

POSSESSION OF CANNABIS FOR MEDICINAL PURPOSES

IN *R. v. Quayle* [2005] EWCA Crim 1415, the Court of Appeal heard a set of conjoined appeals and decided that a person who possesses cannabis purely for medicinal purposes, even if it gives him relief from the crippling effects of an illness, has no defence to the charge of possession. Duress of circumstances is unavailable, and the conviction of the cannabis user is compatible with his right to privacy under Article 8 ECHR.

It is hard to disagree with these rulings as a matter of legal interpretation. Let us start with the elements of defence of duress of circumstances. The defendant must be acting to prevent a threat of death *or* serious bodily harm which cannot be met in another way: *R. v. Pommell* [1995] 2 Cr. App. R. 607. Admittedly, those elements might be satisfied if his illness (in some cases, multiple sclerosis) can amount to serious bodily harm, and if the medicines prescribed by the patient's doctor have already proven ineffectual.

But even if the person who takes the drug regularly is averting an imminent threat of serious harm, the threat which he is meeting is of an ongoing nature, and affects many people. In the words of the Court (at [57]), the defendants' conduct "contravenes the legislative policy and scheme *on a continuing and regular basis*" (emphasis added). So, for the first time since *Southwark LBC v. Williams* [1971] 2 All E.R. 175 (C.A.), a court seems to have given recognition to the notion (more usually discussed in academic texts) that the perceived emergency which bases a defence of duress of circumstances (or "necessity", if one must) should be an emergency of a likely "one-off" nature. Parliament must legislate to create exceptions for "regular" cases where application of the law would cause hardship. It is not enough, then, that there is nothing which explicitly rules out the defence in the Misuse of Drugs Act 1971: any defence needs to be included in the statute.

The Article 8 argument was that the prosecution and conviction of the drug user interferes with his private life, again assuming that he derives some therapeutic benefit from the drug. If that were so,

perhaps the court would have to revise its self-imposed limitation on the defence of duress of circumstances, as discussed above. But that “interference” would be justified if it were necessary and proportionate towards the protection of health: Article 8 (2) ECHR. One can see why the Court accepted this. Recent research commissioned by the government suggested that the dangers to health from taking cannabis are indeed substantial and that the potential medicinal effects are normally relatively marginal. Thus, a blanket ban on the possession of cannabis is not disproportionate—or at least, so Parliament was entitled to conclude (note that it matters only that the law can presently be defended: it does not matter that the law might have been insufficiently thought through back in 1971). Understandably, the Court of Appeal showed substantial deference on the need to combat the harms of cannabis by criminal prohibition.

Unfortunately none of the counsel in *Quayle* tried an even bolder human rights argument based on Article 3 of the ECHR: that the very act of prosecution would subject the patient to inhuman or degrading treatment in so far as it would be likely to inhibit him from resorting to his only cure for his illness in the future. The right in Article 3 is absolute, so if it is engaged, the State cannot justify interference by pointing to the same public policy interests as might justify interference under Article 8. Thus the problem of deference to the government’s assessment of the risks to health from cannabis use would disappear too.

That, however, is the question—*is* the Article 3 right engaged? The nearest analogy is with *R. v. DPP, ex p. Pretty* [2002] 1 A.C. 800 (H.L.) where it was thought that a refusal by the Director of Public Prosecutions not to rule out the prosecution of Mr. Pretty for any prospective act of assisted suicide he might commit did not (on causal grounds) subject Mrs. Pretty to inhuman or degrading treatment. It was her illness which did that, and not the effects of the DPP’s decision on the freedom of action of her husband.

It is a difficult authority to distinguish, but one ought at least to try. In *Pretty*, the illness (motor neurone disease) would necessarily cause suffering and death. There is no cure available, short of accelerated death (and the State is quite entitled not to recognise that as a cure). But where a prohibited drug may restore a patient to at least temporary health, then there may be a stronger link between a decision to prosecute him for possession of the drug and the harm which would then be caused by the untreated condition. Surely one cannot say that the patient breaks the chain of causation by not doing an act (the use of cannabis) which might alleviate his suffering but which he expects would lead to further prosecution.

So the argument in court could be that the prosecutor's exercise of discretion to proceed was an "unlawful act" under section 6 (1) of the Human Rights Act 1998 (because it was incompatible with Article 3); and that the court should terminate this continuing "unlawful act" by declaring the proceedings to be an abuse of process. This bold contention should at least be arguable if it is confined to those (exceptional) cases where (1) no conventional medicine has been effective, (2) there is substantial evidence that cannabis was helping the patient, and (3) the latter would not continue to use the drug if he feared further prosecution. Note that the accused would not necessarily be entitled to receive compensation in subsequent civil proceedings if the decision to prosecute were accepted to be an "unlawful act" (section 8 of the HRA). Nor should there be any suggestion that the police committed any "unlawful act" in arresting the drug user and in otherwise investigating the circumstances of the case.

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