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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY S, a minor, by his mother and next friend

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Before Kerr LCJ, Higgins LJ and Gillen J

KERR LCJ

Introduction

[1] The applicant in this case is a defendant in Youth Court proceedings. He faces charges in relation to the alleged indecent assault of another young person. Nothing should be reported about these proceedings that would tend to reveal the identity of the applicant or the complainant.

[2] This is an application for judicial review of the decision of the Public Prosecution Service (PPS) not to seek medical notes and records including counselling records relating to the alleged victim of the indecent assault. The applicant's solicitors had requested PPS to obtain these records so that they could be examined for the presence of any inconsistency in the accounts given by the complainant.

Factual background

[3] On 28 May, 2005 the complainant, (who is a relative of the applicant and some years younger; we shall refer to him as H), was staying with S at the home of a mutual relative. H alleges that after both boys had been watching a video in a bedroom S indecently assaulted him. S denied these allegations in interview stating that H was a 'drama queen' and that 'he makes up stuff.' In the defence statement served on behalf of the applicant, it is stated that he relies on these answers to contest the charge that has been preferred against him.

[4] S's solicitor wrote to PPS on 25 May 2006 stating that it was "not beyond the realms of possibility" that the allegations made by H were "the product of a young imagination as opposed to having their basis in fact". It was also suggested that H might have been subjected to abuse by another party and that these allegations had been merely transposed onto the applicant. The letter continued: -

> "… if he has received counselling … then there will be a further record of the allegations which may or may not contain inconsistencies. We are surely entitled to examine whether that is the case or not."

[5] PPS replied on 5 June 2006. Their letter contained the following passage: -

> "I have considered your request for access to third party material and can advise that on the basis of the evidence presently before me I do not consider it appropriate to make any enquiries with any third parties. I can advise that in reaching this decision I have considered the duties incumbent upon the police and the prosecution under the Criminal Procedure and Investigations Act 1996, the Code of Practice and the Attorney General's guidelines on disclosure. I would refer you to the case of *R v H & C* [2003] where it states that the trial process is not well served if the defence are permitted to make general and unspecified allegations in the hope that the material will turn up to make them good."

[6] Further correspondence was exchanged which we need not rehearse. Application for leave to apply for judicial review was made on 25 October 2006. Following this, on 21 November 2006, PPS wrote to the investigating officer asking her to discover whether H had attended any counselling as a result of the alleged incident. In an affidavit sworn on the morning of the hearing of the judicial review application (26 April 2007) Ms Brolly of PPS deposed that she had been informed that H had not received any counselling although this had been offered to him. She explained that she had concluded that it would be prudent to make this inquiry. She was due to consult with counsel on 22 November and this had brought the matter to her mind. She did not feel that the matter should be decided in a "factual vacuum".

The Criminal Procedure and Investigations Act 1996

[7] As amended, section 3 of this Act provides: -

> *"Primary disclosure by prosecutor*
>
> (1) The prosecutor must—
>
> > (a) disclose to the accused any prosecution material which has not previously been disclosed to the accused and which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused, or
> >
> > (b) give to the accused a written statement that there is no material of a description mentioned in paragraph (a).
>
> (2) For the purposes of this section prosecution material is material—
>
> > (a) which is in the prosecutor's possession, and came into his possession in connection with the case for the prosecution against the accused, or
> >
> > (b) which, in pursuance of a code operative under Part II, he has inspected in connection with the case for the prosecution against the accused."

The Criminal Procedure and Investigations Act 1996 Code of Practice for Northern Ireland (July 2005)

[8] Paragraph 3 (4) of this Code provides: -

> "In conducting an investigation, the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances…"

[9] Paragraph 3 (5) states: -

> "If the officer in charge of an investigation believes that other persons may be in possession of

> material that may be relevant to the investigation and if this has not been obtained under paragraph 3 (4) above, he should ask the disclosure officer to inform them of the existence of the investigation and invite them to retain material in case they receive a request for its disclosure. The disclosure officer should inform the prosecutor that they may have such material. However, the officer in charge of the investigation is not required to make speculative inquiries of other persons. There must be some reason to believe that they may have relevant material. That reason may come from information provided to the police by the accused or from inquiries made or from some other source."

The Attorney General's guidelines on disclosure

[10] Paragraph 2 of the guidelines provides: -

> "What must be clear is that a fair trial consists of an examination not just of all the evidence the parties wish to rely on but also all other relevant subject matter".

[11] Paragraph 3 is in the following terms: -

> "The scheme set out in the Criminal Procedure and Investigations Act 1996 is designed to ensure that there is fair disclosure of material which may be relevant to an investigation and which does not form part of the prosecution case."

[12] Paragraph 32 requires prosecutors to do all that they can to facilitate proper disclosure. This guideline also reminds prosecutors of the need to provide advice to and where necessary probe actions taken by disclosure officers to ensure that disclosure obligations are met.

[13] Paragraph 47 deals with material held by a government department or other Crown body. It states: -

> "Where it appears to an investigator, disclosure officer or prosecutor that a government department or other Crown body has material that may be relevant to an issue in the case reasonable steps should be taken to identify and consider

> such material. Although what is reasonable will vary from case to case the prosecution should inform the department or other body of the nature of its case and of relevant issues in the case in respect of which the department or body might possess such material and ask whether it has such material. ”

[14] The most important part of the guidelines in relation to this case is paragraph 51. It states: -

> “There may be cases where the investigator, disclosure officer or prosecutor believes that a third party (for example, a local authority, a social services department, a hospital, a doctor, a school, a provider of forensic services) has material or information which might be relevant to the prosecution case. In such cases, if the material or information might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused prosecutors should take what steps they regard as appropriate in the particular case to obtain it.”

Article 6 of ECHR

[15] The relevant part of article 6 for the purposes of this case is paragraph (3) (b). It provides: -

> “3 Everyone charged with a criminal offence has the following minimum rights:
>
> …
>
> (b) to have adequate time and facilities for the preparation of his defence;”

[16] In *Jespers* v. *Belgium* (1981) 27 DR 61, ECmHR said that the right under article 6 (3) (b) to adequate time and facilities for the preparation of the defence comprehends an accused’s right to have at his disposal ‘all relevant elements that have been or could be collected by the competent authorities.’ It should be noted, however, that this decision concerns itself only with materials *within* the possession of the prosecution. The specific issue of materials held by third parties did not arise on the facts of the case.

The case for the applicant

[17] For the applicant Mr Barry Macdonald QC submitted that, in the first instance at least, PPS had failed to address the question whether it should seek medical and counselling notes. It had not exercised its discretion as to whether it should make the inquiry that paragraph 51 suggested might be required. In its correspondence PPS had referred to the decision in *Butler –v- Police Ombudsman for Northern Ireland* [2004] NI 93 (where it was held that there was no third party disclosure in the magistrates' court) in a way which implied that the request made on the applicant's behalf should be automatically refused.

[18] Alternatively, Mr Macdonald argued, the decision not to inquire whether there were medical or counselling records that might bear on the creditworthiness of the complainant was irrational. As article 6 of ECHR was engaged, scrutiny of that decision should be appropriately searching and intense. Since third party disclosure was not available in summary proceedings, the need to inquire about the availability of counselling records was all the more urgent. Mr Macdonald drew our attention to the approach that should be taken to third party disclosure in this type of case commended by Girvan J in *Re O'N and another* [2001] NI 136.

[19] In that case the defendants were charged on a number of counts alleging sexual offences and acts of physical violence against the first defendant's step-daughters. They sought orders directing the relevant Social Services Board, the Board of Governors of a school attended by the complainants and the Compensation Agency to disclose to them certain documents. These were ordered to be disclosed. Subsequently, they applied for an order that the family GP should disclose notes and records relating to the complainants and that the Health and Social Services Trust should disclose all social services' records relating to one of the alleged victims. This application was made under sections 51A *et seq* of the Judicature (Northern Ireland) Act 1978 as amended and the Crown Court Rules made thereunder. These contain an exhaustive statutory code governing third party disclosure in criminal proceedings. At page 150 Girvan J described the approach that should be taken to the provisions: -

> "While there is no Convention law decision that deals directly with the point in issue in the present case, the width of the approach in *Jespers v Belgium* points in favour of construing ss 51A et seq as benevolently and favourably as possible in favour of the defence. The legislation must be construed and applied compatibly with a defendant's Convention rights under s 3 of the Human Rights Act 1998. The restrictive and narrow approach

> adopted under the old legislation would deprive the defendants of access to material that justice would appear to demand that he should see in order to prepare his defence (as borne out in *R v* K (1993) 13 BMLR 104, 97 Cr App R 342). The court is thus called on to construe s 51A widely."

[20] Mr Macdonald argued that, although these observations were made in relation to proceedings in the Crown Court, they provide useful guidance as to the approach that a prosecutor should follow in deciding whether to make inquiry about the existence of records that might be relevant to issues that arise in summary proceedings.

The arguments for the respondent

[21] For the respondent Mr Maguire QC submitted that all the available contemporaneous evidence pointed clearly to the conclusion that careful consideration had been given to the question whether medical and counselling notes should be sought. The correspondence showed that the officers of PPS had at all times been grappling with the issues. They had referred to the relevant legislation; the Code of Practice; the Attorney General's guidelines; and relevant judicial authority. He refuted the suggestion that PPS had failed to address the question whether it should seek medical and counselling notes.

[22] Mr Maguire argued that the real issue for the court to consider was, 'What are the obligations of the prosecutor in relation to disclosure of materials in the hands of third parties in the context of proceedings in a court of summary jurisdiction?'. He pointed out that the 1996 Act does not deal with that issue. It is relevant, he acknowledged, in that it establishes the legal context for disclosure generally but it does not deal directly with material held by third parties. The matter is dealt with by the Attorney General's guidelines. The guidelines were designed to reflect not merely the requirements of national law but also such obligations as may arise under article 6 of ECHR. He submitted that unless the court concluded that the PPS had breached those guidelines, there was no occasion for a finding that the decision taken was unlawful.

[23] In relation to paragraph 51 of the guidelines, Mr Maguire acknowledged that this was but a guide but, he said, one must respect the fact that the guidelines generally were the product of accumulated experience based on the case-law and knowledge of the way in which justice can best be achieved. In particular, it was to be assumed that the Attorney was aware of the decisions in *Butler* and *O'N* in devising paragraph 51. This paragraph did not create a special category for third party disclosure in sex offence cases. In its terms are to be found two tests. The first was that the prosecutor must believe

that there was material in existence that was held by the third party in question. Mr Maguire submitted that the word 'believe' in the context of paragraph 51 was a strong one – it equated with having reasonable grounds to believe. The second test was that the prosecutor must consider that the material in issue might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused. It was, said Mr Maguire, only where these two tests were satisfied that one had to address the question of the steps to be taken to obtain the material. There was nothing in the papers to suggest that counselling had occurred. There was no suggestion that the complainant had suffered a mental reaction that, for instance, might have required the intervention of a psychiatrist.

[24] Mr Maguire submitted that *R v O'N* was not in point. It was essentially concerned with the powers of the Crown Court in a case where serious sexual offences had been alleged to summon a witness who was likely to be able to give material evidence or produce any document or thing likely to be material evidence. The issue that Girvan J had to deal with was whether the provisions in the Judicature Act in so far as they refer to "be likely to give material evidence" etc should be given the same meaning as that adopted by the House of Lords in *R v Derby Magistrates' Court ex p B* [1996] AC 487 or whether a wider interpretation should be given. In the latter case the House of Lords approved Simon Brown LJ's statement of principle in *R v Reading Justices ex parte Berkshire County Council* (unreported) where he stated: -

> "The central principles to be derived from the authorities are as follows:
>
> (i) to be material evidence documents must be not only relevant to the issues arising in the criminal proceedings but also documents admissible as such in evidence;
>
> (ii) documents which are desired merely for the purpose of possible cross-examination are not admissible in evidence and thus are not material for the purposes of Section 97…"

[25] Girvan J held that a wider interpretation was to be preferred because of the effect of the Human Rights Act 1998 and because the provisions that he had to interpret, although similar in terms to those under consideration in the *Derby Magistrates* case, were different in that they applied only to the Crown Court. But Mr Maguire pointed out that no consideration was undertaken in the *O'N* case of the Attorney's guidelines nor was it required since the context in which it was taken (Crown Court proceedings) was entirely different. Counsel also pointed out that Gillen J had held in *Butler* that the approach in the *Derby Magistrates* case was to be followed in relation to magistrates' courts

in this jurisdiction and that to do so did not involve a violation of the European Convention.

Conclusions

[26] We can deal with the first argument briefly. We do not consider that the claim made on behalf of the applicant that PPS did not address the question whether it should ascertain if there were medical or counselling records can be supported by a review of the correspondence passing between the parties. It is, in our opinion, clear that PPS did not rely solely on the decision in *Butler* in refusing the applicant's request. If the sole motivating factor in refusing the request was that third party disclosure was not available in the magistrates' court, there would have been no need in the correspondence to refer to the Attorney's guidelines or the decision in *R v H &C.* It seems to us to be unmistakably clear that the two issues arising under paragraph 51 were considered and a decision was made that the guidance contained in that paragraph did not require the inquiry to be made.

[27] It was not in dispute that the applicant's rights under article 6 of ECHR were engaged in this case and we are satisfied that, on that account, a more intense scrutiny of the propriety of the decision is called for – see, for instance *Regina (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, particularly the opinion of Lord Steyn at paragraph 28.

[28] The essential issue in the case is whether paragraph 51 of the guidelines has been properly applied by PPS. Cases such as *R v O'N* and *Butler* provide helpful context to that decision. The duty imposed on the prosecution to make disclosure under the 1996 Act and the duties that arise under the Code of Practice are also relevant in looking at the nature of the obligation articulated by paragraph 51, as are earlier paragraphs in the guidelines but, ultimately, it is within the terms of the paragraph itself that the answer whether it has been complied with must be found.

[29] There appeared to be general agreement that paragraph 51 contained two qualifying conditions that required to be fulfilled before the duty to make inquiry arose. The first is that the prosecutor believes that a third party has material or information which might be relevant to the prosecution case. Mr Maguire suggested that 'believes' in this passage should be construed as 'having reason to believe' but we consider that this is an unnecessary gloss on the plain meaning of the sentence. Obviously, the belief should not be frivolous or fanciful but there is no need, in our opinion, to import extraneous words in order to have a clear understanding of what 'believes' means in this context. It is incumbent on the prosecutor to consider all material facts and circumstances and to reach a belief one way or the other.

[30] What were the material circumstances here? The first is that the complainant was a young boy who, if his story was true, had been the victim of sexual abuse by a somewhat older relative. The second is whether medical

treatment or counselling services are likely to have been provided or offered in this type of case. It has been the unvarying experience of each of the members of this court that counselling services would be offered to a victim such as the complainant in this case. It is by no means invariable, however, that medical treatment would have been sought or provided. We consider that any experienced prosecutor should have known that counselling services would have been offered (as indeed proved to be the case).

[31] It is to be remembered, of course, that the prosecutor should believe that the third party *has* rather than *might have* material but, absent any information that counselling services have been refused, it seems to us that in the vast majority of cases a prosecutor will inevitably reach the belief that such records exist. We were told by Mr Maguire that the prosecutor in this case did not believe that counselling records existed and, as it happens, this indeed proved to be correct because the complainant was offered counselling but did not avail of it. Obviously, however, that was not the basis on which the prosecutor reached her decision since she knew nothing at that stage of the refusal to accept the offer and we are bound to say that we consider that the proper belief to have reached on the material then available to her was that such records did exist.

[32] In reaching that conclusion, we bear in mind that the approach to the question should be influenced by the fact that the applicant's article 6 rights are engaged. Although Girvan J's judgment in *R v O'N* was given in a different context we consider that his remarks about the approach to be adopted to the matter of disclosure resonate here. In the knowledge that the complainant was virtually certain to have been offered counselling, to have formed a belief that no counselling records existed, without knowing that counselling had been refused, seems to us to be unsustainable. Medical records are a different matter; there was no reason to suppose that such records did exist.

[33] If the prosecutor had formed the belief (as we consider she should have) that counselling records existed, it would have been a small step to take to conclude that these were relevant to the prosecution case. It is again our consistent experience that counselling will involve the complainant giving an account of his or her experiences at the hands of the alleged abuser. Such an account is relevant to the case. It may not derogate from it or reinforce the case but its relevance cannot, in our judgment be disputed.

[34] The second pre-condition in paragraph 51 is that the material or information might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused. Mr Macdonald argued that because the applicant reacted to the complainant's allegations by suggesting that he was a 'drama queen' who made up stories, the prosecutor was bound to have concluded that the material might undermine the prosecution case or assist the applicant. We do not accept that. As Mr Maguire pointed out, in a great many contested cases the defendant will seek

to cast doubt on the credibility of the complainant. That routine allegation alone cannot be said inevitably to give rise to the possibility that the material would weaken the prosecution case or strengthen the defence.

[35] We have had a little difficulty with this part of paragraph 51. On one view it would be much more logical to tie the first condition to a requirement to obtain the information and to link the second with an obligation to disclose it. If the material has not been seen by the prosecutor but she or he has concluded that it exists and is relevant to the prosecution how can a judgment be made on its potential to undermine the case for the prosecution or assist the case for the defence without its being seen? It is clear from the terms of paragraph 51, however, that both conditions must be met before prosecutors are enjoined to take what steps they regard as appropriate to obtain the material.

[36] It seems to us that the explanation for this is that the obtaining of counselling records in every case of a prosecution for sexual abuse in a magistrates' court would become automatic unless some further check on the requirement to obtain them applied. While we are conscious of the need to ensure that all reasonably obtainable material that might assist his case or undermine that made against him should be made available to a defendant in summary proceedings, we consider that the prosecuting authorities must be allowed "a margin of consideration" as it was described by the Court of Appeal in *R v Alibhai and others* [2004] EWCA Crim 681.

[37] That case involved an appeal against conviction on the broad ground of inadequate disclosure of material in the hands of third parties. The court considered paragraphs 30-33 of the Attorney General's guidelines then relevant in England and Wales. These are in broad outline similar to the guidelines that now apply in Northern Ireland but there are a number of differences that are not of especial significance in the present case. At paragraphs 62 and 63 Longmore LJ (who delivered the judgment of the court) said: -

> "62. The trigger for the provisions of paragraphs 30-33 of the Attorney General's Guidelines is suspicion on the part of the investigator, disclosure officer or prosecutor that a third party has material or information that might be disclosable if in the possession of the prosecution. Material in the possession of a prosecutor is not disclosable simply because it is or might be relevant to an issue in the case. As Lord Bingham said in *R v H*, [2004] UKHL 3 at paragraph 35:-
>
> > "If material does not weaken the prosecution case or strengthen that of the defendant, there is no requirement to disclose it. For this

> purpose the parties' respective cases should not be restrictively analysed. But they must be carefully analysed, to ascertain the specific facts the prosecution seek to establish and the specific grounds on which the charges are resisted…. Neutral material or material damaging to the defendant need not be disclosed."

> Thus before it can be said that there has been a breach of an obligation under these provisions of the Guidelines, it must be shown that there was suspicion that the FBI, Microsoft or McGrath, as the case might be, not only had potentially relevant material but that the material was not neutral or damaging to the defendants but damaging to the prosecution or of assistance to the defendants.
>
> 63. Secondly, even if there is the suspicion that triggers these provisions, the prosecutor is not under an absolute obligation to secure the disclosure of the material or information. He enjoys what might be described as a "margin of consideration" as to what steps he regards as appropriate in the particular case. If criticism is to be made of a failure to secure third party disclosure, it would have to be shown that the prosecutor did not act within the permissible limits afforded by the Guidelines."

[38] As Mr Macdonald pointed out, the thrust of the case made on behalf of the appellants in that case was that the refusal of the prosecuting authorities to go beyond attempts to obtain possibly relevant material on a consensual basis should have led to a dismissal of the charges against them as an abuse of process. But we nevertheless consider that the observations about the discretion available to the prosecutor whether to obtain the material are relevant here and we respectfully agree with them. In the event, however, that was not the basis on which the prosecutor in the present case decided that she should not seek these records. Rather it was because she did not believe that they existed.

[39] The somewhat ironical conclusion that we have reached is that, at the time the prosecutor made her decision that she did not need to seek the records, she did so for the wrong reason *viz* that such records would not have been created as a matter of course. In fact, for the reasons that we have given, the high probability is that, in normal course, these records would have been

generated but because of the complainant's decision that he did not want to have counselling, records that one would have expected to be produced did not come into existence. The prosecutor's conclusion that records did not exist was therefore taken for the wrong reasons. If she had based her decision not to seek the records exclusively on the second condition in paragraph 51 - that there was no reason to suppose that that the material or information might reasonably be considered capable of undermining the prosecution case or of assisting the case for the accused, her conclusion could not have been challenged. We are, of course, aware that the decision was taken in reliance on both conditions. In so far as it depended on the first condition, however, for the reasons that we have given, we consider that, at the time that it was taken, it was wrong.

[40] Since, however, no counselling records in fact existed and since a decision to refuse to obtain them based on the second condition in paragraph 51 would have been unimpeachable, we cannot accede to the application for judicial review and it is dismissed.