**Right to Liberty and Security/Right to a Speedy Decision on Lawfulness of Detention**

B.D. v. Belgium (no. 50058/12): The case concerns a Belgian national who was born in 1980. He complains that he was placed in compulsory confinement in the psychiatric wings of various prisons in Belgium. In 1999, finding that he had not been criminally responsible for his acts, the Belgian judicial authorities ordered the applicant's compulsory confinement for burglary and attempted theft. At various times from 1999 to 2009 and from 2010 to 2015 he was placed in the psychiatric wing of Ghent Prison and in the social protection unit of Merksplas Prison, pending placement in an institution designated by the Social Protection Board. Subsequently, in 2015, he was admitted to the Ghent forensic psychiatry centre, where he stayed until his discharge on probation on 8 June 2020.

Relying on Article 5 §§ 1 and 4 (right to liberty and security/right to a speedy decision on the lawfulness of detention) of the Convention, the applicant complains of his compulsory confinement. He complains that he did not receive suitable therapeutic treatment for his mental health or effective legal assistance in obtaining a decision on the lawfulness of his detention.

Violation of Article 5 § 4 and Article 5 § 1 Just satisfaction: non-pecuniary damage: EUR 7,300

**Fresh Attempt Will be Made to Resolve the Scandal of the IPP Sentence Once and For All**

The attempt will come in the form of a Private Members' Bill, by the Labour peer Lord Woodley: the Imprisonment for Public Protection (Resentencing) Bill. The life sentence-like IPP was imposed on thousands of people between 2005 and 2012. Abolished in 2012, but not retrospectively, nearly 2,800 remain languishing in prison, sometimes for years after the term set by the court. This is equivalent to the population of four medium-sized men's prisons. Those released from prison live under the shadow of recall to prison, often for minor infractions of licence conditions.

Lord Woodley's Bill, if it becomes law, will place the Justice Secretary under a legal obligation to ensure that all those serving an IPP sentence, whether in prison or in the community, are retrospectively given a determinate sentence. For the vast majority of IPP prisoners this will result in their swift and more than justified release. Such an exercise was the primary recommendation of the House of Commons Justice Committee in its 2022 report on IPP.

Before the election, the outgoing Conservative government rejected resentencing. It did, though, pass legislation shortening the post-release licence conditions for released IPP prisoners, so reducing the number of released prisoners recalled to custody. Labour is yet to implement this change. It should get on with it.

While the government wrestles with the short-term prison capacity crisis – recent reports suggest that there are fewer than 100 places available across the entire estate in England and Wales – I hope that ministers and their advisers are also thinking long and hard about the medium-term capacity crisis barrelling quickly towards them.

The prison population currently stands at just over 88,000. Three years from now, if current projections are accurate, it could be more than 105,000, or even higher. Boosterish claims by ministers that they will build the necessary additional places to meet this demand appear slightly fanciful. This is where a measure such as Lord Woodley's Bill comes in. Resentencing all those subject to the IPP sentence will go some way to heading off the medium-term prison capacity crisis.

Labour, not unreasonably, argues that the immediate, short-term capacity crisis is a legacy of the outgoing Conservative government. But now Labour is in government. It is time to act. If Labour continues to reject measures like the resentencing of those serving and IPP sentence, and other creative solutions to the medium-term capacity crisis coming down the road, the resulting mess will be on it alone.

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# MOJUK: Newsletter 'Inside Out' No 1017 (05/09/2020)

**You Cannot Break the Law to Uphold the Law**

MOJUK is not concerned with the 'innocence or guilt' of those in jail. We are concerned only with their being brought to trial and convicted through 'Due Process of Law'. Miscarriages of Justice (MOJ) do not occur by chance. Every MOJ, when examined in hindsight, will show massive defects in our so-called 'Justice System', from the original incident (*in some cases which never happened) right through to the appeal court, where the 'justice system' descends into total farce.

Any abuse of due process, no matter how small, should be sufficient grounds for quashing any conviction, and compensation should be paid in every case.

Many of the miscarriages of justice supported by MOJUK are 'career criminals' who have been *'Taken off the streets by the police.

*'Taken off the streets': Police have, since their formation, been in the habit of where they think someone has committed a serious crime or habitually committed a crime and cannot get a conviction through 'due process', resort to illegal means to get convictions.

'Hostages of the State: The Criminal Justice System has become the focal point of increased criticism over recent years due to a rising Prison population, unrest within the Prison System itself, deaths in custody, racism, and 'Miscarriages of Justice'.

There are in the UK prison system many hundreds of people who are convinced they should not be there. They claim they should not be there for no other reason than that they are victims of a 'Miscarriage of Justice'. These victims of the Criminal Justice system commonly refer to themselves as 'Hostages of the State'. MOJUK has no doubts whatsoever that this is true, as there is a chronic failure within the legal system to recognise that justice:

1. Is applied by human beings who are not infallible.
2. Distortion of facts is a standard method of gaining convictions.
3. Police do lie and plant/conceal evidence.
4 Theatrics of solicitors and barristers in the courtroom can condemn innocent people.
5. Judges can be opinionated and biased to the detriment of the accused.
6. Juries are susceptible to misdirection by judges, expert witnesses, and barristers.
7. Juries can be subject to every prejudice imaginable and are generally clueless about what is happening in the courtroom.
8. Accused are at the mercy of expert witnesses. Both the defence and prosecution expert witnesses will have impeccable academic qualifications and proven experience in the field. Moreover, both will be diametrically opposed to one another.
9. Expert Witnesses never witness anything; they are giving their expert 'Opinion' on matters before the court rather than factual evidence.
10. The prosecution is legally obliged to disclose details of all the evidence and provide full access to it before trial. This, too frequently, does not happen. (An ever-increasing number of complaints to the European Court of Human Rights under article 6, 'Non-Disclosure', have been upheld.)
11. Once convicted, no matter how clear it becomes that the conviction was wrong, the Criminal Justice System will do everything in its power to prevent that conviction from being overturned.

**'Inquisitorial System' v 'Adversarial System'**

*The inquisitorial process can be described as an official inquiry to ascertain the truth, whereas the adversarial system uses a competitive process between prosecution and defence to determine the facts.*

Where at trial, if the expert witnesses the prosecution/defence cannot agree on the facts of the evidence to be presented to the court, they should be barred from giving evidence to the jury!

Where the cause of death is not determined - no murder charges should be brought!

If medical experts cannot determine the cause or mechanism of death, then how can a jury?

In the absence of solid evidence of murder, a case should not be prosecuted.

Neither should evidence be allowed into court where prosecution and defence cannot agree on the value of the evidence. There is a very strong case for using the 'inquisitorial system' used in Europe rather than the 'adversarial system' used in the UK justice system.

**Europe - 'Inquisitorial system' -** "The evidence/facts should be agreed upon before the trial proceeds; if the prosecution and defence cannot agree, then the disputed evidence/facts should not be allowed into court to be presented to a jury. This is the common procedure in most other European Countries. (Despite this, Miscarriages do occur)

**UK - 'Adversarial System'** - In the UK's adversarial system, juries can be susceptible to misdirection by expert witnesses based on expediency, distortion of facts, tunnel vision, or malfeasance. The bottom line is that no one is ever held responsible. The tragedy is followed by cover-ups and the logic of the ostrich, and it continues.

In Europe, they use the 'inquisitorial system' If it's a science, then the facts should be agreed upon before the trial proceeds; if they cannot come to an agreement, then it should not be allowed in court, as the onus is on innocent until proven guilty.

An inquisitorial system in forensics would go a long way toward preventing miscarriages of justice and the unnecessary suffering that the innocent and their families endure.

**Wrongful Convictions are an Inevitable Risk**

The “Uncertainty Principle” permeates the criminal justice process such that wrongful convictions are an inevitable risk and moreover that, while there are certain safeguards that protect from some of the problems of the past, there remains a high potential for such events to occur. This potential is exacerbated by the current political “convictionist” rhetoric and policy framework and by trends and developments in the media world and the consequent social influence of this.

Further concerns are expressed at the continuing reluctance of post conviction agencies, most notably the Court of Appeal, to fully recognise the risks inherent in the system. Consequently post-conviction procedures continue to function on the principle of finality within the system and prioritise the protection of the decisions of the lower courts. It is argued that the principle should not be finality but uncertainty and that the protection of the innocent rather than the protection of the image of the system should be the paramount concern.

**Kazakhstan - Repression Without Rationality.**

The state bureaucracy punishes peaceful opposition activists, government critics, and others with unjustified, unclear, and unannounced restrictions.

Imagine this. You just got out of prison. By the way, you didn’t do anything wrong to get there – you merely protested peacefully against the authorities – but they locked you up anyway. Now, you’re walking out the prison gates, finally free.

It’s time to get your life back in order. One of the first things you need to do is get some



ered painstakingly over the years, hundreds of hours of unpaid professional time worth many thousands of pounds and the valiant effort of students and supporters would have come to nothing. That is a fundamental flaw in the system it comes back to the well-worn arguments of how the legal system treats jury decisions as infallible and judge’s decisions as immaculate. It is high time we abandoned such crude paganism for a more evidence-based practice.*

We cannot expect accountability of course, that would be too much to ask but an apology from Gareth’s trial barrister and Mr Justice Globe might just engender a degree of respect. However perhaps the most worrying aspect of this case has been the role of the Crown Prosecution Service (CPS). I will not argue that the case should never have gone to trial, despite that being absolutely my view.

However, the CPS must bear some responsibility for the debacle of the joint expert statement at the trial and especially for their actions following the granting of leave to appeal by the full court. The CPS were clearly committed to maintaining Gareth’s conviction at all costs. Despite the opinion of the three expert psychologists concerning the lack of adequate support for Gareth’s disabilities at the trial, the CPS sought to undermine this evidence. No doubt at considerable public expense, and with the result of further delaying the process, the CPS commissioned their own expert, curiously a psychiatrist rather than a psychologist.

When the psychiatrist finally produced his report, his findings concurred with those of the three psychologists. The CPS obviously considered that the learning disability aspect was key to the safety of the conviction and presumably hoped their expert would undermine the arguments. When this did not happen, one might reasonably have expected that they would cease to oppose the appeal. On the contrary the CPS hired a QC, at more considerable public expense, to contest the appeal. This was pursuing conviction at all costs and the CPS should really examine their decision-making processes and consider an apology for the extra pain inflicted on Gareth and his family and friends by this approach, and the cost to the public purse.

On this occasion the Court of Appeal were clearly concerned about the events in question and resolved the case with a carefully worded judgment. They accepted that unfairness had occurred as a result of the failure to provide suitable support and safeguards at the trial given Gareth’s disability, and that the joint statement denied proper consideration of the medical evidence. However, they did not accept the new report of Dr Wood or the nursing specialist Ms Hampton on the basis that it did not ‘significantly advance the argument’ and ‘It was evidence that plainly could have been adduced at trial with reasonable diligence’.

It is hard to accept these conclusions; they reflect the Court of Appeal’s over-cautious approach to new evidence and the continuing unfairness of allowing the defendant to pay the penalty for the lack of diligence of his or her lawyers. We are of course delighted with this judgement but even so there are worrying caveats for other cases which may rely on new expert evidence.

It is extremely rare for the Court of Appeal to declare innocence or issue an apology on behalf of the criminal justice system, and this case was no exception. Many argue that it is not the role of the Court of Appeal, as a court of review not a trial court. However, the sad reality of this case is that no one has taken any responsibility for this appalling injustice and without the free of charge support of students, friends, expert witnesses and barristers, Gareth’s conviction would, like so many others without this support, never have been overturned. The Court of Appeal generously acknowledged the contribution of the Cardiff Law School Innocence project, in working on this case. It has been a privilege for us to do so, because everything we have confronted in this case has convinced us that Gareth is innocent. Is it right however that innocence people should have to rely on student volunteers and the good will of unpaid professionals? Is this not lottery justice?

reports and two practicing barristers all of whom gave their time and expertise free of charge.

Harsh and Presumptuous: Once strong grounds for appeal had been carefully and scrupulously crafted, the first stage of the process could be attempted – an application to a single judge to seek leave for a full appeal. The single judge examines the papers and makes a decision about whether the case can proceed to appeal, there is no courtroom hearing at this stage. In Gareth's case the single Judge, Mr Justice Globe, refused to give leave to appeal.

Mr Justice Globe rejected the views of the three psychologists stating: 'It cannot be reasonably argued that the proposed evidence obtained many years after the event is sufficient to suggest that the applicant's mental state was such that he did not have a fair trial and the verdict of the jury is unsafe.' This was, to say the least, a harsh and presumptuous judgement. One wonders where on earth the bar is set for a reasonable argument? Mr Justice Globe reserved his tour de force for the medical evidence:

'In the factual circumstances of the case, the jury had before them sufficient evidence upon which to consider alternatives to that which founded the applicant's conviction. It cannot be reasonably argued that the reduction of the expert evidence to a joint statement has rendered the resultant conviction unsafe; nor can it be reasonably argued that the contents of the reports of Dr Wood and Ms Hampton affect the safety of the conviction and should be admitted as fresh evidence.' As has been explained above the jury did not have sufficient evidence before them, in fact they had no evidence from the experts about alternative explanations, they had little option but to conclude that there had been a sexual assault.

Not only was the joint report inadequate but the new medical reports obtained by the Cardiff Innocence project did provide possible alternative explanations that the jury could have considered had they been available to the trial. Dr Wood, a forensic medical specialist, explained that one possibility was that 'a series of medical mishaps' may have combined to create such a wound. This might have included existing potential for skin damage, problems with care such as removal of incontinence pads, chaotic first aid and problems in surgery. Ms Hampton a nurse practitioner and tissue viability specialist explained in her report the potential risks associated with frail elderly skin, incontinence and care practices.

According to Mr Justice Globe it 'cannot be reasonably argued' that any of this would have made a difference to the jury. This is a staggering inversion of logic. Surely it is the case that 'it cannot be reasonably argued' that a jury, given other explanations for the wound, would not potentially come to a different conclusion, especially given the Houdini-like qualities the prosecution needed to subscribe to Gareth to get around the timing and forensic cleaning issues in the case. I struggle to think of another profession, outside of the judiciary, that could get away with such blatantly specious reasoning. What is so serious about this decision is that, were it not for the support of a student project and unpaid barristers, that would have been the end of the road for Gareth and he would never have achieved a just resolution. Barristers Phil Evans QC and Tim Naylor were prepared to renew the leave to appeal application to the full court and try (successfully as it happened) to reverse the decision of the single judge in an oral hearing before three Judges. A full appeal was thus granted.

Gareth could not have done this without legal support, he would not have got legal aid once refused leave by the single judge (or indeed to get that far in the first place). His only recourse would have been an application to the CCRC, but this would have been doomed to failure from the outset because the CCRC will only consider new evidence or arguments, not arguments or evidence already rejected by the first appeal system. On past evidence it is highly unlikely that the CCRC would have challenged the decision of the single judge. All the new evidence gath-



cash, so you hit an ATM. Your card doesn't work. When you go into the bank to find out what the trouble is, they tell you your account's been blocked. That's how you learn you're on the government's "Financing Terrorism List."

You thought you were finally free, but it turns out you're not. Not really.

You can be in public, but you can't interact with much of it. You are financially ostracized, cut out of the modern economy. You are forbidden from using credit cards and debit cards. You are theoretically allowed to have a job, but what employer is going to want to hire someone on a government blacklist – especially since they would have to make special arrangements to pay you? When you were sentenced – again, for the non-crime of peacefully protesting – there was nothing in the verdict about these restrictions. And when you try to find out more, you get the runaround. Sometimes, officials say they don't even know what the list is about.

**Gareth Jones: Conviction Quashed: So All Is Well – Or Is It?**

The history of miscarriages of justice is littered with examples of how the criminal justice process seems to have an innate ability to deny the obvious. Gareth Jones' case is such an example. In 2008. Gareth was convicted of the serious sexual assault of an elderly lady in a care home where he worked. Dennis Eady writes The lady concerned was found to have a serious perineal and vaginal tear which caused serious blood loss. Due to her dementia, she was unable to provide any evidence of what might have happened.

There were problems explaining the wound, which experts deemed to be of a similar type to that sometimes inflicted on younger victims of sexual assault. That apart, all the evidence suggested that Gareth could not have been responsible for such an act, at least not deliberately (it is possible that difficulties caring alone for someone who, due to their dementia, may have resisted care might have contributed to 'a series of medical mishaps').

It was not disputed that he was only in the room with the elderly woman for around four minutes before he himself sounded the alarm. During these four minutes he would have been expecting his working partner to enter the room (she had said that she would be there to assist him straight away after making a telephone call). The wound bled profusely such that surgery was eventually required, yet Gareth, who had allegedly inflicted a violent sexual assault to cause it, was not described by any witness as having any sign of the inevitable blood staining. Moreover, thorough forensic testing soon after the incident, showed no trace of such an assault.

Somehow the jury was led to believe that Gareth had committed this violent assault causing major bleeding and then cleaned himself up to remove any trace of evidence – all within four minutes. The great Houdini would have struggled with such a challenge let alone Gareth, a person with significant learning disabilities. How did the jury come to accept such a strikingly unlikely scenario? The explanation may well lie in the fact that they were given no other possible explanation for the wound. Other care staff denied having noticed any pre-existing wound, therefore, because Gareth discovered the wound it was assumed that he must therefore be responsible. The way the medical evidence was handled at the trial gave the jury the distinct impression that there was no other explanation but neither was there anything, either in his character or the circumstances, to link Gareth to the alleged crime. He was simply in the wrong place at the wrong time.

On November 22 2018, the case of Gareth Jones was heard at the Court of Appeal. After an agonising four week wait Gareth's conviction was quashed just before Christmas on December 28. This is, of course, a cause for celebration, even a degree of appreciation that, on this occasion, the Court of Appeal accepted that this was a conviction that could not, in fairness, be sus-

tained. A few of us who had supported Gareth, had the privilege of being present when the news came through from the Court of Appeal. It was not a 'punch the air' moment as we might superficially have expected, it was a moment of emotion, a sudden relief from 11 years of torment, stress and burning injustice for Gareth and his family and close friends. The media were there in force and have been wonderfully supportive in giving Gareth and those involved in his campaign a voice and thus alerting the public to this cruel and shameful injustice.

Although things will never be the same, there is relief and joy that lives can be belatedly restored to some kind of normality – a happy ending to the story.

It seems 'the system' is happy to leave it at that; but to do so simply leaves the door wide open for more injustices. The joy and relief that we all feel is clouded by an even greater awareness that many people, equally victims of terrible injustices, will never have the relief that Gareth has achieved. I once asked Gareth what his experience of prison was like; he gave me an admirably succinct and unequivocal answer: 'It was hell.' The fact that he handled his nightmare with great courage and dignity, as so many injustice victims do, does not take away or diminish that hell.

In 2008 when the event in question occurred, Gareth was living his life in the way that conventional expectations respect. He had no criminal record and was entirely of 'good character'. Despite cognitive disabilities, he had a job as a care assistant demanding hard work, a high level of commitment and a desire to help others. He was an asset to society, part of a decent hard-working family of the kind politicians often like to appeal to. He did nothing wrong but his life was torn apart and all the horrors of the criminal justice system were inflicted upon him.

It is simply not satisfactory to say justice has now been achieved and 'let's leave it at that'. Apology, compensation and accountability are what we would expect from any organisation that screwed up your holiday let alone robbed you of your freedom, your reputation, your ability to earn a living and your personal safety (to name just a few of the consequences of wrongful conviction). Yet it seems Gareth will receive no apology, no compensation and no accountability: those responsible show no remorse, the need for any of these three basic responses does not even seem to have occurred to any agent of the criminal justice system. A brief comment on apology and compensation will have to suffice here. The issue of accountability though needs a little more scrutiny.

The late Nettie Hewins, a tragic victim of wrongful conviction in relation to the fatal fire on the Gurnos Estate in Merthyr Tydfil in 1997, once said to me that what she wanted more than financial compensation, and what she never got, was an apology from the people who had colluded to destroy her life. Although the fire conviction was eventually overturned, Nettie's premature death was almost certainly related to a heroin addiction she acquired in prison. In Gareth's case again, there has not been a murmur of apology from any quarter of the criminal justice system for inflicting this nightmare on Gareth. This would mean a lot and it would cost nothing, apart from the one thing the system seems to be incapable of doing – showing some humility and responsibility for the damage it does in these cases.

Last week the Supreme Court upheld the position that a miscarriage of justice should only be defined for compensation purposes 'if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence' – see here (Criminal Justice Act 1988, section 133, as amended by the Anti-social Behaviour, Crime and Policing Act 2014, section 175). The government's current approach (now backed by the Supreme Court) to the compensation issue, amounts to the requirement to 'prove' your innocence. This, in most circumstances, is no more of a reality than being able to prove guilt (although we chose to sustain the latter myth in criminal trials).

Gareth is highly unlikely to get any financial compensation for nearly four years in prison and



another seven living with the stigma of being on the sex offender register. The great Bridgewater Four campaigner, Ann Whelan, always and rightly, corrected those who spoke of compensation, by pointing out that it is not 'compensation', it is 'damages'.

It could be argued that we increasingly live in a 'blame society', there is an almost obsessive need to make someone responsible (and often guilty in a court of law) for every tragedy, be they an unfortunate driver who makes a genuine mistake or the hospital doctor who, working under the most extreme and unreasonable pressure, makes an error with serious consequences. Our society is unreasonably harsh in many such instances. We all make mistakes, but, in most jobs and situations we are fortunate because the consequences are relatively minor. Curiously this blame culture does not seem to apply to agents of the criminal justice system, in fact it does not even seem to apply when there is not just an error (which is forgivable) but when there is an obstinate determination to compound the error rather than address it.

Gareth's case is an example of errors, at times suggesting elements of malice, and a determination to pursue conviction at all costs in denial of error and at times in denial of rational thought. At the trial there was a complete failure by the defence to address Gareth's complex but not always immediately apparent, learning disabilities. Indeed, his own trial barrister maintained even to the Court of Appeal that this did not seem to have any impact on his ability to understand the process or cope with cross-examination. This view was expressed despite the new reports of three expert psychologists who had assessed Gareth as part of the work undertaken to achieve an appeal. Furthermore, the Court of Appeal in its judgment identified that some of the prosecution questioning 'would have been objectionable if asked of a person without learning disabilities…when asked of someone suffering from a disability such as the appellant, they can be seen to be unfair'.

What then of the medical evidence? While both prosecution and defence experts agreed that the wound could have been indicative of a sexual assault, their conclusions were different. The defence expert's report concluding that there was no convincing evidence that Gareth had committed a sexual assault and posing other alternatives such as a fall onto a blunt object. However, the defence and prosecution agreed for the experts to make a short joint statement rather than give live evidence. Unfortunately, the joint statement described the wound and noted only what the experts agreed upon, notably that the wound was consistent with a sexual assault. The Court of Appeal concluded: 'There was, and is, nothing objectionable about a joint statement as such… . However, the joint statement that was placed before the jury, in the present case, not only failed to identify the areas of disagreement, which should properly have been the subject of live evidence, it failed to address the possible causes of the injury in the clear way that both experts had set out in their reports.'

Gareth then, denied a fair trial and subjected to a prison sentence and life on the sex offenders' register, was faced with trying to climb the mountain necessary to achieve a successful appeal. It should be noted that, to his great credit, Gareth's trial solicitor (unlike his trial barrister) admitted there had been failings and supported his claim of innocence. If only other legal professionals had acted with similar integrity and insight, that mountain could have been reduced to a much shorter and gentler incline.

Gareth's lawyers advised that there were no grounds of appeal after the trial and it was not until after his release from prison that his friend and supporter Paula Morgan sought help to challenge the conviction. Without legal aid and ineligible for an application to the Criminal Cases Review Commission (CCRC) because he had not yet attempted an appeal, the only option Paula could find was Cardiff University's Law School Innocence Project. The project, with Paula's help, was able to re-examine the case, and eventually obtain three expert psychological reports, two medical