

‘PAEDOPHILE HUNTERS’: HOW SHOULD THE LAW RESPOND?

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ABSTRACT

This article seeks to explore the phenomenon of the so-called ‘paedophile hunters’. These are members of the public who see themselves as protecting children by visiting social media sites posing as children and engaging with adults who seek to exploit children sexually. They typically film subsequent encounters with the adults involved and pass the information to the police to investigate as a potential sexual offence. While the police condemn these activities as vigilantism, it is clear that both the police and courts will act upon the evidence. However, questions are being asked about whether hunters entrap those that they suspect of abuse, and whether the courts should accede to submissions that the actions of paedophile hunters lead to an abuse of process.

INTRODUCTION

In recent years, so-called paedophile hunters have captured the imagination of the public while causing the police a degree of concern. The hunters are ordinary members of the public who adopt the persona of a child on social media. In that persona, they communicate with adults whom they suspect of being interested in child sex. The suspect typically engage with the “child” in sexual conversation, and ultimately he seeks to meet the child for sex. When the suspect turns up to the meeting, he (as the suspect is inevitably male) is confronted and filmed, with the footage then being sent to the police (or, in some cases, the police being told of the meeting in advance).

Paedophile hunters pose challenges to the criminal justice system. While they argue that they are filling a void left by the police,¹ the police are concerned that the hunters do not appreciate the complexities of online investigations, and can even prejudice police investigations.² However, at the same time, the police are prepared to use the evidence gathered by the hunters. Evidence

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¹ HMIC has noted that not all regional units have capacity to do this work: HMIC, *Real Lives, Real Crimes: A Study of Digital Crime and Policing*, (TSO 2015).

² Frances Perraudin, ‘Paedophile Hunters Jeopardising Police Work, Says Senior Officer’ (*the Guardian*, 24 April 2017) <<http://www.theguardian.com/society/2017/apr/24/paedophile-hunters-jeopardising-police-work-child-protection>> accessed 3 April 2018.

gathered by hunters has led to 150 convictions in England & Wales during the twelve months to April 2018.³ Recently, the courts have⁴ been called upon to identify the limits of the behaviour undertaken by the hunters. In *R v TL*⁴, the Court of Appeal held that paedophile hunters should, in assessing whether their conduct amounts to entrapment, be measured against a different standard of behaviour to the police. However, there are limits to what is acceptable conduct on their part. Two contrasting Crown Court cases demonstrate the difficulties their conduct poses. In *R v Walters and Ali*⁵ Langstaff J. rejected an application to stay an indictment based on the activities of a paedophile hunter, whereas in *R v Slusalarczyk*⁶ HHJ Blair QC did stay an indictment, stating that the activities of paedophile hunters brought the criminal justice system into disrepute as had occurred in that case.

This article seeks to explore the phenomenon of paedophile hunters and identify the challenges that their activities bring to the criminal justice system. In particular, it will consider how the courts should treat applications to stay indictments as an abuse of process where it is alleged that the hunters have unfairly entrapped the suspect.

THE PAEDOPHILE HUNTER

It is difficult to identify when the concept of the paedophile hunter entered the public consciousness, although a milestone moment was undoubtedly the airing on US networked television of the show 'To Catch a Predator'.⁷ This show began in 2004 and presented itself as a news network joining forces with a vigilante group (and later the police) to try and catch those who were seeking to solicit children online for sex.⁸ The undercover civilian would be filmed talking to a suspect, with the latter believing that they were talking to a child. They would arrange a meeting with the 'child', almost always at the child's house, whereupon the reporter would confront them, accompanied by a TV crew. When the suspect tried to leave, they would be arrested by the police who had allowed the meeting to go ahead. The footage (which remains

³ Telegraph, 'Paedophile Hunters Ignore Police Pleas and Bring 150 Offenders to Justice' *The Telegraph* (11 April 2018) <<https://www.telegraph.co.uk/news/2018/04/11/paedophile-hunters-ignore-police-pleas-bring-150-offenders-justice/>> accessed 16 September 2018.

⁴ [2018] EWCA Crim 1821.

⁵ T2016262 and T20160897, Crown Court at Newcastle. Judgment of Langstaff J. on 6.4.2017. A transcript of this ruling is available at: <https://www.judiciary.uk/wp-content/uploads/2017/04/r-v-walters-and-r-v-ali.pdf?LinkSource=PassleApp> Accessed 7 May 2018.

⁶ T30187009, Crown Court at Bristol. Judgment of HHJ Blair QC on 29.8.2018. A transcript of the judgment was requested, and provided to, the author by the Transcription Agency.

⁷ An interesting discussion on this show is presented by Amy Adler, 'To Catch a Predator' (2011) 21 *Columbia Journal of Gender and the Law* 130.

⁸ Adler (n 7) 135.

widely available on social media sites such as YouTube) is invariably accompanied by high-octane footage of police arriving with red and blue flashing lights and guns drawn.

To Catch a Predator was, at least in ratings terms, a huge hit. However, it raised some uncomfortable questions, many of which continue today and are discussed below. The show ultimately ended, in part because it was linked to a small number of suicides. One saw William Conratt, a Texas lawyer, confronted on the show and realising the consequences of what was happening, chose to shoot himself in the house that he had attended in the hope of meeting the child.⁹ Other suicides led some to question the ethics of what was happening, although the popularity of the show suggested that the general public was perhaps more forgiving of the TV executives actions.

Perhaps unsurprisingly given the attention that it attracted, people in the UK soon started to act as paedophile hunters. Again, it is not clear when this phenomenon began in the UK, but the activity has thrived, with the courts recently describing it as a ‘cottage industry’.¹⁰ Unlike in America, paedophile hunters are not a form of mainstream entertainment. Journalists initially began posing as children when the issue of online grooming first came to prominence. So, for example, the BBC ran a story on how easy it was to groom a child online. This story involved a journalist pretending to be a schoolgirl and turning up to meet her contact.¹¹ The BBC broadcast the meeting as part of the ‘6 o’clock news’, one of the most important news programmes in the UK. Some (print) journalists followed this pattern when engaging in similar activity, but again these incidents were presented as news rather than entertainment. Eventually, Channel 4 presented a documentary on the work of paedophile hunters,¹² but it did so in a way that showed all sides of the argument, including presenting the views of police officers and social workers who argued that the actions of the hunters were inappropriate. Again, the presentation was more as a news story than as entertainment.

The Channel 4 documentary was perhaps the first that looked at the phenomenon of the ‘paedophile hunter’ rather than the issue of grooming. The documentary was broadcast at a time

⁹ Adler (n 7) 141.

¹⁰ Martin Evans, ‘Paedophile Hunters like a “Cottage Industry”, Court Hears as Three Groups Target Same Suspect’ *Daily Telegraph* (9 January 2018) <<https://www.telegraph.co.uk/news/2018/01/09/paedophile-hunters-now-operating-like-cottage-industry-court/>> accessed 19 April 2018.

¹¹ James Westhead, “I Was Groomed Online” (6 February 2003) <<http://news.bbc.co.uk/1/hi/uk/2733989.stm>> accessed 16 September 2018 This was at the time that s.15, Sexual Offences Act 2003 had just been enacted.

¹² ‘The Paedophile Hunter’, broadcast 1 October 2014.

when traditional forms of entertainment, such as television, were arguably becoming eclipsed by social media and online news. Traditional broadcasting rules do not constrain these formats and allow a message to be sent directly to those interested in such matters.¹³ Certainly, paedophile hunters have adopted social media in earnest. Not only do individual collectives operate their sites, but they come together to publicise what they do. ‘UK Hunters Stream’¹⁴ is a website that presents the activities of many paedophile hunter groups. The site includes an explanation of what the hunters do and why and even tries to provide educational advice to parents and the wider public. UK Hunters Stream collect statistics on what the groups do and present reports of successful stings. The site is intended to try to show that the activity is worthy. The presentation of statistics and reports is partly to try and legitimise their activities. The reports are akin to statistics and messages put out by police forces. The site is careful not to glamorise what they do and instead presents the information in a measured way. That said, it also provides links to the individual pages of paedophile hunters, which often include footage of the meetings between hunter and hunted. Thus, the hunters can present their activities to the wider public without being subject to the questioning that often arises when engaging with the mainstream media.

The relationship between police and paedophile hunters

What relationship exists between paedophile hunters and the police? If over 150 convictions have succeeded, then it would seem, at face value, that the relationship should be positive, but that is not the case. The official position of the NPCC is that paedophile hunters are vigilantes, and the police will not condone their actions.¹⁵ Indeed, recently there was a discussion about the police adopting a policy of arresting paedophile hunters where they were found to have engaged in criminality, including harassment.¹⁶ Presumably, the intention was to dissuade individuals from acting as paedophile hunters. If so, the policy was unsuccessful, and at least anecdotally, the police appear to have resiled from this stance.

¹³ Axel Bruns, ‘Working the Story: News Curation in Social Media as a Second Wave of Citizen Journalism.’ in Chris Atton (ed), *The Routledge Companion to Alternative and Community Media*. (Routledge 2015).

¹⁴ <http://ukhunters.stream/>

¹⁵ NPCC, ‘Police Approach to Paedophile Hunters Has Not Changed’ (18 September 2017) <<https://news.npcc.police.uk/releases/police-approach-to-paedophile-hunters-has-not-changed>> accessed 28 September 2018.

¹⁶ Rozina Sabur, ‘“Paedophile Hunters” Arrested by Police as Officers Begin Crackdown on Social Media Vigilantes.’ *Daily Telegraph* (25 April 2017).

The hunters frequently state that there is commonly local-level co-operation.¹⁷ Of course, it is easy to say this without proof, but it would not be difficult to believe that some police officers will be broadly supportive of the activities. At a practical level, there is a link, in that most hunters will pass the evidence to the police, and the courts have noted that such information will invariably require investigation.¹⁸ The fact that hunters supply the police information means that there is, at the very least, alignment between the activities of the hunters and the police,¹⁹ even if no official relationship exists.

Should the relationship change? A radical suggestion was put forward by Jim Gamble, the former Assistant Chief Constable and founding chief executive of CEOP (*Child Exploitation and Online Protection Centre*). Gamble has suggested that paedophile hunters could be recruited by the police to act as special constables.²⁰ While this idea has been rejected by many in authority, it is perhaps not as extreme as it may sound. Note, that Gamble was not suggesting that the police should simply accept what the hunters do. Rather, he suggested recruiting hunters as Special Constables. This would mean that they would become sworn constables and would be the subject of regulation in the same way that ordinary police officers are. In other words, the hunters would no longer be able to act in the way that they do now, but instead would be trained in how to conduct undercover operations in compliance with the law and following appropriate legal safeguards,²¹ including potentially requiring authorisation as a covert human intelligence source.²²

Realistically, it is unlikely that many paedophile hunters would choose to join the police, even if the police suddenly decided to permit it. Many argue that they became paedophile hunters because they think the police are over-regulated and constrained in such operations.²³ It is

¹⁷ Iwan Gabe Davies, 'Paedophile Hunter behind PH Balance Reveals How He Is Bringing Perverts to Justice' *South Wales Argus* (3 July 2018) <<https://www.southwalesargus.co.uk/news/16329129.paedophile-hunter-behind-ph-balance-reveals-how-he-is-bringing-perverts-to-justice/>> accessed 28 September 2018.

¹⁸ See *R v Walters and Ali*, T2016262 and T20160897 at [39].

¹⁹ Elaine Campbell, 'Policing Paedophilia: Assembling Bodies, Spaces and Things' (2016) 12 *Crime, media, culture* 345, 347.

²⁰ BBC, 'Ex-CEOP Boss: "Recruit Paedophile Hunters"' *BBC News* (21 September 2017) <<https://www.bbc.com/news/uk-northern-ireland-41350389>> accessed 16 September 2018.

²¹ Special constables hold all the powers of a constable when on duty (Police Act 1996, s.30(2)) and so there is no legal impediment to a special constable working undercover.

²² Regulation of Investigatory Powers Act 2000, s.26(8) and see *Covert Human Intelligence Sources: Revised Code of Practice* (2018, Home Office) at 23.

²³ Campbell notes that some have a perception that 'red tape' prevents the police doing what they are doing: Campbell (n 19) 353.

unlikely that their concerns would go away. However, that means the relationship between police and hunter is likely to remain one of distrust.

THE COURTS' RESPONSE

Notwithstanding the number of successful prosecutions that have followed the activities of paedophile hunters, concern has grown about the appropriateness of accepting the evidence of 'vigilantes'. Defence advocates began to challenge prosecutions based on the evidence gathered by paedophile hunters. There are two principal avenues of attack. The first is that the police circumvent the rules of covert policing by relying on the evidence, and second is that the conduct of paedophile hunters constitutes entrapment.

Circumventing the rules

The first argument put forward is that while the police officially denies any relationship exists between them and paedophile hunters, the use of the evidence means that prosecutions are taking place without the oversight that would exist if the police were to conduct the operations. In essence, the argument that the police turn a 'blind eye' and thus allow suspects to be targeted proactively in such a way that circumvents the laws regulating covert surveillance.

The police do undertake proactive operations similar to those undertaken by paedophile hunters.²⁴ When they do so, they are subject to both internal and external regulation. The internal procedures will ordinarily involve management approval and oversight of the operation.²⁵ This assures that the operation is conducted legitimately and that the safety of everyone involved is assured. However, these are matters of internal guidance. The existence of this internal guidance does not support an argument that paedophile hunters are acting contrary to the law by not being subject to them. The existence of the rules will assist in gaining positive outcomes, but the same is true of lots of types of police work, where rules, procedures and authorisations are commonplace but not required in law.

The second form of authorisation is more complicated. Where a police officer goes online pretending to be a child to talk to a suspect, that officer will be establishing or maintaining a personal or other relationship. In other words, the officer will be a covert human intelligence

²⁴ HMIC, *An Inspection of Undercover Policing in England and Wales* (TSO 2014) 150.

²⁵ See, for example, the comments of the Lord Chief Justice in *R v TL* [2018] EWCA Crim 1821 at [20]-[21].

source (CHIS).²⁶ Where the police wish to use a CHIS, including an undercover officer, then they need an appropriate authority²⁷ for both the ‘use’ of the CHIS and their ‘conduct’.²⁸ These authorisations are subject to scrutiny by the judicial commissioners (previously the ‘Surveillance Commissioners’) based in the Investigatory Powers Commissioner’s Office.²⁹ While the scrutiny is retrospective, it would still be extremely embarrassing for the police to be criticised for acting inappropriately, and thus the police will follow the guidance of the Commissioners.

In *R v Walters and Ali*³⁰ the defendants sought to argue that paedophile hunters were CHIS and therefore required authority for their work. If the hunters were not authorised as CHIS this, the defendants argued, meant that the prosecution amounted to an abuse of process. Langstaff J. did not accept these submissions. He accepted that the activities met the definition of a CHIS,³¹ but that is unsurprising given the breadth of the definition of that concept. It encompasses all those who covertly establish or maintain a personal or other relationship to, *inter alia*, obtain or disclose information. Paedophile hunters will fall within this definition as would many private investigators. However, Langstaff J. noted that falling within the definition is largely irrelevant. Despite the Act’s name, RIPA 2000 does not fully regulate investigatory powers. It regulates *some* regulatory powers exercised by *some* organisations. It was a response to the passing of the Human Rights Act 1998.³² While the traditional approach in England & Wales has been to consider anything not illegal to be lawful, this contrasts with the approach of the European Court of Human Rights who require a clear legal basis for any interference with a right under Article 8. Thus, surveillance powers have previously been declared a breach of Article 8 by that Court because they did not have any statutory basis.³² RIPA 2000 was designed to put the principal investigatory powers exercised by public authorities onto a statutory footing, providing a legal basis to defend any action brought under s.7, Human Rights Act 1998.

That RIPA 2000 does not regulate all forms of covert surveillance can be seen from s.80 which provides that a failure to authorise conduct does not render it unlawful. Similarly, s.80(b) does not require the exercise of any power or authority. If the Act were truly to regulate all forms of

²⁶ s.26(8), Regulation of Investigatory Powers Act 2000.

²⁷ s.29, Regulation of Investigatory Powers Act 2000.

²⁸ s.26(7), Regulation of Investigatory Powers Act 2000.

²⁹ See Part 8, Investigatory Powers Act 2016.

³⁰ T20167262 and T20160897. Crown Court at Newcastle-upon-Tyne.

³¹ Paragraph 24 of the judgment.

³² See, most notably, *Malone v United Kingdom* (1984) 7 EHRR 14 and *Halford v United Kingdom* (1997) 24 EHRR 523.

investigatory powers, then it would permit only those powers that comply with the Act be used, declaring all others to be unlawful.

Langstaff J. ruled that the mere fact that a person is acting as a CHIS does not mean that they have to be authorised. RIPA 2000 is permissive; it allows the police to authorise a source, but it does not require them to do so. The mere fact that someone's actions mean that he meets the definition of a CHIS is irrelevant if the police are not using that person. Obviously where they do use them, as, for example when the police make use of informants, then the position is different, but that is because of the relationship that exists between the source and the police. In *Walters and Ali* counsel for the defendants admitted that it could not be shown that there was an obvious link between the police and the paedophile hunter. Counsel expressly disavowed any suggestion of bad conduct on behalf of the police (through, for example, covering up any such link).³³ Langstaff J. expressly rejected the suggestion that a link could be established by association and ruled that it required co-operation. Counsel submitted that the fact the police attended the meeting to arrest the suspect showed condonation and complicity, but Langstaff J. pointed out that to do otherwise would arguably be a breach of the police's duty to investigate.³⁴

This latter point is extremely important. While there is some doubt as to whether the police owe a general duty to investigate all crime,³⁵ there is less doubt that such a duty exists in respect of child abuse cases. The sexual abuse and exploitation of children can engage Article 3 of the ECHR.³⁶ Article 3 imposes positive obligations on the state, i.e. it must take steps to protect a child from abuse, not just react to abuse after it has happened.³⁷ Let us take the following (plausible) example:

D has been chatting with two 'girls' (X and Y) purportedly aged 14 online. He arranges to meet X on Monday night and Y on Tuesday night. In fact, X is a paedophile hunter posing as a child. X passes on all the information that shows D has engaged in sexually-explicit conversation with X and clearly intends to have sexual intercourse with X. The police decline to attend, arrest or question D. On Tuesday, he meets Y, who is, in fact, a 14-year-old girl and sexually assaults her.

³³ T20167262, para [33] of the judgment.

³⁴ T20167262, para [49] of the judgment.

³⁵ Perhaps best summarised by Lord Toulson in *Michael and others v Chief Constable of South Wales* [2015] UKSC 2.

³⁶ *MC v Bulgaria* (2005) 40 EHRR 20 although there is a minimum threshold to meet Article 3 (*Z and others v United Kingdom* (2002) 34 EHRR 97).

³⁷ *X and Y v Netherlands* (1985) 8 EHRR 235.

One could imagine the press headlines that might accompany such a case. Equally, the law would take a dim view of the police decision to decline to investigate D.³⁸ Thus, where the police attend a meeting arranged by a paedophile hunter, it is not that they are condoning the hunter's actions, but rather it is a pragmatic decision to investigate whether an individual may have committed a crime or pose a danger to children.

Entrapment

The second argument advanced to exclude the evidence gathered by the hunters is that the activities of paedophile hunters constitute entrapment. As is well known, in England & Wales, entrapment does not exist as a substantive defence.⁹³ Instead, where entrapment exists, it is used to mitigate sentence,⁹⁴ justify the exclusion of evidence,⁹⁵ or as grounds to seek a stay of proceedings as an abuse of process.⁹⁶ Where the entrapment is by the state, the last has become the default position,⁹⁷ but it is less clear that this is the appropriate result for private entrapment.

Defining entrapment

What is entrapment? As it is not a defence, it has not been particularly well defined. Even *R v Looseley*, which is the leading authority on entrapment, did not fully articulate what entrapment was. Lord Hoffman arguably gave the clearest definition when he stated that it was, 'when an agent of the state – usually a law enforcement officer or a controlled informer – causes someone to commit an offence in order that he should be prosecuted'.⁹⁸ Lord Nicholls argued that it was when 'the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so'.⁹⁹ 'Lure' is certainly less tangible than 'cause' and Lord Nicholls notes that the problem with 'lure', 'incite', 'entice' and 'instigate' is that they are very imprecise. His Lordship notes that test purchasing operations are an example of circumstances when there is no entrapment,¹⁰⁰ and this must be true of Lord Hoffman's definition. For example, if the state sends a 16-year-old into a shop to purchase alcohol, then the

³⁸ See *Commissioner of Police for the Metropolis v DSD and another* [2018] UKSC 11.

⁹³ Most recently confirmed by the House of Lords in *R v Looseley* [2001] UKHL 53.

⁹⁴ See, for example, *R v McCann* (1972) 56 Cr App R 359.

⁹⁵ *Police and Criminal Evidence Act 1984*, s.78.

⁹⁶ *R v Looseley* [2001] UKHL 53.

⁹⁷ Andrew LT Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* (2nd edn, Oxford University Press 2008).

⁹⁸ *R v Looseley* [2001] UKHL 53 at [36].

⁹⁹ *R v Looseley* [2001] UKHL 53 at [1].

¹⁰⁰ *R v Looseley* [2001] UKHL 53 at [2].

state has *caused* (to use Lord Hoffman's definition) the shop to commit an offence.¹⁰¹ Yet, this will not be objected to because it is considered to be a legitimate tactic to combat the illegal sale of alcohol.¹⁰² The same is true of other test-purchases including, for example, drugs.

Perhaps entrapment should, therefore, be better defined as the *unfair* causing of a person to commit an offence. Certainly, this would better echo the approach that the courts have taken to such cases. In *Looseley* it was noted that the reason for committing the offence was important. Lord Nicholls notes, 'if the defendant already had the intent to commit a crime of the same or similar kind, then the police did no more than give him the opportunity to fulfil his existing intent'.¹⁰³ So, for example, in the context of drugs; a suspect was always going to sell drugs to someone, they just happened to sell them to a police officer. Lord Hoffman agreed with this, although he noted that ascertaining that this was going to be the case will not always be easy.¹⁰⁴ He also noted that while it is an appropriate test for regulatory matters, 'ordinary members of the public do not become involved in large scale drug dealing, conspiracy to rob...or hiring assassins'.¹⁰⁵

Both Lord Nicholls and Lord Hoffman referred to entrapment being by the state. Lord Nicholls, in particular, noting that this would include an informant because they are engaging on behalf of the state. While entrapment will ordinarily be through the state, the courts have accepted the possibility that a private citizen could commit entrapment through acting as an agent provocateur. In *R v Shannon*¹⁰⁶ a TV actor was tricked into supplying drugs by a journalist for the News of the World. The Court of Appeal accepted that, in principle, the actions of an agent provocateur could affect the fairness of proceedings but noted that the judge at first instance had held that the defendant had supplied the drugs without any pressure.¹⁰⁷ In other words, that it did not constitute entrapment on the facts of this case. Journalistic excesses were also considered in *Council for the Regulation of Health Care Professionals v General Medical Council and Saluja*,¹⁰⁸ which concerned regulatory proceedings. A doctor was accused of misconduct following a journalistic investigation into doctors falsely accused of signing people as unfit to work. The GMC stayed the proceedings on the basis that they felt the journalist had entrapped the doctor, but the High

¹⁰¹ *Licensing Act 2003*, s.146(1).

¹⁰² Indeed, the state would not be committing an offence by doing so: *Licensing Act 2003*, ss.152(4), 154(2).

¹⁰³ *R v Looseley* [2001] UKHL 53 at [21].

¹⁰⁴ *R v Looseley* [2001] UKHL 53 at [50].

¹⁰⁵ *R v Looseley* [2001] UKHL 53 at [51].

¹⁰⁶ [2001] 1 WLR 51.

¹⁰⁷ *R v Shannon* [2001] 1 WLR 51 at 71.

¹⁰⁸ [2006] EWHC 2784 (Admin).

Court quashed this stay, noting that the conduct did not constitute entrapment.¹⁰⁹ In part, this was because they did not find that the conduct was anything other than unexceptionable, and partly because they considered that some forms of misconduct would only be detected by offering inducements.¹¹⁰

From these cases, it can be seen that entrapment can be summarised as unfair activity that causes a person to commit a criminal offence by inappropriately tricking, pressurising or inducing them. Importantly, this recognises that there will be circumstances when offering an opportunity to commit a crime will be legitimate, not least when all a person did was to offer the suspect an unexceptional opportunity to commit an offence that the suspect would have otherwise been willing to have done.¹¹¹

How does this apply to paedophile hunter cases? It will be remembered from earlier sections that paedophile hunters invariably pretend to be children and seek to meet people online. Depending on what form the conversation takes, a person talking to the ‘child’ could commit a variety of offences. The most obvious would be sexual communication with a child¹¹² (where the conversation is sexual and the defendant engaged in the conversation for the purposes of sexual gratification), meeting a child following grooming¹¹³ (where the suspect and the ‘child’ communicate on at least one occasion and the suspect meets the ‘child’, travels to meet or causes the child to travel for a meeting, and at that meeting intends to commit a child sex offence) or arranging or facilitating a child sexual offence¹¹⁴ (where the suspect puts in place arrangements that will allow him to commit a sexual offence).¹¹⁵ The question is the extent to which it can be said that their conduct is inappropriate: i.e. do they seek to unduly pressurise or induce a suspect, or do they simply provide an opportunity to commit an offence that the suspect was fully prepared to commit?

¹⁰⁹ *Council for the Regulation of Health Care Professionals v General Medical Council* [2006] EWHC 2784 (Admin) at [111]-[122].

¹¹⁰ *Council for the Regulation of Health Care Professionals v General Medical Council* [2006] EWHC 2784 (Admin) at [124].

¹¹¹ *R v Syed* [2018] EWCA Crim 2809 at [123], [124].

¹¹² *Sexual Offences Act 2003*, s.15A.

¹¹³ *Sexual Offences Act 2003*, s.15

¹¹⁴ *Sexual Offences Act 2003*, s.14.

¹¹⁵ For some time there has been a discussion on whether s.14 should be charged as a substantive or attempt. It is an inchoate offence. It criminalises behaviour that if carried out *in accordance with the defendant's intention*, would constitute a child sex offence. The defendant will intend to commit an offence on a real child, and thus the substantive offence can be charged. From the 2010s the offence was charged as attempted s.14. The CPS has now decided to return to charging the substantive offence, which must be correct (<https://www.cps.gov.uk/cps/news/cps-strengthens-guidance-child-abusers-caught-undercover-stings>) (Accessed 1.8.19).

This is an issue that has received recent judicial attention. Two cases are presented here because they reached very different conclusions; that is the decision in *R v TL*,¹¹⁶ which was first heard in the Crown Court at Nottingham, and then ultimately in the Court of Appeal (Criminal Division), and *R v Shusalarczik*,¹¹⁷ a first-instance decision in the Crown Court at Bristol before the Honorary Recorder of Bristol, HHJ Blair QC.

In *TL* a paedophile hunter known only as ‘Mr U’ adopted the persona of ‘Bexie’, a 14-year-old girl. The profile of ‘Bexie’ stated, ‘Hiya am just your average 14-year-old girl looking to meet new friends’.¹¹⁸ Someone using the suspect’s computer¹¹⁹ had posted a message asking for a threesome. When ‘Bexie’ replied and said that she was inexperienced, the reply was, ‘It’s ok we are experienced we will learn u and u can join in on sex as threesome’. ‘Bexie’ and TL engaged in conversation that made it clear that TL wanted to have sex. It culminated in TL asking ‘Bexie’ whether she wanted to meet with them after school to have sex.¹²⁰ ‘Bexie’ expressly referred to her age and asked whether it bothered TL, to which the reply was ‘no’. After they discussed sex, TL sent a photograph of condoms to reassure ‘Bexie’ that she would not fall pregnant.¹²¹

TL arranged a time when Bexie would turn up at the house. At that time, Mr U, other paedophile hunters and the police turned up. TL was charged with attempting to meet a child following grooming etc.,¹²² but he sought a stay of prosecution arguing that he had been entrapped. The judge at first instance (HHJ Sampson) held that *TL* had been the victim of entrapment. The judge ruled that the photograph that accompanied ‘Bexie’s’ profile showed a picture of someone who was ‘at least 14, but could be older, including 18 or more’.¹²³ He found that there was no reasonable suspicion against TL and that, in essence, the offence had been created by ‘Bexie’. He decided that because paedophile hunters try to behave like self-appointed internet police then, ‘it seems to me the common law principle against entrapment should apply to this private citizens’ operation, in the same manner as it would apply to a police operation’.¹²⁴ For reasons set out later, he stayed the prosecution as an abuse of process.

¹¹⁶ [2018] EWCA Crim 1821.

¹¹⁷ T20187009.

¹¹⁸ *R v TL* [2018] EWCA Crim 1821 at [7].

¹¹⁹ This strange formulation is required because the defendant argued that he had not communicated with ‘Bexie’ and, instead, it has been his girlfriend. This matter had not been resolved by the courts. However, for simplicity reference will be to TL as that is what the prosecution allege.

¹²⁰ *R v TL* [2018] EWCA Crim 1821 at [8].

¹²¹ *R v TL* [2018] EWCA Crim 1821 at [9].

¹²² Criminal Attempts Act 1981, s.1 when read in conjunction with *Sexual Offences Act 2003*, s.15.

¹²³ *R v TL* [2018] EWCA Crim 1821 at [13] quoting HHJ Sampson, the judge at first instance.

¹²⁴ *R v TL* [2018] EWCA Crim 1821 at [14].

The facts of *Slusalarczyk* were not dissimilar. A paedophile hunter known as Mr Webb created an online persona of a 14-year-old girl known as 'Lou'. The profile said that Lou's age was 18, although it was agreed that this was, in part, because the site could not be accessed by someone claiming to be under 18, and that children did use the site. The profile picture was of a 20-year-old woman. 'Lou' and Slusalarczyk began to talk after a general message was sent out to lots of people saying, 'I would love to have a chat and get to know each other a bit if you are up for that'.¹²⁵

Slusalarczyk replied and 'Lou' said quickly, 'Just want a honest, I'm 14, is my age OK for you? Puts some off'. The defendant replied, 'You don't look 14 but that's fine I guess'. They then have a conversation about school. After a break, 'Lou' sends a message saying, 'Shall I be honest about what I want? I want to lose my [virginity]'. 'She' then says, 'You look cute, so do you want to do it?' to which the defendant replied, 'Thanks, and yeah I'm up for it. We can do whatever you want'. He later says, 'Well, I wouldn't want to just meet and fuck straight away. I get that you want to get it over and done with but you can at least work up to it'. 'Lou' at one point says, 'I can prove I'm real too. I'll take a pic in a min doing something you ask me to', although there is no evidence that Slusalarczyk did indeed ask her to send a picture.

During Mr Webb's cross-examination, he noted that paedophile hunters cooperate in training themselves to know what they can, and cannot do evidentially. In the cross-examination, he agreed that '[I] should not maybe have started turning the conversation sexual' and then added, 'But he should not have continued it'.¹²⁶ It is also notable that after this cross-examination, the jury asked the judge what the law of entrapment was.

After the cross-examination, counsel for the defence sought a stay of the prosecution as an abuse of process based on entrapment. He expressly averred that he was not making a submission that there was no case to answer and that he was seeking a stay. The judge agreed, stating that 'I am of the view that this is of such an exceptional nature that this offence that is alleged would not have occurred but for the deliberate entrapment by Mr Webb of the Defendant by turning a conversation that was otherwise one of a general chat into one of a sexual wish, which was

¹²⁵ *R v Slusalarczyk* T20187009, page 30 of the transcript.

¹²⁶ *R v Slusalarczyk* T20187009, page 33 of the transcript.

pursued when it looked as though the Defendant might be going a little bit cold or having suspicions as to the veracity of this fictional profile which Mr Webb had created'.¹²⁷

Did the activities, in either case, constitute entrapment? The Court of Appeal ruled that there was no entrapment in *TL*. The Court of Appeal noted that the hunter 'committed no offences in the course of his conduct',¹²⁸ and used limited deception. They noted that while the profile picture was someone aged 18, the hunter had immediately announced that he was a 14-year-old girl.¹²⁹ The Court of Appeal did not consider that he induced TL to commit an offence, he simply acted the part of a 14-year-old girl and responded in the way that one would if they were being groomed. They ultimately concluded, 'This is far removed from a case of incitement in the sense of one person pushing another towards committing an offence which he would otherwise not commit'.¹³⁰ In other words, there was no entrapment. Professor Hungerford-Welch has noted that if the police had done what the hunter, in this case, had done, there would have been no viable argument of entrapment,¹³¹ something Judge Sampson did not appear to appreciate.

What of *Slusalarczyk*? Here, the position is arguably more complicated. There are some similarities to *TL*. Both used an adult photograph with a profile implying a girl of an older age, but both referred to themselves as being a 14-year-old girl at the very beginning of the conversations. While Judge Blair considered the profile important, it is submitted that it was not. Many chatrooms require a person to be over a certain age to join. Invariably adolescents will provide false details to access these sites; indeed it is a common occurrence as few chatrooms require the age to be verified.¹³² Thus, the profile in both *Slusalarczyk* and *TL* cannot be considered anything other than an unexceptional circumstance.

It is clear in *Slusalarczyk* that the hunter took the lead a number of times. This can be contrasted to *TL*, where the Court of Appeal expressly noted that this did not happen.¹³³ Does this take us closer to the concept of being lured? While there was persistence, there was no pressure. There

¹²⁷ *R v Slusalarczyk* T20187009, page 34 of the transcript.

¹²⁸ Although arguably an offence under Communications Act 2003, s.127 could be committed as the messages exchanged would be considered indecent. That is not an argument against what the Court of Appeal in *TL* says, and is more an example of the breadth of s.127.

¹²⁹ *R v TL* [2018] EWCA Crim 1821 at [34].

¹³⁰ *R v TL* [2018] EWCA Crim 1821 at [34].

¹³¹ Hungerford-Welch, P. 'Abuse of process – conduct by non-state actors – approach to applications to stay' [2018] 9 *Archbold Review* 1.

¹³² See, for example, Freeman-Longo, RE 'Children, Teens, and Sex on the Internet' (2000) 7 *Sexual Addiction & Compulsivity* 75-90 at 79.

¹³³ *R v TL* [2018] EWCA Crim 1821 at [34].

were no threats or badgering. When the suspect went quiet, the hunter would take the lead. This conduct is more proactive than that the police would ordinarily engage in, but, again, it does not follow that it is unusual. Society has historically inferred innocence on children, believing that they are not sexual,¹³⁴ and thus many may find it easier to believe that it is adults that initiate the sexual conversation. In fact, research has shown that this is far from true and that adolescents are more than capable of initiating sexual conversations with strangers.¹³⁵

Did the hunter in *Slusalarzik* go too far? That is a difficult question to answer. Taking the lead on turning the conversation sexual is not something that the police would do, but, as noted above, it is not dissimilar to what happens in adolescent chatrooms every day. Therefore, it is perhaps unexceptional. Why is taking the lead in saying, “do you want to have sex?” any different to a police officer saying, “Hello, mate, can you sort us out a couple of bags [of drugs]?”¹³⁷ We are perhaps more comfortable with a request for drugs than arranging illegal sex with a child, but perhaps this is a good example of Lord Hoffman’s point in *Looseley* that ordinary people not trying to engage assassins. Ordinary adults do not try to have sex with 14-year-old girls, but, if they do, they may find that sometimes the child leads.

Counsel for the defence argued that there was clearly encouragement rather than enticement,¹³⁸ and the judge agreed. He concluded, ‘...but for the deliberate entrapment by Mr Webb of the Defendant by turning a conversation that was otherwise one of a general chat into one of a sexual wish, which was pursued when it looked as though the Defendant might be going a little cold...’¹³⁹ As noted above, it can be questioned whether this is necessarily any different to what is expected within a teenage chatroom. More than this, however, it arguably misunderstands the offence. There would be a greater argument for entrapment if the defendant had been charged with sexual communication with a child.¹⁴⁰ That offence prohibits the intentional sexual communication with a child for the purpose of obtaining sexual gratification. Clearly, if a

¹³⁴ Waites, M *The Age of Consent: Young People, Sexuality and Citizenship* (2005, Palgrave).

¹³⁵ See, for example, Subrahmanyam, K. and Smahel, D. ‘Connecting Developmental Constructions to the Internet: Identity Presentation and Sexual Exploration in Online Teen Chat Rooms’ (2006) 42 *Development Psychology* 395.

¹³⁷ This is what the undercover officer in *Looseley* asked when first initiating contact. See *R v Looseley* [2001] UKHL 53 at [84].

¹³⁸ *R v Slusalarzik* T20187009, page 22 of the transcript.

¹³⁹ *R v Slusalarzik* T20187009, page 34 of the transcript.

¹⁴⁰ *Sexual Offences Act 2003*, s.15A.

paedophile hunter is the one who constantly keeps the conversation sexual, then it could be argued that this was entrapment.¹⁴¹

However, Slusalarczik was not charged with this, he was charged with attempting to meet a child following grooming etc.¹⁴² Thus, it was not the conversation that is crucial, but it is the meeting with the ‘child’.

Counsel for the prosecution notes that Slusalarczik had plenty of opportunities to say, ‘I’m not interested’. Instead, when asked whether he wants to meet and have sex with a 14-year-old, he replied, ‘...yeah, I’m up for it. We can do whatever you want’.¹⁴³ Counsel continues, ‘And so yes, Mr Webb goes further than the police would have done...but this is not a case where he repeatedly brings up, pesters, badgers or persuades, he offers explicitly rather than implicitly, but it is entirely for Mr Slusalarczik, or anybody else in that position responds’.¹⁴⁴ Slusalarczik’s conversations with the hunter discussed the sexual activities that they could undertake, asks about previous experience and voluntarily, and clearly, agrees to a meeting with ‘Lou’. There were opportunities for him to decide, “I’m arranging to meet a 14-year-old girl for sex. That’s wrong”. But he did not. Had he failed to turn up to the meeting, no charge could have been proffered. It is the meeting that is key. In the absence of unfair badgering into a person *meeting* then, it is submitted, there is arguably no entrapment.

One final point of relevance in defining entrapment is the issue about whether the police and private citizens should be held to the same standard as regards the conduct they can engage in without entrapping someone. The judge at first instance in TL held that the same standard applied, something the Court of Appeal disagreed with.¹⁴⁶ However, the Court of Appeal then confused matters by stating, ‘a starting point...is to ask whether the same, or similar conduct by the police’ would constitute entrapment.¹⁴⁷ In fairness, the Court of Appeal continue and note that it is only a starting point and that the ‘police are subject to codes of conduct and hierarchical

¹⁴¹ Although context will remain important because if the suspect responds positively and enthusiastically then this would suggest that they are prepared to talk sexually to a child. Where, like here, it was more stuttering, then an argument is easier to sustain.

¹⁴² *Criminal Attempts Act 1981*, s.1 when read in conjunction with *Sexual Offences Act 2003*, s.15. Charging attempt was necessary because there was no child but, of course, attempting the impossible is perfectly possible (*Criminal Attempts Act 1981*, s.1(2)).

¹⁴³ *R v Slusalarczik* T20187009, page 17 of the transcript.

¹⁴⁴ *R v Slusalarczik* T20187009, page 18 of the transcript.

¹⁴⁶ *R v TL* [2018] EWCA Crim 1821 at [29].

¹⁴⁷ *R v TL* [2018] EWCA Crim 1821 at [35].

oversight'. This latter point is important and is why there is a different standard. The police, who are handed key powers of investigation and enforcement, receive specialist training before being authorised to act as undercover investigators. They have all the resources of the National Police Chief's Council and the Crown Prosecution Service to ensure that they do not cross the line. Private citizens do not. They cannot, therefore, be expected to act in the same way that a highly trained police officer would. Ultimately, the test is whether the paedophile hunter has gone beyond offering an unexceptional opportunity and has unfairly caused a person to commit an offence that they would not otherwise have done so. In determining that, there is likely to be higher standards of transparency for the police than there would for paedophile hunters.

Remedy for entrapment

Assuming that a paedophile hunter does go too far and is found to have entrapped a suspect, what should the remedy be? The first-instance judges in both *TL* and *Slusarz* decided the appropriate remedy was to stay the prosecution as an abuse of process. This was undoubtedly because in *Looseley*, the House of Lords had indicated that a stay was the usual remedy.¹⁴⁸ However, the two cases before the House in *Looseley*¹⁴⁹ both concerned police officers. Therefore, the focus of the House of Lords was the remedy when the state had entrapped someone. It does not follow that the same remedy should apply where a private citizen has entrapped a suspect.

In *R v Maxwell*,¹⁵⁰ the Supreme Court held that it was settled law that there are two categories of cases that permit a court to stay a prosecution as an abuse of process. The first is where they conclude that it is impossible for a defendant to receive a fair trial. The second is where 'it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case'.¹⁵¹ While entrapment could theoretically be placed in the first category, it is more usual to consider it belonging to the second category. The Supreme Court noted that the essence of this category is, 'the court is considered to protect the integrity of the criminal justice system...[a] stay will be granted where the court concludes that in all the circumstances a

¹⁴⁸ *R v Looseley* [2001] UKHL 53 at [42].

¹⁴⁹ *Attorney-General's Reference (No 3 of 2000)* was also before the House as a conjoined appeal.

¹⁵⁰ [2010] UKSC 48.

¹⁵¹ [2010] UKSC 48 at [13] per Lord Dyson SCJ.

trial will offend the court's sense of justice and propriety'.¹⁵² Sir Brian Leveson P. in *R v Crawley*¹⁵³ rearticulated this:

The second limb concerns the integrity of the criminal justice system and applies where the Court considers that the accused should not be standing trial at all, irrespective of the potential fairness of the trial itself.¹⁵⁴

The Court of Appeal has stated that part of this principle is that the 'ends do not necessarily justify the means'.¹⁵⁵ While, theoretically, this could apply to both the actions of a private citizen and the state, the Court of Appeal was clear it was principally referring to the actions of the state, and that a stay should be granted where 'it is an affront to the public conscience on account of the improper conduct of state agents'.¹⁵⁶

Hofmeyr, cites John Finnis in support of her argument that the principle that the state must not act improperly forms part of the rule of law, which requires accountability and officials using their power in accordance with the law.¹⁵⁷ This can be summarised as the principle that nobody is above the law.¹⁵⁸ Ashworth agrees, noting 'those who enforce the law should also obey the law'.¹⁵⁹ Both argue that this means the integrity of the criminal justice system is based on the actions of the state and not the actions of a private citizen. Hofmeyr argues that it is the content of the law, institutional design and official conduct that undermines the law. In terms of entrapment, she argues that the law does not become involved until after the private citizen has acted. Presumably, Hofmeyr means that a private citizen has no special powers or requirements to act in a particular way. As they have no duty to investigate or prevent crime, their actions are not undermining the rule of law until the point at which they unfairly entrap a suspect.

In *TL*, the Court of Appeal held that it would be extremely rare that the actions of a private citizen could sustain a stay for abuse of process. The Court of Appeal referred to it applying 'in theory' because 'the underlying purpose of the doctrine of abuse of process is not present'.¹⁶⁰

¹⁵² [2010] UKSC 48 at [13].

¹⁵³ [2014] EWCA Crim 1028.

¹⁵⁴ *R v Crawley* [2014] EWCA Crim 1028 at [17].

¹⁵⁵ *R v Syed* [2018] EWCA Crim 2809 at [108] per Gross LJ.

¹⁵⁶ *R v Syed* [2018] EWCA Crim 2809.

¹⁵⁷ K. Hofmeyr 'The problem of private entrapment' [2006] Crim LR 319 at 331.

¹⁵⁸ K. Hofmeyr 'The problem of private entrapment' [2006] Crim LR 319 at 332.

¹⁵⁹ Ashworth, A. 'What is wrong with entrapment?' [1999] *Singapore Journal of Legal Studies* 293 at 307.

¹⁶⁰ *R v TL* [2018] EWCA Crim 1821 at [31].

The Court of Appeal approved the judgment of Goldring J. in *Heath Care Professionals v General Medical Council* where he ruled that the actions of the private citizen would have to be ‘deeply offensive to ordinary notions of fairness’, ‘an affront to the public conscience’ or ‘so seriously improper as to bring the administration of justice into disrepute’.¹⁶¹ Goldring J. had noted that there was no reported case of this threshold being met, something that the Court of Appeal found ‘unsurprising’.

The Court of Appeal could not be clearer about how high the threshold for misconduct is. There has, in fact, been one reported case where misconduct by a private citizen has reached this level. In fairness to Goldring J., the case was heard eight years’ after his observation. The case concerns the investigative journalist Mazher Mahmood, who was the journalist involved in the case of *Shannon*. This time, however, the case concerned the prosecution of Tulisa Contostavlos (a former singer), who was accused of being complicit in the supply of drugs.¹⁶² Mahmood, by now, had been responsible for several ‘stings’ on behalf of the News of the World, but by the time of the trial, his star was on the wane as his actions had led to criminal trials collapsing, convictions being quashed and he was widely accepted to have given unconvincing evidence before the *Leveson Inquiry*.¹⁶³

Contostavlos had been flown first-class to America, given a limousine service, a suite at a top hotel and a suggestion of multi-million-pound film contacts. One role that she was going to be offered involved a gritty, street-wise girl coming from an area where drugs were known. Eventually, Mahmood captured her on film saying that she had previously taken and dealt in drugs. A friend of hers supplied some cocaine. Contostavlos argued that the admissions had to be taken in the context of the part that she was being offered and was, in essence, her demonstrating ‘character’.

The defence sought to stay the proceedings as an abuse of process but the trial judge, HHJ McCreath, refused to do so saying that ‘there is a world of difference between the court feeling a sense of distaste at the journalistic methods of Mr Mahmood...and on the other, the court being so outraged by his conduct as to be driven to stay the indictment’.¹⁶⁴ However, a short time later,

¹⁶¹ *R v TL* [2018] EWCA Crim 1821 at [32].

¹⁶² Dein, J. and Collier, V. ‘Non-state agent entrapment – the X factor’ [2014] 9 *Archbold Review* 4-6 present an accurate summary of the facts and issues.

¹⁶³ Dein, J. and Collier, V. ‘Non-state agent entrapment – the X factor’ [2014] 9 *Archbold Review* 4-6 at 5.

¹⁶⁴ Dein, J. and Collier, V. ‘Non-state agent entrapment – the X factor’ [2014] 9 *Archbold Review* 4-6 at 5.

evidence was discovered that suggested that Contostavlos had previously indicated a strong dislike for drugs and that it had caused problems for family members. A witness statement that made reference to this was altered, apparently by Mahmood, and so the defence was unaware of these comments, which would undoubtedly help their case.

Judge McCreath revisited the stay, and this time decided that it was appropriate to order a stay. There was evidence that the sting had gone further than had been explained, but, more importantly, there was the clear evidence that a witness statement had been changed to remove exculpatory statements. The judge held that this was one of those rare instances when the integrity of the justice system was compromised, something that would be difficult to argue against.¹⁶⁵

The cases of *TL* and *Slusalarczyk* do not come anywhere close to this threshold. As noted earlier, in *TL*, there was no entrapment. In *Slusalarczyk* there is an arguable case that the defendant was entrapped, although it will be remembered from the earlier discussion, that it is not certain that it constituted entrapment. Judge Blair said, 'I consider that Mr Webb's conduct was sufficiently gross misconduct as to require me to stay this prosecution'.¹⁶⁶ That, it is submitted, is wrong. Judge Blair fell into the trap defined by Judge McCreath. It was clear that Judge Blair had 'clear distaste' for the actions of Webb, but taking the lead on certain parts of a conversation is far from the type of 'gross misconduct' that the Court of Appeal in *TL* anticipated.

It is submitted that save for cases akin to the misconduct in *Constostavlos*; it is unlikely that the actions of a paedophile hunter will constitute sufficiently gross misconduct as to bring the criminal justice system into disrepute. Taking the lead, pushing or badgering a suspect does not constitute 'gross misconduct' of the sort required by the law. That does not mean there is no remedy where a paedophile hunter entraps a suspect, as the remedy lies in the exclusion of evidence.

Section 78 was expressly mentioned in *R v Looseley* and the presumption for a stay should be put in the context of those facts being state entrapment. Section 78 is designed to ensure a fair trial, by permitting evidence to be excluded, inter alia, where it has been unfairly gathered. Section 78

¹⁶⁵ Following this trial, Mahmood was convicted of perverting the course of justice in respect of his conduct and was sentenced to 15 months' imprisonment.

¹⁶⁶ *R v Slusalarczyk* T20187009, page 34 of the transcript.

requires a different test from a stay, but rightly so. The judge must decide whether that evidence, including the circumstances of its gathering, would have ‘such an adverse effect on the fairness of proceedings that the court ought not to admit it’.



The Court of Appeal in *Shannon* considered whether the judge had rightly rejected an argument under s.78. The Court ultimately agreed with the judge’s ruling (in that there was no evidence of entrapment), they accepted that s.78 was an appropriate remedy for private entrapment. It is quite possible in *Slusalarczyk* that Judge Blair would have excluded some, or all, of Webb’s evidence, not least because it is clear that the learned judge believed that he went too far and that there was unfairness in his conduct. If he did so, the same result (the acquittal of the defendant) would have almost certainly occurred as his evidence was crucial to the prosecution proving their case. It is was perhaps this fact that led to the prosecution not appealing the stay.¹⁶⁷

However, that would not be the position in all cases. Let us take an example:

PH is pretending to be a 14-year-old girl called ‘Rebecca’ and is chatting to D on the internet. For our example, we can assume that PH has gone beyond what would ordinarily be permitted by initiating the sexual element into the discussion first. D turns up to the meet whereupon the police arrest him. In his possession are some flowers that have a card saying ‘To Rebecca xxx’, a teddy-bear and some condoms.

In this example, a judge may take the view that the chatroom transcript is prejudicial evidence and she exercises her discretion to exclude it under s.78. Assuming that D is charged with attempting to commit s.15, *Sexual Offences Act 2003*,¹⁶⁸ an application that there is no case to answer would not necessarily succeed even with the transcript excluded. The elements required of the offence are:

- D has communicated with another person (B).
- D meets, travels with the intention of meeting B or arranges to meet B, or B travels to meet D.
- At that meeting, D intends to do an act that would constitute a child sex offence.

¹⁶⁷ *Criminal Justice Act 2003*, s.58. A stay of prosecution is a terminatory ruling for these purposes.

¹⁶⁸ Contrary to s.1(1), *Criminal Attempts Act 1981*.

- D (believes) B is under the age of 16.¹⁶⁹

All of this can be proven without the transcript of the chat. Even if the transcript itself is excluded, the communications data accompanying it¹⁷⁰ will prove that there was a conversation, and nothing within s.15 requires that the communication is sexual. D's presence at the meeting will show that he intended to meet B, as would the flowers with 'Rebecca' on them. The condoms are evidence that could be put forward to the jury, in combination with the other possessions, and any admissions made in the interview, as evidence on which they *could* conclude the intention to commit a child sex offence.

CONCLUSION

The Court of Appeal decision in *TL* is to be welcomed because it helped to clarify the correct approach to dealing with the activities of paedophile hunters. Not all will agree because it leaves open the acceptance of evidence from paedophile hunters. As noted at the beginning of this article, the police strongly disapprove the 'work' of paedophile hunters and believe that it is unhelpful. In *TL* the Court of Appeal, while overturning the stay of prosecution, concluded by saying:

In reaching this conclusion, we do not seek to undermine or contradict the stated position of the police, by which they discourage [paedophile hunters]. [The police] have concerns that...the zeal of some "vigilantes" may lead them to seriously improper conduct. It would be much better for [paedophile hunters] immediately they have suspicions about the conduct of an identifiable individual to involve the police and leave them to investigate.¹⁷¹

Does condemnation go far enough? Theoretically, the Court of Appeal could have decided that relying on the evidence gathered by vigilantes constitutes an abuse of process. However, it is not

¹⁶⁹ It is irrelevant that B is actually an adult and not under 16 as one can attempt the impossible (s.1(2), *Criminal Attempts Act 1981*). Where D believes that B is 16 or under then he can also not have a reasonable belief that she is aged 16 or over (s.15(1)(d), *Sexual Offences Act 2003*).

¹⁷⁰ See Investigatory Powers Act 2016, Part 3 and s. 261. Internet connection records and subscriber information etc. would allow the police to identify when communications occur, and the type of communication. It would not, however, include their content.

¹⁷¹ [2018] EWCA Crim 1821 at [39].

really for the courts to tackle paedophile hunters. The courts have, for some time, become accustomed to holding their proverbial nose while listening to the evidence. Whether the courts should hear the evidence of paedophile hunters is a policy decision, and, therefore, one for the government and not the courts.

The police have a real concern about the activities of paedophile hunters and the risk that they could pose to their operations and, indeed, to those suspected of a crime. Anecdotally, at least, there appears to be public support for their activities, and it would be a brave government that sought to ban their activities. England & Wales has a long history of private citizens becoming involved in the detection of crime, particularly in respect of fraud and theft.¹⁷² It would be difficult to identify a rule that only tackled paedophile hunters and which did not, at the same time, tackle private investigations into other forms of crime.

In the absence of a ban, the courts must do what they can to balance the need to prosecute those who have potentially committed serious crimes with the rights of those coerced into committing a crime. *TL* could be seen as a fudge, but if it is, then it is in good company. The relationship between the police and paedophile hunters is undoubtedly complicated, in that they dislike the activities of the hunters, but they cannot ignore evidence passed to them. To that extent, the criminal justice system reluctantly acquiesces to the activities of paedophile hunters.

If the activities of paedophile hunters are to be accepted, how are people protected from being tricked into committing a criminal offence? While a stay for abuse of process remains technically possible, the Court of Appeal in *TL* was right to say that it is more theoretical than practical. It requires conduct that is so wrong as to bring the criminal justice system into disrepute, a high threshold. The courts should instead use their powers to ensure a fair trial. Where that means excluding evidence gathered unfairly, then they should do so. That is what should have happened in *Slusalarçizik*, and it will mean that individuals are protected from those who go too far, while, at the same time, ensuring punishment for those who willingly seek to meet a child for sexual purposes.

¹⁷² See, for example, Mark Button and others, 'New Directions in Policing Fraud: The Emergence of the Counter Fraud Specialist in the United Kingdom' (2007) 35 *International Journal of the Sociology of Law* 192; Martin Gill and Jerry Hart, 'Exploring Investigative Policing: A Study of Private Detectives in Britain' (1997) 37 *The British Journal of Criminology* 549.