immunity for expert witnesses could no longer be justified. Moreover, as Lady Hale and Lord Hope explained it is difficult to see how a principled line could be drawn so that immunity could operate in other proceedings or at other stages of the proceedings.

What are the likely consequences? No doubt some witnesses will seek insurance, which will increase the cost to the parties, although presumably they will not be able to insure retrospectively, and they may have difficulty identifying precisely what they need insurance for. Whilst the majority rejected "chilling effect" arguments, these arguments have found strong support from some academic commentators, and these points seem particularly compelling in the case of one-off expert witnesses. What impact did the Justices anticipate? Lord Brown (in the majority) thought that the most likely consequence would be "a sharpened awareness of the risks of pitching their initial views of the merits of their client's case too high or too inflexibly" (at [67]). However, whilst he welcomed this as a "healthy development" (at [67]), one might respectfully suggest that timid witnesses, hedging their bets, are undesirable. Such hesitant and defensive experts might drag out court proceedings and costs and make it far more difficult for the court and for the parties to assess the strength of their case.

Finally, one has to ask, was this necessary? Expert witnesses are not immune from disciplinary proceedings, nor from wasted cost orders. Of course these controls do not provide a remedy for the injured client. However, as Lord Brown noted, negligence on the part of expert witnesses is "no doubt rare" and "highly exceptional" (at [68]). In *Jones* v. *Kaney* the problem was brought to the judge's attention before the case was settled. Whilst one can see why the judge was reluctant to allow Jones to change his expert witness, would it not have been far simpler if the judge had ordered the experts to prepare a new joint statement, and issued a wasted costs order against Kaney for the expense of re-opening this aspect of the case?

KIRSTY HUGHES

EU (NON)-SUPREMACY AND CRIMINAL LAW

IN 2009, the Government announced that the provisions of the Video Recordings Act 1984 – legislation designed to control the distribution of pornographic and violent videos – had not been notified to the European Commission as required by the technical standards directive: Council Directive (EEC) No 83/189 (OJ 1983 L 109 p.8). According to a series of decisions of the European Court of Justice, that failure rendered the Act unenforceable against individuals. Unaware of this,

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the applicants in *Interfact Ltd.* v. *Liverpool City Council (Secretary of State for Culture, Media and Sport intervening)*; *R.* v. *Budimir (Secretary of State for Culture, Media and Sport intervening)* [2010] EWCA (Crim) 1486, [2011] Q.B. 744 were convicted of offences under the Act in 2004 and 2008 respectively. Had they known that it was unenforceable against them, they could have utilised that knowledge to claim a defence deriving from the supremacy of EU law.

By the time the error came to light, legal proceedings were closed in both cases. So, to challenge their convictions, the applicants sought to establish that they had a right under EU law to appeal out of time, with a view to having the convictions, when re-examined, quashed. The applicants in *Budimir* contended as well that a refusal to do so would contravene Articles 7 and 10 ECHR, and thus the Human Rights Act 1998; a contention that was firmly dismissed and will not be discussed further.

Judgment was delivered by Lord Judge C.J. on behalf of the Court, which was sitting as the Divisional Court in *Interfact* and as the Court of Appeal in *Budimir*. Ultimately, it granted leave to appeal in both cases, but then upheld the convictions on the grounds that the applicants had not suffered any substantial injustice. Given that finding, it regarded it as contrary to legal certainty to allow the applicants retroactively to claim the benefit of the Government's failure. The decision is rich in points that are worthy of debate, only a selection of which can be highlighted here.

The applicants' contention that they had the right to have the proceedings against them reopened arose from the body of law that the Court of Justice has developed to reconcile respect for "national procedural autonomy" with Article 4(3) TEU (ex Article 10 EC), which obliges Member States "to ensure fulfilment of the obligations arising out of the Treaties". Its starting premise is that the task of affording a remedy for a breach of EU law is a matter for the domestic law of the Member States, but this is subject to the overriding requirements of "equivalence and effectiveness". To satisfy the first, the remedy must be no less favourable than that which would be granted in an analogous domestic situation; to satisfy the second, it must be neither virtually impossible nor excessively difficult to obtain. As the applicants' convictions would not have been reopened in a purely domestic case, it was easy to deduce that there was no need to do so in order to meet the principle of equivalence. Therefore, most of the Court's attention was focused on the criterion of effectiveness.

The judgment bears signs that the Court was less comfortable in applying this test. At a basic level, it seems to have lacked confidence as to which set of proceedings it should attach to. Although the Court proceeded, rightly, to apply it to the applications to have the

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convictions reopened, certain of his statements imply that he also thought it relevant to the initial prosecutions. This tendency to conflate the right to the remedy with the right to have the convictions quashed comes through in other ways too. Much of the Court's analysis is rather undisciplined and not all of it is on point. For instance, some of it reiterates the Court's belief in the applicants' guilt and its consequent view that a refusal to reopen the convictions would not result in any real injustice. More contentiously, it contains some dubious assertions regarding the applicants' alleged responsibility for raising the notification point themselves.

According to Lord Judge, it was apparent from the face of the Act that its provisions were of a kind that ought to have been notified in accordance with the Directive. Coupled with that, the Court had been informed of reported cases where the point had been taken at first prosecution. To him, this was evidence that the applicants could have done likewise, tacitly hinting that they were estopped from complaining about the loss of the defence now.

As a matter of EU law, however, this cannot be right. The duty that is established by Article 4(3) TEU (mentioned above) crystallises upon all organs and emanations of the state. Along with the criminal courts themselves, it therefore encompasses the CPS, but not private persons such as the applicants. Thus, if responsibility fell on any party for raising the notification point, it was the prosecution; not the defence. Not only did the CPS fail to discharge its duty in these individual cases, but it is possible that its failure was of greater magnitude.

Once the notification point had been taken in a prosecution, the CPS surely fell under a duty to alert the Government to the precarious status of the Act and stay all relevant proceedings. Yet, while it is unclear how the matter eventually came to attention, it does not appear to have been through this route. Furthermore, the occurrence of these cases implies that the Government may have had at least constructive knowledge that the Act was unenforceable prior to admitting the failure to notify in 2009. Together, these factors point to a measure of default on behalf of the State that may be more significant than initially appeared.

Although more could be said, that observation raises one final criticism. In the context of the direct effect and indirect effect of Directives and Framework Decisions, it is settled EU law that a Member State cannot rely on its own default in order to impose, or exacerbate, criminal liability or punishment. EU law respects the prohibition on retrospective criminalisation and punishment that is contained in Article 7 ECHR, and now reproduced in Article 49 of the EU Charter of Fundamental Rights, and such action would violate it. It might thus be thought incongruous that here the Court refused permission

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retrospectively to rely on a good defence that arose due to a failure by the United Kingdom completely to comply with its obligations under the directive. However, none of the relevant authorities was cited to the Court (e.g. Case C-148/78 *Ratti* [1979] E.C.R. 1629; Case C-168/95 *Luciano Arcaro* [1996] E.C.R. I-4705; Case C-105/05 *Maria Pupino* [2005] E.C.R. I-5285), still less mentioned in its judgment. In so far as it considered any case law of the Court of Justice, its attention was wholly fixed upon that concerning the right to a remedy. Although relevant, virtually all of these authorities, and certainly the most recent, relate to the field of private law. The judgment is silent as to whether, and why, they apply without modification to criminal prosecutions such as those of the applicants. It is not necessarily safe to assume that they do.

For that reason, as well as the others that have been discussed, it should be apparent that this case raises more issues of principle than were rehearsed by the Court in its judgment. Given their importance, it is regrettable that the Supreme Court declined to give permission to the applicants to appeal. It is arguable too that it involved questions of EU law that were sufficiently novel to have justified the Court in making a reference for a preliminary ruling from the Court of Justice. Yet there is no sign that such a course of action was contemplated.

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