

Code for Crown Prosecutors Test - Merits Based Approach

Background

In January 2009, Toulson J gave the ruling in the Divisional Court case of R (FB) v Director of Public Prosecutions [2009] EWHC 106 (Admin), variously referred to as "B" or, more frequently "FB". In the judgment the phrase "merits based approach" was used for the first time in relation to decisions taken under the Code for Crown Prosecutors.

The case involved a decision to offer no evidence, in relation to a count of wounding with intent to cause grievous bodily harm. The decision was based on a report about the complainant's general mental health, rather than on an assessment of the reliability of his evidence in the particular case. The Divisional Court had no hesitation in concluding that the decision was unlawful and involved a breach of the complainant's rights under Article 3 of the European Convention on Human Rights.

In the course of the discussion and in setting out the merits based approach as preferable to the "bookmaker's approach" Toulson J gave "date rape" as an example of why prosecutors should use the former rather than the latter. As a result, although FB concerned an offence of violence, the comments made had wider application and have been particularly important in making sure that the CPS approach to sexual offence allegations is consistent with the proper application of the Code.

It is in sexual offence cases that there is the greatest risk that myths and stereotypes will influence a jury and in which, therefore, an assessment based on a predictive or bookmaker's is most likely to involve a failure properly to apply the Code. Decisions should not be based on perceptions of how myths and stereotypes might lead a particular jury to reach a particular conclusion.

The merits based approach is closely linked to the CPS's determination to avoid flawed review decisions.

The word "approach" does not indicate any change to what is always required when applying the Code for Crown Prosecutors, which calls on prosecutors to assess whether a particular outcome is more or less likely assuming that the case will be considered by "an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law."

In applying the Code prosecutors are required to make judgements and should do so based on objective factors. The merits based approach requires prosecutors to approach cases with an understanding that not every point that may be made by the defence will be a good point, let alone a point fatal to the prosecution. Cases do not fail the Code test merely because they are difficult. The review process should always involve assessing what the defence may be and factors which may potentially undermine the prosecution case. If such factors have been properly considered, and are not objectively undermining, the prosecution should be robust in

the face of challenges.

However prosecutors should not ignore factors that are objectively undermining. Prosecuting flawed cases undermines public confidence, raises unrealistic expectations for complainants and diverts resources from other case, which are delayed as a result.

A Quick Guide

The merits based approach:

- Is not a different test, merely the approach we must take in applying the Code test;
- Does not change, or differ in any respect from, the Code test;
- Is not new - it is a different way of expressing what has always been there;
- Applies in all cases, not just rape cases;
- Reflects the requirement to assume that every case will be considered by an objective, impartial and reasonable tribunal, properly directed and acting in accordance with the law, who will decide cases in the light of the evidence they have heard in court without being influenced by anything else;
- Requires an objective assessment of the factors which potentially undermine the case for the prosecution or assist the case for the defence. The merits based approach does not involve suspending judgement but it does require prosecutors to take objective decisions that are fair and reasonable. Any decision which takes account of subjective matters such as myths, stereotypes, preconceptions and predictions based on previous cases cannot be an objective decision.
- Note: Prosecutors must not introduce a requirement for corroboration in the review process - one person's word can be enough (and often is) – but the quality of the evidence must be assessed.

Questions and Answers

Does the merits based approach change the Code test?

No. The merits based approach is best understood as an explanation of the correct principles for decision-making under the Code.

The evidential stage of the Code test requires prosecutors to conduct an "objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which he or she might rely."

The Code says that the evidential stage of the Code test is met where "an objective, impartial and reasonable jury or bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged." (Paragraph 4.5 of the Code.)

Prosecutors should assume that the tribunal will approach its task in that way and will decide the case in the light of the evidence heard in court, without being influenced by anything heard, read or seen elsewhere.

The merits based approach makes it clear that the proper application of the Code test should reflect those principles. Prosecutors must make their decisions objectively, impartially and reasonably, according to the evidence, having regard to any defence and any other information that the suspect has put forward or on which he or she might rely; must assume that the case will be considered by a properly directed, objective, impartial and reasonable tribunal acting in accordance with the law; and must not allow themselves to be influenced by myths or stereotypes, by predictions based on the outcomes of previous similar cases or by anything they have heard, read or seen elsewhere.

When did the merits based approach come in?

Although the phrase "merits based approach" was used for the first time in January 2009, in the Divisional Court case of R (FB) v Director of Public Prosecutions [2009] EWHC 106 (Admin), it is merely an explanation of the principles that have always applied to the correct application of the evidential stage of the Code test.

Does it only apply to rape cases?

No, it applies to all Code test decisions.

In fact, R (FB) v Director of Public Prosecutions [2009] EWHC 106 (Admin) was a case involving an allegation of GBH. The court simply gave "date rape" as an example of why prosecutors should use the merits based approach rather than a "bookmaker's approach" because in rape cases a failure to apply the Code test properly is particularly likely to lead to a flawed decision. As a result the court's comments have been particularly important in underlining the correct approach to sexual offence allegations. The correct approach helps to ensure that Code test decisions are based on the assumption that each case will be considered by a properly directed, objective, impartial and reasonable tribunal, acting in accordance with the law, rather than by a tribunal which might be influenced by myths or stereotypes.

Does the "merits based approach" mean that we are being asked to suspend judgment?

No, the review process should always involve an objective assessment of the factors which potentially undermine the case for the prosecution or assist the case for the defence. The merits based approach does not involve suspending judgement but it does require prosecutors to take objective decisions that are fair and reasonable. Any decision which takes account of subjective matters such as myths, stereotypes, preconceptions and predictions based on previous cases cannot be an objective decision.

What does it mean by "having regard to any defence and any other information that the suspect has put forward or on which he or she might rely"?

"Having regard" to these matters requires an awareness of their existence, and an assessment of their likely impact, but not an unquestioning acceptance of their truth. Not every point that

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may be made by the defence will be a good point, let alone a point fatal to the prosecution.

What is wrong with using our experience of previous cases to work out if the next case is likely to succeed?

Predictions based on past trial outcomes are inherently flawed since we cannot know why a particular decision was reached. What happened in a previous case is not a reliable indicator of what is likely to happen in the future. What happened in an earlier case cannot amount to evidence or relevant unused material in the present case. The court will decide the case on the evidence heard in court, not on what happened in an earlier case. Prosecutors are required to decide each case on its own facts and merits. (Paragraph 2.3 of the Code.)

Should review decisions always refer to the merits based approach?

No: what is important is to apply the Code test correctly and to record reasoning clearly. Applying the Code test correctly necessarily involves taking the merits based approach. Failing to take that approach can have a number of consequences. It may mean that offenders will escape prosecution, which will cause injustice to victims and a loss of public confidence in the criminal justice system generally and in the Crown Prosecution Service in particular. As the court made clear in R (FB) v Director of Public Prosecutions [2009] EWHC 106 (Admin) failure to take a merits based approach exposes prosecutors to the risk that their decisions will be found to be "unreasonable" or "irrational" in judicial review proceedings.

Applying the Merits Based Approach

The questions the prosecutor should consider, in assessing the likely impact of each piece of information or evidence, include:

- Is it relevant?
- Is it admissible?
- If it is admissible how would be it be admitted and what affect might that have on its impact?
- Is it credible?
- Is it reliable?
- Does it come from an independent source?
- How persuasive is it, in objective terms?
- How important is it in relation to the issues?
- How significant is it in the context of the other evidence in the case?

Relevance and admissibility

If information would not be admissible then it will not be relevant to the evidential stage of the full Code test, unless it would lead to a successful application to stay proceedings as an abuse of process. Cases should not be decided on the basis of a potential abuse argument unless it is clear that such an argument would succeed (*Guest v DPP* [2009] EWHC 594 (Admin)). Information that would not be admissible because, for example, it ought to be excluded under section 41 of the Youth Justice and Criminal Evidence Act 1999, should not affect the outcome of cases at the CPS review stage. Where Parliament has decided that a jury should not consider information, because it is irrelevant, then it should not be given any weight in the evidential stage of the review process.

How would the information feature in the case?

If the information is admissible then consider whether it should be part of the prosecution's case or would be for the defence to call. Consider its impact in terms of whose case it would form part of, whether the evidence about it would be direct or would involve hearsay admissible under the Criminal Justice Act 2003 and how it would be tested in cross-examination if the evidence was called.

How persuasive is it likely to be?

Although you may conclude that evidence is relevant and admissible it does not follow that it will necessarily be persuasive. Not every undermining factor will be fatal to the prospects of conviction.

It is essential that any assessment of an undermining factor takes account of how significant it is in relation to the issues and in the context of the other evidence. That was what the prosecution failed to do in *R (FB) v Director of Public Prosecutions* [2009] EWHC 106 (Admin).

What other evidence is there?

It is essential that prosecutors do not introduce a requirement for corroboration in the review process - one person's word can be enough (and often is) - but the quality of the evidence must be assessed. Where it is one person's word against another's then a jury will look to other factors to help decide whether the prosecution has proved its case.

The review should disregard factors that are irrelevant or based on myths or stereotypes. We should expect juries to be properly directed about delayed complaints and other matters that might give rise to misconceived assumptions.

Credibility and reliability

Jurors are bound to consider internal and external consistency, particularly where there is no other direct evidence. It follows that prosecutors should consider the likely impact of any inconsistencies.

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- In doing so it is important to distinguish between actual inconsistency and potential inconsistency.
 - Potential inconsistency encompasses two main possibilities (neither of which should be elevated to the status of actual inconsistency), described, for these purposes, in these terms:
 - Apparent inconsistency, where the point depends on the reliability of the report against which an account is being compared and
 - Presumed inconsistency, where, for example, a jury may be invited to conclude that an action is inconsistent with a state of mind being described.
 - With apparent inconsistency it is important to consider the possibility that other reports may not be accurate, independent or reliable - not every apparent inconsistency is real.
 - In any event the mere fact that a complaint emerges in an inconsistent way does not mean it is untrue. There are a number of reasons why a complaint may emerge in an inconsistent way and those are matters on which a jury may either be directed or may use their common sense.
 - With presumed inconsistency it is critical that prosecutors do not apply myths and stereotypes: juries would be warned not to do so.
 - It would, though, be wrong to ignore levels of inconsistency which, even with the benefit of a warning about myths and stereotypes, are nonetheless likely to prove a significant cause of concern to any jury.

Applying the Code

Prosecutors should assess the likely impact of all of the evidence and information that is available, giving each piece of information the weight it deserves. Each piece of information should be assessed in its context: evidence supporting one side or the other should not be considered in isolation; it should be assessed by comparison with other evidence and known facts.

Where a factor or a combination of factors, properly considered and assessed, leads to the conclusion that there is not a realistic prospect of conviction then the case does not pass the evidential stage of the full Code test and should not proceed.

The merits based approach does not involve suspending all judgement but it does require prosecutors to take decisions that are fair and reasonable.