SWEET & MAXWELL

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Archbold Review

Cases in Brief

Disclosure—whether documents created by or received by a defendant fall outside disclosure scheme in Criminal Procedure and Investigations Act 1996—whether memory refreshing documents fall outside the scheme

WHALE AND WEST [2016] EWCA Crim 742; June 21, 2016

The server upon which W's business emails were stored was in the hands of the Crown. He sought, in the course of his trial for fraud, disclosure of some or all of his emails as memory refreshing documents. His renewed application for leave was refused – contrary to his submission, the Criminal Procedure and Investigations Act 1996 disclosure regime did apply to documentation created (or received) by an accused himself. Further, his submission that documents said to be required for memory refreshing fell outside the regime altogether was unarguable.

Evidence—witness anonymity orders—Coroners and Justice Act 2009 ss.86-90—continuing duty to review

CALVERT AND OTHERS [2016] EWCA Crim 890; July 8, 2016

A judge has an on-going duty to review the making of a witness anonymity order under the Coroners and Justice Act 2009 ss.86-90. If the basis upon which an order was made were to be displaced by the way in which the evidence emerged during the trial, such that the trial might potentially become unfair, it must be revisited.

Manslaughter—gross negligence—doctor's breach of duty not assessing patient—whether at time of breach risk of death obvious

RUDLING [2016] EWCA Crim 741; June 21, 2016

The court refused permission for the Crown to appeal under the Criminal Justice Act 2003 s.58 against a finding of no case to answer against R, a general practice doctor, on a charge of gross negligence manslaughter. The negligence alleged was a failure to see a child suffering from a rare disease, following a telephone consultation with the child's mother. Had the child been seen and as a result admitted to hospital, he would have received life-saving treatment. The Crown's expert's evidence was that R should have seen the child, to assess whether his condition was life-threatening. To succeed on appeal, the Crown must make out s.67(c) of the 2003 Act, that "the ruling was a ruling that it was not reasonable for the judge to have made". Thus it must be outwith the range of reasonable conclusions which were open to her (*R v B* [2008] EWCA Crim 1144, *The Times* May 22, 2008; *R v M and T* [2009] EWCA Crim 2848); and the Court would recognise the judge's advantage in hearing the evidence. In any event, the ruling was right. The Crown's expert was not able to say that at the time of the telephone call there was an obvious and serious risk to life: rather, the reported symptoms together meant that a face-to-face assessment was necessary because it could be something serious. The elements of this form of manslaughter were set out in *Prentice, Adomako and Holloway* [1994] Q.B. 302, CA, *Adomako* [1995] 1 A.C. 171, [1994] 99 Cr.App.R. 362, HL and *Misra* [2004] EWCA Crim 2374, [2005] 1 Cr.App.R. 21. Relevantly, for gross negligence manslaughter to be made out, at the time of the breach of duty, there must be a risk of death, not merely serious illness; the risk must be serious; and the risk must be obvious. A GP faced with an unusual presentation which was worrying and undiagnosed may need to ensure a face-to-face assessment urgently in order to investigate further. That may be in order to assess whether it was something serious, which may or may not be so serious as to be life-threatening. But a recognisable risk of something serious was not the same as a recognisable risk of death. An obvious risk was a present risk which was clear

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and unambiguous, not one which might become apparent on further investigation.

Prosecution—consent by the DPP—whether charging decision by Crown prosecutor amounts to consent—when proceedings instituted

WALKER [2016] EWCA Crim 751; June 29, 2016

On an application for leave to appeal referred by the single judge, W attacked the safety of his conviction in 2009 via the submission that it was unsafe because the charges against his co-accused G were a nullity, the DPP not having given consent for charges under the Criminal Law Act 1967 s.4 until after sending to the Crown Court (in reliance on *Welsh* [2016] 1 Cr.App.R 9). The trial in W's case was before *Welsh* and *Lambert* [2009] EWCA Crim 700, [2009] 2 Cr.App.R 32 (establishing sending as the key threshold), at a time when decisions such as *Elliott* [1985] 81 Cr.App.R. 115, and *Whale and Lockton* [1991] Crim.L.R. 692 applied the principle that proceedings were instituted when the accused came to court to answer the charge. Leave was refused: the requirement for consent in s.4(4) of the 1967 Act would be satisfied if the proceedings were instituted by the DPP or with her consent. As a matter of statutory construction, if the DPP instituted the proceedings the requirements of the subsection were satisfied and there would be no need for a separate consent to be given. Consent was only required if some person other than the DPP, such as the police, instituted the criminal proceedings. Since the statutory charging scheme in the Police and Criminal Evidence Act s.37B was introduced (Criminal Justice Act 2003) it was the DPP, through Crown prosecutors, who determined charge. A Crown prosecutor who had decided that there was sufficient evidence to charge, had identified the relevant offence and had notified the police of this decision had either instituted proceedings personally, in which case no separate act of consent was necessary or, alternatively, had required the police to charge the offender, in which case notification of that decision constituted the giving of consent. To consider the evidence, determine the charge and then inform the police that they must charge an accused with that offence necessarily connoted consent to the charge. It being a leave application, it was not necessary to determine whether that giving of consent also constituted the institution of proceedings or whether proceedings were instituted by the subsequent notification of the charge to G, or by his sending to the Crown Court, in the light of *Welsh*. *Welsh* was a decision relating to the Attorney-General's consent, and it may be that in a future case that issue will have to be resolved.

Reporting restrictions—Contempt of Court Act 1981 s.11—"matter"—whether order may restrain publication of things said in open court—form of orders—handling of reporting restriction applications in the future

RE TIMES NEWSPAPERS LIMITED, R V ABDULAZIZ [2016] EWCA Crim 887; July 8, 2016

At the trial of A, the court made an order under the Criminal Procedure Rules 2015 pt.6 that certain evidence would be heard *in camera*. On resuming the public hearing after making the order, a reporter in court asked the judge on what grounds the order had been made. The judge gave a brief explanation, repeating the wording of an email sent without covering restriction to the appellant. Thereafter, the judge made an order on the application of the Crown under the Contempt of Court Act 1981 s.11 prohibiting reporting of the wording. The appellant opposed the order, and the Crown applied for part of the application to be heard *ex parte*, which was also opposed by the appellant. The judge allowed both prosecution applications. The Court refused the appellant's appeal under the Criminal Justice Act 1988 s.159.

(1) As to whether it was *necessary* (*In re Guardian News and Media Ltd* [2014] EWCA Crim 1861, [2015] 1 Cr.App.R. 4, at [10] *et seq; In re Guardian News and Media Ltd.* [2016] EWCA Crim 11, [2016] 1 W.L.R. 1767, at [47]-[50]) to depart from the principle of open justice in respect of the wording, having heard evidence *ex parte*, the Court concluded that there were compelling reasons to do so – publication would have frustrated the purpose of the order to which the wording related.

(2) As to whether the court had jurisdiction to restrain publication of the wording, where it had been given in open court, the only power capable of being invoked was s.11 of the 1981 Act. The use of the wording by the judge in open court was a mistake (subsequently repeated by the judge in further orders). Restraining the publication of something said in open court was rightly and plainly a matter of extreme sensitivity, but that it was said in open court was not fatal to any restraint. There was a jurisdiction to correct mishaps: in *In re Times Newspapers Ltd* [2007] ECWA Crim 1925, [2008] 1 W.L.R. 234, although the order there in dispute was quashed, the Court made clear that there was a distinction between what was said in open court and what was published, and statements in open court could be the subject of an order under s.11. On the wording of s.11 the directions prohibiting publication were linked to the purpose for which the matter was withheld in the first place. "Matter" did not have a fixed meaning, but depended on the context and was fact sensitive. In this case, the appellant argued that the "matter" was the evidence to be heard *in camera*; the Crown that it included the reasons given in the wording. While the express terms of the order dealt only with the evidence, as a matter of necessary implication, the "matter" allowed to be withheld from the public must also cover the reasons for that order, the wording – the publication of those reasons would otherwise have had the effect of revealing the nature of the evidence to be withheld from the public, and would frustrate or undermine the purpose of the order. Orders, especially those restraining publication and so derogating from the principle of open justice, must be precise. Save most exceptionally, the Court would expect their express terms to deal exhaustively with the matter to be withheld from the public. In this case, however, the Court was driven to its conclusion, exceptionally, by the stark and strict *necessity* for the implication.

(3) For the future, the Court observed, first, that when there was a hearing *in camera*, it was of the first importance to give proper attention to what was thereafter said in open court. As provided by Criminal Practice Direction I (General Matters) 6B.4(i), the order must specify "…whether or not the making or terms of the order may be reported or whether this itself is prohibited". Secondly, applications for *in camera* hearings and such hearings themselves could give rise to complexity. In this case, the matter arose unexpectedly and had to be dealt with by the trial judge. The Senior Presiding Judge may, however, wish to consider what arrangements could or should be made via presiding and resident judges with regard to the allocation of such ap-

plications, either to resident judges or to judges specifically designated by them.

Trial—fitness to plead—where defendant becomes unfit during trial—mandatory nature of statutory procedure in the Criminal Procedure (Insanity) Act 1964—requirement for rigorous examination of expert evidence of unfitness
ORR [2016] EWCA Crim 889; July 7, 2016
O became unfit to be cross-examined after giving lengthy evidence in chief. Following various discussions with counsel, the judge declined O's application to discharge the jury and persisted with the trial, prosecuting counsel's closing speech being edited to exclude any material which O had not been in a position to meet in cross-examination. The judge was wrong to so proceed. Once the issue of fitness to plead had been raised it must be determined. The issue of "fitness to plead", so called in the Criminal Procedure (Insanity) Act 1964 s.4, but more aptly identified as "fitness to participate in the trial process", since the supposed disability could be determined at any stage up to verdict or acquittal, could not be determined by reference to part only of the trial process. The capacity to be cross-examined was part and parcel of the defendant's ability to give evidence in his own defence. The Court noted that the Criminal Justice and Public Order Act 1994 s.35(1)(a) catered for the situation when "the physical or mental condition of the accused makes it undesirable for him to give evidence" supporting the Crown's contention that a finding that O was unfit to give evidence in cross-examination did not necessarily determine the question of "fitness to plead". *Pritchard* (1836) 7 Car & P 303 identified three factors for the jury to consider in determining the defendant's ability to participate in his trial, and had been endorsed by the Court of Appeal on several occasions. The extended formulation at first instance commended in *John M* [2003] EWCA Crim 3452, [2004] M.H.L.R. 91 (and endorsed in *Walls* [2011] EWCA Crim 443, [2011] 2 Cr.App.R 6), included reference to the appellant's ability to give evidence:

> "the defendant must be able (a) to understand the questions he is asked in the witness box, (b) to apply his mind to answering them, and (c) to convey intelligibly to the jury the answers which he wishes to give. It is not necessary that his answers should be plausible or believable or reliable... Nor is it necessary that the defendant should be able to remember all or any of the matters which give rise to the charge against him …"

The recent Law Commission report *Unfitness to Plead* (Law Comm No 364, [2016] EWLC 364) favoured a statutory formulation of the test to encompass the abilities identified in *John M*, informed by the corresponding observations in *SC v United Kingdom* (2005) 40 E.H.R.R. 10. In O's case, the judge explicitly found that the appellant had been fit to participate in his trial up to the point of cross-examination and thereby implicitly determined that the appellant was no longer able to fully participate in his trial within the *Pritchard*-refined criteria. In these circumstances, the procedure to be adopted was clearly set out by the Criminal Procedure (Insanity) Act 1964, s.4A. This was a statutory mandatory requirement which could not be avoided by the court's general discretion to order proceedings otherwise, however beneficial to the defendant that may appear. It followed that the jury should not have been allowed to return a verdict, other than a verdict of acquittal if they were not satisfied on the evidence already given in the trial that the appellant did the act charged against him. The Court noted that the Crown had not contested O's inability to participate, which was endorsed by the two psychiatrists who examined him, and observed that these highly unusual factual circumstances may have merited a more detailed exploration of the experts' reasons and conclusions, not least in terms of possible means of facilitating the appellant being cross-examined in the presence of an intermediary, and regretted that the proceedings did not articulate the "rigorous examination and a careful analysis against the *Pritchard* criteria as interpreted in *Podola* (1959) 43 Cr.App.R. 220" referred to in *Walls* at [38].

SENTENCING CASE

Assistance to law enforcement authorities
AXN AND ANOR [2016] EWCA Crim 590; May 27 2016
The court considered the following three issues arising when the police have been asked by an offender to provide confirmation of assistance provided to authorities at their sentencing hearing: (i) the obligation of the police to provide confirmation; (ii) the appropriate course in the event of a dispute between the police and the offender about the police's refusal to provide any confirmation or about the information the police supplied; (iii) the circumstances in which a court should grant an adjournment if the request for assistance from the police was raised late.

(i) The obligation of the police to provide confirmation
Three situations arose in these appeals: (i) where the police declined to engage; (ii) where the police engaged, saw the offender, but did no more; (iii) where having engaged and made an assessment, the police concluded the assistance was of no value.

The police decline to engage or after engagement do not provide any information
Although the court will always expect the police to inform the court of the fact that the police have decided not to provide a text as matter of case management, it is sufficient if the police state that they will not provide any information in relation to the offender's assertions of assistance. They are not required to give any explanation of their reasons for the decision or the stage at which they decided not to provide any information. The statement must be signed by a senior officer of police (normally a superintendent) or equivalent senior official in other agencies.

The police after engagement decide the assistance is of no value
It is again a matter for the judgement of the police as to the extent of the information they wish to provide. Their judgement is a judgement to be exercised in the public interest and the interests of justice; it is not for a court to inquire further. There are proper safeguards to protect offenders from error or malpractice in such cases: the Investigatory Powers Tribunal, the IPPC and other bodies listed in [26]. These safeguards are both sufficient and more appropriate than an attempt by a sentencing court to try and examine why the police declined to provide a text.

(ii) The position if the offender disputes the contents of the text
As said in *X* [1999] 2 Cr.App.R 125, it is not the function of the sentencing court to question the police as to the accuracy of the text supplied; if there is an issue, that can be addressed through the safeguards mentioned in para.[26] of the judgment.

(iii) Late requests for assistance resulting in an application for an adjournment
An offender who does not offer assistance before conviction and sentence will ordinarily not be able to rely on the provision of information after conviction before the Court of Appeal.
It is of the greatest importance that an offender ensures that the sentencing court has in the form of a text any confirmation by the police of the assistance which the offender has provided and its value. A court should not readily contemplate granting an adjournment unless the request to the police had been made in a timely manner and the delay arose because the police were unable to provide information. A court should not ordinarily grant an adjournment because a request was made late.

Comment

Transition and the Law Commission's New Sentencing Code

By Vincent Scully[1]

Background: A New Sentencing Code for England & Wales
Since January 2015, the Law Commission has been working to create a New Sentencing Code for England & Wales as part of its 12th Programme of Law Reform. On 20 May, as part of this project, the Commission published a report[2] containing recommendations on transition to the Code. This follows on from a public consultation launched last summer, and reported in *Archbold Review*.[3] Transitional provisions are typically seen as a tedious and largely irrelevant topic. However, the Commission believes that the way the issue is currently dealt with is one of the main causes behind the atrocious state of our sentencing law, and that a new approach to transitional provisions can dramatically improve the law in this area.

Why is transition a problem?
Changes in sentencing law are normally made only prospectively. This fact, combined with the high frequency of change in the law, rapidly leads to many different versions of the law being in force for different classes of offender, any of which a court might have to use in a given case. This would be bad enough in itself, but the way the classes of offender are defined also varies wildly across the law – for example, some new provisions apply only to people committing offences after the date of commencement, some to those convicted after that date, and some to those sentenced after that date. The final complexity arising from transitional provisions is that they are often individually comprehensible but collectively almost impossible to navigate, a problem that is exacerbated by their being tucked away in obscure sections of a large number of different Acts or in secondary legislation. Further, much of this law is not easily accessible to the public.
Consultees agreed that these were major problems. The Council of HM Circuit Judges stated:

> The present state of sentencing law is a disgrace to our jurisprudence. It is totally unacceptable to have so much complexity and uncertainty that result from layer upon layer of statutes that have been brought into effect in a piecemeal fashion or have never been brought into effect at all…

During the drafting of the issues paper, the Commission reported[4] that:

> According to policy officials, the landscape has become so confused that they cannot always be confident when advising on the likely effects of proposed sentencing initiatives. Unintended consequences of new statutory procedures cannot reliably be identified and guarded against.

What will the Code do about transition?
The Commission's proposals on consultation aimed to resolve these issues, both for now and for as long as the Code exists. An Issues Paper published last July set out their initial view on how to do this: they proposed a "clean sweep" approach to sentencing law: any sentencing hearings begun under the Code will be carried out under it.
The Commission recommends that sentencing hearings are considered to start, and the law be "fixed" at that time for the purpose of the hearing, at the moment of conviction or guilty plea. This is because no other point is certain enough to be used for this purpose.
The only exceptions to this approach would be where fundamental rights considerations demand something different, and in those rare cases, the rules to be applied will still be in the Code, with the dates of their application made clear on the face of the provisions. Even in those cases, the Code will be a boon to practitioners, since the Code makes clear what provisions apply, and those provisions will be accessible without having to look to historic, repealed legislation which has been "saved" for limited purposes.
Both the general principle and the exceptions carved out

1 Former Research Assistant at the Law Commission in the Criminal Law Team.
2 *A New Sentencing Code for England and Wales: Transition – Final Report*, Law Com No 365, http://www.lawcom.gov.uk/project/sentencing-code/
3 P Humpherson, Issue 7, 24 August 2015, pp 5-7; *Sentencing Procedure: Issues Paper 1 – Transition* (also available from the link above).
4 *Ibid n 2 above.*

from it were overwhelmingly supported on consultation, with Professor Andrew Ashworth CBE QC,[5] writing that:

> I think the paper confronts the difficult issue of non-retroactivity in a way that is both practical and compatible with the current understanding of the European Convention on Human Rights.

Because of this extensive support, the Commission's recommendations are largely unchanged from the consultation proposals.

So, what are these fundamental rights limitations to the clean sweep approach? The primary limitation is that the offender should not be given a more severe punishment, taken as a whole, than would have been available at the time of the offence(s) giving rise to the conviction. Normally, this is very easy to apply: sentencers can simply look at the maximum penalty at the time the offender committed their offence (e.g. two years' imprisonment for an old offence of indecent assault), and not exceed it. A problem only arises if a combination of penalties is being imposed: for example, two years' custody, plus a heavy fine and several punitive preventive orders. For this limited class of cases, the Commission recommends that a simple five-step process be followed to ensure that rights under the ECHR and at common law are not violated.

The Commission has considered a wide range of possible new sentence types to see whether their retrospective introduction would offend against fundamental rights principles. Whilst perhaps not strictly necessary, they recommend that at least three situations be excluded from the clean sweep approach. First, they recommend that any provision which sets a minimum sentence level should be applied only in cases where the offence that triggers it occurred after the provision was brought into force. Secondly, any new laws created which mandate some increase in sentence because of the offenders' past offending should only apply to cases where offence for which the court is sentencing the offender occurs after they have been brought into force. Finally, new laws creating types of sentences without identifiable last possible release dates (indeterminate sentences) should only be available in cases where the offence for which the court is sentencing the offender occurs after they have been brought into force.

The clean sweep approach in practice

Chapter 5 of the report, together with an appendix which has diagrams using various hypothetical scenarios, sets out the practical implications of the clean sweep approach. The "central case" is where there is a change in sentencing law which post-dates the offence but pre-dates conviction. In such a case, as described above, the latest version of the law will apply, subject only to sentence being limited to the maximum penalty at the time of the offence and any other exceptions from the clean sweep.

More complex are cases where the offender returns to court after a sentencing hearing. An example of this would be where a non-custodial sentence was given and then breached. In many cases, this gives the court a power to re-sentence. The report suggests that the law the offender should be resentenced under is that which exists at the date on which the breach is proved. This is essential because otherwise the court would be forced, contrary to the clean sweep approach, to look back to the law as it existed a long time ago. To give one example, an unpaid work requirement continues to subsist if not completed,[6] even if the community order to which it is attached has long since expired. Thus an offender could be brought back to court many years after first being sentenced – and complexity is reintroduced into sentencing law if, in that situation, the court must look back to the law as it existed when the sentence was imposed.

How will the Code be implemented?

The current sentencing law has been established by the Commission in a 1300-page document, which was open for six months to public consultation on its completeness and accuracy.[7] The Code is primarily about making that law more coherent, simpler, and easier to apply, rather than changing sentencing policy. To put it another way, it is about changing how a sentence is arrived at rather than the sentence itself. For this reason, despite the fact that the Code will clearly be a colossal Bill in terms of the number of clauses, it is proposed to enact it through a special consolidation procedure, since it uncontroversially replicates the effect of the law that preceded it. This will enable it to have a rapid progression through Parliament, with almost all debate taking place before an expert committee rather than on the floor of the house.

There are some parts which are unsuitable for this, primarily the transition change: this is not in the existing law, so it cannot be consolidated. Instead, a clause implementing it (and another allowing for minor changes to be made to the existing law to facilitate the consolidation) would need to be included in a Government programme Bill prior to the Code Bill being introduced. Only then can the Code Bill, as a consolidation, take into account these substantive changes to the law within the special consolidation procedure. The transition and other changes will actually be commenced at the same time as the Code, so in the end – despite having two separate Acts of Parliament – the law will only change once.

Conclusion

The initial reaction to hearing of a proposal for retroactive legislation might be one of surprise and concern. However, that concern would be misplaced here. There is a clear case for having retroactive legislation in sentencing – the disastrous state of the present law. Further, it will ultimately make very little difference to offenders: if you are convicted in 2020 (after the Code has come into force) of a minor offence committed in 2001, under the Code you will receive a more community-based penalty than the one which was then available. This is unobjectionable, both because the change is minimal and because in any event the sentence is considerably less than the maximum available (which must *always*[8] be imprisonment for a community penalty to be available).

The Law Commission has built extensive safeguards into its scheme to ensure that no offenders' fundamental rights are violated by this novel approach. If enacted, it will enable layers of old law to be swept away, and for sentencing law to be accessible to the public for the first time in over a decade.

5 Emeritus Vinerian Professor of English Law.

6 Criminal Justice Act 2003, s.200(3).

7 Law Commission, Sentencing Law in England and Wales–Legislation Currently in Force, *http://www.lawcom.gov.uk/project/sentencing-code/#collapse1*.

8 Issues Paper 1, para 5.9.

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Feature

The "Roadmap Directives" in UK criminal procedure: now and post-Brexit

By Jodie Blackstock[1] and Alex Tinsley[2]

Introduction

This article discusses two EU standards applicable in UK criminal cases: Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings (the "Interpretation & Translation Directive") and Directive 2012/13/EU on the right to information in criminal proceedings (the "Right to Information Directive") (together, the Two Directives). It reviews their background and (current) constitutional position in UK law, then considers each directive and the way it has been implemented in England and Wales. Particular aspects are raised for criminal practitioners to consider further.

While the recent referendum vote in favour of the UK leaving the EU on 23 June will alter our adherence to EU law dramatically, withdrawal is still distant. In the intervening period the opportunity should not be missed to ensure the full protection of the safeguards provided in the Directives for suspects and defendants in England and Wales. This said, there are now new questions as to what effects and relevance such rules will have following the UK's exit; this article provides an initial view on that issue.

Background

Mutual recognition and mutual trust

EU Member States cooperate closely on matters related to criminal law through cross-border systems like Framework Decision 2002/584/JHA on the European Arrest Warrant. The central feature of most of these systems is the concept of "mutual recognition": a decision "issued" by a judicial authority of another Member State must be "executed" by the other Member State, subject to only very limited grounds for refusal. The concept in turn depends upon "mutual trust": the presumption that, although they may work in very different ways, each Member State's justice system will respect the fundamental rights of the person concerned.

Experience, however, has shown that Member States' formal adherence to the European Convention on Human Rights (the "Convention") and other international standards is widely varied.[3]

The Roadmap Directives

In order to strengthen the foundations of mutual trust, the EU Member States created a legal basis via the Lisbon Treaty for EU directives governing "the rights of individuals in criminal procedure".[4] These would be "minimum rules", which would have to have regard to the "different traditions" of the Member States' justice systems. In other words, the EU measures would build upon the protection provided by the Convention by imposing further standards, without dictating their national procedures. Mutual trust would thereby be enhanced.

In 2009 the Council adopted the Roadmap for strengthening procedural rights of suspects and accused persons[5] (the "Roadmap") sketching a step-by-step plan for the adoption of Directives on the above legal basis. This first programme is now complete, with six directives adopted in total. However, the UK secured an "opt-out" for all measures relating to justice and home affairs in the Lisbon Treaty,[6] meaning that Roadmap measures only apply if the UK chooses to participate. To date, it has chosen to opt in only twice, in respect of the two Directives with which this article is concerned.

The Directives

General points[7]

Some key general points should be noted. First, the Directives apply in all domestic criminal cases: there is no need for a cross-border element. Secondly, the application of the Directives is different to the fair trials standards provided by Art.6 of the Convention, which are given effect in the UK through the Human Rights Act 1998. The Directives form part of the corpus of EU law that is given binding effect through s.2 of the European Communities Act 1972: this means that UK law must be interpreted "subject to" EU law.[8] And finally, their interpretation is ultimately a matter for the CJEU at Luxembourg, which means English courts – including the Crown Court and magistrates' courts – may refer questions to the CJEU for preliminary rulings (see p.8 below).

The Interpretation & Translation Directive

The Directive

The Interpretation & Translation Directive was adopted in 2010 and had to be implemented by 27 October 2012. It applies to "persons who do not speak or understand the language of the criminal proceedings" and applies throughout criminal proceedings, i.e. in police custody and at court. It contains two distinct rights: interpretation (Art.2) and translation (Art.3) and a set of general provisions concerning record-keeping, quality control and other matters. These provisions are amplified by 36 recitals.

1 Barrister and Director of Criminal Justice at law reform organisation JUSTICE.

2 Pupil barrister at Church Court Chambers, former coordinator of the Legal Experts Advisory Panel (LEAP).

3 For a detailed review of the flaws in mutual recognition and mutual trust on the basis of human rights violations, see: *http://2bguk8cdew6192tsu41lay8t.wpengine.netdna-cdn.com/wp-content/uploads/2015/01/FTI-and-Justice-response-to-Balance-of-Competences-Review-policing-and-criminal-justice.pdf*

4 See Article 82(2)(b) of the Treaty on the Functioning of the European Union ("TFEU").

5 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (OJ 2009 C 295, p.1).

6 Protocol (No 21) [to the TFEU] on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

7 For a fuller analysis of the legal effects of the Directives, see S. Peers, *EU Justice and Home Affairs Law* (OUP, 2016).

8 See Case C-617/10 *Åklagaren v Hans Åkerberg Fransson,* Grand Chamber (26 February 2013) for a good comparison of this.

Article 2 of the Directive establishes the requirement for interpretation before investigative and judicial authorities, including in "police questioning, all court hearings and necessary interim hearings". The right includes assistance for those with hearing or speech impediments (it thus covers British Sign Language interpretation for the deaf). It applies, "where necessary for the purpose of safeguarding the fairness of proceedings," for communication between suspect and counsel. The interpretation must be of a "quality sufficient to safeguard the fairness of the proceedings", enabling defendants "to have knowledge of the case against them" and to "exercise their right of defence". There must be a possibility to complain if the interpretation does not meet that standard.

Article 3 establishes the requirement for translation of "essential documents". The Directive establishes some documents as always being essential: any decision depriving a person of his liberty, any charge or indictment, and any judgment. Beyond that, the Directive requires that national authorities decide, in any given case, whether other documents are essential. The Directive includes some flexible exceptions: there is no requirement to translate passages of essential documents not relevant for the purposes of enabling defendants to have knowledge of the case against them; and a written translation may exceptionally be replaced by oral translation or summary. The right to translation (unlike interpretation) may be waived, providing the consequences are understood.

England and Wales implementation

The Directive was implemented in England & Wales primarily through amendments to the Police and Criminal Evidence Act ('PACE") Code of Practice C and to the Criminal Procedure Rules ('Crim PR"). In relation to police station procedures, changes were made to paragraphs 3, 11 and 13 of Code C, which should be reviewed in light of the requirements of the Directive. In relation to interpretation, the general requirement to provide an interpreter for a person who does not "appear" to speak or understand English is set out in para.3.12 and para.13 makes extensive provision for police interviews via interpretation, referring explicitly to the Directive and its quality requirement. Paragraph 13 also governs translations, which must, notably, include a translation of the Notice of Rights and Entitlements (the content of which is itself governed by the Right to Information Directive).[9]

So far as court proceedings are concerned, the main amendment was to Rule 3.9 Crim PR. The Rule provides that the court must take every reasonable step to facilitate the participation of the defendant, which includes establishing whether the defendant needs interpretation. Where this applies, the court must arrange for interpretation at "every hearing". On application by the defence, the court must give "any direction" it thinks appropriate where complaints arise as to the quality of interpretation provided.

Aspects for further consideration

In all discussions of this measure, attention is focused upon the issue of the quality of interpretation. Words can make a big difference – "annoyed" describes a different state of mind to "upset', for instance – so misinterpreted statements may be prejudicial to the defendant. While it is obvious when things are going badly wrong with interpretation, subtler differences in descriptive language are much harder to spot. Diligent action by police station representatives or court advocates is necessary to identify and address any issues of quality in interviews and/or court proceedings.

Particular issues may arise in respect of prosecution reliance at trial on interviews conducted via interpretation where a misunderstanding is detected only later. The court, being bound by the overall objectives of the Directive, will need to take the appropriate remedial action, such as excluding the interview outright or directing the jury to an agreed alternative as to what was in fact intended, unless it is able positively to satisfy itself of the accuracy of the interpreted version. Other practical issues may also arise: the Crim PR, for instance, clearly require interpretation at "every hearing" but are silent on conferences between defendants, solicitor and counsel pre-trial and at court; if there are multiple defendants, the court interpreter cannot work in the confidential conferences of each. In this situation, solicitors may need to seek prior authority to engage separate interpreters for conferences during trial. Arguments as to costs should be met with the answer that, under Art.5 of the Directive, the costs are to be borne by the Member State without exception.

The Right to Information Directive

The Directive

The Right to Information Directive was adopted in 2012 and had to be implemented by 2 June 2014. It applies to all suspects and defendants throughout criminal proceedings. It contains three rights: (1) the right to know your rights (Arts 3, 4 and 5), (2) the right to know the case against you (Art.6), and (3) the right of access to the evidence against you (Art.7), and as with the Interpretation Directive, additional articles on record keeping, remedies and training. These are amplified by 45 recitals.

Article 3 requires a minimum of five specific rights to be notified to persons, as they apply under national law in order to "allow for those rights to be exercised effectively". These are (a) access to a lawyer; (b) legal aid and the conditions of obtaining it; (c) reasons for arrest/charge in accordance with Art.6; (d) interpretation and translation; and (e) remaining silent. The information can be given orally or in writing. Arts 4 and 5 require a "letter of rights" to be provided when a suspect is arrested, either on a domestic warrant or EAW, which they should be given time to read and be allowed to keep. This should contain the five rights already mentioned, but also information about how other detention rights apply in national law, such as access to evidence, consular authorities, urgent medical assistance and length of detention. It should also explain how the arrest and continuing detention might be challenged, and how to ask for provisional release. A translated version should be made available, or delivered orally if this is not possible. The information in both Articles must be provided in simple and accessible language, taking into account the needs of vulnerable suspects.

Article 6 requires that information about the criminal act the person is suspected of committing be provided promptly and "in such detail as is necessary to safeguard the fairness of the proceedings and the effective exercise of the rights of the defence". Upon arrest the reasons, including

9 The police and public are able to download translations in 55 languages at *https://www.gov.uk/guidance/notice-of-rights-and-entitlements-a-persons-rights-in-police-detention*

the criminal act suspected, must be explained. Detailed information about the charge, including the nature and legal classification of the offence and the nature of the defendant's participation must be provided "at the latest on submission of the merits of the accusation to a court".
Article 7 provides two rights. First, access to case documents that are essential to challenging the lawfulness of the arrest or detention. Second, access to all material evidence, whether for or against the defendant "in order to safeguard the fairness of the proceedings and to prepare the defence". This should be in due time to allow the effective exercise of the defence, and, again, at the latest, when the case is submitted to court. The second right can be derogated from where such access may lead to a serious threat to the life or fundamental rights of another person or if it is "strictly necessary to safeguard an important public interest", such as jeopardising an ongoing investigation or for national security concerns. This must not prejudice the right to a fair trial and the decision must be taken by a judicial authority or be subject to judicial review. Access must be free of charge.

England and Wales implementation
PACE Code C was significantly amended to implement the Directive, to deal with how information should be supplied in the police station. Suspects must be told clearly what their rights are and be given a notice of rights and entitlements, which has itself been amended to comply with the indicative rights set out in the Directive. They must be given an opportunity to read the notice and sign to confirm its receipt (paras. 3.1 and 3.2). With respect to disclosure, the custody officer must make available *to the suspect or their solicitor* documents essential to challenging the lawfulness of the arrest or detention (i.e. where documents are capable of undermining the reasons and grounds that make arrest necessary) (para. 3.4(b)). Prior to interview, the investigating officer must give *the suspect or their solicitor* sufficient information to understand the nature of the offence and why they are suspected of it (although this need not be at a time when this would prejudice the investigation) (para. 11.1A). The information should include as a minimum a description of the facts relating to the suspected offence known to the officer, including time and place (note 11ZA). An inspector should also deal with any complaints raised (para. 3.26).
Post charge, the Criminal Procedure and Investigations Act 1996, the Attorney General's Guidelines on Disclosure (most recently of 2013) and the Judicial Protocol on Disclosure of Unused Material 2013 already set out the disclosure regime. No changes have been made as a consequence of the Directive. The Criminal Procedure Rules also already give effect to the Directive by requiring initial details of the prosecution case (IDPC) to be served no later than the first hearing at the magistrates' court (r.8.2(2)). The Rules detail that IDPC must contain a summary of the circumstances of the offence, criminal record and (where the defendant was not in police custody immediately before the hearing) any account given in interview, any witness statement or exhibit essential to plea or allocation, and any victim impact statement (r.8.3).

Aspects for further consideration
Although the Directive provides the suspect with some key rights to knowledge about the case against them, the issue will be defining what that right looks like on the facts of the case. The definitions of "material" and "essential" evidence together with exemptions provided by the Directive create conditions in which police officers and prosecutors may, for instance, decide to withhold pre-interview briefings and delay disclosure. In our view, however, the Directive clearly envisages *some* pre-interview information to be given to a suspect's solicitor, but also to the suspect themselves: the key decisions made at this stage form part of the "exercise of the rights of the defence" to which the right of access to documents is linked in the Directive.
The same is true for a failure to disclosure key documents such as witness statements at first appearances, or exhibits prior to Plea and Trial Preparation Hearings, where there is pressure to plead. These are, again, key stages where the "rights of the defence" are exercised and the Directive envisages that this should be done on an informed basis.
When insufficient disclosure is given for the suspect to understand the case against them, it should not only be possible to challenge that failure and seek the missing information (an avenue which is already utilised), but also to rely upon the Directive to resist inferences being drawn from silence or credit being withheld for an absence of plea at an earlier occasion.
Likewise, where the police fail to provide a notice of rights and entitlements in the suspect's language during police detention, the appropriate remedy may be even less clear. But, for example, if a suspect does not exercise their right of access to a lawyer as a consequence, it may be that the interview could be excluded due to an equivocal waiver.[10] The failure to provide the notice and an opportunity for the suspect to consider it may, alternatively, provide a legal argument against the drawing of an adverse inference if the suspect chooses not to answer questions.

References for preliminary rulings on the Directives
Issues of interpretation of the Directives may have to be referred to the CJEU for a preliminary ruling, the procedure envisaged by Pt. 44 Crim PR, which Helen Malcolm QC discussed in a previous issue.[11] Two additional points may be of interest to practitioners seeking references. First, responding to an opponent's, or the court's, view as to the interpretation of EU law may be aided by comparative law examples showing the way the relevant rule has been implemented in other countries. Networks such as LEAP[12] are a good first port of call for such information. Secondly, if the party is minded to invite third parties (e.g. NGOs) to consider intervening (in the High Court or above) to make public interest arguments in the case, the intervention must first take place in the national proceedings, before the case is referred to the CJEU: third parties may not apply directly to the CJEU to intervene.

The "Brexit" outlook
In light of the vote to leave the EU on 23 June 2016, a question arises as to the relevance of the Directives in the medium-term future. This should be considered in light of the overall scheme of which the Directives are part, described on p.6 above.

10 In both of these examples, Art.47 of the Charter of Fundamental Rights, which provides the right to an effective remedy, should also be pleaded to bolster the claim.
11 "What is a Preliminary Reference? And Why Should I Care?', *Archbold Review*, Issue 9 of 2015, p. 5-6.
12 The Fair Trials International Legal Experts Advisory Panel, see: *https://www.fairtrials.org/fair-trials-defenders/legal-experts/*

The need to preserve cooperation

As John Spencer noted in Issue 5,[13] the alternatives to EU criminal justice mechanisms (e.g. reliance on earlier Conventions) could be unattractive as they are less effective than the EU systems adopted to replace them. It may be that the UK will wish for the "arrangements for its exit" agreed under Art.50 TEU to preserve, so far as possible, its existing close cooperation of our nearest neighbours. This will, however, depend upon on other travel and immigration arrangements made with EU Member States.

The place of common standards

The Directives are a step removed from the mutual recognition systems. They require minimum standards in *national* law, not between states. However, the British Advocate General at the CJEU, Eleanor Sharpston QC, has observed that compliance with the Roadmap measures is the yardstick by which a Member State's court should assess whether another Member State's request for assistance falls to be recognised.[14] Adherence to the Directives is increasingly being seen as the precondition for mutual recognition to happen. The Government may decide to retain the national implementing rules described above now that they are part of domestic law. To a certain extent this may keep our standards in line with other EU nations. However, as the CJEU interprets the Directives, requiring Member States to clarify and bolster their national law, we may find ourselves further away from consensus amongst EU Member States on the content of procedural rights.

The consequences of being out-of-step with other Member States are not insubstantial. Recently, the German Federal Constitutional Court gave injunctive relief against a UK extradition request due to concerns about the system of adverse inferences from silence in the UK,[15] which does not exist in Germany. That disparity is brought into focus by the fact that the UK has not opted in to Directive 2016/343/EU strengthening certain aspects of the presumption of innocence and the right to be present at one's trial in criminal proceedings which, amongst other provisions, excludes the drawing of adverse inferences from silence in line with the general consensus in the rest of the EU. So long as other Member States owe the UK the duty of sincere cooperation imposed by the Treaty on European Union,[16] pragmatic solutions to issues like these may be found. But if the UK withdraws, the UK's non-participation in the Roadmap standards may constitute more of a stumbling block to continued cooperation. This should be carefully considered in Brexit negotiations.

Conclusion

The Two Directives considered here provide discrete and significant enhancements to the procedural rights of suspects and defendants in the criminal justice system in England and Wales. Practitioners should be familiar with both the Directives and the implementing legislation and be ready to argue when domestic rules do not go far enough or their application in practice is inadequate. If necessary, references to the CJEU for interpretation of the Directives should be sought. With our exit from the EU edging closer, it is perhaps a good time to get as much favourable judicial interpretation of these rules in line with the Directives as possible into the law of England and Wales before we lose the benefit of being able to bolster our cases by relying on what is happening on the Continent.

13 J.R. Spencer "What would Brexit mean for British criminal justice?", *Archbold Review* (2016) issue 5, p.5.
14 Opinion in Case C-60/12 *Baláž*.
15 The decision is available on the Court's website, unsurprisingly, in German, *https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/04/rk20160429_2bvr089016.html*
16 Article 4(3) of the Treaty on European Union.

News

The Crown Court Compendium – endorsement by the LCJ

The previous Issue carried an article by Simon Tonking about the Crown Court Compendium. The Compendium has now been endorsed by the Lord Chief Justice, who says:

> "This compendium is a remarkable achievement: the culmination of much hard work from the distinguished authors all of whom are leaders in their field. It is a true compendium in every sense of the word; providing detailed and considered advice covering a wealth of situations."

Comment

The collapse of BHS

The Report of the House of Commons Work and Pensions Committee on the collapse of BHS claims that Sir Philip Green, when in charge, caused BHS to enrich himself and his family by paying dividends in excess of profits, while knowingly allowing the company pension fund to run into deficit. Although these claims (which he denies) have led to calls for the Queen to strip him of his knighthood, no one seems to have considered that behaviour of the sort alleged might constitute a criminal offence. This is surprising, because s.4 of the Fraud Act 2006 creates an offence "fraud by abuse of position", which is committed where a person "(a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person, (b) dishonestly abuses that position, and (c) intends, by means of the abuse of that position (i) to make a gain for himself or another, or (ii) to cause loss to another or expose another to a risk of loss." By s.4(2), "A person may be regarded as having abused his position even though his conduct consisted of omission rather than an act." JRS

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