A Judicial review of decisions to prosecute

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The recent decision of the CPS to re-prosecute the SAS soldier Danny Nightingale has led to criticism. There has also been muted suggestion that CPS decisions concerned with alleged phone-hacking and “historic” sex abuse cases are also flawed.

The risks and indignities of a trial in the public spotlight have led some newly-charged defendants to consider whether it is legally possible to challenge in the courts this aspect of executive decision-making. Such accused would have already attempted in vain to persuade the CPS not to prosecute them. If a judicial review is available in respect of some alleged unreasonable decision made by a minister or a planning inspector, then why not similarly in this regard where the anguish inflicted by the decision to prosecute may be much greater.

Potential applicants contemplating a judicial review would be encouraged by the CPS’ own legal guidance on this subject published on its website. This guidance creates the impression that such a remedy is equally available as regards decisions to prosecute and decisions not to prosecute. Unfortunately this suggestion of equivalence is mistaken and thus this guidance is deficient. Whilst the courts are willing to consider complaints arising from a non-prosecution decision, they have displayed a reluctance to consider prosecution ones.

The issue of whether public law principles underlying the availability of a judicial review should be imported into criminal litigation was most recently considered by the Admin Court last March in R (Barons Pub Company) –v– Staines Magistrates Court [2013] EWHC 898. Here the defendant company was charged with food safety offences by the local council. The company contended that the decision to prosecute it was perverse as it was in breach of the council’s enforcement policy. It invited the magistrates court to review this prosecutorial decision as a “mini judicial review”.

The Court was not attracted to the idea. It held that any challenge to such a decision should not be made outside of the criminal proceedings and only as an abuse of process application which by definition, could only be determined by the (criminal) trial court.

Whilst this ruling was sufficient to dismiss the case, the Court decided to venture further and opine as to what kind of abuse application founded on a decision to prosecute could possibly succeed. Its focus was whether a decision to prosecute in breach of the own prosecutor’s policy or code amounted to an abuse. Or whether something worse was necessary.

The Court was evidently determined to restrict as far as possible the ability of an accused to challenge the decision to prosecute them. It alighted upon the concept of “oppression”. It held such a decision even if made in breach of an internal policy “would be no reason to prevent the prosecutor then continuing the prosecution unless there were other circumstances that were shown to make such a course oppressive” (para 47) “Oppression over and above the decision to prosecute” (para 49) was needed.
So what would amount to oppression? A decision “that could be described as entirely arbitrary” (para 48). Such an answer is hardly informative. The Court however said it was difficult to think of an example. It gave only one; a prosecutor being ordered to prosecute by someone who had no legitimate role in the process and there being no evidence to justify a prosecution. This example echoes what Lord Bingham held in *R (Corner House Research and another) v Director of the Serious Fraud Office* [2008] UKHL 60; “only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator... The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend.” (para 71).

This authority shows that successful challenges to the decision to prosecute will border on the impossible. There is only one modern example of success in this regard; where the CPS failed to consider the best interests of the infant accused (*E and others* [2011] EWHC 1465). In the *Barons Pub case* the Admin Court wished to drive home the constitutional principle that decisions to prosecute are solely for the prosecutor and that the task of the criminal courts is instead to decide whether the prosecution has on the merits proved its case.

For lawyers acting for clients who are anxious to avoid prosecution, the lesson is that if prevention fails then the cure will only be achieved after contested and public court proceedings. There is virtually no legal space between those two. Moreover in contrast to the US where someone like the notorious Lance Armstrong can stave off his prosecution by entering into a deferred prosecution agreement, UK law even after Part 2 of the Crime and Courts Act 2013 is implemented next year will not permit a prosecutor to enter into one with an individual.

For prosecutors, the courts have signalled their faith in them to make rational and justified decisions to prosecute and thus have resolved not to interfere. However such faith is not blind and if instances emerge of plainly irresponsible decision-making then a judicial review might be possible.