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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

THE QUEEN

v

GERARD ROBERT SMITH

Before Kerr LCJ, Campbell LJ and Sheil LJ

KERR LCJ

Introduction

[1] This is an application by Gerard Robert Smith for leave to appeal against his conviction of two offences of indecent assault contrary to section 52 of the Offences against the Person Act 1861 and for leave to have time extended within which the application might be made. The applications were heard on 19 June 2006 and on that date we dismissed both applications and indicated that we would give our reasons later. In this judgment we now provide those reasons.

Factual Background

[2] The applicant was born on 17 May 1972. In March 2003, he was tried before His Honour Judge Markey QC and a jury at Belfast Crown Court on ten counts of sexual offences committed against his cousin whom we shall refer to as the complainant. On 6 March 2003, the applicant was convicted by a jury on two counts of indecent assault. These related to incidents alleged to have occurred in the period from 1987 to 1989, when the applicant was between 14 and 17 years old and the complainant was between 9 and 12 years of age.

[3] On 3 April 2003, Judge Markey sentenced the applicant to two years' imprisonment (one year on each count of indecent assault to run consecutively). The judge ordered that the applicant's release from imprisonment should be on licence under article 26 of the Criminal Justice (Northern Ireland) Order 1996. He was discharged from prison on 5 March 2004 and the period of supervision on licence ended on 5 March 2005.

[4] On 12 January 2006, as required by section 5(1) of the Human Rights Act 1998 and rule 20A of the Criminal Appeal (Northern Ireland) Rules 1968, this court notified the Secretary of State for Northern Ireland that the applicant had sought a declaration of incompatibility under section 4 of HRA in relation to section 1 of the Criminal Law Amendment Act (Northern Ireland) 1923 (as amended) and that in consequence we would consider the compatibility of that provision with the applicant's convention rights. By notice dated 12 January 2006, pursuant to rule 20B of the 1968 Rules, the Secretary of State notified the court that he wished to be joined as a party to the proceedings. He was duly made a party and was represented at the hearing by Mr McCloskey QC.

Statutory Background

The Offences against the Person Act 1861

[5] The applicant was convicted of two counts of indecent assault on a female under the age of 17, contrary to section 52 of the Offences Against the Person Act 1861 which provides: -

> "Whosoever shall be convicted of any indecent assault upon any female shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding ten years or to be fined or both".

[6] The offences in the present case occurred before 3 October 1989 when, by virtue of article 12 of the Treatment of Offenders (Northern Ireland) Order 1989, the maximum penalty for offences of this nature was increased from two to ten years' imprisonment. The longest period of imprisonment to which the applicant could be sentenced was, therefore, two years.

Criminal Law Amendment Act (Northern Ireland) 1923 (as amended)

[7] The provision in respect of which the applicant sought a declaration of incompatibility was section 1 of the 1923 Act which provides: -

> "*Consent of young person to be no defence*

> It shall be no defence to a charge or indictment for an indecent assault on a child or young person under the age of seventeen to prove that he or she consented to the act of indecency".

Human Rights Act 1998

[8] Section 6(1) of HRA provides that it is unlawful for a public authority to act in a way which is incompatible with a convention right. If an individual makes a claim that this has occurred, section 7 of the Act imposes a requirement that he show that he is or would be a victim of the unlawful act: -

> "7. - (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-
>
> (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or
>
> (b) rely on the Convention right or rights concerned in any legal proceedings,
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> but only if he is (or would be) a victim of the unlawful act".

European Convention on Human Rights

[9] Counsel for the applicant, Mr Brian Kennedy QC, advanced the argument that the non-availability of the defence of consent in respect of indecent assault breached the applicant's rights under articles 6 and 8 of the ECHR. Articles 6(1) and 8 provide: -

> "Article 6
>
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…
>
> …..

> Article 8
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

The United Nations Convention on the Rights of the Child

[10] The applicant also contended that the law and procedure governing his trial was in breach of articles 40(1) and 40 (3) of the UNCRC which provide: -

> "1. State Parties recognise the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
>
> …..
>
> 3. State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular…".

The application for leave to appeal

[11] The applicant initiated judicial review proceedings against the Secretary of State in respect of a condition imposed on his licence and against the North and West Social Services Trust in relation to a recommendation made concerning his place of residence. In the course of those proceedings, his counsel identified the potential grounds of appeal that now form the basis of

the present application. The period in which an application for leave to appeal might be made had already elapsed and it was therefore necessary in these proceedings for the applicant to apply to have time extended.

[12] The grounds of appeal were that the jury's verdict on the counts on which the applicant was convicted was based on a law and procedure that was inconsistent with his right to a fair trial, in that the defence of consent was not available to him and that the law on the matter of consent permitted no consideration of the fact that the accused himself was a minor at the time of the alleged offences.

The applicant's arguments

[13] Mr Kennedy referred to the Sexual Offences Act 2003 in England and Wales which introduced a new offence of sexual assault where the absence of consent was an element of the offence, irrespective of the age of the complainant. Sections 9 to 12 of the 2003 Act provide for new child sex offences committed by adults over eighteen years of age, whereas section 13 makes provision for offences committed by persons less than 18 years of age. Although (by virtue of section 13 (1)) such a person shall commit an offence if he does anything which would be an offence under any of sections 9 to 12 if he were aged 18, the maximum penalties that may be imposed on a person of less than 18 are lower than for the adult offences. It was argued that section 13 of the 2003 Act thereby made special provision for child sex offences committed by children or young persons. This was, said Mr Kennedy, clearly an attempt to differentiate between adult and child offenders in terms of their respective levels of culpability. This change in the law in England and Wales recognised the particular status of young persons who committed such offences. The law in that jurisdiction no longer held the child to adult standards whereas in Northern Ireland, a young person was required to adhere to the same standards as were expected of an adult.

[14] Counsel for the applicant informed the court that, on a number of occasions in his summing up, the learned trial judge explained that a person under seventeen years of age in Northern Ireland could not consent to indecent assault. This accurately reflected the state of the law before incorporation of the European Convention on Human Rights and Fundamental Freedoms into domestic law but the logic of that legal position was that two young persons who engaged in consensual sexual behaviour amounting to indecent assault would both be criminally liable even if there was no exploitative behaviour on either part. This was because the law made no allowance in terms of criminal liability for the age of the offender. That position contravened the convention.

[15] It was submitted that if the 2003 Act applied to Northern Ireland it would have been necessary for the Crown to prove the absence of consent even if it

had not been alleged by the defendant that the complainant had given her consent. The absence of such a requirement in the law of Northern Ireland rendered it incompatible with articles 6 and 8 of ECHR and article 40(1) of the UNCRC.

[16] Mr Kennedy accepted that the applicant had not suggested at any time that any sexual behaviour between the complainant and himself was consensual. His defence always had been one of complete denial that the behaviour had taken place. His stance on that remained as at trial. He continued to deny that any sexual behaviour had taken place between them. On that account, counsel conceded that the present case "did not present the strongest facts" on which the alleged deficiency in the current law might be challenged. It was submitted, however, that the applicant was a victim for the purposes of section 7 of HRA because he had been deprived of the benefit - available to a defendant charged with the same offence in England and Wales – of requiring the prosecution to prove that there had been an absence of consent.

[17] Moreover, Mr Kennedy argued, the possibility of any alleged behaviour between the applicant and the complainant having been consensual was not entirely fanciful given their respective ages between 1985 and 1990. The jury had acquitted the applicant on a number of counts and disagreed on others. Because of the nature of the jury's verdict, it was impossible to determine the basis on which it had reached its decision. The possibility could not be discounted that the jury had accepted the complainant's evidence on the two counts but formed a view that there was a reasonable possibility the behaviour had been consensual and convicted in defiance of the direction that consent was irrelevant.

[18] Finally, it was submitted that the case gave rise to a matter of considerable public importance and, even if the court was not prepared to find that the conviction was unsafe, the applicant invited the court to express a view on the present state of the law in Northern Ireland in this area.

The arguments for the prosecution

[19] Counsel for the Crown, Mr McMahon QC, submitted that the court should not exercise its power to extend time for leave to appeal. The issues in this case were, he claimed, entirely theoretical since the applicant had never claimed that a defence of consent would have been available to him. There was no unlawful act under section 6 of HRA and the applicant was not a victim within the meaning of section 7 of that Act. The applicant was not entitled to seek a declaration of incompatibility as he was not adversely affected by the absence of a defence based on consent. The applicant had not raised the defence of consent even on the far more serious charges of rape that had been preferred against him. He should not be permitted now to rely on

the absence of the defence of consent when, throughout the proceedings and even on this appeal, he steadfastly maintained that none of the sexual activity alleged against him had ever taken place.

[20] In any event, Mr McMahon argued, the five year age difference between the applicant and his cousin and the applicant's worldliness compared to the innocence of the complainant justified the enhanced protection that the impugned section provided. Articles 3, 16, 19 and 34 of the UNCRC recognised that children, as victims of sexually predatory behaviour, were in need of special protection. There was therefore no breach of article 40 of that instrument or of any convention right.

The arguments for the Secretary of State

[21] Mr McCloskey pointed out that the challenged provision, section 1 of the 1923 Act was, by virtue of section 21 (1) of HRA was expressly considered to be subordinate legislation. It was therefore open to the Crown Court to have disapplied the provision if the applicant's arguments about its incompatibility with any convention right were efficacious. On that account, the applicant could not satisfy the requirements of section 7 of HRA since it had been open to him on his trial to raise the claim that he now pursued. The applicant's case comprised an academic argument because the fact that he had deliberately eschewed a defence of consent presented him with an insuperable hurdle.

[22] Since it had been open to the applicant at his trial to challenge the compatibility of section 1 of the 1923 Act with his convention rights, it was impossible now, Mr McCloskey argued, to claim that there had been a breach of his article 6 rights. Even if his arguments about the incompatibility of the section with the convention were correct, there was nothing to prevent him from raising those arguments at his trial. His failure to do so did not amount to an unfairness in the trial process.

[23] Mr McCloskey accepted that consensual sexual behaviour between individuals was protected by article 8 but submitted that the applicant could not pray this provision in aid where, as here, the issue was whether non-consensual sexual behaviour had occurred. The applicant's article 8 rights could only be infringed if the factual matrix within which those rights arose was present. In this case it was not.

[24] By way of alternative, Mr McCloskey argued that if there had been interference with the applicant's article 8 rights, such interference was for a legitimate aim, was proportionate and was necessary in a democratic society. He submitted that parliament had concluded (in the Criminal Law Amendment Act 1880 in England and Wales and the 1923 Act in Northern Ireland) that consent should not be a defence to sexual offences in the case of

young girls in order to adequately safeguard their rights. There was a need to protect young females from coercion, exploitation, abuse and sexual harassment, particularly where consent to sexual activity may be obtained through grooming or abuse of trust. It was asserted that the justification for such a provision was classically a matter for Parliament to assess and decide upon and that the approach adopted in the 1923 Act and, in recent years, maintained in the Sexual Offences Act 2003, was squarely within the legislature's discretionary area of judgment. It was, therefore, appropriate for consensual sexual activity for persons under the age of consent to remain criminalised. In any event, Mr McCloskey argued, there was adequate protection for a child who was accused of committing such a criminal offence in the normal rules of criminal law and evidence applicable to such cases. The alleged consent of the victim and/or the young age of the accused can be taken into account in sentencing a young offender where indecent assault against a child is proved.

Conclusions

[25] In *Lester and Pannick, Human Rights Law and Practice*¸ 2nd Edition at paragraph 2.7.2a the authors state: -

> "(a) The court must 'confine itself, as far as possible, to an examination of the concrete case before it. It is accordingly not called upon to review the system of the [domestic law] *in abstracto*, but to determine whether the manner in which this system was applied to or affected the applicants gave rise to any violations of the Convention."

[26] In *Klass v Germany* (1978) 2 EHRR 214, ECtHR dealt with the requirement under the convention that an applicant for a remedy for breach of one of its provisions demonstrate that he has suffered a detriment. At paragraph 33, the court said: -

> "33. …[the convention] does not permit individuals to complain against a law in abstracto simply because they feel that it contravenes the Convention. In principle, it does not suffice for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary that the law should have been applied to his detriment".

[27] The same theme was taken up by the Court of Appeal in England and Wales in *Lancashire County Council v Taylor* [2005] EWCA Civ 284, with

particular reference to the need for victimhood under section 7 of HRA in order to pursue a claim that the convention has been breached. At paragraph 38 of his judgment Lord Woolf CJ said: -

> "It is not, however, the intention of the HRA or the Convention that members of the public should use these provisions if they are not adversely affected by them to change legislation because they consider that the legislation is incompatible with the Convention. This is made clear by the language of section 7(1) of the HRA…."

[28] In the same case, Lord Woolf emphasised that the making of a declaration of incompatibility was discretionary. At paragraph 42 he said: -

> "42. In addition, the grant of a declaration of incompatibility…..is discretionary….As Lord Slynn in *R v A* [2002] 1 AC 45 stated (at p.68) "a declaration of incompatibility is a measure of last resort which must be avoided unless it is plainly impossible to do so". It is doubtful in the extreme that a court would exercise its discretion in favour of Mr Taylor if he could not be affected by the breach of the Convention on which he was attempting to rely."

[29] In *Guenoun v France* 66 DR 181 (1990), the applicant claimed to be a victim of a breach of article 6 of the HRA in that he was not afforded the opportunity to have his disciplinary hearing conducted in public. ECmHR rejected the claim as manifestly ill-founded. The applicant could not claim to be a victim of the violation of one of the ECHR provisions since he had never asserted his right to a public hearing before the disciplinary tribunals.

[30] We are satisfied that the applicant cannot assert violation of either article 6 or 8 of the convention. He has trenchantly and tenaciously asserted that no sexual contact between him and the complainant ever took place. The issue of consent could never have played any part in his trial or on appeal, given this resolute attitude. We are of the opinion that it is not possible for the applicant to claim on appeal that he suffered the disadvantage of the non-availability of a possible defence of consent if he had expressly disavowed such a defence throughout the criminal proceedings. In any event, as Mr McCloskey has pointed out, it was open to the applicant to seek the disapplication of section 1 in the trial of these offences. We accept the submission that the trial could not have been rendered unfair by the applicant's failure to avail of that course, if it had been open to him.

[31] We moreover do not consider that the applicant has established a breach of article 40 of UNCRC. Articles 3, 16, 19 and 34 of UNCRC recognise that children, as potential victims of sexually predatory behaviour, need special protection. Even if it were open to the applicant to rely on this provision (other than as an interpretative aid) in domestic law, which it is not, since it has not been incorporated into United Kingdom domestic law, we consider that there is nothing in the aspirations of article 40 which requires the availability of a defence of consent in respect of sexual activity with young females. The need for the protection of young girls was well put by Baroness Hale in *R v J* [2004] UKHL 42 where she said at paragraph 78: -

> "… It is recognised that [girls] need protection from two rather different sorts of harm. One is from premature sexual activity…..The other sort of harm is sexual abuse….: a much older man in a position of trust who takes advantage of her youth and vulnerability. There is no debate at all that girls require protection from this sort of behaviour …..Those with professional experience of trying to pick up the pieces, sometimes many years after the event, are in no doubt of the gravity of the risks involved. Such considerations of policy clearly favour prosecution for any offences committed, provided that a fair trial is possible."

[32] In light of our conclusion that the applicant does not possess the necessary status as a victim under section 7 of HRA, it is strictly unnecessary for us to reach a conclusion on whether, if there has been an interference with his article 8 rights, that interference can be justified within the terms of article 8 (2). Without expressing a concluded view on this issue, however, we see much force in the argument of Mr McCloskey that such an interference is warranted as a legitimate means of protecting young females even from young men of a similar age. In *R v K* [2001] UKHL 41 the House of Lords dealt with a case where a defendant aged twenty six was charged with indecent assault of a girl aged fourteen. The accused had made the case that he believed that the complainant was sixteen and that he was entitled to be acquitted unless it was proved that he did not have a genuine belief that the victim was aged 16 or over. That claim was upheld by the House of Lords but, in the course of his speech, Lord Bingham said something of the genesis of section 14 of the Sexual Offences Act 1956 and his observations are relevant to the issue of the need for a provision that it should be no defence to a charge of indecent assault on a young person to prove that he or she consented to the act of indecency. The passage appears at paragraphs 5 and 6 of Lord Bingham's speech as follows: -

> "… Section 14 (1) derives from section 52 of the Offences against the Person Act 1861. At common law there was no offence of indecent assault. Section 52 of the 1861 Act criminalised "any indecent assault upon any female". The maximum penalty was two years' imprisonment. Since conduct is not generally an assault in law if done with the consent of the alleged victim, it seems clear that the consent of the victim, whatever her age, defeated a charge under this section as originally enacted.
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> 6. Plainly this provision gave inadequate protection to children, whose inherent immaturity was understandably regarded as impairing any consent they might give. There was legitimate public concern when a defendant accused of indecently assaulting a child of 6 years relied successfully on the consent of the child. There could have been no belief on the defendant's part that the child was over the age of consent, so that issue did not arise. In the Criminal Law Amendment Act 1880 (43 & 44 Vict, c45) it was provided that it should be no defence to a charge of indecent assault on a young person under the age of 13 to prove that he or she consented to the act of indecency. This provision was re-enacted in section 1 of the Criminal Law Amendment Act 1922 (with an increase of the age to 16). It is the source of section 14(2). [the equivalent of section 1 of the 1923 Act]"

[33] We will await the case where this subject arises other than as a theoretical issue before pronouncing finally on it, but it should not be assumed that, even in the case of a defendant whose age is not much greater than the person on whom the indecent assault is alleged to have been perpetrated, article 8 of ECHR will be found to require that a lack of consent on the part of the victim will have to be proved.