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Scrambling for Safety 8 (14 August 2006)
RIPA III – ss. 49 and 53 –human rights issues
Additional Notes & Scenarios
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Introduction

At the Scrambling for Safety-8 event yesterday, Simon Watkins of the Home Office criticised my comments about the increased maximum sentence for the s. 53 RIPA offence of non-disclosure of a decryption key in national security-related cases, and the suggested similar increase in child pornography-related cases (see slides nos. 5, 11 and 17 of my presentation). **He (and others) said that the issue of increased penalties had nothing to do with the main charge and trial: the issue would only come in at the sentencing phase of any trial.**

I gave this some consideration and came up with a series of xx scenarios, which follow; certain scenarios are variations on others. Between them, I believe they cover pretty much all the kinds of cases that might arise in this respect. I also believe that (with all due respect to Simon *et al.*) they show that Simon is wrong. They are offered here to stimulate further debate on this important matter.

Douwe Korff
Cambridge, 15 August 2006

SCENARIO NO. 1:

Mr. A is suspected of involvement in terrorism. He is arrested and his house is searched, his computers are seized. At the end of the investigation, he is charged with possession of materials of likely use to terrorists and with not handing over the key to encrypted material on his pc. The jury finds him guilty on both counts.

Comment:
Clearly, in this case, the terrorist issues and the s. 53 issues are closely related. The jury will have heard evidence on both issues. It would be utterly unrealistic to assume that the hearing on the first set of issues had had no bearing on their considerations of the second set.

SCENARIO NO. 2:

Mr. B is suspected of possession of child pornography. He is arrested and his house is searched, his computers are seized. At the end of the investigation, he is charged with possession of some child pornography materials, found in unencrypted form on his pc, and with not handing over the key to further, encrypted material on his pc. The jury finds him guilty on both counts.

Comment:
Clearly, in this case too, the issues on the main charge (child pornography) and the s. 53 issues are closely related. The jury will again have heard evidence on both issues. It would again be utterly unrealistic to assume that the hearing on the first set of issues had had no bearing on their considerations of the second set.

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SCENARIO NO. 3:

Mr. C, who has a previous conviction for possession of child pornography, is suspected of VAT fraud totally unrelated to child pornography (or terrorism). He is arrested and his house is searched, his computers are seized. At the end of the investigation, he is charged with VAT fraud and with not handing over the key to encrypted material on his pc. The jury finds him guilty on both counts.

Comment:
In this case, the issues on the main charge (VAT fraud) and the s. 53 issues may be, or may not be, related: perhaps the encrypted files contain evidence of more VAT fraud; perhaps they contain child pornography; perhaps something else. The jury will have heard evidence on the main charge and on C's "knowing" non-disclosure of the key, but will have been totally unaware of C's previous conviction for possession of child pornography.

So now what happens? Can the prosecution introduce the previous conviction at the sentencing phase, and ask the judge for a sentence in excess of 2 years? That sounds preposterous - but I can't see anything in the law against it. Nor would I assume that prosecuting counsel would never do this: if they feel that the fraud charges they could prove were only the tip of an iceberg, and that the encrypted files, if decrypted, would provide evidence of much wider fraud, they might well be tempted to use the s. 53 charge to get a higher sentence. At the very least, the code of practice should ensure this doesn't happen.

SCENARIO NO. 4:

Mr. D is suspected of involvement in terrorism. He is arrested and his house is searched, his computers are seized. At the end of the investigation, he is charged with possession of materials of likely use to terrorists and with not handing over the key to encrypted material on his pc. The jury finds him not guilty on the first count but guilty on the second one.

Comment:
Clearly, in this case, the terrorist issues and the s. 53 issues were closely related. The jury will have heard evidence on both issues, but in the end was not convinced of the terrorist charge. Is this case nevertheless one to which the increased penalty applies? That again would seem preposterous - but I can see nothing in the law against it.

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SCENARIO NO. 5:

Mr. E is suspected of possession of child pornography. He is arrested and his house is searched, his computers are seized. At the end of the investigation, he is charged with possession of some materials, found in unencrypted form on his pc, which the prosecution alleges constitute child pornography (although they are relatively innocuous) and with not handing over the key to further, encrypted material on his pc. The jury finds him not guilty on the first count but guilty on the second one.

Comment:
Clearly, in this case too, the issues on the main charge (child pornography) and the s. 53 issues were closely related. The jury will again have heard evidence on both issues, but in the end was not convinced of the child pornography charge. Is this case nevertheless one to which the increased penalty applies?

Here, the law is more specific: an increased penalty can be imposed:
* where the person in question had a previous conviction relating to such materials; or
* where the court is otherwise "*satisfied that the protected information is likely to contain an indecent photograph or pseudo-photograph of a child (on the basis, for example, of evidence from a witness)*."

[NB The third ground, that other child pornography materials (unencrypted) were found on the storing device, presumably does not apply here, since E was acquitted on the main charge.]

Could the court impose a sentence of more than 2 years if Mr. E had a previous conviction for possession of child pornography, in spite of the fact that on this occasion he was explicitly found not guilty of a charge of possessing such material?

Could the court (i.e., I presume here, the judge) rule that, in spite of the acquittal on the main charge, it (the court, i.e. the judge) was "satisfied" that the encrypted files contained child pornography?

Both these prepositions too would seem preposterous - but again I can see nothing in the law against it. Indeed, as I pointed out at my presentation, the word "satisfied" suggests that the court (the judge) may make such a finding on the balance of probabilities - which would seem to seriously undermine the verdict of the jury on the higher standard of beyond reasonable doubt. Again, to suggest that the child pornography matters and the s. 53 issues only come up at the sentencing phase of the trial and are not linked to the main issues at the trial is clearly wrong: they are inextricably linked to those issues.

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SCENARIO NO. 6:

Mr. F is suspected of involvement in terrorism. He is arrested and his house is searched, his computers are seized. The investigation produces insufficient evidence to charge him with a terrorist offence. However, he is charged under s. 53 with not handing over the key to encrypted material on his pc. The jury finds him guilty on this (single) count.

Comment:
In this case, if the defence and the judge did their job properly, the the jury will not have been aware of the terrorist background to the case at all: to reveal that background to the jury would have been highly prejudicial and would probably lead to the case being quashed on appeal.

Is this case nevertheless one to which the increased penalty applies because the investigation related to national security matters? That would yet again seem preposterous - but I can yet again see nothing in the law against it.

SCENARIO NO. 7:

Mr. G, who has a previous conviction for possession of child pornography, is suspected of possession of further such materials. He is arrested and his house is searched, his computers are seized. The investigation produces insufficient evidence to charge him with possession of child pornography. However, he is charged under s. 53 with not handing over the key to encrypted material on his pc. The jury finds him guilty on this (single) count.

Comment:
In this case, too, if the defence and the judge did their job properly, the the jury will not have been aware of the child pornography background to the case at all: again, to reveal that background to the jury would have been highly prejudicial and would probably lead to the case being quashed on appeal.

However, here again, the law nevertheless explicitly allows for an increased sentence - in spite of the fact that on this occasion G was not even charged with any offence relating to child pornography - in that, as noted in scenario no. 5, under s. 53 an increased penalty can be imposed:
* where the person in question had a previous conviction relating to such materials; or
* where the court is otherwise "*satisfied that the protected information is likely to contain an indecent photograph or pseudo-photograph of a child (on the basis, for example, of evidence from a witness)*."

If this is preposterous in scenario no. 5 (as I submit it is), it must be equally preposterous here. But that is the law.

END