Youth justice: update

Kate Aubrey-Johnson, Elena Papamichael, Michael Goold and Catherine Rose round up important developments.

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Rap and drill music as evidence

The use of music videos and lyrics by the prosecution as evidence in criminal trials is becoming increasingly common. Recent research by the University of Manchester identified 68 cases, involving 252 defendants, in England and Wales in 2020–23 in which rap music was used as evidence: *Compound injustice: a review of cases involving rap music evidence in England and Wales* (Eithne Quinn, Erica Kane and Will Pritchard, Centre on the Dynamics of Ethnicity, April 2024). The use of such evidence is also drawing increasing attention and controversy.

Children and young people are heavily represented in cases involving rap evidence. Researchers found 15 per cent of defendants were children and 67 per cent were 18–24 years old. Twenty-seven per cent of the cases reviewed involved one or more child defendants. The number was higher in cases prosecuted under the principle of joint enterprise (34 per cent). Eighty-eight per cent of the child defendants had been charged with murder.

Typically, this evidence is used in trials of violent offences where the prosecution alleges a gang motivation behind the offending. The music and lyrics are invariably rap, frequently the more recent subgenre drill, which often has a confrontational lyrical style similar to gangsta rap. The prosecution may seek to rely on such songs as evidence of gang association, familiarity with guns and/or knives, or of specific knowledge of or involvement in the offence itself if it is referenced in the song. The songs may be produced by the defendants themselves or may simply be songs by other artists found on a defendant's phone.

Such evidence is controversial for several reasons. First, the defendants in such cases are disproportionately from ethnic majority backgrounds (84 per cent according to the University of Manchester research). Sixty-six per cent of the defendants in the research were Black and a further 12 per cent were of Black/mixed ethnicity heritage. This raises concerns that ethnic minority defendants – in particular, young Black men – are being penalised for their artistic and cultural output in a way that White people are not.

Second, there is concern that treating the lyrics and attitudes from a creative, artistic output as literal and directly confessional is simply inaccurate. The fact that a person raps about guns does not mean they use guns. However, the prosecution frequently relies on gang culture 'expert' police officers at trial to interpret song lyrics and music videos in such a literal way.

This concern has been raised by the campaign group Art Not Evidence – a coalition of lawyers, artists and academics – who argue that art, including rap music, should be protected as a 'fundamental form of freedom of expression' and want to see restrictions on its use as evidence in criminal courts.

Third, such evidence is frequently used in joint enterprise prosecutions. This legal concept has also provoked controversy and attracted criticism in recent years due to concerns that it criminalises individuals merely for being present or nearby when an offence happens, or for being friends with others who were involved in an offence.[1] This particularly criminalises teenagers and young adults, who are more likely to socialise and associate in groups (see a fuller discussion of the joint enterprise doctrine below). Prosecutors in some recent cases have relied on rap music videos to try to prove a criminal association between defendants, supporting their case that a defendant was part of such a joint enterprise.

Using such a contentious form of evidence in support of what is already a controversial form of prosecution creates a sort of controversy-squared that risks real miscarriages of justice. In the context that Black children continue to be overrepresented across most stages of the youth justice system (*Youth justice statistics 2022 to 2023 England and Wales*, Youth Justice Board for England and Wales (YJB), 25 January 2024, page 5), we will have to wait and see whether the courts or our new government respond to the concerns raised by academics and campaign groups and introduce restrictions on this form of evidence.

There are a number of resources available for practitioners who may wish to challenge the admissibility of music and lyrics as evidence – see for example, *Fighting racial injustice: rap & drill* (Youth Justice Legal Centre (YJLC) Racial Injustice Series No 3, June 2024).

Ending unnecessary criminalisation of care-experienced people

Fewer than one per cent of all children in England are in care (*Children looked after in England including adoptions*, UK government, 16 November 2023; last updated 25 April 2024) and yet 66 per cent of children in custody reported having been in local authority care when surveyed for the chief inspector of prisons: *Children in custody 2022–23* (HM Inspectorate of Prisons, November 2023, para 1.2, page 9). Groundbreaking research published last year found that one in three care-experienced children (33 per cent) received a youth caution or conviction by the age of 18 compared with one in 25 of children without care experience (four per cent): *Care experience, ethnicity and youth justice involvement: key trends and policy implications* (Dr Katie Hunter, Professor Brian Francis and Dr Claire Fitzpatrick, ADR (Administrative Data Research) UK, September 2023, page 6). By the age of 24, according to the Office for National Statistics (ONS), more than half (52 per cent) of children who had been in care had a wwcriminal conviction compared with 13 per cent of children who had not been in care (*The education background of looked-after children who interact with the criminal justice system: December 2022*, ONS, 5 December 2022).

Black and mixed ethnicity care-experienced children experience 'double discrimination', and research found they were twice as likely to receive a custodial sentence as White children (*Care experience, ethnicity and youth justice involvement*, page 12).[2] Black and mixed ethnicity care-experienced children were significantly more likely to have a youth caution or conviction (page 3), and nearly one in 10 received a custodial sentence by the age of 18 (page 12). For care-experienced children from Traveller and Gypsy/Roma backgrounds, nearly half had youth justice involvement by the age of 18, compared with four per cent of children who had not been in care (page 6).

September 2023 saw the publication of *Dare to care: representing care experienced young people* (YJLC Legal Guides No 14), a legal guide for criminal solicitors and barristers, co-produced with care-experienced young people (members of the Drive Forward policy forum) and written by Kate Aubrey-Johnson and Dr Laura Janes. It provides practical guidance and tips on how to address the over-criminalisation of care experienced children and young adults.

Children and the police

Strip search

The Runnymede Trust has published a briefing and response to a Home Office consultation (*Proposed amendments to PACE Codes of Practice A and C: strip searches*, Home Office, 30 April 2024; closed 10 June 2024) on the use of strip searches against children: *The racialised harm of police strip searches: a response from the Runnymede Trust to a Home Office consultation* (June 2024). It reported that Black children were **6½** times more likely to be strip searched by the police than White children. Nearly half (47.7 per cent) of strip searches carried out on children in London were on Black children, despite only representing 16.9 per cent of the city's child population.

Detention of children at the police station

In 2023, principal investigator Dr Vicky Kemp revealed, in a groundbreaking report on experiences of children in police custody, not only that children are spending on average 11½ hours in police custody but also that only 21 per cent of children were subsequently charged: *Examining the impact of PACE on the detention and questioning of child suspects* (Dr Vicky Kemp, Professor Nichola Carr and Professor Stephen Farrall, University of Nottingham, May 2023). She also observed that the 'authorisation of detention' decision by custody sergeants was a rubber-stamping exercise rather than a robust protection of the use of custody as a last resort. Lessons clearly haven't been learned from the case of *ST v Chief Constable of Nottinghamshire Police* [2022] EWHC 1280 (QB); October 2022 *Legal Action* 19, and the Authorised Professional Practice published by the College of Policing (*Detention and custody > Detainee care > Children and young persons*, 23 October 2013; last updated 16 March 2024) is not being applied. There are potentially thousands of children being unnecessarily subjected to the traumatic effects of police detention, of whom disproportionately high numbers are from Black and mixed heritage backgrounds. Dr Vicky Kemp and Dr Miranda Bevan have now commenced a further Nuffield Foundation-funded research project on 'Children in police custody: piloting a "Child First" approach'.

Out-of-court disposals

The National Police Chiefs' Council published the long-awaited *Child gravity matrix* in 2023. It replaces the decade-old *Youth gravity matrix* and is a triage tool to support decision-making for officers, to assist in deciding the most appropriate outcome or disposal for children. The *Child gravity matrix* is underpinned by the YJB's 'Child First' strategy, which signals a move away from approaching child offending though risk management towards addressing the underlying causes of offending and promoting diversion. Each offence has a gravity score of one to five, which can be increased or decreased by one point. The list of mitigating factors includes 'vulnerability factors' such as care experience and adverse childhood experiences (ACEs).

The *Child gravity matrix* reflects the breadth of options available to the decision-maker, both statutory (caution, conditional caution or prosecution) and non-statutory (community resolution, deferred prosecution, deferred caution, voluntary diversionary activity). The document is user-friendly; for example, the disposals table on page 14 helpfully clarifies when diversion/out-of-court disposals are available without the need for a formal admission.

The YJB has also published revised case management guidance on *How to use out-of-court disposals* (12 October 2022; last updated 31 January 2024), which should be read alongside the updated Crown Prosecution Service (CPS) legal guidance on *Children as suspects and defendants* (last updated 13 July 2023), which replaced the CPS *Youth offenders* guidance. The Centre for Justice Innovation has published *How is youth diversion working for children with special educational needs and disabilities?* (Carla McDonald-Heffernan and Carmen Robin-D'Cruz, March 2024) and the YJB has launched the Prevention and Diversion Assessment Tool (30 April 2024), a brand new national assessment tool for youth justice services working with children subject to prevention and diversion disposals.

Children and courts

Bail and remand

The *Youth justice statistics 2022 to 2023 England and Wales*, published on 25 January 2024, showed that there were still consistently high numbers of children held on remand; 44 per cent of children in the secure estate were on remand, whereas a decade previously the remand population was just 22 per cent of children in custody. The statistics further illustrate the disproportionate use of remand: 61 per cent were from Black, mixed, Asian and other backgrounds, and 63 per cent of children on remand did not subsequently receive a custodial sentence, 28 per cent of whom were acquitted and 72 per cent received a community sentence.

A joint thematic inspection of work with children subject to remand in youth detention, led by HM Inspectorate of Probation and published in November 2023, found that not all children in the sample needed to be remanded in custody. A quarter were released on bail before being sentenced, and inspectors judged that more of them could have been safely managed in the community.

Underlying these shortcomings in remand are racial and ethnic disparities at many of the key decision points in the system, ***which result in black and mixed heritage children being over-represented in custody****. This needs urgent attention* (page 4; emphasis added).

A lack of understanding of the legal framework underpinning remand options for children by all professionals was one of the areas highlighted as contributing to unnecessary remand (see pages 7 and 19).

Ministry of Justice (MoJ) Circular No 2022/03 (*Legal Aid, Sentencing and Punishment of Offenders Act 2012: amendments to the youth remand framework by the Police, Crime, Sentencing and Courts Act 2022, 28 June 2022*) and its annex are useful resources and the MoJ will respond to concerns by leading on the creation of a concordat to bring together existing guidance and statutory duties (*Action plan response to: A joint thematic inspection of work with children subject to remand in youth detention*, 19 February 2024).

Child criminal exploitation: modern slavery

Raising the Modern Slavery Act 2015 s45 defence

In *R v BSG* [2023] EWCA Crim 1041, 12 September 2023, the Court of Appeal allowed an appeal in circumstances where the appellant, who had been a child at the time of the alleged offences, had subsequently been found to be a victim of modern slavery by the single competent authority (SCA), a finding upheld by the First-tier Tribunal (FtT), where the judge found that the applicant (who had given evidence and been cross-examined) was a credible witness whose oral evidence was consistent with the available documentary evidence.

The Court of Appeal accepted that the appellant had been a child at the time of the criminal proceedings who had been:

… dependent on the advice received from his legal representatives. It is clear that those representatives ***did not at any stage advise him of the potential availability of a statutory defence****. It is also clear that no action was taken at any stage by the police to refer him into the [National Referral Mechanism (NRM)]. Moreover, if the applicant's account is correct, the fear of reprisals would no doubt have played a part in the account he felt able to put forward. It is, therefore, unsurprising that he did not advance his core contention until a much later stage, after the FtT's decision* (para 50; emphasis added).

The court reiterated, again, that the Modern Slavery Act (MSA) 2015 defence available under s45(4) to a child offender does not require that they were 'compelled' to act and the child is only required to have acted as they did as a direct consequence of their having been a victim of modern slavery. 'That distinction between the defences is in our view important in this case' (para 51).

In allowing the appeal, the court accepted that if the MSA 2015 s45 defence had been advanced, it would probably have succeeded. While the SCA conclusive grounds decision is not admissible evidence at trial,[3] it does not preclude raising the s45 defence. The misapprehension that this defence is, in effect, precluded following *R v AAD, AAH and AAI* [2022] EWCA Crim 106 needs to be rigorously challenged across the legal profession. Evidence underpinning the NRM referral, alongside other evidence such as police intelligence/disclosure, will help establish credible evidence of modern slavery (child criminal exploitation).

BSG is a salient reminder that defence representatives *must* advise all defendants of the availability of the defence, and that particular care is needed when advising and representing child clients who may fear reprisals if they disclose their forced criminality.

Legal directions: the Modern Slavery Act 2015 s45 defence

In our last update, we discussed the case of *R v Farrel* [2022] EWCA Crim 859 (see September 2023 *Legal Action* 38), which involved a conviction for being concerned in the supply of class A drugs being quashed where the trial judge had misdirected the jury as to the elements of the modern slavery

defence for under-18s pursuant to MSA 2015 s45(4).

Lamentably, later in 2023, the Court of Appeal had to consider an almost identical issue. In *R v ADG and BIJ* [2023] EWCA Crim 1309, 8 November 2023, the trial judge once again wrongly directed the jury that the defendants would only have a defence if the jury were sure the defendants were (or may have been) acting under compulsion and the compulsion was attributable to slavery or to relevant exploitation. Compulsion is not an element of the s45 defence for children (see above). Upon quashing the convictions, the court noted that, alongside *R v NHF*, this was the second case in which it was apparent that the critical difference between the s45 defence for those aged 18 years and over and those aged under 18 years had been missed by defence counsel, prosecution counsel and the trial judge.

Appeals

Children who plead guilty to offences in the youth court and subsequently become aware that they would have had a defence under MSA 2015 s45 cannot seek to vacate their plea or appeal to the Crown Court[4] and must apply to the Criminal Cases Review Commission (CCRC). In *R (Crown Prosecution Service) v Crown Court at Preston* [2023] EWHC 1857 (Admin), 27 July 2023, the Divisional Court considered the mechanism for dealing with an appeal once the CCRC referral was made to the Crown Court.

Mens rea, joint enterprise and secondary liability

The case of *R v Sossongo* [2021] EWCA Crim 1777, 26 November 2021, only recently published owing to reporting restrictions imposed pending the retrial, raised important issues relating to children, mens rea and neurodivergence.

At his original trial, there were no expert reports commissioned for the appellant. The reports subsequently obtained by his appellate team led to a successful appeal against sentence. In the leading authority of *R v PS, Dahir and CF* [2019] EWCA Crim 2286 (see September 2020 *Legal Action* 33), the lord chief justice established the principle that:

… where a serious offence has been committed by a young offender, both the court and those representing him must be alert to the possibility that mental health may be a relevant feature of the case. The younger the offender, and the more serious the offence, the more likely it is that the court will need the assistance of expert reports (para 20).

PS was approved in the case *R v Meanley* [2022] EWCA Crim 1065, on the importance of a pre-sentence report for children charged with serious offences:

[I]n cases involving young persons charged with very serious crimes, it is strongly advisable to obtain a [pre-sentence] report if none exists already. The [Sentencing Council's guideline on Sentencing Children and Young People] says that where a child or young person is to be sentenced for any serious offending, the court should ensure that it has full information about them, and that information should cover the possibility of mental health issues, learning difficulties, the possibility of brain injury or traumatic life experience, speech and language difficulties and any communication issues, vulnerability to self-harm, and the effect of past loss, neglect or abuse (para 63).

In *Sossongo*, the appeal against conviction was successful because the Court of Appeal recognised that the appellant's subsequent diagnoses of autism and attention deficit hyperactivity disorder were relevant to the jury's understanding of whether he, a child at the time of the offences, could reasonably have been expected to draw common sense conclusions from the principal co-defendant's actions. The appellant was alleged by the prosecution to have been in the role of lookout and he asserted that he did not play this role because he did not know what his co-accused was about to do. The jury's verdict at the retrial (he was acquitted in 30 minutes) reinforces the accuracy of the Court of Appeal decision.

For any legal representatives representing children (and young adults) charged with murder, it would be rare not to instruct a child and adolescent psychiatrist, as this is likely to be relevant to understanding how best to communicate with their child client and take effective instructions, and adapt proceedings so that the child can effectively participate, and, where relevant, it may impact on the jury's understanding of the child's actions (it may also, of course, lead to the prosecution reviewing the public interest in prosecuting). Arguably, although expert advice and information about a child is essential for sentence, this is far too late in the legal process and it should be the first step for a defence legal team, even as early as the police investigation.

Possession of zombie knives

In *Thompson v Crown Prosecution Service* [2024] EWHC 470 (Admin), 7 February 2024, the Administrative Court gave guidance as to the proper application of the definition of 'zombie knife' in Criminal Justice Act 1988 (Offensive Weapons) Order 1988 SI No 2019 Schedule para 1(s). The knife was a nine-inch bladed weapon with both a cutting edge and a serrated edge, and bore the words 'Rambo First Blood Part 1'.

The order identified zombie knives by three characteristics. The first two, namely that there was both a bladed and serrated edge, were uncontroversial: it was accepted that the appellant's knife bore those characteristics. The court was concerned with the third characteristic, that the knife had images or words that 'suggested' it was to be used for the purpose of violence.

The court considered the word 'suggest' and its meaning, 'to bring to one's mind by association of ideas'. Therefore, if the words or images on a knife could, by the association of ideas, bring to mind that the item was to be used for violence, the statutory definition would be met, even if the person in possession of the item had not intention of using it. The words 'Rambo First Blood Part 1' referred to a film that was violent. Rambo, was a violent character and 'First Blood' denoted initiating an act of violence.

This ruling arguably considerably widens the scope of the legislation and criminalises possession of a far greater number of weapons held in the home as well as outside.

Child sentencing

Children, custodial sentences and the secure estate for children

The number of children in custody continues to fall and in June 2024 was 431.[5] However, the *Youth justice statistics 2022 to 2023 England and Wales* and the chief inspector of prisons' *Children in custody 2022–23* report paint a bleak picture of the secure estate. Children who are separated from their peers spend up to 23½ hours a day alone in their cells ('Vulnerable children in custody forcibly stripped, inappropriate pain-inducing techniques of restraint and inadequate oversight at HMYOI Wetherby', HM Inspectorate of Prisons press release, 5 March 2024), described as 'solitary confinement' in 2023 by the UN Committee on the Rights of the Child (*Concluding observations on the combined sixth and seventh periodic reports of the United Kingdom of Great Britain and Northern Ireland*, CRC/C/GBR/CO/6-7. 23 June 2023, paras 53(d) and 54(j), pages 20–21).

The chief inspector has raised concerns about the high number of pain-inducing restraint techniques and strip searches under restraint: *Report on an unannounced inspection of HMYOI Wetherby by HM chief inspector of prisons 20 November–7 December 2023* (HM Inspectorate of Prisons, 5 March 2024, page 5). He observed that many of these incidents were not in accordance with national policy and not properly authorised. There has been a significant increase in rates of self-harm and assault,[6] and at significantly higher levels for girls.[7]

Children are spending far less than the promised 30 hours a week in 'education and purposeful activity'. A recent inspection found children received far less than 15 hours of education a week: *Report on an unannounced*

Sentencing Act 2020 Sch 21 para 5A minimum term starting points for murder (under 18 at the date of the offence)

1	2	3	4
Age of offender when offence committed	Starting point supplied by paragraph 3(1) had offender been 18	Starting point supplied by paragraph 4(1) had offender been 18	Starting point supplied by paragraph 5 had offender been 18
17	27 years	23 years	14 years
15 or 16	20 years	17 years	10 years
14 or under	15 years	13 years	8 years

inspection of HMYOI Feltham A by HM chief inspector of prisons 4–14 March 2024 (HM Inspectorate of Prisons, 16 July 2024). The long-awaited Oasis Restore secure school has been officially opened ('New secure school to protect public and cut crime', MoJ press release, 17 May 2024), but at the time of writing, had still not received any placements. A new review has called for an end to child imprisonment in England: *Why child imprisonment is beyond reform: a review of the evidence* (Dr Tim Bateman, Dr Barry Goldson, Dr Laura Janes and Carolyne Willow, Article 39, August 2024).

Sentencing children (and young adults) for murder

Significant revisions to the minimum term starting points for murder came into force on 28 June 2022 pursuant to Police, Crime, Sentencing and Courts Act (PCSCA) 2022 s127 amending Sentencing Act 2020 Sch 21 para 3. The changes substantially increased the minimum terms for children (those aged under 18 at the date of offence[8]) convicted of murder on or after this provision came into force. Previously, the starting point for any child was a minimum term of 12 years. Under the new provisions, a 17-year-old can face a starting point of up to 27 years (see box on page 39).

This increase in minimum terms for children runs contrary to the wider trend in recent years to see age and immaturity as significant mitigating factors in sentencing. A '"root and branch"' difference of approach' (see *R v ZA* [2023] EWCA Crim 2023 at para 83) is required when sentencing children, and the lack of maturity of young adults[9] should be reflected in the sentencing exercise. One difficultly arising from this apparent contradiction is how to approach minimum terms for older teenagers and young adults convicted of murder.

This tension between the overarching sentencing guideline, Sentencing Children and Young People, and the statutory starting points is illustrated, for example, by comparison with the starting point for an adult convicted of murder with certain serious aggravating features, which is 30 years (Sentencing Act 2020 Sch 21 para 3). Previously, an 18-year-old convicted of such a murder could have expected a significant reduction on account of their age, relying on the principle in cases such as *R v Clarke, Andrews and Thompson* [2018] EWCA Crim 185 that turning 18 'does not present a cliff edge for the purposes of sentencing … The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday (para 5; see fuller discussion of sentencing young adults below). However, under the amended starting points, a 17-year-old now faces a starting point of 27 years for such a murder. Accordingly, how much of a reduction can a young adult now expect on account of their age?

The Court of Appeal considered this question in *R v Kamarra-Jarra* [2024] EWCA Crim 198, 20 February 2024. The case involved an 18-year-old convicted of a serious murder and sentenced to life with a minimum term of 32 years. The court held that '[t]he advent of [PCSCA 2022] section 127 does not dictate a different approach when sentencing either a defendant who has just turned 18 or who is just under 18' (para 33). While chronological age governs the starting point, the court must still consider maturity when assessing culpability. The court allowed the appeal and reduced the 32-year minimum term to 28 years.

The Court of Appeal had previously made the same point about children who are directly subject to the new s127 provisions in *R v SK (AG Ref)* [2022] EWCA Crim 1421. In that case, the court stated that the sentencing principles for children set out in the Sentencing Children and Young People guideline and previous case law still applied. Adjustments should be made to any starting point in s127 to reflect a child's (im)maturity.

Although the court's finding in *Kamarra-Jarra* that s127 does not affect the approach to sentencing 18-year-olds is welcome, it is notable that the reduced sentence in that case was still higher than the 27-year starting point that would have applied to a 17-year-old, particularly in light of the court's observation that the appellant had exceptional personal mitigation given the challenges he had faced during childhood. For practitioners, it will be important to gather evidence of the defendant's developmental age (see, for example, *R v Haslam* below) as this is a factor that may justify a lower starting point. In practice, it will be interesting to see whether courts are willing to pass sentences on adults that are lower than the starting points that now apply to children under Sentencing Act 2020 Sch 21 para 3.

Ending IPP and DPP tariffs

Some 326 children received detention for public protection (DPP) sentences during the seven years this sentence was available (*Criminal justice statistics outcomes by offence data tool*, MoJ, 19 May 2016). As of 12 March 2024, there were still 32 individuals in custody who received DPP sentences as children and have never been released, meaning they will have spent at 12 years or more in custody (*Hansard* HL Debates vol 836, col 1979, 12 March 2024). On 24 May 2024, changes to how imprisonment for public protection (IPP) and DPP licences can be terminated were passed in the Victims and Prisoners Act 2024. It is anticipated that these changes will be implemented by the new government. They reduce the length of the qualifying period before a licence is reviewed by the Parole Board and introduce an automatic termination of licence after a qualifying period. Changes will apply retrospectively. The Howard League, the Prison Reform Trust and the Prisoners' Advice Service have published *Terminating your IPP licence: a legal guide* (Claire Salama and Dr Laura Janes, July 2024).

Turning 18

Sentencing children who turn 18 between offence and sentence

R v TS [2024] EWCA Crim 382, 22 March 2024 highlights the complicated framework of disposal options for children who cross significant age thresholds between offence, conviction and sentence. The appellant was 15 when he committed the offence, 17 when he entered a guilty plea and 18 when he was sentenced. The Court of Appeal held that the community order imposed was wrong in principle and substituted a youth rehabilitation order (YRO).

This was a significant case, clarifying the position that age at the date of conviction determines the available sentence (and that child sentences remain available even if the defendant has turned 18 before the date of sentence).

Sentencing young adults: age and/or lack of maturity

New Sentencing Council guidance

The Sentencing Council has revised the mitigating factor 'Age and/or lack of maturity (which may be applicable to offenders aged 18–25)' as of 1 April 2024. The offence-specific guidelines now emphasise that young adults 'are still developing neurologically and consequently may be less able to: evaluate the consequences of their actions; limit their impulsivity; limit risk taking'. Sentencers are reminded that young adults are 'likely to be susceptible to peer pressure', that they 'may find it particularly hard to cope with custody' and that '[t]here is greater capacity for change in immature offenders'. A defendant's 'emotional and developmental age' is 'of at least equal importance to their chronological age (if not greater)'.

Court of Appeal judgment on age and lack of maturity

In *R v Haslam (AG Ref)* [2024] EWCA Crim 404, 20 February 2024, the Court of Appeal held that it was not unduly lenient to defer the sentence of a young adult (aged 19 at sentence) who was a class A drug trafficking 'third striker'. The sentencing judge had heard evidence and made a finding of fact that the defendant was, although 18 years nine months old at the time of the third offence, 'operating as a child' (see para 40). These were exceptional circumstances justifying a departure from the mandatory minimum sentence, because the 'third strike' rule is addressed at adults.

Under Sentencing Act 2020 s313, as amended by PCSCA 2022 s124, any offender who commits their third eligible offence on or after 28 June 2022 falls to be sentenced to seven years' imprisonment unless exceptional circumstances apply.

The court at first instance refused to impose the minimum term and found that the appellant, although technically an adult, was operating as a child (a juvenile). The sentencing judge held that there were exceptional circumstances given his age, the grooming findings and his personal circumstances. In deferring the sentence until May 2024, the judge imposed conditions for the appellant: not to commit further offences; to comply with the requirements of social services or probation; to retain accommodation; and to try to obtain employment and a full psychological assessment. Upon reference by the attorney general, the Court of Appeal held that the judge was entitled to make that finding and to defer sentence.

This is a significant development in the courts' approach to children and young adults subject to minimum terms post *R v Clarke, Andrews and Thompson* and hopefully heralds a permanent departure from earlier authorities such as *R v Usherwood* [2018] EWCA Crim 1156. The case also shows significant recognition by the Court of Appeal of the principle governing sentencing of children and young adults – that the emotional and developmental age and maturity of the defendant is 'of at least equal importance to their chronological age (if not greater)' (see the Sentencing Children and Young People guideline para 1.5 and the mitigating factor 'Age and/or lack of maturity'.

Sentencing parents with dependent babies and children

New Sentencing Council guidance

The Sentencing Council has introduced an additional mitigating factor, 'Pregnancy, childbirth and post-natal care', into the majority of offence-specific guidelines (as of 1 April 2024). The new sentencing guidelines invite the court to consider the effect of sentence on the defendant and their child, and emphasise the harmful impact of separation, particularly in the first two years of life. This is particularly relevant where a pregnant or post-natal defendant is on the cusp of custody: imprisonment should not be imposed where there would be an impact on dependants that would make a custodial sentence disproportionate to achieving the aims of sentencing.

Court of Appeal considers impact of custodial sentence on mother and baby

In *R v Byrne* [2024] EWCA Crim 801, 4 July 2024, the Court of Appeal considered an appeal of a mother of a baby who was sentenced to immediate imprisonment for a conspiracy to defraud, despite being assessed as being a low risk of reoffending and a low risk of harm to the public. She was assessed as suitable for a community-based disposal. As a result of her sentence, the appellant was separated from her nine-month-old baby until they were reunited in a mother and baby unit. There was evidence that the separation caused harm to both her and the child over the short and long term.

Notably, the Court of Appeal emphasised that even where the original sentencing exercise had been approached fairly, the welfare of the child must 'trump' the original term imposed:

[I]nterference with family life may mean that a custodial sentence which is otherwise proportionate can become disproportionate (para 34).

The court considered fresh evidence and reduced the sentence length having found that further separation was to be avoided at all costs. However, the fact that the appellant had received an immediate custodial sentence in the first place, for serious but non-violent offending, is concerning and suggests the new Sentencing Council guidance does not go far enough, or is not yet being given sufficient regard by the courts.

1 This is the focus of the campaign group, JENGbA (Joint Enterprise Not Guilty by Association). More recently, it was illustrated by the case known as the Manchester 10: 'Curious case of the Manchester 10' (Fran Robertson, InsideTime, 31 January 2023). See also the work of Kids of Colour.
2 See also *Double discrimination: Black care-experienced young adults navigating the criminal justice system* (Barnardo's, September 2023).
3 Decisions of the SCA are not admissible at trial, but may be adduced on appeal: see *R v AAD, AAH and AAI* [2022] EWCA Crim 106 at paras 81–82 and *R v AFU* [2023] EWCA Crim 23 at para 88. Although not binding, a decision by the SCA will usually be respected by the Court of Appeal, unless there is significant evidence to contradict it: see, for example, *R v AAJ* [2021] EWCA Crim 1278 at para 39(vii). The SCA is a specialist authority with particular knowledge and expertise in the area of trafficking: see *R v JXP* [2019] EWCA Crim 1280.
4 There is no appeal route for unequivocal pleas: *Harvey v Director of Public Prosecutions* [2021] EWHC 147 (Admin) (see May 2021 *Legal Action* 36).
5 The latest monthly figures are available at: www.gov.uk/government/publications/youth-custody-data.
6 An overall rise in the rate of assault incidents of 28 per cent and increase in the rate of self-harm by 37 per cent compared with 2021/22: *Children in custody 2022–23*.
7 For example, use of force incidents per 100 children were around 4,400 for girls compared with around 820 for boys; self-harm per 100 children was higher for girls at 9,200 compared with 160 for boys: *Youth justice statistics 2022 to 2023 England and Wales*.
8 Note that unlike most sentences for children, which are determined by the child's age at the date of conviction, the sentence for murder is determined by age at the date of the offence.
9 This recognition is seen in Sentencing Council guidelines as a factor reducing seriousness or reflecting personal mitigation: 'Age and/or lack of maturity (which may be applicable to offenders aged 18–25)'. See fuller discussion below.

Kate Aubrey-Johnson, Elena Papamichael, Michael Goold and Catherine Rose are barristers at Garden Court Chambers.

Employment: update

Philip Tsamados rounds up policy, legislation and guidance developments, and cases on discrimination, procedure, contractual rights and unfair dismissal.

Philip Tsamados

Policy, legislation and guidance

Tips

In a previous update (see September 2023 *Legal Action* 22), I reported on the Employment (Allocation of Tips) Act 2023, which essentially requires employers to ensure that their workers receive 100 per cent of any tips or service charges paid by customers (minus income tax and national insurance contributions). The government has since indicated that the Act will come into force on 1 October 2024 and has published the final draft *Code of practice on fair and transparent distribution of tips* (Department for Business and Trade, April 2024), to which employers must have regard when distributing tips.

Annual increase in employment tribunal awards and entitlements

The annual increases in limits on compensation awarded by employment tribunals (ETs) came into force from 6 April 2024 (Employment Rights (Increase of Limits) Order 2024 SI No 213). In particular, for dismissals or other events giving rise to compensation on or after that date, the maximum gross weekly pay that can be used in calculating the basic award for unfair dismissal and statutory redundancy pay increased from £643 to £700 per week and the maximum amount of the compensatory award increased from £105,707 to £115,115.

Procedure

Vento guidelines

The presidents of the ETs in England and Wales, and in Scotland, have issued a seventh addendum to the presidential guidance (originally published on 5 September 2017) updating the *Vento* bands used for calculating awards for injury to feelings, which takes into account changes in the RPI All Items Index released on 20 March 2024 (*Presidential guidance: employment tribunal awards for injury to feelings and psychiatric injury following De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879: seventh addendum to presidential guidance*