**Abuse of Process CPR**

1. c. Non-disclosure by prosecutor
The prosecution's failure to disclose material may lead the courts to stay proceedings on grounds of abuse of process: R v Birmingham and Others (above). However, a stay should not be imposed unless the defendant can show that he or she would suffer such prejudice that a fair trial would not be possible.
https://www.cps.gov.uk/legal-guidance/abuse-process#b03

2. h. Unconscionable behaviour by the executive
This category of the doctrine of abuse is more exceptional than those described above. It arises from the duty of the High Court (first articulated in the case of Bennett v Horseferry Magistrates' Court) to oversee executive action so as to prevent the State taking advantage of acts that threaten either basic human rights or the rule of law (including international law).

Applications for a stay based on this ground cannot be determined in any tribunal below the High Court because they involve the judiciary exercising a supervisory function over the actions of the executive (Bennett v Horseferry Road Magistrates' Court, per Lord Griffiths at 152 H-J). Where the defence wishes to make such an application at the beginning or as a preliminary to trial, the proper procedure is for the instant proceedings to be adjourned and for the defence to commence proceedings in the High Court for a declaration that continuing the prosecution would amount to an abuse of the process.

It is unlikely that the relevant circumstances will arise very often. They are most commonly encountered in relation to attempts to avoid the normal extradition procedures or where oppressive methods have been used to investigate crime (although the category is not limited to these areas alone).

In Bennett v Horseferry Road Magistrates' Court, there was a challenge to proceedings where the defendant had been brought to the UK from South Africa. It was held that it was an abuse of process for a person to be forcibly brought into the jurisdiction of the court in disregard of extradition procedures.

The principles explained in Bennett were applied in R v Mullen [1999] 2 Cr. App. R. 143, although in that case the Court of Appeal stressed that there may be cases in which the seriousness of the crime is so great, relative to the nature of a particular abuse of process, that it would be a proper exercise of judicial discretion to allow the prosecution to succeed.

In R v Looseley; Attorney General's Reference (No 3 of 2000) [2002] 1 Cr. App. R. 29, the House of Lords held that:

i. it is not acceptable for the state to lure its citizens into committing illegal acts and then to seek to prosecute them for doing so;

ii. the courts can use their inherent power to stay proceedings in order to ensure that executive agents of the state do not misuse the coercive law enforcement functions of the court;

iii. a useful guide to identifying the limits of acceptable police conduct is to consider whether, in

the particular circumstances, the police did no more than present the defendant with an unexceptional opportunity to commit a crime (although each case will depend on its own facts); and

iv. the courts will need to carefully consider whether to exclude the evidence under section 78 PACE 1984, or to stay proceedings.

Where the court is faced with illegal conduct by police or prosecutors, so grave as to threaten to undermine the rule of law, the court is likely to regard itself as bound to stop the case: R v Grant [2005] 2 Cr. App. R. 28.

3. ECHR Implications
In determining whether a defendant can receive a fair trial, a court is bound to take into account the protections guaranteed under Article 6 of the ECHR.

As to cases where a defendant seeks to argue that his or her ECHR right to a fair trial has been breached by delay, see Attorney General's Reference (No 2 of 2001) (above).

The prosecution might also be confronted with an argument that a criminal prosecution amounts to an abuse of process on the ground that the offence-creating provision in question is incompatible with the ECHR. Whenever an abuse of process argument is brought on this basis, it will be necessary to consider whether:

on the existing principles of statutory construction the provision in question is compatible with the Convention. If so, no difficulty arises. If not,
it is possible to read and give effect to the provision in a way which is compatible with Convention rights. If so, no difficulty arises.
Cases where the primary legislation in question is irretrievably incompatible with the Convention are likely to be extremely rare. Even where this situation arises, the incompatibility does not deprive the provision of its force and validity, and therefore, it should not affect the criminal trial.

Where, in these circumstances, the defence argues that a trial should be stayed as an abuse of process because of incompatibility with the ECHR, the notice of the court should be drawn to the following provisions of the Human Rights Act 1998:

Section 4(5) provides a list of courts that may make a "declaration of incompatibility" where it is satisfied that the incompatibility between the legislation and ECHR cannot be resolved. The courts include the High Court, Court of Appeal and House of Lords. The list does not include the Crown Court or magistrates' courts.
Section 3(2)(b) provides that, as far as possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights. However, where there is incompatibility between the domestic legislation and the Convention, the validity of the legislation is not affected if primary legislation prevents the removal of the incompatibility.
Section 6(2) provides that a public authority is not acting unlawfully if, as a result of primary legislation, it could not have acted differently (i.e. the CPS cannot be held to be acting unlawfully for prosecuting in accordance with existing legislation).
Relying on these provisions, the prosecution can safely respond that a decision to stay a prosecution on the ground that the Act establishing the offence is allegedly incompatible with the

ECHR is not a matter for either the magistrates' courts or the Crown Court to consider. Moreover, it may also be asserted that under the HRA a finding of incompatibility is no bar to trial. The removal of any incompatibility is a matter exclusively for Parliament.

4. The need for skeleton arguments criminal courts
Applications for a stay on the grounds of abuse of process can be raised in either the magistrates' courts or the Crown Court. Where the application is before the Crown Court, the procedure set out in the Consolidated Criminal Practice Direction, paragraph IV.36 (see Annex 2) must be followed.

While this Direction is not strictly applicable in the magistrates' courts, prosecutors in the magistrates' courts should always ask the court to order skeleton arguments from both sides (defence first, prosecution response) so that the issues can be identified and the matter properly argued on the basis of agreed facts, principles, and law.

The prosecution response skeleton argument must specify any propositions of law to be advanced (together with the authorities relied on in support), and, where appropriate, include a chronology of events and a list of key people in the case. A sample skeleton argument for the Crown is provided at Annex 3.

An application involving abuse of process based on a prior promise not to prosecute should normally be made at the beginning of the trial (R v Croydon Justices ex parte Dean [1993] 3 All E.R. 129, 135, QBD). In cases involving delay, it is preferable for such an application to be made after the evidence of the complainant(s): R v Smolinski [2004] 2 Cr. App. R. 40.

5.

https://drukker.co.uk/portfolio/abuse-of-process/

Abuse of process covers a broad range of activity which can lead the court to strike out a statement of case.

The term is not defined in the Civil Procedure Rules 1998 (“CPR”). However, it has been explained in another context as “using that process for a purpose or in a way significantly different from its ordinary and proper use” (Attorney General v Barker [2000] 1 F.L.R. 759).

The categories of abuse of process are many and are not closed. However, the CPR sets out some examples of the potential forms of abuse, which include:

Vexatious proceedings
Attempts to re-litigate decided issues
Collateral attacks upon earlier decisions
Pointless and wasteful litigation
Improper collateral purpose
Delay