

TREASON DOTH NEVER PROSPER

Could the Courts see a return of the ancient law of treason?

In the wake of the recent controversy surrounding Shamima Begum, the British schoolgirl who fled to Syria in order to join ISIS, questions have been raised as to whether the Treason Act 1351 needs to be updated. Though prosecution for membership of a terrorist organisation is possible, under s.11 Terrorism Act 2000, it may not reflect the full criminality in all cases. Nevertheless, a charge of treason is rarely seen, the last prosecution being that of William Joyce in 1945. What is the current law of treason? Are we likely to see a resurgence of this ancient law?

Treason, historically, was considered the most serious of crimes, punishable by death until s.36(1) Crime and Disorder Act 1998 substituted life imprisonment for death by hanging. The Treason Act 1351 describes treason as:

“When a Man doth compass or imagine the Death of our Lord the King, or of our Lady his Queen or of their eldest Child¹ and Heir; or if a Man do violate the King’s Companion, or the King’s eldest Daughter unmarried, or the Wife of the King’s eldest Son² if the Heir; or if a Man do levy War against our Lord the King in his Realm, or be adherent to the King’s Enemies in his Realm, giving to them Aid and Comfort in the Realm, or elsewhere, and thereof be probably attained of open Deed by the People of the Condition, and if a Man slea the Chancellor, Treasurer or the King’s Justices of the one Bench or the other Justices in Eyre, or Justices of Assise, and all other Justices assigned to hear and determine, being in their Places, doing their Office”.

There are, therefore, four fundamental versions of high treason:

- a. Conspiracy to kill the King, his queen³ or heir apparent;
- b. Endangering royal succession through sexual intercourse with the Queen, the Monarch’s eldest daughter if unmarried or the wife of the heir apparent;
- c. Levying war against the Monarch within the realms; and
- d. Adherence, by giving aid and comfort to, the Monarch’s enemies.

It is under this final head that all prosecutions under the Act in the twentieth century were brought, and the most likely to be invoked in cases involving those returning to the UK from terrorist organisations. Any overt act to strengthen the enemies of the Queen or to weaken the country against those enemies, is capable of being high treason. ^{4,5}

The act alone, however, is not sufficient, it must be done with an “evil” intention and the purpose of aiding and comforting the enemy.⁶ In cases such as that of Ms. Begum, the prosecution may struggle to prove this important aspect, though it is not an impossibility. The real difficulty in bringing a prosecution under this head, is that an “enemy” is a foreign state in actual hostility with the UK.⁷ Though ISIS has declared itself a worldwide caliphate, a prosecution would require the government recognising ISIS as a state which undoubtedly creates a number of political complications.

Should there be a decision to prosecute British citizens returning from ISIS or other terrorist organisations, the coming into force of the Counter-Terrorism and Border Security Act 2019 will provide a helping hand. From 12th April 2019 it will be an offence to enter or remain in a “designated area” such as Syria, however the principle of non-retroactivity would prevent this from applying to those who have returned by 12th April. It seems, until that date, there is a hole in the Law, one which the Treason Act 1351 is unlikely to fill.



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Treason Doth Never Prosper, Continued

¹ Modified from “eldest Son and Heir” by Succession to the Crown Act 2013 c.20, Sch. 1 para 1

² *As above*

³ It is, as yet, unclear whether this liability arises in relation to the husband of the Queen Regnant

⁴ 1 Hale 159

⁵ *The King v Casement* [1917] 1 K.B. 98

⁶ *R v Ahlers* [1915] 1 K.B. 616

⁷ *Fost.* 219