COPS WITH CAMERAS – WHAT CAN THEY DO?

THE law regulating the taking and retention of photographs by the police is in a state of considerable uncertainty and flux. That much is clear from the decision of the Court of Appeal in *Wood* v. *Commissioner of Police for the Metropolis* [2009] EWCA Civ 414, in which the decision at first instance [2008] EWHC Admin 1105 (noted [2009] C.L.J. 20) was reversed by a divided Court of Appeal. The complainant, who was not himself suspected of having participated in any unlawful activity, had been photographed by the police leaving the site of a potentially unruly meeting. He had sought a declaration that the conduct of the police was unlawful and an order that the photographs be destroyed. All three members of the Court of Appeal disagreed with the judge's decision that the claimant's privacy rights were not invaded by the acts of taking and retaining the photographs, and that Article 8(1) of the European Convention was not even engaged. Moreover, the majority decided that the police had not discharged the burden of establishing that the taking and retention were proportionate to the aim of detecting and preventing crime, as permitted by the exceptions identified in Article 8(2). In the event, then, the appeal was allowed.

The dissenting member of the Court was Laws L.J., and much of his relatively lengthy judgment is devoted to the question of whether Article 8(1) is engaged. The other two members of the court (Dyson L.J. and Lord Collins) agreed with his analysis on this point. At the centre was the conclusion that Article 8 was intended to protect the personal autonomy of individuals which make a person "master of all those facts about … identity, such as his name, health, sexuality, ethnicity, his own image … and also of the 'zone of interaction'… between himself and others", at [18]. Moreover, "the paradigm case of Article 8's application is where the putative violation is by the State itself", at [20]. But this did not mean that the mere taking of photographs necessarily engaged Article 8, even when the agency was the State, as the claimant had contended. In this fact-sensitive context, what mattered was that the Metropolitan Police were visibly and with no obvious cause taking photographs of an individual going about his lawful business in the streets of London with the clear implication that they would retain and use them. The appellant could not and did not know why they were doing it and what use they might make of the pictures. This amounted to a sufficiently significant intrusion into the complainant's integrity and space as to amount to a *prima facie* invasion.

This much was consonant with the reasoning of the decision of the Grand Chamber of the European Court of Human Rights in *Marper* (Applications no. 30562/04 and 30566/04, judgment delivered on 4 December 2008) in whose shadow the judgment at first instance had been given. That decision (which was concerned with fingerprints and

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DNA evidence rather than photographs) was handed down only a few weeks before the hearing in *Wood*, and it may be wondered whether its implications for UK law and practice have yet been fully appreciated. The European Court consistently takes the view that the mere storing of data relating to the private life of an individual amounts to an interference within the meaning of Article 8(1) whatever use the data may be put to in the future. This means in context that the police must be able to show that the storage is undertaken in accordance with the law, and that it is proportionate. Both Dyson L.J. and Lord Collins were not persuaded on the proportionality point. Even though the aims – the prevention and detection of crime – were sanctioned, they could not justify the retention of photographs after it had become abundantly clear within days after the meeting that no offences had been committed there, by the claimant or by anybody else. The suggestion that the police might be entitled to retain them just in case the claimant might commit an offence at a subsequent meeting could not carry the point. That being so, they did not need to address the lawfulness point.

Laws L.J.'s conclusion that the retention of the photographs was proportionate required him to consider whether the practice was properly regulated by law. There is no doubt that the common law can be relied upon as providing the legal framework for the purposes of compliance with this aspect of European Convention law, and Laws L.J. expressed himself satisfied that it did so in this case. But it must be questionable whether it does so to the degree of specificity that European human rights jurisprudence requires. To count as regulated, the law must be accessible, and couched in language sufficient to permit the citizen subject to it to know what its dictates require. There is a "Standard Operating Procedures on the Use of Overt Filming/ Photography" document produced by the Metropolitan Police which is not, however, a public document, and it was not disclosed in the course of the current proceedings. But there is no comparable document, as Lord Collins notes, on the retention of photographs. It would seem that the practices that Laws L.J. describes in his judgment as to how photographs are in fact dealt with are just that, practices, rather than the product of some protocol or a set of rules that the police are obliged to apply. There would appear to be no constraints relating to matters such as the seriousness of the offences involved and what the limits might be as to the length of time for which the photographs may be kept. Nor does there appear to be any independent oversight of the practices, and there are very few opportunities to challenge what is being done. If, as Lord Collins puts it, this was "not the case for the exploration of the wider, and very serious, human rights issues which arise when the State obtains and retains the images of persons who have committed no offence and are not suspected of having committed

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any offence", we will have to hope that an opportunity, whether forensic or legislative, arises before too much longer. The issues are important, both in front of and behind the lens.

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MANSLAUGHTER AS A "VICISSITUDE OF LIFE"

IN *Gray* v. *Thames Trains* [2009] UKHL 33, [2009] 3 W.L.R. 167 the claimant was involved in a 1999 train crash caused by the negligence of the defendants. He suffered minor physical injuries and post-traumatic stress disorder ("PTSD"). In 2001, Mr Gray fatally assaulted a man; at his ensuing prosecution, the Crown accepted a plea of manslaughter on the grounds of diminished responsibility caused by the PTSD. He was sentenced to be detained indefinitely under the Mental Health Act 1983.

The defendants admitted liability up to the date that the claimant was sentenced, but thereafter resisted his claim (being, more specifically, for loss of earnings, general damages for feelings of remorse and damage to reputation, and an indemnity against any liabilities to the deceased). The defendants argued that these heads of loss were excluded by the maxim *ex turpi causa non oritur actio* (or more accurately, *non oritur damnum*). The House of Lords agreed, reversing the Court of Appeal [2008] EWCA Civ 713.

Lord Hoffmann identified a narrower and a wider version of *ex turpi causa*. The narrower rule was that "you cannot recover for damage which is the consequence of a sentence imposed upon you for a criminal act", at [32]. As Lord Hoffmann pointed out, this is well established (*cf. Clunis* v. *Camden and Islington Health Authority* [1998] Q.B. 978), and can readily be justified by the need to preserve consistency across the legal system. As Samuels J.A. said in a judgment quoted with approval by both Lord Hoffmann and Lord Rodger of Earlsferry: "If the law of negligence were to say, in effect, that the offender was not responsible for his actions and should be compensated by the tortfeasor, it would set the determination of the criminal court at nought. It would generate the sort of clash between civil and criminal law that is apt to bring the law into disrepute": *State Rail Authority of New South Wales* v. *Wiegold* (1991) 25 N.S.W.L.R. 500, 514.

For Lord Hoffmann, this disposed of the claim for lost earnings and damage to reputation, since these losses were caused by the lawful sentence imposed upon the claimant. But his Lordship thought it might be more difficult to bring within this narrower version of the rule the claimant's feelings of remorse and the potential liability against which he claimed to be indemnified, since these were not consequences of the

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