

## **A GUIDE TO THE CRIMINAL PROCEDURE (AMENDMENT) RULES 2021 (S.I. 2021/40)**

### **Where to find the new Rules**

The Criminal Procedure (Amendment) Rules 2021 are at this address:

<https://www.legislation.gov.uk/ukxi/2021/40/contents/made>

When the Rules come into force, the changes they make will appear at these addresses, too:

<https://www.gov.uk/guidance/rules-and-practice-directions-2020>

<https://www.legislation.gov.uk/ukxi/2020/759/contents/made>

### **What the new Rules are for**

The new Rules amend the Criminal Procedure Rules 2020. They:

- (a) include new rules about—
  - alerting the court to an impediment to a defendant’s effective participation
  - the appointment and duties of intermediaries for witnesses and defendants
  - alerting the court to related family proceedings and exchanging information with a family proceedings court
  - a new power of arrest in extradition proceedings
- (b) make changes to the rules about—
  - the overriding objective of the Criminal Procedure Rules
  - obtaining a defendant’s nationality
  - providing documents for the Court of Appeal
  - applications for some types of investigation order
- (c) bring rules up to date because of—
  - new sentencing legislation
  - legislation connected with UK withdrawal from the European Union.

### **When the new rules come into force**

The changes made by these rules come into force in two instalments.

These changes come into force on 8 February 2021—

- (a) the amendment to the overriding objective in Part 1 of the Criminal Procedure Rules
- (b) the amendments to the rules about obtaining a defendant’s nationality in Parts 3, 24 and 25
- (c) the amendments to the rules about applications for disclosure orders in Part 47
- (d) the amendments that supplement the Extradition (Provisional Arrest) Act 2020 in Part 50
- (e) the amendments consequent on the Sentencing Act 2020
- (f) the amendments consequent on the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019 and the Criminal Justice (Amendment etc.) (EU Exit) Regulations 2019
- (g) some miscellaneous amendments that correct previous errors.

These changes come into force on 5 April 2021—

- (a) the amendments to the rules in Part 3 about (i) the parties’ duties and (ii) the exchange of information with family proceedings courts
- (b) the amendments about intermediaries in Part 18
- (c) the amendments about electronic links to documents for the Court of Appeal in Parts 36, 37, 38, 39, 40 and 41.

## What is in the new Rules

### *Obligation to treat others with politeness and respect*

The Rule Committee heard about occasions when participants in criminal cases had been subjected to disrespectful, abusive, aggressive or violent behaviour. The Committee decided that it would be appropriate explicitly to require the sort of behaviour that ought to be expected of everyone, in the hope of encouraging politeness and respect among all participants. Rule 5 of these Rules amends rule 1.1 of the Criminal Procedure Rules to include that obligation.

### *Effective participation and intermediaries*

Intermediaries in criminal cases help witnesses and defendants who need their help to understand and answer questions and to understand what happens in court. The appointment of an intermediary may be approved by the court under statutory powers or it may be made under the court's inherent powers. Guidance about the appointment and functions of intermediaries has been available for a long time,<sup>1</sup> the Court of Appeal has given guidance in its judgments (for example, in *R v Thomas*<sup>2</sup> and in other cases mentioned there), and Criminal Practice Directions made by the Lord Chief Justice apply.<sup>3</sup> However, until now there have been no Criminal Procedure Rules about the role and responsibilities of intermediaries. The Rule Committee heard that that the lack of rules sometimes led to misunderstanding.

The Committee decided to put in rules the advice and guidance already published. It consulted with people representing intermediaries, with suppliers of intermediaries' services, with people responsible for the preparation of the existing advice and guidance, and with members of the judiciary and legal professions. The result is the new rules and rule amendments in Parts 3 and 18 of the Criminal Procedure Rules added by rules 6 and 9 of these Rules. The new rules include a definition of 'intermediary' for the purposes of the Rules, criteria for the appointment of an intermediary, requirements for the content of an intermediary's report for the court, rules about the variation or discharge of an intermediary's appointment and a description of an intermediary's duty to the court.

### *Related family proceedings*

In a judgment two years ago<sup>4</sup> a former President of the Family Division of the High Court criticised the lack of communication in that case between the courts and parties dealing with a prosecution and with a family law case arising out of the same events. Prompted by that judgment and by Committee members' own experiences, and after consulting with the current President of the Family Division, the Rule Committee decided to make rule amendments which (i) remind the parties to a criminal case to make sure that the criminal court knows about any related family law case and that the family court knows what is happening in the criminal case, and (ii) remind everyone of the criminal court's powers and responsibilities to request and supply information about the cases. Rule 6 of these Rules amends rules 3.3 and 3.5 of the Criminal Procedure Rules for that purpose.

### *Requirement to collect defendant's nationality*

Section 86A of the Courts Act 2003 requires Criminal Procedure Rules to require criminal courts to require a defendant to give the defendant's name, date of birth and nationality at a stage or stages of proceedings specified by the Rules. It was added by the Policing and Crime Act 2017 and it came into force on 13<sup>th</sup> November, 2017. The Explanatory Notes published with the Policing and Crime Act described the objective of the legislation as being to "remove as many Foreign National Offenders as quickly as possible to their home countries, to protect the public, to reduce costs and to free up spaces in prison."

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<sup>1</sup> See in particular the 'toolkits' at: <https://www.theadvocatesgateway.org/toolkits> and the *Equal Treatment Bench Book* published by the Judicial College at: <https://www.judiciary.uk/wp-content/uploads/2020/05/ETBB-February-2018-amended-March-2020-17.09.20-1.pdf>.

<sup>2</sup> [2020] EWCA Crim 117: <https://www.bailii.org/ew/cases/EWCA/Crim/2020/117.html>.

<sup>3</sup> Set out in the judgment in *R v Thomas*.

<sup>4</sup> *Re H (Children)* [2018] EWFC 61: <https://www.bailii.org/ew/cases/EWFC/H CJ/2018/61.html>.

Courts ask defendants to confirm their identity at the beginning of each case, to make sure that the person attending is the person the court expects. Where a defendant is held in custody pending trial, and where a defendant is convicted and given a custodial sentence, custody staff take the defendant's nationality, among other personal details. The effect of the Policing and Crime Act amendment was understood to be that every defendant had to be asked to give their nationality at the beginning of the case, when they were asked to give their name and date of birth, and that is what the Criminal Procedure Rules required.

In May 2018 the Data Protection Act 2018 came into force. The Act lays down data protection principles which prescribe the circumstances in which personal information, such as a person's name, date of birth and nationality, lawfully may be collected, recorded and passed on to others. The published objective of such 'data processing', as the Act calls it, is a relevant factor, and so is the proportionality to that objective of the arrangements to achieve it.

In July, 2020, the Rule Committee received a paper suggesting that the practice required by the Criminal Procedure Rules no longer could be reconciled with the data protection principles laid down by the Data Protection Act 2018. It suggested that it was no longer lawful to require a defendant's nationality under section 86A of the Courts Act unless the defendant had been convicted and had received the sort of sentence that would make a foreign national offender liable to deportation under immigration law. The Committee agreed and advised courts to act accordingly. Rule 6(d) and (e) of these Rules removes the current requirements from the Criminal Procedure Rules, and rules 12(c) and 13(c) of these Rules add the Courts Act requirement to the questions already asked by custody staff.

#### *Electronic documents for the Court of Appeal*

Most documents needed for a Crown Court trial now are delivered and stored electronically, so that the court and the parties to the case have easy access to them. On an appeal from the Crown Court to the Court of Appeal the staff of the Registrar of Criminal Appeals also have electronic access to those documents, and if the parties to the appeal identify the electronic documents and electronic case reports that they want the Court of Appeal to read then the appeal can be prepared and dealt with more efficiently.

For that reason, the Registrar of Criminal Appeals asked the Rule Committee to make it a requirement for the parties to an appeal to include with their appeal notices electronic links to each stored document to which they want to refer, and electronic copies of case reports on which they rely. The Committee agreed to do so. Rules 20, 21, 22, 23, 24 and 25 of these Rules make the necessary amendments to the relevant Parts of the Criminal Procedure Rules.

#### *Applications for disclosure orders – identification of respondents*

The rules in Part 47 of the Criminal Procedure Rules govern applications for, among other things, a type of court order known as a 'disclosure order', made under the Terrorism Act 2000 or under the Proceeds of Crime Act 2002, which authorises a person investigating a suspected crime to question anyone whom the investigator thinks may have information of substantial value to the investigation. The rules presently assume that at the time of the application to the court there will be at least one identifiable person whom the investigator expects to question, described by the rules as a 'respondent'.

It was pointed out to the Rule Committee that although in practice usually there will be a respondent when the application to the court is made, neither Act requires that there must be such a person at that stage, and there may be cases in which there is none then. The Committee accepted that in such a case the way in which the rules are written could be misleading and agreed to adjust them. Rule 27(b) to (i) of these Rules adjusts eight rules in Part 47 to allow for the possibility of there being no identifiable respondent at the time the application is made.

### *Rules to supplement the Extradition (Provisional Arrest) Act 2020*

The Extradition (Provisional Arrest) Act 2020 gives the police a new power of arrest pending receipt of a formal extradition request where another country wants a fugitive defendant to be returned for a serious extradition offence under Part 2 of the Extradition Act 2003. Where the new power is used then as soon as practicable an extradition judge must assess the supporting evidence or information and must decide whether it would have been enough to justify the issue of an extradition arrest warrant. If it would, then the extradition proceedings will continue just as if the arrest had been under a warrant. If not, then the defendant must be discharged.

This new procedure needs some amendments to the extradition procedure rules in Part 50 of the Criminal Procedure Rules so as to provide for a first court hearing and the procedure at that hearing. The Rule Committee has made rule amendments for that which are applied by rule 29(b) to (f) of these Rules.

### *References to sentencing legislation*

On 1 December 2020 the Sentencing Act 2020 consolidated and replaced most previous legislation to do with sentencing. The Criminal Procedure Rules contain a number of references to that previous legislation which would be misleading if they were not replaced, so these Rules replace those references with references to the corresponding new provisions.

### *Rule amendments connected with the withdrawal of the UK from the European Union*

On 31 December 2020 the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019<sup>5</sup> and the Criminal Justice (Amendment etc.) (EU Exit) Regulations 2019<sup>6</sup> revoked other criminal justice legislation when the arrangements with EU member states to which that other legislation gave effect came to an end. The Criminal Procedure Rules contain references to that other criminal justice legislation which would be misleading if they were not removed, so these Rules remove those references.

The 2019 Regulations include transitional provisions which mean that the other criminal justice legislation stays in force for the purposes of a case in progress on 31 December. For that reason, rule 3 of these Rules makes the same transitional provision for the amendments to the Criminal Procedure Rules. The effect is that where, for example, the United Kingdom has received a request to enforce a financial penalty imposed by an EU member state, and the enforcement was not complete by 31 December, then regulation 20 of the Criminal Justice (Amendment, etc.) (EU Exit) Regulations 2019 (which is the relevant transitional provision) applies, and under rule 3 of these Rules rule 30.10 of the Criminal Procedure Rules is not removed for the purposes of completing that enforcement.

Criminal Procedure Rule Committee secretariat  
18 January 2021

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<sup>5</sup> Published at <https://www.legislation.gov.uk/uksi/2019/742/contents>.

<sup>6</sup> Published at <https://www.legislation.gov.uk/uksi/2019/780/contents/made>.