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Sutherland v HM Advocate:

The right to privacy, evidence gathering and the integrity of justice in a digital age

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I INTRODUCTION

In the recent case of *Sutherland*, the Supreme Court was asked to consider “the use in a criminal trial of evidence obtained by members of the public acting as so-called “paedophile hunter” (“PH”) groups, and whether this is compatible with the accused person’s rights under article 8 of the European Convention on Human Rights (“the ECHR”)”.¹ The judgment follows a series of cases in the UK (reported and unreported) in which the admissibility of such evidence has been questioned. It also follows increased professional² and academic³ questioning of the appropriateness of such evidence being routinely admitted into trials. As such, although the appeal was dismissed, the judgment makes an important contribution to ongoing discussions surrounding future prosecutions of sexual offences, policing in a digital age and the integrity of the justice system more broadly.

II CASE BACKGROUND

In 2018, Mark Sutherland was active on the adult dating app ‘Grindr’, sending sexual messages and images to a male with whom he had been ‘matched’. These communications continued even after his match claimed to be a 13-year-old boy. The communications involved included a sexually explicit picture of the appellant.⁴ Further arrangements were made to meet with the boy in person at Partick station in Glasgow. In reality, the meeting which took place at Partick station was between Mark Sutherland and adult members of the group ‘Groom Resisters Scotland’ – a vigilante PH group. The confrontation which followed was broadcast on social media. Groom Resisters Scotland then shared their evidence with Police Scotland who charged Sutherland under sections 33⁵ and 34⁶ of the Sexual Offences (Scotland) Act 2009 and section 1 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005⁷. Sutherland was subsequently convicted of attempting each of the charges and sentenced to 12 months’ imprisonment on each charge to be served consecutively. He was also subject to notification requirements for a period of ten years under section 9(2) of the Sexual Offences Act 2003.

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¹ *Sutherland (AP) v HM Advocate*, [2020] UKSC 32.

² Sheriff Brown made clear his disapproval in *Procurator Fiscal (Dundee) v P(P)* [2019] SC Dun 39. This judgment is no longer available, but discussion of the case can be found in *PF, Dundee v P.H.P* [2019] SAC (Crim) 7. Both the National Society for the Prevention of Cruelty to Children (NSPCC) and National Police Chiefs’ Council have previously voiced their concerns to the BBC, “Police concerns over rise of ‘paedophile hunters’”, BBC News, November 6, 2019; available at: <https://www.bbc.co.uk/news/uk-england-50302912> [Last accessed 21 July 2020].

³ Joe Purshouse, “‘Paedophile Hunters’, Criminal Procedure, and Fundamental Human Rights” *Journal of Law and Society* (2020) [early view, citation tbc] <https://doi.org/10.1111/jols.12235>; Rachel McPherson, “Entrapment and the road to fraud” 2019 *Juridical Review* 277.

⁴ It is also worth noting that the photograph which had been used to create the fake online profile was that of a boy approximately 13 years old. This picture had been deliberately used in order to attract communications with those with a sexual interest in children, *Sutherland (AP) v HM Advocate*, [2020] UKSC 32 at para 3.

⁵ “Causing an older child to look at a sexual image”.

⁶ “Communicating indecently with an older child”.

⁷ “Meeting a child following certain preliminary contact”.

Sutherland appealed against his convictions on the basis that the evidence provided by Groom Resisters Scotland was obtained contrary to the Regulation of Investigatory Powers (Scotland) Act 2000 ('RIPSA') and that his rights under article 8 of the ECHR had been breached by the admission of such evidence. The appeal, heard alongside another similar case involving evidence gathered by a PH group, was refused by the Scottish Court of Criminal Appeal.⁸ However, permission was granted for the case to be remitted to the Supreme Court for further consideration of the compatibility issues which had arisen.⁹ The Supreme Court hearing which took place in June 2020 had been expediated on the basis of the large number of ongoing cases relying on the evidence gathered by PH groups.

III THE RIGHT TO PRIVACY

Under article 8, an individual's right to privacy, family life and correspondence is protected. The second paragraph of article 8 provides:

There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interest 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 freedom of others.

The appeal before the Supreme Court centred around two article 8 compatibility issues:

1. whether, in respect of the type of communications used by the appellant and the PH group, article 8 rights may be interfered with by their use as evidence in a public prosecution of the appellant for a relevant offence; and
2. the extent to which the obligation on the state, to provide adequate protection for article 8 rights, is incompatible with the use by a public prosecutor of material supplied by PH groups in investigating and prosecuting crime.¹⁰

Article 8 creates both negative and positive obligations. This second ground of the appeal relates to a state's positive obligation to protect article 8 which coexists alongside the negative obligation not to interfere with privacy rights.

It was submitted on behalf of the appellant that the used of Grindr (and similar apps) invokes article 8 by virtue of the fact that the communications which take place are on a one-to-one basis¹¹, therefore giving rise to a reasonable expectation of privacy. It was further submitted that article 8 protection is not lost because the conduct in question is criminal.¹²

In the unanimous judgment delivered by Lord Sales, two reasons were set out as to why the appellant's article 8 rights had not been breached: (i) the nature of the communications were not capable "of making them worthy of respect for the purposes of the application of the ECHR"¹³ and

⁸ The Appeal Court's judgment on this remains unpublished.

⁹ In relation to article 8.

¹⁰ *Sutherland (AP) v HM Advocate*, [2020] UKSC 32 at para 11.

¹¹ It was recognised that earlier reference by the High Court to exchanges taking place in "chat rooms" amounted to a "slip" (at para 14).

¹² On this point reference was made to *G v United Kingdom* which involved sexual activity between older children. The court's rejection of this point can be found at para 49.

¹³ *Sutherland (AP) v HM Advocate*, [2020] UKSC 32 at para 31.

(ii) the appellant had no reasonable expectation of privacy (since it is entirely foreseeable that a child would share communications of this nature with an adult).¹⁴

On the first issue of compatibility the Court referred to earlier comments made by Lord Clarke of Stone-cum-Ebony in *re JR38*: “on the facts here the criminal nature of what the appellant was doing was not an aspect of his private life that he was entitled to keep private.”¹⁵ As such, in *Sutherland*, the appellant’s failure on this first issue can be located in the fact that his conduct conflicted with the fundamental values which underpin article 8.

On the second issue, the Court emphasised the positive duty which lies with public authorities to ensure the principles of criminal law are adhered to: public protection (particularly of vulnerable groups such as children), deterrence and punishment of crime.

The Court emphasised that even where article 8 is applicable, a balance must be struck between competing interests.¹⁶ It was further remarked upon that, even where evidence has been obtained in breach of article 8, it may be relied upon provided that article 6 (right to a fair trial) has not be violated.¹⁷ In this regard, it was reiterated that article 8 is a qualified right.

IV EVIDENCE GATHERING BY ONLINE ACTIVIST GROUPS

At the outset of the judgment, Lord Sales emphasised the narrow focus of the appeal: compatibility issues under article 8. As such, the Court made clear that its remit did not include providing a view on the wider issue of the appropriateness of using evidence gathered by PH groups. Yet, discussion on this point must continue given the obvious problems posed by the use of such evidence.

Under Scottish criminal procedure, the admission of evidence can be challenged in a number of ways. Exclusion of evidence arguments have typically been structured around whether or not evidence is unfairly obtained, rather than conceptualised as entrapment.¹⁸ However, a plea of entrapment could form the basis of an admissibility argument¹⁹, as could objections based on RIPSA compliance. Historically, limitations been placed upon the plea of entrapment in Scots law, specifically, that it only applies to the conduct of police authorities.²⁰ However, the Court of Appeal in England Wales and European Court of Human Rights have both previously recognised that entrapment could be carried out by persons other than a law authority²¹, suggesting that some scope for this to be developed in Scotland exists.²²

Reflecting on the practises of PH groups, Purshouse identifies three particular areas of concern: the threat posed to the administration of justice; the threat posed to due process and the threat of stigmatization and collateral damage. He recognises that the practises of PH groups are diverse but concludes that there exists good reason for not only a robust regulation of such groups, but perhaps also criminalisation of that specific behaviour (falsely presenting oneself as a child online).²³ In

¹⁴ *Sutherland (AP) v HM Advocate*, [2020] UKSC 32 at para 31.

¹⁵ *re JR38* [2015] UKSC 42 at para 112 cited in *Sutherland (AP) v HM Advocate*, [2020] UKSC 32 at para 46.

¹⁶ *Sutherland (AP) v HM Advocate*, [2020] UKSC 32 at para 67.

¹⁷ *Sutherland (AP) v HM Advocate*, [2020] UKSC 32 at para 71.

¹⁸ For discussion see Fiona Leverick and Findlay Stark. “How do you solve a problem like entrapment” (2010) *Edin. L. Rev.* 14(3) 467 and Rachel McPherson, “Entrapment and the road to fraud” 2019 *Juridical Review* 277.

¹⁹ *Jones and Doyle v HM Advocate* [2009] H.C.J.A.C. 86.

²⁰ *Jones and Doyle v HM Advocate* [2009] H.C.J.A.C. 86.

²¹ *Hardwicke and Thwaite* [2001] Crim. L.R. 220; *Shannon v United Kingdom* 67537/01, 6 April 2004.

²² Rachel McPherson, “Entrapment and the road to fraud” 2019 *Juridical Review* 277.

²³ Joe Purshouse, “‘Paedophile Hunters’, Criminal Procedure, and Fundamental Human Rights” *Journal of Law and Society* (2020) [early view, citation tbc] <https://doi.org/10.1111/jols.12235>

expressing his own disapproval of the use of such evidence, Sheriff Brown has previously noted that the common law offence of fraud in Scots law adequately covers the types of behaviours which are undertaken by members of these groups.²⁴ Certainly, members of PH groups involved in confrontations have incurred police warnings²⁵ and prosecutions²⁶ for public order offences and offences against the person, but it would appear that, in practice, they are seldom prosecuted for actions undertaken in their 'sting' operations.

In *Sutherland*, senior counsel for the appellant, Gordon Jackson QC, described the Crown's use of this type of evidence as "systemic". He suggested that there now existed large-scale reliance on this form of evidence in Scottish trials, citing a figure of 110 cases currently awaiting trial in Scotland in which PH evidence was being relied upon.²⁷ For him, the creation of official Practice Guidelines by the Crown Office and Procurator Fiscal Service (COPFS) on the use of evidence by PH groups further demonstrates the systemic nature of reliance upon this type of evidence. The fact that such a large number of these cases result in prosecution, for Jackson, encourages vigilante groups to continue.

The data available on the use of this evidence points to the fact that it is now widespread in Scotland and the rest of the UK. In 2018, the BBC reported in that evidence from PH groups had been used to charge 150 suspects in a 12-month period in England and Wales.²⁸ The number of cases involving PH evidence had more than tripled in England and Wales over a two year period, increasing from 57 cases in 2016 to 179 in 2018.²⁹ A Freedom of Information request made to COPFS in 2018 confirmed that they do not record data on the number of reports based on evidence gathered by PH groups in Scotland.³⁰ They did, however, provide data on the total number of charges reported under section 1 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005³¹:

²⁴ *Procurator Fiscal (Dundee) v P(P)* [2019] SC Dun 39. For discussion of this case see Rachel McPherson, "Entrapment and the road to fraud" 2019 *Juridical Review* 277.

²⁵ "Vigilante Paedophile hunter group banned from area by police", *The Scotsman*, August 18, 2018; available at: <https://www.scotsman.com/news-2-15012/vigilante-paedophile-hunter-group-banned-from-area-by-police-1-4786179> [Last accessed 20 July 2020]

²⁶ "Members of 'Wolfpack' appear in court following Edinburgh sting", *The Courier*, September 29, 2018; available at: <https://www.thecourier.co.uk/fp/news/local/fife/734735/members-of-wolfpack-appear-in-court-following-edinburgh-sting/> [Last accessed 20 July 2020]; "Leeds-based paedophile hunters group cleared of assault", *BBC News*, October 20, 2019; available at: <https://www.bbc.co.uk/news/uk-england-leeds-50236017> [Last accessed 21 July 2020]

²⁷ *Sutherland (AP) v HM Advocate*, [2020] UKSC 32, morning session submissions available at: <https://www.supremecourt.uk/watch/uksc-2020-0022/030620-am.html> [Last accessed 21 July 2020]

²⁸ "'Paedophile hunter' evidence used to charge 150 suspects", *BBC News*, April 10, 2018; available at: <https://www.bbc.co.uk/news/uk-england-43634585> [Last accessed 20 July 2020]

²⁹ "Police concerns over rise of 'paedophile hunters'", *BBC News*, November 6, 2019; available at: <https://www.bbc.co.uk/news/uk-england-50302912> [Last accessed 21 July 2020]

³⁰ Crown Office and Procurator Fiscal Service. 2018. *Responses we have made to FOI requests*. Available at: <https://www.copfs.gov.uk/foi/responses-we-have-made-to-foi-requests/48-responses2018/1720-protection-of-children-and-prevention-of-sexual-offences-scotland-act-2005-march-2018-r017913> [Last accessed 21 July 2020]

³¹ Crown Office and Procurator Fiscal Service. 2018. *Responses we have made to FOI requests*. Available at: <https://www.copfs.gov.uk/foi/responses-we-have-made-to-foi-requests/48-responses2018/1720-protection-of-children-and-prevention-of-sexual-offences-scotland-act-2005-march-2018-r017913> [Last accessed 21 July 2020]

Table 1: Number of charges reported to COPFS under section 1 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005

	2012-13	2013-14	2014-15	2015-16	2016-17
Charges reported to COPFS	28	56	36	50	70
Court proceedings	14	36	23	31	46
No action	<5	8	<5	<5	8

In 2019, Police Scotland reported to the BBC that the use of PH evidence in recorded offences had grown from one case in 2016 to more than 60 per cent of cases in 2016.³² In the recently published *Strategic review of Police Scotland's response to online child sexual abuse*, it was commented:

Almost half of the online grooming cases emanate from the activities of online child abuse activist groups (vigilante groups), who are unregulated and untrained. A more robust proactive capability on the part of Police Scotland would reduce the opportunities for these groups to operate.³³

Although it was recognised that Police Scotland generally had a good level of awareness of the standard operating procedures for responding to Online Child Abuse Activist Groups³⁴, it was further commented that:

The absence of online covert activity by Police Scotland has created a proactive void that undermines any challenge to the legitimacy of Online Child Abuse Activist Groups.³⁵

Purshouse notes that increased collaboration with PH groups has occurred against a wider movement which has seen the responsibility for policing child sex offences taken up by numerous non-state actors, such as internet providers.³⁶ In this regard, the policy of using PH group evidence is taking place against a wider cultural change which has occurred in policing – one which can be linked to the number of offences which are now committed online. In 2016-17 it was estimated that the internet was used to as a means to commit at least 20 per cent of all sexual crime recorded in Scotland. In the same period, 51 per cent of 'other sexual crimes' recorded were 'cyber-enabled' (up from 38 per cent in 2013-14). Compared to non-cyber cases, victims and offenders tended to be younger (under 16 for the most part).³⁷ Criminal offences are now increasingly carried out online;

³² "Police concerns over rise of 'paedophile hunters'", BBC News, November 6, 2019; available at: <https://www.bbc.co.uk/news/uk-england-50302912> [Last accessed 21 July 2020]

³³ HM Inspectorate of Constabulary in Scotland. 2020. *Strategic review of Police Scotland's response to online child sexual abuse*. At p 5; available at <https://www.hmics.scot/sites/default/files/publications/HMICS20200226PUB.pdf> [Last accessed 21 July 2020]

³⁴ HM Inspectorate of Constabulary in Scotland. 2020. *Strategic review of Police Scotland's response to online child sexual abuse*. At p 45 para 250; available at <https://www.hmics.scot/sites/default/files/publications/HMICS20200226PUB.pdf> [Last accessed 21 July 2020]

³⁵ HM Inspectorate of Constabulary in Scotland. 2020. *Strategic review of Police Scotland's response to online child sexual abuse*. At p 8; available at <https://www.hmics.scot/sites/default/files/publications/HMICS20200226PUB.pdf> [Last accessed 21 July 2020]

³⁶ Joe Purshouse. 2020. "'Paedophile Hunters', Criminal Procedure, and Fundamental Human Rights" *Journal of Law and Society*. <https://doi.org/10.1111/jols.12235>

³⁷ Scottish Government. 2018. *Cybercrime in Scotland: A Review of the Evidence*. At pp 7-8. Available at <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and->

the landscape in which sexual offences are committed is radically different to the one which existed ten years ago. Such changes place new and increased demands on the criminal justice system and on police in particular. The *Strategic review of Police Scotland's response to online child sexual abuse* recognises this changing landscape and invites a considered reflection on the wider strategies employed in responding to online child sexual abuse in particular.

V CONCLUSION

The dismissal of this appeal by the Supreme Court clarifies the legal position in relation to article 8 compatibility. However, unanswered questions remain about the use of evidence gathered by PH groups. There exists growing professional and academic unease about the multi-faceted dangers associated with the use of such evidence. Given the numbers of convictions based on evidence gathered by PH groups, it is clear that significant financial resources would need to be provided to police services in order to replicate those investigations being undertaken by members of these groups and that such investigations would have to be RIPSAs compliant.³⁸ In this regard, there is no simple solution to the problem. However, this should not mean that the current status quo should remain. Urgent regulation of this landscape is required to ensure that the correct balance is struck between deterrence/punishment of crime and upholding the integrity of evidence used to secure criminal convictions.

[analysis/2018/03/cyber-crime-scotland-review-evidence/documents/00532978-pdf/00532978-pdf/govscot%3Adocument/00532978.pdf](https://www.gov.scot/publications/analysis/2018/03/cyber-crime-scotland-review-evidence/documents/00532978-pdf/00532978-pdf/govscot%3Adocument/00532978.pdf) [Last accessed 20 July 2020]

³⁸ The type of activity currently undertaken by PH groups would be considered “Covert Human Intelligence Sources” (CHIS) work if undertaken by the police. Under RIPSAs, CHIS work requires prior authorisation. This would involve a written application in advance, setting out the reasons why the authorisation is necessary, the purpose for which the CHIS will be employed, the nature of the operation, the nature of the conduct which will be undertaken, the details of any collateral intrusion which may occur and why this is justified, the details of any confidential information which may be obtained as a result of the operation, the level of authorisation required and the reason why authorisation is considered proportionate to what it seeks to achieve. Scottish Government. 2017. *Covert Human Intelligence Sources: Code of Practice*. At para 5.10. Available at <https://www.gov.scot/publications/covert-human-intelligence-sources-code-practice/pages/1/> [Last accessed 8 August 2020]