Albion Chambers, Broad Street, Bristol BS1 1DR

**Telephone** 0117 927 2144
**Fax** 0117 926 2569
**DX** 7822 Bristol
clerks@albionchambers.co.uk
www.albionchambers.co.uk

Number 25 January 2018

# Albion Chambers CRIME TEAM NEWSLETTER

## What happened to deportation orders?

Does anyone remember the frantic scrabble to find the relevant form at the end of a sentencing hearing when the word "deportation" was mentioned? Does deportation still feature in our criminal courts, and do we need to know anything about it?

The power to recommend deportation is contained in section 3(6) of the Immigration Act 1971, and is still in force. A recommendation may be made in respect of any person who is not a British citizen, who is aged 17 or over, and who is convicted of an offence punishable with imprisonment as an adult. However, on 1 August 2008 the UK Borders Act 2007 brought into effect provisions for automatic deportation of foreign criminals, and it was held in *Kluxen* [2011] EWCA Crim 1081 that since the 2007 Act came into force it is no longer appropriate for a court to recommend the deportation of a "foreign criminal" as defined in that Act. This is because no useful purpose would be served by doing so, and, although the new provisions do not expressly prevent the Court from recommending the deportation of a "foreign criminal", there is no longer any need for the Court to do so since the Secretary of State is given the powers and duties to deport without the involvement of a Court. It is also unnecessary for the Court to explain during sentencing remarks why it is not making a recommendation for deportation.

This, therefore, explains the general silence on this topic within the criminal courts. The most common trigger for the automatic provisions is a single term (not aggregate) custodial sentence of 12 months or more (including YOI and indeterminate terms but not suspended sentences). There are exceptions to the automatic provisions, some of which involve an assessment of human rights or refugee status which will not feature in the criminal proceedings, and also include provision about offenders under 18 on the date of conviction or where specified orders under the Mental Health Act 1983 are in force. Even if the automatic provisions are not triggered, and no recommendation for an offender's deportation is made, the Secretary of State may nevertheless deport if she deems this conducive to the public good.

The consequence for an offender who is not a British citizen will be that they may well be facing a prospect of deportation, but this is a decision for the Secretary of State, involving a wider range of considerations than a recommendation by the criminal court alone. The likelihood of a deportation order ultimately being made in any particular case is beyond the scope of both this article and the legal expertise of a purely criminal practitioner.

In theory, a recommendation for deportation could still be appropriate in cases where non-custodial sentences or custodial sentences shorter than 12 months are involved. The test for a recommendation is whether the offender's conduct constitutes a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society, or whether his/her continued presence in the United Kingdom is to its detriment. It would perhaps be rare for short and non-custodial sentences to accompany a set of circumstances capable of satisfying that threshold. In *Kluxen* it was considered that the power to make a recommendation may still come into play for an offender who repeatedly commits minor offences, or a single offence involving the possession or use of false identity documents. Although any reference to making a recommendation for deportation may be vanishingly rare, it should be noted that for the criminal court to make it, the offender must have seven days' notice, so if a recommendation is a possibility at all, the paperwork will need to have been served in advance, or an adjournment sought. If an offender is not detained by reason of his sentence, but a recommendation is nevertheless made, the offender must be detained pending the making of the Deportation Order unless the Court otherwise directs, the Secretary of State otherwise decides, or bail is otherwise granted.

In *Kluxen*, matters which should not be taken into account by the criminal court were listed, including the rights of the offender under the ECHR, further considerations under EU Directives and EEA Regulations and any effect of any recommendation for deportation on innocent persons before the Court such as family members, or the political situation in the country to which the offender may deported. This is because such matters relate to the deportation decision made by the Secretary of State not the recommendation made by the criminal court, and because, in any event, the Secretary of State or the Immigration Tribunal are better placed to assess such matters. It is also wrong to reduce an otherwise appropriate custodial sentence to avoid the provisions of the 2007 Act or alter the sentence on the assumption that a deportation order will be made.

Notwithstanding the list of matters that cannot feature in the sentencing process, thorough mitigation will still be important, because, even in a case without a recommendation, the sentencing remarks of the Judge and the sentence imposed will be factors in assessing the gravity of the offending for the purposes of any deportation decision, and any assessment of future risk of offending and harm may be relevant. Therefore, in any sentencing process involving a foreign national you may consider that it is at least worth remembering why you are not talking about deportation.

**Kirsty Real**

# A *Twist* in the tale

## Hearsay post-*Twist* not so simple?

The three-step hearsay test set out by the Court of Appeal in *Twist* [2011] EWCA Crim 1143 appeared to be clearly expressed, straightforward in principle, and (helpfully) capable of general application. However, the decision in *Midmore* [2017] EWCA Crim 533 may suggest otherwise.

Midmore (M) appealed against his conviction for causing Grievous Bodily Harm – by throwing acid in the face of the victim (V). M and his brother (B) were drug dealers and it was M's belief that V had robbed B. The allegation was that M had been party to a joint enterprise with his brother – who pleaded guilty. The defendants had purchased sulphuric acid, which M said was for the purpose of unblocking a drain. B had sent messages to his girlfriend regarding the robbery, including that he knew who was responsible, and a photograph of the box of sulphuric acid accompanied by a message saying "this is the one face melter".

This text message was adduced at M's trial. He appealed against his conviction on the basis that the text message was inadmissible hearsay. The trial Judge had ruled that it was not hearsay, and was relevant to the question of whether there had been a shared innocent purpose in the purchase of the sulphuric acid as M asserted, and so was admissible.

On appeal M argued that the trial judge had fallen into error because the text had been admitted in order to prove a representation of fact – namely what B's purpose was at the time of purchase.

The appeal was dismissed. The Court observed that the trial judge had followed the three-stage approach in *Twist*. The Court said that the text message satisfied the first two steps: the fact/matter which the prosecution sought to prove (that the acid product had been purchased with intent to injure) was contained in the message. However, the court said that the message failed the third stage of the hearsay test, because the message had not been sent with the intention of causing B's girlfriend to believe/act on it.

Commentators have observed in response to this decision that the test in *Twist* may be more easily stated than applied. It has also been suggested that the Court was wrong in concluding that the message was not sent with the intention of making B's girlfriend believe that he intended to use the face melter for that purpose, and the rhetorical question has been posed: why else did he send it?

There is scope for disagreement and variance in interpretation in relation to this third step, as this case demonstrates. Perhaps the first two stages of the test should have been approached differently.

- Step 1: what is the fact/matter the prosecution seek to prove?

*That the acid was purchased with the intention of using it in an attack.*

- Step 2: does the statement contain a representation of that fact or matter?

*No. The statement (the message) does not say anything about the intention of those who purchased the acid.*

The statement says that this acid is a "face melter", it does not say that it was B's or M's or anyone else's intention to use it to 'melt' a face. The Court of Appeal's analysis, in reaching the opposite conclusion, was that "[i]t was an implied representation of the intention, not simply a comment from which the intention could be inferred. It therefore fell within the definition in s115(2) as it was a statement of the matter intended to be proved".

Arguably, this approach may lead to error and confusion, and may resurrect the concept of the 'implied assertion'. One of the reasons *Twist* was such a welcome and refreshing authority was because it did away with this troublesome concept. Hughes LJ said *"The Act does not use the expression "assertion". Instead it speaks of a "statement" and the "matter stated" in it. That seems likely to have been because its framers wished to avoid the complex philosophical arguments which beset the common law, as explained in* DPP v Kearley *[1992] 2 AC 228, as to when an utterance contains an implied assertion."* Whilst the Act does use the expression representation, it does not use the word "implied", and to revert to consideration of whether a statement contains an implied representation of the fact or matter which it is sought to prove will result in the same complex philosophical arguments. The message in *Midmore* did not state that B's purpose in purchasing the acid had been to use it in an attack. If the trial judge and Court of Appeal had, therefore, said that the message failed the second limb of the hearsay test, their conclusion (that it was admissible) would have been the same, and arguably more logical, and would have neatly avoided the difficulties which are encountered when the hearsay test depends to any extent upon 'implication'. Keep it simple?

**Anna Midgley**

# The resurrection of the dead?

## When 'lie on file' wakes up to bite back at the cherry

'Lie on file' does not mean a promise not to prosecute in the future. This is well-known. Counts which have previously been ordered to "lie on file" are not the same as cases where the prosecution have offered no evidence. In many circumstances, counts which have previously been ordered to "lie on file" several years ago are more likely to be resurrected than cases where a defendant has pleaded guilty in the past and then the prosecution seek to proceed on substantially the same allegation. The prosecution must apply to the Crown Court (where the counts were ordered to "lie on file") or the Court of Appeal for permission to proceed with such counts. The relevant principles can be found in Blackstone's Criminal Practice 2017 at D12.85.

"Before the Crown Court or Court of Appeal is likely to give leave for a count or indictment ordered to lie on the file to be

tried, a *significant change of circumstances* will be required. This would most commonly arise where the accused's convictions on the other matters (i.e. the charges on the same or separate indictments to which he pleaded guilty or of which he was found guilty at the same time as the order to lie on the file was made) are quashed on appeal and a retrial sought…" and also "where other similar allegations later came to light" by analogy with *R v Gadd* [2014] EWHC 3307 (QB).

The authority of *R v Gadd* provides some helpful guidance as to what might amount to a "significant change of circumstances".

In *R v Gadd*, the offender more commonly known by his former stage name of "Gary Glitter", the prosecution were able to proceed with an allegation which had previously been stayed (rather than voluntarily left to "lie on file"). In this particular case the prosecution preferred a voluntary bill of indictment. The complaint from one alleged victim was "stayed" by a stipendiary magistrate several years ago. She was aggrieved and wished her allegation to be pursued. Further victims came to light. It is important to note that:

- there was "clear and compelling evidence from her about what happened";
- she was "available" to give evidence;
- there was no evidence of any actual prejudice to the defendant.

The kernel of the decision in respect of resurrecting old allegations is contained within [55] of the judgement of Globe J in *R v Gadd* above:

*"If JA's allegations stood alone with no other complaints having been made and the prosecution had simply decided through a change of policy to attempt to resurrect it, I may well have recognised unfairness. My decision in this case is not a green light to prosecutors to seek to resurrect old cases. However, JA's allegation will not stand alone. It will sit alongside the other complaints and be tried with them. The defendant is going to be tried upon counts 3 to 10 in any event. Balancing all of the facts and interests, I do not regard it as unfair that the defendant should also be tried on counts 1 and 2."*

What amounts to a significant change of circumstances? This may not be a particularly high threshold for the prosecution. A simple change of heart will be insufficient if the true reason is that the decision to resurrect accounts is solely prompted by a disgruntled complainant or pressure driven by revised prosecution policy.

However, if the prosecution are able to provide a fuller picture with further complainants this will often support any prosecution application to proceed with allegations previously ordered to "lie on file".

Ultimately it is a decision for the judge as to whether it is fair or just to proceed. If the real complaint is that the defendant received a good deal last time and feels hard done by, that would obviously not amount to unfairness.

An example of the application of these principles can be found in a recent first instance case of *R v M,* tried at the Hereford Crown Court. In 1998, the defendant pleaded guilty to having unlawful sexual intercourse with the 12-year-old daughter of his partner. The girl (G) became pregnant. The defendant, having little choice, pleaded guilty to having unlawful sexual intercourse with G on more than one occasion, where it was accepted that he made her pregnant and took her to a family planning clinic. In 1998, he received a sentence of four-and-a-half years' imprisonment for this offence. At that time two other complainants also made complaints that they too had been sexually abused by their stepfather but their allegations were left to "lie on file". P had alleged that the defendant had digitally penetrated her vagina on two occasions. Her sister, S, also alleged that she had been indecently assaulted on two occasions. At the time of the original complaints P was only five-years old and S was seven. A decision was taken in 1998 to accept the guilty plea in respect of the unlawful sexual intercourse with S alone. In 2015 P and S were spoken to again, following Social Services intervention, and P alleged that she had been sexually abused on far more occasions. This was new evidence. S maintained her allegations. Another sister (E) also made allegations for the first time that she too had been sexually abused by the defendant when he lived at their address; although in 1997 she only felt able complain about physical abuse. In 2017 the prosecution were allowed to proceed with allegations made by P, S and E including the "lie on file" counts in a trial lasting two weeks.

The trial judge accepted the prosecution submissions that:

- evidence from P and S almost 20 years ago, which led to "lie on file" counts, would have been admissible in the trial as bad character evidence in any event;
- the counts ordered to lie on file in 1998 were not stand-alone counts but formed part of a wider picture of sexual abuse now known to the police, and, therefore, there had been a change of circumstances (see *R v Gadd*);
- there was no unfairness in that the evidence could be challenged in a trial since the defendant could plead Not Guilty and cross-examine the complainants.

Defence practitioners will be alive to the following issues in realistically resisted pre-trial arguments when the prosecution seek to pursue counts previously ordered to "lie on file".

Basis of Plea and Limitation of Culpability: When the defendant has already pleaded guilty in relation to one complainant in the initial proceedings on a limited basis, which may have limited the offender's culpability in relation to the complainants whose allegations were ordered to lie on file, this may be a factor which inhibits any trial judge's readiness to permit the prosecution to resurrect such allegations.

Deficiencies in Disclosure: These should be brought to the attention of the Crown Court judge, or Court of Appeal judge, who will determine whether the prosecution are able to proceed with old allegations which were formally ordered to "lie on file", particularly if this relates to the "loss" or destruction of recorded descriptions by the complainant of the alleged complaint, where the Defence would be deprived of the opportunity to compare and contrast potentially varying accounts if it is known that a complainant has made some contact with the police or support agencies between the initial allegations and the new proceedings.

What about Sentence? When the prosecution succeed in proceeding with counts previously ordered to "lie on file", there is little force in arguing that the defendant has already been punished and sent to prison for some crimes which occurred during the same time frame. The defendant in *R v M* received a total sentence of 16 years' imprisonment and was identified as an offender of "particular concern" notwithstanding that he had received a four-and-a-half year sentence for similar offending against another sibling 19 years before: The sentencing court had regard to Lady Justice Hallett's observations in *Attorney General's Reference No 92 of 2009* [2010] EWCA Crim 524 at [28] onwards in which Her Ladyship observed that the offender "did not wipe the slate clean" and "therefore denied himself the freedom from subsequent prosecution and punishment which a full confession would have given him. He is the author of his present situation."

Furthermore it would be "wrong to reward the offender's lack of frankness"

Whenever the Court orders that counts should "lie on file *in the usual way*" (whatever that is), it is probably worth advising the defendant about the state of the law and the "usual way" in diplomatic terms. Second bites of the cherry are occasionally permitted and when they are… they can hurt.

**Kannan Siva**

# Sexual offences

## Sentencing update

We have all grown accustomed to the upward trend in sentencing in recent years in respect of sexual offences, particularly those relating to historic allegations. But the increase in sentence has been echoed by a similar increase in the number of appeals against sentence which, although in the main are unsuccessful, is nonetheless proof that there is still a great deal of confusion in relation to this area of sentencing.

In an attempt to clarify matters, Lord Judge LJ provided guidance on the approach to sentencing historic sexual offences, as far back as 2011 in the case of *H* (2011) EWCA 2753; guidance that is in the main now replicated in Annex B to the Sexual Offences Definitive Guideline. The main principle to be derived from *H* is that an offender must be sentenced in accordance with the regime that is applicable at the time of sentence. Such a sentence will necessarily be limited to the maximum sentence available at the time of the commission of the offence, unless the maximum has been reduced in the intervening period, in which case the lower maximum will be applicable. However, in addition to that first and most obvious principle, Annex B details 10 other principles, which though clear in intent, have caused a number of difficulties in interpretation and so clarification was provided by a 5-strong Court of Appeal in *Forbes* (2016) EWCA 1388. The court didn't go through the paragraphs in order but, for ease of cross reference, I have listed them below in paragraph order.

- Paragraph 3 of Annex B highlights the need for the sentence to have regard to any applicable sentencing guidelines for equivalent offences under the Sexual Offences Act 2003 (SOA 2003). In respect of that principle, the Court rejected the prosecution approach that a judge should simply select the applicable current guideline and reduce the sentence if required, on the basis that such an approach was inconsistent with both Annex B and the principles detailed in *H*. Importantly, the Court confirmed that the words 'having regard to' indicated that a judge should use the Guideline in a 'measured and reflective manner', to enable him or her to arrive at the appropriate sentence. Doing so would avoid a mechanical approach, and in order to arrive at the appropriate sentence, which may additionally necessitate looking at more than one guideline, or even to more general principles, such as that of Article 7 and the common law requirements of fairness.

- Paragraphs 4 to 6 of Annex B deal with the assessment of culpability and harm, in respect of which the Court stressed that it is essential that a sentencing court avoids double counting but bears in mind that the starting points for sentence are designed to reflect the gravity of that particular type of offending. That is particularly important when dealing with familial or domestic relationships, where the fact of such a relationship is often taken into account when determining the starting point. If that is the case, something more is required to establish a separate aggravating feature of an abuse of trust. The Court observed that the term abuse of trust is reflected at different stages throughout the Guideline and, as a consequence, has caused great difficulty. In order to clarify how the term applies with specific reference to sentencing, the Court said that although, in a colloquial sense, it is as we all understand it to be, trusting the care of our children to another, as used in the Guideline, it connotes something more than that. Thus, abuse by a sibling on a younger sibling, or the mere fact of association does not necessarily amount to a breach of trust, while the relationship between a teacher and pupil, or a scoutmaster and the scouts in his charge would. What is important is a close examination of the facts of each case and the need for clear justification when delivering the sentence, if such an abuse of trust is found.

- Paragraph 6 of Annex B deals with the assessment of harm to the victim. The Court said that whilst it is evident that that the effect can be devastating on a victim, as with the assessment of culpability, a court must take care to avoid double counting. In that regard, they pointed out that the starting points and sentencing ranges inherently provide for the effect on the victim, which means that there has to be something significantly more before harm can be taken into account as a distinct and further aggravating feature. A similar assessment must be made before the judge can make a finding of extremely severe psychological or physical harm, which elevates the offending to the top category of harm. Of particular note for practitioners, the Court observed that some of the victim personal statements provided to them, contained matters which should not have been included within such a statement.

- Paragraph 7 of Annex B deals with the relevance of the passage of time and the potential for such to mitigate or aggravate the seriousness of the offence. The Court confirmed that where threats were made by the offender, in an attempt to discourage the complainant from reporting the offence, the passage of time could never be a mitigating factor.

- Paragraph 8 of Annex B deals with the issue of good character in the intervening period between commission of the offences and sentence. The main point being that the more serious the offence, the less weight would normally be attributed to subsequent good character. Importantly, where the good character or exemplary conduct has been used to facilitate the offence, such as would be the case of a teacher committing offences against pupils, rather than being mitigation that would normally amount to an aggravating feature.

- Paragraph 9 of Annex B confirms that youth or immaturity at the time of the offence is potentially able to be regarded as personal mitigation. However, the Court noted that that was not what was expressed by Lord Judge CJ in *H* and reaffirmed that his principle, that immaturity goes to culpability is the better of the two, again urging the sentencing court to look at all of the facts in order to reach an overall assessment.

- Finally, the Court drew attention to two other matters that have the potential to affect sentence in such cases. The first is the question of the indictment and the importance of reflecting the criminality

alleged in the counts of the indictment in order to provide the sentencing court with the appropriate powers of sentence. The prosecution should consider the use of multiple incident counts but also to ensure that there is a sufficient number or mix of such counts to ensure that sentencing aim is achieved. The second is the application of s.236A of the criminal Justice Act 2003, the provision dealing with offenders of particular concern. The Court confirming that where such provisions apply, the judge should impose an additional one-year period of licence because failure to do so cannot later rectified by the Court of Appeal.

What is clear from this very helpful judgment is that advocates, on each side, must consider each case on its facts. Too strict adherence to the guidelines, without applying them to the particular facts of case, would certainly be of no real assistance to the sentencing tribunal but, rather more seriously, may result in their wrongful application.

**Sarah Regan**

# Albion Chambers Crime Team

**Team Clerks**
Bonnie Colbeck
Ken Duthie

**Ignatius Hughes QC**
Call 1986
QC 2009 Recorder

**Adam Vaitilingam QC**
Call 1987
QC 2010 Recorder

**Kate Brunner QC**
Call 1997 QC 2015
Recorder
Upper Tribunal Judge

**Edward Burgess QC**
Call 1993
QC 2017 Recorder

**Timothy Hills**
Call 1968

**Nicholas O'Brien**
Call 1968

**Nicholas Fridd**
Call 1975

**Robert Duval**
Call 1979

**Don Tait**
Call 1987 Recorder

**Stephen Mooney**
Call 1987
Team Leader

**Fiona Elder**
Call 1988

**Simon Burns**
Call 1992

**Paul Cook**
Call 1992 Recorder

**Alan Fuller**
Call 1993

**Giles Nelson**
Call 1995

**Jason Taylor**
Call 1995 Recorder

**Kirsty Real**
Call 1996
Part-time Tribunal Judge

**Michael Hall**
Call 1996

**Kannan Siva**
Call 1996

**Sarah Regan**
Call 2000

**Richard Shepherd**
Call 2001

**Anna Midgley**
Call 2005 Recorder

**Derek Perry**
Call 2006

**Edward Hetherington**
Call 2006

**Alun Williams**
Call 2009

**Alexander West**
Call 2011

**Simon Cooper**
Call 2012

**Alexander Small**
Call 2012

**Chloe Griggs**
Call 2014

**Robert Morgan-Jones**
Call 2014