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Title of the article (no more than 10 words)	**Covid and the Penal System**
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Meta-description of 100-140 characters (characters NOT words, as this is the snippet that will show on a Google search)	This review reveals some of the 'behind the scenes' issues dealt with by the English courts during the Covid-19 pandemic period.
Up to 5 keywords (keywords can be multiple word phrases)	Covid-19, news, English Courts, prisons, proportionality
Brief biographical note of yourself (25-50 words)	Susanna Menis is a Lecturer in Law at Birkbeck London University, School of Law. She was a member of the Independent Monitoring Boards of Prisons for many years.
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Covid and the Penal System

News concerning sentencing in the UK during the pandemic period are mixed in tone and expectation. Typical to the media's lack of restraint in informing the public, we can read headlines such as 'Criminals handed coronavirus discounts as sentences shortened because of harsh new prison conditions'; and 'Paedophiles, thugs and drugs dealers have sentences cut because coronavirus makes prisons too harsh'. Other concerns have also been reported, for example that 'prisoners locked up for 23 hours a day due to Covid rules is dangerous'. The aim of this blog entry is to reveal some of the 'behind the scenes' issues dealt with by the English courts during this pandemic period. Some of the prison related concerns that the judiciary came across have been sentencing, prison conditions, release on licence, extradition and early discharge. The following will review the extent to which Covid-19 has affected some of these circumstances.

One of the first stories released by the media at the end of March 2020 was the governmental instruction for early discharge from prison. The conditions for such a release were that the prisoner was of low risk and within two months of their original release date. In the first application for early release that we have a record (6 April 2020), the Queen's Bench Division made an interesting observation (*Chelsea Football Club Ltd 2020)*. The Court was concerned as to whether the early release scheme might undermine the rule of law. The answer was 'yes' in principle, but 'no' in practice. It was considered that the scheme was part of a bigger picture of protecting public interests by reducing the burden on the NHS in case of a Covid-19 outbreak in prison.

In hindsight, most prisons were able to limit the spread of the Covid-19 first wave, and this was the reason why the scheme was very quickly shelved.

The court also touched on a concern which came up in several forthcoming cases, that is, the balance between more restricted prison conditions and the proportionality of the sentence. It was this that has mainly caught media attention: imposing the lowest threshold of a sentence on individuals which in normal circumstances might not have escaped imprisonment or longer sentences so easily. The restricted prison regimes used to control the spread of the virus meant that prisoners were confined in their cells for longer hours and family visits were not permitted; although similar or worse circumstances were faced by the public, the courts took the pandemic as a factor in determining the suitability of a prison sentence (Manning 2020) – would imprisonment during this period inevitably restrict even more the level of privation of the individual? And should this be taken into consideration?

The courts believed that they should (Manning 2020; Smith 2020; Ranshawa 2020, Khan 2020; Davey 2020)); although not without challenge by the Solicitor General (manning 2020; Gaves 2020; Mohamed 2020; Bastri 2020). Indeed, despite decades of overcrowding, questionable conditions, and doubtful rehabilitative impact on low risk offenders, it is only with the pandemic – ironically, given the safer environment during the first Covid-19 wave - that the courts felt it acceptable to waive a prison sentence and replace it with, for example, a suspended sentence accompanied by any of the range of rehabilitation, prevention and curfew orders. Another eyebrow-raising observation made by the Courts was the rational used to justify a suspended sentence on an offender who ‘posed a high risk to a “known child”’ (manning 2020); that is, that the curfew imposed

was further enhanced by the lockdown forced by the government. Of course, having experienced several lockdowns since, it is clear that the inhibition of this person's movement would have been but little affected by the lockdown.

It seems that the courts have started to back down from this reasoning, perhaps because the state of emergency had become the norm by November 2020. However, before this shift took place in England, the Appeal Court in Scotland made its stance clear earlier in June 2020 (HM Advocate 2020). Accordingly, in the context of the pandemic, coughing in jest justified a longer prison sentence. This court response to the approach taken in England was first, that opting for a suspended sentence instead, and 'take account of the emergency as a reason for discounting - would only serve to discriminate against those who might have been given a short term sentence before lockdown'. Second, the court thought that by now, prisons had found ways to mitigate the conditions dictated by the pandemic. For example, they were told that Inverness prison was about to implement a 'virtual' family visits scheme. It is difficult to tell whether this case had any effect on the English courts as it was only cited once and not in relation to the pointers mentioned above. Nevertheless, since November 2020, the English courts have showed greater reluctance in allowing the initially applied lax approach to sentencing (Strong 2020); Gaves 2020; Mohamed 2020).

Although apparently less newsworthy but perhaps most significant, the last two questions faced by the courts during this period concerned extradition and immigration bail. The travel restrictions meant that several extraditions had to be postponed. The issue at hand was not so much the longer detention period that followed, but rather what was considered to be an unlawful detention – *habeas corpus*. The courts clarified

that there was no case to answer. The original detention was set by a judge following lawful legal procedures; this was the case also for the order authorising the postponement of the extradition term (Cosar 2020; Verde 2020). Referring to an EU decision on that matter, it was explained by the court that postponing these extraditions was justified on a serious humanitarian reason and that this was a situation beyond states' control (EU Council Decision 2002/584/JHA Article 23).

Different has been the case for immigration bail. Individuals granted bail from immigration detention to an approved premise had their rights mostly compromised during this period. The lockdowns and social distancing experienced meant that approved premises have struggled to meet the increasing demands- particularly detrimental in cases of immigration. Here, the Home Secretary for the Home Department was delaying removals due to lack of suitable accommodation, leaving people in detention for longer than justifiable. Applications for interim relief to urge action, were framed around the violation of the *Hardial Singh* principles concerning lawful detention in the context of immigration. The Courts recognised the impact of COVID-19 on these situations stating that it 'made an already difficult task virtually impossible' (Mahboubian 2020); however, it was also stated that the need to avoid false imprisonment was not mitigated by the pandemic (Merca 2020; Ko 2020; CN 2020; Diriye 2020; Tutaj 2020; Mahboubian 2020).

Almost reaching a full year of life under pandemic conditions, initial media focus on punishment and justice is dwindling. Unsurprisingly, attention is now shifted towards crimes committed in the context of Covid-19. Still, in the background, the criminal justice system is facing a real struggle in balancing public interests against individual liberties.

Case reference

Chelsea Football Club Ltd v Nichols [2020] EWHC 827 (QB)

R. v Manning (Christopher) [2020] EWCA Crim 592

R. v Peter James Smith [2020] EWCA Crim 1014

R. v Randhawa [2020] EWCA Crim 1071

R. v Khan [2020] EWCA Crim 1617

R. v Davey [2020] EWCA Crim 1448

R. v Gaves [2020] EWCA Crim 1728

R. v Mohamed [2020] WCA Crim 1745

R. v Basri [2020] EWCA Crim 1218

HM Advocate v Lindsay (Iain) [2020] HCJAC 26

R. v Strong [2020] EWCA Crim 1712

Cosar v Governor of HMP Wandsworth [2020] EWHC 1142

Verde v Governor of Wandsworth Prison [2020] EWHC 1219

R. (on the application of Mahboubian) v Secretary of State for the Home Department [2020] EWHC 3289

R. (on the application of Merca) v Secretary of State for the Home Department [2020] EWHC 1479

R. (on the application of Ko) v Secretary of State for the Home Department [2020] EWHC 2678

R. (on the application of CN) v Secretary of State for the Home Department [2020] 10 WLUK 85

R. (on the application of Diriye) v Secretary of State for the Home Department [2020] EWHC 3033

R. (on the application of Tutaj) v Secretary of State for the Home Department [2020] EWHC 3579