

## **Frontiers of Independence and Accountability**

Thirteen years after *Lagesse v DPP (1990) MR 194*, the Judicial Committee of the Privy Council in *Jeewan Mohit v DPP [2005] UKPC 31* has laid to rest the 'apparent contradiction' in the *Lagesse* case (highlighted in *Hurnam v Lan Yee Chui (2001) MR 81*), when it held that judicial review was available in cases where the DPP had discontinued a private prosecution. Reminding us of the scope of section 119 of the Constitution, the Committee quoted with approval the *ratio* in the case of *Matalulu V DPP (1999) FJCA 15* to the effect that *prosecutorial discretion is reviewable but only on grounds of **flagrant impropriety in the exercise of the discretion***". The recent House of Lords case of *R (on the application of Purdy) v Director of Public Prosecutions [2009] UKHL 45* however brings a new twist to the interaction between the prosecutor and the Courts.

The facts of the Purdy case were as follows: Ms Purdy suffered from multiple sclerosis for which there was no known cure. She expected that there would come a time when her continuing existence would become unbearable. She would wish to end her life when that happens. She would by that stage require the assistance of her husband to travel to a jurisdiction where assisted suicide is permitted. However under section 2(1) of the UK Suicide Act 1961(SA 1961) a person who aided and abetted, abetted, counseled or procured the suicide of another would be guilty of criminal conduct. Section 2(4) of the SA 1961 provides that no proceedings would be instituted for an offence under section 2(1) without the consent of the DPP. On the 18 December 2007, Ms Purdy wrote to the DPP requesting for the publication of any policy not to prosecute that he may have in place relevant to her circumstances. Alternatively Ms Purdy suggested that if no such policy existed, then the DPP should promulgate one, setting out the criteria for the exercise of the discretion in deciding whether to prosecute under Section 2(1) of the SA 1961 in particular, relevant to her case since her husband had proposed to assist her to travel to Switzerland where assisted suicide is not a criminal offence.

The DPP turned down the request of Ms Purdy. She was told in a letter dated the 14 January 2008:

*“There is no such policy, and indeed, as you will be aware from the judgment of the House of Lords in the Dianne Pretty case, any such policy – which would amount to a proleptic grant of immunity- would be unlawful.*

*As Lord Bingham said: “It would have been a gross dereliction of the Director’s duty and a gross abuse of his power had he ventured to undertake that a crime yet to be committed would not lead prosecution”.*

There are two observations to be made on the contents of the letter of the DPP. First that the DPP was clearly stating that it would be unlawful for him to guarantee to a person that he would not be prosecuted for an offence yet to be committed. Second the only policy applied by the DPP is the one set out in the Code for Crown Prosecutors which is applicable generally to the prosecution of all alleged offences. The Code lays down a two-tier process before advising prosecution. First prosecutors have to consider the evidence and decide whether on the basis of such evidence there are reasonable prospects of securing a conviction and second whether prosecution would be justified on grounds of public interest. The Code does not on any account lay down a case -specific policy in which a prosecution would never be brought for a given offence.

Being dissatisfied with the DPP’s refusal, Ms Purdy made an application to the Court of Appeal seeking declaratory relief ordering the DPP to promulgate a policy setting out the criteria as to how he proposes to exercise his discretion under section 2(4) of the Act. She was not successful and appealed to the House of Lords. Broadly her argument before the House of Lords was the absence of a case-specific policy in the Code as to the circumstances in which the DPP would exercise his discretion under section 2 (4) of the SA 1961, had contravened her right to respect for private life under Article 8(1) of the European Convention. In the UK, Article 8 is binding in virtue of the Human Rights Act. In its judgment the House of Lords could not have been more explicit. It held that:

*“Respect for a person’s private life related to the way a person lived. The way she chose the closing moments of her life was part of the act of living and she had the right to ask that that too had to be respected. Accordingly the right to respect for private life in art 8(1) was engaged in the instant case. The principle of legality required the court to address itself to three distinct questions: whether there was a legal basis in domestic law for the restriction; whether the law or rule in question was sufficiently accessible to the individual who was affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he could regulate his conduct without breaking the law; and whether, assuming that those two requirements were satisfied, it was nevertheless open to the criticism that it was being applied in a way that was arbitrary because, for example, it had been resorted to in bad faith or in a way that was not proportionate. The word ‘law’ in that context was to be understood in its substantive sense, not its formal one. It implied qualitative requirements, including those of accessibility and foreseeability. Accessibility meant that an individual had to know the wording of the relevant provision and, if necessary, with the assistance of the court’s interpretation of it, what acts and omissions would make him criminally liable. The requirement of foreseeability would be satisfied where the person concerned was able to foresee, if necessary with appropriate legal advice, the consequences which a given action might entail. A law which conferred a discretion was not in itself inconsistent with that requirement provided the scope of the discretion and the manner of its exercise were indicated with sufficient clarity to give the individual protection against interference which was arbitrary..... The issue raised by P however was directed to S2(4) and to the way in which the respondent could be expected to exercise the discretion which he was given by that subsection whether or not to consent to her husband’s prosecution if he assisted her.”*

Accordingly the DPP was required to promulgate an offence-specific policy identifying the facts and circumstances which he would take into account in deciding, in a case such as that which Purdy’s case exemplified, whether or not to consent to a prosecution under section 2(1) of the SA 1961.

It can be gathered from that decision that Courts will not hesitate, in cases where a fundamental right is engaged, to take the extra step and impose on the DPP the duty to

state with sufficient clarity the criteria he will adopt when deciding whether to prosecute or not.

The Purdy case gives rise to new issues about prosecutorial independence and accountability. Three observations need to be made: The decision is at odds with earlier pronouncements of the Privy Council (also constituted of Law Lords) which held that in principle decisions involving the exercise of prosecutorial discretion were susceptible to judicial review, but in practice, it was a highly exceptional remedy (*Sharma V DPP [2006] UKPC 57*). In *Jeewan Mohit V DPP*, the Privy Council endorsed the following passage quoted in *Matalulu v DPP*:

*"It is not necessary for present purposes to explore exhaustively the circumstances in which the occasions for judicial review of a prosecutorial decision may arise. It is sufficient, in our opinion in cases involving the exercise of prosecutorial discretion to apply established principles of judicial review. These would have proper regard to the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits. This approach subsumes concerns about separation of powers."*

Second whilst there is ample justification for a person to be absolutely certain as to which acts would make him criminally liable, there is always a risk that any criteria laid down by the prosecutorial agency may encroach on the legislative function of Parliament and the sacrosanct principle of separation of powers.

Third the Law Lords may have overlooked the inherent powers of the courts to guard any abuse of process or other forms of arbitrariness. The right to a person's private life as laid down under Article 8 of the European Convention is not known to our Constitution. Our own Supreme Court has provided the answer to the dilemma of the Purdy case by reminding us that the court is part of the protective system. In the case of *Jeewan Mohit V DPP (2003) MR 134*, the court held that where the DPP decides to prosecute a case the matter automatically falls under control of the court by virtue of sections 10,76,82 and 119 of the Constitution. In other words, the court is part of the protective system which

discourages and prevents the effect of any arbitrary or unprincipled exercise by the DPP of his responsibilities. This approach would in my view be a more sensitive and realistic one.

To conclude, let me say that I have no doubt as to the emerging trend across Commonwealth jurisdictions. The independence of the prosecutor should be equally matched by a policy of accountability in a system of justice characterized by the rule of law and the separation of powers.

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