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Evidence of Absent Witness's Telephone Recording Did Not Make Trial Unfair

The European Court of Human Rights ("ECtHR") has held that the use of telephone recordings as evidence in a criminal trial, despite the inability of the accused to challenge the caller, did not violate his rights under Article 6, ECHR. This judgment follows a number of Grand Chamber judgments on similar issues that have altered the ECtHR's stance on the subject of absent witness evidence.

The applicant, Mr Seton, was on trial for murder. Prior to the trial, he submitted a defence statement stating that he believed that the murder had been carried out by Mr Pearman. The applicant alleged that he had previously been involved in a drug deal with Mr Pearman and the victim. Mr Pearman, who was at the time imprisoned for drug dealing, was interviewed by the police but he refused to cooperate and answered "no comment" to all questions. Following these interviews, Mr Pearman phoned his wife and son from the prison and stated that he had never heard of the applicant and had no knowledge of the murder. These calls were recorded – a standard practice that Mr Pearman would have been aware of.

During the applicant's trial for murder, it was accepted that the primary issue to be determined by the jury was whether the applicant or Mr Pearman had committed the murder. Mr Pearman had refused to attend the trial or make a formal witness statement. Accordingly, the prosecution sought to rely upon these recordings to disprove the applicant's version of events. The trial judge, in deciding whether the recordings could be admitted as evidence, referred to s.114, Criminal Justice Act 2003 ("CJA 2003"). After considering the relevant considerations - such as the probative value of the evidence, whether it was self-serving, the reliability of the recording, and the prejudice that the applicant would face if it were to be admitted - the judge decided that the recordings could be relied upon during the trial. In summing up, the trial judge outlined the limitations of the telephone recordings and stated that it was up to the jury, in light of these limitations, to decide the relevant weight to be attached to the recordings. The applicant was subsequently convicted by the jury and sentenced to life imprisonment.

The applicant unsuccessfully appealed his conviction to the Court of Appeal (see, Seton v. R., [2010] EWCA Crim 450). The Court of Appeal considered that compelling Mr Pearman to attend the trial, which was an option, would have "been a fruitless exercise". Mr Pearman could have invoked the protection against self-incrimination and had consistently refused to cooperate so the "prospect of any sensible evidence being given by him was, on a realistic view, nil" (paragraph 22 of Court of Appeal judgment). The Court of Appeal would only interfere with the trial judge's decision if the decision was "marred by legal error, or by a failure to take relevant matters into account or it is such that the judge could not sensibly have made". The Court of Appeal held that the relevant consideration under s.114(2), CJA 2003 had been covered by the trial judge and there were no other grounds to overturn the conviction. Further, the Court of Appeal commented on the safety of the conviction. Due to the "overwhelming" evidence against the applicant, including eye-witness accounts, telephone call records between the applicant and the victim and cell site location evidence placing the applicant in the vicinity of the murder, the conviction was deemed to be safe.

The applicant applied to the European Court of Human Rights and alleged that his right to a fair trial within Article 6(1) and 6(3)(d) had been violated. Article 6(1) includes the right to a fair hearing when facing criminal charges whilst Article 6(3)(d) ensures that the individual has the right: "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him" The default position is that witness evidence should be provided during the trial and the accused should have the opportunity to challenge this evidence during this trial. However, the use of witness evidence when the witness does not attend the trial does not automatically result in a violation of Article 6(1) and 6(3)(d). The Grand Chamber has previously set out specific guidance in assessing whether the use of such evidence complies with Article 6. In Al-Khawaja and Tahery v. the United Kingdom (GC), Application nos. 26766/05 and 22228/06, 15 December 2011 (see paragraphs 118-151), the Grand Chamber outlined a general three-part process: Consider whether good reasons exist for the absence of the witness. Consider whether the evidence was the "sole or decisive" decisive evidence against the accused. Assess the existence of sufficient counterbalancing factors and procedural safeguards which allow the reliability of the evidence to be fairly and properly tested.

This process was clarified in Schatschaschwili v. Germany (GC), Application no. 9154/10, 15 December 2015. The Grand Chamber stated that the lack of good reasons for lack of attendance was not sufficient to result in a violation of Article 6, but it was a strong factor to be considered when assessing the overall fairness of the proceedings (paragraph 113). Additionally, the necessary extent of counterbalancing factors depends upon the weight of the evidence provided by the absent witness in the overall context of the proceedings (paragraph 116).

Were there good reasons for the non-attendance of Mr Pearman? (paragraphs 61-62) The ECtHR has previously adopted a robust approach to assessing whether "good reasons" existed for the absence of the witness at the trial. Previously, even in situations where the witness was located in another country (Gabrielyan v. Armenia, Application no. 8088/05, 10 April 2012), or could not be located at all (Lučić v. Croatia, Application no. 5699/11, 27 February 2014), the ECtHR have held that the authorities have failed to satisfy their duty to secure attendance of the witness. In light of this, the ECtHR unsurprisingly concluded that no good reasons existed for Mr Pearman being absent from the trial. The trial court could have compelled Mr Pearman to attend the trial and whilst they could not compel him to give evidence, due to his right to silence, the jury would have at least been able to assess his demeanour when facing cross-examination.

Was the evidence of Mr Pearman the "sole or decisive" evidence? (Paragraphs 63-64) The ECtHR considered that the recorded telephone calls could not be considered the "sole or decisive" evidence in the criminal trial. The Court of Appeal, in commenting on the safeness of the conviction, had listed the other "overwhelming" evidence against the applicant. However, the evidence had been described as "important" by the trial judge. Accordingly, following the Grand Chamber decision in Schatschaschwili, it was necessary to consider whether sufficient counterbalancing factors existed during the trial.

Did sufficient counterbalancing factors exist? (Paragraphs 65-68) In the present case, the ECtHR highlighted the detailed legislative scheme intended to ensure that evidence from the absent witness could only be relied upon in limited circumstances. The need to assess the significance of the evidence, its reliability, and the prejudice that the applicant would face as a result of being unable to challenge the witness was an important procedural safeguard intended to uphold respect for the applicant's rights. Additionally, the instruction of the judge as to the limitations of the evidence was another important counterbalancing factor.

As clarified by the Grand Chamber in Schatschaschwili, the assessment of counterbal-

ancing factors is a relative one – fewer factors will be required if the evidence provided by the absent witness is not especially important. In light of the existence of separate "overwhelming" evidence against the accused, the counterbalancing factors in the present case were considered sufficient. In conclusion, the ECtHR decided that the criminal proceedings as a whole had been fair. Having following the procedure outlined in Al-Khawaja, the ECtHR concluded that there had been no violation of Article 6.

UK Human Rights Blog Comment:This decision of the ECtHR is the consequence of previous Grand Chamber decisions tending to dilute the procedural protections contained within Article 6(3). The right to examine witnesses has slowly been weakened in favour of a more holistic approach that focusses upon the overall fairness of the proceedings instead of potential individual deficiencies. When considering the three part test in Al-Khawaja, the first step - whether good reasons existed for the non-attendance of the witness - was previously considered determinative. If no good reasons existed, then Article 6 had been violated. Such a stance has even been adopted by the ECtHR following the judgment in Al-Khawaja and only months before the decision in Schatschaschwili (see Karpyuk and Others v. Ukraine, Application nos. 30582/04 and 32152/04, 6 October 2015, paragraph 123). Additionally, if such good reasons did exist but the evidence was the "sole or decisive" evidence in the case, then Article 6 had also been violated (Saïdi v. France, Application no. 14647/89, 20 September 1993, paragraph 44). Now, the position is that these considerations are merely factors that can be balanced away.

But the balancing process places an undue weight upon the existence of other incriminating evidence against the accused. The position appears to be that it is more acceptable to deny the accused the right to cross-examine a witness if the prosecution's case against him/her is strong. This move towards focussing on the accuracy of the verdict, as opposed to upholding the rights of individuals, is a potentially worrying development. Indeed, the contemporary Strasbourg position appears, in effect, similar to the Court of Appeal's consideration of the safety of the conviction. It could be argued that the ECtHR may be surrendering its role as an upholder of fundamental human rights and moving towards that of an international criminal appeal court.

Human Rights Work Has Been Downgraded by Foreign Office, say MPs

Foreign Office ministers, through their actions and words, have allowed a perception to grow that its human rights work has been downgraded, especially in countries such as Saudi Arabia, China and Egypt, the foreign affairs select committee has found. A new report by the committee of MPs says that it has become harder since Philip Hammond became foreign secretary for human rights organisations "to get access to senior ministers and their immediate advisors and even that engagement at ministerial level seemed to be more about box-ticking than genuine consultation". The committee highlights the government's failure to place Egypt and Bahrain on its list of human rights priority countries, saying this sent the wrong signal, and suggests the government has no reliable way of measuring whether its human rights work is having any impact.

Hammond rejected the report, saying: "I do not recognise this characterisation of our human rights work. Improving human rights is a core function of the Foreign Office and is the responsibility of every British diplomat around the world. The UK supports over 75 human rights projects in more than 40 countries and this year we are doubling the funding available for human rights projects to £10m – a true measure of the importance we attach to this agenda." The MPs challenge the government to do more overseas to champion the cause of gay rights, and suggests the rainbow flag should be flown above embassies on gay pride days.

The all-party committee found the attitude of ministers "contributes to the perception that the FCO has become more hesitant in promoting and defending international human rights openly and robustly, notwithstanding the importance of private diplomacy". It says: "While ministers say they have not deprioritised human rights, the written evidence received by the committee as part of its inquiry indicates there is plainly a perception that its status in the Foreign Office's work has been downgraded. "Perceptions and symbols matter, particularly in the context of the UK's soft power and international influence. We recommend that the FCO is more mindful of the perceptions it creates at ministerial level, especially when other interests are engaged such as prosperity and security, as is the case with China, Egypt and Saudi Arabia."

The committee pointed out there had been a strategic shift in the FCO's approach – focusing on international systems, human rights for a stable world and the rule of law – but that was so unspecific that it was impossible to see how the government would be held accountable. Crispin Blunt, the committee's chairman, said: "The actual effect of this change of approach could be to lose the focus of specific human right priorities. It will be important for specific issues, such as the prevention of torture or women's rights, not to be overlooked by FCO missions and for strategies to be developed and progress measured. "In the absence of measurable targets for the department's human rights and democracy work, it is extremely difficult to hold the Foreign Office to account for its spending and to assess whether projects deliver value for money." The MPs said they would monitor the work the carried out by the FCO to help 11 named political prisoners, as well as its work to strengthen human rights in Egypt and Eritrea.

An open letter to the Criminal Cases Review Commission (CCRC)

Given the apparent public put-down of innocence projects by Richard Foster, chair of the Criminal Cases Review Commission, in one sentence of his recent interview ('If you think that you have a terminal illness, would you rather have your case considered by medical students in the bar on Friday night – or would you rather send it to a consultant oncologist?'), and the number of comments, including from students, I thought it appropriate to pen a response in a similarly public way, so.

Dear Mr Foster, I congratulate you on engaging with the Justice Gap, but I join others in condemning your 'bar' analogy, whilst declaring my gratitude to you for not going the whole hog and suggesting that our submissions to the CCRC are made on the back of a fag packet. At Cardiff Law School Innocence Project we take your slur very seriously, and on behalf of our hard-working, dedicated, enthusiastic, professional students, I invite you to withdraw your comment. In these times of austerity, I also invite you to work more creatively with your 'stakeholders'. The referral in your analogy to someone with a terminal illness is perhaps a Freudian slip – it seems to indicate that you recognise that those who come to innocence projects or indeed the CCRC are unlikely to be cured under the current system. We concur. Here are some facts, opinions and questions that underpin those invitations and observations.

Cardiff statistics: As the article points out, Cardiff has been responsible for more than half of the university applications to the CCRC: on 12 different cases, 15 applications in all including three re-applications (one referral by you to the Court of Appeal, which conviction was successfully overturned). Additionally, we have drafted and submitted (often in conjunction with experts) a further seven substantive responses to various Provisional Statements of Reasons. In total, 22 pieces of high-quality evidence-based pieces of work were prepared largely by our students, and we are very proud to say that. Each of those submissions has resulted from (often) years of painstaking research and analysis, undertaken by our students (always

sober) under staff supervision. All but one of our submissions passed your initial sift, and went on for a 'full' case review by the CCRC (i.e., we raised sufficient doubt on the safety of the convictions to persuade your organisation to further look into the cases).

Substantial footwork is a necessity, not a luxury: It is a fallacy to suggest that all we need to do is to pass things to the CCRC and you'll deal with them. Representatives from the Commission who have spoken at student events have made it clear that applications have to present significant new evidence. This is not easy and the low level of referrals from such projects perhaps suggests that most have taken the Commission's advice on board. It is clear that unless new evidence or a new line of argument can be proposed, then the proverbial cat in hell has more chance of passing your initial sift. Speaking only for Cardiff (but I'm sure that other university projects will concur), our operation is thorough and professional, even if our casework takes longer than is ideal, but we are not claiming to be beyond criticism. Like you, we are operating on a shoestring, but unlike you we lack any powers to obtain documents or evidence for re-testing. That is perhaps where you could, and should, be more willing to work constructively with us, in the interests of those wrongly convicted who fall foul of the current statutory framework hurdles.

Lessons from Hillsborough? We have dealt with more than 30 cases of people who may be wrongly convicted. This is admittedly a tiny number compared to your operations, and not all of ours reach a stage where we can realistically make a referral to the CCRC or Court of Appeal. We conclude that your organisation is still reluctant to accept the possibility of problems with police investigations, and their potential consequential impact upon the safety of a conviction. Professor Carolyn Hoyle also addressed this when presenting her research at the Criminal Appeal Lawyers Association conference in November 2015: 'Decision making at the CCRC: Responses to claims of police misconduct and poor legal defence at trial.' One of her key conclusions was that the CCRC applies a high threshold for impact of misconduct on safety of conviction. We are not suggesting for one second that police issues feature in most cases. However, where we see evidence of this, we have regularly presented you with detailed reports from not just one (because you have questioned his expertise despite impressive career credentials), but often two highly-qualified police forensic experts. We have spelled out to you the effect of those issues upon the integrity of a conviction, in several cases, yet still you refuse to refer those to the Court of Appeal to let them decide. Why?

Statutory constraints and/or timidity? Are you reluctant to refer more cases because you know that the Court of Appeal will not readily accept such arguments? Fair enough – we know the limitations of your statutory remit. Your interview with Jon Robins reminds us that you 'welcomed' the Justice Select Committee's (JSC) 2015 recommendation that the Law Commission should review the Court of Appeal's grounds for allowing appeals. However, we detected little recognition of the need for change in the CCRC's submissions to the JSC. So, with this in mind, how have you responded to the Justice Secretary declining to follow the JSC recommendations, and his reasoning? You regularly stress your independence, which you must, of course. But those democratically-reached recommendations, based on evidence, have been blown out of the water by a single politician seemingly acting on the word of a senior member of the judiciary.

The CCRC is independent of politics and the judiciary – so may I ask, please, what are the CCRC's plans to react to that? We (with one tiny voice) have written to Michael Gove about not implementing the JSC recommendations. In your latest annual report you say: 'The Commission welcomes that recommendation as the appropriate way to take forward any further discussion.'

You are a key person in the criminal appeals arena – have you written to Mr Gove? If not the

CCRC, then who is going to press the government on these matters? If it helps, those of us at the other coalface could provide you with examples from a different perspective to yours, of why this has to be addressed by politicians. Please excuse these questions if the CCRC is already on the case, but it is difficult, if not impossible outside of your website and annual reports, to be aware of what actions the CCRC takes wearing its watchdog hat.

Delays and money: Delays of eight months (for in-custody cases) and 13 months (non-custody) before the CCRC even starts to look at a new case are noted. However, one of our clients on licence was told to wait three years for the review to start, although that has since been shortened a little. Is that acceptable? Your introduction to the latest CCRC annual report says: 'We look to the new government to deliver on these recommendations' (that the CCRC gets an additional £1million a year, to eliminate its "unacceptable" queues). You lament the government ignoring this JSC recommendation. You are 'sadly…not surprised'. But my question is – what are you doing about it? Please don't think we are naïve; between 2010 and 2015 central government spending on criminal justice fell by 18% in England and Wales (source: Centre for Crime and Justice Studies). Also, while we're on the subject of 'holding on to cases', you say one reason for delays is 'the number of further representations that we receive from the very same people who are telling us get on with it'. Our own experience is that once a case is under review, we are rarely (and not regularly) informed of progress unless we ask. We know that to respond at length would divert a Case Review Manager (CRM) from valuable casework, so it's a difficult balancing act, but lack of CCRC engagement is a problem.

Further and better particulars: In relation to some high-profile cases that have been on your books for an eon, you say you have sent Provisional Statements of Reasons (PSOR) and a few months down the line you are still waiting for representations, hence the delay. I'd be interested in more information on this please. We have some cases that took upwards of two years to reach the PSOR stage. Then when the PSOR was issued, we were given just one month to respond. Admittedly, this has sometimes been extended by kindly CRMs but never further than three months. In our experience, delays occur in the CCRC reaching a decision. Once a PSOR is given, it is usually a rejection, and in our view often an unreasonable one. At that point, time is needed to properly respond to points made – one month is not generally sufficient to respond meaningfully. In fact, in our experience most clients do not complain about the delays but they are devastated when the PSOR is issued containing what they (and often we) consider to be weak reasoning and a cursory level of "investigation". We note your strategy in your business plan and annual report on working more efficiently to deal with delays. However, as your report indicates, your referral rate dropped, so "speeding up" doesn't necessarily equate to improvement in outcome.

More delays: Before we leave the thorny subject of delays, one person we know claims the dubious record of being your longest customer. His case was with the CCRC for 12 years (starting before your tenure, admittedly), with a short break for a threat of Judicial Review. In his words: 'What other public body is given a job to do and still hasn't finished it ten years later?' Indeed. Massive national infrastructure projects aside, I think he has a fair point. In this person's case even at the end of ten years he remains devastated by rejection of his case based on weak reasoning and cursory investigation.

Campaigning: Your reluctance to be described as campaigners is understandable – I share your pain. University projects are educators first and foremost but have been drawn into this uncertain political world because of the dire situation that we have experienced first-hand. It

is refreshing to see that the CCRC has recently put out calls for research project interest, but please also talk to us more creatively as regards casework, Mr Foster. There is now no network or single individual that dominates this landscape a decade on. Those doing pro bono casework are a pretty approachable extremely loose alliance of foolhardy souls who have become reluctant 'campaigners' out of necessity. Perhaps this 'c' word, and the 'collaboration' one, are two that should be embraced by the CCRC, in this period of increasing difficulty for us all. But we all need to recognise the need for change so that all of our work can be more effective in redressing injustice. See you at the bar?

Anyway, over to you, Mr Foster. You know where we are if you fancy a chat. We'll be in our under-resourced diligent student-filled offices with a cup of tea, not in the pub.

Yours sincerely, Professor Julie Price, Director, Cardiff Law School Innocence Project

Crown Not Obliged to Investigate Special Defence of Incrimination

Scottish Legal News: A man found guilty of being concerned in the supply of cocaine who lodged a special defence of incrimination which he later had to withdraw due to a lack of evidence to support it has failed in an appeal against conviction after claiming that prosecutors failed in their duty to disclose information relating to the incriminee. The Criminal Appeal Court ruled that where an accused person lodges a special defence of incrimination of a named person, whose address is unknown, there is no obligation on the Crown to investigate that incrimination and disclose the address of the incriminee, if known to the police, to the defence. The Lord Justice General, Lord Carloway, sitting with Lord Bracadale and Lady Clark of Calton, heard that the appellant James Sinclair was indicted along with a co-accused William McCafferty to a first diet in September 2014 at Airdrie Sheriff Court, charged with concern in the supply of £22,500 of cocaine at an address in Cumbernauld in February 2013, contrary to section 4(3)(b) of the Misuse of Drugs Act 1971.

The accused's solicitors had lodged a notice of incrimination of a Thomas Talent, whose address was "meantime unknown", but at no point during the pre-trial process did the defence agents ask the Crown if they had an address for Mr Talent, nor did they make any attempt of their own to find him. The evidence at trial consisted of the testimony of several police officers, who spoke to what was admittedly a drugs transaction in the vicinity of the locus, and who identified the appellant as the man who moved between two cars parked at the scene. The appellant's agent asked the police officers if they had ever spoken to the incriminee or whether they had been made aware of the incrimination, with negative results, and none of the officers was asked was whether they knew of the incriminee's whereabouts. The accused did not give evidence and in the absence of any evidence to support the incrimination the special defence was withdrawn at the conclusion of the evidence.

On appeal it was argued that the Crown had failed to disclose material information. It was asserted that, had the agents been aware of the incriminee's address, attempts would have been made to cite him as a witness and he could have been led as a "body production" because of the alleged similarities between him and the accused. The Crown were said to have been under a duty to disclose the details held in relation to Mr Talent and breach of the obligation had resulted in the defence not being able to lead evidence in support of the incrimination. When the defence lodged the special defence of incrimination, that should have caused the Crown to review the case and ascertain whether there was any information that they ought to disclose and, in particular, the contact details of Mr Talent and a police statement that he was a longstanding acquaintance of the accused. The lack of disclosure rendered the trial "unfair" and a "miscarriage of justice" had occurred, it was submitted.

However, the judges observed that the "fundamental flaw" in the appeal was the assertion that the appellant, or his agent, wanted to ascertain the incriminee's address and that, had they found it, they would have cited him and either called him as a witness or used him as part of the cross-examination on identification. "There is no material to support this assertion," Lord Carloway said. "On the contrary," he continued, "it is clear that the defence decided not to locate the incriminee. It is equally clear that, had they elected to do so, there would have been little difficulty in finding out his address. They could easily have been found, probably by the most basic of search mechanisms available in the modern era. "Had there been any difficulty, it could have been resolved by a simple request to the Crown, or the court. In short, there was no failure to disclose information which had any effect on the conduct of the trial. There was neither an attempt to find that information nor any difficulty in doing so."

Delivering the opinion of the court, the Lord Justice General said: "It is well established that there is an obligation on the Crown to disclose any information in their possession which would: materially weaken or undermine the evidence likely to be led by the Crown; materially strengthen the accused's case; or be likely to form part of the evidence to be led by the Crown. This is now enshrined in statute (Criminal Justice and Licensing (Scotland) Act 2010, s 121) "The address of a witness does not fit neatly into the statutory definition. If the address of an incriminee is 'information' in terms of the definition, had the appellant wanted to know what it was, it was open to him to include that in a defence statement. "There was no attempt to do this. Had it been done, the appellant could have asked the court for an order to disclose the information, if it was not revealed (2010 Act, s 128), but that stage was never reached... In these circumstances, it cannot be said that there was any unfairness in the trial proceedings."

Lord Carloway added: "The lodging of the special defence of incrimination may have prompted the Crown to review the case and to disclose any material relevant to it. However, a special defence remains a notice to the Crown that a particular defence is to be run. There is no obligation on the Crown to investigate it. "In any event, it was impossible to assert that such information, as the Crown may have had... strengthened the defence of incrimination or in any way weakened the Crown case. There was, and remains, no evidence to support the incrimination. "In all these circumstances, even if there had been a breach of any statutory obligation of disclosure or of the more general Article 6 right to a fair trial which the legislation is designed to secure, there is nothing to demonstrate that the use of any material now known could have had any effect on the jury; i.e. that there was a real possibility that a different verdict would have been reached. Such information as there is would suggest the opposite.

William Beggs Fails in Appeal Against Decision to Refuse FOI Request

The man convicted of the "limbs in the loch" murder has had an appeal against a decision of the Scottish Information Commissioner concerning a freedom of information request he made to the former Strathclyde Police over its handling of the murder inquiry refused. William Beggs argued that the decision by commissioner Rosemary Agnew was "erroneous in law", but judges in the Inner House of the Court of Session ruled that the arguments advanced on behalf of the appellant "must be rejected in their entirety". Mr Beggs was sentenced to life imprisonment in 2001 for murdering 18-year-old Barry Wallace and dismembering his body in December 1999 at a flat in Kilmarnock, Ayrshire, and discarding the limbs and torso of his victim in Loch Lomond and disposing of his head by throwing it into the sea off the Ayrshire coast.

Lord Drummond Young, Lord McGhie and Lord Armstrong heard that the appellant, who is serving his life sentence for murder in HMP Edinburgh, wrote to Strathclyde Police in October 2010 requesting certain information that he claimed he was entitled to under the Freedom of Information (Scotland) Act 2002. He sought information relating to the way in which officers had dealt with complaints that he had made about the alleged oppressive use by the police of "intelligence" relied upon in seeking a warrant to search his home, the extent to which officers had allegedly been involved in "unofficial and official briefing" which resulted in the dissemination by the media of material "prejudicial" to him, and the alleged failure on the part of police officers to conduct "appropriate inquiries" into the circumstances surrounding the death of the murder victim. Strathclyde Police responded to that request, but the appellant was dissatisfied with the way in which they did so and in December 2010 he requested the Police Investigations and Review Commissioner (PIRC) to review their response.

Following further correspondence, in April 2013 the PIRC disclosed certain information to the appellant, consisting only of the appellant's own personal data, while other information was withheld under sections 29 and 31 of the Data Protection Act 1998 and section 38(1)(b) of the Freedom of Information (Scotland) Act 2002. In May 2013 the appellant wrote again to the PIRC to request a review of the earlier decision, as he did not consider that the response had been justified according to the terms of the exemptions that were cited, but the PIRC decided that the original decision should be upheld without modification. Thereafter, in December 2013, the appellant wrote to the Scottish Information Commissioner to express dissatisfaction with the result of the PIRC's review and to apply to her for a decision in terms of section 47(1) of the 2002 Act. The appellant claimed that the PIRC had failed to apply the relevant data protection principles contained in the 1998 Act properly and had not properly applied the statutory exemption in section 30(b)(ii) of the 2002 Act, but after considering the submissions from both sides the commissioner rejected the application.

The appellant then appealed against the commissioner's decision to the Court of Session under section 56 of the 2002 Act, which permits an appeal on a point of law. He argued that the commissioner's conclusion that disclosure would be likely to cause the "substantial inhibition" envisaged by the section 30(b)(i) exemption, that is to say inhibition from the free and frank provision of advice, was not supported by adequate investigations. It was also submitted that the commissioner concluded that the PIRC was entitled to apply the exemption in section 30(b)(i) "without giving intelligible reasons", and that she failed to give intelligible reasons for concluding that the public interest in disclosure was outweighed by the public interest in maintaining the exemption. In relation to the application of section 38(1)(b), it was claimed that the commissioner concluded that the disclosure necessary to fulfil the appellant's legitimate interests did not outweigh the prejudice that would be caused to the data subjects' rights, freedoms and legitimate interests, but did not give an adequate or intelligible explanation of the underlying reasoning.

However, the appeal judges rejected all of the appellant's arguments. Delivering the opinion of the court, Lord Drummond Young said: "In our opinion the commissioner's reasoning cannot be faulted. She took account of the submissions made to her, to the extent that she considered them relevant, and made use of the correct statutory test...In our opinion the commissioner gave adequate reasons for her conclusion that the PIRC was entitled to apply the exemption in section 30(b)(i). "The critical factors...were the sensitivity of the information, the nature of the communications and the circumstances in which the information was created. In our opinion these are plainly material factors...the proper legal tests were applied, and we cannot fault the commissioner's reasoning, or stigmatise it as unintelligible." In relation to the

public interest test in section 30(b)(i), the commissioner acknowledged that there was a "public interest in transparency" in relation to the actions and decision-making processes of public bodies, including the police, and that disclosure of the information would shed some light on those actions and processes, but thought that there was a "justifiable expectation" on the part of the individuals concerned in the communications that the information would not be disclosed to the public, and that it would discourage relevant parties from corresponding openly and candidly in relation to such matters in future.

"On that basis, she considered that the public interest in maintaining the exemption in section 30(b)(i) outweighed the public interest in disclosure, and that accordingly the PIRC was entitled to withhold the information. In our opinion this reasoning cannot be faulted," Lord Drummond Young added. In relation to section 38(1)(b), the commissioner decided that the relevant information was the "personal data" of a number of individuals who could be identified from the information, meaning section 1(1) of the 1998 Act was satisfied. Lord Drummond Young said: "In our opinion the commissioner in her decision gives an entirely adequate and intelligible explanation of her reasoning. She correctly identified the critical balancing exercise that arises under condition 6 of Schedule 2, and she proceeded to carry out that exercise. "In the present case it is not suggested that the Commissioner's decision is perverse or unreasonable in the foregoing sense. Nor was it suggested that she failed to take account of the specific factors that were put forward by the appellant and the PIRC, or that she took account of an irrelevant factor. All that is left, therefore, is a complaint about the weight accorded to the various factors, which cannot be an error of law." Source Scottish Legal News

Regina v Jogee: Supreme Court Orders Retrial

Further to the Supreme Court's judgment of 18 February 2016, the Court has now received and considered submissions from the parties on the disposal of the appeal in the case of R v Jogee. The Supreme Court has today (7 April) issued an order directing that Jogee will be re-tried on the charge of murder (with the included alternative of manslaughter), at a re-trial to take place at a Crown Court determined by a Presiding Judge of the South Eastern Circuit. Jogee will be remanded in custody pending his re-trial and any application for bail be made to the court of trial, or (if before that is known) to the Court of Appeal (Criminal Division).

Media representatives and those publishing material on social media channels should note that pursuant to section 4(2) of the Contempt of Court Act 1981, no further publication of the facts or circumstances surrounding the death of Mr Fyfe or the first trial of the Appellant shall be permitted until the conclusion of the re-trial. It is of course of the upmost importance to all involved that the re-trial can proceed without complaint that publicity has made a fair trial impossible. While the existence of today's order is a matter of record, the Court asks that any reporting is careful to avoid repeating any details which could jeopardise the re-trial process.

The Supreme Court's reasons, made available to the parties today alongside the order, are reproduced in full here: 1) The court is satisfied that there was and remains a prima facie case to answer of murder or alternatively manslaughter. 2) The conviction for murder must be quashed because the direction as to the mental element of a secondary party followed the law as laid down in Chan Wing-Siu v The Queen, now overruled by this court and, as a result of that direction, the jury may not have considered whether the defendant intended to encourage Hirsi in causing death or at least grievous bodily harm to Mr Fyfe. 3) It is in the public interest that the guilt or innocence of Jogee on the charge of murder alternatively manslaughter

should be determined by a fresh jury approaching the case anew and correctly directed upon the law as it is now known to be. 4) Neither the findings of the first jury nor any observations of this court as to the interpretation of those findings will, unless they somehow become admissible in the re-trial, be of any relevance to the jury in that re-trial. 5) On the material provided to this court the publicity given to its decision does not appear to be such as to prevent a fair re-trial of Jogee. To the extent that it has concerned the general state of the law relating to alleged secondary offenders it is mixed. To the extent that it has recorded the strong feelings of the family of Mr Fyfe, this court is not persuaded that a jury properly directed will be unable to put those out of consideration in deciding the re-trial on the evidence.

Righting Wrong Turns: Where Next After Jogee? *Simon McKay, Justice Gap*

CS Lewis wrote: 'We all want progress, but if you're on the wrong road, progress means doing an about-turn and walking back to the right road. In that case, the man who turns back soonest is the most progressive.' It took English law 30 years to realise what the Supreme Court in R v Jogee called its 'wrong turn' but the imperative now is the law's response to those who may have been wrongly convicted. To be clear, not all, probably not even that many convictions after Chan Wing-Sui, the case in 1985 that disorientated the criminal courts, will result in successful appeals.

The Supreme Court put it in these terms: 'The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the [wrong] law… where a conviction has been arrived at by faithfully applying the law as it stood at the time, it can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time. That court has power to grant such leave, and may do so if substantial injustice be demonstrated, but it will not do so simply because the law applied has now been declared to have been mistaken… the same principles must govern the decision of the Criminal Cases Review Commission if it is asked to consider referring a conviction to the Court of Appeal.' At least from the Supreme Court's point of view, the fact that the law has been wrongly applied, does not of itself give rise to the right of appeal out of time. More is needed, demonstrating, 'substantial injustice'. This is not defined but it is likely to require an applicant for leave to appeal to be able to demonstrate that the conviction is unsafe and that the Court of Appeal would be likely to, on hearing the case, quash the conviction.

The Criminal Cases Review Commission has said that it 'seems likely' that Jogee would have 'a significant impact' on its work. 'The specific nature of the Supreme Court's judgment means that the decision in Jogee will affect other cases only in certain very specific circumstances. However, given that the judgment potentially affects cases going back a number of years, it may generate a considerable number of applications or re-applications to the Commission.' The CCRC is currently reviewing around 30 joint enterprise murder convictions and has a number of other such cases waiting for reviews to begin. 'It may well be that we get other applications from former applicants and from others who have never applied but now think that the decision in Jogee may affect their cases. It is impossible to assess how many cases the Commission may need to consider as a result of the judgment,' a spokesman says.

It may have been helpful to identify a principled approach to applications – a filter – to assist applicants to either the CCRC or Court of Appeal understand whether their case may pass a minimum criteria. It is reasonably easy to identify, by reference to the judgment in Jogee, a series of key questions. First, having regard to the facts of the case, were the defendants together responsible for the crime whether as principals or secondary parties. Did the applicant do it or intentionally assist or encourage it? Second, was there an agreement involving encouragement

or assistance between the parties, or of more or less spontaneous joining in a criminal enterprise? It will be necessary to analyse whether the principal and secondary party shared a common criminal purpose, as this may demonstrate the secondary party's intention to assist or obviate it. Third, was the jury directed on foresight of the crime as automatic authorisation of it, as opposed to that foresight as simply but often strong evidence of intent to assist or encourage? Finally, notwithstanding the answers to the above questions, is there a risk of substantial injustice if the case is not reviewed and is it likely the conviction might quashed or substituted?

The clearest example of a case where the re-alignment of the law is unlikely to materially affect its outcome is, ironically, Jogee. In his case the Supreme Court observed that the argument that he ought not to have been convicted of either murder or manslaughter and that his conviction should simply be quashed was "quite unrealistic". On the evidence and the jury's verdict he was "unquestionably guilty at least of manslaughter, and there was evidence on which the jury could have found him guilty of murder on a proper direction". Professor David Ormerod QC, barrister and Law Commissioner, who, with William Wilson, authored the Criminal Law Review article 'Simply harsh to fairly simple: Joint Enterprise Reform', which anticipated the decision in Jogee is working on a sample direction for the judiciary.

This is a welcome step and is assured forensic integrity. There are calls for a Royal Commission from JENGBA (Joint Enterprise Not Guilty By Association) the group that was a prime mover behind the reform of the law in this area and an interested party in the case. Royal Commissions have been in decline in recent years but objectively there is a pressing need for some form of inquiry to restore public confidence. This is likely to become even more acute if in the deluge of applications to the CCRC or Court of Appeal – and in the absence of guidance many lacking merit – deserving cases get lost. The politics of joint enterprise may make an inquiry unlikely but to demonstrate our justice system's progressiveness it is essential there is a clear demonstration that the law intends to make the necessary about turn.

Bamber Appeal Letters 'Ill-Conceived', Say Essex Police

Police have accused a multiple murderer of "circumnavigating the formal process" of appeal by using the media and websites to fight his conviction. Jeremy Bamber, 55, is serving a whole life term for killing five members of his family in Essex in 1985. His supporters are calling for evidence to be disclosed and wrote to MPs who in turn have written to Essex Police. A reply from the chief constable's office has outlined the reasons why the force will not reopen his case. In the reply, Insp Matt Cornish, Staff Officer to Essex Police's chief constable, makes reference to findings by the Court of Appeal and the Criminal Cases Review Commission in Bamber's case, which found no new evidence or proof the trial's fairness had been affected. Insp Cornish said Bamber was "well aware of the legal processes that he should follow to seek a review of his convictions. His attempt at circumnavigating the formal process using the media and websites is ill-conceived," the letter continued. Source BBC News, 02/03/2016

Response from JB Campaign to article on BBC news

Jeremy Bamber has made repeated attempts to obtain disclosure of evidence proving his innocence both pre-trial and pre-2002 Appeal. He has asked the Criminal Cases Review Commission to obtain many documents on his behalf but these requests were refused by Essex Police. The recent request for disclosure by Jeremy has provided both Essex Police and MP's with evidence proving the existence of undisclosed documents pertaining to his father's call to police saying his daughter had 'gone berserk and has a gun' as well as other

material in our 'disclosure document' which also supports Jeremy's innocence.

The claim that both the 2002 Appeal and Criminal Cases Review Commission have both found no evidence of Jeremy Bamber's innocence is grossly misleading to both MP's and the public. The 2002 Appeal court ordered Essex Police to disclose Evidence under two orders which remain unfulfilled. It is Essex Police who are 'circumnavigating the formal process' by non compliance with the Appeal court orders. If disclosure is not made, Jeremy Bamber intends to return to the the court who issued the disclosure orders and request that they are enforced. Essex Police is not above the law and should be made to fully comply with the request made by the Appeal court judges. Had disclosure been made to the defence prior to the trial or 2002 Appeal Jeremy would be a free man now.

As human rights campaigner Peter Tatchell has said in support of full disclosure, "I have grave concerns about the way in which Essex Police are refusing to hand over to Jeremy's defence team 10 key bundles of evidence, totalling hundreds of documents and photographs. Justice requires transparency. We not only have to ensure that justice is done but it's seen to be done. I would appeal to the Chief constable of Essex to make those documents and those photographs available, that's in the interests of Jeremy's right to fair justice but it's also in the interests of the wider public. We need to be certain that the guilty man is the man behind bars and the way to clear this up is to release these documents. It's true that Jeremy Bamber has had previous appeals against his conviction but none of those previous appeals have included the evidence that Essex Police have withheld for all these decades. That's why the release of these documents and photographs is so important so that he can have a final appeal with all the evidence so the appeal court can make a decision about whether he's guilty or not." Please write to your MP regarding this matter, using the evidence of documents and court orders on our web site and copying in the Attorney General as well as the Justice Minister. Thank you, Trudi Benjamin, Managing Director, Jeremy Bamber Campaign

Amnesty Highlights 'Disturbing Rise' in State Executions *BBC News*

A surge in the number of executions recorded worldwide saw more people put to death last year than at any point since 1989, Amnesty International says. At least 1,634 people were executed in 2015, a rise of more than 50% on the previous year, the group found in its review of the use of the death penalty. Iran, Pakistan and Saudi Arabia were responsible for 89% of the executions. The total does not include China, where Amnesty said thousands more were likely killed but records were kept secret. On the other hand, the group also noted that for the first time ever a majority of the world's countries had fully abolished the death penalty. Fiji, Madagascar, Congo-Brazzaville and Suriname changed their laws in 2015, while Mongolia also passed a new criminal code that will take effect later this year.

Amnesty said China remained the world's top executioner. It estimated that thousands of people had been put to death and thousands of others sentenced to death in 2015. It added that there were signs that the number of executions in China had decreased in recent years but the secrecy around the death penalty made that impossible to confirm for certain. Iran executed at least 977 people in 2015 - the vast majority for drug-related crimes - compared with 743 the year before, according to Amnesty. Those put to death, the group found, included at least four people who were under 18 at the time of the crime for which they had been convicted. This, it said, violated international law.

Pakistan meanwhile continued what Amnesty described as a "state-sanctioned killing spree" that had started when a moratorium on civilian executions was lifted in December 2014. At least 326 people were sent to the gallows last year, the highest annual total Amnesty has

recorded for the country. Executions in Saudi Arabia rose by 76% compared with 2014, with at least 158 people put to death, Amnesty said. Most were beheaded but the authorities also used firing squads and sometimes displayed bodies in public. The US carried out the fifth highest number of executions last year but the total of 28 was the country's lowest since 1991. Amnesty also reported notable jumps in the number of executions recorded in some countries, including Egypt and Somalia, while at least six who had not put anyone to death in 2014 did so last year, among them Chad. "The rise in executions last year is profoundly disturbing," said Salil Shetty, Amnesty's secretary general. "Not for the last 25 years have so many people been put to death by states around the world. "In 2015 governments continued relentlessly to deprive people of their lives on the false premise that the death penalty would make us safer." Mr Shetty called for an end to the "slaughter".

Poor Prison Conditions Can Prevent Extradition Under European Arrest Warrant Scheme

The execution of a European arrest warrant must be deferred if there is a real risk of inhuman or degrading treatment because of the conditions of detention of the person concerned in the Member State where the warrant was issued. There are wildly differing prison conditions to be found throughout the European Union. Chronic overcrowding is commonplace and many facilities are simply not fit for purpose. In some member states prison conditions have been found to be so bad that they amount to a breach of Article 3 of the European Convention on Human Rights ('ECHR') and in a handful of cases the Strasbourg Court has even instituted its Pilot Judgment procedure in respect of prison conditions in certain member states. These Pilot Judgments amount to a recognition by the Strasbourg Court that there are systemic failings in some Member States' prison systems. It is therefore, little wonder that individuals facing extradition under the European Arrest Warrant ('EAW') scheme frequently seek to raise 'prison conditions' as a bar to extradition. In the UK these arguments are increasingly hard to successfully mount but nobody here doubts the principle that poor prison conditions can, in the appropriate case, amount to a bar to extradition by virtue of the risk of a breach of Article 3 of the ECHR.

The 2002 European Arrest Warrant Framework Decision established the EAW scheme. Member States then enacted their own domestic legislation to implement the scheme. The Framework Decision provided for a number of mandatory and discretionary grounds for refusing to execute an EAW. These grounds do not explicitly include refusal on the grounds of a breach of human rights. However, Article 1(3) provides, "This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union". Based on this Article, two thirds of Member States have chosen to introduce grounds for refusing extradition on the grounds of breaches of fundamental rights. In February 2016 the CJEU in Luxembourg heard two important cases concerning fundamental rights, prison conditions and the EAW scheme. The cases of Aranyosi and Caldararu are requests from a German Court for a preliminary ruling from the CJEU and both concern the question of whether an EAW can be refused on the basis of poor prison conditions in the requesting state.

The Court heard argument from nine Member States plus the Commission. The issue raises a significant tension between the concepts of mutual respect and trust and respect for fundamental rights. Spain and Lithuania argued that mutual trust throughout the EU meant that Member States must execute EAWs without any checks for anything other than the mandatory grounds for refusal in the 2002 Framework Decision. This would exclude many grounds for refusing extradition

included in the UK legislation, which are not found in the Framework Decision such as Proportionality, Forum, Trial Readiness and most fundamentally - Human Rights. The remaining seven Member states (including the UK) and the Commission argued that mutual trust was not blind trust and that it can be rebutted in exceptional circumstances. The Commission argued that there needed to be a balance between mutual trust and the protection of fundamental rights.

After the hearing in February the Advocate General ('AG') Yves Bot submitted his Opinion to the Court. The AG's Opinion in this case, published in March, was that, "Article 1(3) ... must be interpreted in a way that it does not create a ground for non-execution of an Arrest Warrant ... on the basis of a risk of a violation in the requesting state of the human rights of the requested person". The AG's Opinion in this case caused significant consternation amongst the legal community in the EU. On 10 March 2016 Fair Trials wrote to the EU Commissioner for Justice Ms Vera Jourova to express their concerns over the Opinion of AG Bot. They urged the Commissioner to re-emphasise that mutual recognition should not undermine fundamental rights in the EU and, if the Court followed the AG's Opinion, to introduce EU legislation which makes it explicit that EAW Framework Decision is subject to proper protection for human rights. The role of the AG is to present Opinions on cases brought before the Court. Although the Court will usually follow the advice of the AG, it does not always do so.

On 5 April 2016 the Court gave judgment. The Court stated that the absolute prohibition on inhuman or degrading treatment or punishment is part of the fundamental rights protected under EU law. Accordingly, where the authority responsible for the execution of a warrant has in its possession evidence of a real risk of inhuman or degrading treatment of persons detained in the Member State where the warrant was issued, that authority must assess that risk before deciding on the surrender of the individual concerned.

Where such a risk derives from the general detention conditions in the Member State concerned, the identification of that risk cannot, in itself, lead to the execution of the warrant being refused. It is necessary to demonstrate that there are substantial grounds for believing that the individual concerned will in fact be exposed to such a risk because of the conditions in which it is envisaged that they will be detained. In order to be able to assess the existence of that risk in relation to the individual concerned, the authority responsible for the execution of the warrant must ask the issuing authority to provide, as a matter of urgency, all the information necessary on the conditions of detention.

If, in the light of the information provided or any other information available to it, the authority responsible for the execution of the warrant finds that there is a real risk of inhuman or degrading treatment, the execution of the warrant must be deferred until there additional information has been obtained on the basis of which that risk can be discounted. If the existence of that risk cannot be discounted within a reasonable period, that authority must decide whether the surrender procedure should be brought to an end. In short the CJEU has confirmed the duty of the executing state to make enquiries as to the prison conditions in the requesting state. The assumption will always be one of satisfactory compliance. However, where there is an issue (which will need to be raised by the requested person - with evidence) assurances must be sought from the requesting state. If those assurances are insufficient then the executing authority may terminate the extradition proceedings Gherson has extensive experience in representing individuals facing extradition under the EAW scheme and also in bringing cases before the Courts of the EU. If you wish to discuss any of the issues raised in this blog please do not hesitate to contact us. Source Gherson,Solicitors

Dead Men Tell No Tales & Therefore Cannot be Prosecuted

Senior prosecutors have invoked new policy in rejecting a request from police that they consider charging a dead suspect with the 40-year-old murder of a teenage girl. Detectives at Devon and Cornwall police sent a file containing "scores of pages", according to the BBC, to the Crown Prosecution Service concerning evidence suggesting that Robert Black murdered Genette Tate in 1978. Black died last January of natural causes while serving a sentence at Maghaberry prison in Northern Ireland for the murder of three other girls. A senior local police source told the BBC: "We would like a clear statement that it [Crown Prosecution Service] would have charged Black with Genette's murder. It's the closest we can now get to justice and might offer some comfort to her family and the community." However, a spokesman for the CPS told The Brief yesterday that "in accordance with our policy on deceased suspects, we will not be making a charging decision in this case". Prosecution policy is clear on the point, reading: "Since deceased persons cannot be prosecuted, the CPS will not make a charging decision in respect of a suspect who is deceased." spokeswoman for Devon and Cornwall police maintained that the CPS policy was new, having only been put in place recently.

Sex, Money and the Long Arm of the Law *Guardian Opinion*

The harm principle, the assertion that the only just use of power in a civilised community is to prevent harm, can be a handy weapon in the arduous trek through the moral and practical thickets of how best to regulate sex work – or whether to regulate it directly at all. Momentum is growing behind criminalising the punters, not the providers: stifling demand in the hope of throttling the industry. This week, the French national assembly finally ended two years of wrangling and became the fifth European legislature to introduce a ban on buying sex. It is following the example set by Sweden in the late 1990s, and then by Norway and Iceland. In the UK, the Northern Ireland assembly banned it in June last year.

Many sex workers, admittedly, don't want their clients criminalised. In France, backed by a commission of the senate, they vehemently protested that it would make their work more, rather than less, dangerous: it would reduce the number of punters, they say, and leave them facing greater competition, the more vulnerable because they would have less choice. Rather than enhancing their rights, they argued that criminalising clients would mean they were deprived of what they had. They cited a rise in police harassment in some countries with the result that sex workers were forced into increasingly dangerous environments. Even Swedish claims to have halved the number of sex workers and made significant reductions in the number of women and girls trafficked into sex work were dismissed, by determined decriminalisers, as confirmation that sex work now takes place out of sight.

What politically organised sex workers say they would prefer, of course, is to decriminalise completely non-coercive sex between adults altogether. In Scotland, a serious opportunity to do just this has been lost because of next month's election. The model is New Zealand where, in 2003, MPs decriminalised every aspect of sex work. Now workers say they feel safer; they have the kind of employment rights that other workers take for granted. It hasn't reduced their numbers, but according to independent reviews it has improved sexual health and made it easier to stop underage sex-working and trafficking. Maybe. If criminalisation drives prostitution back into the shadows, and leaves workers more exposed to harm than they were, then there might indeed be an argument to find a different battleground for the moral fight, and concentrate instead on minimising the harm suffered by the women who, for whatever reason, are offering sex for money.

The great difficulty, however, is that it leaves the sex industry intact. And in all paid-for sex there is, arguably, an inherently exploitative dimension. Even if there is nominally consent, in most cases, if not all, this will be a choice that women make out of desperation, rather than anything positive. The social and economic circumstances in which a woman sees sex work as the best available option represents, in itself, an environment of coercion. Criminalising not the women involved but their clients – particularly when, as in the French proposal, it is accompanied by a properly funded programme to help sex workers into more secure jobs – may be the least-bad answer, in both moral and practical terms.

William Ernest Coulter: Court of Appeal Reduces Life Sentence Tariff

The Court of Appeal today allowed an appeal against sentence by William Ernest Coulter which was imposed following his conviction for the murder of his partner in 2003. He had been sentenced to life imprisonment and ordered to serve a minimum term of 18 years. The Court reduced this tariff and substituted it with one of 16 years. William Ernest Coulter ("the applicant") was convicted at Ballymena Crown Court on 20 October 2004 for the murder of his partner, Gillian Doherty. The court heard that the applicant and his partner went out for a meal and both consumed alcohol. They returned home at about 10:00 pm. At 3:34 am on 30 January 2003 the applicant telephoned 999 and told ambulance control that he had stabbed his girlfriend. When the police arrived the applicant told them, "I killed her, she's upstairs". When cautioned he replied, "Having a drink in the bedroom, fell out, she hit me over the head with a glass, I took a knife and stuck it in her and cut her throat".

The tariff is the minimum period that the court considers appropriate to satisfy the requirements of retribution and deterrence having regard to the seriousness of the offence. This sentencing exercise involves the judge determining the appropriate starting point in accordance with sentencing guidance and then varying the starting point upwards or downwards to take account of aggravating or mitigating factors which relate to either the offence or the offender in the particular case. The defendant receives no remission for any part of the minimum term.

At trial the jury heard evidence about the highly volatile and tumultuous relationship between the applicant and Gillian Doherty which included allegations of physical violence. The applicant disputed many of the incidents although he accepted that he had smashed windows and a car in the course of these arguments. The court also heard that the applicant suffered from alcohol dependency syndrome and a moderate anxiety depressive disorder. The trial judge accepted that he should be sentenced on that basis. He considered that the deceased was no match for the physical strength of the applicant and she was unable to defend herself against the savage attack. He also took into account that the deceased suffered 21 stab wounds and 9 incised cuts from a knife. He considered that all of the factors merited the higher starting point. The trial judge further considered that it was a serious aggravating factor that the murder was the culmination of cruel and violent behaviour by the applicant over a period of time and that there was no clear evidence of his remorse or contrition given the way he had sought to darken the deceased's good name. He imposed a sentence of life imprisonment and ordered the applicant to serve a minimum term of 18 years imprisonment before being eligible to be considered for release.

The applicant sought leave to appeal against his sentence submitting that the tariff of 18 years was manifestly excessive, that the trial judge erred in applying the higher starting point and further erred in adding two years for the alleged incidents of domestic violence that were denied and had not been before the jury for a factual determination. Counsel for the applicant contended that

this was a case of a quarrel or loss of temper between two people known to each other which generally fell within the normal starting point. He also relied upon the applicant's medical history.

The Lord Chief Justice, delivering the judgment of the Court of Appeal, said there were, however, substantial factors pointing towards the higher starting point: "This was a case in which there was an issue of vulnerability. The deceased was a woman alone in her own house. Unfortunately her sons were not present on that occasion. There is accepted evidence that on other occasions the applicant had been well able to overpower the deceased and in particular had previously been able to take a knife from her when she had brandished it in a threatening manner. That feeds into the domestic violence context of this offence."

The Court of Appeal accepted that it was not open to the trial judge to reach a conclusion on disputed allegations of violence in the course of the relationship but that it was perfectly proper to take into account the domestic violence background and in particular the fact that this offence represented an abuse of power and trust in what was a tumultuous relationship in which the applicant was clearly the more physically dominant. The Court also considered that the nature of the wounds sustained by the deceased demonstrated that some were as a result of self-defence indicating that she was alive when some at least of the wounds were being inflicted on her. The Court further recognised the deep distress caused to the family of the deceased as a result of the manner of her death which in its view required consideration in determining the appropriate starting point.

The Lord Chief Justice said that the Court was satisfied that there were issues of vulnerability and multiple injuries which justified a higher starting point in this case. He noted that the trial judge had added a further two years in respect of the violence inflicted upon the deceased by the applicant in the period prior to her death and said that although there was disputed evidence about that background those issues were not before the jury and the trial judge was not entitled to conduct a trial in respect of them. The Court accepted therefore that it was wrong in principle to impose an additional tariff period on that basis: "We have carefully considered whether we should interfere with the 18 year tariff set by the trial judge. There were a number of factors justifying the higher starting point and the domestic violence background was an additional aggravating factor. It is clear that the relatives of the victim have suffered grievously as a result of the attack. We accept that there were relevant circumstances to be taken into account in mitigation reflecting the jury's approach to the provocation issue, the finding of some remorse and to some extent the background of the offender. We consider that the tariff of 16 years initially indicated by the trial judge was appropriate taking all those factors into account. Whether the applicant should be released at that point depends entirely upon the assessment of the Parole Commissioners as to the risk he now poses." The Court of Appeal allowed the appeal and substituted a tariff period of 16 years in place of the period of 18 years.

Sinn Féin/SDLP Can Not Be Seen to Side With Republican Prisoners

Over the past number of weeks Republican Prisoners have witnessed the hypocrisy of Sinn Féin and the SDLP in their efforts to recruit support in the face of the forthcoming elections. Whilst one sells itself as a republican party and the other as a party of civil rights, Republican Prisoners have witnessed the true face of both. Although both parties have agreed with Republican Prisoners in private neither have concerned themselves with Republican Roe House in the past year, with both privately conceding to others that they cannot be seen to side with Republican Prisoners. Indeed, politicians from Leinster House have remained much more involved. Both parties were in fact keen to verbally attack Republicans and Republican Prisoners at the beginning of last month and they

also stood by whilst the Director General of the Prison Service and politicians made claims that they knew to be false. Both parties were keen to portray themselves as progressive and upstanding yet their concerns have not extended to the conditions of Republican Prisoners.

In the last month alone Republican Prisoners were subject to an almost 48 hour lock down, during which two men were removed from their cells and forcibly strip searched whilst our living space was turned upside down and our meager educational resources were removed. Two men attending outside hospital appointments were forcibly strip searched upon leaving and returning to the jail despite being handcuffed to a jailer throughout. Indeed, both were forced to undergo private consultations in the company of three jailers with these handcuffs on. Sleep disruption, restrictions of the landings and attempts to prevent Republican Prisoners from recording and disseminating information via the removal of computers are among other repressive measures occurring over the past month alone. Through all this, there has not been a single utterance from the SDLP or Sinn Féin. It is abundantly clear that both parties are no less than pro-brit quislings and Redmondites undeserving of the support of Republicans and the Nationalist community. *Republican Prisoners, Roe 4, Maghaberry, 6/4/2016*

When Prurient Curiosity Meets Privacy *UK HumanRights Blog*

In an anonymised judgment PJS v News Group Newspapers Limited [2016] EWCA Civ 100dated 22nd January – but only recently published – the Court of Appeal underscored the importance of the right to privacy in the context of sexual activity. In the modern digital age – an age when society is grappling with "sexting" and "revenge porn", and one's follies may be photographed and uploaded to Facebook for friends and family (and others) to see for years to come – the nature and scope of privacy, and the public's expectations in relation to it, are being consistently challenged and redefined. This case may therefore be seen as a welcome re-affirmation of the basic point that, at least in normal circumstances, one's sex-life is inherently private, and not a topic for public consumption. In January of this year, the Sun newspaper sought to publish an article about a well-known entertainer (anonymised as "PJS"), in which it claimed that, despite being in a long-term committed relationship, he had been engaging in sexual activity with other people, including a "three-way sexual encounter" with a couple in around late 2011. The entertainer sought an interim injunction to prevent publication of the article, which was refused by the High Court. His appeal was then subject to an urgent hearing before a two-person bench in the Court of Appeal.

It is well-established that freedom of expression, enshrined in Article 10 of the European Convention on Human Rights ("ECHR") is a right of fundamental importance in a healthy democracy. It is a qualified right, however, and frequently, it can and will come into conflict with Article 8, which protects the right to respect for one's private life. Whilst section 6 of the Human Rights Act 1998 ("HRA") mandates that public authorities act compatibly with the human rights enshrined in the ECHR, generally speaking it does not impose the same obligation on private entities and persons. Nevertheless, because courts are public authorities (under section 6(3) of the HRA) human rights considerations permeate the legal reasoning of judges, and they must act compatibly with the rights enshrined in the ECHR, so far as possible, wherever it is relevant. In cases like this one, Articles 8 and 10 have been built into the traditional common law action for breach of confidence. That was established in the famous case involving the model Naomi Cambpell (Campbell v MGN Ltd [2004] 2 AC 457; see also A v B plc [2003] QB 195). In basic terms, where person X receives information about which person Y has a reasonable expectation of privacy, it will be a breach of confidence for X to publish that information, unless the court concludes that prohibiting publication would amount to a disproportionate interference with X's right to freedom of expression under Article 10 of the ECHR. In determining that issue, the right to free expression under Article 10 and the right to privacy under Article 8 have to be balanced against each other In the case of In re S (a child) [2005] 1 AC 593. Lord Steyn summarised the position at paragraph 17 of S as follows: First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. That balancing test was the focus of the Court of Appeal's decision in this case. The following factors and points of principle were of particular importance in its reasoning: 1.The mere gratification of readers' prurient curiosity does not serve the public interest (Donald v Ntuli [2010] EWCA Civ 1276). 2. In light of that principle, the Sun had argued that PJS and his partner had purveyed in the media a misleading impression of commitment to each other. The court disagreed. In a nod to the fluidity and breadth of contemporary sexual ethics, the court noted that, as the first instance judge had pointed out, commitment did not necessarily entail monogamy. 3.In that regard, the bundle of media materials relied upon by the Sun contained only two references to monogamy, both of which pre-dated the sexual relations at issue in the present case, and in an age where an article, once written and uploaded, could be accessible for many years, it was not always incumbent on individuals to provide updates or publicise corrections when circumstances changed. More significantly, the court held that insofar as PJS and his partner had publicly portrayed an image of commitment to each other, that appeared to be the truth on the evidence before the court, albeit they had an open relationship in recent years. Accordingly, there was no misleading impression which it was in the public interest to correct. 4.In the court's view, the information would not meaningfully contribute to any ongoing public debate. 5. The proposed story would be devastating to the Claimant. 6. In case such as this the rights of affected family members were also relevant (ETK v News Group Newspapers Ltd [2011] EWCA Civ 439). In this case, the Claimant and his partner had children, and the court considered that the publication of the article could have a significantly harmful and/or disruptive impact upon them as well.

Accordingly, the Court of Appeal found that the balance lay firmly in favour of preserving the Claimant's Article 8 rights over the Article 10 rights of the Sun newspaper, and it overturned the first instance decision and granted an interim injunction. Of course, the injunction was only "until trial or further order". It remains to be seen whether or not this matter will be revisited at a hearing to determine whether or not a final injunction will be issued. That may be unlikely given that under section 12(3) of the HRA "no such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed".

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