SWEET & MAXWELL

Issue 7 August 15 , 2014

Archbold Review

Cases in Brief

Costs orders—Prosecution of Offences Act 1985 s.19—use of power to impugn prosecutorial decision-making—jurisdiction of the High Court—test for "improper"

R. (DPP) v SHEFFIELD CROWN COURT [2014] EWHC 2014 (Admin); June 20, 2014

(1) Where a judge had considered the decision to prosecute a defendant unsound, had asked for the decision to be reviewed before trial, and then the defendant had been acquitted, he had been wrong to make an order that the CPS pay the costs of the defendant under Prosecution of Offenders Act 1985 s.19. There was no jurisdiction to so order as a means of impugning the prosecutorial discretion given to the DPP and other state prosecutors under the constitution. It was not the judge's role to discipline the DPP for what he considered was an aberrant exercise of prosecutorial discretion. The ways to challenge the decision to prosecute were clearly established: as an abuse of process application at trial, including misconduct or oppression as explained in *Ex parte Bennett* [1994] 1 A.C. 42; or in the rarest cases, before the Administrative Court—*DPP ex p. C* [1995] 1 Cr.App.R. 136 at 140-141, where it was a highly exceptional remedy (see *Sharma v Brown-Antoine* [2007] 1 W.L.R. 780; *Inland Revenue Commissioners ex p. Mead* [1993] 1 All E.R. 772; *R. (Pepushi) v CPS* [2004] Imm.A.R. 549; *R. (Bermingham) v Director of the SFO* [2007] 2 W.L.R. 635), and, rarer still since the institution of the CPS review system (see *R. (L) v DPP* [2013] EWHC 1752 (Admin); *R. (F) v DPP* [2013] EWHC 945 (Admin)). Those ways could not be circumvented by an application or decision at the conclusion of the trial to revisit the issue by means of the power under s.19. This applied to all state prosecutors, given their constitutional position: *Moss & Son Ltd v CPS* [2012] EWHC 3658 at [26]-[31]. The position of private prosecutors may be different: an example of costs being awarded was *R. (Oddy) v Bugbugs* [2003] EWHC 2865, although the circumstances in which an order could be made were likely to be very rare indeed.

(2) The Court had jurisdiction to consider the judicial review, notwithstanding the Senior Courts Act 1981 s.29(3), on the basis that the trial judge had no jurisdiction to make the order: *Maidstone Crown Court ex p. London Borough of Harrow* [2000] 1 Cr.App.R. 117 (QB).

(3) The court noted, *obiter*, that the test for an "improper act" in s.19 was now the rigorous test as set out in *Ridehalgh v Horsefield* [1994] Ch 205 and not that in *DPP v Denning* [1991] 2 Q.B. 532 (on which the trial judge had relied).

Criminal records—Police Act 1997 ss.113A and 113B—European Convention on Human Rights art. 8—compatibility—Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975—whether ultra vires

R. (T and JB) v SECRETARY OF STATE FOR THE HOME DEPARMENT [2014] UKSC 35; June 18, 2014

The Supreme Court upheld declarations of incompatibility made by the Court of Appeal in respect of the Police Act 1997 ss.113A and 113B, but, reversing the lower court, found that the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 was not *ultra vires*.

(1) The disclosure, in enhanced criminal records checks under s.113B, of warnings and cautions engaged European Convention on Human Rights art.8 (*R. (L) v Commissioner of Police of the Metropolis (Secretary of State for the Home Department intervening)* [2010] 1 A.C. 410; *Sidabras v Lithuania* (2004) 42 E.H.R.R. 104). In accordance with *MM v UK* (Application No. 24029/07), *The Times,* January 16, 2013, which itself reflected settled case law in the European Court of Human Rights (see *Amman v Switzerland* (2000) 30 E.H.R.R. 843*, Rotaru v Romania* (2000) 8 BHRC 449 and *Bykov v Russia* (Application No. 4378/02), unreported, March 10, 2009),

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legislation which required the indiscriminate disclosure by the state of personal data which it had collected and stored did not contain adequate safeguards against arbitrary interferences with art.8 rights. The legislation governing the disclosure of the data in the instant case was indistinguishable from that considered in *MM*. That judgment established persuasively that the legislation failed to meet the requirements for disclosure to constitute an interference "in accordance with the law" because of the cumulative effect of the failure to draw any distinction on the basis of the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place or the relevance of the data to the employment sought, and the absence of any mechanism for independent review of a decision to disclose data under s.113A. Although the issue of legality was interlinked with "necessary in a democratic society", it remained distinct—in order for the interference to satisfy the former, there must be safeguards which had the effect of enabling the proportionality of the interference to be adequately examined. Whether the interference in a given case was in fact proportionate was a separate question (*per* Lord Reed, Lords Neuberger, Clarke and Lady Hale agreeing; Lord Wilson dissenting). In any event, the disclosures in this case could not be regarded as necessary in a democratic society—disclosure of warnings for dishonesty given to T as a young child bore no rational relationship to the aim of protecting the safety of children with whom, as an adult, he might come into contact. In B's case, the impact on her private life of the disclosure of her caution for minor dishonesty many years earlier, was disproportionate to its likely benefit. It was impossible for the provisions in the 1997 Act to be read down under Human Rights Act 1998 s.3 (*per* Lord Reed, with unanimous agreement).

(2) An order need not be found *ultra vires* in its entirely where that which was *ultra vires* could be severed from that which was *intra vires* even if particular words could not be "blue pencilled". Examples included *Dunkley v Evans* [1981] 1 W.L.R. 1522 and *DPP v Hutchinson* [1990] 2 A.C. 783 (it was not severability that defeated the by-law in that case, but that the construction necessary for severance would have undermined the legislative purpose behind it). Sometimes the court decided that the operation of a piece of subordinate legislation had violated fundamental rights in circumstances in which the logic of the decision meant that its operation would always violate fundamental rights. A good example was *A v HM Treasury* [2010] UKSC 2; [2010] 2 A.C. 534, finding a subparagraph that would always breach the rights of someone listed under it *ultra vires*. In the instant case, the effect of the Court of Appeal's decision in relation to the order was that the operation of the entire order always violated art.8 rights and therefore that all actions taken by questioners in reliance on disclosures made pursuant to it had been unlawful in that, not having been permitted by the 1974 Act, they had not been the subject of any valid exception under the order. Further, by a sidewind, its effect was to declare that the regime for the issue of certificates under the 1997 Act was also invalid. If the order were *ultra vires*, there was no definition of "exempted question", invalidating all applications that required a statement that the record was required for the purposes of an "exempted question". In any event, the finding was inconsistent with the declaration of incompatibility, which stated that it did not affect the validity or continuing operation of the 1997 Act, Part V of which in fact relied upon the validity of the terms of the order. No judicial remedy was necessary in relation to the order. (The Court records that "no doubt for reasons that they considered to be good", the Secretaries of State had made orders eliminating the deficiencies found in the 1975 Order, despite the order of the Court of Appeal, and subsequently the Supreme Court, staying the effect of the finding until determination of the appeal.)

Evidence—of demeanour over extended period—admissibility

MIAH AND MOHAMMED [2014] EWCA Crim 938; April 9, 2014

M submitted that evidence of the alleged victim's demeanour over a prolonged period (that, over months, he was "a completely changed person") should not have been admitted, relying on *Keast* [1998] Crim.L.R. 748. In general such evidence, even though it may technically be relevant, was unlikely to be of any material assistance to a jury because of the difficulty of distinguishing the cause of changes in behaviour over a longer period, as set out in *Keast* (given the brevity of the report, the Court quoted at some length from the transcript). Furthermore, there were good reasons why, in the overwhelming majority of cases, such evidence should not be adduced. It would lead to collateral witnesses being called to explain the reaction of the alleged victim, lengthening the trial and giving rise to difficulties investigating the veracity of the evidence. However, the instant case fell within the limited category of cases identified in *Keast* where there was some concrete basis for the relevance of the evidence. It was helpful to the jury, relevant, and therefore admissible

Prosecution—duty to disclose/allow inspection—common law duty—extent of on appeal—extent of after appeal

R. (NUNN) v CHIEF CONSTABLE OF SUFFOLK CONSTABULARY [2014] UKSC 37; June 18, 2014

After conviction and appeal, there was no indefinitely continuing duty on the police or prosecutor either to disclose material in the same form as existed pre-trial or to respond to whatever enquiries the defendant may make for access to the case materials to allow re-investigation. The Criminal Procedure and Investigations Act 1996 put the prosecution common law duty of disclosure developed in the second half of the twentieth century into statutory form. For trials on indictment, the duty began with the arrival of the case (by whatever route) in the Crown Court: s.1(2). It ended with the end of the trial, whether by conviction, acquittal or the Crown discontinuing proceedings: s.7A(1)(b). It followed that the duty of disclosure created by the Act did not apply to N, who sought disclosure and inspection of materials after conviction. The end of the trial was not always the end of the process—a defendant may seek to appeal, or, thereafter, a reference from the Criminal Cases Review Commission. The principled origin of the duty of disclosure was fairness (see *H* [2004] 2 A.C. 134, [14], *per* Lord Bingham), but it did not follow that fairness required the same level of disclosure at every stage. The common law had recognised duties to disclose at other points in the criminal process, but had modulated their intensity as was appropriate to the stage of the process (e.g. *DPP, ex p. Lee* [1999] 1 W.L.R. 1950, before committal to the Crown Court; the recognition of some duties after conviction but before sentence in the Attorney-General's guidelines). While an appeal was pending, a limited common law duty of disclosure remained. Its extent had not been analysed in English cases, but plainly it extended

in principle to any material which was relevant to an identified ground of appeal and which might assist the appellant. Ordinarily it arose only in relation to material which came into the possession of the Crown after trial, but if there had been a failure, for whatever reason, of disclosure at trial then the duty after trial would extend to pre-existing material (for an example, see *Makin* [2004] EWCA Crim 1607). A similar result was reached in *McDonald v HM Advocate* [2008] UKPC 46; 2010 SC (PC) 1 (where the content of the duty of disclosure in Scotland was then in a transitional state, but which rejected a wholesale re-perfomance of the earlier duty to disclose). Thus what fairness required varied according to the stage of the proceedings under consideration. The Court rejected N's submission that the common law duty after conviction and appeal was of the same nature as the common law duty replaced by the 1996 Act; but a limited duty did exist. If the police or prosecution came into possession of something new which might afford arguable grounds for contending that the conviction was unsafe, it was their duty to disclose it (as recognised in para. 72 of the *Attorney General's Guidelines*). It did not extend to affording renewed access to something disclosed at the time of trial, or to undertake further enquiries at the request of the convicted defendant. However, if there existed a real prospect that further enquiry may reveal something affecting the safety of the conviction, that enquiry ought to be made. The Court noted the position of the CCRC as the safety net in the case of disputed requests for review.

Trial—intermediaries for persons with learning difficulties—differential provision for defendants and other witnesses—equality of arms

R. (OP) v SECRETARY OF STATE FOR JUSTICE [2014] EWHC 1944 (Admin); June 13, 2014

The system under which witnesses other than the defendant had available to them "registered intermediaries", whereas those available to the defendant were unregistered, could reveal an arguable inequality of arms, and created either a risk of unfairness or at its lowest a perceived risk of unfairness to defendants. Registered intermediaries are appointed under the Youth Justice and Criminal Evidence Act 1999 s.29, and operate through the Witness Intermediary Scheme, which maintains a register to be matched with witnesses or victims so as to ensure the provision of experience and expertise at a suitable standard. Registered intermediaries are appointed by a Board which oversees recruitment, training, assessment and professional compliance, and provides a Code of Practice and a Code of Ethics. They are overseen by a Quality Assurance Board. There are no requirements at all in relation to non-registered intermediaries, appointed under the court's inherent powers. They are unregulated and there is no professional framework within which they are required to operate. A provision assimilating the two systems has been legislated but not brought into force (s.33BA of the 1999 Act). Until summer 2011, the Scheme provided registered intermediaries to defendants. A witness statement from a Ministry of Justice official explained that, because orders were generally for the whole trial, provision of registered intermediaries to defendants threatened to result in the Scheme being unable to provide intermediaries to other witnesses. The objection was misconceived. While general support, which could be provided by adults of appropriate understanding, might be necessary for the whole trial, a registered intermediary should only be required for the defendant's evidence. The regime as currently operated would allow a witness for the Crown to be supported by a registered intermediary matched by the Witness Intermediary Scheme, but the defendant against whom he or she gave evidence would be denied one under the same scheme. The intelligent observer would be puzzled by why that were so. The decision to deny OP, a young person with a significant learning disability and Asperger's Syndrome, a registered intermediary was set aside and the question remitted for re-decision.

SENTENCING CASES

Manslaughter; minimum terms

ATTORNEY-GENERAL'S REFERENCE NO. 34 OF 2014 (JOHN JENKIN) [2014] EWCA Crim 1394

The offender had pleaded guilty to the manslaughter of his mother and his sister. The Crown had accepted these pleas in light of psychiatric evidence that his responsibility for the killings was impaired due to mental illness. The offender was initially sentenced to life imprisonment with a minimum term of 12 years. Those sentences were passed on each count and were imposed under s.225 of the Criminal Justice Act 2003. The judge also gave a direction under s.45A of the Mental Health Act 1983 that the offender be treated in hospital with a s.41 Mental Health Act restriction. The judge then had the case relisted pursuant to s.155 of the Powers of the Criminal Courts (Sentencing) Act 2000 because he had failed to specify that only half of the notional determinate sentence had to be served before the offender could be considered for parole. The minimum term was therefore to be six years instead of 12.

Granting leave for the reference to be made, the Court referred to guidance given in the case of *Wood* [2010] 1 Cr.App.R.(S.) 2, which emphasised that in cases of diminished responsibility manslaughter, a reduction in culpability was inherent in the offence. However, the degree of culpability remaining might nonetheless vary from very little to very high, and this should be reflected in the appropriate sentence. The court would also be entitled to have regard to Sched.21 to the 2003 Act in considering aggravating and mitigating features, and should do so sensitive to the fact that diminished responsibility had been established. In *Wood*, the court therefore identified a link between diminished responsibility manslaughter and Sched.21 and derived support from the clear intention of Parliament to increase sentences to reflect the grave harm done by the unlawful causing of death.

Wood expressly recognised that the minimum terms set out in Sched.21 represent real time to be served in custody so that, for example, a 30-year minimum term was the equivalent of a 60-year determinate sentence. A large disproportion between sentences for murder and sentences for offences of manslaughter which came close to murder would be inimical to the administration of justice.

Reference was also made to the case of *Dighton* [2012] 1 Cr.App.R.(S.) 30, in which the Court of Appeal stated that whilst the court was entitled to have regard to Sched.21 and the fact that two killings had taken place, it was unconvinced that the rationale for taking a starting point of 30 years had the case been one of murder applied in cases of diminished responsibility. In *Dighton*'s case, the offender's responsibility was found to be "substantially diminished".

Allowing the reference, the Court of Appeal affirmed that a nuanced approach must be taken to Sched.21 so as to reflect the fact of diminished responsibility as well as the extent of the offender's residual culpability. The greater it is, the greater the impact of the Sched.21 factors. In this case, the serious aggravating factor of more than one killing with an intention to kill should have its own impact on sentence. Given the judge's conclusion that this offender's residual responsibility was "significant", his responsibility was higher up the scale than that assessed in *Dighton*, but lower than that found in *Wood*.

As a murder case, a 30-year starting point subject only to the question of guilty plea would have been appropriate. Given the offender's significant degree of residual responsibility, a minimum term of 20 years would be appropriate. This was reduced to 13 years and 4 months to reflect his early guilty plea.

The Court also identified a possible danger of sentencers failing properly to distinguish between the notional determinate sentence and the minimum term, citing the case of *Martin* [2014] EWCA Crim 795. In *Martin*, a case of diminished responsibility manslaughter, the court arrived at a figure of 12 years which it referred to as the "determinate minimum term" and "the appropriate determinate sentence". It then proceeded to apply s.82A(3)(c) of the Powers of Criminal Courts (Sentencing) Act 2000 and halved the 12-year period to produce a minimum term of six years. Discussing *Martin*, the Court stated that "it is clear to us that the court, with the agreement of two leading counsel, fell into error". Since the court had throughout been working in terms of the minimum term, there was no need to take into account the early release provisions as there would have been had a determinate sentence been passed. The use of the minimum term by its very nature already takes into account the early release provisions as required by s.82(3)(c). The Court stated that the decision in *Martin* should be regarded as being *per incuriam* and should not be followed.

The Court concluded that if the court chooses to work with the currency of minimum terms it does not need to have regard to the early release provisions. If the court's consideration embraces both notional determinate term and minimum terms, it must have regard to the important difference between these two regimes to avoid the difficulties that arose in *Martin* and may well have occurred in this case.

Sentencing Guidelines: Environmental Offences

On July 1, 2014 the Sentencing Council issued a new guideline for environmental offences. The Guideline came into force on July 1, 2014 and can be found in full at http://sentencingcouncil.judiciary.gov.uk/index.htm.

Comment

Hate Crime Law: More Incrementalism or Time for Reform?

By Catherine Heard[1]

The Law Commission report, *Hate crime: should the current offences be extended?* was published on May 28, 2014. The project was referred to the Commission by the Ministry of Justice in December 2012 with a scope restricted to assessing the case for extending the existing hate crime offences to apply to all five hate crime characteristics that are currently recognised in criminal justice legislation: race, religion, disability, transgender identity and sexual orientation. Currently, the aggravated offences under the Crime and Disorder Act 1998 (CDA 1998) only apply to racial and religious hostility.[2] Conversely, enhanced sentencing powers under the Criminal Justice Act 2003 (CJA 2003) recognise all five characteristics for sentence uplift where hostility is proved as an aggravating factor, applying the same test for hostility as used in the aggravated offences. There are two alternatives: either, in committing the offence, D was (wholly or partially) *motivated* by hostility towards members of a racial or religious group or, at the time of committing the offence or immediately before or afterwards, D *demonstrated* hostility based on V's actual or presumed race or religion.

The project's narrow focus precluded analysis of deeper questions which, the Commission now recommends, require examination prior to any further extension. Why protect some characteristics with specific offences but not others (for example, gender or age)? What advantages derive from having offences requiring proof of hostility as a separate element? And why hostility rather than, say, prejudice or bias?

The effects of piecemeal reform

Parliament's piecemeal approach of adding further characteristics (first disability and sexual orientation, then transgender identity) to the statutory sentencing regime in recent years has had unforeseen and unsatisfactory consequences. Police and prosecutors must now work to a system where investigative approaches and charging decisions in otherwise similar factual cases differ depending whether the hostility was based on, say, race or sexual orientation. In terms of sentencing outcome, the differing legislative treatment may be more form than substance: sentences passed for aggravated offences almost never exceed the maximum that could have been imposed under the corresponding

1 Catherine Heard is the Law Commission lawyer responsible for the hate crime project. An earlier article discussed the provisional reform proposals in the Commission's Consultation Paper No. 213: *Hate Crime: The Case for Extending the Existing Offences.* See [2013] 8 *Archbold Review* 5.

2 The report also examines the case for extending the offences of stirring up hatred under the Public Order Act 1986, which apply in relation to hatred on grounds of race, religion and sexual orientation. The report deals with these in chapter 7 but they are not discussed in this article.

non-aggravated offence. That suggests that one key rationale for the existence of hate crime offences—the need for higher sentences to punish and deter—could be achieved through proper application of enhanced sentencing.

However, the consultation conducted by the Commission has shown that this unequal legislative treatment may be resulting in potentially serious consequences for the prosecution of hate crime. Several police forces complained that the unequal treatment of protected characteristics in the current system is hindering their work in dealing with hate crime. They argued that, if the aggravated offences applied to all five characteristics, it would lead to improved investigative and prosecution approaches. They considered that this would have positive effects even in cases where the offence fell outside the CDA 1998 scheme (because it was not listed in the CDA 1998 as one of the offences carrying an aggravated form), and could therefore only be dealt with by sentence enhancement. The practical benefit would be that police officers would routinely seek evidence of demonstration or motivation of hostility in all hate crime cases. A system that worked in the same way for all five characteristics would be simpler to use and easier to explain to victims. It would also be fairer.

These are important arguments from a practical perspective. If the aggravated offences remain applicable only to race and religion, this would leave in place what some respondents called a "two-tier system" with the other characteristics being seen as less important because they are only protected as a matter of sentencing uplift. This sits awkwardly with Parliament's decision to amend the CJA 2003 sentencing regime so that courts must treat hostility against all five characteristics as an aggravating factor. Implicit in that decision was a recognition that hate crime occurs in relation to disability, sexual orientation and transgender identity and is of sufficient seriousness in terms of harm and culpability to warrant statutory recognition. There is no evidence that racial or religious hate crime involves greater harm or culpability or differs in some other significant way so as to make aggravated offences less suitable where the hostility is based on disability, sexual orientation or transgender identity.

Addressing the fundamentals

These considerations led police and prosecutors to favour extension of the existing offences to apply to all five characteristics. Their views were shared by most of the NGOs who support victims of hate crime.

However, objections were raised by others in the criminal justice field, notably the judiciary and some academics. They preferred a pure enhanced sentencing approach to hate crime. The advantages they saw in the sentencing system included the powerful communicative effect of the statement which the judge is obliged to make, in open court, as to the sentence increase attributable to the hate element. They also noted the flexibility of a system that applies to all offences rather than just a limited range (as with the aggravated offences). Their objections to extension of the offences went beyond preferring a pure sentencing approach. Other factors included the unduly complex structure of the offences, difficulties in prosecuting them, the reluctance of some juries to convict for them, and a difficult compromise having to be considered on the frequent occasions when pleas are offered to the corresponding non-aggravated offences. Compounding these problems, consultees pointed to the risk that failure to prove an aggravated offence destroys any prospect of marking out the hostility with an enhanced sentence under the CJA 2003: the aggravated offences and the enhanced sentencing system are in essence mutually exclusive.

Another objection to extending the aggravated offences in their current form was that they were not created to address the types of conduct commonly forming the basis of today's hate crime, and did not have the characteristics of sexual orientation, disability or transgender identity in view. Before extending, additional offence types may need to be brought into the list of offences for which aggravated forms exist. For example, should communications offences (Communications Act 2003 s.127 and others) be added to deal with online hatred? Should financial or sexual offences be added, both of which reportedly occur in the disability hate crime context?

In view of the reservations expressed about the effectiveness of the existing aggravated offences and the additional problems which extension would bring, the Commission's primary recommendation is that a full-scale review of their operation be conducted. Without prescribing the terms of that review, the Commission sets out some fundamental questions it might address, including: what are the purposes of laws specifically addressing hostility-based offending, for victims, the justice system and wider society?; to what extent do the current aggravated offences and enhanced sentencing systems meet those objectives?; if aggravated offences, or enhanced sentencing, are necessary or desirable, what model should they use (hostility, prejudice, bias, deliberate targeting, motivation, demonstration?), what characteristics should be protected, and on what basis should characteristics be selected?

Accepting that such a review will require Government commitment, the Commission makes an alternative recommendation: if no review is forthcoming, the offences should be extended in their current form. Although not its preferred solution, this would at least produce a more coherent and equal system.

Sentencing reforms required in any event

For the time being, enhanced sentencing remains the only specific criminal law provision that responds to hate crime where hostility is demonstrated or is a motivating factor, based on disability, sexual orientation or transgender identity. It also applies to all cases where racial or religious hostility is shown, but which cannot be prosecuted as an aggravated offence under the CDA 1998. Evidence from the consultation suggests it is under-used. Even where it is correctly applied, no record of this will appear on the offender's record, unlike a conviction for an aggravated offence, which fairly labels the offending for what it is, providing valuable information for those working in the justice system and potential future employers.

The report makes two recommendations to improve the use and the recording of enhance sentencing: detailed Sentencing Council guidance on hostility-based offending; and the recording of enhanced sentencing on the Police National Computer. These reforms are recommended for implementation irrespective of whether a wider review of hate crime offences takes place.

Features

Evidence of Bad Character—Where We Are Today [concluded[1]]

By J.R. Spencer

Evidence of propensity and cross-admissibility

A relatively common situation is where D is accused of similar misbehaviour by a string of different complainants: as where (say) three women, A, B and C, all say he sexually assaulted them. Under the old law, where their complaints were "strikingly similar" the evidence of A was admissible in the case of B and C, and *vice versa*. The evidence was "cross-admissible", it was said, not because it showed D had a disposition to do this sort of thing, but because of the unlikelihood of all three complainants inventing false allegations that were virtually identical. Case law since the 2003 reform establishes that, in such a case, this kind of approach is still appropriate. And as under the earlier law, the tribunal of fact should be instructed to look at the evidence in this sort of case "in the round". So the magistrates or jury do not have to be satisfied beyond reasonable doubt that A has told the truth before they consider A's evidence in relation to the cases involving B and C, but should consider them together.[2]

However, the fact that under the new law the "forbidden chain of reasoning" may now be followed means that, in principle, an alternative approach in such a case is also possible. In such a case, it would now also be open to the tribunal of fact to decide that it was convinced beyond reasonable doubt that D committed the offence against A, from this to deduce that D has a propensity to commit offences of this sort, and then to take this propensity into account in deciding whether D also committed the offences against B and C. In the *Crown Court Bench Book*, indeed, the possible co-existence of these two different chains of reasoning is mentioned[3]—a suggested form of words being proposed by which a judge could present both possibilities to a jury.

That said, however, common sense suggests that juries should not be invited to follow the "propensity" line of reasoning in this type of case except where evidence in relation to one of the alleged incidents is particularly strong. In *N(H)*,[4] the Court of Appeal said:

> "It will be in rare circumstances, if at all, that the jury might be directed to consider both these possibilities in the same case (although it is not so unusual for the jury to consider the effect of a *previous conviction* as demonstrating a propensity *and* the unlikelihood that similar but independent complaints are, as between themselves, coincidental or malicious). Whichever is the basis upon which the jury is directed that they may consider the evidence given in relation to one count as support for another, they will require careful directions as to their proper approach to the evidence and, in the case of an alleged propensity, a specific warning as to the limitations of such evidence."

Gateway (d) and bad character that does not indicate propensity

A final point to make in this connection is that, though evidence of bad character that enters via "gateway (d)" will commonly do so because it shows propensity, it will sometimes be admissible via "gateway (d)" even if it does not. The ultimate question here is whether the evidence in question is relevant to a disputed issue between D and the Crown, and this it may be for some other reason than because it shows D's propensity to commit offences of the type he is now charged with. For example, it may show guilty knowledge: as in the old case of *Francis*,[5] for example, where D's previous conviction showed he knew the difference between genuine and fake jewellery, despite his claim that he had passed off the fake jewellery in innocence. Or D's previous misbehaviour may show motive for what D claims to have been an accident. (Though as we saw in the first instalment of this article, in *Sule*[6] the Court of Appeal held that, where D's previous crime established the motive for his alleged present one, this would be covered by the proviso to s.98 which renders automatically admissible evidence which "has to do with the alleged facts of the offence with which the defendant is charged".)

Judicial discretion to exclude

The provisions of the CJA 2003 expressly give the court a discretionary power to exclude evidence of bad character which would otherwise be admissible via gateways (d) or (g), but—unlike the provisions of the Act on hearsay[7]—they say nothing about any more general discretion to exclude. However, case law quickly established that the new bad character evidence provisions are to be read subject to s.78 of PACE 1984—the general power of the court to exclude prosecution evidence where the court believes its admission would make the trial unfair.[8] And it is now well established that this power should be invoked in two types of case: (i) where the Crown seeks to adduce the bad character evidence to "bolster a weak case", and (ii) where the bad character evidence is contested, and it would distract the attention of the court from the main body of evidence by the minute examination of "satellite issues" of secondary importance.[9]

What, as a matter of principle, amounts a "weak case"? In *Darnley*[10] the Court of Appeal (which, incidentally, thought the evidence in the case in hand was strong) addressed this issue of principle. Rejecting the idea that it means evidence which, when taken on its own, would not constitute a case to answer, the Court said it thought that, in this context, it

1 The first part of this article appeared in Issue 5.
2 *Freeman and Crawford* [2008] EWCA Crim 1863; [2009] 1 W.L.R. 2723; *McAllister* [2008] EWCA Crim 1544; [2009] 1 Cr.App.R. 12 (129); and see Ormerod and Fortson in [2009] Crim.L.R. 313.
3 At p.179 in the printed version.
4 [2011] EWCA Crim 730; [2011] 1 Cr.App.R. 12.
5 (1874) L.R. 2 C.C.R. 128.
6 [2012] EWCA Crim 1120.
7 Section 126(2) expressly makes the hearsay provisions subject to s.78 of PACE, and "any other power of a court to exclude evidence at its discretion (whether by preventing questions being put or otherwise)".
8 See Spencer, *Evidence of Bad Character*, §§1.54 *et seq.*
9 *O'Dowd* [2009] EWCA Crim 905; [2009] 2 CrApp.R. 16 (280).
10 [2012] EWCA Crim 1148.

meant "evidence which links the defendant with the offence but which the courts would normally treat with caution, such as a 'fleeting glance' identification or a 'cell confession'".[11]
"Satellite issues" typically arise where the bad character evidence is alleged misconduct on a previous occasion which, like the matters forming the subject of the charge, D strongly denies. The problem is less likely to arise, of course, if the earlier incident led to a conviction—and particularly a conviction by a court in the UK or another EU Member State, when by statute[12] D is presumed to have committed the offence of which he was convicted. That said, the presumption is rebuttable and, as the Court of Appeal reminded us in *C(JW)*,[13] this means D is perfectly entitled to go into the witness box and deny on oath—however implausibly—that he committed the earlier offence. But if he elects to do this, that does not mean that the presumption promptly evaporates and the Crown is then obliged to call the witnesses to the earlier offence if they wish to establish that D committed it. Nor does it mean that D is able to call the witnesses to the earlier offence, in order to have their veracity challenged in the witness box—because in order to compel a person to give evidence, that person must not only be able to give evidence that is material to the case, but that evidence must be supportive of the case of the party calling them.[14]
Section 78 of PACE, it should be noted, only operates in respect of evidence "*on which the prosecution proposes to rely*". So, as the Court of Appeal pointed out in *Apabhai*[15] and again in *Phillips*,[16] it does not enable the court to exclude on "case-management grounds", or on grounds of general unfairness, evidence of bad character which one defendant wishes to adduce against another, using "gateway (e)". Nor does it enable the court to exclude defence allegedly showing that a prosecution witness is of bad character, admissible under the CJA 2003 s.100.[17] However, the test for admissibility via "gateway (e)", and also for admissibility under s.100, is not simple relevance, but "super-relevance". Both s.101(1)(e), and s.100, require the evidence of bad character to be "of substantial probative value" in relation to a matter of importance. And this enables the court, albeit within limits, to exclude evidence of bad character that is likely to generate more heat than light.

11 At [32]; adopting the suggestion made in §4.58 of *Evidence of Bad Character.*
12 PACE 1984 s.74(2).
13 [2010] EWCA Crim 2971; [2011] 1 W.L.R. 1942.
14 *Marylebone Justices ex p. Gatting and Embury* (1990) 154 J.P. 549; [1990] Crim. L.R. 578.
15 [2011] EWCA Crim 917.
16 [2011] EWCA Crim 2935; [2012] 1 Cr.App.R. 332 (25).
17 *Dizaei* [2013] EWCA Crim 88; [2013] 1 W.L.R. 2257; discussed in the first instalment of this article.

Assisted Suicide Saga—the *Nicklinson* Episode

By Jonathan Rogers[1]

On June 25, the Supreme Court delivered its opinions in *Nicklinson v Ministry of Justice, A.M. v DPP* [2014] UKSC 38. These two cases occasioned a revision of two House of Lords decisions on assisted suicide, but it turns out that observers may have to await a fourth decision in this area. The issues in the cases are considered separately below.

The argument in Nicklinson

Mr Nicklinson suffered a stroke which paralysed him completely save to the extent that he could communicate, with great difficulty, by moving his head and eyes with the use of technology. He wished to die but, like Diane Pretty before him, was physically unable to commit suicide. For the purposes of accepting that his rights were engaged, it was conceded that Mr Nicklinson was a fully competent person whose wish to die was unaffected by the influence of others.
As is well known, s.2(1) of the Suicide Act 1961 (hereafter "s.2(1) SA 1961") is interpreted as providing an unqualified ban on assisted suicide. Thus it may deter anyone who would like to assist the incapacitated person to commit suicide, and this constitutes an interference with the private life of the sufferer himself, under art.8(1) ECHR: *Pretty v UK* (2002) 35 E.H.R.R. 1, followed in domestic law in *R. (Purdy) v DPP* [2010] 1 A.C. 345.
But in *R. (Pretty) v DPP* [2002] 1 A.C. 800, it was held that the broad prohibition was in any event "necessary for the protection of the rights of others" for the purposes of art.8(2) ECHR. The leading decision of Lord Bingham was that, in the main run of cases, it might be very difficult to be sure that an incapacitated person, even though apparently fully competent, does not perceive pressure of one sort or another to relieve his carers (typically family members) of the burden of looking after him. The interests of these vulnerable people can only be effectively protected by an unqualified ban on anyone helping him or her to die (at [29]). It was acknowledged that this means that some undoubtedly competent sufferers are deprived of the opportunity of a desired early death as the price for protecting more vulnerable sufferers. The European Court of Human Rights in *Pretty v UK* accepted that this may be proportionate, taking into account a considerable margin of appreciation. The European Court said (at [74]):

"But many will be vulnerable and it is the vulnerability of the class which provides the rationale for the law in question … Clear risks of abuse do exist, notwithstanding arguments as to the possibility of safeguards and protective procedures."

On behalf of Mr Nicklinson[2] it was now argued that the effects of the unqualified ban on him and others in his situation is disproportionate to "the protection of the rights of others" for the purposes of art.8(2) ECHR; and since there is no way to reinterpret the provision, that the Supreme Court should declare that s.2(1) SA 1961 is incompatible with art.8 ECHR.

The decision in Nicklinson

None of the nine Justices offered his or her own opinion that the effects of s.2(1) SA 1961 on persons in Mr Nicklinson's position *are* proportionate to protecting the rights of others. Two dissenting Justices, Lady Hale and Lord Kerr, held that

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2 Following his defeat in the High Court, Nicklinson had brought about his own death by refusing food, drink and medication. The legal proceedings were continued by his widow, and then by Paul Lamb, another person in a position similar to Nicklinson's, who was added as a claimant in the Court of Appeal.

the effects are disproportionate and would have granted the declaration of incompatibility. But the other seven Justices refrained from an opinion, on the basis that it would, in any event, at this moment in time at any rate, be inappropriate to hold that s.2(1) SA 1961 is incompatible with art.8 ECHR. Parliament is the appropriate forum to consider the proportionality of the ban on assisted suicide, and to decide what to do if the present law is disproportionate.

The exact reasons of the seven Justices in the majority varied. Lord Sumption, with whom Lord Hughes, Lord Reed and Lord Clarke agreed, thought that firm factual conclusions relating to the pressures perceived by the incapacitated were likely to be "elusive". It was better for Parliament to be left to make its own decisions on the width of the law on assisted suicide, even if they would be guided by instinct (at [232]–[233]). By contrast, Lord Neuberger, Lord Mance and Lord Wilson held that the judiciary is competent to make a declaration even in this difficult area; but each preferred to reserve judgment for now. Lord Neuberger thought that, *inter alia*, reversing *Pretty v DPP* in this way would be an "unheralded *volte-face*" (at [162]). Lord Mance considered that too little had changed since *Pretty v DPP* to justify reversing it, and noted that even the pro-reform Falconer Commission had failed to agree on how the law should be revised to enable competent but incapacitated persons to die (at [182]–[187]). Lord Wilson suggested that it would only be appropriate to issue a declaration of incompatibility if the Court were able to steer Parliament as to what sort of revision would make the law compatible. This was not presently the case (at [203]).

Including the dissents, this means that a 5:4 majority thought it possible, in principle, to declare s.2(1) SA 1961 to be incompatible with art.8 ECHR. The majority anticipated that a further case would be brought if Parliament were to debate the issue but were again to decline to change the law. Lord Neuberger (at [118]) and Lord Wilson (at [202])—each seemed careful to reserve what their own opinion might finally be in such an eventuality. There is surely much to be said for Lady Hale's determination to make the decision now, since even agreeing upon a declaration of incompatibility would have had no greater effect than requiring Parliament to consider whether, and if so how, it wished to address the incompatibility.

The unresolved legal point in Nicklinson

Instead of adding to the arguments about the proportionality of s.2(1) SA 1961, it seems more profitable to focus on one important legal point, which should be of particular interest to criminal lawyers, and might hold the key to any subsequent case. This concerns the proper interpretation of paragraph [76] of the decision of the European Court of Human Rights in *Pretty v UK*, and in particular the final sentence. The relevant passage reads:

> "The Court does not consider therefore that the blanket nature of the ban on assisted suicide is disproportionate. The Government have stated that flexibility is provided for in individual cases by the fact that consent is needed from the DPP to bring a prosecution and by the fact that a maximum sentence is provided, allowing lesser penalties to be imposed as appropriate… *It does not appear to be arbitrary to the Court for the law to reflect the importance of the right to life, by prohibiting assisted suicide while providing for a system of enforcement and adjudication which allows due regard to be given in each particular case to the public interest in bringing a prosecution, as well as to the fair and proper requirements of retribution and deterrence*." (emphasis added)

For Lord Neuberger, at [66], this is an indication that the provision of prosecutorial and sentencing discretion in English law may help to render the effect of s.2(1) SA 1961 to be proportionate. Lady Hale, at [323], seemed to agree, repeating her view in *Purdy* that a prosecutorial policy would have a role not only in clarifying the DPP's approach but also "in securing that section 2 (1) does not operate as a disproportionate interference". In *Purdy* too, Lord Brown had thought it "impossible to read [paragraph [76] of *Pretty v UK*] in any other way": *Purdy* at [74].

But for Lord Mance at [156]–[157], Lord Hughes at [275] and Lord Kerr at [362] in *Nicklinson*, the final sentence of paragraph [76] is no more than an observation by the European Court of Human Rights. If the deterrent effects of s.2(1) SA 1961 on persons in the tragic situation of Mr Nicklinson are truly disproportionate to the need to protect the vulnerable, then s.2(1) SA 1961 cannot be made compatible by reference to practical methods of disposal in relation to anyone who might help Mr Nicklinson to commit suicide. For his part, Lord Sumption also thought that the European Court did not mean to suggest that compatibility was conditional on prosecutorial discretion. On the other hand, he did seem to consider that such a consideration might be properly regarded as relevant to the proportionality question by a Member State, at [222].

It is curious that the separate views on paragraph [76] of *Pretty v UK* do not correspond with the final decisions of the relevant judges; they seem rather to cross the boundaries between the different opinions in *Nicklinson*. But resolving this point is surely of some importance. Presently it is clear that nothing very bad awaits those who compassionately assist a competent person who wishes to die. In *Nicklinson* it was noted that that 215 people have travelled from England to Switzerland to commit suicide; and no one has been prosecuted for assisting any of them. Further, from 85 cases of assisted suicide referred to the DPP since April 2009, only one has been prosecuted under s.2(1) SA 1961 (and this involved a malicious assistor and clearly vulnerable victim). If this trend continues and *if* it is accepted that sentencing and prosecutorial discretion are relevant to the proportionality of s.2(1) SA 1961, then it should remain very difficult (more difficult than was generally conceded in *Nicklinson*) to argue in any future case that s.2(1) SA 1961 is incompatible with art.8 ECHR.

So which is the correct approach?

The proper relevance of sentencing and prosecutorial discretion

It is argued here that the availability of sentencing and prosecutorial discretion is part of the overall package and as such they are relevant to the proportionality of the effects of a substantive offence. It is in fact odd to talk about the proportionality of any state measure without detailing *all* of its likely effects, both on those who are deterred by it and on those who violate it.

In *Nicklinson*, Lord Hughes explained his differing interpretation of paragraph [76] of *Pretty v UK* by noting that many countries in Europe do not generally permit the prosecutor to discontinue cases in the public interest. He suggested that it would therefore be strange if the European Court of Human Rights had meant to suggest it as a relevant factor: at [275]. But the European Court does not lay down rules for the whole of Europe. It only decides whether the law and practice of an individual Member State complies with the Convention. So there is no surprise that it would advert to the possibility of public interest discontinuance in a state where it *is* possible. Moreover readers should not overlook the additional reference to sentencing discretion. One might assume that all of the 36 ECHR Member States which impose similar unqualified bans on assisted suicide

have sentencing discretion, even if not also prosecutorial discretion. Possibly sentencing discretion alone would suffice to render their law to be compatible with article 8 ECHR in cases analogous to that of *Pretty* and *Nicklinson*.
It is true that the criminalisation of some forms of behaviour is so offensive that no amount of discretion can render the resulting criminal offence compatible. This was the case for the prohibition of homosexual activity, which to modern eyes serves no wider public interest at all: *Norris v Ireland* (1989) 13 E.H.R.R. 186. But where the criminal law *can* reasonably be invoked to protect a state interest such as the health and rights of others, it is possible that a broad prohibition may be compatible with any Convention right that is engaged, *if* it is supplemented by a system of sentencing and prosecutorial decisions to deal with cases where there is little apparent threat to the interest in question. Thus the European Court in *Laskey v UK* [1997] 24 E.H.R.R. 39 at [49]–[50] referred approvingly to the fact that not all possible charges were pursued against the men convicted over extreme consensual sado-masochistic activities, and especially approved their lenient sentences. It has also held that a decision to prosecute a 15-year-old boy for child rape over a consensual encounter with a 12-year-old girl was compatible with art.8 ECHR by reference to the light sentence imposed (*G v UK* (2011) 53 E.H.R.R.S.E. 25 at [39]).
At least, and importantly, such flexible options may be sufficient to comply with the ECHR even if the substantive law *could* be narrowed and improved so that there is less of a need to rely on discretion. Domestic lawyers can demand the best possible criminal law, but one only expects human rights law (at home as well as internationally) to be used to require minimum standards of criminal law where Convention rights are engaged. It may be that many who argue that s.2(1) SA 1961 is incompatible with art.8 ECHR tend to neglect this point.

The decision in A.M. ("Martin")
The other applicant, AM, referred to as "Martin", suffered a brainstem stroke and is also largely incapacitated, though able to communicate through slow hand movements as well as via an eye-blink computer. He too wishes to die but his wife is unwilling to offer him the assistance he needs to commit suicide. Martin wishes to be assisted to travel to commit suicide in Switzerland (where he could lawfully be assisted to die), either by a sympathetic carer in England, or by an organisation known as "Friends At The End".
The DPP's Policy on prosecuting assisted suicide lists as a factor pointing towards prosecution that "the suspect would be paid by the victim" (which might be necessary in Martin's case, if only to cover the expenses of the suspect) and also that "the suspect was acting in his or her capacity as … a professional carer". Martin therefore wishes the DPP to clarify whether his possible assistors might therefore be treated differently from how a family member would have been, even if they were to do the same acts as a family member might have done and were also to be motivated by compassion.
All nine of their Lordships in *Nicklinson* agreed that it was difficult to assess the likelihood of prosecution in Martin's hypothetical case from reading the DPP's Policy; but they unanimously reversed the Court of Appeal's majority decision to order the DPP to amend the policy. They emphasised that the purpose of the DPP's Policy was not to inform prospective offenders how to escape prosecution. That would be doubly wrong, in that it would indicate a willingness effectively to rewrite the law of assisted suicide in such cases and it would also amount to making that decision before the act had taken place. As Lord Sumption put it, at [247]:

"The most that the Director can reasonably be expected to do in the face of such a complex process of evaluative judgment is to identify the main factors that will be relevant. It is neither possible nor proper for him to attempt a precise statement in advance of the facts about when a professional will or will not be prosecuted. Either such a statement will have to be so general and qualified as to be of limited value for predictive purposes, or else it is liable to tie the Director's hands in a way that would in practice amount to a dispensation from the law."

It might be thought that this reasoning undermines the decision in *Purdy* itself. It seems perfectly clear that anyone whose case features most of the factors "against" prosecution and none of the factors "for" prosecution can expect confidently not to be prosecuted, and yet setting out such a Policy is exactly what the House of Lords in *Purdy* had ordered the DPP to do. Lord Hughes, who had not been in the House of Lords at the time of the case, noted that very little was said about the principles of legality in *Purdy* and went so far as to suggest that it had been wrongly decided, at [276]–[280]. Indeed, it was striking their Lordships in *Purdy* had said nothing about the rule of law when it was clear that the DPP was content routinely not to prosecute some cases, such as that of Daniel James, in the public interest.
One might welcome the return in *Nicklinson* of the interest in the rule of law, which had also featured in *Pretty v DPP*. Yet the majority of the Court wished to resist the suggestion that *Purdy* was wrongly decided. Lord Sumption emphasised at [250] that the relevant factors only had to be articulated. Nothing in *Purdy* had meant to suggest that guidance should also be offered as to how the various opposing factors would be weighed in any individual case. It was offering the sort of further "clarification" requested by *Martin* which would cross the Rubicon.
With respect, this reconciliation does not convince. The *Purdy* decision did require the DPP to set out the relevant factors with some degree of precision. Martin might instead have complained that the listed factor "the suspect was acting in his or her capacity as … a professional carer" was itself so imprecise that it might be interpreted arbitrarily by different DPPs. It may or may not exclude carers who act in their spare time, or who had given up care of the victim at the time of the assistance: or, a carer who is overcome by compassion for the predicament of the patient may not be acting "in his or her capacity" as a professional carer. There is little difference between being required to set out relevant factors and being required to indicate how they would be weighed, because it is always possible to set out the relevant factors so precisely that weighing them may no longer be necessary.

Conclusion
The case of *Martin* exposes, but does not resolve, the tension between the principle of legality and the need to set out the public interest factors against prosecution. Probably it is necessary to over-rule *Purdy* in order to achieve that. For those who prefer s.2(1) SA 1961 to be changed, the end of the battle is still nowhere in sight. If Parliament declines again to relax the law, they must wait for another case to reach the Supreme Court; and even if a declaration is then made, Parliament might conceivably refuse to amend the law. Then the case would have to go to the European Court of Human Rights, which might yet still follow its own decision in *Pretty v UK* and allow a generous margin of appreciation to the UK legislature.
On the legal side, it has been argued here that it is proper to consider prosecutorial discretion and sentencing discretion as relevant to the proportionality of s.2(1) SA 1961, and if that is right, then a finding of incompatibility with art.8 ECHR is all the more unlikely in either Court.

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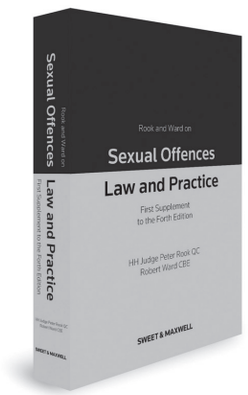

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Sweet & Maxwell document delivery service: £9.45 plus VAT per article with an extra £1 per page if faxed.
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Archbold Review is published by Thomson Reuters (Professional) UK Limited trading as Sweet & Maxwell, Friars House, 160 Blackfriars Road, London, SE1 8EZ (Registered in England & Wales, Company No 1679046.
Registered Office and address for service: 2nd floor, Aldgate House, 33 Aldgate High Street, London EC3N 1DL
For further information on our products and services, visit
www.sweetandmaxwell.co.uk
ISSN 0961–4249

Typeset by Matthew Marley
Printed by St Austell Printing Co

649994