Chapter 3: Evidence obtained by illegal or unfair means

Law

Staying proceedings as an abuse of process

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When considering a stay in entrapment cases, a distinction will be drawn between the conduct of state agents and private citizens who have acted on their own initiative as 'agents provocateurs'. See *R v L* [2018] EWCA Crim 1821 (evidence of sexual grooming obtained by 'paedophile hunters'). See also *R v Marriner* [2002] EWCA Crim 2855, *R v Shannon* [2001] 1 WLR 51, CA and *R v Hardwicke* [2001] Crim LR 220 (examples of evidence obtained by undercover journalists).

Whether the entrapment is by state or private agents the issue will be the same, namely whether the prosecution would be "deeply offensive to ordinary notions of fairness" or "an affront to the public conscience", or "so seriously improper as to bring the administration of justice into disrepute" (*R v L* [2018] EWCA Crim 1821 at [32]). Thus in principle it could be an abuse of the process of the court where there has been misconduct by private citizens which is so serious that reliance on evidence obtained by them would compromise the court's integrity. However, "the situations in which that might occur would be very rare indeed" (per Goldring J in *Council for the Regulation of Healthcare Professionals* v *General Medical Council* [2007] 1 WLR 3094, (Admin) at [81], cited in *R v L* [2018] EWCA Crim 1821 at [32]).

A stay may be justified where intrusive covert surveillance has interfered significantly with an accused's right to legal professional privilege: *R v Turner* [2013] EWCA Crim 642 at [28].

The exceptions

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Concerning intercepted evidence, section 56(1) of the Investigatory Powers Act 2016 makes provision for the exclusion of the content of intercepted communications which have been unlawfully or improperly obtained. Under the section, exclusion may cover 'secondary data' (material) obtained from such communications.

Section 56(1) states as follows:
56 Exclusion of matters from legal proceedings etc.
(1) No evidence may be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings or Inquiries Act proceedings which (in any manner)—
(a) discloses, in circumstances from which its origin in interception-related conduct may be inferred—
(i) any content of an intercepted communication, or

(ii) any secondary data obtained from a communication, or
(b) tends to suggest that any interception-related conduct has or may have occurred or may be going to occur.
This is subject to Schedule 3 (exceptions).

Concerning the exceptions in Sch 3 para 5, for example, s 56(1) does not apply to proceedings before the Special Immigration Appeals Commission. Nor, by virtue of Sch 3, para 7, does it apply to Closed Material Proceedings

Under 56(2)(a)-(e), 'interception-related conduct' means conduct which would constitute an offence of unlawful interception contrary to s 3(1) of the Act; a breach of the prohibition under s 9 (concerning the restriction on requests for interception by overseas authorities); a breach of the prohibition imposed by s 10 (concerning the restriction on requests for assistance under mutual assistance agreements etc); conduct which involves the making of an application for a warrant or the issue of a warrant under Chapter 1, Part 2 of the Act; or involves imposing any requirement on a person to provide assistance in effecting a targeted interception warrant or a mutual assistance warrant.

Under s 56(4) 'interception-related conduct' also covers conduct which occurred before s 56(1) came into force and would have amounted to an offence or otherwise have been improper under provisions contained in the Regulation of Investigatory Powers Act 2000 and the Interception of Communications Act 1985.

Criminal cases: s 78 of the Police and Criminal Evidence Act 1984

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Footnote 57

In *R v Thompson* [2018] EWCA Crim 2082 at [48], it was said that general remarks made by Sir Igor Judge P in *R v Renda* [2006] 1 WLR 2948, CA at [3] concerning the exercise of the exclusionary discretion under s 101(3) of the Criminal Justice Act 2003, applied equally when considering the exercise of discretion under s 78.

In *R v Thompson* [2018] EWCA Crim 2082, the judge was correct not to exercise her discretion under s 78 in respect of evidence admissible under s 101(1)(f) (see [46]-[48]).

The rights-based principle

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In *Bueze v Belgium*, the Grand Chamber stated that the criterion of 'compelling reasons' to justify any restriction is stringent, the restriction being permissible only in exceptional circumstances, and only if it is temporary and based on an individual assessment of the circumstances of the case ((2019) 69 EHRR 1, GC, at [142]; see also *Ibrahim v UK* [2016] ECHR 750, GC at [258]). However, the lack of compelling

reasons does not automatically result in a breach of Art 6, the real question being whether the accused nevertheless had a fair trial overall. Where there are no compelling reasons, the onus will be on the authorities to demonstrate convincingly why the overall fairness of the criminal proceedings was not irretrievably prejudiced by the restriction.

The decision in *Beuze v Belgium* (2019) 69 EHRR 1, GC, has been criticized for diluting the principle laid down in *Salduz v Turkey* (2009) 49 EHRR 19, GC, to the effect that restricting access to a lawyer without compelling reasons *does* automatically violate Art 6 : see *Beuze V Belgium* [2019] Crim LR 233 ; and Celiksoy, '*Ibrahim and Others v. UK*: Watering down the Salduz principles?' accessible at https://journals.sagepub.com/doi/pdf/10.1177/2032284418778149.
See further, the Joint Concurring Opinion in *Bueze v Belgium* (2019) 69 EHRR 1, GC at [B-F].

Breaches of Code C (detention, treatment, and questioning)

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Concerning references in the text to the caution, see now paras 10.1-10.9 of Code C.

Entrapment and undercover operations

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Footnote 143

Concerning para 7 in the text, see also *R v L* [2018] EWCA Crim 821 at [32]. And see earlier in this update under, **Law**, **Staying proceedings as an abuse of process**.

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In *R v Syed* [2019] 1 Cr App R 267 (21) at [109] – [110] it was observed that working definitions of entrapment in Strasbourg jurisprudence and English law are essentially the same; that although there may be distinctions in the language used, they are not material distinctions; and efforts to construct differences between the approaches using unduly literal reading of the language of judgments are misplaced and discouraged.