Miscarriages of JusticeUK (MOJUK)
22 Berners St, Birmingham B19 2DR
Tele: 0121- 507 0844 Email: mojuk@mojuk.org.uk Web: www.mojuk.org.uk

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Criminalising the Possession of "Terrorist Propaganda": A Human Rights Analysis

Sapan Maini-Thompson, UK Human Rights Blog: The Home Office is proposing to legislate for a new criminal offence relating to the "possession of the most serious material glorifying or encouraging terrorism". This follows a suggestion made by the Chief Coroner, HHJ Mark Lucraft QC, in his report concerning the 2017 London Bridge terrorist attack. In his view, the lack of such an offence may sometimes prevent counter-terror police taking disruptive action against terror suspects, even when the extremist propaganda they possess is of the most offensive and shocking character. That propaganda might include, for instance, footage of sadistic violence. The criminal law is ultimately concerned with the prevention of harm. The normative classification of harm with a political dimension, however, engages the right to freedom of thought under Article 10 of the European Convention on Human Rights, as protected under the Human Rights Act. To ensure a proper balance is struck between protecting the public and safeguarding civil liberties, any new offence ought to satisfy a three-limb test:

It must provide a specific definition for the "most serious" category of materials which "glorify or encourage" terrorism. This should be supplemented with empirical guidance to ensure a high and objective threshold is set for criminal sanction. The mens rea requirement for the offence must be deliberate possession of harmful material, with the knowledge that said material glorifies or encourages terrorism. The standard of liability must be one of intention rather than recklessness or negligence. This would ensure that only harmful purposes are penalised. It must establish statutory defences to such possession on grounds of reasonable excuse and/or working in the public interest.

The current legal framework: Under s.58 Terrorism Act 2000, it is an offence to possess a document "likely to be useful" to a person in "committing or preparing an act of terrorism". An example is a bomb construction manual. The Counter-Terrorism and Border Security Act 2019 (CTBSA) extended the scope of the s.58 offence to viewing such documents online. Additionally, under s.2 Terrorism Act 2006, it is an offence to "disseminate" terrorist publications. But there is no offence of possessing "terrorist propaganda" material simpliciter. At present, criminal prosecutions may only rely upon such material as evidence of an "extremist mindset".

The Normative Basis For a New Offence.

The law falls short of satisfying the harm principle on two grounds: First, the possession of material which encourages or glorifies terrorism is inherently harmful. This is because in glorifying terrorism, such material is designed to outrage public decency. A comparison with pornography legislation supports this argument. Per s.62 Coroners and Justice Act 2009, it is an offence for a person to be in possession of a prohibited image of a child. Similarly, per s.63 Criminal Justice and Immigration Act 2008, it is an offence for a person to be in possession of an extreme pornographic image. The rationale for criminalising possession, therefore, is that it is reasonable to assume that certain categories of material can only have been produced to cause harm, irrespective of their wider distribution.

Second, the possession of extremist propaganda endangers the safety of the public because it might motivate an individual to commit an act of terrorism. This argument captures how terrorist propaganda may operate as a vector of radicalisation, indirectly encouraging or desensitising viewers to extremist violence. This ground is admittedly more challenging because it engages issues of causation. Nonetheless, it offers a necessary perspective on the instrumental risks posed by the possession of seriously harmful content.

Why amending the existing offence is undesirable: The scholar Stuart Macdonald has argued that even if we accept the existence of a lacuna in the law, it is not necessary to legislate for a new offence. Instead, he argues, the gap could be plugged by amending the s.58 offence so that "terrorist propaganda" may be classified as material which is "likely to be useful" to furthering a terrorist purpose. But there are both practical and normative reasons to be sceptical of this proposal. In practice, this proposed amendment would likely complicate the assessment of factual causation in criminal trials. This because it would be difficult for juries to scrutinise "usefulness" in the abstract context of propaganda and risk leaving the law unclear. The principle of fair labelling, moreover, surely requires we distinguish between the possession of terrorist propaganda, which may indirectly benefit a terrorist organisation, and the collection of information which directly assists the commission of an act of terrorism. In R v G; R v J [2009] UKHL 13, the House of Lords ruled that "to fall within [s.58], the information must, of its very nature, be designed to provide practical assistance to a person committing or preparing an act or terrorism." [43] This normative discrepancy corresponds with different levels of moral culpability. The possession of extremist propaganda, therefore, ought to be considered a separate offence.

Comparative approaches: There is international precedent for criminalising access to extremist propaganda. Following the Christ Church mosque attack in New Zealand, Australia passed the Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019. The Act creates new offences under the Criminal Code that have the effect of requiring social media platforms and other websites to expeditiously remove abhorrent violent material and refer it to the Australian Federal Police. This offence is distinguishable from that proposed by the UK Home Office insofar as it applies to internet service providers and is limited to the audio-visual content produced by the perpetrator of the abhorrent violence itself. Nonetheless, in terms of whom it regulates, the Australian law may be compared to the UK government's Online Harms White Paper which seeks to impose a "duty of care" onto social media companies to protect their users from harmful content, including terrorist propaganda.

How to ensure compliance with Article 10 ECHR: The main objection to criminalising the possession of "terrorist propaganda" is that this proposed offence risks infringing the right to receive and impart information under Article 10 ECHR. Propaganda, even if extremely harmful, remains a form of political speech. This concern is amplified by the fact that the definition of "terrorism" under the Terrorism Act 2000 is broad, covering any form of ideologically motivated violence across multiple contexts. To ensure the interference with Article 10 remains proportionate, therefore, the definition of "serious harm" must be specific and narrow in scope. Depictions of physical suffering, for example, would satisfy the objective threshold anticipated by the Chief Coroner. In Australia, the 2019 Act defines "abhorrent violent material" in terms of specific violent offences that a reasonable person would consider offensive in the circumstances. It would also be essential to have guidance with empirical examples to define "glorifying and encouraging" terrorism.

Ultimately, however, the classification of what constitutes an illegitimate purpose should be determined on grounds of criminal intent alone. The reason for why this offence should be a crime of intent can be inferred from the judgement of the Court of Appeal in the 2016 case of R v Choudhary and Rahman. That case concerned the offence of "inviting support for a proscribed organisation" under s.12 Terrorism Act 2000. This is an offence which engages

Article 10, comparable to the proposed offence of possessing extremist propaganda. In its ruling, the Court said the prohibition was a proportionate interference with the right to free speech because the "requisite intent" [70] could be established. Recklessness, therefore, is not an appropriate standard for criminalisation when applied to speech or political communication more generally. Problematically, legislative change since Choudhary has undermined the reasoning of the Court of Appeal. The CTBSA 2019 extended the s.12 offence beyond knowingly inviting support to "expressions of support" and being "reckless" as to whether they will encourage support for a proscribed group. There is a legitimate concern, therefore, that if the possession of extremist propaganda was criminalised through amendments to existing statute, the standard of recklessness might unjustly be applied to the crime of possession. This is similar to the argument which justifies not seeking to work within the parameters of s.58. It follows that the best way to safeguard proportionate interference with Article 10 is to legislate for a new offence with a clear mens rea standard of intent.

Relevant defences: There are, of course, legitimate reasons for why one might be in possession of extremist propaganda. Two obvious cases – also cited in s.58– are academic research and journalism. The offence of possession, therefore, should be subject to a defence of reasonable excuse or working in the public interest. This defence should also extend to circumstances where a person did not know, and had no reason to believe the material in their possession glorified terrorism. The new Australian statute provides for similar defences.

Conclusion: The proliferation of "terrorist propaganda" poses a major challenge to international security. There is a normative and practical case for establishing a new offence to criminalise its possession. To ensure compliance with Article 10 HRA, any new offence must be: (i) narrow in scope; (ii) limited to cases where criminal intent can be proven; and (iii) subject to a statutory defence of "reasonable excuse".

One in 10 Children in Young Offender Institutions Separated From Peers

Jon Robins, Justice Gap: Children in young offender institutions were being held in 'harmful' solitary confinement – some leaving their cells for just 15 minutes a day – according to the prison watchdog. A new report published by HM Inspectorate of Prisons found one in 10 children in YOIs were separated and that there were 'fundamental flaws' in their approach to solitary confinement. 'As a consequence of these failings most separated children experienced a regime that amounted to the widely accepted definition of solitary confinement,' it said. 'For some of these children, their solitary confinement was prolonged in nature.'

Chief inspector Peter Clarke told Radio 4's Today programme that 'the system was so badly broken' that an 'entirely new approach' was needed. The new report drew on 85 interviews with separated children which revealed 'dramatic variations' in children's experience across five young offender institutions. Such a range of approaches was 'inexplicable'given such a small custodial estate holding just over 600 children. After 21 days of separation, a YOI has to secure authorisation from the prison group director. Between May 2018 and April 2019, YOI managers had sought and secured such authorisations on 346 occasions including children who needed further authorisations at 42, 63 and 84 days.

In 2017, the High Court found the Prison Service to be in breach of its rules in a case involving a child who spent more than 100 days isolated and locked up for over 22 hours a day and sometimes for more than 15 consecutive days. As a result of this judgment, the prison service extended its rule 49 ('removal from association') oversight arrangements to all children

spending more than 22 hours a day in their cell. According to the new report, that strategy failed. According to the spring 2019 inspection around 10% of children in YOIs were separated under rule 49. 'The regime offered to most separated children was inadequate. While it tended to be better on designated segregation units, nearly all separated children spent long periods of time in their cell without any meaningful human interaction. We found children who were unable to access the very basics of everyday life, including a daily shower and telephone call. In the worst cases children left their cells for just 15 minutes a day.'

Although prison rules ban the use of separation as a punishment, almost six out of 10 children (58%) told inspectors they had been kept locked up as a punishment. At the time of the inspection in May and June last year, eight children had spent a total of 373 days in solitary confinement waiting to transfer to a hospital for treatment fortheirmental health conditions. Inspectors found children isolated in unfurnished accommodation 'solely because they had self-harmed and were passively non-compliant with staff' contrary to prison rules. At Feltham, one child who was 'in crisis' was left to lie on a mattress 'on the floor of a filthy cell for more than 22 hours a day with no meaningful contact' in direct and constant sight of an officer. The use of unfurnished 'special' accommodation was reported to be 'very high' at Feltham but rarely used elsewhere.

According to the report, the daily regime for separated children was 'poor – all children had an unpredictable and limited amount of time out of their cell'. 'In most cases, children were regularly subject to a regime that constituted solitary confinement: locked up for more than 22 hours a day, without meaningful human contact,' it continued. According to the inspectorate's survey, just over half (53%) reported getting more than two hours out of their room on a weekday and much less at weekends (17%). Several children described sleeping most of the day when separated and then staying awake at night. 'We try to just ride it out together by talking through our doors and playing I-spy,' one 16 year old told the inspectorate. 'It makes the time pass, especially at night time. I have a behaviour target to stop shouting through my door to the other boys on the unit, which I think is really unfair 'cause it is literally my only chance to chat to anyone. We're not arguing or anything, we're just chatting, having a joke and checking up on each other.'

Deaths in Prison: A National Scandal

Every four days a person takes their life in prison, and rising numbers of 'natural' and unclassified deaths are too often found to relate to serious failures in healthcare. The lack of government action on official recommendations is leading to preventable deaths. Deaths in prison: a national scandal exposes dangerous, longstanding failures across the prison estate and historically high levels of deaths in custody and offers unique insight and analysis into findings from 61 prison inquests in England and Wales in 2018 and 2019. The report details repeated safety failures including mental and physical healthcare, communication systems, emergency responses, and drugs and medication. It also looks at the wider statistics and historic context, showing the repetitive and persistent nature of such failings. With case studies of deaths and inquest findings, it tells the harrowing human stories behind the statistics (see page 9). INQUEST also details the experiences of bereaved families who struggle to access minimal legal aid for inquests, while prisons automatically receive millions in public funding.

The report sets out the following recommendations to improve safety and prevent future deaths: 1. Halt prison building, commit to an immediate reduction in the prison population and divert people away from the criminal justice system. 2. Prison staff, including healthcare staff, require improved training to meet minimum human rights standards to ensure the health, well-

being and safety of prisoners. 3. Ensure access to justice for bereaved families through the provision of automatic non-means tested legal aid funding for specialist legal representation to cover preparation and representation at the inquest and other legal processes. Funding should be equivalent to that enjoyed by state bodies/public authorities and corporate bodies represented. 4. Establish a 'National Oversight Mechanism' – a new and independent body tasked with the duty to collate, analyse and monitor learning and implementation arising out of post death investigations, inquiries and inquests. This body must be accountable to parliament to ensure the advantage of parliamentary oversight and debate. It should provide a role for bereaved families and community groups to voice concerns and provide a mandate for its work. 5. Ensure accountability for institutional failings that lead to deaths in prison. For example, full consideration should be given to prosecutions under the Corporate Manslaughter and Corporate Homicide Act, where ongoing failures are identified and the prison service and health providers have been forewarned. The reintroduction of The Public Authority (Accountability) Bill would also establish a statutory duty of candour on state authorities and officers and private entities.

Deborah Coles, Director of INQUEST, said: "This report exposes indefensible levels of neglect and despair in prison. Officials and Ministers repeat the empty words that 'lessons will be learned'. Yet the recommendations of coroners, the prison ombudsman and inspectorate are being systematically ignored. This is a national scandal. The personal stories of those who died show prisons failing in their duty of care towards people long failed by struggling health, education, welfare and social services. The system is also failing their families whose trauma over deaths is compounded by the struggle for truth, justice and change. In the long term, protecting both prisoners and the public from more harm will require investment in our communities, not ineffective punitive policies."

Deaths of People Following Release From Prison

In 2018/19, ten people died each week following release from prison. Every two days, someone took their own life. In the same year, one woman died every week, and half of these deaths were self-inflicted. The report, co-authored by Dr Jake Phillips of Sheffield Hallam University and Rebecca Roberts of INQUEST provides an overview of what is known about the deaths of people on post custody supervision following release from prison. It highlights the lack of visibility and policy attention given to this growing problem and calls for immediate action to ensure greater scrutiny, learning and prevention.

The report makes the following recommendations: National review: The government should proceed with its national review of deaths of people on post-release supervision in the community following a custodial sentence to establish the scale, nature and cause of the problem. Data: More detailed and accurate data should be made available along with regular reporting to the Minister responsible and Parliament alongside the publication of an annual report. Investigations: Deaths of people on post custody supervision should be investigated by an independent body with adequate resources allocated to allow this to happen. There needs to be a threshold for this with a range of factors taken into account. Improve scrutiny and learning. The Government needs to confirm oversight at a local and national level.

Deborah Coles, Director of INQUEST said: "INQUEST has become increasingly concerned about the rising numbers of deaths of people on post custody supervision. In 2018/19, ten people died each week following release from prison. Every two days, someone took their own life. In the same year, one woman died every week, and half of these deaths were self-inflicted. The figures are deeply disturbing and require urgent scrutiny, due to the current lack of independent investigation into these deaths. Without this, we cannot fully understand what is happening or how it could be addressed. What is clear however is that people are being released into failing support systems, poverty, homelessness and an absence of services for mental health and addictions. This is state abandonment. The silence, inaction and institutional indifference surrounding deaths of people following release from prison must end."

Countering Terrorism Statement by Priti Patel

The Government's first priority is to keep families, communities and our country safe. Following the terrorist attack at Fishmongers' Hall in November 2019 we have reviewed our overall approach to counter-terrorism and the package of measures we have announced today represents a major shift in the UK's approach to the sentencing and management of terrorist offenders. The counter-terrorism strategy—CONTEST—was strengthened in 2018 and remains one of the most comprehensive approaches to countering terrorism in the world. But we know the threat we face will to continue to diversify and evolve as it has done in recent years and we must continually assess the effectiveness of our action and remain flexible in adapting our approach. The package announced today includes a major overhaul of prisons and probation, including tougher monitoring conditions for terrorist offenders and doubling the number of counter-terrorism probation officers. This will also include a full independent review of the multi-agency public protection arrangements. Jonathan Hall QC will lead this review. A new Counter-Terrorism (Sentencing and Release) Bill, will be introduced in the first 100 days of this Government. The Bill will include measures that will force dangerous terrorist offenders who receive extended determinate sentences to serve the whole time behind bars and will introduce a new statutory minimum sentence of 14 years in prison, which can be applied to those convicted of the most serious terrorist offences. Funding for CT policing will also grow to £906 million in 2020-21, a £90 million year-on-year increase. The money will support and maintain the record high numbers of ongoing counter-terrorism policing investigations and ensure a swift and effective response to the threat. The Government will also review the support available to victims of terrorism, including families and loved ones, and immediately invest £500,000 to increase the support provided by the victims of terrorism unit, to ensure more victims get the support and advice they need, faster. This package of measures sets out how we will continue to build on the UK's formidable capabilities, experience and expertise to tackle the growing and changing threat from terrorism in all its forms.

High Court Rules Gypsies/Travellers Have 'Enshrined Freedom' to Move From Place to Place

The Court of Appeal today, Tuesday 21st January 2020, ruled that Gypsies and Travellers have an "enshrined freedom" to move from one place to another and that an injunction to prevent camping on public land would breach the rights of the communities it targeted. Bromley Council sought the injunction, which was rejected by the High Court in May 2019, after an intervention by community group London Gypsies and Travellers. The Court of Appeal upheld that decision and highlighted that while numerous injunctions have been granted in recent years, this was the first time one has been challenged in proceedings that included representatives of the Gypsy and Traveller community. Fourteen councils in and around London have already obtained injunctions, breach of which may be punished with fines, imprisonment or the seizure of property of Gypsies and Travellers if they camp on public land.

Debby Kennett, CEO of London Gypsies and Travellers, said: "We are extremely pleased with this result and proud to have been involved in such an important case which advances the recognition and protection of the nomadic way of life in the UK. The judgment sets a high

standard for councils seeking injunctions and stresses the need to put in place adequate and safe provision. We are keen to work with councils to explore alternatives to evictions and injunctions, such as negotiated stopping."

Sam Grant, policy and campaigns manager at Liberty, said: "This is a major victory for the Gypsy, Roma and Traveller communities in the face of increasing hostility from local and national governments. If you're a member of these communities, these injunctions, like the government's proposals to criminalise trespass, are a real threat to your entire way of life. It's now up to the government to provide adequate safe sites for encampments to help these communities live and reduce the discrimination they face."

Lord Justice Haddon-Cave, summing up: Whilst I do not accept the written submissions produced on behalf of the third intervener, to the general effect that this kind of injunction should never be granted, the following summary of the points noted above may be a useful guide: a) When injunction orders are sought against the Gypsy and Traveller community, the evidence should include what other suitable and secure alternative housing or transit sites are reasonably available. This is necessary if the nomadic lifestyle of the Gypsy and Traveller community is to have effective protection under article 8 and the Equality Act. b) If there is no alternative or transit site, no proposal for such a site, and no support for the provision of such a site, then that may weigh significantly against the proportionality of any injunction order. c) The submission that the Gypsy and Traveller community can "go elsewhere" or occupy private land is not a sufficient response, particularly when an injunction is imposed in circumstances where multiple nearby authorities are taking similar action. d) There should be a proper engagement with the Gypsy and Traveller community and an assessment of the impact of an injunction might have, taking into account their specific needs, vulnerabilities and different lifestyle. To this end, the carrying out of a substantive EIA, so far as the needs of the affected community can be identified, should be considered good practice, as is the carrying out of welfare assessments of individual members of the community (especially children) prior to the initiation of any enforcement action. e) Special consideration is to be given to the timing and manner of approaches to dealing with any unlawful settlement and as regards the arrangements for alternative pitches or housing.

Finally, it must be recognised that the cases referred to above make plain that the Gypsy and Traveller community have an enshrined freedom not to stay in one place but to move from one place to another. An injunction which prevents them from stopping at all in a defined part of the UK comprises a potential breach of both the Convention and the Equality Act, and in future should only be sought when, having taken all the steps noted above, a local authority reaches the considered view that there is no other solution to the particular problems that have arisen or are imminently likely to arise.

Proportion of UK Prisoners With Drug Problem Doubles in Five Years

The proportion of prisoners developing a drug problem in custody has more than doubled in the past five years, research suggests. The analysis of survey data from HM Inspectorate of Prisons by the thinktank Reform found that the proportion of inmates who reported developing a drug problem in prison rose 8.4 percentage points to almost 15% between 2013-14 and 2018-19. The study found that much of the estate was not equipped to disrupt the drug supply and that security standards varied from prison to prison. It pointed to the example of HMP Nottingham, a category B prison with high levels of violence and drug use. The institution received a body scanner after being given the most serious warning from the prison's inspectorate, while HMP Bedford, which received the same warning, did not.

Last year the then prisons minster, Rory Stewart, said the prisons system had been unprepared for the arrival of new psychoactive drugs such as spice and had been playing catch-up ever since. Spice, the most widely used psychoactive substance, is a liquid that can be sprayed on paper, which is then ripped up, added to roll-up cigarettes and smoked. It has been smuggled into prisons after being sprayed on children's drawings and letters. The research by Reform found prisons in poor condition, overcrowded and struggling to retain experienced staff. The report argued that the use of short-term prison sentences was counterintuitive and contributed to an overcrowding in the prison population.

Frances Perraudin, Guardian: Analysis of official figures showed the use of community sentences for minor offences had decreased 52% since 2010, despite evidence that they are more effective and around a ninth of the annual cost of prison. The thinktank recommended the Ministry of Justice consider banning or reducing the use of short custodial sentences. Aidan Shilson-Thomas, a Reform researcher and the author of the report, said: "There must always be a place in prison for those who commit serious crimes. However, prison must also be an opportunity for inmates to change their behaviour. "Stabilising the system means stemming the flow of drugs, reducing overcrowding, fixing the crumbling estate and improving officer retention. Its long-term sustainability requires a serious conversation about how many people we lock up and for how long. Failing to act will mean poorer social outcomes, more reoffending and ultimately huge costs to the taxpayer." A Ministry of Justice spokesman said: "Illicit substances pose huge challenges in our prisons which is why we are investing £100m in airport-style security – including x-ray body scanners – to stop them getting in. "This is part of our £2.75bn investment to make jails safer for offenders and staff, while working closely with healthcare providers to ensure prisoners have the support they need to live drug-free upon release."

Immigration and Article 8: what did we learn in 2019?

Michael Spencer, UK Human Rights blog: Another year passes, with another series of higher court cases on human rights in the immigration context. As in previous years, the courts in 2019 were particularly concerned with Theresa May's attempts as Home Secretary to codify the Article 8 proportionality exercise into legislation. Those changes have had a significant impact on the approach of tribunals to appeals against deportation and removal on grounds of private and family life. Judges now have to apply a series of prescribed tests under the immigration rules, before going on to consider whether there are exceptional circumstances requiring a grant of leave. The general principles having already been established by the Supreme Court (see e.g. in Agyarko [2017] UKSC 11, covered by the Blog here, KO (Nigeria) [2018] UKSC 53, covered by the Blog here, and Rhuppiah [2018] UKSC 58, covered by the Blog here), 2019 saw the Court of Appeal flesh out those principles and clarify the relevant legal tests. So, for your ease of reference, here are 10 things we learnt about human rights in the immigration context in 2019.

1. The Approach to Article 8 Proportionality is Now Settled: In GM (Sri Lanka) [2019] EWCA Civ 1630, the Court of Appeal gave a useful summary of the principles to be applied when considering the proportionality of deportation or removal under Article 8 and the Nationality and the Immigration Act 2002 ("NIAA"). These are that: (i) the legislation and rules must be construed in a way that is consistent with Article 8, (ii) the policy of the rules must be accorded "significant weight", but there must be a "limited degree of flexibility", (iii) the test to be applied outside the rules is whether a "fair balance" is struck between competing public and private interests (and not one of exceptionality), (iv) the test is to be applied on the circumstances

of the individual case evaluated "in the real world", (v) there is a need for "real evidence" and (vi) the list of relevant factors is "not closed", but is in practice "relatively well trodden" and includes personal conduct, social and economic ties and delay.

2. There is No Requirement to Give "Little Weight" to Family Life Formed While Immigration Status Was "Precarious": Also in GM (Sri Lanka), the Court of Appeal considered the approach under s117B of the Nationality, Immigration and Asylum Act 2002, which requires little weight to be given to private life while an applicant's immigration status is precarious or to family life while they are in the UK unlawfully. The Court clarified that this did not mean that little weight should be given to family life created during a precarious, but lawful, residence (e.g. where members of the family had temporary leave). The First-tier Tribunal had erred in doing so and had also failed to take into account the husband's knowledge that his immigration status placed him on a "pathway to settlement" or to treat the children's interests in that context as "paramount".

3. An "Insurmountable Obstacle" to Return Does Not Mean an Inability to Return. In CL (India) [2019] EWCA Civ 1925, the Court suggested a three-stage approach to the insurmountable obstacles test under the Immigration Rules: (i) whether the alleged obstacle to continuing family life outside the UK amounts to a very significant difficulty, (ii) if so, whether the difficulty is one which would make it impossible for the applicant and their partner to continue family life together outside the UK and, (iii) if not, whether, taking account of any steps which could reasonably be taken to avoid or mitigate the difficulty, it would nevertheless entail very serious hardship for the applicant or their partner (or both) – [35] to [36].

4. Sensitivity to Heat Can Be An "Insurmountable Obstacle" To Return: Also in CL (India), the First-tier Tribunal had found that the appellant's British husband faced insurmountable obstacles to returning with her to India because of his age and sensitivity to hot weather. The Upper Tribunal disagreed, holding that difficulty in coping with heat cannot entail serious hardship "in a country where there is air conditioning and available urban environments built to protect people against the heat". The Court of Appeal held that both Tribunals had erred. While sensitivity to heat could constitute an insurmountable obstacle to return, all relevant factors would need to be considered on the evidence, such as the different areas of India they could live in, the average temperature across the year, the practicability of moving to a different area for part of the year and whether appliances such as air conditioning would in fact be available.

5. In Medical Cases, Article 8 is Not the Same as Article 3. In PF (Nigeria) [2019] EWCA Civ 1139, Hickinbottom LJ criticised the tendency of immigration judges to amalgamate the tests for Article 3 and Article 8 in medical cases. The tests are distinct in their nature – a claim failing in Article 3 cannot succeed under Article 8 unless there is some additional factor that specifically engages private life or the ability to form and enjoy relationships. The judge had in effect treated the Article 8 claim as the same as an Article 3 claim, but with a lower threshold, and failed to focus on the effect of the appellant's illness (sickle cell anaemia) on his children. The fact that their father will suffer more frequent or more serious crises or that the children will, at some stage, have to face his death abroad fell "far short of being unduly harsh, let alone a very compelling circumstance". Meanwhile, in December 2019 the Supreme Court heard the appeal in AM (Zimbabwe) as to whether the test in Article 3 medical cases should be relaxed following the Strasbourg Court's decision in Paposhvili v Belgium [2017] Imm AR 867. We covered the Court of Appeal's decision here. The Supreme Court's judgment is awaited.

6. Deportation of Foreign Criminals is About Deterrence, Not Just Risk: In MS (Philippines) [2019] UKUT 122 IAC, the Upper Tribunal considered s117(2) of the NIAA: "The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal." The Tribunal found that Parliament intended the seriousness of the offence to be the "touchstone" for assessing how strong the public interest is in a deportation. The Tribunal should not solely focus on assessing whether the appellant poses a risk to society, but should also consider aspects such as the deterrent effect of deporting serious criminals. See also Akinyemi [2019] EWCA Civ 2098, where the Court of Appeal clarified that the "public interest in the deportation of foreign criminals has a moveable rather than fixed quality" and requires flexibility when assessing the facts of any case [39].

7. A "Persistent Offender" is Unlikely to be Rehabilitated in a Matter of Months: In Binbuga [2019] EWCA Civ 551, the Court of Appeal considered the meaning of the phrase "persistent offender" for determining whether a person is a "foreign criminal" liable to deportation under s117C and D of the NIAA. The appellant had committed a burglary and a series of less serious offences as a teenager and young adult. The Tribunal had held that he was no longer a "persistent offender" because he had not committed any offences for over two years and there was evidence he had been rehabilitated. The Court of Appeal disagreed. The Tribunal had focused unduly on the current position rather than the overall picture. A persistent offender is someone who "keeps on breaking the law" (Chege [2016] Imm AR 833) and an individual may be so regarded even though "he may not have offended for some time". The Tribunal also wrongly focused on the length of time since the appellant had last offended, even though for a significant part of that period he had been in prison and the remainder on licence and under the threat of deportation. Rehabilitation could be relevant, but usually only where it is established "over a significant period of time" [46].

8. Being in Prison or a Member of a Criminal Gang Does Not Indicate "Social And Cultural Integration": The Tribunal in Binbuga had also held that the appellant was "socially and culturally integrated" into the UK in part because of his membership of a local gang, noting that gang culture although "unpleasant" is now an "accepted and widespread part of [UK] life". The Court of Appeal again disagreed. Membership of a pro-criminal gang "tells against rather than for social integration", while the latter implies an "acceptance and assumption… of the culture of the UK [and] its core values… including the principle of the rule of law". Social and cultural integration in the UK "connotes integration as a law-abiding citizen" [56-58]. At the other end of the spectrum, the Court of Appeal in CI (Nigeria) [2019] EWCA Civ 2027 held that criminal offending and imprisonment would not "ordinarily, by themselves and unless associated with the breakdown of relationships, destroy the social and cultural integration of someone whose entire social identity has been formed in the UK."

9. It is Not "Unduly Harsh" for a Child to Suffer "Normal" Emotional and Behavioural Fallout When Their Criminal Parent is Deported: In PG (Jamaica) [2019] EWCA Civ 1213, the Court of Appeal considered the exception to the rule requiring deportation of a foreign criminal where the effect on their British or settled partner or child would be "unduly harsh" (s117C5 NIAA). The Court held that this requires "a degree of harshness going beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation". Although the appellant's children would suffer "great distress" and "emotional and behavioural fallout", these were no more than the likely consequences where any foreign criminal who has a genuine and subsisting relationship with a qualifying partner and/or children is deported. It is questionable whether this is correct as a matter of law or fact. There will be some children of foreign criminals with whom they have a genuine and subsisting relationship, but who do not suffer emotionally and behaviourally as a result of their parent's deportation. In this regard, it is noted

that the bar for establishing a genuine and subsisting parental relationship is not high. To assert that all such children will suffer distress and then to require hardship going over and above that arguably sets the bar too high.

10. Immigration Law is Too Complex: Not exactly news, but in January 2019 the Law Commission published its long-awaited consultation on the simplification of the Immigration Rules. In Robinson [2019] UKSC 11, the Supreme Court welcomed this "timely" development, commenting that "the structure of both primary and secondary legislation in this field has reached such a degree of complexity that there is an urgent need to make the law and procedure clear and comprehensible" [65]. Update: the Law Commission has since published its proposals. Despite these welcome noises, 2020 looks set to bring yet more legislative complexity, including Conservative manifesto promises to "update" the Human Rights Act and to introduce an "Australian-style, points-based immigration system" (whatever that might mean). Yet another eventful year beckons for immigration practitioners and their clients.

Courtrooms Lie Empty as Trial Delays Increase

Owen Bowcott, Guardian: Backlog caused by government cuts 'undermining access to justice' in criminal courts. Courtrooms are "lying empty" and judges are being prevented from presiding over trials while the backlog of criminal cases grows longer due to government cuts, according to a report by barristers in the west of England. The number of sitting days on the Western Circuit – which includes Winchester, Southampton, Exeter and Bristol – has been cut by 15% by HM Courts and Tribunal Service in the past year causing "rocketing delays", the study finds. Some courts, it says, are booked solid – even for short trials – for the next nine months, while many cases are being adjourned and moved up to 100 miles away.

"The national average time between an offence and completion of the case in the crown court has [risen] over the last decade from 392 days in 2010 to 525 days in 2019," the report says. One unnamed resident judge quoted in the report said the restrictions were causing "considerable concern to witnesses and advocates when they have attended anticipating the trial only to find it has had to be adjourned". That was particularly "galling", the judge added, "if one of the judges is reading papers, preparing etc so as to ensure we do not exceed the limited number of sitting days. We have the court and judge available but not the sitting days within which to do the work." "Reading days are being imposed on judges to keep sitting days down," the report says. "Although the judge is paid on an annual salary, money is still being saved by not paying court staff, advocates' fees etc. Official figures for judges' reading days are not available, but it is understood that they have increased as court sitting days have been decreased."

The report, signed by Kate Brunner QC who is leader of the Western Circuit, concludes: "Judges are available, being paid, perhaps not working, while a single judge hears an overburdened list, and witnesses are told that the trial which they have already waited a year for will have to be adjourned." Amanda Pinto QC, the chair of the Bar Council representing barristers in England and Wales, said: "The problems highlighted by the Western Circuit are by no means confined to one region. This is a national issue which is fast becoming a national crisis. "Currently, crime is rising but courts are sitting empty. We are seeing an increasing time gap from an offence allegedly being committed to the end of the court case. The many months of delay and the false starts in hearing cases, are undermining effective access to justice for all those caught up in the criminal courts. This trend must be reversed. Investment must be made across the whole of the criminal justice system. With thousands more police and

many more CPS prosecutors due to be recruited and, as a result, more crime likely to be detected, investigated and prosecuted, how will the justice system cope when our courts cannot function effectively now?" The shadow minister for courts, Labour's Yasmin Qureshi MP, said: "The government is clearly letting down victims of crime. This damning report reveals the devastating effect of the Conservatives' senseless decision to cut sitting days in courts. While the backlog of cases grows and the length of cases rises, the Ministry of Justice is sticking its head in the sand. The inevitable result is that vulnerable people are forced to wait longer for justice. The government needs to immediately increase sitting days and provide the funding that is so desperately needed on the front line of our courts system."

The Ministry of Justice has denied that case backlogs are growing longer. A spokesman for HM Courts and Tribunals said: "We keep sitting days under constant review and in November 2019 we allocated an extra 700 crown court sitting days nationally for the remainder of 2019-20 in response to an increase in cases. "Since 2014, the number of outstanding cases at the crown court has decreased by around 40%, with waiting times for these at their lowest ever."

Release of Prisoners (Alteration of Relevant Proportion of Sentence)

Lord Keen of Elie: These draft instruments form part of the Government's wider plans to reform sentencing and law and order, through which we aim to strengthen public confidence in the criminal justice system. The purpose of these instruments is to ensure that serious violent and sexual offenders serve a greater proportion of their sentence in prison, and to put beyond doubt that these release provisions will apply in relation to offenders receiving consecutive sentences, ahead of further changes the Government will set out in a sentencing Bill.

Under the provisions of the Criminal Justice Act 2003, all offenders sentenced to standard determinate sentences must be automatically released halfway through their sentence. These orders move the automatic release point for the most serious offenders who receive a standard determinate sentence of seven years or more. Instead of being released at the halfway point of their sentence, they will be released after serving two-thirds of their sentence.

A key component of our criminal justice system should be transparency, but currently, a person convicted of rape and sentenced to nine years in prison will be released after only half that sentence. Victims and the general public do not understand why they should serve only half their sentence in custody. While improved communication about how a sentence is served will help, this measure aims directly to improve public confidence by making sure that serious offenders will serve longer in prison.

Some may suggest that the whole sentence should be served behind bars, but this would not serve victims' interests. It is crucial that when someone is given a custodial sentence, they spend part of this sentence under supervision in the community. The licence period has long been an integral part of the sentence, and it should remain so. It provides assurance to victims through the imposition of conditions to protect them such as non-contact conditions and exclusion zones, through supervision by the probation service and through the power to recall that offender to prison if they breach their conditions. It is also an important period for rehabilitation, giving the offender the chance to address their offending behaviour and undertake activities that can help to prevent them reoffending. So, a licence period must remain.

However, it is not in the interests of public protection that when someone has committed a serious offence for which they rightly receive a long sentence, such as grievous bodily harm with intent or rape, they are entitled to be released half way. This instrument aims to address this by moving the release point for these serious offenders so that they will serve two-thirds of their

sentence in prison and the remainder on licence. Retaining them in prison for longer will provide reassurance to victims, protect the public and restore public confidence in the administration of justice. It will also provide longer periods for these offenders to undertake rehabilitative activity in prison and prepare effectively for their release and resettlement in the community.

Automatic release from a fixed-term custodial sentence is a long-established measure. The Criminal Justice Act 1991 made a clear distinction between long-term and short-term prisoners. Short-term prisoners would be released automatically at the halfway point of their custodial sentence. Under Section 33(2) of that Act, long-term prisoners could be released automatically only at the two-thirds point of the custodial period. The 2003 Act removed this distinction between sentence lengths, requiring all standard determinate sentence prisoners to be released at the halfway point.

This order is the first step in restoring that distinction, beginning with those sentenced to standard determinate sentences of seven years or more, where the offender has been convicted of a serious sexual or violent offence, as specified in parts 1 and 2 of Schedule 15 to the 2003 Act, and for which the maximum penalty is life. Moving the release point to two-thirds for these offenders will correct what this Government consider to be an anomaly in the current sentencing and release framework.

Take the example of an offender convicted of rape. They could receive a standard determinate sentence, or, if they are determined by the courts to be dangerous, an extended determinate sentence. If they are given an extended determinate sentence with a custodial term of nine years, they could spend the whole custodial period behind bars if it was necessary for the protection of the public, but the Parole Board could consider them for release on licence after two-thirds of that period—namely, six years. However, if they were not assessed to be dangerous but had still been convicted of this very serious offence and sentenced to a standard determinate sentence of nine years, currently, they would be released after four and a half years. This measure will bring the two sentencing regimes closer into line, so that the offender could be released only after six years, ensuring that offenders committing these grave offences serve time in prison that truly reflects the severity of their crime.

We are starting with those sentenced to seven years or more because this strikes a sensible balance between catching those at the more serious end of the scale and allowing time for the change to embed sustainably. While the measures will apply to anyone sentenced to a standard determinate sentence of seven years or more for a relevant offence after the orders commence, the effects will not begin to be felt until nearly four years later—that is, until we approach the stage at which the first affected prisoners reach the halfway point of their sentence and remain in prison rather than being released. The impact will be felt gradually; our best estimates are that this will result in fewer than 50 additional people in custody by March 2024, rising to 2,000 over the course of 10 years.

The House's Secondary Legislation Scrutiny Committee has drawn attention to the impact of this measure. I am content to offer assurances that this Government will act to ensure that the additional demands on HM Prison and Probation Service will be met. We will continue to invest in our prisons, both to build the additional capacity of 10,000 places announced by the Prime Minister—as well as the 3,500 places already planned at Wellingborough, Glen Parva and Stocken—and to undertake maintenance across our prison estate to manage the anticipated increase in demand. We have also invested significantly to increase staff numbers, recruiting between October 2016 and September 2019 an additional 4,581 full-time equivalent prison officers, thereby surpassing our original target of 2,500. We will continue to recruit officers to ensure that prisons are safe and decent, and to support both the current estate and planned future additional capacity.

Our impact assessment is based on assumptions that judicial and offender behaviour will continue unchanged, although of course, that cannot be certain. We are putting in place mechanisms with our partners across the criminal justice system to monitor the impact of the additional officers and give us the ongoing and future insight necessary to allow us to plan the prison estate. As these offenders spend more of the sentence in prison, correspondingly less time will be spent under probation supervision in the community.

These measures will enable us to take swift but sustainable action ahead of the wider package of reforms that the Government intend to bring forward in the sentencing Bill. They are not retrospective and will apply only to those sentenced in England and Wales on or after 1 April 2020. Not proceeding with legislation would mean continuing with a system which fails properly to ensure that serious offenders serve sentences that reflect the gravity of their crimes and continue to be released halfway through their custodial period. In our view, that is not in the public interest, nor does it promote confidence in the justice system. I beg to move.

NHS - Victim of Price Fixing Drug Companies

Scottish Legal News: The Competition and Markets Authority (CMA) has alleged, and provisionally found, that the agreement between Aspen, Tiofarma and Amilco contributed to the price of fludrocortisone acetate tablets supplied to the NHS increasing by up to 1,800 per cent. Fludrocortisone is a life-saving medicine that thousands of patients rely on to treat adrenal insufficiency, commonly known as Addison's Disease. Drug company Tiofarma has admitted that it took part in an agreement that resulted in significant price hikes for a life-saving medicine. The development means that two of the three companies under investigation by the Competition and Markets Authority (CMA) have now admitted to an allegation that they illegally took part in an anti-competitive agreement. In October 2019, the CMA issued a 'statement of objections' provisionally finding that the three suppliers had broken the law. The CMA's provisional finding was that the agreement involved Tiofarma and Amilco staying out of the UK fludrocortisone market so that Aspen could maintain its position as the sole UK supplier.

The CMA also provisionally found that, in exchange, Tiofarma was given the right to be the sole manufacturer of the drug for direct sale in the UK, and Amilco received a 30 per cent share of the increased prices that Aspen was able to charge. By the time the CMA issued its 'statement of objections', Aspen had already admitted its part in the agreement and agreed to pay a maximum fine of £2.1 million if there is a formal final decision that the law has been broken Aspen has also made a payment of £8m in compensation to the NHS as part of a package to address the CMA's wider concerns about its sale of fludrocortisone. Tiofarma has now agreed to pay a maximum fine of £186,000 if there is a formal final decision that the law has been broken. The third company, Amilco, has made no admission of liability and the CMA's probe is ongoing.

Fight Night at the Opera

A lawyer has been forced to pay over £2,000 after a bust-up in the front row of an opera house. Matthew Feargrieve, a solicitor specialising in corporate and investment funds law, was sentenced this week after being found guilty of common assault last month, MyLondon reports. He was found to have punched fashion designer Ulrich Engler "at least once" after he took a seat next to Mr Feargrieve's wife. Sentencing him in City of London Magistrates' Court, District Judge John Zani told Mr Feargrieve: "It was excessive. It should not have happened. You are an experienced, professional man and you should know how to behave." Mr Feargrieve was fined

£900 and ordered to pay £775 in costs, £500 in compensation and a £90 victim surcharge. Mr Engler earlier told the court that he had moved from his second-row seat to a vacant front-row seat in a previous performance in Royal Opera House and decided to do so again. He said asked Catherine Chandler if he could take the empty seat next to her and she said no, but admitted that she had not paid for it, so he moved into it anyway. He removed Ms Chandler's coat from the seat and put it on her lap and Mr Feargrieve then leaned over her and began hitting his shoulder, The Guardian reports. Mr Engler was then arrested and temporarily banned from the opera house, though the case against him was dropped within weeks.

More Than 300 Human Rights Activists Were Killed In 2019

Nina Lakhani, Guardian: More than 300 human rights defenders working to protect the environment, free speech, LGBTQ+ rights and indigenous lands in 31 countries were killed in 2019, a new report reveals. Two-thirds of the total killings took place in Latin America where impunity from prosecution is the norm. Colombia, where targeted violence against community leaders opposing environmentally destructive mega-projects has spiraled since the 2016 peace accords, was the bloodiest nation with 106 murders in 2019. The Philippines was the second deadliest country with 43 killings, followed by Honduras, Brazil and Mexico.

2019 was characterized by waves of social uprisings demanding political and economic changes across the globe from Iraq and Lebanon in the Middle East to Hong Kong and India in Asia and Chile in the Americas. The report by Front Line Defenders (FLD) details the physical assaults, defamation campaigns, digital security threats, judicial harassment, and gender-based attacks faced by human rights defenders across the world, who were on the frontline of protests against deep seated inequalities, corruption and authoritarianism. In the cases for which the data is available, the report found: 85% of those killed last year had previously been threatened either individually or as part of the community or group in which they worked. 13% of those reported killed were women. 40% of those killed worked on land, indigenous peoples and environmental issues.

In nearly all countries that experienced mass protests last year, human rights defenders – who mobilized marches, documented police and military abuses, and helped citizens who were injured or arrested – were specifically targeted. For instance, in Chile, in the biggest anti-government protests since the end of the Augusto Pinochet dictatorship, at least 23 people were killed and 2,300 injured, with scores blinded by non-lethal projectiles. In Iraq, where anti-corruption protests during October and November left more than 300 people dead, Saba Al Mahdawi was abducted and held for nearly two weeks by unidentified militants. She was most likely targeted as a result of her work providing food, water and medical aid to injured protesters. Honduras, a key geopolitical US ally, has been one of the most dangerous countries in the world to be a woman, lawyer, journalist and land or environmental defender since the 2009 military-backed coup unleashed a wave of unchecked violence. Last year, targeted killings in the Central American country increased fourfold compared to 2018, as tens of thousands of people fled a toxic mix of violence, poverty and corruption, and journeyed overland through Mexico to the US southern border in search of security.

Yet despite difficult and frightening circumstances, human rights activists have continued to spearhead positive social changes. For instance, Mexican reproductive rights defenders celebrated the legalisation of abortion in the state of Oaxaca – following in the footsteps of Mexico City 12 years earlier. While in Jordan, lawmakers withdrew the cybercrime bill, which proposed restrictions to the freedom of speech and the right to privacy, after a high-profile campaign by civil society groups. Andrew Anderson, executive director of FLD, said: "In 2019, we saw human rights defenders on the frontlines defending and advancing rights in Hong Kong, Chile, Iraq, Algeria, Zimbabwe, Spain and many other cities and towns around the world. And despite repression, they continue to advance visions of their societies and the world that put to shame not only their own governments and leaders, but also the international community."

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Sheku Bayoh: Former judge to head public inquiry

Mr Bayoh died in 2015 after being restrained by officers in Kirkcaldy. The public inquiry into Sheku Bayoh's death in police custody will be led by a retired senior judge, the justice secretary has said. Mr Bayoh died in 2015 after being restrained by officers in Kirkcaldy, with his family claiming that race played a part in his death. Justice Secretary Humza Yousaf announced in November that a full public inquiry would be held. He has now named Lord Bracadale as the inquiry's chairman. Lord Bracadale became a High Court judge in 2003, and presided over some of the most high-profile criminal trials in recent Scottish history before retiring in 2017. He was also one of the prosecutors during the Lockerbie bombing trial, which led to Abdelbaset al-Megrahi being convicted in 2001.

Mr Yousaf said the former judge would bring a wealth of knowledge and experience to the inquiry, which has been tasked with examining the circumstances surrounding Mr Bayoh's death and the events that followed. The justice secretary will now meet Lord Bracadale and the Bayoh family over the coming weeks before setting out the full remit of the inquiry. The public inquiry was announced after it emerged that no police officers would face prosecution over Mr Bayoh's death. Mr Bayoh's family said they felt "betrayed" by the decision not to prosecute the officers involved, who have always denied any wrongdoing.

On the day he died, the father-of-two had been at a friend's house in the morning watching a boxing match. He had taken the drugs MDMA and another drug known as Flakka. The drugs dramatically altered his behaviour, and he became aggressive with a friend. He later left home with a knife from his kitchen, and neighbours called the police. He had discarded the knife by the time police arrived. Mr Bayoh, who was originally from Sierra Leone but had lived in Scotland since he was 17, was restrained by six officers and lost consciousness. He died at hospital soon, and was found to have suffered 23 injuries. Days after Mr Bayoh's death, the Scottish Police Federation (SPF) lawyer Peter Watson told the media that "a petite female police officer was subjected to a violent and unprovoked attack by a very large man who punched, kicked and stamped on her." But new evidence which was obtained by the BBC's Disclosure programme, including CCTV footage, cast doubt on some of the officers' accounts of the incident.

Serving Prisoners Supported by MOJUK: Walid Habib, 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, Hyrone Hart, 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.