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Citizen Led Policing in the Digital Realm: Paedophile Hunters and Article 8 in the case of *Sutherland* v *Her Majesty's Advocate*

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In *Sutherland* v *Her Majesty's Advocate*, the Supreme Court unanimously dismissed an appeal which argued that the use of communications obtained by a paedophile hunter group as evidence in criminal prosecution was a violation of Article 8 of the European Convention on Human Rights. The case raises fundamental questions of the scope of the right to private life as regards to the content of communications and the role played by private actors in the criminal justice process. This note argues that by limiting the protection of Article 8 to private communications which satisfy a contents-based test, the Court has bypassed the Article 8(2) balancing test to the detriment of the due process rights of the accused. The note concludes that the decision opens up the prospect of the state circumventing the accused's Article 8 privacy rights by lending tacit approval to the proactive investigations of these private 'paedophile hunter' groups.

INTRODUCTION

Groom Resisters Scotland describe themselves as an 'online child protection enforcement team'. They are just one of the so-called paedophile hunter groups who are engaged in activities aimed at identifying and ultimately convicting individuals involved in interpersonal child-oriented sexual offences.[1] Operating outside of the legislative framework for covert activity which binds traditional police authorities, these groups represent a shift toward citizen-led policing in the digital sphere. The techniques utilised by the groups vary, but typically involve online interactions coupled with real-world contact. Frequently, this involves adult decoys purporting to be children online in order to lure those who aim to groom and exploit children. Once these individuals are identified, the paedophile hunter groups arrange meetings to confront them, often filming and publicising these encounters. The evidence obtained through

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1 L. Brooks, 'Scotland's child abuse activists: We embrace the vigilante label' *The Guardian* 6 Aug 2019 at https://www.theguardian.com/society/2019/aug/06/scotlands-child-abuse-activists-we-embrace-the-vigilante-label (last visited 10 September 2020). Interpersonal child sexual offences are defined as offences where an individual targets sexual communications at a minor in an online environment. These communications include: the description of explicit sexual behaviours and scenarios, discussions of a sexual nature, and incitements to minors to engage in sexual behaviour. See M. Yar, 'The policing of Internet sex offences: pluralised governance versus hierarchies of standing' (2013) 23 *Policing and Society* 482, 483.

these 'sting' operations is shared with the police for the purposes of criminal prosecution.

This conduct formed the basis of the submissions in *Sutherland* v *Her Majesty's Advocate (Scotland)*[2] (*Sutherland*). The appellant was charged with multiple offences related to sexually motivated communications with a child contrary to the Sexual Offences (Scotland) Act 2009 and the Protection of Children and the Prevention of Sexual Offences (Scotland) Act 2005.[3] These charges emanated from contact with an adult member of Groom Resisters Scotland, posing as a 13-year-old boy on the website Grindr. The appellant was informed throughout the exchanges, both on Grindr and subsequently on WhatsApp, that the recipient of the communications was underage. Copies of the appellant's communications were provided to the police and formed the basis of the evidence utilised against him. It was within this context that the Court was asked to consider two issues: first, whether Article 8 rights may be interfered with by the use of the type of communications between the appellant and the paedophile hunter group as evidence for the prosecution; and second, the extent to which the state's obligation to provide adequate protection for Article 8 is incompatible with the use by a public prosecutor of this material.[4]

In ultimately deciding these questions in the negative, the judgment limits the scope of Article 8(1) on the basis of the content of the communications and the conduct of the individual involved. Drawing on extant jurisprudence, the Court considered that the conduct and nature of the communications were such that no reasonable expectation of privacy could be afforded. Focusing on the content of the communications in the evaluation of the applicability of Article 8(1), the reasoning of the Court imposes an additional barrier to the right to private life. The case also raises wider policy issues. The judgment concentrates on balancing the interest in the right to private life of the appellant against that of the potential victim, omitting discussion of the role played by these private organisations. This case raises questions of lateral surveillance and the horizontal effect of privacy protections between individuals. The decision reinforces a two-tiered system of liability for interferences with the right to private life which precludes conduct which would be classed as a violation when undertaken by the state being classed as an interference when undertaken by a private organisation. By failing to acknowledge the implications of the activities of the paedophile hunter groups on privacy, the court lends tacit acceptance to the activities of these groups and provides a route through which

2 *Sutherland* v *Her Majesty's Advocate (Scotland)* [2020] UKSC 32.

3 The charges were attempting to cause an older child to look at a sexual image under the Sexual Offences (Scotland) Act 2009, s 33; attempting to communicate indecently with an older child under the Sexual Offences (Scotland) Act 2009, s 34; and an offence of attempting to meet with a child for the purposes of engaging in unlawful sexual activity under the Protection of Children and the Prevention of Sexual Offences (Scotland) Act 2005, s 1.

4 n 2 above at [11].

communications may be interfered with and used for policing purposes in the absence of legal safeguards.

THE PATH TO THE SUPREME COURT

The case of *Sutherland* concerns a series of communications which took place between the appellant and a decoy from 18 January 2018 to 31 January 2018. During this period, the appellant initiated contact with the decoy and sent sexually explicit content to an individual whom he believed to be aged 13. The appellant asked the decoy to delete the communications and to move the conversation to WhatsApp, which the decoy agreed to do.[5] On 31 January, a meeting was arranged. At this meeting, members of the paedophile hunter group met the appellant and filmed and live broadcasted the encounter on social media.[6] It was during this encounter that the police were called and extracts of the communications shared with the authorities. One the basis of this evidence, the appellant was indicted on the charges at Glasgow Sheriff Court.

In the initial proceedings, the appellant challenged the admissibility of the evidence on two bases. He first alleged that the evidence had been obtained by covert means without the necessary authorisation required under the Regulation of Investigatory Powers (Scotland) Act 2000.[7] Second, he alleged that the evidence should be deemed inadmissible as it was obtained in violation of his Article 8 rights.

Both of these arguments were rejected by the Sheriff. Mr Sutherland then appealed to the High Court of Justiciary. On 20 September 2019 these appeals were refused. However, he was granted permission to appeal to the Supreme Court in relation to certain compatibility issues pursuant to section 288AA of the Criminal Procedure (Scotland) Act 1995.[8]

The compatibility issues on which the court was asked to rule are:

1. Whether, in respect of the type of communications used by the appellant and the paedophile hunter group, Article 8 rights may be interfered with by their use as evidence in a public prosecution of the appellant.
2. The extent to which the obligation on states to provide adequate protection for Article 8 rights is incompatible with the use by a public prosecutor of the material supplied by the paedophile hunter groups in investigating and prosecuting crime.[9]

5 *ibid* at [15].
6 *ibid* at [13].
7 Regulation of Investigatory Powers (Scotland) Act (RIPSA), 2000 s 7.
8 Under Criminal Procedure (Scotland) Act 1995, s 288AA the powers of the Supreme Court are exercisable only for the purposes of determining the compatibility issue. This section, read in conjunction with s 288AZ of the same Act defines a compatibility issue as a question arising in criminal proceedings, as to whether a public authority has acted in a way which is made unlawful by the Human Rights Act 1998, s 6(1).
9 n 2 above at [11].

SUTHERLAND IN THE SUPREME COURT

Article 8 – the right to respect for private and family life

The submissions on behalf of Sutherland concerned Article 8. Article 8 is a qualified right. It may be interfered with in certain circumstances. The right provides as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Was there an interference with Article 8(1)?

In deciding the first issue in the negative, the court examined two criteria, namely, the nature of the communications and the reasonable expectation of privacy on the part of the applicant.

The Nature of the Communications

It was in their assessment of the nature of the communications that the court undertook a balancing exercise, weighing the requirements to protect the privacy of the applicant against the potential interference with the right to private life of the child. Particular attention was given to the fact that the communications at issue concerned purely private citizens rather than any state authorities. Lord Sales, with whom the other judges of the court concurred, observed that absent any question of state surveillance or interception, the reprehensible nature of the conduct in engaging in such communications was sufficient to negate any protection under Article 8(1).[10] Drawing on the reasoning of Baroness Hale in *Countryside Alliance and Ors* v *Her Majesty's Attorney General*, Lord Sales recognised that Article 8 is not an unqualified right; rather, acts done in private may still fall outside the scope of the article when they so drastically conflict with the values inherent in the ECHR.[11]

This conclusion was based on three core considerations. The first related to the nature of the conduct in question, namely that between a paedophile and a child. That such conduct is criminal in nature is irrefutable. However, it was not that the conduct amounted to criminal activity, but rather the nature of the criminal activity itself that precluded it from Article 8 protection. The fact that the potential victim is a child demonstrates the serious nature of the

10 *ibid* at [40].
11 *ibid* at [27]; *Countryside Alliance and Ors* v *Her Majesty's Attorney General* [2007] UKHL 52 at [116].

offence, indicating it is one of greater immediacy and of greater potential damage.[12] The potential victim was further emphasised in the second consideration which looks to the positive obligation owed by the state to children to enforce criminal law.[13] Drawing on the reasoning in the case of *R* v *G* the court noted that the ECHR requires the state to provide priority to the rights of the child over any interest that the paedophile could claim.[14] Finally, the court considered the Article 17 prohibition of the abuse of rights. The domestic implementation of this article requires that nothing in the Convention be interpreted as permitting those activities which are aimed at destroying the rights and freedoms of others.[15] The actions by the appellant were aimed at the destruction of the rights of the child. In concluding their reasoning, the court emphasised that the positive obligations of the state to protect the child outweighed any legitimate interest the appellant could have under Article 8(1).[16]

Reasonable Expectation of Privacy

When assessing whether or not there has been an interference with an individual's communications in a way that amounts to a breach of the right to private life, the court will have regard to whether there is a reasonable expectation of privacy in those communications. Lord Nicholls in *Campbell* v *MGN Ltd* (*Campbell*) noted that 'the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy'.[17] The Supreme Court confirmed this standard in the subsequent case of *In re J38*. In that case Lord Toulson writing for the majority held that this reasonable expectation test is an objective one to be applied broadly, taking into account all the circumstances of the case.[18] As such the individual's reasonable expectation of privacy can be ascertained from a range of factors.

In the case of *Sutherland*, Lord Sales considered that the contents of the communication and the relationship between the sender and recipient negated any reasonable expectation of privacy. The communications were intended for a child of 13 with whom the appellant had no prior relationship. The court reasoned that the request by the appellant to keep the communications confidential were insufficient to create an expectation of privacy.[19] In this regard, Lord Sales linked the reasonable expectation of privacy to the nature of the communications, noting that these communications were not 'an aspect of correspondence which was worthy of respect', precluding the communications from further protections.[20] Notably, Lord Sales recognised that there may be a reasonable expectation of privacy were the communications subject to police surveillance or

12 n 2 above at [41].
13 *ibid* at [42].
14 *ibid*; *R* v *G* [2008] UKHL 37 at [54].
15 Human Rights Act 1998, Sched 1.
16 n 2 above at [43].
17 *Campbell* v *MGN Ltd* [2004] UKHL 22 at [21].
18 *In re JR38* [2015] UKSC 42 at [98].
19 n 2 above at [56].
20 *ibid* at [40].

intrusion by the wider public.[21] However, given the circumstances surrounding the communication, the court concluded that there was no interference with the appellant's rights under Article 8(1).[22]

The state's positive obligation to protect Article 8

Having found that there was no interference in the right to private life, the Court went on to examine the extent to which the state's positive obligation to protect Article 8 rights was inconsistent with the use of evidence provided by paedophile hunter groups. Following the precedent established in *Ribalda* v *Spain*, the court held that positive obligations only arise where Article 8 is applicable in the first place.[23] As the first issue had been answered in the negative, this obligation did not arise in the current context.

THE STRASBOURG POSITION

The European Court of Human Rights (ECtHR) has consistently maintained that 'the right to private life is a broad term and not susceptible to exhaustive definition'.[24] Inherent in this right is respect for correspondence which the court has noted is not qualified by any adjective such as that which precedes 'life'.[25] The protections for correspondence under the article are not limited to those communications sent in private.[26] The Strasbourg Court has interpreted communications to cover a wide range of activities, from telephone calls,[27] to email,[28] to instant messaging.[29] In the instant case the messages sent by the appellant through the web platforms fall within the ambit of correspondence. The appellant's claim revolves around the sharing of that correspondence by the recipient with the state authorities. In this regard it is important to note that the ECtHR jurisprudence recognises the protections for correspondence are not limited to interferences by the state. This point is articulated in the case of *Von Hannover* v *Germany* (*Von Hannover*), where the Court held that

> [w]hile the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These

21 *ibid* at [58].
22 *ibid* at [63].
23 *ibid* at [66]; See also *Ribalda and Ors* v *Spain* [2019] ECHR 752.
24 See *Bărbulescu* v *Romania* [2017] ECHR 754 (*Bărbulescu)* at [70]; *Benedik* v *Slovenia* [2018] ECHR 363 at [100].
25 *Bărbulescu ibid* at [72].
26 See *Niemietz* v *Germany* [1992] ECHR 80 at [29]; *Halford* v *United Kingdom* [1997] ECHR 32 at [44]; *Copland* v *United Kingdom* [2007] ECHR 253 (*Copland*) at [41].
27 See *Klass* v *Germany* [1978] ECHR 4 at [41]; *Zakharov* v *Russia* [2015] ECHR 1065 at [173].
28 *Copland* n 26 above at [41].
29 *Bărbulescu* n 24 above at [74].

> obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.[30]

The extent to which the state is under a positive obligation under Article 8 must be considered with regard to the context and the need to strike a fair balance between competing interests. In determining this balance, the state will be given a wider margin of appreciation where the interests at stake relate to the effective deterrence of criminal acts which impact on aspects of private life.[31] The Court has considered how to balance the competing claims to the right to private life by individuals where criminal conduct is at issue. Extant precedent requires that, where private life is at stake, children and vulnerable individuals are in particular entitled to effective protection and the state is under a positive obligation to ensure those rights.[32] The Strasbourg Court has held that this positive obligation may require the effective criminalisation of acts such as those at issue in the current case.[33] In so doing, the state must act in a way which 'respects the due process and other guarantees which legitimately place restraints on criminal investigations and bringing offenders to justice, including the guarantees contained in Article 8'.[34] The utilisation of evidence provided by paedophile hunter groups calls into question the ability of the state to ensure that those fundamental values of due process are met.

Where a positive obligation exists on the state to balance the right to private life of children against other individuals through effective criminal law provisions, the ECtHR has held that the mere fact that the conduct of the individual was reprehensible does not in itself negate the Article 8 interest of the perpetrator. This position was set out in the case of *KU* v *Finland*, wherein the court qualified its position, holding that the balancing act is 'without prejudice to the question of whether the conduct of the person … can attract the protection of Articles 8 and 10, having regard to its reprehensible nature'.[35] Aware of this qualification, the Supreme Court distinguished the facts of *Sutherland*. Central to this was the idea of the potential harm and the type of protection required. Whereas in the case of *KU* v *Finland* the harm was indirect, here the conduct was direct, giving rise to a more serious risk of harm.[36]

The Supreme Court emphasised the potential harm that could be caused to the child required a positive obligation be placed on the police to take action based on the information provided.[37] This reasoning implies that a determining

30 *Von Hannover* v *Germany* [2005] ECHR 555 at [98].
31 *MC* v *Bulgaria* [2003] ECHR 651 (*MC*) at [150]; *X and Y* v *The Netherlands* [1985] ECHR 4 at [27].
32 *MC ibid* at [150].
33 *KU* v *Finland* [2008] ECHR 1563 at [42]-[43].
34 n 2 above at [48].
35 *ibid* at [49].
36 The case of *KU* v *Finland* concerned an unidentified person placing an advertisement on an Internet dating site in the name of a 12-year-old child, providing details as to his age and a physical description. The applicant became aware of the advertisement when contacted by a man offering to meet him. The service provider, regarding itself as bound by confidentiality, refused to divulge the identity of the person who posted the ad. There was no explicit legal provision in domestic law which would permit an order of disclosure. See n 33 above at [49]-[50].
37 n 2 above at [50].

factor in the application of Article 8(1) is the level of harm risked to others by upholding the private life interest of the individuals engaged in criminal conduct.

Furthermore, the Court drew on the idea that there exists a reasonable expectation of privacy within the communication, linking this to the nature of the communication. The position in the UK courts is that the consideration of whether there is a reasonable expectation is fundamental to determining whether the right to private life is engaged.[38] This interpretation is somewhat at odds with the Strasbourg Court. The ECtHR has examined the issue on several occasions and maintained the position that 'a reasonable expectation of privacy is a significant though not necessarily conclusive factor'.[39] The court in *Sutherland* distinguishes the present case from the previous ECtHR ruling in *Benedik* v *Slovenia* (*Benedik*) which concerned an adult convicted of offences relating to the possession and distribution of pornographic content involving minors.[40] The applicant in *Benedik* similarly alleged an interference with his Article 8 rights. In finding that the applicant's Article 8(1) rights were engaged, the court recognised that from the applicant's subjective perspective, the understanding was that the activity would remain private and that the question was 'whether he could have reasonably expected privacy' in conduct where he presumed his identity was private.[41]

For the court in *Sutherland*, the focus in dismissing this element of the argument was rooted in the idea that the purported recipient was thought to be a child and their communications did not establish a relationship of confidentiality.[42] This fails to fully consider the reasoning of *Benedik* and the wider elements which may contribute to an expectation on the part of the applicant that the communications are private. The above discussion indicates that while the reasonable expectation of privacy is a contributory factor in determining whether there has been an interference, it is not the sole factor. The following discussion will examine the wider implications of the decision of *Sutherland* as it relates to the application of the right to private life.

DISCUSSION

The decision in *Sutherland* emphasises that the content of the communication itself is a determining factor as to whether it engages a privacy interest, with certain elements identified as negating any privacy considerations. In the case of *Sutherland*, these elements focused on the nature of the conduct and the potential recipient. It is submitted that a better interpretation would be to weigh those elements in determining whether the interference was justified under Article 8(2). Such an approach would follow the line of reasoning set out in

38 n 17 above at [21].
39 *Garamukanwa* v *United Kingdom* [2019] ECHR 445 at [22]; *Bărbulescu* n 24 above at [73]; *Benedik* n 24 above at [101].
40 *Benedik ibid* at [14].
41 *ibid* at [116].
42 n 2 above at [56].

Campbell which emphasised that the content of the communications does not normally indicate whether they would benefit from an expectation of privacy; rather such elements are relevant to a consideration as to whether the alleged conduct was proportionate to the interference with the right to private life.[43] In designating the content of a communication as an element to be considered in determining whether a right to privacy was engaged, the Court has circumscribed the interpretation of Article 8(1), making the right contingent on the 'respectability' of the communication. This runs counter to the general interpretation in the ECtHR case law that the content of correspondence is not relevant to the question of whether there has been an interference. Relying on balancing the Article 8 rights of the potential victim against those of the appellant based on the nature of the communications allows the privacy considerations of criminal suspects to be easily dismissed. It raises the risk that these private conversations will be denied the protections under Article 8 without the benefit of the balancing exercise envisaged by Article 8(2). This can preclude any proper assessment of whether the actions of the private actors constitute a disproportionate encroachment on core rule of law values in the criminal process. Similarly, it will obviate a proper assessment of whether the state's reliance on the evidence provided by these actors constitutes a disproportionate interference with the accused's due process rights.

While the court's reasoning on the nature of the communications represents a departure from the Strasbourg case law, the interpretation of the reasonable expectation of privacy appears to follow existing precedent, albeit with some omissions. The academic literature and case law have accepted that there is no universal definition of what a reasonable expectation of privacy may entail.[44] In *Sutherland* the court drew on the fact that the victim was a purported child and there was an absence of a longstanding relationship to indicate that an expectation of confidentiality may exist.[45] Other factors may be relevant to the consideration of whether an expectation exists. Notable in the case of *Sutherland* was the choice of platform; WhatsApp is a messaging platform which is protected by end-to-end encryption. End-to-end encryption is a secure means of communicating in which third parties are prevented from intercepting or accessing the data while in transit. While the recipients are aware of the sender, the use of a secure messaging platform indicates that the appellant may have an expectation of privacy in their correspondence.

This reasoning was evident in the case of *BC and others* v *Chief Constable of the Police Service of Scotland* where the Court of Session considered the expectation of privacy for correspondence sent via WhatsApp. In the initial judgment, Lord Bannatyne considered the characteristics of WhatsApp in contrast with

43 n 17 above at [21]-[22].

44 J. Rule, '"Needs" for surveillance and the movement to protect privacy' in K. Ball, K.D. Haggerty and D. Lyon(eds), *Routledge Handbook of Surveillance Studies* (London: Routledge 2012) 66; R.L. McArthur, 'Reasonable Expectations of Privacy' (2001) 3 *Ethics and Information Technology* 123, 126; P. De Hert, 'Balancing Security and Liberty Within the European Human Rights Framework: A Critical Reading of the Court's Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies After 9/11' (2005) 1 Utrecht L Rev 68, 76.

45 n 2 above at [49].

other social media platforms.[46] In his reasoning, he noted the characteristics of the platform, holding that these indicated that 'an ordinary member of the public using such could have a reasonable expectation of privacy'.[47] On appeal the determination of whether a member of the public using WhatsApp could have a reasonable expectation of privacy was not subject to challenge.[48] As such the position regarding communications sent via these secure platforms remains unclear. It is submitted that the choice of platform could be an element for consideration in determining whether the individual had a reasonable expectation of privacy. Such an interpretation would be in line with the reasoning in *Delfi AS* v *Estonia* and *Benedik* v *Slovenia* which addressed the expectation of confidentiality and anonymity on online platforms in light of the right to private life under Article 8.[49]

An issue of wider significance raised by the case is the blurring of the public-private divide as it relates to the use of privately obtained evidence for criminal prosecutions. While focused on the subsequent use of the material derived by paedophile hunter groups, this case raises questions about the actions of the groups themselves and the potential privacy interferences they commit. The activities of these groups occur across the United Kingdom and have been a consistent phenomenon for years.[50] These groups occupy a distinct space, wherein they are both seen as independent of traditional law enforcement yet reliant on those policing mechanisms to achieve their stated goals. They depend on the digital sphere and interactions for their success, engaging in 'proactive' policing methods where they seek out targets online and confront them in real space. It is the interaction between their digital activities and the legitimate state actions that makes these groups effective.[51]

These methods have met with some success, with Police Scotland recognising that the activities of these groups accounted for 55 per cent of all recorded grooming cases in the 2018–19 fiscal year.[52] Yet these groups pose a unique risk to individuals' fundamental rights. Unregulated and unchecked, they use the moral outrage generated by the activities of paedophiles to gain support for their activities. As the National Police Chiefs' Council notes, '[p]ublic discourse focuses upon tackling child abuse as a positive and marginalises wider consideration of the deleterious effects of these groups'.[53] The tactics of these groups can pose a threat to the right to private life of the individuals they target.

While the case of *Sutherland* addressed the potential implications on private life by the subsequent use of material derived from these groups in criminal prosecutions, it is worth exploring the potential implications for private life by

46 *BC and Others* v *Chief Constable of the Police Service Scotland and Ors* [2020] CSOH 48 at [137].
47 *ibid* at [150].
48 *BC and Others* v *Chief Constable of the police Service Scotland and Ors* [2020] CHIS 61 at [87].
49 *Delfi AS* v *Estonia* [2015] ECHR 586 at [148]; *Benedik* n 24 above at [105].
50 NPCC, 'Responding to Online Child Abuse Activists' (Chief Constables' Council, 11 July 2018) para 2.3.
51 K. Hadjimatheou, 'Citizen-led digital policing and democratic norms: The case of self-styled paedophile hunters' (2019) *Criminology & Criminal Justice* 1, 12.
52 HMICS, *Strategic review of Police Scotland's response to online child sexual abuse* (February 2020) para 248.
53 NPCC, n 50 above, para 2.1.

the activities of these groups themselves. As the Strasbourg courts have established, the right to private life may be engaged between individuals.[54] The activities of these groups in using covert methods, meeting, confronting, recording, and sometimes detaining suspects in real space can trigger questions of the interference with the right to private life by their actions. In particular, the covert nature of their activities which aim to identify suspects and collect evidence for the purposes of prosecution represent a shift towards citizen led surveillance of private communications and activities which raises questions about the positive obligations on the state to prevent such interferences.

In this regard, it is lamentable that the court did not consider the practices of the paedophile hunter groups and the appellant's claims concerning covert human intelligence practices. The appellant alleged that the actions of the paedophile hunter group were such that the provisions of the Regulation of Investigatory Powers (Scotland) Act should apply.[55] This argument was dismissed by the Court, holding that the decoy acted on his own initiative and not at the instigation of the police. The decoy therefore did not fall under the definition of a covert human intelligence source (CHIS) which would require authorisation.[56] Yet this interpretation fails to take into consideration key developments between these groups and their relationship with the police. The National Police Chiefs' Council has recognised that the activism of these groups continues unabated, with more than 100 incidents each month.[57] Police Scotland have noted that the number of crimes reported by these groups 'make it difficult to argue against their contribution'.[58] These groups bill themselves as fulfilling a policing and enforcement role, with Groom Resisters Scotland, the group at issue in *Sutherland*, declaring themselves to be an 'online child protection enforcement team'.[59] They view themselves as occupying the liminal space between vigilantism and law enforcement. The primary aim of these groups is to collect incriminating evidence and engage in covert surveillance methods of intended targets.[60]

With the increasing prevalence of these groups and adoption of their evidence, further consideration is needed as to whether these groups are in fact acting as covert sources. The domestic interpretation to date is that such conduct will not fall under the classification of CHIS activity if the police do not 'use or conduct' the paedophile hunter groups in their activities.[61] This follows from the general interpretation of the RIPA provisions that vigilante activity is normally outside their scope. However, the Code of Practice for CHIS indicates that this interpretation is highly context dependent. Several factors may lend

54 *Köpke* v *Germany* [2010] ECHR 1725 at [42]; *Von Hannover* n 30 above at [57]; *KU* v *Finland* n 33 above at [42]-[43].
55 n 2 above at [18].
56 Regulation of Investigatory Powers (Scotland) Act 2000, s 7(5).
57 n 53 above.
58 n 52 above, para 249.
59 'Groom Resisters Scotland' *Facebook* at https://www.facebook.com/GroomResistersOfficial (last accessed 12 October 2020).
60 J. Purshouse, '"Paedophile Hunters", Criminal Procedure, and Fundamental Human Rights' (2020) J L & Soc'y 1, 14.
61 *R* v *Walters; R* v *Ali T2016262 and T20160897* Crown Court at Newcastle, unreported.

themselves to the determination that the paedophile hunter group is actually acting in a CHIS role. For example, the Crown Prosecution Service has identified the frequency of the provision of information to the police as an element which may result in CHIS protections.[62] In the period from mid-October 2017 to the end of March 2019, one group allegedly undertook 80 sting operations for which they provided evidence to the relevant authorities.[63] This indicates that there is a frequent interaction between the group and provision of relevant materials which lends support to the argument that it should be considered under the CHIS framework. Furthermore, the CHIS Code of Practice notes that an authorisation should be considered, 'for example, where a public authority is aware that a third party is *independently* maintaining a relationship in order to obtain evidence of criminal activity, and the public authority intends to make use of that material for its own investigative purposes'.[64] If police are aware that these groups are, on their own initiative, undertaking covert activities to provide the police with evidence, even in the absence of police direction, then these groups should be interpreted as falling under this provision.

Similarly, if any guidance or instruction is issued by the police in undertaking the activities, that may give rise to the allegation that the activity falls under the scope of covert human intelligence activity. Evidence from academic literature and reports on the paedophile hunter groups states that they often receive informal encouragement and advice from the police forces with whom they interact.[65] The Strasbourg case law indicates that if such support is provided, the activities should be imputable to the police, thereby engaging the responsibility of the state under Article 8.[66] Police guidance on interactions with these groups notes that the current policies are inconsistent across forces.[67] While there is disquiet amongst senior police officials in the activities of these groups, the benefit of their work has been recognised. This leads to concerns that there is an implicit approval of the activities of these groups.

62 'Online Child Abuse Activist Groups on the internet' Crown Prosecution Service, 23 July 2020 at https://www.cps.gov.uk/legal-guidance/online-child-abuse-activist-groups-internet (last accessed 21 October 2020).

63 Brooks, n 1 above.

64 Home Office, *Covert Human Intelligence Sources Revised Code of Practice* (August 2018) para 2.26.

65 See E. Campbell, 'Policing paedophilia: Assembling bodies, spaces and things' (2016) 12 *Crime, Media, and Culture* 345, 349; A. Gillespie, '"Paedophile Hunters": How should the law respond?' (2019) 12 Crim L R 1016, 1019; Yar, n 1 above, 490; Hadjimatheou, n 51 above, 8; Purshouse, n 60 above, 13. For news reports see K. Sandeman, 'Why Nottinghamshire Police could strengthen links with paedophile hunters' *Nottingham Post* 9 October 2018 at https://www.nottinghampost.com/news/nottingham-news/nottinghamshire-police-could-strengthen-links-2090840 (last accessed 2 November 2020); L. Brooks, 'Scottish Prosecutors in "in cahoots with paedophile hunters", court told' *The Guardian Scotland* 3 June 2020 at https://www.theguardian.com/society/2020/jun/03/scottish-prosecutors-in-cahoots-with-paedophile-hunters-supreme-court-told (last accessed 2 November 2020); 'Paedophile hunter behind PH Balance reveals how he is bringing perverts to justice' *South Wales Argus* 3 July 2018 at https://www.southwalesargus.co.uk/news/16329129.paedophile-hunter-behind-ph-balance-reveals-bringing-perverts-justice/ (last accessed 4 November 2020).

66 *MM* v *Netherlands* [2003] ECHR 153 at [36-39].

67 NPCC, 'Responding to Online Child Abuse Activist' (16 Jan 2019) para 4.1.

CONCLUSION

The case of *Sutherland* has expanded the opportunity for excluding the content of criminal correspondence from the protections of Article 8. In so doing, it focuses on assessing the nature of the communication; holding that the reprehensible nature of the communications negates any protections enshrined by the right to private life. Such an interpretation requires the balancing exercise, normally left to the determination of whether an interference was justified under Article 8(2), to be considered in ascertaining whether the right is even engaged. This limitation on the application of Article 8(1) is even more significant given the means by which the correspondence was obtained and used in subsequent proceedings. The role of private actors in performing investigative functions traditionally left to law enforcement allows them to undertake acts which pose a risk to the right to private life of their targets. In failing to recognise these groups as acting in a covert human intelligence capacity, an area is created wherein the right to private life is potentially interfered with, but there is no legal recourse. Accepting the evidence provided by private actors who view themselves as fulfilling a public duty creates a gap in the protections for individuals who may be caught by these activities. By accepting the legitimacy of the evidence used in the case of *Sutherland*, the methods adopted by these groups are given implicit approval.