

COMMENT

Peter Ball and Misconduct in a Public Office

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INTRODUCTION¹

On 27 March 2014 the Crown Prosecution Service announced that it had reviewed the evidence gathered by Sussex Police during its investigation into allegations of sexual abuse by Peter Ball, former Bishop of Lewes (1977–1992) and Bishop of Gloucester (1992–1993), and that he would be prosecuted on the following charges:

- i. Misconduct in public office between 1977 and 1992;
- ii. Indecent assault on a boy aged 12 or 13 in 1978;
- iii. Indecent assault on a man aged 19 or 20 between 1980 and 1982.

On the first count he was charged with misconduct by ‘misusing his position in authority to manipulate and prevail upon others for his own sexual gratification’ in relation to 16 young men in their late teens or early twenties. After an initial denial, on 8 September 2015 Ball pleaded guilty to all three charges via video link from Taunton Crown Court to the Old Bailey and on 7 October 2015 was sentenced to 32 months for misconduct in public office and 15 months for the

1 An earlier and very much shorter version of this comment appeared as David Pocklington, ‘CofE bishops and “public office”’, *Law & Religion UK* 10 November 2014, available at <<http://www.lawandreligionuk.com/2014/11/10/cofe-bishops-and-public-office/>>, accessed 8 October 2015. We should like to thank Norman Doe for commenting on this note in draft.

indecent assaults, the sentences to run concurrently.² The Crown Prosecution Service allowed two charges of indecently assaulting two boys in their early teens to lie on the file.³

THE EQUALITY ACT 2010, AS AMENDED

So far as the misconduct charge is concerned, section 2 of the Bishops and Priests (Consecration and Ordination of Women) Measure 2014 amended Schedule 6 to the Equality Act 2010 by adding at the end: '*Bishops* 4. The office of diocesan or suffragan bishop is not a public office'. But the charge brought against Ball seems to contradict that statement.

Section 50(2) of the 2010 Act defines a public office as

- (a) an office or post, appointment to which is made by a member of the executive;
- (b) an office or post, appointment to which is made on the recommendation of, or subject to the approval of, a member of the executive;
- (c) an office or post, appointment to which is made on the recommendation of, or subject to the approval of, the House of Commons, the House of Lords, the National Assembly for Wales or the Scottish Parliament.

Section 52 of the 2010 Act brings into effect Schedule 6, and paragraph 1 of that Schedule specifies those offices or posts that are *not*

a personal or public office insofar as one or more of the provisions mentioned in sub-paragraph (2) . . . applies in relation to the office or post, or . . . would apply in relation to the office or post but for the operation of some other provision of this Act.

Paragraph 1 (and, therefore, the new sub-paragraph 4 inserted by the Bishops and Priests (Consecration and Ordination of Women) Measure 2014) is of general application within the Act and reflects the provisions of paragraphs 2 (political offices) and 3 (honours, etc).

In its report on the draft Measure, the Ecclesiastical Committee explained the purpose of what became section 2 of the Bishops and Priests (Consecration and Ordination of Women) Measure 2014 like this:

- 2 'Retired bishop Peter Ball jailed for sex assaults', *BBC News*, <<http://www.bbc.co.uk/news/uk-england-34466842>>, accessed 8 October 2015.
- 3 On 5 October 2015 the Archbishop of Canterbury announced that he had commissioned an independent review of the way in which the Church of England responded to the case: see 'Archbishop commissions independent review of Peter Ball case', <<https://www.churchofengland.org/media-centre/news/2015/10/archbishop-commissions-independent-review-of-peter-ball-case.aspx>>, accessed 8 October 2015.

Section 2 of the Measure is a clarificatory amendment to the Equality Act 2010 ... designed to make clear that the office of diocesan or suffragan bishop is not subject to sections 50 and 51 of the Equality Act, which are concerned with appointments to certain categories of 'public office'. The reason section 2 is needed is that if those provisions applied, not all the arrangements that the Church intends to introduce would fall within the relevant existing exception under the 2010 Act. It has been included in the Measure with the agreement of the Government Equalities Office.

Paragraph 3 of the Note by the Legal Office summarises the position as follows:

- i. Under section 50 of the Equality Act it was unlawful for a person with power to make an appointment to a 'public office' to discriminate either in making the appointment or in the terms on which such an appointment was offered;
- ii. A 'public office' for that purpose included one 'made on the recommendation of or subject to the approval of a member of the executive';⁴
- iii. It was uncertain whether or not the *post-2008* arrangements for appointing bishops were such that a diocesan bishopric fell within the definition of 'public office' in the Equality Act;
- iv. If diocesan bishoprics *did* fall within that definition, it would not be lawful for the Church of England to create the *expectation* (even though it were not a legal *requirement*) that diocesan bishops would, in certain circumstances, invite other bishops to exercise ministry in parishes that, on grounds of theological conviction, did not wish to receive episcopal oversight from a woman.

The contention was that the definition of 'public office' in section 50 of the Equality Act 2010 did *not* include the office of diocesan or suffragan bishop; but the Church's legal advisers conceded that the matter was not entirely settled and it was therefore considered that, to put the issue beyond doubt, the draft Measure would have to include some provision to make clear that the office of diocesan or suffragan bishop was not subject to sections 50 and 51 of the Act. So, with the agreement of the then Prime Minister's Appointments Secretary and the Government Equality Office, clause 2 was included in the draft Measure for that purpose. However, for the purposes of the present discussion, it still leaves open the question of whether or not a

4 'Women in the episcopate: note by the legal advisers on clause 2 of the draft Bishops and Priests (Consecration and Ordination of Women) Measure', GS Misc 1068, available at <<https://www.churchofengland.org/media/1910562/gsmisc%201068%20-%20clause%202%20note%20from%20the%20legal%20advisers.pdf>>, accessed 8 October 2015.

suffragan bishopric was a ‘public office’ between 1977 and 1992, when the activities that led to the charge of misconduct took place.

Furthermore, on the more general issue about inviting other bishops from outside a diocese to exercise ministry, the application of section 50(2) of the Equality Act is unclear. Diocesan bishops are appointed by the Queen, ‘on the recommendation of’ the Prime Minister, so their offices certainly satisfy the test in section 50(2)(b). But diocesan bishops are not members of the executive (or if they are, it is certainly news to us); so if a diocesan merely invites another bishop to exercise ministry in his or her diocese, in what way could that invitation constitute either an executive appointment or one made by executive recommendation? Nor is it clear that it would in any case be an invitation to assume an identifiable ‘office’ beyond that which the invitee already held in his or her own right as a bishop in the Church.

THE COMMON LAW OFFENCE

Misconduct in public office is an offence at common law triable only on indictment and carrying a maximum sentence of life imprisonment.⁵ The offence is confined to those who are public office-holders and is committed when the office-holder acts (or fails to act) in a way that constitutes a breach of the duties of that office.

According to the Crown Prosecution Service (CPS)’s current ‘Guidance’,

The offence is committed when a public officer acting as such wilfully neglects to perform his duty and/or wilfully misconducts himself to such a degree as to amount to an abuse of the public’s trust in the office holder without reasonable excuse or justification.⁶

The ‘Guidance’ also reminds us that the Court of Appeal has made it clear that the offence should be ‘strictly confined’.⁷ However, whether or not an offence has, in fact, been committed falls to be determined on the facts.

Regarding the definition of a ‘public officer’, the ‘Guidance’ concedes that the courts have been reluctant to provide a detailed definition:

5 For a recent review of the case law in a range of common law jurisdictions, see C Davids and M McMahon, ‘Police misconduct as a breach of public trust: the offence of misconduct in public office’, (2014) 19:1 *Deakin Law Review* 89–121.

6 Crown Prosecution Service, ‘Misconduct in public office: legal guidance’, available at <http://www.cps.gov.uk/legal/l_to_o/misconduct_in_public_office/#a01> accessed 8 October 2015, quoting *Attorney General’s Reference No. 3 of 2003* [2004] EWCA Crim 868 at para *per* Pill LJ. See also *R v Chapman & ors* [2015] EWCA Crim 539 at para 18, in which Lord Thomas CJ quoted with approval Sir Anthony Mason’s *dictum* in *Shum Kwok Sher* [2002] 5 HKFAR 381 that ‘The threshold is a high one requiring conduct so far below acceptable standards as to amount to an abuse of the public’s trust in the office holder. A mistake, even a serious one, will not suffice.’

7 *Attorney General’s Reference No 3 of 2003* at para 62.

The case-law contains an element of circularity, in that the cases tend to define a public officer as a person who carries out a public duty or has an office of trust. What may constitute a public duty or an office of trust must therefore be inferred from the facts of particular cases . . . It does not seem that the person concerned must be the holder of an ‘office’ in a narrow or technical sense. The authorities suggest that it is the nature of the duties and the level of public trust involved that are relevant, rather than the manner or nature of appointment.

So, on the facts of the present case:

- i. The position of a bishop is presumably regarded as ‘an office’ for the purposes of the common law offence because Church of England bishops and clergy with freehold tenure are office-holders rather than employees with employment rights;⁸
- ii. Bishops carry out a large part of their duties in public rather than in private; and
- iii. The office is one of trust, both in the sense that the office of bishop usually carries with it associated formal fiduciary duties and in the non-technical meaning of the word.

As to the third point, in *Maga*, for example, the Court of Appeal held the Trustees of the Birmingham Archdiocese vicariously liable for sexual assaults on an underage boy by one of their priests even though the victim was not even a Roman Catholic, let alone a member of the miscreant cleric’s congregation. ‘A priest’ said the Court, ‘has a special role, which involves trust and responsibility in a more general way even than a teacher, a doctor, or a nurse.’⁹

As to the circumstances in which the common law offence should be prosecuted, the House of Lords has held that ‘good practice and respect for the primacy of statute . . . require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise’.¹⁰ The CPS ‘Guidance’ states that the charge of misconduct in public office should be considered only where:

- i. There is no suitable statutory offence for a piece of serious misconduct (such as a serious breach of or neglect of a public duty *that is not in itself a criminal offence*);

8 See, for example, *Sharpe v The Bishop of Worcester* [2015] EWCA Civ 399.

9 *Maga v Trustees of the Birmingham Archdiocese of the Roman Catholic Church* [2010] EWCA Civ 256 at para 45 *per* Lord Neuberger MR.

10 *R v Rimmington* [2005] UKHL 63 at para 30 *per* Lord Bingham.

- ii. There was serious misconduct or a deliberate failure to perform a duty owed to the public, with serious potential or actual consequences for the public;
- iii. The facts are so serious that the court's sentencing powers would otherwise be inadequate.¹¹

In the present case, the addition of the misconduct charge to the two charges of indecent assault was presumably regarded as sufficient 'good reason' because the current sentencing guidelines in cases of sexual assault provide a starting point of imprisonment for five years if the victim is under 13, with a sentencing range of four to eight years, as opposed to the maximum life sentence for the common law offence of misconduct.¹² Moreover, as Wilkie J pointed out in sentencing Ball on the misconduct count, he had to have regard to the fact that, because the victims in respect of whom the misconduct charge had been brought were all adults and what occurred had been consensual, Ball's offending *as reflected in that count* did not amount to the commission of any substantive sexual offence.¹³ However, Wilkie J appeared to be in no doubt that it was because of Ball's position in the Church that he had been able to exploit his victims:

Using the authority of the public office of a Bishop of the Church of England, you used this scheme to cause certain young persons so to fall under your influence and tutelage that you were able to persuade them to stand naked before you or to join you in being naked, on occasions in a place of worship, in front of the alter [sic].¹⁴

CONCLUSION

So is 'the office of diocesan or suffragan bishop' a public office for the purposes of misconduct or is it not? If any conclusion from the prosecution of Peter Ball is possible at all, it would appear to be this: that a diocesan or suffragan bishop in the Church of England does *not* occupy a 'public office' for the purposes of the Equality Act 2010, as amended, but *does* appear to occupy a 'public office' for the purposes of criminal prosecution under the common law. Certainly, Wilkie J seemed in no doubt about the latter.¹⁵

11 Emphasis added.

12 Crown Prosecution Service, 'S3: sexual assault' in *Sentencing Manual* (updated January 2012), available at <http://www.cps.gov.uk/legal/s_to_u/sentencing_manual/s3_sexual_assault/>, accessed 8 October 2015.

13 *R v Peter Ball (Sentencing Remarks)* [2015] Central Criminal Court at para 17, available at <<https://www.judiciary.gov.uk/wp-content/uploads/2015/10/r-v-ball-sentencing.pdf>>, accessed 8 October 2015.

14 *Ibid* at para 8, emphasis added.

15 *Ibid* at paras 4 and 8.

Since Ball pleaded guilty to the misconduct charge, the precise reach of the criminal law in this area was not tested – though it should be noted that his sentence on the misconduct charge was heavier than his sentence for the separate counts of indecent assault. The case does, however, raise an issue about the precise scope of the offence, given that the impugned conduct need not be criminal in order to attract the charge.

For example, could there be circumstances in which flagrant heterosexual adultery by a bishop (or, for that matter, by a priest or deacon) might constitute criminal ‘misconduct in public office’, given that it would be a clear breach of ecclesiastical law, though not of civil law? Presumably not, in normal circumstances. But what if the other party was, for example, in recovery from some personal tragedy such as the death of a spouse or a child or experiencing some kind of mental instability?¹⁶ Moreover, given that the CPS ‘Guidance’ admits that ‘the cases tend to define a public officer as a person who carries out a public duty or has an office of trust’, might the offence extend beyond senior clerics of the Church of England: for example, to bishops of the Church in Wales or (referring back to *Maga*) of the Roman Catholic Church?

Perhaps those questions will be resolved by the Law Commission for England and Wales, which included a review of the offence in its 11th programme of reform and aims to produce a final report with recommendations in summer 2016. The Commission identified a series of problems with the current law at the outset:

- i. There is significant difficulty in identifying who is, and is not, a public office-holder. Since this is a core element of the offence it is a fundamental failing;
- ii. There is a need for clarification as to the fault element of the offence. It is unclear whether proof of wilfulness is sufficient in all cases of misconduct in public office, or whether some additional form of fault is required in particular cases;
- iii. The offence requires a breach of duty, but it is unclear whether the duty breached needs to be integral to the state function(s), which cause the person to be treated as a public office-holder;
- iv. The assessment of when wrongdoing is serious enough to amount to an ‘abuse of the public’s trust’ is a very difficult one for investigators, prosecutors and juries to make. Again, this is a fundamental element of the offence;

16 See, for example, *R v Quach* [2010] VSCA 106; (2010) 27 VR 310, in the Court of Appeal of Victoria, which concerned a charge of misconduct in public office involving a police officer who had allegedly used his position to take sexual advantage of a woman who suffered from bipolar disorder; *R v Fletcher* [2012] 1 CR APP R S 62, in which the court upheld the sentence on a police officer who had had sexual intercourse with a vulnerable woman after being directed to visit her house in the course of his duties.

- v. It is unclear to what extent general defences of reasonable excuse and lawful justification operate in respect of misconduct in public office, as opposed to amounting to factors that result in the wrongdoing being assessed as less serious;
- vi. The question of who may be prosecuted for acts of misconduct committed wholly, or in part, abroad, depends primarily on the status of the public office-holder, not his or her function.¹⁷

On 29 January 2016 the Commission published a background paper, *Misconduct in Public Office: Issues Paper 1 – The Current Law*,¹⁸ in which it identified a number of problems with the offence:

- i. ‘Public office’ lacks clear definition yet is a critical element of the offence. This ambiguity generates significant difficulties in interpreting and applying the offence;
- ii. The types of duty that may qualify someone to be a public office-holder are ill-defined. Whether it is essential to prove a breach of those particular duties is also unclear from the case law;
- iii. An ‘abuse of the public’s trust’ is crucial in acting as a threshold element of the offence, but is so vague that it is difficult for investigators, prosecutors and juries to apply;
- iv. The fault element that must be proved for the offence differs depending on the circumstances, which is an unusual and unprincipled position;
- v. Although ‘without reasonable excuse or justification’ appears as an element of the offence, it is unclear whether it operates as a free-standing defence or as a definitional element of the offence.

Responses to the questions in the background paper were sought by 20 March 2016. The second phase of consultation was to begin later in 2016 with the publication of a paper exploring options for reform. The Commission’s intention is to publish a final report in 2017.

Finally, prior to the sentencing hearing on 7 October 2015, four of Ball’s victims announced that they had begun legal proceedings against the Diocese of Chichester – presumably with *Maga* in mind.

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17 Law Commission, ‘Misconduct in public office: current project status’, <<http://www.lawcom.gov.uk/project/misconduct-in-public-office/>>, accessed 20 December 2015.

18 Available at <http://www.lawcom.gov.uk/wp-content/uploads/2016/01/misconduct_in_public_office_issues-1.pdf>, accessed 30 January 2016.