THE JUDICIAL ROLE IN ENSURING EFFECTIVE INVESTIGATIONS AND PROSECUTION: A UK PERSPECTIVE

Hugh Tomlinson QC[1]
Matrix Chambers

Introduction

1. This paper examines the various ways in which the Courts in England and Wales have a role in ensuring effective investigations and prosecutions. This is not a role which has been systematically examined in the case law. It arises in a number of different ways in different areas of the law with differing degrees of effectiveness. In this paper I will examine the current English law in four areas: the investigation of deaths and injuries in custody; the courts' control of abuse of process in criminal proceedings, the role of civil actions against the police and the rights of victims in the criminal process. The disparate nature of these areas of the law is itself an illustration of the lack of a coherent system of "victims rights".

Investigating Deaths and Injuries in Custody

2. Where a person dies in prison, English law requires a coroner to hold an inquest with a jury.[2] However, coroners traditionally have had a limited function in investigating deaths in custody because their inquiries are subject to many constraints, for example, the coroner is restricted to a simple short verdict, he or she cannot make recommendations, and his or her terms of investigation are very narrow.[3]

[1] Barrister, Matrix Chambers, Gray's Inn, London WC1R 5LN

[2] Coroners Act 1988 ss 8(1)(c), 8(3)(a).

[3] See Coroners Act 1988 and Coroners Rules 1984 (SI 1984/552); in Scotland, the Sheriff and Public Prosecutor have much wider powers of investigation, see Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976, on which see *R v Secretary of State for the Home Department, ex parte Amin* [2003] UKHL 51, para 56 *per* Lord Hope.

3. The main judicial control over investigations into deaths in custody is derived from Article 2(1) of the European Convention on Human Rights (ECHR) which protects the right to life. Article 2(1) provides:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which the penalty is provided by law."

4. The scope of Article 2(1) goes beyond an obligation on the state not to take life intentionally and unlawfully, and it has been held to enjoin the state 'to take appropriate steps to safeguard the lives of those within its jurisdiction…by putting in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions'.[4] But Article 2(1) has a further important dimension – a procedural one:

> The obligation to protect the right to life under [Article 2(1)], read in conjunction with Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention' requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the state.[5]

5. The Court of Human Rights has considered the scope of this procedural obligation in a number of recent cases and have established the following propositions:

   (1) "Where agents of the state have used lethal force against an individual the facts relating to the killing and its motivation are likely to be largely within the knowledge of the state, and it is essential both for the relatives and for the public confidence in the administration of justice and in the state's adherence to the principles of the rule of law that a killing by the state be subject to some form of open and objective oversight;"[6]

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[4] *Osman v UK* (1998) 29 EHRR 245, para 115.

[5] *McCann v UK* (1995) 21 EHRR 97, para 161; *Yasa v Turkey* (1998) 28 EHRR, para 98; *Salman v Turkey* (2000) 34 EHRR, para 104; *Jordan v UK* (2001) 37 EHRR 52, para 105.

[6] *McCann v UK* (1995) 21 EHRR 97, 139-40.

(2) "Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the state to provide a plausible explanation of how those injuries were caused. The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies".[7] Where the facts are largely or wholly within the knowledge of the state authorities there is an onus to provide a satisfactory and convincing explanation of how the death or injury occurred;[8]

(3) The obligation to ensure that there is some form of effective official investigation when individuals have been killed as a result of the use of force is not confined to cases where it is apparent that the killing was caused by an agent of the state;[9]

(4) The essential purpose of the investigation is "to secure the effective implementation of the domestic laws which provide the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures…;"[10]

(5) The investigation must be effective in the sense that "it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances… and to the identification and punishment of those responsible…This is not an obligation of result, but of means;"[11]

(6) For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary "for the persons responsible for and carrying

7 *Salman v Turkey* (2000) 34 EHRR 425, para 99.

8 *ibid,* para 100; *Jordan v UK* (2001) 37 EHRR 52, para 105.

9 *ibid,* para 105.

10 *Jordan v UK* (2001) 37 EHRR 52, para 105.

11 *ibid*, para 107.

out the investigation to be independent from those implicated in the events…This means not only a lack of hierarchical or institutional connection but also a practical independence…;"[12]

(7) Public scrutiny of police investigations cannot be regarded as an automatic requirement under Article 2(1),[13] but there must "be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny may well vary from case to case;"[14]

(8) "In all case, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests;"[15]

(9) The Court has not required that any particular procedure be adopted to examine the circumstances of a killing by state agents, nor is it necessary that there be a single unified procedure.[16] But it is indispensable that there be proper procedures for ensuring the accountability of agents of the state so as to maintain public confidence and allay the legitimate concerns that arise from the use of lethal force.[17]

6. Two recent English cases illustrate the application of these principles. In *R (Wright) Secretary of State for the Home Department,* [18] proceedings were brought by the mother and aunt of a man who died in custody as a result of a severe asthma attack. They claimed that his treatment prior to his death had not complied with Article 2 and 3 ECHR, and that there had been a failure to provide a proper investigation into his death. An inquest had been held at which the family of the deceased were present, but not legally represented for want of legal aid. There had been no inquiry into the quality of the medical treatment the deceased had received in prison and it later emerged that the responsible medical officer had been

12 *ibid*, para 106.

13 *ibid*, para 121.

14 *ibid*, para 109.

15 *ibid*, para 109.

16 *Ibid*, para 143.

17 *Ibid*, para 144.

18 [2001] EWHC Admin 520. [2002] HRLR 1.

suspended from duty and had previously been found guilty of serious professional misconduct. A civil action had been brought against the Home Secretary who had admitted liability, thus precluding forensic investigation of the case.

7. Jackson J reviewed the Strasbourg case law and held that the inquest and civil proceedings did not constitute an effective investigation for the purposes of the procedural obligations under Articles 2 and 3 ECHR. He held that the claimants were entitled to an order that the Secretary of State set up an independent investigation into the circumstances of the death.

8. In *R v Secretary of State for the Home Department, ex parte Amin*,[19] a 19-year-old Asian inmate in a young offenders' institute was bludgeoned to death by his violent, racist cellmate. The Director General of the Prison Service wrote to the family of the deceased and accepted responsibility for his death and the Prison Service conducted an internal inquiry (the "Butt Report"). The murderer was tried and admitted killing the deceased, leaving the only issue at trial whether the killing amounted to murder or manslaughter by reason of diminished responsibility. The criminal trial did not therefore examine cell allocation or the events before the murder. An inquest was formally opened and adjourned pending the killer's trial, but the coroner declined to resume the inquest later. The police investigated whether the Prison Service or any of its employees should be prosecuted for manslaughter by negligence or under section 3 Health and Safety at Work Act 1974. In addition, the Commission for Racial Equality included the deceased's death in its investigation into racial discrimination within the Prison Service, but the deceased's family did not have an opportunity to question witnesses as part of this investigation. The deceased's family sought judicial review of the Home Secretary's refusal to hold an inquiry in public to investigate the case.

9. The House of Lords considered the '*Jordan* criteria' in detail and concluded that while there is a measure of flexibility in the means of conducting an effective investigation, and it is true that the ECtHR has not prescribed a single model of investigation to be applied to all cases,

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19 [2003] UKHL 51, [2003] 3 WLR 1169.

nevertheless the ECtHR, particularly in *Jordan* and *Edwards v UK*,[20] has laid down minimum standards which must be met, whatever form the investigation takes.[21] This irreducible minimum could only be met by an appropriate level of publicity <u>and</u> an appropriate level of participation by the next of kin. In the present case there had been neither.

10. The House of Lords rejected the suggestion that there was a clear distinction between killing by state agents (so called 'lethal hands' cases) and cases where the killing is by a non-state agent:

> That cases in the former category may be a greater affront to the public conscience than cases in the latter category can readily be accepted. But the investigation of cases of negligence resulting in the death of prisoners may often be more complex and may require more elaborate investigation. Systemic failures also affect more prisoners.[22]

The House of Lords were equally dismissive of the respondent's argument that further inquiry would be unlikely to unearth new and significant facts – 'That judgment cannot fairly be made until there has been an inquiry'.[23]

11. Under Article 3 of the European Convention on Human Rights, the state is also under a duty to undertake an effective investigation in relation to alleged breaches of Article 3. In *Ribisch v Austria*, the Court of Human Rights held that allegations of torture in custody had not been investigated properly because although there had been a prosecution of one police officer (resulting in an acquittal), the Austrian authorities had failed to investigate sufficiently to enable them to provide a plausible explanation for the injuries sustained by the applicant while in custody.[24] The Court pointed to the absolute nature of the rights set out in Article 3 and stated that:

> Its vigilance must be heightened when dealing with rights such as those set forth in Article 3 of the Convention, which prohibits in absolute terms

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20 (2002) 35 EHRR 487.

21 Ibid para 32, *per* Lord Bingham.

22 Ibid, para 50, *per* Lord Steyn; see also para 41, *per* Lord Slynn.

23 Ibid, para 52, *per* Lord Steyn; also para 39 *per* Lord Bingham.

24 (1995) 21 EHRR 573.

torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct.[25]

12. The Court of Huamn Rights clearly stated the duty to investigate alleged breaches of Article 3 in *Aydin v Turkey*:

> Where an individual has an arguable claim that he or she has been tortured by agents of the State, the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.[26]

The Court's Control of Abuse of the Criminal Process

13. This has a number of different but related aspects:

- Control over delay by in the criminal process.
- Control in cases of loss or destruction of evidence.
- Abuse of power by the executive.
- Control over the use of unlawfully obtained evidence.

Delay in the Criminal Process

14. Delay can be the cause of serious injustice: lengthy periods of pre-trial imprisonment, increased anxiety, the fading of the memories of witnesses. unnecessary expense. English law has, traditionally, avoided the imposition of time limits to prevent delay in criminal proceedings;[27] instead the preferred approach has been the imposition of an overarching

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25 Ibid, para 32.

26 (1998) 25 EHRR 251, para 103.

27 There are however some specific time limits e.g. Magistrates' Court Act 1980 s127 which lays down a six month time limit in relation to summary offences (on which see *R v Brentford Justices, ex parte Wong* [1981] 1 All ER 884; some time limits are implicit e.g. Money Laundering Regulations 1993, regs 5; there is also some 'soft law' on the need

requirement of reasonableness determined by judicial discretion. As will be seen below, the courts have, in exercise of their abuse jurisdiction, claimed the power to intervene and stay prosecutions where prejudice attributable to delay means that the accused cannot receive a fair trial. The juridical basis of the courts' powers in respect of delay is twofold; firstly, the English common law and secondly Article 6(1) European Convention on Human Rights.

15. While the English courts have recognised that delay is inimical to a fair trial, they have preferred to deal with the point in on the basis of the doctrine of "abuse of the process".[28] The leading case on delay and the courts' abuse of process jurisdiction is *A-G's Reference (No 1 of 1990)*.[29] In that case, two important questions were raised before the Court of Appeal:

(1) Can proceedings on indictment be stayed on the grounds of prejudice resulting from delay in the institution of those proceedings even though the delay had not been occasioned by the fault of the prosecution?

(2) If so, what is the degree of likelihood and seriousness of any prejudice required to justify a stay?

16. Lord Lane gave a qualified "yes" in answer to the first question:

> Stays on the ground of delay or for any other reason should only be employed in exceptional circumstances …In principle…even where the delay can be said to have been unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare would be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the action of the defendant himself should never be the foundation for a stay.

He answered the second question as follows:

> …no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the

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for expedition in prosecuting criminal cases e.g. CPS Code of Practice issued under Prosecution of Offences Act 1985 s10.

28 Corker and Young, *Abuse of Process in Criminal Proceedings*, 2nd ed (2003), 22.

29 [1992] QB 630.

> extent that no fair trial can be held…In asserting whether there is likely to be prejudice and if so whether it can properly be described as serious, the following matters should be borne in mind: first, the power of the judge at common law and under (PACE) to regulate the admissibility of evidence; secondly, the trial process itself should ensure that all relevant factual issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the powers of the judge to give appropriate directions to the jury before they consider their verdict.

The Court of Appeal did not hide its purpose of formulating the courts' discretion to stay so narrowly:

> This judgment will, we hope, result in a significant reduction in the number of applications to stay proceedings on the ground of delay.[30]

17. It is clear therefore from Lane LJ's judgment that there must be exceptional circumstances before a stay will be granted; even where there is unjustified delay, a stay will be the exception rather than the rule; a stay will be more exceptional in the absence of fault; and complexity itself should not be a ground for a stay. Furthermore, no stay will be granted unless the defendant can show on the balance of probabilities that, owing to the delay, he has suffered serious prejudice to the extent that no fair trial can be held. This will be difficult to establish because of the flexibility of the trial process which can often eradicate or ameliorate any prejudice caused by delay.[31]

18. The Court of Appeal has recently considered whether the Human Rights Act 1998 mandates a change to this restrictive common law approach. In *A-G's Reference (No 2 of 2001)* the Court of Appeal had to consider whether Article 6 ECHR required the English courts to grant a stay because there had been a violation of the reasonable time requirement in Article 6(1) ECHR in circumstances where the accused cannot demonstrate any prejudice arising from the delay (and hence cannot obtain a stay at common law).[32] Woolf CJ strongly disagreed with the trial judge's view that the right to a trial within a reasonable time under Article 6(1)

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30 [1992] 3 All ER 169, 177, *per* Lane LJ.

31 *R v Cardiff Magistrates' Court, ex parte Hole* [1997] COD 84, 92, *per* Bingham CJ.

32 [2001] EWCA Crim 1568, [2001] 1 WLR 1869.

conferred a correlative right not to be tried after the expiry of a reasonable time without the need to show prejudice, and he held that a stay should be only granted in the circumstances outlined by Lane LJ in *A-G's Reference (No 1 of 1990)*. In Lord Woolf CJ's opinion, the principal effect of the HRA 1998 was to increase the range of remedies available to a trial judge who concludes that there has been unreasonable delay in breach of Article 6(1). The trial judge can now make a declaration, award compensation, or reduce a sentence, but the use of a stay is still governed by Lane LJ's judgment. The Privy Council, hearing an appeal in a case from Scotland, expressly declined to follow Lord Woolf CJ's judgment and it remains for the House of Lords to decide the question authoritatively.[33]

19. Article 6(1) of the European Convention on Human Rights provides that:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing *within a reasonable time* by an independent and impartial tribunal established by law… (emphasis added)

Trial within a reasonable time is an independent right from the other fair trial rights established by Article 6(1), so a complaint of delay cannot be answered by showing that the other rights were not breached.[34]

20. The Court of Human Rights has consistently refused to lay down a tariff or set of minimum periods for determining the length of delay which violates Article 6(1). Instead, the emphasis has been on the concept of reasonableness, which is determined having regard to the facts of the case, in particular:

- the complexity of the case;
- the applicant's conduct; and
- the conduct of the state authorities.[35]
- what is at stake for the applicant

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33 *R v HM Advocate* [2002] UKPC D3, 2003 SLT 4; the matter has recently been heard by an unprecendent 9 judge House of Lords,. Judgment is awaited..

34 *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357.

35 *König v Germany* (1978) 2 EHRR 170; *Eckle v Germany* (1985) 5 EHRR 1; *Howarth v UK* (2000) 31 EHRR 861.

21. It is not necessary for the applicant to show that unreasonable delay has caused him prejudice, as Lord Steyn stated in *R v HM Advocate*, 'the starting point is that prejudice, although a relevant factor, need not be established. It is not necessary to show that a fair trial is no longer possible. The scope of the guarantee is wider'.[36]

22. What amounts to *unreasonable* delay? While the Court of Human Rights has refrained from laying down any time limits, it is clear that before a period of delay is regarded as presumptively unreasonable, it must be 'inordinate'[37] or 'excessive'[38] in the particular circumstances. As Bingham LJ recognised, this imposes a high threshold:

> Unless that period [of delay] is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirements is a high one, not easily crossed.[39]

23. What is the remedy where the court has found unreasonable delay in prosecuting case? Does, for instance, the right to a fair trial within a reasonable time entail a correlative right not to be tried at all after a reasonable time has elapsed? The ECHR does not prescribe the remedies to be awarded for violations of Convention rights; the ECtHR's role (other than in relation to awards of compensation under Article 41) is to consider whether the national authorities have made sufficient and appropriate redress for such violations. In surveying the ECtHR's jurisprudence on the adequacy of the remedies awarded by national authorities for a breach of the requirement of trial within a reasonable time, Hope LJ said:

> The European Court has repeatedly held that unreasonable delay does not automatically render the trial or sentence liable to be set aside because of the delay (assuming that there is no other breach of the accused's Convention rights), provided that the breach is acknowledged and the accused is provided with an adequate remedy for delay in bringing him to trial (though

36 (2000) Times, 6 December, para 10.

37 *Eckle v Germany* (1982) 5 EHRR 1, para 80.

38 *Stogmuller v Austria* (1969) 1 EHRR 155, para 5; *Mansur v Turkey* (1995) 20 EHRR, para 68.

39 *Dyer v Watson* [2002] UKPC D1, para 52.

not for the fact that he was brought to trial), for example by a reduction in the sentence.[40]

The Loss or Destruction of Evidence

24. In criminal cases the prosecution has a virtual monopoly on investigation and so this is counterbalanced by onerous duties of disclosure. It is axiomatic therefore, that the prosecution should not be able to evade their duties of disclosure by suppressing, loosing, perverting or destroying evidence. As part of their abuse jurisdiction the courts have recognised a power to stay proceedings where the prosecution fails to obtain or retain material evidence. The leading statement of the modern law is Brooke LJ's judgment in *R (On the application of Ebrahim) v Feltham Magistrates*.[41] The defendant was charged with assaulting another customer in a supermarket, but contended that he acted in self-defence. The defence obtained a witness summons requiring the supermarket to produce the relevant CCTV video tapes, but it transpired that the supermarket had destroyed the tapes some weeks after service of the summons. The defence objected that no effort had been made to preserve the tape and comply with the summons. Lord Justice Brooke laid down a three-stage test for considering a defence submission on abuse of process in the light of lost or destroyed videotape evidence:

- What was the nature and extent of the investigating authorities' and prosecutors' duty, if any, to obtain and/or retain the evidence? Here the court should have regard to the Criminal Procedure and Investigations Act 1996 Codes of Practice and the Attorney-General's Guidance on disclosure;
- If material evidence is not obtained or retained in breach of duty, the court should examine whether the defendant could nevertheless receive a fair trial, having regard to the fact that the trial process itself is equipped to deal with the majority of abuse complaints, and whether or not the defendant had proved it more likely than not,

40 *Dyer v Watson* [2002] UKPC D1, para 129; *X v Federal Republic of Germany* (1980) 25 DR 142; *Eckle v Germany* (1982) 5 EHRR 1; *Bunkate v Netherlands* (1995) 19 EHRR 477.

41 [2001] EWHC Admin 130, [2001] 1 All ER 831.

that, owing to the 'serious prejudice' caused by the lost or destroyed material, he cannot receive a fair trial (Category 1 abuse);[42]

- If the behaviour of the prosecution has been so very bad that it is not fair that the defendant should be tried, then proceedings should be stayed. Here, the defence must prove an element of bad faith or serious fault on the part of the authorities in their failing to obtain and/or retain material evidence (category 2 abuse). The Court of Appeal's decision in *R v Sadler* illustrates that stays in category 2 cases will be rare indeed, since even though the Court of Appeal noted the 'thoroughly reprehensible' and negligent failings of the police in that case, it held that these 'fell far short of making it unfair to try' the appellant.[43]

It is likely that Brooke LJ's principles will be applied generally to any kind of lost or destroyed evidence argument, not merely to videotape evidence.[44]

Abuse of Power by the Executive

25. What power does the court have to control prosecutions which result from an abuse of power by the executive? The point was considered in *R v Horseferry Magistrates' Court, ex parte Bennett.*[45] The case concerned the forcible deportation of B from South Africa to England. B, a New Zealand citizen, was, ostensibly, being deported from South Africa to New Zealand, but he was to be flown home via England! When B arrived at Heathrow, he was arrested for several offences of dishonesty and never was taken to New Zealand. The English magistrate refused to stay the subsequent prosecution against B on the grounds of abuse of process, and B sought judicial review of this decision.

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[42] The Court of Appeal has applied this test of 'serious prejudice' in *R v Dobson* [2001] EWCA Crim 1606, an element of prejudice does not suffice and indeed it must be tolerated.

[43] [2002] EWCA Crim 1722, paras 15-27 *per* Keene LJ.

[44] Corker and Young, *Abuse of Process in Criminal Proceedings* 2nd ed (2003), Ch 3 point to two recent cases where the principles have been applied more generally, *R v Howell* [2001] EWCA Crim 3009 (destruction of a motor vehicle); *R v Elliot* [2002] 166 JP 18 (loss of various drugs exhibits).

[45] [1994] AC 42.

26. The Divisional Court held that the English criminal courts had no jurisdiction to examine the circumstances by which B came to be in the jurisdiction; the judge's role is confined to the forensic process, to ensure that the accused receives a fair trial and that the process of the court is not manipulated so as to deprive the accused of a fair trial. Since the wider issues of the rule of law and the behaviour of law enforcement officers did not directly impinge on the trial process, they were of no concern of the judiciary.

27. By a majority of 4-1 the House of Lords reversed this decision holding that the courts do have a power to stay proceedings for abuse in the face of an illegal extradition. Lord Griffiths recognised that there was no suggestion in the present case that B might receive an unfair trial, but felt that the courts' abuse jurisdiction should be widened:

> "If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to counterbalance behaviour that threatens either basic human rights or the rule of law…I have no doubt that the judiciary should accept this responsibility in the field of criminal law…If it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act on it."[46]

28. The *Bennett* case therefore established that the courts' where a complaint is made of unlawfulness of State agents in foreign jurisdictions and/or breaches of foreign law by state agents resulting in the arrival of the accused into this jurisdiction, then an English court is competent to hear the complaint in exercise of its abuse jurisdiction.[47] Prior to *Bennett*, the courts' abuse jurisdiction was confined to staying proceedings because it would be impossible (usually by reason of delay) to give the accused a fair trial. The decision in *Bennett* is important because it established a second limb to the abuse jurisdiction; where the court is

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46 [1994] AC 42, 61-2; Lord Oliver dissented, he could see no justification for the court examining questions about the defendant's apprehension and detention if such issues have no bearing on the fainess of the trial.

47 On the circumstances in which a stay will be granted see in addition, *R v Latif and Shahzad* (1996) 2 Cr App Rep 92; *R v Swindon Magistrates' Court, ex parte Nangle* [1998] 4 All ER 210; *R v Mullen* [2000] QB 520.

aware of a serious abuse of power by the executive, it may refuse to allow the police or prosecuting authority to take advantage of such abuse and may instead issue a stay.

29. It is clear from subsequent cases, that while *Bennett* was concerned with the issue of illegal extradition, it established a wider principle that the courts possess a discretionary power to stay proceedings where anterior executive action constitutes a threat to human rights or the rule of law. For instance, in *R v Latif*, the House of Lords held that on the same principles a stay might be granted on the ground of entrapment if a prosecution based on entrapment constituted 'an affront to the public conscience'.[48] In *R v Loosely*, the House of Lords confirmed that as in cases of illegal extradition, in entrapment cases, the courts' abuse jurisdiction extends beyond cases where the accused's trial may be unfair.[49]

Unlawfully Obtained Evidence

30. The English criminal courts have, traditionally, disregarded complaints that evidence has been obtained unlawfully.[50] However, this position is now markedly different because s78 Police and Criminal Evidence Act 1984 gives criminal court judges a power to exclude evidence in order to preserve the fairness of a trial. Section 78 provides:

> "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

31. The House of Lords has held that this provision does not *require* the exclusion of unlawfully obtained evidence. In *A-G's Reference (No 3 of 1999)* Lord Steyn recognised that there is a triangulation of interests to be considered in applications to exclude unlawfully obtained evidence during a criminal trial *viz* the interests of the accused, the interests of the victim and

48 [1996] 1 WLR 104.

49 [2001] UKHL 53, [2001] 4 All ER 897.

50 See e.g. *R v Sang* [1980] AC 402.

the public interest.[51] His Lordship felt that a rule of automatic exclusion would give the accused's interests an unfair preference over the public interest. While section 78 gives the judge a discretion to exclude evidence obtained as a result of police misconduct, the "disciplining of police misconduct" is not a relevant consideration in applying the section.[52]

Prosecutor's Improper Motive

32. Allegations that the prosecutor is acting out of an improper motive, such as spite, revenge etc, usually arise in the context of private prosecutions. The Courts tend to shy away from examining the prosecutor's motives in any great detail and are reluctant to intervene. The general approach is illustrated by the dictum of Lord Salmon in *DPP v Humphrys*:

> "I respectfully agree that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow the prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive or frivolous that the judge has the power to intervene."[53]

Civil Actions against the police

33. There has been a recent increase in the involvement of the civil courts in dealing with police misconduct. This is a direct consequence of the perceived failure of other mechanisms of control, in particular:

- the lack of direct political control over the police;
- the reluctance, until the enactment of PACE 1984, of the criminal courts to become involved in the control of police misconduct;
- the perceived lack of an effective police complaints procedure.

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51 [2001] 2 AC 91, 118; *R v P* [2002] 1 AC 146; the ECtHR has also held that the fact evidence has been unlawfully obtained does not lead to automatic exclusion *Khan v UK* (2000) 8 BHRC 310.

52 *R v Mason* [1988] 1 WLR 139, 144, *per* Watkins LJ.

53 [1977] AC 1, 46; for more recent illustrations of this reluctance to question the prosecutor's motives see e.g. *R v Bow Street Metropolitan Stipendiary Magistrates, ex parte South Coast Shipping* [1993] Crim LR 221; *R v Durham Magistrates, ex parte Davies* (1993) Times, 25 May; *R v Gloucester Crown Court, ex parte Jackman* [1993] COD 100; *R v Milton Keynes Magistrates, ex parte Roberts* [1995] Crim LR 224.

34. In 2001-2002, there were 597 actions threatened or commenced against the Metropolitan Police and payments were made in 135 cases.[54] By comparison, the most recent police complaints procedure figures show a mere 5.4% success rate.[55] The Civil courts can adjudicate on the lawfulness of police conduct either in private law actions relating to the rights of individual citizens, or in public law cases where their policy decisions and general performance of their duties can be subject to judicial review.

35. However, the civil law is a blunt and imperfect instrument for exerting day-to-day control over police misconduct. Firstly, the way in which police powers are framed in English law gives rise to substantial difficulties in making individual officers accountable. Secondly, the courts have long been wary of impeding legitimate policing activities and have shown extreme reluctance to interfere with "policing discretions". For example, the courts' reluctance to interfere with a Chief Constable's decisions in *R v Metropolitan Police Commissioner, ex parte Blackburn (No 4)* where Lawton LJ said:

> "The intention of the relevant statutes was to leave the commissioner to do his job as he thought best and to empower the Home Secretary to remove him if he was not doing his job efficiently. I can see no justification for the courts meddling with the way in which he performs his duties."[56]

36. Thirdly, the delays of litigation mean that civil actions against the police do not give a speedy or accessible remedy. Finally, even when successful, civil actions against the police provide a very inadequate control mechanism for dealing with misconduct. The civil action does not result in disciplinary measures being taken against the relevant officers, nor does it result in measures being taken to prevent a repetition. The remedy is after-the-event vindication by

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54 The Report of the Metropolitan Police Services.

55 Civil actions are "filtered" by solicitors and the Legal Aid authorities so that obviously hopeless claims will not be pursued.

56 (1989) Times, March 6.

way of damages. In short, it is clear that civil actions against the police cannot be used as a device to discipline the police and make them more accountable.

The rights of victims in the criminal process

Victims' Rights and Sentencing

37. The Strasbourg authorities have twice considered the rights of victims in the sentencing process. In *McCourt v UK*, the European Commission on Human Rights held that the government's refusal to recognise any role for the family of a murder victim in setting the tariff period for the murderer did not violate the deceased's family's Article 8 right to respect for family life because the family would lack the necessary impartiality.[57] However, in *T and V v UK*, the ECtHR permitted the parents of a murderer boy to intervene in a case brought by his murderers and for their representatives to address the court orally. Emmerson and Ashworth conclude that this case may reflect a more receptive attitude to hearing representations from victims or their families in sentencing related matters.[58]

38. To a limited extent, the English law recognises that the victim of a crime or his or her family have a legitimate role to play when a judge is considering sentencing options. But the English approach is for statements and representations made by or on behalf of victims and their families to be channelled through the prosecution. For instance the Practice Statement dealing with the tariff period to be served by young offenders detained 'at her Majesty's pleasure' states that the court will 'invite written representations from the detainees' legal advisors and also from the Director of Public Prosecutions who may include representations on behalf of victims' families.'[59]

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[57] (1993) 15 EHRR CD 110.

[58] Emmerson and Ashworth, *Human Rights and Criminal Justice*, (2001), para 18-70.

[59] *Practice Statement (Life Sentences for Murder)* [2000] 2 Cr App R 457.

39. Great care must be taken when inviting victims' representations as to sentencing, to ensure that these partisan submissions do not jeopardise the fairness of the proceedings from the defendant's point of view. Judge LJ expressed this danger clearly when he said:

> "We mean no disrespect to the mother and sister of the deceased, but the opinions of the victim, or the surviving members of the family, about the appropriate level of sentence do not provide any sound basis for reassessing a sentence. If the victim feels utterly merciful towards the criminal, and some do, the crime has still been committed and must be punished as it deserves. If the victim is obsessed with vengeance, which can in reality only be assuaged by a very long sentence, as also happens, the punishment cannot be made longer by the court than would otherwise be appropriate. Otherwise cases with identical features would be dealt with in widely differing ways, leading to improper and unfair disparity, and even in this particular case…the views of the members of the family of the deceased are not absolutely identical."[60]

Protecting Victims During the Trial

40. The English courts have increasingly come to recognise and protect the rights of victims during the trial, especially the right not to be subjected to questioning which might be degrading. This is illustrated by the judgment of Lord Bingham CJ in *R v Brown (Milton)*, a case where the defendant had questioned the complainant in a rape case in a humiliating, degrading manner:

> "It is the clear duty of the trial judge to do everything he can, consistently with giving the defendant a fair trial, to minimise the trauma suffered by other participants…[T]he judge should, if necessary in order to save the complainant from avoidable distress, stop further questioning by the defendant or take over the questioning of the complainant himself. If the defendant seeks by his dress,bearing, manner or questions to dominate, intimidate or humiliate the complainant, or if it is reasonably apprehended that he will seek to do so, the judge should not hesitate to order the erection of a screen, in addition to controlling questioning in the way we have indicated."[61]

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[60] *R v Nuun* [1996] 2 Cr App R (S) 136, 140; see also *R v Roche* [1999] 2 Cr App R (S) 105; *Attorney-General's Reference (No18 of 1993)* (1994) 15 Cr App R (S) 800.

[61] [1998] 2 Cr App R 364, 371.

41. The Youth Justice and Criminal Evidence Act 1999 now provides important protections for victims and witnesses generally in criminal proceedings. Section 34 prevents a defendant charged with a sexual offence from cross-examining the complainant in person. Sections 36 and 37 give the courts a power to disallow cross-examination by the defendant in person if satisfied that the circumstances of the witness and the case merit it, and that a prohibition would not be contrary to the interests of justice. Finally section 39 allows the court to appoint counsel to undertake cross-examination on behalf of the defence if that is necessary. Section 41 YJCEA 1999 severely limits the circumstances in which the accused can cross-examine complaints in sexual case on their previous sexual history. In *R v A*, the majority of the House of Lords held that while this measure pursued the legitimate aim of protecting the complainant against unnecessary and intrusive questioning, it constituted an excessive inroad into the right to fair trial.[62] The majority therefore read section 41 as subject to an implied discretion on the part of the trial judge to ensure that all relevant evidence would be admitted.

62 [2001] 2 WLR 1546.