



# POINTS FOR PROSECUTORS




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**THE LEGAL SECRETARIAT TO THE LAW OFFICERS**


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## Introduction

1. The implementation of the Human Rights Act 1998 (HRA) on 2 October 2000 is likely to prompt the scrutiny of many areas of criminal law and practice in order to test compliance with the European Convention on Human Rights. In criminal cases, practitioners will be able to rely upon the Convention in a number of ways, including challenges to the provisions of legislation where these impact upon the particular case.
2. Since many, if not the majority, of criminal offences are created by statutory provisions, it is likely that some substantive legislative provisions will be subject to early analysis by the courts. In many respects this has already commenced, with the consideration of the provisions of the Prevention of Terrorism Act 1989 in the case of *R v DPP ex parte Kebilene* [1999] 3 WLR 972.
3. It is expected that in the great majority of cases a court or a tribunal will be able to construe legislation compatibly with the Convention. Occasions where there remains an irreconcilable conflict between domestic law and the Convention with the proper application of section 3 HRA are expected to be few.
4. However, defence challenges to substantive provisions will not always be well focused or structured, and may not be easily understood. It will therefore be important for those prosecuting on behalf of public authorities to be able assist the courts with clear and reasoned argument in relation to statutory provisions.
5. The 'Points for Prosecutors' have been developed to assist prosecutors in providing a consistent response to challenges to a selection of legislative provisions where Convention issues are likely to be raised. They summarise the likely areas where points may be taken, and provide a brief resume of the arguments in favour of the compatibility of the specific provisions. They are intended to supplement the training and guidance of individual prosecuting authorities with appropriate policy guidance on commonly utilised legislative provisions.
6. Where appropriate, caselaw is quoted in support of the interpretation suggested. They are not intended to be exhaustive, nor do they provide a substitute for proper preparation on the specific arguments raised in individual cases. The selection of provisions for 'Points for Prosecutors' has been based upon early indications of areas of likely challenge to substantive criminal statutes, and should not be regarded as conceding any particular vulnerability for Convention argument.

## The Human Rights Act framework

7. The key provision in this context is section 3 HRA: '*so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights*'. The provision applies to all primary and subordinate legislation (defined in section 21), whenever enacted, and it applies to all courts and tribunals.
8. Section 3 provides all courts with a powerful interpretative tool to ensure that legislation is read compatibly with the Convention. Every effort must be made to interpret legislation in accordance with Convention rights. Where there are two possible constructions of a provision, the one which is compatible must be adopted.
9. In the 'Points for Prosecutors' on specific provisions, where there is a clear view on whether the provision is compatible with the Convention without the use of section 3, it will state this explicitly. Exceptionally, where the situation is unclear, or there are more than one possible interpretation, the 'Points for Prosecutors' will adopt an alternative formulation: either the provision is compatible, or it can be read compatibly by the use of section 3.
10. This does not inhibit the courts from using section 3 to arrive at a compatible interpretation, even where they find at first sight that the particular provision appears to offend against the Convention. The end result should be the same, although the route taken may differ.

## Consequences of incompatibility

11. If a court is unable to interpret a statutory provision compatibly, even with the use of section 3, the consequences will be different depending on whether the legislation is primary or subordinate. The HRA does not permit the courts to set aside primary legislation, and it follows that if such legislation cannot be interpreted compatibly it must nevertheless be applied. Although the Act provides that the higher courts (High Court, Court of Appeal, and House of Lords) may make a declaration of incompatibility, this will not affect the continuing validity of the legislation pending Parliamentary action.
12. Many substantive criminal offence provisions are contained in subordinate legislation made under an Act of Parliament. For some years a defendant at the court of trial has been able to challenge the lawfulness of such subordinate legislation on pure *vires* grounds. Additionally under the Human Rights Act 1998 in some circumstances the subordinate legislation will not be given effect by the court of trial where a court cannot interpret such subordinate legislation compatibly with Convention rights. However if the subordinate legislation is inevitably incompatible owing to primary legislation the subordinate legislation remains valid and enforceable.

13. Although the 'Points for Prosecutors' do not deal specifically with any provisions of subordinate legislation, it will be important for prosecuting authorities to adopt a clear and consistent approach to legislative challenges. The 'Points for Prosecutors' therefore encourage the courts to try to read provisions compatibly wherever possible, and to make full use of their powers under section 3 to place a compatible construction on statutory provisions.

## **General approach**

14. Direct challenges to statutory provisions may occur at any stage during criminal proceedings, although it is likely that if issue is taken with substantive offence creating provisions, it will be made as a preliminary point. However, it may be that the case will involve challenges to both substantive law, and to the application of the law in the particular circumstances of the case.
15. It will be important for prosecutors to distinguish between challenges to the legislative provisions themselves, and situations where the defence takes issue with the way the provisions have been applied in the individual case. For example, there may be nothing incompatible with the statutory provision itself, but the way that it has been applied infringes against Convention rights. This may mean that a court finds there is a violation of the Convention in a particular case, but does not necessarily indicate that there is a vulnerability to the law or legislative provision in question.
16. A suggested approach to considering Convention issues in the context of criminal cases is set out at Flowchart A [Not featured in this website version]. The 'Points for Prosecutors' in respect of specific legislative provisions are aimed at providing assistance with responding to defence argument at stage 5.

## **Practical issues**

17. Many of the expected arguments on legislative provisions may be dealt with adequately whenever raised during the course of the criminal proceedings. However, where the point is a novel one, or requires further detailed consideration, prosecutors will wish to consider whether it would be appropriate to seek an adjournment to research the matter further. It may be greater assist the court to ensure the provision of skeleton arguments where there are substantive points to be taken on legislative provisions, or where Convention caselaw is referred to extensively.
18. Where counsel is instructed on behalf of the Crown, it may be necessary to ensure that he or she is fully prepared to deal with the likely Convention arguments in relation to legislative provisions. For these purposes, the 'Points for Prosecutors' may be provided or summarised to prosecuting counsel to assist in responding to argument.

19. Each prosecuting authority will have its own arrangements for the consideration and notification of Convention issues as they arise in individual cases. Where a case is being or is likely to merit an appeal, or raises a point of wider importance, it will be particularly important to ensure that information is conveyed swiftly to the appropriate place, so as to ensure proper co-ordination of cases raising similar issues.

### **Common issues – Reverse onus provisions**

20. A number of legislative provisions are likely to receive early scrutiny for Convention points because they fall into a wide category of offences that place some kind of burden of proof upon the defence. The extent to which a specific provision does so will vary, but it will include those offences described as strict liability, or where the defence is expected to establish a specific defence under the terms of the legislation. The principal objections to such provisions are likely to be centred around the guarantee in Article 6(2) to be ‘presumed innocent until proven guilty by law’.
21. The ‘Points for Prosecutors’ provide detailed summaries of suggested responses on the more common legislative provisions, such as those involving possession of drugs, aggravated vehicle taking, and going equipped to steal. Whilst each such statutory provision will require scrutiny against the Convention in its own right, there are a number of common principles which may assist in the analysis of other similar statutory provisions.
22. Firstly, it is clear that the Convention does not in principle prohibit provisions which transfer the burden of proof to the accused to establish a defence, provided that the overall burden of proof remains with the prosecution: *Lingens and Leitgens v Austria* (1981) 4 EHRR 373.
23. Secondly, offence provisions which include presumptions of law or fact occur in every legal system, and do not necessarily offend against the Convention provided that they are confined ‘within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence’: *Salabiaku v France* (1988) 13 EHRR 379. Provided that the provision creating the presumption is restrictively worded, and that it is neither irrebutable nor unreasonable, there is not necessarily a violation of the Convention. See also *R.P. v UK* (1972) Application No 5124/71 42 CD 135; *Bates v UK* (1996) EHRLR 312.
24. Offences of strict liability were also considered to some extent in *Salabiaku v France*, where the ECHR noted that ‘Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence’ (paragraph 27). Offences of strict liability therefore are not necessarily in violation of the Convention, provided that the prosecution retains the burden of proving the commission of the offence.

25. The judgement of Lord Hope in the House of Lords in *R v DPP ex parte Kebilene* provides further illustration of the issues which domestic courts can be expected to consider when assessing whether a particular provision altering the burden of proof offends against the Convention. In deciding where the balance lies, the court will be considering the following issues:
- What does the prosecution have to prove in order to transfer the burden of proof?
  - What is the burden on the defendant? Does it relate to something which is likely to be difficult to prove or does it relate to something that is likely to be within his knowledge and/or to which he readily has access?
  - What is the nature of the threat faced by society that the provision is designed to combat?

In *R v Lambert, R v Ali and R v Jordan* [2000] Times 5<sup>th</sup> September (C.A) the Court examined the reverse burdens of proof under the Misuse of Drugs Act and the Homicide Act 1957 (diminished responsibility) and ruled them to be compatible.

26. The 'Points for Prosecutors' seek to address these issues in relation to each of the legislative provisions considered. Similar considerations will apply when responding to points made upon other provisions of a similar nature, and prosecutors may wish to give thought to those which are in common usage in their own particular area of practice.

## **Retrospectivity and the HRA**

27. Section 7(1)(b) HRA 1998 provides that a person who claims that a public authority has acted (or proposes to act) in a way which is unlawful by reason of being incompatible with a Convention right, may rely on the Convention rights concerned in any legal proceedings.
28. For the most part this will relate to alleged breaches of rights occurring after 2 October 2000. However, there is an important exception. Section 22(4) of the Act provides that where a public authority brings the proceedings, the litigant may rely on the alleged breach whenever it took place, even if this is prior to the Act coming into force.
29. As a prosecution brought against an individual will be 'proceedings brought by or at the instigation of a public authority', this means that in any trial (or appeal) taking place after 2 October 2000 the defendant (or appellant) may rely upon any breach of his Convention rights which occurred before 2 October 2000.
30. This retrospective application of the HRA was confirmed by the Divisional Court and the majority of the House of Lords in *R v DPP ex parte Kebilene*.

31. There is no authority to support the proposition that section 3(1) of the Act has retrospective application, and any argument that it does should strongly be resisted until the matter has been determined by the House of Lords.
32. This is not to say that when section 3 is applied it should not be applied to legislation whenever that legislation was enacted, as expressly set out in section 3(2)(a) HRA.
33. The argument which should be resisted is that a court, at a trial or hearing after 2 October 2000, should, when determining the meaning of a statutory rule that applied to events occurring before that date, construe the statutory rule *as it applied to events before 2 October 2000* by the application of section 3 HRA.

## **AGGRAVATED VEHICLE-TAKING**

### **General**

Section 12A of the Theft Act 1968 was added by the Aggravated Vehicle-Taking Act 1992. The basic offence of taking, driving or being carried in a motor vehicle without the owner's consent is contained in section 12 of the Theft Act. In addition, theft (section 1 of the Theft Act) is sometimes charged for vehicle theft. The aggravated offence is committed when one of the aggravating features occurs after the vehicle is taken and before it is recovered. The features are dangerous driving, injury and damage.

The basic offence is summary only. The aggravated offence attracts a penalty of two years on conviction on indictment; however, this is raised to five years if death results from the aggravated offence. A defendant charged with the aggravated offence may, if not found guilty, be convicted instead of the basic offence. If this takes place in the Crown Court, that court will then have the same powers and duties as a magistrates' court would have on convicting of the same offence.

Where the accused seeks to raise the defence under section 12A(3), (ie that the dangerous driving/ injury/ damage occurred before the defendant came into contact with the vehicle), it may be claimed that the burden of proof is reversed contrary to Article 6.

### **Suggested points for Prosecutors**

- The legislation is aimed at those who steal cars and then cause death or serious injury to persons or property.
- The prosecution has to prove that the defendant took the vehicle and that the aggravating features were present after the vehicle's theft.
- The burden on the defendant is only to negate the precise timing of the aggravating features or his connection with the stolen vehicle at the time. Thus, the requirement on him relates to a narrow issue, which is clearly defined and within reasonable limits. It also relates to an issue which is peculiarly within the defendant's own knowledge.

# BAIL

## General

Domestic legislation is compatible with Convention and caselaw.

Starting point for both Convention and UK legislation is always the right to bail - Article 5(1) and section 4 Bail Act. Liberty is the norm - detention always has to be justified in each individual case for a 'relevant and sufficient reason', and by reference to domestic law (for example, exceptions to bail in Schedule 1 Bail Act) and by reference to Article 5(1).

Specific statutory provisions which may be subject to challenge:

**Section 25 Criminal Justice and Public Order Act 1994** (as amended by section 56 Crime and Disorder Act 1998):

- Section 25 amounts to a recognition that cases to which it applies are in a special class (owing to the gravity of previous conviction and present charge), and that in consequence it will only be exceptionally that bail will be appropriate in such a case.
- The court must consider if release on bail would be appropriate.
- It would be appropriate where release is required by Article 5.

## Paragraph 2A, Schedule 1 Bail Act 1976

- Provision does not compel court to refuse bail where defendant already on bail for a criminal offence. Simply emphasises the discretion – '...defendant *need* not be granted bail...' to refuse bail where circumstances indicate real risk.
- Alerts court to need to consider the case carefully.
- Courts must still consider all relevant factors, and can only refuse bail where detention can be justified under Convention principles as 'relevant and sufficient'.

## Paragraph 6, Schedule 1 Bail Act 1976

- Does not prevent a court from granting bail where defendant has been arrested for a breach of bail condition. Simply emphasises discretion '...defendant need not be granted bail....' to review bail.
- Alerts court to need to consider the case carefully.
- Court must consider all relevant factors and can only refuse bail following arrest under section 7 where detention can be justified as 'relevant and sufficient'. Provided circumstances of each case are considered, relevant factors taken into account and detention in the particular case is for reasons which are 'relevant and sufficient', the provisions can be applied compatibly with the Convention.

### **Paragraph 2(b), Part I, Schedule 1 Bail Act 1976**

- Court must take into account the seriousness of the offence which there are substantial grounds for believing the defendant will commit while on bail; but
- Strasbourg decisions do not go as far as ruling that bail can only be refused if that offence is serious or imprisonable.

### **Paragraph 3, Part I, Schedule 1 Bail Act 1976**

- Strasbourg decisions do not go as far as ruling that bail can never be refused because of the risk of self-harm.

## BINDOVERS

### General

Magistrates have powers to bind over under section 115 Magistrates Courts Act 1980, under common law, and under the Justices of the Peace Act 1361. The power to bind over under section 115 MCA is exercisable upon complaint. At common law and under the 1361 Act, the court can exercise its powers to bind over any participant in the proceedings if it considers that the conduct of the person concerned is such that there might be a breach of the peace or that the behaviour has been *contra bonos mores*.

Bind over orders may be subject to challenge on several Convention grounds including:

- The power to bind over is insufficiently precise to form the basis of a lawful interference with an individual's freedom of expression – i.e. is not 'prescribed by law' and thus violates Article 10(2).
- Arrest and/or detention in order to prevent a breach of the peace may be unnecessary, disproportionate and offends against an individual's Article 10 (freedom of expression) or Article 11 (freedom of assembly) rights.

The ECtHR has considered these issues in relation to UK law in two recent decisions: *Steel and others v UK* -23 September 1998 and *Hashman and Harrup v UK* (1999) EHRLR 342. Analysis of the judgements indicates that the following conclusions can be drawn:

- Binding over to keep the peace is a concept which does not in principle offend against the Convention. In the case of *Steel*, the power to bind over to keep the peace was found to comply with the Convention in that it is defined with an acceptable degree of precision. The violation found in the *Steel* case relates to the disproportionate actions of the police in particular circumstances.
- Binding over to be of good behaviour, by proscribing behaviour which is defined as *contra bonos mores*, is generally too imprecise to comply with the Convention. In *Hashman and Harrup* the wide terms of the wording were found to be insufficiently objective and precise as to provide adequate guidance on what conduct should be avoided. The Court regarded the phrase *contra bones mores*, meaning 'behaviour which is wrong rather than right in the judgment of the majority of contemporary fellow citizens' as too vague to comply with the requirement of clarity and lawfulness implicit in Article 10. The case of *Chorherr v Austria* (1993) 17 EHRR 358 was distinguished, where 'conduct likely to cause annoyance' was found to be sufficiently precise.

- Whether the arrest or detention of an individual can be justified as legitimate interference with Convention rights will depend upon the particular circumstances of each case. In *Steel*, the actions of the police in relation to two of the applicants were found to be justified. This issue goes to the application of the law, not to the legislation itself.
- Binding over to be of good behaviour **may** be compatible with the Convention provided that the court can show by reference to previous unacceptable behaviour precisely what conduct is to be avoided in future. Interference with an individual's rights under Articles 10 and 11 is acceptable provided that it is necessary and proportionate in the circumstances of the case.
- The case of *Ainsworth v UK – Application no. 35095/97* further illustrates the approach of the ECtHR. The applicant was charged with an offence under Army regulations of 'conduct to the prejudice of good order and military discipline'. The Commission found the offence acceptable in terms of certainty, because it was clear to the applicant what behaviour may incur criminal sanction.

### **Suggested points for Prosecutors**

- Statutory powers to bind over are compatible with the Convention, or can be interpreted compatibly under section 3 HRA.
- Binding over to keep the peace has been found to comply with the Convention. There is no objection in principle to the use of powers to bind over individuals where that sanction forms an appropriate response to specific misconduct which creates a danger of injury or harm, or where there is a legitimate fear of disorder.
- Binding over to be of good behaviour could be compatible in individual cases if the court uses examples of previous unacceptable conduct to explain to the offender precisely what behaviour is to be avoided in future.

NB. The Home Office is considering issuing guidance to the courts and the police on the extent to which the binding over powers have been found not to comply with the Convention. This will assist in deciding when it is appropriate to use the powers, which remain current and valid.

## **COVERT SURVEILLANCE**

### **General**

Statutory provisions which may be subject to challenge:

### **Interception of Communications Act 1985**

Potential challenges to the prohibition of intervention and warranty regime are that:

- It does not regulate interception of telecommunications in a private communication system, for example, post not delivered by Royal Mail, telephone calls after they have passed through a BT line.
- It does not cover interception when only one party to the communication consents to the interception.
- It does not provide adequate redress for persons subject to 'collateral intrusion', i.e. the privacy of those not subject of the interception warrant, for example, a call to a telephone number subject of a warrant; the warrant makes no mention of such 'third parties' and the tribunal is therefore not empowered to investigate.
- The defence has no access to the intercept material, which is non-disclosable. Argued to be 'inequality of arms'.

### **Part III Police Act 1997**

This contains provisions for authorisation of intrusive surveillance. Potential challenges are that:

- It deals only with intrusive surveillance where there is an interference with property and does not cover other forms of intrusive surveillance such as long range audio and visual surveillance, use of undercover officers and informants etc.
- The authorisation regime is defective because in urgent cases, the need for prior approval by a Commissioner can be displaced.

## Suggested points for Prosecutors

- Not all surveillance activity necessarily involves a breach of Article 8. Whether there is an interference with an individual's Article 8 rights will depend upon the circumstances. For example, there may be less expectation of privacy in a public place.
- There are areas of covert surveillance which may appear to breach the 'in accordance with the law' requirement of Article 8. The issue is not so much weakness in the domestic legislation, but that they are not presently covered by legislation which regulates this activity.
- The Regulation of Investigatory Powers Act 2000 (RIPA), the relevant provisions of which are expected to be in place by 2 October 2000, will deal with the lacunae in the present legislation.
- However, there may still be ongoing cases which the pre-RIPA position may be relevant. For situations where there was no legislation (until the RIPA becomes law), ACPO and HM Customs & Excise have agreed voluntary joint Codes of Practice, which provide detailed regulation. The Codes of Practice provide a strong, clear and public declaration of how covert surveillance activities will be handled, and will ensure that Convention principles are observed.
- The finding of a violation of Article 8 in *Khan v UK* was on the basis of the law prior to the agreement and publication of the voluntary Codes of Practice. The case is good authority for the proposition that a breach of Article 8 does not necessarily mean the evidence must be excluded.
- Where domestic legislation does cover areas of covert surveillance, it is compatible with Article 8 of the Convention.
- In any authorisation regime, allowances must be made for developing situations. It will be wrong to allow warrants or approvals to be drawn up in wide terms to cover all eventualities, even if it were possible to do so. Time limits on urgent authorisations, backed by retrospective scrutiny and the power to order destruction of material by the person who could have granted the approval/ authorisation, provides sufficient safeguards.
- In relation to 'equality of arms' – neither the prosecution nor the defence can use material which has been obtained under IOCA (see also Part I RIPA). The current system has been approved by Strasbourg in *Jasper v UK*, which specifically addresses the equality of arms issue.

## CUSTOMS OFFENCES, POWERS AND PRACTICES

### The prohibition on the importation of indecent or obscene goods as set out in section 42 of the Customs Consolidation Act 1876

- The Convention and the Court’s jurisprudence do not prohibit laws restricting the availability of indecent or obscene goods nor the imposition of criminal sanctions for breach of such laws.
- Any censorship laws must serve the purposes of the qualifications within Articles 8.2, 10.2 and Article 1.2 of the First Protocol (as set out in the jurisprudence). Those purposes are for the “protection of morals or the rights or freedoms of others”.
- The protection of morals is a matter that falls within the “discretionary area of judgement” identified by Lord Hope in *R v DPP ex parte Kebilene* [1999] 3 WLR 972 at 993H and to which courts should show a measure of deference to legislative and executive authorities.
- The obscenity laws of England and Wales serve these purposes (“protection of morals or the rights or freedoms of others”) in that they are not objectively strict but are liberal in relation to sexual material featuring adults and strict where necessary in relation to material featuring children or material likely to be seen by children:
  - the test for **obscenity** in section 1 of the Obscene Publications Act 1959 has regard to the likely audience/readership but includes the possibility that the likely audience however corrupt or depraved may be further corrupted by having their addiction fed - *DPP v Whyte* (1972) AC 849 (C.A.).
  - the test for **indecent** photographs of children is presumably to protect the subject children in the photograph (whoever and wherever those children may be) and protect other children in the United Kingdom from adults developing any sexual interest in children.

### Writ of assistance

In *Funke v France* (1994) 16 EHRR 287 the restrictions and conditions surrounding the powers of entry of the customs authorities, including the absence of any judicial authorisation, were held to be insufficient for the interference to have been strictly proportionate.

- This power was limited by administrative instruction issued in October 1999 to use in exigent circumstances where entry and search without warrant is necessary to “prevent loss or destruction of goods” and amended in the Finance Act 2000.
- A Canadian case *R v Noble* (1984) 14 DLR (4th) 216 made it clear that urgent searches without prior judicial authority should be permitted to take place as they are sometimes “necessary”.

### **Covert search of passengers’ baggage**

- This is permissible under section 159 CEMA 1979 - thus “in accordance with the law”.
- Canadian human rights law recognises that there “is a reduced expectation of privacy at the border ... routine ... search of luggage ... [is] not unreasonable” *R v Simmons* [1988] 45 CCC (3d) 296.

### **Search of person under section 164 CEMA 1979**

- Canadian jurisprudence on similar provisions suggests they are all compatible with the ECHR (see the references above to a reduced expectation of privacy at the border).
- Where Customs wish to strip search or intimately search a passenger the passenger is entitled to refuse and demand that to be taken before a senior officer or a Magistrate who will determine whether the passenger should be searched.

### **Various reversals of the burden of proof - general**

- Section 154 CEMA 1979 provides for a reversal of the burden of proof in many situations in criminal and condemnation proceedings. The most notable in section 154(2)(a) CEMA 1979 provides it is on the defendant to prove that duty or tax has been paid on goods.
- Customs are mindful of Sir Richard Scott’s criticisms of some of these provisions in his report at Volume IV K.4.2 (iii) (HC 115) but consider that where established domestic case law approved of the provisions they should continue to apply.
- *Salabiaku v France* (1998) 13 EHRR, 379 ECHR states that there is nothing particularly unfair in imposing a burden of proof on someone of matters which he is particularly well placed to prove as it is a presumption of responsibility which he can rebut rather than a presumption of guilt.
- Even in the light of *Kebilene* Customs are happy with these reversals of the burden of proof. They are a persuasive burden in Lord Hope’s classification that provides for an exemption or proviso. The Crown must still prove that the accused was fraudulent.

## Whether duty has been paid

- The burden of proving that the appropriate customs or excise duty has been paid on the goods lies on the claimant by virtue of section 154(2)(a) CEMA.
- In *R v Cohen* [1951] 1 KB 505 Lord Goddard CJ said that such a reversal was entirely appropriate as the other party was uniquely placed to either prove or disprove the fact in dispute.
- In criminal cases, it is still for the prosecution to prove fraudulence. For this reason, there is a compelling argument that section 154(2)(a) is compatible with the presumption of innocence.

## Forfeiture under Schedule 3 of CEMA 1979 - breach of the owner's rights under Article 1 of the First Protocol to the Convention?

- Proceedings are “*in rem*” and are best seen and understood as proceedings in respect of title.
- The European Court of Human Rights (ECHR) has twice considered whether the provisions on forfeiture are a breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 - see *AGOSI v UK* [1986] 7 EHRR 251 and *Air Canada v UK* [1995] 20 EHRR 150.
- In *AGOSI* the Court held that the “fault” or otherwise of the owner was only one of the factors to be taken into account in reaching a fair balance. One other factor was a procedure by means of which the owner could put his case at trial before forfeiture of the goods was ordered by a Court and again after forfeiture. Under UK law at the time the latter procedure was administrative and the decision of Customs not to restore under section 152(b) CEMA 1979 was amenable to judicial review and the applicants had not pursued this. The Court held that such processes were sufficient.
- In *Air Canada* the ECHR held that the seizure of the Tristar and its release subject to payment of £50,000 did not amount to a violation of Article 1 of the First Protocol. The seizure of the aircraft was “a temporary control of use” and did not transfer ownership. Seizure was an exceptional measure designed to bring about an improvement in the company's security procedures. The Court stated that there was proportionality between the means employed and the aim sought to be pursued and to demand only £50,000 for an item worth £60 million was equally proportionate.

## Civil forfeiture of drug trafficking cash under Part II Drug Trafficking Act 1994

- The standard of proof is the civil standard i.e. on the balance of probability - section 43(3) DTA 1994. The hearing is a civil allegation “in rem” against the cash; no one is on trial - *R v Crawley Magistrates’ Court ex parte Ohakwe* (1994) *Crim LR* 936.
- The Court has to be satisfied that the cash directly or indirectly represents any person’s proceeds of or was intended by any person for use in drug trafficking. See *Bassick and Osborne v Commissioners of Customs and Excise* (1997) 161 *JP* 377 for the Divisional Court’s view that this simply means “connected with drug trafficking”.
- A claimant or any other person affected may appeal as of right to the Crown Court against a Magistrates’ Court’s decision to order forfeiture under section 44(2) of the Drug Trafficking Act 1994.
- The ECHR has held that if the general interest is strong enough even preventative seizures and civil confiscation may be justified - *Raimondo v Italy* (1994) 18 *EHRR* 249.
- In *Welch v UK* (1995) 20 *EHRR* 270 *ECHR* the Court said that confiscation regimes were necessary to combat “the scourge of drug-trafficking.”

## DELAY

### General

Article 6(1) states that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

Whether the hearing has taken or is likely to take place within ‘a reasonable time’ may be subject to challenge.

### Suggested points for Prosecutors

The passage of time in itself is not a violation of the Convention if it can be shown:

- that the trial (including any appeal) is heard within a reasonable time, *Darmalingum v The State* [2000] (PC) Times 18 July;
- that a fair hearing can still take place; see obiter in *R v Court Martial Administration Officer ex parte Jordan* [2000] COD 106, DC; *Bunkate v Netherlands* 19 EHRR 477

### What is a reasonable time?

This will depend upon what is reasonable given the particular circumstances of the case. The court should be invited to have regard to:

- the particular circumstances of the case;
- the ECHR jurisprudence;
- the complexity of the case and the conduct of the parties.

An overall assessment should be made what is reasonable considering **all** the circumstances, not just the length of time of a particular part of the process.

### When does time start to run?:

There are a number of authorities on this aspect:

- when he is officially notified of charge - *Ewing v UK* (1986) 10 EHRR 141; *Neumeister v Austria (No 1)* (1968) 1 EHRR 91;

- when a defendant is substantially affected by criminal proceedings - *Deweere v Belgium* (1980) 2 EHRR 439;
- when he is aware that he is under suspicion – *X v Austria* [1967] CD 8;
- when he is aware that he is under investigation *Eckle v Germany* (1982) 5 EHRR 1; *Darmalingum v State* PC Times Law Report 18 July 2000.

*Ewing v UK* is the most recent Strasbourg authority of most relevance to UK cases. The other cases mentioned above on the issue of when time runs are from other jurisdictions and are more relevant to their own individual criminal justice systems.

Note that in some cases (eg including those cases originating from statutory inquiries; regulatory inquiries into the causes of bankruptcy or the failure of companies; alleged malpractice by company officials, and similar inquiries) it may be necessary to distinguish between those inquiries which must of necessity precede the criminal investigation, and those which are part of the subsequent criminal proceedings themselves. Where the court is being invited to consider the time scale before charge, it may be appropriate to count only from the time that the prosecuting authority is seized of the matter.

- Assessment of what is a reasonable time thereafter is dependent on the circumstances of each case. It may be helpful for the prosecution to set out a chronology of events to demonstrate that overall the case can be heard within a reasonable time.
- Where the case is complex and the enquiries are numerous and far reaching, this should be taken into account by the court – *Neumeister v Austria (No 1)* (1968) 1 EHRR 91. If there are complex issues of law and evidence, it may be necessary for the prosecution to spend more time on researching these issues so as to be in a better position to assist the court. The court should also be urged to recognise the strong public interest in the prosecution of cases of serious criminal misconduct, which may take more time to prepare for prosecution.
- Relevant factors which would tend to cause a longer time in bringing a case to trial are the number of defendants, difficult legal issues, obtaining evidence from abroad, obtaining expert evidence.
- Conduct of the parties - the conduct of the prosecuting authority and what is at stake for the defendant will be taken into account as much as the conduct of the defendant.

- The defendant's conduct – absconding, or many requests for adjournments are all matters which may demonstrate that the defendant is responsible for some of the delay.
- The court is also likely to consider the time taken for a case to be heard and the likely date of finalisation of the proceedings overall (ie the conclusion of any appeal against conviction. See *Darmalingum v the State*; also *R v DPP ex parte Kebilene* [1999] 3 WLR 972

### **Can a fair trial still take place?**

Even where the court finds that there has been the passage of a significant and lengthy period of time, it does not necessarily follow that a fair trial cannot take place. The delay may be reasonable given the particular circumstances of the case, and the court is equipped with many procedural and evidential safeguards to ensure that a fair trial can still take place. Where appropriate, the court can be invited to hear the matter even where there has been a significant passage of time; the judge can regulate the proceedings to ensure that a fair trial takes place.

## DETENTION OF YOUTHS

### General

Remands and Committals to Local authority accommodation – Section 23 of the Children and Young Persons Act 1969 (as amended and modified by Sections 97 and 98 of the Crime and Disorder Act 1998).

- Under this provision, all 15 and 16 year-old girls may be remanded to local authority secure accommodation (rather than prison).
- By contrast, only *vulnerable* 15/16 year boys for *whom a place is available* may be so remanded.
- Other 15 and 16 year-old boys are remanded to prison (as are 17 year-old *boys and girls*).

This may be argued to be discrimination contrary to Article 14 (read with Article 5 of the Convention). Article 14 prohibits discrimination in the delivery of other Convention rights. Not every *difference in treatment* will constitute *discrimination* under the Convention. Differential treatment constitutes discrimination if it has *no objective or reasonable justification (legitimate aim)* or if the differentiation is disproportionate to the aim pursued *Lithgow and others v UK (1986) 8 EHRR 329*.

### Suggested points for Prosecutors

- The very small numbers of remanded girls under 17 make them difficult to accommodate in appropriate prison accommodation within a reasonable proximity of home.
- Thus, the difference in treatment is aimed at pursuing the legitimate aim of detaining all juveniles in appropriate accommodation within reasonable visiting distance of home (cf. Article 8 rights).
- From April 2000 the Prison Service will operate a distinct estate for nearly all 15-17 year-old boys in its custody. They will be held in juvenile-only establishments or separate juvenile parts of mixed sites with improved educational and other regime (thus lessening the difference with girls – improving the case as to proportionality).

## DISCLOSURE

### General

Statutory provisions on disclosure are principally contained in the Criminal Procedure and Investigations Act 1996 (CPIA) and in Rules of Court derived from the Act, but also include Magistrates Court's (Advance Information) Rules 1985.

The domestic regime for disclosure of unused material is compatible with the Convention. Principal areas of challenge:

### Criteria for prosecution disclosure in sections 3 and 7 CPIA:

- Article 6 does not require unlimited access to all prosecution material: *'it is clear that the facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence'* **Jespers v Belgium** (1981) 27 DR 61.
- Each case will turn on its merits and on whether there is in fact prejudice to the defendant by the application of the domestic law - **Bendenoun v France** (1994) 18 EHRR 54.
- the Convention looks to the fairness of the proceedings as a whole: failure to provide disclosure of particular material at one stage is not necessarily a violation of Article 6, provided it can be remedied and the defendant's right to a fair trial is not prejudiced.
- Section 9 CPIA provides for a continuing duty on the prosecutor to keep disclosure under review - if material subsequently becomes relevant to the issues in the case, there is an obligation to disclose as soon as reasonably practicable, when this meets the statutory tests.

### The obligation to serve a defence statement under section 5 CPIA

- The obligation to serve a defence statement is a procedural tool to identify the issues in the case. It does not change the burden of proof, which remains throughout on the prosecution. This provision does not therefore offend Article 6.
- Disclosure of material which might assist the defence is not contingent upon a statement being provided - the prosecutor has a continuing duty under section 9 to keep disclosure under review throughout the trial process.
- the statement can only be used in evidence in the circumstances set out in section 11, which are clearly defined and within reasonable limits.

### **Inadequate judicial supervision of the disclosure process:**

- There is judicial supervision of both the investigation of crime and the disclosure process. The police must act in accordance with the CPIA Code of Practice: section 26 CPIA renders the Code admissible in evidence and requires a court to take into account any breach of the Code.
- Section 8 provides a mechanism for judicial supervision after secondary disclosure - the court can be invited to order disclosure of specific items.
- The fact that the court has no input at primary prosecution disclosure stage does not make the process unfair. The defence receive a copy of the non-sensitive material schedule - this enables focused requests for specific items.
- Judicial review is available to the defence as a means of ensuring that police and prosecutor have acted lawfully (albeit limited in Crown Court matters).

### **Disclosure of evidence in summary only trials**

- Although there is no statutory obligation to provide disclosure of prosecution evidence in summary only trials, it is normal best practice to do so in accordance with the Attorney General's guidelines (paragraph 35). Exceptionally, statements may be withheld for the protection of witnesses or to avoid interference with the course of justice.
- Failure to provide the defence with witness statements in summary only trials does not necessarily affect the fairness of the proceedings, provided the court grants reasonable time for the defence to respond to the evidence if taken by surprise: *R v Stratford JJ's ex parte Imbert*.
- Summary only offences are generally simple, straightforward allegations: there is frequently very little information to disclose.
- If a case raises more complex issues, it is always open to the court to hold a pre-trial review and make appropriate directions.

### **Bail and Disclosure**

- Domestic law is compatible with Strasbourg jurisprudence and does not offend against Article 6 (3). The prosecution is under a duty to disclose any material which might assist the defendant to make a bail application, irrespective of the

stage the proceedings have reached, and whether or not the CPIA applies. *R v DPP ex parte Lee (1999) 2 All ER 737; Lamy v Belgium. (1989) 11 EHRR 529.*

### **Public Interest Immunity**

- Withholding material on the basis of PII is not in certain circumstances incompatible with the Convention. The court is entitled to consider the wider interests of the community in applications to withhold material, and needs to balance these with the interests of the accused: *Davis and Rowe, Jasper, Fitt v UK [2000]*.
- Ex parte PII hearings do not offend against Article 6: it is for the trial judge to ensure fairness to the accused - whether this has happened is a question of fact in each case. The trial judge has to keep matters under review (sections 14 and 15 CPIA).

### **Section 66 CPIA provides inadequate access to third party material**

- There are safeguards in the CPIA to ensure that the accused can gain access to material in the hands of third parties: the CPIA Code requires the investigator to consider all reasonable lines of enquiry, and to ask third parties to retain relevant material - paragraph 3.4.
- Unfettered access to material in the hands of third parties may breach the rights of others. Section 66 CPIA is even handed - it provides a judicially supervised procedure for both prosecution and accused to obtain access to third party material.

### **No right to mitigating material in CPIA**

- There are other safeguards to ensure that this material is provided to the defence. The guide to the Professional Conduct of Solicitors requires prosecutors to 'reveal any mitigating circumstances' (paragraph 21.19). In addition, the Code for Crown Prosecutors requires CPS prosecutors to present the facts of the case fairly and impartially. If material exists which may mitigate sentence and is not known to the defence, there are professional duties which ensure that disclosure of this material occurs.
- The Attorney General's Guidelines on Disclosure of Unused Material [2000] make it clear that prosecutors should consider disclosing material which is relevant to sentence in the interests of justice.

## DRINK DRIVE OFFENCES

### General

Legislation concerning drink drive offences is contained primarily in section 4, 5 and 7 of the Road Traffic Act 1988. Likely areas of challenge include:

- The offences under sections 4 & 5 RTA offend against Article 6(2) in that they are strict liability offences requiring no proof of criminal intent. The provisions also impose requirements which compel the accused to incriminate himself by providing specimens for analysis (section 7).
- The procedures for the taking of specimens offend against Article 6(3) c, in that there is inadequate provision for legal advice.

### Suggested points for Prosecutors

- Domestic legislation is compatible with the Convention, or can be interpreted compatibly under section 3 HRA. Strict liability offences do not automatically violate Article 6(2), provided that the prosecution retain the burden of proving the commission of the offence, and that the accused is not left without a means of defence - *Salabiaku v France* (1988) 13 EHRR 379. The drink drive procedures satisfy this requirement.
- Requiring the provision of breath, blood and urine specimens as a means of detecting driving under the influence of drink is a common practice amongst many European countries. The European Commission on Human Rights has held that such measures by an authority in pursuance of the wider public interest (protection of the public from the potential harm caused by drink-driving) are reasonable: *X v Netherlands* (1978) 16 DR 184.
- In *Saunders v UK* (1996) 23 EHRR 313 page 338 paragraph 69 it was held that the right not to incriminate oneself did not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers which has an existence independent of the will of the suspect, such as breath, blood and urine samples.

- The prosecution are required to show strict compliance with the procedures specified in the Road Traffic Act. The burden of proof remains on the prosecution to establish the offences.
- There is provision for legal advice for suspects in PACE: Code C3.1 provides that a person under arrest at a police station is entitled to consult with a solicitor and have independent legal advice free of charge. However, PACE Code C3E provides that procedures under the RTA 1988 need not be delayed. This is a necessary and reasonable limitation on the right of availability of legal advice to ensure that vital evidence of a criminal offence is not lost through the passage of time.
- If a court finds that there has been a failure to comply with Article 6(3)(c) in the particular circumstances of the case (i.e. vulnerable accused), that does not mean that the right to a fair trial has been breached. The proceedings must be judged as a whole. Availability of legal advice at a later stage may satisfy the Article 6 requirements.
- NB. Note that the PACE Codes of Practice are subordinate legislation. Prosecutors should encourage the court to look to compatible interpretations, applying section 3 of the Human Rights Act 1998. If the primary legislation prevents the removal of an incompatibility, the subordinate rules will remain valid and enforceable until Parliament amends the primary statute. It is not open to the magistrates' court or the Crown Court to make a declaration of incompatibility.



## **DRUG TRAFFICKING - RESTRAINT and CONFISCATION, FORFEITURE**

### **General**

Key provisions which are likely to be subject to challenge are:

### **Restraint and Confiscation**

- Restraint orders under Section 26 Drug Trafficking Act 1994 – may be said to violate Article 1 of the First Protocol, which guarantees the right to the peaceful enjoyment of possessions (particularly where infringing on third party rights, e.g. where property in possession of others).
- Disclosure orders made by the High Court to make restraint orders effective may violate Article 6 – the right not to incriminate oneself; or possibly Article 8 – right to privacy in personal affairs.
- The mandatory assumption in section 4 Drug Trafficking Act 1994 may not be compatible with the presumption of innocence enshrined in Article 6(2).
- The retrospective effect of the legislation violates Article 7;
- The exercise of the Crown Court powers to require a defendant to provide financial information (section 12 Drug Trafficking Act) amounts to an interference with Article 8 rights.

### **Forfeiture under section 27 Misuse of Drugs Act 1971**

- The exercise of the power of forfeiture infringes the rights enshrined in Article 1 of the First Protocol: - particularly where persons other than the accused have a proprietary interest in the property.

### **Suggested points for Prosecutors**

#### **Restraint and Confiscation of benefit of crime**

- UK legislation does not generally interfere with the ownership of property – it acts only to prohibit disposal of assets which may later be assessed as the proceeds of crime. Restraint orders amount to a control on the use of property in accordance with general public interest, as permitted by the second paragraph of Article 1. Drug trafficking causes serious public harm, and a restraint order is simply a necessary and

proportionate preventative measure to combat serious crime – see *Togher v UK* (1998) EHRLR 637; and *Raimondo v Italy* A/281 (1994) 18 EHRR 371.

- If an accused could avoid the consequences of confiscation by passing property to a third party, this would defeat legislation aimed at combating serious crime. (See comments of Turner J in *Re D* [1995] *Times* 25 January). Restraint orders therefore need to deal with this eventuality, and because of the minimal interference, do not interfere with Article 1 Protocol 1.
- The High Court has power to require an undertaking from the Prosecution that no disclosure made in compliance with the restraint order shall be used as evidence in the prosecution of an offence alleged to have been committed by the person required to make the disclosure, or by any spouse of that person. (See *Re O* (1991) 2 WLR 475).
- The Court can go further and can require the prosecution not to use evidence obtained as a direct result of such disclosure: these measures adequately protect the defendant's Article 6 rights.
- The Convention does not prohibit presumptions which place a burden upon the accused, providing the overall burden of proof remains with the prosecution. However, rules which place a burden on the accused must remain within reasonable limits – *Salabiaku v France* (1998) 13 EHRR 379. Section 4(4) Drug Trafficking Act requires the court not to make the statutory assumption if it is shown to be incorrect, or if the Court is satisfied that there would be a serious risk of injustice to the defence case. The defendant's position is therefore safeguarded.
- Whether Article 7 is violated will depend on the circumstances of each case, particularly the date of the offence. The convention is not automatically violated when confiscation is ordered in relation to offences which occurred before implementation of the legislation. See *Welch v UK* (1995) 20 EHRR 247; *RC v UK*, Application number 2268/93; *Taylor v UK*, Application number 31209/96 [1998] EHRLR 90; and *Danison v UK* Application Number 45042/98.
- Confiscation regimes are an important element in most jurisdictions' battle against organised crime, particularly drug trafficking and fraud. The effective functioning of any confiscation regime depends upon having available information as to the financial affairs of defendants. Orders made in respect of confiscation in domestic law are for the legitimate aim of the prevention of crime, and are necessary and proportionate to this aim. (See *R v Delaney and Hanrahan* 97/08220/X3 14<sup>th</sup> May 1999 for the Court of Appeal's view that the lifestyle offender provisions in the CJA 1988 are not a breach of Convention rights).

## Forfeiture

- The object of Article 1 Protocol 1 is to protect against the **arbitrary** confiscation of property – see *James v UK (1986) 8 EHRR 123*. Deprivation of property is permitted ‘when in the public interest and subject to the conditions provided for by law’. Each case will turn upon its merits – provided that the forfeiture order is made in accordance with domestic law, and is proportionate to the offence committed, there is no breach of the Convention.

## EARLY ADMINISTRATIVE HEARINGS

### General

As a result of section 46 of the Crime and Disorder Act 1998 defendants are being brought to court more quickly. It may be argued that such hearings would be dealt with so speedily that the accused’s rights to full information about the charge, to legal representation and to time to prepare properly for the hearing will be prejudiced, contrary to Article 6.

### Suggested points for prosecutors

- In making a plea, a defendant has readier access than previously to legal assistance of his own choosing, since (as an alternative to using the court duty solicitor) there is now the option of calling at public expense on any other solicitor from a firm which undertakes duty work (a ‘duty solicitor of choice’).
- Defendants who have admitted the offence and are considered likely to plead guilty will appear at an ‘early first hearing’ in the expectation that the case will proceed. But they cannot be **required** to plead guilty, at the first hearing or at any later stage.
  - Defendants who wish to contest the case against them appear at an ‘early administrative hearing’, the purpose of which is to sort out legal aid and ensure that the defendant is taking steps to secure legal representation if appropriate; the trial will take place at a later date.
  - Either way, the defendant will have adequate time to prepare his defence.

- The defendant's legal adviser receives, in time for the first hearing, 'advance information' of the prosecution case. The defendant is thus informed promptly of the accusation against him.

## FORFEITURE

### General

The relevant statutory provisions are now consolidated in sections 143-144 Powers of Criminal Courts Act 2000 (formerly section 43 Powers of Criminal Courts Act 1973). This provides a power to a Court to forfeit property used in the commission of a crime by depriving the offender of any rights to that property. Provided property is lawfully seized from defendant, and is in his/her possession or control, Court does not have to establish ownership of property.

May be challenged under Article 1, Protocol 1 - right to peaceful enjoyment of property and Article 8 – right to private life.

### Suggested points for prosecutors

- Domestic legislation is compatible with the Convention.
- Forfeiture under the statute depends upon a prior criminal conviction. It represents a legitimate interference with the right of ownership, in order to support the public interest in preventing crime.
- The object of Article 1, Protocol 1 is to prevent the arbitrary confiscation of property. Forfeiture under the statute is not arbitrary – ‘the taking of property in pursuance of policy calculated to enhance social justice within the community can properly be described as being in the public interest’ *James v UK (1986) 8 EHRR 123*.
- There are safeguards to protect the rights of those unconnected with the criminal offence – the property cannot be disposed of until after 6 months have elapsed, and a person with interest in the property may challenge the order within 6 months.
- The forfeiture provisions represent a fair balance between the demands of the wider community (in preventing and deterring crime), and the protection of an individual’s private rights. The provisions are both necessary and proportionate, and there are safeguards which protect the rights of others.

## GOING EQUIPPED FOR STEALING ETC

### General

Section 25 of the Theft Act 1968 makes it an offence for any person when not in his place of abode to have with him any article for use in the course of or in connection with any burglary, theft or cheat. There is no actual reversal of the burden of proof, but proof that the defendant had with him such an article is evidence that he had it with him for such use. Any person can effect an arrest of anyone suspect of committing an offence under the section.

Both article 6(2) of the ECHR and domestic law guarantees the presumption of innocence in criminal proceedings. It is well-established domestic law that the burden of proof is on the prosecution, and that it is for the prosecution to establish guilt beyond reasonable doubt.

### Suggested points for prosecutors

- The section 25 offence is a narrow one, it is clearly defined and is within reasonable limits. An arrest can only be made if there is reason to suspect that the offence is being committed. It is still for the prosecution to show that the defendant was actually in possession of the article, and that the article in question was actually made or adapted for use in committing a burglary.
- The legislation is aimed at those whose behaviour gives rise to reasonable suspicion that they are carrying an article made or adapted for burglary etc. This fairly balances the right of the defendant to expect the prosecution to prove its case with the need to protect public safety and property.

## OFFENSIVE WEAPONS

### General

Statutory provisions which may be subject to challenge are:

- Section 1(1) Prevention of Crime Act 1953 - *possession of an offensive weapon in a public place 'without lawful authority or reasonable excuse'*
- Section 139 Criminal Justice Act 1988 - *having bladed article in public place - s139(4) 'it shall be a defence for the person charged...to prove...good reason or lawful authority'*

Both provisions place burden of showing lawful excuse on accused; the standard of proof on the defendant is on balance of probabilities.

### Suggested points for prosecutors

- Domestic legislation is compatible with the Convention. Provisions which shift the burden of proof to the accused are not necessarily incompatible – see Lord Hope in *R v DPP ex parte Kebilene* (1999) 3 WLR ,972.
- Both Article 6(2) of the Convention and domestic law guarantee the presumption of innocence in criminal proceedings. It is well-established domestic law that the burden of proof is upon the prosecution, and that it is for the prosecution to establish guilt beyond reasonable doubt.
- Article 6(2) does not prohibit rules which transfer burden to accused to establish defence, providing the overall burden remains with the prosecution (*Lingens and Leitgens v Austria* (1981) 4 EHRR 373)
- The requirement imposed on the defence relates to a narrow issue, is clearly defined, and is within reasonable limits. Whether the accused has lawful justification for carrying the weapon in a public place is something uniquely within his/her own knowledge.
- The legislation is aimed at preventing the carrying of weapons in public places which is necessary for the wider protection of the public. The provisions fairly balance the rights of the defendant to expect the prosecution to prove the case against him, with the importance of general public safety.

## POSSESSION OF A CONTROLLED DRUG

### General

Section 5(4) and section 28 Misuse of Drugs Act 1971 provide statutory defences to drugs offences, which the burden is upon the accused to establish. These provisions may be subject to challenge as being incompatible with the presumption of innocence in Article 6(2). In *R v Lambert* [2000] Times 5<sup>th</sup> September (C.A) the Court ruled that the latter provision was not a breach of the defendant's rights.

### Suggested points for prosecutors

- The legislation is compatible with the Convention. Provisions that shift the burden of proof to the accused are not necessarily incompatible – see Lord Hope in *R v DPP ex parte Kebilene* (1999) 3 WLR 175, 972.
- Article 6(2) does not prohibit rules that transfer the burden of proof to the accused, provided the overall burden remains with the prosecution *Lingens and Leitgens v Austria* (1981) 4 EHRR 373
- Both Article 6(2) and domestic law guarantee the presumption of innocence in criminal proceedings. It is well-established domestic law that the burden of proof is upon the prosecution and the prosecution must establish guilt beyond reasonable doubt.
- Before the statutory defences are engaged, the prosecution must first prove that the accused was in possession of the drugs, and also that the drugs are controlled. Unless this heavy burden is discharged, there is no question of requiring the accused to establish any facts relating to the statutory defences.
- Under section 5(4), if the defendant can show possession for a lawful purpose, for example, having seized the drug to destroy it, give to the police etc, the defence is made out.
- Section 28 permits a defence where the defendant shows that he did not know, suspect or have reason to suspect that the substance was a controlled drug. It does not relieve the prosecution of having to prove possession of the substance – proof of possession must include knowledge by the accused that he had control over the substance in question. See *Warner v Metropolitan Police Commissioner* (1969) 2 AC.
- The requirements on the defence in the statutory defences are reasonable, relate

to narrow issues and are clearly defined. They relate to factors uniquely within the knowledge of the defendant. The burden on the defence is on the balance of probabilities and the overall burden of proof remains with the prosecution.

- The legislation is aimed at preventing the unlawful possession and use of drugs, which is necessary for the wider protection of the public. The provisions fairly balance the right of the defendant to expect the prosecution to prove the case against him, with the importance of quickly detecting and preventing threats to public health and welfare.
- The provisions do not offend against the Convention since there are confined ‘within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence’: *Salabiaku v France* (1988) 13 EHRR 379. [Note that the latter case also concerned drug offences.]

## PROOF IN ABSENCE

### General

Section 11 Magistrates Courts Act 1980 permits a magistrates' court to hear evidence in the absence of a defendant. In the Crown Court, the position is governed largely by caselaw (see Archbold [2000] 3-197 onwards), save for section 57 Crime and Disorder Act 1998 in relation to absence of accused during preliminary hearings.

Such provisions may be subject to challenge as being incompatible with Article 6 of the Convention. The object and purpose of Article 6 implies that a person charged with a criminal offence is entitled to participate effectively in the hearing. The minimum rights guaranteed under Article 6 (3)(c), (d) and (e) cannot be exercised without being present.

### Suggested points for prosecutors

- Trial in the absence of the accused is not in principle incompatible with the Convention. Provided there are provisions to safeguard the rights of the accused, Convention caselaw does not prevent a hearing in the absence of the accused.
- Domestic law provides sufficient safeguards to protect the defendant's Article 6 rights. It is only in limited and well-defined circumstances that the court will exceptionally proceed to hear a case in the absence of the accused.
- Powers to hear evidence under section 11 MCA 1980 can only be exercised in limited circumstances. The court must be satisfied that the summons was served a reasonable time before the hearing, or that the accused has appeared on a previous occasion to answer the information. If the defendant by his or her behaviour expressly or impliedly waives the right to be present, there can be no objection to proceeding.
- The absence of the accused does not deny the right to legal representation. The defendant's rights under Article 6 can be secured by legal representation: see *Ensslin & others v Germany* (1978) 14 DR 64; *Preston v UK* (1997) EHRLR 695.
- There are several routes for an aggrieved defendant to seek a fresh determination of the merits, either by appeal to the Crown Court, which will proceed by way of re-hearing the evidence, or by statutory declaration under section 14 MCA: see *Poitrimol v France* (1993) 18 EHRR 130 I for ECtHR treatment of similar provisions. The court may also use powers under s142 MCA to re-open the case to rectify mistakes.
- The court is bound to consider the Convention rights of others. Delays in criminal trials because of the wilful absence of the accused may adversely affect the Article 8

rights of victims and witnesses, particularly if they have attended court to give evidence. Provisions providing for proof in absence provide a necessary mechanism to ensure that the rights of witnesses are also secured.

## PUBLIC CORRUPTION

### General

Statutory provisions relating to the prosecution of offences involving corruption in public office include:

- Public Bodies Corrupt Act 1889
- Section 1 Prevention of Corruption Act 1906
- Section 2 Prevention of Corruption Act 1916

The offence provision in section 1 PCA 1906 requires AG/DPP consent.

Section 2 PCA 1916 may be subject to challenge on the basis that it violates Article 6(2) of the Convention. The provision applies a presumption of corruption unless the contrary is proved in respect of payments to persons in public employment prosecuted under the 1889 or 1906 Acts. It may be argued that such a reverse onus provision infringes the right of the accused to be presumed innocent.

In appropriate cases, prosecutors should consider the alternative offence of conspiracy under section 1 Criminal Law Act 1977, which will avoid use of the presumption – see *R v Attorney General ex parte Rockall* (2000) 1 WLR 882. Corruption in public office may also be prosecuted under common law (see *R v Bowden* (1996) 1 WLR 98; *R v Whittaker* (1914) 3 KB 128). Prosecutions under either section 1 or as a common law offence do not involve reliance upon the presumption in section 2 PCA 1916.

The Law Commission considered the issue in a recent consultation paper: *Legislating the Criminal Code – Corruption No 248/1998*. The Law Commission concluded that, by itself, section 2 of the 1916 Act did not necessarily offend against the Convention. However, it also considered that the effect of sections 34 & 35 Criminal Justice and Public Order Act 1994 may render the provisions of section 2 unnecessary, and therefore more difficult to justify as being necessary and reasonable under Convention caselaw.

The Government white paper on the reform of the law of corruption (published June 2000 – *Raising Standards and Upholding Integrity – the Prevention of Corruption – CM 4759*) includes proposals to abolish the presumption in section 2 and to introduce a new offence of corruption modelled on the Law Commission recommendations.

Pending the introduction of legislative reforms, where it is thought appropriate to prosecute under either the 1889 Act or the 1906 Act, arguments that section 2 is incompatible with the accused's Article 6 rights may be met with the following response:

- The provision is compatible, or can be read compatibly with the Convention.
- Provisions which shift a burden to the accused are not necessarily incompatible with the Convention. Article 6(2) does not prohibit rules that transfer a burden of proof to the accused, provided that the overall burden remains with the prosecution, and the provision is confined with 'reasonable limits which take into account ... what is at stake and maintain the rights of the defence' *Salabiaku v France (1988) 13 EHRR 379*.
- It is well-established domestic law that the overall burden of proof is upon the prosecution and that the prosecution must establish guilty beyond reasonable doubt. Section 2 creates only a rebuttable presumption of fact, which the defence may disprove, and which is not unreasonable. The Commission considered a similar type of provision in *X v UK Application 5124/71* in relation to the offence of living off the earnings of prostitution, and considered it did not offend against the Convention.
- The presumption will not come into effect unless the prosecution can establish beyond reasonable doubt that money, gift or other consideration was paid, given to or received by a public employee, **and** that the person providing the payment was holding or seeking a Government contract. Unless this heavy burden is discharged, there is no question of requiring the accused to establish a defence.
- The accused is required only to show facts on the balance of probabilities which are peculiarly within his own knowledge, and which it is not open to the prosecution to investigate.
- The legislation is aimed at a particularly insidious and elusive crime, which undermines integrity in public life. The provision fairly balances the right of the accused to expect the prosecution to prove the case against him, with the importance of detecting and punishing corruption in public service.
- The effect of sections 34 & 35 CJPOA does not necessarily cause the infringement of Article 6 when combined with the presumption. Both sections allow the fact finders to draw such inferences as appear proper from either silence when questioned, or at trial. The court has a discretion in whether it is appropriate, and to what extent inferences from silence may be drawn, depending on the circumstances in an individual case. This consistent with the Convention requirement of fairness in individual cases.

## REGISTRATION OF SEX OFFENDERS

### General

Part 1 of the Act requires offenders who have been convicted of sex offences against children and other serious sex offences – listed in Schedule 1 of the Act – to notify the police of their name and address within 14 days of conviction and any changes to these if they are living there for 14 days or more.

Failure to register is an offence punishable by a fine and/or imprisonment.

The requirement to register applies to persons convicted after the commencement date of the Act and to those serving a sentence of imprisonment at that time. Sentences of more than 30 months attract a lifelong registration requirement.

### Strasbourg caselaw

- The Act has been challenged in two cases *Ibbotson v UK* 40146/98 and *Adamson v UK* 42293/98. In both cases, the applicants alleged a violation of Article 7 of the Convention, which prohibits the imposition of a penalty heavier than the one applicable at the time the criminal offence was committed.
- In both cases, the Court (European Commission in the case of Ibbotson) ruled that the requirement to register did not amount to a penalty within the meaning of Article 7 and the applications were ruled inadmissible.
- In *Adamson v UK*, however, the applicant also invoked the following articles: Article 8 that the requirement to register constituted an unjustified interference with private life; Article 3 that the registration requirement branded him a sex offender for life, which was inhumane and degrading and might put his family at risk; Article 5(1) that inclusion on the register might jeopardise his personal security and that of his family. The Court ruled all these complaints inadmissible.

### Suggested points for prosecutors

- The registration provisions of the Sex Offenders Act are compatible with the Convention
- The purpose of registration is to deter sex offenders from re-offending

- Registration is not a penalty or punishment, but merely an administrative requirement to enable the police to be aware of sex offenders living in their force area
- Thus registration is aimed at pursuing the legitimate aim of preventing further offending while balancing the rights of offenders who have served their sentence
- The European Court has ruled in two cases that the Sex Offenders Act is not inconsistent with the Convention in respect of challenges brought under Articles 3, 5, 7 and 8.

## SECTION 172 ROAD TRAFFIC ACT 1988

### General

This statutory provision requires the keeper of a motor vehicle to give information about the identity of the driver in certain specified circumstances. Failure to do so is an offence under section 172(3) Road Traffic Act 1988 (RTA).

The provision is subject to challenge in the case of *Margaret Anderson Brown v Procurator Fiscal, Dunfermline* (2000 SLT 179 Appeal Court, Scottish High Court of Justiciary). The defence argued that section 172 RTA is incompatible with the Convention as it is in breach of Article 6. The provision was said to offend against the right of silence and the right not to incriminate oneself, which are embodied in Article 6. An appeal against the High Court decision is due to be heard by the Privy Council. In the meantime it should be noted that:

- The facts of the Margaret Brown case may be distinguishable. In the particular case the police used section 172 when they already suspected her of an offence contrary to section 5(1) of the RTA 1988 and when she was already in custody for another offence (suspected theft). Use of a provision compelling response under threat of a criminal penalty from someone already a suspect without caution is a different situation from the general use of section 172.
- The Scottish Court specifically reserved opinion on the use of section 172 for proof of identity of the driver where roadside cameras are used in the detection and prosecution of traffic offences. Road traffic offences recorded on camera can be distinguished on the basis that the requirement under section 172 is made in writing to the registered keeper who is not a suspect at the time the request is made.
- The legal context in Scotland is very different. The admission of the defendant obtained under section 172 was intended to corroborate other evidence that the defendant was driving. The requirement under Scots law for corroboration of material evidence led by the prosecution has no parallel in the law of England and Wales.
- Defence may argue that "chains" of written requirements for details of the driver contravene the rules of evidence relating to hearsay and amount to a breach of Article 6 - the right to a fair trial - because the evidence is unfairly obtained. However the Convention does not lay down rules for the admissibility of evidence. This is primarily a matter of regulation for the national courts. Section 78 PACE

provides an effective procedure within the trial by which the accused can challenge the admissibility of evidence. Each case will turn on its particular facts.

- The Commission has considered similar provisions requiring information on the driver of vehicles in other European states and no breach of Article 6 has been found – *Tora Tolmos v Spain - Application 23816/94, 17 May 1995*. In that case, which arose from the commission of a speeding offence, the Commission rejected an application on the basis of self-incrimination as ill founded. The Spanish regulation obliged the owner of a vehicle or any person named as the driver by the owner to assume responsibility for the way it has been used or to provide the identity of the actual driver. Since it was open to the owner to show that he had nothing to do with the offence, the Commission concluded that the regulation did not breach Article 6.
- Section 172(4) provides for a defence if the keeper does not know, or could not with reasonable diligence have ascertained who the driver of the vehicle was. It is not therefore inevitable that the keeper will incriminate himself or a friend or relative, and the legislation therefore respects Article 6 rights.

## STOP AND SEARCH IN ANTICIPATION OF VIOLENCE

### General

Legislation is compatible with Articles 3, 5, 8 and 14 of the Convention.

Legislation provides for limited intervention aimed at preventing serious violence, namely the stopping and searching of individuals within a limited geographic area, based on reasonable belief that serious violence may take place or that knives or other offensive weapons are being carried within the area.

### **Section 60, Criminal Justice and Public Order Act 1994, amended by Section 8, Knives Act 1997**

- Based on reasonable belief that serious violence may take place in the locality; or that offensive weapons or other dangerous instruments are being carried.
- Provides power to stop and search persons or vehicles for such offensive weapons or dangerous instruments, on authority of police Inspector or above.
- Applies only in limited and specified area.
- Applies only for a period of 24 hours; may be renewed for a further twenty four hours.
- Creates offence of failing to stop when required to do so.

Powers to stop and search are inherently neither inhuman nor degrading (Article 3) or discriminatory (Article 14); individual decisions must be justified on facts available; powers are **limited and proportionate** to the need to prevent serious violence.

Based on reasonable belief as to likelihood of serious violence or use of weapons, therefore **objective basis**; cannot be imposed at random, although may be based on police intelligence etc.

**Stop and search of individuals in these circumstances is carefully provided for by law.**

### **Suggested points for prosecutors**

Article 8 protects the right to respect for private life, which includes the right to walk the streets freely without interference from the police. Article 8 has not, so far, been

interpreted as meaning that respect for a person's private life is infringed if he is simply stopped while walking on a street. However, even if that is asserted, Article 8(2) addresses the relevant justifications. Section 60 prescribes the detailed circumstances in which interference with this right is justifiable (so meeting the requirement of "in accordance with the law"). These relate closely to protecting public safety and the prevention of disorder or crime. As mentioned above, the interference is limited, proportionate, objective and not inherently discriminatory.

Article 5 is engaged where there is an arrest or a detention. There may be circumstances where the stop and the search under section 60 will amount to an arrest or a detention within the meaning of Article 5. The facts of the case, for example, whether the individual consented, whether there was physical restraint, and the period of time involved are all relevant.

Article 5(1)(b) is relevant to justifying a detention in circumstances where the reasonable suspicion is not focused on any particular individual. A detention can be justified for the fulfilment of an obligation prescribed by law: the requirement not to carry knives/offensive weapons in a public place.

- *McVeigh, O'Neill and Evans v UK (1981) 5 EHRR 71* (obligation on persons entering GB from NI to submit to further examination as part of border security) is relevant in justifying powers of temporary detention where there is a legitimate need to obtain immediate fulfilment of the obligation to submit to a limited period of detention but where there is no reasonable suspicion relating to the individual who is stopped.

Where there are reasonable grounds to suspect an individual, detention for purposes of search may be justified under article 5(1)(c). If any evidence is found of any offence (carrying an offensive weapon) person could be taken before a court; if no offence is committed, person is free to go.

Provision protects Convention rights of others who may be subject to unlawful violence in the absence of preventative powers and aids the objective of crime prevention.

## TRESPASSORY ASSEMBLIES

### General

Sections 14A, 14B and 14C Public Order Act 1986

- Section 14A - power to make an order prohibiting trespassory assemblies;
- Section 14B - creates offence of knowingly taking part in an assembly prohibited by an order made under section 14A
- Section 14C - power of police constable to stop and direct an individual not to proceed towards prohibited assembly, with offence provision.

Potential challenges to the prohibition of assemblies on land to which the public has no right of access or only a limited right of access are:

- that the powers amount to an interference with the right to freedom of expression under Article 10;
- that the powers amount to an interference with the right to freedom of peaceful assembly under Article 11.

### Suggested points for prosecutors

- The provisions are compatible with the Convention. The legislation provides only for limited intervention aimed at preventing serious disorder or significant damage.
- The starting point for domestic law is that an assembly on the highway will not necessarily be unlawful. However, there is no right to trespass – orders affecting private land, or assemblies on the highway which are unlawful (eg because obstructive, or disorderly) will still be valid and enforceable: *DPP v Jones and another* (1999) 2 All ER 257 HL
- Article 11 only protects the right to organise and participate in *peaceful* meetings and demonstrations.

- The prohibitory powers are limited and proportionate, applying only in a limited area, for a limited period.
- Prohibitory orders are aimed at preventing crime or disorder in accordance with Articles 10(2) and 11(2). The limited interference with Convention rights is prescribed by law and necessary in a democratic society for the prevention of disorder - *Pendragon v UK* (1999) EHRLR 223 (Commission found order under s14A POA 1986 compatible with Convention, even though peaceful – interference with rights justified and application declared inadmissible).
- Prohibitory orders protect the Convention rights of landowners and others (for example, right to free passage). They do not prevent lawful, peaceful assemblies.
- The provisions contain safeguards to protect the Convention rights of all. Orders under s14A can only be made if police, local authority (outside London) and Secretary of State all satisfied that it is necessary. Only those organising or knowingly taking part in a prohibited assembly commit an offence. Powers under s14C can only be exercised within the area covered by the order. Interference with Convention rights is therefore limited and proportionate.

## YOUTHS IN THE CROWN COURT

Statutory provisions relating to the trial of young offenders in the Crown Court are section 24 Magistrates Courts Act 1980 and sections 53 Children and Young Person's Act 1933. The four exceptions to the rule that all youths must be tried summarily in a youth court may be challenged under Article 3 and/or Article 6.

Domestic provisions are compatible with the Convention, or can be read compatibility under section 3 Human Rights Act, provided appropriate steps are taken in individual cases to ensure that the proceedings meet Convention requirements.

- The decision of the ECHR in T & V UK (February 2000) does not say that youths should not be tried in the Crown Court. The court did not find a breach of Article 3. The fact that young persons are tried in an adult court does not of itself breach the Convention.
- Whether such proceedings are in breach of Article 6 will depend on the circumstances. Provided the safeguards outlined in the Practice Direction (published 16 February) are followed, young offenders may be tried in adult courts in appropriate circumstances.
- The Practice Direction directs courts to adapt the trial process in adult courts (so far as is necessary) to ensure that the trial process does not expose the young defendant to avoidable humiliation, intimidation or distress. All steps should be taken to assist the young defendant to understand and participate in the proceedings. Provided this is done, the legislative provisions permitting young offenders to be tried in the Crown Court will not be in breach of the Convention.
- There are other safeguards for young offenders appearing in courts: section 39 CYPA 1933 prohibits the reporting of material which may identify a child or young person appearing **in any court**. Section 44 CYA 1933 directs the court to have regard to the welfare of **any or young person** appearing before it.