est, but the same system has not exposed the failings until much later. There are many examples of such experts, from the infamous Sally Clarke case with Professor Roy Meadows and Dr Alan Williams, to the recent example, Saul Rowe in the LIBOR trial R v Pabon [2018], where again the Court of Appeal refused to quash convictions despite finding Mr Rowe had, "signally failed to comply with his basic duties as an expert" indicating," t*here is no room for complacency and this case stands as a stark reminder of the need for those instructing expert witnesses to satisfy themselves as to the witness' expertise and to engage (difficult though it sometimes may be) an expert of a suitable calibre.'*

Mr Ager continued to be instructed by and give evidence for the Crown despite the fact that the Criminal Procedure Rules and CPS guidance had long been in existence, and after the judgment in Pabon, and that Court's "stark reminder", without any apparent interrogation of Ager by the Crown, or any change in the Crown's approach to his evidence. Practitioners should note that this ruling is yet more reason to try get it right first time: not to accept a prosecution witness's credentials at face value, to instruct alternative experts and to ensure that they challenge the evidence, even when it appears difficult to do so, and at appeal, similarly, to ask for disclosure and instruct experts to truly examine the accuracy and honesty of the Crown's case at trial.

However, the concern must be that if there is no effective sanction for the prosecution in cases where they have called an unqualified or unscrupulous expert, and have failed to properly supervise and interrogate them, there is simply no incentive for any prosecutor (public or private) to ensure their experts comply with the CPS guidance or the Criminal Procedure Rules or the Forensic Science Regulator's latest Code of Conduct. Without convictions being quashed, the guidance, rules and codes are effectively toothless and, whatever is said by the Court, history will, inevitably, repeat itself.

Legal Challenge Seeks to Stop Ministers Sending Disappearing Messages

Ministers could be stopped from using self-destructing messages to conduct government business, following a legal challenge supported by an alliance of transparency campaigners and university archivists. WhatsApp recently introduced the option for users to make messages permanently disappear for both the sender and the recipient after seven days. Its privacy-focussed rival, Signal, used by many Conservative MPs, has had a similar function for some time. There are growing concerns that politicians and special advisers could be using such features to avoid accountability. Lawyers are now gearing up to bring a judicial review against the use of automatically disappearing messages, on the basis that using such functions makes it impossible to carry out the required legal checks about whether a message should be archived for posterity. Almost a decade ago, the Information Commissioner's Office declared that private emails and text messages used to discuss government business were still subject to freedom of information requests.

Serving Prisoners Supported by MOJUK: Derek Patterson, Walib Habid, Giovanni Di Stefano, 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, Warren Slaney, Melvyn 'Adie' McLellan, Lyndon Coles, Robert Bradley, 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 William Kenealy, Glyn Razzell, Willie Gage, Kate Keaveney, Michael Stone, Michael Attwooll, John Roden, Nick Tucker, Karl Watson, Terry Allen, Richard Southern, Peter Hannigan.

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Human Rights Act Review: Incompatibility and Political Expediency

Nicholas Reed Langen, Justice Gap: The window has closed for submissions to the Independent Human Rights Act Review (IHRAR). For anyone in the government hoping that these submissions would pave the way for the review to recommend wholesale reform of the Human Rights Act (HRA), their hopes will have been dashed. The submissions are harmonious in their rejection of the need for any reform, praising the HRA for 'bringing rights home' and for sparking a dialogue between the courts, the government and Parliament on what rights mean. Given that the government set up this review in the hope of curtailing, not buttressing, the judicial protection of rights, this hardly comes as a surprise. Trusting Boris Johnson's government to meaningfully reform the protection of human rights in the UK would be like inviting a fox into a chicken coop, locking it inside, and then wondering why the regular supply of eggs had dried up.

But while these institutions, ranging from campaigning organisations like Amnesty to legal think-tanks like the Oxford Human Rights Hub, are right to reject the notion of a government with the populist instincts of Johnson's reforming the HRA, they err in concluding that the HRA adequately protects human rights. While recognising that rights are fundamental to any liberal democracy, they fail to emphasise that as part of this, there must be meaningful remedies for their violation which the HRA fails to provide, preferring to prioritise the supremacy of Parliament instead. This reflects the concern of the Blair government to enhance the protection of rights in the UK but with outrage upsetting the UK's constitutional structure, which has Parliament, not the courts and not human rights, at its centre. Consequently, instead of allowing courts to strike down legislation that contravenes human rights, as is the case in many liberal democracies, whether Germany, Israel or the Netherlands, the HRA limits the courts, giving them the power to remedy some violations, but not all.

The first of these powers is in Section 3, and places judges under an obligation to interpret legislation compatibly with human rights 'so far as it is possible to do so'. What this means is that if legislation, on the face of it breaches someone's rights – perhaps through discriminating against them – the courts should not simply say that the legislation harms the right and throw their hands up in defeat. Rather, they must look at the legislation and try and preserve both the right and the legislative purpose. For instance, say the government wanted to protect cohabiting partners' tenancy rights in the event that the partner named on the lease died, ensuring that grief-stricken partners are not facing eviction as they mourn the death of their partner, and that the tenancy rights pass instead to them. In the legislation, Parliament therefore protects 'spouses' from eviction in such circumstances, but failing to recognise that gay couples (at the time) can be partners, but not spouses, and so the plain reading of the legislation discriminates against homosexual people.

This was the scenario faced by the House of Lords in 2004, when they found that same-sex couples also fell under the legislation's protective umbrella. In this case, interpreting the legislation to extend its protection to same-sex couples was not 'judicial vandalism', as Lord Bingham put it, because it upheld the purpose of the Act while remedying the discrimination, even if doing so stretched the meaning of 'spouse'. Such a potent power of interpretation gives the judiciary means of remedying the violation of some rights, letting them reinterpret, but not reorient, legislation, reconciling the need to respect the intentions of Parliament with the dignity of individuals.

But it is when legislation cannot be interpreted in a way that is compatible with rights that difficulties arise. If the purpose of the legislation is inextricably tied up with the violation of a right, as it was in the case of A v UK, where the Parliament passed the Anti-Terrorism, Crime and Security Act, giving the Home Secretary the power to detain non-British nationals indefinitely, the courts can only issue a 'declaration of incompatibility' under Section 4. This does nothing substantive to assist the injured party, with s.4 declarations being the judicial equivalent of scratching an SOS in the sand. A declaration makes it easier for the government to remedy the violation, but it does not impose any real obligation on it, or Parliament, to do so. As Lord Kerr said in the Supreme Court's decision on the legality of assisted suicide, it is 'always open to Parliament to decide to do nothing'.

In essence, therefore, s.4 declarations are no remedy at all. This leaves the UK's constitution in the curious position where for less wanton violations of human rights, the courts can meaningfully intervene, but when real harm is done to them- possibly intentionally – judges are left wringing their hands, hoping the government finds its conscience and remedies the wrong. For the most part, this has been a reasonable compromise, with British governments of all political stripes engaging with s.4 declarations. But if we have learnt anything at all from recent years, it is that governments cannot be trusted to remain faithful to norms and conventions that ask them to act, but do not force them to. And once a convention – particularly one that limits government action – has fallen by the wayside, it would take the election of an astonishingly conscientious prime minister for it to be restored.

Already, we have seen this convention (respect for s.4 declarations) wobble over prisoner voting, with Gordon Brown's government simply ignoring a declaration of incompatibility, and with with Cameron's government eventually finding a milquetoast solution that just about satisfied the ECtHR, but not before Cameron said that the idea of prisoners voting made him feel 'physically ill'. In our current state of constitutional chaos, it is not difficult to imagine an equally controversial case (perhaps Shamima Begum's, had it come before the Supreme Court in a different guise) leading to a s.4 declaration that Johnson's government refused to abide by. Indeed, it is not difficult to imagine Johnson's government revelling in such a refusal, using it as lynchpin in their re-election campaign by painting themselves as tribunes of the people, checking the elitist instincts of the judges.

Ultimately, this exposes rights to the whim of the mob. This is not the approach of a liberal democracy, but of a majoritarian one, where groups or individuals despised by society see their rights sacrificed to political expediency. There is a solution to this, which elevates rights while still ensuring that Parliament retains ultimate sovereignty. This is to invert the operation of s.4, giving the courts the power to strike down legislation they find violates human rights, while also providing Parliament with the right of response, allowing the legislature to vote and reject the court's interpretation of the right. Such an approach is not novel. UK courts were previously obliged to strike down legislation that conflicted with the laws of the European Union, and Parliament still retained ultimate sovereignty, even though there the House of Commons did not even have a right of response. And looking further afield, a system like this, which prioritises rights while preserving a legislative role, exists in Canada. There, the Canadian Parliament, which is still ultimately sovereign, is empowered through a 'notwithstanding' clause to overturn decisions of the courts on rights, prioritising the legislative interpretation of the right ahead of the judicial.

The courts say that Parliament should be forced to 'squarely confront' what it is doing if it is to violate rights. This is not how our constitution works, with the executive – and Parliament – ultimately free to disregard declarations of incompatibility if they consider it politically expedient. It is only by shifting the burden, forcing Parliament to respond to judicial decisions on rights and to candidly admit they are overturning the judges' interpretation of the rights, that the legislature can be made to confront what it is doing.

for IPP inmates would bring their treatment in line with prisoners on determinate sentences of a fixed length, but warn it could also mean "letting out people who were still considered dangerous". Lord Blunkett, who as Labour home secretary introduced IPPs back in 2005, has expressed regret before about the way they were used for many more people than he intended or expected. He has now told the World at One the fact there are still 1,900 people in jail on an IPPs "weighs heavily on him". Families want all those on IPPs with a minimum tariff of under five years - like Maroni - to have their cases reviewed and given a sentence with an end date. Only then, they say, will the legacy of these "disgraceful" sentences end. The Ministry of Defence said in a statement: "The number of IPP prisoners has fallen by two-thirds since 2012 - and is down 13% in the last year. "We are helping those still in custody progress towards release, but as a judge deemed them to be a high risk to the public, the independent Parole Board must decide if they are safe to leave prison."

When Expert Witnesses Turn Out Not as Expert- or as Honest - as They Claim?

Katy Thorne QC, Doughty Street Chambers: What is the Court of Appeal's attitude when experts turn out to be not as expert - or as honest - as they claim? We all know the duties that experts giving evidence in criminal courts are supposed to comply with: to be unbiased and objective, not to stray outside of their expertise and to disclose material and information which may undermine their opinion or standing.[1] These duties are currently set out in Part 19 Criminal Procedure Rules but have been in previous iterations of the Criminal Procedure Rules and set out many times the Courts[2] and by Regulators[3]. But what happens if experts do not comply? What happens when experts are not so expert? What happens when experts are not honest? Unfortunately, it appears, the Court of Appeal has recently been unwilling to interfere.

In the case of R v Byrne and others [2021] EWCA Crim 107, the Court of Appeal gave judgment in seven conjoined appeals which followed the collapse of a major fraud trial (R v Sulley and others) due to the wholesale discrediting of the Prosecution's carbon credit expert witness, Andrew Ager. In that earlier trial, at Southwark Crown Court, Ager had not just been shown to have questionable qualifications, but not to have complied with, or even understood his duties as an expert, and he had even attempted to improperly persuade a defence expert not to give evidence, in the fear that he, Ager would be exposed. The very senior trial judge found him not to be an expert of "suitable calibre" and the CPS indicated he would never be used as an expert again.

All the cases in the Byrne and Others appeal were previous trials where Mr Ager had given evidence about the carbon credit industry. The Court of Appeal accepted Mr Ager's wholesale failure in Sulley to comply with the requirements of an expert witness and the trial judge's conclusion that he was not suitable, but declined to quash any of the convictions. In their judgment, the Court sought to remind all parties of the need to ensure that inappropriate expert witnesses are not called in criminal trials, stating that the guidance issued by the CPS, and compliance with the Criminal Procedure Rules will ensure that rogue experts are weeded out. The Court said: *The Crown must take all necessary steps to ensure that inappropriate expert witnesses are not called in criminal trials in the future. Proper adherence to the two sets of Crown Prosecution Guidance set out in [87] above, together with the Criminal Procedure Rules and the Criminal Practice Directions, should ensure that this regrettable lapse will not be repeated. The failure to detect the underlying problems with Ager as an expert witness was a notable error on the part of those with conduct of these cases. [emphasis added]*

Unfortunately, history tells us that such confidence may be misplaced, because time after time prosecution experts have overstepped their expertise or even turned out to be dishon-

amount of time unconvicted defendants could await trial in prison would have a disproportionate impact on people who are black, Asian or from other ethnic minorities. Griff Ferris, the legal and policy officer at Fair Trials, said the justice system was being undermined by the imprisonment of unconvicted people for excessive periods. “People are being made to suffer these conditions because of the government’s insistence on putting more and more people in prison, and repeated and systematic failures to get trials heard in time,” he said. The government must reverse the extension of time limits on pre-trial custody immediately, and implement structural solutions to this crisis aimed at releasing more people, rather than trying find more ways to put more people into prison, which is what it’s trying to do with the policing bill.”

A Ministry of Justice spokesperson said: “Only those who pose the highest risk to the public or are likely to abscond are held on remand – extensions to normal custody time limits must be approved by independent judges and defendants have the right to apply for bail. Hundreds of millions of pounds have been invested throughout the pandemic, which has seen outstanding magistrates’ cases fall by 50,000 since last summer, 54 Nightingale courtrooms and the rollout of video hearings.”

Imprisonment for Public Protection Jail Terms 'A Death Sentence'

Victoria Derbyshire: BBC News: Karl Maroni, 33, has spent all his adult life in jail. Aged 18 he committed three violent offences and was convicted. He was told the minimum time he'd be in prison would be three and a half years. But 16 years and 17 jails later he's still there, "left to rot", he says. He's never had a bank account, never owned a smartphone and never used social media. Speaking from the low-secure mental unit where he's currently detained, he says he's come close to "giving up". "I was self-harming, getting into trouble, feeling really low and depressed, not knowing when I was going to get out," he said. "It's like a death sentence." Maroni is serving a sentence known as an IPP - Imprisonment for Public Protection - which were abolished by the coalition government eight years ago because they were seen to be unfair. Yet there are still 1,900 people in custody in England and Wales with no end date and no idea when they are getting out. Former Conservative Justice Secretary Lord Kenneth Clarke, who got rid of them in 2012, has told BBC Radio 4's World At One programme it's a "tragedy" there are still so many people serving IPPs. Another former Tory Justice Secretary, Sir David Lidington, told the programme that all remaining IPP cases should be reviewed "as soon as possible". As a teenager, Maroni took part in a robbery of a bookmakers in London. He and an accomplice threatened the pregnant cashier with an imitation gun and demanded cash, leaving with £200. He also refused to pay a taxi fare and showed the driver a knife, as well as carrying out a street robbery. He says he now feels remorse for his victims. "I was an offender," he says. "Growing up I was a street kid. People shouldn't feel sorry for me but I have changed. I've been punished enough." Back in 2005, the Labour government thought they'd be used for around 900 offenders - but 6,000 people received the sentence. Many were kept in jail for years after their tariff expired. The prison and parole system couldn't cope with the need to give inmates access to rehabilitation programmes in order to demonstrate they were safe to be let out. According to official probation documents, Maroni had a difficult childhood. His mum was an alcoholic and drug user and her partner used to beat her and Maroni. He missed three years of school and attempted to take his own life using his mother's drugs. Since he's been in custody, his mental health has deteriorated significantly - exacerbated, he says, by having a sentence which gave him no hope. He's self-harmed, had panic attacks and says he's been diagnosed with a personality disorder and schizophrenia. His application for parole has been rejected several times because the parole board thought he still posed a risk to the public. He's due to have another hearing this summer and is feeling optimistic.

Blunkett's 'regret' at IPPs: Sir David Lidington and Lord Clarke say setting a firm release date

HMP Long Lartin – Poor leadership Across Many Areas of Prison Life

Along-term high-security prison in Worcestershire, was found by inspectors from HM Inspectorate of Prisons in February 2021 to be recovering from a serious recent COVID-19 outbreak in which three prisoners had died and there were staff shortages. Long Lartin holds some of the country’s most dangerous and serious offenders, with two-thirds serving life sentences and almost all of the rest serving more than 10 years. At the time of the inspection visit, over 20% of those held were category A, the highest security classification. Most prisoners said that the measures to prevent the spread of tCOVID were necessary, but the recent outbreak had affected their perceptions of their own safety, which were poor despite falls in recorded violence and self-harm.”

Inspectors identified weaknesses in many areas of prison life. More than half of the 546 prisoners – around 280 – lived in cells with no toilet, sink or running water. The report noted: “They had to use an electronic request system – which was often unreliable – to use the toilets at night. The pandemic had brought the shortcomings of this system into sharp focus because prisoners were locked up for longer periods than usual.” Though the exercise yards were open throughout prisoners’ time unlocked enabling them to access time in the open air for over two hours a day during the week.

The segregation unit subjected prisoners to a very austere regime for long periods without any reintegration planning. Planned use of force by staff was very high, largely because of excessive use of handcuffs in the segregation unit, much of which went unrecorded.

Mr Taylor added: “The prison’s investigations into prisoner complaints were poor and sometimes carried out by the member of staff about whom the prisoner had complained. The system for investigating complaints into discrimination was in disarray and nearly half of allegations made in the previous three months had not received a response.” Health care waiting lists were undermanaged, resulting in some waits of over a year to see the GP. There had also been long delays in telephone monitoring of prisoner calls for public protection reasons. “Our concerns about these practices was compounded by the failure of leaders to establish effective oversight to identify or address any of them. We had little confidence that sustained progress was possible without a major improvement to governance and management across many areas of prison life.”

British Soldiers and the Criminal Process in Northern Ireland

Anurag Deb, UK Human Rights Blog: The family of Daniel Hegarty shot dead and Christopher wounded have waited almost 40 years for the start of the process of ensuring justice. Re B’s application [2020] NIQB 76 was a challenge to a decision to prosecute a soldier for offences going back to 1972. Part of the small but politically divisive cohort of prosecutions arising out of the Troubles in Northern Ireland, Re B provides a classic example of how courts approach the issue of fairness in criminal prosecutions for historic offences. “B” is a former soldier of the British Army who had been serving in Northern Ireland. On 31 July 1972, the Army launched “Operation Motorman” to clear so-called “no-go” areas in Belfast and Derry, which had become highly problematic and dangerous for security forces at the time.

In the early hours of 31 July 1972, B was part of a company of soldiers deployed in the Creggan Heights area of Derry. He was armed with a 7.62 x 51 mm calibre General Purpose Machine Gun. At around this time, three local people were also in the area: Thomas Hegarty, his brother Christopher Hegarty and their cousin Daniel Hegarty. At some time shortly after 4.15 am, there was a burst of machine gun fire. When it stopped, Daniel Hegarty lay dead on the street, having been shot twice in the head. He was 15 years old. Christopher Hegarty was also wounded in the shooting, but survived.

An initial inquest in 1973 returned an “open verdict“, which is used when verdicts such as a

death from natural causes, an accident or suicide are unavailable. A second inquest was ordered by the Northern Ireland Attorney General in 2009, which concluded in 2011 with a unanimous jury finding that none of the Hegartys had posed any risk when they had been shot at. Soon after the second inquest, the Coroner made a statutory referral to the then Director of Public Prosecutions for Northern Ireland (DPPNI) as it appeared that one or more offences had been committed in the shooting of the Hegartys. In 2016, the DPPNI decided not to prosecute B in relation to Daniel and Christopher Hegarty. This was successfully challenged, with the decision quashed in 2018 for the DPPNI's failure to apply the correct test for commencement of a criminal prosecution.

A fresh decision, by a new DPPNI, was made in April 2019 to prosecute B for the murder of Daniel Hegarty and the wounding with intent of Christopher Hegarty. This was then challenged by B and the challenge heard before a Divisional Court (Lord Justice Treacy, Mr Justice O'Hara and Sir John Gillen). B challenged the decision on several grounds, two of which were central. B argued that the DPPNI's decision had breached his rights under Articles 2 (right to life) and 3 (right not to be subjected to torture or inhuman or degrading treatment or punishment) of the European Convention on Human Rights. This was because B argued that the decision (1) effectively increased the risk to his life and (2) subjected him to inhuman or degrading treatment or punishment. The main evidential backdrop to B's challenge was supplied in four medical reports (which had also been supplied to the previous and current DPPNI). At their height, these reports concluded that there was an increased risk of myocardial infarction and sudden death if B were prosecuted, but also conceded "No one can predict when a deterioration in heart failure will occur and/or death in [B]".

The Court's Decision: At the outset, Treacy LJ for the unanimous Court heavily criticised the challenge as being a kind of "satellite" litigation – a case taken on an issue related to but not at the heart of the main case, before a different court to the one which would hear the main case. In the criminal justice setting, while judicial reviews taken out of the criminal courts are not unusual, they add delay and procedural complexity in an area where timely justice is a fundamental concern (see a recent post on this blog by Joanna Curtis), and are therefore discouraged for this reason. Moreover, as Treacy LJ observed, the entirety of the decision-making process in this case had already been plagued by considerable delay – the Coroner's referral to the DPPNI had been (at the time of the judgment) made almost a decade prior. Further, the crux of B's evidence – that of his health concerns – could be dealt with in the criminal courts as part of the criminal process itself, without commencing actions in other courts.

The challenge under Article 2 of the ECHR proceeded on two related duties: not to take life and to protect life in circumstances where a real and immediate risk to an individual's life exists. For B, this risk was disclosed in the medical reports. This risk also formed the basis of the Article 3 challenge – that the prospect of enduring a trial given B's health concerns gave rise to inhuman or degrading treatment. Treacy LJ ultimately dismissed both challenges by pointing to the existing safeguards built into the criminal process. The Court observed that B may make use of several applications in the criminal courts – arguing that he is unfit to stand trial, that a trial would be an abuse of process or argue for special measures to accommodate his health concerns as part of the trial process. This was particularly relevant as the increase in risk to B was unquantifiable – the four medical reports highlighted concerns, but also recognised the futility of accurately predicting or quantifying the risk to B from the trial process itself. The Court were particularly unimpressed with the potentially sweeping nature of B's main argument – if medical evidence pointing to increased health risks as part of any criminal trial could establish breaches of ECHR rights, then it would "confer de facto immunity on any suspect with a medical condition capable of similarly increasing risk consequential upon higher levels of stress resulting from a decision to prosecute".

EDM 1656: Undercover Policing Inquiry

That this House notes the ongoing independent public Undercover Policing Inquiry, set up to investigate undercover policing in England and Wales since 1968; recognises the concerns raised by Non State Non Police Core Participants (NSNPCPs) and interested campaign groups (including the Campaign Opposing Police Surveillance and Police Spies Out of Lives) that the inquiry is not currently properly accessible to Core Participants or to the public; supports the principle of open justice including that public inquiries should be open and accessible to the public; believes that all Core Participants should be able to fully access and participate in the Inquiry; is concerned that the decision not to have audio and visual live streaming of the inquiry prevents full engagement from participants and prevents public and press access to proceedings; and Supports the calls from the NSNPCPs for full audio and visual live streaming, for the Inquiry to sit with a diverse panel of experts alongside the Chair throughout, for the names of groups subjected to undercover police surveillance to be disclosed publicly alongside the 'cover' names of undercover officers to allow those who were subjected to undercover police surveillance to assist the inquiry, for NSNPCPs to receive disclosure of their registry files in full and as a matter of urgency, for the terms of reference to be extended to include Scotland and Northern Ireland, and for trade unions, alongside all participating NSNPCPs to be given funding for legal costs so they are able to fully participate in the inquiry.

Third of Remand Prisoners in England Being Held Beyond Legal Time Limit For Trials

Ben Quinn, Guardian: More than 3,600 people – almost a third of England's remand prison population – have been held beyond the legal time limit awaiting trials as the pandemic wreaks havoc on the legal process. The scale of the backlog has prompted calls for more remand prisoners to be released immediately. Some prisoners have been pleading guilty purely to avoid lengthy pre-trial detention. The figures were revealed in data provided under the Freedom of Information Act to a campaign group, Fair Trials, which has collected accounts of prisoners struggling with conditions as they await trial. The issue is expected to be raised in parliament, where the shadow minister for courts and sentencing, Alex Cunningham, has called on the government to rapidly increase the number of temporary "Nightingale" courts. "It is a national travesty that because of the government's incompetence, justice is being denied to victims of crime, as well as thousands of people who have not been convicted of any crime but are locked up in prison on remand past the legal time limit – often with no trial date in sight," he said.

The figures obtained by Fair Trials, a legal charity focusing on improving respect for trial rights in criminal cases, were provided by the Ministry of Justice. They recorded that 3,608 people had been held for six months or longer as of December 2020, and 2,551 people had been held for eight months or longer. One prisoner who had been on remand since October 2019, and whose trial date had been put back until September of this year, told of being locked up for 23 hours a day, apart from a shower and half an hour of exercise. In a letter to Fair Trials, they wrote of suffering from PTSD, adding: "At times I've really struggled with the isolation as I'm single cell status." They had recently been making progress in terms of recovering from drug use but a Covid-19 outbreak at the prison curtailed their use of the gym. Another wrote of being locked up for similar amounts of time, adding: "The conditions were horrible, so much so that I was going to plead guilty to get a transfer out of here … my mental health was suffering and I was severely depressed."

In September the government extended custody time limits – the amount of time that someone can be held on remand – from six to eight months. But as the extended limit of eight months only came into force in September 2020, none of the people held for longer than six months by December 2020 fall under that extended limit. Separately, the government's own advice in October last year said that extending the

Race Issues Sidelined Since Probation Service Shake-Up, Says Watchdog

Jamie Grierson, Guardian: Perpetrators of racist crimes are being allocated to black, Asian and minority ethnic probation officers without warning, inspectors have said, as they warned that issues of race had been sidelined in the sector. Her Majesty's Inspectorate of Probation (HMIP) found that the service's focus on racial equality had declined since disastrous privatisation changes were introduced in 2014 by the then justice secretary, Chris Grayling. This lack of interest in race issues applies to both BAME offenders being managed by the probation service, and staff who are from BAME backgrounds, the report said. Inspectors heard distressing stories of inappropriate behaviour by white staff towards minority ethnic staff including instances of stereotyping, racist and sexualised language, and false allegations. In one shocking case a probation officer was propositioned by a white male colleague because "he had not had sex with a black woman before".

The chief inspector, Justin Russell, said the inquiry discovered that minority ethnic staff were not always consulted or supported when assigned work with individuals who had committed race-related offences. "Proper care and attention hadn't been taken in the allocation of cases that had a hate crime or a racial motivation aspect," he said. "They would be allocated these cases … it wouldn't be until they started the supervision that [they discovered that] the person had been convicted for a crime where harm had been done to an ethnic-minority individual." He added: "There was a significant percentage of ethnic minority staff who reported those instances. There were deficits in the organisation in the impact of these types of offences."

HMIP heard that complaints of racist language were instead found to be swearing; racial slurs were characterised as just banter. Several BAME staff members said they did not feel it was safe to raise issues of racial discrimination and serious complaints had been "repeatedly downplayed, ignored or dismissed". The report said there were "systemic" issues within the service, but Russell fell short of branding it "institutionally" racist. With offenders, the inspectors found that little interest was taken in how race, ethnicity or experiences of discrimination had affected their lives. "Probation officers need to find out as much as possible about individuals to support their rehabilitation. How can you help someone if you don't know what their life is like?" Russell said.

Inspectors found that the decline in focus on race issues within probation can be traced back to the Transforming Rehabilitation reforms spearheaded by Grayling, which are set to be reversed this year. Under Grayling's widely derided shake-up, the probation sector was separated between a public sector organisation – the National Probation Service (NPS), managing high-risk criminals – and 21 private companies responsible for the supervision of 150,000 low- to medium-risk offenders. Long-serving staff told inspectors that before the reforms, issues of equality and diversity – race equality in particular – had been given a higher profile, and since then specific resources have been lost. Effective commissioning of rehabilitative services for black, Asian and minority ethnic service users proved problematic under the reforms, and some valued services that existed previously were lost, the report added. In an unusual move, Russell announced his intention to reinspect this work again in two years.

More than 222,000 people are supervised by probation services across England and Wales; approximately a fifth are from BAME backgrounds. About 14% of National Probation Service staff are from a BAME background. The director general for probation, Amy Rees, said: "This is a difficult report to read as our staff take pride in helping offenders turn their lives around. Clearly, that support needs to be better tailored for the Black, Asian and ethnic minority offenders we work with. "We are working hard to diversify our workforce so that we have greater collective understanding for the particular challenges faced by ethnic minority offenders, and I want to reassure probation staff that we are listening and acting on their concerns."

Comment: The Divisional Court's judgment is a classic restatement of two main points with long-standing authority: the need to avoid satellite litigation and its associated delay and complexity in the criminal process, and the difference between a decision to prosecute and an actual prosecution in the context of ECHR rights. While B had argued that it is not in the public interest to prosecute someone with an increased risk of death, the Court, invoking recent Supreme Court authority, held that the public interest test for deciding whether to prosecute was not the same as the question of whether there would be an unjustifiable interference with an individual's ECHR rights.

A final point of considerable importance is the Court's reminder of the structural guarantees of fairness built into the criminal process. This reminder is not only important in terms of the administration of criminal justice (i.e. the importance of a fair system to protect the substantive rights of suspects and defendants) but also for the political and social backdrop from which this case arose. The prosecution of soldiers for offences relating to the Troubles is a (numerically) small but increasingly explosive cohort of judicial business. No soldier has yet been convicted in this cohort, though the litigation surrounding it has been subject to emotive, divisive and often insensitive rhetoric. A government bill has passed the House of Commons and is now in the House of Lords, which creates restrictions of time and process for bringing similar prosecutions, with a new duty on the Secretary of State to consider whether or not the UK should make a derogation under the ECHR in respect of any overseas operations which are or would be significant.

Amid this controversy, it is worth remembering that the investigative duty under Article 2 of the ECHR includes duties owed to victims' next-of-kin (see e.g. Al-Skeini v United Kingdom (Application no. 55721/07)), with the family of Daniel and Christopher Hegarty having waited almost 40 years for the start of the process of ensuring justice.

Exclusion of Unlawfully Obtained Evidence

Jonathan Lennon, Doughty Street Chambers: Many remand prisoners will have a considerable amount of time to ponder the evidence against them and conclude that some aspect of the evidence has been obtained illegally; e.g. by improper telephone intercept or by use of a participating informant etc. At this point it is time to ask the question that the trial Judge will ask; *'So what?'*

Due Process: Americans place a great deal of emphasis on 'due process'. When the police or the District Attorney infringe a citizen's constitutional rights the trial Judge will, almost automatically, protect the citizen's rights by excluding the evidence or halting the case. In this country the approach is different. Judge's have to perform balancing exercises and address notions such as 'the interests of justice' and whether a defendant can have a 'fair trial' or not. A failure to perform 'due process' may be alleviated by a judicial direction to the jury or, more hopefully for defendants, the exclusion of certain evidence.

Section 78 of PACE is the principal device by which a Judge can exclude evidence. Section 78 permits the Judge to; "refuse to allow evidence on which the prosecution proposes to rely… if it appears to the Court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it." One of the classic types of s78 applications is where the police have breached their own Codes of Practice in obtaining the evidence. For example, exceeding the authority for the use of a bugging device under the Regulation of Investigatory Powers Act 2000, or not following the correct procedure for an interview at the police station. The evidence sought to be excluded would in those cases be, respectively, the transcript of the bugging material and the transcript of the taped interview. The greater the breach of the 'rules', then the more likely the evidence is to be excluded. If 'bad

faith' is shown; i.e. the officers breached the rules deliberately, then the chances of a successful application increase. However, suggesting that a police officer has acted in 'bad faith' is a serious allegation that cannot be made lightly and will demand a high level of proof. Such allegations should never be made on a speculative basis – it will just irritate the Judge. There must always be a proper basis before embarking on that route. The extent to which a breach of procedural rules, such as the PACE Codes of Practice, will trigger the exercise of the trial Judge's discretion to exclude evidence under s78 all depends on the facts of the case. The expression "significant and substantial" has been favoured by the Court of Appeal, e.g. in R. v. Walsh, 91 Cr.App.R. 161. In that case the defence had applied to the trial Judge to rule the interview out because of certain breaches of PACE at the police station. The trial Judge found that the officers had not acted in bad faith and kept the material in evidence in the trial. Walsh was convicted and appealed to the Court of Appeal. The Appeal Court said: In the present case, we have no material which would lead us to suppose that the judge erred in concluding that the police officers were acting in good faith. However, although bad faith may make substantial or significant that which might not otherwise be so, the contrary does not follow. Breaches which are in themselves significant and substantial are not rendered otherwise by the good faith of the officers concerned. The Appeal Court quashed the conviction. Section 78 did not mean that a police officer fabricating evidence, or deliberately fouling up the identification parade procedure would automatically lead to that evidence being excluded – but the Court gave a strong indication that it would usually do so.

In R v McGovern (1991) 92 Cr. App. R 228 the Court of Appeal considered the case of a 19 year old girl, of limited intelligence, who had been interviewed by the police following her arrest for murder. The police refused her access to a solicitor. She confessed to having taken part in the killing. In a second interview, with a solicitor present, she made similar confessions and she was subsequently convicted of manslaughter. She appealed. The Court of Appeal found that her first confession was unreliable given the lack of a solicitor at interview and that in relation to the second interview the very fact that of the admissions in the first interview was likely to have an effect upon the accused during the course of a second interview. If the first interview was in breach of the rules then the subsequent interview must be similarly tainted. The conviction was quashed.

C*ommon-Law/Fairness:* The other main tool in the defence armoury is the 'common law' – i.e. Judge made law created over the years from judicial precedent and not by Act of Parliament. There is no magic formula or test here – the Judge simply has a discretion "to exclude evidence if it is necessary in order to secure a fair trial for the accused" (Scott v R [1989] AC 1242) – this is often expressed as the test that evidence ought to be excluded if its prejudicial effect exceeds its probative value. In other words if the evidence only lightly assists the prosecution in helping to establish the offence, but greatly damages the credibility of the defendant, then the evidence should be excluded. So, if someone is charged with laundering tens of millions of pounds of drugs money the Crown will no doubt wish to include in the evidence a lavish lifestyle of sports cars and luxury yachts. But if that evidence is included in a murder trial where lifestyle is of some marginal relevance, e.g. because it is a gangland shooting, then the Judge may exclude it from the jury if the real issue is the defendant's case of alibi.

Human Rights: Overlaying the s78 and the common law rules is the Human Rights Act 1998 and the right to a fair trial under Article 6 of the Convention. Just because your right to a private life under Article 8 of the Convention has been violated because of over the top surveillance does not mean the surveillance evidence cannot be admitted; Schenk v Switzerland (1991) 13 EHRR 493. Much will depend on what other evidence there is and the quality of the evidence in dispute and look to the fairness of the proceedings as a whole.

come (see the discussion at paragraphs 68 to 70 of Osborn) and so this is a materially different outcome for the Claimant. In any event, to the extent that it is relevant to consider what the outcome of the parole review would have been following an oral hearing, I cannot say that it is "highly likely" that the ultimate outcome of the parole review would have been the same. Given the disputed facts, the range and complexity of the issues to be decided and the assessment to be made, it is impossible to predict.

38) The decision is quashed and I direct that there is to be an oral hearing before the Parole Board.

More Than Six Out of 10 Women Prisoners Homeless on Release

Kaya Kannan, Justice Gap: Thousands of women released from prison have nowhere to live, a plastic HMP bag and just a £46 discharge grant, according campaigners. The Safe Homes for Women Leaving Prison initiatives is due meet MPs today in an attempt to urge the Government to stop releasing women into homelessness and poverty. The initiative is a collaboration involving the London Prisons Mission, Prison Reform Trust, the Church of St Martin-in-the-Fields and HMP & YOI Bronzefield that is committed to the safety and rehabilitation of vulnerable women discharged from prison. 'Thousands of women leave prison each year with just a £46 discharge grant and a plastic bag of belongings,' the coalition argues. 'This puts vulnerable women, many of whom have experienced domestic abuse and trauma, at risk and prevents them from securing regular employment, resuming care of children and achieving rehabilitation. 65% of prison leavers released to no fixed abode go on to reoffend.' The Government recently announced £70 million to support prison leavers, including a new temporary accommodation service, but the Safe Homes for Women Leaving Prison initiative argue that this is not enough to end the crisis.

'It is unacceptable that in 2021, thousands of women are being released from prison directly into homelessness,' commented John Plummer, coordinator of London Prisons Mission and Representative of the Safe Homes for Women Leaving Prison initiative. 'The Government must take urgent action to end this crisis and the new accommodation service for prison leavers is just the beginning. We must provide for the specific and complex needs of vulnerable women leaving prison.' According to data published by the Ministry of Justice in July last year, some 6,185 women were released from custody in the year to March 2020 with only half going into secure, long-term accommodation. The 2019 Independent Monitoring Boards report for HMP & YOI Bronzefield surveyed 116 women prior to their release and found more than six out of 10 (62%) would be homeless on release. The most recent IMB report on women's resettlement found approximately four out of 10 women had housing to go to on release (41%) and that prisons discharging people back to London had 'the most difficult challenge to find them suitable housing'. According to the report, a quarter of women interviewed had lost their home as a result of imprisonment, often as a consequence of a very short prison sentence.

The Safe Homes for Women Leaving Prison initiative is calling for a cross-government approach to ensure no woman is released from prison to homelessness. 'We urge the Ministry of Justice and Ministry of Housing, Communities and Local Government to listen to these calls and demonstrate, within their initiatives, an understanding of the very different experiences, circumstances and needs of women in the criminal justice system, which are fundamentally different from those of men,' Plummer added. 'The Government is failing to address the staggering numbers of women leaving prison to homelessness,' said Lord Bishop of Gloucester and Anglican Bishop for HM Prisons in England and Wales, the Right Revd Rachel Treweek. 'This places thousands of women back into at-risk environments, directly contributing to an avoidable cycle of reoffending. The Government needs to be working effectively across departments, and with local authorities and partner organisations to ensure that every vulnerable woman with complex needs is supported into safe and secure permanent housing so they can rebuild their lives – without it, we are simply setting them up to fail.'

14) On 16th July 2020, the Claimant's solicitor sought an oral hearing of his parole review, submitting: a) the Claimant disputed much of the contents of the dossier and the report writers had relied on inaccurate information; b) the Claimant had spent many years in custody; c) he was a post-tariff IPP prisoner and should have the opportunity of presenting his case orally; d) if the Claimant's concerns about discrimination were warranted, this could impact on the perception of his level of risk; e) the dossier included unproven allegations and adjudications and should be tested fairly.

15) On 20th July 2020, a Duty Member of the Parole Board refused the request for an oral hearing, giving the following reasons: "• An oral hearing is not required to consider the facts of the case. They are clearly laid out in the MCA decision. • The MCA panel correctly identifies that Mr Stubbs' case was reviewed at an oral hearing in January 2019 when it was concluded that Mr Stubbs had core risk reduction work outstanding. • The MCA panel concludes that Mr Stubbs has made "limited progress in completing core risk reduction work and in stabilising your (sic) behaviour". • Legal representations were considered at the time of the MCA review and the Duty Member concludes that Mr Stubbs' legitimate interest in taking part in his review is satisfied by the consideration of written submissions. This includes the submissions that Mr Stubbs disputes much of the contents of his dossier and that he considers that he has been the subject of discrimination at HMP Gartree. It is clear from the MCA decision letter, that the MCA panel considered these submissions. • The legal representations do not raise any issues which cause the Duty Member to put the paper decision into serious question."

17) Section 28(7) of the Crime (Sentences) Act 1997 entitles each indeterminate sentence prisoner to have his case referred to the Parole Board by the Secretary of State at any time after he has served the relevant part of his sentence and to further reviews by the Parole Board every two years thereafter. Section 28(5) requires the Secretary of State to release the prisoner as soon as he has served the tariff part of his sentence and the Board has directed his release. By section 28(6) the Board may not direct release unless it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.

35) Relief: In his decision granting permission on the papers, the deputy Judge said that there may be a "real issue in this case as to whether it is highly likely that an oral hearing would have made no difference" although he suggested that the issue may be of less relevance by the time this case came to a hearing given the passage of time since the decision under challenge. This was a reference to section 31(2A) of the Senior Courts Act 1981 which prohibits the court from granting relief "if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

36) The first thing to point out is that the deputy Judge's comment was based on a misconception in that he thought that the previous Parole Board decision had been only six months before the decision under challenge whereas it had in fact been eighteen months earlier, during which period there had been some significant developments. In any event, as explained by Bingham LJ in R v Chief Constable of the Thames Valley Police, ex p Cotton [1990] IRLR 344, at 352, courts should be reluctant to conclude that the same result would have occurred if a person had not been deprived of an adequate opportunity to put his case. The reasons for this include that: (i) experience shows that that which is confidently expected is by no means always that which happens; (ii) the court should avoid straying from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of reviewing the merits of a decision, (iii) this is a field in which appearances are generally thought to matter, and (iv) a right to be heard is not to be lightly denied.

37) Applying the principles in Osborn and in the light of my reasoning above, it was unfair to refuse an oral hearing. An oral hearing is of itself an important right, even if it could not change the out-

It has long been the case that one area that was sacrosanct was a suspect's right to un-monitored discussions with his lawyers where, even in the most serious of cases, would be stopped because of a violation of that part of Article 6 regarding access to legal advice; see R v Grant [2005] 2 Cr. App. R 28. However, the Grant case was expressly disapproved by the Privy Council in Curtis Warren v Att. General for Jersey [2011] 2 ALL ER 513, PC (see now R v Lawless [2016] EWCA Crim 2185). In the Warren case the police had placed an audio probe in the defendants hire car which would be driven through a number of overseas European countries. The police knew that permission from those countries had been refused for the use of such devices but went ahead anyway. The consequent abuse of process application failed, a decision upheld on appeal. However, that case was an abuse of process case, rather than an exclusion of evidence case. There is still plenty of scope to argue for exclusion of unlawfully obtained evidence because the right to a fair trial under Article 6 imports a certain standard on the behaviour of the State including police, prosecutors and Courts which can be considered when considering the fairness of the trial.

As is often the way much will depend not on the alleged conduct of the police officers, but in the preparation of the defence case – have the prosecution been put on notice; has a certain issue been raised in the Defence Statement; is the matter on the Court record? The answer to the question 'so what if there is a breach of the rules?' will very often depend on how well the issue has been considered and whether the groundwork has been laid for your day in Court. In criminal litigation there are few guarantees except that preparation is everything.

A Strange Case That Ignores an Interesting Issue in Confiscation Proceedings

Doughty Street Chambers: In the recent decision of R v Court [2021] EWCA Crim 242 the Court of Appeal skates over some potentially interesting issues about the "benefit" in confiscation proceedings, throws open the chance of re-litigating lost appeals without needing to trouble either the Supreme Court or the Criminal Cases Review Commission, and possibly enjoyed some schadenfreude [pleasure at the misfortune of others] at the expense of another 3 very senior Judges. Mr Court pleaded guilty to cultivating cannabis. At the time of the offence, he owned a piece of land worth £62 000. His offence triggered the "criminal lifestyle" provisions of the Proceeds of Crime Act 2002 [sections 10 and 75 and schedule 2], which meant the land was rebuttably presumed to be the benefit of crime. Mr Court called evidence that he had bought the land under a mortgage taken out against a house he owned some years before he was found to be growing cannabis. The sentencing judge found that the mortgage was fraudulently obtained, basing that finding on Mr Court failing to declare his spent convictions and failing to tell the mortgage company he did not own the house outright; , the problem with that ruling was that one does not have to declare spent convictions [hence the phrase "spent"] and elsewhere in the same ruling the judge found Mr Court did own the house outright.

Mr Court appealed on numerous grounds. The Single Judge refused leave, so he renewed. At the renewed leave hearing the first Court gave judgment allowing the appeal on the single issue of the "benefit" of the piece of land. So far, so good [for Mr Court, at least]. Unhappily, the Registrar had not told the Prosecution about the renewed leave hearing, so they did not attend. More unhappily, the Judges in the first appeal did not follow the Court's published practice of giving leave then adjourning a final decision for the Prosecution to attend. Thus, the Prosecution found they had lost an appeal without even being aware it was happening: They were not impressed. There is a rarely used power [see Yasain [2015] 2 Cr App R 28] for the Court of Appeal to reopen an appeal where (i) there are exceptional circumstances, (ii) it is necessary to avoid real injustice, and (iii) there is no other remedy available [often the existence of the CCRC, another remedy, will block a convicted person from using this route]. On this occasion, the

Court was prepared to allow a second appeal, and a new constitution re-heard the appeal and upheld the original confiscation order on the basis that there were other clear reasons for the sentencing judge to have found the mortgage was fraudulently obtained. In doing so, the second court, in effect, declared that the 3 Judges in the first had made pretty basic errors of both reasoning and procedural fairness: This commentator is far too low down the legal food-chain to have any idea whether this would have caused the second constitution pleasure or pain.

The striking thing about the facts of this case is that by the end Mr Court was found to have benefited by £62 000 by way of an offence completely unrelated to the index offence, that was then litigated with a reverse burden of proof, without [as far as the appeal judgment reveals] the sentencing judge directing himself as to the mens rea of a mortgage fraud. The questions the Court of Appeal could have considered might be: Is a confiscation based on a mortgage taken out and repaid, proportionate under the Waya test? Can a judge use the statutory assumptions of sections 10, 75 and 76 of POCA to semi-convict of an offence of dishonesty without addressing the mens rea? Can a quasi-conviction for an unconnected offence be upheld when the trial judge's expressed reasons are all agreed to be wrong? They could have, but they didn't. Maybe these are questions for another case on another day.

Cut Destructive' Short-Term Sentences for Gypsy, Roma and Traveller Women

Noah Robinson, Justice Gap: Campaigners are calling for a cut in 'destructive' short-term custodial sentences for Gypsy, Roma, and Irish Traveller women to tackle a massive over-representation in prisons. The report by the Traveller Movement reveals GRT women are overrepresented comprising 6% of the prison population but only 0.1% of the general population. That overrepresentation is far higher in some prisons and so approximately one in 10 women at Foston Hall, Bronzefield (both 9%) and Peterborough (10%) self-identified as 'Gypsy/Irish Traveller' as part of HM Prison inspectorate surveys. The data does not include Roma women who are not included in ethnic monitoring.

According to the Traveller Movement report: 'GRT women are impacted by the destructive pattern of reoffending that short-term sentences create, and the experience of short-term sentences are disruptive, traumatising and have poor outcomes for these women.' Despite being over-policed, the report states that GRT women's 'distinct needs' are 'poorly understood and overlooked'. As an alternative to short term-custodial sentences, the group is calling for community programs run by Women's centres together with the prison service to 'become the norm not the exception' and be better funded. According to a 2019/2020 survey by the prison inspectorate, more than six out of 10 travellers (62%) reported feeling unsafe compared to less than half of non-travellers (47%). A Traveller Movement report from 2016 showed that more than nine out of 10 GRT people surveyed had experienced discrimination due to their ethnicity (91%) and in 2019 an inquiry by the House of Commons' Women and Equalities Committee found that 'successive governments had comprehensively failed' the community.

The group point out that Traveller women face significant challenges in finding housing and describes the failure of 'local authorities to provide Traveller specific accommodation'. A domestic abuse worker described how Irish Traveller women have been 'stuck in cycles of reoffending due to being released into precarious housing'. Issues of self-harm and suicide have been flagged as an issue disproportionately impacting Traveller people in prisons. Traveller women are five times more likely to commit suicide than the general population. The report calls for greater sensitivity in differentiating between the ethnic groups and for example Roma people are not included in current prison data on Gypsy/Irish Travellers. 'Roma' will be introduced to the Census in 2021 but 'more work needs to be done to ensure meaningful participation'.

CoA Orders Parole Board to Give Darren Stubbs an Oral Hearing

1) The Claimant challenges the Defendant's decision not to hold an oral hearing of the Claimant's parole review. Permission to bring judicial review proceedings was given by Mr David Lock QC sitting as a Deputy High Court Judge on 15th January 2021. 2) In correspondence exchanged pursuant to the judicial review pre- action protocol, the Parole Board stated that it would take a neutral approach to the claim. This is the Board's general position in accordance with its 2019 Litigation Strategy "because of the judicial nature of the decision and the requirements of case law". That remains the Board's position in this case. The Secretary of State for Justice was served as an interested party but has also taken a neutral approach and so has not participated in the proceedings. 3) Accordingly, only the Claimant was represented at the oral hearing which took place by video (MS Teams) on 9th March 2021.

12) On 2nd July 2020, the Claimant's solicitor submitted representations to the Parole Board explaining that the Claimant sought a progressive move to open conditions. He sought an oral hearing for the following principal reasons. First, the Claimant strongly disagreed with the contents of his dossier (including the intelligence reports) and wanted the opportunity to address the Parole Board to make his case for open conditions. Second, the Claimant was of the view that he had been unfairly discriminated against in HMP Gartree and he believed that staff may confirm this. The submission stated that the Claimant had been "provoked" when on the normal prison wing, his property had been taken from him, and his legal papers had been disrupted in his cell. It was submitted that his risk could best be assessed through an oral hearing so that the information within the dossier could be tested. Third, the submission referred to the impasse described above regarding the Claimant's progression and in particular engagement with the Kaizen programme, saying "Whatever the truth is in this situation Mr Stubbs appears to have reached an impasse. A Governor made it clear Mr Stubbs would not be remaining at Gartree and this was 9 months or so ago. (On another occasion it is evident that Mr Stubbs was 'not allowed' to attend a Kaizen meeting.) On receiving such information, it is understandable that Mr Stubbs did not want to engage with his sentence plan, anticipating he would be transferred from HMP Gartree….It is however difficult for him to evidence risk reduction in the absence of OBP completion. It appears Mr Stubbs was informed in September 2019 that he would not be staying at Gartree, however his (disputed) prison record prevents any other prison accepting him. How then does he progress?" The solicitor also identified witnesses who the Claimant would like to be called to the hearing.

13) On 15th July 2020, under a process known as "Member Case Assessment" or "MCA", a single Member of the Parole Board assessed the case on the papers and decided not to direct the Claimant's release or recommend his transfer to open conditions. The decision stated that the Member "did not find reasons to convene an oral hearing as there is core risk reduction work that is required before release can be considered". After a summary of the evidence, the decision stated that the Claimant had "made a small amount of progress in beginning to engage with Kaizen and continuing to work with the prison substance misuse team, but [he had] not completed any further core risk reduction work and [he had] not been able to maintain stable custodial conduct". The Member concluded: "Since the last review you have unfortunately made limited progress in completing core risk reduction work and in stabilising your prison behaviour. The Panel Member assesses that you present a high risk of reoffending and a high risk of causing serious harm in the community and considers that you need to complete Kaizen and begin to further stabilise your custodial behaviour. The Panel Member acknowledges the hopelessness that you feel at times and would wish you assure you that the Parole Board would be pleased to see positive progress on your part that could be discussed with you at your next review. The Panel Member concluded that it is necessary that you continue to be confined for the protection of the public. The Panel Member does not direct release".