

BLACKSTONE'S CRIMINAL PRACTICE BULLETIN

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Welcome to the fourth edition of *Blackstone's Criminal Practice Bulletin*. The Bulletin is a quarterly newsletter designed to alert practitioners to key developments in criminal law and sentencing, and to place these changes in the context of the main work.

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CASE DIGEST—IN BRIEF

GENERAL PRINCIPLES—CAUSATION

Dhaliwal [2006] EWCA Crim 1139

The Court of Appeal held that where D inflicts physical and/or psychological abuse on V and thereby causes her some kind of recognised psychiatric illness (i.e. injury amounting in law to actual or grievous bodily harm for the purposes of the OAPA 1861, s. 47 or s. 20) his conduct may give rise to liability for manslaughter (i.e. constructive manslaughter) should this illness in turn cause V to commit suicide. Conditions such as post-traumatic stress disorder, battered woman syndrome, or reactive depression were identified as potential causes. In *Dhaliwal*, however, the prosecution could not prove that V had suffered any such psychiatric injury. The infliction of mere psychological harm would not suffice.

The Court left open the possibility that a manslaughter conviction might sometimes be sup-

portable on a somewhat different basis, namely that: 'where a decision to commit suicide has been triggered by a physical assault which represents the culmination of a course of abusive conduct, it would be possible . . . to argue that the final assault played a significant part in causing the victim's death'.

See *Blackstone's Criminal Practice*: A1.30

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GENERAL PRINCIPLES—PREVENTION OF CRIME**Jones and other appeals** [2006] UKHL 16

A crime of aggression under public international law is not a 'crime' within the meaning of the Criminal Law Act 1967, s. 3. Peace activists opposed to the Iraq war could not therefore justify invasions of airfields or damage to military facilities by arguing that they had been using force in the prevention of crime, even if (and their lordships would not be drawn into ruling upon this) the war in Iraq was indeed illegal.

See *Blackstone's Criminal Practice*: A3.30

GENERAL PRINCIPLES—CONSPIRACY**Saik** [2006] UKHL 18

The view that contingency planning (as in *O'Hadhmaill* [1996] Crim LR 509) may amount to a criminal conspiracy appears to have been endorsed by the House of Lords in this case; but their lordships distinguished such cases from that in which A and B agree to launder money or other property that they suspect may *possibly* represent the proceeds of crime. If they do not know or intend this to be the case (as is required by the Criminal Law Act 1922, s. 1(2)), they are not guilty of conspiracy, even though it may transpire that their suspicions are well founded (in which case they may end up committing a substantive money laundering offence).

Any lingering doubts as to the application of s. 1(2) to cases of conspiracy to commit money laundering offences under the 'old' law (i.e. in cases not governed by the PCA 2002 (see B22)) have now been resolved by the judgment. The House has confirmed that both *Singh* [2003] EWCA Crim 3712 and *Sakavickas* [2005] 1 WLR 857 were based on an interpretation of the substantive money laundering law that was later rejected by the House of Lords in *Montila* [2004] 1 WLR 3141, and that neither of those cases survives the ruling in *Montila*.

See *Blackstone's Criminal Practice*: A6.17 and A6.21

OFFENCES—RAPE OF A CHILD**G** [2006] EWCA Crim 821

The rape of a child is a strict liability offence as far as the age of the child is concerned. The Court of Appeal rejected arguments that such an interpretation involves any conflict with the ECHR, Article 6, or, in the case of a child offender, with Article 8. The Court recognised that in cases involving consensual acts between children, a prosecution for child rape under the SOA 2003, s. 5, might often be excessive and inappropriate. In this case, however, the original allegation had been one of non-consensual rape, and when the defendant pleaded guilty on the basis of *de facto* consent and mistaken belief as to age it was appropriate for this to be reflected in the sentence.

See *Blackstone's Criminal Practice*: B3.35

OFFENCES—FORGERY: FALSITY AS TO AUTHORSHIP**Atunwa** [2006] EWCA Crim 673

More [1987] 1 WLR 1578 was distinguished in this case, in which the appellant was found in possession of cheques purporting to have been signed on behalf of registered companies, but bearing the signatures of unknown individuals who (if they existed at all) had no connection with those companies. His convictions for possessing false instruments with intent were upheld.

See *Blackstone's Criminal Practice*: B6.24 and B6.43

OFFENCES—ILLEGAL ENTRY AND DECEPTION**Asfaw** [2006] EWCA Crim 707

The limited scope of the defence provided by the Immigration and Asylum Act 1999, s. 31, was examined by the Court of Appeal in this case. A refugee from Ethiopia appealed against her conviction for attempting to obtain services (airline travel) by deception, namely by use of a false passport. Having initially entered England by means of a false passport, she was arrested at Heathrow as she attempted to board a flight to the USA.

The Court noted that the s. 31 defence does not fully give effect to Article 31 of the Refugee Convention, and leaves many refugees liable to conviction for offences such as obtaining services by deception, even though they might have a good defence to a charge alleging an offence to which s. 31 applies (namely, forgery and related offences under the Forgery and Counterfeiting Act 1981, Part 1, and offences of deception or falsification of documents under the Immigration Act 1971, s. 24A or s. 26(1)(d)). The Court also noted that:

It is apparently standard practice when an asylum seeker is attempting to leave this country for another place of refuge using false documents to combine a charge of infringement of the Forgery and Counterfeiting Act with a charge of attempting to obtain air services by deception.

The Court took the view that if such counts are added in the interests of immigration control, in order to prevent asylum seekers from invoking a defence that s. 31 would otherwise provide, there would be strong grounds for contending that this practice constituted an abuse of process. It was possible, however, that in so doing the CPS is merely seeking to enforce the law in the interest of the airlines that are put at risk by the use of false documents.

See Blackstone's Criminal Practice: B23.5

ROAD TRAFFIC OFFENCES— ADMISSIBILITY OF SPECIMENS

O'Connell v DPP [2006] All ER (D) 260

The duty to 'supply' one part of a blood or urine specimen to the accused, which is imposed under the RTOA 1988, s. 15(5), does not necessarily require any part of the specimen to be handed physically to the accused: it may be satisfied where in some other way that part of the specimen is made available to the accused. The appellant's arms had been broken in a motorcycle crash, and therefore his half of the divided blood specimen was handed to his friend, who fully understood its purpose. The Divisional Court saw no irregularity in this.

See Blackstone's Criminal Practice: C5.23

PROCEDURE—TERRORIST INVESTIGATIONS

R (Gillan) v Metropolitan Police Commissioner
[2006] UKHL 12

In this case the House of Lords upheld the powers of stop and search in the Terrorism Act 2000, ss. 44 to 47, and rejected an argument that they contravene the ECHR.

See Blackstone's Criminal Practice: D1.50

PROCEDURE—CASE MANAGEMENT

K [2006] EWCA Crim 724

Guidance as to the exercise of case management powers by judges was issued by the Court of Appeal in this case. This guidance emphasises *inter alia* the judge's power to deal with issues arising prior to the trial exclusively by reference to written submissions, and his power, if he sees fit, to impose limits on the length of such submissions.

See Blackstone's Criminal Practice: D3.3

PROCEDURE—WITNESS ANONYMITY

Davis [2006] EWCA Crim 1155

This case raised a number of issues relating to the granting of anonymity to prosecution witnesses. The Court of Appeal ruled that the power to grant such anonymity was clearly established at common law, but this power must be exercised only with scrupulous care, given the difficulties that the granting of anonymity might pose to the defence. Properly exercised, the power to grant anonymity does not ordinarily infringe the defendant's right to a fair trial under the ECHR, Article 6; and where the power is exercised an appellate court will not ordinarily interfere. In some cases, however, the granting of anonymity, even where apparently justified at the time, may (as things turn out) lead to an unfair trial, and any conviction imposed in such circumstances would fall to be quashed as unsafe. Other forms of protection (see *Blackstone's Criminal Practice*, D13.30) should be considered before anonymity is granted.

PROCEDURE—ASBOS FOLLOWING CONVICTION IN CRIMINAL PROCEEDINGS**W** [2006] EWCA Crim 686

Because ASBO proceedings are deemed to be civil, rather than criminal, even when brought before a criminal court under the CDA 1998, s. 1C, they do not appear to be subject to the usual rules of criminal evidence or procedure. As the Court of Appeal noted, this may give rise to considerable uncertainty and confusion. The CrimPR are stated to apply, in general, to 'all criminal cases in the magistrates' courts and in the Crown Court'. Only r. 50.4, which merely provides for the form of the order, clearly applies to such proceedings. On the other hand, the Civil Procedure Rules, which apply to all proceedings in the High Court and county courts, do not govern applications to the Crown Court (see CPR, r. 2.1(1)). The Court in *W* accordingly suggested that urgent consideration be given to the drafting of appropriate procedural rules. The Court also identified the principles governing the proper handling of ASBO proceedings under s. 1C.

See *Blackstone's Criminal Practice: D23.7*

PROCEDURE—PROPER APPROACH TO MAKING OF A DEFENDANT'S COSTS ORDER**Hussain v United Kingdom** (Appln. No 8866/04) (2006) *The Times*, 5 April 2006

The European Court of Human Rights held that there had been a violation of the applicant's rights under ECHR, Article 6(2), when, following the prosecution's failure to offer any evidence against him, he was denied an order for costs on the grounds that there was 'clear and compelling evidence of his guilt on the court papers'. There was no evidence that he had intimidated or otherwise interfered with any prosecution witnesses (although he was originally charged with such an offence) and it followed that he was being denied his costs purely on the basis of an unproven suspicion of guilt.

See *Blackstone's Criminal Practice: D29.12*

EVIDENCE—EVIDENCE OF SUBSTANTIAL PROBATIVE VALUE**S** [2006] EWCA Crim 1303

The CJA 2003, s. 100, was examined by the Court of Appeal in this case. The complainant, in a case of alleged sexual assault, was a prostitute and heroin addict, who had convictions for burglary, theft and related offences, to which she had pleaded guilty. She alleged that the appellant had violently assaulted her. His defence was that he had paid her for 'hand relief' and that she had then demanded further payment, threatening him with a rape allegation if he did not pay up.

The trial judge rejected the appellant's application to cross-examine the complainant as to her convictions on the basis of their relevance to her credibility, and the Court of Appeal appear to have agreed that these convictions were not sufficiently relevant on that particular basis. No transcript is yet available, but this ruling appears, with respect, to be surprising. A complainant with such a criminal record might reasonably be regarded as an untrustworthy witness, even allowing for the fact that she had always pleaded guilty, especially since it was largely a case of her word against the appellant's and credibility was crucial.

This ruling was of no consequence as far as the appellant's case was concerned, because the Court took the view that the complainant's convictions were relevant to the issue of her propensity to behave dishonestly (e.g., by blackmailing the appellant as he asserted she had done). A retrial was ordered.

See *Blackstone's Criminal Practice: F14.7*

EVIDENCE—CRIMINAL JUSTICE ACT 2003: MULTIPLE HEARSAY**Maher v DPP** [2006] EWHC 1271 (Admin)

The CJA 2003, s. 121(1)(c), was relied upon in this case, in which, following a collision, evidence of the defendant's car registration number had been provided to the victim by a member of the public, and then passed on to the police by the victim's girlfriend and recorded by the police officer in question in the relevant incident log. The log was thus based on multiple hearsay. Although the justices had

purported to rely upon s. 117 of the Act, the element of multiple hearsay in fact precluded reliance on that section (see s. 117(2)(c)). At this point s. 121(1)(c) became crucial, and the Divisional

Court concluded that it was clearly in the interests of justice for the evidence to be admitted.

See Blackstone's Criminal Practice: F16.48

SENTENCING

Meeting a Child following Sexual Grooming

Mohammed [2006] All ER (D) 167 (Apr)

Concurrent sentences of 3½ years' imprisonment were upheld for offences committed by a 55-year-old male appellant who had been found guilty of conduct described as the 'deliberate predatory grooming' of a 'demonstrably young and vulnerable' 13-year-old girl with learning difficulties. Intimate text messages had been exchanged and she had spent occasional nights at his house. The Court rejected the appellant's claim that he had acted out of mere foolish infatuation and noted that the maximum penalty for the offence (ten years) was much higher than that imposed on him.

See Blackstone's Criminal Practice: B3.84

Class C Drugs Offences

A-G's Ref (No. 12 of 2006); Sinclair [2006] All ER (D) 425 (Mar)

The downgrading of cannabis to a Class C drug has not affected sentencing practice for offences other than simple possession. The *Aramah* guidelines therefore remain valid.

See Blackstone's Criminal Practice: B20.108

Class C Drugs Offences

Parekh [2006] All ER (D) 225 (Apr)

The increase in the maximum penalty for the illegal production, importation, etc., of Class C drugs from five years' imprisonment to 14 years is equally applicable to all such drugs, and there is nothing to suggest that Parliament intended heavier sentences to be imposed only in cases involving the former Class B drug, cannabis. A custodial sentence of five years imposed in a case involving the illegal com-

mercial importation of diazepam tablets was accordingly upheld, even though the appellant was not alleged to be the ringleader and had pleaded guilty.

See Blackstone's Criminal Practice: B20.108

Sentencing Guidelines and Prescribed Minimum Sentences

A-G's Ref (No. 6 of 2006) [2006] EWCA Crim 1043

The Court of Appeal has confirmed that the guidelines issued by the Sentencing Guidelines Council do not affect the rules governing minimum sentences for Class A drug trafficking offences or domestic burglary.

See Blackstone's Criminal Practice: E1.2, E6.1 and E6.2

Length of Discretionary Custodial Sentences

A-G's Ref (No. 19 of 2005); Hoyle [2006] EWCA Crim 1160

The problem of prison overcrowding and its effect on sentencing was considered in this Court of Appeal case.

When passing sentence in *Hoyle* for offences of robbery and wounding, in which serious and gratuitous violence (including 29 minor stab wounds) had been inflicted on a disabled victim, the trial judge stated that because of the overcrowding problem he would not be imposing as long a sentence as he would otherwise have done. Concurrent sentences of three and four years which he then imposed were increased on appeal to six and eight years respectively, and the Court of Appeal indicated that sentences totalling ten years should ordinarily have been imposed. The overcrowding of prisons might have been a relevant factor in lesser cases, where a com-

munity sentence might perhaps be justified in place of imprisonment, but in cases of such gravity the full sentence merited by such behaviour should be imposed, without regard to the state of the prisons.

See Blackstone's Criminal Practice: E2.6

Minimum Custodial Sentences for Firearms Offences

Campbell [2006] EWCA Crim 726

The maze of prescriptive and prohibitive sentencing legislation through which sentencing courts must navigate is becoming steadily more complex, and in some cases can appear bewilderingly contradictory. In this case, the Court of Appeal had to consider two conflicting statutory directives. Where applicable, the FA 1968, s. 51A, requires the imposition of a minimum sentence of five years' imprisonment on an offender aged 18 or over at the relevant time; but by the PCC(S)A 2000, s. 89(1):

Subject to subsection (2) below, no court shall (a) pass a sentence of imprisonment on a person for an offence if he is aged under 21 when convicted of the offence.

The CJCSA 2000 provides for the amendment of s. 89(1) so that it will apply to those 'under 18' rather than to those 'under 21', but at the date of the hearing (and at the date of writing) that provision had yet to come into force. Moreover, the Secretary of State had failed to exercise his powers under the CJA 2003, s. 333, to make supplementary, consequential or transitional provisions relating to the issue.

Faced with this regrettable conflict, the Court decided that Parliament's clear intention was reflected in s. 89(1) and a sentence of four years in a young offender institution was substituted.

See Blackstone's Criminal Practice: E6.3

Determination of Benefit from Criminal Conduct

Jennings v Crown Prosecution Service [2005] EWCA Civ 746

The concept of benefiting from the obtaining of property or of a pecuniary advantage has been further examined by the civil division of the Court of Appeal. It is clear that D may be deemed to have benefited from criminal conduct even though that benefit was almost immediately dissipated or lost, but difficulties may arise where he has been involved in a criminal enterprise without at any stage gaining anything for himself. Laws LJ said:

The defendant . . . should have been instrumental in getting the property out of the crime. His acts must have been a cause of that being done. Not necessarily the only cause: there may, plainly, be other actors playing their parts. All that is required is that the defendant's acts should have contributed, to a non-trivial (that is, not de minimis) extent, to the getting of the property. This is no more than an instance of the common law's conventional approach to questions of causation.

See Blackstone's Criminal Practice: E21.6

CASE DIGEST—IN DETAIL

Porter

[2006] EWCA Crim 560

Indecent photographs of children—computers

Many computer users now know that images or files that have been deleted from a computer drive or even 'emptied from the recycle bin' may subsequently be retrieved or 'undeleted' by the use of specialist software. Some of this software is commercially available, while some is available only to specialist users such as the police. If a defendant is found to have deleted the files in question prior to the date or dates covered by the indictment, and if he does not possess the software needed to retrieve them, can he still be said to be 'in possession' of those files?

This question was examined by the Court of Appeal in *Porter*, but the answer given by the Court requires subtle distinctions to be drawn between one case and another. Dyson LJ said:

Our starting point . . . is that the first question for the jury is whether the defendant in a case of this kind has possession of the image at the relevant time, in the sense of custody or control of the image at that time. If at the alleged time of possession the image is beyond his control . . . he will not possess it. If, however, at that time the image is within his control, for example, because he has the ability to produce it on his screen, to make a hard copy of it, or to send it to someone else, then he will possess it. It will be a matter for the jury to decide whether images are beyond the control of the defendant having regard to all the factors in the case, including his knowledge and particular circumstances. Thus, images which have been emptied from the recycle bin may be considered to be within the control of a defendant who is skilled in the use of computers and in fact owns the software necessary to retrieve such images; whereas such images may be considered not to be within the control of a defendant who does not possess these skills and does not own such software.

The Court does not mean by this that a defendant who knows something about the existence of data retrieval software must necessarily remain in possession of any data that he has not actually shredded. Dyson LJ also said:

Suppose that a person receives unsolicited images of child pornography as an attachment to an email. He is shocked by what he sees and immediately deletes the attachment

. . . He knows that the images are retrievable from the hard disk drive, but he believes that they can only be retrieved and removed by specialists who have software and equipment which he does not have. It does not occur to him to seek to acquire the software or engage a specialist for this purpose. So far as he is concerned, he has no intention of ever seeking to retrieve the images and he has done all that is reasonably necessary to make them irretrievable. We think that it would be surprising if Parliament had intended that such a person should be guilty of an offence under section 160(1) of the 1988 Act.

R (W) v Metropolitan Police Commissioner and another[2006] EWCA Civ 458, (2006) *The Times*, 22 May 2006*Police powers—Anti-social behaviour*

The nature of the power given to police officers under the ASBA 2003, s. 30(6), was re-examined by the Court of Appeal. Following the designation by senior officers of two 'disposal areas' in the Richmond area, the applicants in this case sought:

- (a) a declaration that the HRA 1998, s. 3, requires that s. 30(6) should be read down so as either (1) to limit a constable's power to remove a person under 16 to cases in which the constable reasonably believes the person is himself acting or likely to act in an anti-social manner, or (2) to construe the sub-section as not giving the constable power to use reasonable force to remove the person;
- (b) a declaration that the Richmond dispersal authorisation was unlawful because it was given on a misunderstanding as to the meaning and scope of s. 30(6); and an order quashing the authorisation; or
- (c) a declaration of incompatibility under the HRA 1998, s. 4, in respect of s. 30(6).

Reversing an earlier ruling of the Divisional Court ([2005] EWHC 1586 (Admin), [2005] 3 WLR 3706), the Court of Appeal held that s. 20(6) does in fact authorise, in appropriate cases, the forcible or coercive removal from a dispersal area of a person under 16. It did not, however, amount to a curfew provision, nor if properly exercised did the power

infringe any human rights. Section 30(6) would only have a curfew effect if it gave an arbitrary power of removal; as if it gave a constable power to remove to his place of residence any unaccompanied child within a designated dispersal area at night whatever the child was doing and whatever the circumstances prevailing in the area. But the Court held that the provision does not create any such arbitrary power. The power given to officers is not a power of arrest, and is designed both to protect children within a designated dispersal area at night from the physical and social risks of anti-social behaviour by others, and to prevent such children from themselves participating in anti-social behaviour within a designated dispersal area at night. It did not confer an arbitrary power to remove children simply because they were in a designated area at night.

Giving the judgment of the Court, May LJ cited *R (Gillan and Another) v Commissioner of Police of the Metropolis* [2006] UKHL 12, [2006] 2 WLR 537 and said at [34]:

There are legislative constraints on the powers conferred by section 30 . . . These include the requirement to designate an area (section 30(1)(a)); that anti-social behaviour should there be a significant and persistent problem (section 30(1)(b)); that the period is limited to not more than 6 months (section 30(2)); that the constable has reasonable grounds for believing that the presence or behaviour of a group of two or more persons in a public place has resulted or is likely to result in members of the public being intimidated, harassed, alarmed or distressed (section 30(3)); that the constable's first main power is to give dispersal directions (section 30(4)); the limitations in section 30(5); the formal safeguards for authorisation (section 31(1)) and the required seniority of the relevant officer (section 36); the requirement for the consent of the local authority (section 31(2)); and the requirement for publicity (section 31(3), (4) and (5)). Specifically for the power in section 30(6), there is the constraint that the constable must have reasonable grounds for believing that a person under the age of 16 is not under the effective control of a parent or a responsible person aged 18 or over; and the requirement that, if the power under section 30(6) is exercised, a relevant local authority must be notified (section 32(4)). Further and importantly in *Gillan* Lord Bingham said of the relevant constraints of that case:

'Lastly, it is clear that any misuse of the power to authorise or confirm or search will expose the authorising officer, the Secretary of State or the constable, as the case may be, to corrective legal action.'

Ashton

[2006] EWCA Crim 794, (2006) *The Times*, 18 April 2006

Clarke

[2006] EWCA Crim 1196

Procedural defects—Indictments—Appeals against conviction

These two cases are linked here because they demonstrate a sea-change in the approach to procedural defects resulting from *Soneji* [2005] UKHL 49, [2006] 1 AC 340.

In *Ashton*, the Court of Appeal examined the problem of procedural failures, and whether (or when) such failures should be held to render the affected proceedings (and any conviction or sentence) invalid. Having considered the ruling of the House of Lords in *Soneji*, Fulford J said:

It is now wholly clear that whenever a court is confronted by failure to take a required step, properly or at all, before a power is exercised ('a procedural failure'), the court should first ask itself whether the intention of the legislature was that any act done following that procedural failure should be invalid. If the answer to that question is no, then the court should go on to consider the interests of justice generally, and most particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure. If there is such a risk, the court must decide whether it is just to allow the proceedings to continue.

On the other hand, if a court acts without jurisdiction—if, for instance, a magistrates' court purports to try a defendant on a charge of homicide—then the proceedings will usually be invalid.

The Court also approved the dictum of Lord Woolf CJ in *Sekhon and others* [2002] EWCA Crim 2954:

We would expect a procedural failure only to result in a lack of jurisdiction if this was necessary to ensure that the criminal justice system served the interests of justice and thus the public or where there was at least a real possibility of the defendant suffering prejudice as a consequence of a procedural failure.

Morais [1988] 3 All ER 161 was not followed by the Court of Appeal in *Clarke*, in which it was held that the absence of the required signature on a voluntary bill of indictment did not invalidate the subsequent trial or convictions. The Court instead followed *Ashton* and *Soneji*.

In *Clarke*, Pill LJ said:

The implications of the approach advocated in *Soneji* will need to be worked out in the many different circumstances in which parties rely on breaches of the rules, whether the rules appear in a statute or elsewhere. The case does, however, weaken the strict distinction between mandatory and directory requirements, consideration of which was at the heart of the decision in *Morais*. Whatever

its implications in other circumstances, we consider that, in the present situation, we are bound by the decision of this court in *Ashton*, which is based on *Soneji* . . .

Applying *Ashton*, the proceedings are not rendered automatically invalid because the indictment had not been signed. No prejudice or consequential injustice having been identified, the convictions should stand.

LEGISLATION

Terrorism Act 2006

This Act received Royal Assent on 30 March 2006. Part 1 of the Act creates a number of new and serious criminal offences in respect of things done in the course of, or in connection with the commission of, an act of terrorism or for the purposes of terrorism, notably:

- encouragement of terrorism (s. 1);
- dissemination of terrorist publications (s. 2);
- preparation of terrorist acts (s. 5);
- training for terrorism (s. 6);
- attendance at a place used for terrorist training (s. 8);
- making and possession of radioactive devices or materials (s. 9);
- misuse of radioactive devices or material and misuse and damage of facilities (s. 10);
- making demands or threats relating to devices, materials or facilities (s. 11).

Section 16 amends the CPIA 1996, s. 29 (power to order preparatory hearing).

Section 17 significantly extends English (and other United Kingdom) criminal jurisdiction over terrorist conduct abroad, and will do so irrespective of whether the alleged offender is a British citizen or, in the case of a company, a company incorporated in a part of the United Kingdom.

Part 2 of the Act deals with the proscription of terrorist organisations, the detention of terrorist suspects, and police and other investigatory powers.

The Terrorism Act 2006 (Commencement No. 1) Order 2006 (SI 2006 No. 1013) brought the Act into force on 13 April 2006 subject to certain

exceptions (principally ss. 23 to 25: detention of terrorist suspects).

Immigration, Asylum and Nationality Act 2006

This Act received Royal Assent on 30 March 2006. Although not primarily a penal statute, it creates (in s. 21) an offence of knowingly employing an adult who has not been granted leave to enter or remain, whose leave is invalid, has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or whose conditions of entry or stay prevent them from undertaking the employment in question. For the purposes of s. 21, a body (whether corporate or not) shall be treated as knowing a fact about an employee if a person who has responsibility within the body for an aspect of the employment knows the fact (s. 22(1)). The Act also provides for the imposition of civil penalties on employers of such persons and for extended search powers.

Identity Cards Act 2006

This Act received Royal Assent on 30 March 2006. It provides for the creation of a national scheme of registration of individuals and for the issue of cards capable of being used for identifying registered individuals. It will also create a series of offences and provide for the imposition of civil penalties on persons who are in default of obligations under the Act.

The principal offences created by the Act include: possession of false identity documents etc. (s. 25, read in conjunction with s. 26); unauthorised disclosure of information (s. 27); providing false

information (s. 28); and tampering with the Register etc. (s. 29).

The Forgery and Counterfeiting Act 1981, s. 5(5)(f) (knowingly and with intent etc. having custody or control etc. of false passports or documents which can be used instead of passports) and (fa) (knowingly and with intent etc. having custody or control etc. of false immigration documents) have been repealed (along with the accompanying definitions in s. 5(9)–(11)) by the Identity Cards Act 2006, s. 44 and sch. 2. The repeals appear to have come into force at Royal Assent (i.e. on 30 March 2006). At that time, the provisions intended to supplant the repealed ones (notably ss. 25 and 26 of the 2006 Act) had not yet been brought into force. Following criticism of this oversight, the Home Office has acted quickly to remedy it and, by the Identity Cards Act 2006 (Commencement No. 1) Order 2006 (SI 2006 No. 1439), *inter alia*, ss. 25, 26 and 30 were brought into force on 7 June 2006. It also purports to bring into force sch. 2 (repeals) but this appears to contradict the wording of the Act itself.

Domestic Violence, Crime and Victims Act 2004 (Victims' Code of Practice) Order 2006 (SI 2006 No. 629)

This Order brings the Code of Practice for Victims of Crime into force on 3 April 2006.

Criminal Justice Act 2003 (Commencement No. 12) Order 2006 (SI 2006 No. 751)

This Order brings into force, on 6 April 2006, sch. 35, paras. 5 (insofar as not already in force), 6, 8, 9 and 12, and the repeals in sch. 37, part 11 relating to the Police Act 1997, s. 125, the Private Security Industry Act 2001, the CJPA 2001 and the National Health Service and Health Care Professions Act 2002. All the provisions relate to criminal record certificates.

Anti-Social Behaviour Act 2003 (Commencement No. 4) (Amendment) Order 2006 (SI 2006 No. 835)

This Order has the effect of extending the period of a pilot implementation of s. 85(5) of the 2003 Act (anti-social behaviour orders against juveniles who are not parties) for a further six months to 1 October 2006.

Misuse of Drugs (Amendment) Regulations 2006 (SI 2006 No. 986)

These Regulations amend the Misuse of Drugs Regulations 2001 (SI 2001 No. 3998). Regulations 2 to 7 amend regs 2, 6B and 7 to 10 of the 2001 Regulations to replace references to 'extended formulary nurse prescribers' with references to 'nurse independent prescribers'. Regulations 3(c) to (e) and 6(b) amend regs 6B and 9 of the 2001 Regulations to allow nurse independent prescribers to prescribe and supply diazepam, lorazepam and midazolam for the treatment of tonic-clonic seizures.

Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006 (SI 2006 No. 1070)

This Order sets out exceptions to the defences in the PCA 2002, ss. 327(2A), 328(3) and 329(2A). Sections 327(1), 328(1) and 329(1) of that Act create offences relating to 'criminal property', as defined by s. 340(3) by reference to benefit from 'criminal conduct'. The definition of 'criminal conduct' includes conduct that would constitute an offence in any part of the United Kingdom if it occurred there (see s. 340(2)). The defences apply if the person who would otherwise commit such an offence knows, or believes on reasonable grounds, that the 'relevant criminal conduct' occurred in a particular country or territory outside the UK and was not, at the time it occurred, unlawful under the criminal law then applying in that country or territory. Such a defence does not apply in respect of relevant criminal conduct of a description prescribed in an order. Article 2(2) of this Order prescribes conduct which would constitute an

offence punishable by imprisonment for a maximum term in excess of 12 months in any part of the UK if it occurred there other than:

- (a) an offence under the Gaming Act 1968;
- (b) an offence under the Lotteries and Amusements Act 1976; or
- (c) an offence under s. 23 or s. 25 of the Financial Services and Markets Act 2000.

Serious Organised Crime and Police Act 2005 (Commencement No. 6 and Appointed Day) Order 2006 (SI 2006 No. 1085)

This Order brought into force, on 8 May 2006, various provisions of the Act relating to the abolition of the Royal Parks Constabulary. It also brought into force, on 15 May 2006, s. 102 of the Act (money laundering: defence where overseas conduct is legal under local law).

COMMENT AND ANALYSIS

Recommendation for Deportation

The politics of deportation (and, in particular, the failure of systems within the Home Office to deport offenders recommended for deportation by the criminal courts) has rarely been out of the newspaper headlines in recent weeks. Embarrassment over this issue forced the departure of Home Secretary Charles Clarke in early May 2006. Failures of the executive to do what is required should not be confused with the law on recommendation for deportation. Yet on 23 May the new Home Secretary John Reid made a statement to Parliament in which he indicated that, following the deportation fiasco, there would be an urgent and complete review of all issues relating to deportation of foreign nationals convicted of criminal offences. It is possible that, as part of this review, the power to recommend deportation may be amended significantly, or abolished altogether. Proposals are due to be announced before the summer recess. By coincidence, at the same time as the shortcomings of the arrangements for deportation were becoming clear, the Court of Appeal changed the law on recommendations for deportation in a very significant way.

In *Carmona* [2006] EWCA Crim 508, the offender was a Portuguese national, a man of previous good character, who pleaded guilty to a number of offences of handling stolen goods and forgery. He was sentenced to 15 months' imprisonment and recommended for deportation. On appeal, the Court of Appeal was invited to give guidance on the power to recommend for deportation, following the

HRA 1998. The Court noted that a consultation paper on guidelines in relation to this topic had been issued by the Sentencing Advisory Panel (March 2005), and it was likely that the Sentencing Guidelines Council would issue guidelines in due course. The Court considered the existing law, well settled in a series of decisions following and applying *Nazari* (1980) 2 Cr App R (S) 84. The first issue is whether the offender's continued presence would be to the detriment of society. The second issue is the need to weigh the benefit to this country of the offender's deportation against the harm that might be suffered by innocent third parties, in particular, the offender's family. Recommendations have in the past been quashed on appeal because insufficient weight had been given by the judge to this matter (examples include *Shittu* (1993) 14 Cr App R (S) 283, *Odendaal* (1992) 13 Cr App R (S) 341 and *Harris* [2004] EWCA Crim 1738, all cited in the Panel's paper). It has always been clear, however, that the sentencing judge should not try to take into account the political and other conditions prevailing in the country to which the offender may be deported. Such matters are properly taken into account by the Home Secretary at the time when the decision on deportation is made. The Home Secretary will have fuller and more up-to-date information on those matters than the Court can possibly have.

The Convention right most likely to be engaged by the deportation process is Article 8, which provides for the right to respect for private and family life. In

Carmona it was the clear view of the Court that a recommendation for deportation could not, of itself, infringe Article 8 rights, since the sentencing court was merely making a recommendation which might or might not be acted upon by the Secretary of State; it was not making a decision on deportation. Article 8 rights might be infringed by the decision of the Home Secretary, but not by the recommendation *per se* (see *Samaroo* and *Sezek* [2001] EWCA Civ 1139). It was the Court's view that it was better for all such issues (whether affecting the offender or his family) to be addressed by the Home Secretary (or on appeal to the Asylum and Immigration Tribunal) rather than at the time of sentence. It followed that there was no need for a judge making a recommendation for deportation to consider the Convention rights of the offender. Although *Nazari* indicated that the judge should have considered the Convention rights of the offender's long-standing partner and two children, aged seven and two, *Carmona* says that the former authority is superseded in this respect, and it is now unnecessary and undesirable for the sentencing judge to have regard to such matters. They would be considered in due course by the Home Secretary when the decision whether or not to deport was actually made. It is ironic that the effect of the HRA 1998 has been to remove a constraint which formerly operated on the criminal court to consider the offender's family ties in this country before recommending the drastic step of deportation in his case.

The decision in *Carmona* is logical and clear, and will have the effect of simplifying the procedure when a court makes a recommendation. It is open to criticism, however, on the basis that s. 6 of the HRA 1998 requires every court to consider relevant Convention rights as they arise. It had been widely assumed (as reflected in the Panel's paper, and elsewhere) that the effect of the HRA 1998 in this area had been to elevate this aspect of the guidance in *Nazari* into a legally enforceable right. The Strasbourg jurisprudence on deportation and Article 8 rights has in recent years explored the question of proportionality between rights under Article 8 and 'the prevention of disorder or crime'. Key decisions are *Boultif v Switzerland* (2001) EHRR 50 and *Mokrani v France* (2005) 40 EHRR 5. These decisions are, however, distinguishable. They are all concerned with the decision to deport, an administrative

decision taken in most countries by the police or Ministry of the Interior following conviction and sentence. None of the authorities cover the special situation operating (at least for the moment) in English law where the criminal court makes a recommendation on point of sentence.

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Bad Character and Contaminated Evidence

In *Card* [2006] EWCA Crim 1079, the Court of Appeal has for the first time given detailed consideration to the scope and effect of the CJA 2003, s. 107. This provision was touched upon, briefly and *obiter*, in *Renda* [2005] EWCA Crim 2826, at [27], but has not previously been central to the outcome of any reported case. *Card* now provides detailed guidance as to the proper handling of s. 107 issues, but this guidance appears to be undermined by confusion as to what evidence must be 'contaminated' before s. 107 can apply.

The Criminal Justice Act 2003, s. 107

Section 107(1) and (5) provide:

- (1) If on a defendant's trial before a judge and jury for an offence—
 - (a) evidence of his bad character has been admitted under any of paragraphs (c) to (g) of section 101(1), and
 - (b) the court is satisfied at any time after the close of the case for the prosecution that—
 - (i) the evidence is contaminated, and
 - (ii) the contamination is such that, considering the importance of the evidence to the case against the defendant, his conviction of the offence would be unsafe,

the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.
- (5) For the purposes of this section a person's evidence is contaminated where—
 - (a) as a result of an agreement or understanding between the person and one or more others, or
 - (b) as a result of the person being aware of anything alleged by one or more others whose evidence may be, or has been, given in the proceedings, the evidence is false or misleading in any respect, or is different from what it would otherwise have been.

It seems clear from subsection (1) that s. 107 is concerned only with cases in which the 'contaminated evidence' is itself evidence of bad character as defined in s. 98 of the Act (i.e. evidence of misconduct *other than* evidence which has to do with the offence with which D is charged or evidence of misconduct in connection with the investigation or prosecution of that offence). The section does not appear to be applicable to cases in which uncontaminated evidence of bad character has been adduced in support of other prosecution evidence which is then found to be contaminated. If, for example, the complainant alleges that D assaulted her, and evidence of his previous convictions for similar assaults is adduced under s. 101(1)(d) to demonstrate his propensity to commit such assaults, s. 107 is not engaged merely because evidence later emerges to show that the complainant changed her evidence after colluding with another prosecution witness. There is a danger in such cases that a court or jury will still convict D because of his criminal record, but this is not a danger that s. 107 purports to address.

On the other hand, s. 107 is capable of applying in cases where D is charged with two or more allegedly similar or related offences, in which the evidence on one count has been presented as corroborative (or mutually supportive) of the other[s], but is then found to be contaminated. This is because s. 112(2) provides:

Where a defendant is charged with two or more offences in the same criminal proceedings, this Chapter (except section 101(3)) has effect as if each offence were charged in separate proceedings; and references to the offence with which the defendant is charged are to be read accordingly.

In other words, evidence relating to count 1 may be 'evidence of bad character' as far as count 2 is concerned (and vice versa). If such evidence is contaminated, s. 107 may then apply.

R v Card

In *Card* the prosecution case was that D had committed separate acts of sexual abuse at different times on the same day against M, a five-year-old girl and A, her ten-year-old brother. Complaints made by the children were supported by evidence from their mother and by evidence of the defendant's previous convictions for nine serious sexual offences

against children, committed over a period of several years. These convictions were adduced, under the CJA 2003, s. 101(1)(d), as relevant to his propensity to commit offences of the kind with which he was charged.

The prosecution case began to fall apart under cross-examination, notably because both children readily admitted in cross-examination that their mother had coached them in their evidence and 'told them what to say'. The mother also proved to be an unsatisfactory and unconvincing witness, whereas the evidence of a second adult witness (a family friend) differed from that of the others in certain key respects. In the event, the trial judge accepted a submission of 'no case to answer' in respect of the alleged offence against the five-year-old girl, but allowed the case to continue in respect of the alleged offence against her older brother, and refused an application to discharge the jury on the basis of contamination under s. 107. On this count the jury convicted—influenced no doubt by the evidence of D's previous convictions.

On appeal, it was held that the jury should have been discharged under s. 107, because the evidence of the children had been contaminated. The purpose of s. 107, said the Court, was to safeguard the position of the defendant whose 'bad character' had been put in evidence, by requiring the judge to stop the trial if 'evidence in support of the prosecution' proves to have been contaminated. Judge P said:

The duty under section 107 does not arise unless the judge is satisfied that there has been important contamination of the evidence. If he is so satisfied, what then follows is not a matter of discretion. The consequences are prescribed by statute. Whether or not there would on the conventional approach be a case to answer, the trial should be stopped. The jury must either acquit the defendant in accordance with a judicial direction, or if the judge considers that the case ought to proceed to a retrial, the jury will be discharged from returning a verdict and a retrial ordered. . . .

In our judgment there was plain and unequivocal evidence that M's evidence was different from what it would otherwise have been as a result of the conversations with her mother. The inference that A's evidence was different from what it would otherwise have been if he had not been present during the same conversation as his sister, in our judgment, was virtually inescapable. The excluding provisions in section 107 were established. The jury should have been discharged.

Pausing here, one may note that there was no contamination of what the Court in *Card* refers to as 'the bad character evidence' (i.e. the evidence of D's previous convictions). The contamination was of testimony which that evidence was adduced to support. The judgment does not refer to s. 112(2), either expressly or by implication. Far from regarding the evidence of the witnesses as bad character evidence (as it might to some extent have done), the Court purports to draw a clear distinction between such testimony on the one hand and 'bad character evidence' on the other, as in this passage:

In future, we suggest that when, in answer to a submission by the Crown at the start of the trial that the defendant's previous bad character should be admitted before the jury, counsel for the defendant (as here) makes a responsible submission that there is material in the prosecution case itself to suggest that there was or may have been witness contamination, it would normally be sensible for the judge to postpone a decision until the suggested contaminated evidence has been examined at trial. If the decision to admit bad character evidence were postponed until the evidence of the complainants and any other witnesses were concluded, the judge, when deciding whether to admit the evidence of bad character, would

have well in mind the precise details of the evidence actually given, with such weaknesses and problems as may have emerged. He would not then be acting on his judgment about anticipated evidence, but making a decision based on the evidence itself.

The Right Outcome?

The Court of Appeal appear to have lost sight of the principle that bad character evidence must itself be contaminated before s. 107 can apply. This does not mean that the case was wrongly decided. Some of the contaminated evidence heard by the jury (namely the evidence of M) was in fact bad character evidence by virtue of s. 112(2), even if the Court failed to identify it as such, and in any event the case against D was so flawed and contradictory that his conviction was impossible to defend. Despite this, *Card* remains a flawed precedent and one hopes that the misinterpretation at its heart will be corrected when the opportunity next arises.

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PUBLISHING NEWS

NEW—OUT AUGUST 2006

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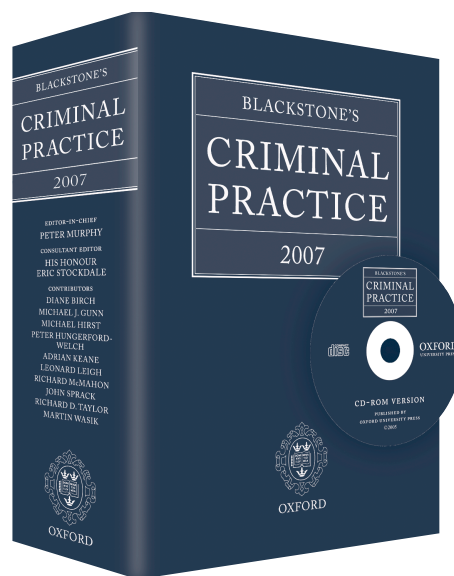
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