withheld where the individual petitioner suffers no significant prejudice. With respect, denying relief on this basis ignores the broader concerns of environmental Directives, and such an individualist focus seems out of place within a public interest conception of review.

Lastly, *Berkeley* avoids the sorts of rule-of-law concerns that dog discretionary remedialism, and the "doublespeak" in emphasising the importance of preserving the rule of law, while allowing unlawful decisions to stand.

JASON N. E. VARUHAS

THE DAIRY, THE HERDSMAN AND THE GANGMASTER

GANGMASTERS supply workers to certain industries, such as agriculture. It is an offence under section 13 of the Gangmasters (Licensing) Act 2004 (the 2004 Act) to contract with an unlicensed gangmaster for the supply of labour. This offence is one of strict liability, though the defendant is entitled to be acquitted if he can show he exercised due diligence. The recent case of *Moss & Son Ltd. v CPS* [2012] EWHC 3658 (Admin) shows just how harsh an offence this can be.

Moss & Son Ltd. (M&S Ltd.) needed a herdsman for their dairy operation, and entered into a contract with Marden Management Limited (Marden), who sourced one. Marden was not a licensed gangmaster. The contract required M&S Ltd. to pay Marden a fee, out of which the herdsman's wages would be paid. Marden did not pay the herdsman the minimum agricultural wage, which amounted to financial exploitation.

The Crown accepted that the herdsman was treated well by M&S Ltd., and that the company was not aware that he was not being remunerated sufficiently. As noted above, however, that ought not to matter: there is no requirement that the party to the contract knows he is dealing with an unlicensed gangmaster or that the worker is being exploited. There was no attempt by M&S Ltd. to argue due diligence. Instead, the company argued that the prosecution against them, instigated by the Gangmasters Licensing Authority (GLA) and taken over ultimately by the Crown Prosecution Service (CPS), constituted an abuse of process and should have been stayed. The trial judge disagreed, and M&S Ltd. appealed to the Divisional Court.

The abuse of process argument arose because the GLA had adopted a policy on when it would, and would not, decide to prosecute those who contracted for labour with unlicensed gangmasters. Such a policy was needed because it would be too expensive to pursue every person

who committed the offence under the 2004 Act. The policy adopted by the GLA indicated that it was only when a defendant had contributed to the financial exploitation of a worker that he should be prosecuted. In applying this policy, the GLA decided that those who had employed workers supplied by Marden for over a year should be prosecuted. M&S Ltd. argued that – although they had employed the herdsman for over a year – M&S Ltd. had not contributed to his underpayment (the company did not know about it), and thus the GLA should not have decided upon prosecution. The prosecution was thus an abuse of the court process.

It is difficult not to have some sympathy for M&S Ltd., which seems to have been run in a manner that was more feckless than culpable, but the abuse of process argument was doomed to fail. It is very difficult to have a prosecution stayed as an abuse of process solely on the basis that the prosecutor has gone beyond, or against, an adopted prosecutorial policy. M&S Ltd. could not even convince the Divisional Court that the GLA had gone beyond its policy, because – the judges concluded – it was sensible to hold that exploitation of workers would probably be greater where they were working for less than the minimum wage for a sustained period of time. Hence, although arbitrary, the twelve-month limit was not contrary to the GLA's policy.

The Divisional Court could have stopped there, but went further, giving consideration to the circumstances in which a stay should be granted when a prosecutorial policy has been breached. This involved reasserting some basic, and by now well established, points. First, the defendant should raise the argument for a stay of proceedings before the trial judge, rather than institute judicial review of the decision to prosecute. Nevertheless, the same test applies in both cases. This is entirely sensible, as the basis of the defendant's argument is the same in an application for a stay or judicial review: this prosecutorial decision was contrary to an adopted policy. Secondly, proceedings should not be stayed, or a judicial review upheld, simply because a prosecutorial policy was not followed to the letter. As the Court of Appeal explained in *R. v A.* [2012] EWCA Crim 434, [2012] 2 Cr. App. R. 8, three additional points must be borne in mind: (i) prosecutorial decisions are for prosecutors, not the courts; (ii) if the offence is made out on the evidence, the court should be wary of staying proceedings where a decision has been made to instigate them; and (iii) it is open to a prosecutor to refuse to apply her policy in appropriate circumstances. These points are not particularly controversial, given that some flexibility in prosecutorial practice must be allowed to ensure that a policy does not become a vehicle for injustice.

Taking all of the above into account, to be granted a stay of proceedings the defendant must be able to establish that, in going beyond

or against the relevant policy, the prosecutor has abused her discretionary power in such a grave way that the prosecution should be stopped to avoid bringing the court system into disrepute (see *R. v Horseferry Road Magistrates' Court, ex p. Bennett* [1994] 1 A.C. 42).

The decision in *Moss & Sons Ltd.* thus provides further evidence for the view that prosecutorial discretion is well respected by the criminal courts. There were, however, three concerns raised by the court that warrant brief mention. First, there is the matter of who is exercising prosecutorial discretion. The Divisional Court described the deference shown by the courts towards the discretion accorded to institutions such as the CPS as stemming from their independence from government. Doubts were expressed over whether the GLA was sufficiently independent from the executive to merit a similar reluctance to interfere. A "powerful argument" for a "stringent" approach towards prosecutorial decisions taken by manifestations of the executive was recognised (at [28]–[29]).

Although this differentiated approach is entirely defensible, in many cases the CPS will take over the prosecution (indeed, this happened in M&S Ltd.'s case). When it does, the CPS will apply its two-stage prosecution test: is there sufficient evidence to give rise to a realistic prospect of conviction, and is it in the public interest to proceed? If this test is satisfied, the prosecution will be continued. This decision is independent, and so if a case is taken over by the CPS it can be assumed that the courts will be wary of questioning it. All is well, then, but it must be accepted that this is an unnecessarily convoluted process: it would be far easier to have government agencies report potential criminal activity to the CPS (in line with whatever policy those agencies want to invent), and have the CPS make the only decision on whether to institute a prosecution. This system would ensure that the CPS is not swamped with reports of potential criminality (as the relevant agency would sift through them first), and that prosecutorial decisions are made consistently and independently of executive interference (or even the perception of such interference).

The second point raised by the Divisional Court concerns the drafting of prosecution policies. Something has gone very wrong when a court seeks to make "the best sense [it] can" of a prosecution policy (at [19]). Perhaps poor wording is not a terrible problem when a policy is not published (subject to the points made below): no defendants can be disappointed by their attempted reliance on such a policy. A badly drafted policy nevertheless makes it difficult for courts to assess properly an abuse of process argument based on the exercise of prosecutorial discretion.

The final point raised by the Divisional Court concerns access to prosecutorial policies. It is remarkable that neither the trial judge nor the Divisional Court was given access to the full text of the GLA's prosecution policy. As a result, the appellate judges "found it far from easy to give a sensible and reasonable interpretation" to the parts of the policy that were put before them in evidence (at [17]). It is difficult to see what is gained by refusing to let courts see the entire document so that the context of the relevant provisions can be considered. It might equally be questioned why a policy should be kept out of the public domain in the first place, given that it might impact upon a person's potential criminal liability.

The fear might be that, if all prosecutorial policies were disseminated widely, potential defendants might manage to work out how to avoid prosecution through the exploitation of a "loophole". This is not a very compelling argument. As noted above, it is possible for prosecutors to go beyond, or even against, the terms of their policies in some circumstances. Cynically "gaming" a policy, so as to try and escape prosecution, seems exactly the kind of conduct that would justify instituting a prosecution that a policy seems to rule out. Given this point, it is submitted that prosecutors should be more candid about their prosecutorial policies.

FINDLAY STARK

EXTRADITION, THE EUROPEAN ARREST WARRANT AND HUMAN RIGHTS

WHEN – to use the language of the *Daily Mail* – should courts refuse to extradite a person wanted for a crime committed in another country "because of human rights"?

The question is particularly pertinent to extraditions to other EU Member States, where these are now carried out by using the European Arrest Warrant, a summary procedure whereby Member States are in principle obliged to execute an EAW (as the instrument is usually called) unless one of limited grounds of objection is applicable. In recent months, this question has arisen in three interesting cases. At the risk of superficiality, this note will attempt to deal with all of them together.

In the first, *H. (H.) v Deputy Prosecutor of the Italian Republic (Genoa) and F.-K. v Polish Judicial Authority* [2012] UKSC 25, [2012] 3 W.L.R. 90, the human rights objection argued before the UK Supreme Court was, in effect, that "it would be unfair to uproot us and send us off to another country." In the second, *Krolik v Regional Court in Czestochowa, Poland* [2012] EWHC 2357, [2013] 1 W.L.R. 490,