assumption challenged as it was contended that an intermediary had been "undermined and undervalued" and been treated as an "enemy of the court" at trial.[18] The Court of Appeal recognised that intermediaries "provide a very useful service to the court" but continued in strong terms that they are "not to dictate to anyone what is to happen" and that the role provides assistance "as directed by the judge".[19] In equally strong terms, the court stated that intermediaries "should not interfere with the functions of others unless specifically directed to do so by the judge."[20] Penny Cooper has commented that these judicial statements should act as a reminder to defendant intermediaries who are not selected, trained or quality assured, but in truth, the force of the judgment applies equally to all intermediaries, both registered and non-registered.[21] The Court made it plain that while intermediaries are instrumental in the effort to achieve the effective participation of the defendant, ultimately the burden for ensuring this happens is on the judge.

Relationship with the bench

The nature of the relationship between the bench and intermediaries warrants closer examination. Considering judges decide the terms of defendant intermediary appointments, understanding of the role and its parameters are crucial. Intermediaries cannot be expected to operate effectively without the confidence of the judiciary.[22] Yet, the evidence points towards a discord between the judicial conception of the intermediary role and its operation in practice. In their recent research into young witness practice and policy, Plotnikoff and Woolfson found it troubling that many judges were unable to distinguish between registered intermediaries for witnesses and defendant intermediaries.[23] In my own doctoral research, I have witnessed magistrates, as well as district judges, referring to intermediaries are "interpreters" on occasion. Intermediaries in my research interviews also recounted similar experiences. These anecdotal examples suggest potentially serious misunderstandings of the intermediary role, but the case law is also concerning. In both *Boxer*[24] and in *Beards and Beards*,[25] intermediaries were asked to provide expert evidence on the communication needs of vulnerable individuals. As has been recognised by the Advocate's Gateway guidance[26] and the Criminal Practice Directions, this is contrary to good practice if the intermediary is at the same time acting in his/her intermediary role.[27] In the more recent case of *Pringle*, the Court of Appeal noted that the trial judge was open to the possibility of an intermediary acting as an expert witness and did not expressly reject the notion.[28] It is stark that all three of these cases came years after the Lord Chief Justice, speaking extrajudicially, stated categorically that intermediaries are not expert witnesses nor supporters.[29] Elsewhere, the Equal Treatment Bench Book and the Registered Intermediary Procedural Guidance plainly state that the intermediary is not to be treated as an expert witness.[30] The practice

10 Penny Cooper (2014) *Highs and Lows: The 4th Intermediary Survey*. London: Kingston University.
11 [2017] 1 W.L.R 2449.
12 [2019] EWCA Crim 86.
13 [2020] EWCA Crim 117 [38].
14 Laura Hoyano and Angela Rafferty QC, "Rationing Defence Intermediaries under the April 2016 Criminal Practice Direction" [2017] Criminal Law Review 90.
15 Data collected by "Communicourt", a commercial provider of defendant intermediaries, shows a slight overall decrease in the number of defendant intermediary referrals from 2016 to 2020 (personal email correspondence between author and Communicourt).
16 Criminal Practice Directions 2015 [2015] EWCA Crim 1567, 3F.
17 Criminal Procedure Rules (October 2020) Pt 18, rules 18.27-18.32.
18 *Grant Murray* [2017] EWCA Crim 1228 [196].
19 Ibid [199].
20 Ibid.
21 Penny Cooper, "Joint enterprise: Grant-Murray (Janhelle); McGill (Joseph) Court of Appeal (Criminal Division): Lord Thomas of Cwmgiedd CJ, Hallett LJ (VP CACD) and Goss J: 11 August 2017; [2017] EWCA Crim 1228" [2018] 1 *Criminal Law Review* 71, 74.
22 Joyce Plotnikoff and Richard Woolfson, *Falling short?: a snapshot of young witness policy and* practice (London: NSPCC 2019) 17.
23 Ibid.
24 [2015] EWCA Crim 1684.
25 [2016] EW Misc B14 (CC).
26 The Advocate's Gateway, "Intermediaries: step by step (Toolkit 16, 2 September 2019) available at: https://www.theadvocatesgateway.org/images/toolkits/16-intermediaries-step-by-step-2019.pdf.
27 The Advocates Gateway, "Cases" available at: https://www.theadvocatesgateway.org/cases; Criminal Practice Directions [2015] EWCA Crim 1567, 3D.7.
28 [2019] EWCA Crim 1722.
29 The Rt. Hon. The Lord Judge, Lord Chief Justice of England and Wales, 7 September 2012, at the 17th Australian Institute of Judicial Administration Conference on "Vulnerable Witnesses in the Administration of Criminal Justice".
30 Judicial College, *Equal Treatment Bench Book* (February 2018 edition, revised March 2020) 58; MOJ, *Registered Intermediary Procedural Guidance 2020* (September 2020) 36.

of judges asking intermediaries to effectively act as expert witnesses has been well documented empirically and must be recognised as inappropriate.[31]

"Crossing the court"

The lack of clarity as to the intermediary role and its status within criminal proceedings raises some interesting questions going forward. One issue, for example, is whether an intermediary appointed to assist a vulnerable witness or defendant may be asked by the judge to "cross the court" and assist a witness or defendant on the other side. This term was coined by a witness intermediary who had been asked by the judge to assist a vulnerable defendant after the commercial organisation providing an intermediary withdrew. This issue has not been explored in any depth in the literature or academic commentary, but in my doctoral research interviews a handful of intermediaries revealed experience of such a practice. *Prima facie*, this seems relatively uncontentious - intermediaries are officers of the court and are independent of both the prosecution and defence. Further, as the case law outlines, intermediaries are

> instructed to provide advice and guidance to the judge (and to the advocates)… and, if required by the court, to provide assistance to a witness or defendant *as directed by the judge*[32]

The Criminal Practice Directions 2015 also speak about the roles and functions of intermediaries in general terms. Considering the role's primary function is

> to improve the quality of evidence and aid understanding between the court, the advocates and the witness or defendant[33]

it seems reasonable that an intermediary could help facilitate communication for multiple individuals within the same proceedings. In interview, however, intermediaries were decidedly lukewarm on the notion with a number suggesting that "crossing the court" could adversely affect the vulnerable witness/defendant they assist originally. One intermediary viewed the idea of assisting both a witness and a defendant as "problematic from the outset [and] that whilst you could do it, it is best not to." In more practical terms, such appointments raise issues about intermediaries being given sufficient time to adequately assess the additional person in order to gauge their communication abilities. Further, the matter of payment could become even more complex as the prosecution and defence would be separately responsible for each appointment. This latter issue (among many others) could be addressed if a unified intermediary scheme assisting all vulnerable individuals were to be established, similar to the one operated by the Department of Justice of Northern Ireland.[34]

Intermediaries - here to stay?

Lastly, a salient question relates to the future status of intermediaries within the criminal process. Initially introduced to help criminal justice actors communicate with the most vulnerable individuals, it is apposite to reflect on whether this was an objective to be reached by a certain point in time or if it was intended that the intermediary would become an established criminal justice actor. Initial pushback from judges and lawyers suggested intermediaries would have a difficult time integrating into the criminal justice system. However, growing acceptance, and at times celebration, of intermediaries and their utility over a number of years seemed auspicious.[35] With the MOJ recently publishing a "Pre-Procurement Notice" for the provision of Court Appointed Intermediary Services, now is an appropriate juncture to assess the state of the intermediary role and its parameters.[36] Will the intermediary become increasingly integrated into all aspects of criminal proceedings or has their impact been to highlight communication deficiencies for which lawyers and judges must now take more responsibility? For example, The Inns of Court College of Advocacy (ICCA) established the "Advocacy and the Vulnerable Training Programme" to ensure that all advocates understand the key principles behind the approach to and questioning of vulnerable people.[37] Judges have pressed the MOJ for vulnerable witness training,[38] but have received *some* limited training in the context of the introduction of s.28 pre-trial cross-examination.[39] In their research focusing on the treatment of young witnesses, Plotnikoff and Woolfson found that 80% of 40 judges surveyed thought more training on identifying communication problems would be helpful.

With lawyers and judges equipping themselves to better deal with complex communication issues, we may ask whether aspects of the intermediary role as currently performed could eventually be assumed by judges and advocates. Viewing part of the role's purpose as "skilling up" traditional criminal justice actors could help underscore its commitment to impartiality as well as integrate intermediaries into existing training programmes such as that run by the ICCA.[40]

However, in practice, the reality of such a suggestion is fraught with complications. The vast majority of intermediaries that I interviewed were unconvinced that judges and lawyers could deputise for an intermediary. Equally, while the judges I interviewed in Northern Ireland acknowledged that intermediaries could help all criminal justice professionals to communicate more effectively, they were firmly of the view that the intermediary's expertise could not be easily replaced. One magistrate noted the intermediary is "bespoke to that particular client's needs and for that reason you will still need the intermediary expertise." It is difficult to imagine how judges and lawyers, with their own individual responsibilities within the criminal process, could assess a vulnerable individual and build rapport and trust in the way intermediaries currently do. Further, much of the "backstage" work that intermediaries perform is rarely seen or appreciated but is fundamental to the role. It is the totality of the intermediary's communicative assistance,

31 Joyce Plotnikoff and Richard Woolfson, *Intermediaries in the criminal justice system* (Policy Press 2015) 258-260; Law Commission, *Unfitness to Plead, Volume 1: Report* (Law Com No 364, 2016) 117-118.
32 *Grant Murray* (n 18) [199].
33 Criminal Practice Directions 2015 [2015] EWCA Crim 1567, 3F.1.
34 See: Penny Cooper and David Wurtzel (n 7 above).
35 Penny Cooper and Michelle Mattison, "Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model" (2017) 21(4) *The International Journal of Evidence and Proof* 351.
36 Any eventual services will be provided in "courts and tribunals in England and Wales," which it appears would cover family courts and potentially even employment tribunals.
37 ICCA, "Advocacy and The Vulnerable (Crime)" available at: www.icca.ac.uk/advocacy-the-vulnerable.
38 Penny Cooper, "Participation of vulnerable people: Don't expect fireworks" (2018) 48 *Family Law* 3.
39 Plotnikoff and Woolfson (n.22).
40 Plotnikoff and Woolfson have called for collaboration between judges, advocates and intermediaries to develop training materials: see Plotnikoff and Woolfson (n 19) 23.

not just that provided during questioning, which helps the court discharge its obligation to take "every reasonable step" to facilitate participation.[41]

Conclusion

Intermediaries have been recognised as introducing "fresh insights" into the criminal justice process.[42] Both registered intermediaries for witnesses and non-registered intermediaries for defendants have significantly improved how the most vulnerable communicate within the criminal justice system. But, as Cooper and Mattison have noted, there is a distinct lack of empirical research into the intermediary role and it is unclear exactly how it functions in practice during investigative interviews and at court.[43] The discord between the case law and intermediaries as to the role's status and function does little to assist. With the MOJ seeking to broaden intermediary access in courts and tribunals, more questions are sure to emerge about how the role operates in new fora. Even if the intermediary role is broadly recognised as "highly valued",[44] there is a serious need to clarify the role's function and scope as well as its status within the criminal justice system.

41 Plotnikoff and Woolfson (n 22) 105.
42 Lord Judge (n 29).
43 Cooper and Mattison (n 7) 364.
44 Ibid 367.

The Sunny Uplands?

"*WHAT EXACTLY IS IN THE HISTORIC EU TRADE DEAL? The Daily Gnome's forensic examination of the 2,000-page document that will determine the UK's future for the next millennium.*

- *We don't know*
- *We don't care*
- *We are just really glad it's over*"

This spoof headline from a recent *Private Eye* may sum up the feelings of many of our readers. But for those interested, a thumbnail sketch now follows of as much of the Trade and Co-operation Agreement (TCA) as deals with the future relationship in the field of criminal justice.

Overview of structure, and the constitutional position

Deconstructed, "EU criminal law" is the body of EU legal instruments containing provisions relevant criminal justice; and for each Member State, those parts that it is bound by.[1] The duty of the Member States to implement these instruments is enforced by the EU Commission through the Court of Justice of the European Union (CJEU), which also resolves issues of interpretation referred to it by the Member States. For the UK, most of this structure remained in place until the Transition Period ended on 1 January 2021.

A replacement structure is now contained in Part III of the TCA, which (with the rest of the TCA) is made effective in the UK by the European Union (Future Relationship) Act 2020[2] (EUFRA): rushed through Parliament on 30 December, with Royal Assent on 31st, and most of it in force immediately: either by virtue of the Act itself, or of a Commencement Order issued later in the day.[3] The key implementing provisions are s. 29 (1), which provides that domestic law is now to be interpreted "with such modifications" as are required to give effect to the TCA, and s.31, which confers wide law-making powers on "relevant national authorities" to give further effect to it by Regulation.

Part I of the EUFRA contains provisions which adjust existing UK legislation originally enacted to implement EU criminal justice instruments, to make it fit the replacement provisions in the TCA - including Part I of the Extradition Act 2003 and the Crime (International Cooperation) Act 2003.

A "red line" for the UK government was the UK's removal from the jurisdiction of the CJEU. To comply with this, the TCA creates a new ad hoc structure to fill the role it used to play. This is a Partnership Council, composed of representatives from the EU and the UK, and a list of Specialised Committees – including one on law enforcement and judicial cooperation, which is responsible for criminal justice matters arising under TCA Part III.[4] These bodies can impose a binding solution to a disputed issue if the EU and the UK cannot reach a "mutually agreed solution" by negotiation.[5] As a last resort, each side has the right to suspend the operation of Part III,[6] or to pull out of it altogether.[7]

Where the replacement provisions in the TCA are closely modelled on the old ones, what is now the legal status of any CJEU case-law on the precursor instruments? A provision of the TCA,[8] mirrored in the EUFRA,[9] requires the text to be interpreted "in accordance with the customary rules of interpretation in public international law" and makes it clear that CJEU case-law is no longer binding. But if no longer binding it might still have some residual standing as "persuasive authority".

The contents of the package

The text of the new arrangements is vast[10] and all that can be attempted here is a catalogue, together with some passing comments.

A major element in the previous arrangements were instruments designed to facilitate cooperation between the police forces of the Member States, and most of these are replicated in the TCA. These include provisions continuing the reciprocal arrangements for automatic access to databases of DNA profiles, fingerprints and vehicle registration records,[11] and facilitated access to PNR (airline passenger

1 Under the 2009 Lisbon Treaty, future EU justice measures only applied to the UK if it elected to opt-in, which it sometimes chose not to do. The Treaty also gave the UK the right to opt-out of earlier justice measures – which it exercised en bloc in 2012, then opting back into those of practical importance. For a brief account see [2014] 8 *Archbold Review* 9.
2 2020 c.29.
3 The European Union (Future Relationship) Act 2020 (Commencement No. 1) Order, SI 2020/1662 Obscurely, this Order brings a range of provisions into force on something called "IP Completion Day", which as explained means 11 p.m. GMT on 31 December.
4 Part I, title III, Art Inst (2) (1) (r).
5 Part III, title XIII, Art LAW DS 4: Consultations.
6 Part III, title XII, Art LAW OTHER 137.
7 Part III, title XII, Art LAW OTHER: Termination.
8 Part I, title II, Art. COMPROV 13.
9 S.30.
10 In the body of the TCA itself,13 titles, comprising 179 articles (79 pages); plus 8 Annexes, (133 more pages).
11 Part III, Title II.

name records).[12] Also replicated is the reciprocal duty of the national police forces to respond to each other's requests for information.[13] There is also a replacement for the EU's ECRIS scheme, which requires Member States to supply information about criminal convictions,[14] and replacements for EU instruments on money-laundering,[15] and on freezing and confiscation.[16]

What is significantly missing, however, is the UK's previous membership of SIS – the Schengen Information System. This is a computer system for automatically circulating information about persons and vehicles "of interest" to the police forces of the Member States; and is also used to disseminate European Arrest Warrants. Its loss is said be a serious blow to law enforcement. Also absent is a detailed replacement for the EU instrument on JITs - joint investigation teams.[17]

Central pillars in the previous structure were Europol, a collegiate body which coordinates the activities of police forces in the Member States and facilitates their sharing information, and Eurojust, which does the same for public prosecutors. The UK's membership of these bodies ended, with its membership of other EU bodies, when the UK first ceased to be an EU Member State on 1 January 2020. An important suite of articles in Part III of the TCA now guarantees the UK's continued right to make use of their facilities and to invoke their help,[18] but does not restore its formal membership of the collegiate bodies which shape their policies and direction; much better than nothing, but poor compared with its central position when, as a Member State, the UK provided one Director of Europol and two Presidents of Eurojust.

Two hugely important components of EU criminal law are the European Arrest Warrant (EAW), a highly streamlined form of extradition, and the European Information Order (EIO), a parallel scheme for transborder enforcement of orders for the gathering of evidence. Both are replicated in the TCA,[19] the EAW scheme containing provisions ensuring continuity for cases already in the pipe-line at the date of change.[20]

Though broadly similar to the EAW, the TCA replacement differs from the original in a number of respects, of which just two will be briefly mentioned here.[21] One is the option[22] - already taken by the UK[23] – to insist on a dual criminality requirement, even in respect of those offences in the "Framework Decision List": a change which, if significant in principle, even if (as seems likely) it will make little difference in practice. The other is the option for the UK or a Member State to adopt a policy of refusing to surrender its nationals.[24] This was never the UK's policy, but in many countries the refusal to extradite a national is seen as an essential aspect of the compact between the citizen and the state. During the Transition Period, Germany, Austria and Slovenia opted to refuse to extradite their nationals to the UK and it seems likely that they, and possibly other Member States, will now opt to refuse to extradite their nationals in the future. In principle, a State which refuses to surrender its national is then obliged to try him or her at home, but in practice this is frequently impossible – with a failure of justice the result. To this extent, the new "EAW-lite" is significantly weaker than the original.

Assessment

If not perfect from their point of view, the extensive package of criminal justice measures in Part III of the TCA will be viewed by police and prosecutors with relief. Defence lawyers, by contrast, will be disappointed, because the rather limited range of EU instruments designed to protect the interests of defendants has disappeared without replacement. There is no replacement, for example, for the European Supervision Order,[25] which made it possible for defendants awaiting trial elsewhere to be released on bail in their home State; nor for the EU instruments guaranteeing certain minimum rights for suspects, arrested persons and defendants.

Defence lawyers will take comfort, however, in the provisions of the TCA which make the continued existence of the criminal justice measures dependent on the UK's remaining a contracting party to the European Convention on Human Rights:[26] a "red line" it is said, on which the EU insisted as strongly as the UK on the elimination of the CJEU. For now, at least, this presumably precludes a "Brexit 2" in the form of the UK's withdrawal from the Strasbourg apparatus – a dual ambition summed up by the tabloid headline, "if we really want to escape the grip of human rights law we must quit the EU".[27]

When the Transition Period began, a year was widely said to be too short a time to negotiate a new scheme to manage criminal justice affairs between the UK and the EU, so that on 1 January 2021 the existing arrangements would just end without replacement, leaving the UK to deal with the individual EU Member States as best it could, on the criminal justice equivalent of "WTO terms". So perhaps the most remarkable thing about the new arrangements is the simple fact of their existence.[28]

JRS

12 Ibid, Title III.
13 Ibid, Title IV.
14 Ibid, Title IX.
15 Ibid, Title X.
16 Ibid, Title XI.
17 Though their existence is briefly adverted to in Art. LAW.MUTAS. 122: " If the competent authorities of States set up a Joint Investigation Team, the relationship between Member States within the Joint Investigation Team shall be governed by Union law, notwithstanding the legal basis referred to in the Agreement on the setting up of the Joint Investigation Team." So it looks as if they will continue to be used.
18 Part III, Titles V and VI.
19 Ibid, Titles VII and VIII.
20 Articles 111 and 112; Unsuccessfully challenged in *Polakowski & Ors v Westminster Magistrates Court & Ors* [2021] EWHC Civ 53 (Admin).
21 Ten are listed in a summary on Crimeline Extradition Hub (a subscription service).
22 Part III, Title VII, Art. LAW SURR 79(4).
23 EUFRA s.12.
24 Part III, Title VII, Art. LAW SURR 83(2).
25 Council Framework decision 2009/829/JHA, O.J. L. 294/20 (11.11.2009). See Jodie Blackstock and Alex Tinsley, "The arrival of EU law in criminal proceedings", [2015] 8 *Archbold Review* 5.
26 Part III, Title I, Art. LAW GEN 3 Protection of human rights and fundamental freedoms. Part III, Title XII, Art. LAW OTHER 136.
27 *Daily Mail*, 6 May 2006.
28 A more detailed account is available on the Law Society website at this link: https://www.lawsociety.org.uk/topics/brexit/end-of-transition-period-guidance-law-enforcement-and-judicial-cooperation-in-criminal-matters.

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