

Sutherland v Her Majesty's Advocate [2020] UKSC 32

The issues

The appeal concerned whether the use of evidence obtained by a so-called 'paedophile hunter' group in criminal proceedings is compatible with the defendant's rights under article 8 of the European Convention on Human Rights ('ECHR').

'Paedophile hunter' ('PH') groups impersonate children over the internet to trick adults into making inappropriate or sexualised communications with them. Any such material obtained is shared with the police. The appellant had entered into sexualised communications with a decoy from a PH group, believing that he was a child. After being reported to the police, he was convicted of three charges related to sexually motivated communications with a child, using the evidence obtained through the PH group. He unsuccessfully challenged the admissibility of this evidence before the Glasgow Sheriff Court and, on appeal against his conviction, the Scottish High Court of Justiciary.

The appeal before the Supreme Court concerned two compatibility issues:

1. Whether, considering the type of communications shared between the appellant and the PH group, the rights of the former under article 8 had been interfered with through their use as evidence in his prosecution.
2. Whether the positive obligations of the state to provide adequate protection for article 8 rights are incompatible with a public prosecutor's use of such material submitted by PH groups.

The court decision

The Supreme Court unanimously dismissed the appeal.

The court held on two grounds that there had been no interference with the appellant's rights to respect for private life and correspondence under article 8(1). Firstly, the 'reprehensible nature' of the communications in question did not attract the protection of article 8,¹ because they did not reflect values which the ECHR 'exists to protect and promote'.² The court emphasised that by virtue of the fundamental values protected by article 8, states have a positive obligation to enforce provisions of the criminal law to protect children from sexual exploitation. Where all that is at issue is the balance of interests between the person engaging in such communications and the intended recipient, the protection of the moral and physical integrity of children has clear priority under article 8. The court reasoned that this conclusion was reinforced by the prohibition of abuse of rights under article 17 ECHR. Secondly, the court held that the appellant had no reasonable expectation of privacy in respect of the communications – an important indicator of whether the right to respect for private life and correspondence is engaged.

On the second compatibility issue, the court held that the respondent had no supervening positive obligation to protect the interests of the appellant under article 8 which would impede

¹ *Sutherland v HM Advocate* [2020] UKSC 32, [2020] 3 WLR 327, [40].

² *Ibid* [32].

the use of his communications with the decoy to investigate and prosecute the crimes he was alleged to have committed. On the contrary, under article 8 the respondent was entitled, and possibly required, to use such evidence in prosecution to deter sexual offences against children.

Significance

Pragmatically, the Supreme Court's decision to dismiss the appeal is not altogether surprising considering the nature of the communications and the decisions of the courts below. However, the reasoning applied is significant in so far as it represents a considered attempt to precisely delineate clear principles which determine the scope of article 8. The Supreme Court's express consideration of the 'scheme of values inherent in the ECHR',³ which the Convention fundamentally 'exists to protect and promote',⁴ articulates a principled basis from which to circumscribe the otherwise expansive remit of article 8 in human rights jurisprudence. In particular, the European Court of Human Rights have repeatedly held that 'private life' is a broad term incapable of exhaustive definition⁵ – a notion which explains the influence of article 8 over a wide range of policy areas. Indeed, it was the 'extraordinary growth or extension' of article 8 over the past sixty years which prompted Lord Walker to aptly describe it as 'indefinite'.⁶ In comparison to the evolutionary interpretation of the Convention as a living instrument when article 8 is applied to other issues, such as transgender rights or the death penalty,⁷ in *Sutherland* the Supreme Court has placed greater emphasis on the core values upon which the ECHR was originally founded. This provides a coherent theoretical basis from which to demarcate the aspects of an individual's private life and correspondence protected by article 8.

Nevertheless, regarding the first issue of whether article 8 had been interfered with, it could be said that further questions arise from the reasoning applied by the court. For example, in this case and in the 2009 House of Lords case *R v G* (cited in paragraph 44),⁸ the majority decision that there had been no interference with the right to respect for private life under article 8(1) was primarily based on the criminality of the appellant's conduct. Both cases involved sexual activity, or sexually motivated activity, with children incapable of giving any form of consent. The Supreme Court's judgment in *Sutherland* could be interpreted as articulating a threshold for the engagement of article 8 in the first place, through the requirement that the relevant private life or correspondence be 'capable of respect within the scheme of values inherent in the ECHR'.⁹ If so, future cases can feasibly be imagined in which the application of such a test is more subjective and less clear-cut. For the scope of article 8 to be more precisely defined, it remains to be seen whether 'capable of respect' is a condition which requires further elaboration.

³ *Ibid* [40].

⁴ *Ibid* [32].

⁵ *Niemietz v Germany* (1993) 16 EHRR 97, [29]; *Pretty v United Kingdom* (2002) 35 EHRR 1, [61]; *Peck v United Kingdom* (2003) 36 EHRR 41, [57].

⁶ Robert Walker, 'The Indefinite Article 8' (Thomas Moore Lecture, Lincoln's Inn, 9 November 2011), 5 < https://www.supremecourt.uk/docs/speech_111109.pdf > accessed 16 August 2020.

⁷ *Goodwin v United Kingdom* (2002) 35 EHRR 18; *Soering v United Kingdom* (1989) 11 EHRR 439.

⁸ [2008] UKHL 37, [2009] AC 92.

⁹ *Sutherland* (n 1) [40].