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Two Sexual Assault Convictions Quashed – CPS Failure to Disclose

[1] The appellant was convicted at Antrim Crown Court on two counts, one a specific count and the other a specimen count, of sexual assault on a child under 13, contrary to Article 14 of the Sexual Offences (Northern Ireland) Order 2008. There were a number of grounds of appeal but in the event the only ground which it was necessary for this court to determine was whether there was a failure on the part of the prosecution to make proper disclosure, and if so, whether the failure to disclose the material rendered the convictions unsafe. Mr Connor QC and Mr Neil Moore appeared for the appellant and Ms Kitson for the prosecution.

[2] The complainant is a child and is entitled to automatic life anonymity by virtue of Section 1 of the Sexual Offences (Amendment) Act 1992, as amended by the Youth Justice and Criminal Evidence Act 1999. No matter relating to the complainant shall during her lifetime be included in any publication if it is likely to lead members of the public to identify her. In this judgment we will anonymise the name of the complainant by the cypher "C." There is a familial connection between the appellant and the complainant so to protect the identity of the complainant we anonymise the name of the appellant by the cypher "A." For the same reason we will anonymise the names of various other witnesses and family members.

[3] At the conclusion of the hearing of the appeal on 9 November 2017 we allowed the appeal, quashing both of the convictions and declining to order a retrial. We indicated that we would give a written judgment which we now do.

[4] Background Facts: The complainant resides with her mother ("M") and her father ("F"). Also residing in the family home are not only the complainant's siblings but also her half siblings by M's previous relationship including a half sibling who we anonymise with the cipher "S."

[5] The appellant is a longstanding partner of the complainant's paternal aunt with both of whom the complainant and two of her siblings spent one weekend in every month in their care at their home which is in a different town than M and F's family home.

[6] M and F state that on Monday 16 March 2015 the complainant, C, who was then between 5 and 6 years of age, informed M and F either that the appellant "pulls my pants down and licks my bum" or the appellant "licks my bum and I think it's funny." M states that she then asked the complainant where he licked her and that the complainant pointed to her vagina. F then immediately rang social services who reported the allegations to the police on the same day.

[7] On Tuesday 31 March 2015 the complainant was interviewed by the police with the interview being recorded on DVD which was subsequently played to the jury at the trial. During this Achieving Best Evidence interview ("the ABE interview") the complainant set out the nature of her evidence. Although there were some inconsistencies in what she stated a summary of her account is that the offending behaviour had occurred at the last weekend visit some 3 weeks prior to 16 March 2015. That meant that the alleged offending occurred between Friday 20 February 2015 and Sunday 22 February 2015 or possibly between Friday 13 February 2015 and Sunday 15 February 2015. The overall thrust of the complaint was that her paternal aunt had put her to bed on her own in an upstairs bedroom and shortly thereafter the appellant had entered the bedroom and whilst there had pulled down her pyjama bottoms and briefly licked her bottom and then turned her over and licked her "private parts." C stated that the appellant put his finger to his mouth and made a "shush" sound before leaving. The complainant also stated that she was going to tell her aunt but that her aunt was in the bathroom and thereafter the complainant forgot to do so. The complainant went on to state that the same thing happened on consecutive nights. Furthermore, she stated that on one or two occasions over the same weekend the appellant engaged in the same behaviour in the kitchen by lifting her onto a bench covering the washing machine and removing her lower clothing, her underwear and then proceeding to lick her in exactly the same way as in the bedroom.

[8] On 6 May 2015 the appellant was interviewed. He denied that anything of the nature alleged by the complainant had occurred. The appellant did not suggest any reason for the complainant to have made these allegations. He did not speculate as to what were the reasons which might in theory have been many and varied. He simply stated that they were incorrect.

[9] No-one witnessed what C alleged had occurred so the case depended on an assessment of the credibility and reliability of the evidence of C on the one hand and of the appellant on the other. As a part of the police investigation seven witness statements were prepared. M and F gave statements both dated 8 May 2015. Statements were also given by the three police officers and the social worker who were involved in either the ABE interview or the interview of the appellant. The statements from the police officers were formal statements about the circumstances of either the ABE interview or the interview of the appellant. The last statement is dated 21 September 2015 from the social worker who attended the ABE interview and it was a formal statement about the circumstances of that interview.

[10] The indictment dated 9 June 2016 contained 6 counts. Count 1 was a specific count and count 2 a specimen count of an adult causing or inciting a child under 13 to engage in sexual activity contrary to Article 17(1) of the Sexual Offences (Northern Ireland) Order 2008. Count 3 was a specific count and Count 4 was a specimen count, in relation to the allegations as to what had taken place in the bedroom. Count 5 was a specific count and Count 6 a specimen count, in relation to the allegations as to what had taken place in the kitchen. In relation to the dates of each of the alleged offences the particulars in respect of each count are that the offence occurred on a date unknown between 25 June 2013 and 16 March 2015.

[11] On 15 June 2016 the appellant was arraigned pleading not guilty to all six counts.

[12] On 24/10/16 trial commenced with the complainant cross-examined by videolink on 25/10/16.

[13] At trial an issue arose as to the motive or explanation for the complainant having made the allegations against the appellant. That issue arose on a number of occasions during the course of the trial. We consider that it can be illustrated by an exchange that took place at the conclusion of the appellant's evidence between the learned trial judge in the presence of the jury and the appellant which culminated in an application being made to the judge in the absence of the jury. The exchange was: "Q. All right. The final thing I want to ask you is this: it's very clear in this case that you were very fond of (C) and she was very fond of you. I don't think anyone disagrees with that. A. No, I wouldn't disagree with that. Q. She trusted you in the sense that she wanted to be on your knee, she wanted you to tickle her, all those things? A. Yes, Your Honour. Q. And you were happy to treat her almost like a grandchild? A. Yes, Your Honour. Q. I am sure that the question that has crossed your mind a thousand times since the constable came to your door and said "get back into the house." Can you attribute any motive to (C) for saying these things about you? A. To be truthful, your Honour, this whole episode this last two years has just been a living nightmare for me, as much you can under-

stand. I just, I can't make head nor tail of it, Your Honour, I really can't. Q. Was there any falling out? Did you have an argument or did you sort of criticise her for something that you can remember? A. Well, I don't know, Your Honour, (my partner) would have been the one that sort of would have spoke to (F) and (M) most of the time. Q. Right? A. I don't know that but now there has been things that I have found out sort of recently, you know, which I didn't know nothing, about like, you know. Q. Now is your chance to say something because

Mr Connor: Again, Your Honour. Judge: Sorry, I am asking the defendant. Mr Connor: Well, I have a further legal application. Judge: Well, I am asking the defendant what I think everybody in this room wants to know. Why is this wee girl saying this? Mr Connor: I have an application. Judge: You can make your application by all means. Mr Connor: I have an application. Judge: Thank you, members of the jury, we will not keep you too long."

[14] The learned trial judge gave extensive directions in his charge to the jury in relation to this issue. Those directions included "it is not for (the appellant) to think of a motive, but there must be something bizarre going on for this child to make up a case and stick to it through thick and thin." At the very final part of his charge the learned trial judge concluded by saying "But then one has to ask again when one finally comes to the question why. No-one has to prove it, but why is (C) saying this thing?"

[15] There was also an issue at trial as to the complainant's use of the expression "private parts." In the course of her evidence M stated that she had never heard the complainant using this expression and the police officers who had dealt with the complainant denied using this expression. In his charge to the jury the learned trial judge stated that: "There has been no explanation that I have heard or you have heard which explains how the rather adult and somewhat antiquated term "private parts" got into this case and we may never know."

[16] At trial and on the direction of the judge the appellant was found not guilty on counts 1 and 2.

[17] On 01/11/15 the appellant was convicted by a majority of 11-1 on counts 3 and 4 (the bedroom incidents) and found not guilty by a unanimous jury verdict on counts 5 and 6 (the kitchen incidents). Sentencing was adjourned to facilitate a probation report and a victim impact assessment.

[18] Dr Michael Patterson, Consultant Clinical Psychologist, prepared a victim impact report dated 5 December 2016. That report recorded, amongst other matters, that M's daughter by an earlier relationship (S) had been sexually abused by her then partner's father (whom we shall refer to as "S's paternal relation"). The report stated that there had been a police investigation and a number of victims had been identified.

[19] No documents in relation to that previous police investigation had been disclosed by the prosecution in this case. It now transpires that not only was the previous incident investigated by the police but also that there had been a prosecution of S's paternal relation who had been convicted. The significance of the documents in relation to that police investigation and prosecution is to be seen in the context that (a) S lived with M and her new partner F in the family home so that she resided in the same household as the complainant C; (b) the previous incident involved events in a bedroom and in a kitchen; and (c) the term "private parts" was used by S in relation to the previous incidents. It is the appellant's case that the documents were relevant to the question as to how the complainant C, between the ages of 5 and 6, could have made allegations of the nature that she did on the basis that it was entirely possible that she was privy to or overheard discussions regarding the previous abuse of S. It is also the appellant's case that the use of the expression "private parts" by both the complainant and by S may have lent credence to the suggestion that there had been discussions between the complainant and S or between others in the family home either in relation to the previous abuse of S or of a sexual nature. It is the appellant's case that this material could

have been of assistance during the course of cross-examination and could potentially have led to a different outcome. Furthermore the appellant contends that the documents ought to have been disclosed and that the failure to disclose renders the convictions unsafe.

[20] At the hearing of this appeal we were informed by Ms Kitson that the material had not been within the knowledge of the prosecution service at any time before receipt of Dr Patterson's report. We were also informed by Ms Kitson that on 20 December 2016 she spoke to M about the reference in Dr Patterson's report to a previous police investigation identifying a number of victims and was told by M that there had been no previous police investigation. We were also informed at the hearing of this appeal that at an early stage during the course of the police investigation into the allegations against the appellant the investigating police officer had been informed by M that there had been a report to the police in relation to S's paternal relation and a potential sexual offence in relation to S but that M did not want police to be involved and did not want to pursue a formal complaint. The documents that have now become available reveal that there was a complaint in 2003 to the police and the response of M to the police in relation to that complaint was that she did not want to make a formal complaint. It is correct that there was no police investigation into the 2003 complaint. We were also informed by Ms Kitson that the investigating police officer was not informed by M as to the subsequent complaint in 2004 which led to a police investigation in respect of S's paternal relation in respect of further allegations made by S and also in respect of allegations made by another child. Also that the investigating police officer was not informed that there had been a prosecution of S's paternal relation or that on 7 October 2005 he had been convicted on his plea of guilty of 6 sexual offences against S and 6 against the other child. The explanation proffered is that M thought that the police did not use S's evidence in relation to his conviction and up until recently was unaware that he had been convicted of 6 offences against S as M had never been informed by police of the convictions. We were also informed that the early plea could explain why M and S were never asked to give evidence against S's paternal relation.

[21] Furthermore, at the hearing of this appeal we were informed by Ms Kitson that after becoming aware at an early stage of the police investigation into the allegations against the appellant as to a complaint against S's paternal relation the investigating police officer had checked the police NICHE system in relation to him but that this had not revealed any convictions. That the investigating police officer has subsequently found out "by making contact with the Offender Management Unit that his conviction was never shared with the police system even though up until his death he was managed as a sex offender." That as S's paternal relation had no relevant record on the NICHE system at time of checking the investigating police officer did not make mention of this to the DPP. Further that "it wasn't until the old file was retrieved that this has all been married together."

[22] On 20 December 2016 a sentence of 3 years 6 months' imprisonment was imposed on the appellant with 1 year and 6 months as the custodial element and 2 years on licence.

[23] On 14 January 2017 the appellant applied for leave to appeal against conviction. The grounds of appeal dated 14 February 2017 included: "The prosecution failed to disclose that the complainant's older step sister (with whom she resided) had been sexually abused by an unrelated individual. This may have provided an answer to the question posed by the learned trial judge (as to why the complainant would make such allegations if not true) and would certainly have formed part of the cross-examination of the complainant's mother." This ground was also referred to in the appellant's skeleton argument dated 13 February 2017.

[24] The single judge gave leave to appeal in relation to that ground of appeal and direct-

ed that details of the older sibling's complaint and how it was disposed of should be obtained for the assistance of this court.

[25] The details were made available to the prosecution and to the appellant on 27 October 2017 and were provided to this court on 8 November 2017 the day before the hearing of the appeal which took place on 9 November 2017.

[26] Discussion: R v Hadley and others [2006] EWCA 2544 sets out the test on appeal in relation to a failure by the prosecution to make disclosure at trial. The first question is whether the material ought to have been disclosed as being material that would have undermined the case for the prosecution or assisted the case for the defence. The second question is whether the failure to disclose renders the convictions unsafe. In some cases the failure to disclose will not render the convictions unsafe because the court is satisfied that the evidence tending to establish the appellant's guilt was so strong that the undisclosed material could have made no difference to the outcome.

[27] In relation to the first question as soon as the appellant denied doing what the complainant had alleged during the course of his interview on 6 May 2015 then it became his case that she was incorrect in her allegations and that there must have been some reason or explanation for her to have made the allegations. The undisclosed material provided a potential explanation and not only should it have been disclosed but it should also have been considered in relation to the decision as to whether to prosecute. The issue as to the potential motive or as to the potential explanation for the complainant making the allegations was brought into stark relief at the trial. There was a continuing obligation to make disclosure and the material should have been disclosed at trial. Ms Kitson on behalf of the prosecution quite properly conceded that the documents ought to have been disclosed and we consider that she was correct to make that concession. We note the explanations as to why the material was not disclosed. We deprecate the explanation that the NICHE system had no record in relation to S's paternal relation emphasising that non-disclosure is a potent source of injustice. If it had not been for the report from Dr Patterson then this material may never have come to light.

[28] In relation to the second question there were similarities between the offences involving S which occurred in a bedroom and in a kitchen. There was also a similarity in relation to the use of the expression "private parts." On the other hand there were differences between what had occurred to S and the complainant's allegations. The differences may have undermined the impact on the jury of the undisclosed material but the question for this court is whether it is capable of affecting the mind of a reasonable jury properly directed. The appellant does not have to establish that the disclosure of the material would have affected the outcome of the proceeding but rather that it is reasonable to suppose such failure might have affected the outcome of the defence. This was a case in which the outcome depended on an assessment of the credibility and reliability of the complainant and of the appellant there being no corroborative evidence one way or the other. The issue as to why the complainant was making the allegations was an issue of significance at the trial. Ms Kitson on behalf of the prosecution quite properly conceded that the failure to disclose renders the convictions unsafe. We consider that she was correct to make that concession. We consider that the undisclosed documents would have provided significant cross-examination material. We consider that the material could have had an effect on the verdicts of the jury in relation to counts 3 and 4.

Conclusion [29] We quash the convictions. [30] The prosecution have indicated that they do not seek a retrial. We do not order a retrial.

Ann Power Granted Order Against Met Police & Senior Coroner

On 16th March 2017 the claimant Ms Power, issued proceedings pursuant to section 13 of the Coroners Act 1988 ("the 1988 Act") seeking an order: i) That the inquest touching upon the death of her husband, Mr Onese Power, be quashed; and ii) A direction that a fresh inquest be held.A Fiat was granted by the Attorney General's office on 7 February 2017 authorising the claimant to make the application.

The deceased, Onese Power, was born on 2 May 1946. He was married to the claimant and they had three sons. On 6 June 1997, the deceased was disqualified from driving for six months. At approximately 10:45 on 17 August 1997 the deceased was driving a Kawasaki motorcycle along Camden Road, NW1. He was travelling at an estimated speed of 60mph along a road with a speed limit of 30mph. He was observed by PC Collier, who was driving a liveried Vauxhall Cavalier, registration number N49 OUW and PC Heatley, who was the operating officer in the car. PC Collier and Heatley made efforts to stop the deceased. The Court was informed that the trigger for their efforts was the excessive speed of the motorcycle. A pursuit ensued over a distance of approximately three miles, which lasted approximately three minutes. At a left-hand bend where Royal College Street, NW1, meets St Pancras Way and Farrier Street, the deceased's motorcycle left the carriageway and struck a bollard in the central reservation, as a result of which the deceased sustained fatal injuries. It is the claimant's case that the central issue is whether there was contact between the police car and the motorcycle prior to the collision with the bollard. The inquest into the death of the deceased was held at St Pancras Coroners' Court on 18 February 1998 before a jury who returned an open verdict. The claimant was not legally represented at the inquest.

The claimant submits that a new inquest should be ordered on three grounds: i) Irregularity of proceedings - The claimant did not receive disclosure of witness statements prior to the inquest despite a request for the same. Neither the claimant nor the jury were aware that PC Collier and PC Heatley had given identical statements five days following the fatal incident. A relevant witness was unable to attend due to ill health; ii) Insufficiency of inquiry - There were failures: a) to test the police vehicle at the speed at which it was travelling at the time of death in order to replicate the tyre marks found at the scene; b) to forensically examine the damage to the police vehicle which could have been caused by contact with the motorcycle driven by the deceased. iii) New evidence has become available which was not known at the time of the original inquest.

Conclusion: The claimant did not have the benefit of legal representation at the inquest into the death of her husband. Her request for disclosure of statements in advance of the inquest had been refused. It was clear from her questioning of PC Lamb that the case put forward on behalf of the deceased was that he was entering the left bend from College Road but was unable to lean into the bend to safely navigate it because of the presence of the police vehicle on his nearside, at some point there was contact between the two vehicles. PC Collier and Heatley deny this version of events. The evidence of the driver of the police vehicle and his passenger was critical. The fact that the two police officers had made, in effect, identical statements was a matter upon which each could and should have been questioned so as to test the credibility and veracity of each account, in particular as to speed, distance and sequencing. One independent witness provided two statements which, on their face, could be taken as supporting the assertion of speed and contact between the two vehicles. Her statements were read, no opportunity was afforded to the unrepresented claimant to adjourn the proceedings to permit Miss McDine to attend. In my judgment, upon these two grounds alone, there were irregularities in the proceedings, the result of which was to deprive the

claimant of an informed opportunity to question each police officer as to his account of the pursuit and the collision and to elicit in oral form the evidence of Miss McDine.

The subsequent reports of Mr Cox and Dr Searle cast doubts upon the findings of PC McCarthy, PC Lamb and Mr David Turner as to the speed and direction of the police vehicle and whether there was contact between the police vehicle and the motorcycle. The opinions of Mr Cox and Dr Searle are relevant to the fundamental issue of how the fatal accident occurred. Both reports, and that of Superintendent Light, comment upon the adequacy of the original police investigation. The three reports are all relevant new evidence which was not available at the time of the original inquest. It is to the credit of the claimant, who has pursued her concerns with conspicuous tenacity, that Mr Cox's report was finally disclosed and a meeting was held with Superintendent Light.

The reports also identify the inadequacy of the forensic testing carried out prior to the original inquest which relates to Ground Two, namely the insufficiency of inquiry. It has not been suggested that these are not valid concerns, the point that is made is that neither vehicle is available for further forensic testing. That may be, but it does not answer the point that at the original inquiry there was an insufficiency of inquiry by reason of the inadequate forensic testing.

The question to be answered is whether it is in the interests of justice for a fresh inquest to be ordered? By reason of my findings as to the irregularity in the proceedings, the insufficiency of inquiry and the emergence of relevant new evidence, the question has to be answered in the affirmative. In reaching this conclusion I take account of the considerable lapse of time which has occurred since the original inquest which brings with it the uncertainty of the availability of relevant witnesses (paragraph 34 above) and what effect the years will have upon their recollection of events. Notwithstanding these matters the cumulative effect of the significant deficiencies in the original process provide a powerful weight to set against the factors resulting from the lapse of time. The result being a balance decisively falling in favour of a new inquest.

A jury at a new inquest will be better informed to enable it to arrive at a verdict by reason of properly informed questioning of relevant witnesses, objective and independent assessment of the forensic testing and the original police investigation. It will be open to a new jury to return a narrative verdict which, it is to be hoped, would bring a measure of closure for the claimant, who for twenty years has fought tenaciously on behalf of her husband.

Accordingly, in my view, the original inquest touching upon the death of Mr Onese Power must be quashed and a fresh inquest held into his death.

CPS Confirm Decision Not to Charge Officers Involved in Death of Sean Rigg

INQUEST: For the second time, the Crown Prosecution Service (CPS) has decided not to charge officers of any criminal offences in relation to the death of Sean Rigg, following a review of the original decision. Sean, aged 40, was suffering mental ill health at the time of his arrest and was restrained by Metropolitan Police Officers. He died at Brixton police station on 21 August 2008. Restraint by police officers was deemed 'unnecessary' and 'unsuitable' by an inquest jury in 2012, and the NHS trust tasked with Sean's care were criticised. His case has been significant for civil rights and justice campaigners, and was a catalyst for the recent Independent review of deaths and serious incidents in police custody by Dame Elish Angiolini.

Following a review by Dr Silvia Casale in 2013 which was highly critical of the Independent Police Complaints Commission's (IPCC) original findings, the IPCC reopened their investigation into Sean's death. Criminal charges were then considered by the CPS. However, in September 2016 they announced their original decision not to prosecute any officers,

despite the length of time Sean was held in the prone position, the decision to leave him in the back of the police van and the failure to provide him with emergency medical attention.

Criminal charges were considered again following a Victim's Right to Review claim brought by the family. The CPS considered five officers involved in Sean's death for offences of unlawful act manslaughter, gross negligence manslaughter, misconduct in a public office, perverting the course of justice, perjury and an offence under the Health and Safety at Work Act. They today confirmed their conclusion that there is "insufficient evidence to provide a realistic prospect of conviction" for any of these charges. Officers are being considered for misconduct proceedings through the police, which can be recommended by the IPCC.

Marcia Rigg, Sean's sister, said on behalf of the Rigg family: "It is shameful and unhelpful that the CPS should yet again find there is insufficient evidence for a jury to convict police officers who are so evidently guilty. The CPS seem to apply an impossibly high evidential test when deciding whether to prosecute police officers, setting the bar so high that one cannot reach it. This is in stark contrast to the approach taken to prosecuting members of the public, whom the police are meant to serve. Almost 10 years on, our quest for justice has achieved no accountability whatsoever of the wrong committed against Sean by police officers. The Rigg family are naturally disappointed and Sean is forever missed by us and the community. Any hope has been crushed, unnecessarily. Lessons must be learnt, but without accountability lessons will never be achieved."

D*eborah Coles, Director of INQUEST* said: "For the family of Sean Rigg, the decision is bitter and painful. It stands at odds with the inquest evidence and findings. Excessive use of force against black people and those with mental ill health continues because of failing systems of investigation, oversight and accountability. Preventable police deaths go criminally unchallenged and police officers continue to be shielded from justice. Until this changes families will continue to see these decisions as further evidence that police related deaths are tolerated and officers guaranteed impunity."

Dramatic Decline in Access to Legal Help for Immigration Detainees

Caterina Franchi, 'The Justice Gap': The number of immigration detainees with no access to legal representation while in detention has tripled in the past few months, a new survey published by the immigration detention charity BID has indicated. Of the 101 detainees interviewed by the charity as many as one in three had never had a legal representative while in detention, compared to one in 10 in the spring of 2017. Almost half of the detainees surveyed mentioned money as the reason they were unable to access legal representation and almost two-thirds were forced to work on their own immigration case with no assistance. The numbers are even more alarming for immigration detainees held in prison. Less than 10% of those detained in prison under immigration powers had received independent legal advice on their immigration issues while a prisoner.

Lack of legal representation in detention not only means that detainees are at risk of being removed to dangerous countries without the possibility to argue their case, but they are also deprived of their liberty, often indefinitely. They are separated from their family, sometimes unlawfully, and do not know how to apply for bail or challenge their detention.

Commenting on the findings, Celia Clarke, BID's Director, said that the numbers have been the worse the charity has seen in 7 years of interviewing detainees. 'It is disgraceful that nearly a third of our sample had never had legal representation while in immigration detention,' she said. 'Everyone held in detention should be able to access legal advice and representation, particularly as people's liberty and family life is at stake. A system which requires people to nav-

igate their way through complex immigration law without legal assistance is unfair and cruel.'

On top of poor access to services, the survey highlights the difficulties of finding a lawyer with capacity to take on new cases on legal aid. 'I have seen three solicitors,' said one of the detainees interviewed. 'They tell me what I am doing is correct and to keep trying to get myself a solicitor. The last one said that I need to wait two weeks and then he might have space for my case. I am still waiting.'

As many as 30,000 people entered immigration detention last year but less than one in four detainees were offered free representation on Legal Aid after an initial advice appointment.

Since the implementation of the legal aid cuts under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act in 2012, there has been a dramatic decline in the number of people who are able to access free legal representation whilst in detention and whose case can be funded under the legal aid scheme. The cuts have denied proper access to justice to thousands of detainees every year, something that BID deems 'simply unacceptable' when it comes to depriving people of their liberty.

When Can a Closed Material Procedure Be Used?

The Justice and Security Act 2013 introduced the idea of Closed Material Proceedings (CMP) to civil litigation in a significant way for the first time. This is a procedure (which had previously only used in a small number of specialist tribunals) whereby all or part of a claim can be heard in closed proceedings in order for the court to consider material which, if disclosed publicly, would risk harming national security. These hearings exclude even the claimant, who is represented instead by a Special Advocate who takes instructions and then is unable to speak to his or her client again once they have seen the sensitive material.

This system is obviously far from ideal. Indeed it is a major deviation from the usual (and very important) principle that justice must not only be done, but be seen to be done. It was introduced because the alternative in some cases involving national security matters was no justice at all. But it must be used sparingly. In particular, the 2013 Act allows its use only in civil litigation and not in "proceedings in a criminal cause or matter" (section 6(11)). The question that the Divisional Court had to consider in this case is how wide that exception for criminal matters should be.

Background: The Claimants' claim is that they were the victims of the infamous 'extraordinary rendition' programme run by the US intelligence agencies as part of the war on terror. They allege that they were 'rendered' from Thailand to Libya, where they were unlawfully detained, tortured and threatened with execution, and they are suing a number of UK government figures who they say were complicit in, and indeed instrumental in arranging, their rendition.

Parallel to those civil proceedings, in January 2012 a criminal investigation began into complaints of ill-treatment by detainees (including the Claimants) with a view to considering whether there should be a prosecution for misconduct in public office. However, on 9 June 2016 the Crown Prosecution Service decided not to prosecute. The Claimants invoked their Victims Right to Review, but on 5 August 2016 the CPS Director of Legal Services wrote to them confirming the original decision not to bring any charges.

The Claimants were bitterly disappointed by this and launched a judicial review of the decision not to prosecute. The judicial review application was the claim to which this judgment relates. In the course of it, the Foreign Secretary applied under s.6 of the 2013 Act for a CMP hearing in order for the court to consider sensitive material. The Claimants' objected to this, on the basis that the judicial review constituted a 'criminal cause or matter' and therefore the court had no jurisdiction to allow CMP.

Decision: The Divisional Court conducted an exhaustive analysis of the law on what amounts to a criminal cause as opposed to a civil one. However, the Court's conclusion was eventually that most of this case-law did not assist, because it was in the context of criminal appeals, and the phrase 'criminal cause or matter' can have different meanings in different statutes! Ultimately, the Court decided that whilst the judicial review application could be seen as proceedings concerning a criminal cause or matter, it was certainly not proceedings in a criminal cause or matter. The Court held that there was jurisdiction to consider the Foreign Secretary's CMP application. And so the litigation continues…

Comment: The most notable point in this case (and the most interesting from the standpoint of this blog) is the comment made by the Divisional Court about the tension between openness and justice created by national security concerns and the CMP process. The Court noted that: As Mr Eadie recognises, there is a paradox here. The effect of the extension of the JSA 2013 to proceedings such as these is that the executive, in the form of the prosecuting authorities, can be held to account by judicial process. What is described by the Claimants as an encroachment on their fundamental rights in fact enfranchises informed and detailed scrutiny by the Courts, which would otherwise be impossible.

This gets to the nub of the issue. CMP is a restriction on basic rights to a fair trial, but in order to achieve a fairer trial than would otherwise be possible. As the court noted, in criminal matters "closed proceedings might be likely to breach Article 6, as well as long-established common law principles", which is why they are exempted from the 2013 Act. But in civil litigation, even civil litigation which concerns criminal matters, closed hearings are on occasion the better of two evils. *Alasdair Henderson, UK Human Rights Blog*

West Yorkshire Police Officer Dismissed Following IPCC Investigation

A West Yorkshire Police constable has been dismissed following an IPCC investigation into the preparation of statements, allegations of collusion between officers, and whether two officers provided false evidence, while under oath, during a criminal trial. PC Abubakar Saddique was one of two officers who arrested a man, on suspicion of theft, in November 2015. The man was later charged and put on trial in February 2016. Wakefield Magistrates Court dismissed the case against the man, following allegations of collusion during the court proceedings against PC Saddique and one other officer. An adverse judicial finding was made against West Yorkshire Police following the collapse of the trial, resulting in a referral to the IPCC in July 2016.

The IPCC independent investigation examined the witness statements the two officers provided as evidence to the court, as the statements were similar despite both officers claiming not have seen each other's accounts. The IPCC Investigator found evidence amounting to a case to answer for gross misconduct by the two officers. In February this year, a file of evidence was submitted to the CPS who found insufficient evidence to charge the officers with attempting to pervert the course of justice, perjury or misconduct in public office. The final report was shared with West Yorkshire Police in September and the force agreed with the findings. The case to answer for gross misconduct for PC Saddique was found proven by the panel and he was dismissed without notice on 5 December 2017. The case against the other officer was found not proven.

IPCC Operations Manager Ian Tolan said: "This was a serious matter in which the police officers' actions resulted in the dismissal of criminal court proceedings. Our investigation looked carefully at the evidence the officers provided to the court and their testimony; finding little doubt that there was some level of collusion given the similarities in their statements, which included the same errors. The officers have been held to account, as a result of our investigation, which highlights the importance of officers ensuring their statements meet the levels of honesty and integrity the public expects."

Two Families Win Right to New Inquest into Deaths

1. Gabriel Kovari died on 28th August 2014, aged twenty-two. Daniel Whitworth died on 20th September 2014, aged twenty-one. Inquests into both deaths were conducted by Her Majesty's Senior Coroner for the Eastern Area of Greater London (hereinafter referred to for convenience as the "Coroner"). On 19th June 2015, she reached an open conclusion in respect of each death. Subsequent to the hearing of those inquests, one Stephen Port was prosecuted for the murders of Mr Kovari and Mr Whitworth and also for the murders of two other young men, Mr Anthony Walgate and Mr Jack Taylor. After a trial before Mr Justice Openshaw and a jury he was convicted of all four crimes. On 25th November 2016, he was sentenced to life imprisonment with a whole life order.

2. The Coroner now applies pursuant to s.13 of the Coroners Act 1988 for an order that the original inquisition be quashed and a fresh inquest be held in relation to both Mr Kovari and Mr Whitworth. That application is supported by the bereaved families of Messrs Kovari and Whitworth (to whom I shall refer for convenience as the "families").

3. Summarising the written submissions in two sentences, the Coroner submits that it is necessary and desirable in the interests of justice for fresh inquests to be held because further evidence as to the deaths is now available. The families support that submission, and have further submitted in writing that fresh inquests are also necessary and desirable because the initial police investigation can now be seen to have been insufficient.

4. Discussion: Applying the principles so clearly stated by Lord Judge it is in my judgment plain that it is both necessary and desirable in the public interest that fresh inquests should be conducted into the deaths of Mr Kovari and Mr Whitworth. The discovery by the Metropolitan Police of new facts and evidence makes it clear that the evidence heard by the Coroner was insufficient to give her the full picture which is now available as to the circumstances of the deaths. For that reason, and through no fault of the Coroner, her investigation was insufficient. Both the public interest and the interests of the bereaved families require that the evidence now available as to the circumstances of the deaths should be heard. Although it is not essential on this application for the Coroner to show that the conclusions reached at a fresh inquest are likely to be different, the verdicts of the jury of the criminal trial show that different conclusions can confidently be expected.

5. On the face of it, it is surprising that the initial police investigation revealed so little of the full picture and appears to have led quite quickly to a conclusion that there was no evidence of any crime having been committed by any person still living. I agree with Mr Thomas' written submission that the information placed before this court gives rise to a question why the original investigation did not discover more than it appears to have done. It would, however, be wrong for me on the hearing of this application to express any view one way or the other as to whether such investigation is necessary and appropriate, or as to the scope of a fresh inquest generally. Those are decisions for the coroner charged with the duty of hearing the fresh inquests. I therefore say nothing about them. Mr Thomas, in his oral submissions, helpfully made clear that he recognises that those are decisions for the coroner at the fresh inquests and he was content to support the application solely on the ground put forward by Mr Pleeth on behalf of the Coroner.

6. I conclude, on the basis of the fresh evidence which is now available, and on the basis that the evidence before the Coroner at the original inquests can now be seen to have been inadequate to permit a sufficient investigation into the deaths, that this application should be granted. If my Lord agrees, I would therefore make an order in the terms of the draft helpfully prepared by counsel and order that the inquisitions dated 19th June 2015, in relation to the

inquest and conclusions into the deaths of Mr Daniel Whitworth and Mr Gabriel Kovari be quashed; that the applicant or such Assistant Coroner as may hereafter be appointed in these matters do convene a fresh investigation into the deaths of Mr Whitworth and Mr Kovari; and that there be no order as to costs.

7. I conclude by making this observation, conscious that the court has before it today the inquests touching the deaths of Mr Kovari and Mr. Whitworth but not the inquests touching the deaths of Mr Walgate and Mr Taylor. As I have indicated, counsel have informed the court that all concerned in relation to the four inquests would intend that the suspended inquests into the deaths of Messrs Walgate and Taylor should proceed before the same coroner and at the same time as the fresh inquests into the deaths of Messrs Kovari and Whitworth. That seems to me to be an eminently sensible course. This court is not invited today to make any order about it, but as Mr Thomas has explained, the Chief Coroner would, if necessary, upon an application made to him by an interested party, have the power to give directions to bring about that result. It seems, however, that no such application will be needed because it seems to be generally recognised that all four inquests should be heard together.

Court Grants Leave to Challenge Terrorism Travel Notification Requirements

The Divisional Court, sitting in Belfast, Friday 8th December, granted leave to challenge the Counter-Terrorism Foreign Travel Notifications. Anthony John McDonnell (“the applicant”) is an Irish citizen resident in Northern Ireland. On 4 December 2013 he was convicted of five counts of the possession of car registration numbers of police officers, contrary to s.58(1)(b) of the Terrorism Act 2000. A determinate custodial sentence (DCS) of three years and six months was imposed, of which one year and nine months was to be served in custody, and one year and nine months on licence, subject to conditions imposed on his release. By virtue of that conviction, the applicant became subject to notification requirements pursuant to Part 4 of the 2008 Act and regulations 3 and 4 of the Counter Terrorism Act (Foreign Travel Notification Requirements) Regulations (2009). He is subject to such requirements until 2023.

The notification requirements are an automatic requirement for persons aged 16 or over when they are convicted of certain terrorism offences or offences with terrorist connection, and are given a ‘relevant’ sentence. The requirements are not dependent on an order of the Court, and neither the Court nor the police have a discretion imposing them. Similarly the period the convicted person is subject to the requirements as set out in the 2008 Act, and again there is no discretion vested in the Court or the police as to the length of time during which the notification is to be made. The requirements as they relate to the applicant are that: • He must give notice to the police seven days in advance of any proposed trip out of the United Kingdom for a period of three days or more. • He must give notice of his return within three days to the police. • The above notices must be made in person at a police station within his local policing area.

Failure to comply is a criminal offence. The applicant, for family contact reasons, visits the Republic of Ireland. These trips appear to have been undertaken without any problem for some considerable time, but in June 2017 there was difficulty in the police recording his return. The applicant seeks inter alia a declaration that the automatic imposition of foreign travel notification requirements is unlawful as it is contrary to his right of free movement within the EU, and the continuing imposition of such requirements is unlawful absent an individual assessment of his circumstances by the State which establishes that he constitutes a genuine, present and sufficiently serious threat to society.

By the imposition of a DCS, the court determined that the applicant was not, at the date of sentencing, 'dangerous', namely that he was not considered a significant risk to members of the public of serious harm by the commission by him of further specified offences (including offences under the Terrorism Act 2000). He was released on licence on 2 October 2014 subject to a series of conditions including to permanently reside at an address approved by his probation officer; not to travel outside the United Kingdom without the prior permission of his probation officer; not to behave in a way that would undermine the purposes of release on licence, which are the protection of the public, the prevention of reoffending and the rehabilitation of the offender; and if he poses a risk of harm to the protection of the public he could be recalled. The licence provided for its expiry on the 3 July 2016.

The applicant was not recalled to prison during his licence term, and there is no evidence before the court as to any failure on his part to comply with his licence conditions, or that he behaved in any way which posed a risk of harm to the protection of the public. It was accepted that no assessment was carried out as to the risk, if any, which he poses to the public, neither in respect of issues of terrorism, or at all. It was also accepted that since his release he has complied with all conditions imposed on him in respect of the notification requirements.

The Divisional Court said that the applicant's right of freedom of movement is not absolute but subject to restrictions when the Member State seeks to show measures are required on grounds of public policy or public security. If so established, such restrictions are required to be proportionate and not contrary to the Charter. The applicant submitted that there must not be a blanket approach to a particular individual, but rather that there must be a case by case assessment in which all relevant circumstances must be considered, and that the threat must be genuine, real and current. It was also argued that there should have been a reassessment during the statutory period of the restrictions, in the case of this applicant, during a period of 10 years. During custody the restrictions did not apply, and during the applicant's licence period the restrictions imposed by his licence conditions ran in parallel with the notification restrictions, in that not only was he required to comply with those restrictions, he required the permission of the probation officer to leave the jurisdiction - and he would have had to give details of any trip, and his return. The applicant argued, however, that the restrictions are a continuing breach of his freedom of movement, and that if the provisions are unlawful then the lapse of time cannot vest the provisions with legitimacy.

The Divisional Court said it was satisfied that leave should be granted against the Home Secretary on the ground that the requirement for notification is unlawful without any assessment or reassessment of any offender as representing a genuine and real current risk.

Robert Hamill 's Mother to Get Her Day in Court

[Robert Hamill was an Irish Catholic civilian who was beaten to death by a loyalist mob in Portadown, County Armagh, Northern Ireland. Hamill and his friends were attacked on 27 April 1997 on the town's main street. It has been claimed that the local Royal Ulster Constabulary (RUC), parked a short distance away, did nothing to stop the attack.]

The Divisional Court, sitting today in Belfast, Friday 8th December 2017, quashed a decision of a District Judge not to commit three people for trial on charges of perverting the course of justice and conspiring to give false information to police in connection with the investigation into the death of Robert Hamill. The Court directed that a fresh preliminary inquiry should be held.

The proceedings were brought by Jessica Hamill ("the applicant"), the mother of

Robert Hamill who died on 8 May 1997 following an assault in Portadown on 27 April 1997. She was seeking to quash the decision of a District Judge (Magistrates' Courts) ("District Judge") on 3 September 2014, declining to commit Robert Atkinson, Eleanor Atkinson and Kenneth Hanvey for trial in the Crown Court.

The District Judge, on the basis of his assessment of the credibility of the evidence of a key prosecution witness, Andrea Jones, held that there was insufficient evidence to put the accused on trial. The applicant claims that the District Judge failed to consider all of the evidence against the defendants neglecting to take into account three matters which supported the central evidence of Andrea Jones that there was a conspiracy involving the defendants. Those matters were (a) the conviction of Andrea Jones for an offence in relation to giving false information to the police as to the telephone call; (b) the conviction of her then husband Michael McKee for the same offence; and (c) evidence in relation to a telephone call to a taxi company and the records of the taxi company which supported Andrea Jones' evidence that she was not at the Atkinsons' home on the night of 26 – 27 April 2017 but rather was at her own home.

Conclusion: The Divisional Court quashed the District Judge's decision of 3 September 2014 and remitted the case with a direction that the preliminary inquiry commence afresh before another judge who should feel free to make decisions on the basis of the evidence without regard to any conclusions previously reached.

A Quick Chat with the Police – Or an Interview? You Need a Lawyer

Gemma Blythe, Tuckers Solicitors: When the police investigate a criminal offence, it may not be necessary to formally arrest a suspect. In the past, it would be common practice that those being questioned by the police were arrested. With the introduction of the 28-day bail limit, itis now common for the police to ask a suspect to attend the police station voluntarily, rather than make a formal arrest. This may come by way of a request from the police asking for a 'quick chat'. In these circumstances, the suspect may voluntarily attend the police station or another venue, such as the scene of the crime or even the suspect's home address, to assist the police with their enquiries. The benefit of a voluntary interview is that you can negotiate a mutually convenient venue, date and time with the officer, and there will be no delays, particularly if you instruct a solicitor beforehand. However, there can be disadvantages for those who are unsure of exactly what being a volunteer entails.

Under the Police and Evidence Act (PACE) 1984, the suspect is entitled to leave at any time unless placed under arrest, and shall be informed once they are under arrest if a decision is taken by a constable to prevent them from leaving. All suspects who are interviewed, whether arrested or voluntary, are entitled to free and independent legal advice. Voluntary interviews should not be at the expense of legal advice. Understandably, particularly if they are sitting in their own home, a volunteer may not feel that the interview is too serious and that the police are simply investigating, rather than questioning them as a suspect. For this reason, they may also be reluctant to obtain legal advice. By being asked to participate in a voluntarily interview, suspects should be under no illusion that the matter is less serious or informal. The legal status of a voluntary interview is the same as if the suspect had been arrested. If the matter progresses to Court, the interview can, of course, be used in evidence.

Whilst the choice is that of the suspect whether they wish to exercise their rights, it is of upmost importance that they are advised of those rights. As in any interview, advice from a solicitor is always advised. It is completely free for anyone who is questioned by the police. It is vital that the suspect is aware of their options in interview and possible outcomes, such as a charge.

A government consultation has closed. The consultation related to Codes C, E, F and H which refer to detention, treatment and questioning of persons detained, and audio and visual recording of interviews. Under Code C, the proposals are that for voluntary suspect interviews, the police should set out in full the rights, entitlements and safeguards that apply and the procedure to be followed when arranging for the interview to take place. Any PACE developments whereby safeguards are put in place to ensure that suspects are more informed of their rights are welcomed. It is vital that suspects, no matter whether arrested or attending an interview as a volunteer, should seek free and independent legal advice. The changes would take account of concerns that suspects might not realise that a voluntary interview is just as serious and important as being interviewed after arrest. This applies particularly when the interview takes place in the suspect's own home rather than at a police station. The approach mirrors that which is applied to detained suspects on arrival at the police station. In particular, it requires the suspect to be informed of all the rights, entitlements and safeguards that will apply before they are asked to consent to the interview and to be given a notice to explain those matters.

HMP Wormwood Scrubs – Suffering Persistent and Intractable Failings

Wormwood Scrubs, was found to be suffering from persistent and intractable failings, including high violence, drugs, chronic staff shortages and poor public protection work, according to a report by HM Inspectorate of Prisons (HMIP). The jail, holding more than 1,200 men, has been inspected three times in the last three-and-a-half years. The inspections in May 2014 and December 2015 raised "very serious concerns." This latest inspection, in July and August 2017, showed no improvement. "We report again on the intractability and persistence of failure at this prison, notwithstanding the hard work of the governor and his staff to try to make some difference." Mr Clarke said,44 recommendations from the last inspection had not been achieved.

Wormwood Scrubs is an iconic local prison serving communities in London. A key responsibility of the prison is the resettlement and reintegration of the 1,227 men it holds, with many recently remanded or sentenced and others reaching the end of their sentences. Reflecting its catchment area, the population is diverse, with over half being from a black and minority ethnic background, a third being foreign nationals, and 83 being young adults under the age of 21. It was also the case that the population presented with significant personal needs and vulnerabilities.

This announced inspection followed our previous visits in December 2015 and May 2014, and on both occasions we raised very serious concerns across our healthy prison assessments and commented on the lack of progress in improving outcomes for those detained. Following this inspection we report again on the intractability and persistence of failure at this prison, notwithstanding the hard work of the governor and his staff to try to make some difference. As we have reported before, outcomes for prisoners were not good enough in any of our assessments, and in two assessments outcomes remained poor.

The prison was still not safe enough, with high levels of often serious violence. It would be wrong to say that there had been no work to try to improve the situation, yet in our survey prisoners told us they felt less safe than at our last visit. There had also been three self-inflicted deaths since our last visit, but care for men vulnerable to self-harm was poor. Despite some efforts to improve the physical environment and offer more purposeful activity, prisoners faced real daily frustrations and the prison struggled to provide decent conditions. Equality and diversity work was poor, and too many men were locked up for significant periods of the day, often as long as 23 hours. Resettlement and offender management work was fundamentally failing and the prison was not meeting one of its key aims of supporting men to understand and address their offending behaviour and risk. The quality of public protection work was also not good enough.

Some progress had been made. Early days support had improved, and first night substance misuse support was now appropriate and safe. Oversight of the use of force was better and, while use of force was high, what we saw was proportionate. The segregation unit did reasonably well with some very challenging men. Staff-prisoner relationships remained basically sound and, in our judgement, staff were remarkably stoic despite the pressures they were under. Health care provision was reasonably good, and effort had been made to make daily routines more predictable. There were now more purposeful activity places, and leadership and management and learning outcomes had improved somewhat, although from a very low base. That said, we found 44% of prisoners locked in cell during the working day.

Some key themes were evident in the problems we saw. Staffing shortages were pervasive, and resulted in significant staff redeployment and a failure to deliver even basic services. We were told of chronic problems experienced in recruiting new staff, and a large number of more experienced staff had left. We saw large, challenging wings being run by groups of relatively junior staff, some of whom lacked the confidence to challenge the men in their care adequately. Some key contracted providers were not delivering services effectively. There were long delays in Carillion carrying out maintenance tasks, and the prison stores had not been open for many weeks, leaving staff to scavenge for many basic items needed by prisoners. The community rehabilitation company (CRC) contract had not delivered the appropriate level of resettlement work required, which meant that many men left the prison without support. It was particularly concerning that men posing high risks of harm were not being adequately managed by probation officers.

Overall, this was an extremely concerning picture, and we could see no justification as to why this poor situation had persisted since 2014. The governor and his team were, to their credit, working tirelessly to address the problems faced. Managers understood the challenges and had made some tough choices about what they could and could not do, given the multitude of problems. This was commendable. But we were not confident that they could deliver improvement to outcomes without considerable additional external support. Her Majesty's Prison and Probation Service (HMPPS) must, in our view, engage with the governor and his team to develop a recovery plan, addressing issues of resources and contractual provision, as well as areas where the current management team and staff at Wormwood Scrubs can do better. We fear that if this does not happen, the poor picture we found at this and the previous two inspections will persist. For our part, we have made far fewer recommendations in this report than normal, to ensure that the priority actions we have identified are clear and unambiguous.

Hostages: 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, 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.