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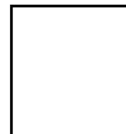

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ARTICLES

Challenges to prosecutorial discretion

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The European Court of Human Rights (ECtHR) published its judgment in *Da Silva v United Kingdom* (Application no.5878/08) on 30 March 2016. The case centred upon prosecutorial decisions in England following the fatal shooting by police officers of Jean Charles de Menezes in London on 22 July 2005. The case is interesting both in a general sense and in light of the controversy arising over the prosecutorial aftermath of the fatal bin lorry accident in Glasgow city centre on 22 December 2014. It also creates an occasion to note various other prosecution related developments in Scotland. Of course the shooting of de Menezes and the bin lorry accident are different in many ways. They are, however, similar to the extent that both entail contested decisions not to prosecute.

Da Silva v UK is the culmination of a number of decisions, developments and judgments arising from the shooting together with the desire of the deceased's relative, Armani Da Silva, to see an individual or individuals criminally prosecuted for it. These include an original investigation by the Independent Police Complaints Commission and accompanying report [available online at *http://webarchive.nationalarchives.gov.uk/20100908152737/http://www.ipcc.gov.uk/index/resources/evidence_reports/investigation_reports/the_stockwell_investigation.htm*], a letter by the Crown Prosecution Service (CPS) intimating that the Director of Public Prosecution (DPP) had decided not to prosecute any individuals (but instead the Office of Commissioner of the Police of the Metropolis (OCPM) for health and safety offences), a judicial review of the decision not to prosecute any individual (*R (on the application of Da Silva v DPP* [2006] EWHC 3204 (Admin)), the prosecution and conviction of the OCPM, the coroner's ruling following an inquest and subsequently the jury's verdict and coroner's report, and a civil action settled on a confidential basis. Absent amongst these developments, according to Da Silva, was a criminal prosecution of the person or persons responsible for the shooting.

The argument at the ECtHR was based upon the European Convention on Human Rights 1950 (ECHR) art.2 protecting the right to life. The article has been interpreted to contain a procedural aspect requiring authorities, when an individual has been killed by the use of force, to conduct an effective investigation of the facts, determine whether the force used was justified and, if appropriate, to punish those responsible. Particularly, Da Silva averred that the investigation into her cousin's death fell short of the standard of art.2 and that the prosecutorial system in England and Wales prevented those responsible for the shooting from being held accountable. The submission in regard to the investigation focused upon self defence in English law and as such is not directly relevant to prosecutorial discretion. There were two germane parts to Da Silva's challenge of the prosecutorial decisions. The first was that the test applied by the CPS in deciding to institute a prosecution was incompatible with art.2. The second was the averment that the level of scrutiny that domestic courts applied to a decision not to prosecute was incompatible with that article.

The ECtHR began its assessment of the case by iterating the procedural obligation inherent in art.2. It noted that the state must ensure "... by all means at its disposal, an adequate response — judicial or otherwise — so that the legislative and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished" (at para.230). In regard to the test applied in making a decision to prosecute, found in the code for crown prosecutors [available online at *https://www.cps.gov.uk/publications/docs/code_2013_accessible_english.pdf*], the ECtHR noted it is a two stage test which firstly asks whether there is enough evidence to provide a 'realistic prospect of conviction' and secondly whether a prosecution is needed in the public interest. 'Realistic prospect of conviction' meant, according to the English authorities, that a conviction was 'more likely than not', and an arthimetical 51 % rule should be eschewed. The ECtHR held that states are permitted to have such a test, and that they have a margin of appreciation in setting the threshold (at para.267). It noted that the test has been the subject of reviews

and scrutiny, and that it applies to all offences and persons. The ECtHR held that whilst the threshold was higher in England and Wales than certain other countries it could not be said to fall outside its margin of appreciation. In coming to that decision it *inter alia* examined the position in other jurisdictions — but notably not Scotland. The court held that the test did not constitute an 'institutional deficiency' which precluded those responsible for the death of de Menezes being held responsible (at para.276).

Having reached a decision on the test employed in making prosecutorial decisions the ECtHR then moved to the issue of the review of decisions not to prosecute. At the outset it noted that such decisions were reviewable in England and Wales, but that the power to review was used 'sparingly' with the courts only able to interfere with a decision where it was wrong in law (at para.277). The court then disagreed with the applicant's argument that the scope of review was too narrow. Indeed, it held that the procedural obligation under art.2 did not necessarily require that there should be judicial review of investigative decisions, although it did note that "... such reviews were doubtless a reassuring safeguard of accountability and transparency" (at para.278). It noted that of the 47 states party to the ECHR decisions not to prosecute were reviewable in at least 25, and in those states the standard of review varied considerably. The ECtHR concluded on the review point that it could find nothing in its case law that would support the applicant's assertion that the Administrative Court should have greater powers of review. It noted that that court had considered the ECtHR's jurisprudence in its judicial review, particularly that the prosecutorial decision be subjected to 'careful scrutiny'. The court held, as above, that the scope of judicial review of prosecutorial decisions in England and Wales could not be described as an 'institutional deficiency' which impacted upon the ability of the domestic authorities to ensure that those responsible for the death of de Menezes were held to account (at para.281). Overall, the court held, by 13 votes to 4, that there had been no violation of the procedural limb of art.2.

Discussion

It is useful to contrast *Da Silva v UK* with the bin lorry case. This is because the former sheds light on the applicability of human rights law to prosecutorial decision making and its possible review. The decision not to prosecute in the bin lorry case of course gave rise to considerable contention and criticism, and brought into the public eye the law and practice surrounding decision making by the Crown Office and Procurator Fiscal Service (COPFS). The COPFS prosecution code [available online at *http://www.crownoffice.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412__1.pdf*] iterates the factors taken into account in coming to decisions to prosecute. It is in general terms akin to the English prosecution code. It is, however, considerably less detailed. The specific prosecutorial guidelines and instructions applying in Scotland are found in the Book of Regulations Ch.3, which is not in the public domain [see *http://www.crownoffice.gov.uk/publications/prosecution-policy-and-guidance*]. The COPFS prosecution code provides that legal, evidential and public interest considerations condition the decision making process. Legally, the conduct must constitute a crime known to the law of Scotland, and decisions must be compatible with the Human Rights Act 1998 and the ECHR. Evidentially, the prosecutor must be satisfied that there is sufficient evidence to commence proceedings. The code does not specify a threshold as to what is, or is not, sufficient or otherwise comment upon a likelihood of conviction. Public interest considerations come into play subsequent to decision on law and evidence. They include consideration of competing interests, including those of the victims, accused and wider community.

Considering the COPFS prosecution code in light of the *Da Silva v UK* decision, it is not unreasonable to conclude that the test applied is consistent with the procedural obligation inherent in art.2, although clarity on the exact nature of 'sufficient evidence to commence proceedings' appears to be called for. This point is particularly relevant in light of evidence — or rather the lack of it — being at the heart of the decision in the bin lorry case. Following criticism of the decision not to prosecute in the bin lorry case the COPFS took the highly unusual step of publishing the reasons behind its decision. This included a list of offences that may have been applicable and their particular evidential requirements. The reasons measured the facts of the case including the medical condition and history

of the driver against those requirements in support of the decision not to prosecute on the basis of insufficient evidence.

The position in Scotland as regards the review of decisions not to prosecute is supported by *Da Silva v UK*. As is well known, prosecutorial decisions of the Lord Advocate are historically and generally non-reviewable. As master of the instance the Lord Advocate has absolute discretion as to whether or not to prosecute in the Crown's name. *Da Silva v UK* did not question such a position. Indeed, it noted that approximately half of the 47 state parties to the ECHR also adhere to a position of non-reviewability. The ECtHR did, however, suggest that some form of review is desirable, stating that reviews a reassuring safeguard of accountability and transparency. Notably, of the Victims and Witnesses (Scotland) Act 2014 s.4 obliged the Lord Advocate to make rules for the review of decisions not to prosecute by victims of crime. These rules have been published and apply to decisions made on or after 1 July 2015. The rules provide that where a review has taken place those decisions are final and not subject to further review or appeal. Arguably, the time is ripe to consider allowing judicial review of decisions of the Lord Advocate for precisely those reasons of accountability and transparency. It is at least of some relevance that that possibility is well settled in England and Wales. Indeed, *Da Silva v UK* is a reminder of the divergence between Scotland and England and Wales in the area. A further instance of which is found in the Extradition Act 2003 and the non-extension of the forum bar to extradition to Scotland. The forum bar, introduced to England and Wales by the Crime and Courts Act 2013, allows for the judicial review of decisions not to prosecute in the context of an extradition request.

Conclusion

Da Silva v UK brings to an end the legal proceedings following the shooting of Jean Charles de Menezes. The case interestingly examined prosecutorial decision making in England from the perspective of the procedural limb of the right to life under art.2. It brings to the fore the complexity of society and crime and the divergence between Scotland and England and Wales in judicial scrutiny of prosecutorial decision making. Complexity was referred to by the UK Government in *Da Silva v UK* where it noted "... that a real tension existed between the paradigm of criminal culpability based on individual responsibility and the increasing recognition of the potential for harm inherent in large scale or complex activity where no one person was wholly to blame for what went wrong" (at para.223). This can perhaps apply to the circumstances of the bin lorry accident where the acts of the driver were arguably affected by or related to DVLA practices, the driver's medical history and condition, employment policies and so forth. The divergence between Scotland and England and Wales in the area of prosecutorial decision making is clearly increasing. This extends beyond a general right of review of decisions not to prosecute. There is now a need to reconsider the position of the Lord Advocate. Relevant here a comment within the dissenting opinion of Judge Lopez Guerra in *Da Silva v UK*: "It cannot be concluded that the United Kingdom's positive obligation was met merely because... those that decided not to prosecute (the CPS) were deemed to be independent authorities for the purposes of Article 2 of the Convention... Independence in itself is not enough to guarantee the existence of an effective investigation. In this case, what is missing are all of the other guarantees deriving from judicial proceedings in which evidence is publicly examined, with the intervention of all the affected parties, so that responsibilities may be ascertained accordingly" (at para.8).