Institution: University of the West of England, Bristol		
Unit of Assessment: 18		
Title of case study: Changing the law on pre-trial detention		
Period when the underpinning research was undertaken: 2007 – 2020		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s):	**Role(s) (e.g. job title):**	**Period(s) employed by submitting HEI:**
Ed Cape Tom Smith	Professor of Law Senior Lecturer in Law	1988 – 2017 2014 – present
Period when the claimed impact occurred: 2016 – 2020		
Is this case study continued from a case study submitted in 2014? No		

1. Summary of the impact

University of the West of England (UWE) researchers Professor Ed Cape and Dr Tom Smith examined court decisions regarding the pre-trial detention (PTD) of criminal defendants. They found that:

- courts made decisions rapidly;
- problems existed with disclosure of evidence in advance of hearings;
- the reasoning given for decisions tended to be generic and lacking in detail.

In 2017, responding to UWE research, the Criminal Procedure Rule Committee amended the Criminal Procedure Rules, requiring that:

- courts must ensure they have sufficient time to make decisions;
- a defendant must be given sufficient time to consider evidence disclosed before a hearing;
- courts must announce decisions by reference to the specific details of the case.

These changes to the Rules, which directly implemented the recommendations of the research, are binding on all criminal courts in England and Wales.

2. Underpinning research

UWE research into pre-trial detention in England and Wales developed as a component of broader research on effective defence rights in multiple European jurisdictions. In 2007, UWE researchers began to examine access to effective defence proceedings across nine EU jurisdictions (**G1**). Pre-trial detention may, in practice, limit or negate access to effective criminal defence by restricting defendants' ability to participate fully in proceedings, prepare their defence and obtain legal representation. UWE researchers examined these rights in the context of PTD practice in various jurisdictions, including England and Wales. They discovered significant issues with both disclosure of evidence and the reasoning given for decisions in PTD hearings in many jurisdictions. In particular, the project identified consistent failures to provide the defendant with the material on which applications for detention were based, and found that the accused was often left with insufficient time to prepare a defence due to expedited procedures (**R1**).

A 2012 UWE study (**R2**) then focused on effective defence in five Eastern European jurisdictions. Whilst it was concluded that the law governing PTD in all five countries was compliant with the European Court of Human Rights jurisprudence, it was also found that, in practice, there was evidence of significant non-compliance with these standards (**R2**). Disclosure of relevant materials and inadequate reasoning for PTD decisions were both identified as *'major forms of non-compliance'* (**R2**, p448), with timely access to prosecution materials prior to hearings often not granted. As a result, it was recommended that jurisdictions impose requirements on judicial decision-makers to fully justify their decisions and make efforts to ensure that prosecutors disclose evidence and materials to the accused in

enough detail, and promptly enough to allow preparation of the defence, including for PTD hearings (**R2**).

A study by Cape published by the UN in 2014 (**R3**) built on the earlier research on effective defence and PTD in an EU context (**R1**, **R2**), and examined the issue in a global, and applied, context. This research aimed at establishing the basis for the development of effective legally-aided defence services and improved PTD practice. This work highlighted that a variety of factors – including vague legal standards, the failure of judges to dedicate sufficient time to decisions, and misapplication of criteria justifying detention – drive arbitrary and excessive use of PTD across the globe **R3**.

In 2014 and 2015, UWE researchers conducted fieldwork in England and Wales on the practice of PTD (**R4**). This was part of a cross-jurisdictional project co-ordinated by Fair Trials International (FTI), and funded by the European Commission (**G2**). The project, which covered 10 EU member states including England and Wales, sought to understand the over-use of pre-trial detention in many jurisdictions and to inform legal reforms. Prior to **R4**, research into the practice of PTD decision-making in England and Wales had been limited. The research involved: a desk-based review of relevant law, procedure and research; a survey of criminal defence practitioners; observation of court hearings; review of prosecution case files; and interviews with practitioners. **R4** fed into a regional report as part of the overall EU project (**R5**).This research found that PTD proceedings were typically very short, averaging only a few minutes, and noted that in many cases more time was dedicated to case management than to PTD decision-making. Additionally, and in line with **R1** and **R2**, the study found that the reasoning provided for a decision to remand a defendant in custody was often limited, especially in those cases dealt with by lay magistrates. This meant that domestic and human rights were *'routinely breached'* (**R4**, p79). The research also suggested that judicial decisions were characterised by a lack of engagement with the specific features of individual cases, and it identified significant problems with the disclosure of relevant evidence by the prosecution (as per **R1** and **R2**). Evidence provided to the defence was often tardy, minimal or incomplete. The report on practice in England and Wales (**R4**) made various recommendations for reform, including:

- more time and resources should be made available in magistrates courts for PTD hearings (**R4**, p115);
- a clear obligation on the police or CPS to provide timely access for the defence to all relevant case materials (**R4**, p114);
- the Criminal Procedure Rules should be amended to make clear that the court must explain its decision by reference to the facts of the case (**R4**, p117).

This research was published in a peer-reviewed journal article in 2020 (**R6**).

3. References to the research

R1 Cape, E., Namoradze, Z., Smith, R., Spronken, T. (2010) *Effective criminal defence in Europe*. Intersentia. https://intersentia.com/en/effective-criminal-defence-in-europe.html
R2 Cape, E. and Namoradze, Z. (2012) Effective criminal defence in Eastern Europe. Open Society Foundations. https://www.unodc.org/documents/congress/background-information/NGO/Open_society_foundation/Eastern_Europe_Effective_Criminal_Defence.PDF
R3 Cape, E. (2014) *Early access to legal aid in criminal justice processes: a handbook for policymakers and practitioners.* United Nations Office on Drugs and Crime. https://www.unodc.org/documents/justice-and-prison-reform/eBook-early_access_to_legal_aid.pdf

R4 Cape, E. and Smith, T. (2016) *The practice of pre-trial detention in England and Wales: research report*. Fair Trials International. https://www.fairtrials.org/publication/practice-pre-trial-detention-england-and-wales-research-report
R5 Fair Trials International (2016) *A measure of last resort? The practice of pre-trial detention decision-making in the EU.* Fair Trials International. https://www.fairtrials.org/publication/measure-last-resort
R6 Smith, T. (2020) 'Rushing Remand'? Pretrial Detention and Bail Decision Making in England and Wales. *Howard Journal of Crime and Justice*. https://doi.org/10.1111/hojo.12392

Evidence of the quality of the underpinning research

G1 European Commission *Effective defence rights in the European Union and access to justice* (JLS/2007/JPEN/215) £27,184.
G2 European Commission Directorate General for Justice *A Measure of Last Resort? Monitoring Alternatives and Judicial Decision-Making* (JUST/2013/JPEN/AG/4533) £38,699.

R4 is the country report for England and Wales (written by the UWE research team), and significantly contributed to **R5** - the final 'regional' (i.e. EU-wide) report produced by Fair Trials International. Findings from **R4** are cited in various parts of **R5** (particularly the sections on the substance of PTD hearings and the use of alternatives to detention), and an executive summary of **R4** is included in Annex 2 of **R5**.

4. Details of the impact

Changing the Criminal Procedure Rules – expanding the knowledge base of the Criminal Procedure Rule Committee with UWE research

UWE research made a '*distinct and material contribution*' (**S1**) to changes to the Criminal Procedure Rules - a key part of the legal framework regulating PTD. UWE research was initially shared with the Criminal Procedure Rule Committee (hereafter 'the Committee'), the body responsible for making the Criminal Procedure Rules (hereafter, 'CrimPR'). These rules govern the practice and procedure to be followed in all criminal courts in England and Wales, including PTD decision-making. UWE research highlighted several issues with PTD practice, particularly regarding the speed of hearings, problems with the disclosure of evidence prior to hearings, and with the fullness of explanations for decisions by courts. In March 2016, the Committee was sent a copy of the underpinning research (**R4**, **S2**). The Secretary of the Committee (hereafter, the Secretary) distributed a summary of the research findings and relevant excerpts to the Committee for consideration at a meeting in March 2016 (which Dr Smith also attended) (**S2**, **S3**). This was followed by the submission of a position paper to the Committee (**S4**) summarising relevant research findings and outlining recommendations. The paper argued that *'there is a need to amend the CrimPR'* (**S4**, p2) because *'the defence may not receive adequate information at a sufficiently early stage'* (**S4**, p3) and that *'limited time [was] spent by courts in assessing the necessity of pre-trial detention'* (**S4**, p3). **S2**, **S3** and **S4** were explicitly considered with a view to possible amendment of the CrimPR at Committee meetings in July and October 2016 (**S5**, **S6**, **S7**) and remained pertinent to discussions at a further meeting in November 2016.

Changing the Criminal Procedure Rules – actions taken by the Criminal Procedure Rule Committee in response to UWE research

S5 outlined amendments that would *'give effect to recommendations made in a report… prepared by Professor Cape and Dr Smith'* (p1), specifically that *'bail decisions should not be disposed of hastily'* (p2); *'reasons for bail decisions should be… "closely related to the individual circumstances pertaining to the defendant"'* (p2); and that *'relevant information must*

be provided, and relevant documents made available, to the defendant in advance of a hearing at which bail is to be considered' (p2). To this end, the amendments (summarised in **S6**) *'explicitly required the court to take sufficient time to consider bail''* (p8); *'explicitly required the court to explain its decision adequately'* (p8); and *'required the prosecutor to ensure the availability of information relevant to bail'* (p8). In response, the Committee was *'not opposed [to the amendments], but some [members] were in some respects sceptical'* (**S6**, p8). As such, Dr Smith submitted further arguments (quoted in **S6**, p9-10) for their consideration. After discussion, the Committee *'indicated its approval'* (**S7**, p6) of the amendments, including *'an express requirement that the defence be allowed sufficient time to consider information on which the prosecutor relied in objecting to bail'* (**S7**, p6). After a further meeting in November 2016, *'the Committee decided to make these amendments in order to impose explicit obligations upon the court to ensure that sufficient time… is allowed for information to be considered and representations made and assessed'* (**S8**, p3). They were incorporated into law via statutory instrument (*The Criminal Procedure (Amendment) Rules* 2017 (**S9**, rules 3 and 4)) in February 2017, and came into force in April 2017. As a result of this process, the CrimPR now require that courts ensure:

- that '*sufficient time*' is taken for PTD decision-making (Rule 14.2(d)(ii));
- that the defence be given '*sufficient time*' to consider any disclosed evidence before a hearing starts (Rules 8.4 and 14.2(d)(i));
- that prosecutors share all relevant evidence and case materials with the defence (and the court) before hearings and in a timely manner (Rule 14.5(2));
- that courts fully explain their PTD decisions by reference to the specifics of a case (Rule 14.2(5)) (**S9**).

In a testimonial letter, the Secretary commented that '*the Committee took into account the report and a position paper… prepared by Professor Cape and Dr Smith, in considering whether to amend the Criminal Procedure rules, which ultimately it did'* and that UWE research had made a *'distinct and material contribution'* (**S1**, p2) to these changes. The contribution of **R4** to the rule changes was also acknowledged in an Explanatory Memorandum to the rule changes issued by the Ministry of Justice (**S8**). These amendments constitute a substantial procedural step towards improving the rigour with which criminal courts decide upon the use of PTD - better aligning the law in England and Wales with EU and international legal standards.

A survey conducted by Dr Smith in 2020 (**S10**) indicated significant levels of awareness among defence practitioners and magistrates of their new statutory duties under the 2017 amendments:

- *79% were aware of the introduction of Rule 8.4 (sufficient time to consider IDPC);*
- *73% were aware of the amendment of Rule 14.5(2) (timely disclosure of information material to bail decisions by prosecutors);*
- *61% were aware of the amendment of Rule 14.2 (sufficient time to consider bail disclosure and for PTD decision making generally);*
- *85% were aware of the amendment of Rule 14.2 (detailed announcement of decisions).*

This implies that, because of UWE research, legal practitioners are now better equipped to improve the rigour with which PTD is applied in UK courts.

Pre-trial detention – the impact of UWE research in context

Detention is a significant judicial power which necessarily interferes with fundamental individual rights to liberty and privacy (protected under Articles 5 and 8 of the European Convention on Human Rights). PTD hearings are a common feature of decision-making in the criminal justice system of England and Wales. For example, just over 300,000 people were remanded either on bail or in custody by courts in 2019 (Ministry of Justice, *Criminal justice system statistics quarterly: December 2019 Overview Tables*, May 2020). On any given day, approximately 10,000 people will be held in custody prior to either conviction or sentence, with 50,000 admissions into prison of pre-trial detainees in 2019 (Ministry of Justice, *Offender Management Statistics Bulletin, England and Wales*, April 2020. This context illustrates vividly the *reach* of the UWE research findings, which have led to changes in the law on PTD.

The use of PTD challenges the presumption of innocence, and can significantly impact on the lives of those detained (**R1**, **R2**, **R3**, **R5**). In the short term, detention can lead to loss of employment or housing, and can damage mental health. As such, it should be used proportionately, appropriately, and (ideally) as a last resort. It is concerning, then, that courts spend limited time on such decisions, that the defence often have inadequate access to evidence at this stage, and that courts offer limited reasoning for PTD decisions. The UK prides itself on the individual rights guaranteed by its legal system, and many citizens would be disturbed by the idea that they could be detained prior to trial without an appropriately rigorous process. As a signatory to the UN Sustainable Development Agenda (which uses PTD as a key indicator), the UK is required to take a leadership role in the protection of civil liberties. UWE research findings cast doubt on the extent to which the UK lives up to its self-understood and international reputation in this regard. These considerations illustrate the *significance* of the changes to the law on PTD underpinned by UWE research.

5. Sources to corroborate the impact

S1 Testimonial from the Secretary of the Criminal Procedure Rule Committee (June 2019)
S2 Criminal Procedure Rule Committee, 'CrimPRC(16)27(b) *Extracts from The Practice of Pre-trial Detention in England and Wales*' (March 2016)
S3 Criminal Procedure Rule Committee, '*Part 8 – Initial details of the prosecution case: two further documents*' - CrimPRC(16)27 (March 2016)
S4 Criminal Procedure Rule Committee, 'CrimPRC(16)51 *Position Paper - Implications of PTD Research for CrimPR* (June 2016)'
S5 Criminal Procedure Rule Committee, 'Part 14 - CrimPRC(16)53 *Information in bail proceedings and reasons for bail decisions* (July 2016)'
S6 Criminal Procedure Rule Committee, 'Part 8 - CrimPRC(16)59 *Use of initial details of the prosecution case in bail proceedings* (September 2016)'
S7 Draft minutes of CrimPRC meeting October 2016
S8 Ministry of Justice Explanatory Memorandum to the Criminal Procedure (Amendment) Rules 2017 No. 144 (L. 2) (April 2017)
S9 Senior Courts of England and Wales & Magistrates' Courts, England and Wales, Statutory Instrument: *The Criminal Procedure (Amendment) Rules* 2017 (2017 No. 144 (L. 2))
S10 Survey - '*How aware are decision-makers and defence practitioners of the amendments?*' (T Smith, May 2020)