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Archbold Review

Cases in Brief

Appeal—extension of time in which to seek leave to appeal—change of law cases—relationship to test for safety where guilty plea entered—application

ORDU [2017] EWCA Crim 4; January 20, 2017

O pleaded guilty to possessing identity documents with intent contrary to the Identity Cards Act 2006 s.25 and was sentenced to nine months' imprisonment before the ambit of the defence in the Immigration and Asylum Act 1999 s.31 was made clear in *Asfaw* [2008] UKHL 31, [2008] 1 AC 1061. It was accepted that, if his application for an extension of time of eight years and three months to seek leave to appeal were granted, the conviction would probably be found to be unsafe because the test in *Boal* [1992] Q.B. 591 would be made out (an appellant who pleaded guilty must show a "clear injustice" by demonstrating that he or she was deprived of a defence which would probably have succeeded). To be afforded the extension of time, O required to show that a "substantial injustice" would be done by refusing the application (*Mitchell* [1977] 1 W.L.R. 753; *Johnson* [2016] EWCA Crim 1613, [2017] 1 Cr.App.R. 12). Whether there was a difference as a matter of language between the terms "clear injustice" and "substantial injustice" was unclear and was probably not a profitable subject for analysis. But the first described a means of determining the safety of a conviction and the second an exercise of a judicial discretion. There was an obvious difference between the two exercises which gave rise to the two tests. When considering whether to quash a conviction following a plea of guilty, the court is simply concerned with safety. By that stage all considerations of the special test for extensions of time in change of law cases would have been overcome and the court would be simply focussing on the safety of the conviction. It was obvious that the substantial injustice test was different from that involving considerations additional to the safety of the conviction. This implied that in most cases the applicant would have shown that the conviction was unsafe if the "substantial injustice" test had been satisfied, but an applicant would also have established not only that it was unsafe but also that a substantial injustice would be done if it were not quashed. It did not matter to the safety of a conviction whether an applicant was still serving a sentence but it did make a difference to whether exceptional leave to appeal should be granted. The tests were described by ostensibly similar verbal formulations but they were different things. The statement in *Johnson* at [21] that it was not material to consider the length of time that had elapsed in considering an extension of time application was limited to cases of murder, with which the case was concerned, given the sentence for that offence. In O's case, the court declined to extend time. It was a very long extension, albeit not, for the most part, the fault of O. However, it meant that he had now lived through all the adverse consequences of the conviction and emerged to a happier, more settled and safe life in the UK (his application for asylum having been granted on appeal). The conviction and sentence were now a long time ago and quashing the conviction would not remedy the unpleasant memories which were now its only legacy. Quashing the conviction would make no real difference to O's life, and in those circumstances it was impossible to say that a substantial injustice would occur if the application were refused.

[*Comment: It may be that the court is undertaking different exercises in determining safety in a guilty plea case and granting an extension of time in a change of law case; but, however much the judgment disparages the significance of the words used in the two formulae, "injustice" is the core shared concept. To reduce that concept to mere continuing prejudice in relation to extensions of time, when it appears to mean something quite different in the guilty plea context, is wrong. There might be a case for the extension of time test to be one based on practical consequences, rather than injustice. But that would be a change in the law which the court should acknowledge, if inclined to make it (RP).*]

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Evidence—DNA evidence—deposit on a moveable article left at the scene of a crime—submission of no case to answer—whether high probability profile sufficient to establish case without supporting evidence—relevant factors

TSEKIRI [2017] EWCA Crim 40; February 17, 2016

(1) Contrary to the Crown's submissions, at the close of the prosecution case, the only evidence to connect T with the offence was a DNA match to the major (of two) contributors to a DNA profile taken from a car door handle (a description was too vague; the defence statement not being in evidence had no probative value; no adverse inference could be drawn from silence in interview because when submitting there was no case, he was not relying on anything not mentioned, but simply putting the prosecution to proof).

(2) If, therefore, the proposition stated in *Bryon* [2015] EWCA Crim 997, [2015] 2 Cr.App.R. 21 that, where a movable item with mixed DNA profiles, one being the defendant's, was found at the scene, this would not be sufficient on its own to support a conviction were correct, T's appeal against the judge's finding that there was a case to answer would be allowed. It was clear that in the absence of supporting evidence, the court in *Bryon* would have allowed the appeal. The approach set out in *Bryon* was not correct, however. The court endorsed the criticisms of *Bryon* made in *FNC* [2015] EWCA Crim 1732, [2016] 1 Cr.App.R. 13. Moreover, the proposition from *Byron* relied on by T was obiter.

(3) The fact that DNA was on an article left at the scene of a crime could be sufficient without more to raise a case to answer where the match probability was 1:1 billion or similar. Whether it did would depend on the facts of the particular case. A non-exhaustive list of factors included the following. (a) Was there evidence of some other explanation for the presence of the DNA? (b) Was the article apparently associated with the offence itself? Here, there was no doubt the offender did touch the article in question. The position could be different if the article were not necessarily so connected with the offence, such as a cigarette stub discarded at the scene of a street robbery. (c) How readily movable was the article in question? A profile on a small article of clothing or a cigarette end might be of less probative force than one on a vehicle. (d) Was there evidence of some geographical association between the offence and the offender? (e) In the case of a mixed profile, was the defendant's the major contributor? (f) Was it more or less likely that the DNA profile attributable to the defendant was deposited by primary or secondary transfer?

Prosecution of offences—trafficking of human beings—prosecution of trafficked defendant—defence in Modern Slavery Act 2015 s.45—whether existing law should be developed in light of defence—relevance of gravity of offence—positon of child defendant—relationship between Competent Authority and CPS

JOSEPH AND CONJOINED APPEALS [2017] EWCA Crim 36; February 9, 2017

(1) The law on the protection of victims of trafficking from prosecution for offences where there was a nexus between the trafficking and the offence was now contained in the Modern Slavery Act 2015 s.45 and Sch.4; but before that, in compliance with international obligations (particularly, the non-punishment provision of the Council of Europe Convention on Action Against Trafficking in Human Beings Art.29 and EU Directive 2011/36/EU on Preventing and Combatting Trafficking in Human Beings), protection was afforded by Governmental and CPS policies, and by the Court in (most significantly) *M(L), B(M) and G(D)* [2010] EWCA Crim 2327, [2011] 1 Cr. App.R. 12; *N, and L* [2012] EWCA Crim 189, [2013] QB 379 and *L(C), N, N and T* [2013] EWCA Crim 991, [2013] 2 Cr.App.R 23. The interveners, Anti-Slavery International, submitted that, in the light of the new defence provided in s.45 of the 2015 Act, it was no longer appropriate or in compliance with international obligations, in cases where the evidence did not establish duress, to rely on the approach set out in *M(L)*, that is, reliance on prosecutorial discretion and the abuse of process jurisdiction, but rather that the law of duress should (in the trafficking context) be extended to make comparable provision to that in s.45. The court rejected the submission. The existing case law was consistent with international obligations (*M(L)* [7]). The present law of duress was clear. Parliament had chosen not to make s.45 retrospective. It would require instances of clear injustice to justify the court amending the law of duress as applicable to victims of trafficking who were not able to take advantage of the 2015 Act. There was no evidence of such instances.

(2) Three general issues arose, however, in relation to the current law. (a) The relevance of the gravity of the offence: there would be graves crimes where, taking into account all the circumstances, it was in the public interest to prosecute. The decision was always fact sensitive. Two of the instant appeals, for instance, involved serious drug trafficking offences where prosecution was in the public interest. (b) The position of a child victim: it was clear that, once it was established that a child was a victim of trafficking for the purposes of exploitation, the relevant consideration was whether there was a sufficient nexus between the trafficking for the purposes of exploitation and the offence; it was not necessary to go so far as to show that there was compulsion to commit the offence, as required in the case of an adult (*N, and L* [90] was not authority to the contrary). (c) The relationship between the CPS and the "Competent Authority" set up within the Home Office following the coming into force of the Council of Europe Convention, which was responsible for making "conclusive decisions" on whether those who claimed to have been trafficked for the purposes of exploitation had in fact been trafficked. While provision was made in the relevant guidance for cooperation between them before the conclusion of a prosecution, there was no clear guidance or process where a person claimed to be a victim after conviction. It would be desirable for much clearer guidance and processes to be developed. The Competent Authority's decision did not bind a court a court (*L(C), N, N and T* [28]). It was important to appreciate that the court would bear such a decision in mind but would examine the cogency of the evidence on which the Competent Authority relied and subject the evidence to thorough forensic examination. It did not follow from the fact than an individual "fitted the profile" of a victim of trafficking that they were necessarily the victim of trafficking. A careful analysis of the facts was required including close examination of the individual's account and a proper focus on the evidence on the nexus between trafficking and offence.

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Trial—assistance of defendant by intermediary—under inherent jurisdiction at common law—approach—Criminal Practice Direction

RASHID [2017] EWCA Crim 2; January 18, 2017

The judge had not been wrong to allow R an intermediary to assist him to give evidence, but not to require one for the whole trial.

(1) As the statutory power to appoint an intermediary (Youth Justice and Criminal Evidence Act 1999 s.33BA) was still not in force, a judge's power to appoint one was governed by the court's inherent power at common law.

(2) In assessing the need for an intermediary at the different stages of the trial, the judge was entitled to assess the mental capacity of the applicant on all the evidence before him, including his own observations, and was not bound to accept the conclusion of the experts (even if they had all agreed). Given that trial was before the amendments made in April 2016 to the Criminal Practice Direction in relation to intermediaries, it fell to the court to determine the position under the inherent power of the court. In the overwhelming majority of cases, competent legal representation and good trial management would provide the opportunity for a defendant to give their best evidence, participate, and receive a fair trial. An intermediary may, however, be required to accomplish those ends as a result of a defendant's mental or other disability: *R (C) v Sevenoaks Youth Court* [2009] EWHC 3088 (Admin), [2010] 1 All E.R. 735 and see *Cox* [2012] EWCA Crim 549, [2012] 2 Cr.App.R 6 for the court's discretion.

(3) There were two types of possible assistance: (a) general support, reassurance and calm interpretation of unfolding events; and (b) skilled support and interpretation with the potential for intervention and on occasion suggestion to the Bench associated with the giving of the defendant's evidence: *R (OP) v Ministry of Justice* [2014] EWHC 1944 (Admin), [2015] 1 Cr.App.R. 7; Law Commission, *Unfitness to Plead* (Law Com No 354), para.2.48 (but which considered a whole-trial intermediary would be needed for those with some conditions). In considering what was needed in a particular case, the court must take into account that the advocates' training and experience would enable them, in all but the rarest cases, to do what was needed for a defendant to fully participate in every aspect of the trial until the defendant gave evidence. If an advocate asked a question that did not do so, then the judge, as a matter of trial management, would intervene to correct the error.

(4) The order made in this case was the most common form of order in the rare case where the threshold of disability was crossed. Cases in which an order would be made for an intermediary to be present for the whole trial would be very rare.

(5) The procedure to be followed was now set out in the amended Criminal Practice Direction, reflecting the position at common law, at paragraphs 3F.11 to 3F.16. Had it been in force at the time of R's trial, there would have been no difference in approach or outcome.

SENTENCING CASE

Low-level shoplifting

CHAMBERLAIN [2017] EWCA CRIM 39; 18 January 2017

The appellant appealed against her sentence of two years' imprisonment for an offence of attempted theft. She had attempted to steal goods worth £78 from a shop. She had previous convictions for over 100 offences, about 80 of which were thefts. The appellant submitted that the sentence imposed was manifestly excessive; and that (1) s.22A of the Magistrates' Courts Act 1980 provides that, for low-value shoplifting (£200 or less), the offence is to be treated as a summary offence with a maximum of six months' imprisonment; (2) she had pleaded guilty to an attempt rather than the completed offence and (3) the judge paid too much regard to the case of *Thomas* [2013] EWCA Crim 1084, 2 Cr.App.R (S) 86, and insufficient regard to the prospect of rehabilitation.

Regarding s.22A, the court stated that, per s.22A (2), s.22A does not apply where the adult offender elects Crown Court trial, as was the case here. The fact that the offence was one of attempt provided scant mitigation: the appellant had done all she could to commit the offence. *Thomas* is not a guideline case. Guidance from the Sentencing Council regarding theft offences came into force on 1 February 2016. Applying the guideline concerning theft from a shop, this case involved high culpability (due to planning and sophistication) and lesser harm (due to the value of the goods and their being recovered). For a category 3A offence, the guideline gives a starting point of a high-level community order, with a range from a low-level community order to 12 weeks' custody. Relevant previous convictions are an aggravating factor and may justify an upward adjustment, including outside the category range. The guideline reminds sentencers to consider alternative disposals. Where the offending is of a relatively minor nature, a custodial sentence must be a measure of last resort. Previous diversionary work does not necessarily, if unsuccessful, preclude consideration of such an option again. If a custodial sentence has to be imposed, it should be proportionate to the offence committed, albeit in the context of its aggravation by persistent offending after exhaustion of other options. It does not follow that in every case of this kind the custodial sentence must inevitably be longer than the longest previous sentence imposed for similar offending. Although s.22A did not apply, the maximum level for the matter dealt with summarily gives assistance in fixing a proportionate sentence for a low-value, prolific, non-violent individual shoplifter. It is hard to envisage that in most such cases a sentence of more than 12 months' imprisonment before credit for plea will be appropriate. However, each case must be decided on its merits.

The appeal was allowed to the extent that the court determined that the starting point of three years was too high; 12 months was appropriate. A term of nine months' imprisonment was substituted (credit of 25% for plea applied).

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Case in Depth

Guraj: the urgent need for reform of Part 2 PoCA

By Alice Lepeuple[1]

Introduction

Since the implementation of the Proceeds of Crime Act 2002 (PoCA), the Supreme Court has had to consider issues arising from the provisions of the Act in no fewer than 15 cases. The latest of these, *Guraj*[2], concerned the effect of procedural errors on the validity of confiscation orders under Pt.2 of the Act. Like many cases before it, *Guraj* demonstrates the urgent need for reform of proceeds of crime legislation.

Guraj

Statutory provisions

Given the intricacy of the issue in the case, it is useful to start by setting out the relevant statutory provisions. Sections 13 to 15 of PoCA provide for the timetabling of confiscation proceedings. Section 14(1)(b) allows the court to postpone confiscation proceedings for a specified period until after sentencing. Section 14(11) provides that "*a confiscation order must not be quashed only on the ground that there was a defect or omission in the procedure connected with the application for or the granting of a postponement.*" Under s.14(12)(b), however, s.14(11) does not apply if the court made an order falling within s.13(3) before it made a confiscation order. The orders there referred to include forfeiture orders under s.27 of the Misuse of Drugs Act 1971 and deprivation orders under s.143 of the Powers of Criminal Courts (Sentencing) Act 2000, among others. Section 14(12) thus echoes s.15(2)(c), which prohibits a court from making an order under s.13(3) during the postponement period.

Facts

In June 2012, the respondent pleaded guilty to offences involving the supply of drugs and money laundering. At a hearing in July 2012 he was sentenced to five years and four months' imprisonment. At the same time, the judge made orders forfeiting the drugs under s.27 of the Misuse of Drugs Act 1971 and depriving the respondent of items used in connection with the offences under s.143 of the Powers of Criminal Courts (Sentencing) Act 2000. The judge also set a timetable for confiscation proceedings.

After the respondent served his statement of information one month late, the prosecution failed to take any action in relation to the case for more than a year. In October 2013, a new timetable was set and the prosecution failed to attend two hearings, which resulted in wasted cost orders against them. In May 2014, the judge heard arguments by the defence that procedural errors and delays by the prosecution meant that the court no longer had the power to make a confiscation order. The prosecution could not rely on s.14(11) because the judge had made orders contrary to s.15(2) of PoCA and thus triggered s.14(12). The judge rejected the argument, noting that no unfairness had been caused to the respondent, and proceeded to make a confiscation order. In March 2015, the Court of Appeal quashed the order and the prosecution appealed to the Supreme Court.

The Supreme Court's decision

The issue before the Supreme Court was thus whether, following the making of property orders in contravention of s.15(2), s.14(12) deprived the court of its power to make a confiscation order under s.6 and compelled the appellate courts to quash such an order.

The Supreme Court concluded that it did not and allowed the prosecution's appeal. The court adopted a purposive interpretation of PoCA and stated that Parliament could not have intended for procedural errors to invalidate confiscation orders in cases where no unfairness ensued. This interpretation was supported by the prescriptive language of s.6 of PoCA and followed the decisions in *Knights*[3] and *Soneji*[4] (which concerned delays under the Criminal Justice Act 1988). The court concluded that s.14(12) did not prevent the Crown Court from making an order; rather, it enabled the court to decline to do so where procedural errors caused unfairness to the defendant and such unfairness could not be cured.

Commentary: the need for reform

Lord Hughes, delivering the judgment of the court, began by quoting Lord Steyn's doubts in *Soneji* that PoCA had "*solved the problems involved in the criminal process of confiscation*". He later referred positively to the Law Commission's interest in reviewing proceeds of crime legislation. *Guraj* illustrates a number of problems with the Act, beyond the obvious one of the sheer complexity of its provisions.

First, some of the provisions of PoCA are outdated. As Lord Hughes explains in his judgment s.13, which requires the court to take into account a confiscation order before making a property order or imposing a fine, is a relic from a time when confiscation proceedings took place before sentencing under the Drug Trafficking Offences Act 1986 and the Criminal Justice Act 1988. It is now common practice for confiscation proceedings to take place after sentence, and such legislative anachronisms risk impeding the effective running of confiscation proceedings.

Secondly, other provisions defeat the purpose of the Act: depriving offenders of the benefits of their crime. In *Guraj*, waiting until the conclusion of confiscation proceedings to impose forfeiture and deprivation orders in compliance with s.15(2) would have been at best unnecessary, at worst ineffective. The orders were uncontroversial. Forfeiting and destroying colossal quantities of class A drugs and equipment was more prudent than storing them for nearly two years in a police station. Further, the drugs were not

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2 [2016] UKSC 65.
3 [2005] UKHL 50, [2006] 1 AC 368.
4 [2005] UKHL 49, [2006] 1 AC 340.

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realisable property for the purpose of calculating the available amount; hence the confiscation order would not have affected the forfeiture order. Lord Hughes thus describes s.15(2) as "*counter-intuitive*" and creating "*a trap into which even the most experienced and skilful trial judges may fall*" at [11]. More generally, the fact that the court had to adopt an overtly purposive rather than literal interpretation suggests that the relevant provisions do not serve the purpose of the Act.

Finally, *Guraj* raises the issue of the place of judicial discretion in confiscation proceedings. On the one hand, successive legislative regimes have gradually removed judicial discretion from the PoCA framework. This is reflected in the prescriptive language of s.6, which as we have seen, the court took into consideration in reaching its decision. Jonathan Hall QC for the prosecution had drawn the court's attention to Lord Clarke's judgment in *Varma*[5], where he described s.6 as: "*expressed in absolute terms in that it leaves the court with no discretion whether or not to make a confiscation order if the conditions in subsections (2) and (3) are satisfied*".

On the other hand, this line of reasoning has led to the introduction into confiscation proceedings of the concept of unfairness – arguably a back door to judicial discretion. This adds to the measure of discretion restored by the insertion of the requirement for confiscation orders to be proportionate in s.6(5) PoCA following the Supreme Court's decision in *Waya*[6].

In conclusion, *Guraj* indicates a number of reform objectives for the Law Commission's prospective review of PoCA: modernising PoCA in line with current practice, revising statutory provisions to better serve its purpose, and clarifying the extent of judicial discretion in confiscation proceedings.

5 [2012] UKSC 42, [2013] 1 AC 463.

6 [2012] UKSC 51, [2013] 1 AC 294.

Features

Criminal Records Disclosure: a Pressing Case for Reform

By Katie Jones[1]

On 1 February 2017 the Law Commission launched its report *Criminal Records Disclosure: Non-Filterable Offences*[2] at a symposium held at City University. The report examined part of one narrow aspect of the criminal records disclosure system known as "filtering". The Commission offers a potential solution to the problems with that narrow aspect of the criminal records disclosure system while acknowledging that the solution offered would not provide an optimal outcome. A broader review is essential given the range and breadth of problems across the entire system.

Current law

The current legislative framework governing the system of criminal records disclosure is complex and convoluted and it is only possible here to give the barest outline. Briefly, under the Rehabilitation of Offenders Act 1974 an individual's previous criminal convictions are to be treated as "spent" after a certain amount of time has elapsed provided there has been no further offending. When a conviction becomes spent the ex-offender is no longer required to disclose it to a prospective employer as part of his or her criminal history. There are, however, a number of exceptions to this general principle of non-disclosure contained within the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975. The exceptions apply in a number of circumstances including in response to questions asked for the purposes of assessing suitability for entry to particular professions, for work with children or vulnerable adults or for the grant of various licences. These questions are referred to as the "exempted questions".

A further exception to this exception, the process of "filtering", was introduced in 2013[3] in response to the Court of Appeal judgment in *R(T) v Chief Constable of Greater Manchester Police*.[4] The Court held that blanket disclosure of all convictions and cautions in response to an exempted question was disproportionate and incompatible with art.8 of the ECHR.[5] T's convictions for theft of two bicycles when he was 11 had been disclosed on an enhanced criminal records check in connection with his application to participate in sporting activities with children. These historic convictions, it was successfully argued, bore no relevance to the role for which he was applying. This judgment, subsequently affirmed by the Supreme Court, called attention to the potentially harsh outcomes of the disclosure regime at the time.

The filtering scheme provides that even in the case of exempted questions, certain convictions and cautions do not fall to be disclosed; they are filtered. The criteria for deciding whether a spent conviction is "filtered" include requirements that:

(1) it is the only caution or conviction;

(2) it resulted in a non-custodial sentence; and

(3) the offence is not contained in the non-filterable list.[6]

The filtering system was an attempt at balancing the two competing policy objectives which lie at the heart of the whole criminal records regime. These are: the right of an individual who has offended in the past to make a fresh start

1 Katie Jones is a research assistant in the criminal law team at the Law Commission.

2 (2017) Law Com No 371.

3 Police Act 1997 (Criminal Record Certificates: Relevant Matters) (Amendment) (England and Wales) Order 2013/1200; Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 (Amendment) (England and Wales) Order 2013/1198.

4 [2013] EWCA Civ 25.

5 The right to respect for private and family life.

6 The list of offences which will never be filtered is contained in both art.2A(5) of the 1975 Order and in s.113A(6D) of the Police Act 1997.

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and become a fully rehabilitated member of society and the need of employers and others in a position of responsibility to have access to the information required to fulfil those responsibilities. This is crucial to assess the potential risks posed by those holding the position or license applied for.[7] The terms of reference of our narrow review allowed us to examine only one part of the filtering system in detail, the list of non-filterable offences.

Problems

Although heralded by the Government as a remedy to the ills of the previous regime, the filtering system has significant shortcomings. The statutory framework, in particular as it pertains to the list of non-filterable offences, is drafted in a manner that is difficult to understand and inaccessible to users. The list of non-filterable offences is contained in two pieces of legislation and mainly consists of cross references to provisions and lists in a wide range of other legislative provisions. To have a comprehensive grasp of the up-to-date list would require a subscription to a legal database: not something that every lawyer has access to. The Law Commission has produced, as an appendix to its report, an itemised list which purports to be as accurate a representation of the legislative list as proved possible. This list was produced in line with a conservative interpretation of some of the more doubtful terms in the legislation as detailed below. Prior to the Law Commission's publication of Appendix A no accurate itemised list of non-filterable offences was available to the public. There remain several fundamental concerns with the interpretation of the list. For example, it includes offences "corresponding" to those committed by the defendant in foreign jurisdictions. No clear definition of the degree of correspondence is provided. Similarly, the list includes offences that have been "superseded by" other offences. What that means is unclear. These areas of doubt, coupled with the scale of the disclosure system, give rise to the possibility of errors.

A further problem lies in the operational application of the list. In applying the filtering process to the some 4.2 million applications for criminal record certificates received annually, the Disclosure and Barring Service use an "operational list" of non-filterable offences. This list appears to contain a number of inaccuracies giving rise to the potential for both over and under-disclosure. This has the potential for particularly severe consequences given the nature of the risks that the disclosure system seeks to guard against and the likely impact on an individual's future employability. Many of the difficulties with the operational list stem from its reliance on the offence codes contained in the Police National Computer. Not every offence is recorded on the PNC, others have more than one code thus further increasing the risk of errors in disclosure and sometimes descriptions of offences differ between the list of non-filterable offences as they appear in the legislation and how they appear on the operational list, as a result of the descriptors used for offences entered on the PNC.

The Commission's terms of reference from the Home Office were to look only at the list of non-filterable offences and solutions that could be achieved by secondary legislation. The Commission makes a series of recommendations about the non-filterable list in Chapter 4 of the report, including:

(1) Creating a single itemised list of non-filterable offences to avoid the present parasitic reliance on lists in other pieces of legislation.

(2) The list should be updated by amending the legislation itself.

(3) A review of the PNC code system to ensure it works effectively in this context.

The report is accompanied by two Appendices, the first of which provides an accurate list of offences that must always be disclosed on a criminal record certificate called the "itemised list" while the second contains comparative research on disclosure regimes in other jurisdictions.

The need for a wider review

The Law Commission's recommendations are limited by the narrow scope of this project but it is apparent that there exists a pressing need for a wider review. A number of significant issues falling outside the terms of reference were identified in the course of consultation with stakeholders. These include:

(1) a failure to take into account the relevance of offences;

(2) an arguable lack of proportionality, particularly in relation to young offenders; and

(3) potential incompatibility with ECHR art.8.

As part of a wider review, attention could be given to the development of a coherent set of principles for determining which offences, if any, should remain indefinitely disclosable. Further consideration could be given to the appropriateness of the "one conviction" and "custodial sentence" rules which many stakeholders considered excessively stringent in their operation, often producing unfairly harsh outcomes. Stakeholders were particularly vocal in relation to the need for cautions to be treated differently, especially in the case of young offenders. Even for an offence contained in the non-filterable list, when a caution is issued there is an argument to be made that the circumstances of the offending must not have been to a high degree of seriousness or the disposal imposed would surely have been harsher. Further it is unclear whether current police practice in relation to the issuing and accepting of cautions for offences on the non-filterable list is satisfactory. Stakeholders raised concerns that individuals are accepting cautions in respect of these offences without sufficient appreciation of the fact that they would remain permanently disclosable. These concerns, among others, deserve the attention afforded by a full scale review.

Conclusion

The system, as it now stands, arguably fails to serve the purposes for which it was created. There is little consideration given to the link between the risks associated with particular offences and the purposes for which disclosure is required. An offence that is relevant for an application to look after children may not be relevant to an application for a gaming licence. This indiscriminate disclosure of a wide range of offences for a wide range of purposes appears both arbitrary and unsatisfactory.

Given the systemic problems identified with the current system, the Commission considers the need for reform to be beyond doubt. A failure to address the disclosure system's failings will surely lead to continuing litigation and it is clear that a short-term technical fix is no substitution for undertaking a wider review aiming to produce a proportionate system that serves the objectives of both safeguarding and rehabilitation.

7 Criminal Records Disclosure: Non-Filterable Offences (2017) Law Com No 371.

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The Section 28 Pilot Study: Effects on Case Progression[1]

By Hayden M. Henderson and Michael E. Lamb[2]

Currently, over 90,000 children in the United Kingdom have been removed from homes in which they were at risk of suffering from physical, emotional, or sexual abuse and neglect.[3] Many of those children have been or will be forensically interviewed by police officers in "Achieving Best Evidence" interviews,[4] recordings of which routinely function as the evidence-in-chief if criminal charges result and the alleged victim is called as a witness.[5] However, vulnerable witnesses are still required to return to court months or years after their initial reports to be cross-examined, even when recordings of their interviews are admitted as evidence.[6] There is considerable evidence that child witnesses are adversely affected mentally, physically, and psychologically by these delays[7] and as a result, many efforts have been made to implement reforms that would reduce the length of delay. One set of reforms, suggested by the Pigot Committee in 1989, involved pre-recording children's evidence in chief (hence the admissibility of ABE interviews) and cross-examination, so that their involvement could be completed before the actual trial.[8] Although the first suggested reform was successfully implemented in 1992,[9] the second was only embraced recently.[10] This article describes a study designed to evaluate whether or not this further reform has had the desired effects on young witnesses.[11]

Section 28 of the Youth Justice and Criminal Evidence Act

In 2014, s.28 was finally embraced and a pilot scheme ran for 10 months in Kingston, Liverpool, and Leeds Crown Courts[12]. At the conclusion of the trial period, lead judges believed:

> "*... it could be one of the single most beneficial improvements in delivering justice to some of the most vulnerable in society*".[13]

Judges hoped that s.28 would be beneficial in several ways, including: considerable financial savings; drastically reduced witnesses' waiting times at court; elimination of the need for repeated testimony in re-trials and multi-defendant trials; more systematic control of lawyers' questions resulting in fewer interventions during questioning; trial time and financial savings due to an increased number of both guilty pleas and dropped charges based on the evidence provided in the s.28 hearing[14]. And although some issues still need to be resolved to ensure that national rollout[15] is effective (e.g., technology, "front load" case preparation, secure storage), Plotnikoff and Woolfson concluded that:

> "*... 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*".[16]

Delays in the Current System[17]

A study conducted for the NSPCC in 2009 focused on 182 child witnesses and highlighted problematic delays in three crucial areas: (1) between recording the ABE interview and trial, (2) while the child was testifying at court, and (3) with respect to the time of day they were called to give evidence. For Crown Court cases, the average delay between reporting offences (i.e., ABE interview) and trial was 13 months, with delays ranging from six to 67 months. A third of the trials (59 children) were rescheduled one or more times. The average waiting time at court was 5.8 hours, with delays ranging from 20 minutes to 31 hours. Lastly, only 51% of children in England and Wales and 8% of children in Northern Ireland gave their evidence in the morning, "*while [children] are fresh*".[18]

Effects of Delay

Delays may have adverse effects on children and their testimony in a number of ways. Firstly, children encode and store fewer details about experienced events in long term memory than adults do,[19] forget more rapidly,[20] and are more likely to confuse memories from similar sources (i.e., source monitoring).[21] The process of forgetting ensures that children not only remember less but are also more susceptible to suggestion and source monitoring confusion as their memories become hazier.[22] Children are also more willing to guess when memory has deteriorated.[23] Together, these factors make it easier for questioners (e.g., in cross-exami-

1 A fuller report of this study will appear in [2017] *Criminal Law Review* Issue 5.

2 Hayden M Henderson is a Ph D student and Michael E Lamb is a Professor in the Department of Psychology at the University of Cambridge.

3 "Statistics" (National Society for Prevention of Cruelty to Children, 2015). *NSPCC*: https://www.nspcc.org.uk/preventing-abuse/child-protection-system/

4 Home Office, *Achieving the best evidence in criminal proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures* (Home Office, 2011).

5 Youth Justice and Criminal Evidence Act 1999 (YJCEA 1999) s.27.

6 *Children and cross-examination: Time to change the rules?* edited by J. R. Spencer, CBE, QC and M.E. Lamb (Oxford and Portland, Oregon: Hart Publishing, 2012).

7 G. S. Goodman, E. P. Taub, D. P. Jones, P. England, L. K. Port, L. Rudy, and G. B. Melton, "Testifying in criminal court: Emotional effects on child sexual assault victims" (Monographs of the Society for Research in Child Development, 1992); J. Plotnikoff and R. Woolfson, "Measuring up?" In *Evaluating Implementation of.* (2009); *Children and cross-examination: Time to change the rules* (2012).

8 T. Pigot, *Report of the advisory group on video-recorded evidence* (London: Home Office, 1989).

9 CJA 1991, inserting a new s.33A in the CJA 1988; a provision replaced by YJCEA 1999 s.27, which applies to vulnerable witnesses of any age.

10 Ministry of Justice, *Transforming the CJS: A strategy and action plan to reform the criminal justice system* (Ministry of Justice, 2013).

11 The authors are extremely grateful to the HM Courts and Tribunals Service Office at the Ministry of Justice (London), and in particular, Janet Healey, Lola Kasim, and Martin Hibberd, for their extensive assistance and support. Hayden Henderson is supported by a scholarship from the Cambridge Trusts. This research was conducted as part of her Ph D research at the University of Cambridge. Michael Lamb's research on children's testimony is supported by the Nuffield and Jacobs Foundations, whose support is gratefully acknowledged.

12 Ministry of Justice, *Transforming the CJS: A strategy and action plan to reform the criminal justice system.*

13 Judiciary of England and Wales *The Lord Chief Justice's Report 2015,* p.9.

14 J. Plotnikoff and R. Woolfson, "Worth waiting for: The benefits of section 28 pre-trial cross-examination," (*Archbold Review*, Issue 8 2016).

15 The national rollout was announced by Justice Minister Mike Penning, Minister for Policing, Fire, Criminal Justice and Victims, Hansard, 6 July 2016, col 1016.

16 J. Plotnikoff and R. Woolfson, "Worth waiting for: The benefits of section 28 pre-trial cross-examination,", p.5. N.14 above.

17 J. Plotnikoff and R. Woolfson, "Measuring up?" N.7 above.

18 ibid, p.163.

19 M. Erdelyi, "The ups and downs of memory" (American Psychologist, 2010); M. L. Howe, *The nature of early memory: An adaptive theory of the genesis and development of memory* (Oxford, England, Oxford University Press, 2011).

20 C. J. Brainerd, V. F. Reyna, M. L. Howe, and J. Kingma, "The development of forgetting and reminiscence" (Monographs of the Society for Research in Child Development, 1990).

21 S. Lindsay, M. K. Johnson, and P. Kwon, "Developmental changes in memory source monitoring" (Journal of Experimental Child Psychology, 1991).

22 M. E. Lamb, L. C. Malloy, I. Hershkowitz, and D. La Rooy, (2015) "Children and the law", In *Handbook of child psychology and developmental science* (7th ed.), Volume 3, *Social, emotional and personality development.* edited by R. M. Lerner & M. E. Lamb (Hoboken, NJ: Wiley, 2015).

23 A.H. Waterman and M. Blades, "The effect of delay and individual differences on children's tendency to guess" (Developmental Psychology, 2013).

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nation) to discredit young witnesses by making them appear inconsistent or suggestible as events recede in memory.[24] Secondly, the stress resulting from delay is also problematic because it negatively affects the child's welfare while awaiting trial[25]. Half of the children in Plotnikoff and Woolfson's (2009) study exhibited symptoms of stress, such as depression, anxiety, self-harm, bedwetting, and panic attacks, while awaiting trial. As Emily Henderson observed:

> *"There is an irony to the fact that the longest delays are suffered by those least able to withstand them."*[26]

Thirdly, stress adversely affects children's cognitive capabilities, inhibiting their ability to recall details and to communicate these details while they are testifying.[27] Because children devote some of their cognitive resources to coping with their emotions, stress interferes with attention and memory retrieval.[28]

Additional Problems with Court Procedure

Once children are called to court for cross-examination, the process can still be problematic. Further delays commonly result from technical difficulties, interruptions by lawyers, and poor scheduling (e.g., the child arrives at court before lunch and must wait until after lunch to give evidence). For example, 40% of child witnesses in one study reported problems with either the video-playing procedure or the live links.[29] Giving evidence at non-optimal times of day may further diminish children's alertness, therefore affecting the quality of evidence elicited.

The Present Study

Accordingly, we sought to examine whether implementation of the s.28 procedures reduced unnecessary delays, both between first report and cross-examination, as well as on the day that they testified. We expected that children in the s.28 pilot cases would be cross-examined (and thus end their involvement in the court process) after shorter delays and be examined in court for shorter periods of time than children who were not able to benefit from the s.28 special measure. We also expected that they would give evidence significantly earlier in the day.

Sample

The Ministry of Justice HM Courts and Tribunals Service identified 138 non-s.28 (hereinafter NS28) cases – i.e. cases where s.28 was not used - and 84 cases where s.28 was used (hereinafter S28) cases that took place between 2012 and 2016. Attempts were made to obtain records for all S28 cases that had taken place by the time of the study in the three courts that were participating in the pilot study (Leeds, Liverpool, and Kingston). Cases for the NS28 group came from Bradford, Durham, Hull, Luton, Newcastle, Norwich, and Oxford. Of the 222 cases, 52 NS28 cases and 46 S28 cases involved children aged 15 and under testifying as alleged victims of sexual assault. The S28 and NS28 cases were matched with respect to: gender of child, age at ABE, age at trial, frequency of abuse, severity of abuse, child-suspect relationship, and verdict. The average length of the ABE interviews in the two conditions were similar (NS28= 49 mins, S28 = 47 mins).

Delay Durations

Duration Type	Average	N[30]	Average	N
	Non-Section 28		Section 28	
ABE to Trial	423 days	50	291 days	45
Total Court participation	79 min	52	21 min	46
Direct Examination[31]	8.5 min	24	2 min	3
Cross Examination	30 min	52	17 min	46
Redirect Examination	4 min	35	3.5 min	14
Breaks	56 min	37	6 min	6

24 M. E. Lamb, L. C. Malloy, I. Hershkowitz, and D. La Rooy, "Children and the law". N.22 above.
25 M. L. Howe, *The nature of early memory: An adaptive theory of the genesis and development of memory*, (2011). N.19 above.
26 *Children and cross-examination: Time to change the rules* (2012) p.45. N.6 above.
27 R. Nathanson and K. J. Saywitz, "The effects of the courtroom context on children's memory and anxiety" (The Journal of Psychiatry and Law, 2003).
28 J. A. Quas, A. Bauer, and W. T. Boyce, "Physiological reactivity, social support, and memory in early childhood" (Child Development, 2004).
29 J. Plotnikoff and R. Woolfson, "Measuring up?" N.7 above.

30 "N" refers to the sample size used in the analyses.
31 The duration of direct examination was not significantly different, likely due to the small sample size (N=3) for the S28 group.

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Findings

As shown in the table above, children in the NS28 condition waited significantly longer (423 days on average) than children in the S28 condition (291 days on average). Further, the duration of total court participation, cross-examination time, and break time were all significantly shorter for S28 cases, while the time for examination in-chief and re-examination were also shorter for S28 cases, although not significantly so. On average, children in the NS28 condition began testifying at 12.31pm whereas children in the S28 condition began testifying at 10.52am.

Unexpectedly, there was a significant association between age at ABE interview and the length of time between the ABE interview and cross-examination, indicating that younger children experienced longer delays, regardless of trial condition (S28 or NS28).

More disturbingly, trials in which defendants were found not guilty began an average of 423 days after the ABE interview, whereas trials that led to convictions began after average delays of "only" 315 days.

Discussion

These results clearly demonstrate that the implementation of the s.28 special measure significantly improved legal proceedings for trials involving vulnerable witnesses in three important ways. Firstly, children in the S28 condition gave their evidence over four months earlier than those not accorded the opportunity to provide a recorded cross-examination, demonstrating that pre-recording reduced the length of time that children waited to conclude their involvement in legal proceedings. Secondly, children in the S28 condition spent nearly an hour less time in the courthouse, indicating that the s.28 procedures and Ground Rules Hearings significantly reduced both the length of questioning and the number of unnecessary delays during the proceedings. Thirdly, children in the S28 condition began giving evidence an hour and 13 minutes earlier in the day than children in the NS28 condition.

Children in the S28 condition gave their evidence 132 days earlier than similarly placed children in the NS28 condition. The reduced delays may be beneficial not only for the children but for the legal system as a whole. Children's involvement — and the accompanying stress associated with waiting — was resolved an average of four months earlier, allowing their memories to be more detailed and more reliable at the time that they completed their testimony.[32] Because age is a major determinant of the accuracy and richness of autobiographical episodic memories,[33] allowing children to give their evidence as early as possible reduces the risk of forgetting or contamination. Even worse, longer delays between the first formal (ABE) interview and trial increase the risk of further forgetting and contamination, resulting in uncertain and inconsistent performance during cross examinations which may adversely affect the child's credibility.[34] Thus, as the Pigot Committee reasoned when they recommended pre-recording the cross-examinations of children,[35] reducing delay should improve the quality of evidence obtained, thereby increasing the likelihood that just verdicts will be reached.

Unexpectedly, younger children were significantly more likely to experience longer delays than older children, regardless of condition. Because younger children forget their experiences more quickly than older children,[36] extended delays are especially problematic for them. Research should further investigate the cause of these delays and identify ways in which lengthy delays could be reduced. It may be that younger children are accorded more special measures (e.g., intermediary assistance) and that coordinating and scheduling these additional provisions inadvertently extends pre-trial delays.[37]

Length of delay was also significantly associated with verdict, with not guilty verdicts being more common when delays were longer. This could reflect the predicted declines in the quality of children's evidence as their memories fade, but the finding underlines the need to reduce delays wherever possible, so that courts can consider evidence of the highest quality. In this context, the reductions in delay evident in the S28 cases suggests that extension of the pilot program nationwide could have positive effects on the still excessive delays we identified.

Children in the S28 condition also spent less time in the courthouses than children in the comparison group. Unfortunately, it is not possible to determine whether these reductions were attributable to the fact that the children were being interviewed after shorter delays, and were thus better able to remember their experiences, or to the fact that they benefitted from the Ground Rules Hearings conducted in advance of the testimonial hearings. Changes in the lengths of children's participation, and reductions in the amount of time they spent waiting to be questioned, are likely to have made the experience less stressful for them. Reductions in stress may allow them to concentrate better on the task at hand and provide more complete and coherent testimonial accounts.[38]

Children were also called to testify significantly earlier in the day in the S28 condition (10:52 am) than in the N28 condition (12:31 pm). Practitioners have long argued that children should testify or be interviewed in the morning, both because they are likely to be freshest and most attentive at that time, and because it increases the likelihood that their involvement will be completed on one day, without the need for further trips to court. In this respect, the significant change in the times at which children began their courtroom participation represents another desirable consequence of the implementation of s.28, as greater alertness should enhance the quality of the children's testimony. Additional research might more thoroughly investigate individual differences in children's preferences so accommodations can be made, especially perhaps for adolescents who would prefer later start times.

In all, the trial implementation of s.28 showed that this special measure had several beneficial effects: it reduced the delay in processing cases involving young alleged victims, it streamlined the presentation of their evidence, and it was conducted in circumstances that might be expected to enhance the quality of their testimony. Of course, it will be critically important to ensure that these benefits are achieved when a larger number of courts, judges, and barristers are involved, so further evaluation after the national rollout will be essential. Nevertheless, there is reason to believe that the implementation of s.28 will yield benefits for alleged victims, for defendants (who are tried sooner), and for the pursuit of just outcomes when criminal misbehaviour has been alleged.

32 M. L. Howe, *The nature of early memory,* (2011). N.19 above.
33 R. Flin, J. Boon, A. Knox, and R. Bull, "The effect of a five-month delay on children's and adults' eyewitness memory" (British Journal of Psychology, 1992).
34 M. E. Lamb, L. C. Malloy, I. Hershkowitz, and D. La Rooy, "Children and the law". N.22 above.
35 T. Pigot, *Report of the advisory group on video-recorded evidence,* (1989). N.8 above.
36 M. L. Howe, *The nature of early memory,* (2011). N.19 above.
37 J. Plotnikoff and R. Woolfson, "Measuring up?"N.7 above.
38 M. E. Lamb, L. C. Malloy, I. Hershkowitz, and D. La Rooy, "Children and the law". N.22 above.

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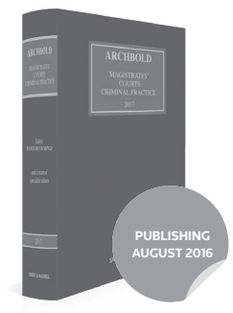

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