Neutral Citation Number: [2011] EWHC 1465 (Admin)

Case No: CO/12640/2010
CO/12644/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(SITTING AT LEEDS)

Leeds Combined Court
1 Oxford Row
Leeds LS1 3BG

Date: 10 June 2011

Before :

LORD JUSTICE MUNBY
MR JUSTICE McCOMBE

- -

Between :

R (on the application of (1) E (2) S and (3) R)	**Claimants**
- and -	
THE DIRECTOR OF PUBLIC PROSECUTIONS	**Defendant**

- -
- -

Mr Hugh Southey QC and Ms Tina Dempster (instructed by Howard & Byrne) for the First Claimant (E)
Mr Adrian Strong (instructed by Howard & Byrne) for the Second and Third Claimants (S and R)
Mr Louis Mably (instructed by the CPS Appeals Unit) for the Defendant

Hearing date: 11 May 2011

- -

Judgment

Lord Justice Munby :

1. In these proceedings for judicial review challenge is made to the decision of the Director of Public Prosecutions to prosecute a child for the alleged sexual abuse by her of her two younger sisters.

The facts

2. E, S and R are sisters. E was born in 1996 and is 14 years old. S was born in 2005 and is 5 years old. R was born in 2007 and is 4 years old. At the time of the offences in the middle of 2009 they were respectively 12, 3 and 2 years old. I shall refer to their mother as J.

3. On 26 January 2010 police officers from CEOP (the Child Exploitation and Online Protection Centre) discovered a video recording on the internet. We have not seen the video but have been supplied with a description of its contents. There is no need to go

into detail. It is common ground that it lasts for about 25 minutes and shows E engaging in the sexual activities with S and R which are referred to in paragraph 7 below. (E subsequently told the police that some of this was simulated – "I just pretended to" – but nothing turns on that for present purposes.)

4. The local authority convened a multi agency strategy group "to co-ordinate the response to the concerns identified in relation to E". It consisted of representatives from the local authority, the NSPCC, the local safeguarding children board, the youth offending team, the child and adolescent mental health service, the children's school and the police. It met on 11 February 2010, 17 March 2010 and 15 May 2010. On 8 June 2010 its chair, the local authority's Assistant Director, Children and Families, produced a report for consideration by the CPS.

5. The report records that at the meeting on 17 March 2010 the police informed the strategy group of their intention to treat E as a perpetrator of offences against her younger siblings, described their plan to arrest and interview her under caution at the police custody suite and potentially seek a criminal conviction against her, and set out their rationale. The report continues:

> "The strategy group on 17th March wanted to clarify the outcomes sought by this planned course of action however these remain unclear.
>
> The impact of the planned approach by the police on other agencies ability to safeguard E and her younger sisters was considered at this meeting and a subsequent strategy meeting held on 15th May2010.
>
> It would be fair to say that the Police were isolated in their analysis that such a course of action would be in the best interests of the child."

6. E was interviewed by the police on 26 March 2010 and again on 23 April 2010. During the course of the interview on 26 March 2010 her solicitor read out a statement E had prepared. In it she gave an account which, if true, showed that she had been groomed over the internet by an adult male who, in part by the use of threats, had persuaded her on various previous occasions to expose herself and behave in a sexual way and had then persuaded her to do the things to her sisters which can be seen on the video.

7. The papers were passed to the CPS and considered by a Crown Prosecutor who is a specialist prosecutor in cases of child abuse and sexual offences. On 11 August 2010 she wrote to the police saying that she was satisfied there was sufficient evidence to provide a realistic prospect of conviction of E for the following four offences:

   i) Sexual assault of S, a child under 13, contrary to section 7 of the Sexual Offences Act 2003, by forcing her to suck E's nipples on numerous occasions between 1 July 2009 and 30 September 2009.

   ii) Sexual assault by penetration of R, a child under 13, contrary to section 6 of the Act, by removing her clothes, inserting her tongue and finger into R's vagina and sitting astride R's vaginal area when naked and moving up and down, between the same dates.

iii) Making an indecent photograph of both S and R in a video contrary to section 1(1)(a) of the Protection of Children Act 1978 (level 4) between the same dates.

iv) Distributing an indecent photograph of a child as above contrary to section 1(1)(b) (level 4) between the same dates.

She said she had decided that it was in the public interest to charge E with these four offences.

8. E was served with a summons on 3 September 2010 and appeared at the Youth Court on 21 September 2010. On 19 October 2010 the Youth Court committed her for trial at the Crown Court, where she stands charged on an indictment containing six counts (the matters referred to in paragraph 7(ii) above are now the subject of three separate counts). Each count charges an offence on a single occasion, now put as having been between 1 January 2009 and 19 November 2009. The proceedings have been adjourned pending the outcome of the present applications.

The strategy group

9. I return to the report of the strategy group dated 8 June 2010.

10. The report recognised that "inevitably a matter such as this presents a dilemma about how best to proceed in the best interests of these children and the wider community."

11. Under the heading 'Safeguarding issues' the report made a number of important points. It is desirable to set out the key passages in full (for ease of reference I have inserted paragraph numbers):

> "1 Colleagues from the NSPCC have confirmed that neither E nor her sisters could be therapeutically supported while a prosecution of this complexity is pursued. The likely delay in getting such support to these children is both great and harmful to their eventual recovery.
>
> 2 The family has to-date survived the impact of this devastating discovery; helpfully they have worked in partnership with the agencies to protect and support all of their children.
>
> 3 Given their own history and experience of the criminal justice system it is very difficult to imagine how they will construe any criminal action taken against their daughter as anything other than hostile.
>
> 4 In circumstances such as these parents are critical agents in the support and recovery of their children. To lose their cooperation and understanding in this matter would seriously jeopardise the children's ability to recover from their experiences and potentially this family's ability to remain intact.
>
> 5 E's view of herself and her culpability in this matter is a key issue. She is already experiencing, for a 13-year-old child, severe consequences for her actions. E is separated from her parents and sisters, deprived of a network of friends, her

behaviour is known about by some of her peers and she lives with ongoing uncertainty about 'what happened' without the opportunity for any therapeutic support.

6 Images of E being remotely abused are now widely published across the Internet with a large pool of potential suspects spread throughout the world. Police advice to the strategy group was that the opportunity to identify these suspects is limited.

7 Agencies are concerned that a prosecution through a criminal justice process risks seriously distorting her ability to separate out in the future any distinction between what she can be reasonably held to account for and what was in fact the responsibility of a predatory paedophile. Helping E to achieve an appropriate view of her role in this matter is also critical to her recovery from the abuse she experienced.

8 Concerns were also raised about the message such a prosecution will give not only to E and her family but to the wider community and any other young people who may be experiencing similar abuse and coercion online.

9 Agencies understand CEOP are keen to restrict interventions which might limit the future potential for young people engaged in such incidents to come forward."

12. Under the heading 'Summary' the following (amongst other) points were made:

> "10 Uncertainty about how this matter is dealt with is creating significant delay in getting therapeutic help to E.
>
> 11 The multi agency group are further concerned about the impact on E of a criminal trial which would further significantly delay the essential therapeutic work she needs.
>
> 12 Agencies were generally agreed that it is such therapeutic work that will help to quantify and minimise any potential future risk E may pose."

13. It will be noted that the report focussed not only on the implications of prosecution for E (paragraphs 1-7, 10-12) and children generally (paragraphs 8-9); it also, and this is a crucial point, considered the effects on her siblings if E was prosecuted (paragraphs 1-4).

The decision

14. In accordance with The Code for Crown Prosecutors, issued by the Director of Public Prosecutions in February 2010 pursuant to section 10 of the Prosecution of Offences Act 1985, the decision to prosecute has two stages: (i) the evidential stage followed by (ii) the public interest stage. In the present case, as we have seen, the Crown Prosecutor decided that both criteria were met. There is no challenge to the decision in relation to (i), the attack from all three claimants being explicitly confined to the decision in relation to (ii). It is accordingly on this that I concentrate.

The decision: the DPP's guidance

15. Before turning to the decision itself, it is convenient to summarise what for present purposes are the most significant parts of the relevant guidance given by the DPP which the Crown Prosecutor was required to apply.

16. I start with The Code for Crown Prosecutors. Paragraph 2.6 provides so far as material:

> "The prosecution service is … a public authority for the purposes of the Human Rights Act 1998. Prosecutors must apply the principles of the European Convention on Human Rights, in accordance with the Human Rights Act, at each stage of a case. Prosecutors must also comply with … the policies of the prosecution service issued on behalf of the DPP."

Paragraph 8.2 provides as follows:

> "Prosecutors must bear in mind in all cases involving youths" – defined in paragraph 8.1 as meaning "a person under 18 years of age" – "that the United Kingdom is a signatory to the United Nations 1989 Convention on the Rights of the Child and the United Nations 1985 Standard Minimum Rules for the Administration of Juvenile Justice. In addition, prosecutors must have regard to the principal aim of the youth justice system which is to prevent offending by children and young people. Prosecutors must consider the interests of the youth when deciding whether it is in the public interest to prosecute."

17. There is no need for me to set out Articles 3 and 8 of the European Convention, which are those that are relevant for present purposes. I should, however, set out the relevant provisions of the UN Convention. Article 3.1 provides as follows:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Article 39 provides that:

> "States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

Article 40.1 provides that:

> "States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the

> desirability of promoting the child's reintegration and the child's assuming a constructive role in society."

Finally, Article 40.3(b) provides that:

> "States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
>
> … Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected."

18. Paragraphs 4.10-4.15 of The Code for Crown Prosecutors deal with the public interest stage in the decision-making process. Paragraph 4.16 lists some common public interest factors tending in favour of prosecution and paragraph 4.17 some common public interest factors tending against prosecution. Paragraph 4.17 includes the following:

> "A prosecution is less likely to be required if:
>
> …
>
> g) a prosecution is likely to have an adverse effect on the victim's physical or mental health, always bearing in mind the seriousness of the offence and the views of the victim about the effect of a prosecution on his or her physical or mental health;
>
> j) the suspect is, or was at the time of the offence, suffering from significant mental or physical ill health, unless the offence is serious or there is a real possibility that it may be repeated … "

19. Paragraphs 4.18-4.19 of The Code deal with the views of victims or their families:

> "4.18 In deciding whether a prosecution is required in the public interest, prosecutors should take into account any views expressed by the victim regarding the impact that the offence has had. In appropriate cases, for example, … where the victim is a child … , prosecutors should take into account any views expressed by the victim's family.
>
> 4.19 However, the prosecution service does not act for victims or their families in the same way as solicitors act for their clients, and prosecutors must form an overall view of the public interest."

20. We were taken to the relevant parts of the Legal Guidance issued by the DPP. I go first to the guidance on Youth Offenders as updated on 22 April 2010. Under the heading 'Sexual Offences and Child Abuse by Young Offenders' this includes the following:

> "Although a reprimand or final warning may provide an acceptable alternative in some cases, in reaching any decision,

> the police and the CPS will have to take into account fully the view of other agencies involved in the case, in particular the Social Services. The consequences for the victim of the decision whether or not to prosecute, and any views expressed by the victim or the victims family should also be taken into account.
>
> In child abuse cases, it will be important to have the views of the Social Services on file if at all possible, as well as any background or history of similar conduct, information about the relationship between the two and the effect a prosecution might have on the victim."

21. The guidance on the Sexual Offences Act 2003, up to date as at 4 May 2010, says this under the heading 'Factors: whether or not to prosecute young defendants':

> "In deciding whether or not to prosecute, prosecutors should have careful regard to the factors below. The weight to be attached to a particular factor will vary depending on the circumstances of each case. The factors are
>
> - The age and understanding of the offender. This may include whether the offender has been subjected to any exploitation, coercion, threat, deception, grooming or manipulation by another which has lead him or her to commit the offence;
> - …
> - The nature of the activity e.g. penetrative or non-penetrative activity;
> - What is in the best interests and welfare of the complainant; and
> - What is in the best interests and welfare of the defendant."

22. The guidance on 'Safeguarding Children: Guidance on Children as Victims and Witnesses' updated in November 2009, under the heading 'Public interest stage', contains the following:

> "The UN Convention on the Rights of the Child requires that authorities should give primary consideration to the best interests of the child. In terms of prosecution, this means that prosecutors are bound to consider the likely consequences for any children, be they victims or witnesses, of proceeding with a prosecution. Careful consideration must therefore be given to the factors for and against prosecution.
>
> … The other public interest factor that must be taken into account is whether a prosecution is likely to have a bad effect on the victim's physical or mental health …
>
> The more traumatic the offence for the child (being a victim of or a witness to violence or sexual abuse are the most obvious

examples), the more likely it is that criminal proceedings may re-traumatise and cause further emotional damage to the child. Yet the most serious cases are usually the ones that will, on the facts, require a prosecution in the public interest, both to secure justice but also to provide protection for the child and the public at large.

It follows that prosecutors will have to balance the interests of the child with the wider interests of the public at large in reaching a decision on whether or not to prosecute. Some decisions will inevitably be very sensitive and finely balanced."

23. I shall refer in due course to certain other guidance to which we were taken.

The decision: the Crown Prosecutor's reasons

24. In her decision letter the Crown Prosecutor recorded that she had had regard to The Code for Crown Prosecutors and to the guidance on Prosecuting Child Abuse Cases, on Youth Offenders and on the Sexual Offences Act 2003, and that she had "considered" the report of 8 June 2010. The critical part of her reasoning in arriving at the conclusion that it was in the public interest to charge E with these offences is to be found in the following passages which I set out in full:

"It is my view therefore that the options in this case are to take no further action or to charge E.

In determining which is the appropriate course, … I have particularly considered the interests and welfare of E. I have considered the potential effects upon her of prosecution for sexual offences.

... I have noted that careful regard should be paid to the relative ages of the parties and, the existence and nature of the relationship and the sexual and emotional maturity of the parties.

… I have considered the Report … dated the 8.6.10. In particular, I have noted [the] reference … to the likelihood of E's parents regarding prosecution with hostility.

I have also considered the following factors:

The offences alleged are very serious.

I have had regard to the fact that E was 12 years old when the alleged offences took place and the victims were 2 and 3 years old. This is a significant age gap.

The 2 victims were particularly vulnerable due to their age and because they were in their own home.

I have considered the fact that the DVD shows that E used expressions to her sisters like 'I'll take the money off you if you don't do this' and 'If you don't come here now, I'll smack your bum'. E is seen to pull the children around.

> Although there may have been some internet grooming by a third party, E on the footage looks relaxed and is seen to smile and laugh at various points.
>
> I have considered carefully E's background; she seems to be from a fairly stable home and certainly had friends at the time of the alleged offending.
>
> I have carefully weighed all the above factors and have decided that it is in the public interest to charge E with the 4 offences listed above."

The proceedings

25. Solicitors instructed by J wrote a pre-action protocol letter to the CPS on 5 November 2010. It invited the CPS to reconsider its decision in the light of *R v M(L), B(M) and G(D)* [2010] EWCA Crim 2327, [2011] 1 Cr App R 135, and Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings, 2005, CETS No 197.

26. It was not (and is not) suggested that the case falls within the definition of trafficking in Article 4(a):

> ""Trafficking in human beings" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".

But it was (and is) said that E's position was, by reason of her grooming, analogous to that of a victim of human trafficking. Article 26 provides that:

> "Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so."

The DPP has issued guidance on 'Human Trafficking and Smuggling', updated on 20 April 2010, designed to ensure compliance with Article 26.

27. The letter went on to suggest that the CPS might wish to consider E too as a victim recognised by the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000, one of the recitals to which recognizes that:

> "a number of particularly vulnerable groups, including girl children, are at greater risk of sexual exploitation and that girl children are disproportionately represented among the sexually exploited".

Article 8.1(a) of the Protocol provides so far as material that:

> "States Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by … Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs".

Article 8.3 provides that:

> "States Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol" – which include child pornography as defined in Article 2(c) – "the best interest of the child shall be a primary consideration."

The letter made various other points to which there is no need to refer.

28. I should also refer at this point to the 'Concluding observations of the Forty-ninth session of the Committee on the Rights of the Child on 20 October 2008 in relation to the United Kingdom'. In paragraph 74, under the heading 'Sexual exploitation and abuse', the Committee said:

> "The State party should always consider, both in legislation and in practice, child victims of these criminal practices, including child prostitution, exclusively as victims in need of recovery and reintegration and not as offenders."

29. The CPS replied on 17 November 2010. The CPS did not accept that E's position was analogous to that of a victim of human trafficking. It said that although there "may have been" an "element" of grooming, there was no evidence to support the view that E had been coerced to act as she did.

30. An application for permission to apply for judicial review was issued by E (acting by J as her litigation friend) on 3 December 2010. An application for permission to apply for judicial review was also issued by S and R (likewise acting by J as their litigation friend) on 3 December 2010. Acknowledgements of service were filed on 7 January 2011 and 12 January 2011 respectively. Permission was refused on the papers by His Honour Judge Roger Kaye QC (sitting as a judge of the High Court) on 13 January 2011. On renewal, permission was granted by Kenneth Parker J on 15 February 2011. He directed an expedited hearing by a Divisional Court.

31. Following the grant of permission, the DPP on 21 March 2011 filed his detailed grounds for contesting the claim. On 29 March 2011 the Crown Prosecutor who had made the original decision in August 2010 reconsidered the matter in the light of the detailed statement of grounds attached to the application by S and R which had been drafted by counsel on 1 December 2010. Counsel had not seen the original decision letter at that stage – indeed, it was not disclosed to any of the claimants until their solicitor received it on 23 March 2011 under cover of a letter from the CPS dated 21 March 2011 which also enclosed the detailed grounds for contesting the claim. So his formulation of their case was not directed to it specifically. The Crown Prosecutor's response therefore focused on the other points made by counsel. Apart from the comment that "I was informed by Children's Services that [the mother] would view prosecution with hostility and took this into account when I made my initial decision",

the review contains no reference to the strategy group report of 8 June 2010. It concluded that prosecution was still justified in the public interest.

32. On 14 April 2011, Ms RC, a Consultant Forensic and Clinical Psychologist instructed by E's solicitors, produced a report on E based on interviews with her in February 2011. Since it post-dates the decision under challenge there is no need for me to refer to its contents. E did not suggest that there was any obligation on the CPS to obtain such a report before deciding whether or not to prosecute, but suggests that the report shows what the CPS would have discovered if it had carried out further investigations before coming to a decision. That may be, but, given counsel's very proper concession, it does not seem to me that Ms RC's report, however illuminating its contents, is of any assistance to us.

33. The matter came on for hearing before us on 11 May 2011. E was represented by Mr Hugh Southey QC and Ms Tina Dempster, S and R by Mr Adrian Strong and the DPP by Mr Louis Mably. At the end of the hearing we reserved judgment.

34. On 12 May 2011, the day after the hearing, the CPS disclosed a review of the case which had been undertaken on 11 January 2011 by the acting Chief Crown Prosecutor.[1] It confirmed the decision to prosecute. There is no reference to the strategy group report of 8 June 2010. It concluded:

> "The interests of all the children involved in the case have been considered, including the impact of a prosecution and the most appropriate venue for trial, particularly since the children are young and vulnerable."

The claimants' case

35. On behalf of E, Mr Southey and Ms Dempster put her case on three bases:

    i) First, they assert that the DPP's guidance is inadequate and, indeed, unlawful.

    ii) Second, they submit that the decision-making process was flawed: the Crown Prosecutor failed properly to apply the DPP's guidance and failed to take into account relevant considerations. Linked with this is the complaint that the decision as set out in the letter of 8 August 2010 is inadequately explained and inadequately reasoned.

    iii) Third, they challenge the substance of the Crown Prosecutor's decision.

    Mr Strong, although putting the case for S and R in different terms, essentially makes common cause with Mr Southey and Ms Dempster, although focusing on the second and third complaints rather than the first and, of course, approaching matters from the perspective of S and R rather than E.

36. None of this is accepted by Mr Mably. Each of the complaints, he says, is without merit.

The issues

37. Mr Mably correctly accepts that the CPS and the DPP are in principle amenable to judicial review. But, pointing to the words of Lord Bingham of Cornhill in *R (Corner*

[1] The review had been undertaken in the relevant Area office of the CPS and had not previously been sent to the CPS Appeals Unit handling the judicial review proceedings. The relevant CPS officer in the Appeals Unit discovered its existence only on 12 May 2011. He immediately sought counsel's advice and disclosed it the same day.

House Research and another) v Director of the Serious Fraud Office (JUSTICE intervening) [2008] UKHL 60, [2009] 1 AC 756, para [30], he submits that "only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator". That, of course, I accept.

38. Lord Bingham continued:

> "[31] 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. Secondly, the courts have recognised (as it was described in the cited passage of *Matalulu v Director of Public Prosecutions* [[2003] 4 LRC 712, 735-736])
>
> > "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".
>
> Thirdly, the powers are conferred in very broad and unprescriptive terms.
>
> [32] Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice."

39. Consistently with that, judicial review will in principle lie if the relevant policy is unlawful or if the Crown Prosecutor has failed to act in accordance with the policy: see *R v Chief Constable of Kent ex p L, R v Director of Public Prosecutions ex p B* (1991) 93 Cr App R 416, 428, and *R v Director of Public Prosecutions ex p C* [1995] 1 Cr App R 136, 141. Indeed, in the latter case a CPS decision not to prosecute was quashed because (see at 144) the decision-maker had failed to have regard to one of the matters identified in the relevant part of The Code for Crown Prosecutors.

40. In the present case, the claimants have not sought to impugn the good faith of the CPS or the Crown Prosecutor in any way. But, as we have seen, they do assert that the Crown Prosecutor failed to apply the relevant guidance. Moreover, they challenge the legality of the policy. So, as to the substance, this is in principle an appropriate case for judicial review.

41. Mr Mably also raises, as an independent question, the issue of whether the appropriate forum for the ventilation of these issues is the Crown Court rather than the Administrative Court. I shall return to the question of forum below.

Issue (1): the legality of the DPP's policy

42. Mr Southey and Ms Dempster challenge the legality of the DPP's guidance, essentially on the ground that, except in relation to children who are victims of

trafficking, it fails to address, and to accord special recognition to, what they call the special status of the child who is both defendant and victim. This, they say, is inconsistent with the State's obligations under international law. Alternatively, if that is putting it too high, they say that at the very least it gives rise to an unacceptable risk of violations of international law because relevant factors are not identified in the guidance.

43. The facts of the present case, they say, demonstrate how the absence of policy may result in violations of international law in practice. Thus, they assert, there is a need for an appropriate policy going beyond the present guidance. They point to what Wyn Williams J said in *R (Suppiah) v Secretary of State for the Home Department* [2011] EWHC 2 (Admin), para [137]:

> "a policy which is in principle capable of being implemented lawfully but which nonetheless gives rise to an unacceptable risk of unlawful decision-making is itself an unlawful policy."

So, they say, the absence of this essential element, addressing the position of children who are also victims, makes the policy unlawful, even if otherwise unimpeachable, because it gives rise to an unacceptable risk that victims of crime will be prosecuted in violation of the United Kingdom's obligations under international law.

44. In support of this submission, they point to three specific respects in which, they say, the DPP's policy is deficient.

45. First, they submit that it is inadequate in that it fails to accord sufficient weight to the State's responsibilities, in particular under Articles 39 and 40 of the UN Convention on the Rights of the Child. The consequence, they say, is that the rights of defendants *as victims* are given inadequate protection under Article 3 of the European Convention.

46. Second, comparing the DPP's guidance on 'Human Trafficking and Smuggling' with his guidance on the Sexual Offences Act 2003, they submit that there is a significant difference in emphasis. The latter guidance refers merely to the need to have careful regard to whether "the offender has been subjected to any exploitation, coercion, threat, deception, grooming or manipulation by another which has lead him or her to commit the offence". That approach, they say, stands in marked contrast to the 'non-punishment' approach in Article 26. Thus, they submit, by failing to incorporate this approach, the guidance lacks the emphasis which, they assert, is necessary to ensure compliance with the UN Convention. Moreover, it does not provide the framework necessary to ensure compliance with Article 3 of the European Convention.

47. Third, they draw attention to the fact that the relevant guidance contains nothing comparable with what they say is the important point made in the guidance on 'Human Trafficking and Smuggling' under the heading 'Prosecution of Defendants charged with offences who might be Trafficked Victims':

> "Some trafficked victim's experiences are likely to be outside the knowledge and experience of prosecutors. For example young female victims may be subject to cultural and religious practices such as witchcraft and juju rituals inherent in their countries which bind them to their traffickers through fear of repercussions. Other trafficked victims may be held captive, physically and sexually assaulted and violated, or they may be less abused physically but are psychologically coerced and are dependent on those who are victimising them."

Likewise, they suggest in the case of groomed victims such as E.

48. Mr Mably submits that The Code and the relevant guidance provide a comprehensive, appropriate and lawful framework for prosecutorial decision making. The framework, he says, pays particular attention to the position of children in the criminal justice system, whether as defendants or victims, and focuses attention throughout, and as a central theme, on their welfare. He disputes that there is any inconsistency between the DPP's policy and the State's various obligations under international law – to which, as we have seen, The Code makes specific reference – or any inadequacy in the way in which these topics are dealt with in The Code and the guidance. There is, he says, no requirement, whether in international law, human rights law or domestic law, for the policy to embrace specifically or in terms the matters whose omission is sought to be made a matter of complaint.

49. I agree in substance with Mr Mably's submissions.

50. It is vital to bear in mind that it is for the DPP, and not for the court, to determine what policies the CPS should apply. Parliament has conferred upon the DPP alone the responsibility for formulating prosecutorial policy. It is not for the judges to advise the DPP as to what his policy should be or as to how, or in what form and at what level of detail it should be expressed. These are all matters for the DPP. The only function of the court is to determine whether the policy he has formulated is lawful. This is not merely a vitally important constitutional principle. It also reflects the realities, explained so clearly by Lord Bingham in *Corner House*, that judges lack the necessary expertise and competence to formulate the kind of policy with which we are here concerned.

51. In my judgment it is quite impossible to contend that the DPP's policy as set out in the relevant parts of The Code and the guidance is unlawful.

52. I need not take up time considering to what extent these various international instruments are binding, either as a matter of domestic law or because they have been incorporated by the DPP in his guidance. I merely record that counsel took us to *T v United Kingdom* (2000) 30 EHRR 121, para [73], *R (C (A Minor)) v Secretary of State for Justice* [2008] EWCA Civ 882, [2009] QB 657, paras [60]-[61], and *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 WLR 148, paras [23], [25], with a view to demonstrating the weight the courts attach not merely to Article 3 of the UN Convention but also to the "authoritative international views" expressed by the United Nations Committee on the Rights of the Child.

53. Even assuming for the sake of argument that all these international instruments are binding, whether as a matter of domestic law or because they have been incorporated by the DPP in his guidance, and likewise assuming that they are to be read in every way as Mr Southey and Mr Strong would have us read them, it does not follow that the DPP's policy is thereby invalidated. It is not. If in the context of coming to a decision in a particular case proper effect is not given to relevant State obligations, then it may be that the decision will be amenable to challenge on its own merits (or lack of them). But that is not to say, and I entirely reject the proposition, that the legality of the DPP's carefully crafted and clearly formulated policy depends upon the amount of detail which he chooses to apply in his exegesis of such obligations. Despite Mr Southey's vigorous arguments, the present case is fairly far removed from the kind of case with which Wyn Williams J was concerned in *Suppiah*.

54. In my judgment this complaint fails.

Issue (2): the decision-making process

55. In contrast, there is, in my judgment, much more substance – indeed irrefutable substance – in the claimants' next complaint.

56. The point made here by the claimants is, in essence very simple. They assert that a comparison of the relevant parts of the guidance with the reasons articulated by the Crown Prosecutor demonstrates that the guidance simply has not been followed and properly applied. The argument is bolstered by the contention that in deciding to prosecute the Crown Prosecutor failed to have regard to Article 40 of the UN Convention. As to that unconvincing assertion I need say nothing more.

57. I have already set out the relevant passages in The Code for Crown Prosecutors and in the guidance and need not rehearse it all again. Here I merely draw attention to what for present purposes are the key elements in The Code and the guidance:

- the interests of any child involved are a primary consideration;
- Crown Prosecutors must consider what is in the best interests and welfare of the defendant;
- Crown Prosecutors must consider what is in the best interests and welfare of the victim;
- specifically, Crown Prosecutors must consider the consequences for the victim of a decision to prosecute, the effect a prosecution might have on the victim and, in particular, whether a prosecution is likely to have an adverse impact on the victim's physical or mental health;
- Crown Prosecutors must take into account any views expressed by the victim or, where the victim is a child, any views expressed by the victim's family, including the views of the victim about the effect of a prosecution on her physical or mental health – it will be noted that the guidance does not in terms impose any obligation to seek out such views;
- Crown Prosecutors must take into account "fully" the views of other agencies and "in particular" of social services.

Mr Strong submits, and I agree, that "physical or mental health" is properly to be understood as embracing emotional well being.

58. It is against this background that one has to consider what had been said by the strategy group in its report of 8 June 2010. I have already set out the relevant passages in full. Here I merely draw attention to what for present purposes are the key elements:

- neither E nor her sisters S and R can be therapeutically supported while the prosecution is pursued;
- the likely delay in getting such support to the children is both "great" and "harmful to their eventual recovery";
- in relation to E, therapeutic work is "essential"; it is such therapeutic work that will help to quantify and minimise any potential future risk E may pose (including, of course, risk to S and R);

- the parents are critical agents in the support and recovery of their children and the loss of their cooperation would "seriously jeopardise" both the children's ability to recover from their experiences and potentially the family's ability to remain intact;

- although the parents have worked in partnership with the agencies to protect and support all their children, it is "very difficult" to imagine how they will construe criminal proceedings against E as anything other than hostile.

59. Viewed from this perspective the decision letter of 11 August 2010 is striking not so much for what it says but for what it does *not* say:

i) the *only* references in relation to S and R are to their ages and vulnerability at the time of the offences; the decision letter makes *no* reference at all to what the report had said about their need for therapy and the fact that delay will be "harmful to their eventual recovery";

ii) although the decision letter says that E's welfare and interests have been considered, there is no corresponding reference to S and R;

iii) the decision letter makes *no* reference at all to what the report had said about the importance of therapy for E and the adverse consequences for her of delay;

iv) the *only* specific reference to anything in the report is to the likelihood of the parents' adverse reaction; to repeat, the decision letter makes *no* reference at all to what the report had said about the children's need for therapy and the adverse consequences for all of them, including S and R, of delay.

60. In short, the decision letter simply does not engage at all with what the report had said, in very plain and concerning terms, about the adverse effects on the welfare of all three children of the decision to prosecute E. I do not, of course, overlook the fact that in the decision letter the Crown Prosecutor said that she had "considered" the report, but as Mr Strong points out, not merely are the specific factors identified in the report as having an adverse impact on S and R (and for that matter E) not further identified; there is simply no explanation of how the report has been considered or as to why, given what had been said in the report, the decision was nonetheless to prosecute.

61. Put in a nutshell, what is said is that, reading the decision letter of 11 August 2010, and having regard to the key parts of the guidance which I have summarised in paragraph 57 above, it is quite impossible to know whether the Crown Prosecutor simply failed to consider the views of the strategy group as I have summarised them in paragraph 58, or, having considered them, decided they were irrelevant, or, having accepted that they were relevant, rejected the various points being made by the strategy group, or, having accepted the various points the group had made, considered that they were nonetheless outweighed by other factors.

62. I accept of course that a decision such as this is to be read in a broad and common sense way, applying a fair and sensible view to what the decision maker has said. I readily acknowledge that, as Lord Hoffmann pointed out in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372, reasons should be read on the assumption that, unless she has demonstrated the contrary, the decision maker knew how she should perform her functions and which matters she should take into account. And I have very much in mind his warning that an appellate court – and the same must also go for this court – must "resist the temptation to subvert the principle that they should not substitute their own discretion for that of the [decision maker] by a narrow textual analysis which

enables them to claim that he misdirected himself." But the fact, in my judgment, is that the errors here – and we are not of course concerned with only a single error – are patent on the face of the decision letter.

63. Mr Mably sought to argue the contrary, asserting that the Crown Prosecutor had had proper regard to all the factors relevant to the matter she had to decide, not least the welfare of all the children, and suggesting that this ground of complaint is simply a contention that the Crown Prosecutor, balancing all the relevant factors, had reached a wrong and indeed irrational conclusion. I do not agree. Despite all his endeavours, Mr Mably was simply unable to meet the case as I have summarised it in paragraphs 59-61 above. To that case there is, in truth, no answer. And on that simple ground the claimants are entitled to succeed. The decision of the Crown Prosecutor must be quashed.

64. I should add that, notwithstanding what was argued, albeit rather faintly, by Mr Mably, the various deficiencies in the original decision-making process in August 2010 are not cured by anything that has happened since. I have summarised the subsequent decisions on review by the acting Chief Crown Prosecutor on 11 January 2011 and on reconsideration by the original Crown Prosecutor on 29 March 2011. Neither, as I have explained, engaged in any meaningful way with the strategy group report. There is nothing in either decision which even begins to address, let alone to make good, the various deficiencies in the original decision letter.

65. That suffices to deal with this head of complaint. I should however mention two further arguments deployed by Mr Strong.

66. He submits that the failure to seek J's views as to how a prosecution would impact on S and R was itself a breach of The Code and the guidance, involving, he says, a breach of what he submits was the obligation to put the best interests of S and R, as the victims, "foremost" when reaching a decision as to whether or not to prosecute E. I cannot accept either branch of that proposition. As I have already observed, neither The Code nor the guidance imposes any obligation to seek out the victim's views; the Crown Prosecutor's duty is merely to have regard to any views expressed. Moreover, neither the law nor The Code or guidance requires priority to be given to the interests of the victim. On the contrary, both the law and the guidance require a proper balancing of the interests of the defendant, of the victim and indeed of the public at large.

67. Mr Strong also makes a number of other criticisms of the decision letter suggesting that in a number of further respects it failed adequately, if at all, to engage with what was in the report. These arguments, which are on any view less compelling than those on which I have focused, do not in my judgment warrant detailed consideration. I therefore say no more about them.

Issue (3): the substance of the decision

68. The claimants' final contention is that in all the circumstances of the case the decision to prosecute was a disproportionate response that failed to have proper regard to the claimants' rights under Articles 3 and 8 of the European Convention or, in E's case, to Article 40 of the UN Convention and Article 26 of the Council of Europe Convention. So far as E is concerned, it is said that the decision to prosecute her will have consequences for her that are far-reaching and potentially catastrophic. In its potential impact, not merely on E but also on S and R, the decision, so it is said, is neither supported by the consensus of professional opinion on the strategy group nor consistent with the children's welfare nor appropriate having regard to the range of diversionary options (a caution, a referral order or care proceedings) which it is

suggested are available for E. Indeed, it is said on behalf of all the claimants that, having regard to all the relevant circumstances, the decision to prosecute is one that no reasonable authority would make. It is said that the adverse impact on all three children of the prosecution, which Mr Strong submits is directly contrary to the best interests of S and R, plainly and heavily outweighs any public or other interest in a prosecution.

69. Mr Southey took us to well-known passages in *Bensaid v United Kingdom* (2001) 33 EHRR 205, paras [46]-[47], and *Pretty v United Kingdom* (2002) 35 EHRR 1, paras [52], [61] and [65], to demonstrate how in principle, and depending upon the severity of his treatment, Article 3 and Article 8 are each capable of protecting the claimant's dignity, mental health, mental stability and moral and psychological integrity. Referring to *R (C (A Minor)) v Secretary of State for Justice* [2008] EWCA Civ 882, [2009] QB 657, para [58], and *E v Chief Constable of the Royal Ulster Constabulary and another (Northern Ireland Human Rights Commission and others intervening)* [2008] UKHL 66, [2009] 1 AC 536, paras [7]-[9], he submitted that Article 3 imposes special obligations on the State in the case of the young or vulnerable, so that the special vulnerability of children is relevant, first, as a factor in determining whether the treatment in question reaches the high level of severity needed to attract the protection of Article 3 and, second, to the scope of the obligations of the State to protect them from such treatment. Here, he says, the evidence supports the contention that the decision to prosecute E breaches her rights under Article 3 and under Article 8. Mr Strong made similar submissions in relation to S and R.

70. Mr Southey also took us to *R (H) v A City Council* [2011] EWCA Civ 403, para [41], as the most recent authority demonstrating that, where human rights such as those said to be engaged here are involved, the appropriate standard of review which the court must adopt is not the *Wednesbury* test of irrationality but the more intense *Daly* standard: *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, para [27].

71. So far so good, but in my judgment none of this begins to get the claimants to where they would have us go.

72. A criminal prosecution may in principle engage Convention rights at various stages of the process. A question may arise as to whether certain activities should be criminalised at all. A question may arise as to whether the defendant has had or will have a fair trial. A question may arise as to whether a particular type of sentence or the implementation of the sentence in a particular case is Convention compliant. But the present case does not raise any questions of that nature. It concerns, and concerns only, prosecutorial policy and the prosecutor's decision to prosecute a matter which is properly the subject of the criminal law.

73. In relation to that, there is dispute between Mr Southey and Mr Strong on the one side and Mr Mably on the other as to whether the Convention is engaged at all and, if it is, as to the circumstances in which a prosecutor's decision to prosecute such a matter can ever give rise to a breach of either Article 3 or Article 8.

74. Mr Mably referred us to the decision of the Strasbourg court in *Massey v United Kingdom* (2003, unreported) and to the observations of Lord Phillips of Worth Matravers PSC in *Norris v Government of the United States of America (No 2)* [2010] UKSC 9, [2010] 2 AC 487, paras [51]-[65], an extradition case whose relevance for present purposes is not immediately apparent. More pertinently, he relied upon *R v G (Secretary of State for the Home Department intervening)* [2008] UKHL 37, [2009] 1 AC 92, a case where a 15-year-old boy convicted of a sexual offence involving a 12-

year-old girl failed in his attempt to challenge the proceedings on the basis that they breached his rights under Article 8. The House was divided both on the question whether Article 8 was engaged at all and, if it was, on the question whether it had been breached. Lord Hoffmann (paras [9]-[10]) was emphatic that such matters have nothing to do with Article 8 or, indeed, with human rights at all. Baroness Hale of Richmond (para [54]) agreed that Article 8 was not engaged at all. Lord Hope of Craighead (para [54]) and Lord Carswell (para [61]) took the opposite view and indeed went on to hold that there had been a breach of Article 8. As Lord Hope put it, "where choices are left to the prosecutor they must be exercised compatibly with the Convention rights". Lord Mance (para [72]) seems to have expressed no concluded view on the first point, but agreed with Lord Hoffmann and Baroness Hale that there was in any event in the circumstances no breach of Article 8.

75. Tellingly, Mr Mably asserted, and neither Mr Southey nor Mr Strong was able to gainsay him, that there is no case, either before the Strasbourg court or in any domestic court, where, in a matter properly the subject of the criminal law, a prosecutor's decision to prosecute either an adult or a child for a first-time offence has been held to constitute a breach of either Article 3 or Article 8. As an exception which, as it were, proves the rule, Mr Mably pointed to *Ülke v Turkey* (2006).

76. In that case a prosecution was held to breach Article 3 but only because the applicant had been convicted for the eighth time of offences relating to his conscientious objection to military service in circumstances where he was, despite his convictions, not exempted from his obligation to perform military service and was therefore exposed, as the court put it (paras [61]-[62]), to the "risk of an interminable series of prosecutions and criminal convictions", a "constant alternation between prosecution and imprisonment", that might last for the rest of his life. There was a breach of Article 3 because the severe pain, suffering, humiliation and debasement he had been subjected to was (see paras [58], [59], [63]) of a special level that went beyond the usual degree of humiliation inherent in any criminal conviction. Those extreme circumstances, reminiscent in their effect to Asquith's Cat and Mouse Act, the Prisoners (Temporary Discharge for Ill-health) Act 1913, are far removed indeed from the circumstances of the present case.

77. I do not propose to explore these issues any further. There is no need to do so, for the claimants succeed on other grounds. It is better that we do not because these are issues which are best addressed when the court has, as we have not, an adequately reasoned decision which makes clear the basis upon which the factors relevant to this head of claim have been addressed by the decision-maker.

78. That said, there are, I think, four points which I can and should make. First, there is, as I have noted, no precedent for a claim such as this succeeding; indeed much authority pointing in the other direction. Second, and giving all appropriate weight to what was said in *R (C (A Minor)) v Secretary of State for Justice* [2008] EWCA Civ 882, [2009] QB 657, and *E v Chief Constable of the Royal Ulster Constabulary and another (Northern Ireland Human Rights Commission and others intervening)* [2008] UKHL 66, [2009] 1 AC 536, the circumstances as they are here presented to us seem to me to fall far short of anything that could possibly engage Article 3, even in relation to a child. Third, the decision and reasoning in *R v G (Secretary of State for the Home Department intervening)* [2008] UKHL 37, [2009] 1 AC 92, seem to me to present formidable obstacles to the success of any claim based on Article 8. Fourth, and in a sense encapsulating the previous points, in the context of criminal proceedings Articles 3 and 8 are more likely to be engaged, and potentially breached, in matters of sentence rather than prosecution.

79. Finally, it is to be noted that Mr Strong made clear that his submissions were founded exclusively on the fact that S and R are *victims*. It was no part of his case to argue that the relevant Convention rights for which he contended were engaged merely because S and R were members of E's family. J, it should be noted, is not herself a claimant – she is merely acting as litigation friend for her daughters – so there is no one before the court seeking to argue what may, on one view, be a rather different and even more difficult proposition than that for which Mr Strong was arguing.

Forum

80. I turn finally to the question of forum. Is the appropriate forum for the ventilation of these issues the Crown Court rather than the Administrative Court? Mr Mably says it is. Mr Southey and Mr Strong disagree.

81. Mr Mably points to what Lord Steyn said in *R v Director of Public Prosecutions ex p Kebilene and others* [2000] 2 AC 326, 371, and to the vigorous endorsement of that principle by Thomas LJ in *R (Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin), [2004] INLR 638, para [49]:

> "In view of the frequency of applications seeking to challenge decisions to prosecute, we wish to make it clear … that, save in wholly exceptional circumstances, applications in respect of pending prosecutions that seek to challenge the decision to prosecute should not be made to this [the Administrative] court. The proper course to follow, as should have been followed in this case, is to take the point in accordance with the procedures of the Criminal Courts. In the Crown Court that would ordinarily be by way of defence in the Crown Court and if necessary on appeal to the Court of Appeal Criminal Division. The circumstances in which a challenge is made to the bringing of a prosecution should be very rare indeed as the speeches in *Kebilene* make clear."

82. Mr Southey seeks to escape from this difficulty by praying in aid the fact that E is a child and submitting on the basis of what Watkins LJ said in *R v Chief Constable of Kent ex p L, R v Director of Public Prosecutions ex p B* (1991) 93 Cr App R 416, 428, that, as Watkins LJ put it, "Juveniles, and the policy with regard to them, are … in a special position." Their special vulnerability, he suggests, makes it all the more important that children should be permitted to make the application by way of judicial review in the Administrative Court, so as to be spared the stigma of appearing before a criminal court, even if only for the purpose of making an application to stay the proceedings. I do not, however, read the point that Watkins LJ was making as going to the question of forum but rather to the substantive grounds upon which judicial review will or will not lie.

83. Be that as it may, the authorities upon which Mr Mably relies relate to the situation where the applicant for judicial review is the defendant in the criminal proceedings. Mr Strong, however, points to the fact that, whatever the position may be in relation to E, S and R are not defendants in the criminal proceedings, have no *locus standi* before the Crown Court, and accordingly have no remedy unless by way of an application for judicial review in the Administrative Court. As he says, absent such a remedy their position cannot be protected and their interests will go unheeded. They have, as he correctly asserts, a free-standing claim, wholly independent of any claim E may have. So, he says, and I agree, Mr Mably is wrong when he submits that their claim effectively collapses into the grounds advanced by E.

84. In this Mr Strong can derive support from what Lord Steyn said in *Kebiline* (at 369):

> "In the opposite case, namely a decision not to prosecute, judicial review is available: see *Reg v Director of Public Prosecutions Ex parte C* [1995] 1 Cr App R 136. That is, however, a wholly different situation because in such a case there is no other remedy."

So here, he says, whatever may be the position in relation to E, there is no remedy other than judicial review available to S and R.

85. I agree with Mr Strong. The Administrative Court is the appropriate forum – indeed the only forum – for the determination of a victim's claim such as that being pursued by S and R. And if their claim is to be determined here, as it must be, it would make no sense to send E's closely intertwined claim off for determination in the Crown Court. So for that reason I would reject Mr Mably's invitation to us to decline jurisdiction. What our decision might have been if we had had only E's claim before us is therefore not something which requires determination, and in the circumstances I prefer to express no concluded view on it.

Conclusion

86. For these reasons I would dismiss both applications in so far as they challenge the legality of the DPP's policy and guidance. I would, however, grant both applications insofar as they seek the quashing of the decision to prosecute E.

Mr Justice McCombe :

87. I agree.