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I'm watching the Court of Appeal consider whether a care plan to facilitate C's contact with a sex worker could be implemented without commission of an offence under the Sexual Offences Act 2003. It's an appeal against Hayden's judgment in the COP.

Sir James Eadie QC is counsel for the Secretary of State of Justice, the Appellant in this case. He's presenting the case against Hayden J's decision that s.53A Sexual Offences Act has "little, if any relevance" to C's proposed contact with a sex worker.



Sir James Eadie QC

James Eadie QC was appointed First Treasury Counsel in January 2009, breaking the tradition of appointing Junior Counsel to this role.

<https://www.blackstonechambers.com/barristers/james-eadie-qc/>

Here's what s.53A of the Sexual Offences Act says:

[F153A Paying for sexual services of a prostitute subjected to force etc.]

- (1) A person (A) commits an offence if—
 - (a) A makes or promises payment for the sexual services of a prostitute (B),
 - (b) a third person (C) has engaged in exploitative conduct of a kind likely to induce or encourage B to provide the sexual services for which A has made or promised payment, and
 - (c) C engaged in that conduct for or in the expectation of gain for C or another person (apart from A or B).
- (2) The following are irrelevant—
 - (a) where in the world the sexual services are to be provided and whether those services are provided,
 - (b) whether A is, or ought to be, aware that C has engaged in exploitative conduct.
- (3) C engages in exploitative conduct if—
 - (a) C uses force, threats (whether or not relating to violence) or any other form of coercion, or
 - (b) C practises any form of deception.
- (4) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.]

Eadie QC says "the Court of Protection should be taking NO chances with the criminal law" + quotes research + submitted evidence showing that all women in prostitution are likely to be vulnerable to exploitation, coercion and force.

Research shows it's not possible, says Eadie QC, on an initial conversation to distinguish trafficked and non-trafficked women, or to tell whether women are being

coerced + exploited. Some don't even recognise it themselves. All women in sex-trade are at risk.

Approving a care plan involving a sex worker is "treading down a primrose path" and "sanctioning a course of conduct exposing a care worker and P to the risk of committing a criminal offence" (Eadie QC)

The court's power to make orders is constrained by the principle that it should not be contrary to public policy.

Society has serious concerns about prostitution - there are moral views + increasing recognition that it often involves strong elements of exploitation.

(Eadie QC)

Should a court be sanctioning the use of public resources to organise prostitution? It is tacitly approving an activity that continues to be regarded as a moral minefield and risks reliance on trafficking and modern slavery. (Eadie QC)

Eadie QC is addressing the European Convention on Human Rights.

Does Art 8 (right to private life) mean the state has a positive obligation to support a person such as C to have sexual relations with a prostitute?

No, says Eadie QC.

Article 14 ECHR: non-discrimination

If the court doesn't order support for C to have sex with prostitute it's likely he won't be able to do so whereas a person without his disabilities is. Disability is a strongly protected status

But there is no right to have sexual relations with a prostitute. (Indeed quite the reverse, see. s. 53A SOA)

It's not just C's rights that are at issue -also rights of care workers and those of sex workers, protected under Art 4 ECHR (slavery + forced labour)

Says Eadie QC

Another case where a disabled person's rights are constrained by public policy. Personal autonomy is important but there is no positive right to engage a sex worker as there is no positive right to kill oneself.

<https://publications.parliament.uk/pa/ld200102/ldjudgmt/jd011129/pretty-2.htm>

(Says Eadie QC)

35. If, contrary to my opinion, Mrs Pretty's rights under one or other of the articles are engaged, it would be necessary to examine whether section 2(1) of the 1961 Act is discriminatory. She contends that the section is discriminatory because it prevents the disabled, but not the able-bodied, exercising their right to commit suicide. This argument is in my opinion based on a misconception. The law confers no right to commit suicide. Suicide was always, as a crime, anomalous, since it was the only crime with which no defendant could ever be charged. The main effect of the criminalisation of suicide was to penalise those who attempted to take their own lives and failed, and secondary parties. Suicide itself (and with it attempted suicide) was decriminalised because recognition of the common law offence was not thought to act as a deterrent, because it cast an unwarranted stigma on innocent members of the suicide's family and because it led to the distasteful result that patients recovering in hospital from a failed suicide attempt were prosecuted, in effect, for their lack of success. But while the 1961 Act abrogated the rule of law whereby it was a crime for a person to commit (or attempt to commit) suicide, it conferred no right on anyone to do so. Had that been its object there would have been no justification for penalising by a potentially very long term of imprisonment one who aided, abetted, counselled or procured the exercise or attempted exercise by another of that right. The policy of the law remained firmly adverse to suicide, as section 2(1) makes clear.

Now Victoria Butler Cole QC for C (the autistic man who wants sex with prostitute/sex worker)

She's rather hard to hear - lots of banging by the judges who are closer to mike and her voice is rather soft. Will do my best.



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[@TorButlerCole](#) [@39PublicLaw](#)

[@TorButlerCole](#) [@39PublicLaw](#) Butler-Cole QC begins by explaining that the focus in the COP was on s.39 of the Sexual Offences Act - not s.53A which Eadie QC was addressing in his argument.

- 39 Care workers: causing or inciting sexual activity**
- (1) A person (A) commits an offence if—
 - (a) he intentionally causes or incites another person (B) to engage in an activity,
 - (b) the activity is sexual,
 - (c) B has a mental disorder,
 - (d) A knows or could reasonably be expected to know that B has a mental disorder, and
 - (e) A is involved in B's care in a way that falls within section 42.
 - (2) Where in proceedings for an offence under this section it is proved that the other person had a mental disorder, it is to be taken that the defendant knew or could reasonably have been expected to know that that person had a mental disorder unless sufficient evidence is adduced to raise an issue as to whether he knew or could reasonably have been expected to know it.
 - (3) A person guilty of an offence under this section, if the activity caused or incited involved—
 - (a) penetration of B's anus or vagina,
 - (b) penetration of B's mouth with a person's penis,
 - (c) penetration of a person's anus or vagina with a part of B's body or by B with anything else, or
 - (d) penetration of a person's mouth with B's penis,
 is liable, on conviction on indictment, to imprisonment for a term not exceeding 14 years.
 - (4) Unless subsection (3) applies, a person guilty of an offence under this section is liable—
 - (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
 - (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years.

Butler-Cole raises procedural problem:

It is s.39 that is the subject of appeal - not s.53A which hasn't been addressed in the COP yet and which *would* be only in the event that the CoA upholds the judgment in relation to s.39.

Section 39 SOA cannot be looked at solely through prism of sex work. It's about the actions of carers. It says nothing at all about sex workers.

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Butler-Cole QC says Eadie QC's construction would mean carers providing practical assistance to ppl with mental disorders to support sex with their partners would be acting unlawfully.

The proposed + hypothetical care plan for C is (a) care staff assist C to select a particular sex worker from those available through specialist sex worker agency for ppl with disabilities (presenting choices in format suitable for him) cont/

(b) staff will determine payment required + assist C by accompanying him to cashpoint to help him get relevant amount which C will then keep in an envelope until required (+ he'll then make payment himself) cont/

(c) staff will make sure co-tenant is out of house while C is with sex worker; (d) staff will remain in C's house; (e) staff will work with C to prepare plan for how activity should go in advance; (f) sex worker will be given a doc summarising C's risk profile.

Lunch break - starting again at 2pm.

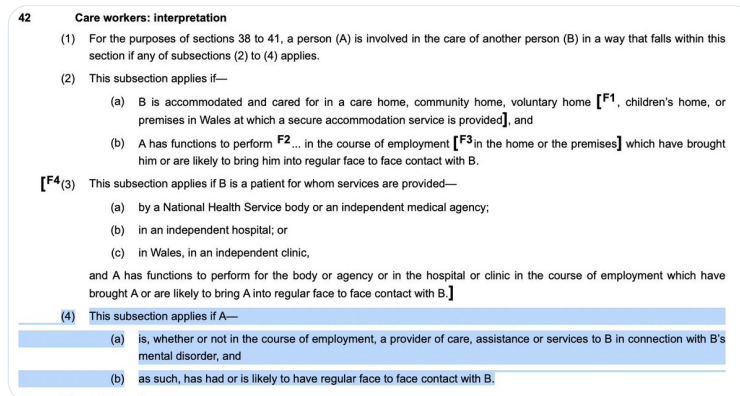
Here's the link:



The Institute of Registered Case Managers is an "interested party" in this case. Butler-Cole QC has just referred to their submission. It's often the case manager who would be responsible for organising access to a sex worker. Their survey found 52% had experience of this.

Court is now addressing the definition of "care workers" - since it's that category of people who cannot 'cause or incite' sexual activity under s. 39.

S.42(4) casts the net very widely. Does it include family members, voluntary workers, Finance Deputy?



"You cannot use your power over people who happen to have a mental disorder to impose what you consider to be morally right" says Butler-Cole QC (counsel for C)

Lady Justice King reflects that "these decisions [about sex for people with disabilities] are made day in, day out. It's just a nervous moment for this particular local authority that has brought this issue to court".

Parishil Patel QC represents the LA
Accept arguments of Butler-Cole QC for C.

The appeal is about the legality of making arrangements for capacitous adults with mental disorder to have sex. It does NOT concern the rights and wrongs of prostitution.



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Patel QC says the words "intentionally cause" have to be understood in context of the Sexual Offences Act which is designed to "criminalise a serious breach of trust".

Sam Karim QC is representing the CCG. Taking a risk-averse position they would not commission a care package including contact between C and a sex worker unless there was no risk of an offence under s. 39 (s.53 not having been contemplated at that time apparently).

The CCG takes a neutral position.

In terms of public policy: Quoting *Stephens v Avery* 1988

"if it is right that there is now no generally-accepted code of sexual morality applying to this case, it would be quite wrong in my judgment for any judge to apply his own personal /cont

... moral views, however strongly held, in deciding the legal rights of the parties. The court's function is to apply the law, not personal prejudice. /cont

Only in a case where there is still a generally accepted moral code can the court refuse to enforce rights in such a way as to offend that generally accepted code." (*Stephens v Avery* 1988)

Eadie QC doing final submission.

Refers to s. 53a as the "elephant sitting in the corner of the room".

Says scheme by Butler-Cole QC to return to CoA later on this is impractical and a waste of resources.

"This ultimately is about whether the COP can use its power to sanction this sort of activity. I say (1) there's an unacceptable risk of criminality + (2) even if there isn't, it's contrary to public policy." (Eadie QC)

And returns to the meaning of "cause" - it's not the "but for" version of cause, but it's "operatively causing" ie. making a more than minimal contribution. That's what care worker would be doing by help C select sex worker, take out money etc. (Eadie QC)

"We are in territory where the offences of s.39 and s.53 are plainly and squarely in the frame. The COP cannot make an order that exposes C or public servants involved in

care plan to those real and significant risks of criminality" (Eadie QC)

Eadie QC returns to s.53A offence as a means of protecting sex workers.

NIA and Women@thewell were joint intervenors whose submission made this point.

NIA supports women exiting prostitution



Women@theWell supports women whose lives are affected by prostitution

watw.org.uk

The hearing is now finished. We await a published judgment.

Here is the earlier judgment by Hayden J

<https://www.bailii.org/ew/cases/EWCOP/2021/25.html>

And the blog by [@AstiHeaven](#) about the hearing in the Court of Protection

