The legal basis for the National Driving offender Retraining Scheme

1. Historical background

In 1988 Sir Peter North QC, at the request of the Government, carried out a comprehensive review of Road Traffic offences, methods of detection and penalties. The Road Traffic Law Review 1988, now known simply as the North report, was accepted and acted upon in the Road Traffic Act 1991 which made amendments to existing legislation. This heralded the introduction of a number of new speed detection devices, both manually operated and fully automatic, which in turn led to a very great increase in the number of persons being caught exceeding the speed limit. This increase had been anticipated within the Report which recommended that consideration be given to providing alternatives to formal prosecution of offenders. The following are extracts from the report:

"Retraining of [traffic] offenders may lead to an improvement in their driving (in which term we include both their technical skill and behaviour) particularly if their training can be angled towards their failings"

"It must be in the public interest to rectify a fault rather than punish the transgressor"

"A pilot study of one day retraining in basic driving skills as a disposal should be undertaken to determine if such retraining produces a lasting improvement in the driving skills of the offenders undertaking it."

In due course such a pilot was undertaken and following appropriate evaluation and academic input, the current educational courses have been developed. That evaluation has confirmed that the courses do offer improvements to the driving skills and behaviour of the majority of those who participate in them.

2. The public interest test

In considering where the prosecuting authority, in applying the public interest test, should prefer to rectifying a fault, or treat the matter as a criminal offence requiring punishment (whether by fixed penalty or court process), those responsible must take into account the availability and known effectiveness of retraining courses. The currently accepted test for public interest was first stated in 1951 by the then Attorney General Sir Hartley Shawcross and has been adopted by the Crown Prosecution Service at paragraphs 4.10 to 4.12 of the current Code for Crown Prosecutors:

4.10 …"It has never been the rule in this country – and I hope it never will be – that suspected criminal offences must automatically be the subject of prosecution."

4.11 Accordingly, where there is sufficient evidence to justify a prosecution or to offer an out of court disposal, prosecutors must go on to consider whether a prosecution is required in the public interest.

4.12 A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against a prosecution which outweigh those tending in favour; or unless the prosecutor is satisfied that the public interest may be properly served, in the first instance, by offering the offender the opportunity to have the matter dealt with by an out of court disposal. The more serious the offence or the offenders record of criminal behaviour, the more likely it is that a prosecution will be required in the public interest.

3. The prosecuting authority

Prosecutions for speeding and red traffic light offences are "specified proceedings" within the meaning of the Prosecution of Offences Act 1985 (Specified Proceedings) Order 1999/904. As such, the decision to prosecute, up to the point of a not guilty plea or failure to respond, is left in the hands of the Police. Thereafter the Crown Prosecution Service will, if it considers it appropriate, adopt the prosecution but is not bound to do so. The application of the public interest test set out above is therefore initially a matter for the police, who must apply the Code for Crown Prosecutors on behalf of the CPS. See Paragraph 3.1 of the Code.

4. The exercise of discretion

The common law has long acknowledged that in dealing with those believed to be offenders, the police can devise a "constructive and pragmatic" response which has included verbal "warnings" and simple "cautions" – R (on the application of R) v Durham Constabulary [2005] WLR 1184. Legislation has built upon this discretion adding formal cautions and latterly conditional cautions to this list of out of court disposals but the power to offer courses remains routed in the common law rather than being based upon statute. The exercise of this discretion therefore rests, as in all such cases, with (a) there being, in the belief of those offering the disposal, sufficient evidence that an offence has been committed and that the offender is the person who committed it (b) an acceptance by the offender that he or she committed the offence (c) the offence being sufficiently minor, and the offenders record of similar behaviour sufficiently small, that the public interest does not require a prosecution. In the case of the offer of a retraining course, there must then be a reasonable belief that the course will be of sufficient benefit that it will be in the public interest to offer it.

Essentially a public body is under a duty to act reasonably whenever it exercises a discretion. That duty was clearly enunciated in the well known case of Associated Picture Houses v Wednesbury Corporation [1948] 1KB 223. Any discretion exercised in a way that is "Wednesbury unreasonable" will be open to attack by Judicial Review of that decision at the behest of a person having locus standii to do so, that is to say a person who is affected by the decision. There are two ways in which a decision can be held to be unreasonable. First the authority must take into account all relevant matters which bear upon that decision and disregard those which would not be germane. Failure to do so is likely to leave the decision open to attack as unreasonable. The second is that, even though all relevant matters were apparently taken into account, the decision reached is "so absurd that no sensible person could ever dream that it lay within the power of his authority."

5. Charging for the course

The decision to offer a course to a driver does not impose any obligation on the driver to attend the course. The driver retains the right to refuse the offer of attendance on the course and instead opt for a fixed penalty and points or contest the allegation or the penalty for it in court. The police, on behalf of the State, are simply offering the opportunity to receive a service in the form of an educational course that has been properly evaluated and is believed to offer a benefit. There is bound to be a cost involved in providing that course but that does not mean that, having devised it, the State is obliged to meet that cost. Indeed the provision of free courses, at a cost to the Police authority, might itself be judged an unreasonable use of public money. In deciding to attend a course, the driver is exercising a choice. The cost of the course to the driver is the cost of exercising that choice. The course fee, whether it is paid to the Police as an intermediary or directly to the course provider, is part of the agreement that the driver enters into by accepting the offer to attend a course. This is distinct from the driver paying a fee to avoid a prosecution or other penalty.

Finally, there can be nothing objectionable in building into the course fee an element to cover detection and processing costs, since the basis of the offer must be a belief in evidential integrity and a proper identification of the offender. Provided that levy properly reflects the cost of reaching the point of being able to make the offer it will not be unreasonable. The wider public interest of greater road safety through the retraining of offenders cannot be achieved without this.

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