



#### Members of Chambers

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John Jenkins QC  
Roger Thomas QC  
Alan Conrad QC

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Kristian Garsed

#### Principal Clerk

Lee Cook

## Crime Case Law and Criminal Justice Policy Update

### January 2008

#### Introduction

Welcome to the fifth of our criminal updates which we hope that you will find informative. Please feel free to forward it to colleagues and if they wish to be added to our mailing list they just need to send an email to [clerks@4kbw.co.uk](mailto:clerks@4kbw.co.uk).

Our next edition will be circulated in **April 2008**

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## CHAMBERS NEWS

### Website

Our new website is now available online at [www.4kbw.co.uk](http://www.4kbw.co.uk). There is a great deal of useful information including barrister profiles which can be downloaded.

### New Pupil's

Chambers has two new pupils in Andrea Vasilli and John Brown. Both pupils will be on their feet in April and have already been sharpening their advocacy skills for the various pro bono units.

### CJIT - Secure Email

Chambers is now linked to the **CJIT Secure Email System**. If you are linked to CJIT and wish to email our members or clerks using the system just use the normal 4kbw email address for the person and add after the .co.uk the following .cjsm.net We suggest if you send urgent mail that it should also be sent to the clerks to ensure a prompt response.

If you require any further help in this area please contact Lee Cook our Principal Clerk.



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## Member Profile



### Richard Moss - Called 2005

Richard obtained his LLB (First Class) at the University of Leeds and, following volunteer work in Latin America, undertook the Bar Vocational Course at Nottingham Law School. He was called to the bar in 2005 by Lincoln's Inn. After completing pupillage at 4 KBW he was offered tenancy in October of this year. His areas of practice are crime and general civil.

Richard has prosecuted a range of offences in both the Magistrates and Youth Courts including a variety of assaults, harassment, drugs, dishonesty, traffic, environmental health and firearms offences. He prosecutes for the probation service in both the Magistrates and Crown Court.

Richard has successfully defended privately and publicly funded clients in the Magistrates Court for offences including common assault, obstruction of a police officer and burglary, amongst others. He has experience of representing clients on various matters in the Crown Court, including appeals from the Magistrates Court. He is also a member of the Criminal Bar Association.



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## Member Profile



### Kristian Garsed - Called 2006

After completing his first degree in 2002 at the University of Southampton, Kristian went on to do an MA at the University of Kent. Whilst studying he worked at an organisation responsible for co-ordinating counselling services at GP's surgeries in Kent. After a journey through South America in 2004 he returned to London and completed his Graduate Diploma in Law at BPP Law School and then his BVC also at BPP.

Kristian was called to the Bar in 2006 and prior to starting his pupillage he gained legal experience working as a paralegal to one of the partners at a leading firm of personal injury solicitors.

Currently his general areas of practice are crime, personal injury, landlord and tenant, social security, licensing and contract.

Kristian's criminal practice involves prosecuting and defending in the Crown Courts, Magistrates' Courts and Youth Court. He has experience prosecuting and defending a wide range of different offences including; offences of dishonesty, violent crime, public order offences, driving offences and drug offences. Kristian also prosecutes on behalf of the National Probation Service dealing with allegations of breaches of community orders and has defended in cases prosecuted by Trading Standards.

Kristian is a member of the Criminal Bar Association.



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## General Case Law Update

### [R v S \[2007\] EWCA 2105](#)

It would be wrong to admit into evidence the plea of a co-defendant, where to do so would effectively close off the defences available to the defendant. The pre CJA 2003 line of authority, that s.74 PACE 1984 should be sparingly applied, was held not to be 'out of date'. (See [R v Kempster \[1990\] 90 Cr App R 14](#))

### [R v B \[2007\] EWCA Crim 23](#)

S.41 YJCEA 1999 operates so as to prevent cross-examination in relation to a man's sexual orientation and past sexual experience, where that man had alleged rape.

### [R v Kennedy \[2007\] UKHL 38](#)

The House of Lords was requested to consider the following point of law:  
*"When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of class A drugs, which is then freely and voluntarily self-administered by the person to whom it was supplied, and the administration then causes death?"*  
The answer given was:  
*"In the case of a fully-informed and responsible adult, never".*

### [R v Abdroikof \[2007\] UKHL 37](#)

This case concerned the issue of serving police officers and CPS employees sitting on juries. It was held that where in a case there is a real dispute on the evidence between the defendant and a police witness, the presence of a police officer on a jury may give rise to concern such as to compel a Judge to discharge that juror. Further, that *"justice is not seen to be done if one discharging the very important neutral role of juror is a full-time, salaried, long-serving employee of the prosecutor"*. Although the court went on to comment that the situation may be different where the CPS employee concerned held a peripheral, temporary or short-term role and the prosecution was not being brought by their own office. In addition, there could be no objection to CPS employees serving as jurors where the prosecution was brought by other persons or authorities.

### [R v Pintori \[2007\] EWCA 1700](#)

In this case the Court of Appeal held that where a juror was a civilian employee of the police who knew and had worked with some of the officers involved in the case, this was sufficient for a fair minded and informed observer to conclude that there was a real possibility of bias.

### [R v Graham \[2007\] EWCA Crim 1499](#)

This case deals with the directions to be given to a jury regarding the relevance of large sums of money being found at the home of a defendant charged with possessing drugs with intent to supply.



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## General Case Law Update Continued

### [R v Kepple \[2007\] EWCA Crim 1339](#)

A defendant can waive his right to arraignment by choosing to absent himself just as he can waive his right to attend his trial. Where counsel continues to represent an absent defendant, cross-examination can be as detailed as thought proper and prudent based upon the defendant's instructions previously obtained, although it would clearly be impermissible to ask questions that may suggest what the defendant's evidence would have been.

### [R \(Kelly v Wareley Magistrates Court \[2007\] EWHC 1836 \(Admin\)\)](#)

A court has no power to order the disclosure of the details of intended defence witness, which are privileged material, until the implementation of s.6C and 11 Criminal Procedure and Investigations Act 1996.

### [R v Hamilton \[2007\] EWCA 2062](#)

A defendant found to have secretly shot films looking up women's skirts, even when no one had seen the filming, was correctly convicted of outraging public decency.

### [Secretary of State for the Home Department v JJ and others \[2007\] UKHL 45; Secretary of State for the Home Department v MB \[2007\] UKHL 46; Secretary of State for the Home Department v E and another \[2007\] UKHL 47](#)

The House of Lords recent rulings on control orders.

### [R v Johnson \[2007\] EWCA Crim 1651](#)

A previous guilty plea and written basis of plea, made by a defendant and subsequently vacated, can be admissible as a confession by a co-accused under s.76A PACE 1984.

### [R v P \[2007\] EWCA Crim 2290](#)

The Court of Appeal considered s.71-75 Serious Organised Crime and Police Act 2005, which provided a statutory framework for the common law principles of "Queen's Evidence".

### [R v Ulcay \[2007\] EWCA Crim 2379](#)

The Court of Appeal gave guidance to solicitors and barristers taking over a case where the defendant's previous representatives have withdrawn. The new representatives cannot withdraw if the court subsequently refuses, what they consider to be, a proper adjournment period to allow them to prepare the case. To do so is not consistent with the professional obligations of both solicitors and counsel.



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## General Case Law Update Continued

### [T v DPP \[2007\] EWHC 1793 \(Admin\)](#)

The Court of Appeal clarified the approach when deciding whether an adverse inference should be drawn in a case where a defendant has declined to answer questions in interview but has instead submitted a prepared statement. It also advises solicitors who provide advice at police station interviews that a defendant should go 'no comment', that they should carefully consider whether they may be required to be a witness of fact in due course on this issue, before they undertake to conduct the trial proceedings themselves.

### [R v George \[2007\] EWCA Crim 2722](#)

A detailed examination into the evidence provided by firearms residue.

### [R v Amrouchi \[2007\] EWCA 3019](#)

*Robert Spencer Barnard of these chambers representing the Crown*

The Court of Appeal held that where a defendant was due to stand trial but refused to leave his prison cell, the proper practice should be for the trial Judge to adjourn for 24 hours and ensure that an explicit warning is given to the defendant that should he continue to refuse to attend court then he would be tried in absence. The Judge should usually require written confirmation from the prison that the warning has been given, preferably in writing, to the defendant.

## Prision Law Update

### [R \(Brooke\) v Parole Board \[2007\] EWHC Admin 2036](#)

It was held that the parole board failed the test for objective independence required by Article 6 ECHR. The court concluded that:

*"The question for us is whether the Parole Board has the necessary objective independence which a court must have in order to satisfy both the common law of England and Wales and the requirements of Article 5(4) ECHR. There is no question about the independence of mind and impartiality of the individual members of the Board. The issue is whether the relationship with the sponsoring Department of State, formerly the Home Office and now the Ministry of Justice, makes the Board too close to both the Executive and the principal party to all its decisions. We have found no sign of any attempt by the Department to influence individual cases, as distinct from the general approach to release decisions; that is so whether the individual cases are those of the claimants before us or any others. In some respects we have found that the structure of the Board is consistent with the necessary objective independence. But we are satisfied that the relationship of sponsorship is such as to create what objectively appears to be a lack of independence, and to cause the sponsoring Department sometimes to treat the Board as part of its establishment (see paragraph 55). That has led to inadequate protection for the security of tenure of members (see paragraph 42). It has also led to documented examples of the use of the powers of the Department which have not been consistent with the need to maintain the Board's objective independence; those have been powers of funding (see paragraphs 48-9 & 60), of appointment (see paragraphs 33 & 62) and to give directions (see Girling and paragraph 45).*



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## Prison Law Update Continued

*The continuing practice of regular confidential meetings between the Board and one party to its decisions, and the appearance given by the integration of the Board with the Department for housing and for electronic communications might not, alone, be inconsistent with the necessary demonstration of objective independence, but taken together with the other incidents of sponsorship they are."*

The judgment has however presently been suspended pending appeal.

### [R v Montgomery \[2007\] EWCA Crim 2157](#)

A prisoner given temporary release under the Prison Rules 1999 who fails to return to prison at the expiry of that period of release cannot be convicted of the common law offence of escape.

## Hearsay Update

### [R v Keet \[2007\] EWCA Crim 1924](#)

There is an absolute rule of evidence that hearsay evidence should be precluded where it is the sole or decisive evidence against a defendant. The governing criterion was whether the admission of the evidence compatible with a fair trial.

### [R v Chal \[2007\] EWCA Crim 2647](#)

The hearsay provisions in CJA 2003 apply to proceedings under s.4A Criminal Procedure (Insanity) Act 1964.

## Bad Character Update

### [R v Campbell \[2007\] EWCA Crim 1472](#)

Further guidance was given by the Court of Appeal regarding the application of the bad character provisions of the CJA 2003. Specifically, guidance was given regarding: (i) jury directions; (ii) the use such evidence could be put to once admitted through one of the 'gateways'; and (iii) when the question of whether or not the defendant is truthful becomes an important matter in issue.

### [R v Wallace \[2007\] EWCA Crim 1760](#)

Where a defendant was charged with 4 separate but linked robberies on which the evidence on each was circumstantial but showed some link between him and each of them, applications should have been made under s.101 CJA 2003 to admit the evidence on each in relation to the others. Such an application would however inevitably succeed and therefore, despite no such application having been made in the case concerned, the conviction was not unsafe.



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## Sentencing Update

### [R v Juma \[2007\] EWCA Crim 936](#)

The Court of Appeal considered the guidelines for sentencing in false passport cases (*R v Kolawole* [2004] EWCA Crim 3047). Significant mitigation should be taken into account when considering the appropriate sentence to be imposed. (Also see *R v Mutende* [2005] EWCA Crim 3208, which held that lesser sentences could be appropriate where the passport has not been used to enter the UK).

### [R v Zenasni \[2007\] EWCA Crim 2165](#)

The Court of Appeal supported the approach of the sentencing Judge in this case where he drew the conclusion that the purpose that the defendant had a false identity document in his possession was likely to have been a 'sinister one', no other purpose having been advanced in mitigation. Why a defendant may have had possession of such a document is a relevant consideration even where a defendant faces a charge under s.25(5) of the Identity Cards Act 2006.

### [R v Watty \[2007\] EWCA Crim 123](#)

The Court of Appeal held that the imposition of an IPP for an offence where the appropriate determinate sentence would have been 12 months imprisonment was inappropriate. Held: "*Parliament cannot have intended a sentence of imprisonment for public for public protection for offences of a relative minor nature which would at most result in only a short term of imprisonment*".

### [R v Xhelollari \[2007\] EWCA Crim 2052](#)

The decision that a defendant is dangerous and therefore should be made subject to an IPP should only be made on actual evidence, not speculation or mere apprehension of future risk.

### [R v Green \[2007\] EWCA Crim 2172](#)

The Court of Appeal held that a finding of dangerousness could perfectly possibly be made on the basis of material which had no close relationship to the actual offence being sentenced for. It upheld the Judge's approach in this case where, when sentencing a defendant for an offence of causing death by careless driving when unfit through drink or drugs, he also considered his previous convictions for 2 offences of wounding. His Honour took account of the defendant's history of abusing illegal drugs at the time of committing those offences when assessing whether or not he was 'dangerous'. However the court also stated that "in practice such cases will no doubt be very rare".

### [Attorney-General's Reference \(no.66 of 2007\) EWCA Crim 2630](#)

Tariffs were set down for cases of attempted murder where the victim survives. (Also see *R v Clark* [2007] EWCA 2195 and *R v Coleman* [2007] EWCA 2318).

### [R v Kulah \[2007\] EWCA 1701](#)

It may be dangers in giving Goodyear directions in cases where the defendant is subject to the mandatory dangerous offender provisions under the CJA 2003 as the Judge may not at that time have possession of all the information necessary to enable him to make the assessment of risk.



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## Sentencing Update Continued

### [Attorney General's References \(74 and 83 of 2007\) The Times 16<sup>th</sup> Nov 2007](#)

In cases of rape of a child under 13, actual consent may in some rare cases provide mitigation, depending on the circumstances of the case. The apparent age of the victim being over 16 could also provide mitigation, such mitigation growing less relevant the older the offender is.

### [R v Langham \[2007\] EWCA Crim 3004](#)

The downloading of images for research purposes provides an offender with only minimal mitigation and would in itself not be sufficient to warrant a non-custodial sentence.

### [Director of Assets Recovery Agency v Jackson & Smith \[2007\] EWHC 2553](#)

Guidance on dealing with POCA cases where the defendant has unexplained wealth and offers numerous explanations for it and the court's general approach to businesses conducted in an irregular manner, lack of business records and money stored in an irregular manner. The case also discusses the status of monies contaminated with drugs.

### [Sentencing Guidelines Council: Fail to Surrender to Bail: Definitive Guidelines \[2007\]](#)

These guidelines were issued in November 2007 and apply to all defendants convicted of failing to surrender to bail and sentenced on or after 10<sup>th</sup> December 2007.

## Legislation & Policy Update

### [Road Safety Act 2006 \(Commencement No.2\) Order 2007](#)

A further 14 sections of the Road Safety Act 2006 came into force on 24<sup>th</sup> September 2007: s.14, s.23, s.24, s.25. s.27, s.28. s.29. s.30, s.31, s.32, s.33, s.41, s.43, s.59.

### [The Violent Crime Reduction Order 2006 \(Commencement No.3\) Order 2007-11-21](#)

s.43 of the above Act came into force on 1<sup>st</sup> October 2007 and amended s.141 CJA 1988 to make it an offence to sell a knife (and certain other articles with a blade or point) to a person under 16. The maximum penalty is 6 months imprisonment or a level 5 fine, or both.

s.44 of the above Act came into force on 1<sup>st</sup> October 2007 and amended the Crossbows Act 1987 to make it an offence to sell or hire a crossbow to a person under the age of 17 years and for a person under 17 years to purchase or hire one or be in possession of one unless under the supervision of a person aged over 21. Maximum penalty is 6 months imprisonment or a level 5 fine, or both.



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Olive Lycourgou  
Tamia Tagon  
Beverly Roberts  
Cameron Brown  
Gavin Holme  
Sabina Khan  
Simon Heptonstall  
Michael Roques  
Justyn Turner  
Justine Davidge  
Alison Griffiths  
Jerome Silva  
Louise Robinson  
Claire Van Overdijk  
David Bennett  
David Sawtell  
Richard Moss  
Kristian Garsed

## Principal Clerk

Lee Cook

## Legislation & Policy Update Continued

### [The Violent Crime Reduction Act 2006 \(Commencement No.4\) Order 2007](#)

s.41 of the above Act came into force on 1<sup>st</sup> October 2007. It makes offences of carrying an imitation firearm in a public place without reasonable excuse triable either way. The maximum sentence is 12 months on indictment, and in summary proceedings is 6 months, until the coming into force of s.282(3) CJA 2003 when it will be increased to 12 months also.

### [The Violent Crime Reduction Act 2006 \(Realistic Imitation Firearms\) Regulations 2007](#)

These regulations make various provisions with regards the definition of and available defences to the charges of manufacture, importation and sale of realistic imitation firearms.

### [The Firearms \(Amendment\) Rules 2007](#)

These rules amend Schedule 4 of the Firearms Act 1968 and the Firearms Rules 1998 regarding the registration of air weapons.

### [The Offender Management Act 2007 \(Commencement and Transitional Provisions\) Order 2007](#)

This order brings into force certain provisions of the Offender Management Act 2007.

### [The Police & Criminal Evidence Act 1984 \(Application to Revenue & Customs\) Order 2007](#)

This order applies certain provisions of PACE, subject to specific modifications, to relevant criminal investigations conducted by Revenue & Customs officers.

### [Serious Crime Act 2007](#)

Part 1 - creates new 'Serious Crime Prevention Orders', civil orders aimed at preventing serious crime.

Part 2 – abolishes the common law offence of incitement and creates new offences of intentionally encouraging or assisting crime and encouraging or assisting crime believing that an offence, or more than one offence, will be committed.

Part 3 – contains numerous other 'measures to prevent or disrupt serious and other crime'.

### [Home Office Circular 33/2007: Standard Powers and Duties of Police Community Support Officers](#)