



15 July 2020

PRESS SUMMARY

Sutherland (Appellant) v Her Majesty’s Advocate (Respondent) (Scotland)
[2020] UKSC 32
On appeal from [2019] HCJAC 61

JUSTICES: Lord Reed (President), Lord Hodge (Deputy President), Lord Lloyd-Jones, Lord Sales, Lord Leggatt

BACKGROUND TO THE APPEAL

This appeal concerns the compatibility of the use in a criminal trial of evidence obtained by a so-called “paedophile hunter” (“**PH**”) group with the accused person’s rights under article 8 of the European Convention on Human Rights (“**the ECHR**”). Article 8 provides that everyone has the right to respect for his or her private life and correspondence. PH groups impersonate children online to lure persons into inappropriate communications and provide the resulting material to the police.

An adult member of a PH group, acting as a decoy, created a fake profile on a dating application using a photograph of a boy aged approximately 13 years old. The appellant entered into communication with the decoy, who stated that he was 13 years old. The appellant sent the decoy a sexual image and also arranged a meeting. At the meeting, the appellant was confronted by members of the PH group who remained with him until the police arrived. Copies of the appellant’s communications with the decoy were provided to the police.

The respondent, as public prosecutor, charged the appellant with attempts to commit: (i) the offence of attempting to cause an older child (i.e. a child between 13 and 16 years old) to look at a sexual image, for the purposes of obtaining sexual gratification, contrary to section 33 of the Sexual Offences (Scotland) Act 2009 (“**the 2009 Act**”); (ii) the offence of attempting to communicate indecently with an older child, contrary to section 34 of the 2009 Act; and (iii) the offence of attempting to meet with a child for the purpose of engaging in unlawful sexual activity, contrary to section 1 of the Protection of Children and the Prevention of Sexual Offences (Scotland) Act 2005 (together, “**the charges**”).

The appellant objected to the admissibility of the evidence sought to be relied upon by the respondent on the basis that it was obtained covertly without authorisation under the Regulation of Investigatory Powers (Scotland) Act 2000 and without authorisation or reasonable suspicion of criminality in violation of his rights under article 8. These objections were dismissed and the appellant was convicted of the charges. The appellant appealed against his conviction to the High Court of Justiciary, which refused the appeal and granted the appellant permission to appeal to the Supreme Court on two compatibility issues, which arise in criminal proceedings over whether a public authority has acted in a way that is unlawful under section 6(1) of the Human Rights Act 1998.

JUDGMENT

The Supreme Court unanimously dismisses the appeal. Lord Sales gives the judgment, with which all members of the Court agree.

REASONS FOR THE JUDGMENT

The appellant appeals on two issues: (1) whether, in respect of the type of communications used by the appellant and the PH group, article 8 rights may be interfered with by their use as evidence in a public prosecution of the appellant for a relevant offence; and (2) the extent to which the obligation on the state, to provide adequate protection for article 8 rights, is incompatible with the use by a public prosecutor of material supplied by PH groups in investigating and prosecuting crime [11].

On the first issue, the appellant submits that there was an interference with the appellant's rights to respect for his private life and his correspondence under article 8(1), which required the respondent to show that such interference was justified under article 8(2) [26]. The court holds that there was no interference with those rights at any stage because: (i) the nature of the communications rendered them incapable of being worthy of respect under article 8; and (ii) the appellant had no reasonable expectation of privacy in relation to the communications [29]-[31].

It is implicit in article 8(1) that the protected features of private life and correspondence must be capable of respect within the scheme of values the ECHR exists to protect and promote. States party to the ECHR have a special responsibility to protect children against sexual exploitation by adults [32]-[33]. Here, in the absence of any state surveillance, and where the issue is the balance of the interests of a person engaging in such conduct and the children who are the recipients of the relevant communications, the reprehensible nature of the communications means they do not attract protection under article 8(1) [40]. The interests of children have priority over any interest a paedophile could have in being allowed to engage in criminal conduct. Further, the prohibition of the abuse of rights in article 17 of the ECHR supports the conclusion that the criminal conduct at issue in this case is not capable of respect for the purposes of article 8(1) [41]-[43].

An important indication of whether the right to respect for private life and correspondence is engaged is whether the individual had a reasonable expectation of privacy in relation to those communications, which is an objective question [51]-[55]. The appellant's communications were sent directly to the decoy. There was no prior relationship between the appellant and recipient from which an expectation of privacy might be said to arise. Requests made by the appellant to the decoy to keep the communications private did not establish a relationship of confidentiality. Furthermore, the appellant believed he was communicating with a 13-year-old child, who it was foreseeable might share any worrying communications with an adult [56]. The appellant may have enjoyed a reasonable expectation of privacy so far as the possibility of police surveillance or intrusion by the wider public are concerned, but not in relation to the recipient [58]. Once the evidence had been passed on to the police, the appellant had no reasonable expectation that either the police or the respondent should treat them as confidential. Again, under the scheme of the ECHR, the effective prosecution of serious crimes committed in relation to children is part of the regime of deterrence a state must have in place [59].

On the second issue, the state had no supervening positive obligation to protect the appellant's interests that would prevent the respondent making use of the evidence to investigate or prosecute the crime. On the contrary, the relevant positive obligation on the respondent was to ensure that the criminal law could be applied effectively to deter sexual offences against children. Article 8 has the effect that the respondent should be entitled to, and might indeed be obliged to, make use of the evidence in bringing a prosecution against him [64].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>