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Cases in Brief

Abuse of process—planning enforcement—whether invalidity with mala fides *founding stay—whether contumelious conduct not affecting validity founding stay*

CLAYTON AND DOCKERTY [2014] EWCA Crim 1030; May 23, 2014

C and D were prosecuted for failing to comply with an enforcement notice contrary to the Town and Country Planning Act 1990 s.179. The judge had been right to reject an application to stay the proceedings as an abuse of process on the basis that the enforcement notice had been procured by the improper conduct of the Council's solicitor, who had (it was said) concealed information fatal to the making of an order. The primary application was that if the enforcement order was invalid, it would be an abuse of process for the Council to initiate the prosecution for breach of an order which should never have been granted had the solicitor acted with due propriety (relying on a parallel with *White and White v South Derbyshire DC* [2012] EWHC 3495). Assuming for the purposes of the judicial review that the notice had indeed been procured *mala fides*, both the Town and Country Planning Act 1990 s.285(1) and *Wicks* [1998] A.C. 92 precluded such an application. If the order itself could not be challenged in the criminal proceedings by way of defence to the prosecution for breach (s.285 and *Wicks*), that limitation could not be overcome by seeking to recast the claim as a stay of proceedings, when the argument for a stay depended for its success on establishing the invalidity of the Order. The invalidity should have been questioned on appeal to the Secretary of State or judicial review (to the extent that the *male fides* argument could not be advanced by way of appeal, judicial review was the appropriate procedure: *Wicks*). The application on appeal was also put on a broader basis (it was not clear whether it was so put or not at first instance) that if the Council, through the solicitor, had indeed deliberately and knowingly concealed information from the Council or the Secretary of State on appeal, that would be reprehensible conduct which would in principle be capable of mounting an abuse of process whether or not it was material to the making of the enforcement notice. The application, so stated, relied on the contumelious nature of the officer's conduct, rather than its effect. While the Court accepted (*Warren v AG for Jersey* [2012] 1 A.C. 22) that it was not necessary to establish that a defendant should have been prejudiced by the action of the prosecutor as a precondition to a stay on this basis, if the argument for a stay rested on the wrongdoing of the solicitor and was independent of the effect on the enforcement order, no court could conceivably find that a stay would be appropriate. The fact that an officer of the Council concealed information would not render it in any way abusive for the Council to prosecute for breach of an enforcement order properly made, whatever the professional or criminal liability of the solicitor.

Abuse of process—inability of defendants to secure representation at level of remuneration set for Very High Cost Cases—whether integrity of criminal justice system impugned by adjournment—whether fair trial possible

CRAWLEY [2014] EWCA Crim 1028; May 25, 2014

The judge had been wrong to stay proceedings as an abuse of process where, at the date set for trial (time estimate two and half to three months) no qualified advocate was prepared to represent the defendants in a fraud trial due to a reduction in the remuneration paid to advocates in cases categorised as Very High Cost Cases. The judge found that a stay was necessary under both heads of abuse (*Attorney General's Reference (No. 2 of 2001)* [2004] 2 A.C. 72), to protect the integrity of the criminal justice system and because the defendants could not receive a fair trial.

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(1) As to the integrity of the system, the judge had (despite directing himself to disregard the ongoing dispute between the Bar and the Lord Chancellor as to remuneration under the legal aid scheme) attributed fault to "the state", and found that the state as prosecutor, through the Financial Conduct Authority (in fact, a private company undertaking public functions), should not benefit from its own failing to provide representation (by the grant of an adjournment rather than a stay). It was quite wrong to link, effectively as one, the FCA as prosecuting authority and those responsible for the provision of legal aid or to speak of "its own failure" as if there was a joint enterprise in which both were involved. Some prosecutions were undeniably brought by private organisations (such as the Federation against Copyright Theft); some by independent bodies established by statute (such as the FCA); others by the Crown Prosecution Service (itself independent of government albeit answerable to the Attorney General). None have any power or ability to affect the exercise by the Lord Chancellor or the Ministry of Justice of its statutory responsibilities for legal aid. It was inappropriate to enter a debate about "fault". The responsibility of the Lord Chancellor to provide resources to permit a fair trial to take place arose irrespective of the cause of a problem in so doing. Regardless of the merits of the dispute, to conclude that the State had violated the process of the court or that what happened jeopardised the integrity of the criminal justice system (as opposed to its effective operation) was wrong as a matter of principle. To make out the other limb of the abuse of process jurisdiction required the conclusion that it would be impossible to give the accused a fair trial (*Maxwell* [2011] 1 W.L.R. 1837). The judge had erred in his analysis of the likely future availability of senior counsel through the Public Defender Service. On the agreed test (whether there was a realistic prospect of competent advocates with sufficient time to prepare being available in the foreseeable future), on a proper analysis there was a sufficient prospect of a sufficient number of PDS advocates being available to enable a trial within a reasonable time scale. The finding of the judge to the contrary could not be sustained; neither was it reasonable for him to have reached it. In any event, it was unjustifiable to proceed on the basis that the position was fixed. It had changed over time and, whether or not the bar accepted VHCC cases on the present terms, further discussion could not be ruled out.

Appeal—by way of case stated—where magistrates' legal advisor misled parties—magistrates not making ruling or determination—planning enforcement—information—whether defective

LYCAMOBILE LTD v LONDON BOROUGH OF WALTHAM FOREST [2014] EWHC 1829 (Admin); May 20, 2014

L pleaded guilty to offences contrary to the Town and Country Planning Act 1990 s.224 and appealed by way of case stated.

(1) L had intended to advance a defence based on the Town and Country Planning Act 1990 s.225. At the trial, the legal adviser to the magistrates raised the issue whether s.225 was in force and said it appeared that the provision had been superseded by s.225A, which did not appear to provide the defence, on the basis of the presentation of the provisions in *Stone's Justices Manual* (although it was not suggested that it said so in terms or by necessary implication). L changed its plea to guilty. At no stage did the magistrates make a ruling on the law. Section 225 had not been superseded. Where the justices were not required to make a finding of fact or law or other determination, there could be no erroneous finding by the magistrates and the appeal must fail. To decide otherwise would be to extend the jurisdiction of a case stated in the High Court far beyond that which it was intended to encompass. It would bring into court the impact of discussions by lawyers for the parties involving the legal adviser as to the nature of advice to be given to the magistrates without ever the magistrates ruling one way or the other. Short of allegations of incompetence, it was not the role of the court to remedy failures by advocates adequately to put their case in the court below or otherwise to rule in circumstances which did not, in fact, generate a decision of the court which could properly be challenged. It had been open to L to apply to have the conviction set aside under the Magistrates' Court Act 1981 s.142(2), or to maintain its plea of not guilty, appeal to the Crown Court and thence by way of case stated.

(2) The offences consisted of breaches of the Town and Country Planning (Control of Advertisements) (England) Regulations 2007. The informations only identified the "advertising regulations". In a submission not ventilated below, L submitted that the informations were thereby defective and that the Court could and should entertain and determine a pure point of law which might, if sound, afford it a defence even if that point had not been raised at first instance, relying on *Whitehead v Haines* [1965] 1 Q.B. 200. It was right that there were some defects in an information which could not be remedied. *Hunter v Coombs* [1962] 1 All E.R. 904, where the statute pleaded had been repealed, was an example. Although the Court recognised that it would have been far better had the information contained more by way of particularity in the form of an identification of the regulation and the breach, the failure in its drafting fell within that group of failures that did not undermine the safety of a conviction based upon them.

Obstructing an officer in the execution of duty—Children Act 1989 s.46—whether lawful where emergency protection order not sought—reasonable belief in likelihood of significant harm

KIAM v CPS [2014] EWHC 1606 (Admin); April 30, 2014

Officers attended K's home with a social worker in order to remove a child pursuant to the Children Act 1989 s.46, on the basis that a constable had reasonable cause to believe that the child would otherwise be likely to suffer significant harm.

(1) It had been open to the magistrates to find that use of s.46, rather than an emergency protection order under s.44, was not unjustified. The statute accorded primacy to s.44 as clearly the preferable procedure where it was practicable to use it; but the police must always have regard to the paramount need to protect the children from significant harm. It could not be right that if the police had not reacted to information about child being at risk as promptly as they might have done, they were debarred from using the s.46 power at a stage where the child was believed to be at imminent risk of significant harm and it was too late to make an application under s.44.

(2) The officers attending had been sent to the house by the sergeant in charge of the case. While mere orders by a superior officer were insufficient to provide reasonable grounds for an arrest, the authorities made it clear that the arresting officer need not have been told the principal features of the prosecution evidence, or, indeed, have evidence amounting to a *prima facie* case (*O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] A.C. 286; *Raissi v Metropolitan Police Commissioner* [2009] Q.B. 564; and *Christie v Leachinsky* [1947] A.C. 573). In any event, the analogy with the arrest of a suspect on the criminal charge should not be pressed very far. The constables were told to go to K's home, gain entry and assist social services in removing a nine-year-old girl into police protection. The obvious inference as to the grounds for her removal (whether or not it was spelled out in these words) was that it was believed necessary in order to protect her from the risk of significant harm if no such action were taken. It was not essential for the lawfulness of the operation for the sergeant to have explained to the constables the nature of the significant harm.

Publicity—courts' common law powers—Contempt of Court Act 1981 s.11—European Convention on Human Rights guarantees—relationship—Human Rights Act 1998 s.12(2) —application to orders under common law and Contempt of Court Act 1981 s.11—proper approach to use of powers of the court

A v BBC [2014] UKSC 25; May 8, 2014

The BBC challenged orders of the Court of Session in judicial review proceedings relating to A's challenge to his deportation following his conviction for sexual offences. The orders permitted the anonymisation of A's application, in exercise of common law powers; and directed the prohibition under the Contempt of Court Act 1981 s.11 of the publication of his name, other identifying details, and photographs.

(1) The principle of open justice was fundamental (and received statutory expression in Scotland as part of the revolutionary settlement in the Court of Sessions Act 1693), and that principle was inextricably linked to the freedom of the media to report on court proceedings. But since the principle of open justice was a constitutional principle to be found in the common law, it followed that it was for the courts to determine its ambit and its requirements, subject to statute. The courts therefore had an inherent jurisdiction to determine how the principle should be applied.

(2) Contrary to the BBC's submissions, it was apparent from recent authorities at the highest level (*Al Rawi v Security Service (JUSTICE and others intervening)* [2012] 1 A.C. 531; *Bank Mellat v Her Majesty's Treasury* [2013] 3 W.L.R. 179; and *Kennedy v The Charity Commission* [2014] UKSC 20), that the common law principle of open justice remained in vigour, even when rights under the European Convention on Human Rights were also applicable. In another recent decision, *R. (Osborn) v Parole Board* [2013] 3 W.L.R. 1020, the Supreme Court had referred (at [61]) to the importance of the continuing development of the common law in areas falling within the scope of the Convention guarantees, and cited as an illustration the case of *R. (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 Intervening)* [2013] Q.B. 618.

(3) It was open to the court to use an order under the Contempt of Court Act 1981 s.11 to protect a person's Convention rights (and, when required by the Human Rights Act 1998, it must do so). Section 11 was not confined to the protection of the public interest in the administration of justice. It was not a necessary precondition for an order to be made under s.11 that a member of the public in the courtroom had had some matter withheld from them.

(4) An application to allow a name or other matter to be withheld was not an application for relief made against any person: no remedy or order would be sought against any respondent. Similarly, an application for ancillary directions under s.11 was not an application for relief made against any respondent: the directions would operate on a blanket basis. There was therefore no obligation under the Human Rights Act 1998 s.12(2) to allow the media an opportunity to be heard before such an order could be granted. Nevertheless, the media may be entitled to be heard on such applications as a matter of fairness, if necessary at a hearing subsequent to that at which the orders or directions were made.

(5) In A's case the case for upholding the restrictions were overwhelming—it was only by protecting his identity that it would be safe to deport him without endangering his Art. 3 rights. The publication of A's identity would have subverted the basis of the decision to authorise his deportation, with the result that A could have made a fresh application to be allowed to remain. The restrictions were necessary both to protect his Art. 3 rights and to prevent the proceedings themselves being frustrated. The orders, accordingly, were not incompatible with the BBC's Art. 10 rights.

(6) Much of the BBC's submissions were devoted to criticising an *obiter* passage in the court below in which it was said that the court had the power at common law to withhold disclosure where to do so would do injustice regardless of the outcome of the case, such as where it would endanger a party's safety or be commercially ruinous; or to protect the identity of a female pursuer where the decision turned on intimate medical evidence, this last being particularly criticised. The BBC was concerned that the statement would be treated as authoritative by lower courts. The Supreme Court discussed *Attorney-General v Butterworth* [1963] 1 Q.B. 696, 725, *A v Scottish Minsters* 2008 SLT 412; *HM Advocate v M* [2007] HCJ 2, 2007 SLT 462 and *Devine v Secretary of State for Scotland*, unreported, January 22, 1993, concluding that all three examples set out above were capable of raising issues which could warrant a qualification of the principle of open justice. In relation to the last example, it would be in the interests of justice to protect a party to proceedings from the painful and humiliating disclosure of personal information where there was no public interest in its being publicised. Whether a departure from the principle of open justice was justified in any particular case would depend on the facts of that case, and the court carrying out a balancing act (*Kennedy v The Charity Commission* [2014] UKSC 20). Central to the court's evaluation would be the purpose of the open justice principle, the potential value of the information in advancing that purpose and, conversely, any risk of harm which its disclosure might cause to the maintenance of an effective judicial process or to the legitimate interests of others.

SENTENCING CASES

Confiscation; proportionality

PAULET v UK 6219/08—Chamber Judgment
[2014] ECHR 477; May 13, 2014

Relying on Article 1 of the First Protocol to the European Convention on Human Rights, the applicant complained that the imposition of a confiscation order was disproportionate.

The applicant had been made subject to a confiscation order in 2007 following his guilty pleas to three counts of dishonestly obtaining a pecuniary advantage by deception, one count of having a false identity document with intent, one count of driving whilst disqualified and one count of driving a motor vehicle without insurance.

The applicant had arrived in the UK in 2001, and gained employment through the use of a false French passport. Between 2003 and 2007 he earned a total gross salary of £73,293.17 and had savings of £21,649.60. His employers stated that they would not have employed him without the false passport.

When passing sentence, the trial judge accepted that the applicant had paid all the tax and national insurance due on his earnings. Taking such payments into account, the applicant's benefit from his earnings was calculated as £50,000. Of this sum, the applicant still had savings of £21,949.60, and a confiscation order was made for this amount.

The applicant appealed to the Court of Appeal, submitting that the confiscation order was oppressive and it was therefore an abuse of process for the Crown to seek and the court to impose a confiscation order for what was the applicant's entire savings over nearly four years of work. It was further submitted that seeking the imposition of a confiscation order on the basis of a benefit figure which far exceeded the value of the defendant's crimes was disproportionate and therefore an abusive exercise of jurisdiction.

The Court of Appeal dismissed the appeal, finding that there was a clear link between the applicant's earnings and his criminal offences, and that there was a public interest in confiscation as the applicant had been deliberately circumventing the prohibition against him seeking paid employment in the UK.

On October 27, 2009 the Court of Appeal refused to certify a point of law of general public importance which ought to be considered by the Supreme Court. The applicant then complained to the European Court of Human Rights.

Considering the application, the European Court stated that Art. 1 of Protocol No. 1 comprises "three distinct rules": the first rule concerns the peaceful enjoyment of property; the second rule covers the conditions in which individuals may be deprived of property; and the third rule recognises that Contracting States may control the use of property in accordance with the general interest. The three rules are connected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should be construed in light of the general principle enunciated in the first rule.

It was undisputed that the confiscation order amounted to an interference with the applicant's right to peaceful enjoyment of his possessions. Confiscation orders fall within the scope of the second paragraph of Art. 1 of Protocol No. 1, which allows Contracting States to control property to secure the payment of penalties. However, there must be a reasonable relationship of proportionality between the means employed and the aim pursued.

An interference with Art. 1 of Protocol No. 1 will be disproportionate where the property owner concerned has had to "bear an individual and excessive burden", such that "the fair balance which should be struck between the protection of the right of property and the requirements of the general interest" is upset (*Sporrong and Lönnroth v Sweden*, September 23, 1982, § 61, Series A no. 52). The striking of a fair balance depends on many factors.

The Court stated that it had to be determined whether the proceedings as a whole afforded the applicant a reasonable opportunity for putting his case to the competent authorities to enable them to establish a fair balance between the conflicting interests at stake.

At the time the applicant brought his complaint before the domestic courts, it was appropriate for him to argue his case in terms of "oppression" and "abuse of process". Although he sought to argue that "oppression" should be interpreted in line with the proportionality test required by Art. 1 of Protocol No. 1, the Court of Appeal did not adopt this approach. It was only when giving judgment in *Waya* [2012] UKSC 51 that the Supreme Court indicated that confiscation cases should be analysed in terms of proportionality.

The Court of Appeal had considered whether the order was in the public interest in assessing whether or not it was oppressive and thus an abuse of process. Having decided that it was in the public interest, they did not go on to exercise their power of review to determine whether the requisite balance was maintained in a manner compatible with the applicant's right to the peaceful enjoyment of his possessions. The scope of the review carried out by the domestic courts was consequently too narrow to satisfy the requirement of seeking the "fair balance" inherent in the second paragraph of Art. 1 of Protocol No. 1. There was therefore a violation of Art. 1 of Protocol No. 1 to the Convention. The Court did not consider it necessary to reach any further conclusions in respect of the proportionality of the confiscation order made.

The applicant had claimed £21,963.80 in respect of pecuniary damage, this being the amount paid pursuant to the confiscation order. The Court stated the violation found was procedural in character, and it was possible that if a sufficiently wide review had been conducted by the domestic courts, confiscation of the applicant's assets might have been found to be consistent with the Convention.

The Court held that in the absence of a proximate causal link between the procedural violation found and financial loss sustained through the confiscation order, it could not make an award to the applicant under this head. The Court did recognise that the applicant must have suffered some anguish and frustration as a result of the failure of the domestic courts to conduct a Convention-compliant review of the confiscation order and therefore awarded €2,000 in respect of such non-pecuniary prejudice.

Comment

Can the Variation of an ASBO be appealed?

By Alastair Munt and Sam Skinner[1]

Under s.1 of the Crime and Disorder Act 1998 (the Act) a stand-alone Anti-Social Behaviour Order (ASBO) can be made by the magistrates' court sitting in its civil jurisdiction. Orders to similar effect, also usually called ASBOs,[2] can also be made in the County Court under s.1B, and after conviction in criminal proceedings in either the magistrates' court or the Crown Court under s.1C. The criteria for making an ASBO, irrespective of the court, are that the offender or person: (a) has acted in an anti-social manner that caused or was likely to cause harassment, alarm or distress to one or more persons not of the same household as himself; and (b) an order is necessary to protect persons from further anti-social acts by him.

Right of appeal: magistrates' court to the Crown Court

Section 4(1) of the Act provides a specific right of appeal to the Crown Court against a stand-alone ASBO made in the magistrates' court under s.1 of the Act. The route of appeal for an ASBO made in the magistrates' court after conviction lies under the general criminal appeal provisions of s.108 of the Magistrates' Court Act 1980[3] (MCA). Irrespective of any right of appeal, a party can apply to vary an ASBO but, save with the consent of the parties, neither a stand-alone order (s.1(9)) nor an ASBO made after conviction (s.1CA(7)), can be discharged before a minimum period of two years. The Act does not provide an explicit right of appeal against the variation or refusal to vary an ASBO; and this notwithstanding that a variation can make its terms more onerous. For instance, its length may be extended; or stricter geographical limitations imposed. The issue of whether any right of appeal exists to the Crown Court against a variation of a stand-alone ASBO made in the magistrates' court under s.1 of the Act was decided in *R. (Langley) v Crown Court at Preston* [2008] EWHC 2623 (Admin); [2009] 1 W.L.R. 1612.

In *Langley*, the District Council obtained a three-and-half-year "stand-alone" ASBO in Chorley Magistrates' Court. Shortly before the ASBO was due to expire, the District Council was granted a variation that extended the ASBO by another two years. The Crown Court at Preston later held that it had no jurisdiction to hear the appeal. Mr Langley sought judicial review. Scott Baker L.J., giving the judgment, held that no right of appeal existed to the Crown Court against the variation or refusal to vary a stand-alone ASBO made in the magistrates' court under s.1 of the Act. The court's reasons were as follows.

First: an appeal under s.4(1) of the Act only lies against the "making" of an ASBO. Making an ASBO requires a two-stage test, namely, that the court must be satisfied as to: (i) certain basic facts about D's behaviour; and (ii) that an ASBO is necessary in the light of them. When asked to vary an existing ASBO the court is concerned with only the second limb of the test, which is evaluative, rather than the first, which is purely factual. To challenge the evaluative decision of a magistrates' court made when varying an ASBO, the remedies of judicial review and case stated are already available. As court time is a finite resource, Parliament would not have wanted to create unnecessary avenues of appeal.

Second: the Court approved Latham L.J.'s *obiter dicta* at [12] in *Leeds City Council v RG* [2007] EWHC 1612 (Admin) that there were already sufficient safeguards without the need for an extra appeal. An applicant seeking to persuade a court to impose more stringent terms would need to satisfy the usual burden and standard of proof. Further, where it was sought to extend the duration of the ASBO, a court would also need to be satisfied that a variation rather than an application for a new order was required.

Third: an appeal could not lie under s.108 of the MCA 1980 because: (a) an application under s.1 of the Act was a civil matter; and (b) even if the matter in question were criminal in nature, as in *R. (Lee) v Leeds Crown Court* [2006] EWHC 2550 (Admin) a variation of an order did not fall within the meaning of the word "sentence" in s.108(3) MCA 1980, *per* Bean J. at [7].

Fourth: where an ASBO was varied, Parliament would have intended to give rights of appeal that were comparable irrespective of the court which varied the order. Appeals against the variation of an ASBO made by the County Court (Civil Procedure Rules 52) and the Crown Court (ss.9 and 50 of the Criminal Appeals Act 1968 (CAA)) are avenues of appeal that require permission or leave and are normally hearings that take the form of a review. It therefore follows that an appeal from the magistrates' court on a stand-alone ASBO variation should have comparable qualities. The remedies of judicial review and case stated have such qualities and are appropriate routes to challenge the variation of an ASBO made by the magistrates' court.

For the reasoning stated above it is settled law that no right of appeal exists to the Crown Court against the variation or refusal to vary an ASBO made in the magistrates' court either under s.1 or s.1C.

Right of appeal: Crown Court to Court of Appeal?

It has yet to be determined whether an appeal lies to the Court of Appeal (Criminal Division) against the Crown Court's variation or refusal to vary an ASBO. In *Langley*, Scott Baker L.J., accepting that no argument had been heard on the point, expressed the view, at [22], that "...an ASBO, and probably a variation of an ASBO, made on conviction in the Crown Court is appealable to the Court of Appeal (Criminal Division)..."

The general right of appeal is provided by s.9 of the CAA 1968 which states that "a person who has been convicted of an offence on indictment may appeal to the Court of Appeal

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2 Though not with total accuracy; see James Richardson's commentary on the *Langley* case in CLW 2008/47/4.

3 *Ibid.*

against any sentence passed on him for the offence, whether passed on his conviction or in subsequent proceedings." By s.50(1) of the CAA 1968 the term sentence includes "… any order made by a court when dealing with an offender …" It follows that a variation of an ASBO would fall within the meaning of "sentence" in s.50(1) of the CAA 1968.
An appeal against the variation of an ASBO from the Crown Court to the Court of Appeal (Criminal Division) but not from the magistrates' court to the Crown Court would seem illogical. Section 108(1) of the MCA 1980 and s.50 of the CAA 1968 give the meaning of "sentence" in very similar terms, yet an order varying an ASBO is not a "sentence" under s.108(1) of the MCA 1980 but would be a "sentence" for the purposes of s.9 of the CAA 1968. Whilst Scott Baker L.J. relied upon Bean J.'s reasoning in *Lee* as authority that a refusal to vary or discharge a restraining order was not a "sentence", *Lee* may now be doubted by the more recent authority of *Barry Ward* [2010] EWCA Crim 1932[4] which held that it was an unsustainable distinction to say a refusal to vary a confiscation order was not an order for the purposes of ss.9 and 50 of the CAA 1968, but an order varying a confiscation order was.
Until the courts determine this issue, it remains unclear whether such an appeal lies to the Court of Appeal (Criminal Division).[5]

4 Bean J. gave this judgment. See [11].
5 The Anti-Social Behaviour Crime and Policing Act 2014 (ASBCP), which received Royal Assent on March 3, 2014, if brought into force, will repeal provisions for making ASBOs under ss.1, 1B and 1C of the Act and replace them with a new regime of anti-social behavioural orders. The issue, however, of whether there is an appeal to the Court of Appeal (Criminal Division) against a variation of this new type of anti-social order remains.

Feature

"Lies, Damned Lies, and [Criminal] Statistics?"

By Elaine Freer

At present, crime is widely reported to be falling. But the public, or a section of it, seems reluctant to accept this—and also appears to be persuaded that, where criminals are caught and brought to justice, the courts are then routinely "soft on crime". This article will give an overview of the current figures, which suggest that crime is, in fact, falling, and the courts are not handing down less punitive sentences than previously.

Statistics on the crime-rate
There are two main sources of crime statistics in the public domain in England and Wales. The first of these is the Crime Survey for England and Wales (herein CSEW; formerly the British Crime Survey), and the second is police figures of reported crime.

Crime Survey for England and Wales
This is administered annually by a company contracted out to by the Ministry of Justice, and the results are published by the Office for National Statistics each July, with quarterly updates.[1] The data is collected by attempting to administer questionnaires to one individual in each of a random sample of 50,000 households, which is claimed to be representative of households nationwide. No substitutes are used in place of the original 50,000 selected, meaning that participation cannot be boosted by increasing the sample size.[2] For the 2012-2013 survey, the sample size was reduced to 36,000, and the number of children interviewed from 4,000 to 3,000.[3] It is not clear if this smaller core sample will be retained. The survey is conducted by an interviewer visiting selected addresses and randomly selecting one resident aged 16 or over to participate. The interviewer can only interview the person who has been selected: no-one else in the household can take their place.
The main strength of the CSEW is that it includes unreported crimes. This is especially useful for certain under-reported offence groups, such as violence, especially domestic or gang-based (e.g. 2013 police figures showed 614,464 recorded offences,[4] while CSEW figures suggest the number is double this[5]). However, although it aims to collect data from a representative sample, its ability to do so is compromised by its reliance on the goodwill of participants, and if certain groups are less likely to agree to participate, then its claims to representativeness are compromised, due to its refusal to substitute participants.
Furthermore CSEW necessarily omits two main categories of crime; those that are "victimless" (i.e. vandalising an empty house, or those crimes against non-human persons, such as corporations), and those in which the victim does not realise that what has happened to them constitutes a crime. It also relies on the honesty of its interviewees, who may not always be truthful.
The CSEW technical report acknowledges these difficulties.[6] However, the response rates for the survey in 2012/2013 were 73 per cent and 67 per cent for adults and children respectively, and the survey is weighted to adjust for possible non-response bias and to ensure the sample reflects the profile of the general population.

1 http://www.crimesurvey.co.uk/about-this-research.html.
2 http://www.crimesurvey.co.uk/faqs.html.
3 Office for National Statistics, *2012-13 CSEW Technical Report* (London: ONS, 2013).

4 Ministry of Justice, *Criminal Justice Statistics 2013: England and Wales*, (London: Ministry of Justice, 2014) p.15
5 CSEW, *Crime in England and Wales, Year Ending December 2013*, (London: Office for National Statistics, 2014) p.9
6 *Ibid.*, fn.3 above.

Police statistics

The second main source of crime statistics are official police statistics, based on crimes reported to the police, regardless of whether a conviction follows. Although previously believed to be reliable for types of crime that were likely to be reported, this is no longer necessarily the case, with recent revelations about the downgrading of crimes,[7] the failure to record others,[8] and the consequent removal of the UK Statistics' Agency's approval from all police crime stats in January of this year.[9] The investigation that led to this removal of approval was carried out by the Public Administration Select Committee, which published its full report in April 2014, stating that there is strong evidence that the police under-record crime, particularly sexual crimes such as rape, in many police areas, due to "lax compliance with the agreed national standard of victim-focussed crime recording."[10]

Until 2006, police statistics were analysed by the Audit Commission, at which point that requirement was removed. In 2007 the Audit Commission published a short follow-up report on crime statistics,[11] after which police forces were left to their own devices in terms of the collection and analysis of crime statistics.

In 2012, Her Majesty's Inspectorate of Constabulary (HMIC) published its first full report on the quality of crime data.[12] This showed some improvement from an interim 2009 report, in which only 64 per cent of decisions to record violent incidents and serious crimes as "no crime" had been correct; by 2012 it was 84 per cent, suggesting greater recording accuracy, and less evidence of "downgrading" crimes to be classed as non-criminal (although crimes of a more serious nature may still be downgraded to a lesser seriousness). However, after whistleblowing by serving officers, potential manipulation of crime statistics again came to the attention of both the public and HMIC in late 2013. This led to the publication, in April 2014, of an interim report during ongoing investigations.[13]

Police crime figures have other limitations besides the risk of deliberate manipulation in order to meet official targets. Of these the most important is the reluctance of certain groups of victims to report offences against them to the police. These victims fall broadly into two categories; those that do not report because of the nature of the crime against them, and those who do not report for cultural reasons, such as distrust of the police, or cultural expectations of women, for example.

Most recent statistics on crime incidence

Latest figures from the CSEW estimate that there were 7.5 million crimes against households and resident adults in the previous 12 months in December 2013.[14] This was down 15 per cent when compared with the previous year's survey, and is the lowest estimate since the survey began in 1981. Police crime figures for the period since 1981 have also shown a reduction in recent years, albeit one that is less marked. In 2012-2013, for which the CSEW estimated there were 7.5 million crimes, the police recorded 3.7 million.[15]

The highest level of crime estimated by the CSEW was 19,000,000 in 1996. Since then, rates of CSEW-reported crime have decreased steadily until 2004/2005, followed by small fluctuations until the present.[16] The peak in police-recorded crime came in 2003/2004 of just over 6,000,000 crimes. The most recent decrease in CSEW crime was largely influenced by decreases in a range of offence groups, including: household theft (down 25 per cent); violence (down 22 per cent); and vandalism (down 15 per cent).[17] Meanwhile, the police-recorded 2012-2013 figure included decreases across most of the main categories of police-recorded crime, although shoplifting continued to increase (by 6 per cent in the year ending December 2013), as did violence against the person offences recorded by the police (but only by 1 per cent, thought to reflect improvements in recording and possibly a rise in public reporting). The biggest increase in a category of police-recorded crime was sexual offences; these increased by 17 per cent. This is probably due to a cultural shift in approach towards historic sexual offences.

The differences in data collection methods and their effectiveness at recording certain types of crime are starkly illustrated by comparing the most recent CSEW figures for violent crime to the most recent police statistics on recorded incidences of violent crime for the year ending December 2013; whilst the CSEW has reported a 22 per cent decrease in the same period, the number of such incidences recorded by police has increased by 1 per cent. But when looked at in the round, both sets of figures illustrate that the number of crimes committed each year is falling.

This article will now set out the most recent statistics released by the Ministry of Justice on the way in which offences are dealt with within criminal justice system after having been reported (the most recent statistics are those for 2013, as published on May 15, 2014).[18]

Out of court disposals

The notion that the criminal justice system has "gone soft on crime" arises in part from public concern about what is thought to be the excessive use of out of court disposals.

Out of court disposals were en vogue in the mid-2000s, and thus much used; their use was highest in 2007, with nearly 700,000 out of court disposals.[19] Since then, however, their use has declined, partly due to "populist punitiveness"[20] which has led politicians to (wrongly) perceive that the

7 HMIC, *Crime Recording in Kent: A report commissioned by the Police and Crime Commissioner for Kent,* (London: HMIC, 2013) p.4.
8 Public Administration Select Committee, *Caught Red-handed: Why we can't rely on Police Recorded Crime* (London: TSO, 2014).
9 UK Statistics' Authority, *Assessment of compliance with the Code of Practice for Official Statistics: Statistics on Crime in England and Wales*, Assessment Report 268 (London: UK Statistics' Authority, 2014).
10 *Ibid.*, fn.8 above.
11 Audit Commission, *Police data quality 2006/7* (London: Audit Commission, 2007).
12 HMIC, *The Crime Scene: A review of police crime and incident reports* (London: HMIC, 2012).
13 HMIC, *Crime recording: A matter of fact* (London: HMIC, 2014).
14 *Ibid.*, fn.5 above.
15 *Ibid.*, fn.4 above, p.13.
16 *Ibid.*, fn.5 above.
17 *Ibid.*
18 *Ibid.*, fn.4 above.
19 *Ibid.*, fn.4 above, p.8.
20 A. Bottoms, "The Philosophy and Politics of Punishment and Sentencing" in C. Clarkson and R. Morgan (eds), *The Politics of Sentencing Reform*, (Oxford: Clarendon Press, 1995) pp. 17–49.

public value punishment over other sentencing aims.[21] The most recent statistics issued by the Ministry of Justice suggest that out of court disposals have been declining every year since 2007, down to 331,000 in 2013.[22]

However, statistics about the fall in out of court disposals do not necessarily shed light on the correctness or consistency of their use; although the MoJ states "The decision to offer a particular out-of-court disposal must be made in accordance with the national guidance on the individual disposal", there is academic research demonstrating that such guidance is not always followed.[23,24]

So although the number of cautions has fallen, there are still some concerns about their inappropriate use; in 2013, 20 cautions were administered for rape offences, compared with 16 cautions in 2012.[25] 19 of these 20 were administered to juveniles, however, for whom it is more important to avoid the potentially criminogenic effects of deeper involvement with the criminal justice system,[26] and offering some potential justification for such a course of action.

Since 2007, the number of penalty notices for disorder (PNDs) has dropped by two-thirds, to around 80,000 in 2013.[27] But with these, a worry that appears to be justified is that a large proportion of those who receive them then fail to pay. Thus, in 2013 the compliance rate was only 53 per cent. Those who fail to pay the amount in full (or request alternative outcomes) within 21 days have a fine of one-and-a-half times the penalty amount registered in the magistrates' court for enforcement.[28] This may reflect an inherent flaw in the extensive use of purely financial penalties; many recipients may be simply unable to pay them and, where the recipient is a child, it will almost always be the parents who are in fact penalised.[29]

A PND, it should be noted, does not form part of an individual's criminal record. However if given for a recordable offence, an entry may be made on the Police National Computer (PNC) which may be disclosed as part of an enhanced Disclosure and Barring Service check.[30]

Prosecution

Since 2003, overall numbers of defendants both proceeded against and found guilty have slightly decreased, whilst the conviction ratio has slightly increased. In 2013, theft offences accounted for the majority of recorded crime and for the most convictions of all notifiable offences according to MoJ statistics.[31]

Against this general trend, sex offences saw an increase in prosecution rates but a drop in conviction rates. The MoJ report states that the decrease in the conviction ratio coincides with an increasing proportion of sexual offences cases waiting to go to court, possibly because such cases often require more time building a case than with other offence groups.[32] It may also be that, due to high profile prosecutions recently, there has been an increase in reporting of historical sexual offences, which may, due to complications caused by the passage of time, be less likely to result in a conviction.

Finally, the MoJ report states: "In 2013, 25% of convictions were given for indictable offences, 37% for summary non-motoring offences and 38% for summary motoring offences. This is a very similar pattern to that seen in 2012."[33]

Sentencing

Another discussion often aired in the press is whether the criminal justice system is "going soft on crime" as regards the sentences imposed on those who are prosecuted in the courts, and then convicted. The sentencing statistics suggest that the opposite is true, with greater use of custody, and longer sentences. Community penalties, by contrast, decreased over the past two years, having peaked between 2005 and 2010, whilst suspended sentences have become more widely used.[34] As these other disposals have increased in prevalence, the use of fines has decreased, although it remains the most common disposal across all courts, and rates of discharge, both conditional and absolute, have remained stable for around the last decade. [35]

In 2013, after fines, community sentences were the second most common disposal, and immediate custody the third, followed by a discharge (figures not given separately for absolute and conditional), a suspended sentence, and finally "otherwise dealt with", in the words of the MoJ.[36]

When disposals are split between offence types, however, the figures are rather different:

"A different distribution of sentences is observed for indictable offences. In 2013, of all offenders sentenced for indictable offences, 27% were sentenced to immediate custody, 23% to community sentences, 18% to a fine, and 12% to a Suspended Sentence Order (SSO). In 2013, for the first time in the period between 2003 and 2013, immediate custody was the most common disposal given for indictable offences."[37]

Since 2003, the most noticeable sentencing changes have been a significant decrease in the number of community sentences given, and a corresponding increase in the use of immediate custody, together with suspended prison sentences. Both the custody rate, and the average length of custodial sentence (ACSL) has increased:

"The custody rate for indictable offences in 2013 was 27% the highest in the period from 2003 to 2013 and it has increased each year since 2010 from 24% to 27%. This compared with a 2% custodial rate for summary offences.

The average custodial sentence length (ACSL), which excludes life and indeterminate sentences, has increased over the last decade, particularly in the last year – up to 15.5 months in 2013, compared with 12.6 months in 2003 and 14.5 months in 2012."[38]

21 M. Hough And J.V. Roberts, "Sentencing trends in Britain Public knowledge and public opinion", (1999) *Punishment and Society*, 1(1), 11-26.
22 *Ibid.*, fn.4 above.
23 L. Blakeborough and H. Pierpoint, *Conditional Cautions: An Examination of the Early Implementation of the Scheme*, Research Summary 7 (London: Ministry of Justice, 2007).
24 J. Amadi, *Piloting Penalty Notices for Disorder on 10-15 year olds*, Ministry of Justice Research Series 19/08 (London: Ministry of Justice, 2008).
25 *Ibid.*, fn.4 above, p.23.
26 L. McAra and S. McVie, "Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime" (2010) *Criminology and Criminal Justice*, 10(2), pp. 179-209.
27 *Ibid.*, fn.4 above, p.25.
28 Ministry of Justice, *Guidance on penalty notices for disorder*, (London: Ministry of Justice, 2013) p.4.
29 *Ibid.*, fn.24 above.
30 *Ibid.*, fn.28, p.5.
31 *Ibid.*, fn.4 above, p.15.
32 *Ibid.*, p.33.
33 *Ibid.*
34 *Ibid.*, p.11.
35 *Ibid.*, p.35.
36 *Ibid.*, p.11.
37 *Ibid.*, p.36.
38 *Ibid.*

There are various reasons given for these changes. In summary, they are due to a greater proportion of immediate custodial sentences being given for indictable offences which, due to their more serious nature, tend to be longer. There has been a 3 per cent increase (from 10 per cent to 13 per cent) of those being given sentences of 18 months to two years, and since 2007 there has been a 2 per cent increase in the proportion of determinate sentences that are five years or longer. Furthermore, the restriction in the CJIA 2008, and subsequent repeal by the LASPOA 2012 of IPP (as found in the CJA 2003) has led to a larger number of longer determinate sentences, as has the introduction in the LASPOA 2012 of an automatic life sentence on the second conviction for a serious offence.[39]

Prison population

These changes in sentencing are also reflected in changes in the prison population. In January 2013 the Ministry of Justice published an illuminating document entitled "Story of the Prison Population 1993-2012 – England and Wales".[40] The first paragraph is as follows:

"Between June 1993 and June 2013 the prison population in England and Wales increased by 41,800 prisoners to over 86,000. Almost all of this increase (98%) took place within two segments of the population – those sentenced to immediate custody (85% of the increase) and those recalled to prison for breaking the conditions of their release (13% of the increase)."

Despite these increasing population figures, according to the Ministry of Justice's statistics for 2013:

"The number of persons given a custodial sentence (that is, to prison or other form of secure detention) decreased by 13% between 2011 and 2013, reflecting a decrease in the number of offenders being sentenced, down 11% over the same period. The immediate custody rate (the proportion of all persons sentenced receiving immediate custody) peaked in 2011 and has been relatively stable since at 8%. Over half of offenders sentenced for sexual offences and robbery offences and more than two out of five sentenced for violence against the person in 2013 received a custodial sentence."[41]

Thus, in conclusion, it appears that, along with the fall in crime, there has been a fall in the number of people proceeded against. However, the proceedings have been more likely to result in a conviction. Of those convicted, slightly more than previously are being sentenced to immediate custody, whilst fewer are being given community sentences, suggesting that there is either a process of "up-tariffing" occurring, or those being convicted are being convicted of more serious crimes which are crossing the "custody threshold".[42]

European comparisons

As Lewis writes, in a special journal issue on European crime statistics, there are different collections of comparative statistics; two worldwide and five European.[43] Thus, the figures and conclusions that can be drawn depend partly on the statistics used. The most recent figures available are for 2012.

Compared to the rest of Europe, England and Wales is known for its high imprisonment rate, and high prison population. Statistics published by Eurostat (the statistics arm of the European Commission), up to date as of May 2012, show that, of the countries for whom data was available, England has the highest prison population (by raw number) in the developed world.[44] The figures for the United States and Turkey, both of which, in previous years, have had populations significantly higher than England and presumably still have them, are not available for 2012. However, a House of Commons briefing paper using statistics from 2010 (the most recent "full set" available) shows that England and Wales had 153 prisoners per 100,000 population in 2010, the second highest rate in Western Europe, below Spain. The US had the highest rate in the developed world (731 per 100,000).[45]

Similarly, it has a comparatively high crime rate; in 2012 only Germany had a higher crime rate (the figures referred to here are police-recorded crime, suggesting that our true crime rate is likely to be higher, as discussed above, but such an assertion could similarly be made about the other countries for whom data is provided).[46]

These figures, however, must be treated with caution; the comparison of raw figures is problematic due to different definitions of crimes, recording practices and other variations between jurisdictions. Nonetheless, they provide a suggestion of the discrepancies between crime and imprisonment here, and in neighbouring countries.

The United Nation Office on Drugs and Crime (UNODC) corroborates these high figures, however, showing that in 2012, England and Wales had the highest number of persons prosecuted of any European country that provided statistics.[47] England and Wales did not return figures showing how many people had been brought into formal contact with the police,[48] but the figures for persons convicted also showed the highest number in Europe (no rate was given).[49]

Conclusion

Crime statistics are a difficult matter; variations in methodology of recording and reporting, even when done well and thoroughly, mean that drawing comparisons is difficult, and can lead to false conclusions. However, the damage done to the public's perception of the accuracy of statistics by the revelations about police manipulation of data is unlikely to be easily repaired. It seems that a more transparent system of presenting statistics, along with an explanation of what they actually show in real terms, would assist the public to draw accurate conclusions from the data presented to them. For now, at least, this is that crime overall in England and Wales is decreasing.

39 LASPOA 2012, s.122.
40 Online at https://www.gov.uk/government/publications/story-of-the-prison-population-1993-2012.
41 *Ibid.*, fn.4 above, p.36.
42 Criminal Justice Act 2003, s.152(2).
43 C. Lewis, "Crime and Justice Statistics Collected by International Agencies" (2012) *European Journal of Criminal Policy and Research* 18, 5–21.
44 http://epp.eurostat.ec.europa.eu/portal/page/portal/crime/data/database.
45 G. Berman and A. Dar, *Prison Population Statistics*, (London: House of Commons Library, 2013) p.5.
46 *Ibid.*, fn.44 above; also Eurostat Meta-data: Crime and Criminal Justice (http://epp.eurostat.ec.europa.eu/cache/ITY_SDDS/EN/crim_esms.htm#unit_measure1400061447759).
47 http://www.unodc.org/unodc/en/data-and-analysis/statistics/crime.html 'persons prosecuted'.
48 *Ibid.*, 'Persons brought into formal contact'.
49 *Ibid.*, 'Persons convicted'.

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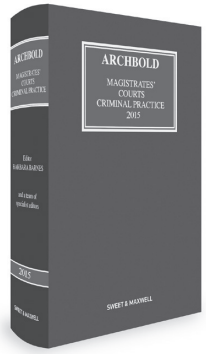

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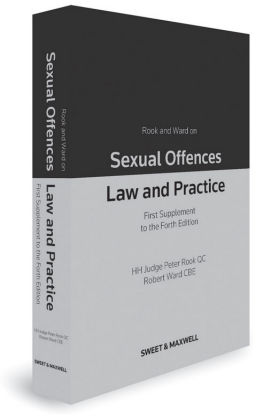

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