Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **Draconian police powers have been introduced at UK ports to combat the threat of "hostile activity" from actors on behalf of a foreign State. They will also facilitate intrusive monitoring of ordinary everyday travel post-Brexit in the Northern Ireland border area with the Republic of Ireland.**

- **The Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 has been enacted in Ireland to allow for greater use of video link and online hearings in a wide range of court proceedings. Enacted with unnecessary haste, supposedly in response to the challenges posed by Covid-19, the measures clearly have a more permanent and far-reaching agenda.**

Policing Hostile Activity at UK Ports and Border

Introduction

The Counter-Terrorism and Security Act 2019 confers extensive powers on an "examining officer" to stop, question and detain a person at a UK port or border area to determine whether he or she appears to be a person who is, or has been, engaged in "hostile activity". The powers came into effect a few weeks ago on the 13th August 2020. They have been presented as a necessary response to the perceived threat posed by hostile actors or agents on behalf of a foreign State. The immediate trigger was the poisoning of two Russian nationals (among others) by a Novichok nerve agent in Salisbury in March 2018.

As often happens with such draconian police powers, the new measures have much wider reach than their purported target. Not only do they expose all travellers to the risk of being subjected arbitrarily to coercive and severe intrusion on their liberty, person and privacy, but they also provide a powerful tool to curtail the legitimate activities of actors who threaten powerful political and economic interests.

Initial examination powers

The statutory powers conferred on an examining officer under these provisions parallel the draconian counter terrorism police powers. An examining officer in this context is a constable, designated immigration officer or designated customs officer. He or she can stop, question and search a person in a port or border area where that person is believed to be travelling in to or out of the UK. The search power extends to personal items and mobile electronic devices. It also extends to a search of goods and vehicles in a port or border area where they are believed to be coming into or out of the UK.

Critically, there is no requirement for a prior suspicion in any individual case that the person (or goods etc) may be, or may have been, engaged in hostile activity (see

below). It can be an arbitrary exploratory check.

The person stopped must give the officer any information in his or her possession that the officer requests. The same applies to any documents (including passwords to electronic devices) requested by the officer. It should also be noted, however, that the examining officer should avoid asking questions that are likely to lead to disclosure of a journalist's sources; but that restriction is not absolute.

Information and documents

An officer may retain any article obtained from the person subjected to examination. It can also be destroyed in certain circumstances. Significantly, the purposes for which an article can be retained (or destroyed) are not confined to suspected association with hostile activity.

There is an obvious risk that the article may comprise confidential journalistic material or protected material such as legally privileged documents or medical records. While there is provision for independent oversight of access to such materials, it does not provide full protection for them. Moreover, it applies only in respect of articles that are believed to be connected with a hostile act or where retention is necessary to prevent death or significant injury. The grounds for retaining confidential materials extend well beyond them.

The examining officer has an even broader power to make and retain a copy of anything (including electronic data) obtained from the person or pursuant to a search. The copy may contain confidential or sensitive material, such as a journalist's sources.

It must be acknowledged that the person concerned will normally have an opportunity to make representations (albeit after the event) as to why any particular article or document (or a copy) should not be retained. The Code of Practice (see below) also offers some further, but limited, protection for confidential material.

Detention

After the first hour of examination, a person can be detained for up to another five hours, during which the same obligation to answer questions and provide information etc continues.

The regime applicable to the detained person is very similar to that applicable to the detention of terrorist suspects. He or she can be photographed, fingerprinted, measured, identified, strip-searched and questioned. Non-intimate body samples can be taken. These include a swab from the inside of the mouth from which a DNA profile of the person can be derived. Fingerprints and DNA profiles can be retained for six months and can be retained indefinitely if the person has been convicted of a recorded offence (or equivalent) in the UK or elsewhere. Conviction in this context includes a caution, reprimand or warning. The prints and profiles can also be retained as long as necessary in the interests of national security.

It is important to note that the detained person can be subject to these draconian invasions of his or her liberty, bodily integrity and privacy although he or she is not suspected of a criminal offence. Indeed, there is no requirement even for a suspicion that the detained person may be, or may have been, engaged in hostile activity. The powers can be used simply as part of a process for determining whether

a traveller selected at random might be engaged in hostile activity.

There are some limited protections. The detained person has a qualified right of access to a solicitor and to have a named person informed of his or her whereabouts. The need for continued detention must be reviewed after one hour and, after that, at least every two hours.

Hostile activity

These draconian powers are deemed necessary to combat the perceived threat of foreign agents engaging in "hostile activity". The first point to note about this is that it signals a major step-change in the expansion of exceptional coercive powers. Previously these were mostly confined to, and officially justified as necessary to deal with, terrorism or an emergency situation. Now, their reach is being expanded into new territory, the limits of which arguably are even broader and more ill-defined than terrorism.

Hostile activity is the commission, preparation or instigation of a hostile act that is or may be carried out on behalf of another State or otherwise in the interests of another State. An act is hostile for this purpose if it threatens national security, threatens the economic well-being of the UK in a way relevant to the interests of the UK **or** constitutes an offence punishable by a term of imprisonment of at least three years.

This definition gives the powers an incredibly broad reach. It goes far beyond the stereotype of foreign spies coming to the UK to steal military secrets or to engage in criminal activity aimed at threatening life or essential national infrastructure. It is not even necessary for the 'hostile' act to constitute a criminal offence or to have occurred on UK territory. Nor is it necessary for the person concerned to be aware that he or she is engaged in a hostile act. Nor is it necessary for a foreign State to have sanctioned the act or even to be aware that it is being carried out. Hostile activity could feasibly be satisfied, for example, by a major foreign enterprise engaging in legitimate commercial activities that damage British interests in markets for sensitive information technology goods or services.

Ultimately, the concept of the hostile act is so broad that its limits are difficult to identify in practice. It leaves almost unbridled discretion over the exercise of the associated draconian powers to the examining officer on the ground and to the security and political authorities who can guide how and when they should be applied. It is yet another example of government using a shocking criminal or terrorist act as justification for a major expansion of government and security powers. These are framed so broadly that they could potentially be used to suppress political dissent. Equally they could be used in a manner that would silence those who might otherwise be minded to disclose evidence of matters that government and powerful economic interests would prefer to remain hidden to protect their own selfish interests.

Northern Ireland

It is worth taking particular note of the application of these provisions to the border area in Northern Ireland. There, the officer does not even have to be checking whether the person might be engaged in hostile activity. The officer can stop, question and detain any person simply to determine whether his or her presence in the border area "is connected with the person's entry into or departure from

Northern Ireland." Where such a person is detained, he or she can be subjected to all the powers pertaining to photographs, fingerprints, measurement, identification, strip-search, questioning, non-intimate body samples and DNA profiles.

Almost inevitably, the entry or departure in question will relate to the Republic of Ireland which lies on the other side of the border and which is part of a common travel area with Northern Ireland and Britain. Indeed, the legislation defines the border area in this context as any place not more than one mile from the border between Northern Ireland and the Republic of Ireland (or the first place that a train from the Republic of Ireland stops in Northern Ireland to allow passengers to leave).

The power exposes all persons living and moving in the border area in Northern Ireland to random and intrusive police monitoring for no apparent reason beyond determining whether they are moving backwards and forwards across an 'invisible' border within a common travel area. It is not at all clear why an officer would want to know whether a person was coming from or going to the Republic of Ireland in this context. In effect, it is putting such ordinary everyday travel on the same footing as hostile activity.

Curiously the Explanatory Notes to the legislation state that the Northern Ireland border provision is essentially a precursor power to enable an examining officer determine whether a person satisfies a pre-condition for the exercise of the main power, which is itself exercisable on a random and arbitrary basis. At best, this is an implausible explanation. Why would a police officer need a power to stop and examine a person at random in order to determine whether that person can be stopped and examined at random? And why is it not necessary to give police officers a similar "precursor" power at all of the UK ports?

Perhaps, the real explanation is that the power is a post-Brexit policing measure which has been slipped in quietly under cover of the hostile foreign actor provisions. The permanent police hard-border checks of old may well be gone. It may now be, however, that they have been superseded by random mobile checks that are even more intrusive on the personal liberty, privacy and bodily integrity of all persons living, working and socialising within one mile of the UK's 'invisible border' with the Republic of Ireland and, soon to be, Euro border.

Code of Practice

The Code of Practice applicable to these port and border area powers offers a few protections for persons examined and detained. Two are worth noting, even if they are very light, relative to the enormity of the powers themselves. The first is the reminder that race, ethnic background etc must not be used as criteria to target persons. The potential benefits of this, however, are severely undermined by the fact that it is legitimate to use criteria such as suspected sources of hostile activity and possible sources of future hostile activity. When added to the exceptionally broad definition of hostile activity, it seems clear that the cautions against using race and ethnic background etc as profilers will have little currency.

A second protection concerns access to material that is confidential in the hands of the person examined. This applies where the examining officer wants to retain or copy documents containing confidential material which cannot easily be detached

from the rest. In this event, there is provision for an independent counsel to conduct the separation so that the examining officer will not have to read the confidential material. It should be noted, however, that confidential material is not given absolute protection. There is provision for an examining officer to access it in certain circumstances.

A failure to observe any provision of the Code of Practice does not of itself amount to a criminal or civil matter.

Conclusion

These port and border powers represent a major escalation of the exceptional regime that up to now has been confined essentially to counter terrorism. Extending the substance of the latter to vaguely defined hostile activity effects another ground-breaking expansion of draconian executive powers to police and government. The pattern is now familiar and relentless. A single shocking incident has been used as the pretext for this power grab. The consequential measures are voluminous, sweeping, lacking in clear limits and go far beyond anything that may have been needed to deal with the nature of that incident.

Another striking feature about the port and border control powers is that they are contained not in the main body of an Act of Parliament, but in one of the Schedules appended to it. The provisions run to 45 pages of small print and are accompanied by a 64-page Code of Practice. They are complex, impenetrable for the layperson and add to the already extensive body of similar counter terrorism measures. That in itself is an affront to the rule of law, given the extent to which the measures intrude on the personal liberty, privacy and bodily integrity of the individual. It is a stark illustration of our seemingly inexorable transition from government in accordance with law in these matters to government by sweeping discretionary powers.

It must be asked if we are any safer under the weight of this vast edifice of draconian powers. Is it possible that the measures introduced supposedly to protect us from certain harms are now so extensive and extreme that they pose an even greater risk of harm to fundamental values that we hold dear?

Covid-19 and Irish Court Proceedings

Introduction

The Irish courts have been responding to the challenges presented by Covid-19 through a combination of remote hearings and social distancing measures within courtrooms. Nevertheless, lengthy backlogs have built up partly because of the unavailability of suitable court venues and partly because many applications and proceedings were required by law to be carried out in the physical presence of the accused.

A few weeks ago, and more than five months into the crisis, the Irish government finally moved to introduce legislation to deal with the situation in the form of the Civil Law and Criminal Law (Miscellaneous Provisions) Bill 2020 (now an Act). Among other things, it permits more court business to be conducted by video link and electronically. While it is easy to see the practical need for some of the measures in the Act, there must be a strong suspicion that the government has taken advantage of the Covid crisis to ram through some

permanent criminal (and civil) procedure changes without proper legislative scrutiny.

Hasty legislation

The most striking feature of the new legislation is the incredible haste within which it was enacted at the very end of the parliamentary session. All of the parliamentary parties agreed in advance to a truncated process which dispensed with the normal pre-legislative scrutiny stage and applied very tight time constraints on the passage of the Bill though each other stage of the legislative procedure. The net effect was that the Bill was introduced in the upper House (the Seanad) without pre-legislative scrutiny and raced through all of the legislative stages in that House in a single evening sitting of about three hours. Two days later, on the very last day of the sitting before the Summer recess, the same pattern was repeated in the lower House (the Dáil).

This is not the first time that an Irish government has rammed criminal procedure measures through parliament in emergency fashion even though it could and should have acted much earlier and at a more considered pace. The parliamentary opposition parties acquiesced in the strategy on the understanding that the measures in question were required urgently in response to the challenges presented by the Covid crisis and went no further than was necessary to meet those challenges. Their trust may have been misplaced.

Sunset clause?

As will be seen below, the criminal procedure measures in the Act are intended to be permanent and are of a type that could easily have been introduced and enacted in the normal way years ago. More ominous is the fact that, despite being pressed by the opposition, the government refused to include a 'sunset clause' in which the measures would automatically expire after a set period unless renewed or re-enacted. The advantage of such a clause is that it postpones a decision on their permanency until a set point in the future when their merits can be subject to more considered scrutiny. Other 'Covid' emergency legislation contains a 'sunset clause' and the government explanation for its absence in this Act seems hollow.

Cuckoo in the nest

Confidence in the government's approach is further undermined by the fact that some of the changes on the civil side (allowing for business records to be admissible in evidence as to the truth of the facts stated in them) have nothing at all to do with the Covid crisis. There is at least a suspicion that they were slipped into the Bill in order to overcome difficulties that 'Vulture Funds' have been experiencing in the courts in securing repossessions in respect of business, farming and residential properties on which they purchased risky loans from the banks.

The opposition parties were not alerted to this 'cuckoo in the nest' until the Bill had completed its passage through the Seanad. The government never quite managed to provide a satisfactory explanation as to why it was necessary to include these particular provisions in a Covid measure that was rushed through in emergency style at the very end of a parliamentary session. If it was needed, it could and should have been introduced, scrutinised and, if considered appropriate, enacted as a civil evidence measure in the normal manner. Most unusually, some of the government's own back-benchers joined with the opposition (albeit in vein) in pleading with

the government to deal separately with the civil evidence measures.

Live video link participation

The criminal procedure provisions in the Act are concerned mostly with facilitating: court applications to be heard using live video link, evidence to be taken from witnesses through live video-link and the remote hearing of appeals.

There already were provisions for a range of applications in criminal proceedings to be heard with the participation of the applicant through video link rather than being physically present. These were confined to situations in which the applicant was a prisoner or in detention. Not only does the new Act expand the range of such applications considerably, but it also extends the video link option to accused persons generally, irrespective of whether they are in prison or detention.

The range of applications in which the accused's participation can be satisfied by a live video link include: an application for bail or free legal aid; an application relating to sentencing; most pre-trial and post-trial applications; and applications relating to appeals (apart from the hearing of an appeal from the District Court to the Circuit Court).

In effect, the facility can be used in respect of most applications outside of the trial itself. While it is by no means clear, it would appear that it can be used even in respect of an actual sentencing hearing. It is also not entirely clear whether it can be used in respect of pre-charge proceedings, such as an application for extension of detention in police custody.

The court concerned can issue a direction for an accused to participate by a live video link pursuant to these provisions on its own motion or on the application of the DPP or the accused. The DPP can make an application for such a direction without notice to the accused; and vice versa. Where the court issues a direction, the effect is that the accused is physically detached from the hearing of the application in the criminal proceedings and participates by video from his or her location, wherever that might be. Inevitably, this has implications for the proceedings and for the capacity of the accused to engage with his or her legal team, interpreter (where relevant) and family support. It also has broader implications for the whole character of criminal proceedings relative to how they have been understood and experienced in this jurisdiction for hundreds of years.

It is important to note that the court itself has an even broader power to direct that all applications of a specified type or class (or concerning a specified class of person) shall be heard with the accused participating through a live video link. Where such a direction is in force, the accused can only participate in the proceedings concerned through a live video link from the place where he or she is located.

EAW and similar proceedings

All of the above provisions apply to criminal proceedings. There are parallel provisions for applications relating to the execution of a European Arrest Warrant, and for extradition and related proceedings. The net effect is that the person concerned can be restricted to participation in such proceedings through a live video link. It should be noted, however, that this option cannot be used for proceedings concerning the first appearance of the person in court after arrest, the hearing in regard to the making

of an order for surrender or a hearing for the making of an order committing the person to prison to await the Minister's direction on extradition or surrender. Nevertheless, the cases in which they do apply bring with them an increased risk of language difficulties and engagement for the person attempting to participate through video.

Evidence by live video link

While the accused is exposed to potential prejudice through being deprived of the right to be physically present at a wide range of hearings in his or her case, the prosecution is potentially advantaged by a sweeping provision enabling witnesses to give evidence by live video link. Admittedly, there already was provision for some witnesses to give evidence, and be cross-examined, in certain criminal proceedings. For the most part, however, these have been confined to children and vulnerable persons giving evidence in respect of sexual or other serious offences against the person. The new Act takes this on to a wholly different level.

Now a witness (other than the accused or the requested person in an EAW etc case) can give evidence by live video link on the hearing of applications across the range of situations outlined above. This can be done simply by leave of the court. No further elucidation or qualification is provided. Presumably, the court can grant leave on its own motion or in response to an application from the DPP (or Minister or Attorney General in extradition or surrender proceedings), the accused or the requested person. On the face of it, there seems to be no reason why it cannot do so on the direct request of the witness.

Where the court does grant leave under this provision, the witness can give evidence (and, presumably, be cross-examined) through a live video link from his or her location whether inside or outside the State. This will relieve the witness of the requirement to give evidence and submit to cross-examination in the physical presence of the accused. When combined with the provisions on the participation of the accused through a live video link, the effect could be that a significant chunk of the criminal business of the courts would go virtual.

A notable feature about the witness facility is the express requirement for the witness' evidence to be video-recorded or otherwise recorded in such manner as is provided for by the court or in rules of court. Superficially, of course, this can be seen as little more than an efficient means of recording the evidence for the purpose of making and retaining an official record of the proceedings. Nevertheless, the wider implications of having such a video record, and the uses to which it might be put in future proceedings, are not clear and are not defined. It is also worth noting that there is no equivalent provision in respect of the appearance of the accused (or requested person) by live video link. It would appear that the latter is seen as nothing more than satisfying any legal requirement for the accused's presence at the hearing of the application in question.

Appeal proceedings by remote hearing

The new Act makes provision for appeal proceedings in the Court of Appeal and in the Supreme Court to proceed remotely; in the sense that one or more of the parties participates by means of electronic communications technology from a location other than the court itself. In effect, this facilitates complete appeal hearings being conducted on-line with the participants looking at and appearing on a two-

dimensional screen rather than being in each other's physical presence in a three-dimensional courtroom.

The Court in question can direct that any category or type of appeal proceeding before it should proceed by remote hearing. Equally, it can direct the same with respect to any individual appeal proceedings before it, and it can do so on its own motion or on the application of any of the parties. The court concerned will make all necessary provision and orders for the conduct of remote proceedings.

Miscellaneous provisions

The Act gives a court the power to make such provision as it considers appropriate to ensure the conduct, in a just and expeditious manner, of criminal or EAW etc proceedings. This extends to the management of lists of criminal proceedings.

An amendment to the Criminal Justice Administration Act 1914 deals with a situation in which a person is detained in one prison but is the subject of an unexecuted warrant committing him to another named prison. In this situation, the warrant can be executed as if the named prison was the prison in which he or she was already detained.

Conclusion

The criminal procedure changes provided for by the new Act augur a major reorientation in the character of the trial process. If used to the full, the familiar experience of court proceedings in which all the parties and players come together in real time in a three-dimensional courtroom will fade. It will be replaced increasingly by proceedings in which they participate remotely in physical isolation from each other through a two-dimensional screen.

The personal contacts, the nuances of body language, the opportunity for quiet asides between the players, and between the parties and their legal teams, will be lost. These informal, unwritten, and essentially human, practices that have been engrained in our trial process for centuries will be squeezed out by the brutal and sanitising effects of technology. Some of the humanity of our criminal process will go with them.

The accused will suffer the most as he or she will be physically isolated from proceedings which may be making life-changing decisions affecting his or her fundamental rights, liberty and person. The opportunity to engage with his or her legal team (and family) remotely through a computer screen is a poor and inadequate substitute for engaging with them in person in such anxious and highly-charged circumstances.

More broadly, public engagement and identification with the law and justice process will be adversely affected. The changes could distort application of the fundamental principle of justice being administered in public; a principle that is as old as the criminal process itself. Taken to the extreme, the real-life drama of law and justice being played out live in public, as in a theatre, could become little more than an episode of a TV play which is called up on a two-dimensional computer screen.

A shocking feature of this potentially ground-breaking legislation is the speed with which it was rammed through parliament. Given the potential impact of criminal measures on the rights and freedoms of the individual, it is always

dangerous to enact them in haste. Yet the Irish government and parliament have taken that approach unnecessarily with this legislation.

The Act comprises 33 sections, running over 37 pages. The criminal procedure provisions account for seven sections across 11 pages. By any standards, they are complex and difficult to interpret, even for lawyers. They really needed to be subject to the normal process of pre-legislative scrutiny to tease out their full implications. Only then could the parliamentarians have had the material and insights to debate the measures fully and to take informed decisions on them.

A particularly disturbing feature is that the measures, and the undue haste surrounding their enactment, were not necessitated by the Covid crisis. They effect permanent changes to the law that could have been enacted years ago or in years to come. Some of the key provisions will not even come into operation until the 14th September (more than five weeks after they were enacted) while there was a delay of two weeks in bringing the other measures into operation. It seems shameful that they should have been enacted in the manner that they were undercover of the Covid crisis. Not only is their substance damaging to the essence and character of the criminal trial process, but it is submitted that the manner of their enactment is also damaging to the integrity of the democratic process.