

Judicial Communications Office

18 November 2020

COURT DISMISSES CHALLENGE TO PPS DECISION

Summary of Judgment

The Divisional Court¹ today dismissed an application for a judicial review of a prosecutorial decision on the basis that an internal review of the decision addressed any public law grounds upon which the decision could be challenged.

Background

The applicant sought leave to apply for a judicial review of the decision of the Public Prosecution Service (“PPS”) that a person identified as “DB” would receive a caution for the offence of disclosing a private sexual photograph of her to someone other than her without her consent and with the intention of causing distress contrary to section 51(1) of the Justice (NI) Act 2016. The applicant further sought to challenge the PPS’s decision to uphold this decision on review.

The applicant had been in a relationship with DB for approximately one year at the time the photograph was taken and the offence was committed. DB took a video of himself and the applicant whilst they were engaged in sexual intercourse. DB alleged the video was taken with the applicant’s knowledge or consent but she denied this and also claimed that she was under 16 years of age at the time. DB then made a still photograph from the video and sent it to a third party without the applicant’s knowledge or consent. The applicant’s brother was sent a copy of the image and the matter was reported to the police in October 2018.

The applicant was advised by the police that DB would be interviewed in connection with the complaint made by her. On 27 March 2019, the PPS sent the applicant a standardised letter confirming the investigation file had been received from the police and that a PPS prosecutor would make a decision on the file. The letter also provided the name of a point of contact within the PPS who she could call. On 16 May 2019 the applicant received a letter from the PPS Victim and Witness Care Unit stating that a decision had been made to caution DB for the offence of disclosing a private sexual photograph to another without consent rather than to prosecute him through the criminal courts. The applicant complained to the PPS that she was not contacted by the PSNI or the PPS and her views were not sought prior to the decision being taken.

The applicant sought legal advice and in May 2019 her solicitor contacted the PPS to ask for a review of the decision. On 6 June 2019, the PPS replied to advise that the decision maker in this case was of the view that it was not one where a decision not to prosecute was made and as such was not open to review. The applicant’s solicitor sent a pre-action letter to the PPS on 4 July 2019. She was informed on 29 July that the decision would be looked at, however, the solicitor issued proceedings on 6 August 2019 due to concerns about the time limit expiring. On 6 September 2019, the PPS wrote to the applicant’s solicitor to advise that an Assistant Director had conducted a review of the decision and that the original decision would remain unchanged.

¹ The panel was Lord Justice Treacy and Mr Justice Colton. Lord Justice Treacy delivered the judgment of the court.

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Grounds of Challenge

The applicant contended that the PPS misdirected itself in law when making the original decision because it acted in breach of the then applicable Code for Prosecutors (2016) and policy documents including the PPS Guidelines for Diversion (2008) and the Department of Justice Victim Charter (2015). It was alleged that these documents were breached because, in summary, the PPS:

- failed to take account of the applicant's views and the impact of the offence on the applicant and her family;
- failed to consult her adequately or provide adequate case management information;
- failed to give any or adequate weight to relevant matters as set out in the guidance documents during the decision making process; and
- failed to give any or adequate reasons at least for the initial decision to offer the caution.

The applicant also contended that the PPS failed to consider prosecuting DB for other relevant offences:

- engaging in sexual activity with a child contrary to Article 20 read with Articles 16 and 17 of the Sexual Offences (NI) Order 2008; and
- taking and/or distributing an indecent photograph of a child contrary to Article 3(1) of the Protection of Children (NI) Order 1978 (this ground was abandoned at the hearing as it was clear from the PPS's review decision letter of 6 September 2019 that explicit consideration has been given to this offence).

The PPS's Arguments

The PPS argued that the challenge to both the original diversion decision issued in May 2019 and the review decision issued in September 2019 was unsustainable because the latter decision supercedes the former and thereby renders the May 2019 decision irrelevant and its legality academic. It submitted that the review decision letter addressed the grounds relating to failure to take the applicant's views into account, failure to consult, failure to provide adequate case progression information and failure to give any/adequate weight to relevant factors.

In respect of the ground of failure to consider prosecuting DB for other offences, the PPS stated that in order to sustain a prosecution under Articles 16 or 17 of the Sexual Offences (NI) Order 2008 it must be established that the complainant was under 16 years of age at the time of the alleged commission of the offence. In addition it is a defence that the defendant reasonably believed the complainant to be 16 at the time. In her statement to the police the applicant said the recording was taken "around October 2016" which if correct would mean that she was under 16 at the relevant time. When interviewed, however, DB said the applicant was 16 when the recording was made. The court was told that the police could not date the recording through forensic examination and the only evidence of when it was made was therefore the applicant's reference to October 2016. In the review letter of 6 September 2019, the Assistant Director said that without the admissions of DB during interview she would not have been satisfied that the evidential test had been satisfied for *any* offence as it was not possible to identify any person from image or their age. She considered the prosecution had a reasonable prospect of proving the defendant was responsible for creating an indecent image of the applicant when she was under 18 and sending it to a third person without her consent.

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Discussion

The Court noted that the challenge was aimed at two decisions by the PPS (the initial diversion decision of May 2019 and the internal review decision of September 2019). It said the facts disclosed in the case papers suggested there was significant weight in some of the applicant's complaints about the initial decision, especially in relation to the adequacy of reasons for that decision, but as a result of the interventions of the applicant's legal team the PPS undertook a review which resulted in a fully reasoned decision issuing. The Court said it would therefore appear pedantic and counterproductive for it to review for a second time the materials used to deliver the initial decision when that had already been reviewed by the internal mechanism set up specifically to enable an administrative system to self-correct:

"The PPS process has already got checks and balances built into it and internal reviews are an important internal appeal mechanism which is quite capable of correcting early errors if any are found. As a matter of principle the judicial review court ought not to review an original decision which has already been internally reconsidered and corrected. This reflects the role of this court as a last resort mechanism for oversight of administrative systems and also the general principle that the judicial review court should not entertain questions that have become academic. Therefore, we will treat this case as a challenge to the review decision of 6 September alone."

The Court considered that the review letter expressly addressed the complaints in relation to the failure to have regard to the views of the victim and her family and the failure to give adequate weight to the gravity of the offence. The Assistant Director said she had taken into account the applicant's views, which were detailed in the police report and her letter to the PPS, and concluded that the following factors operated in favour of prosecution: that the offence was serious; the complainant was young and vulnerable; and the views clearly expressed by [the applicant] and on her behalf that she wanted [DB] to be prosecuted. The Court also noted that the PPS had provided the applicant with the name and contact details of an individual she could contact in order to receive progress updates about the case.

The Court accepted that the PPS had considered prosecuting DB for other relevant offences. It noted that the evidential test for an offence of engaging in a sexual activity with a child had not been met as the prosecution would have had to be able to establish to the criminal standard that the complainant was under 16 and that the defendant reasonably believed the complainant to be 16 at the time:

"Insofar as it may have been implied or suggested that there was any obligation on this young complainant to indicate to the PSNI that she wished to pursue a specific complaint in respect of underage sexual activity we reject such a contention. The obligation on the decision maker is to carefully analyse all the available evidence and apply the prosecution test in respect of all potential relevant offences identified. We are satisfied that this was done and that the application of the public interest test by the PPS resulting in a caution rather than prosecution is unimpeachable."

In conclusion the Court said that the complaints made by the applicant do not stand scrutiny in relation to the review decision issued in September 2019:

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“While there may have been some grounds for complain in relation to the earlier decision, that decision was superceded and corrected by the internal review which took place within the PPS and there are no public law grounds upon which that fresh decision can be impugned.”

The Court refused leave and dismissed the application for judicial review.

NOTES TO EDITORS

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://judiciaryni.uk>).

ENDS

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