

Bingham Centre Event 16 July 2013: Prosecutorial Discretion and the

Rule of Law

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On 12 March 2007 a young man aged 22 was very seriously injured during a training session at Nuneaton Rugby Club. Despite the best efforts of the National Spinal Injuries Centre at Stoke Mandeville Hospital he was diagnosed as tetraplegic, paralysed from the chest down and with no independent hand or finger movement.

The impact of the injuries on the young man in question was profound. In the early months he gave his all to prove the medical prognosis incorrect, but ultimately he came to accept that his condition could never improve. He became suicidal, driven by his distress at his predicament and his dependency on others. To his consultant psychiatrist, he described himself as a “dynamic, active, sporty young man who loved travel and being independent” and that “he could not envisage a worthwhile future for himself now”. He frequently stated his wish that he had died of his injuries on the rugby field and that he was determined to end his own life. He made several attempts to do so.

One week after a third failed suicide attempt, he contacted *Dignitas* in Switzerland asking for assistance in dying. The young man’s parents were particularly distressed by his wish to end his own life. They tried relentlessly to persuade him not to do so. As his father put it in interview, “We pleaded with

him not to do it and to change his mind and live.... we were all so upset but at the end of the day it was what he wanted”. Later he added, “Even up to the last second.... I hoped he’d change his mind and my wife..... I know she felt exactly the same....There would be nobody happier to hear him say he’d changed his mind and he didn’t want to do it”.

However his parents came to accept their son’s wish to travel to Switzerland to commit suicide and, although it was against their own wishes, they begun to assist him. They agreed to accompany him and to that end they organised flights and arranged for appropriate carers to be available to assist their son with his daily routine. Ultimately they travelled to Switzerland with their son where he committed suicide on 12 September 2008.

On 9 December 2008, less than six weeks after having taken up the post of DPP, I decided that although there was more than enough evidence to prosecute the young man’s parents for assisted suicide, a prosecution was not required in the public interest. I exercised a discretion not to prosecute.

No one has ever questioned my decision not to prosecute that case. But that fact should not be allowed to mask the profound impact that the decision had on the subsequent development of the law, and the way in which the Crown Prosecution Service now approaches the exercise of discretion.

The impact of my decision on the development of the law came when Debbie Purdy’s case reached the Judicial Committee of the House of Lords (the last

case to be decided by the Committee before their Lordships regrouped as Justices' in the Supreme Court).

Debbie Purdy suffers from multiple sclerosis for which there is no known cure. Her condition is deteriorating and she expects that there will come a time when her continuing existence will become unbearable. When that happens she wants to end her life, but by that stage she will almost certainly need assistance to do so. Her husband is willing to assist but Debbie Purdy does not want to expose him to the risk of prosecution for assisted suicide.

In argument before the House of Lords, she accepted that her husband could not be guaranteed immunity from prosecution. Instead she argued that in order to enable her to make an informed decision as to whether or not to ask her husband for assistance, she needed to know the factors that the DPP would take into account in deciding whether a prosecution is required in the public interest. In response to this, the CPS argued that the Code for Crown Prosecutors, which sets out the public interest factors for and against prosecution for all offences, provided sufficient information about the factors likely to be relevant. The House of Lords disagreed.

Although their Lordships accepted that the Code will normally provide sufficient guidance to prosecutors and to the public as to how decisions are likely to be taken whether or not, in a given case, it will be in the public interest to prosecute, pointing to my decision in the case of the young man injured on the rugby pitch, Lord Hope said: "The Director's own analysis

shows that, in a highly unusual and extremely sensitive case of this kind, the Code offers almost no guidance at all” (para 53).

Accordingly, the House of Lords required me, as DPP, to “clarify what [my] position is as to the factors that [I regard] as relevant for and against prosecution in this very special and carefully defined class of case”. I complied with the Judgment by publishing assisted suicide guidelines, first in interim form, and then in final form. They have been in force since February 2010 and, contrary to views expressed by some at the time, work very well in practice.

The significance of Debbie Purdy’s case is not only that it was the first time that the courts have ever required the CPS to publish offence-specific guidance setting out the approach to be taken to the exercise of prosecutorial discretion, but also that the underlying principle – namely that individuals are entitled to a reasonable degree of certainty about the application of the criminal law – is of general application and fundamental. Where better to turn for evidence in support of that proposition than the late Lord Bingham.

When Lord Bingham died in September 2010, he was hailed as the greatest Judge of our time – an intellectual giant with a twinkle of irreverence. I had the privilege of appearing as counsel before Lord Bingham on numerous occasions in the House of Lords and the Judicial Committee of the Privy Council, and of relying on his judgements on many other occasions. His analysis and resolution of legal issues, reduced in judgements to compelling

jurisprudence, gave both meaning and effect to the Human Rights Act in England and Wales and greatly reduced the scope of the death penalty in many other jurisdictions. His combination of intellect, integrity, humanity and humility left a lasting impression on me.

In his book, the Rule of Law, published just before he died in 2010 Lord Bingham is clear that questions of legal right and liability should be governed by law, not the arbitrary whim of an official. It is important to understand what he meant by this. As he himself points out, “this does not mean that every decision affecting the rights or liabilities of the citizen should be made by a court or tribunal, or that the criteria governing administrative decisions should be prescribed in statute”. And then the crucial passage, “what matters is that decisions should be based on stated criteria and they should be amenable to legal challenge” (pg 50).

I agree. The grant to, and the exercise by, the CPS of discretion is essential in our system of criminal justice. Whilst it may be superficially attractive to declare that, where there is sufficient evidence all crimes should be prosecuted, a moments thought will demonstrate the bluntness and unfairness of such an approach.

The classic example is the 10 year old who shoplifts for the first time under encouragement from his peers. But there are other equally powerful examples which demonstrate the need for discretion. Let me give you two very recent examples where the Court of Appeal had to consider how the criminal justice

system should deal with victims of trafficking. The first concerned a boy, known to the courts as THN, who was born in Vietnam. His family ran up large debts. Two things happened as a result. A gang took the boy to pay off the debt and the title deeds to his parents' house were surrendered to the gang, to be returned when the boy had paid the debt. The boy first left Vietnam with the gang in 2009, aged just 14 and, after two unsuccessful attempts, finally entered the UK in 2011, aged 16, hidden in a freezer container. He was taken to a cannabis farm in the West Country where he cultivated the plants until 1 September 2011 when the police raided the premises. THN was arrested, apparently to his great relief, and in due course charged with and pleaded guilty to drug production on a significant scale.

The second example concerns a boy known to the courts as HVN. He was arrested on 5 March 2012 when the police attended a house in Mansfield, having been alerted by the neighbours to the fact that they had seen a boy being moved from the premises by a gang. The house was full of cannabis, but empty of people. HVN, then a 17 year old Vietnamese boy, was found nearby, with his hands bound, barefoot and apparently very frightened. Fingerprints linked him to the production of cannabis and he too was duly charged and pleaded guilty to the production of drugs on a large scale.

When the cases came before the Court of Appeal, the Lord Chief Justice observed that the vile trade in people has different manifestations. Women and girls are trafficked into prostitution; others, usually teenage boys, but

sometimes young adults, are trafficked into cannabis farming. Whether trafficked from home or abroad, they are all victims of crime.

However, the Lord Chief Justice went on to say that, “It has not and could not have been argued that if and when victims of trafficking participate or become involved in criminal activities, a trafficked individual should be given some kind of immunity from prosecution, just because he or she was or has been trafficked: nor for that reason alone, that a substantive defence to a criminal charge is available to a victim of trafficking” [para13]. That observation – no immunity and no defence – creates a healthy tension between our law and the obligations arising under the EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims which came into effect on 6 April 2013. Recital 14 provides: -

“Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators. The safeguard should not exclude prosecution or punishment for offense that a person has voluntarily committed or participated in”

That tension between our substantive law and the Recital can be resolved by, what the Lord Chief Justice described as, a duty on the prosecution to approach the decision whether to prosecute “with the greatest sensitivity”.

That is because the criminality or culpability of any victim of trafficking may be significantly diminished, and in some cases effectively extinguished, not merely because of age (always a relevant factor in the case of a child) but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual or group of individuals (para 13). By that means the discretion of the prosecutor not only guarantees a measure of humanity where there is no immunity or defence, but also ensures compliance with the EU Directive and with the UK’s wider international obligations under Article 26 of the Council of Europe Convention on action against trafficking in Human Beings.

However, I am not under any illusion; there are risks attached to the exercise of discretion. Whilst in appropriate circumstances it can be a force for good, poorly exercised discretion can mask corruption and malevolence. It is the bad decisions which are taken on the basis of inappropriate factors – be they based on the offender, the victim, the offence, or indeed the personal views of the prosecutor – which may be hidden under the respectable cloak of discretion.

How then can the prosecutor and the system work through the potential for abuse? How can the victim of a crime, the suspect, and the community in

which the crime took place, have confidence that those entrusted with the heavy responsibility of exercising discretion, have only taken into account factors which legitimately fall to be considered?

Inevitably, my answer to those questions draws heavily on Lord Bingham's analysis. The CPS should exercise its discretion whether to prosecute on stated criteria, and our decisions should be amenable to legal challenge.

In Debbie Purdy's case, the House of Lords found that the "stated criteria" set out in the Code governing the exercise of the discretion whether to prosecute were not sufficient in cases of assisted suicide. Something more specific was needed. My guidelines now satisfy the first part of the test of the legitimate exercise of discretion set out by Lord Bingham. The same is true in other cases. One of the features of my tenure as DPP has been the publication of publically facing guidelines, setting out in clear terms how the CPS will approach decision making in difficult and often sensitive areas of the law.

Hence we have guidelines for prosecutors in cases where there is evidence that victims of domestic violence or rape may have withdrawn or retracted their allegation or even in some cases positively asserted that the allegation was false. There are many reasons why such victims refuse to support a prosecution which relies on the allegation they made to the police, but I am clear that the automatic prosecution of them for perverting the course of justice would be wrong in principle and unfair in practice.

The DPP's guidelines on prosecuting journalists provide another example of the exercise of discretion according to stated criteria. The conundrum in these cases being how to uphold the criminal law whilst at the same time recognising and protecting the public interest served by the media in a democratic society. To take an obvious example the first prosecution under the Bribery Act 2010 was of a clerk at Redbridge Magistrates' Court. He was caught in a sting operation organised by journalists from The Sun, who offered him a large amount of cash in a car park to make a criminal case disappear. In doing so, the journalists may have themselves committed the offence of offering a bribe, but no one has suggested that a prosecution was required in the public interest.

More recently I published guidelines in prosecuting cases involving offensive messages sent using social media – of which there are very many. The challenge there being to square our law with Article 10 of the European Convention on Human Rights which protects free speech.

There are other examples, all based on the same principle, namely that the exercise of discretion by a prosecutor is only legitimate if based on stated criteria.

The second part of the test of the legitimate exercise of discretion set out by Lord Bingham requires CPS decisions to be amenable to legal challenge.

Here the principles are very well established. A decision of the CPS can be challenged if it fails to comply with settled policy, is unreasonable because irrelevant factors were relied upon, or relevant factors were left out of accounts, or the decision is otherwise “perverse”: see *R v DPP ex parte Manning* ([2001] Q3 330) – a decision of Lord Bingham, at that stage, Lord Chief Justice.

So far so good. But judicial review is a time consuming, often costly, procedure which may be beyond the reach of many citizens affected by CPS decisions and, in any event, the courts have made clear that judicial review of a CPS decision is a highly exceptional remedy. These features were highlighted by the Court of Appeal in the case of *Killick* two years ago ([2011] EWCA). Lord Justice Thomas reasoned that since a decision not to prosecute is in reality a final decision for a victim, it would be more proportionate for the CPS to recognise and give effect to a victim’s right to seek a review of its decisions without recourse to legal proceedings.

We responded to that challenge in June this year when I launched the CPS Victims’ Right to Review Policy. This is one of the most significant victim initiatives ever launched by the CPS. It provides victims with a straightforward opportunity to ask the CPS to look again at a decision not to start, or to stop, a prosecution.

The criminal justice system historically treated victims as bystanders and accordingly gave them little say in their cases. The decisions of prosecutors

were rarely reversed because it was considered vital that decisions, even when later shown to be questionable, were final and could be relied upon. This approach was intended to inspire confidence, but in reality it had the opposite effect. Refusing to admit mistakes can seriously undermine public trust in the criminal justice system. The Victims' Right to Review not only demonstrates how attitudes to victims have changed; it also clearly shows how the CPS has changed.

It is now recognised by the criminal justice system that the interests of justice and the rights of the victim can outweigh the suspect's right to certainty. This is already reflected in the Code for Crown Prosecutors, but more needs to be done to correct this historic imbalance and ensure that the people affected by our decisions can hold us to account. The Victims' Right to Review is a major step in the right direction. It recognises that victims are active participants in the criminal justice process, with both interests to protect and rights to enforce.”

Any victim of crime, which includes bereaved family members or other representatives, can now ask the CPS to look again at a case following a decision not to charge, to discontinue proceedings or offer no evidence. Those entitled to an enhanced service under the Victims' Code will also be offered a discussion with a prosecutor about the outcome of the review.

These reviews will be an entirely fresh examination of all the evidence and circumstances of a case. If a charge is justified and there are no legal barriers

to prosecution, the mistake will be put right. Making fair decisions and delivering justice is the priority.

I have no doubt that such a simple, practical and effective solution would have met with the approval of Lord Bingham. We pass both limbs of his test. We operate to “stated criteria” set out in its publicly facing policy and guidance; and we provide an effective means of challenge which complements rather than substituting for judicial review.

For my part, I would go further than Lord Bingham. To give practical effect to his dual test of stated criteria and legal challenge, explanation and reasons for CPS decision-making are needed. On my model there are three not two stages. The CPS should:

1. Set out in advance how it intends to approach the exercise of discretion in any given category of case; i.e. publically facing policy or guidelines
2. Explain how any given decision has been reached. That is to enable others to know whether we have taken a decision in accordance with our stated criteria.
3. Provide, though our Victims’ Right of Review procedure, a practical and effective way of challenging our decisions.

That is why another feature of my tenure as DPP has been the more visible prosecutor. I have asked my staff to go out and explain our decisions, whether by making charging announcements, delivering steps of court statements or in the radio or TV studios. Neither they, nor I, can properly be held to account unless the public know what our decisions are.

So, to return to where we started. Prosecutorial discretion is a good thing. It takes the edges off blunt criminal laws; it prevents injustice; it provides for compliance with international obligations; and it allows compassion to play its rightful part in the criminal justice response to wrongdoing. But it also calls for strict accountability through guidelines, reasons and challenge. That way prosecutorial discretion and the rule of law can march hand in hand. And Lord Bingham can rest in peace.