



APPEAL COURT, HIGH COURT OF JUSTICIARY

[2026] HCJAC 37
HCA/2025/000336/XC

Lord Justice General
Lord Armstrong
Lord Clark

OPINION OF THE COURT

delivered by LORD PENTLAND, the LORD JUSTICE GENERAL

in

APPEAL UNDER SECTION 74(1) OF THE
CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

by

HIS MAJESTY'S ADVOCATE

Appellant

against

SEAN DOCHERTY

Respondent

Appellant: Harvey, AD; the Crown Agent
Respondent: Reid; Richard Freeman Solicitors

28 August 2025

Introduction

[1] In this appeal the Crown challenges the sheriff's pre-trial ruling that evidence of an undercover police officer involved in the investigation of online child abuse was inadmissible because he had not been properly authorised under the Regulation of Investigatory Powers (Scotland) Act 2000 (RIPSA).

[2] The respondent has been indicted on charges of attempting to communicate indecently with a child, contrary to section 34(1) of the Sexual Offences (Scotland) Act 2009 (charges 1 and 3), attempting to cause a child to view a sexual image, contrary to section 33 of the 2009 Act (charges 2 and 4) and attempting to take, or permit to be taken, or make indecent photographs of children, by searching on the internet for images of child sexual abuse contrary to section 52(1)(a) of the Civic Government (Scotland) Act 1982 (charge 5). The persons with whom it is alleged that the respondent was engaging online were not children; they were undercover police officers referred to in the charges as “Police Officer Ava” and “Police Officer William”. Charges 3 and 4 refer to communications between the respondent and Police Officer William, while charges 1 and 2 relate to communications between the respondent and Police Officer Ava. The appeal is concerned only with the authorisation of Police Officer William.

[3] It is important to note that at a hearing on 8 April 2025 the court granted the Crown’s unopposed motion for special measures permitting the undercover officers to be described by pseudonyms in order to protect their true identities. The effect of the order is that the officers must not be identified in the proceedings.

[4] The respondent lodged a preliminary issue minute challenging *inter alia* the admissibility of Police Officer William’s evidence on the basis that his actions were carried out without any authority granted under RIPSA. Covert surveillance carried out without such authority was objectionable and inadmissible. Even if RIPSA authority had been obtained, Police Officer William’s evidence was objectionable on the basis that the Crown had not disclosed an unredacted copy of the authorisation nor had they lodged one as a production to establish it as the principal source of evidence. In effect the respondent’s position was that the Crown could not prove that Police Officer William had been properly

authorised to act as an undercover officer under RIPSAs. The effect of the redactions was that it was impossible to know who had been authorised to act as an undercover officer. After hearing evidence led by the Crown from Detective Inspector Jonathan Cunningham, a covert operations manager for undercover policing, on 13 May 2025 the sheriff sustained the challenges to the admissibility of Police Officer William's evidence. He granted leave to appeal.

The Regulation of Investigatory Powers (Scotland) Act 2000

[5] RIPSAs applies to and regulates three forms of investigative conduct: directed surveillance, intrusive surveillance and the conduct and use of covert human intelligence sources (section 1(1)).

[6] By section 1(2) directed surveillance is surveillance which is covert but not intrusive and is undertaken: for the purposes of a specific investigation or a specific operation; in such a manner as is likely to result in the obtaining of private information about a person; and is otherwise than by way of an immediate response to events or circumstances, the nature of which mean it would not be reasonably practicable for an authorisation to be sought to carry out the surveillance.

[7] Under section 1(3) intrusive surveillance is covert surveillance carried out in relation to anything taking place on any residential premises or in any private vehicle, and involves the presence of an individual on the premises or in the vehicle or is carried out by means of a surveillance device.

[8] In terms of section 1(7) a person is a covert human intelligence source if he or she:

“(a) establishes or maintains a personal or other relationship with another person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c) below;

(b) covertly uses such a relationship to obtain information or to provide access to any information to another person; or

(c) covertly discloses information obtained by the use of such a relationship or as a consequence of the existence of such a relationship.”

The present case concerns the use of a covert human intelligence source, in the person of the undercover officer referred to in charges 3 and 4 as Police Officer William.

[9] Section 5 provides that each form of conduct is lawful for all purposes if an authorisation under RIPSAs confers an entitlement to engage in the conduct on the person and the person’s conduct is in accordance with that authorisation.

[10] The same scheme of authorisation applies to both directed surveillance and the conduct of covert human intelligence sources; a different and stricter form of authorisation applies to intrusive surveillance.

[11] Section 6 regulates the authorisation of directed surveillance. Persons designated for the purposes of the section have power to grant authorisations for the carrying out of directed surveillance (section 6(1)). The designated person must not grant authorisation unless satisfied that the authorisation is necessary and proportionate (section 6(2)). An authorisation is necessary if it is necessary: (i) for the purpose of preventing or detecting crime or of preventing disorder; (ii) in the interests of public safety; or (iii) for the purpose of protecting health (section 6(3)).

[12] The same provisions and criteria apply to authorisation of covert human intelligence sources (section 7(1), (2) and (3)). There is an additional criterion for authorisation of a covert human intelligence source: as for directed surveillance, the authorisation must be necessary and proportionate, but the authorising officer must also be satisfied that

arrangements exist for supervising and caring for the source, and maintaining various records of the use made of the source (section 7(2)(c) and (6)).

[13] Authorisation for intrusive surveillance is regulated separately by section 10, which provides that authorisations can be given only by the chief constable of Police Scotland (or any senior police officer designated by him) or by the Police Investigations and Review Commissioner. Authorisation can only be given when necessary and proportionate (section 10(2)). Necessity in relation to intrusive surveillance is restricted only to the purpose of preventing or detecting serious crime (and not just crime) and does not include the other two forms of necessity that apply to directed surveillance and covert human intelligence sources (section 10(2)(a)). Authorisation is then subject to notification to, and the approval of, a judicial commissioner (sections 13 and 14).

[14] Section 8 regulates who can grant authorisation for directed surveillance or the use of covert human intelligence sources under sections 6 and 7 of RIPSAs. By section 8(1), the person must hold an office, rank or position within a relevant public authority. "Relevant public authority" is defined to include *inter alia* the Police Service of Scotland (section 8(3)(aa)). Section 8(1) gives the Scottish Ministers the power to make rules determining which office, rank or position an individual must hold within the relevant public authority before that individual can grant an authorisation. The rules made by the Scottish Ministers are contained in the Regulation of Investigatory Powers (Prescription of Offices, etc. and Specification of Public Authorities) (Scotland) Order 2010 (SSI 2010/350).

[15] By Article 2A and column 2 of Schedule 1A of the 2010 Order, directed surveillance must be authorised by a superintendent (or higher rank), or, in urgent cases, inspectors. For covert human intelligence sources, the 2010 Order distinguishes between sources who are police officers and those who are not. When the source is a police officer, he or she is termed

a “relevant source” (Article 1(2)). In such cases, the authorisation must be given by an Assistant Chief Constable (or higher) and, for urgent cases, inspectors. Where the source is not a relevant source, i.e. not a police officer, the authorisation may be given by a superintendent or higher and, again, in urgent cases, the authorisation may be given by an inspector.

[16] When authorisation has been granted for the use of a police officer as a covert human intelligence source notice must be given to the judicial commissioner (Article 7 of the Regulation of Investigatory Powers (Authorisation of Covert Human Intelligence Sources) (Scotland) Order 2014 (SSI 2014/339)).

The redacted authorisation

[17] The redacted authorisation was lodged as a Crown production. It was accompanied and supported by a certificate of authentication in terms of section 279 of and schedule 8 to the Criminal Procedure (Scotland) Act 1995 (1995 Act). The certificate was signed by Assistant Chief Constable Andy Freeburn.

[18] It is not necessary for present purposes to set out in detail the terms of the redacted authorisation. It was signed by ACC Freeburn and is stated to be effective from 19 October 2022 until 18 October 2023. The authorisation is a detailed document setting out comprehensively the nature and purpose of a police operation (Operation Overview) to deploy undercover officers in an online environment to gather intelligence and evidence against persons intending to harm, abuse or exploit children. The authorisation states that ACC Freeburn is satisfied that the use of an intrusive and covert tactic, such as utilising undercover officers, is required in order to provide the best possible opportunity to safeguard child victims and gather evidence to secure convictions against those committing

offences of child sexual abuse and exploitation. ACC Freeburn certified that the proposed use of undercover officers was proportionate and justified. Accordingly, he granted authority to the undercover officers *inter alia* to engage in certain specified types of conduct, including deploying online to secure evidence against any person whose criminal intent was to harm, abuse or exploit any child. All the other statutory requirements for the use of covert human intelligence sources were covered in the authorisation.

[19] Certain redactions have been made from the authorisation. In particular, the names of and other information from which it might be possible to identify the undercover officers have been blocked out.

The sheriff's report

[20] The sheriff reports that DI Cunningham gave evidence in which he explained that the prosecution arose from Operation Overview. He was the covert operations manager for that operation and had prepared and presented the application for authorisation. He confirmed that the authorisation was granted by ACC Freeburn. It was to run from 19 October 2022 to 18 October 2023. The purpose of the operation was proactively and reactively to target persons with a sexual interest in children online. DI Cunningham confirmed that he had seen the unredacted copy of the authorisation and that he was aware of the content of the redactions. The redactions were made for the safety and security of undercover operatives and to protect police methodology and tactics employed in undercover operations.

[21] DI Cunningham went on to explain that undercover operatives (UCOs) were assigned a unique identification number (URN) when they had completed their training and had been authorised to act as UCOs. The URN is assigned to the UCO for the duration of

their service. When engaged in covert operations, UCOs are given a pseudonym, which is different from their URN. In the present case one of the UCOs was designated as Police Officer William. The pseudonym of a UCO may be changed during the course of the operation depending on where he or she is deployed and on the risk factors. The redacted part of the authorisation included the URN assigned to Police Officer William as well as those of other UCOs involved in Operation Overview.

[22] DI Cunningham testified that the URNs were redacted from the authorisation in order to protect the true identities of the UCOs. UCOs are deployed in covert operations across the United Kingdom. They are called upon to give evidence in court under their pseudonyms. If the URN of a UCO came to be associated with a particular officer, his or her safety could be at risk. If the URN of a UCO was disclosed, by way of court appearances or press reports, their activities could be plotted, and a pattern of their investigations determined. This could affect the physical safety of the UCOs and of their families, their mental health, and it might also affect ongoing undercover operations.

[23] Applying what he understood to be the reasoning in *Henderson & Marnoch v HM Advocate* [2005] HCJAC 47; 2005 1 JC 301, the sheriff concluded that the Crown had failed to prove that Police Officer William was one of the UCOs authorised to carry out covert intrusive surveillance. The identities of the persons said to have been authorised were not apparent from the face of the redacted document, even under reference to their pseudonyms or URNs. The names of the Detective Superintendent and Detective Inspector presenting the application had also been redacted. DI Cunningham had not been able to explain the reason for these redactions. The extent of operational matters in respect of which authorisation had been sought was unclear.

[24] These deficiencies were not cured by the evidence of DI Cunningham. While he was a credible and reliable witness, he was unable to provide a cogent explanation as to why the names of the officers presenting the application had been redacted. The sheriff was concerned that the police had refused the Crown's request for provision of the unredacted authorisation. The Crown had simply accepted the position adopted by the police. The authorisation was *ex facie* meaningless. It was impossible for the court to determine, from reading it, which UCOs were authorised to undertake covert operations. There were redactions which, from the surrounding text, appeared to bear on the extent of activities which were purportedly authorised. The Crown had not sought to lead any evidence in relation to those other redacted areas.

[25] The Crown had not independently verified that the authorisation had been granted on the basis advanced by DI Cunningham. This was a potentially dangerous state of affairs in that the Crown was accepting at face value the information provided by DI Cunningham as to the content of the unredacted authorisation. This left the court in the unenviable position of being unable to determine the precise terms and extent of the purported authorisation. The only admissible evidence as to the terms of the authorisation was the writing itself. It followed that it was insufficient for the Crown to seek to lead evidence from an officer who had seen the original authorisation.

[26] The irregularity of the evidence could not be excused under the principles established in *Lawrie v Muir* 1950 JC 19. The redactions were made deliberately and with the acquiescence of the Crown. It was open to the Crown to insist on obtaining the unredacted authorisation from the police. It was impossible for the court to determine who was authorised to act under it.

Crown Submissions

[27] The evidence of DI Cunningham together with the redacted RIPSAs was sufficient to prove that Police Officer William was authorised to act as a covert human intelligence source.

[28] The sheriff erred in his application of *Henderson v HM Advocate*. There were significant factual differences between *Henderson* and the current case. The sheriff had the written authorisation, accompanied by a certificate of authentication from the senior authorising officer, an Assistant Chief Constable. The authorisation showed that it related to a specific investigation: Operation Overview. The nature of the operation and the reasons for it were fully explained in the authorisation. The authorisation was in force at the material time.

[29] DI Cunningham's evidence filled the gap between the redacted and unredacted authorisations. He had prepared and presented the application for RIPSAs. He had knowledge of its terms and of the nature and necessity of the redactions. He confirmed that Police Officer William had signed the documentation, which confirmed Police Officer William had read and understood the authorisation. The sheriff was in a different position from the court in *Henderson*. He had the written authorisation and clear and reliable evidence from DI Cunningham.

[30] The law of evidence was a highly practical matter (*Lord Advocate's Reference No 1 of 2023* [2023] HCJAC 40; 2024 JC 140). After DI Cunningham's evidence had been heard, there was no doubt that Police Officer William had been authorised to conduct the activities that he did. It was unduly and unnecessarily technical to have insisted upon an unredacted authorisation.

[31] Evidence was not inadmissible because better evidence could have been led. If evidence was accepted as credible and reliable, and supported the drawing of an inference, then generally the fact will be held to be proved (*Ruby Properties (Scotland) Ltd v Watt and another* [2025] CSOH 61, para [49]).

[32] Secondary evidence would be accepted as proof of a fact if there were good reasons for not producing primary evidence (*Macleod v Woodmuir Miners Welfare Society Social Club* 1961 JC 5 at 6). The question was whether the evidence was essential for proving the case against the accused and whether any prejudice to the accused would result from its absence (*McIver v Mackenzie* 1942 JC 51). The secondary evidence of DI Cunningham was competent because it was not reasonably practicable and convenient to produce the unredacted authorisation. The production of the unredacted authorisation would have disclosed the URNs of undercover officers, which could have put their safety at risk or led to their activities being plotted and a pattern of their investigations determined. The Crown led the best evidence in the circumstances.

[33] Even if there was an irregularity, the sheriff erred in finding that the failure to prove the lawfulness of Police Officer William's activities could not be excused by the principles set out in *Lawrie v Muir*.

[34] RIPSAs were not specifically directed to the protection of persons suspected of crime. The evidence which emerged from Police Officer William's covert activities was evidence of serious sexual offending, and not private information. Police Officer William acted in good faith. He believed that he held the requisite authority under RIPSAs. Police Officer William's activities were not intrusive surveillance and were confined to chatting with the respondent in a public internet chatroom, and thereafter on Snapchat, where, on the evidence captured by Police Officer William, the respondent quickly turned the conversation to sexual matters.

There was no breach of the criminal law by Police Officer William. There was no challenge to the authenticity of the messages Police Officer William recorded. The respondent had the opportunity to challenge the lawfulness of Police Officer William's activities and the fairness of the admission of the evidence obtained. For these reasons any irregularity with the RIPSAs authorisation should be excused.

Respondent's Submissions

[35] The non-disclosure of the unredacted authorisation should not be accepted, standing the constitutional position between the public prosecutor and the police in Scotland. The police are agents of the Procurator Fiscal and investigate crime under the direction of the Procurator Fiscal (*Smith v HM Advocate* 1952 JC 66 at 71; *Johnston v HM Advocate* [2006] HCJAC 30; 2006 SCCR 236, para [177]). Statutory powers consolidate the subordinate relationship of the police to the Crown (section 12 of the 1995 Act). The police must comply with a lawful instruction provided by the Crown (section 17(3) of the Police and Fire Reform (Scotland) Act 2012).

[36] The failure to provide the unredacted authorisation was inexplicable. There exists an established process for dealing with sensitive documentation. The Crown should have been afforded the opportunity to examine the unredacted authorisation. The Crown was responsible for the discharge of the prosecution in the public interest. The Crown was unable to make an informed decision to prosecute when they were blind to the unredacted authorisation.

[37] The redactions made to the authorisation made the document *ex facie* meaningless. There was a need for proper judicial oversight of the authorisation process for operations of this kind. The court required to be satisfied that Police Officer William was authorised to

undertake the undercover activities in terms of the written authorisation. The court could not do so based on the evidence of an officer who had merely seen the unredacted document. The sheriff was entitled to rely on *Henderson*, in determining that the only admissible evidence as to the terms of the authorisation was the document itself.

[38] This was not a case where the authorisation was not produced or could not have been produced due to it being unavailable. The document existed; it was in the hands of the police but not the Crown. The Crown had not seen it and the police were refusing to provide the unredacted authorisation to the Crown. The Crown should have been furnished with this information to satisfy itself of the nature of the authorised police activity.

[39] The evidence of DI Cunningham comprised merely his own observations of what was contained in the unredacted authorisation. The exact information was contained within the document itself. The court was unable to determine the precise terms of the purported RIPSAs authorisation. It was unexplained why the authorisation was so heavily redacted.

[40] The irregularity was not capable of being excused under *Lawrie v Muir*. It was open to the Crown to have secured the unredacted authorisation. An excusal in terms of *Lawrie v Muir* was appropriate only when the irregularity occurred in good faith. The situation here could have been remedied by the Crown to have avoided the need for such an irregularity. The Crown were able to ensure that the unredacted version was provided to them.

Analysis and decision

[41] We are in no doubt that the Crown's submissions are to be preferred. The sheriff had before him unchallenged evidence from DI Cunningham that it was essential for the URNs of the undercover officers to be redacted from the authorisation in the interests of their safety and that of their families, to allow the police operation to proceed effectively and to

avoid the possibility of the activities of the officers from being discovered. These were all compelling reasons to justify the relevant redactions. DI Cunningham had seen the authorisation and was in a position to confirm that Police Officer William was one of the authorised undercover officers to whom it related. His evidence supplied an entirely clear and sufficient link between the redacted authorisation and Police Officer William. The combination of the redacted authorisation and the evidence of DI Cunningham provided convincing evidence of the fact that Police Officer William had been properly authorised under RIPSA. That was the only question for the sheriff to determine.

[42] The sheriff was influenced by the fact that the Crown had not seen the unredacted authorisation despite having requested it from the police. This is beside the point. The sheriff's task was to evaluate the issues on the basis of the evidence led before him. It was not, as he suggests in paragraph [19] of his report, to conduct "proper judicial oversight of the authorisation process". The pertinent evidence was clear and indeed uncontested. It amply showed that Police Officer William had been properly authorised under RIPSA. In paragraph [21] of his report the sheriff refers to what he describes as a potentially dangerous state of affairs, in that the Crown had accepted at face value the information provided by DI Cunningham as to the content of the unredacted authorisation. That left the court in the unenviable position of being unable to determine the precise terms and extent of the "purported authorisation". With respect to the sheriff, these observations are misconceived. There was no reason why the Crown or the court should not accept DI Cunningham's explanations, particularly as they were unchallenged.

[43] Even if the unredacted authorisation had been made available by the police to the Crown it would still have been necessary for the URNs to be redacted for the cogent and unchallenged reasons put forward by DI Cunningham. It would be contrary to the interests

of justice to insist on production of the unredacted authorisation given the compelling reasons set out by DI Cunningham for protecting the interests of the undercover officers. The investigation and detection of online criminality against children requires the police to deploy undercover officers. There are strong public interest reasons for ensuring that their identities are protected and that their safety (and that of their families) is not endangered.

[44] The present case is clearly distinguishable from *Henderson & Marnoch v HM Advocate* [2005] HCJAC 47; 2005 1 JC 301. In that case (unlike in the present one) no written authorisation had been produced. The police officer (DI Purvis) led to speak to authority having been granted had little, if any, direct knowledge of the authorisation. He said that he had only seen the authorisation some time after it had been granted, but could not recall when. In these particular circumstances, the court had no realistic option except to hold that the authorisation should have been produced as it amounted to the “best” and *prima facie* the only admissible evidence of the granting of the authorisation (Lord Marnoch para [4]; Lord Hamilton para [27]).

[45] In the present case there can be no doubt that DI Cunningham’s evidence supplied the necessary link between the redacted and unredacted versions of the authorisation by confirming that the authorisation conferred on Police Officer William an entitlement to engage in the relevant conduct. In contrast to DI Purvis in *Henderson*, DI Cunningham was not simply an officer fitting a recording device; he was the covert operations manager for undercover policing. He had prepared and presented the application for RIPSAs authorisation. He had direct knowledge of the terms of the authorisation and of the nature and necessity of the redactions. He confirmed that Police Officer William had signed documentation which made clear that the officer had read and understood the authorisation. Unlike the unsatisfactory evidence given by DI Purvis in *Henderson*, DI Cunningham’s

evidence was not – and could not be – subject to any criticism. It was uncontested and properly accepted by the sheriff as credible and reliable.

[46] In line with what Lord Hamilton desiderated (*Henderson* para [27]), the redacted authorisation in the present case showed that it related to the specific investigation or operation, Operation Overview: the gathering of intelligence and evidence of child sexual abuse and exploitation, including online abuse. The nature of that operation and the reasons for it are fully explained in the authorisation. It was an operation which produced evidence against the respondent and which led to his arrest, charge and indictment. As Lord Hamilton said was required (*ibid*) the written authorisation also showed that it was in force at the material time. Contrary to the respondent's submissions, the extent of operational matters in respect of which authorisation had been sought and granted was clear.

[47] In *Lord Advocate's Reference (No 1 of 2023)* [2023] HCJAC 40; 2024 JC 140 a full-bench emphasised that the admissibility of evidence should be a relatively simple concept, rather than something which is over-technical and theoretical (para [234]). The law of evidence is essentially a tool designed to set the parameters within which evidence may be led to ensure that the court focuses on the issues truly in dispute, and to achieve a fair trial, not only for the accused but also in the public interest (*ibid*). The sheriff has taken an artificially technical approach in holding that the undercover activities of Police Officer William had not been properly authorised. On any realistic view of the evidence they clearly had been.

[48] Primary evidence of fact is not always essential. Secondary evidence will be accepted as proof of a fact if there are good reasons for not producing the primary evidence.

As it was put in *Macleod v Woodmuir Miners Welfare Society Social Club* 1961 JC 5 (per Lord Justice General Clyde at p9):

“Primary evidence is not always essential, and secondary evidence is not necessarily incompetent. Secondary evidence is competent if it is not reasonably practicable and convenient to produce the primary evidence.”

The secondary evidence of DI Cunningham was competent because it would not have been reasonably practicable and convenient to produce the unredacted authorisation. In the present case matters go further than mere questions of practicability and convenience. On the accepted evidence of DI Cunningham, disclosure of the URNs of the undercover officers might put their safety at risk or lead to their activities being plotted and a pattern of their investigations determined. All of that could, as he explained, affect their physical safety, and that of their families, their mental health, and it could prejudice ongoing undercover operations. In these circumstances it would obviously be wrong for the law to insist on production of the unredacted authorisation.

[49] The Crown led the best evidence available to it in the circumstances: the redacted written authorisation and a specialist officer with direct knowledge of the terms of the authorisation. There was no need for the unredacted authorisation to be produced. This does not involve any prejudice to the respondent, who will be fully entitled at the trial to challenge the evidence of Police Officer William on its merits.

[50] Given the view we have taken, we need not address the arguments advanced under reference to *Lawrie v Muir* 1950 JC 19.

[51] The appeal is allowed.