Judicial Communications Office

31 May 2024

COURT DECLARES LEGISLATION ON SEXUAL OFFENCES SUSPECT ANONYMITY ARE NOT LAW

Summary of Judgment

Mr Justice Humphreys, sitting in the High Court in Belfast, today made a declaration that sections 12 to 16 of the Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022 are not law since they are outside the legislative competence of the Northern Ireland Assembly as they are incompatible with the article 10 rights of the media organisations who brought the challenge.

The Justice (Sexual Offences and Trafficking Victims) Act (Northern Ireland) 2022 ("the 2022 Act")

Sections 12 to 16 of the 2022 Act create a statutory prohibition on the publication of any matter likely to lead to members of the public to identify a suspect in a sexual offence when the allegation has been made to the police or the police have taken any step to investigate whether the suspect has committed such an offence. The prohibition only applies pre-charge but continues for the suspect's lifetime and for 25 years thereafter. It applies to allegations made or steps taken both before and after 28 September 2023 (when the provisions were enacted).

The prohibition may be revoked or modified on application to the magistrates' court, however, during the suspect's lifetime such an application can only be made by the suspect himself or the Chief Constable of the PSNI. Following death, this is expanded to include family members of the suspect and persons interested in publishing matters relating to the suspect. The judge considering such an application may make an order if satisfied it would be in the interests of justice or the public interest. The 2022 Act makes it a criminal offence to publish any matter in contravention of these provisions which is punishable by a term of imprisonment of up to six months and/or a fine of up to £5,000.

The 2022 Act also provides, at sections 8 to 11, for an extension to the duration of the anonymity enjoyed by victims of sexual offences from a lifetime period to lifetime plus 25 years after death.

The legislative history

Statutory anonymity for both complainants and those accused of having committed a rape offence was introduced by the Sexual Offences (Northern Ireland) Order 1978. Anonymity for the accused ceased on conviction. It was open to the accused or a co-accused to apply to have publication authorised, or the court could disapply the prohibition where it imposed a substantial and unreasonable restriction on reporting, and it was in the public interest to remove it. These provisions were repealed by the Criminal Justice (Northern Ireland) Order 1994 and from then on there was no statutory anonymity for suspects in rape cases.

In 2019, Sir John Gillen published his Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland" ('the Gillen Review'). The report noted the dangers of public shaming, the impact on the presumption of innocence and the extraordinary stigma which attaches to being accused of sexual offences and concluded that an extremely strong case had been made for

the introduction of legislation "to extend a degree of statutory anonymity to persons being investigated until the time that a charge is brought." It also stated that there was a need for a new law to make it a criminal offence to breach anonymity until charges are brought unless in exceptional circumstances in the public interest. The relevant recommendations of the report were as follows:

- No change in the current law concerning publication of the identity of the accused post charge. The identity of the accused should be anonymised pre-charge and the accused should have the right to apply for a judge-alone trial in the rare circumstances where the judge considers it to be in the interests of justice (key recommendation [10]).
- Anonymity of complainants shall be made permanent so that it applies even after death (recommendation [21]).
- There should be statutory regulation to prohibit the publication of the identity of those being investigated for serious sexual offences until they are charged (recommendation [159].

The Justice (Sexual Offences and Trafficking Victims) Bill ("the Bill"), together with its Explanatory and Financial Memorandum (EEFM") contained the clauses which became sections 12 to 16 of the Act. The Bill was considered by the Committee for Justice ('the Committee') on 9 September 2021. The Committee asked officials from the Department of Justice ("the Department") questions about why anonymity was being granted for complainants/victims until 25 years after their death. It was explained that this was as the result of legal advice that an indefinite period would not have been proportionate. The issue of the provision relating to the anonymity of suspects was not the subject of discussion or debate.

In moving the Bill before the Assembly on 13 September 2021, the Minister for Justice reiterated that the provisions were intended to implement recommendations from the Gillen Review, including providing for anonymity of suspects up to the point of charge. She stated that "anonymity for suspects who are investigated but not subsequently charged is being placed on a par with that of victims." The Minister explained the rationale for suspect anonymity was in line with the Gillen Review and outlined the circumstances in which the prohibition could be set aside. There was no further discussion of the provisions relating to suspect anonymity as the Bill progressed through the Assembly and Royal Assent was received on 27 April 2022.

The Bill's EFM addressed the implications of ECHR only as regards the extension of anonymity for victims. It explained that permanent anonymity may have caused breach of the ECHR and therefore the period of life plus 25 years after death was chosen. It added that a similar limit had been applied to the provisions providing for the anonymity of a suspect in a sexual offence case who has not been subsequently charged. The EFM also contained the statement from the Minister of Justice that in her opinion the Bill would be within the legislative competence of the Northern Ireland Assembly.

The challenge

Article 10 ECHR confers a qualified right to the freedom of expression. Interference can only be justified when it is prescribed by law, in pursuit of a legitimate aim, and proportionate. In paras [67] – [72] the court cited decisions of the European Court of Human Rights ("ECtHR") where it has emphasised the important role played by media outlets in a democratic society. By section 21(1) of the Human Rights Act 1998 ("HRA), an Act of the Northern Ireland Assembly is subordinate legislation and therefore can be struck down in the event of incompatibility with the ECHR.

Section 6 of the Northern Ireland Act 1998 ("NIA") provides that a provision of an Act is not law if it is outside the legislative competence of the Assembly and that a provision is outside that competence if it is incompatible with any of the ECHR rights.

The applicants, a number of local and national media organisations, contended that the provisions as enacted went significantly beyond the Gillen Review's recommendations for the following reasons:

- There is no defence of public interest to any prosecution for breach of the prohibition.
- Post death anonymity for suspects was not recommended by the report.
- There is no provision for media organisations or others to apply to the court, during the suspect's lifetime, for modification or revocation of the prohibition.
- The report did not recommend that anonymity would apply retrospectively.
- The report did not recommend that the prohibition would have extra-territorial effect.

In response, the Department's Head of Criminal Policy Unit said the rationale behind the impugned provisions of the 2022 Act was to seek to protect a suspect from reputational damage and other potential impacts, including violence or a threat to life, which may arise as a consequence of identification. The rights protected include those arising under articles 2, 3, 6 and 8 ECHR and those of family members. The witness said it was considered necessary to draw a distinction between those who can apply to modify or revoke the prohibition before the death of the suspect and who can apply thereafter to reflect the very different circumstances that apply in those varying circumstances. She said that "to provide for applications from anyone other than the suspect or the police while the suspect was still alive would run contrary to the aims of key recommendation 10 of the [Gillen Review]". In general, the position was that "anonymity of those suspects not charged was aligned with that provided for the victim of a sexual offence". The court noted that this rationale, as presented in evidence, did not feature in any of the materials presented to the Committee or the Assembly.

The applicants contended that a less intrusive measure could have been used and that a fair balance has not been struck between competing rights. In England & Wales, a person under criminal investigation has, as a general rule, a reasonable expectation of privacy in respect of information relating to that investigation. It is open to media organisations to argue that the article 10 right of freedom of expression should, in a public interest case, outweigh the article 8 rights to privacy of a suspect. In Scotland, neither complainants nor suspects in sex cases enjoy any statutory right to anonymity, albeit legislative proposals have been brought forward in respect of complainants. In the Republic of Ireland, an accused person in a rape case has statutory anonymity post-charge and breach of this is a criminal offence, however, there is a public interest exception and the right ceases upon conviction. The court said that it is only in Northern Ireland that the publication of material which identifies a suspect in a sexual offence investigation may lead to criminal liability. The court considered the absence of a 'public interest' defence to a prosecution under section 16 of the 2022 Act gives rise to concern.

The lack of a public interest defence

The applicants' first ground of challenge was that the imposition of a criminal sanction on public interest journalism, and the chilling effect occasioned thereby, represents an interference with an article 10 right which requires the most anxious scrutiny. The court commented:

> "In very many cases, the publication of the name of an individual suspected of involvement in a sexual offence will not be a matter of public interest. However, in cases where it is, editors and broadcasters ought not to be exposed to the threat of prosecution and conviction without an opportunity to make this case. Interference with the article 10 rights of journalists in this fashion can only serve to restrict the carrying out of important public interest investigations of the nature outlined by the applicants in their evidence. … Restrictions on the exercise of freedom of expression in this context must be strictly construed and the rationale for same convincingly established. The rationale put forward by the respondent falls far short of this threshold. The failure to recognise the category of case where public interest journalism is concerned means that a fair balance between competing rights has not been struck."

The exclusion of the media as a 'relevant person'

The second aspect of the challenge related to the inability of any media organisation or interested person to apply during the suspect's lifetime to have the anonymity prohibition modified or removed. The court said it seemed "entirely anomalous that such a right exists in respect of complainants … but not in relation to suspects". It said this area of fundamental difference was not articulated or explained when the Bill was being considered in the Assembly. In evidence, the Department asserted that it was "considered necessary to draw a distinction between who can apply … before the death of the suspect and who can apply thereafter to reflect the very different circumstances that apply in those varying circumstances" but the court said it was unclear as to why those different circumstances ought to prohibit a media organisation from making an application to the court, particularly when this is permitted in other contexts:

> "The claim, put forward in evidence, but not made at any stage during the Assembly or Committee hearings, that allowing application from anyone other than the suspect or police during the suspect's lifetime "would run contrary to the aims of key recommendation 10" is quite wrong. There is nothing in the Gillen Review which supports the contention that only the suspect or the police ought to be able to make such applications. Indeed, in the statutory regime cited in the report relating to restrictions on the reporting of alleged offences by teachers … provides for a public interest exception on application to the court [which can be] made by "any person"."

It was speculatively argued that media organisations or others could attempt to persuade the police to make an application to the court or that, in certain cases, the interests of the police and the media may coincide. The court, however, said this argument failed to recognise that the right of freedom of expression enshrined in article 10 is conferred on everyone and its exercise is not to be determined by agents of the state such as the police except in clearly defined circumstances; any interference with the right entails a risk of obstructing or paralysing future media coverage; in media reporting, time may be of the essence; and there may be cases where the interests of the media and the police do not coincide, for instance, the allegations may relate to sexual offences allegedly committed by police officers or may be suggestive of a want of proper police investigation. In such cases it would be entirely inappropriate for media outlets to be obliged to approach the police in an effort to have the prohibition removed.

The court said that while the explanations for the statutory provisions relating to the presumption of innocence, the harm caused to reputations by identification and the jigsaw identification of

victims are all important, none serve to explain why the media ought not, in appropriate public interest circumstances, be entitled to apply to the court to have the prohibition modified or revoked. It said it was evident that the consideration of this issue during the Bill's passage into law was "manifestly lacking". If the absence of any ability on the part of the media or others to apply to the court, on public interest grounds, had been brought to the attention of legislators, and subjected to analysis and consideration, then the court said its approach may differ. However, on the evidence in this case, no such analysis was undertaken. Furthermore, it said this must be seen in the context of the importance of the article 10 right to freedom of expression, particularly in the context of public interest journalism:

> "If a right existed for any person to apply to the court pre-emptively to have the prohibition modified or revoked during the suspect's lifetime, on public interest grounds, then this may impact on whether, in the exercise of fair balance, a public interest defence to any criminal charge should exist. In this legislative scheme, however, neither of these means of protecting public interest journalism exists. There has been disproportionate interference with the article 10 rights of the applicants by: (i) Criminalising publication without recognising any public interest defence; and (ii) Failing to provide for a process by which media organisations may apply to the court to have the prohibition on publication modified or revoked on public interest grounds."

For ab ante challenges such as this to succeed the court must be satisfied that the disproportionate interference will occur in "all or almost all cases." The relevant category of cases under consideration in this case is those where there is a public interest in publishing the name of a living suspect. The court said the fact that, in the preponderance of cases, the media will not seek to name a suspect in a sexual offence investigation is not relevant to the analysis: "The blanket nature of the prohibition means that the prohibition will occur in all or almost all public interest cases. The applicants' case on proportionality therefore succeeds."

Retrospectivity

The third ground of challenge related to the retrospectivity of the Act. The legislation does not change what the law was in the past but is retrospective in the narrow sense that it creates different outcomes in respect of an event in the past. Thus, prior to 28 September 2023, it was not a crime to identify a suspect in a sexual offences investigation which occurred in 2022. Post that date, however, it becomes a crime. The court said that such limited retrospectivity does not offend any legal principle or upset the fair balance in a proportionality exercise:

> "The effect of the law is clear and those impacted by it will modify their behaviour accordingly. No one will be subject to criminal sanction by reason of a publication which occurred prior to the Act coming into force. This aspect of the applicants' challenge is not made out."

In accordance with the law

The issue of whether a measure is "in accordance with the law" is a binary one with no question of degree or margin of appreciation. If legislation fails the legality test, then it is incompatible with ECHR. The UKSC has explained that to be "in accordance with law", legislation must be accessible, and its effects must be foreseeable. It must be sufficiently precise to provide safeguards against arbitrariness. This, in turn, requires that there are adequate safeguards to ensure that the

proportionality of the interference with the ECHR right can be adequately examined. The court said that under the provisions of the 2022 Act, media organisations have no access to the court to test whether the interference with the article 10 right in any given situation is disproportionate and therefore unlawful:

> "There is no public interest defence, nor is any media organisation able to apply to the court, during the suspect's lifetime, for modification or revocation of the prohibition. There is no role for the court, or any other effective remedy, to enable the article 10 rights of the media to be protected. The blanket ban on publication means that no court can carry out the balancing act between the ECHR rights of the suspect and the article 10 rights of the publisher. There are no safeguards provided which enable proportionality to be examined. The legislative provisions therefore fall at this hurdle – they are not "in accordance with law.""

The common law challenge

The applicants also pursued a claim based on an alleged lack of procedural fairness arising out of the consultation process which led to the 2022 Act. The complaint was that the Department failed to put in place any targeted or specialist consultation and that the media in general ought to have been consulted, rather than merely the criminal justice partners. The court said any duty could only arise if the applicants established that a failure to consult would be "conspicuously unfair." It commented that the Gillen Review revealed that there was extensive engagement with the media and many of its proposals were subject to comment by editors and journalists. In light of this, the Department made a decision not to consult widely on the draft legislation. The court noted that Committee reports and Assembly debates are publicly available and, if any media representative wished to do so, it could have made representations publicly or privately. There was also a Call for Evidence seeking written submissions and if any media organisation wished to engage on the content of the draft legislation, it had every opportunity to do so. The court concluded that it cannot be said that any lack of consultation gave rise to conspicuous unfairness.

Summary and conclusions

The court found that in two significant respects the 2022 Act fails to strike a fair balance between the rights of suspects and those of the applicants. It said that by enacting law which failed to provide a mechanism whereby the article 10 rights of media organisations, in the pursuit of public interest journalism, could be protected, the legislation is not in accordance with law and the Northern Ireland Assembly acted outwith the margin of appreciation afforded to it in this field. The court arrived at these findings for the following reasons:

- Public interest journalism serves a vital role in any democratic society. The role of the press as watchdog, and the role of journalists in facilitating and prompting police investigations is fully evidenced.
- The courts, both domestically and in Europe, have recognised the particular protection which must be accorded to the right of freedom of expression of journalists and the media. Any interference must be carefully scrutinised and be capable of justification by the state in the limited circumstances recognised by article 10(2) ECHR.
- There were clear shortcomings in the consideration of the article 10 rights of organisations such as the applicants throughout the legislative process. There was no debate around the

issue of the public interest, relevant to the anonymity of suspects, nor any consideration of the need for a fair balance of rights.

- The consideration of the role of ECHR rights was limited to the question of the duration of the anonymity of victims/complainants. The advice received in this regard was transplanted into the area of suspect anonymity without proper recognition of the different interests in play.
- The ex post facto rationale offered by the Department did not feature in any contemporaneous debate or discussion and was, in any event, unconvincing since it failed to recognise that the Gillen Review itself referenced situations in which suspect anonymity may have to give way to the public interest.
- The degree of deference which ought to be shown to the legislature on this issue must therefore be limited, both because of the lack of proper debate and scrutiny but also because of the importance attached to the article 10 right in this context.
- The statutory provisions represent a disproportionate interference by reason of the criminalisation of publication in the absence of a public interest defence and by reason of the lack of an ability on the part of the media to apply to the court to have the prohibition on publication modified or revoked on public interest grounds. A fair balance has not been struck and less intrusive measures could have been used to achieve the legitimate aim of the legislation.
- The absence of proper safeguards in the form of scrutiny by the court of the public interest renders the provisions of the Act not in accordance with law.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://www.judiciaryni.uk/).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Lady Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk