

## Written evidence from Mr Omran Belhadi (COV0191)

### I. Introduction

1. The Joint Committee on Human Rights (“JCHR”) is currently undertaking an inquiry entitled “*The Government’s response to COVID-19: human rights implications*”. A call for evidence will last until 22 July 2020.
2. Evidence should address the following three questions:

*“What steps need to be taken to ensure that measures taken by the Government to address the COVID-19 pandemic are human rights compliant?”*

*What will the impact of specific measures taken by Government to address the COVID-19 pandemic be on human rights in the UK?*

*Which groups will be disproportionately affected by measures taken by the Government to address the COVID-19 pandemic?”*

3. These submissions seek to address these three questions through the prism of those accused and found guilty of crimes. The Government’s response has an impact on Articles 3, 6 (criminal limb) and 8 of the European Convention on Human Rights (“ECHR”).

### II. The problem

4. The country went officially on lockdown on 23 March 2020 in response to the COVID-19 pandemic. Since then, there has been a drastic reduction in jury trials and in-person hearings in courts and tribunals across England & Wales.
5. As a result, a backlog—which existed before the pandemic—has increased.<sup>1</sup> There has been a minor increase in cases before the Crown Court but a drastic increase in cases before Magistrates’ Court, where the overwhelming majority of criminal cases are decided.
6. A backlog in hearing a criminal case has ripple effects. Criminal cases rely predominantly on the oral evidence of witnesses. Victims and corroborating witnesses come to court in order to give their evidence. Defendants, if they choose to do so, give evidence orally. The court—be it a jury, district judge or bench of lay magistrates—then decide beyond reasonable doubt whether the defendant is guilty.
7. Over time, memories fade. Defendants may be convicted because, many months or years after the events, their memory fails them and the evidence they give is perceived as unconvincing. While awaiting trial, some defendants are deprived of their liberty. The time they spend waiting for their trial could dwarf—even substantially—the sentence they receive if found guilty.

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<sup>1</sup> <https://www.bbc.co.uk/news/uk-53463856>

8. In addition to the impact on those awaiting trial, the lockdown has affected those sentenced to imprisonment. Prison is not a pleasant place. It is designed to restrict liberty. During lockdown prisoners are subjected to even more stringent conditions and are effectively in solitary confinement.

### **III. The proposed solution**

9. The need to restart trials is therefore obvious. The innocent could be languishing in prison cells for months or years before being acquitted. The guilty could escape punishment because witnesses no longer wish to attend court.
10. Since the start of the lockdown the government has proposed a number of measures to re-start trials:
  - a. Restricting the right to trial by jury to the more serious offences and replacing juries with a bench of a Crown Court judge and two lay magistrates;<sup>2</sup>
  - b. Reducing jury numbers;<sup>3</sup>
  - c. Opening new venues or “Nightingale Courts.”<sup>4</sup>
11. Meanwhile, little thought has been given to those who are in prison who do not need to be. Individual prisons showed no signs of expanding and accelerating the use of home detention curfew under the Criminal Justice Act 2003.<sup>5</sup> The Government put forward an End of Custody Temporary Release (“ECTR”) scheme—distinct from the powers under the Criminal Justice Act 2003—which resulted in very few releases.<sup>6</sup>

### **IV. The problem(s) with the proposed solution**

12. The Government’s approach to those accused and convicted of crimes is troubling with regards to its obligations under Articles 3, 6 (criminal limb) and 8 ECHR.
13. Article 6(1) ECHR requires that a person charged with a criminal offence has a right to a
  - “fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”*
14. Article 6 ECHR does not require trial by jury.<sup>7</sup> It requires trial by an independent, impartial tribunal. The Government approach and rhetoric fails to place to the rights of those accused of crime at the forefront.

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<sup>2</sup> <https://www.lawgazette.co.uk/news/legislation-to-abolish-some-jury-trials-could-be-passed-within-weeks/5104739.article>

<sup>3</sup> <https://www.telegraph.co.uk/politics/2020/04/30/juries-could-reduced-size-first-time-since-second-world-war/>

<sup>4</sup> <https://www.gov.uk/government/news/10-nightingale-courts-unveiled>

<sup>5</sup> The powers are contained in section 246 and onwards of the Criminal Justice Act 2003

<sup>6</sup> <https://www.theguardian.com/society/2020/may/31/prison-release-schemes-close-to-impossible-to-deliver-says-watchdog-coronavirus>

<sup>7</sup> *Twomey, Cameron and Guthrie v United Kingdom* (Applications nos. 67318/09 and 22226/12, 28 May 2013) paragraph 30

15. The Government has claimed that the pandemic has created a backlog which requires taking drastic measures, including—they claim—reducing the right to jury trial. This sense of urgency is welcome but based on a false premise.
16. The serious backlog existed before the pandemic forced the courts shut. There was a need to clear the backlog before then, yet the Government took no action. Putting measures in place now tends to suggest that the Government's pre-occupation is with the appearance of tackling the backlog rather than taking measures which would ensure that the right to a timely trial is upheld.
17. The measures taken so far indicate that the rights of defendants to a timely trial is at—or close to—the bottom of the Government's list of considerations. While not directly violating Article 6 ECHR, the suggestion of a restriction on the right to jury trial is contrary to centuries of principle and the notion of adversarial British justice. Out of the 10 Nightingale Courts, only two are specifically dedicated to tackling criminal cases. They are restricted to “non-custodial crime” cases where the defendant is on bail. A third tackles “non-custodial corporate crime” where the defendant is a company rather than an individual. No measures have been announced to tackle the backlog of Magistrates' Court cases which hears the majority of criminal cases.
18. In addition, Article 6(3)(b) ECHR, that a defendant has the right to “*to have adequate time and facilities for the preparation of his defence*”. While courts are shut, prisons are also on lockdown. Lawyers cannot visit. Prisons are not equipped to allow the entire population to communicate with their lawyers via video-link. For those on remand this means it is near impossible to provide instructions to their legal teams. It is equally impossible for them to receive advice. In the circumstances, they are not being provided with adequate facilities for the preparation of their defence.
19. Further, the failure to adequately assess the use of powers under the Criminal Justice Act 2003 has an impact on the rights of prisoners under Articles 3 and 8 ECHR. Both Articles 3 and 8 ECHR apply to the standards of detention. If conditions are sufficiently poor, they may amount to a breach of Article 3 ECHR.<sup>8</sup> In any event, they may impact on the right to private life under Article 8 ECHR as they greatly limit the access that prisoners have to the outside world.
20. Because of the pandemic, the severity of the prison regime across the UK has heightened. Courts have recognised this and reiterated the principle that severe prison conditions can be a reason to avoid sending a defendant to prison.<sup>9</sup> The Sentencing Council has issued a specific guideline reminding sentencing courts that the severity of the current regime must be taken into account.<sup>10</sup>

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<sup>8</sup> See, for example, *Ananyev and others v Russia* (Applications nos. 42525/07 and 60800/08, 10 April 2012) where the Court found at paragraphs 160 to 166 that having only an hour of exercise a day, in overcrowded prisons with little access to sunlight and poor access to hygiene would amount to inhumane and degrading treatment contrary to Article 3 ECHR.

<sup>9</sup> *R v Christopher Manning* [2020] EWCA Crim 592

<sup>10</sup> <https://www.sentencingcouncil.org.uk/news/item/the-application-of-sentencing-principles-during-the-covid-19-emergency/>

21. Yet since the pandemic has started, few prisoners have been released under the ECTR scheme. In May, the Independent Advisory Panel on Deaths in Custody criticised the scheme for its complexity and its “*risk aversion*.”<sup>11</sup>
22. The scheme under the Criminal Justice Act 2003 is one that can easily operate without the need for physical proximity.<sup>12</sup> At its highest, the only physical proximity required is for the verification of addresses as suitable for a curfew.

## V. Conclusion

23. The Government’s response to the pandemic’s effect on the criminal justice system has been empty. The Government has focussed on headline-grabbing initiatives that create controversy, erode rights and fail to cause even a dent into the backlog.
24. A rights-based approach to the ever-increasing problem in the criminal justice system would lead the government to only one conclusion. The solution is to fund the criminal justice system by fairly remunerating prosecution and defence advocates, funding the re-opening of court buildings and ensuring there are enough judges to hear cases.

21/07/2020

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<sup>11</sup> <https://www.theguardian.com/society/2020/may/31/prison-release-schemes-close-to-impossible-to-deliver-says-watchdog-coronavirus>

<sup>12</sup> The Home Office has produced guidance on home detention curfew which can be found here: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/882216/home-detention-curfew.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/882216/home-detention-curfew.pdf)