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Cases in Brief

Defences—prevention of crime—Criminal Law Act 1967 s.3(1)—protestor cases—availability of defence—proper approach; magistrates' courts procedure—refusal to state a case; expert evidence—expression of duty to the court—as to lawfulness of activity sought to be prevented

R (DPP) v STRATFORD MAGISTRATES' COURT [2017] EWHC 1794 (Admin); July 14, 2017

(1) The district judge had been wrong to allow protestors outside an arms fair to raise the defence of reasonable force in the prevention in crime under the Criminal Law Act 1967 s.3(1) to charges of wilful obstruction of the highway (Highways Act 1980 s.137), the crimes sought to be prevented being the sale etc of arms illegal by reason of Export Control Order 2008 (S1 2008/3231) ss.21 and 25 and crimes committed outside the jurisdiction contrary to the International Criminal Court Act 2001 ss.52 and 55(1)(a). The defendants had relied on a ruling of Flaux J at Leicester Crown Court in *Barkshire* (unreported, 21 May 2010; convictions overturned for unrelated reasons: [2011] EWCA Crim 1885, but "reservations" expressed about ruling). In that ruling, the judge had considered Lord Hoffmann's speech in *Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136, [73]-[94], on the limits of self-help and concluded that it was not essential to the decision and was contrary to principle in usurping the function of the jury. The court in the instant case did not accept that the observations could be dismissed as *obiter dicta*. Whether or not they were strictly speaking necessary for the decision could be debated. What was plain was that they provided a clear and cogent exposition of the legal issues that would arise in this type of case, with which the other members of the House of Lords had agreed.

(2) In addition to *Jones*, the court considered *Birch v DPP* [2000] Crim. L.R. 301, *Hutchinson v Newbury Magistrates' Court* (unreported, 9 October 2000), and *Bard* [2014] EWCA Crim 463. Although it was not possible to set out all-embracing principles derived from the cases, these themes emerged: (a) The defence under s.3(1) operated as a justification for the use of force rather than an excuse to use force, and was linked to the concept of necessity. There must be an apprehension of a need to use force (or in an appropriate case something less than force) to prevent an imminent or immediate crime; or as expressed in Hale, Pleas of the Crown (1778) volume 1 p.52 "an actual and inevitable danger". There must be a clear nexus between the use of force and the prevention of crime; and there was a difference between a protest against what was regarded as objectionable and even illegal conduct on the one hand, and the use of force to prevent an imminent and immediate crime on the other. (b) The court should not countenance the demand for disclosure or the calling of evidence (expert or otherwise) which related to what could not properly be characterised as an imminent or immediate crime. If the commission of such crimes were not within the direct knowledge of a defendant, they were unlikely to fall into that category. (c) On an application to consider the ambit of a defence under s.3(1), a court should consider whether, on the most favourable view of the facts, such a defence was available, keeping firmly in mind the points raised in the speech of Lord Hoffmann in *Jones*. If there were no proper evidential basis on which the defence could be said to be available, it should be withdrawn from consideration. (d) Where a case was before a magistrate, who was both the judge of the law and the finder of fact, it was particularly important to consider carefully both the proper ambit of the defence and, when making findings, the questions which needed to be posed and how they should be answered. (e) It was very doubtful whether the ruling in the Crown Court in *Barkshire* provided guidance as to the proper approach either in the Crown Court or in the magistrates' court.

(3) The court considered, *obiter*, the question of whether the conduct of the defendants amounted to the use of force (*Swales v Cox* [1981] 1 QB 849; *Renouf* [1986] 1 WLR 522; *Jones*; *DPP v Bayer* [2004] 1 WLR 2856; and *Birch v DPP* considered). The s.3(1) defence applied to the direct application of force, although the force would not necessarily have to be applied directly against a person. It would apply for example to a defendant who attached him or herself to a lorry which was believed to be carrying chemical weapons. In contrast, the defence would not be available to those who lie down in the road in front of lorries making their way to a place where crimes were believed to be taking place or who blocked ac-

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cess by chaining themselves to gates. It was anomalous that force may be relied on as a statutory defence but that something less than force could not.
(4) The district judge had been wrong to refuse to state a case: the proper guidance on the meaning of "frivolous" in the Magistrates' Court Act 1980 s.111(5), was given in *North West Suffolk (Mildenhall) Magistrates Court, ex p Forest Heath DC* [1998] Env.L.R 9, per Lord Bingham – "futile, misconceived, hopeless or academic"– and that on the approach of the court when such a refusal was challenged in *Sunworld Ltd v Hammersmith & Fulham London Borough Council* [2000] 1 WLR 2102, at 2106F-H. In this case, there was little factual dispute between the parties and the district judge gave a written ruling containing his findings of fact.
(5) Expert evidence as to the potential lawfulness of the conduct of the arms fair was heard. The witness statement of one expert stated that he understood his duties to the court as contained in CPR Part 19. The better practice was to set out (at least in summary) an express acknowledgment of the witness's duty to the court and the important obligation to provide objective and unbiased evidence: not least because the failure to do so invited a line of cross-examination. The expert's statement also contained assertions that particular conduct constituted a criminal offence. While he was entitled to give evidence of past events and the defence was entitled to invite the court to draw the conclusion that what had happened in the past was likely to be repeated, whether or not the conduct constituted a criminal offence was a matter for the court and not expert evidence. Further, where the defence wished to adduce evidence of this sort, it was important for the court to have in mind the observations of Lord Hoffmann in *Jones* at [94] that expert evidence to support the opinions of the protesters as to the legality of the acts in question was irrelevant and inadmissible.

Procedure—age of defendant—requirements for age assessment
R (M) v HAMMERSMITH MAGISTRATES' COURT [2017] EWHC 1359 (Admin); May 5, 2017
M said he was 16. The police had not conducted an age assessment. The magistrates were wrong to conclude, in the absence of any evidence, that M was over 18 and send him to trial at the Crown Court. In cases where there was a real doubt as to the claimed age, the proper course was to make directions for an age assessment to be conducted. The relevant local authority, through the medium of the youth offending team or service, will usually be the appropriate avenue to pursue. Further, the magistrates had been wrong to decline an adjournment so that M could present evidence of age: to do so was unfair (M relied on *SSHD ex parte Duggan* [1994] 3 All ER 277 and *Reilly's Application for Judicial Review* [2013] UKSC 61; [2014] A.C. 1115). There was no need to await the outcome of a promise to supply evidence by a defendant before instigating an age assessment: the two could run in parallel and be considered by the court. If no material emerged from the defendant, then the court could proceed without it, provided a fair opportunity has been given to deploy a case or evidence on behalf of the defendant himself or herself. A particular complication was that the Crown Court lacked any statutory power to remit cases for trial to the magistrates' court or youth court (see *W v Leeds Crown Court* [2011] EWHC 2326 (Admin); [2012] 1 W.L.R. 2786). The Crown Court could not remit the case to the youth court, and it would be inappropriate for the Crown Court to continue to deal with him as an adult, as it could by virtue of the deeming provision in the Children and Young Persons Act 1933 s.99(1). The court quashed the decisions as to age and sending to the Crown Court, and to remand him to adult custody.

Procedure—failure to take guilty plea personally in magistrates' court—nature of procedural defect—effects; jurisdiction of the Crown Court in relation to magistrates' courts—procedure for challenge
R (OWADALLY AND KHAN) v WESTMINSTER CITY COUNCIL [2017] EWHC 1092 (Admin); May 17, 2017
(1) It was clear that in the Crown Court only a defendant personally could enter a plea of guilty. No departure from this rule was permitted and any departure rendered subsequent proceedings void: *Ellis* (1973) 57 Cr.App.R 571; *Williams* [1978] QB 373. The position under the Magistrates' Courts Act 1980 s.17A was not different. Although the magistrates' court was dealing with an indication of a plea, s.17(A)(6) and s.9(1) of the 1980 Act served to treat that indication as a plea. The fact that in cases of committal for sentence, there would be a moment in the Crown Court where the defendant accepted that he or she has been committed from the magistrates' court did not furnish a relevant distinction. In terms of the distinction set out in *Ashton* [2006] EWCA Crim 794; [2007] 1 WLR 181 between procedural failures and proceedings without jurisdiction, this failure was of the latter kind, and it (including under previous legislation to the same effect) had been consistently so treated: *Cockshott* [1898] 1 QB 582; *Kent Justices, Ex parte Machin* [1952] 2 QB 366 and *R (Rahmdezfouli) v Wood Green Crown Court* [2013] EWHC 2998 (Admin); [2014] 1 W.L.R. 1793. Accordingly informed acquiescence or waiver could not operate to remedy the failure and confer jurisdiction, even though O and K had admitted at the first hearing at the Crown Court that they had been committed for sentence from the magistrates' court and they had participated in interlocutory hearings in relation to confiscation for a prolonged period.
(2) The matter had come before the Administrative Court as an appeal by way of case stated challenging the decision of the recorder on an application to vacate the plea made in the Crown Court. The Crown Court should not have entertained the application. Whether the matter came as an appeal by way of case stated or on an application for judicial review (for the choice, see *Archbold* 2017 2-91 to 2-93), the relevant court in which to pursue either remedy was the High Court, not the Crown Court. This was not an appropriate case for an application to vacate a plea to the Crown Court. It was far removed from a straightforward application to vacate a plea, which did not raise grounds challenging the powers and jurisdiction of the magistrates' court, with which the Crown Court could deal. Here the Crown Court had no jurisdiction to quash the committal, which was anything but obviously bad: *Sheffield Crown Court, ex p DPP* (1994) 15 Cr.App.R (S) 768. Rather, it was the exercise of a supervisory jurisdiction over the conduct of the magistrates' court, a jurisdiction the Crown Court did not have: *Hereford Magistrates' Court, ex p Rowlands* [1997] 2 Cr.App.R 340, 350. The decision of the Crown Court was without effect and fell to be quashed. The court accordingly treated the application as a substantive judicial review

of both the magistrates' court and Crown Court decisions, waiving procedural requirements as necessary, and treating the evidence as confined to that stated in the original case stated.

Reporting restrictions—relating to person not participating in proceedings—principles

KHUJA v TIMES NEWSPAPERS [2017] UKSC 49; July 19, 2017

K was arrested at the same time as a number of men who were subsequently convicted of sexual offences. K was not charged, but released from arrest, and told that his case remained under review. Magistrates granted an injunction (Contempt of Court Act 1981 s.4(2)) after his arrest prohibiting his identification until charge, and the judge at the trial of the other men made an order prohibiting publication until charge. His name, and a person with the same (common) first name, were frequently mentioned in evidence at the trial. Following newspaper applications to discharge the order, K applied for an interim injunction restraining publication, on the basis of misuse of private information and European Convention on Human Rights, Art.8, which was refused, as was his appeal (*sub nom PNM v Times Newspapers* [2013] EWHC 3177; [2014] EWCA Civ 1132; [2015] 1 Cr.App.R. 1). The judge committed no error of law and the conclusion was one he was entitled to make.

(1) K's application was to prohibit the reporting, however fair or accurate, of matters discussed at a public trial. These were not matters in respect of which K could have had any reasonable expectation of privacy. The contrast with the facts in *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457 could hardly be starker.

(2) K also sought to rely on his Art.8 rights in relation to the impact which publication would have on his relations with his family and their relations with the community. But the impact on his family life of what was said about him at the trial was no different in kind from the impact of many disagreeable statements which may be made about individuals at a high profile criminal trial. The collateral impact of the trial process on those affected was part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public.

(3) The impact on K's family was indirect and incidental (as in *In re S (Identification: Restrictions on Publication)* [2004] UKHL 47; [2005] 1 AC 593 and *In re Guardian News and Media Ltd* [2010] UKSC 1; [2010] 2 AC 697), in that they took no part in the trial. More fundamentally, protection of his family relied on protection of his reputation: it would be incoherent for the law to refuse an injunction to prevent damage to K's reputation directly, while granting it to prevent the collateral impact on his family life in the same circumstances.

(4) The court would not rule out the possibility of a pre-emptive injunction in a case where the information was private or there were no sufficiently substantial public interest in publication. But in relation to the reporting of public court proceedings such cases were likely to be rare, and this was not one.

(5) The court considered whether the public interest extended to K's identity. Although the order sought by K would not prevent the identification of a party to proceedings, or a witness, the policy which permitted media reporting of judicial proceedings did not depend on the person adversely affected by the publicity being a participant in proceedings. It depended on (a) the right of the public to be informed about a significant public act of the state, and (b) the law's recognition that, within the limits imposed by the law of defamation, the way in which the story was presented was a matter of editorial judgment. K's identity was not a peripheral or irrelevant feature of this particular story. Lord Sumption's judgment was agreed by Lord Neuberger, Lady Hale and Lords Clarke and Reed. Lords Kerr and Wilson dissented.

SENTENCING CASE

Fresh evidence—psychiatric evidence—hospital order—restriction order

KITCHENER [2017] EWCA Crim 937 (July 7, 2017)

On 22 November 2002, the applicant had pleaded guilty to attempted murder and been sentenced to custody for life with a minimum term of 14 years and eight months less time on remand. He applied for an extension of time of about 14 years, for leave to appeal against sentence and to call fresh psychiatric evidence, contending that he should have been sentenced to a hospital order and a restriction order under ss.37 and 41 of the Mental Health Act 1983 rather than to custody for life.

The basis for the application for an extension of time was psychiatric evidence that was not available at the time of sentence which concluded that at the time that the applicant was sentenced he was suffering from a severe personality disorder amounting to a psychopathic disorder within the meaning of s.37 of the Mental Health Act 1983 as was in force at the time in December 2002.

The court was satisfied that the psychiatric evidence relied on was credible, relevant and fresh in that it could not have been obtained previously with due diligence. The evidence was admitted and the court granted the extension of time and leave to appeal.

The court adopted the approach set out at [51] in *Vowles* [2015] EWCA Crim 45 when considering the appeal against sentence and emphasised that very considerable caution should be exercised before a judge decides that a hospital order is the appropriate disposal where a dangerous offender has committed a very violent crime but is diagnosed as suffering from a personality disorder.

The court was satisfied that the applicant was suffering from personality disorders at the time of the offending that constituted a psychopathic disorder and that the commission of the very serious crime was substantially attributable to this disorder. The court concluded that the applicant needed hospital treatment. His disorder was not initially identified in prison and could not be treated there. The evidence was that his condition was treatable and he had responded to treatment.

The court then considered what it referred to as the "most important factor": public protection. The court took the view that the applicant's history within the prison and matters identified during consideration of his release on licence strongly indicated that the public would be better protected if the cause of his offending was addressed by successful treatment that could gradually secure his successful return to the community.

The applicant's age (he was under 21 at the date of sentence) meant that the court could not impose a hospital and limitation direction under s.45A of the Mental Health Act 1983. This meant that what the court referred to as the "double lock" of both the Parole Board and the first-tier Tribunal being required to adjudicate upon his release was not available. The court therefore had to consider which of these two judicial bodies was better placed to assess risk in this case. The court accepted the psychiatric opinion before it that the first-tier Tribunal was the most appropriate body to perform this function in this case.

Allowing the appeal, the court quashed the sentence of custody for life and substituted a treatment order under s.37 of the Mental Health Act 1983 with a restriction order under s.41 of the same Act.

Features

Violating the right to a fair trial? The secure dock in England and Wales

By Joe Stone QC and Jodie Blackstock[1]

An update

In 2015 we drew attention, by separate means, to the use of the dock in criminal trials and asked whether this was necessary in a modern era where UK law respects the rights contained in Article 6 ECHR to be presumed innocent and effectively to participate in one's defence.[2] In these pieces we drew attention to the historical absence of the secure dock in this country until 20 years ago, and significant similar jurisdictions almost entirely. In our distinct conclusions we suggested that its use was outdated and unfair, drawing on recent mock jury research and appellate reasoning from courts that should be influential to our own. As we continue this debate with colleagues and law reformers, we feel that readers of *Archbold Review* may find it useful to consider that the European Court of Human Rights has now unequivocally ruled the secure dock a violation of the right to a fair trial.

Yaroslav Belousov v Russia[3]

Mr Belousov brought a complaint pursuant to Article 3 ECHR that placement in "glass cabins" during trial in Russia amounted to degrading treatment (an additional claim relating to metal cages was ruled inadmissible) and Article 6 ECHR that such placement restricted the defendants' effective participation in their trial. The applicant stood trial together with nine other defendants for violent disorder following a demonstration. The glass cabins are described in the judgment as follows:

> [74] On 6 June 2013 the court proceedings began in hearing room no.338 of the Moscow City Court. The latter court lent its premises to the Zamoskvoretsky District Court so as to accommodate all the participants in the proceedings, the public and the press. In that hearing room ten defendants were held in a glass cabin measuring 3.2 m x 1.7 m x 2.3 m (height). The Government submitted that the glass cabin was a permanent courtroom installation consisting of a steel frame and sheets of bulletproof glass, with a partition inside, a steel mesh ceiling and a secure door; the cabin was equipped with benches. The walls of the cabin had slots allowing documents to be passed between the defendants and their counsel; ventilation outlets were at floor level, and near the dock was an air conditioner. The cabin was equipped with microphones allowing for consultations with counsel and facilitating the defendants' participation in the proceedings. The Government specified that convoy officer [sic] guarded the cabin on both sides, supervised the defendants and intercepted any attempts of "contact with outsiders", but the defendants could communicate with their counsel with the court's permission.
>
> [75] The applicant submitted that the glass cabin lacked space and ventilation and that it was virtually soundproof, hampering the defendants' participation in the proceedings and their communication with counsel. The benches had no backrests, and the lack of space made it impossible to have documents; it was impossible to consult counsel or the case file during the hearing. The applicant also submitted that the video evidence examined at the hearing could not be seen by him from the cabin because of the distance between the cabin and the screen and his poor eyesight.
>
> [76] In August 2013 the proceedings moved to hearing room no. 635 of the Moscow City Court. This hearing room was equipped with two glass cabins similar to the one in hearing room no. 338, except that there were no slots in them. Each cabin measured 4 m x 1.2 m x 2.3 m (height). From 2 August 2013 one of the defendants was no longer placed in the glass cabin owing to a change in the measure of restraint for him. The nine remaining defendants were divided between the two cabins.

The glass cabins described here and used in Russia for defendants remanded in custody are not dissimilar from the secure dock now used in nearly all criminal courtrooms in England and Wales, with the exception that Russian security officers are likely to be armed.[4] The case is therefore significant in that the findings by the European Court of Human Rights as to detrimental effects are entirely likely to be occurring in each case appearing before our domestic criminal courts.

Degrading treatment

Although our primary focus is the impact of the dock on the

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2 See J. Stone, "Is it now time to abolish the dock in all criminal proceedings in England and Wales?," *Archbold Review* [2015] 3, pp 7-9, https://www.archbolde-update.co.uk/PDF/2015/Archbold%203-15%20v%206.pdf and J. Blackstock, *In the Dock: reassessing the use of the dock in criminal trials* (JUSTICE, 2015), available at: https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2015/07/JUSTICE-In-the-Dock.pdf.

3 App. nos. 2653/13 and 60980/14, 4 October 2016.

4 Google the Pussy Riot trial and you will get an impression of a similar set-up to ours, save that Russia seems to employ floor-to-ceiling glass.

fairness of the proceedings, it is worth noting that the applicant also complained that the conditions in the glass cabin were cramped, with ten defendants held there and that the confinement caused difficulties in communication with counsel, in violation of Article 3 ECHR. Russia countered that these cabins are used for all detainees placed in pre-trial detention and that the glass cabins were replacing the metal cages (which had previously been ruled in breach of Article 3 ECHR in *Svinarenko and Slyadnev v Russia*,[5] due to the objectively degrading nature of cages). The appearance of the glass cabins, by contrast, did not violate Article 3 ECHR. The cramped conditions were overcome by being moved to a courtroom with two glass cabins.

The court at [124] agreed that the appearance of the glass cabins is not as harsh as the metal cages, recalling that the means chosen for ensuring courtroom order and security must not involve measures of restraint which, by virtue of their level of severity or by their very nature, would bring them within the scope of Article 3 ECHR. It noted that in *Svinarenko and Slyadnev* the court had surveyed security in other Member States and found that glass installations are used in courtrooms although their designs vary from glass cubicles to glass partitions, and in the majority of the States their use is reserved for high-security hearings.

However, the court noted in *Belousov* at [125] that the glass cabin could reach a level of humiliation that would violate Article 3 ECHR if the circumstances of the defendants' confinement, taken as a whole, "would cause them distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention."[6] The court held that the crowded conditions in the first courtroom did amount to a violation of Art.3 ECHR, but the second courtroom was acceptable since there was more space available.

Although trials involving ten or more co-defendants are unusual in the courts in England and Wales, they are not unheard of. The dock may also be filled with other professionals engaged in necessary activities that may crowd the space – interpreters, intermediaries, dock officers, security officers and/or psychiatric nurses. A crowded secure dock, where the defendant is required to remain throughout the trial, could give rise to a violation of Art.3 ECHR.

Effective participation

Mr Belousov also complained that his confinement in glass cabins during the court hearings hindered his participation in the trial, in particular because the glass partition reduced visibility and audibility and made confidential exchanges with legal counsel impossible. The interior arrangement of the cabins also made it awkward to handle and read documents. He further complained that the intensive schedule of the court hearings and late arrivals back at the detention facility did not leave him sufficient time to prepare for the next day's hearings. The lack of sleep compounded by lengthy transfers from the detention facility in difficult conditions led to physical exhaustion which also diminished his ability to participate in the proceedings and to defend himself effectively.

The Russian Government contended that the applicant's capacity to participate in the proceedings had not been affected by the glass cabins because the latter were equipped with loudspeakers and microphones. It also did not consider the schedule of the court hearings excessively intensive, referring to the complexity of the case and the need to strike an appropriate balance between expeditious proceedings and the interests of proper administration of justice. It argued that the applicant's requests for intervals during the hearing to allow for preparations and consultations had usually been granted.

With regard to the first courtroom, the court held at [147] that it would find it difficult to reconcile the degrading treatment of the defendant during the judicial proceedings with the notion of a fair hearing, regard being had to the importance of equality of arms, the presumption of innocence, and the confidence which the courts in a democratic society must inspire in the public, above all in the accused. The first two months of the trial were therefore conducted in breach of Article 6 ECHR, by virtue of the Article 3 ECHR breach.

The court considered the second courtroom in the context of every defendant in Russian who is in pre-trial detention being placed either in a glass cabin, like in England and Wales, or where this is not available, a metal cage. At [149] the court recalled that a measure of confinement in the courtroom may affect the fairness of a hearing guaranteed by Article 6 ECHR, in particular because it may have an impact on the exercise of an accused's rights to participate effectively in the proceedings and to receive practical and effective legal assistance.[7] This includes the right to communicate with one's lawyer without the risk of being overheard by a third party "as one of the basic requirements of a fair trial; otherwise legal assistance would lose much of its usefulness".[8]

Although the court recognised that court order and security is necessary for the proper administration of proceedings, any measures restricting the defendant's participation in the proceedings or imposing limitations on consultation with their lawyers should "only be imposed in so far as is necessary, and should be proportionate to the risks in a specific case".[9]

As the court explained:

> In the present case, the applicant and his co-defendants were separated from the rest of the hearing room by glass, a physical barrier which to some extent reduced their direct involvement in the hearing. Moreover, this arrangement made it impossible for the applicant to have confidential exchanges with his legal counsel, to whom he could only speak through a microphone and in close proximity to the police guards. It is also of relevance that the cabin was not equipped to enable the applicant to handle documents or take notes.[10]

The court reflected that the glass cabin was not used due to a specific security risk or concern, but, rather, was a matter of routine. It held that domestic courts need to choose the most appropriate security arrangement for the circumstances of the case, taking into account, the administration of justice, the fairness of the proceedings and the presumption of innocence:

> The trial court did not seem to recognise the impact of these courtroom arrangements on the applicant's defence rights, and did not take any

5 App. nos. 32541/08 and 43441/08, ECHR (GC),17 July 2014.
6 Applying *Kudła v Poland* (GC), app. no. 30210/96, 26 October 2000 at [92-94]).
7 Referring to *Svinarenko and Slyadnev* at [134] and the cases cited there.
8 See *Sakhnovskiy v Russia*, app. no. 21272/03, 2 November 2010 (GC), at [97].
9 Applying *Van Mechelen*, app. no. 55/1996/674/861-864 (23 April 1997), at [58], and *Sakhnovskiy*, at [102].
10 At [151].

> measures to compensate for these limitations. Such circumstances prevailed for the whole duration…and could not but adversely affect the fairness of the proceedings as a whole (at [152]).

The court concluded at [153] that the defendant's rights to effectively participate in proceedings and to receive practical and effective legal advice had been restricted, and that there were no necessary or proportionate reasons for doing so. This was in violation of Articles 6(1) and 6(3)(c) ECHR.

Implications for England and Wales

The case raises significant implications for practice in the criminal courts of England and Wales, where use of the secure dock, irrespective of whether a person is remanded in pre-trial detention, is now routine in almost all cases. The conditions in our docks are equally hostile to an effective defence. There is no space for documentation or to take notes; passing documents though the gaps in the glass partitions is nigh on impossible; consultation with counsel – or the rarely-sighted solicitor – is subject to gaining their attention by banging, waving and other demeaning methods; consultation is done within hearing of other parties, the dock officer, anyone else in the dock, and if it is particularly difficult to communicate through the glass, everyone else in the courtroom. We view British justice with smug complacency, but in this respect it would appear that our courts share the same flaws as countries like Russia. As the Strasbourg Court has held, our trial courts need to recognise the impact of these arrangements on the defence rights of people standing trial. But first, as defence lawyers, we need to recognise that the enclosure and isolation of our clients for the duration of their trial without clear justification is, quite simply, a violation of their rights.

Confiscation: An Update (Part 2 - Procedure & Practicalities)

By Polly Dyer[1] and Michael Hopmeier[2]

Introduction

This article aims to assist the practitioner and judge by outlining the guidance the appellant courts have recently provided as to procedure and practicalities at confiscation, restraint and enforcement hearings.

General procedural matters

The most significant of the recent decisions in this area is *Guraj,*[3] not least because the Supreme Court restated the general principle that, before holding that an order was invalidated by a procedural error, the court should ask itself whether it was really the intention of Parliament that such a drastic consequence should follow. But as this decision was fully examined by Alice Lepeuple earlier this year, no more will be said about it here.[4]

A less tolerant attitude towards procedural failings was shown by the European Court of Human Rights in *Piper v United Kingdom*[5]– which the Strasbourg Court decided some 11 years and two months after the national proceedings had finally concluded with a decision of the Court of Appeal on the defendant's confiscation order. The Strasbourg Court found that the delays attributable to the state authorities in the national proceedings totalled some three years. In view of what was at stake for the applicant, and despite the fact that he was responsible for most of the overall delay, the three years of delay attributable to the state authorities resulted in the proceedings not being completed within a reasonable time. As such, there had been a breach of art.6(1) of the European Convention – albeit a less grave one than the applicant had claimed.

In *Halim,*[6] the Court of Appeal – referring back to *Johal*[7] – held that Parliament had intended the courts to take a broad approach to what constitutes "exceptional circumstances" in s.14(4) of POCA. Adherence to timetables set is an obligation, but the approach to strict failures to comply should reflect that general intention. A consideration of exceptional circumstances will involve looking at the entire history of the proceedings and Crown Courts were advised that it would be good practice for readiness hearings to be scheduled a week or so before the date fixed to ensure that the parties are ready to go ahead. Where necessary, the courts should also direct that skeleton arguments be exchanged in good time so as to identify the matters in issue at the hearing[8].

Identification of Issues

The decision in *Balqis*[9] reminds judges at first instance of the importance of separating out the different issues and providing cogent reasons for their decisions supported by legal authority for them. The decision in *Sandford*[10] also reminds them that the provisions of ss.19 to 25 of POCA allow, in given circumstances, the benefit figure to be increased but not reduced.

Displacing the Assumptions – Hidden Assets

The Supreme Court in *Harvey* reaffirmed the principle that in confiscation proceedings there is a burden on the defence, and the defence will be required to produce evidence in order to displace the assumptions in a criminal lifestyle case.[11] For a defence practitioner, it is important to note that

1 Barrister at QEB Hollis Whiteman.
2 Circuit Judge at Kingston Crown Court.
3 [2016] UKSC 65.
4 "*Guraj*: the Urgent Need for Reform of Part 2 of POCA", [2017] 2 *Archbold Review* 4-5.
5 (2015) 61 EHRR 38.
6 [2017] EWCA Crim 33.
7 [2013] EWCA Crim.
8 At [45].
9 [2016] EWCA Crim 1726.
10 [2016] EWCA Crim 810.
11 [2015] UKSC 73, [2017] AC 105.

simply producing VAT returns is unlikely to be sufficient for this purpose. In *O'Shea,*[12] the court emphasised that it was not unjust to apply the assumptions where the defendant had been unable to produce written records for a large number of transactions of less than £500; it was the defendant's responsibility to keep records and the reason for his failure to do so here was no doubt to avoid paying tax. Furthermore, the defendant had given no meaningful oral evidence on those transactions during the trial.

Recent judgments on hidden assets have also re-asserted that the burden is on a defendant to account for his or her assets, and to show that the value of their realisable property is less than the value of their benefit. Here too evidence is also generally required.[13] The Court of Appeal has further made it clear that a hearing addressing an application for a certificate of inadequacy is not the appropriate forum to re-litigate the issue of hidden assets: *Price v CPS,*[14] such hearings should focus on what has happened since the judge's order and on the defendant's current position at the date of the proceedings.[15] Likewise, an application for the appointment of an enforcement receiver is not the appropriate time or place to challenge the fairness of the confiscation order.[16]

Confiscation and Compensation

In *Davenport,*[17] the Court of Appeal provided a list of considerations which a Crown Court should bear in mind before making in the same case both a confiscation and a compensation order. In particular, the court highlighted the following:

(a) the court should be alert to the risk of double counting inherent in such a combination of orders and the risk of making a confiscation order which is disproportionate;

(b) the court should ordinarily not make both a compensation order and a confiscation order representing the full amount of the benefit where there has been actual restitution to the victims prior to the date of the confiscation hearing;[18]

(c) where a defendant claims that restitution will be made after the date of the hearing the court should scrutinise with great care the evidence and arguments raised in support of his assertion. If the court remains uncertain whether the victims will be repaid under the compensation order then a confiscation order which includes that amount will not ordinarily be disproportionate. However, mathematical certainty of restitution is not required. The court should approach matters in a practical and realistic way.

Sale of the matrimonial home

The Court of Appeal in *Parkinson*[19] made it clear that there is no general principle against the imposition of confiscation orders which are likely to require the sale of the family home. That this might be the consequence of the order is a factor to be considered, but its importance will depend on the facts of the individual case. In so holding it said that *Beaumont*[20], a decision of a two-judge court which suggests otherwise, but which turned on its own facts, should not be taken as decisive of the point. The decision of the Administrative Court in *Re Kone*, a case previously mentioned,[21] is to similar effect. In *Re Kone*, the court approved a ruling that required the family home to be sold, holding that any interference with the defendant's or her family's rights under ECHR Protocol 1 Article 1 and Article 6 was proportionate; the court upheld the appointment of a receiver to carry out the sale. In *Parkinson,*[22] the Administrative Court suspended the receiver's power for approximately seven months in order to allow the wife the opportunity to discharge the liability by whatever other means she could find, in order to avoid a forced sale of the matrimonial home. That delay, it was suggested, struck a balance between the interests of the wife and children and the need to satisfy a confiscation order which had been outstanding for some time.

"Agreements"

In *Kelly,*[23] the Court of Appeal stressed that it is for the judge to determine the recoverable amount and judges are not bound by any agreements made between the parties. In this case the judge had conducted his own assessment of the material and reached a figure for the recoverable amount that was far higher than the sum that had been agreed. He was found to have acted appropriately.

In *Souleiman,*[24] after a four-day hearing the appellant had agreed to a confiscation order by consent. At that stage he had agreed that two assets were available to him to satisfy his confiscation order, a flat and a house in London, and also agreed that he owned a 50% share of each property. On appeal he contended that this in fact was not correct and that he was only entitled to a 50% share of the *deposit* paid to purchase the property. This argument had not been raised at any time previously. Dismissing the defendant's appeal, the Court of Appeal said that the case law distinguishes between the situation where the judge proceeded on a wrong legal basis by consent, and the situation where the judge proceeded on a wrong factual basis by consent. If a judge's legal ruling is incorrect then it is open to the appellant to appeal it.[25] However, where it is alleged that the judge made a consent order based upon an apparent error of fact, ordinarily no appeal will lie. The judge has not in fact made an error of fact in such a case: he is proceeding on the facts as suggested upon the invitation of the defendant. In this case, the error was one of fact and so the appeal was dismissed.

At the confiscation hearing in *Yaseen*[26] it had been agreed that certain properties belonged to the defendant (although initially he had contended that he was holding the properties on trust for his uncle). Subsequently, the defendant's

12 [2015] EWCA Crim 1395.
13 See *Omorogieva* [2015] EWCA Crim 382 and *Yiu & Lin* [2015] EWCA Crim 1076
14 [2016] EWHC 455.
15 See also *Stannard* [2015] EWHC 1199 (Admin), where the court re-emphasised that an application that challenges the findings made by the Crown Court must be dealt with by an appeal to the Court of Appeal.
16 *Re Kone*, Administrative Court, 15 February 2017; unreported, but the case summary is available on Westlaw.
17 [2015] EWCA Crim 1731.
18 See *Waya*; *Jawad* [2013] EWCA Crim 644.
19 [2015] EWCA Crim 1448.
20 [2014] EWCA Crim 1664.
21 n 16 above.
22 Unreported, 4 July 2017.
23 [2016] EWCA Crim 1505.
24 [2016] EWCA Crim 124.
25 See *Harriott* [2012] EWCA Crim 2294.
26 [2016] EWCA Crim 2139.

uncle independently issued a claim in the Chancery Division alleging that he was the beneficial owner of the properties in question. The CPS was made a party to the proceedings and, in light of documentation that was provided, a settlement agreement was reached and approved by the court in which it was declared that the applicant owned the houses on trust for his uncle. Both the defence and prosecution agreed that a s.23 variation order should be granted. However, the judge refused to do so. His reasoning was that there had been no genuine change of position to warrant a variation. On appeal it was held that: (1) ordinarily the fact that the original order was made as a result of an agreement will defeat any appeal, although (2) there will be some exceptions, for example when the whole process was unfair.[27] No such exceptions applied here. However, this was not a case where the defendant sought to contest the basis of the agreement that he had made. It was the independent approval by the Chancery Court of the settlement agreement, following an application by the defendant's uncle, which had frustrated the operation of the agreement. So here the defendant's appeal was allowed.

In the recent case of *Morfitt,*[28] the Court of Appeal held that where a defendant had consented to the valuation of benefit, there was no basis for quashing a confiscation order even if it was possible that the prosecution might not have proved the amount of the benefit if the proceedings had been contested.

Valuation of Property

In *Gor,*[29] the Court of Appeal considered (among other matters) the meaning of "market value" in s.79 of POCA .The appellant argued that the "market" here referred to was the market in which the relevant property was to be sold, which in this case meant the market on a forced sale. The court – applying *Islam*[30]– held that the true meaning of "market" in s.79 is the hypothetical open market between willing buyer and willing seller, without constraint as to any particular time of sale.

In *Nevitt,*[31] a case in which the proceedings were brought under the Criminal Justice Act 1988, it was held to be lawful to proceed in the defendant's absence where he had absconded.

And in *Henson,*[32] a judge at Nottingham Crown Court agreed to vary the available amount under s.22 of POCA when properties held by the defendant and obtained as a result of his criminal activity had increased in value (from a position of negative equity).

Restraint, freezing injunctions and disclosure orders

In *Nuttall v NCA,*[33] the court provided some helpful considerations in relation to disclosure orders. It was held that when a court grants a disclosure order on paper under s.357 of POCA there is no legal duty to give reasons; a judge would only grant such an order if satisfied the grounds were established, and so the giving of reasons would be otiose. A safeguard existed here, in that the evidence upon which the agency relied would have to be disclosed once the individual against whom it was made sought to challenge it.

In *A v DPP,*[34] the applicant sought permission to appeal a decision concerning the registration of a foreign judgment freezing his assets. In refusing the application for permission the Administrative Court said Crown Courts should in such cases refuse to entertain evidence or arguments directed at the substantive basis for the making of the initial freezing order. Only the courts of the issuing state had the jurisdiction to consider such arguments, not the courts of the executing state.

In *National Crime Agency v Davies,*[35] the defendants had been acquitted of mortgage fraud, despite proof that the false information had been included on mortgage application forms. However, the defendants' subsequent applications to discharge property freezing orders and disclosure orders were refused. Their acquittals did not mean that the funds involved were not arguably the proceeds of unlawful conduct.

In *Bhandal v Her Majesty's Revenue & Customs,*[36] an individual whose property had been subject to a restraint order sought to obtain compensation under s.89 of the Criminal Justice Act 1998 (now s.72 of POCA). These provisions confer a right to compensation where the claimant can establish a "serious default" by the agencies which carried out the investigation. Collins J held that, in principle, "serious default" could consist of negligence as well as deliberate misconduct – although on the facts of the case he held that no default, even in this wider sense, was present.

Enforcement and default sentences

In *Malhi,*[37] the Court of Appeal confirmed that s.10 of the Serious Crime Act 2015, which governs default sentences, applies to confiscation orders made in relation to offences committed before the Act came into force. The court also reiterated that there should be a correlation between the amount in which the order was made and the default period, and that a judge should not automatically apply the maximum term.

In *Gangar v Director of the Serious Fraud Office,*[38] the court considered the interpretation of s.79(2) of the Magistrates' Courts Act 1980, which concerns the reduction of the default sentence of imprisonment where part of the sum has now been paid. The correct approach, it said, was to look at the amount that was outstanding at the date when the decision was made to impose a default sentence, and to measure against that sum the amount the individual has paid.[39]

In *White & Gangar v Serious Fraud Office,*[40] the court made it clear that a defendant's failure to co-operate with an enforcement receiver will be a material factor for consideration by the court where the same defendant relies upon the failure of an enforcement receiver to realise assets as the foundation for an application to vary a confiscation order because of the inadequacy of realisable assets.

In *Cooper,*[41] a district judge had committed the appellant to prison for non-payment of a confiscation order despite the fact that he was suffering from advancing dementia – a deci-

27 See *Hirani* [2008] EWCA Crim 1463 at [35].
28 [2017] EWCA Crim 669.
29 [2017] EWCA Crim 3.
30 Following *Islam* [2009] 1 AC 1076.
31 [2017] EWCA Crim 421.
32 Nottingham Crown Court, 22 May 2017.
33 [2016] EWHC 1911 (Admin).
34 [2016] EWCA Crim 1393.
35 [2016] EWHC 899 (Admin).
36 [2015] EWHC 538 (Admin).
37 [2016] EWCA Crim 2025.
38 [2016] EWHC 2561 (Admin).
39 Following *R (on the application of Gibson) v Secretary of State for Justice* [2015] EWCA Civ 1148.
40 [2015] EWHC 446 (Admin).
41 [2015] EWHC 2341 (Admin).

sion taken on the basis that he had "no power or discretion to be sympathetic to the applicant's health and withhold imposing the committal for that reason". Reversing this ruling, the Administrative Court held that an enforcing court is entitled to take such matters into account; although its discretion to do so must be exercised with care, to avoid confiscation orders being improperly undermined.[42]

In *Re A,*[43] the defendants were convicted of a large MTIC fraud[44] and were made subject to a confiscation order in the sum of £16.1m (adjusted for inflation). During the currency of that MTIC fraud, substantial sums of money were paid to money launderers, who were convicted in separate proceedings and made subject to a separate confiscation order. In the proceedings to appoint the enforcement receiver for the MTIC fraud, the defendants sought to offset the sums recovered under the second confiscation order imposed against the money launderers. In the Administrative Court their argument was rejected. In so holding, Mitting J said (at [22]):

> It is difficult to see on what basis Article 1 and Protocol 1 would require the State to give credit to defendants convicted of fraud against whom confiscation proceedings were brought for sums of money paid to others (money launderers) out of money which they had already fraudulently obtained before the fraud which was the subject of confiscation orders against them… therefore, although the money launderers did obtain money in connection with commission of this fraud, it should not in principle be taken into account when confiscation orders against the operators of the fraud are to be enforced. Accordingly, even if it was open to me to decide that payment of money launderers should be taken into account, I would decline to do so.

The money launderers had been paid with money obtained from previous frauds; therefore, the sums recovered from them did not relate to the same joint benefit. The appeal was dismissed.

Conclusion

The principle that criminals should not profit from their crimes is universally accepted. How the courts should proceed in achieving that objective fairly, proportionately and effectively is plainly not straightforward. The current legislation in the UK has been and continues, as appears from our two recent articles, to be a fertile source of litigation and doubtless recent related legislation such as the Criminal Finances Act 2017 will also keep the lawyers and the courts regularly occupied. The Law Commission is due to report on this complex area of law. The authors look forward to considering their recommendations in due course.

42 Following *Harrow Justices, ex parte DPP* [1991] 1 WLR 39.

43 [2016] EWHC 304 (Admin). This decision was a later stage in the litigation which had earlier produced the decision in *Ahmed and Fields* [2014] UKSC 36, [2015] A.C. 299.

44 "MTIC" stands for "Missing Trader Intra Community" and an MTIC fraud is a VAT fraud which exploits the rule that trading between Member States is VAT-free and when goods cross a border any VAT previously paid can be reclaimed from the national authorities.

Juvenile offences and adult liability

By J.R.Spencer

In 2016 PF, now in his late 40s, was convicted of offences of indecent assault and indecency with children, committed against his younger sister. The indictment charged the offences as taking place on dates unknown between 1979 and 1983, when she was aged between 9 and 13 and he was between 10 and 14. As the offences were, or may have been, committed when he was not yet 14, as the law then stood he was not guilty of these offences unless the Crown could show he was *doli capax*, meaning that he realised that his behaviour was "seriously wrong and not merely naughty or mischievous". On this point the jury were duly directed. However, the trial judge did not also tell them, as case-law required, that this knowledge must be established by evidence that went "beyond the doing of the act in question[1]." Because of this omission the Court of Appeal quashed PF's convictions.

This case prompts three distinct but related thoughts.

The first concerns the abolition of the *doli incapax* rule. As we all know, this vanished into legal history with s.34 of the Crime and Disorder Act 1998 and at the time no one seems to have shed any tears for it. But in retrospect, was its abolition really wise? In *PF* the Court of Appeal quoted with approval this passage from a judgment of the High Court of Australia.

> It is common enough for children to engage in forms of sexual play and to endeavour to keep it secret, since even very young children may appreciate that it is naughty to engage in such play…

The abolition of the *doli incapax* rule means that, provided they are over 10, such children now commit criminal offences – and this is so, even if they do not even understand that what they did was "naughty", let alone seriously wrong. Whether this is satisfactory is (to put it mildly) questionable.

The second concerns the wisdom (or otherwise) of prosecuting in a case like this. It is one thing to prosecute for historic sex offences someone who, many years before, abused children when he was an adult. But what social purpose, if any, is served by prosecuting a person who at the time in question was himself a child? Particularly if – as may be – his adult life has been exemplary.[2] Offences committed by juveniles, surely, should be subject to a limitation period.

The third related point concerns the length of time that convictions (and cautions) imposed on juveniles linger on a person's criminal record, and hence remain potentially disclosable when they later seek employment. In 2014, a committee of Parliamentarians chaired by Lord Carlile said that the current rules are too severe and should be revised;[3] and so on principle they should be.

1 At [15]; referring to *C (a minor) v DPP* [1996] AC 1, *L (a minor) v DPP* [1996] 2 Cr.App.R 501 and *R v M(L)* [2016] EWCA Crim 674, [2016] Cr.App.R 20.

2 A point made at greater length in the editorial comment on Charles Falk's note in *R v GB* [2015] EWCA Crim 150, [2016] 1 *Archbold Review*.

3 The Report can be found online at http://michaelsieff-foundation.org.uk/content/inquiry_into_the_operation_and_effectiveness_of_the_youth_court-uk-carlile-inquiry.pdf.

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