Tel: 020 7404 1313
54 Doughty Street
London, WC1N 2LS
E: crime@doughtystreet.co.uk

Issue 50 | January 2021

Criminal Appeals Bulletin

Welcome


Farrhat Arshad

Welcome to the January 2021 edition of our monthly Criminal Appeals Bulletin.

The Bulletin aims to highlight recent changes in case law and procedure in England and Wales, Northern Ireland, and the Caribbean (with an occasional series on appeal cases from Scotland) and to provide practical guidance to those advising on appellate matters. Our monthly case summaries illustrate when an appellate court is likely to interfere with conviction or sentence, as well as looking at the courts' approach to procedural matters.

In this month's Bulletin, Maya Sikand looks at a recent Appeal by way of case stated, brought by the DPP against a District Judge's decision to acquit in the Youth Court, based on a Conclusive Grounds decision. Tayyiba Bajwa looks at an appeal against conviction concerning non-defendant's bad character. Rabah Kherbane examines the application of the new Guideline on sentencing offenders with mental disorders, developmental disorders, or neurological impairments, in a recent appeal against sentence and Peter Caldwell looks at POCA restraint orders and the criteria to be applied in determining "reasonable living expenses".

The keen-eyed amongst you will have noticed that this is the 50th issue of the Bulletin. We hope you have found it useful over the past four years and we look forward to the 100th edition. By which time we hope to be out of lockdown!

Doughty Street has some of the most experienced appellate practitioners at the Bar, including the contributors to the leading works on appellate procedure - *The Criminal Appeals Handbook, Taylor on Criminal Appeals, Blackstones Criminal Practice (appeals section), Halsbury's Laws (Appeals)*.

Please feel free to e-mail us or to call our crime team on 020 7400 9088. We also offer our instructing solicitors a free Advice Line, where they can discuss initial ideas about possible appeals, at no cost to them or their client. More information on our services can be found on our website.

Farrhat Arshad
Deputy Head of the DSC Criminal Appeals Unit

In this issue

Contact us

If you would like to know more, or discuss how our barristers may be able to help you and your clients, please contact Criminal Practice Manager, Matthew Butchard on 020 7400 9074.

Useful links

DPP v M [2020] EWHC 3422 (Admin)

Maya Sikand looks at a recent Appeal by way of case stated, brought by the DPP against a District Judge's decision to acquit in the Youth Court, based on a Conclusive Grounds decision

Appeals against Sentence; England and Wales

Rabah Kherbane examines the application of the new Guideline on sentencing offenders with mental disorders, developmental disorders, or neurological impairments, in a recent appeal against sentence

Financial Crime Appeals

Peter Calwdell looks at POCA restraint orders and the criteria to be applied in determining "reasonable living expenses"

Appeals against Conviction; England and Wales

Tayyiba Bajwa looks at an appeal against conviction concerning non-defendant's bad character

Appeal by way of Case Stated DPP v M [2020] EWHC 3422 (Admin), unreported, 15 December 2020, DC.

Victims of human trafficking – Modern Slavery Act 2015, s. 45 defence – Single Competent Authority's decisions – expert evidence – admissibility

By Maya Sikand

Background

The thorny issue of whether the Single Competent Authority's decisions were admissible before a court or jury at first instance was neatly side-stepped by the Lord Chief Justice in *R v DS* EWCA Crim 285 (see [43]). Before turning to the facts of *DPP v M*, it is important to put the case into some context. The admissibility of the decisions of the Competent Authority (usually the Conclusive Grounds ('CG') decision that a person is more likely than not a victim of trafficking ('VoT')) has long been resolved by the Court of Appeal Criminal Division ('CACD') in so far as appeals against conviction are concerned. Indeed, in numerous decisions of the CACD pre-dating the Modern Slavery Act ('MSA') 2015, convictions have been overturned because of a failure to refer a person into the National Referral Mechanism ('NRM') in order to identify their trafficking status, and because, post-conviction, they have received a positive CG, which tended to support their contention that they should have had non-prosecution protections in the Council of Europe Convention on Action against Trafficking in Human Beings 2005 and/or the European Union Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting victims. Both instruments impose obligations on the United Kingdom in international law which inter alia seek to protect victims of human trafficking.

There have been a number of cases in which the relevance and application of these legal principles to criminal proceedings in England and Wales has been discussed by the CACD. The summary of these was provided in *R v VSJ* [2017] EWCA Crim 36 at [20], and of particular relevance is [20 (iii)]:

"(viii) The decision of the competent authority as to whether a person had been trafficked for the purposes of exploitation is not binding on the court but, unless there was evidence to contradict it or significant evidence that had not been considered, it is likely that the criminal courts will abide by the decision (see R v L(C), N, N & T, 2013 at paragraph 28)."

The above was confirmed in *R v GS* [2018] EWCA Crim 1824, which also confirmed that the decisions of the First Tier-Tribunal are similarly admissible as fresh evidence in the interests of justice, although raised a question mark over the basis of admissibility at first instance.

More recently, in *R v JXP* [2019] EWCA Crim 1280 (not referred to in *DPP v M*), the Court said that a SCA decision whilst not binding must however be borne in mind by the criminal court as the Competent Authority is "a specialist authority with particular expertise and knowledge in this area of trafficking".

Section 45 of the MSA 2015

The MSA 2015 came into force on 31 July 2015. Section 45 of the MSA 2015 was enacted to reflect the UK's international obligations (as set out above) and to provide VoTs with a statutory defence if they could satisfy a court or jury that there was a sufficient nexus between their slavery or relevant exploitation ('VoT') status and their offending behaviour. Over 18s are required to prove a nexus of compulsion; under 18s just have to show that the offending was a direct consequence of that status. Section 45 introduced a new element to the test, namely an objective element (would a reasonable person have acted as the defendant did?). The current CPS guidance sets out the process prosecutors have to follow.

In *R v N* [2019] EWCA Crim 984, cited in *DPP v M*, a post-MSA 2015 appeal against conviction brought by a Vietnamese 'gardener' on a cannabis farm who received a positive CG post-conviction, the court approached s. 45 and the CG decision in this way:

> "43. …The factual position, as found by the Conclusive Decision, was that for the short time that he was in Birmingham, the applicant had no travel documents; he had a history of being beaten by traffickers following his earlier escape in another country; he was in a new country; and he had no contact with any persons other than those involved with the traffickers…
> 44. Were appropriate weight to be given to these facts, as contained in the Conclusive Decision, we believe that a decision would or should have been made that the defence pursuant to section 45 would probably succeed. In our judgment, no public interest consideration would outweigh such a determination.
> 45. In summary, we conclude that, following the appropriate CPS Guidance at the time,

the applicant's case should have been adjourned for referral to the NRM. Following the Conclusive Decision, a fair decision based on the facts of that decision and the evidence upon which it was based would be that a defence pursuant to section 45 would probably succeed. In the circumstances the conviction cannot be regarded as safe…"

In the very recent case of *RvPBL* [2020] EWCA Crim 1447, not before the court in *DPP v M*, a similar approach to that in *R v N* was taken to the operation of s. 45 in light of a positive CG decision. Of significance is this passage at [25]:

"Within an hour of his arrival at the police station the applicant had been recorded as saying that he was a victim of trafficking. The information received from the immigration authorities to the effect that the applicant was or might be an overstayer was not a reason not to refer him to the National Referral Mechanism. **Thus an immediate opportunity to investigate the possible availability of statutory defence was missed.**" (my emphasis)

The instant case

This was an appeal brought by the DPP by way of cased stated against the decision of a District Judge ('DJ') sitting in a Youth Court. She acquitted a 15-year old boy of possessing Class A drugs and a bladed article. At the time of his arrest, M was with two alleged gang members of the same age as him, who, unlike M, were known to the police. Upon arrest and charge, M was referred to the NRM by Lewisham Children's Social Care. The SCA made a positive CG decision that, on a balance of probabilities, M had been recruited, harboured and transported for the purposes of criminal exploitation. The full minute of the decision was before the Youth Court. M relied upon the s.45 defence. He did not give evidence. The DJ admitted the decision of the SCA. The DPP said that it was wrong to admit 'opinion evidence'; it was non-expert evidence and it was hearsay, and in any event M's offending was not directly connected to his child criminal exploitation. The DPP went as far as to say that that no SCA decision can be admissible at trial, although properly admissible in the CACD in considering the safety of a conviction. The further complication in this case was the prosecution had agreed to put the decision before the court by way of a s.10 CJA 1967 admission.

The Divisional Court (Simler LJ, William Davis J) found that the DJ had been entitled to receive and admit the conclusive grounds decision of the SCA. It held that whether a person is a victim of exploitation for the purposes of the defence under section 45 of the 2015 Act is a question of fact. The factors relevant to trafficking or exploitation are not necessarily within the knowledge of the ordinary person, and therefore expert evidence on which factors are relevant must be admissible. In their view, the SCA decision-maker had the necessary expertise and the weight of a CG SCA decision will vary and will not be determinative. The fact that an SCA decision-maker will not have prepared a minute of their CG decision with a view to its being used as expert evidence (an issue of concern to the DPP) does not of itself prevent its admission in criminal proceedings. The Court said that in practical terms, the minute of the SCA decision will be introduced by an agreed fact. On the substantive issue of whether s. 45 was made out, the Court found that on the evidence before her, the DJ was entitled to conclude that the prosecution had failed to disprove the statutory defence.

Comment

The important point to remember, as the Court pointed out, is that a decision of the SCA is just one aspect of the evidence that may support a s. 45 defence. A positive CG decision does not mean nexus is satisfied or nexus of compulsion. Or indeed the 'objective;' test. There has been a growing trend of CPS lawyers not accepting the basis of a CG decision and thus ploughing on with a prosecution of a potential VoT. In those circumstances, defendants only have s. 45 open to them. There appears to be no rational reason for suggesting that the CACD is entitled to admit the CG decision as fresh evidence because it is in the interests of justice to do so (without, to date, determining its status), and to consider how it would have impacted on s.45 (as in *R v N*, *R v PBL*), but that a first instance court cannot. Given the 1943 'rule' in *Hollington v F. Hewthorn & co. Ltd* is often cited as a bar to eliciting 'opinion' evidence, the only sensible route is to treat the SCA decision-maker as an expert - in a similar way police constables, who have significant experience of drug arrests, are allowed to give evidence that a certain quantity of a drug is more consistent with supply than simple possession. The real problems are practical ones. First, despite the Court's optimism, prosecutors could refuse to 'agree' the evidence via s. 10 of the CJA 1967, which leaves open the spectre of an already over-burdened Home Office employee being required to attend Court to justify their decision (although many experts have 'day' jobs), as well as the question of whose task it will be to secure their attendance (given that they were not instructed by the defence for trial purposes). Secondly, will the prosecution seek to rely upon alternative expert evidence? Additionally, and perhaps most importantly, what's good for the goose is good for the gander –the prosecution would be entitled to rely on a negative CG decisions to rebut a s.45 defence.

If you would like to speak to Maya Sikand about this article, please click here.

About Maya Sikand

Maya Sikand has a civil liberties practice, specialising in public law as well as private law damages claims against public bodies. Her specialist areas include human rights and tortious damages claims against the police and public bodies; statutory compensation claims via the Criminal Injuries Compensation Authority and the Miscarriage of Justice Application Scheme, in particular in relation to victims of trafficking. She also has a specialist criminal appellate practice which focuses on trafficked victims wrongfully convicted of crimes. She is a contributing editor of the seminal criminal textbook *Archbold Criminal Pleading, Evidence & Practice* (Sweet & Maxwell). She has recently contributed a chapter on compensation to the second edition of *Human Trafficking & Modern Slavery: Law & Practice*.
She sits as Recorder in the criminal courts.

To see Maya's full profile, click here.

Appeals against Sentence; England and Wales

Sentence – Attorney General's reference – rape – mental disorders – developmental disorders – neurological impairment – age – youth – community order – lenience – alternative to custody

By Rabah Kherbane

R v CH
[2020] EWCA Crim 1736

Following a referral by the Attorney General, the CACD upheld a sentence of a three-year community order for an offence of rape of a child under 13, which engaged a cross-section of the youth sentencing guidelines, and new sentencing guidelines on mental disorders, developmental disorders, and neurological impairments. The difficult sentencing exercise involved a 17-year-old, who had the developmental age of an 11- 12-year-old and inserted his penis into the mouth of a 5-year-old.

Facts

On 14 February 2020, CH was convicted of rape of a child under the age of 13, contrary to Section 5(1) of the Sexual Offences Act 2003. On 1 October 2020, he was sentenced to a three-year community order with a rehabilitation activity requirement of 35 days. He was fined £200, and ordered to pay £2,500 compensation to the victim, A.

CH was 17 at the time of the offence; A was 5, and granddaughter of CH's guardians. CH and A played together in a shed at the bottom of the garden where CH kept his toy cars. On 9 October 2016, A alleged CH had put his penis 'down her throat', once, for 'about three seconds.' CH denied the allegation. On 4 April 2019, CH was eventually charged, and his trial fixed for 10 February 2020. CH did not give evidence at his trial.

Sentence

At sentence, the judge had before him the following information on CH, including reports from a psychiatrist, psychologist, and the Probation Service:

i. CH had no previous convictions or cautions;
ii. CH had previously been in care, where he had been the victim of sexual assault;
iii. CH had been diagnosed with ADHD, and a mild learning disability;
iv. CH had some traits of autism, and would be 'very vulnerable' to changes in a custodial setting, where his wellbeing would significantly deteriorate;
v. CH's cognitive reasoning, verbal comprehension, and levels of concentration were in the extremely low range;
vi. CH had an IQ of 62, and a mental age of someone aged 11 or 12. In this respect, CH was examined for the purposes of this report some years after the offence. It was likely he would have had the mental age of an even younger child at the time of the offence;
vii. The trial process was adapted considerably to accommodate CH's difficulties, including through use of an intermediary; and
viii. The pre-sentence report noted that CH had been a victim of neglect as a young child. The report recommended an alternative to custody, in addition to a curfew requirement.

The judge also had before him a victim impact statement from A's mother, detailing bed-wetting and night terrors suffered by A, as well as the 'devastating impact' of the offence on the family 'as a whole.'

The judge acknowledged this was a serious offence, meriting a significant custodial sentence, even on the bottom of the relevant sentencing guideline. The same guidelines however acknowledged that there may be exceptional cases where a lengthy community order may be an appropriate alternative to custody, particularly if this may be the best way of changing the offender's behaviour and protecting the public by preventing any repetition of the offence. Moreover, both the over-arching guideline on sentencing offenders with mental disorders, and the youth sentencing guidelines needed to be carefully considered in this difficult sentencing exercise.

The sentencing judge placed the offence within category 3B (8 year starting point, 6 to 11 years range), agreed by both parties. The judge applied the necessary reductions, including 50% on account of CH's youth at the time. The judge further considered that he was dealing with an offender who was and still remains in terms of their functioning and maturity a child not much above the age of criminal responsibility. The judge concluded that CH's condition significantly impaired his ability to exercise appropriate judgment, make rational choices and understand the nature and consequences of his actions; he was a vulnerable individual who functioned at the intellectual level of a child.

The judge also bore in mind the far-reaching and damaging impact of a sentence of immediate custody on CH, including in an adult prison, and during

the pandemic. The judge did not underestimate the impact that the offence had had upon A, but the purposes of sentencing were not limited to punishment alone, and included the prevention of future offending and rehabilitation.

As a result, the judge agreed with the carefully considered proposal made in the pre-sentence report. He concluded that that proposal was a realistic one, and offered a real prospect of protecting the public by preventing future offending by CH, who is likely to continue to function at the level of a child for the remainder of his life.

Appeal

The AG submitted there had been a deliberate isolation of the victim, and therefore the offence fell within Category A. Further, the sentence did not sufficiently reflect a punitive element. In total, all of the mitigation available could not reasonably have resulted in the imposition of a community sentence, given the seriousness of the offence. The sentence was therefore unduly lenient.

The CACD reiterated that the judge faced an exceptionally difficult sentencing exercise, and had the advantage of being the trial judge. It is true that the vast majority of such cases would merit an immediate custodial sentence. However, the CACD would only interfere with a sentence as 'unduly lenient' where the sentence passed was a sentence that fell outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate. Further, mercy is not a vice, when applied appropriately.

The CACD confirmed the proper application of the new guidelines on offenders suffering from mental or developmental disorders and the importance of considering precisely the culpability of an offender as a result of any impairment. Moreover, an impairment or disorder may very well make a custodial sentence disproportionate to achieving the aims of sentencing that the public are better protected and crime reduced by a rehabilitative approach.

The CACD therefore largely refused to interfere with the sentence, as the judge had proper reference to all relevant features in the case, including impressive reports; the only reasonable course open to the judge was certainly not to reject those expert reports. The CACD however did note that there was no explanation for not imposing the curfew recommended by the Probation Service, and amended the sentence accordingly.

Commentary:

The seriousness of the offence is always a feature in a sentencing exercise, and – particularly where grave offending is concerned – often clouds other significant features, such as the root causes in offending behaviour. Tackling or addressing factors that can cause offending is arguably a better way to reduce crime and protect the public in the future. Exploring alternatives to a custodial sentence where possible is therefore not only a display of mercy, but also a broader public good.

The new sentencing guidelines on mental disorders, developmental disorders, or neurological impairments is essential reading for all practitioners, and has the capacity to properly inform a more empathetic and appropriate sentencing exercises for this very purpose. In this difficult case, the CACD was able to follow the logic the judge applied as he grappled with competing considerations, within the important framework of this new guideline. This case also underlines the duty of defence legal teams to take the time to explore all avenues and obtain all necessary reports before moving to sentence; this sentencing guideline provides the vehicle to do just that.

If you would like to speak to Rabah Kherbane about this case, please click here.

About Rabah Kherbane

Rabah specialises in crime and appeals. Rabah is regularly instructed in criminal cases characterised by highly technical evidence, cross-jurisdictional elements, and complex legal and human rights issues. Rabah has appeared successfully both alone and led in the Court of Appeal, including recently overturning a serious conviction on the basis of the trial judge's conduct. Rabah provides advice on fresh appeals against conviction and sentence.

To see Rabah's full profile, click here.

Appeals against Conviction; England and Wales

Non-defendant bad character – lurking doubt

By Tayyiba Bajwa

R v A [2020] EWCA Crim 1687

The key question addressed by the Court of Appeal was the admissibility of non-defendant bad character evidence under the second limb of s.100 Criminal Justice Act 2003 – that of "substantive probative value".

The defendant "A", a youth, appealed against his conviction for murder.

At trial, A had advanced self-defence. He gave evidence that the victim, a 15-year old boy "E" had first attacked him with a knife and that he, A, had been using his own knife to defend himself. He gave evidence at trial that E regularly carried a knife and that E had recently used a knife in a violent incident a few weeks before he died. A defence witness, J, gave evidence that he had seen E pull a knife on A and stab A in the shoulder.

A appealed on the following grounds:

(a) The trial judge's refusal to adduce non-defendant bad character evidence.
(b) The decision by the trial judge not to permit questions to be put to two prosecution witnesses on the ground that the likely answers would be inadmissible evidence.
(c) There was a "lurking doubt" about the safety of the conviction.

Non-defendant bad character evidence: The Judge had refused to allow evidence to be adduced that E had been removed from mainstream education for persistent violent behaviour, that E had been known as "Stabber" and that E had been involved in a violent incident shortly before his death.

The CACD found that:

(i) The judge's conclusion that the records contained nothing of substantial probative value had been "entirely justified". She had found that the school records included no recorded instances of serious violence or possession of weapons and in fact, the records showed that that E's behaviour at school had latterly been good.
(ii) In relation to E's nickname as "Stabber", the CACD found this ground "completely hopeless", observing that the use of the nickname was completely unexplained and "would have asked the jury simply to speculate as to what, if anything, that nickname connoted and on what particular basis that nickname, if it was a nickname attributable to E, had been acquired".
(iii) In relation to the earlier incident involving E, the CACD agreed with the trial judge's assessment of the evidence about that incident as being "highly confusing" and, without expressing a final conclusion, observed that that evidence was likely to come within the meaning of evidence that "no court or jury could reasonably find…to be true" under s.109(2) CJA 2003.

Inadmissible questions: This related to questions the defence had sought to put to prosecution witness S, about statements E had made to S that he, E, was regularly involved in fights.

The CACD found that these were hearsay statements of what S said that E had told to S in circumstances where S said he knew nothing of the details of any fights. The third ground related to the exclusion of questions relating to E having attended a Special Behavioural School.

The CACD noted that it was "altogether extraordinary" to suggest that the defence case rested on an argument that A had responded in the way he had to E's having come at him with a knife because he had in mind the earlier incident involving E or because of some consciousness E had been excluded from school for violent behaviour, which preceded E's death by 4 years. Rather, as noted by the CACD, the obvious point for the defence was that A's response and belief at the time of this very fast-moving incident was conditioned by, on his case, E having a knife and coming at A with it. The CACD emphasised that the points the defence had sought to put to the prosecution witnesses were "realistically, peripheral sideshows" to the real focus of the trial and that quite simply, the jury clearly did not believe A's account.

"lurking doubt": The CACD found this was an exceptional course for an appellate court to interfere on such a basis and there was no basis for doing so in this case. On appeal, some concern had been expressed about a majority verdict direction being given six hours after deliberations started. There had been some attempt to argue that the effect of covid-19 was to put the jury under pressure swiftly to reach a verdict. That was found to be "pure speculation" and in any case the jury had returned a unanimous verdict an hour after the majority direction was given.

Commentary:

The admissibility of non-defendant bad character evidence requires a solid evidential basis. The decision on this appeal was centred on the somewhat shaky foundations of the evidence that the defence sought to adduce and the tenuous link to the defendant's asserted case. The CACD concluded that evidence that E had been excluded from school four years before his death, uncontextualized evidence about his nickname being "Stabber" and "highly confusing" evidence about a previous incident involving E was not admissible under s.100.

If you would like to speak to Tayyiba Bajwa about this case, please click here.

About Tayyiba Bajwa

Tayyiba has a developing practice in criminal appeals and has recently been instructed on an appeal against conviction involving a victim of trafficking. Aside from her appellate work, she has a busy criminal practice representing clients accused of a wide range of criminal offences and appears regularly in the youth, magistrates' and Crown Court.

To see Tayyiba's full profile, click here.

Financial Crime Appeals

The reasonable exercise of restraint

By Peter Caldwell

Luckhurst [2020] EWCA Crim 1579

In ***Luckhurst*** the Court of Appeal took a deep dive into the nature and purposes of restraint orders made under the Proceeds of Crime Act 2002 (PoCA), with particular focus on the criteria to be applied in determining what were "reasonable living expenses" under s.41(3)(a).

Reasonable living expenses
The Court declined to attempt a definition of *reasonableness* or identify prescriptive principles, but did list [§33] the following considerations that may be relevant to the fact sensitive decision in each case:

1. *Whether the payment is necessary or desirable to improve or maintain the value of assets available to meet a confiscation order.* Expenditure that is likely to preserve or enhance the value of realisable assets available for confiscation is likely to satisfy the legislative steer in section 69(2), which requires the court to promote the preservation of assets so as to render them available to meet a confiscation order.

2. *The defendant's assets in relation to the size of any likely confiscation order.* Although it is not always possible to predict the likely extent of a confiscation order, if it is clear that the level of expenditure sought will not diminish the value of the restrained assets below the likely level of a confiscation order, it is difficult to see how the expenditure could be characterised as unreasonable.

3. *The standard of living enjoyed by the defendant prior to the restraint order.* Whilst there is no entitlement to maintain a lifestyle merely because it is that which has previously been enjoyed, nevertheless the Court must give some weight to the fact that if innocent of any offence the subject would be entitled to continue to maintain his existing lifestyle.

4. *Affordability.* The uncertainty of the defendant's financial future can inform the answer to the question what a reasonable person would spend in his or her situation.

5. *The period of the restraint.* A reduction in living standards may be more reasonable for a short period than for a longer one.

6. *Whether there is a prima facie case that the existing standard of living is the result of criminal activity; and if so, what standard of living would be enjoyed but for such criminal activity.*

7. *The amount of the expenditure sought: an absolute level of unreasonableness.* In placing a cap on expenditure there is a level which is inconsistent with the statutory objective in s.69.

Payment of unsecured creditors
The Court held that the judge at first instance was wrong to apply Section 69(2)(c) and the decision in *Director of the Serious Fraud Office v Lexi Holdings Plc* [2009] QB 376 as if it were a prohibition on the repayment of loans to unsecured creditors. It confirmed [§34] that living expenses incurred on unsecured credit are permitted under a restraint order per s.41(3)(a) PoCA. It would otherwise lead to absurd results if credit cards for example could not be used to meet ordinary living expenses.

The "other available assets" principle
The Court also affirmed that the "other available assets principle" applies to restraint orders under s. 41 of the 2002 Act, applying Director of the Serious Fraud Office v X [2005] EWCA Civ 1564. Where a defendant has assets available to meet living or legal expenses which are not caught by the restraint, he is expected to resort to that source of funds (eg. family and friends) first.

Legal Expenses
Section 41(4) of the 2002 Act which forbids provision for legal expenses which "relate to" the offence which gives rise to the restraint order did not bar a defendant meeting reasonable legal expenditure in civil proceedings from restrained funds merely because the proceedings concerned the same *factual inquiry* as would be engaged in the trial of the offence. The Court emphasised that an application for such a payment entails the exercise of a discretion.

Commentary
This guidance is much needed and resolves a number of important points of principle. In respect of reasonable living expenses, it is surprising that the Court was not referred to any case law on Article 8 of the Convention in considering, at least in principle, the impact of a restraint order on the family life of the subject. Whilst Article 8 will seldom defeat the legislative steer in s.69(2), it is very likely

to be relevant to fact-specific decisions on the reasonableness of the expenditure. In this context, the rights of children should be taken as a primary consideration when the issue of proportionality is considered: *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 A.C. 166. Although such expenditure may indeed maintain a respondent's lifestyle, where the educational and health needs of children are affected by a restraint order, those interests should not be prejudiced.

If you would like to speak to Peter Caldwell about this case, please click here.

About Peter Caldwell

Peter is ranked by Legal 500 and Chambers UK as a leading barrister in criminal fraud, extradition and international crime. He advises companies and professionals in relation to financial investigations and regulatory enforcement as well as civil recovery PoCA proceedings.

To see Peter's full profile, click here.

Maya Sikand, Emma Goodall, Jamie Burton, and Adam Straw to be appointed Queen's Counsel

Doughty Street Chambers is thrilled and proud to announce that Maya Sikand, Emma Goodall, Jamie Burton, and Adam Straw will be appointed as Queen's Counsel in a ceremony (to be announced in due course) when the Lord Chancellor will present them with their Letters Patent on behalf of Her Majesty The Queen.

Maya has a strong civil liberties and human rights practice, primarily holding public authorities to account through public law and private law damages claims; death in custody inquests and public inquiries. She is top ranked in both legal directories for Police Law and Human Rights & Civil Liberties work. She also has a specialist criminal appellate practice acting for trafficked victims. Throughout her career she has sought to provide a voice to the marginalised and brings an intersectional approach to her work. She was appointed a Recorder in 2018; she is a contributor to Archbold and Human Trafficking & Modern Slavery Law & Practice (Bloomsbury, 2020).

Emma is a specialist criminal practitioner. She has earned a loyal following amongst solicitors due to her meticulous approach to law and case preparation and her reputation for outstanding client-care. She has a strong track record in dealing with vulnerable and mentally disordered clients.. She is regularly instructed in trials of a high profile, complex and sensitive nature including serious sexual offences, homicide, drug trafficking and fraud. Emma also advises upon criminal appeals where she did not act at first instance and in Judicial Review proceedings. In 2012, she was appointed as a criminal Recorder.

Jamie is a both a public lawyer and an experienced civil litigator, with particular expertise in human rights, discrimination and social welfare. Jamie's main areas of practise are human rights, community and health care, housing, social security, landlord and tenant and actions against the police. He is head of the Doughty Street Community Care and Health Team and is a leading authority on the Care Act 2014 and children's and migrant's rights and acts for Claimants and Defendants and regularly advises public authorities on their policies and procedures in relation to their statutory and human rights obligations.

Adam specialises in judicial review, human rights and civil claims against public authorities. His practice includes inquests, prisons, police, surveillance, closed proceedings, international law, terrorism, children's rights, discrimination, trafficking, immigration detention, and community care.

Maya, Emma, Jamie, and Adam join our market-leading team of 33 Silks who practise across all areas of domestic and international crime, public and administrative law, and a range of other civil and criminal practice areas.

A list of all those appointed Queen's Counsel in 2020 can be found by clicking here.

For more information on Maya's, Jamie's and Adam's work please contact Sian Wilkins, for more information on Emma's work please contact Matt Butchard.