

Sutherland (Appellant) v Her Majesty's Advocate (Respondent) (Scotland)

The Supreme Court has handed down a judgement on whether the use of evidence obtained by "Paedophile Hunters" breached an individual's Human Rights. The answer was a unanimous and emphatic "no."

The appellant was convicted of offences arising out of his contact with the fake profile of a 13 year old boy uploaded to Grindr with which he had engaged in indecent sexualised communication, sent a picture of his erect penis and arranged to meet the "child" for the purpose of sexual activity.

The appellant's appeal to the High Court of Justiciary was refused but the following questions were certified for consideration by the Supreme Court –

- i. Whether, in respect of the type of communications used by the appellant and the "paedophile hunter" group, article 8 rights may be interfered with by their use as evidence in a public prosecution of the appellant for a relevant offence; and
- ii. The extent to which the obligation on the state, to provide adequate protection for article 8 rights, is incompatible with the use by a public prosecutor of material supplied by "paedophile hunter" groups in investigating and prosecuting crime.

Article 8 provides –

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The appellant submitted that there was an interference with his rights to respect for his private life and for his correspondence under article 8(1). The Supreme Court concluded that in relation to the first certified question, there was no interference with the appellant's right to respect for his private life and correspondence under article 8(1) by reason of the use by the prosecution authorities of the evidence obtained from the decoy. In relation to the second question, there was no incompatibility between the obligation on the state to protect rights arising under article 8 and the use by the prosecution authorities of the evidence provided by the decoy in support of the prosecution of the appellant.

In coming to these conclusions the Supreme Court made the following points –

1. The nature of the communications from the appellant to the decoy, whom he believed to be a child, was not such as was capable of making them worthy of

respect for the purposes of the application of the European Convention on Human Rights (ECHR).

2. The communications were sent directly to the decoy, a private individual. Their contents were such that the recipient could not be thought to owe the appellant any obligation of confidentiality. There was no prior relationship between the appellant and the recipient from which an expectation of privacy might be said to arise. The appellant's contact with the decoy came out of the blue and demands by the appellant that their communications should be kept private did not establish a relationship of confidentiality. The appellant had no legitimate interest to assert or maintain privacy in the communications he sent.
3. The evidence had been gathered by a private individual acting on his own behalf, and not by means of surveillance by state authorities, nor by a private individual acting on behalf of or at the instigation of a public authority. He could not reasonably expect that, where his messages constituted evidence of criminal conduct on his part, the recipient would not pass them on to the police.
4. The sending of the communications constituted criminal offences, and the decoy was entitled to provide the evidence to the police. The police and the prosecuting authorities had a responsibility to take effective action to protect children to the extent that the evidence indicated that the appellant represented a risk to them. States party to the ECHR have a special responsibility to protect children against sexual exploitation by adults.
5. Once evidence of the messages had been passed to the police by the decoy, the appellant had no reasonable expectation that the police should treat them as confidential. The police were bound to investigate in order to safeguard children. Nor did the appellant have any reasonable expectation that the prosecution authorities should treat the messages as confidential, and not make use of the evidence in bringing a prosecution. The effective prosecution of serious crimes committed in relation to children is part of the regime of deterrence which a state is required to have in place to protect children. Open justice is an important principle in domestic law and under the ECHR, so a defendant in the position of the appellant can have no reasonable expectation that a prosecution in which reliance is placed on material of this kind will take place in anything other than a public forum.
6. Not only was this a case where the state had no obligation to prevent the authorities from making use of the evidence, there was a positive obligation on them to ensure that the criminal law could be applied effectively so as to deter sexual offences against children. Article 8 has the effect that the prosecution should be entitled to, and indeed might be obliged to, make use of the evidence of the communications with the decoy in bringing a prosecution in these circumstances.
7. Had the appellant been able to show that there had been an interference with his rights under article 8(1), he would still have faced fundamental difficulties in challenging his convictions. Even if there had been an interference with the appellant's article 8(1) rights, it would have been justified under article 8(2) as being in accordance with the law and necessary in a democratic society as a

measure proportionate to promoting the legitimate objectives of the prevention of crime and the protection of the rights and freedoms of others.

8. Further, had the appellant been successful in establishing a breach of article 8(1), it would not follow that his conviction should be quashed as evidence obtained in breach of article 8 may be relied on in criminal proceedings, provided that there is no violation of the right under article 6 to have a fair trial, and there was no unfairness in the proceedings brought against the appellant.

One final point. The appellant had argue in the High Court that authorisation should have been obtained under the Regulation of Investigatory Powers (Scotland) Act 2000 for the decoy to act as a covert human intelligence source within the meaning of that Act, and that as no such authorisation had been sought, the evidence had been obtained unlawfully. However, the Supreme Court held that this argument involved consideration whether interference with the appellant's rights by a public authority had been exercise in accordance with the law under article 8(2), and since the questions certified by the High Court concerned article 8(1) alone, the Supreme Court was not required to consider this point.

Jonathan Savage
Barrister
Criminal Team