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CCRC Refers Joint Enterprise Murder Conviction of Andre Johnson-Haynes to CoA

Mr Johnson-Haynes was one of seven defendants tried on the basis of joint enterprise for the murder of Shakilus Townsend in London in July 2008. All defendants pleaded not guilty at the Central Criminal Court in April 2009, but the jury returned guilty verdicts against all seven. Mr Johnson-Haynes, who was 17 at the time of the murder, was ordered to be detained at Her Majesty's pleasure with a minimum term of 12 years' imprisonment – the starting point for youths in such circumstances. Mr Johnson-Haynes's application for leave to appeal refused in July 2011 – several years before the Supreme Court decision in the case of R-v-Jogee, Ruddock-v-The Queen [2016] UKSC 8, [2016] 2 WLR 681 ("Jogee") made significant changes to the law in relation to secondary parties in joint enterprise cases. He applied to the CCRC for a review of his case in March 2016 on the basis that the change in the law regarding joint enterprise following Jogee may be relevant to his case.

Having considered the case in detail the Commission has decided to refer Mr Johnson-Haynes's conviction to the Court of Appeal because it believes that there is a real possibility that the Court will find that it would be a substantial injustice to maintain Mr Johnson-Haynes's conviction and will quash it as unsafe. This referral is based on the change in the law in relation to the liability of secondary parties brought about by the judgment of the Supreme Court in Jogee, the scope of which was further clarified by the Court of Appeal in R-v-Johnson and others [2016] EWCA Crim 1613.

Met Police Strip-Searching of Children 'Not Properly Justified'

Lizzie Dearden, Independent: Children are being strip-searched by London's Metropolitan Police in cases that may not be "properly justified", a watchdog has found. An unannounced inspection of 12 custody suites in London found the tactic was also being used against disproportionate numbers of black and minority ethnic detainees. "Force data indicated that the numbers of strip searches were high, and included many children," the report by HM Inspectorates of Prisons and Constabulary said. "Not all strip searches were warranted or properly justified." It drew the conclusion after a July 2018 inspection as part of checks covering every police custody suite in England and Wales. It found that in the previous year, more than 10,000 detainees had been strip-searched in custody - a higher rate than other British police forces. "This included a high proportion of children and a disproportionately higher number of black and minority ethnic (BME) detainees, who accounted for 25 per cent of the throughput but 51 per cent of those strip-searched," the report said. "Strip-searches should only take place when there are reasonable grounds to suspect a detainee may have concealed an article that they would not be allowed to keep. The justification for such a search should be fully recorded." Inspectors also raised concerns over how long detainees were kept in controversial "spit hoods" and the way force was used.

The Police Federation, which represents rank-and-file officers, has been campaigning for spit hoods – mesh bags placed over the head – to be rolled out nationwide to protect police from spitting and biting. But campaigners say they are demeaning and worsen the risks of illness or death in custody. A review of 24 incidents involving police force found half were managed well, but inspectors referred two cases to the Metropolitan Police for review over the "lack of proportionality". The report warned that while the force had improved some ways it cares for children, not all were receiving the support needed in custody or kept in appropriate accommodation. "For some children who were involved in serious, violent and gang-related crime, custody was seen as the best option to ensure arrangements could be put in to protect them," it said. Inspectors said the Metropolitan Police must record all uses of force in custody and make sure the tactics used are proportionate. They also found that oversight of healthcare provision was poor and outcomes for detainees were inconsistent. During the inspection, there were a "significant number" of staff vacancies and the watchdog said the use of overtime to cover shortfalls was "not sustainable".

Peter Clarke, HM Chief Inspector of Prisons, and Wendy Williams, HM Inspector of Constabulary, said there was evidence of general progress since the last inspection in 2017. They added: "We identified two causes of concern and several areas requiring improvement, which we were confident the force would be able to address." A spokesperson for the Metropolitan Police said strip-searches were a "safeguarding measure" and "vital" power used to seize evidence. "Custody officers will only conduct a strip search where there is reasonable cause to do so, and when it has been authorised by a custody sergeant," they added. "Certain offence types are more likely to lead to the authorisation of a strip search, for example drug offences or possession of a weapon. "We are committed to ensuring the safety and security of those in our custody and legal safeguards are applied to any strip search."

Terry Smith v Secretary of State for Justice

I (Terry G.M. Smith) have instigated Judicial Review Proceedings against the Secretary of State for Justice, Rt Hon. David Gauke MP, which is aimed at the unreasonable decision by the Secretary of State for Justice in refusing to invoke s.128 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 to review the test for those sentenced to Indeterminate Sentence for Public Protection under the Criminal Justice Act s.225. More specifically, as the Secretary of State for Justice in November 2018 has lowered the test for release for those serving Her Majesty's Pleasure from: What Risk Does The Applicant Pose For Release to What Progress Has The Applicant Made To Allow Release

I have invited the Secretary of State for Justice to apply the same test given to those serving sentences for Her Majesty's Pleasure (HMP) to the 2,800 IPP prisoners who must pose less of a risk as they have not been convicted of murder or killed anyone. Accordingly, it is argued, not to apply the same test for the release of IPP as HMP prisoners would be both arbitrary and discriminatory against IPP prisoners. It is further advanced, it is clearly not fair, citing Wednesbury unreasonableness for the Secretary of State for Justice to alter the release test for those who commit murder and not IPP prisoners who also like HMP prisoners had their sentences abolished.

Terry G.M. Smith, A8672AQ, HMP Highpoint, Stradishall, Newmarket, CB8 9YG

Decision to Disqualify Applicants' Lawyer Rendered Proceedings Unfair

In Chamber judgment1 in the case of Rivera Vazquez and Calleja Delsordo v. Switzerland (application no. 65048/13) the European Court of Human Rights held, unanimously, that there had been: a violation of Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights. The case concerned an alleged violation of the adversarial principle in proceedings before the Swiss Federal Court. The Court observed that the Federal Court had deprived the applicants of legal representation after raising of its own motion the question of the validity of their choice of lawyer. The applicants had not been informed and had not been asked for their views or given the opportunity to remedy the lack of representation, contrary

to the express terms of the law.The Court took the view that the Federal Court's decision to deprive the applicants of a lawyer,without allowing for adversarial debate, had thus objectively placed them in a situation of significant disadvantage in relation to the other party.

400% Rise in Use of Section 60 Stop and Search Powers

Vincent Palfi, Justice Gap: The use of section 60 'stop and search' powers rose five-fold last year. Figures obtained by Channel 4 News revealed that 7,328 section 60 orders were used in 2018, a 417% rise compared to the previous year. In the same period, there was almost a 15% rise in stop and searches, over 150,000 in total, and arrests were down in the same period by nearly 4%.

Section 60 stop and searches can take place in an area which has been authorised by a senior police officer on the basis of their reasonable belief that violence has or is about to occur. They were recently used in north east London following the murder of 14-year-old Jaden Moodie. On the use of these powers, Labour MP for Walthamstow Stella Creasy said: 'We've lost 213 police officers in the last couple of years due to the cuts in funding.' She went on to add that stop and search was not going to 'break the cycle' of violence and that more help was needed through 'intelligence led policing'. Patrick Green, sitting on the Government's Serious and Violent Crime Task Force, said policing was 'not the answer to serious violence' and that 'we need to look far wider at the causes of violence if we really want to tackle it'.

In a statement, the Metropolitan Police force said that 'stop and search remains a hugely important police power for protecting Londoners and keeping our streets safe. It is extremely valuable in tackling knife and gun crime, resulting in over 4,200 arrests for weapon possession in the capital last year'. A report from the Home Office on police powers published in October 2018 has shown that the use of stop and search has declined since 2009, but the recent rise in stop and search reflects a year in which knife and offensive weapon offences rose to their highest level since 2010.

Woman Settles Case Against Police Following Flawed Investigation

The woman, known as AB to protect her identity, brought a legal claim for malfeasance in public office against the Chief Constable of Leicester Police after she was left with no recourse for achieving justice against the alleged perpetrator because of the way the police investigation was carried out. AB reported allegations of abuse to the police in February 2011. She reported that she had been abused in the late 1970s and 1980s when she was between the ages of seven and 15/16. As a result the alleged perpetrator was arrested and charged with five counts of child cruelty and four counts of indecent assault.

The police officer in charge of the investigation was a PC in the force's Child Abuse Information Unit (CAIU). In December 2011 the PC was required to leave the CAIU as he had twice failed detective exams. In December 2012 he was served with a formal written warning following a finding of professional misconduct against him. Despite this he remained the lead officer in AB's case.

In AB's legal claim she argued that the PC failed to interview witnesses, failed to pursue a number of obvious lines of inquiry, failed to record conversations with witnesses and contacted witnesses during the trial. During an investigation into the PC's handling of the case following a complaint made by AB in 2014 it was discovered that one of the witnesses died before being spoken to about the case and another was able to provide further lines of enquiry which had been missed by the PC. In addition the officer had failed to follow up other lines of enquiry which would have given him the opportunity to refer other sexual abuse cases for investigation and identify risks to children. As well as his role as lead officer in the case the PC was also responsible for the disclosure of evidence that may either support or undermine the prosecution case. The investigation into his handling of the case found that he did not appear to properly understand the disclosure process and had failed in his legal responsibilities for disclosure in the case by causing and/or permitting evidence to be destroyed or not otherwise be made available. The PC resigned from the police force in 2014.

A settlement was agreed in the case and compensation was awarded to AB as well as an unequivocal apology from the Chief Constable who acknowledged that the investigation into her allegations fell below the expected standard. AB said: "I am pleased that Leicester police have acknowledged that their investigation into my case was flawed and that some steps have been taken since then to change their procedures. However, I am now left with no way to bring the perpetrator of my abuse to justice, having already gone through the incredibly difficult investigation and failed trial process. It is extremely distressing for me to know that my abuser may never be brought to justice for the crimes he committed against me and that I was failed so terrible by the police, whom I trusted." Yvonne Kestler, solicitor in Leigh Day's actions against the police team, added: "While there is no way that our client can turn back the clock and receive a proper and thorough investigation of her case we are pleased that she has received compensation that will help with ongoing support and a formal apology and acknowledgment of the failings by Leicester Police. Police forces must adequately train and supervise their officers to ensure investigations are carried out properly from the outset."

'Islamic State fighters AKA The Beatles': Mother Loses High Court Challenge Over Evidence

The mother of one of four suspected Islamic State fighters has lost a legal challenge against the UK's sharing of evidence with the US without seeking assurances he would not be executed. El Shafee Elsheikh is accused of belonging to an IS cell which is thought to have beheaded hostages. He is being held with another suspected cell member in northern Syria, and they may face prosecution in the US. The court ruled the UK has no legal duty to protect Mr Elsheikh. Britain shared 600 witness statements gathered by the Metropolitan Police with the US under a process called "mutual legal assistance" (MLA).

Mr Elsheikh's mother, Maha Elgizouli, challenged the government's decision. She argued that, due to the UK's stance on the death penalty, the government should have ensured her son would not face execution if he was extradited and tried in the US. She also stated that it went against her own human rights, and breached data protection laws. Lord Chief Justice Lord Burnett said: "There is no general, common law duty on Her Majesty's government to take positive steps to protect an individual's life from the actions of a third party and that includes requiring particular undertakings before complying with the MLA request."

Mr Elsheikh and the other suspected IS fighter, Alexanda Kotey, were raised in the UK, but no longer have British citizenships. The two, who are being held by Syrian-Kurdish forces, are accused of being a part of a terrorist cell known as "The Beatles" because of their British accents. The cell are believed to have murdered foreign hostages, including Alan Henning, James Foley and David Haines; created brutal propaganda videos, and tortured dozens of people. The other two members of the group - also from London - were Mohammed Emwazi, nicknamed "Jihadi John", and Aine Davis. Mohammed Emwazi was killed in a US drone strike and Aine Davis was sentenced to prison in Turkey. All four were radicalised in the UK before travelling to Syria.

Analysis By Dominic Casciani, BBC Home Affairs correspondent

This judgement paves the way for the two Londoners to be prosecuted in the USA - after a fraught series of talks over what to do with them. Documents in the case show that the US administration became frustrated with the UK's refusal to take the men back while trying to tell it what to do with them if they were instead to face justice in America. In fact, the British ambassador in Washington warned President Trump could "hold a grudge" if the UK persisted in asking for a death penalty assurance. Ms Elgizouli's lawyers argued that the UK's long-standing opposition to the death penalty was therefore cast aside in the interests of political expediency.

However, the judgement underlines that no law has been broken. Mr Elsheikh is not British - nor is he under UK control - so the obligations on ministers to act on his mother's concerns are limited. In the past, Britain has sought assurances from foreign governments that the death penalty would not be used in cases where the UK provided information or extradited suspects. In this case, intelligence was shared with the US but no such assurances were sought. However, information sharing was halted last month after Mr Elsheikh's mother launched a legal challenge. Home Secretary Sajid Javid said: "My priority has always been to ensure we deliver justice for the victims' families and that the individuals suspected of these sickening crimes face prosecution as quickly as possible. Our longstanding opposition to the death penalty has not changed. Any evidence shared with the US in this case must be for the express purpose of progressing a federal prosecution."

Ms Elgizouli's solicitor said that she found the decision difficult to take on board. Gareth Peirce, of Birnberg Peirce Solicitors, said that while Ms Elgizouli thinks her son should be prosecuted, she argues that it should take place within accordance of international human rights standards. "Ms Elgizouli hopes that the opportunity will be given for the Supreme Court to consider whether it has a greater ability to explore the important factors raised in the case she has brought," Ms Peirce said.

Javid Accused of Giving Way to Police Over no Conferring Rule

Vikram Dodd, Guardian: The government was accused of watering down plans for a total ban on police conferring after the deaths of suspects, after it approved new rules for officers following the most controversial cases. The home secretary, Sajid Javid, on Thursday approved revised rules first drawn up by the police watchdog in 2014, but changed after fierce opposition from the police and claims that armed officers would lay down their weapons in protest.

They are meant to cover cases such as the Mark Duggan shooting in 2011, when officers were cleared of wrongdoing but police involved in the incident sat together in a room writing up parts of their statements for eight hours afterwards. This undermined confidence in their accounts.A complete ban on conferring about any issue after an incident, which some had called for, was rejected, as was mandatory separation of officers immediately after an incident such as a shooting, use of a stun gun or death in custody. Instead officers will be told they should not confer but, if they do, they need to state the reason why and any conversation should be recorded on body-worn video or be conducted with an independent observer present.

The wrangling over the rules started when the then Independent Police Complaints Commission published the proposed draft guidance for consultation in 2014. The dispute went on so long the IPCC was abolished and is now the Independent Office for Police Conduct. On conferring, the revised IOPC guidance approved by the home secretary stresses the need to ensure public confidence. It states: “Our preference for achieving this is to keep key policing witnesses separate from the moment it is operationally safe to do so, until after they have provided their personal initial account.” The police say conferring covers only the lead-up to the use of force, and, for instance, an officer who opens fire would not confer about why they had taken a decision to do so. Critics, including the high court, have said conferring is an opportunity for collusion.

The new guidance says after a shooting or death in custody the assumption from IOPC investigators should be that officers are treated as a witness, not a suspect, unless evidence emerges to the contrary. Police, especially firearm officers, said they felt criminalised after events, which is unfair as they are public servants exercising their lawful powers to protect the public.Families of those who have died felt IOPC investigations needed to be more robust and were too soft on the police. Both families and police agreed the investigations take too long, with distress to officers and grieving relatives.

Deborah Coles from Inquest, which supports families whose loved ones have died after police contact, said: “Officers not conferring is vital to the truth. Anything less undermines confidence that the police can be held to account. This is watered down and the government and IOPC appear to have caved to the police.” The original guidelines put out for consultation called for the immediate separation of officers and for them to make a full statement immediately after the incident instead of 48 hours later. Officers will make an initial account and then have 48 hours to make their full account under the new guidelines. The guidelines immediately separating and standing down officers would not apply in cases such as police shooting a suspect in a terror attack when officers would still be needed on operational duty. Shaping government thinking was the fear that firearms officers would surrender their guns in protest. Ministers needed more officers to volunteer to carry guns because of the rising threat of a terrorist gun attack in the UK, similar to that suffered by Paris in November 2015. Former prime minister David Cameron said he had commissioned a review about the protections for firearms officers.

Ché Donald, the lead on firearms for the Police Federation, was scathing about the review: “That is cold comfort for officers out there doing the job, knowing that if they are forced to pull the trigger their lives will probably be overturned while they are under investigation, often for years. Where’s the evidence to show this has been looked into diligently, as we would expect for such a responsible role in policing? Because it’s certainly not in this review.” The review said firearms officers have enough legal protections but urges prosecutors considering charges against officers to bear in mind the “dynamic and often fast-evolving situations police find themselves in when considering a prosecution”, the Home Office said. Javid said: “Any use of force by the police must be proportionate and necessary and the public must have confidence that investigations following a police shooting incident are independent and robust. “But we must also make sure armed officers feel empowered to use their skills and experience in order to save lives in the most dangerous situations.” The government hailed an increase in firearms officers in response to the terrorist threat. But Donald said: “Three years down the line there is still a shortfall of more than 600 firearms officers – and a review that appears to have been written on the back of a cigarette packet.”

Discharging Restricted Patients and Deprivations of Liberty

The Supreme Court has issued a significant ruling on the power to impose conditions on a discharge of a restricted patient which would amount objectively to a deprivation of the patient’s liberty. The Court of Protection team at 39 Essex Chambers analyse the judgment. In Secretary of State for Justice v MM [2018] UKSC 60 the Supreme Court (Lord Hughes dissenting) has upheld the ruling of the Court of Appeal that neither the Secretary of the State nor the Mental Health

Tribunal has the power to impose conditions on a discharge of a restricted patient which would amount objectively to a deprivation of the patient's liberty. The parameters of the problem are clearly defined: the patient, MM, "is anxious to get out of hospital and is willing to consent to a very restrictive regime in the community in order that this can happen. The Secretary of State argues that this is not legally permissible." It was agreed that MM had capacity to consent to the restrictions, which undoubtedly satisfied the 'acid test' set down in Cheshire West.

As Lady Hale (for the majority) noted (at paragraph 24) that: It is, of course, an irony, not lost on the judges who have decided these cases, that the Secretary of State for Justice is relying on the protection of liberty in article 5 in support of an argument that the patient should remain detained in conditions of greater security than would be the case were he to be conditionally discharged into the community. However, Lady Hale considered that there were three key reasons why MM could not consent to conditions amounting to confinement:

The first was one of high principle, as the power to deprive a person of his liberty is by definition an interference with his fundamental right to liberty of the person, it engaged the rule of statutory construction known as the principle of legality, as explained by Lord Hoffmann in R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115, at 131: the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. Lady Hale took the view that Parliament had not been asked – as they would have to have be – as to whether the relevant provisions of the MHA: Included a power to impose a different form of detention from that provided for in the MHA, without any equivalent of the prescribed criteria for detention in a hospital, let alone any of the prescribed procedural safeguards. While it could be suggested that the FtT process is its own safeguard, the same is not the case with the Secretary of State, who is in a position to impose whatever conditions he sees fit. (paragraph 31)

The second was one of practicality. The MHA confers no coercive powers over conditionally discharged patients; as Lady Hale noted (although many may not realise): "[b]reach of the conditions is not a criminal offence. It is not even an automatic ground for recall to hospital, although it may well lead to this." The patient could therefore: withdraw his consent to the deprivation at any time and demand to be released. It is possible to bind oneself contractually not to revoke consent to a temporary deprivation of liberty: the best-known examples are the passenger on a ferry to a defined destination in Robinson v Balmain New Ferry Co Ltd [1910] AC 295 and the miner going down the mine for a defined shift in Herd v Weardale Steel, Coal and Coke Co Ltd [1915] AC 67. But that is not the situation here: there is no contract by which the patient is bound. (paragraph 32).

That led on to what Lady Hale identified as the third and most compelling set of reasons, namely that she considered that to allow a person to consent to their confinement on conditional discharge would be contrary to the whole scheme of the MHA. This provided in detail for only two forms of detention (1) in a place of safety; and (2) in hospital. Those were accompanied by specific powers of conveyance and detention, which were lacking in relation to conditionally discharged patients – "[i]f the MHA had contemplated that such a patient could be detained, it is inconceivable that equivalent provision would not have been made for that purpose" (paragraph 34). There was, further, no equivalent to the concept of being absent without leave to that

applicable where a patient is on s.17 leave, it again being "inconceivable" that "if the MHA had contemplated that he might be detained as a condition of his discharge […] that it would not have applied the same regime to such a patient as it applies to a patient granted leave of absence under section 17" (paragraph 36). Finally, the ability of a conditionally discharged patient to apply to the tribunal is more limited than that of a patient in hospital (or on s.17 leave), this being "[a]t the very least, this is an indication that it was not thought that such patients required the same degree of protection as did those deprived of their liberty; and this again is an indication that it was not contemplated that they could be deprived of their liberty by the imposition of conditions."

Lord Hughes, dissenting, took as his starting proposition that what was in question was not the removal of liberty from someone who is unrestrained. Rather: The restricted patient under consideration is, by definition, deprived of his liberty by the combination of hospital order and restriction order. That deprivation of liberty is lawful, and Convention-compliant. If he is released from the hospital and relaxed conditions of detention are substituted by way of conditional discharge, he cannot properly be said to be being deprived of his liberty. On the contrary, the existing deprivation of liberty is being modified, and a lesser deprivation substituted. The authority for his detention remains the original combination of orders, from the consequences of which he is only conditionally discharged. He then took on each of the set of reasons given by Lady Hale for the majority before concluding at paragraph 48 that:

[i]t seems to me that the FTT does indeed have the power, if it considers it right in all the circumstances, to impose conditions upon the discharge of a restricted patient which, if considered out of the context of an existing court order for detention, would meet the Cheshire West test, at least so long as the loss of liberty involved is not greater than that already authorised by the hospital and restriction orders. Whether it is right to do so in any particular case is a different matter. The power to do so does not seem to me to depend on the consent of the (capacitous) patient. His consent, if given, and the prospect of it being reliably maintained, will of course be very relevant practical considerations on the question whether such an order ought to be made, and will have sufficient prospect of being effective. Tribunals will at that stage have to scrutinise the reality of the consent, but the fact that it is given in the face of the less palatable alternative of remaining detained in hospital does not, as it seems to me, necessarily rob it of reality. Many decisions have to be made to consent to a less unpalatable option of two or several: a simple example is where consent is required to deferment of sentence, in a case where the offence would otherwise merit an immediate custodial sentence.

Comment: It is clear that this is not a judgment that the majority wished to reach, for the self-evident reason that it will both prevent restricted patients from being discharged from hospital and (worse) require the recall of any patients who are out of hospital on conditions amounting to a confinement, at least where they have capacity to consent to those conditions. Despite Lord Hughes' heroic efforts to find a way through to a different answer, it is in reality difficult to see how the majority's iron logic was not correct.

Of course, in at least some situations, the judgment will prompt very careful consideration of whether all of the actual or proposed conditions are in fact strictly necessary, which could only be a good thing. But the combination of this decision and the earlier decision in Cheshire West, making clear how low the bar for the test of confinement is set, does seem to lead to an odd outcome. The only way in which that outcome could be reversed, it is clear, is by way of legislation. In the circumstances, perhaps it is no bad thing that there is at present a review of the Mental Health Act underway, and hence a realistic possibility that there may, in due course, be legislation to respond to that review, in which consideration could be given of what should happen in this situation, and

opposed to what (on the logic of the Supreme Court decision) must currently happen.

It is important to note that Lady Hale for the majority expressly declined to engage with the question of whether "the Court of Protection could authorise a future deprivation, once the FtT has granted a conditional discharge, and whether the FtT could defer its decision for this purpose." This was, in part, because it had been raised too late in the day, but also because even if this did give rise to discrimination against those with capacity, it could make no difference to the outcome of the case, which depended solely on the construction of the relevant provisions of the MHA. Lady Hale did not entirely close down the possibility that the Court of Protection could step into the breach, or that authority to deprive the person of their liberty under arrangements considered necessary by the Secretary of State/MH Tribunal could be provided by way of a DoLS. This may, therefore, remain one of the very few areas where it is a curious (even perverse) benefit to lack capacity in a material domain.

This article was written by the Court of Protection team at 39 Essex Chambers

Prisoner Assaulted and Raped in Serbian Prison Suffered Breaches of his Article 3 Rights

In Chamber judgment! in the case of Gjini v. Serbia (application no. 1128/16) the European Court of Human Rights held, unanimously, that there had been: a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) of the European Convention on Human Rights owing to the authorities' failure to protect the applicant from being ill-treated by his prison cell mates, and a violation of Article 3 because of the lack of an investigation into his complaints. The case concerned inter-prisoner violence, in particular, the applicant's complaint that he was assaulted, raped and humiliated by his cell mates in prison, that the prison failed to protect him and that the prison authorities failed to investigate his complaints properly. The Court found in particular that the applicant had made credible claims of being a victim of violence from his cellmates in prison. It should have been obvious to prison staff at the time of the events that he was being ill-treated, but they had done nothing to protect him. The State had also failed to carry out an investigation or launch a prosecution over his complaints, even though the authorities must have been aware of them because he won compensation in civil proceedings and complained to various bodies about what had happened to him.

Principal facts: The applicant, Fabian Gjini, is a Croatian national who was born in 1972 and lives in Crikvenica (Croatia). Mr Gjini was arrested in August 2008 for trying to use an allegedly counterfeit 10 euro note at a Serbian-Croatian border toll. Unable to pay the required 6,000 euros (EUR) in bail, he was placed in detention pending the outcome of the investigation. He spent 31 days in Sremska Mitrovica Prison before being released when the criminal case was ended after the 10 euro note was found to be genuine. Mr Gjini stated that during his period in detention he was subjected to assault and humiliation by his cell mates, including being raped after he was drugged. The ill-treatment and humiliation allegedly began as soon as he was placed in prison, with his cell mates forcing him to mop the floor, not allowing him to raise his head and kicking him from time to time. He was also made to stand in cold water, which caused the skin to peel off his feet. The cell mates, who apparently thought he was a police informer, said they would stage his suicide if he informed the authorities about the ill-treatment.

His cell mates later found out about his Croatian and Albanian origin and began to treat him even worse. They forced his head into a bucket of water and then made him take a cold shower. He was made to fight another prisoner and was then beaten by his cellmates for hitting a Serb. He was also made to sing Serbian nationalist songs. He stated that the prison guards knew what was going on. He could not remember exactly when the rape happened but

recounted that he was given a glass of water and then lost consciousness. When he came to, his eyebrows had been shaved - a sign in prison that someone has been raped - and he had a painful anus with blood in his stools. His head had also been shaved. His lawyer, noticing a change in Mr Gjini's behaviour, asked for him to be moved to another cell, after which the ill-treatment ended. After his release Mr Gjini began civil proceedings for compensation for the fear, physical pain and mental anxiety caused by his treatment in prison. In judgments delivered in 2013 he was awarded approximately EUR 2,350 in compensation. He lodged a constitutional appeal in January 2014, which was rejected in June 2015. Relying on Article 3 (prohibition of torture and inhuman and degrading treatment), the applicant complained about being subjected to ill-treatment by his cellmates and that the authorities had failed to protect him or provide an effective response to his allegations. Decision of the Court

Admissibility: The Government objected that Mr Gjini could no longer claim to be a victim of a violation of the Convention as he had been awarded compensation. The applicant argued that the sum he had been given was not sufficient. The Court found that the domestic award was less than the level of just satisfaction it awarded in such cases and Mr Gjini could legimately pursue his case in Strasbourg. The Government also argued that Mr Gjini had not exhausted domestic remedies as he had failed properly to substantiate his Constitutional Court complaint. The Court found that the applicant had specifically complained of ill-treatment that had happened with lithe silent approval of officials" who had known the situation they had placed him in. He had therefore formulated his constitutional complaints properly and the Government's objection had to be rejected. The Government objected in addition that Mr Gjini had not exhausted domestic remedies for his submission that the authorities had failed to react in an effective manner as he had never lodged a criminal complaint against those responsible for ill-treating him. The Court held that this objection went to the heart of the applicant's complaint and joined it to the merits of the case.

The Court noted that the parties were in dispute over whether the applicant had been ill-treated by his cell mates or not. However, the domestic courts had found that Mr Gjini had lost 10% of his physical capacity owing to the events in the prison and the Court held that that conclusion was enough to establish that he had suffered such ill-treatment and that Article 3 applied to his case. The Government had denied any responsibility for what had happened to Mr Gjini through any failure or omission on the part of the prison authorities, in particular because he had not lodged any official complaint at the time.

However, the Court noted that the Committee for the Prevention of Torture (CPT) had reported serious incidences of inter-prisoner violence at Sremska Mitrovica Prison and that no action whatsoever had been taken by the prison or State authorities to deal with that problem. The CPT had also criticised the failure of prison medical personnel to record injuries caused by such violence. Furthermore, prison staff should have been aware of incidents involving Mr Gjini, in particular that his eyebrows had been shaved off, that he had a strange haircut and that his skin had been damaged. The authorities had either failed to notice or had failed to react to such signs, and had not provided a safe environment for him. They had thus failed to detect, prevent, or monitor the violence against him. For those reasons there had been a violation of Article 3.

The Court went on to examine whether the authorities had investigated the applicant's complaints properly, under the heading of the procedural requirement of Article 3. While it was true that the applicant had never lodged a criminal complaint with the police, prosecutor's office or prison, his lawyer had turned to the prison authorities at the time of the events in

question and Mr Gjini had been moved to another cell. Furthermore, the applicant had later complained to the civil courts and written to the President, the Ombudsman and the Ministry of Justice about his ill-treatment, but no official investigation had ever taken place. There had been nothing in Serbian law to prevent such an investigation, indeed, the law required that public authorities had to report prosecutable offences they became aware of.

The Court concluded by dismissing the Government's objection of non-exhaustion of domestic remedies owing to the absence of a criminal complaint by the applicant and found that there had been another violation of Article 3 owing to the lack of an effective investigation. Just satisfaction (Article 41) Taking account of the domestic award, the Court held by five votes to two that Serbia was to pay the applicant 25,000 euros (EUR) in respect of non-pecuniary damage and EUR 2,000 for costs and expenses.

Offenders Recalled to Prison Surges Following 'Disastrous' Probation Reforms

May Bulman, Independent: Ministers have been accused of pushing through "disastrous" probation reforms as it emerged the number of offenders recalled to prison for breaching bail conditions has surged by more than a quarter in four years. Mandatory supervision, which sees offenders monitored in the community after release from prison, was extended to custodial sentences under 12 months as part of a flagship probation overhaul in 2015 by the then justice secretary Chris Grayling. The conditions can see offenders sent back to prison for just 14 to 28 days for breaching their bail conditions on issues as minor as getting a taxi without permission or being late to meet their probation officer, charities said. An analysis of government figures shows the number of recalls to custody following breach of licence increased by 26 per cent to 21,914 in the four years to 2017. In the three months to June 2018 the figure stood at 5,999 – an 11 per cent increase on the same period the previous year.

Labour's shadow justice secretary Richard Burgon said the increase underlined how the prisons and probation system was "failing to rehabilitate people after years of unprecedented cuts and privatisation by successive Conservative justice secretaries". "We now have a situation where far too many are being recalled for technical breaches, which puts needless pressure on our already overcrowded prisons and undermines any progress offenders are making in turning their lives around," he added. Women are disproportionately affected, as the vast majority of female inmates – 72 per cent – are sent to prison for committing non-violent offences and are therefore serving sentences of less than a year. Research by the Prison Reform Trust in December showed recall numbers for women had increased by 131 per cent in the last year, compared with 22 per cent for men, with more than 1,700 female inmates sent back to jail in England and Wales in 2017.

Alex Hewson, policy and commuications officer at the charity, said the new figures demonstrated that Mr Grayling's policy had "failed", and urged ministers to "end it once and for all. The government was warned before it extended mandatory post-custody supervision to people serving short prison sentences that without adequate support in the community, people would be set up to fail," he added. Frances Crook, chief executive of the Howard League for Penal Reform, said: "This is just one more example of the disastrous reforms imposed by Chris Grayling. We need legislation urgently to sweep away the recalls framework, to bring back safety and justice to prisons and to individuals." The figures come amid a developing crisis facing prisons in England and Wales, with self-harm and violent attacks at record levels, and widespread understaffing and overcrowding in jails.

The prison population in England and Wales has doubled since the early 1990s, up from 40,000 to more than 82,000 in 2018. A probation service spokesperson said: "Public protection is our priority and recall is used to ensure that offenders on licence who present a high risk to the public are returned to prison as quickly as possible. "Our probation reforms extended supervision and support to around 40,000 extra offenders each year, which explains why there has been an increase in recalls since 2015."

Prisoner Seriously Injured In Shoot-Out Between Detainees And Officers Violation Of Article 3

In Chamber judgment in the case of Ilgiz Khalikov v. Russia (application no. 48724/15) the European Court of Human Rights held, unanimously, that there had been: a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights. The case concerned a prisoner's complaint that he had been seriously wounded by a stray bullet during a shoot-out between escorting officers and detainees attempting to escape during their transfer to another facility. The Court found in particular that the State had been responsible for the applicant's injury because the escorting officers had disregarded the regulations put in place for the security of detainees during transfers. In particular, the officers had decided to transport more detainees than the prison van had been designed to accommodate. The fact that the van had been over its capacity had meant that detainees had been able to attempt to overpower officers and that the applicant, a former police officer and therefore a vulnerable detainee who should have been travelling in a separate cell, had been in the rear of the van with two of the escorting officers when the attack had taken place. Furthermore, the investigation into the incident had been ineffective. The pre-investigation inquiry had been marred by delays, limited in scope and had never progressed to the stage of a criminal investigation.

Principal facts: The applicant, Ilgiz Khalikov, is a Russian national who was born in 1969 and is serving a prison sentence in a detention facility at Nizhniy Tagil (Russia). On 7 November 2013 Mr Khalikov was caught up in a shoot-out between escorting officers and detainees attempting to escape from a prison van during their transfer to a remand facility. One of the detainees overpowered an officer and seized his holster containing a handgun. A struggle ensued and shots were fired. Mr Khalikov's leg was wounded by a stray bullet and he was taken to hospital. He was transferred to a prison hospital the following day. The following month he filed a complaint with the prosecuting authorities, alleging that he had been injured because of a serious breach of prison transfer regulations, namely there had been more prisoners than the van was designed to accommodate. Several pre-investigation inquiries were opened over the next few years, but they have never progressed to the stage of a criminal investigation. Each inquiry has been concluded with a decision refusing to open criminal proceedings, then set aside with additional checks requested. In particular, in September 2015 a forensic firearm examination was carried out, but it was neither able to link the bullets or cartridges to the handgun from which the shot had been fired, nor to identify the person who had pulled the trigger. In May 2016 the authorities ordered an assessment of Mr Khalikov's injury, however, this proved impossible because his medical record had been misplaced.

Relying on Article 3 (prohibition of inhuman or degrading treatment), Mr Khalikov alleged that he had been wounded in the shoot-out because of the escorting officers' negligence. In particular, as a former police officer, the regulations stipulated that he should have been placed in an isolated cell in the van, but this had not been possible because it was over its capacity and he had therefore been riding in the rear of the van with two of the escorting officers. He also alleged under the same

Article that the authorities had failed to carry out an effective investigation into the incident which, he emphasised, had left him disabled for life and in considerable pain.

Decision of the Court: Despite Mr Khalikov bringing his claim promptly after the shoot-out, the authorities had ultimately refused to open a criminal case into his credible allegation of the State's failure to protect his physical integrity resulting from a serious breach of prison transfer regulations. The investigators' reluctance to open a criminal investigation, following repeated pre-investigation inquiries, had led to the loss of precious time and evidence having been undermined. In particular, the forensic firearm examination had only been carried out many months after the incident. Furthermore, an assessment of the extent of Mr Khalikov's injuries had only been ordered two years later. These inquiries had thus failed to elucidate the most important aspects of the incident such as which gun had been at the origin of the shot which had wounded the applicant and the identity of the person who had pulled the trigger.

In any case, as highlighted in many previous Russian cases brought before the European Court, in cases of credible allegations of ill-treatment, the framework of the "pre-investigation inquiry" alone (if not followed by a "preliminary investigation") under Russian procedure was not capable of meeting the requirements of an effective investigation under Article 3 of the Convention. There had therefore been a procedural violation of Article 3 as concerned the failure to carry out an effective investigation.

As concerned whether or not the State could be held responsible, the Court noted that even though Mr Khalikov's injury had been accidental, his presence in the non-secure area of the prison van had not. It resulted from the escorting officers' decision to transport more detainees than the prison van had been designed for. Such a decision had been in breach of the regulations which had been put in place to reduce security risks and protect detainees during transfers. Those regulations aimed to reduce the risk of prisoners making a concerted attempt to overpower their escorting officers by limiting the number of prisoners transported together. They were also to avoid inter-prisoner violence by placing vulnerable detainees, such as former law-enforcement officers, like the applicant, in separate cells. It followed that the State had been responsible for Mr Khalikov's injury because they had failed to adequately protect his physical integrity during the transfer. There had therefore also been a substantive violation of Article 3. Just satisfaction (Article 41) The Court held that Russia was to pay Mr Khalikov 20,000 euros (EUR) in respect of non-pecuniary damage.

What are Sexual Risk Orders and How do They Impact Human Rights?

Saxon Norgard, Human Rights News: Sexual Risk Orders may be imposed on individuals who are seen as posing a risk of sexual harm to the public, even if they have not been found guilty of a crime. Those subject to Sexual Risk Orders may be prohibited from engaging in a wide variety of behaviours, including overseas travel, and required to report to the police prior to engaging in sexual activity. In 2016 Sky News found that more than 50 Sexual Risk Orders have been issued in England since their introduction in 2014, targeting those like IT consultant John O'Neill who have engaged in potentially dangerous, but not criminal, sexual behaviour. Last year, Somerset Live, reported that police in Avon and Somerset had imposed 13 Sexual Risk Orders, or 'sex asbos' as they're sometimes described, since 2015. Failure to comply with the terms of a Sexual Risk Order is a criminal offence, punishable by a sentence of up to six months in prison, or a fine, or both. More serious breaches carry a term of imprisonment up to five years.

In 2016 a Sexual Risk Order was made against John O'Neill, prohibiting him from using certain internet-connected devices and requiring that he give authorities 24-hours notice

before engaging in 'sexual contact'. After being found not guilty of rape in 2016 a Sexual Risk Order was made against John O'Neill, prohibiting him from using certain internet-connected devices and requiring that he give authorities 24-hours notice before engaging in 'sexual contact'. He challenged the order, arguing – in part – that it infringes his human rights. His appeal was heard by District Judge Adrian Lower, who refused to terminate the Sexual Risk Order but agreed to modify its conditions – requiring that he now only give notice "as soon as is reasonably practicable" prior to forming a sexual relationship. Since then the term of his Sexual Risk Order has been reduced from indefinitely to two years, and it came to an end on 22 September 2018.

Sexual Risk Orders Can Be Used to Prevent Child Sex Tourism. There are clear human rights justifications for Sexual Risk Orders, particularly with respect to the United Kingdom's obligations under the United Nations Convention on the Rights of the Child (UNCRC). Sexual Risk Orders allow authorities to take preventative action where there is evidence that a child may be at risk of sexual abuse from a specific individual, and can be used to prevent 'child sex tourists' from travelling to countries where the sexual exploitation of children is more prevalent. Orders can also be imposed to protect other vulnerable individuals, such as those suffering from mental or physical disabilities.

However, more intrusive Sexual Risk Orders like that imposed on Mr. O'Neill – which reportedly left him homeless, unable to find meaningful employment and incapable of forming emotional relationships – are not so clear-cut. This is particularly so given that there is no suggestion that he has engaged, or had a desire to engage, in inappropriate conduct with a child.

Requiring a person to notify police before engaging in sexual activity could infringe Article 8 of the Human Rights Convention, which governs people's right to respect for private and family life. Requiring a person to notify police before engaging in sexual activity could infringe Article 8 of the Human Rights Convention, which governs people's right to respect for private and family life. This is because Sexual Risk Orders interfere with the privacy of people's sexual relationships, which by their nature are very private and personal. A counter to this idea lies in the words of Article 8, which permits such an interference for the "prevention of disorder or crime" and "protection of health and morals".

A more troubling aspect of Mr. O'Neill's case relates to his freedom to discuss sexual urges and fantasies with others, including medical professionals. Under the terms of the Sexual Risk Order he is prohibited from raising certain sex-related topics with medical professionals unless a third party is present. The expansive definition of "sexual contact" has also forced him to notify police before having such a conversation with friends. This could amount to a violation of his right to freedom of expression under Article 10 of the Human Rights Convention, particularly since impeding his access to medical help probably makes it more likely that he will commit a crime in the future.

Wales Has 'Highest Imprisonment Rate' In Western Europe

BBC News: Wales has the highest imprisonment rate in western Europe, new research has claimed. The Wales Governance Centre's analysis of official figures also reveals average custody rates are higher than in England for a number of different groups and offences. In particular, non-white Welsh prisoners are overrepresented in prison. Report author Dr Robert Jones said this was a major cause of concern. "Equally disturbing is that such an alarming trend has emerged in Wales without detection," his report concluded. "This undoubtedly calls into question the role being played by UK justice agencies in Wales as well as civil society organ-

isations and academic researchers." This is the first time Wales has been analysed separately and Dr Jones said wider research was now needed.

▪ The total number of prison sentences handed out in England dropped by 16% between 2010 and 2017; at the same time they rose by 0.3% in Wales ▪ Immediate custodial sentences imposed by magistrates rose by 12% in Wales. ▪ Women in Wales are more likely to receive short-term custodial sentences than men, with 78.6% jailed for less than 12 months, compared with 67% of men. ▪ White offenders in Wales were given the lowest average immediate custodial sentence length in 2017 (13.2 months), while black offenders recorded the highest average sentence length (21.5 months), followed by Asian (19 months) and mixed race (17.7 months). ▪ But Wales handed out shorter sentences to offenders than in England, with the average prison sentence being 13.4 months, compared with 17.2 months in England in 2017. ▪ And a higher percentage of sentences of four years or more were also handed out in England.

Sentencing figures show there were 154 prisoners for every 100,000 people in Wales, a higher proportion than England - which has the second-highest imprisonment rate. More people were being jailed in Wales despite a lower crime rate than in England every year between 2013 and 2017. The Sentencing Council downplayed the likelihood that meaningful differences exist between England and Wales in their recent evidence to the Commission on Justice in Wales, saying guidelines "ensure a consistency of approach" regardless of location. But Dr Jones, who is based at Cardiff University, said this was an area that could no longer be disregarded.

Dr Jones added: "Gradually, a detailed picture is emerging of the justice system in Wales and how it is quite different to that of England. "A thorough debate is needed on why these kinds of sentencing and custodial patterns occur in Wales and whether these are the outcomes that the UK and Welsh governments want to see from the criminal justice system." The researchers obtained the figures from the Ministry of Justice under the Freedom of Information Act. Katy Hanson, managing director of Welch & Co, who works as a duty solicitor in Pembrokeshire, said: "Every court, wherever you are, has its own way of doing things and to a certain extent there are always going to be discrepancies, but I am surprised by these statistics. "Courts do hand out shorter sentences and perhaps don't suspend sentences when they could. It's interesting that this has been released at a time when the government is looking at whether there's merit in scrapping short sentences. There's a lot of evidence that short-term sentences don't do that much to deter people offending." She also questioned whether courts have fewer sentencing options. "It feels as though probation have more courses and assistance available to those on probation in England, possibly because there are more defendants, so resources are being put there. That might make a difference because the courts there feel more can be done to assist people and prevent them reoffending."

HMP Bedford – Inexorable and Dangerous Decline

HMP Bedford, one of the oldest local prisons in Britain, was found by inspectors to have suffered an "inexorable decline" in treatment and conditions despite two years of internal prison service efforts to improve the jail. Peter Clarke, HM Chief Inspector of Prisons, found no credible plans by the prison or HM Prison and Probation Service (HMPSS) to address Bedford's "dangerous shortcomings." So troubling were the findings of an inspection in 2018 that Mr Clarke took the rare step of invoking the 'Urgent Notification' protocol, requiring the Secretary of State for Justice to respond publicly with an improvement action plan.

The scale of the violence, squalor and lack of control is set out in the full report on the unannounced inspection in August and September 2018, which is published on 22 January: Only one comparable local prison, Birmingham, had higher overall rates of violence. Bedford had the highest rate of assaults on staff, a daily occurrence. Violent prisoners faced few effective sanctions. Use of force by staff, including baton use, had risen significantly and was "exceptionally high." Many prisoners felt unsafe, including 49% on their first night. Pest control work had failed to eradicate significant rat infestation. One notice on a door (see pictures at Appendix V of the report), said: "Please ensure doors remain shut to prevent rats entering the wing!!!"

Conditions in the segregation unit were appalling. One segregated prisoner caught and killed a number of rats in his cell during the inspection. A committed but "extremely inexperienced" staff group were trying to control a population with many young men and "the lack of order and control on some wings was a major concern. Self-harm had increased substantially and there had been five self-inflicted deaths since the previous inspection in 2016. Drugs fuelled debt and violence. Almost half of prisoners surveyed said it was easy to get illicit drugs, and a fifth said that they had developed a drug problem while in Bedford. One officer said: "If it's just cannabis, it's a good day." Nearly 40% of men were locked up during the working day and many milled around aimlessly when they were let out of cells. "Too many prisoners left the prison no more qualified or skilled for work than on entry." Many cells were cramped and overcrowded. Among vulnerable prisoners, one amputee said he had only been able to shower five times in 2018. Mr Clarke said: "This inspection found that the prison has continued on a seemingly inexorable decline that is evident through the results of the four inspections carried out since 2009. It used to have a reputation as a good local prison, and the collapse in standards is as sad as it is inexcusable." Bedford was now assessed as 'poor' in the areas of safety, respect and purposeful activity and 'not sufficiently good' in rehabilitation and release planning.

HMPPS had made the prison subject to a Performance Improvement Plan in September 2016, but by May 2018 it was judged that there had been insufficient progress and the prison was placed in what HMPPS terms 'special measures.' However, Mr Clarke said: "The lack of progress to date and the poor quality of the action plans led me to the inevitable conclusion that I could not be confident in the prison's capacity for change and improvement, even when under special measures."

Overall, Mr Clarke added: "The use of the UN Protocol is not something that I take lightly. I am required to have 'significant concerns with regard to the treatment and conditions of those detained'. Sadly, in the case of HMP Bedford, that threshold was easily exceeded…I should also point out the abject failure over many years to respond to recommendations for improvement made by this Inspectorate… For the sake of both prisoners and staff at HMP Bedford, I hope that on this occasion the use of the UN Protocol will lead to the concerns of HM Inspectorate of Prisons being taken seriously at all levels of HMPPS."

Hostages: Sally Challen, Naweed Ali, Khobaib Hussain, Mohibur Rahman, Tahir Aziz, Roger Khan, Wang Yam, Andrew Malkinson, Michael Ross, Mark Alexander, Anis Sardar, Jamie Green, Dan Payne, Zoran Dresic, Scott Birtwistle, Jon Beere, Chedwyn Evans, Darren Waterhouse, David Norris, Brendan McConville, John Paul Wooton, John Keelan, Mohammed Niaz Khan, Abid Ashiq Hussain, Sharaz Yaqub, David Ferguson, Anthony Parsons, James Cullinene, Stephen Marsh, Graham Coutts, Royston Moore, Duane King, Leon Chapman, Tony Marshall, Anthony Jackson, David Kent, Norman Grant, Ricardo Morrison, Alex Silva,Terry Smith, Hyrone Hart, Glen Cameron,Warren Slaney, Melvyn 'Adie' McLellan, Lyndon Coles, Robert Bradley, John Twomey, Thomas G. Bourke, David E. Ferguson, Lee Mockble, George Coleman, Neil Hurley, Jaslyn Ricardo Smith, James Dowsett, Kevan & Miran Thakrar, Jordan Towers, Patrick Docherty, Brendan Dixon, Paul Bush, Alex Black, Nicholas Rose, Kevin Nunn, Peter Carine, Paul Higginson, Robert Knapp, Thomas Petch, Vincent and Sean Bradish, John Allen, Jeremy Bamber, Kevin Lane, Michael Brown, Robert Knapp, William Kenealy, Glyn Razzell, Willie Gage, Kate Keaveney, Michael Stone, Michael Attwooll, John Roden, Nick Tucker, Karl Watson, Terry Allen, Richard Southern, Jamil Chowdhary, Jake Mawhinney, Peter Hannigan.