CBQ

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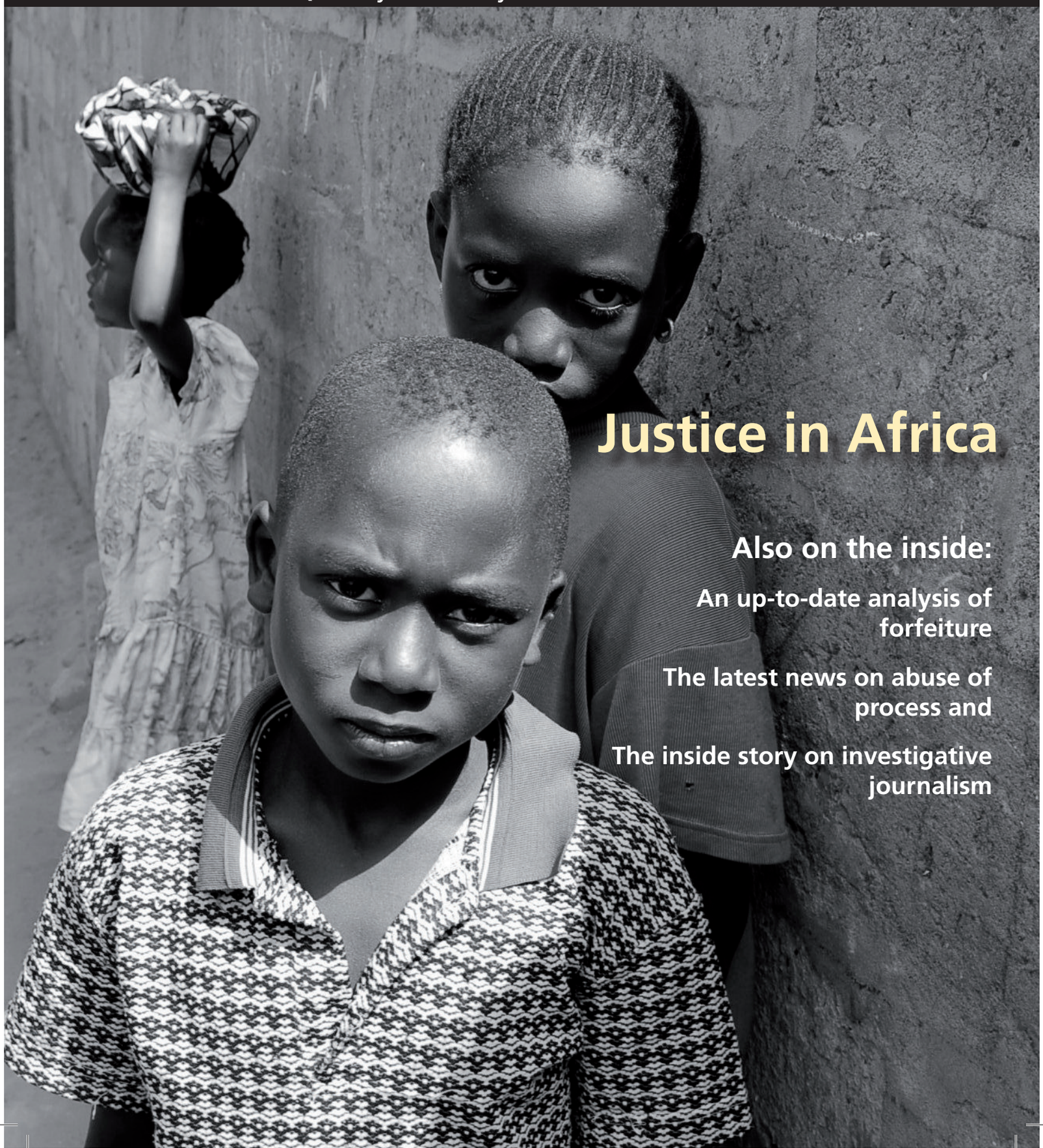

Justice in Africa

Also on the inside:

An up-to-date analysis of forfeiture

The latest news on abuse of process and

The inside story on investigative journalism

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The Editor


John Cooper

There is much debate amongst family practitioners as to the merits of the drive to open the family courts to the media. Whilst that issue is for the Family Bar who have to grapple with the particularly sensitive matters relating to their discipline, the more the public can see as to how the Bar operates within the court process, the better. How many times do we hear uninformed positions being taken by the public about what we do, relying upon the distorted, though entertaining conduit of the courtroom drama? From the caricatured pin-striped barrister to the over theatrical, insensitive cross-examination, nothing could be further from the truth. Open Justice requires as full a participation of the media as is consistent with the proper administration of justice and the more people see how central the Bar is to that process the more difficult it will be for those who wish to undermine us to prevail.

In this issue of the CBQ we have a mixture of themes from crime and human rights in Africa, forfeiture in our own jurisdiction and the work of an undercover journalist. This reflects an aspiration for the CBQ that it not only takes in matters of practical importance to the profession, but occasionally lifts its eyes beyond practice and procedure and covers wider issues which the Criminal Bar may find stimulating. I hope that you enjoy the latest edition.

John Cooper

The views expressed here are not necessarily the views of the Criminal Bar Association.

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CHAIRMAN'S COLUMN


Peter Lodder Q.C.

HIGHER COURT ADVOCATES

There are good, competent and professional HCAs practicing in the Crown Courts. There are employed advocates, formerly successful members of the independent bar, who now appear as in-house advocates for the Crown Prosecution Service and for defence solicitors. For those who act with propriety, in cases within the range of their ability and experience, and who respect the real interests of their clients, the right to appear in the Crown Court is beyond question. The CBA does not and will not criticise an advocate simply according to his category. In open competition the better advocates will succeed wherever they come from. The bar is well used to such competition, indeed it thrives on it. Competition has been an effective way of maintaining high quality in advocacy and the Criminal Justice System has benefited from it.

However, there is a growing problem. As is becoming widely known there are HCAs who appear in cases that are beyond their ability or outside their experience. It is unacceptable that a person who has conducted but two or three crown court trials should consider himself to be acting in a client's best interests when he represents that client against a prosecution alleging a serious violent or sexual offence. However we are all aware of inexperienced in-house advocates who will represent defendants charged with serious crime; cases in which, on conviction, substantial prison sentences will be imposed.

There have been attempts, in some parts of the press, to hijack reports of poor performance and characterise such complaints as partisan or protectionist. They are full of talk of simmering rows and internecine strife, of the two sides of the legal profession turning on each other. These reports serve no valuable purpose if they do not stress the importance of qualified, professional representation, on both sides, to the efficient and effective running of the Criminal Justice System. This is of concern to us all and particularly to the senior judiciary. Indeed, I have spoken to many who represent employed advocates who are deeply embarrassed by the effect that the poor performance of some is having on their own image.

Our concern is, and always will be, for the quality of criminal justice.

But whichever way the problem is cast, let us not be distracted from the real significance of this issue, there are deep challenges which have to be met. In the short term we are investigating steps to ensure:

- that a universal and appropriate standard is required for all advocacy;
- that all clients are fully and properly informed of their choice when it comes to choosing their advocate;
- that open competition is not distorted by referral payments or "secret commissions".

In the slightly longer term, and with a sense of urgency, the modern bar must adapt to the recent market changes. Work does not come into any profession simply because it is demanded. Economic pressures do not respect professional status. Likewise, it would be a great mistake not to consider alternative forms of business structure just because they are different. It is of the greatest importance that members of this association acquaint themselves with the options for the future: examples of which have been set out in the recent BSB consultation papers. Few have actively engaged in this debate and this cannot continue. There are significant opportunities for the bar in some of the changes under consideration. It is not inevitable that fusion will be the end result. The schemes proposed are intended to retain the characteristics and functions of advocacy as our principal and expert province. We need your views to assist in choosing the right course to maintain a thriving criminal bar.

Education

The bar maintains its standards and excellence by virtue of it's education programmes. The high quality of the Criminal Bar Association's training has been exemplified by two recent highly successful conferences:

On March 7, 2009 there was an outstanding conference on advocacy at the Royal College of Surgeons. The target audience was junior practitioners in the up to 10 year call bracket, but it was attended by many who were more senior. The day comprised a review of all stages in the presentation and conduct of a criminal trial, each seen from both the prosecution and the defence perspective. An added and invaluable bonus was the speech of His Honour Judge Rivlin Q.C. (The Recorder of Westminster), which offered advice and guidance from the judicial perspective. The quality of all the speakers, juniors and silks (many of whom are or were treasury counsel) and the presentation of the conference as a whole, was most impressive. It was enjoyed by an audience of 200 members.

The CBA Spring Conference was in April. Following the successes in Birmingham and York, this year it was held in Manchester. "Conviction and Beyond" dealt with the issues of sentencing, confiscation, the process and procedures of the Court of Appeal Criminal Division, prison law and the parole system and the Criminal Cases Review Commission. These important topics were dealt with informatively by a range of inspiring speakers. They covered aspects which are of increasing significance and highlighted areas of work which some may not have considered before. The warm welcome of the Northern Circuit ensured that a constructive conference was also a particularly enjoyable one.

VHCC

Not so much of a headline at the moment, but the VHCC topic continues to command our attention. The steering group has been meeting regularly to consider the responses to the consultation paper. Vital to this process is obtaining accurate data from concluded cases. You will have received a letter from Desmond Browne Q.C. and I asking you to provide details of your cases which have closed since the beginning of the year or will come to an end over the next few months. Much of the criticism of the proposals made in the paper was founded on the insufficiency of the data used. This is your chance to help to remedy this problem—please use it and give the steering group the information it needs.

The CBA continues to fight for the interests of criminal practitioners but, as always, we need your assistance in order to do so.

Peter Lodder Q.C.
Chairman

Who Got the Benefit?


David Wurtzel

David Wurtzel provides a comprehensive analysis of the forfeiture and confiscation regime

The power of the courts to confiscate the assets of convicted criminals is no older than the youngest practicing member of the Bar. Beginning with the Drug Trafficking Offences Act 1986 and up to and including clauses in the Coroners and Justice Bill 2009, Parliament has extended, amended, refined and tinkered with schema to enable the Crown (to put it broadly) to assess, trace and seize a wongdoer's property regardless of whether it is itself the proceeds of crime.

There are of course three stages to forfeiture:

1. has the defendant benefited from the relevant criminal conduct?
2. what is the value of the benefit he has obtained?
3. what sum is recoverable against him?

The second and third questions are matters of detective work and mathematics. Question one is a matter of fact and law.

In practice, it is not easy to prise open the criminal's hand and to find something worth taking. The Asset Recovery Agency was set up with fanfare and good intentions in 2003 and was absorbed into SOCA five years later. It seized £23 million of assets versus running costs of £65 million, far short of the "self financing" target it had been set. Against that, the sum ordered to be forfeited in 2007–2008 (£225 million) looks to be aspirational.

If one is unable to squeeze the criminal "mastermind" until the pips squeak, why not go against the cohort who played a significant role in making the criminal enterprise work? Looking at the cases decided over the last 18 months, one can see no lack of enthusiasm for answering that question "Yes" amongst the prosecution, crown court judges, and even in the Court of Appeal. However, beginning with the conjoined appeals of *May, Jennings and Green* in the House of Lords in May 2008 the definition of who has benefited has got narrower. The Court of Appeal since then has been particularly keen to keep it as narrow as possible.

May, Jennings and *Green*

The appeal in *Jennings* dealt solely with whether an employee in an "advance fee fraud" should be subject to a restraint order. The issue of whether he had in fact benefited is due for hearing in May 2009. Jennings was an employee in a company which netted over half a million pounds by charging credit-risky customers a £70 administration fee in return for arranging a loan which never materialised. "Obtain", Jennings submitted, must mean "receive" but not necessarily "retain"—apart from his salary, he had only received (and cashed) some postal orders when the managing director was out of town. Their Lordships accepted "there was clearly sufficient material to support the making of a restraint order" and dismissed the appeal.

However they went on (para.13) to remind themselves that "the object of the legislation is to deprive the defendant of the product of his crime or its equivalent, not to operate by way of fine". A defendant has to obtain property "so as to own it … which will ordinarily connote power of disposition or control". While not necessarily excluding an employee from the forfeiture net, they expressly disapproved of the approach taken in the Court of Appeal below by Lord Justice Laws, who had said:

> "[A]ll that is required is that the defendant's acts should have contributed, to a non-trivial extent, to the getting of the property. This is no more than an instance of the common law's conventional approach to questions of causation".

It is that on which the courts must now turn their back.

Green concerned the "principal directing mind" behind a drugs conspiracy. Whether he had benefited was not in issue; the question was the extent to which he was deemed to benefit from moneys he never saw but which were received by his associates from the sale of drugs. The crown court judge had rightly held that they all had an interest in all the moneys received by all of them, and which was held by them jointly. What mattered was not what a co-conspirator did with the money; what mattered was the capacity in which he received it.

May is the judgment which contains the fullest reasoning—the other two judgments adopted this without repeating it. It was about a VAT "carousel fraud" which the defendant joined in its later phases and is a case where the crown court judge had some difficulty with the sums, confusing benefit with realisable assets. Like *Green* it upheld the practice of deeming a co-conspirator to have obtained property jointly with the others:

> "[I]t is of course necessary that the defendant himself should have obtained property as a result of his offending, even if jointly or through a third party at his behest".

If a court has no further information to go on it can justifiably divide the total sum equally between the relevant offenders (*Gibbons)* as "it would have defeated the purpose of the legislation to allow lack of information, which only the defendant and the co-conspirators could provide, to preclude the making of an order".

The judgment ends with six broad principles. They include:

4. In addressing the questions the court should focus very closely on the language of the statutory provision in question in the context of the statute and in the light of any statutory definition. The language used is not arcane or obscure and any juridical gloss of exegesis should be viewed with caution. Guidance should ordinarily be sought in the statutory language rather than in the proliferating case laws;
6. D ordinarily obtains property if in law he owns it, whether alone or jointly. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property. It may be otherwise with money launderers.

Common sense prevails

In the first eight months following the decisions, the Court of Appeal put its own stamp on the law relating to "who has obtained a benefit?" It is Lord Justice Toulson who has made this branch of the law his own, giving a vigorous judgment in all the important cases.

Before turning to the several judgments between July and January which applied the House of Lords dicta it is worth noting the refreshing appeal of *Shabir* [2008] EWCA Crim 1809. Mr. Shabir was a pharmacist who inflated several monthly claims to the Health Service for the cost of prescriptions dispensed. His actual benefit was £464; a confiscation order as made in the sum of £212,464.17, in respect of everything although almost all of it was legitimate. The Crown had found it easier to indict the defendant on the basis that he had obtained the total payments by deception by pretending that the claim was wholly correct, but considering the sums and the fact that the jury convicted him on six counts he found himself in the confiscation proceedings with a deemed criminal lifestyle. While upholding the correctness in law, Lord Justice Hughes held that if a judge had been asked to stay the confiscation procedure as an abuse of process, he would have had to allow it. The confiscation order was quashed and a compensation order for £464 substituted.

An employee does not benefit

On July 24, 2008, Lord Justice Toulson in the Court of Appeal allowed the appeal in *Sivaraman* [2008] EWCA Crim 1736. The appellant pleaded guilty to a conspiracy to evade excise duty by altering and reselling low-excise diesel as DERV. He was the manager of the petrol station, where he accepted deliveries of up to 300,000 litres knowing what was going on. The total benefit was £128,520; he said he received £15,000 as his share of the sales proceeds. Counsel for the Crown submitted that Mr Sivaraman was not a mere minor contributor to the conspiracy but had played a significant role as the petrol station manager. Lord Justice Toulson would have none of that:

> "The way in which [counsel] sought to deploy that sentence illustrates the need for care in the way that courts approach judicial commentary, the purpose of which is to elucidate and not stand in the place of the underlying principle".

He took the view that a defendant may contribute "significantly" to obtaining the benefit without obtaining it himself. He consoled circuit judges and recorders "who do not come from a civil law background" and who may find all this "rather daunting" (for what it is worth, the judge who confused benefit with realisable assets in *May* had been a Chancery Silk) but it is "essentially a matter of applying concepts which are themselves in most cases relatively straightforward". The confiscation order was set aside and one for £15,000 substituted.

A similar order was made in *Grainger* [2008] EWCA Crim 2506 in respect of the group financial director and part shareholder in a company involved in obtaining payments of advances through fraudulent invoices. He was fully complicit in the fraud and was rewarded handsomely by a company which otherwise was hopelessly in debt—he was, in short, in a position analogous to Mr Jennings. The crown court judge found that "benefit meant any property or derivative which the defendant had been instrumental in getting out of the crime, whether or not for himself". Lord Justice Toulson disagreed:

> "[T]hat the appellant derived benefit from his fraudulent conduct is plain. The judge himself described the true nature of the benefit which he obtained by way of employment in a company which would otherwise have gone into liquidation and a variety of fringe benefits."

That being the case, the judge should have placed a value on it. He had not been invited to do so.

> "The moral is that in such cases it is essential, first, for the prosecution and then for the judge to look to see what real benefit the offender has obtained and to examine the evidence relating to it in order to arrive at a fair valuation."

The confiscation order, based on the treatment of payments by the banks to the companies as equivalent to payments to the appellant was set aside.

And neither does a courier

When the Court of Appeal sits in a panel of five and delivers judgment on four appeals together, one sits up and takes particular notice. So one should to *Allpress* [2009] EWCA Crim 8. The roles of the various appellants were as follows: a courier of £154,301 in cash, the proceeds of drugs trafficking, who went back and forth to France; in the same case, a courier of over a million pounds; the owner of a bogus café carrying cash between premises for a drug smuggling operation; a solicitor who facilitated the removal of the proceeds of crime which had been deposited in the client account; and a shopkeeper who allowed his brother to store the proceeds of crime in the appellant's shop.

In the most significant paragraph (31), Lord Justice Toulson scotched two ideas. The first was about the nature of a conspiracy. It was not a legal entity and in confiscation proceedings the court is concerned only with the benefit obtained, singly or jointly, by the individual conspirator. The second myth is that anyone who takes part in a conspiracy in more than a minor way is to be taken as having a joint share in all the benefits obtained from the conspiracy. "This is to confuse criminal liability and resulting benefit." He may be sentenced more severely if he has been more heavily involved in the conspiracy but in confiscation the "focus of the inquiry is on the benefit gained by the relevant defendant, with the court relying on evidence and by drawing 'common sense inferences". Under POCA:

> "[T]he answer to the question whether a person is intended to be regarded as holding an interest in property by mere manual possession, or whether something more is required, is put beyond doubt by the words "right to possession"."

The appeals were allowed in the case of those with no "right of possession", namely, the cash couriers and the cash custodian. They were dismissed in respect of the solicitor, as the account was in the name of the firm and the appellant had sole operational control over it.

Narrowing the grounds further

Two further related decisions by Lord Justice Toulson are worth noting and flow from what has already been stated. In *R. v M* [2009] EWCA Crim 214 the crown appealed against a judge's ruling that a man who had loaded illegally imported tobacco onto a lorry should be subject to a confiscation order in respect of the evaded excise duty. The Court of Appeal rejected the crown's submission that those who carry out this kind of crime would not send a "mere lieutenant overseas to do the loading" and that his presence was a strong indication that he was a driving force behind the importation. "We find nothing remarkable in the notion that those behind the organisation should despatch underlings to carry out the donkey work" and there was no evidence of high living which one might expect from a man with money to buy that amount of tobacco. Neither was he then liable to pay the duty on its arrival in England. The confiscation order for £100 (which he said he had been paid) was upheld.

Finally, in *Islam* [2008] EWCA Crim1740 a man convicted of being responsible for the importation of 3.53kg of heroin (which was seized before it came into his possession) successfully appealed against a confiscation order based on having benefited by the wholesale value of the drugs. One cannot put a market value on what has no lawful market. The judge should have instead inferred what he paid for it and that that must have come from criminal conduct.

The task of seizing the proceeds of crime will not get easier; the possibility of extending the inquiry to "softer" targets amongst co-conspirators has become much more difficult.

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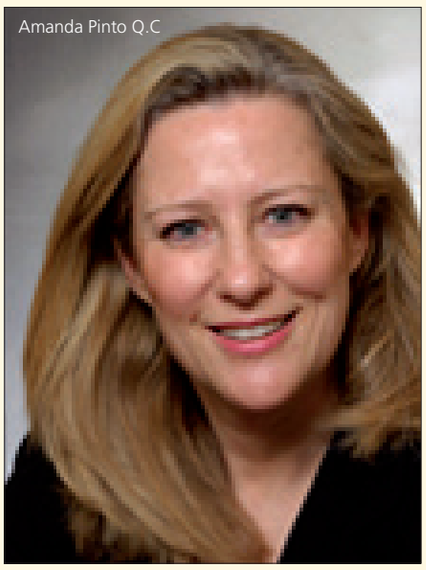
Royal Courts of Justice


Amanda Pinto Q.C

Human Rights in Africa

Amanda Pinto Q.C. & Andrew Johnson introduce the African Court of Justice and Human Rights


Andrew Johnson

On March 23, 2009 Chatham House hosted an event entitled "Introducing Africa's New Human Rights Court" with a distinguished panel of speakers chaired by Lord Steyn. It marked the advent of a new court, the African Court of Justice and Human Rights, to replace the earlier bodies—the Courts and the African Commission—which the African Union set up to rise to the challenge of enforcing human rights across the continent, where many continue to suffer abuse on a massive scale. The evening was not only characterised by a hopefulness on the part of the speakers[1] and audience about what the court aims to achieve but also a refreshing admission about the limitations and difficulties that the new court faces. This article will attempt to put those aspirations and concerns into context.

Background

African governments agreed in 1998 to create an African Court on Human and Peoples' Rights. Four years later, when the African Union (AU) was formed, its Constitutive Act created a further court, the Court of Justice of the AU. This latter court was aimed at providing a forum for allegations between African nations, whereas the former was to be concerned with human rights of individuals and peoples on the continent.

The establishment of the AU gave hope that, across the continent, African nations would no longer tolerate the wrongdoings of other African rulers. "The AU committed itself to uphold human rights and democratic principles, respect the rule of law and end impunity for atrocities on the continent. These commitments are fundamental to its Constitutive Act, to the African Peer Review Mechanism and to the New Partnership for Africa's Development (NEPAD)."[2]

In June 2004, African governments agreed to merge the two courts into one institution. It took four years of negotiations for African justice ministers to approve the text of a single legal instrument to create an African Court of Justice and Human Rights, combining both arms of the former arrangement.

In July 2008, the Assembly of the AU decided to establish the African Court of Justice and Human Rights as "the main judicial organ of the African Union".[3] The intended court has a complex structure. In essence, it consists of two separate sections; a "general affairs section" focused on traditional international law disputes between states, and a "human rights section".[4] This unusual structure reflects the single court's replacement of the African Court of Justice and the African Court on Human and Peoples' Rights. The African Court of Justice, which the AU voted to establish in 2003, never in fact came to fruition. The latter, in contrast, came into being in 2006. The two sections are not, however, entirely separate: each has the power to order that matters of particular significance be considered by the full court.[5]

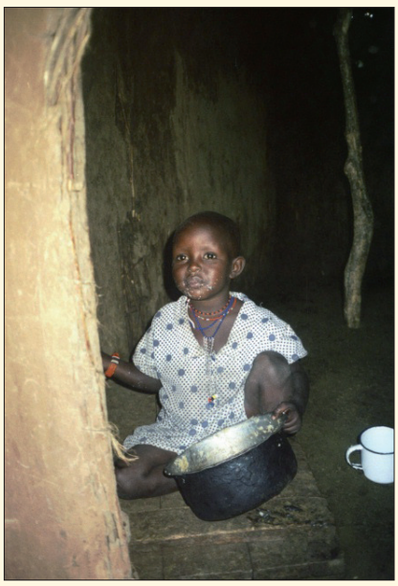
Organisation of the court

The court will consist of 16 judges,[6] eight of which will be allocated to each section.[7] They will serve six-year terms, to which they may be re-elected once.[8] The President and Vice-President will serve full-time on election by the full court, with the remaining judges acting on a part-time basis.[9] It appears to be implicit in art.22 that the President and Vice-President shall each belong to, and lead, a different section of the court. The court may sit anywhere but will usually sit in the current home of the Court on Human and Peoples' Rights, in Arusha, Tanzania.[10] The fact that the judges are mainly part-time is beneficial in that the many different languages and systems of justice in the region are represented and integrated on a regular basis in the court, but it has made for a slow gestation period and will doubtless make for further delays as the caseload gets underway.

The jurisdiction of the court

The jurisdiction of the human rights section of the court, with which this article is concerned, is intended to be broad. The African Charter on Human and Peoples' Rights, the primary human rights instrument in Africa, was signed in 1981 and ratified in 1986. It set civil and political, economic and sociocultural rights on a par with each other. To that extent the Court will complement the African Commission on Human and People's Rights, which currently exists. However, the jurisdiction of the court is not limited to the Charter.

1 Judge Bernard Ngoepe, African Court on Human and Peoples' Rights, Sanji Monageng, Chairperson of the African Commission on Human and Peoples' Rights and Nobuntu Mbelle, a Human Rights lawyer and consultant and co-ordinator of the Coalition for the African Court on Human and Peoples' Rights.
2 According to Nobuntu Mbelle, writing with Chidi Odinkalu on the *allAfrica.com* website on June 26, 2008 'Africa: Continent Needs Effective Human Rights Court'.
3 Article 2(1) 2008 Protocol.
4 Article 17 2008 Protocol.
5 Article 18 2008 Protocol.
6 Article 3 2008 Protocol.
7 Article 6 2008 Protocol.
8 Article 8(1) 2008 Protocol.
9 Article 8(4) 2008 Protocol.
10 Article 25 2008 Protocol.



It also has jurisdiction to consider "the interpretation and the application of … the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned".[11] It is notable that the court can take action in respect of socioeconomic rights, and that matters such as illiteracy and poverty, both of which are often indicators of human rights problems can, in principle, be addressed by the court.

Indeed, the jurisdiction of the court appears limitless: the protocol apparently conferring jurisdiction on the court to consider any international human rights treaty, including the Universal Declaration on Human Rights. This distinguishes the court from its international counterparts: the European Court of Human Rights is limited to interpreting and applying the European Convention on Human Rights,[12] and the Inter-American Court of Human Rights is similarly limited to interpreting and applying the American Convention on Human Rights.[13]

Merger of the courts

The new court promises independence, efficiency and effectiveness. However, the new court has been the subject of some criticism. There is concern at merging the two courts. Sonia Sceats[14] identified a number of positives from the merger, including cost-efficiency, the permeation of human rights throughout the court's jurisprudence, and the avoidance of jurisdictional conflicts between the former separate bodies. But there is a concern that the merged courts will take the focus away from human rights and subordinate them to the international law issues dealt with by the other division. Sonya Sceats noted a fear that "human rights issues may be perceived as less significant than the border disputes and other matters of "high state" which are likely to occupy the general section". This fear may, however, be misplaced. Firstly, judges of the human rights section will be assigned exclusively to that section, having been appointed on the basis of their experience in dealing with human rights issues.[15] The new court will benefit from such experienced judges and there is no risk of their workload being overwhelmed with international law issues. Secondly, it is arguable that the merger of itself gives more weight to human rights, endorsing their importance by placing them on an equal footing with the issues of "high state" to which Sceats refers.

11 Article 28(c) 2008 Protocol.
12 Article 32(1) European Convention on Human Rights and Fundamental Freedoms.
13 Article 62(3) American Convention on Human Rights.
14 Associate Fellow, International Law, Chatham House: "Africa's New Human Rights Court: Whistling in the Wind?" March 2009.
15 Article 6(1) 2008 Protocol.

Delay

The abstract advantages and disadvantages, however, are perhaps less important than what Sceats deems the "chaotic beginning to Africa's new human rights enforcement machinery". Seventeen years passed between the signing of the African Charter and the taking of the decision to establish a court, let alone the further eight years before that court first sat. The court is only now preparing to take its first case. Delay, so often detrimental to justice, may equally affect the birth of the new court. This experience is at least acknowledged by the provision that, whilst the ratification of the 2008 Protocol takes place, the old court will continue to sit on a transitional basis. Those with standing can still bring cases before it, and when the new court comes into existence, any cases before the old court shall be transferred to it.[16] Whilst many criticise the old court as weak, at least a court will exist during the transitional period, and the danger of cases falling into a void as one court closes down and another commences is reduced.

Access

This is the most controversial aspect of the new court. As of right only the African Commission on Human Rights, member states and certain specified African NGOs will have standing before the new court.[17] Whereas the African Commission can hear complaints against member states from member states, individuals, groups or NGOs, victims and international NGOs will only be able to bring matters before the court if the defendant state has signed an additional protocol permitting them to do so.[18] There is a marked reluctance by member states to endorse broadened access to the court, in respect of alleged breaches of human rights; as of June 2008, only one state—Burkina Faso—had signed the additional protocol with regards to the old court.[19] Indeed, at the Chatham House debate following the speeches, a representative of the AU indicated that this lack of access was no thoughtless omission. In the first draft of the treaty the limitation on access was omitted but the signatory states would not accept it; even after a second draft the states would not agree; in order for the treaty to be agreed the limitation on the power of an individual or an NGO to bring a case before the court was necessary. Amnesty International has commented that the limits on standing are a "retrogressive step in the efforts to ensure effective protection of human rights in Africa, and could undermine

16 Article 5 2008 Protocol.
17 Article 30(a)–(e) 2008 Protocol; Article 34(6) 1998 Protocol.
18 Article 30(f) 2008 Protocol.
19 Paragraph 4 Report of the Court of Human and Peoples' Rights to the African Union Council, June 2008.

the long-term effectiveness of the Court".[20] It has subsequently called on AU states to make a declaration allowing direct access to the court at the same time as they ratify the protocol.[21] This restricted access to the court has been described as a big defect in the system. It is feared that without it the court will be, in practical terms, redundant. Before the Commission, NGOs have been a strong influence in bringing to its notice significant violations. The very subjugation of peoples or individuals which might properly form the basis of a case makes it all the less likely that their complaint will be presented to the court with the access restrictions which currently exist. A possible means of resolving the impasse is to adopt the European Court's procedure whereby access is only available after the exhaustion of all domestic remedies coupled with the requirement of leave.

There is again, perhaps, some room for optimism. When the European Court of Human Rights first came into existence, the rules on standing were similarly limited.[22] Yet slowly, states began to grant rights of standing, and there is now, subject to the caveats already stated, a general right of individual access.[23] It can only be hoped that the AU moves in a similar way, and that direct access for the victims of violations of rights will be granted.

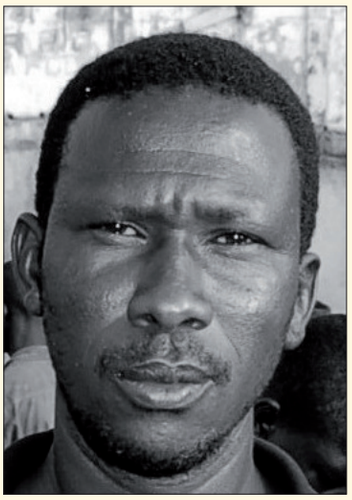
Implementation and enforcement

It is of the greatest importance that African states accept the court's jurisdiction and abide by its decisions. History gives little cause for optimism. The African Commission currently gives advisory opinions and interprets the Charter. Each of its 11 part-time commissioners has particular countries of responsibility to which it must take promotional tours. At Chatham House, it was of considerable concern to those present that only approximately 34 per cent of the Commission's judgments or decisions and advice given on visits, are actually implemented. It is hoped that the Court, unlike the Commission, will give binding decisions rather than judgments which have led, in the words of Sanji Monageng, Chairperson of the African Commission, "to a multiplicity of interpretations".

Moreover, whilst each of the 53 members of the African Union are signatories to the Charter, only 24 of those states have ratified the Protocol establishing the old court. The effect of this is stated by the Court of Human and Peoples' Rights itself:

> "[A]s long as a significant number of Member States do not ratify the Protocol establishing the Court, and do not subscribe to the declaration accepting the competence of the Court to receive cases from individuals and non-governmental organizations, access to the Court will remain extremely limited, and the system of judicial protection of human and peoples' rights instituted with the establishment of the Court, will not be able to have its full impact."[24]

Only ten states have currently signed the 2008 Protocol, and none has ratified it. If less than half of the members of African Union accept the jurisdiction of the court, its influence will remain negligible.



Even if an individual were to obtain direct access to the court, if the state accused of violating that individual's rights does not recognise the court's authority, it will be an empty gain. It is perhaps necessary for states, both in the African Union and outside, to recognise the court both in terms of due legal process and political accountability before it can expect the power and status it deserves. Economic sanctions by states both within Africa and further afield for noncompliance with the court's judgments and orders may ultimately provide the only way of bolstering the court as a fundamental tool for promoting human rights on the African continent.

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20 Amnesty International, Recommendations to the AU Assembly, June 23, 2008; Ref. IOR 63/002/2008.
21 Amnesty International, Recommendations to the AU Assembly, January 31, 2009; Ref. IOR 63/001/2009.
22 Article 25 European Convention on Human Rights and Fundamental Freedoms.
23 Protocol 11 European Convention on Human Rights, ratified by treaty November 1998; arts 34 and 35.
24 Paragraph 46 Report of the Court of Human and Peoples' Rights to the African Union Council, June 2008.

* Photographs by Georgina Smith

Abuse of Process Update


Priya Malhotra

Colin Wells and Priya Malhotra analyse the latest cases


Colin Wells

R. v Mohammed Shabir [2008] EWCA Crim 1809

Mohammed Shabir, a pharmacist, was convicted of six counts of obtaining a Money Transfer by Deception, having inflated six monthly claims to the NHS for the cost of prescriptions he had dispensed. The Crown argued that Mohammed Shabir had obtained a benefit of £179,731.77 from the six offences because that was the sum which was paid to him on the strength of his dishonestly inflated claims.

It was contended by the defendant that the excess was the extent of his crime and not the whole amount.

When sentencing the judge accepted that the amount by which he had inflated the claims was £464.

A confiscation order was made in the sum of £212,464.17.

The Court of Appeal considered two questions:

1. what can properly be said to be the defendant's benefit from his criminal conduct?
2. was the confiscation order oppressive or a breach of Protocol 1 of the European Convention of Human Rights?

Benefit

The Court of Appeal concluded that it was not possible to construe s.76(4) or s.76(5) of the Proceeds of Crime Act 2002 as meaning the appellant obtained only the inflated excess of his claims. The judge was right to rule that the appellant had obtained the total sum of £179,731.97.

When considering whether the confiscation order was oppressive, Mr Lord Justice Hughes stated:

"Once the Crown decides to invoke the confiscation process, the making of an order is mandatory, and its amount is arithmetically determined but cannot be moderated by judicial decision. It follows that that makes the decision to invoke the confiscation process a critical one. It is plain that it is not appropriate to seek confiscation in every single case where some benefit has been obtained by crime. Section 6 POCA does not make confiscation proceedings automatic in every case where some benefit has been obtained from criminal conduct. Accordingly there is an individual decision to be made by the Crown in each case whether to ask the court to apply the confiscation process and on what basis to put the claim if made. Similarly, it is open to the Crown, subject to the approval of the Judge, to discontinue the confiscation proceedings at any stage or to compromise them. Thus, it is accepted by the Crown, there is an individual exercise of judgment involved in each case."

Lord Justice Hughes went on to state that:

"The court retains the jurisdiction to stay an application for confiscation, as any other criminal process, where it amounts to an abuse of the court's process. In the present context, that power exists where it would be oppressive to seek confiscation, or to do so on a particular basis" (see *Mahmood and Shahin* [2006] Cr.App.R.(S.) 96).

Lord Justice Hughes further observed:

"What was patently oppressive in the present case was to rely on the form of the counts for obtaining a money transfer by deception (i) to bring the criminal lifestyle provisions into operation when they could not have applied if the charges had reflected the fact that the defendant's crimes involved fraud to an extent very much less than the threshold of £5000 (as per section 75(4) POCA), and (ii) to advance the contention that the defendant had benefited to the tune of over £179,000 when in any ordinary language his claims were dishonestly inflated by only a few hundred pounds. We accept that those who determined to seek confiscation on the basis advanced did so in good faith, having not applied their minds to the question whether what was being done was oppressive. But we have no doubt that in fact it was. Whether or not, if the criminal lifestyle provisions had applied, there would have been a basis for applying one or more of the assumptions we do not know. But we are clear that without oppression the assumptions could not be brought into play and are thus irrelevant. It might have been different if there were a genuine dispute what the excess of the defendant's inflated claims was, and whether it did or did not exceed £5000, but that situation did not arise. On the very unusual and exceptional facts of this case, we are sure that if an application had been made to the Judge to stay the confiscation application for abuse of process his answer could only have been that such stay should be granted."

The Court of Appeal quashed the confiscation order and in its place imposed a compensation order in the sum of £464 in favour of the Prescription Pricing Authority.

R. (on the application of BERR) v Baden Lowe [2009] EWCA 194

The appellant, a company director appealed against a confiscation order imposed, following his guilty plea to an offence under s.206(1)(b) of the Insolvency Act 1986.

The issue on appeal was whether a confiscation order should have been imposed and whether the order amounted to an abuse of process.

The appellant was a company director. Revenue and Customs had petitioned to wind up his company. Before the winding up order was made, the appellant transferred property, for no consideration, to another company where he was also a director. The liquidator recovered the transferred property six months prior to the appellant pleading guilty and therefore it was contended by the appellant that a confiscation order should not have been imposed based on ss.6(6) and 7(3) of the Proceeds of Crime Act 2002 (POCA) and furthermore that the order amounted to an abuse of process since the property had been recovered.

The Court of Appeal concluded that the section had no application because of the way in which the provisions of the Insolvency Act operated in respect of the property. The transfer that the appellant had instigated was to a company of which he was a director and a 50 per cent shareholder. The land so transferred was never vested in him personally. As a result of the operation of s.127 that transfer was void unless the court otherwise ordered. Therefore there would be no need to bring a claim against the appellant to which s.6(6) POCA would apply and in fact none was brought. Even if the transfer had not been void, proceedings under s.238 of the Insolvency Act 1986 (which gives the liquidator power to apply to the court for the restoration of property transferred at an undervalue), would have been proceedings against receiving company and not the appellant. Section 6(6) POCA did not operate in this case, as the remedy to recover the land lay against the company and not against the appellant.

It was common ground, subject to the abuse of process argument, that a confiscation order had to be made.

In relation to the abuse of process argument, the Court of Appeal held that it was not an abuse of process to seek to recover more than a defendant had profited from his crime or where he had made restitution outside the very narrow circumstances outline in *Morgan* (2008) EWCA Crim 1323.

Mr. Lord Justice Thomas stated:

"[T]he circumstances of this case are illustrative of circumstances where the suggestion of abuse could not remotely arise.

(i) The appellant made no offer to restore the property. It would have been restored by operation of the provision of the Insolvency Act if his co-director Mr Lloyd had not entered into an agreement to restore it.

(ii) This was not a course of criminal conduct limited to one or more identifiable losers; the fraudulent transfer was made to strip an asset out of his company to the detriment of every creditor.

(iii) There can be no suggestion of an abuse or oppression. The decision to seek a confiscation order is one that can be seen as simply carrying out the decision of Parliament."

R. v Maguire and Heffernan [2009] EWCA Crim 462

The Applicants applied for leave to appeal against their convictions for conspiracy to supply cocaine (following guilty pleas).

They complained that the first instance judge erred in deciding that evidence that was derived from telephone interceptions carried out in Holland by the Dutch police was admissible.

The Court of Appeal made the following remarks:

"… it is necessary to rule on two questions.

First the circumstances in which an interception in a foreign state can be requested by the United Kingdom authorities; that depends substantially on section 1(4) of the 2000 Act and involves an investigation which does not seem to have been made in this case into whether the particular international cooperation treaty has been designated under that section or not.

Secondly, we are not investigating or ruling upon when such a foreign interception, if lawfully requested, is admissible, but we register the caution that the broad assertion that every interception is rendered inadmissible by section 17 is, on the face of it, not justified. There are a number of exceptions in the Act but we need say no more about that issue here at this stage."

The Court of Appeal refused leave to appeal, as both applicants had pleaded guilty.

The Vice President, Lord Justice Hughes, went further to say:

"[I]t is a misconception if it be thought that a ruling as to admissibility deprives the defendant of any legal escape from conviction. The prospective admission of the interception evidence did not amount to a ruling that the defendants were guilty, it merely meant that the evidence against them was substantially reinforced."

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Raymond Emson

EXPERT EVIDENCE—THE LAW COMMISSION'S PROPOSALS

Raymond Emson invites responses

The Law Commission has recently published a consultation paper on expert evidence, *The Admissibility of Expert Evidence in Criminal Proceedings in England and Wales*, Law Com CP No.190.

The Commission's provisional proposals focus on the situation where the prosecution or defence wish to adduce scientific (or purportedly scientific) evidence, but other types of expert evidence are also addressed. Scientific evidence may have a particularly persuasive effect on the jury's deliberations and findings, so it is especially important that such evidence should be admitted only if it is reliable.

The Commission believes the present law governing the admissibility of expert evidence in criminal trials is unsatisfactory. This is because:

- there is no specific bar to the admissibility of expert evidence of doubtful reliability, save that expert evidence must satisfy the "ordinary tests of relevance and reliability", which is not particularly helpful;
- at present, trial judges who have to consider the admissibility of expert evidence have little if any guidance to help them determine whether the evidence is sufficiently reliable to be admitted; and
- there have been a number of miscarriages of justice in recent years where prosecution expert evidence of doubtful reliability has been placed before Crown Court juries and led them, wrongly, to find the defendant guilty.

Examples of miscarriages of justice following the admission of unreliable expert evidence are set out in the consultation paper at paras 2.14 to 2.24. These miscarriages, together with the absence of practical guidance for trial judges, suggest that judges need specific guidelines to assist them in their determination of evidentiary reliability.

The Commission has therefore put forward proposals for reform, which, if approved and taken forward by the Government, would be implemented by legislation.

The Commission proposes a specific admissibility test for expert evidence to replace the present application of the "ordinary tests of relevance and reliability". The party seeking to adduce expert evidence, whether the prosecution or defence, should have to demonstrate that the evidence is sufficiently reliable to be admitted.[1] Crucially, this basic test would not stand alone. The Commission also sets out the sort of guidance Crown Court judges (and magistrates' courts) might need when determining whether proffered expert evidence is sufficiently reliable to be admitted.

1 Law Com CP No.190 paras 6.10 and 6.57.

There would be separate guidelines depending on whether the expert evidence is scientific/purportedly scientific evidence[2] or experience-based, non-scientific evidence.[3]

The Commission takes the view that its proposed admissibility test and guidance must apply equally to expert evidence tendered by the defence. That is to say, whilst the defence should be able to place evidence before the jury which would raise a reasonable doubt as to the defendant's guilt, the defence should not be able to place expert evidence before the jury which is inherently unreliable. Such evidence would mislead the jury and place in their collective mind an unwarranted doubt as to the defendant's guilt.

The Commission believes that its admissibility test and context-specific guidelines would result in more accurate outcomes in criminal trials, meaning fewer wrongful convictions and fewer wrongful acquittals. The proposed approach would also bring clarity and certainty to the law and the legal processes governing the admissibility of expert evidence. This would render the law more comprehensible and therefore more accessible.

In short, the Commission's proposed scheme would make it easier for trial judges to determine the reliability of expert evidence; and it would provide them with the tool they need to keep unreliable expert evidence from the jury.

The Commission also asks its consultees to consider whether, exceptionally, Crown Court trial judges should be able to call upon the assistance of a court-appointed assessor to provide additional guidance in difficult cases.[4]

The consultation paper is available on-line at *www.lawcom.gov.uk/docs/cp190.pdf*. The consultation period runs until July 7, 2009. There is also an on-line forum at *www.lawcom.org.uk/lc-forum/* which will be active until the same date.

The Commission would be extremely interested to hear what members of the Criminal Bar Association have to say about its proposals.

Any comments may be sent to me at: Law Commission, Steel House, 11 Tothill Street, London SW1H 9LJ. Alternatively, comments may be sent by e-mail to *expert.evidence@lawcommission.gsi.gov.uk*.

Raymond Emson is a Lawyer at the Law Commission.

2 Law Com CP No.190 para.6.26.
3 Law Com CP No.190 para.6.35.
4 Law Com CP No.190 para.6.67.

Undercover Journalism: the Truth Revealed

Tessa Mayes, undercover journalist, gives a personal view

Undercover journalism has changed. Originally the idea was to expose wrongdoing by the powerful against the powerless. Now it's often about exposing people's private thoughts and behaviours such as their racist ideas or sex lives.

The Max Mosely case illustrates other new trends in undercover journalism. Ever since the President of the Federation Internationale de L'Automobile (FIA) had his unterhosen aired in public, many people have reacted against the *News of the World* newspaper as if their undercover journalists were mainly responsible for revealing secretly filmed images of him at an orgy with prostitutes. In fact they weren't. The person who did that was an S&M dominatrix married to an MI5 officer trying to make money from selling the story to pay off the couple's debts. This wasn't an undercover journalist exposé. It was a member of the public's spank-n-tell.

A new era

It wasn't always this way. Undercover journalism used to be more straightforward. The journalist would uncover something nobody knew about and the public would write in to tell him what a good job they'd done and suggest other stories. Now the age of the citizen undercover journalist is upon us. A confessional culture has united with the rise of instant, internet access to a world audience to create a frenzy of secret filming, snatched photography, random mobile phone images and covert sound recordings.

Just check out *mrpaparazzi.com*, a site encouraging the public to send in photographs of celebrities. To the celebrity, the public don't appear to be photo-journalists at first sight and in that sense are acting semi-undercover if they intend to sell or publish photos as photo-journalists and the paparazzi do. Whatever you think of the content, the democratisation of undercover journalism skills from the hands of the few to the many is to be welcomed, as long as journalists don't get blamed for things they haven't done.

I became an undercover journalist by accident. In the early nineties I got a job as a reporter on "Short Change", a new BBC consumer show for kids. I wanted to expose the issues consumer experts didn't mention such as the use of private security guards on housing estates that intimidated child residents. I decided to use hidden cameras to gather evidence of wrongdoing. One week I posed successfully although rather unconvincingly as a flower buyer with a strange bag I held oddly. I was investigating companies using children to sell flowers by motorways on their own and illegally transporting the sellers in the back of a van. I door-stepped the company owners. They denied criminal intent, saying they didn't know it was wrong and they'd check out the rules. After that the viewers wrote in to tell me of other things that I should investigate. If I were doing the programme today, no doubt I'd encourage viewers to send me mobile phone footage of consumer problems.

Tessa Mayes

Crime

Crime is a big area for undercover reporting. According to TV Genius, the UK's first search-based TV listings service, between March and October 2005, 78 documentaries that call themselves "undercover" were broadcast on the five main terrestrial channels. Most of the programmes were on crime (15), customs (22), tradesmen (18) and public services (10). One was on UFOs!

Crime stories make for dramatic footage and are of public importance. It's easier to get permission to film covertly on crime stories because they're about illegality, which is clearly in the "public interest" according to all regulatory and legal definitions of the term. For television undercover work, the authorities you have to refer to (apart from your own editor, TV lawyer and the 50-odd laws that relate to limits on freedom of expression) include the rules of the media company broadcasting the programme such as the BBC's Producer Guidelines. Ofcom, the Office of Communications, has a Broadcasting Code applicable to all television channels. The Code includes a warning to broadcast journalists that they may be invading privacy unless "revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public". For non-broadcast journalists, the Press Complaint Commission (PCC) and National Union of Journalists (NUJ) provide similar guidance.

Yet what if you don't agree with official guidance or the law? Perhaps it is good to harass somebody you think it's important to expose. What if the only way to get a story about kidnapping by the state is to breach a policeman's privacy? Sometimes the law is the subject you're exposing, not the law-breakers. The thought that sometimes goes through your mind is: is it worth breaking the law for this story?

Sometimes the criminal law is worth exposing more than the criminal. I frequently made this point a few years ago but kept getting shouted down by TV producers. For example, for a while exposés of racist ideas seemed to dominate undercover and investigative TV journalism. This coincided with years of debate on government proposals to develop the law on race hatred, culminating in The Racial and Religious Hatred Act 2007.

Whereas investigative journalists used to expose racism in terms of public policy by institutions giving unequal rights to people according to their race, they started to focus on catching off-guard comments made by the least powerful in those institutions such as police officers or members of small political parties. The problem was that the impression created by an emphasis on individual racist behaviour and speech—however sensational the footage—is that racism was reduced to personal, private behaviour and speech rather than presented in all its complexity as system of political ideas, laws, rules or informal policy created by those in power. Undercover and investigative journalists should be sharper in challenging orthodoxies—including new laws—not merely going along with what the authorities decide should be criminalised and the subject of scrutiny.

The Cook Report

One of my first big, dangerous assignments was on a story where I had to pose as a drug baron's wife for ITV's "The Cook Report". This work involved inventing a new kind of job for myself as a journalist-actress. It used skills that had not been part of my postgraduate course in journalism or, I assume, the syllabus at RADA. I didn't get caught so I must have been convincing although I'm not sure how or why. I used some physical and psychological tricks to transform myself but I can't reveal those without giving my technique away. Sorry!

To avoid suspicion I wore no body armour. I had a minder with me but it didn't stop me thinking that if a drug gang member wanted to stab me, they'd have no problem. When the gang arrived I was unsurprised to find they were ordinary blokes with a lot of drugs and intense personalities. I spent several hours with them in a car saying very little. I decided not to do small talk in case it offered more opportunity for me to make a mistake. Instead I sat silently in the back, with the knowledge that my producer was in a car not far behind.

I'm a shy and giggly person by nature which can give the game away when you're pretending to be somebody serious. By the time I was in the undercover situation, however, I had become a hard, drug baron's wife and there were no laughs—from my side anyway. When somebody who has no problem killing looks at you with their nose half an inch away from your own, you tend to become very, very, VERY focused.

Even in this tense situation it's not difficult to remember the point of the story you're trying to amass evidence for. Basically anything somebody does that's illegal, claims they want to do that's illegal, odd or illustrative of a trend that you think the public needs to know about, registers somewhere in the back of your mind as a "STORY". Meanwhile the forefront of your mind is busy remembering to be a drug baron's wife …

"The Cook Report" producers had briefed me on the purpose of the story, given me a secret camera and told me to follow their telephone instructions. At the end of the whole undercover assignment I was invited to speak to the police. This was very uncomfortable. On the one hand you want to follow the protocol of the television programme and its producers and at the same time, you have to protect the integrity of your own way of working as a freelance journalist. I had gone undercover to broadcast a story for television, not help the police with a prosecution. I didn't reveal anything incriminating to anyone, sought independent legal advice and withdrew my services.

Entrapment

There's a long-standing rule that undercover journalists shouldn't entrap—or in my case as a woman (because apparently only women do this, which is a ridiculous notion since plenty of male undercover journalists expose women where a sexual enticement may come in to play), honey trap. This can be a difficult position to maintain. When I'm undercover the character I'm playing is part of a situation. Even though I'm focusing on the reporting, the protagonists around me are reacting to me as a character and not as a journalist which may affect what they do. The basic rule of thumb is to not encourage people to do what they wouldn't ordinarily do, to be as much a fly-on-the-wall as you can be.

Use of evidence in court

I don't think undercover journalists' evidence should be used in a court as a general rule. Evidence that makes a story is not the same as that pieced together to argue a case in the courts. We are and should be independent of the prosecution process. Undercover journalists' mission is to expose the truth and tell the world, not to have to work like a prosecution investigator and tell a judge to secure a conviction. A Journalist's role needs to be defended as an extraordinary one with a certain intention and context. I haven't bought heroin in a building for children, run brothels with foreign prostitutes, hired a child kidnapper, talked to witnesses in a murder case, challenged the efficacy of laws or joined a religious group as a living but to publicise a story about something of public interest.

This is why I think journalists should be free to expose what they want. Undercover journalists aren't above the law but whenever we're invading people's privacy or dealing with stolen property there is often a public interest in the story. Even when there's not, there is an overriding public interest in defending the media's role in a democracy to expose what's really going on, even at times like these when the public is doing much of the undercover work and disclosure themselves and uploading it all on You Tube.

The law recognises the importance of the public interest as a defence. Yet this is constantly questioned in court as if judges should be the arbiters of public taste and cultural standards rather than elected politicians or the public. The public interest defence for journalism should be rigorously defended. No area of public life should be immune from scrutiny.

Tessa Mayes is a journalist and author. Her undercover assignments include reports for the BBC, Channel 4, ITV, Five, Sky News, The Sunday Times and The Spectator.

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