

Prosecution Guidance: Purpose and Status

Introduction

The CPS currently publishes over 200 pieces of guidance for its prosecutors. The CPS publishes this statement by way of introduction to the whole of Prosecution Guidance:

“The purpose of the prosecution guidance is to assist Crown Prosecutors in applying the Code when exercising prosecutorial discretion in their decision making. The guidance ensures that decisions are fair, transparent, and consistent.”

Prosecution guidance is not:

1. A replacement for the Code¹.
2. A recitation of the law.
3. A policy statement of the CPS.

Example: Non-fatal strangulation and suffocation²

The status of Prosecution Guidance

Point 1: Prosecution Guidance must be lawful (and is presumed to be unless shown otherwise)

The starting point is that it, unless it is argued the guidance is in some way inadequate, it should normally be assumed that the contemporaneous guidance will have taken account of all the guidance offered by the relevant authorities with responsibilities in the context of Convention obligations (*AFU v R [2023] EWCA Crim 23*)

Further confirmation that the DPP can issue guidance and if it is wrong the court can intervene is found in *EVAW v DPP [2021] EWCA Civ 350*.

Point 2: Prosecution Guidance must be applied (unless good reason)

In the case of *COL v DPP [2022 EWHC 601 (Admin)]*: “Particularly where a review decision is exceptionally detailed, thorough and in accordance with CPS policy it cannot be considered perverse”³. The case echoes the fundamental principle from a much earlier (and now very dated) case - *R. v DPP Ex p. Chaudhary, [1995] 1 Cr. App. R. 136* – which makes it clear that, rarely, cases can be shown to be flawed when the prosecutor “on behalf of the Director of Public Prosecutions did not approach the question which he had to decide in accordance with the settled policy of the Director of Public Prosecutions as set out in the Code”.

More recent cases endorse this principle for guidance which is standalone guidance under the authority of the Code: “Where the prosecution has applied its mind to the relevant questions in accordance with the applicable CPS guidance, it will not generally be an abuse of process to

¹ [The Code for Crown Prosecutors | The Crown Prosecution Service \(cps.gov.uk\)](https://www.cps.gov.uk/the-code-for-crown-prosecutors)

² [Non-fatal strangulation or non-fatal suffocation | The Crown Prosecution Service \(cps.gov.uk\)](https://www.cps.gov.uk/non-fatal-strangulation-or-non-fatal-suffocation)

³ *OL v DPP [2022 EWHC 601 (Admin)* para 46(1)

prosecute unless the decision to do so is “clearly flawed” (see AGM at [12] and R v BYA [2022] EWCA Crim 1326 at [20])⁴.

But CPS guidance can be disapplied for good reason, see, A v R [2012] EWCA Crim 434.

(1) Prosecution guidance cannot create an immunity or defence

Individual decisions are grounded in the specific case and circumstances – it is for the prosecutor to apply the guidance and make that decision: A v R [2012] EWCA Crim 434.

The Code remains paramount and for almost all case work decisions provides a sufficient framework (but note the limited exception created by Purdy v DPP [2009] UKHL 45 for prosecuting cases of assisted suicide.)

(2) Prosecution guidance can be the way the UK meets its international legal obligations

Prior to the Modern Slavery Act 2015, there was no statutory defence for victims to raise, however, the UK honoured its international obligations by the application, by Prosecutors, of prosecution guidance (as well as defences of duress and the court’s abuse of process jurisdiction): DS, R. v (Rev 1) [2020] EWCA Crim 285. This still remains relevant following the 2015 Act.

(3) Prosecution guidance may be endorsed in caselaw, examples include:

- (a) The four-stage test to apply to victims of modern slavery (R v DS [2020] EWCA Crim 285; R v CS [2021] EWCA Crim 134)
- (b) The guidance to prosecutors to scrutinise and test the SCA’s decision as to whether an individual is a trafficked victim⁵: “The passage underlined in that citation does not derive from authority, but we consider that it is a legitimate approach for a prosecutor to take” in R v DS [2020] EWCA Crim 285
- (c) Endorsing CPS guidelines on communications evidence in 2018: “This guidance appears to us accurately to set out the considerations that investigators should have in mind when deciding what enquiries should be made during investigations into allegations of sexual offences” R v E [2018] EWCA Crim 2426
- (d) Endorsing the factors a prosecutor may take account of in determining whether sexual misconduct is sufficient serious to warrant a charge of misconduct in public office: “We agree that these factors can be useful in determining whether sexual misconduct is sufficiently serious in the context of the misconduct offence, but other factors may be material too, depending on the circumstances. As always, all must depend on the facts of the individual case” Ali v R 2023] EWCA Crim 1464
- (e) CPS Guidance on freedom of speech in communication offence cases being affirmed: “As the CPS Guidelines state, “prosecutors should only proceed with cases under section 1 [of the 1988 Act] ... where the interference with freedom of expression is necessary and is proportionate.” R v Casserley [2024] EWCA Crim 25

⁴ AFU v R [2023] EWCA Crim 23

⁵ DS, R. v (Rev 1) [2020] EWCA Crim 285 (28 February 2020)