SWEET & MAXWELL

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Archbold Review

Cases in Brief

Appeal—lurking doubt where no challenge to ruling that there was a case to answer

PRICE [2021] EWCA Crim 835; 21 May 2021

Where the ground of appeal was that P's convictions were unsafe because they were inconsistent with the circumstantial evidence against him when considered in its entirely, but there was no complaint that the submission of no case had been wrongly refused, the Court of Appeal must proceed on the basis that the judge's ruling was correct, and a reasonable jury could convict on the prosecution case. Where P gave no evidence, necessarily the jury could properly infer his guilt. The court was being invited to conclude, on a paper exercise, that there was a lurking doubt about the safety of verdicts returned by a properly directed jury at the conclusion of a trial which lasted several weeks, which it declined to do.

Appeal—grounds settled by further fresh counsel—prejudice caused by late grounds

MANJRA [2021] EWCA Crim 853, 14 May 2021

Where, on a renewed application for leave to appeal, further grounds of appeal were settled by a second fresh leading counsel, counsel had been wrong to suggest that doing so occasioned no prejudice. It deprived the Court of the opportunity to have the views of the Single Judge; it caused additional expense and delay in requiring renewed consideration by the Crown and a further Respondent's Notice; and it deprived the applicant's trial counsel of an opportunity to comment at a time when the details of the trial were fresh in his mind. M's trial counsel, who had agreed draft directions, was implicitly criticised for failing to correct alleged deficiencies in the summing-up. Although fresh counsel had complied with *McCook* [2014] EWCA Crim 734, [2016] 2 Cr.App.R. 30 in seeking trial counsel's comments, that was not a satisfactory substitute for their being considered by both trial counsel, with the trial fresh in their minds. Fresh counsel's course of picking holes in the directions was fraught with danger when the directions were not the subject matter of any objection or criticism at trial; when neither fresh counsel nor the court could have any feel for the evidence adduced at trial, only a selection of which was before the court; and when the dynamics and detail of the conduct of the trial were peculiarly within the knowledge of the trial judge and trial counsel.

Causation—foreseeability of risk of event—R v A *[2020] EWCA Crim 407, [2020] 1 W.L.R. 2320—whether limited to interventions by third parties—ex ante advice test*

MUHAMMED [2021] EWCA Crim 802; 28 May 2021

M was convicted of causing death and serious injury to passengers in his car when it crashed following a tyre blow-out during 100 mph-plus "competitive driving" with a co-accused. The tyre's blowing out as it did was not necessarily foreseeable – the expert evidence was that it could have done so had M been travelling at 70 mph (and then there would have been no question of prosecution) – did not mean that the chain of causation between M's driving and the death and serious injuries had been broken. M's argument effectively mirrored that of the respondent defendant in *R v A* [2020] EWCA Crim 407, [2020] 1 W.L.R. 2320, which had been rejected by the Court of Appeal (applying *Wallace* [2018] EWCA Crim 690; [2018] 2 Cr.App.R 22 and the Canadian case of *Maybin* [2012] 2 S.C.R 30; considering *Girdler* [2009] EWCA Crim 2666; [2010] RTR 28). If the general form and risk of further harm had been reasonably foreseeable, it did not matter that the specific manner in which the harm occurred was entirely unpredictable. Contrary to M's argument, the decision in *R v A* was not confined to the actions of third parties. Foreseeability of the

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intervening act may be tested by considering what sensible ex ante advice would be tendered to the driver on the risks inherent in the manner in which he was driving, including any number of unpredictable situations regarding road conditions, vehicle malfunctions or other road user behaviour.

Evidence—whether power to direct evidence of defendant via live link; stare decisis—Court of Appeal, Criminal Division decisions—Young v Bristol Aeroplane Co *[1944] KB 718 categories of per incuriam*

LOUANJL [2021] EWCA Crim 819, 7 May 2021

L argued through counsel, on his renewed application for leave to appeal conviction, that it was open to the Court of Appeal to revisit its decision in *Ukpabio* [2007] EWCA Crim 2108, [2008] 1 W.L.R 728 that the Crown Court had no jurisdiction to make a direction that a defendant give his or her evidence by video link. In *Ukpabio* the court followed *R(S) v Waltham Forest Youth Court* [2004] EWHC 715 (Admin), but a close reading of *R(D) v Camberwell Green Youth Court* [2005] UKHL 4, [2005] 1 W.L.R 393 should have led the court to the contrary conclusion, given the doubts expressed about *Waltham Forest* in that case, applying *Young v Bristol Aeroplane Co* [1944] KB 718. The court rejected the submission. The principle in *Young v Bristol Aeroplane* was important and longstanding. Unless one of the exceptions applied, the Court of Appeal was bound to follow the decision in *Ukpabio*. There was no question that it was per incuriam because in ignorance of the relevant statutory provisions, or a previous decision of its own, or a decision of the House of Lords. L argued that the categories of case which fell within the per incuriam principle were not closed. In order to succeed in that submission, it must be shown that the case, as described by Lord Greene, was one of "the rarest occurrence" which must be dealt with "in accordance with [its] special facts" (per Lord Greene, p 729). In *Ukpabio*, the conclusion was based on the proper construction of the legislation, not on the basis that the court was bound by *Waltham Forest*, and the observations on that case in *Camberwell Green* were obiter. There was no basis for the submission that the decision in *Ukpabio* fell within those "rarest" of cases that were per incuriam beyond the *Bristol Aeroplane* specified categories.

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

BRECANI [2021] EWCA Crim 731; 19 May 2021

The Court of Appeal considered whether a conclusive decision made by the Single Competent Authority (in the Home Office) as to whether a person had been a victim of modern slavery was admissible in criminal proceedings in relation to whether the defence in Modern Slavery Act 2015 s.45 was made out.

(1) Considering the criteria for the admissibility of expert opinion evidence in *Turner* [1975] QB 834, the court concluded that the first criterion of relevance to a decision for the jury was made out. As to whether relevant expertise had been made out, the classic statement of the test, followed in England and Wales, was to be found in *Bonython* (1984) 38 S.A.S.R. 45 (South Australian Supreme Court), and was "whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court". Conclusive decisions were made by case workers assigned to the Competent Authority. Generally, no information was available upon which it was possible to determine whether and in what area a case worker might be an expert. Beyond an inference that decision making was approached via the relevant comprehensive guidance (Home Office, *Modern Slavery: Statutory Guidance for England and Wales (under s.49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland Version 2.1* March 2021 [now version 2.3 of June 2021]), and that there must be some training provided, case workers in the Competent Authority were junior civil servants performing an administrative function which included making conclusive grounds decisions. The guidance recognised that a conclusive decision might be disclosed in criminal proceedings but nowhere was there any suggestion that the decision-maker might be called to give evidence, still less that in making the decision the case worker was acting as an expert and might give evidence in chief and be cross-examined in a criminal court as such. Contrary to *DPP v M* [2020] EWHC 344 Admin; [2021] 1 W.L.R 1669, the case workers were not experts in human trafficking or modern slavery (whether generally or in respect of specified countries) and for that fundamental reason could not give opinion evidence in a trial on the question whether an individual was trafficked or exploited. None of the requirements of Crim PR 19, designed to ensure that the person giving evidence was an expert, understood that he or she was acting as such and understood the obligations of an expert to the court, were complied with. There could be circumstances in which a suitably qualified expert might be able to give evidence relevant to the questions that arose under the 2015 Act which were outside the knowledge of the jury, particularly to provide context of a cultural nature. The evidence would have to be truly expert and not a vehicle to enable the expert to stray into the territory of the jury by expressing an opinion about whether an account was credible. There were further impediments to the admission of conclusive grounds decisions and the narrative of facts upon which they depended. First, the accounts (given by B) relied on were hearsay which had not been the subject of an application to admit (and would not have been successful had there been), and, in B's case, were produced without the benefit of further evidence available at first instance (and so were, in *Turner* terms, based on misinformation and were without value). Nothing in the Strasbourg jurisprudence contradicted these conclusions (noting *VCL and AN v UK*, App. Nos 77587 and 74603/12, 16 February 2021).

(2) The court also considered the admissibility of two reports by an independent forensic social worker and criminologist, and concluded that the author had not demonstrated appropriate expertise, and that his conclusions were based on factual material suffering from the same deficits as that relied on in the conclusive decision.

(3) The court was aware of the concerns relating to Merton-compliant age assessments (*R(B) v Merton London Borough Council* [2003] EWHC 1689 (Admin), [2003] 4 All ER 280) in *DPP v M*. The court emphasised that it had heard no argument on the issues and said nothing about them.

Immigration offences—Immigration Act 1971 ss.25 and 25A—relationship—Kapoor *[2012] EWCA Crim 435, [2012] 1 W.L.R. 3569 and* Bina *[2014] EWCA Crim 1444, [2014] 2 Cr.App.R. 30—whether in conflict; appeal—circumstances in which appeal lies where unequivocal guilty plea*

KAKAEI [2021] EWCA Crim 503; 8 April 2021

K was convicted of offences of assisting unlawful immigration to the UK contrary to Immigration Act 1971 s.25(1), when he admitted he had assisted in steering a boat crossing the channel, with others seeing to enter the UK. He pleaded guilty following the judge's ruling that, even if he and the other passengers had made applications for asylum as soon as they disembarked, they would have committed the offence of illegal entry under s.24 of the 1971 Act, and thus the assisting offence under s.25 would be made out. The full Court of Appeal granted leave to appeal on the basis that there was a tension between *Kapoor* [2012] EWCA Crim 435, [2012] 1 W.L.R. 3569, upon which K relied, and *Bina* [2014] EWCA Crim 1444, [2014] 2 Cr.App.R. 30, relied on by the Crown, and uncertainty as to the relationship between s.25 and s.25A (helping an asylum seeker to enter), which required an additional element of gain.

(1) On appeal, the prosecution changed its stance and agreed that the judge's ruling had been wrong. The deeming provision in s.11 of the 1971 Act meant that a person who arrived at a port or airport with an approved area where people were held pending consideration of their entry into the UK, did not enter the country until they left that area (*Naillie* [1993] AC 674; *Adams* [1996] Crim LR 593; and *Javaherifard* [2005] EWCA Crim 3231). If the plan of those in the boat had been to arrive at a port, and to claim asylum before leaving the approved area in that port, then that arrival would not constitute entry and so no offence could be committed under s.24. Thus both *Kapoor* and *Bina* were correctly decided, and were factually distinct illustrations of the principle. The passage at paragraph [38] of *Kapoor*, which suggested that the facilitation of "the arrival into this country of an asylum seeker" which was not an offence under s.25A could not be an offence under s.25, was wrong, but obiter (the court suggested that if the Divisional Court decision in *Sternaj v. DPP* [2011] EWHC 1094 (Admin) had been cited, the court would have been likely to have followed it).

(2) In *Asiedu* [2015] EWCA Crim 714, [2015] 2 Cr.App.R. 8, the court identified two categories of cases in which an appeal against conviction may succeed following a guilty plea (equivocal or unintended pleas aside): where the plea was compelled as a matter of law by a ruling by the judge (as opposed to a defendant's case being made more difficult, as for instance by a ruling on evidence: *Chalkley* [1998] Q.B. 848), and abuse of process cases. To that the court would add a third, which may be viewed as an extension of the first. Where a defendant had pleaded guilty following legal advice which deprived him of a defence which would probably have succeeded, that was a proper ground for regarding the conviction as unsafe (*Boal* [1992] 1 QB 591, for a recent example, *R. v P.B.L.* [2020] EWCA Crim 1445). The test for this approach was not the same as the *Chalkley* situation of a ruling on law that meant that the appellant had no defence even on the most favourable view of the facts. If such a ruling were wrong, then the conviction would probably be unsafe even if it was unlikely the jury would have believed the factual basis contended for by the defence. Where the plea followed legal advice (on factual or legal issues, or a mix), its effect must be to deprive the appellant of a defence which would probably have succeeded before a conviction would be unsafe. K's case was a mixed one, where his defence was removed by a combination of correct legal advice and an incorrect legal ruling – the judge's ruling only left one, wholly untenable, defence on the facts, thus depriving K of his only viable defence. It thus fell within *Chalkley* rather than *Boal*, and the conviction was quashed.

Kidnapping—lawful excuse—belief as to parental authority

OSBORNE [2021] EWCA Crim 832; 18 May 2021

O was convicted of conspiracy to kidnap where a father, using force, took a child away from the child's mother. On appeal he argued that his belief that the father had a lawful excuse for doing as he did, being legally entitled to take the child, was a mistake of fact as to circumstances, on which O was entitled to rely. Dismissing his renewed application for leave to appeal the Court of Appeal disagreed. From the jury's verdict it was clear that O was knowingly a party to an agreement to take the child by force and his mistake was therefore one of law, on which he was not entitled to rely. The court cited the account of the law on parental in Law Commission, *Simplification of the Criminal Law: Kidnapping and Related Offences* (Law Com 355, 2014), para.2.86 with approval (the passage cited *R v D* [1984] AC 778 and *Rahman* (1985) 81 Cr.App.R. 349). Renewed application for leave to appeal refused (counsel appeared for O pro bono).

SENTENCING CASE

Life sentence—minimum term—age of offender

POPOOLA [2021] EWCA Crim 842, 11 June 2021

The Court of Appeal considered whether a judge gave sufficient weight to the appellant's age at the time of the offence (18 years, nine months) when determining the appropriate minimum term to be served under a life sentence imposed for murder.

The appellant had been convicted after trial of four offences: inflicting grievous bodily harm; manslaughter; violent disorder, and murder. For the murder he was sentenced to custody for life, with a minimum term of 28 years (less time on remand). He had been sentenced pursuant to Sch.21 to the Criminal Justice Act 2003 (now replaced by Sch.21 of the Sentencing Act 2020, which the Court noted is materially the same for the purposes of the appeal).

Applying para.5A of Sch.21 of the 2003 Act, the appropriate starting point for the minimum term was 25 years. For an offender aged under 18 at the time of the offence, the appropriate starting point would be 12 years (Sch.21, para.7). Paragraph 8 of Sch.21 provided that having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point. Paragraph 9 stated that detailed consideration of aggravating or mitigating factors may result in a minimum term of any length, or in the making of a whole life order.

The Court stated that the provisions of Sch.21 (to both the 2003 and the 2020 Acts) underline the principle that considerations of age and maturity are usually relevant to the culpability of an offender and the seriousness of the offence (per *Peters* [2005] EWCA Crim 605). The differing starting points in Sch.21 should not be treated as a cliff edge from

which an offender must inevitably fall upon as soon as they attain the relevant age.
To avoid a factor being counted twice in the sentencing process it must be recognised that considerations of age and maturity are to some extent built into the lower starting point applicable to offenders aged under 18. However, the application of the principle to the facts of a particular case cannot be reduced to an arithmetical process. The sentencing judge must consider the offender's level of maturity at the time of the offence, and assess the extent to which young age and lack of maturity reduced the offender's culpability in committing the murder. If a long period of time has passed between the commission of the crime and the sentencing hearing, it will be necessary to consider whether there has been significant maturation during that period.
Considering the approach taken by the sentencing judge, the Court was satisfied that in the circumstances of the case, the minimum term imposed was within the range properly open to him to reflect the seriousness of the appellant's offending as a whole. The appeal was therefore dismissed.

Case in Depth

Hamilton v Post Office Ltd [2021] EWCA Crim 577

By Barry Smith, Solicitor-Advocate, Barrister, at Aliant Law

In the latest round of litigation arising out of what has become the "Post Office Scandal," the Court of Appeal (Criminal Division) has allowed 39 appeals of historic prosecutions brought by the Post Office Ltd as private prosecutor.[1] This article draws upon the author's experience of the proceedings as a representative of one of the appellants[2] to highlight less well-known aspects of the appeals which may be of wider interest.

Background
In 2000, the Post Office brought in a new IT accounting system, said to be the biggest non-military IT system in Europe, known as "Horizon". Sub-postmasters ran branches of the Post Office under contract and were liable to make up for any branch shortfalls which were picked up by the system. The Post Office did not hesitate to bring civil and criminal proceedings against sub-postmasters and their assistants when such shortfalls arose. Many were made bankrupt as a result. Between 2003 and 2013 the appellants were convicted of offences of theft, fraud, or false accounting committed during the period 2000 to 2012 following prosecution by the Post Office Ltd as private prosecutor. In 2009 *Computer Weekly* broke the story that errors and bugs in the system could be responsible for the shortfalls. 550 sub-postmasters then brought civil proceedings against the Post Office Ltd under a Group Litigation Order in 2017. Those proceedings resulted in no fewer than six High Court judgments by Mr. Justice Fraser[3] before the case was settled. Important findings relevant to the prosecutions were made in the "Common Issues"[4] and "Horizon Issues" judgments.[5] These included that Horizon was not remotely robust or reliable, and contained various bugs and errors which gave rise to a material risk that an apparent shortfall in the accounts of a branch post office did not in fact reflect missing case or stock, and was caused by one of the bugs or errors.[6] The Criminal Cases Review Commission drew upon the findings in these judgments in their reasons for referring 42 cases to the Court of Appeal. The convictions were all said to have been dependent on the reliability and accuracy of Horizon. The chief concern was that the Post Office had failed to properly investigate the real cause of apparent shortfalls, despite complaints by sub-postmasters that the IT system was the cause of the shortfalls, and also had failed to disclose evidence of known bugs to those appellants who were prosecuted. The proceedings were argued to have been an abuse of process.
It was conceded by the Post Office that the convictions of four appellants were unsafe on both limbs of the well-known test in *Maxwell*,[7] i.e. that the proceedings had been unfair ("category 1 abuse") and also that the conduct of the prosecutor was an affront to the public conscience ("category 2 abuse").[8] The Post Office conceded for 35 appellants that the investigatory and disclosure findings relating to Horizon amounted to a category 1 abuse because Horizon data was essential to the conviction, there being no other evidence as to the cause of a shortfall. Category 2 abuse was disputed.[9]
At an earlier hearing, the Court of Appeal, having considered and set out the factors to be taken into account when deciding how to proceed with appeals which are conceded on some but not all grounds, held that it was in the public interest to determine whether or not category 2 abuse was made out.[10]

Findings
The Court held that the Post Office's concessions on category 1 were properly made. The judgments of Fraser J established both that there were defects in the Horizon IT system and that the Post Office knew that there were serious issues with its reliability. As a prosecutor, it was under a clear duty to investigate all reasonable lines of enquiry and to consider (and make) disclosure in accordance with its duties under the Criminal Procedure and Investigations Act

1 At least six other appeals have been allowed (unopposed) at the Southwark Crown Court where the original conviction was in the magistrates' court.
2 Mr. Vijay Parekh, led by Mr. Sandip Patel QC.
3 These begin with *Alan Bates v Post Office Ltd* [2017] EWHC 2844 (QB).
4 *Alan Bates v Post Office Ltd* [2019] EWHC 606 (QB) "Common Issues".
5 *Alan Bates v Post Office Ltd* [2019] EWHC 3408 (QB) "Horizon Issues".
6 See, for example, [968-9], [978], [971], [975] of "Horizon Issues".
7 [2010] UKSC 48, [2011] 1 W.L.R 1837, at [13] per Lord Dyson JSC.
8 *Hamilton* [2021] EWCA Crim 577 at [74] per Holroyde LJ.
9 See at [75].
10 [2021] EWCA Crim 21 at [39].

1996. In these appeals there was no adequate consideration, investigation or disclosure of the Horizon problems, even following complaints by sub-postmasters (in interview, defence statement or before investigation). Further, the Post Office's consistent failure to be open and honest about Horizon could only be explained by a strong reluctance to say or do anything which might lead to other-sub-postmasters knowing about those issues. A fair trial was not possible owing to the prosecutor's failures to investigate and disclose material which would allow the appellants to challenge the reliability of the data.[11]

Turning to category 2, it was held that conduct which is sufficient to amount to category 1-type abuse can also amount to category 2-type abuse.[12] In these cases, the investigatory and disclosure failures were so egregious that the prosecutions were an affront to the conscience of the court. Specifically, in so far as the Post Office deliberately chose not to comply with its obligations of disclosure, it did so whilst asserting that sub-postmasters were contractually liable to make good all losses,[13] and assumed dishonesty on the part of individuals of good character, which effectively sought to reverse the burden of proof.[14] Furthermore, the approach of the prosecutor was influenced by its own interests over its legal obligations.[15] Unusually, the Court heard moving submissions, particularly in respect of now-deceased appellants, as to the severe consequences of the prosecutions which resulted variously in financial losses (in many cases bankruptcy), breakdowns in family relationships, breakdowns in health, and the shame and humiliation of being reduced from a respected local figure to a convicted criminal.[16]

Three appeals were dismissed, the court finding that, on their facts, the reliability of Horizon evidence was not essential to those convictions.[17] At least 730 other individuals who were prosecuted by the Post Office in similar circumstances to the appellants may now seek to appeal their convictions. It is anticipated the litmus test for success in future appeals will be whether or not the reliability of Horizon was essential to the conviction.

In finding category 2 abuse met, the Court was particularly concerned by contemporaneous internal documents in which the prosecutor expressed concern that the disclosure in one case of problems with Horizon could have an impact on other cases.[18] A Post Office legal executive reported that he had asked defence solicitors if they intended to serve any expert evidence, but had not mentioned *Seema Misra's* [an appellant raising similar issues] case to them: "They can find that out for themselves."[19] These appeals are a stark reminder to prosecutors to consider the extent to which cross-case disclosure may be appropriate, and as to the consequences of permitting a prosecutor's self-interest in defending its own position to take precedence over the rights of defendants.

Analysis

Although it is not clear from the judgment itself, the Post Office carried out a very significant post-conviction disclosure exercise pursuant to its duties under *R (Nunn) v Chief Constable of Suffolk Constabulary,*[20] reviewing over four million documents and disclosing over 300,000 pages of material to the appellants. Technically, for the appeal hearing, these were subject to applications to adduce fresh evidence.[21] The same is true of the reliance by the appellants (and the Court) on the earlier judgments of Fraser J, although there are other examples of the Court of Appeal relying on civil judgments as fresh evidence of fact.[22] It is likely that this does not constitute a newly relaxed approach by the Court of Appeal to the question of fresh evidence, however. The facts of these appeals were extraordinary. The principal *Bates* judgments run to 1122 and 1030 paragraphs respectively, and in refusing the Post Office permission to appeal the Common Issues, it was observed by Coulson LJ in respect of challenges to the factual findings that "the trial and the subsequent judgment were manifestly 'the first and last night of the show'. No judge will ever know more about this case generally, and the Common Issues specifically, than Fraser J."[23]

Unsurprisingly, the Post Office did not contest the admissibility of the new material.

These cases are also an unusual example of the Court of Appeal permitting appellants relying on post-conviction activity by the prosecutor to establish category 2 abuse. The only reference to this in the judgment is that there was evidence of systemic failures of many years, and that the later events shed legitimate light on the approach to earlier prosecutions.[24] It follows that where a proper line of reasoning can be established from post-conviction behaviour to pre-conviction behaviour, such evidence may be admissible on appeal.

The four appellants in respect of whom category 2 abuse was conceded by the Post Office deserve close attention by practitioners. For example, it was held that to charge both theft and false accounting (when there was no actual evidence of theft) amounted to category 2 abuse.[25] The use of alternative charges which have the effect of inducing a guilty plea is not an uncommon practice of prosecutors, and the circumstances in which that will stray into an abuse of process perhaps requires more attention by both practitioners and the courts. It is unfortunate that the Court of Appeal's concerns raised in 1971 as to the practice of parallel charging theft and false accounting in Post Office cases appear to have been so quickly forgotten.[26]

Equally, it was held (and not disputed by the Post Office) that where the prosecutor made a basis of plea conditional on Horizon not being criticised, that too was an abusive practice.[27] An attendance note suggesting that an appellant was pressured into accepting a positive position on Horizon as a condition of dropping a theft charge and accepting a plea to false accounting was concerning to the Court.[28] Prosecutors must be alive to the fact that the circumstances in which a basis of plea is considered acceptable can easily draw them into this kind of territory, and that English criminal procedure gives little room for plea bargaining or any true kind of "without prejudice" type negotiations.

11 *Hamilton* [2021] EWCA Crim 577 at [121].
12 At [127].
13 At [129].
14 At [137].
15 At [129].
16 At [132].
17 See, for example, at [446].
18 See [135].
19 See at [93].
20 [2014] UKSC 37.
21 Section 23(1)(c) of the Criminal Appeal Act 1968.
22 See *D and J* [1996] 1 Cr.App.R. 455 p.460E, *A* [2006] EWCA Crim 905, *Islam* [2007] EWCA Crim 1089 and *R v Dorling* [2016] EW CA Crim 1750.
23 *Alan Bates v Post Office Ltd* Case No. A1/2019/1387/PTA "Judgment on PTA".
24 *Hamilton* [2021] EWCA Crim 577 at [130].
25 At [145].
26 *Eden* (1971) 55 Cr.App.R. 193 at p 198.
27 *Hamilton* [2021] EWCA Crim 577 at [162].
28 At [154].

What is also of note is that the majority of the successful appellants, at various stages of their proceedings, pleaded guilty. Whilst the Court of Appeal has previously held that this is not a bar to a conviction being unsafe, particularly where the plea was founded upon the irregularity of non-disclosure,[29] no successful appellant gave direct evidence as to the circumstances or reasons for entering a guilty plea. Against the extraordinary circumstances of these cases, the Court accepted that an appellant would have felt pressured (and, in all likelihood, have been advised) to plead guilty.[30] The fact that the majority of appeals were uncontested on category 1 abuse is likely to have been a factor in this departure from the Court's usual approach, when waiver of privilege and direct evidence from an appellant is expected. Although the fact of a guilty plea was not determinative of the unsuccessful appeals, the Court did not hesitate to rely on it as evidence as to the safety of the conviction.[31] It is not anticipated, therefore, that these cases will have any real impact on the Court of Appeal's usual approach to an appeal following a plea of guilty.

In refusing the Post Office permission to appeal the Common Issues judgment, Coulson LJ stated that

> The PO describes itself as "the nation's most trusted brand". Yet this application is founded on the premise the nation's most trusted brand was not obliged to treat their SPMs with good faith, and instead entitled them to behave in capricious or arbitrary ways which would not be unfamiliar to a mid-Victorian factory-owner (the PO's right to terminate contracts arbitrarily, and the SPMs alleged strict liability to the PO for errors made by the PO's own computer system, being just two of many examples.)[32]

The conduct of the Post Office as a private prosecutor can be safely added to that list. These appeals are a timely, and in some cases tragic, reminder to all prosecutors – public and private alike – as to the serious consequences when the basic prosecutorial duties of investigation and disclosure are not given the attention they require.

29 *Tougher* [2000] All ER (D) 1752.
30 *Hamilton* [2021] EWCA Crim 577 at [125].
31 At [409].
32 *Alan Bates v Post Office Ltd* Case no. A1/2019/1387/PTA "Judgment on PTA".

Features

The new sentencing regime for terrorist offenders under the Counter-Terrorism and Sentencing Act 2021

By Barnaby Jameson QC, Red Lion Chambers

On 29 November 2019 Usman Khan, a convicted terrorist, fatally stabbed two Cambridge graduates at a prisoner rehabilitation event at Fishmongers' Hall in London. Khan stabbed three others and threatened to detonate a suicide vest. Attendees who fought him off included a convicted murderer and a delegate who armed himself with a Narwal tusk. The struggle continued outside onto London Bridge where Khan was shot dead by armed officers.

Usman Khan had been automatically released on licence in 2018 after serving half of a 16-year sentence for terrorism offences including a plot to bomb the London Stock Exchange. His licence conditions allowed him to attend Fishmongers' Hall unaccompanied. The ensuing public outcry led to emergency legislation enacted in February 2020: the Terrorist Offenders (Restriction on Early Release) Act (TORERA 2020). This Act scrapped the automatic release provisions for terrorist offenders serving a fixed-term of imprisonment. TORERA 2020 increased the custodial term from half to two-thirds, with release dependent on a public protection risk assessment by the Parole Board. Since TORERA 2020 the Government has gone further. Some would say much further. The Counter-Terrorism and Sentencing Act 2021, in force on 29 June 2021, makes sweeping changes to the landscape in respect of the sentencing and detention of terrorist offenders. Depending on the viewer's perspective the reforms may be seen either as a welcome and overdue toughening of measures against dangerous terrorist offenders or as a draconian clampdown that may be a casualty of its own over-reaching ambitions.

The key changes may be summarised as follows:

1) New classification of "Serious Terrorist Offences":

The Counter-Terrorism and Sentencing Act 2021 (CTSA 2021) classifies certain terrorist and terrorist-related offences as potential "serious terrorism offences" if the risk of multiple deaths was "very likely." "Multiple deaths" are defined as "…. the deaths of at least two people as a result of an act of terrorism" (s.5 of the CTSA 2021 inserting a new s.282B into the Sentencing Code). It is irrelevant whether any deaths occurred. As will be seen, conviction for a "serious terrorism offence" has, potentially, far-reaching repercussions for sentence.

"*Serious Terrorism Offences": examples*

The CTSA 2021 inserts a new Sch.17A into the Sentencing Code which classifies the following offences as "serious terrorism offences":

Under the Terrorism Act 2000 these include:

- s.54: weapons training;
- s.56: directing a terrorist organisation;
- s.59: inciting terrorism overseas.

Under the Terrorism Act 2006 these include:

- s.5: preparation of terrorist acts.
- s.6: training for terrorism.

The CTSA 2021 also classifies various common law and non-terrorist offences found to have a terrorist connection as "serious terrorism offences". Common law offences include manslaughter, kidnapping and false imprisonment. Statutory offences include offences under (but not limited to) the following:

- Offences Against the Person Act 1861
- Explosive Substances Act 1883
- Biological Weapons Act 1974
- Nuclear Material (Offences) Act 1983
- Chemical Weapons Act 1993
- Taking of Hostages Act 1982

Conviction for a "serious terrorist offence" leads, in the absence of exceptional circumstances (and if the court does not impose a life sentence), to a mandatory "serious terrorism sentence". To meet the criteria of a "serious terrorism sentence", the court would need to be satisfied:

(i) The offence was properly classified under Sch.17A of the Sentencing Code, inserted by CTSA 2021, as a "serious terrorism offence".

(ii) There was a significant risk to members of the public of the commission of further serious terrorism or other specified offences: s.282B (1) (d) of the Sentencing Code as inserted by s.5 of CTSA 2021.

(iii) The Serious Terrorist Offence was "…very likely to result or contribute to (whether directly or indirectly) the deaths of at least two people as a result of an act of terrorism ... and the offender was, or ought to have been, aware of that likelihood": s.282B (3) of the Sentencing Code as inserted by s.5 of CTSA 2021.

If the criteria are met the court would be obliged, if dissuaded passing a life sentence, to impose a "serious terrorism sentence". A "serious terrorism sentence" carries a minimum custodial term of 14 years' imprisonment and an extension period of between seven and 25 years: s.282C of the Criminal Code, as inserted by s.5 of the CTSA 2021. The minimum term may be less than 14 years to account for a reduction for a guilty plea or assistance given to the prosecution. Section 8 of the CTSA 2021 brings the reduction for a guilty plea – no greater than 20 per cent – in line with other mandatory sentences including life imprisonment for certain dangerous offenders under ss.258, 274 and 285 of the Criminal Code.

A "serious terrorism sentence" when applied to an offender over 21 is known as a "serious terrorism sentence" of imprisonment. The equivalent for an offender under 21 is a "serious terrorism sentence" in a young offender institution. Terrorist offenders under 18 are liable to receive a "special custodial sentence" under s.252A of the Criminal Code if the court does not impose detention for life or an extended sentence of detention.

The structure of the new regime is likely to be stress-tested. Satisfying a court that the offender knew, or ought to have known, of the "very likely" risk of multiple deaths will bring significant evidential challenges. Even if the hurdle is overcome, a "serious terrorism offence" would only be mandatory in the absence of "exceptional circumstances" which may relate to the offence or the offender. The CTSA 2021 does not define "exceptional circumstances" and it is likely a court will be slow to curtail or close any list. It is hard to imagine a terrorist offender not advancing "exceptional circumstances" to avoid an otherwise mandatory sentence. The restriction on credit for a guilty plea is likely to act as a further disincentive for an individual facing a "serious terrorist offence" to plead. The "multiple deaths" condition creates anomalies. In the case of *Renshaw*[33] the defendant pleaded guilty to an offence under s.5 of the Terrorism Act 2006: a Neo-Nazi terrorist plot to murder Rosie Cooper MP. Under the CTSA 2021, Renshaw would not, on the face of it, have been eligible for a Serious Terrorism Sentence as the "multiple deaths" condition would not have applied. The same might also be said of Mair who was convicted in November 2016 for the terrorist murder of Jo Cox MP.[34] Another anomaly lies in the new classification. An offender convicted of, for example, membership of a terrorist organisation,[35] dissemination of a terrorist publication[36] and possession of terrorist information[37] could make the legitimate submission that none of the offences were classified under statute as "serious terrorism offences." This undermines the proposition that all terrorist offences are, by definition, serious.

2) Penalty increases for certain terrorist offences:

s.26 of the CTSA 2021 increases the maximum penalties for the following offences from 10 to 14 years:

- Membership of a terrorist organisation contrary to s.11 of the Terrorism Act 2000.
- Inviting or expressing support for a proscribed organisation contrary to s.12 of the Terrorism Act 2000.
- Attendance at a place used for terrorist training contrary to s.8 of the Terrorism Act 2006.

3) Expansion of offences with a terrorist connection and the notification provisions:

Conviction of certain terrorist offences (or offences with a terrorist connection) trigger the automatic notification provisions under Pt.4 of the Counter-Terrorism Act 2008. The notification regime acts as the equivalent of a Sex Offenders Register for terrorist offenders sentenced to more than 12 months' imprisonment. Section 1 of the CTSA 2021 amends s.69 of the Sentencing Code to expand the range of offences capable of being aggravated by a "terrorist connection" under s.69 of the Sentencing Code. A terrorist connection is made out under s.69 (3) if the offence "(a) is, or takes place in the course of an act or terrorism, or (b) is committed for the purposes of terrorism." The ambit of offences with a potential terrorist connection is widened to include, potentially, any offence with a maximum penalty of more than two years' imprisonment. This means the automatic notification provisions will be triggered by a larger pool of offences with a potential terrorist connection. The new sentencing regime for "dangerous terrorist offenders" (discussed below) will mean, ironically, the notification period will be reduced because the offender will spend more time in custody (the automatic provisions kick in at the time of sentence, not release).

33 BBC News, 17 May 2019.
34 The trial judge found the murder to have been committed for a "political, religious, racial or ideological cause" under Sch.1, s.4 (2) (c) of the Criminal Justice Act 2003.
35 Under s.11 of the Terrorism Act 2000.
36 Under s.2 of the Terrorism Act 2006.
37 Under s.58 of the Terrorism Act 2000.

4) Further restriction on early release:

TORERA 2020 moved the dial on early release for terrorist offenders from the half-way to the two-thirds mark. In respect of "dangerous terrorist prisoners" (those serving an extended sentence or a "serious terrorism sentence") the CTSA 2021 moves the dial to "off". The CTSA abolishes the regime under TORERA 2020. Dangerous terrorist prisoners must now serve the entirety of their custodial term. This departure may require the courts to revisit the settled principle in *Burinskas*[38] – that early release provisions (which frequently change) are irrelevant to sentence. Where early release provisions have been abolished, a defendant may have grounds to argue that the court should take account of this issue in passing sentence: his detention will be materially longer than under the previous sentencing regimes.

Conclusion

Some aspects of the CTSA 2021 are welcome. The increase in the maximum penalty for membership of a terrorist organisation from 10 to 14 years brings it in line with similar terrorist offences. There may be some unease, however, about the new classification of terrorist offences. As discussed, under the new two-tier system an offender convicted of membership of a proscribed terrorist organisation would be entitled to submit that in law membership of a banned terrorist group is not a "serious terrorism offence". As would an individual like Jack Renshaw who admitted plotting the terrorist assassination of one (singular) MP. All terrorist offences are serious – some arguably just as serious than those classified under the CTSA 20201 as "serious terrorist offences." As to the imposition of a mandatory "serious terrorism sentence" following conviction for a serious terrorism offence, instances where a court could be sure of the defendant's awareness of the high likelihood of multiple deaths (as well as jumping the other statutory hurdles) may be rare, except in the most clear-cut cases.

Judges tend to approach legislation that fetters their discretion with a less than warm embrace. If "exceptional circumstances" are a route by which a court can retain its discretion, judges may be more, not less, receptive to such submissions. It remains to be seen how much ground courts will give in considering "exceptional circumstances." If the approach is flexible, then the growl behind the new "serious terrorism sentence" may dwindle into a whimper.

38 [2014] EWCA Crim 334.

A likely story

By Paul Jarvis[1]

Certain words abound in statutory and common law offences. Words such as "assault", "property", "intent", "reckless", "dishonesty", and "reasonable" are but a few examples that feature time and again in the lexicon of the criminal law. Many of them have been dissected, analysed, defined and redefined by the Court of the Appeal, the House of Lords and the Supreme Court over the years. But one word that seems to have escaped this treatment, certainly so far as the criminal courts are concerned, is "likely". What exactly does it mean when a statute provides that in order to be guilty of an offence it must have been likely that the defendant's conduct would bring about a certain result? Is it just an ordinary English word that needs no gloss to be understood by everyone in the same way, or might two reasonable people have quite different views about what it means for an occurrence to be likely?

The word "likely" features in a variety of statutory offences, from summary-only minor public order offences[2] to either-way offences such as child cruelty[3] and even indictable-only offences such as causing an explosion likely to endanger life.[4] In addition to being an express element of a number of statutory offences, the courts have on occasions construed offence-creating provisions with the word "likely" in mind. To give one example, where a defendant is charged with making indecent photographs of children[5], and his defence is that he innocently downloaded such images, the prosecution will have to prove that the defendant intentionally made the photographs knowing that they were, or were likely to be, indecent photographs of a person under the age of 18.[6] In other words, the prosecution will have to show the defendant knew, or believed it likely, that, for example, while searching for adult pornography, he would come across pornography that featured those under the age of 18.

These cases demonstrate the breadth of circumstances in which the word "likely" can arise. Often the word features where a statutory offence requires the court to consider objectively the range of potential outcomes that could have flowed from the defendant's conduct, even if those outcomes did not in fact come to pass, but in some instances "likely" will appear as part of the mental element of the offence where the court has to ask itself what the defendant subjectively considered the consequences of his actions could have been at the time he carried them out. Of course, recognising the number of ways in which "likely" appears in the criminal law does not help to understand what it means, but it does at least demonstrate how widespread its usage is.

In the recent case of *Thacker,*[7] the Court of Appeal had to construe the offence of intentionally disrupting the services of an aerodrome that is contained in s.1(2)(b) of the Aviation and Maritime Security Act 1990. That particular offence required the prosecution to prove that by means of any device, substance or weapon, the defendants unlawfully and intentionally disrupted the services of an aerodrome in such a way as to endanger, or be likely to endanger, the safe operation

1 Barrister, 6KBW College Hill, and Junior Treasury Counsel at the Central Criminal Court.

2 For example, s.4(1) of the Public Order Act 1986, makes it an offence for a person to use towards another person threatening, abusive or insulting words or behaviour or to distribute etc with intent to cause that person to believe that immediate unlawful violence will be used against him or another by any person or to provoke the immediate use of unlawful violence by that person or another, or whereby that person is likely to believe that such violence will be used or it is likely that such violence will be provoked.

3 Section 1 of the Children and Young Persons Act 1933 provides that a person who has attained the age of 16 commits an offence if he has responsibility for any child or young person under that age and wilfully assaults, ill-treats, neglects, abandons or exposes that child etc in a manner likely to cause him unnecessary suffering or injury to health.

4 Section 1 of the Explosive Substances Act 1883.

5 Section 1 of the Protection of Children Act 1978.

6 *PW* [2016] EWCA Crim 745; [2017] 4 W.L.R 79 at [29]–[31].

7 [2021] EWCA Crim 97; [2021] 2 W.L.R 1087.

of the aerodrome or the safety of persons at the aerodrome. The appellants advanced a number of grounds of appeal against their convictions, with the first ground being that the trial judge had misinterpreted the elements of the offence in light of its international and domestic law context.

Specifically, the appellants submitted that in order for the disruption of the services of the aerodrome to be likely to have endangered the safe operation of the aerodrome the risk of that endangerment arising from the disruption had to be more than just a possibility.[8] The trial judge had directed the jury that it was enough for them to be satisfied to the criminal standard that the safe operation of the aerodrome "could well have" been imperilled by the disruption caused by the appellants and so "likely" meant nothing more than that there was a realistic possibility of the endangerment to safety coming to pass from the actions of those on trial. But the Court of Appeal considered that the risk of endangerment had to "transcend a certain degree of likelihood,"[9] by which, presumably, it meant that the risk of endangerment had to be more than just a possibility in order for it to be described as "likely".

The Court of Appeal was taken to a number of domestic authorities on the meaning of "likely" and one in particular is worth mentioning here. *Marcus (Gareth)*[10] was a case from the Court of Appeal in Northern Ireland following the appellant's conviction for offences contrary to the Explosive Substances Act 1883 and, in particular, s.2, which, as referred to earlier, requires the prosecution to prove that the explosion was either likely to endanger life or likely to cause serious injury to property. The trial judge had not directed the jury as to the meaning of the word "likely" but the appellant argued that whatever its meaning in this context, there came a point in his charge to the jury where the trial judge had impermissibly watered it down by saying that there had to be no more than a danger of damage to property. Looking at the charge to the jury as a whole, the Court of Appeal of Northern Ireland was not convinced that there had been any misdirection and so on that ground the appeal was dismissed.

In so doing, Girvan LJ, delivering the judgment of the Court, drew attention to a number of observations that Baroness Hale had made in the earlier case of *Boyle v SCA Packaging Ltd,*[11] which was concerned with the proper test for determining whether, under the Disability Discrimination Act 1995, a claimant's medical condition was likely to have a substantial adverse effect on them if medical treatment to contain it ceased. Her Ladyship commented that apart from decisions of the Employment Appeal Tribunal, where "likely" had been held to mean "more likely than not,"[12] the House of Lords had not been referred to any case where "likely" was said to carry that meaning.[13] It is a shame, then, that the House was not referred to the authorities concerning the making of anti-social behaviour orders (ASBOs) under the Crime and Disorder Act 1998, where the Divisional Court held in the earlier case of *Chief Constable of Lancashire v Potter*[14] "that a person's actions are likely to cause harassment, alarm or distress where it is more probable than not that they will do so."[15]

For Baroness Hale in *Boyle*, "likely" and "probable" meant different things. She noted that it is probable an event will happen if it is more likely than not that it will do so. In this sense, probability denotes a degree of likelihood greater than 50%, but likely "is a much more variable concept,"[16] and that concept can be best described by using expressions such as "real possibility" or "could well have", which are commonly employed in care proceedings where the court has to decide under s.31(2) of the Children Act 1989 whether the child has suffered, or is likely to suffer, significant harm, attributable to the care given to the child, or likely to be given to the child, if a care order is not made, not being what it would be reasonable to expect a parent to give the child.[17]

For Girvan LJ in *Marcus*, the context of the legislation that creates the offence will answer the question of what "likely" means, and in reaching that conclusion he appears to have borrowed from the observations of Lord Nicholls in *Cream Holdings v Banerjee,*[18] who said that "likely" has several different shades of meaning and that its meaning depends on the context in which it is used.[19] The s.2 offence criminalised the causing of explosions which had the real capacity to endanger life or cause serious injury to property and this context required "likely" to be construed as meaning that the explosion could well have caused either of those outcomes rather than that it would probably have caused either of them.

Referring to *Marcus* in *Thacker*, the Court of Appeal of England and Wales was doubtful that the meaning of "likely" could vary depending on the context in which it is used.[20] If its meaning does vary, then in the Court's view proof of a low degree of likelihood could only be justified where the underlying activity was inherently dangerous. On the facts of the case, it was not necessary for the Court to reach a settled view on whether the meaning of "likely" can vary because in the context of s.1(2)(b) of the Aviation and Maritime Security Act 1990, the evidence could not justify the jury's conclusion that the disruption caused by the appellants had been likely to endanger safety at the aerodrome.

So where does this leave "likely"? It is still an open question whether "likely" has one universal meaning regardless of context or different meanings depending on the context in which it is used, and if it has one meaning, what that meaning should be. For the moment at least, it appears to mean something more than just a bare possibility but whether it extends only so far as a realistic possibility (the "could well happen" formula) or further still into the realm of the probable (the "more likely than not" formula) is far from settled. If its meaning does vary then the most that can be extracted from the authorities in the field of criminal law is that the more inherently dangerous the defendant's actions are, the lower the degree of likelihood needed to make out the offence ("could well happen") and conversely, as pointed out in the *Potter* case,[21] in "less acutely risky" cases the degree of likelihood needed to make out the offence will be higher ("more likely than not"). Beyond that, guidance as to what form of "likely" will apply in the context of a particular offence is somewhat thin on the ground. The only prediction that can be made with any confidence is that *Thacker* is unlikely to be the final chapter of this particular story.

8 At [48(3)].
9 At [80].
10 [2013] NICA 60.
11 [2009] UKHL 37; [2009] 4 All ER 1181.
12 See *Latchman v Reed Business Information Ltd* [2002] ICR 1453.
13 At [68].
14 [2003] EWHC 2272 (Admin).
15 At [31].
16 *Boyle*, at [65].
17 See *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, at p 585 in particular.
18 [2004] UKHL 44; [2005] 1 AC 253.
19 At [12].
20 *Thacker* at [82].
21 fn.14.

Reform of the criminal law - the Law Commission's 14th Programme consultation

By Ruby Ward and Roseanna Peck[1]

As required by statute, the Law Commission of England and Wales undertakes periodic public consultations to establish what areas of law it should review in its next Programme of Law Reform. Applying criteria agreed with the Lord Chancellor a draft Programme of Law Reform is then submitted to the Lord Chancellor for approval. The 13th Programme, agreed in 2017, included 14 projects. The Commission has identified several themes and ideas which could feature in its 14th Programme, including four potential areas of law reform relevant to the criminal law.

Review of Appeal Powers in the Criminal Courts

This project would be the first comprehensive and holistic review of appeals powers in the criminal courts in decades. It would focus on a range of technical reforms to solve the problems that have been generated by incremental legislative change to the Court of Appeal (Criminal Division's) (CACD) powers. The project would aim to ensure that the CACD has appropriate powers to guarantee public protection and to deal with offenders in accordance with the will of Parliament.

The project could consider a wider review of the myriad appeal rights spread across legislation outside of the Criminal Appeal Act 1968. It could explore reforms to the tests governing appeals against conviction and sentence (both by the defendant and by the Attorney General under the unduly lenient sentence scheme), and referrals from the Criminal Cases Review Commission (CCRC) to the CACD. Finally, the project could extend to appeals from the magistrates' courts to the Crown Court.

Reform of appeal powers could generate much-needed efficiencies within the criminal courts, as well as provide clarity and simplicity.

Technological Advances and Procedural Efficiency in the Criminal Courts

The challenges presented by the coronavirus pandemic have accelerated the use of online hearings and remote participation in court proceedings seems likely to be an enduring aspect of the criminal justice system. A project to assess how well the criminal courts are keeping pace with technological advances and seek to ensure that the law allows efficient and effective use of the opportunities new technology offers is therefore timely.

Stakeholders have suggested that the way in which witness evidence is adduced has not kept pace with modern technology and is neither the fairest nor the most effective way of conducting trials. This project could examine whether pre-recorded evidence in chief should be more widely used, including recording of witness statements by police body-worn cameras.

This project would seek to improve the efficient administration of criminal justice and ensure that the rights of those involved in hearings, and the rule of law, are properly protected.

The Search, Production and Seizure of Electronic Material

Electronic materials are increasingly important in criminal investigations and prosecutions yet the law governing their search, production and seizure is not fit for purpose.[2] This project would aim to ensure that the legal framework provides law enforcement agencies with the powers necessary to investigate crime and obtain evidence, whilst applying effective safeguards to ensure appropriate use of those powers.

Three issues could be considered within this project. First, the necessity of powers to search electronic devices not contingent on premises, or to search electronic data directly. Second, the efficacy of the current powers of a constable to require production of electronic data accessible from premises.[3] Third, the further regulation of data extraction devices beyond the provisions relating to the consensual extraction of data currently before Parliament in the Police, Crime, Sentencing and Courts Bill 2021.

Contempt of Court

The law of contempt has developed since its origins in royal courts, once used by Kings against their enemies, to address a range of behaviours that affect court proceedings. Our previous reviews[4] have explored specific elements of modern-day contempt—scandalising the court, juror misconduct and internet publications, court reporting, and contempt in the face of the court—but recent high-profile cases[5] have raised a potential need for a holistic review, which could include contempt in the face of the court, a project we consulted on but have not yet concluded.

A wider review of contempt could consider other areas. First, the case for full codification of the law of contempt and how best to address current inconsistencies. Second, the distinction between "civil" and "criminal" contempt, which currently does not correspond to the generally accepted distinction between civil and criminal wrongs, and whether the distinction should be abolished in the context of contempt (as the Victorian Law Reform Commission has recently recommended).[6] Third, whether the concept of contempt, with its overtones of disrespect, still appropriately reflects the harms it seeks to counter.

Consultation

The Commission invites views on these four potential projects and would welcome ideas for other law reform projects. Full details of the 14th Programme and information on how to respond to the consultation are available on the Commission's website: *www.lawcom.gov.uk/14th-programme/*. The deadline for responding is 31 July 2021.

1 Research assistant and legal assistant in the criminal law team at the Law Commission.

2 Law Commission, *Search Warrants* (2020), Law Com No 396, Ch.18.

3 Under ss.19(4) and 20(1) of the Police and Criminal Evidence Act 1984.

4 Available at *www.lawcom.gov.uk*.

5 See, for example, *SFO v O'Brien* [2014] UKSC 23; *AG v Yaxley-Lennon* [2019] EWHC 1791; *Gubarev v Orbis Business Intelligence Ltd* [2020] EWHC 2167; *R (Finch) v Surrey* [2021] EWHC 170.

6 Victorian Law Reform Commission, *Contempt of Court Report* (2020), Recommendation 59.

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