



# ECHR 70 - Rights & Children: Using convention rights in youth justice cases

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GARDEN COURT CHAMBERS



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Garden Court Chambers

18 November 2020



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# Human Rights and Victims of Trafficking in Criminal Cases

Henry Blaxland QC, Garden Court Chambers

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# Article 4 ECHR

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## Prohibition of slavery and forced labour

- 1 No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term “forced or compulsory labour” shall not include:
  - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
  - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
  - (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
  - (d) any work or service which forms part of normal civic obligations.



# Palermo Protocol and ECAT

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*R v Joseph and Ors* [2017] 1 Cr.App.R. 33

*International Conventions and the EU Directive*

9 In 2001, following UN General Assembly Resolution 55/25 of 15 November 2000, the UN Convention against Transnational Organised Crime was agreed at Palermo in December 2000. Annex II to the Convention was the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, usually called the Palermo Protocol. It was ratified by the UK on 9 February 2006.



# Palermo Protocol and ECAT

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10 Its stated purpose was to prevent and combat trafficking in persons and to protect and assist victims of trafficking. A particular importance of the protocol is its definitions section in art.3:

- “(a) ‘trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) ‘child’ shall mean any person under eighteen years of age.”



# Palermo Protocol and ECAT

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11 The Palermo Protocol was complemented in the EU by EU Framework Decision (2002/629/JHA) on combatting trafficking in human beings ([2002] OJ L203/1) (replaced in 2011, as set out at [14] below, by a Directive).

12 It was also followed by a Council of Europe Convention on Action against Trafficking in Human Beings which was agreed in Warsaw in May 2005. This Convention was ratified by the UK on 17 December 2008 and came into force in respect of the UK on 1 April 2009. It adopted in art.4 the same definition of trafficking in human beings as the Palermo Protocol. Article 26 entitled “Non punishment provision” provided:

*“Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.”*



# *Rantsev v Russia* [2010] 51 EHRR 1

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*MS (Pakistan) v Sec of State for the Home Dept* [2020] UKSC 9

In *Rantsev*: ‘The court concluded that trafficking within the meaning of article 4(a) of ECAT fell within the scope of Article 4 ECHR. It was not necessary to decide whether it was slavery, servitude or forced labour.’

‘It is not necessary for us to decide whether all the positive obligations in ECAT are incorporated into the State’s positive obligations under Article 4 in order to decide this appeal.’





# Modern Slavery Act 2015 S.45

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## **Defence for slavery or trafficking victims who commit an offence**

(1) A person is not guilty of an offence if—

(a) the person is aged 18 or over when the person does the act which constitutes the offence,

(b) the person does that act because the person is compelled to do it,

**(c) the compulsion is attributable to slavery or to relevant exploitation,** and

(d) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.

(2) A person may be compelled to do something by another person or by the person's circumstances.

**(3) Compulsion is attributable to slavery or to relevant exploitation only if—**

**(a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or**

**(b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.**



# Modern Slavery Act 2015 S.45

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(4) A person is not guilty of an offence if—

(a) the person is under the age of 18 when the person does the act which constitutes the offence,

(b) the person does that act as a direct consequence of the person being, or having been, a victim

of slavery or a victim of relevant exploitation, and

(c) a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.

(5) For the purposes of this section—

“relevant characteristics” means age, sex and any physical or mental illness or disability;

**“relevant exploitation” is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking.**

(6) In this section references to an act include an omission.

(7) Subsections [\(1\)](#) and [\(4\)](#) do not apply to an offence listed in Schedule 4.

(8) The Secretary of State may by regulations amend Schedule 4.



# MSA 2015 SS 1-3

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## **S.3 Meaning of exploitation**

(1) For the purposes of section 2 a person is exploited only if one or more of the following subsections apply in relation to the person.

*Slavery, servitude and forced or compulsory labour*

**(2) The person is the victim of behaviour—**

**(a) which involves the commission of an offence under section 1, or**

**(b) which would involve the commission of an offence under that section if it took place in England and Wales.**

*Sexual exploitation*

**(3) Something is done to or in respect of the person—**

**(a) which involves the commission of an offence under—**

**(i) section 1(1)(a) of the Protection of Children Act 1978 (indecent photographs of children),  
or**

**(ii) Part 1 of the Sexual Offences Act 2003 (sexual offences), as it has effect in England and Wales, or**

**(b) which would involve the commission of such an offence if it were done in England and Wales.**



## MSA 2015 SS 1-3

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### *Removal of organs etc*

(4)The person is encouraged, required or expected to do anything—

(a)which involves the commission, by him or her or another person, of an offence under section 32 or 33 of the Human Tissue Act 2004 (prohibition of commercial dealings in organs and restrictions on use of live donors) as it has effect in England and Wales, or

(b)which would involve the commission of such an offence, by him or her or another person, if it were done in England and Wales.

### *Securing services etc by force, threats or deception*

**(5)The person is subjected to force, threats or deception designed to induce him or her—**

**(a)to provide services of any kind,**

**(b)to provide another person with benefits of any kind, or**

**(c)to enable another person to acquire benefits of any kind.**



# MSA 2015 SS 1-3

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## *Securing services etc from children and vulnerable persons*

(6) Another person uses or attempts to use the person for a purpose within paragraph (a), (b) or (c) of subsection (5), having chosen him or her for that purpose on the grounds that—

(a) he or she is a child, is mentally or physically ill or disabled, or has a family relationship with a particular person, and

(b) an adult, or a person without the illness, disability, or family relationship, would be likely to refuse to be used for that purpose.

## **S. 2 Human trafficking**

**(1) A person commits an offence if the person arranges or facilitates the travel of another person (“V”) with a view to V being exploited.**

(2) It is irrelevant whether V consents to the travel (whether V is an adult or a child).

(3) A person may in particular arrange or facilitate V’s travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V.



## MSA 2015 SS 1-3

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- (4) A person arranges or facilitates V's travel with a view to V being exploited only if—
- (a) the person intends to exploit V (in any part of the world) during or after the travel, or
  - (b) the person knows or ought to know that another person is likely to exploit V (in any part of the world) during or after the travel.
- (5) "Travel" means—
- (a) arriving in, or entering, any country,
  - (b) departing from any country,
  - (c) travelling within any country.
- (6) A person who is a UK national commits an offence under this section regardless of—
- (a) where the arranging or facilitating takes place, or
  - (b) where the travel takes place.
- (7) A person who is not a UK national commits an offence under this section if—
- (a) any part of the arranging or facilitating takes place in the United Kingdom, or
  - (b) the travel consists of arrival in or entry into, departure from, or travel within, the United Kingdom.



## **S. 1 Slavery, servitude and forced or compulsory labour**

(1) A person commits an offence if—

(a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is held in slavery or servitude, or

(b) the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour.

**(2) In subsection [\(1\)](#) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention.**

(3) In determining whether a person is being held in slavery or servitude or required to perform forced or compulsory labour, regard may be had to all the circumstances.



## MSA 2015 SS 1-3

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(4) For example, regard may be had—

(a) to any of the person's personal circumstances (such as the person being a child, the person's family relationships, and any mental or physical illness) which may make the person more vulnerable than other persons;

(b) to any work or services provided by the person, including work or services provided in circumstances which constitute exploitation within section 3(3) to (6).

(5) The consent of a person (whether an adult or a child) to any of the acts alleged to constitute holding the person in slavery or servitude, or requiring the person to perform forced or compulsory labour, does not preclude a determination that the person is being held in slavery or servitude, or required to perform forced or compulsory labour.

- Home Office – Modern Slavery Act 2015 - Statutory Guidance for England and Wales:
- “What is modern slavery?”
- “Encompasses human trafficking and slavery, servitude and forced or compulsory labour.”





## *R v DS* [2020] EWCA Crim 285

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39. iii “The state’s positive obligation under article 4 ECHR has been considered in *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1: at [185]: “*member States are required to put in place a legislative and administrative framework to prohibit and punish trafficking. The Court observes that the Palermo Protocol and the Anti-Trafficking Convention refer to the need for a comprehensive approach to combat trafficking which includes measures to prevent trafficking and to protect victims, in addition to measures to punish traffickers.*” There is a recognition of the operational choices in terms of priorities and resources that must be made in this context at [286]. The state’s positive obligation to protect victims of trafficking is not expressed in terms of non-prosecution, see [287]: it “*requires States to endeavour to provide for the physical safety of victims of trafficking while in their territories and to establish comprehensive policies and programmes to prevent and combat trafficking...*”. **We do not think that there is any basis for deriving a positive obligation not to prosecute victims of “forced or compulsory labour” in Article 4 of the ECHR.** This, the court found, is the lowest level of gravity of oppression against which protection is required, below “slavery” and “servitude”. That is the level of oppression for which DS contends in this case. If any such obligation did exist, it would be heavily qualified and there is no basis for concluding that the qualifications found in the common law of duress, and in section 45 of the 2015 Act, and the CPS Guidance are inadequate so that there is a violation of any such positive obligation under Article 4 ECHR which might exist.



## *R v DS* [2020] EWCA Crim 285

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*R v A* [2020] EWCA Crim 1408 – role of the court where a defendant is charged with a Schedule 4 offence.



# The National Referral Mechanism

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- The state's positive duty to protect victims of trafficking
- S. 52 MSA 2015 – statutory duty to refer into NRM where there are reasonable grounds to believe that a person may be a victim of slavery or human trafficking.
- The admissibility of decisions of the Single Competent Authority that there are conclusive grounds for deciding that a defendant is a *VOT - R v S (G)* [2019] 1 Cr.App.R. 7
- WATCH THIS SPACE



# Practical guide to defending trafficking cases in the youth court

Fatima Jichi, Garden Court Chambers

18 November 2020



GARDEN COURT CHAMBERS



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Garden Court Chambers



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# Checklist (non-exhaustive)

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1. Explore issues of trafficking at the earliest opportunity.



# Checklist (non-exhaustive)

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1. Explore issues of trafficking at the earliest opportunity.
2. Referral to the National Referral Mechanism (NRM).



# National Referral Mechanism (NRM)

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- The NRM was set up in order to comply with the State's obligation to identify VsOT
- **Who can make a referral?** A referral to the Single Competent Authority (SCA) can only be made by a first responder, namely one of the following bodies:
- UK police forces, UK Border Force, UK Visas and Immigration (UKVI), Home Office Immigration Enforcement, Gangmasters and Labour Abuse Authority (GLAA), Local authorities, Local authority children's services, Health and Social Care Trusts (Northern Ireland), Salvation Army, Poppy Project, Migrant Help, Medaille Trust, Kalayaan, Barnardo's, Unseen, TARA Project (Scotland), NSPCC (CTAC), BAWSO, New Pathways, Refugee Council

## NRM continued

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- **Duty to refer**
- Since 1<sup>st</sup> November 2015 specified public bodies (includes the police) are under a duty to notify the Home Office about any potential VsOT
- If the potential VOT is a child (under 18) an NRM referral to the SCA must be done and does not require the individual's consent





## NRM continued

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- **Reasonable Grounds Decision**

- The SCA will aim to provide a ‘Reasonable Grounds Decision’ (RG) as to whether the individual is a victim of modern slavery within 5 working days.
- **Support during the following 45 day period**
- The individual will have access to appropriate help and support, including legal advice, accommodation, protection and independent emotional and practical help according to gov.uk
- NOTE: Debatable how much support is given in practice!!!

### **Conclusive Grounds Decision**

Thereafter the SCA will aim to provide a ‘Conclusive Grounds Decision’ within a further 45 working days

NOTE: Often the process takes longer than the time estimates suggested!!!

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# Checklist (non-exhaustive)

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1. Explore issues of trafficking at the earliest opportunity.
2. Referral to the National Referral Mechanism (NRM).
3. Consider support available to child where positive conclusive grounds.



# Checklist (non-exhaustive)

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1. Explore issues of trafficking at the earliest opportunity.
2. Referral to the National Referral Mechanism (NRM).
3. Consider support available to child where positive conclusive grounds.
4. Representations, representations, representations.



<https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>

## **A four-stage approach to the prosecution decision**

- When applying the Full Code Test in the Code for Crown Prosecutors, Prosecutors should adopt the following four-stage assessment:
  1. Is there a reason to believe that the person is a victim of trafficking or slavery?
    - If yes, move to Question 2.
    - If not, you do not need to consider this assessment further.
  2. Is there clear evidence of a credible common law defence of duress?
    - If yes, then the case should not be charged or should be discontinued on evidential grounds.
    - If not, move to Question 3.



## CPS Review continued

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3. Is there clear evidence of a statutory defence under Section 45 of the Modern Slavery Act 2015?

- If yes, then the case should not be charged or should be discontinued on evidential grounds.
- If not, move to Question 4.

4. Is it in the public interest to prosecute? Even where there is no clear evidence of duress and no clear evidence of a s.45 defence or where s.45 does not apply (because the offence is excluded under Schedule 4) this must be considered. In considering the public interest, Prosecutors should consider all the circumstances of the case, including the seriousness of the offence and any direct or indirect compulsion arising from their trafficking situation; see R v LM & Ors [2010] EWCA Crim 2327.”

# CPS Review continued

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Consider other relevant guidance:

- CPS Guidance on Youth Offenders;
- CPS Guidance on Suspects and Defendants with Mental Health Conditions and Disorders;
- Coronavirus: Interim CPS Case Review Guidance



# Checklist (non-exhaustive)

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2. Referral to the National Referral Mechanism (NRM).
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4. Representations, representations, representations.
5. Consider expert reports.



# Checklist (non-exhaustive)

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1. Explore issues of trafficking at the earliest opportunity.
2. Referral to the National Referral Mechanism (NRM).
3. Consider support available to child where positive conclusive grounds.
4. Representations, representations, representations.
5. Consider expert reports.
6. Think outside the box for disclosure.





# Checklist (non-exhaustive)

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1. Explore issues of trafficking at the earliest opportunity.
2. Referral to the National Referral Mechanism (NRM).
3. Consider support available to child where positive conclusive grounds.
4. Representations, representations, representations.
5. Consider expert reports.
6. Think outside the box for disclosure.
7. Admissions - mental health, missing person reports, NRM decision.



# Checklist (non-exhaustive)

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2. Referral to the National Referral Mechanism (NRM).
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7. Admissions - mental health, missing person reports, NRM decision.
8. Legal arguments on admissibility.



## Is a CG decision admissible?

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- This issue was left unresolved in the case of *R v DS* as it was not an issue properly before them (para 43)
- There is a pending judicial review that is to consider that issue.
- What judicial guidance is there on the issue?



## Is a CG decision admissible? continued

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*R v S(G) [2018] EWCA Crim 1824 para*

- *‘Before us, no question arises as to the admissibility of these materials as such. That is not the case as to their admissibility at trial, where, to put it no higher, the admissibility of both the decisions in question and the underlying reasoning must be regarded as unlikely on what may be broadly (if very loosely) described as Hollington v F Hewthorn & Co Ltd [1943] KB 587 grounds. That said:*



## Is a CG decision admissible? continued

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- *(i) Had the FTT Decision and the CA Minute been available at the time of trial, we regard it as overwhelmingly likely that, in the interests of justice and fairness, the Crown would have been required to make admissions as to their recognition of the applicant as a VOT—so that, in practical terms, any admissibility difficulties at trial would have been resolved.*
- *(ii) Whatever the difficulties of admissibility at trial, we would not regard them as outweighing our conclusion, on the basis of all the other relevant factors for the purposes of section 23 , that the materials comprising the First Part should be admissible before us. We proceed accordingly. ’*



## Is a CG decision admissible? continued

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As things stand, it can be argued:

- *R v S(G)* authority for an agreed fact re CG decision. CPS may still agree in certain cases Eg where it is agreed D is a VOT but Prosecution say insufficient level of compulsion/ reasonableness test not met
- Where CPS entirely dispute the CG decision and do not concede an agreed fact, it is still worth making an application to admit CG decision as hearsay s114(1)(d) interests of justice, on basis that the decision maker is giving admissible expert opinion

(rather like police officers who are ascribed specialist knowledge of the mechanics of drug trafficking!)



## Supporting evidence

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- Evidence considered by SCA may itself be admissible even if the CG decision is not;
- Psychiatric evidence may be admissible E.g. a diagnosis of PTSD that is consistent with the traumatic events of D's trafficking



# Checklist (non-exhaustive)

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5. Consider expert reports.
6. Think outside the box for disclosure.
7. Admissions - mental health, missing person reports, NRM decision.
8. Legal arguments on admissibility.
9. Character references/evidence of moving away from influences.





# Checklist (non-exhaustive)

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7. Admissions - mental health, missing person reports, NRM decision.
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9. Character references/evidence of moving away from influences.
10. Mitigation where defence is not made out/s45 defence never engaged.



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9. Character references/evidence of moving away from influences.
10. Mitigation where defence is not made out/s45 defence never engaged.

Bonus tip: apply for certificate for counsel.



# ECHR 70 - Using Convention Rights in Youth Justice Cases

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18 November 2020



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# Convention Rights and Children in the Criminal Justice System

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- Convention Rights
- Approach of the Court
- Common Law or Convention Rights
- Arrogance that Article 6 (perhaps the most significant) is otiose because of common law protections



# Convention Rights and Children in the Criminal Justice System

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- Recent Examples
  - Police Station
    - Strip Searches
    - PACE provisions: Lacuna for 17 year olds (as will see Convention opened the door to important international arguments) (*HC v MPS*)
    - Appropriate adults
  - Trial
    - Effective Participation
    - Intermediaries (TI)
  - Sentence
    - Reporting Restrictions – will touch on that later
    - Parole Board Reviews (delay)
    - IPP and EPP sentences
    - Provision of courses and resources



# Article 6

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- Most significant impact stems from *Thompson and Venables*
  - Trial
  - No adaptations made to trial process
  - Trial in full glare of media
  - Effective Participation



# Article 6

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- *T and V v United Kingdom* [2000] 30 EHRR 121
  - Resulted in the promulgation by the then Lord Chief Justice, Lord Bingham of a specific practice direction to ensure compliance with a child’s right to a fair trial.
  - Significant adaptations and minimum standards of practice to guarantee a child’s effective participation.
  - Practice direction has been modified over the years, concomitant with the increased appreciation of the unique issues faced when trying children.
  - 2013: children were recognised as “vulnerable people in court”
  - Section on intermediaries was introduced.
  - Modified see e.g. CrimPD 3F.24-26).
  - The starting point is the presumption is that children require additional assistance



# In Practice?

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- *R v Grant-Murray and Ors*
  - Similarities
  - Setting on fire hair in dock
  - Tagged questions
  - No real modifications





# ECHR and International Instruments

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- Greatest Strengths:
  - Window through which international provisions flow
  - Engagement of a Convention right
  - Statutes should be interpreted so far as possible to give effect to Convention rights
    - *Burnip v Secretary of State for Work & Pensions* [2012] EWCA Civ 629 (§§19-22)
  - Provided there is a sufficient nexus between the UNCRC right infringed and the domestic Convention challenge
    - *R (SG) v. SSWP* [2015] UKSC 16)



# ECHR and International Instruments

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- Best interests
- The Supreme Court has in three recent decisions emphasised the importance of the best interests principle, and its enforceability in the domestic courts
  - *ZH (Tanzania) v. SSHD* [2011] 2 AC 166; *R (HH and PH) v. Deputy Prosecutor of the Italian Republic, Genoa*;
  - *F-K v. Polish Judicial Authority* [2013] 1 AC 338 BH and
  - *KAS/ H v. The Lord Advocate and Another (Scotland)* [2013] 1 AC 413



# ECHR and International Instruments

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- Be imaginative
- Many children have a disability
- UN Convention on the Rights of Persons with Disabilities (“UNCRPD”):
  - The right to equality before the law (Article 12)
  - the right of equal access to justice (Article 13)
  - the right to liberty (Article 14).



# ECHR and International Instruments

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- Eg. Arguable that the test to be applied is not simply whether the defendant can have a fair trial but whether they enjoy the same ability to participate as those who are not disabled, a broader requirement (see Article 13 UNCPRD recognised by HM Government’s Office for Disability Issues as applicable to trial adjustments):

“States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages. ...”.



# Convention Rights and Standard of Review

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- Reporting Restrictions as an example of different test to be applied on review?
- Section 45 YJCEA 1999
- Convention Rights often engaged
  - Articles 2, 3 (absolute rights) – positive duty
  - Article 6
  - Article 8
  - Article 10
- Traditional balancing exercise or hard edged – right or wrong decision



# Convention Rights and Standard of Review

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- *R v. Ayman Aziz* [2019] EWCA Crim 1568
  - Raises issues of jurisdiction
  - Standard of review: Public Law Principles or traditional criminal appeal

“(36) Decisions under these provisions call for the exercise of judgment, requiring the court to balance the competing claims of privacy, a child’s welfare and open justice: Markham [75], [83-84]...When considering a challenge to a decision on such an issue, the court (whether by way of appeal or judicial review) will respect the trial judge’s assessment of the weight to be given to particular factors, interfering only where an error of principle is identified or the decision is plainly wrong...”



# Convention Rights and Standard of Review

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- Arguable that Articles 2 and 3 require different standard of review
- Positive Duty

*R v Lord Saville of Newdigate ex p A* [2000] 1 WLR 1855: “when a fundamental right such as the right to life is engaged, the options available to the reasonable decision maker are curtailed....it is not open to the decision-maker to risk interfering with fundamental rights in the absence of compelling justification’.

- Where absolute rights engaged – not limited to typical balancing exercise:

it is for the Court to decide whether or not [the decision – here making the excepting direction] breached the Child’s Convention rights: *R (on the application of Quila and another) v SSHD* [2012] 1 AC 621, at §61; *R (SB) v Governors of Denbigh High School* [2006] UKHL 15.



# Mandatory Life?

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- Section 90 of the Powers of Criminal Courts Sentencing Act 2000
  - Mandatory sentence of detention at HMP for offenders who commit murder when under the age of 18.
  - Compatibility with Article 3?
  - Challenge in *T & V* failed
  - Challenge in *R v Grant- Murray and Ors* [2017] failed – leave not granted
  - BUT landscape had and is changing
    - 3 June 2016 UN Committee on the Rights of the Child issued its Concluding Observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland.
    - Recommendation: Abolish the mandatory imposition of life imprisonment for children for offences committed while they are under the age of 18





# Mandatory Life?

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- UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment concluded in its March 2015 Report that:

“Life imprisonment and lengthy sentences, such as consecutive sentencing, are grossly disproportionate and therefore cruel, inhuman or degrading when imposed on a child. Life sentences or sentences of an extreme length have a disproportionate impact on children and cause physical and psychological harm that amounts to cruel, inhuman or degrading punishment. Similarly, the Special Rapporteur finds that mandatory sentences for children are similarly incompatible with the State’s obligation regarding children in conflict with the law and the prohibition of cruel, inhuman or degrading punishment.



# Mandatory Life?

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...

Mandatory minimum sentences may result in disproportionate punishments that are often overly retributive in relation to the crimes committed, particularly in relation to the child's individual circumstances and the opportunity for rehabilitation. In the light of the unique vulnerability of children, including the risk of torture or ill-treatment in detention and States' obligation of due diligence to afford children heightened measures of protection against torture and other forms of ill-treatment, children must be subject to sentences that promote rehabilitation and re-entry into society



# Custody Time Limits & Convention Rights

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- Limit length of pre-trial detention
- Purpose:
  - “protect the liberty of the citizen, assumed at the present stage not to be guilty” *R v Manchester Crown Court Ex p McDonald* [1999] 1 WLR 841, §848
- Section 22 of the [Prosecution of Offences Act 1985, as amended](#)
- [Prosecution of Offences \(CTL\) Regulations 1987, as amended](#)
- Criminal Procedure Rules (October 2015)



# Custody Time Limits: Applicability and Test

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- Length:
  - Summary offences: 56 days
  - Either way: 182 days (if Crown Court) (6m)
  - Indictable: 182 days (6m)
- Can be extended upon application: Judicial Oversight
- Test (relevant sections for this discussion):
  - ‘other good and sufficient cause’
  - Prosecution has acted with ‘all due diligence and expedition’
- Resources are relevant e.g. availability of court



# CTLs and COVID

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- Jury trials suspended
- Applications to extend CTLs
- Initially granted
- Coronavirus Crisis Protocol for the effective handling of Custody Time Limit cases in the Magistrates' and the Crown Court, between the Senior Presiding Judge (SPJ), HM Courts & Tribunals Service and the Crown Prosecution Service
- Temporary protocol introduced on 9 April 2020
- Withdrawn on 3 September 2020



# Extension of CTLs: SI

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- Swiftly followed by: Prosecution of Offences (Custody Time Limits) (Coronavirus) (Amendment) Regulations 2020 (“the Regulations”)
- In force on 28 September 2020
- Extended: approximately additional 2 months before application to extension
- Only applies to cases from 28 September 2020. New cases
- No parliamentary scrutiny (although Lords are considering it)



# Context

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- Backdrop: proposals to limit Jury trial
- CTLs: Justified by Gov't on basis of COVID resulting in delays
- Smoke screen
- Pre-COVID: 17,400 outstanding trials (now 33k)
- Result of cuts in sitting days
- Very definition of irrational: import more delay into a scheme where object is to prevent delay.



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- Increasing concerns over Judges refusing CTLs
- Explosive ruling by HHJ Raynor: *R v Young-Williams*
- Abject failure by Government to resource and get trials up and running
- Case sets out an analysis of measures to date





# SI: Impact

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- PSED? Explanatory Note:

*“A full impact assessment has not been produced for this instrument as no, or no significant, impact on the private, voluntary or public sectors is foreseen.”*

- Also Failure to consult Children’s Commissioner



# No impact?!

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- Increase in remands
- Innocent?
  - 2019: 3,000 people acquitted in the Crown court having spent time in prison on remand
- Children
  - 45% of children in prison were on remand as of July 2020/37% adults
  - 48% remanded in custody who were subsequently convicted in the crown court did not receive an immediate sentence of imprisonment

<https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2019>



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- Vulnerability: self harm in custody
- Children: 66% increase in the self-harm rate per 1,000 young people in the 12 months to March 2020
- BAME implications
  - 20% adults remanded (47% black defendants/38%)
  - *'...despite Black defendants being more likely to be remanded in custody at Crown Court, they are less likely than White defendants to go on to receive an immediate custodial sentence at the conclusion of proceedings.'*
  - 1/3 of children



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- Report to the United Kingdom Government by the ‘European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment’, April 2020: concerns raised about the use of remand for children
- Gov’t Response – White Paper:

*‘custody should be used only as a last resort for children... in response to recommendations made by the [IICSA], we committed to consider the use of custodial remand for children in greater detail. We aim to develop options by summer 2020 to reduce the number of children remanded to custody where it is appropriate to do so and while ensuring victims and the public are protected.’*



# Potential Legal Challenge?

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- Howard League, Liberty and Just For Kids Law
  - 16 September 2020: Letter to AG, Suella Braverman and LC, Robert Buckland QC, Lucy Frazer QC, Prisons' Minister
  - Response from LFQC: told conducted impact assessment
  - Sought disclosure of Equalities assessment & whether Child Right's Impact Assessment conducted
  - No Child Rights Impact Assessment



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- Equalities Statement
  - Accepted indirect discrimination
  - BAME and Children disproportionately impacted
  - BAME children?
  - State justified in context of pandemic
- Important for transparency



# Convention Rights?

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- Articles 5(3) and 5(4)
  - Right to a trial within a reasonable time or to be released pending trial
  - Right to 'speedy' review of lawfulness of detention (used mainly in the prison law context)
  - Gives rise to obligation to conduct the proceedings with particular expedition or special diligence
  - Here there is a potential delay in judicial oversight
  - Immediate consequences owing to listing practices



# Convention Rights?

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- Council of Europe: maximum of six months for children to be in pre-trial detention which may only be extended by “exceptional circumstances”
- Strasbourg: Failure to take into account the age of a minor is a factor which amounts to a breach of article 5(3)
- Time on remand?
  - 4 months: *Selçuk v Turkey* (App. no. 21768/02) 10 April 2006 at §35;
  - 48 days: *Nart v Turkey* (App. no. 20817/04) 6 August 2008 §33.
  - Both *Selçuk* and *Nart* concerned charges of robbery.





# Convention Rights?

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- International law flowing through?
  - Failure to take into account Article 37(b) UN Convention on the Rights of the Child was a relevant factor in considering the lawfulness of a minor's detention (*Selçuk*, §36)



# Convention Rights?

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- Article 14 in conjunction with article 5?
  - Recognised and accepted disproportionate impact on BAME
  - Recognised and accepted disproportionate impact on Children
  - Failure to treat different groups differently (*Thlimmenos v Greece* (2001) 31 EHRR 15, §4)
  - Positive Obligation of the State
  - Response – justified by Covid-19



# Thank you

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