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Archbold Review

Cases in Brief

Evidence—Police and Criminal Evidence Act s.74—admission of guilty pleas by co-conspirators–nature of decision making by judge—whether "discretion"

DENHAM AND STANSFIELD [2016] EWCA Crim 1048; July 28, 2016

The judge had been right to allow the prosecution to lead evidence of guilty pleas by alleged co-conspirators, on D and S's trial for, variously, conspiracy to rape or sexually abuse an infant. The defence argued that the admission of the evidence was (a) wrong in law or (b) the decision was nonetheless one that could be impugned on appeal. The judge correctly stated the law. Exclusion depended on unfairness to, not difficulties for, the defence. As to the second point, the decision to admit the evidence, although often described as the exercise of a discretion, would better be described as an exercise of judgment in which a balance had to be struck on the issue of fairness. If it were a matter of pure discretion, the basis of challenge would be unduly confined. The decision whether to admit such evidence was either right or wrong (although the safety of a conviction was another matter). Nonetheless, such decisions were necessarily fact sensitive, and a judge was in a particularly good position to assess the issue of fairness in the context of the dynamics of the trial process.

Judicial review—where application totally without merit—CPR 54.12(7)—whether applies to applications in a criminal cause or matter

R (IMBEAH) v WILLESDEN MAGISTRATES' COURT [2016] EWHC 1760; July 14, 2016

The Civil Procedure Rules (CPR) 54.12(7) precludes reconsideration of a refusal of permission at a hearing in a judicial review application where the judge rules the application to be "totally without merit". The applicant, I, argued that this must be interpreted as not applying in a criminal case. It was said in *R (Grace) v Home Secretary* [2014] 1 W.L.R. 3432 that there were two important safeguards in relation to the phrase "totally without merit" (which meant "bound to fail", not merely abusive or vexatious): first, that the application would be carefully considered; and, second, that "the claimant still had access to the Court of Appeal" as a result of CPR 52.15(1A) (allowing for a paper application for permission to appeal in respect of such a finding). I submitted that, there being no access to the Court of Appeal for an applicant in a criminal cause or matter (Senior Courts Act 1981 s.18(1)(a)), achieving the overriding objective in CPR 1.1(1) required the Court to so interpret CPR 54.12.(7). The Court rejected the argument. The unqualified and unequivocal language used was not capable of being interpreted to impliedly exclude criminal cases. Nor was the application of CPR 54.12(7) to criminal cases contrary to the overriding objective. When the High Court was itself exercising an essentially appellate function, as it did on judicial review from the magistrates' courts, the decision of Parliament not to allow a further avenue of appeal was readily understandable. If applicants in criminal cases were disadvantaged in comparison with those in civil matters, that was a result of s.18(1)(a), and applied to every stage of the judicial review process. Neither was the lack of a route of appeal to the Court of Appeal a breach of the European Convention on Human Rights Art. 6.

Indictment—preferring by electronic means—no requirement for signature; Appeal—prosecution appeal—procedure; Sexual offences—indecent image of child—Protection of Children Act 1978 s.1(1)(a)—mens rea—*Abuse of process; mode of participation in offences—proportionality of prosecution—previous related proceedings*

CONTENTS

P AND OTHERS [2016] EWCA Crim 745; June 23, 2016

The Crown's appeal against a judge's ruling that proceedings against a number of defendants charged with making indecent photographs of a child (Protection of Children Act 1978 s.1(1)(a)) be stayed as an abuse of the process of the court was allowed.

(1) The Crown had lodged by electronic means a 15-count indictment, and but for the abuse application, would have made applications to deal with certain pre-existing indictments and amended counts within the new indictment. Having found in favour of the defendant's abuse application, the judge added that she would not have permitted the addition of new counts to the indictment, and referred to the indictment stayed as "draft or otherwise". It was argued that there was no jurisdiction to appeal, there being no properly preferred indictment, and that other rulings (preferring counts out of time, amendment) had not been identified by the Crown on appeal. The Court rejected the jurisdiction arguments. The definition of "ruling" in s.74(1) of the Criminal Justice Act 2003 was broad. It was clear that the judge had made a single ruling on abuse, and that was properly identified by the Crown. There were no multiple rulings. The submissions in respect of the formal requirements for a valid indictment did not recognise the significant changes that had taken place in the relevant formalities. Prior to the amendment of Administration of Justice (Miscellaneous Provisions) Act 1933 s.2 and Sch.2 by the Coroners and Justice Act 2009, it was a requirement that a bill of indictment be signed by the proper officer before it became an indictment. Now, once a bill of indictment has been preferred, it became an indictment: s.2(1) of the 1933 Act and *Archbold* 2016 para.1 191. The lack of a signature did not invalidate an indictment. Before the advent of the Crown Court paperless digital system it was good practice for an indictment to be signed. The paperless system involved the CPS entering an indictment onto the Crown Court digital system. A signature was no longer needed to make an indictment valid. An indictment was preferred with the meaning of s.2(1) once it was electronically entered into the Crown Court digital system.

(2) Newly instructed counsel for the Crown had sought to identify different counts to those selected by original counsel. The Court refused leave to allow him to do so. First, the Crown was initially given a week to decide which counts to pursue, and it should be held to that election. Secondly, the Court was very doubtful that the Crown could rely on Criminal Procedure Rules pt.36.3 to extend time. Rule 36.3(a) allowed extension "unless that is inconsistent with other legislation". Given the clear terms of s.58 and the strictness with which it had been construed, it was not open to the Court to extend time for the determination of the counts covered by the appeal.

(3) The judge had been wrong to consider that it was anomalous that the *mens rea* requirements of the s.1(1) offence differed, depending on whether the photograph was made by filming or photography, on the one hand, or by downloading onto a computer on the other (*Smith and Jayson* [2003] 1 Cr.App.R.13) – in downloading cases, *mens rea* included knowledge that the image was likely to be an indecent one of a child; *DM* [2011] EWCA Crim 2752 – no *mens rea* beyond deliberate and intentional taking of a photograph). There was a proper distinction to be drawn between the two classes of cases. *Smith and Jayson* concerned what was meant by "makes" in the context of downloading. Given the particular considerations relating to a user's awareness of what was downloaded, it was understandable that a different approach had been adopted in that case. That should not affect the position where the making of the image took place through the more direct action of photographing or filming.

(4) The Court rejected a submission that it was an abuse that some defendants were charged on the basis that their participation in the sexual activity photographed or filmed, without the Crown calling witnesses to demonstrate criminal involvement. Whether such an inference could be drawn from the photographs or films themselves, and if so, what the nature of their participation was, was a matter for the trial process.

(5) The judge had been wrong to take account of the proportionality of the decision to prosecute. The decision was a matter for the CPS and not the court, absent *Horseferry Road Magistrates' Court ex p. Bennett* [1994] 1 A.C. 42 type abuse. In any event, the Court questioned the basis of the proportionality argument.

(6) The proposed trial followed the dismissal of a range of "serious contact offences" relating to sexual activity between a number of defendants and the child depicted in the photographs and films the subject matter of the current indictment, the child having been found to be a thoroughly unreliable witness. It was argued that it was an abuse for the Crown to revive or pursue for the first time the indecent images charges. The judge had held that a combination of the passage of time and the dismissal of the contact charges rendered the proceedings an attempt to manipulate the process of the court, relying on *Piggott and Litwin* [1999] 2 Cr.App.R. 320. That decision was distinguishable. The instant case did not involve a proposed re-trial on essentially the same facts as the first trial. The issues in the proposed indictment had not been tried at all. The first trial concerned contact offences and relied on the child's word. Although the Crown had served the evidence in relation to the indecent images prior to the first trial on all defendants, the Crown did not deploy that evidence in the first trial, on the basis that it had been served too late. None of the respondents to the instant appeal had been involved in the first trial, and so were never in jeopardy. It had been intended to proceed against some respondents to this appeal as part of a pre-first-trial division of a much larger indictment – in their cases, they had been on notice of the possibility of a trial on image counts (regardless of the original plan to rely on the child's evidence), and to proceed against them on the proposed amendment was not a manipulation of the court.

Precedence—judges of co-ordinate jurisdiction—Circuit Judges—precedential value for courts of England and Wales of decisions of the Privy Council—whether to be followed where "foregone conclusion" Privy Council would be followed by higher court—new procedure to allow Privy Council decisions to be binding in England and Wales—Effect in Scotland and Northern Ireland

WILLERS V JOYCE AND ANOTHER [2016] UKSC 43, [2016] 3 WLR 477; 20 July 2016

In a separate judgment relating exclusively to precedence, Lord Neuberger (with whom eight Justices of the Supreme Court agreed) considered the precedential significance of decisions of the Privy Council.

(1) The Court set out the orthodox position in relation precedence within the hierarchy of the courts of England and Wales, and noted that while puisne judges were not technically bound by decisions of their peers, they should generally follow a decision of one unless there were powerful reasons for not doing so, and, where a first instance judge is faced with inconsistent decisions of judges of co-ordinate jurisdiction, the second should be followed (absent cogent reasons): *Patel v Home Secretary* [2013] 1 WLR 63, [59]. The Court suggested ("I would have thought") that circuit judges should adopt the same approach to decisions of other circuit judges.
(2) While the Privy Council was not a court of any part of the UK, it almost always applied the common law, and either all, or four of the five, Privy Counsellors who normally sit on appeals would almost always be Justices of the Supreme Court. As a matter of logic, three consequences flowed from this: (a) decisions of the Privy Council could not be binding on any judge of England and Wales and could not override any decision of a court of this jurisdiction which would otherwise represent a binding precedent; (b) but any decision of the Privy Council, at least on a common law issue, should normally be regarded by any judge of England and Wales as being of great weight and persuasive value; and (c) the Privy Council should regard itself as bound by any decision of the House of Lords or the Supreme Court, at least when applying the law of England and Wales. While a court of England and Wales would normally follow a Privy Council decision, there was no question of it being so bound as a matter of precedence; and there was no doubt that a court should not, at least normally, follow a Privy Council decision if it was inconsistent with a decision of a court binding on it. The difficult question was whether the latter rule was absolute, or subject to the qualification that it could be disapplied where the court considered that it was a foregone conclusion that the Privy Council's view would be accepted by the Court of Appeal or Supreme Court. There were Court of Appeal decisions to that effect in both civil and criminal matters (*Doughty v Turner Manufacturing Co Ltd* [1964] 1 Q.B. 518; *James and Karimi* [2006] Q.B. 588). But the Court had concluded that it would be more satisfactory if – subject to one important qualification – the rule should be absolute; that is, that a judge should never follow a Privy Council decision which was inconsistent with a decision of a court which was otherwise binding.
(3) The qualification was that a new procedure should be adopted. The Privy Council's current Practice Direction (JCPC PD 3.13 and 4.2.2) already required an applicant/appellant to say if the Privy Council would be invited to depart from a House of Lords or Supreme Court decision. This should be extended to the Court of Appeal. Henceforth, the Registrar would draw the attention of the President of Judicial Committee of the Privy Council where there may be such an invitation, so that the President could take account of it in the composition of the panel to hear the case; and it would be open to the members, if they thought it appropriate, to decide that the House of Lords, Supreme Court or Court of Appeal decision was wrong as a matter of the law of England and Wales (as well as the jurisdiction concerned) and expressly direct that the courts of England and Wales should follow the Privy Council's decision.
(4) In respect of Scotland, the traditional view had been that, subject to some possible exceptions, judgments of the House of Lords in English appeals were at most highly persuasive rather than strictly binding; and the Court found it impossible to see how decisions of the Privy Council on English/Welsh law could have greater authority than that. As for Northern Ireland, the same principles should apply as they do in England and Wales.
[Comment: Lord Neuberger's account of stare decisis *appears to assume that the position is the same in respect of both civil and criminal matters, but since* R v Taylor *[1950] 2 K.B. 368, the Criminal Division of the Court of Appeal itself has held that the approach in criminal cases is more relaxed – for a full account of the somewhat unsettled nature of the current case law, see Archbold 2016 paras 7-347-36. The consideration of the other UK jurisdictions is brief, and perhaps surprising. In particular, there were two views amongst Scottish lawyers of the effect of House of Lords decisions in English/Welsh cases. One corresponded to the converse position in the law of England and Wales – highly persuasive, not binding – but the other view accorded binding precedential value to such cases where they involved GB statutes, or where the common law was "the same". However, this dispute seemed to have been settled (in favour of the first view) when the Supreme Court was established, because the Constitutional Reform Act 2007, s.41(2) provides that "a decision of the Supreme Court on appeal from a court of any part of the United Kingdom … is to be regarded as a decision of a court of that part of the United Kingdom". This provision, of course, also means that this decision is not, strictly, binding in Scotland or Northern Ireland. (RP)]*

SENTENCING CASE

Fresh Evidence
ROGERS AND OTHERS [2016] EWCA Crim 801, July 1 2016
In three conjoined appeals the Court of Appeal considered the application of s.23 of the Criminal Appeal Act 1968 to fresh evidence submitted in an appeal against sentence.
Section 23 states that the Court of Appeal may receive evidence, including evidence adduced at trial, provided "they think it necessary or expedient in the interests of justice". In deciding whether to exercise this power it is required to consider the following four factors:

(a) whether the evidence appears to the Court to be capable of belief;

(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

Section 23, it held, is of general application to sentencing appeals. The court will scrutinise intensely any application to give a factual explanation that was not before the sentencing court. It is the advocates' duty to deploy before the sentencing judge all material on which they seek to rely.
There are circumstances where the court will consider updates to information placed before the sentencing judge

without applying the conditions in s.23 (per Lord Judge CJ in *Roberts, Caines* [2006] EWCA Crim 2915, at [44]) but they are strictly limited. They include updated pre-sentence and prison reports on post-sentence conduct in prison, but not fresh psychiatric or psychological evidence to challenge a finding of dangerousness or suggest that a hospital order should have been made. In such a case, s.23 will apply. Another limited exception is updated information concerning assistance given to the law enforcement authorities; although this will rarely apply, for reasons explained in *AXN and ZAR* [2016] EWCA Crim 590 (noted in Issue 7).

In principle, compliance with s.23 is necessary for two reasons. First, as it is incumbent on those representing the defendant to call all the evidence before the sentencing court; persuasive evidence is required to explain why it was not called. Second, the court must consider whether the interests of justice require it to be admitted notwithstanding that failure. If the advocate before the Court of Appeal did not represent the applicant at trial or sentence, that advocate must obtain information from the previous advocate regarding why the evidence was not called.

Case in Depth

An important decision on the European Arrest Warrant

By J.R. Spencer

The European Arrest Warrant (EAW) is a controversial topic. The police and other law enforcement agencies welcome it as an effective means of recovering criminals who take advantage of free movement (and Ryanair) to escape to Europe – and conversely, of removing criminals from Europe who are seeking refuge here. But hard-line Eurosceptics are opposed to it. Their usual reason is that it exposes Britons to Continental criminal justice, a product by definition inferior to our own: a position which gains support when, as inevitably happens sometimes, someone is extradited to face proceedings in another EU Member State which then go badly wrong – as with the deplorable case of Andrew Symeou, who following his extradition to Greece was forced to wait there for two years before the prosecutor terminated the proceedings by the Greek equivalent of offering no evidence.[1] But more inventive reasons are sometimes given too – as when the *Daily Telegraph* solemnly warned its readers that: "The European Arrest Warrant could let Vladimir Putin's goons knock on British doors".[2]

The EAW was covered by the Protocol 36 opt-out – the Lisbon Treaty provision which gave the UK the right to remove itself from a range of pre-Lisbon EU criminal justice measures ahead of the CJEU at Luxembourg acquiring jurisdiction over them, together with the right to seek readmission to any measures for which the jurisdiction of the Court appeared to be a price worth paying. As readers will presumably remember, in 2014 the Coalition government exercised the opt-out, but only to opt the UK back into all the measures of practical importance, headed by the EAW.[3] As the EAW was the *bête noir* of the Tory eurosceptics, and disquieting to some MPs on the opposite end of the political spectrum too, this proved politically difficult at Westminster. So to sweeten the pill, the Government caused Parliament to amend Pt.1 of the Extradition Act 2003 by adding two extra grounds for refusal, intended to meet the two most cogent objections to its workings: its over-use in trivial cases, and its use in cases where the issuing State was not yet ready to try the wanted person, who then faced a long delay before his trial. The first new bar was "disproportionality", now to be found in s.21A, and the second, now to be found in s.12A, was that the authorities of the requesting State has not yet made a decision to charge and try him.[4]

If these new bars were intended to add fairness to EAW proceedings, both – inevitably – had the potential to add delay, cost and complication to the process too. With "disproportionality" the problem was conveniently forestalled. When Parliament added this new bar to the Extradition Act it also gave the Lord Chief Justice power to issue "guidance" in respect of it[5] – which he did, in detail, in what is now para.50A of the Criminal Practice Directions. In consequence, this new bar appears to be working fairly smoothly. No equivalent provision was made, however, in respect of the new bar contained in s.12A, which quickly proved to be a major obstacle to the operation of the EAW system.

s.12A is as follows:

Absence of prosecution decision

(1) A person's extradition to a category 1 territory is barred by reason of absence of prosecution decision if (and only if)—

(a) it appears to the appropriate judge that there are reasonable grounds for believing that—

(i) the competent authorities in the category 1 territory have not made a decision to charge or have not made a decision to try (or have made neither of those decisions), and

(ii) the person's absence from the category 1 territory is not the sole reason for that failure,

and

(b) those representing the category 1 territory do not prove that—

1 *Symeou v Public Prosecutor's Office, Patras* [2009] EWHC 897, [2010] 1 WLR 2384; noted [2010] CLJ 225.

2 10 November 2014 – at the time of the Protocol 36 opt-out affair.

3 See "What would Brexit mean for British criminal justice?" [2016] 5 *Archbold Review* 6-9, and for a longer version, "Opting out of EU criminal justice: withdrawal, or an exercise in smoke and mirrors?" [2013] 8 *Archbold Review*, 6-9.

4 Added by the Anti-Social Behaviour, Crime and Policing Act 2014.

5 Section 7A of the Extradition Act 2003.

(i) the competent authorities in the category 1 territory have made a decision to charge and a decision to try, or

(ii) in a case where one of those decisions has not been made (or neither of them has been made), the person's absence from the category 1 territory is the sole reason for that failure.

(2) In this section *"to charge"* and *"to try"*, in relation to a person and an extradition offence, mean—

(a) to charge the person with the offence in the category 1 territory, and

(b) to try the person for the offence in the category 1 territory.

The difficulty here is that "charge" and "try" are legal terms of art which relate to stages of the prosecution process in England and Wales, and which do not have exact equivalents in the criminal justice systems of many other Member States. In consequence, when dealing with extradition requests from those countries it has sometimes proved difficult or impossible for the UK extradition court to find that the authorities have made a decision to take these now necessary steps.

The s.12A bar can be invoked in cases where there is no real reason to believe that the wanted person, if surrendered, would face a delay ahead of trial. And though presented to Parliament as providing "extra safeguards for British citizens"[6] it operates, of course, across the board; and the beneficiaries of the resulting confusion and delays have almost invariably been citizens of other EU Member States wanted by their own countries for crimes allegedly committed there.

In March 2015 an Administrative Court composed of Aitkens LJ and Nicol J tried to resolve the problems in *Kandola v Germany*.[7] Sadly, experience quickly showed the problems still remained. Accordingly, a Divisional Court with the Lord Chief Justice presiding has now made a new attempt. The case is *VP v Lithuania* [8]– a long and important judgment in which the *Kandola* decision received what Westlaw calls "mixed or mildly negative treatment".

The Court in *Kandola* had held that s.12A imposed a two-stage test. In stage one, the requested person must adduce some evidence suggesting that the decision to charge and try him has not yet been made. This, it stressed, is unlikely to be easy. In most or many cases, it said, the paperwork before the court will make it clear they have been taken, and to suggest otherwise the wanted person must produce evidence, not assertions. This general approach the Court in *VP v Lithuania* endorsed.

In *Kandola* the Court had gone on to say that, if the requested person surmounts the first hurdle, further information may be needed from the judicial authority of the requesting State; and if so, it should be asked what the *Kandola* Court believed to be two simple questions:

"(i) Has a decision been taken in this case (a) to charge the requested person and (b) to try him, if not; (ii) is the sole reason /for the lack of each of the decisions that have not been taken the fact that the requested person is absent from the category 1 territory[9] of which you are a/the judicial authority?"

But if (i) is a question simple for an English lawyer to ask, it is not easy for a Continental prosecutor to answer, for reasons we have seen; and with this in mind, the Court in *VP v Lithuania* said that a more nuanced approach is required, with questions designed to find out if steps have been taken which constitute the functional equivalent.

The emphasis, it said, should be on whether a decision had been made to put the requested person on trial, rather than on whether a decision has been made to charge him (because this will necessarily be included in a decision to bring to trial). Furthermore, the issue s.12A requires the UK court to focus on is whether the judicial authority of the requesting State has "made a decision" to bring him to trial – not whether the formal legal steps have then been taken which lead up to one. Much less does it require a formal step to be taken which, once made, becomes irrevocable.

The bar to extradition s.12A imposes does not operate if the "sole reason" for the failure to reach a decision to charge and try is the wanted person's absence. In many Continental systems the prosecutor is legally required to question the suspect before proceeding with the case and so a common response to questions prompted by s.12A is:

"No, we haven't made a decision to charge or try him yet. This is because we have cannot question him, as he is in the UK".

In *Kandola* the Court held that, in deciding whether in such a case the person's absence was the "sole reason" for the non-decision, the extradition judge should consider whether the foreign prosecutor might have circumvented the problem by invoking mutual legal assistance procedures to interview the wanted person here. This, said the Court in *VP v Lithuania*, was wrong. It is not the business of English courts, it said, to tell foreign prosecutors how to run their cases.

For good measure, the Court in *VP v Lithuania* also said that for the purposes of s.12A the crucial question is whether the judicial authorities of the requesting State have made the decision to charge and try the wanted person by the time the case comes before the courts in the UK – not the date when the EAW was issued, which could be months or even years before.

In the light of all this, it is no surprise to find that in the three cases before the Court the requested persons lost, so facing extradition.

If the UK ceases to be a member of the European Union, at first sight this means it leaves the EAW as well and these two cases cease to be of interest or importance. But if Brexit ends the automatic right of EU citizens to come to the UK to live and work (and vice versa), it is unlikely to bring about the complete end of free movement or of cross-border trade. So the problems of trans-border crime are likely to persist; and though the EAW is opposed by many of those who pressed for Brexit, it is possible that the UK will seek to retain it as part of the post-Brexit settlement. As our new Prime Minister was the Home Secretary who successfully fought to retain the EAW at the time of the Protocol 36 affair, this scenario is not improbable.

6 By the Home Secretary, Teresa May, Hansard (HC) 15 July 2013, col 779; quoted, and castigated as "erroneous", by the Administrative Court in *Kandola*, n 7 below.

7 *Kandola v Generalstaatwaltschaft Frankfurt, Germany, Droma v State Prosecutor Nurnberg-Furth, Bavaria, Germany and Ijaz v Court of Milan (An Italian Judicial Authority)* [2015] EWHC 619 (Admin), [2015] 1 WLR 5097.

8 *Vanda Puceviciene v Lithuanian Judicial Authority, Andreas Conrath v German Judicial Authority and Frantisek Savov v Czech Judicial Authority* [2016] EWHC 1862 (Admin), 22 July 2016.

9 The term by which – obtusely – the Extradition Act 2003 refers to EU Member States.

Feature

Worth waiting for: The benefits of section 28 pre-trial cross-examination

By Joyce Plotnikoff and Richard Woolfson, Lexicon Limited

It is 27 years since Judge Pigot proposed that children's cross-examination be videoed before trial.[1] Eventually enacted as s.28 of the Youth Justice and Criminal Evidence Act 1999, this became one of a package of special measures covering all young and some vulnerable adult witnesses. Combined with the police interview filmed as evidence-in-chief[2], the aim was to capture all of the witness's evidence before trial. This could then be played to the court; the witness need not attend the trial. However, a scheme to pilot s.28 did not receive the government "green light" until adverse publicity surrounding child sex exploitation cases in 2013.[3] The evaluation ran for 10 months in 2014 at the Crown Court in Liverpool, Leeds and Kingston upon Thames. So many benefits emerged that the pilot courts continued to use s.28 when the formal evaluation period ended and extended its use to most of their judges. In July 2016 – in response to Ann Coffey MP's tenth query about s.28's status – Justice Minister Mike Penning announced its national roll-out, albeit without "full government clearance".[4]

The Ministry of Justice evaluation of the pilot has not yet been published.[5] Although cost-effectiveness was not an explicit evaluation objective[6], the lead judges believe that s.28 could result in considerable savings. They are keen for the measure to be adopted nationally:

> "It would be a gross mis-service to the administration of justice and vulnerable witnesses if s.28 is not rolled out. There are so many advantages if it is operated correctly";
>
> "It could be one of the single most beneficial improvements in delivering justice to some of the most vulnerable in society";
>
> "There are no downsides."

The Lord Chief Justice has commended the "very significant benefits" to be achieved by implementation.[7]

Section 28's success can be attributed to a group of case-management minded judges and a case management framework undreamt of by Pigot or those drafting the 1999 Act. Elements include rigorous judicial control driven by Criminal Procedure Rules, Practice Directions and (now) new Plea and Trial Preparation Hearings; heightened awareness of inappropriate questioning reinforced by robust Court of Appeal judgments; and tighter rules on disclosure and discounts for early guilty pleas. Courts must now take "every reasonable step" to facilitate witness participation.[8] This has resulted, for example, in the judge joining the lawyers and witness in the live link room for face-to-face s.28 cross-examination.

Operation of the special measure is governed by a Judicial Protocol[9], a pilot court Guidance Note[10] concerning ground rules hearings and a police-CPS joint agreement. Pilot criteria for inclusion of vulnerable adults were unchanged from the 1999 Act but young people's eligibility was lowered from under 18 to under 16. Even so, most cases in the pilot and its continuation involved children. Section 28 was used not just for sexual offence complainants but also for witnesses to murder, fraud and theft. Witnesses meeting s.28 criteria are also eligible for communication assistance from an intermediary (s.29 of the 1999 Act). However, few such appointments have been made.

Impact on delay and closure for the witness

Judges report that pilot procedures dramatically reduced witness waiting time at court. Section 28 recordings should be the first matter listed in the morning (Protocol, para.62). Timing and duration should take account of witness needs; for "a young child", the hearing should "conclude before lunch time" (para.23). In Leeds and Liverpool (but not Kingston, where it was not feasible), most recordings were scheduled for completion before the start of regular court business. This approach was generally welcomed, but the early start did not suit witnesses living far away or those on medication better accommodated by a later schedule.

Reducing the time cases took to reach cross-examination was not an explicit pilot aim[11] even though expedited timetabling is integral to the regime. Time interval data are likely to be skewed by inclusion of cases pending for a year or more before the pilots began. One judge observed that: "I still accept cases identified late. Even with delays, the section 28 process is much better."

Successive governments considered s.28 to be unworkable on the basis that disclosure was unlikely to be completed until just before trial.[12] Tight timetabling of disclosure by lead judges enabled many s.28 recordings to take place months before trial: "We insist on disclosure keeping to the timetable and resist late, inappropriate requests". However, as more judges became involved at pilot courts, control was not always so exacting: some s.28 recordings have had to be re-

1 Home Office Advisory Group on Video-recorded Evidence (1989).
2 Youth Justice and Criminal Evidence Act 1999 s.27.
3 Ministry of Justice *Section 28 Newsletter* (27 March 2014). Interest in s.28 revived following the judgment in *Barker* [2010] EWCA Crim 4 and publication of *Children and cross-examination: time to change the rules?*, J. Spencer and M. Lamb eds (2012) Hart Publishing.
4 Minister for Policing, Fire, Criminal Justice and Victims, Hansard, 6 July 2016, col 1016.
5 We are indebted to HHJs Cahill QC, Tapping and Collier QC for their comments: unless otherwise noted, quotes came from one of these judges. Thanks also to Registered Intermediary Rosemary Wyatt, who collated feedback from RIs involved in pilot cases. We did not have the opportunity to seek feedback from advocates, but the Criminal Bar Association plans to do so later this autumn.
6 'The aim of the pilot is to improve the court experience of young people, victims of sexual abuse and vulnerable witnesses who, as result of disability, illness, age or personal circumstances are also covered within scope': HM Courts and Tribunals Service *Section 28 Pilot* (27 March 2014.)
7 Judiciary of England and Wales *The Lord Chief Justice's Report 2015*, p 9.
8 Criminal Procedure Rule 3.9(3)(b). This commitment covers helping defendants as well as witnesses.
9 Judiciary of England and Wales *Judicial Protocol on the Implementation of section 28: Pre-recording of cross-examination and re-examination* (September 2014.)
10 HHJs Aubrey QC, Cahill QC and Tapping *Draft Guidance Note for s.28 ground rules hearings at the Crown Court in Kingston, Leeds and Liverpool* (September 2014.)
11 HM Courts and Tribunals Service *Section 28 Pilot* (27 March 2014), see fn 6.
12 See, for example, Spencer and Lamb 2012, p 13, fn 3.

scheduled due to failure to adhere to disclosure timetables.
Another barrier to implementing s.28 was concern that witnesses would probably have to give evidence again. Out of hundreds of witnesses, only one has been recalled to give further evidence, also dealt with by pre-trial recording (Protocol, para.50). Section 28 provides witnesses with finality (though non-eligible witnesses who are family members must still give evidence at trial). In the event of a re-trial, relatively common in vulnerable witness cases, s.28 evidence has already been captured. There is no risk that prosecutions will collapse simply because witnesses refuse to give evidence again.
Where multi-defendant trials are split, recorded cross-examination can be re-played as often as necessary rather than requiring the witness to attend each trial. For example, a "grooming" case with over 30 defendants but just one complainant is being managed as four trials. In a two-day s.28 hearing, lead counsel cross-examined on credibility, and then the witness was briefly questioned without repetition by other advocates. Relevant parts of the recording will be played at each of the four trials taking place over a year.
Section 28 can even be employed when trials are adjourned at short notice. In a non-pilot case involving an elderly witness and offences later described as "a grotesque breach of trust of the highest order",[13] parties were present for trial but it could not proceed as scheduled. As this occurred at a pilot court, it was decided to record the woman's cross-examination that day. The witness died before the re-scheduled trial, but her evidence was played to the jury and the case resulted in a guilty verdict.

Review and control of questioning
Section 28 cross-examinations often last less than an hour. As a result, trials are shorter. Pilot judges say: "Cases that used to end on a Friday now end on a Wednesday". This is regarded as the "pay-off" for time invested in preparing and reviewing questions beforehand.
All s.28 cases must have a ground rules hearing before the day of the recording (Protocol, paras 20, 62), facilitating "the judge's duty to control questioning if necessary" (Guidance, para.3). Length of cross-examination must be discussed (para.11). As noted above, this includes multi-defendant trials. In one "four-hander", the judge described counsel organising themselves into two pairs:

> "The first counsel asked questions for D1 (the main defendant) and D2. This lasted less than 15 minutes. This was followed by a break with the recording running, so that the jury saw how the child behaved. Second counsel then asked questions for D3 and D4 but was only allowed to deal with new matters. This was completed in less than 10 minutes. The process was not unfair. Only D1 was convicted and he is now serving a lengthy sentence."[14]

Proposed questions must be submitted in writing for review by the judge and any intermediary (Guidance, "Section 28 Defence Ground Rules Hearing Form"), preferably with alternatives depending on the witness's response.[15] The aim is to avoid grounds for intervention because all questions are agreed beforehand. One judge described the process as "very effective. If I've altered every question on the first few pages, I send counsel out with the remainder to revise the rest in their own time". Judges assess how questions can be simplified but they can also strike out those that are irrelevant, inappropriate, repetitious or simply comment. (These issues fall outside the intermediary's role and it is therefore helpful if judicial scrutiny precedes that of any intermediary.) The review encapsulates existing judicial responsibilities but this is the first time that they have been exercised quite so systematically.
In *Lubemba,*[16] the Court of Appeal confirmed that a trial judge: "is not only entitled, he is duty bound to control the questioning of a witness… He is entitled to and should set reasonable time limits and to interrupt where he considers questioning is inappropriate". The same issues arose in *RL,*[17] a s.28 pilot case where appellant counsel described the editing of questions as 'draconian' and claimed that his cross-examination was "emasculated". The Court refused permission to appeal.
Lubemba also stated that the trial judge "is not obliged" to allow a defence advocate to put their case to the witness. In s.28 cases, any such restriction must be discussed at the ground rules hearing. The defence must request directions about putting the case (for example, whether a witness is lying) or whether, due to witness vulnerability, the advocate should not do so. However, the Guidance emphasises that "it should not be assumed [putting the case] will be restricted" (Para.11).
Where restrictions on putting the case are justified, this is counterbalanced by opportunities to explain the defence case and such limitations to the jury.[18] Rather than insisting on the "right" to put their case, as happened initially, advocates may now come to ground rules hearings offering to forego putting their case or even asking any questions at all. Intermediaries assert that the evidence of almost all witnesses can be tested by challenging questions asked in a simple, direct way; not giving them the opportunity to do so is "throwing the baby out with the bathwater".
Judges differ in their approach to such defence requests. Some are robust:

> "I press advocates on how to challenge the witness when they say they can't – I insist on it";

> "I don't want counsel complaining at trial that they were not allowed to put their case. Virtually everything can be put in one way or other".

In contrast, others may accede to counsel's request:

> "It is okay if counsel declines to ask the key question. I don't usually ask it myself but sometimes prosecution will do so. However, all this should be hammered out at the ground rules hearing".[19]

Two recent training films (one for Judge Rook's vulnerable witness pan-profession advocacy course, being rolled out by the Inns of Court College of Advocacy, and the other made by the Judicial College) both show an advocate at the

13 http://www.dailymail.co.uk/news/article-3399482/British-diplomat-Moscow-learned-dying-mother-s-87-000-life-savings-stolen-family-paid-care-UK.html.
14 Para.33(b) of the Protocol provides for 'cross-examination by a single advocate if the case is multi-handed'. While the number of advocates has been reduced, it is unclear whether this provision has been invoked.
15 In the absence of intermediary advice, lawyers are expected to draft questions in accordance with toolkits at www.theadvocatesgateway.org; Protocol, para.30.
16 [2014] EWCA Crim 2064.
17 [2015] EWCA Crim 1215.
18 Criminal Practice Direction 3E.4.
19 Different approaches to this issue are discussed in Plotnikoff and Woolfson (2015) *Intermediaries in the Criminal Justice System: Improving communication for vulnerable witnesses and defendants*, Policy Press pp 225-236.

ground rules hearing who initially declines to put his case to a vulnerable witness and a judge "encouraging" him to do so in a short, direct manner.

Section 28 requirements are exacting and, at least initially, ground rules hearings took longer than the norm. The time involved depends on the preparedness of counsel. Some cases required more than one ground rules hearing, with emailed exchanges of questions in between. The schedule should allow time for the intermediary's review, otherwise draft questions are often sent to the intermediary the night before the ground rules hearing.

It is "essential" for the hearing to be conducted by the judge allocated to the s.28 recording and "highly desirable" for the same judge to conduct the trial (Protocol, para.60). Pilot judges feel that continuity of judge is desirable but not essential. Continuity of the defence advocate is expected (para.58), although changes have been accommodated due to illness. Where the judge or lawyer changes before the s.28 recording, ground rules need to be re-confirmed.

Continuity of prosecution advocate is not required, but questions asked by prosecutors in re-examination also need to observe ground rules and be carefully planned. After a "bad experience", at least one pilot judge rules that, where a prosecutor wishes to re-examine the witness, the s.28 recording will be paused for such questions to be reviewed. Intermediaries observe that even experienced advocates can revert to complex wording when unprepared.

The s.28 judge must timetable other matters, including refreshing the witness's memory and the court familiarisation visit; the latter must include "an opportunity not just to view but to practise" with the technology (Protocol, para.28). Intermediaries observe that having the judge and lawyers meet the witness at the court familiarisation visit, with the ground rules hearing to follow, helps inform the review of questions and ground rules decisions.

Outcomes

Judges report that a significant proportion of cases are resolved before trial, to the benefit of the complainant and the defendant. Defence advocates must certify at the ground rules hearing that clients know they will receive credit for guilty pleas entered before the s.28 recording, effectively the first day of trial (Guidance "Section 28 Defence Ground Rules Hearing Form"). Some guilty pleas were also prompted when defendants saw the strength of witness evidence.

For example, the only evidence linking defendants to an armed robbery was that of a nine-year-old eyewitness: the child's cross-examination was recorded, and the defendants pleaded guilty shortly afterwards. Section 28 also saved trial time and cost by enabling CPS to discontinue cases where witnesses failed to "come up to proof". Pilot judges thought that s.28 had little impact on jury verdicts. As one commented:

> "The effect of only seeing the witness on a screen will always be debated but what the jury sees in section 28 differs little from ordinary live link cases."[20]

Technology

What is recorded at the s.28 hearing and how this is shown to the jury have both changed since the pilots began. After the evaluation period ended, pilot courts were provided with large mobile screens to play evidential recordings to the jury. Initially, s.28 questioning was filmed to be shown on a split screen, with the questioner in court on one side and the witness in the live link room on the other. The first pilot case involved a four-year-old. The judge accepted the intermediary's recommendation that face-to-face questioning would enhance the child's communication, so the judge and advocates moved into the live link room. Although provided for in the Protocol (paras 37, 38) apparently this was not anticipated in selecting rooms for installation of pilot equipment. Some recordings took place, as one judge put it, with occupants "squashed in knee to knee". The split screen was unsuitable for this scenario and indeed, was quickly deemed inappropriate in all s.28 cases. The screen layout has since been changed so that the focus is now on the witness, with the questioner shown in "picture in picture" format.

Technology problems persist for the recording and playing of police interviews and s.28 hearings; sound quality is often poor. Close-ups are possible but are not routinely employed. Filming should accommodate communication aids. Sometimes their use was not clearly visible on screen: table height can be crucial. (Irrespective of camera focus, judges should direct intermediaries to describe what happens as aids are used and to repeat anything said by a quiet witness that may not be picked up by the recording.) The Protocol requires intermediaries to be "visible and audible" (para.37), but they are sometimes seated off-screen. Their position should be checked before filming starts.

Implications for roll-out

Section 28 is not just one more procedural change. As operated during the pilots, it represents a fundamental shift of approach, with the potential to deliver great improvements to the cross-examination of children and vulnerable adult witnesses and their experiences at court, and resulting benefits and potential savings for the criminal justice process. Evidence can still be tested but in a way that the witness understands and can cope with. The Government suggested that the Crown Court roll-out would begin in late 2016 or early 2017.[21] More lead time is likely to be needed, for example, to address secure management of s.28 recordings stored "in the cloud" (at present, they are played from disk). Implementation will be staggered. Nationally, the schedule should draw on experience thus far, with an oversight body to monitor and advise on how to "get it right first time". Locally, there should be an inter-agency implementation group and a designated court staff "expert" to address administrative and technology queries and monitor performance.

The pilots benefitted from assigning management of s.28 to a small group of committed judges before extending it to their colleagues. Is this feasible on a local or circuit basis? The roll-out strategy also needs to consider the potential number of applications at individual courts. It is desirable for s.28 to be made available to all eligible witnesses as quickly as possible, but will there be adverse consequences if all are included from the outset? Should there be a separate strategy for small courts?

20 Research shows no consistent difference to jury perceptions or conviction rates whichever special measure is used: L. Ellison and V. Munro (2013) *A 'special' delivery? Exploring the impact of screens, live links and video-recorded evidence on mock juror deliberations in rape trials* Social & Legal Studies, 23:1, pp 3-29; L. Hoyano and C. Keenan (2010) *Child Abuse: Law and Policy across Boundaries OUP.*

21 Former Justice Minister Mike Penning, Hansard, 6 July 2016, col 1016.

The impact on individual court workloads should be considered, especially in light of the increasing burden of sex offence cases.[22] Eligibility was reduced for the pilots; limitations on initial inclusion are also proposed in the Ministerial announcement.[23] Should pending cases be excluded? It may improve integration of s.28 if local police, CPS and courts are allowed to introduce it gradually.

Although s.28 results in saving of trial days, it also requires a considerable pre-trial investment of time from the judiciary. Advocates will have to "front load" case preparation even more than at present and commit to firm diary dates. There are listing challenges in accommodating longer ground rules hearings: pilot judges argue that fewer other matters should be put into the judge's list that day. The regime will have a rocky start if the initial influx of cases is hard to manage. Poor early practice is hard to reverse.

Local characteristics also affect the "learning curve". Leeds and Liverpool deal principally with one CPS and police area; both have a fairly consistent group of advocates, permitting lessons from practice to be consolidated. As a result, judges report that less time is required for s.28 ground rules hearings (though intermediaries report that, in contrast with the start of the pilot, these can now sometimes feel "rushed"). In Leeds, they have sometimes been "sufficiently dealt with electronically".[24] In contrast, criminal justice personnel and advocates at Kingston come from a wider area with high turnover: judicial time needed to manage these cases has not diminished.

The style and content of effective training also have implications for the roll-out schedule. Time is needed to allow pilot judiciary and experienced practitioners to play a key role. Section 28 training should coordinate with the roll-out of pan-profession advocacy training on vulnerability; that programme draws heavily on lessons from s.28. Those able to observe an experienced s.28 judge should do so: the ground rules hearing and resulting cross-examination are very different.[25]

Even in advance of roll-out, some judges around the country are asking lawyers to submit cross-examination questions for review when dealing with a vulnerable witness or defendant. However, many advocates and some judges (whose own unscripted questions may confuse the witness) appear insufficiently equipped for this task. For example, a judge pre-approved this complex question for a five-year-old:

> "If I said that K told you that if you said S did something to you, she would get some money. Do you agree?"

Those delivering training in communication must have excellent skills *and* be committed to the new approach. Experienced intermediaries should play an integral part in s.28 training and implementation: it is a weakness that they are not involved in the roll out of vulnerable witness advocacy training.

Final thoughts

Intermediaries have been appointed for only a small proportion of s.28 witnesses. Reasons included police failure to seek intermediaries for investigative interviews; pressure on intermediary numbers; and difficulties in fulfilling the sensible the Protocol requirement that courts can only appoint an intermediary if available for both the ground rules hearing and the recording (s.31). Further recruitment would relieve some pressure at roll-out but there is also a need to address the waste of intermediary time elsewhere in the system. Non-s.28 ground rules hearings and trials are often listed without checking intermediary availability, and trials – contrary to policy – are warned instead of fixed, unnecessarily blocking intermediary availability to other courts.

At present, s.28 recordings take place in court live link rooms. Witnesses wishing to give evidence in court cannot be filmed; as a result, at least one witness declined to participate in a s.28 recording. Having a choice about how to give evidence can affect the quality of witnesses' evidence.[26] Improved awareness of options would help. "Combined special measures", preventing the defendant from seeing the witness over the live link, are available to witnesses in s.28 hearings (Protocol, para.38) and presumably again at trial, but this option does not appear to have been used.

Witnesses at s.28 hearings sometimes encounter defendants in or around the building, as often happens at trial. This could be avoided if hearings were filmed at remote link sites[27], which should be close enough to court to accommodate introductions to judges and advocates. Remote sites could also provide more spacious and comfortable facilities. Use of non-court locations for s.28 should be piloted.

Youth court defendants have essentially an automatic right of appeal to the Crown Court; this requires a re-hearing so that witnesses (many of whom are also children) are expected to evidence again. This could be avoided by filming cross-examination of young or vulnerable adult witnesses in the youth court, even if this is only done at trial. This is even more desirable in light of s.53 of the Criminal Justice and Courts Act 2015, which encourages youth courts to retain jurisdiction in more serious cases.

Some may disagree; but it seems to us that after many years on the shelf, s.28 has proved to be not a dusty relic but a cutting-edge device. As one pilot judge concluded:

> "Ten, or even five years ago, I couldn't have forecast the changes we've achieved."

Despite the opposition to s.28 from some quarters Lord Judge, former Lord Chief Justice, anticipates that within the next decade we will be "astounded at what all the fuss was about".[28]

[Editor's note: The Government commitment to rollout and evaluation report were published on 15 September, just as this Issue went to press.]

22 Sex offence cases, many of whose witnesses are considered 'vulnerable', now account for 50% of Crown Court cases. Judges reportedly sat a further 7,500 days last year as a result: http://www.dailymail.co.uk/news/article-3578287/Sex-offence-cases-half-crown-court-time-Long-trials-involving-mobile-phone-evidence-straining-criminal-justice-system.html#ixzz4EOHyIOIq.

23 'We will start with the roll-out in the Crown Courts for those under 18 and for witnesses with mental illness', former Justice Minister Mike Penning, Hansard, 6 July 2016, col 1016.

24 Ann Coffey MP, Hansard, 6 July 2016, col 1014.

25 Hayden Henderson, PhD student working with Professor Michael Lamb at the University of Cambridge, is analysing s.28 and non s.28 ground rules hearings and cross-examinations (80 in each sample).

26 J. Cashmore and N. De Haas (1992) *The Use of Closed Circuit television for Child Witnesses in the ACT* Australian Law reform Commission.

27 See Toolkit 9, '*Planning to question someone using a remote link*' www.theadvocatesgateway.org.

28 Lord Judge (2013) *Half a century of change: the evidence of child victims* Toulmin Lecture in Law and Psychiatry, p 9.

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