

## GENERAL CRIME BRIEFING NOTE

*R v ALI* [2023] EWCA CRIM 232:

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### Executive summary:

In a judgement dated 3 March 2023, the Court of Appeal held that the current high prison population in adult male prisons was, at present, an exceptional factor which could be properly taken into account by a sentencing judge, especially in relation to suspending what would otherwise be short immediate custodial sentences, in a similar manner to the situation that arose during the Covid-19 pandemic.

### The facts:

On 20 September 2019 the appellant was a serving prisoner at HMP Maidstone. The appellant threw the boiling hot contents of his mug into a prison officer's face. He pleaded guilty to the offence of assaulting an emergency worker, on the first day of a long-adjourned trial.

The appellant committed the offence whilst he was serving a sentence of 3 years' imprisonment for an offence of conspiracy to assist unlawful immigration into an EU member state. He was released from prison on 29 July 2020 and completed his licence on 28 January 2022. His sentencing hearing for this offence was on 3 February 2023.

The sentencing judge's assessment was that the appellant's culpability fell within category A, because the contents of the mug were equivalent to a weapon, and that the harm caused fell within category 1, because it was more than minor physical harm. The starting point for the assault was therefore a high-level community order, with a range from a low-level community order to 26 weeks' custody.

The offence was aggravated because the appellant committed the offence in prison. He had since been released from custody, and there were a number of mitigating factors, including the fact he had stayed out of trouble since his release, the offence was out of character and there had been significant delays before he had been charged. Applying the appropriate uplift because the assault was committed on an emergency worker, and applying a one tenth reduction for his guilty plea, the judge imposed an immediate custodial sentence of 6 months.

There were three grounds of appeal:

**1. The judge erred in not ordering a pre-sentence report.**

The Court of Appeal considered this not to be a ground of appeal in itself because the judge had considered an immediate custodial sentence was required, especially when the judge had the benefit of a letter from probation.

**2. The length of the sentence was manifestly excessive.**

The Court of Appeal found the term selected by the judge was proportionate.

**3. The sentencing judge erred in passing a sentence of immediate custody.**

The Court of Appeal considered that although the vast majority of cases of this nature would unquestionably lead to an immediate custodial sentence, this ground had merit on account of the exceptional circumstances of this case.

The Court of Appeal identified the exceptional circumstances as being the following:

1. The appellant was not charged until 16 months after the offence, and over 6 months after he was released from prison.
2. He was sentenced 2 ½ years after he had been released from prison and had remained out of trouble throughout that period.
3. He had the benefit of a very positive reference from a probation officer.
4. The sentencing judge had accepted there was a realistic prospect of rehabilitation, and on the face of it he had already rehabilitated himself.
5. The appellant was sentenced at a time of very high prison population.

In relation to that last factor, the Court of Appeal considered the particular time in which the appellant had been sentenced. At paragraphs 18-20, Edis LJ stated:

*“18. A further exceptional factor arises from the fact that the appellant was sentenced at a time of very high prison population. On 30 November 2022 the Minister of State made a statement in Parliament announcing Operation Safeguard. The Government thereby requested the use of 400 police cells to hold people who were remanded in custody or serving prison sentences in the adult male prisons. He explained that this was because “a surge in offenders is coming through the criminal justice system, placing capacity pressure on adult male prisons in particular.” On 5 December 2022 Parliament was informed that it was not possible to estimate the duration of the protocol.*

*19. On 6 February 2023, the day when the sentence in this case was passed, a further announcement was made when the Ministry of Justice gave the National Police Chiefs’ Council 14 days’ notice to make cells in the North of England and the West Midlands available, following a rise in the number of inmates since the start of the year.*

*20. On 24 February 2023 the Deputy Prime Minister wrote to the Lord Chief Justice saying:-*

*“You will appreciate that operating very close to prison capacity will have consequences for the conditions in which prisoners are held. More of them will be in crowded conditions while in custody, have reduced access to rehabilitative programmes, as well as being further away from home (affecting the ability for family visits). Prisoners held in police cells under Operation Safeguard will not have access to the full range of services normally offered in custody, including rehabilitative programmes.”*

The Court of Appeal reiterated the principles it established in *R v Manning* [2020] EWCA Crim 592, where the Lord Chief Justice considered the current conditions in prison as a factor which can be properly taken into account in deciding whether to suspend a sentence:

*“21. [...] Furthermore, the court heard the instant reference at the end of April 2020 when the nation remained in lock-down as a result of the COVID-19 emergency. The impact of that emergency on prisons was well-known and the current conditions in prison represented a factor that could properly be taken into account in deciding whether or not to suspend a sentence. In accordance with established principles, any court would take into account the likely impact of a custodial sentence on an offender and, where appropriate, on others as well. Judges and magistrates could, and should, keep in mind that the impact of a custodial sentence was likely to be heavier during*

*the current emergency than would otherwise be the case. Applying ordinary principles, where a court was satisfied that a custodial sentence had to be imposed, the likely impact of that sentence continued to be relevant to the further decisions as to its necessary length and whether or not this could be suspended. Moreover, sentencers should bear in mind the Guilty Plea Guideline, which made it clear that a guilty plea might result in a different type of sentence, or enable a magistrates' court to retain jurisdiction, rather than committing for sentence."*

The Court of Appeal in *Ali* went on to consider, at paragraph 22, which cases this exceptional factor would apply to:

*"22. [...] This factor will principally apply to shorter sentences because a significant proportion of such sentences is likely to be served during the time when the prison population is very high. It will only apply to sentences passed during this time. We have identified above the starting point for the relevance of this consideration for sentencing, which we take to be the implementation of Operation Safeguard 14 days after 6 February 2023."*

The Court of Appeal quashed the sentence and substituted a suspended sentence order for 6 months' imprisonment, suspended for 18 months.

### **Analysis:**

This judgement will have a significant impact on those borderline cases which are on the cusp of immediate custody. This judgement makes it clear that sentencing tribunals should consider the prison population and prison conditions, when deciding whether or not to suspend a period of imprisonment. Arguments can now be properly made on behalf of adult male defendants who might otherwise be facing immediate custody, that on account of the high prison population, their sentence should be suspended.

Although the judgement is clear that it will principally apply to cases facing short sentences, this may be a relevant factor to consider regarding all sentences passed during this time. If a defendant is facing an immediate custodial sentence, and a significant proportion of that sentence will be served in harsher conditions than otherwise envisioned when the guidelines were made, there may be arguments to be made as to reducing the overall length.

Conversely, those currently serving a period of imprisonment in prisons which are at full capacity, will of course also be experiencing the negative impacts of that high capacity. Nevertheless, prisoners whose sentences were determined before the relevant period will not get the benefit of such considerations, unless they have the benefit of an 'in time' appeal being lodged.

What is currently unclear is the time that this 'exceptional' period will last. It is clear that the starting point for this exceptional circumstance is the implementation of Operation Safeguard, 14 days after 6 February 2023. There is though an unfortunate lack of transparency as to Operation Safeguard. For example, it appears that the letter from the Deputy Prime Minister to the Lord Chief Justice dated 24 February 2023 has not been published. It would seem strange that such an important consideration regarding a matter of such public interest as the sentencing of criminals should be governed by the issuing of an unheralded and unpublished letter between two senior representatives of the executive and judicial branches of the state, which is not then made known to courts and advocates until it features in an otherwise unremarkable sentencing appeal. More crucially, there also appears to be nothing relating to the current implementation or future prospects of Operation Safeguard on the judiciary.uk website or Ministry of Justice/Home Office websites. (There is now, as from 20 March 2023,

one short statement summarising *Ali* issued by the President of the Sentencing Council on that body's website.) The Court of Appeal in *Ali* concluded its judgement by saying that 'it will be a matter for the government to communicate to the courts when prison conditions have returned to a more normal state' but given the manner in which matters were originally communicated, it is not clear *how* the government would communicate such an important message.

Although the judgement in *Ali* sets out that we are in an 'emergency' period in respect of prison conditions, it does not break any new ground in terms of general sentencing law during such periods. The Court of Appeal in *Ali* specifically reiterated the principles in *Manning*. The significance lies in the fact that these principles now apply even in a post-pandemic landscape. In *Manning*, the Lord Chief Justice made clear that the prison conditions, as a result of the Covid-19 pandemic, could be properly taken into account when deciding whether to suspend a period of imprisonment. The reasoning given included the confinement of prisoners to their cells for 23 hours a day, the inability to receive visits and the anxiety caused by the risk of transmission of the disease in confined quarters like prisons. In the absence of such an emergency, one might have expected the experience of prisoners to revert to pre-pandemic conditions. The judgement in *Ali* makes clear though that prison conditions can, in other circumstances, be an important factor for sentencing decisions irrespective of a pandemic.

On 2 May 2022, the maximum custodial sentence available for a single either way offence was doubled from 6 to 12 months, for offences committed after that date. However, less than a year later, and in the same month that the judgement in *Ali* was handed down, this was reversed. The Sentencing Act 2020 (Magistrates' Court Sentencing Powers) (Amendment) Regulations 2023 amends section 224(1A)(b) of the Sentencing Act 2020, reducing the maximum sentence for an either way offence in the Magistrates' Courts from 12 months back to 6 months. Although the high prison population has been growing for some time, there is insufficient data to know if the extension of those sentencing powers contributed to the high prison population issue. What is clear is that the courts are being forced to consider the effects of the inability of the state to house a high prison population in their own sentencing decisions.

The decision in *Ali* may be capable of having some impact on decisions regarding bail. The test for withholding the right to bail is expressed in Schedule 1, paragraph 2(1) of the Bail Act 1976, as follows: '*The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would [fail to surrender, commit further offences, interfere with witnesses etc]*', which demonstrates that bail is quintessentially a *discretionary* power held by the criminal courts.

When making decisions on whether to withhold bail, there will undoubtedly be many cases where the decision to withhold it is necessary, and despite the high prison capacity and worse prison conditions, bail will not be granted. Nevertheless, the courts will be frequently faced with borderline cases, so it may be that in those cases that the courts should bear in mind the harsher prison conditions. It would seem at least arguable that the principles in *Ali* should be considered by the courts when deciding whether to exercise their discretion in favour of granting bail, given the significantly worse prison conditions existing at present.

*This briefing note was produced by Philip Stott, barrister, and Georgina Jenkins, pupil barrister, at QEB Hollis Whiteman. Any views expressed in the note are those of the author's alone and are not necessarily those of QEB Hollis Whiteman or any other member of Chambers. This note should not be taken as constituting formal legal advice.*

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