The applicant's age (he was under 21 at the date of sentence) meant that the court could not impose a hospital and limitation direction under s.45A of the Mental Health Act 1983. This meant that what the court referred to as the "double lock" of both the Parole Board and the first-tier Tribunal being required to adjudicate upon his release was not available. The court therefore had to consider which of these two judicial bodies was better placed to assess risk in this case. The court accepted the psychiatric opinion before it that the first-tier Tribunal was the most appropriate body to perform this function in this case.

Allowing the appeal, the court quashed the sentence of custody for life and substituted a treatment order under s.37 of the Mental Health Act 1983 with a restriction order under s.41 of the same Act.

Features

Violating the right to a fair trial? The secure dock in England and Wales

By Joe Stone QC and Jodie Blackstock[1]

An update

In 2015 we drew attention, by separate means, to the use of the dock in criminal trials and asked whether this was necessary in a modern era where UK law respects the rights contained in Article 6 ECHR to be presumed innocent and effectively to participate in one's defence.[2] In these pieces we drew attention to the historical absence of the secure dock in this country until 20 years ago, and significant similar jurisdictions almost entirely. In our distinct conclusions we suggested that its use was outdated and unfair, drawing on recent mock jury research and appellate reasoning from courts that should be influential to our own. As we continue this debate with colleagues and law reformers, we feel that readers of *Archbold Review* may find it useful to consider that the European Court of Human Rights has now unequivocally ruled the secure dock a violation of the right to a fair trial.

Yaroslav Belousov v Russia[3]

Mr Belousov brought a complaint pursuant to Article 3 ECHR that placement in "glass cabins" during trial in Russia amounted to degrading treatment (an additional claim relating to metal cages was ruled inadmissible) and Article 6 ECHR that such placement restricted the defendants' effective participation in their trial. The applicant stood trial together with nine other defendants for violent disorder following a demonstration. The glass cabins are described in the judgment as follows:

> [74] On 6 June 2013 the court proceedings began in hearing room no.338 of the Moscow City Court. The latter court lent its premises to the Zamoskvoretsky District Court so as to accommodate all the participants in the proceedings, the public and the press. In that hearing room ten defendants were held in a glass cabin measuring 3.2 m x 1.7 m x 2.3 m (height). The Government submitted that the glass cabin was a permanent courtroom installation consisting of a steel frame and sheets of bulletproof glass, with a partition inside, a steel mesh ceiling and a secure door; the cabin was equipped with benches. The walls of the cabin had slots allowing documents to be passed between the defendants and their counsel; ventilation outlets were at floor level, and near the dock was an air conditioner. The cabin was equipped with microphones allowing for consultations with counsel and facilitating the defendants' participation in the proceedings. The Government specified that convoy officer [sic] guarded the cabin on both sides, supervised the defendants and intercepted any attempts of "contact with outsiders", but the defendants could communicate with their counsel with the court's permission.
>
> [75] The applicant submitted that the glass cabin lacked space and ventilation and that it was virtually soundproof, hampering the defendants' participation in the proceedings and their communication with counsel. The benches had no backrests, and the lack of space made it impossible to have documents; it was impossible to consult counsel or the case file during the hearing. The applicant also submitted that the video evidence examined at the hearing could not be seen by him from the cabin because of the distance between the cabin and the screen and his poor eyesight.
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> [76] In August 2013 the proceedings moved to hearing room no. 635 of the Moscow City Court. This hearing room was equipped with two glass cabins similar to the one in hearing room no. 338, except that there were no slots in them. Each cabin measured 4 m x 1.2 m x 2.3 m (height). From 2 August 2013 one of the defendants was no longer placed in the glass cabin owing to a change in the measure of restraint for him. The nine remaining defendants were divided between the two cabins.

The glass cabins described here and used in Russia for defendants remanded in custody are not dissimilar from the secure dock now used in nearly all criminal courtrooms in England and Wales, with the exception that Russian security officers are likely to be armed.[4] The case is therefore significant in that the findings by the European Court of Human Rights as to detrimental effects are entirely likely to be occurring in each case appearing before our domestic criminal courts.

Degrading treatment

Although our primary focus is the impact of the dock on the

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2 See J. Stone, "Is it now time to abolish the dock in all criminal proceedings in England and Wales?," *Archbold Review* [2015] 3, pp 7-9, https://www.archbolde-update.co.uk/PDF/2015/Archbold%203-15%20v%206.pdf and J. Blackstock, *In the Dock: reassessing the use of the dock in criminal trials* (JUSTICE, 2015), available at: https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2015/07/JUSTICE-In-the-Dock.pdf.

3 App. nos. 2653/13 and 60980/14, 4 October 2016.

4 Google the Pussy Riot trial and you will get an impression of a similar set-up to ours, save that Russia seems to employ floor-to-ceiling glass.

fairness of the proceedings, it is worth noting that the applicant also complained that the conditions in the glass cabin were cramped, with ten defendants held there and that the confinement caused difficulties in communication with counsel, in violation of Article 3 ECHR. Russia countered that these cabins are used for all detainees placed in pre-trial detention and that the glass cabins were replacing the metal cages (which had previously been ruled in breach of Article 3 ECHR in *Svinarenko and Slyadnev v Russia*,[5] due to the objectively degrading nature of cages). The appearance of the glass cabins, by contrast, did not violate Article 3 ECHR. The cramped conditions were overcome by being moved to a courtroom with two glass cabins.

The court at [124] agreed that the appearance of the glass cabins is not as harsh as the metal cages, recalling that the means chosen for ensuring courtroom order and security must not involve measures of restraint which, by virtue of their level of severity or by their very nature, would bring them within the scope of Article 3 ECHR. It noted that in *Svinarenko and Slyadnev* the court had surveyed security in other Member States and found that glass installations are used in courtrooms although their designs vary from glass cubicles to glass partitions, and in the majority of the States their use is reserved for high-security hearings.

However, the court noted in *Belousov* at [125] that the glass cabin could reach a level of humiliation that would violate Article 3 ECHR if the circumstances of the defendants' confinement, taken as a whole, "would cause them distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention."[6] The court held that the crowded conditions in the first courtroom did amount to a violation of Art.3 ECHR, but the second courtroom was acceptable since there was more space available.

Although trials involving ten or more co-defendants are unusual in the courts in England and Wales, they are not unheard of. The dock may also be filled with other professionals engaged in necessary activities that may crowd the space – interpreters, intermediaries, dock officers, security officers and/or psychiatric nurses. A crowded secure dock, where the defendant is required to remain throughout the trial, could give rise to a violation of Art.3 ECHR.

Effective participation

Mr Belousov also complained that his confinement in glass cabins during the court hearings hindered his participation in the trial, in particular because the glass partition reduced visibility and audibility and made confidential exchanges with legal counsel impossible. The interior arrangement of the cabins also made it awkward to handle and read documents. He further complained that the intensive schedule of the court hearings and late arrivals back at the detention facility did not leave him sufficient time to prepare for the next day's hearings. The lack of sleep compounded by lengthy transfers from the detention facility in difficult conditions led to physical exhaustion which also diminished his ability to participate in the proceedings and to defend himself effectively.

The Russian Government contended that the applicant's capacity to participate in the proceedings had not been affected by the glass cabins because the latter were equipped with loudspeakers and microphones. It also did not consider the schedule of the court hearings excessively intensive, referring to the complexity of the case and the need to strike an appropriate balance between expeditious proceedings and the interests of proper administration of justice. It argued that the applicant's requests for intervals during the hearing to allow for preparations and consultations had usually been granted.

With regard to the first courtroom, the court held at [147] that it would find it difficult to reconcile the degrading treatment of the defendant during the judicial proceedings with the notion of a fair hearing, regard being had to the importance of equality of arms, the presumption of innocence, and the confidence which the courts in a democratic society must inspire in the public, above all in the accused. The first two months of the trial were therefore conducted in breach of Article 6 ECHR, by virtue of the Article 3 ECHR breach.

The court considered the second courtroom in the context of every defendant in Russian who is in pre-trial detention being placed either in a glass cabin, like in England and Wales, or where this is not available, a metal cage. At [149] the court recalled that a measure of confinement in the courtroom may affect the fairness of a hearing guaranteed by Article 6 ECHR, in particular because it may have an impact on the exercise of an accused's rights to participate effectively in the proceedings and to receive practical and effective legal assistance.[7] This includes the right to communicate with one's lawyer without the risk of being overheard by a third party "as one of the basic requirements of a fair trial; otherwise legal assistance would lose much of its usefulness".[8]

Although the court recognised that court order and security is necessary for the proper administration of proceedings, any measures restricting the defendant's participation in the proceedings or imposing limitations on consultation with their lawyers should "only be imposed in so far as is necessary, and should be proportionate to the risks in a specific case".[9]

As the court explained:

> In the present case, the applicant and his co-defendants were separated from the rest of the hearing room by glass, a physical barrier which to some extent reduced their direct involvement in the hearing. Moreover, this arrangement made it impossible for the applicant to have confidential exchanges with his legal counsel, to whom he could only speak through a microphone and in close proximity to the police guards. It is also of relevance that the cabin was not equipped to enable the applicant to handle documents or take notes.[10]

The court reflected that the glass cabin was not used due to a specific security risk or concern, but, rather, was a matter of routine. It held that domestic courts need to choose the most appropriate security arrangement for the circumstances of the case, taking into account, the administration of justice, the fairness of the proceedings and the presumption of innocence:

> The trial court did not seem to recognise the impact of these courtroom arrangements on the applicant's defence rights, and did not take any

5 App. nos. 32541/08 and 43441/08, ECHR (GC),17 July 2014.

6 Applying *Kudla v Poland* (GC), app. no. 30210/96, 26 October 2000 at [92-94]).

7 Referring to *Svinarenko and Slyadnev* at [134] and the cases cited there.

8 See *Sakhnovskiy v Russia*, app. no. 21272/03, 2 November 2010 (GC), at [97].

9 Applying *Van Mechelen*, app. no. 55/1996/674/861-864 (23 April 1997), at [58], and *Sakhnovskiy*, at [102].

10 At [151].

> measures to compensate for these limitations. Such circumstances prevailed for the whole duration...and could not but adversely affect the fairness of the proceedings as a whole (at [152]).

The court concluded at [153] that the defendant's rights to effectively participate in proceedings and to receive practical and effective legal advice had been restricted, and that there were no necessary or proportionate reasons for doing so. This was in violation of Articles 6(1) and 6(3)(c) ECHR.

Implications for England and Wales

The case raises significant implications for practice in the criminal courts of England and Wales, where use of the secure dock, irrespective of whether a person is remanded in pre-trial detention, is now routine in almost all cases. The conditions in our docks are equally hostile to an effective defence. There is no space for documentation or to take notes; passing documents though the gaps in the glass partitions is nigh on impossible; consultation with counsel – or the rarely-sighted solicitor – is subject to gaining their attention by banging, waving and other demeaning methods; consultation is done within hearing of other parties, the dock officer, anyone else in the dock, and if it is particularly difficult to communicate through the glass, everyone else in the courtroom. We view British justice with smug complacency, but in this respect it would appear that our courts share the same flaws as countries like Russia. As the Strasbourg Court has held, our trial courts need to recognise the impact of these arrangements on the defence rights of people standing trial. But first, as defence lawyers, we need to recognise that the enclosure and isolation of our clients for the duration of their trial without clear justification is, quite simply, a violation of their rights.

Confiscation: An Update (Part 2 - Procedure & Practicalities)

By Polly Dyer[1] and Michael Hopmeier[2]

Introduction

This article aims to assist the practitioner and judge by outlining the guidance the appellant courts have recently provided as to procedure and practicalities at confiscation, restraint and enforcement hearings.

General procedural matters

The most significant of the recent decisions in this area is *Guraj*,[3] not least because the Supreme Court restated the general principle that, before holding that an order was invalidated by a procedural error, the court should ask itself whether it was really the intention of Parliament that such a drastic consequence should follow. But as this decision was fully examined by Alice Lepeuple earlier this year, no more will be said about it here.[4]

A less tolerant attitude towards procedural failings was shown by the European Court of Human Rights in *Piper v United Kingdom*[5]– which the Strasbourg Court decided some 11 years and two months after the national proceedings had finally concluded with a decision of the Court of Appeal on the defendant's confiscation order. The Strasbourg Court found that the delays attributable to the state authorities in the national proceedings totalled some three years. In view of what was at stake for the applicant, and despite the fact that he was responsible for most of the overall delay, the three years of delay attributable to the state authorities resulted in the proceedings not being completed within a reasonable time. As such, there had been a breach of art.6(1) of the European Convention – albeit a less grave one than the applicant had claimed.

In *Halim*,[6] the Court of Appeal – referring back to *Johal*[7] – held that Parliament had intended the courts to take a broad approach to what constitutes "exceptional circumstances" in s.14(4) of POCA. Adherence to timetables set is an obligation, but the approach to strict failures to comply should reflect that general intention. A consideration of exceptional circumstances will involve looking at the entire history of the proceedings and Crown Courts were advised that it would be good practice for readiness hearings to be scheduled a week or so before the date fixed to ensure that the parties are ready to go ahead. Where necessary, the courts should also direct that skeleton arguments be exchanged in good time so as to identify the matters in issue at the hearing[8].

Identification of Issues

The decision in *Balqis*[9] reminds judges at first instance of the importance of separating out the different issues and providing cogent reasons for their decisions supported by legal authority for them. The decision in *Sandford*[10] also reminds them that the provisions of ss.19 to 25 of POCA allow, in given circumstances, the benefit figure to be increased but not reduced.

Displacing the Assumptions – Hidden Assets

The Supreme Court in *Harvey* reaffirmed the principle that in confiscation proceedings there is a burden on the defence, and the defence will be required to produce evidence in order to displace the assumptions in a criminal lifestyle case.[11] For a defence practitioner, it is important to note that

1 Barrister at QEB Hollis Whiteman.
2 Circuit Judge at Kingston Crown Court.
3 [2016] UKSC 65.
4 "*Guraj*: the Urgent Need for Reform of Part 2 of POCA", [2017] 2 *Archbold Review* 4-5.
5 (2015) 61 EHRR 38.
6 [2017] EWCA Crim 33.
7 [2013] EWCA Crim.
8 At [45].
9 [2016] EWCA Crim 1726.
10 [2016] EWCA Crim 810.
11 [2015] UKSC 73, [2017] AC 105.