

## Early release and sentencing reforms: What has changed in the wake of *R v Ali* and overcrowded prisons

### *Introduction*

In March 2023 Edis LJ expounded that unless and until the issue of prison overcrowding in England and Wales eased back to a “*more normal state*”, then the “*very high*” prison population was a real factor which sentencing judges could properly take into account when considering whether to suspend a term of imprisonment. Following the Government’s decision to permit early release of prisoners and the introduction of Operation Early Dawn, this article considers whether, and to what extent, the Court of Appeal’s decision in *R v Ali* [2023] EWCA Crim 232<sup>1</sup> has had an impact on the prison population crisis, as well as reflecting upon other measures that the Ministry of Justice could impose to ease the pressure on the Criminal Justice System.

### *The statistics*

Below is a chronological table of the UK male prison population over the last 5 years at January of each year.<sup>2</sup>

|      |        |
|------|--------|
| 2019 | 79,611 |
| 2020 | 74,983 |
| 2021 | 76,282 |
| 2022 | 79,694 |
| 2023 | 82,951 |

As at end of March 2024, the prison population was 87,869 and rising. Unsurprisingly, there has been an increase in the population of over 17% in the past 5 years (2020-2024). At the time of the judgment in *R v Ali* the population stood at 84,372<sup>3</sup> and since this time the prison population has increased by at least 4.1%.

Turning to sentences imposed by the courts, the available Ministry of Justice figures indicate that those sentenced to suspended sentence orders in the year of 2022 numbered 40,952, whilst in 2023 the figure in fact increased to 43,734 and increased further to 44,255 by March 2024.<sup>4</sup> This gives

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<sup>1</sup> [R v Ali \[2023\] EWCA Crim 232](#)

<sup>2</sup> <https://commonslibrary.parliament.uk/research-briefings/sn04334/>

<sup>3</sup> Notably, giving an increase in previous 12 months of 5.8% in the prison population

<sup>4</sup> <https://data.justice.gov.uk/cjs-statistics/cjs-sentence-types#table-tab-cjs-offenders-sentenced-immediate-custody>

an 8% rise in the number of suspended sentences imposed by the Court. At first blush, this would indicate that the courts are applying *R v Ali* and imposing more suspended sentence orders, thereby attempting to tackle the problem. However, this figure is down 5.8% from the year 2021 to 2022. More significantly, in 2015 the courts issued over 57,000 suspended sentences. This suggests that despite the rise in crime and prison population, the number of suspended sentences being imposed has in fact decreased significantly.<sup>5</sup> This suggests that the courts do have the ability and wherewithal to issue more suspended terms of imprisonment on offenders, but at this time have not done so.

Delving deeper and comparing this to the number of immediate custodial sentences reveals an interesting statistic. The number of immediate custodial sentences imposed in 2022 was 64,835. This has increased to 72,713 as at March 2024 which equals an increase of 12.1%. There are variables which ought to be considered against these figures, such as the potential length of the sentences which are being meted out by the courts. However, of note, the average immediate custodial sentence (excluding life and indeterminate sentences) stands at circa 21 months. This is a sentence figure which is within the range of suspension. Taking those figures, there has been a bigger increase of immediate custodial sentences as opposed to suspended sentences. It might have been hoped that the statistics would have reflected that the number of immediate custodial sentences would not be increasing faster than suspended sentences.

### ***Operation Early Dawn***

It appears that desperate times have called for desperate measures from government. This year Operation Early Dawn was triggered, which introduced several measures to try and combat the prison population crisis. Part of this was permitting the use of police stations' cells to be used to hold prisoners where there is no prison space to accommodate them. This has been widely criticised because police stations are not prisons, the rate of arrests/crime being committed is not falling and the police resources are being drained as a result. Time will tell whether Operation Early Dawn will have the desired effect; however, it does not bode well as being a quick and impactful solution.

More recently, in September 2024, the prisons were able to release inmates at an earlier point than 50% of the way through an individual's determinate sentence. This was imposed because the system is at a point of collapse. This is apparent from the fact that other jurisdictions have complained about potential human rights violations due to the current prison conditions. This

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<sup>5</sup> *Ibid*

impacts upon mutual legal assistance and extradition requests.<sup>6</sup> It is envisaged that the early release scheme will be in place for the next 18 months and will hopefully enable the early release of roughly 5,500 prisoners. However, there is concern about the provisions in place once these prisoners are released to help continue their rehabilitation, or lack thereof. Similarly, there has been great public outcry at seriously violent offenders being released early and immediately reoffending and/or the authorities not notifying their victims<sup>7</sup>.

### *Other considerations*

As discussed above, clearly more must be done to reduce the prison population. The prison estate needs drastic reform, as well as dynamic sentencing considerations. However, one must be cognisant of the fact that the public wish to ensure that they feel safe, that justice is being done and that prisoners are being rehabilitated. To that end, there are some schemes, considerations and posited suggestions that could be implemented and reflected upon. The executive, parliament and the judiciary all have the power to assist.

The F-word. Funding. It is obvious, but more funding is required. It is well-known that there is not a limitless supply of money available which can be used to prop up the Criminal Justice System. Thus, funding from the Government must be targeted to have maximum effect. The suggestion of building more prisons is costly both in terms of finances and time to have a real immediate effect. Furthermore, the building of such premises and being able to properly staff them (which again involves time, money and training) seems an unaffordable option at this time. There are plans for new prisons to be built, but there are already issues over funding and delay in construction. Funding ought to be targeted more towards areas such as the National Probation Service, as discussed below.

There must be focus on the rehabilitation of prisoners. This is not a new concept. As far back as 1910 (and beyond) when Winston Churchill was Home Secretary, he championed that the best way to tackle prison reform and to alleviate the stresses on the prison system was to stop people getting there in the first place.<sup>8</sup> A utopian society will never exist where no crime occurs, but certainly those who do commit crimes have to be given the opportunity to rehabilitate and not

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<sup>6</sup> <https://www.theguardian.com/society/2023/sep/05/germany-refuses-extradite-albanian-man-uk-jail-conditions>

<sup>7</sup> <https://www.bbc.co.uk/news/articles/c23ljkrx0e2o>

<sup>8</sup> Winston Churchill introduced numerous policies, including abolition of prison sentences for those aged 16 and 21, except for the most serious offences.

return. It is often submitted in mitigation that the cycle of recidivism for an offender must be broken and this could be achieved in various ways other than immediate custody in some cases.

Currently, sentences of imprisonment may only be suspended where the term of imprisonment is 2 years or less.<sup>9</sup> Perhaps there ought to be a broadening of that power by way of extending both the custodial and operational period of such orders up to 4 years. As a brief comparison, research into the length of suspended sentences in other jurisdictions shows the following:

|  |               |
|--|---------------|
| China, Japan, Australia, Canada, Nigeria | up to 3 years |
| France, Portugal, Belgium                | up to 5 years |
| Russia                                   | up to 8 years |

Notably, some of the countries listed above exclude certain types of offences from being capable of being suspended, which is an understandable position to take to balance the public interest.

If the law extended the length of suspended sentence orders the scheme would have to increase the punitive elements of such orders (i.e. curfew requirement, unpaid work etc.). This will help to assist in the rehabilitation of individuals. There would certainly have to be funding granted to the National Probation Service for this to occur to provide extended programmes for offenders, training new probation officers, as well as better infrastructure for monitoring curfew requirements.

There are certain offences which one could suggest cries out for punishment such as this. As an example, it can be all too familiar that young men trying to make some extra money (or even feed their own habit) supply class A drugs for a drug line or are a line holder. These offenders are routinely met with an immediate custodial sentence in the range of 2 – 5 years.<sup>10</sup> These types of sentences are clogging up the system. Whereas, if an extended period of suspension was permissible then this may be key to rehabilitating them. As they are not incarcerated they would have better access to education and employment, and this may give such offenders better prospects in life and other opportunities. This is opposed to them languishing in prison amongst

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<sup>9</sup> Sentencing Act 2020, s.277

<sup>10</sup> <https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/supplying-or-offering-to-supply-a-controlled-drug-possession-of-a-controlled-drug-with-intent-to-supply-it-to-another/>; Based on significant role, Category 3 harm.

criminogenic peers likely to reoffend when they are released, due to lack of access to services because of the overcrowding problem.

Alternatively, as a temporary measure, the Government could order that only sentences over a certain length ought to be met with an immediate custodial sentence. This could be imposed as a temporary measure with obvious exceptions (e.g. knife crime, serious violence/sexual offences). This suggestion is based upon the average length of prison sentences being currently within the scope of a suspended sentence order (21 months).

As to the courts, per the statistics, they could be more open to imposing suspended sentence orders for offences which are within the appropriate range. This may be triggered by the Court of Appeal again providing precedent and impress upon the lower courts the importance of the need to take the prison overcrowding situation seriously.

Further, the judiciary could benefit from the extension and utilisation of deferred sentences.<sup>11</sup> The judiciary can exercise their sentencing powers to impose a deferred sentence, with appropriate conditions, to alleviate the strain on the prison system.

### ***Conclusion***

The stark reality and answer in respect of the effectiveness of the Court of Appeal decision in *R v Ali* is that whilst there have been more suspended sentences imposed by the Court, the prison population unfortunately has still increased and continues to do so. Thus, further measures should be properly considered to allow for proper reform of the prison system in England and Wales. It appears that the judgment of *R v Ali* will be relevant for a long time to come in terms of sentencing of defendants.

**Jordan Santos-Sindes**  
**9BR Chambers**

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<sup>11</sup> Sentencing Act 2020, s.5