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Horncastle v UK [2015] 60 EHRR 31

It was held that the court had to apply the principles set out by the Grand Chamber in Al-Khawaja v UK [2009] 49 EHRR. Al-Khawaja decided that there was no authority for any general proposition that untested statements of absentee witnesses could be admitted consistently with Article 6 (1) and 3 (d) of the ECHR where that were the sole or decisive evidence against the defendant, and that it was doubtful whether any counter - balancing factors would be sufficient to justify the admission of such statements.

The ECHR decided in Horncastle v UK that these principles were that the court must decide whether there was a good reason for an absent witness's non-attendance, whether his witness statement was sole of decisive, and if so, whether there were, nonetheless, adequate counter-balancing measures, including strong procedural safeguards permitting a fair and proper assessment of the reliability of the evidence.

Therefore the argument that any decisive evidence had to be reliable, or at the very least to be shown not to be unreliable to any significant extent, before it could be fairly admitted, had to be rejected.

As to reasons of absence, the court said that where a witness had died, there was good reason for this purpose. Where the absence was a result of fear, a distinction could be drawn between fear attributable to threats or other actions of the defendant (or those acting on his behalf) and a more general fear of what would happen if the witness were to give evidence at trial.

In the former case it was appropriate to allow on statement of that witness because to allow a defendant any benefit of the fear he had caused would be incompatible with the rights of victims and witnesses.

As to the latter, the court must conduct appropriate inquiries to determine first, whether or not there were objective grounds for fear and second whether the grounds were supported by evidence.

In all cases, where no prior examination of the witness has taken place the admission of a witness statement in lieu of live evidence has to be a measure of last resort. The court has to be satisfied that all available alternatives, such as witness anonymity and other special measures would be inappropriate or impracticable.

Regarding 'sole or decisive' it was held that 'decisive' should be narrowly constructed as indicating evidence of such significance or importance as was likely to be determinative of the outcome of the case.

Where the witness's evidence is corroborated by other evidence, the assessment of whether it is decisive will depend upon the strength of the supportive evidence, the stronger the corroborative evidence, the less likely that the evidence of the absent witness will be 'decisive'.

The court also observed that proper directions in summing up were in principle strong safeguards designed to ensure that the proceedings were fair. Ultimately, the admissibility of evidence is

primarily a matter for regulation by National Law, the role of the ECHR was to determine whether the proceedings as a whole were fair [130].

Witnesses who cannot be found. Criminal Justice Act 2003 s.116 (2) (d)

R v M [2014] Crim. L.R 823 CA - Whether of not a case falls within this section was ultimately a question of fact for the trial Judge.

Confessions

Admission into Evidence

Police and Criminal Evidence Act 1984 ss 76, 76 A.

"Likely…. to render unreliable any confession which might be made by him in correquence thereof", S.76 (2) (b).

There words create an objective test in - R v Sherif, Ali (Siraj), Ali (Muhedin), Mohammed, Abduratiman and Abdullai, The Times February 11th, 2009 CA, it was held in relation to Abduratiman (who was not suspected of detaining the bomb) that there had been no breach of his rights under Article 6 by reason of the use at his trial of statements made when he had initially been treated as a witness when he should have been treated as a suspect and when he had been denied access to legal advice.

See the 21/7 bombing trial, Ibrahim v UK [2014] ECHR 1492, The Times February 2nd 2015 ECHR.

Here the courts in ruling against him had regard to:

(i) The fact that he had adapted his statements (a mixture of incriminating and exculpatory remarks) after he received legal advice.
(ii) The counter-balancing measures in the legislative framework (see in particular code (a) cautions etc.) and available at trial with a view to ensuring the fairness of the proceedings, including judicial rulings on admissibility, and
(iii) The strength of the other evidence against him.

In these circumstances the court admitted the statements made in the 'safety interviews' despite the denial of access to legal advice and a failure to caution him.

- Therefore no violation of Article 6 rights where statements made in police interview by a defendant at a time that they were denied access to legal advice.
- No violation when wrong caution was given.
- Admitted into evidence at trial.

In deciding whether it was unfair to admit into evidence any statement made by a defendant when he had been justifiably denied access to legal advice, regard should be had to

(a) The applicable legislative framework and any safeguards it contained.
(b) The quality of the evidence, including whether the circumstances in which it had been obtained had cast doubt upon its reliability or accuracy (improper conduct, (i.e.) coercion or ill-treatment during interrogation and vulnerability of suspects).
(c) Whether the statement had been promptly retracted and any admissions made in it consistently denied especially once legal advice had been obtained.
(d) The procedural safeguards applied during the criminal proceedings and in particular whether the applicant had been given the opportunity of challenging the authenticity of the evidence and of opposing its USP (e.g. argument in oppression), and
(e) The strength of the other evidence in the case.

Ultimately, the court found that there was a clear and detailed legislative framework in place which set out the general right to have access to a lawyer upon arrest, which provided for the possibility of delayed access in exceptional cases and provided certain safeguards. The conditions for authorising a delay were strict and exhaustive.

Open Justice

RE: Guardian News and Media Ltd [2015] 1 Cr. App R4, CA.

Open Justice is both a fundamental principle of the common law and a means of ensuring public confidence in the legal system. Exceptions are rare and must be justified on the facts and any exceptions must be necessary and proportionate, no more than a minimum departure from Open Justice will be tolerated.

UK policy is to deal with Terrorism cases through the trial process within the criminal justice system. Whilst consideration of national security will not of itself justify a departure from Open Justice principles, Open Justice must give way to a more fundamental principle of the object of the Justice system to live up to its name, and do justice.

Therefore, where there is a "serious possibility" that an insistence on Open Justice in the national security context would frustrate the administration of justice (i.e. by deferring the Crown from prosecuting) a departure from Open Justice may be appropriate. It was held that a hearing in camera involves a departure from the principle of Open Justice but not natural justice.

The attendance of journalists at trials fulfils the public scrutiny criteria (although there would not be contemporaneous reporting).

The cumulative effects of holding a criminal trial in camera and anonymising defandats are a cause of grave concern, and the court held that it would be difficult to conceive of a situation where both departures from Open Justice would be justified.

Where a Crown Court sits in camera on grounds related to national security to hear sensitive evidence adduced by the defendant it is open to the court to order that there should be no communication of the evidence heard in camera to anyone who had been or would have been excluded from the in camera proceedings.

This included staff of the ECHR. The consequences of breach could be contempt under section 11 of the contempt of Court Act 1981. See R (Wang Yam v Central Criminal Court [2015] 1 Cr. App. R 10 DC- Maintaining the prohibition in the face of a post trial application by the defendant for it to be lifted so that he could use the material for the purposes of an application to the European Court, alleging that reporting restrictions at trial had violated his right to a fair trial.

The right to access to a supra-national court was not considered a fundamental common law right but a matter of treaty obligation.

Whilst it was correct that the Human Rights Act 1998 gave effect to the right of access to court under Article 6 this was only in the context of proceedings before domestic courts.

The Court of Appeal can consider ex parte material considered by the trial Judge and set ex parte to do so for justice to be done. See Bank Mellat v H.M Treasury (No.2) [2014] AC 700, SC.

The concept of publication is not defined in the administration of Justice Act 1960 but extends to any circumstances where the prohibited information is made available to other persons.

From April 6th 2015, Practice Guidance: The use of live text- bared form of communication (including Twitter) from court for the purposes of fair and accurate reporting was revoked and replaced with new direction 16C from the court, which is substantially identical.

They have been incorporated into Practice Direction (Criminal proceedings: various amendments) [2015]1 WLR 1643, Lord Thomas CJ.

Mandatory Life Sentences

In Hutchinson v UK the Times, February 5th 2015, the ECHR abandoned the position taken by the Grand Chamber in Vinter v UK [2014] Crim LR.81 and accepted the decision of the Court of Appeal in A-G's Reference (No 69 of 2013) (R v Mc Loughlin R v Newell, [2014] EWCA Crim. 188) which said had sufficiently addressed the doubts expressed by the Grand Chamber.

In Vinter the Grand Chamber held that a whole life order under the 2003 act is incompatible with Article 3. This was rejected in Mc Loughlin holding that the secretary of the states power to release a prisoner, if there are exceptional circumstances that justify release on compassionate grounds met the requirements. If violation of Article 3 was to be avoided, that a whole life tariff be reducible, in the sense that there needed to be provision for review, to allow domestic authorities to consider a prisoners charge with reference to rehabilitation to justify the removal of continued detention.

Personal Data

The controls on the retention of personal data in police information systems in the UK are "in accordance with the law" for the purposes of Article 8(2) of the ECHR.

Lee R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland (Equality and Human Rights Commission interviewing) [2015]2 WLR 604, reversing the decision of the Court of Appeal.

Juries: Jury interference.

In Hanif v UK [2012] 55 EHRR 424 appeals were allowed in cases where a police officer on a jury shared the same service background with a key Police Officer witness and the juror was not discharged. Here, the ECRH found a violation of Article 6 in circumstances where there was a conflict regarding police evidence and a member of the jury was both a police officer and acquaintance of one of the officers who had given evidence before the jury. Jury directions and judicial warnings were considered insufficient to guard against the risk that the juror may favour the evidence of the police.

At paragraph 148 of that report the ECHH emphasises the importance of the conflict of evidence and the personal acquaintance of the individuals concerned.

The criminal cases review commission referred the case back to the Court of Appeal, cited at [2014] EWCA Crim 1678, which ultimately ruled that the conviction of Hanif was unsafe, although those of his co-defendant Kahn, was upheld, although the ECHH also said that Kahn's rights were violated as he was committed by the same jury. (See Mohamed Ali, presently before the CCRC).

The court emphasised the need to ensure that juries are free from bias and the appearance of bias. The ECHH did not find against the principle of police sitting as jurors.

Assisted Dying (Suicide)

Parliaments voted against the Assisted Dying (No.2) Bill 2015 in September, the ECHH having previously rejected the 'right to die' cases in Lamb and Nicklinson. In the earlier case of R (or the application of Nicklinson) v Ministry of justice [2014] UK SC 38, the Supreme Court observed that it felt the matter was an issue for Parliament to consider and decide upon.

See also, the DPP's policy statement issued on the 16th October 2014, interpreting policy in relation to health care professionals and others.

Other Developments in Brief:

The modern Slavery Act 2015 (consequential amendments) Regulations 2015 (SI 2015/1472) in force 31st July 2015:

These regulations make amendments to secondary legalisation in consequence of the offences of slavery, servitude and forced compulsory labour and human trafficking in the modern Slavery Act 2015 SS 1 and 2.

The Counter-Terrorism and Security Act 2015 (commencement No 2 Regulations 2015 (SI 2015/1698 (C.102)). In force this brings into operation various provisions of the 2015 act on the 18th September 2015. These regulations specify the commencement date for s.26 (general duty on specific authorities) of the Counter-Terrorism and Security Act 2015 in so far as the duty is expressed to apply to those specified authorities to whom s.31 (freedom of expression in universities etc.) of this act is expressed to apply (that is properties or governing bodies of certain further and higher education institutions).

The Police Act 1997 and the protection of vulnerable groups (Scotland) act 2007. Remedial order 2015 (SSI 2015/1330). In force 10th September 2015.

This order makes amendments to the Police Act 1997 and the protection of vulnerable groups (Scotland) act 2007 to remove any potential incompatibility arising from the disclosure of criminal convictions and cautions under the 1997 act and the 2007 act with the European jurisprudence.

Legal Professional Privilege

Brown [2015] EWCA Crim. 1328, July 29, 2015.

B faced trial for attempted murder of another patient at a secure mental hospital in which he was serving life sentences. At an early stage, he had confided to staff that he had thought of trying to kill his Solicitor and he had a long history of self-harm.

The Judge had been right to require him to be handcuffed to two nurses during meetings with his legal team at Crown Court.

The question was whether the Court should prevent the protection of legal privileges being utilised to enable individuals to inflict violence on themselves or others.

The usually inviolable or absolute nature of legal privilege was capable of qualification at common law outside the fraud exceptions raised in R v Cox and Railton [1884] QBD 153.

In Brown's case there was no suggestion of an intention to misuse the overheard privileged communications and the nurses deployed to prevent self-harm or harm to others were not to be equated with investigating Police Officers. They were not present to eavesdrop or secure a tactical advantage on B, nor as part of an unlawful surveillance exercise.

In future cases they would need to be instructed in the clearest terms that they must treat anything they overheard in confidence and that they should not disclose the contents of the discussion save in wholly exceptional circumstances (which may well be limited to where communications were intended to further a criminal or other serious abuse of privilege).

Question whether these safeguards are adequate.

The Court is a public authority under the Human Rights Act 1998 S.6 (3) (a) and had a positive duty to protect human life where the ECHR, Article 2 applied.

Accordingly, and additional common law qualification or exception to the inviolable nature of privilege allowed the imposition of a requirement that individuals could be present at discussions between a defendant and his or her legal team if there was a real possibility that the meeting would be misused for a purpose, or in a manner, that involved impropriety amounting to an abuse of the privilege that justified interference.

Such a restriction was a proportionate and appropriate response to the grave threats posed by Brown, and did not breach Article 6 of the ECHR.

R (o.t.a Henderson) v Secretary of State for Justice [2015] EWHC 130 (Admin):

Crime Justice and Courts Bill, RE Court Charges:

The court ruled that the statutory changes made to the ability of acquitted defendants in the Crown Court to recover their costs from central funds (prosecution of Offences Act 1985 s.16A) are compatible with the ECHR, Article 6.

R v Bell [2015] EWCA Crim 1426:

ECHR art.7 had not been breached where an offender, sentenced in 2014 to life imprisonment for a manslaughter committed in 2000, had had his minimum tern determined on contemporary sentencing practice rather than the practice of the courts at the time of the offence. Unlike the minimum tern for mandatory life sentences for murder, which was subject to the statutory regime in the Criminal Justice Act 2003, the calculation of the minimum tern in discretionary life sentences for manslaughter was an exercise in judicial discretion.

Beghal v DDP [2015] UKSC 49:

The power in the Terrorism Act 2000 Sch.7 to question and search at ports and borders was not incompatible with ECHR art.8.

Jewala v Poland [2015] EWHC (Admin):

Although an extradite had been providing financial support to his family in Poland, his ECHR art.8 rights did not outweigh the public interest in his extradition to serve the outstanding term of his custodial sentence.

Lezon v Poland [2015] EWHC 1908 (Admin):

There was no evidence that a particular regional public prosecutor in Poland had had any influence or effect on an extraditee's trials for fraud offences or his appeals, which amounted to a flagrant breach of his right to a fair trial pursuant to ECHR art.6, see also Miraszewski v District Court in Torun, Poland [2014] EWHC 4261 (Admin) on whether extradition is disproportionate and in breach of Article 8.

Gaughran's Application for Judicial Review, Re [2015] UKSC 29

Although a policy of indefinite retention of fingerprints, photographs and DMA profiles of convicted persons breached individuals' rights under the ECHR art.8, it was within the United Kingdom's margin of appreciation and proportionate.

Beggs v Scottish Ministers [2015] CSOH 98:

The Court held that the way in which the Scottish Prison Service (SPS) handled a prisoner's correspondence breached Article 8 of the European Convention of Human Rights. He had raised court proceeding in the past to vindicate his rights concerning his correspondence, the prison authorities had been well aware of his concern about his mail over a period of approximately 12 years and they had failed in implementation of policies to conform to the rules in respect of the opening of privileged mail, such as to show that the system put in place during the time relevant to the complaints relating to privileged correspondence had been insufficient in its actual working to enable the prisoners right to respect for his correspondence to be upheld.

The crucial issue in this care was the way in which policies relating to privileged prisoner correspondence were implemented. There was no challenge to the prison rules or TO the 2012 Direction, nor was there any suggestion from the court that they were problematic from an Article 8 perspective. However, the SPC had not taken sufficient steps to ensure that the rules and the Direction were complied with in practice. A violation of Article 8 can therefore arise when the authorities fail to ensure that an otherwise sound policy is actually implemented on the ground.

Wright v Lord Chancellor [2015] EWHC 1477:

An individual failed to show that his detention for offences of affray and wounding had breached his rights under ECHR art.5. The Crown Court had clearly had jurisdiction to pass the sentence it had imposed, and he had been unable to demonstrate that the court had sentenced in a way that involved a gross and obvious irregularity, that it had failed to observe a statutory condition precedent, or that it had acted in a way that was arbitrary.

R (on the application of Stevenson) v Governor of Wakefield Prison [2015] EWHC 1014 (Admin):

A prisoner had failed to demonstrate that his allocation to a prison in the north of England whilst his family and friends lived in the south of England violated his right to respect for private and family like under ECHR act.8, as visits from his family were neither very difficult nor impossible.

Bak v Poland [2015] EWHC 797 (Admin):

The extradition of a Polish national to Poland to serve a term of imprisonment would be a disproportionate interference with his ECHR art. rights as there had been a delay in seeking his extradition, he had no reoffended, he had previously been extradited and served time in prison and he had a young child who would be distressed by his removal.

Toleikis v Lithuania [2015] EWHC 904 (Admin):

A Lithuanian national's extradition to face drug charges involving small quantities of cannabis would be disproportionate under ECHR art.8 where the seriousness of the offences, and the sentence that would likely be imposed in the UK, meant that much less weight would be attached to extradition than would usually be the case.

Knights v Parole Board for England and Wales [2015] EWHC (Admin):

The continued detention of two prisoners following the expiry of their respective minimum terms was not arbitrary and did not breach the ECHR art.5. They had been detained for public protection having met the statutory test for dangerousness, and during their detention they had been assessed and had gone on courses to enable them to reduce the risk they posed. However, one of the prisoners was awarded £300 in damages for an unacceptable delay in his parole review hearing which caused him frustration and distress.

D v Secretary of Sate for the Home Department [2014] EWHC 3820 (Admin):

The restrictions imposed by a Terrorism Prevention and Investigation Measure did not amount to a violation of ECHR art.3, notwithstanding the exacerbation of mental health issues suffered by the person restricted, provided that the requisite measures for his care, including those measures arising from the imposition of the TPIM, were met.

Gough v UK [2014] ECHR 1156

The repeated arrest, prosecution, conviction and imprisonment, for public nudity, of a man who refused to wear clothes under ant circumstance did not breach his rights under ECHR art.8 or art.10. The European Court of Human Rights found the UK authorities' restriction of his rights under Articles 10 and 8 of the Convention, proportionate to the legitimate aim of preventing disorder and crime.

Khuram Shazad Iqbal [2014] EWCA Crim 2650

Individual's rights under Article 10 (Freedom of Expression) are engaged at the decision to prosecute stage. The defendant was charged with discrimination of 'Terrorist' publications.

Conclusion:

A salutary warning is given in R (Harkins) v Secretary of State for the Home Departnemt [2015] ACD 33 DC which states that whilst the court was bound to take account of the ECHR's decisions, it was not bound to follow it, and in any even, it did not constitute clear and constant jurisprudence. This was an extradition case grappling with the differences between Trabelsi v Belgium [2015] 60 EHRR 21 and Hutchinson v UK in relation to extradition requests.