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Archbold Review

Cases in Brief

Disclosure—cases involving very large amounts of digital information—principles to be applied; abuse of process—delay
R v R AND OTHERS [2015] EWCA Crim 1941; December 21, 2015
A fraud prosecution which had been live for five years, but in which the indictment had yet to be preferred, was stayed as an abuse of process as a result of problems relating to disclosure under the Criminal Procedure and Investigations Act 1996. Computers seized contained seven terabytes of information. Allowing the prosecution appeal, and providing anonymised extracts of the judgment before the trial was finished, the Court reviewed the materials available on disclosure (the Code of Practice under s.23(1) of the 1996 Act, the versions of the Attorney-General's Guidelines on disclosure published in 2000, 2005, 2011 and 2013 and the Protocol prepared following the Review conducted by Gross LJ). The key principles were:
(1) The prosecution were and must be in the driving seat at the stage of initial disclosure. In order to lead (or drive) disclosure, it was essential that the prosecution took a grip on disclosure requirements from the outset. The prosecution must adopt a considered and appropriately resourced approach to initial disclosure, extending to and including the overall disclosure strategy, selection of software tools, identifying and isolating material that was subject to legal professional privilege and proposing search terms. The prosecution must explain what it was, and was not doing, ideally in the form of a "Disclosure Management Document". This document should clarify the prosecution's approach to disclosure and identify and narrow the issues in dispute. Explanation would prompt early engagement from the defence. Such an approach required early and careful preparation, tailored to the needs of the case. This approach was now embodied in the Better Case Management initiative.
(2) The prosecution must then encourage dialogue and prompt engagement with the defence. The duty of the defence was to then engage with the prosecution. Compliance with the test for initial disclosure called for analysis of the likely cases of prosecution and defence. Absent such analysis, it would not be possible to form a view as to disclosure, even at this stage.
(3) The law was prescriptive of the result, not the method. The prosecution was not required to do the impossible. Where it was impossible to read and schedule every item, the prosecution was entitled to use appropriate sampling and search terms and its record-keeping and scheduling obligations were modified accordingly: see *Brendan Pearson and Paul Cadman* [2006] EWCA Crim 3366 and the 2013 Guidelines. At the stage of initial disclosure the prosecution should formulate a disclosure strategy, canvass that strategy with the Court and the defence and utilise technology to make an appropriate search or conduct an appropriate sampling exercise. The prosecution's duties of record-keeping and scheduling must reflect the reality that not every item can be individually referenced (The Court referred to the approach in the 2013 Guidelines, at Annex A, paras. 45–46, which reflected the Code of Practice approach to the requirement to log in big data cases as being to record the "strategy and the analytical techniques used to search the data"; and the similar modification of the scheduling duty in favour of "block listing", albeit that it remained the prosecution's duty to list and describe separately "the search terms used and any items of material which might satisfy the disclosure test": 2013 Guidelines, Annex A, at para. A50.)
(4) The process of disclosure should be subject to robust case management by the judge, utilising the full range of case management powers. The judicial task of active and robust case management was emphatically not confined to

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the secondary or subsequent stages of disclosure, as was clear from the tenor of the Rules, and authorities since *Jisl* [2004] EWCA Crim 696. Faced with an inadequate prosecution approach to initial disclosure, a judge was not limited to exhortation and veiled warnings. The court was both entitled and obliged to give orders and directions to address the failing with which it was confronted. Nor was the judge required to watch the case become diverted from its proper course, powerless to stop it doing so until much time and costs had elapsed. The Court rejected an argument that such an approach was inconsistent with the 1996 Act (cf Crim PR Rule 3.5(1)), and, properly analysed, *M (Michael)* [2003] EWCA Crim 3764 did not support the argument.

(5) Flexibility was crucial. Disclosure was not to be conducted as a "box-ticking" exercise (in addition to the guidance etc, see *Olu* [2011] 1 Cr.App.R. 33, at [42]–[49] and *Malook* [2012] 1 WLR 633). In a document-heavy case, there could be no objection in principle to the judge, after discussion with the parties, devising a tailored or bespoke approach to disclosure, subject to the need not to subvert the scheme of the 1996 Act.

(6) The judge stayed proceedings for delay, apparently relying on both limbs of abuse of process; that the defendants could not get a fair trial, and that it would be unfair to try them. Under the first limb, delay *per se* did not require a stay, and the fact that prosecution failings had caused the delay was not relevant. Although there may be personal prejudice to the defendants, there was no prejudice to a fair trial. As to the second, while it was possible for gross misconduct that the criminal justice system could not approbate to occur, as in *Horseferry Road Magistrates Court, ex p Bennett* [1994] 1 AC 42 and *Mullen* [2000] QB 520, there had been no deliberate misconduct or bad faith by the prosecution in this case, and no deliberate disregard for a clear direction of the court, as in *Boardman* [2015] EWCA Crim 175. To allow successful abuse of process applications where neither prosecutorial misconduct of the type identified in the authorities nor delay such as would prejudice a fair trial could be established would provide a perverse incentive for those charged with criminal offences to procrastinate and obstruct the prosecution.

Dishonesty—test in Ghosh *[1982] 1 QB 1053—evidence of practice in the market—whether reference to first limb of test as well as second limb*

HAYES [2015] EWCA Crim 1944; December 21, 2015

H was convicted of conspiracy to defraud in relation to LIBOR fixing. It was not contested that he, with others, had, in submitted LIBOR returns, sought to advance the interests of his bank and himself. The central issue was whether to do so was dishonest. On appeal, H argued that he should have been entitled to rely on evidence of practice and ethos in banking at the time in the application of the first, objective, limb of the test in *Ghosh* [1982] 1 QB 1053, as well as relying on the evidence in relation to the second, subjective limb. The appeal was dismissed. The first limb was based on the standards of ordinary and reasonable people. H's submission was that although there was no dispute that an objective standard had to be determined, it should be determined by taking into account the standards of the market. The only purpose of arguing that such evidence was relevant was that the jury would be asked to set an objective standard for a market or a group of traders and not the ordinary standards of honest and reasonable people. There was nothing in any authority that could be used as a basis for that contention. In particular, the reference by Lord Nichols of Birkenhead to "acting as an honest person would in the circumstances" in *Royal Brunei Airlines v Tan* [1995] 2 AC 378, 389C did not justify adducing evidence of "the circumstances" in relation to the objective limb. Further, the setting of the objective standard of honesty by a market would gravely affect the proper conduct of business. The history of the markets had shown that, from time to time, markets adopted patterns of behaviour which were dishonest by the standards of honest and reasonable people; in such cases, the market had simply abandoned ordinary standards of honesty. Therefore to depart from the view that standards of honesty were determined by the standards of ordinary reasonable and honest people was not only unsupported by authority, but would undermine the maintenance of ordinary standards of honesty and integrity that were essential to the conduct of business and markets.

Police powers—Criminal Justice and Public Order Act 1994 s.60—European Convention on Human Rights Art.8—whether power "in accordance with law"

R (ROBERTS) v COMMISSIONER OF POLICE FOR THE METROPOLIS 2015 [UKSC] 79; December 17, 2015

R challenged the compatibility of Criminal Justice and Public Order Act 1994 s.60 (allowing for the authorisation by a senior police officer of "suspicionless" stops and searches for offensive weapons etc. within an area for up to 24 hours, or with further authorisation, up to 48 hours, where violence was likely in the area) with the European Convention on Human Rights Art.8. It was agreed that Art.8 was engaged, and that use of the power was in pursuit of a legitimate aim under Art.8(2); but R contested whether it was "in accordance with law", in the autonomous Convention sense. The claim could only succeed if s.60 was in itself incompatible with Art.8. While the European Court of Human Rights had found powers in the Terrorism Act 2000 ss.44-46 incompatible in *Gillan v United Kingdom* (2010) 50 EHRR 1105, it could not be concluded that every suspicionless power would fail to satisfy the lawfulness requirement: see *Colon v The Netherlands* (2012) 55 EHRR SE45. For such a power to be "in accordance with law" required "safeguards which have the effect of enabling the proportionality of the interference to be adequately examined. Whether the interference in a given case was in fact proportionate is a separate question" (*R (T) v Chief Constable of Greater Manchester Police* [2015] AC 49, [114], *per* Lord Reed). Such safeguards existed in relation to s.60. In addition to the limited nature of the power itself, in general, the courts provided remedies, as did the power to issue Codes of Practice (Police and Criminal Evidence Act 1984 s.66), and local and national democratic avenues. More specifically, there were the requirements of ss.2 and 3 of the 1984 Act, Code A issued under s.66, and the applicable polices and instructions of the police force. While any random "suspicionless" power of stop and search carried with it the risk that it would be used in an arbitrary or discriminatory manner in individual cases, there were great benefits to the public in such a power. It was the

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randomness and therefore the unpredictability of the search which had the deterrent effect and also increased the chance that weapons would be detected. But whatever the scope of the power, it must be operated in a lawful manner. It was not enough simply to look at the content of the power. It had to be read in conjunction with the Human Rights Act 1998 s.6(1), which made it unlawful for a police officer to act incompatibly with the Convention rights and the Equality Act 2010, which made it unlawful for a police officer to discriminate on racial grounds. All of these legal and operational requirements should make it possible to judge whether any action was "necessary in a democratic society … for the prevention of disorder or crime". The Court declined to issue the declaration of incompatibility sought by R.

*Procedure—human rights—*in camera *proceedings—whether judge required to allow disclosure of* in camera *proceedings in process of application to European Court of Human Rights*
R (WANG YAM) V CENTRAL CRIMINAL COURT [2015] UKSC 76; December 16, 2015
At trial, the judge ordered that WY's evidence be heard *in camera* to protect national security and other people and that subsequent publication be prohibited (an interlocutory appeal against the order, and an appeal against conviction, had previously been dismissed). The trial judge had not been wrong to decline to allow WY to disclose the *in camera* material to the European Court of Human Rights in response to the UK's submissions when WY applied to that court for a determination that his trial was unfair under the European Convention on Human Rights, Art.6, Arts.34 (individual petition, state parties not to hinder) and 38 (examination, states to "furnish all necessary facilities") of the Convention were not incorporated into domestic law by the Human Rights Act 1998. The right of access to the Strasbourg Court was a right conferred by the Convention at the international level. It was an independent international court, not another tier in the domestic appellate structure. The domestic principles, according to which a domestic appellate court may have access to all the materials available to a first instance court, had no direct application. On this appeal, WY could only succeed if there were no circumstances in which refusal to permit *in camera* material could be justified.
(1) This proposition could not be made good at the international level. The Court considered *Sisojeva v Latvia* (2007) 45 EHRR 753; *Janowiec v Russia* (2013) 58 EHRR 792 and *Al Nashiri v Poland* (2014) 60 EHRR 393. It was necessary (contrary to WY's case) to consider both Arts.34 and 38, the case law making the interplay between the two clear. On WY's case, an applicant would be the sole judge of what was necessary to effectively present his or her case in Strasbourg, even where (as here) the domestic courts had repeatedly concluded that the publication of the material would be damaging, and its prevention was not damaging to him. The European Court had a central role in deciding what material should be disclosed to it, and a suggested breach of Art.34 was a matter for it to consider under Art.38. The judge's order in WY's case left it at the international level to the European Court to consider and decide under Art.38 whether any and if so what further material should be requested from the UK. Further, the case law of that Court indicated that in this context it would not act as if it were a fourth-instance appeal court re-determining issues of national security, but would review the domestic adjudication on the issues and, if satisfied of its fairness and thoroughness, may accept the outcome without insisting on automatic disclosure to itself of secret material.
(2) Moreover, even if WY's proposition were made good at the international level, it would not follow that the courts should as a matter of domestic law give effect to it. The case concerned a general discretionary common law power, not a statutory provision of uncertain scope in respect of which Parliament may be presumed to have been intended to satisfy an international obligation (see e.g. *Garland v British Rail Engineering Ltd* [1983] 2 AC 751; *Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, and *Assange v Swedish Prosecution Authority* [2012] 2 AC 471). In accordance with *Ex p Brind*, *Lyons* [2003] 1 AC 976, [13] and *R (Hurst) v London Northern District Coroner* [2007] 2 AC 189, [56], a domestic decision-maker exercising a general discretion (i) was neither bound to have regard to purely international obligations nor bound to give effect to them, but (ii) may have regard to them if he or she decided it was appropriate. The trial judge did have regard to the international position under Arts.34 and 38, but made clear that, whatever the UK's obligations might prove to be at the international level, he did not consider the suggested relaxation of his order to allow disclosure was appropriate. That reflected the orthodox approach.

SENTENCING CASE

Sentencing; terrorism offences
R v SARWAR & ANOR [2015] EWCA Crim 1886; December 9, 2015
The appellants appealed against extended sentences of 17 years and eight months imposed for an offence of preparation of terrorist acts contrary to s.5(1) of the *Terrorism Act 2006*. The extended sentence comprised a custodial term of 12 years eight months and an extension period of five years. The judge had granted 20 per cent credit for the guilty pleas. The custodial term after trial would have been 16 years. The appellants had travelled from the UK to Syria where they were involved with Islamist forces fighting President Assad's regime. They were arrested upon their return to the UK.
The appellants submitted that their offences were mitigated by the following features: that their intended use or threat of force abroad was to assist the people in that country against a tyrannical regime condemned by Her Majesty's Government; that when the relevant preparatory acts were carried out there was no prospect that they would end up fighting Western forces because they were joining a group forming part of the Free Syrian Army, a coalition supported by Western countries, and their actions were limited to patrolling and humanitarian assistance.
The Court of Appeal stated that the starting point for sentence is the sentence that would have been imposed had the appellants' objective been achieved. The ultimate sentence would be largely determined by the factual nexus between their conduct in the UK in preparation for acts of terrorism and the potential acts of terrorism.
In most terrorist cases culpability will be extremely high and the purpose of sentencing for the most serious terrorist

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offences will be to punish, deter and incapacitate. These offences were characterised by a significant degree of planning and persistence. Those steps were put into effect by travelling from this country and engaging abroad with like-minded people. The extensive planning and repeated expressions of alignment with radical Muslim fundamentalism, followed by acting upon such views, made the finding of dangerousness and extended sentence appropriate.

The Court refused to endorse the argument that involvement with the Free Syria Army was some form of noble cause terrorism as this would entail consideration of the policies of Her Majesty's Government, an area the courts are wary of entering. Regarding the submission that there was no prospect that the appellants would end up fighting Western forces, it would be an aggravating feature if the preparatory activity was carried out with a view to fighting UK forces, but the absence of this aggravation is not positive mitigation. The position regarding their intention to engage with Assad's troops rather than against civilians was less clear-cut, but the Court noted that in reality armed engagement with Assad's forces was likely to result in significant collateral damage to civilians.

The Court also made clear that s.5 applies whether or not the intended activity was to occur within the UK. That the terrorist activity would take place abroad did not mitigate the offence. For sentencing purposes the court may look at the connection between that activity and the proposed acts of terrorism even if those acts are to be committed abroad. The appellants made significant preparations which achieved their aims of travelling to Syria, meeting like-minded others and receiving firearms training. They were in close proximity with combat and engaged in armed patrol duties. Their activities could support those involved in armed combat. There was nothing to sustain a claim that their preparations were motivated by humanitarian concerns. There was therefore a substantial nexus between the preparatory activity and what transpired once the appellants went abroad.

However, the judge had erred in increasing the sentence because the appellants had actually engaged in combat in Syria. This was denied in their bases of plea, and no *Newton* hearing had been held on the point.

Instead of the judge's starting point of 16 years, 13 years was appropriate. Given the 20 per cent credit for the guilty pleas, an extended sentence of 15 years and three months would be substituted, this being a custodial term of 10 years and three months and an extension period of five years.

Case comment

Beghal v DPP: some unresolved issues

By Jonathan Rogers[1]

The Supreme Court decision in *Beghal v DPP* [2015] UKSC 49 was reported in last year's *Archbold Review*, issue 7. Readers may recall that the case concerned the power to stop travellers at English ports and airports and to question them (for a maximum of six hours) with a view to determining whether they "appear to be concerned in the commission, preparation, or instigation of acts terrorism", pursuant to Sch.7 of the Terrorism Act 2000. The power was held to be compatible with Arts.5 ECHR (the right to liberty) and 8 ECHR (the right to respect for privacy). Further, the offence committed by any stopped person, such as the appellant Mrs Beghal, who refuses to answers questions so put (as provided for by para.18 of Sch.7) was unconstrained by the privilege against self-incrimination.

Lord Kerr, not for the first time in criminal law-related matters, delivered a thoughtful dissent on all of the major issues. Some important points underlie the differences between the majority and Lord Kerr on the application of Art.8 and the privilege against self-incrimination. They remain unresolved and are likely to recur in future cases.

Legality and the potential for arbitrary decisions

Travellers at airports are liable to be searched and, as in the case of Mrs Beghal, asked about their movements and communications in the counties from which they had travelled. So, it was readily agreed that being stopped engages Art.8 ECHR, and that the state interference must be "in accordance with the law" as well as "necessary in a democratic society" to preserve national security or other specified objectives under Art.8(2) ECHR.

We focus here on whether the power sufficiently "accords with law" to satisfy Art.8(2) ECHR. As readers will know, for this purpose, there is a "quality of law" test. In the words of the Grand Chamber of the European Court of Human Rights, *Gillan and Quinton v UK* (2010) 50 EHRR 45 at [77]:

> "In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise."

But under Sch.7 of the Terrorism Act 2000, the officers who stop travellers do not need reasonable grounds for already suspecting that the travellers are, or even appear to be, concerned in terrorism. The potential for arbitrariness is clear, and that same potential explained the decision in *Gillan and Quinton* that the (now abolished) stop and search power under s.44 of the Terrorism Act 2000 was not compatible with Art.8. Lord Neuberger and Lord Dyson in *Beghal* accept that the Code of Practice which attaches to Sch.7 of the Terrorism Act 2000 is not any more restrictive than the analogous Codes which were found wanting in *Gillan and Quinton*.

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However, one distinction from *Gillan* is that in the latter case, there was evidence that personal searches on the street were indeed carried out in an arbitrary and discriminatory way. There is no such evidence relating to the exercise of Sch.7 powers to stop at ports and airports. On the contrary, only around 0.02 per cent of travellers are stopped and yet a substantial amount of real evidence is discovered when searches are conducted on such persons.

Undoubtedly Mrs Beghal, who had returned from visiting her husband in France, where he is said to be in prison for a terrorist-related offence, was not randomly stopped. Evidence that the power is not exercised arbitrarily in practice seems to be decisive in the opinions of Lord Neuberger and Lord Dyson at [88-89].

So this point of principle emerges: *does a discretionary power necessarily fall foul of the "accordance with the law" test simply because of its potential to be exercised arbitrarily, regardless of what seems to happen in practice*? Lord Kerr thought so (at [102]), but alas, neither side sought authority either way on the issue. Perhaps the most compelling case would have been *R (on the application of Purdy) v DPP* [2009] UKHL 45, where the House of Lords held that the lack of a policy on prosecuting assisted suicide meant that the offence was not sufficiently prescribed by law for the purposes of Art.8 (2) ECHR. It was accepted on all sides that, on the basis of past practice, the applicant's husband would most likely not be prosecuted if he were to assist the applicant to commit suicide in the assumed circumstances. But notwithstanding the predictability of the DPP's decision in any future case, the House decided that Art.8(2) was not complied with simply because prosecution was quite conceivable on the basis of the then published legal materials.

It is submitted that Lord Kerr's focus on the potential for the misuse of a power under the law is better supported and seems more consistent with the notion of legal protection. On this basis the power in Sch.7 does seem to be wanting. Nor, arguably, is there an effective remedy should any arbitrary search be said to have occurred. The majority in *Beghal* suggested that judicial review could provide a remedy, but the power to stop is so widely drawn that it is not readily amenable to review, and the scepticism of Lord Kerr (at [100]) on this point will strike many as more realistic.

It is said in *Beghal* that recommendations to limit the power in Sch.7 to reasonable grounds of suspicion (as they are apparently operated in practice) have been resisted on the basis that experienced police officers may have a "hunch" about a traveller which might prove to be right but on a basis which is somehow inexplicable to anyone else. Yet all their Lordships in *Beghal* concede that it is a possible for a power to be useful and effective, and yet to fail the test of legality. It would be better, in terms of compliance with Art.8 ECHR, for Sch.7 to require reasonable grounds for suspicion and for the courts to allow nominal damages in false imprisonment where none can be made out. Given that searches are already said to be intelligence-based, it seems unlikely that this should over-deter officers from acting, in an exceptional case, on any "correct but inexplicable" hunch.

The privilege against self-incrimination

Their Lordships' opinions reveal a discrepancy between the privilege against self-incrimination at common law and under Art.6 ECHR. At common law the privilege is said to arise where compulsion is used and where compliance would create "a real and appreciable risk of prosecution", regardless of the motivations of the questioner: *JSC BTA Bank v Ablyazov (No 13)* [2014] EWHC 2788. By contrast, the privilege under Art.6 ECHR arises where the questioner is primarily seeking to investigate a possible offence with a view to possible prosecution of the person being questioned. Should this not be his primary motivation, then the privilege is not engaged, unless a prosecution is nonetheless brought. In that case, it will be engaged when the prosecution seeks to use the statements made by the accused under legal compulsion as evidence against him: *Saunders v UK* (1996) 23 EHRR 313.

This means that the privilege at common law may be wider than under Art.6, in that it does not depend on the supposed main purpose at the time of questioning. Since the scopes of the privileges differ, it is possible to fall between the gaps, and this appears to be the case with Mrs Beghal herself. The majority found that the common law privilege was, by necessary implication, abrogated by the terms of Sch.7 of the Terrorism Act 2000. But Mrs Beghal was not then able to succeed in arguing that the same legislation is incompatible with Art.6 ECHR because that right was not engaged. The main purpose of the questioners at airports is to gather information so as to be able to fit together pieces of a wider "jigsaw", with no intention *at that time* of bringing a prosecution based on the answers.

We concentrate here on the common law privilege. First, it is not so clear that it is abrogated by the legislation "by necessary implication"; and there may be thought to be a "real risk" of prosecution in practice, if a person questioned gives incriminating answers.

On the first point, the majority thought that the power in Sch.7 would be rendered "largely nugatory" if constrained by the privilege. But surely only some, and not all, questions would expose subjects to the "real and appreciable risk of prosecution". Moreover, the powers are more effective in discovering real evidence by searching subjects or their luggage, which does not engage the privilege. Further, a person might be compelled to help to decrypt electronically stored data which is found in his possession under the Regulation of Investigatory Powers Act 2000, s.53, and it has been held that the offence of refusing to comply does not engage the right in Art.6 ECHR: *S and A* [2008] EWCA Crim 2177. So it seems to be a stretch to say that operation of the privilege would necessarily render the power to be "largely nugatory".

On the second point, the majority thought that a "real risk" of prosecution would not arise based on the traveller's answers. This is because they thought it "inevitable" that a trial judge would exclude any such material by invoking s.78 PACE. Here, Lord Kerr dissents because he is not convinced that a criminal court would necessarily exclude reliable evidence of involvement in terrorism. This seems to be the preferable view. It is unclear whether s.78 PACE would require a judge to exclude incriminating statements in a Sch.7 interview if it were thought that the defendant had in fact volunteered information freely, and not on account of any perceived compulsion. A ready analogy may be found with the conviction of Mr Abdurahman in *Sherif and Others* [2008] EWCA Crim 2653, later held to be compatible with Art.6 ECHR in *Ibrahim and others v United Kingdom* [2014]

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ECHR 1392. Yet it would be unseemly if travellers who thought compliance to be tactically (or socially) advisable should *de facto* forfeit their privilege in this way.

Nor is a court mandated to apply s.78 PACE so as to exclude independently discovered evidence that is found *in consequence* of the answers, as Lord Kerr notes. There is no general "fruits of the poisonous tree" doctrine in relation to independently discovered evidence following *all* excluded confessions in English law. The Supreme Court in *HM Advocate v P* [2011] UKSC 44 decided that Art.6 ECHR recognises no such wide doctrine either. One might add that in such cases it can be difficult to determine whether the evidence would eventually have been discovered anyway. So the "risk" of prosecution is certainly capable of being "real" in some cases.

An unaddressed ground of appeal

There was also available a fact-specific ground of appeal against conviction.

The facts suggest that Mrs Beghal was afforded an opportunity to speak to a lawyer by telephone but was told that questions would commence without waiting for him or her to be present. Shortly after the High Court had dismissed her appeal, it held in a separate case, *Elosta v Commissioner of Police for the Metropolis* [2013] EWHC 3397 (Admin), that all those subject to the power in Sch.7 are entitled to have a lawyer present in person, provided only that the request was made in good faith and not in order to delay the questioning for so long that it could not take place effectively. Recent amendments to the Terrorism Act 2000 (in para.5 of Sch.9 of the Anti-Social Behaviour, Crime and Policing Act 2014) have since adopted this ruling, but *Elosta* confirms that it was already law at the time of Mrs Beghal's detention.

If Mrs Beghal was wrongly denied the presence of a solicitor, can it really be said that, in refusing to answer most of the questions, she "wilfully failed to comply with a duty imposed under or by virtue of Sch.7"? If there was no power to question her at the time when the questions were put (when the police should instead have awaited her solicitor), then arguably she had no "duty" to comply with the questioning. Further, it seems harsh to punish anyone for preferring not to exercise her own judgment on answering particular questions without the benefit of legal advice, especially if one accepts that the potential for prosecution based on the answers is not so fanciful after all.

Conclusions

The approach of the majority in *Beghal* to the legality question under Art.8(2) ECHR is lacking in principle. It is a more difficult question whether the privilege against self-incrimination should have applied. But it is especially unfortunate that no attention was paid to the denial of legal advice. Had the Court heard argument that Mrs Beghal had no duty to comply with the questioning whilst her request for legal advice in person was wrongly denied, it could at least have quashed her conviction without needing to find the Sch.7 power to be incompatible with any Convention right.

Feature

Yes, no, maybe—recent cases on consent and freedom to choose

By Elaine Freer*

The Sexual Offences Act 2003 is the main legislation dealing with some of the most serious non-fatal offences recognised in criminal law. A number of these offences, including rape (s.1) and assault by penetration (s.2), rely on the absence of consent, or a reasonable belief therein. Consent is therefore key in establishing guilt for these serious offences and consequently requires a clear and unambiguous definition. However, s.74 of the Act simply defines consent as the "freedom and capacity to choose".

The Act had a protracted development period, and the policy backdrop to it looked promising. In the report from the Home Office group constituted to consider the issues; *Setting the Boundaries: Reforming the Law on Sex Offences*,[1] it was acknowledged that consent's key role in the construction of the offences meant "it is vital that the law is as clear as possible about what consent means" (para 2.10.1). Putting a definition of consent into a statute, the report said, would clarify its meaning and "enable judges to be able to explain what the law said, and for juries to understand just what is meant by consent" (para 2.10.3). These were laudable and necessary aims.

They were reiterated in the White Paper *Protecting the Public*, which was published in November 2002 and contained a chapter entitled "Clarifying the law on consent". This chapter states:

> "Human beings have devised a complex set of messages to convey agreement or lack of it. […] We intend to make statutory provision on this issue that is clear and unambiguous." (paras 29 and 30).

The full wording of the resulting provision; s.74 of the 2003 Act, which provides the current statutory definition of consent is:

> "For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice."

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It is supported in this by ss.75 and 76. Section 75 sets out a number of circumstances which, if present, will lead to an evidential presumption that consent was not present. This presumption is rebuttable by the defendant 'adducing credible evidence of consent'. Section 76, a much more draconian provision, sets out conclusive presumptions: if these circumstances exist then, as a matter of law, there was no consent.

The two main concepts employed in the definition of consent given in s.74 are the "freedom" and "capacity" to choose. Much has already been written about diminished capacity, both permanent (such as learning disabilities), and temporary (such as intoxication). Similar attention has been paid to the law's approach when one party to a sexual act deliberately deceives the other.[2] What this article seeks to address is the evolution of case law on freedom to choose, examining particularly recent cases which suggest that the interpretation of "freedom to choose" has become concerningly broad. Such a wide construction of a facet of consent means, I argue, that the ambit of the most serious sexual offences has been unacceptably widened. (This could be partly attributable to the perceived need for the 2003 Act to be read so as to plug gaps left by the repeal or non-existence of provisions which deal with specific difficult matters.)

There are five specific cases in which the construction of freedom to choose has been addressed in the recent past. These began with *Kirk*,[3] which concerned a plethora of allegations against two brothers of historical sexual abuse of family members. One was an alleged rape of V, aged 13, by D2, who had previously sexually abused her. V periodically ran away from home and slept rough. On one occasion she went to D2's workplace and waited for him to be alone. She alleged, and he denied, that they had intercourse. The judge directed the jury that if they decided that intercourse did occur, they had to decide whether V consented. Her evidence was clear: her aim from intercourse was payment. D2 was convicted of rape.

At trial the judge's direction to the jury – in line, of course, with the law before the 2003 Act – included the following passages:

> "So what was in her mind? Did she agree to have sex, or did she just submit for £3.25? … [The Crown's case is] that the defendant took advantage of a hungry and vulnerable child whom he knew had been abused by his brother and to a lesser extent by himself, which means that she was submitting because her will was overcome through hunger, and I will use the word desperation again, and that, say the prosecution is not true consent… Just where the line is to be drawn between real consent and submission, albeit willing submission, may not be easy to draw, but the law leaves it to juries who have heard all the evidence of the witnesses to say where the line is to be drawn and whether in any case lack of consent is proved … Therefore I leave it to you to draw the line. Was it consent or was it submission and therefore not consent?"

The Court of Appeal upheld the rape conviction stating, "The expression 'willing submission' is not an easy one in this context. Willingness is usually associated with consent." [92]. The Court was satisfied that there had been no misdirection, however. They held that the jury would not, in the context of the direction as a whole, have been misled by the use of the word "willing". In this case "willing" was used by the judge to describe the lack of physical resistance by the complainant. Thus he left open the possibility of the jury finding submission, as opposed to consent. The Court of Appeal did add, "It is not, however, an expression we would commend for use on other occasions." [92]

Similar matters came before the Court of Appeal again three years later, in the case of *Robinson*.[4] In that case D was V's mother's cohabitee. From the age of 11, it was alleged, he touched her sexually, kissed her, and showed her pornographic material. They had intercourse for the first time when she was 12, continuing for three years [6]. For this he was convicted on one count of indecent assault, plus counts of rape when she was 12 and 13. Her evidence was that "[she] did not ask the defendant not to, [she] did not move to stop him. […] [she] did not make it plain to him that [she] didn't want to. There was no occasion when [she] said that [she] didn't want him to do it, at least not before [she] met Tristan [her boyfriend]." [13].

The first instance judge's interpretation of this, as conveyed in his summing up, was that V, having been comprehensively groomed by D, had merely submitted to him and was thus not consenting [15].

The Court of Appeal stated that grooming alone could not vitiate consent, but said that evidence of such was relevant to finding consent [22], and confirmed the trial judge's summing up [23]. Furthermore, it was recognised both at trial and appeal that the effect of grooming on consent was likely to diminish as a complainant got older. Therefore a jury would have to consider at each stage whether V's increased maturity meant s/he had now developed the freedom to choose in spite of previous grooming. Nonetheless, the appeal was dismissed. The Court of Appeal held that from the evidence adduced a properly directed jury could infer a lack of consent.

Very similar issues came before the Court of Appeal the following year, in *C*.[5] Here D was convicted of 18 counts of sexual offences against his step-daughter, allegedly committed over a 20-year period and starting when she was around five. To the counts relating to when she was under 16 his defence was "it never happened", and to the later counts, "she consented". In relation to these later counts there was some evidence suggestive of consent – and indeed evidence that she had sometimes initiated and welcomed sexual activity [2]. However, the Court held that D's sexual abuse of V from early childhood provided the context in which to assess the reality or otherwise of her apparent consent once over 16. The appeal was therefore dismissed.

This brings the timeline to the two most recent cases: *Ali*,[6] and *Watson*.[7]

Ali was one of a group of defendants tried and convicted in what became known as the Peterborough sex abuse case – in which a large group of men, mainly of Pakistani or Middle Eastern origin, were prosecuted and convicted for a wide range of sex offences against vulnerable girls. For his

2 E.g. Spencer "Sex by Deception", [2013] *Archbold Review* 9, 6; Sjolin (2015) "Ten years on: Consent under the Sexual Offences Act 2003", *Journal of Criminal Law*, 79(1), 20-35.
3 [2008] EWCA Crim 434.
4 [2011] EWCA Crim 916.
5 [2012] EWCA Crim 2034.
6 [2015] EWCA Crim 1279.
7 [2015] EWCA Crim 559.

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part of this, *Ali* was convicted of four counts of rape (counts 1, 5, 9 and 21); seven counts of trafficking within the United Kingdom for sexual exploitation (counts 6, 8, 10, 12, 16, 20 and 23); two counts of making indecent photographs of a child (counts 15 and 27); one count of engaging in sexual activity in the presence of a child (count 24); and one count of intimidation (count 28).

In respect of one of the four counts of rape, D and V had had an apparently consensual sexual relationship, but V's evidence was that she had allowed D to have intercourse with her only because otherwise she thought he would have sex with other women. "She described having '*fallen*' for the appellant and that she did not feel pressured into sex; the judge summarised her description of contact with D thus: "She did not want to say no to him. When she was asked why not, she said she did not know. *'I just wanted to please him. And I thought if I weren't going to give it he'd probably go and find it elsewhere'."* The Court upheld the rape conviction. In doing so it highlighted that grooming could limit or subvert the capacity of the victim to make a free choice, leading to submission due to dependency induced by those doing the grooming [58].

In *Watson*, D had fathered a child who was immediately adopted. This child had no contact with D until she was 34, when she met D, at which time it was agreed by both parties that "an intense and enthusiastic consensual sexual relationship developed between the two" [5]. In consequence, D was prosecuted for sex with an adult relative, to which, was unsurprisingly, he pleaded guilty – and more surprisingly, for rape and assault by penetration, the Crown's case being that V had not consented to some of the sexual activities which had occurred in the context of sustained consensual sexual activity. On these counts of non-consensual offences D was tried and on some of them convicted, receiving a total sentence of ten years' imprisonment. Against his convictions for rape and assault by penetration D successfully appealed, the Court of Appeal quashing the convictions because of a failure to direct the jury adequately on the evidence and – the point of interest for present purposes – a misdirection on the meaning of consent. As to this, the trial judge had told the jury to consider whether V was "freely consenting to sexual intercourse or was she submitting to a demand that she felt unable to resist". This, said the Court of Appeal, was wrong:

> "The dichotomy set up by the judge (free consent/submitting to a demand that she felt unable to resist) did not accurately summarise what had gone before and does not reflect the law. It is possible for a person to submit to a demand which he or she feels unable to resist, but without lacking the capacity or freedom to make a choice. That is an example of reluctant consent." [34].

What is notable about this case, surely, is not the eventual result, but the fact that on the evidence available to them the police and the CPS were prepared to prosecute for rape and other non-consensual sex offences, the judge was prepared to let the case proceed, and the jury was then willing to convict. Albeit halted in this case, this suggests a slide towards a general understanding that, for the purpose of s.74, a person can be seen as lacking "freedom to choose" in the context of any relationship that is abusive or seriously improper. In other words, *Watson* looks like an example of the ambit of rape being widened by the belief of the police, the CPS and a jury that D had behaved in a reprehensible manner.

A fundamental question that arises from these cases is this: how is the concept of being "unable to resist" to be articulated? It is identified by the Court as being different from submission, but in what way? The difference may be that if V submits they realise that they do not want to consent, but do so because they are scared by external threats, whereas if they are unable to resist they are saying yes because of complicated dynamics subconsciously influencing their decisions.

Although V's motivations in *Kirk* were financial, the jury's verdict suggests that they believed that "submission" had outweighed "willingness". In line with established case law that "mere submission" will never suffice as consent this appears straightforward.[8] A difficulty arises, however, because V allegedly sought out D2 at his workplace, and waited until he was alone. When attempting to untangle V's motivation for seeking D2 out for earning money through sex, and her capacity to consent, the matter becomes complicated. How do we interpret "freedom to choose" here? It appears that V freely chose to seek out D2. V had experienced sustained sexual abuse, mainly by D1, although D2 had also been involved in "relatively few" of these occurrences (at [77] and [83]). Did this mean that her finding D2 for prostitution, as a "transaction" of behaviour (*cf Thabo Meli*)[9] was subconsciously directed by the earlier abuse and thus she was not consenting freely to the intercourse because of her earlier experiences? Or should her decision to find D2 be divorced from what occurred when she found him, whereupon the dynamics of their abusive relationship may have constrained her ability to choose whether to engage in sexual activity? In other words, what role did V's motivation for seeking out D2 play in the finding of consent? Regrettably, it is unclear how the Court approached this difficult issue, leaving the matter unsolved.[10]

Where D has systematically abused the complainant from early childhood it might perhaps be said that V is not really exercising free choice when in later life he or she apparently consents to sex. However, in *Ali* V had not been sexually abused by D since early childhood. He may have taken advantage of her younger age (although whether he knew her true age was unclear), and he plied her with alcohol and "sulked" if she would not have intercourse with him. However, whilst this behaviour is manipulative and unpleasant, it surely does not compromise V's capacity to choose as it could be argued previous sustained sexual abuse had done in *Kirk*, *Robinson* and *C*.

If apparent consent is negatived in cases such as these, a wide raft of relatively non-serious "implicit threats" could also potentially vitiate consent. It is argued here that this must be guarded against – at its core, consent should not be negated because a less-than-desirable choice has to be made. By analogy, when a patient visits the doctor for an injection they consent to the injection. Faced with the choice between an injection and the risk of tetanus, they nonetheless consent.

8 *Olugboja* (1981) 73 Cr.App.R 344.
9 [1954] 1 WLR 228.
10 See Simester, Spencer, Sullivan and Virgo (2013), *Simester and Sullivan's Criminal Law: Theory and Doctrine* (5th ed), p.472.

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As threats become more explicit and involve illegal alternatives (such as violence or deprivation of personal liberty) it is unproblematic that they should negate consent, as these instances move towards a choice which is not meaningful, but merely semantic through the presence of "or". A policy question therefore arises on where beyond this point the law should draw the line on when consent is vitiated in a situation where a person is faced with choice between two options, neither of which is appealing.[11] Whether this is a matter that can be established by case law or whether it requires the intervention of the legislature to amend the Sexual Offences Act 2003 is a matter for discussion.

What is clear, however, is that the current confusion in such an important matter is not acceptable. This line should be drawn clearly – and with consideration of the serious consequences of negating consent; as discussed below, the widening of the ambit of non-consensual sexual offences, especially rape, is worrying.

Thus a concern that a sexual partner will cheat should not alone, I argue, compromise freedom to consent. An unpleasant choice is not the same as having freedom to choose compromised in a legal sense, such that the decision then made is legally null.

In a case like *Ali* the appropriate charge, surely, is an offence concerning sexual activity with a person under 16 where D does not reasonably believe that V was 16 or over (ss.9-11 of the Sexual Offences Act 2003). Under those sections, questions of consent are irrelevant as V is under 16 and her consent is therefore legally irrelevant.

Furthermore, if it is accepted that apparent consent can be vitiated in situations where V is "unable to resist" for reasons other than threats of physical violence or constraint, complex issues seem likely to arise in relation to mens rea. Cases such as *Kirk*, *C* and *Ali* raise questions about the depth to which we expect D to be able to read the state of mind of V as regards the sexual relationship. It could be argued that the background between D and V went to the reasonableness of D's belief in V's consent to the sexual activity. But whilst it is well-established that a defendant should be able to identify "mere submission", it might be thought that an exercise more akin to mind-reading will be required if D is expected to think carefully through the psychology of V's decision to communicate ostensibly enthusiastic consent. Such an expectation cannot be defended as fair.

If previous grooming by D of V in childhood will be regarded as always capable of compromising V's capacity to consent to sexual activities, then perhaps such grooming should be included within the evidential presumptions against consent in s.75.

Whilst "grooming is not a term of art"[12] more straightforward wording such as "sexual activity obtained through abuse of relationship" could be drafted effectively. Courts would still have to explore the issue of consent, but the defendant would have to adduce credible evidence that s/he did have a reasonable belief therein. This would address some of the challenges seen in those cases explored here.

Finally, these cases raise questions about the scope of the offence of rape under s.1 of the Sexual Offences Act 2003 and its relationship to the catalogue of consensual sexual offences which the Act also contains. In both *Ali* and *Watson* other 2003 Act offences appropriately criminalised the conduct involved; sexual activity with someone under 16,[13] and sexual activity with an adult relative.[14]

When charging decisions are made it is of course impossible to know how the evidence will emerge in court, making hindsight as wonderful a thing in criminal law as it is anywhere else. However, in *Ali* such a charge would surely have led to a much more straightforward conviction, as the question would not be consent, but V's age and D's reasonable belief in relation to it.

In *Watson*, D pleaded guilty to the charges of sexual activity with an adult relative, which were clearly and indisputably made out on the facts. In charging rape and other non-consensual offences, additional matters relating to consent arose, creating unnecessary complexity. (Though that said, whereas in *Watson* and *Ali* other appropriate charges were available, this is not always the case, as the 2003 Act repealed the 1956 Act without any replacement for the offences in ss.2 and 3 of procuring sexual intercourse by threats or intimidation, or by false representations.)[15]

In conclusion, it is argued that the law on the meaning of consent is currently incoherent. It is a central concept for arguably the most serious non-fatal offences on the statute books. It needs, therefore, to be clear and unambiguous, as the Home Office group identified 15 years ago. It remains unclear, convoluted, and thus potentially a challenge to justice. A conviction for a sexual offence is a serious matter. To comply with fair-labelling principles, D should only be convicted of a non-consensual sexual offence where it is clear that their express or implied words or actions really did overthrow the victim's will.

Many difficult and complex questions surround grooming, a matter itself which the law struggles to fully address due to lack of definitional clarity. There will be cases where V, having been groomed, is also subjected to non-consensual acts. As discussed above, however, such matters may be better dealt with by adding a provision concerning grooming to s.75, instead of contorting s.74.

11 If motivations for the giving of consent are to be considered then many situations would vitiate consent. Glanville Williams uses the example of employers who cannot search employees on suspicion of theft without their consent. However, an employee may consent realising that if they do not the employer is likely to call the police. This choice, however, would not be taken to negate the consent: (1983) *Textbook of Criminal Law* (2nd ed), London: Stevens and Sons Ltd.

12 *Robinson*, above n 4, Elias LJ at [21].

13 Ss. 9-11 of the Sexual Offences Act 2003.

14 Ss.64 and 65 of the Sexual Offences Act 2003.

15 And the decision to prosecute for rape in *Kirk* was presumably motivated by the fact that, at the time the events took place, the current offence of sex with a girl under the age of consent was subject to a 12-month time time-limit that had long expired.

Stop Press: On January 20 the Law Commission published a Summary of Issues Paper on Misconduct in Public Office, on which comments are invited by March 20.
It is available online at: http://www.lawcom.gov.uk/project/misconduct-in-public-office.

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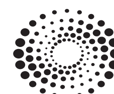

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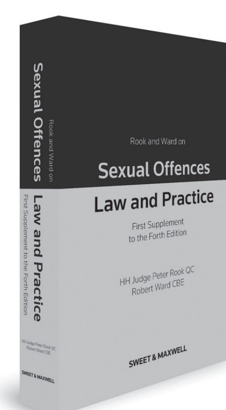

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