Neutral Citation No: [2020] NIQB 67 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **TRE11347** *Delivered:* **18/11/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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BEFORE A DIVISIONAL COURT

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IN THE MATTER OF AN APPLICATION BY JR92
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATER OF DECISIONS OF THE PUBLIC PROSECUTION SERVICE COMMUNICATED TO THE APPLICANT ON 6 MAY 2019 AND 6 SEPTEMBER 2019

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Before: Treacy LJ and Colton J

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TREACY LJ (*delivering the Judgment of the Court*)

Introduction

[1] By this application the Applicant seeks leave to apply for judicial review of a decision of the Public Prosecution Service ("PPS") whereby it determined that DB would receive a caution for the offence of disclosing a private sexual photograph of the Applicant to someone other than the Applicant without her consent and with the intention of causing distress contrary to section 51(1) of the Justice Act (NI) 2016. The Applicant was a minor at the time of the photograph having been taken and a minor when the offence was committed. Further, the Applicant is challenging the proposed Respondent's decision of 6 September 2019 wherein the above decision was upheld on review.

[2] DB, as notice party, is represented for the purposes of this application.

Background

[3] The factual background can be summarised as follows:

(a) The Applicant is now 20 years old having been born in 2000. She was in a relationship with the proposed Notice Party, DB, for approximately one year from the age of 15 years old. The relationship ended when she was 16 years old although they were still in sporadic contact until February 2018.

(b) DB took a video of himself and the Applicant whilst they were engaged in sexual intercourse. In a statement made to police the applicant says that the video was taken "around October 2016." He alleges the video was taken with her knowledge or consent. She denies this. He then made a still photograph from this video and sent it to a third party. It is common case that she did not know of or consent to the sharing of this photograph.

(c) The applicant believes that on Monday 8 October 2018, DB sent this photograph by way of text/social media message to the Applicant's older brother without her knowledge or consent. In fact it appears that the image was originally sent to DB by a third party. The third party felt that the applicant's brother should be made aware so it was he who sent the image to the brother.

(d) The matter was reported to police and a statement of complaint was made by the Applicant in the presence of her mother, EH. The Applicant applied for and was granted an injunction against DB under the Protection from Harassment (NI) Order 1997 on 24 October 2018, her mother acting as her Next Friend.

(e) In and around the end of October 2018 the Applicant was advised by police that the proposed Notice Party would be interviewed in connection with the complaint made by her. The Respondent asserts that it then sent a standardised letter to the Applicant dated 27 March 2019. It confirmed that the investigation file had been received and that a PPS prosecutor would in due course make a decision on the file. The standardised letter explained who the single point of contact was.

(f) It also asked for the Applicant to return a preferred means of contact form. Such a form was received and her details were updated on the PPS system on 12 April 2019. She provided an email address, a mobile number and a new postal address.

(g) She had no further contact from the PSNI or the PPS until she received a letter on 16 May 2019 from the Victim and Witness Care Unit of the PPS indicating that a decision had been made to caution DB for the offence of disclosing a private sexual photograph to another without their consent contrary to section 51(1) of the Justice Act (NI) 2016, rather than to prosecute him through the criminal courts.

(h) The Applicant complains that she was not contacted by the PSNI or the PPS prior to this decision being taken. Her views were not sought. The letter of 16 May 2019 did not advise of any rights she may have or recourse if she had concerns about the decision therein or deemed it to be unsatisfactory.

(i) The Applicant sought legal advice and brought the letter received from the PPS to her solicitor's offices on Friday 17 May 2019. Her solicitor, Ms Bronagh McMullan, received this letter on Monday 20 May 2019. Ms McMullan telephoned the PPS on the same date requesting a review of the decision.

(j) Various further emails ensued and eventually on the afternoon of 5 June 2019, Ms McMullan received an email from Mr Kevin Shiels of the PPS advising that he had received the email chain in relation to the Applicant and that the matter would be referred to the Regional Prosecutor for a review to be conducted.

(k) On 6 June 2019, a further email was sent to Ms McMullan by Mr Shiels referring to paragraphs 4.59-4.65 and, in particular, 4.60, of the PPS Code for Prosecutors (2016) and advising that the view of the decision-maker was that this case was not one where a decision not to prosecute was made and as such was not open to review.

(l) He further stated that "the evidence and information reported on the police investigation file, together with recommendations from police and the views expressed by the Applicant, were carefully considered by [him] before reaching [his] decision which was to caution the accused for the offence alleged."

(m) Mr Shiels also advised in this correspondence that a caution had been administered on 21 May 2019 by the PSNI.

(n) Legal advice was sought by the Applicant and her legal representatives sent a pre-action letter to the PPS on 4 July 2019.

(o) On 29 July 2019, Ms McMullan received a letter advising that the impugned decision would be looked at, however proceedings were issued on 6 August 2019 due to concerns about the time limit expiring on 14 August 2019.

(p) On 21 August 2019, Ms McMullan received email correspondence from Ms Bridgeen Cromwell of the PPS advising that a PPS review of the impugned decision was in progress.

(q) On 6 September 2019, email correspondence was received from Ms Megan McCann of the PPS enclosing a letter from Ms Lynne Carlin, Assistant Director of the PPS, which advised that she had conducted a review of the first impugned decision of 15 May 2019 and included reasons for the new

decision. The outcome of the review was that the original impugned decision would remain unchanged.

The Applicant's Complaints

[4] The Applicant challenges both the original decision to deal with this matter by way of caution rather than by prosecution and also its decision of 6 September 2019 wherein the original decision was upheld on review.

Grounds of Challenge

[5] The gravamen of the Applicant's complaint is that the Respondent misdirected itself in law when making the impugned decision because it acted in breach of the then applicable Code for Prosecutors (2016) and published policy documents including the PPS Guidelines for Diversion (2008) and the Department of Justice Victim Charter 2015.

[6] It is alleged that these documents were breached because (in summary) the Respondent 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 progression information and 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 a caution.

[7] It is alleged that the inadequacies asserted have resulted in the decisions issued being infected by illegality (due to the misdirection), procedural unfairness (due to inadequate consultation) and insufficient provision of information on case progression during the decision-making processes and also by irrationality in the Wednesbury sense for essentially the same reasons.

[8] The applicant amended her Order 53 statement to plead that the proposed respondent failed to consider prosecuting the proposed notice party for other relevant offences, namely (a) the offence of engaging in sexual activity with a child contrary to Article 20 read with Article 16 and 17 of the Sexual Offences (NI) Order 2008 and (b) the offence of taking and/or distributing an indecent photograph of a child contrary to Article 3(1) of the Protection of Children (NI) Order 1978.

The Respondent's Arguments

[9] The Respondent argues that the challenge to both the original diversion decision issued in May 2019 and the review decision issued in September 2019 is unsustainable because the latter decision supercedes the former and thereby renders the original May decision irrelevant and its legality (or otherwise) academic. It therefore approaches this case as a challenge to the currently operational review decision that was issued in September.

[10] In relation to the substantive complaint made by the Applicant it summarises these under the following headings and responds to each complaint in the way summarised below.

(i) Failure to take the Applicant's views into account contrary to the PPS Code and the Victim Charter

[11] On this point the Court is referred to the review decision letter issued on 12 September 2019 which states:

> "I 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 complainant and on her behalf that she wanted [the accused] to be prosecuted.
>
> …
>
> The complainant's views are clearly detailed both in the police report and your [PAP] letter dated 4 July 2019. I take into account the significant level of upset and distress this matter has understandably caused [the applicant]."

(ii) Failure to Consult

[12] The Respondent's skeleton treats this as an extension of the complaint that the Applicant's views were not sufficiently taken into account and asserts that this was done by the review decision-maker as noted in the decision letter quoted above.

(iii) Failure to provide adequate case progression information

[13] The Respondent notes that after the Applicant's complaint was received she was issued with a standardised letter on 27 March 2019 informing her that a file had been received from the PSNI and providing her with the name of an individual she could call to request an update on progress. This factual information appears to answer this aspect of the complaint in full. Receipt of this letter was confirmed by the Applicant returning a preferred means of contact form that had been attached to the standard letter. It was returned and allowed her contact details to be updated on 12 April 2019.

(iv) Failure to give any/adequate weight to relevant factors including the gravity of the offence

[14] In response, the Respondent refers to the following two parts of the review decision letter:

> "I concluded that the following factors operated in favour of prosecution: that the offence was serious; the complainant was young and the views clearly expressed …
>
> I consider the offence serious. It is a hybrid, meaning that it can be prosecuted in the Crown Court or the Magistrates Court. If prosecuted on indictment the maximum sentence that can be imposed is 2 years."

(v) Failing to consider prosecuting DB for other relevant offences

[15] In order to sustain a prosecution under Article 16 or 17 of the Sexual Offences (NI) Order 2008 it must be established that the complainant was under 16 years 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 that time.

[16] In the applicant's witness statement to the police made on 25 October 2018 she says that the recording was taken "around October 2016". If this is correct then she was under 16 at the relevant time. The PPS informed the court that DB when interviewed said that the applicant was 16 when the recording was made.

[17] The court was also informed that the police could not date the recording through forensic examination, so the only evidence of when it was made (and therefore what age the applicant was at the time), is the applicant's reference to October 2016. The prosecution submit that the evidential test would not be met in this case; there were two contradictory accounts of when it was made, without any forensic support for either.

[18] In her letter of the 6th September 2019 the Assistant Director of the PPS, who was not involved in the original decision, explained that she had conducted a fresh examination of the case. She states that she carefully analysed all of the evidence and applied the test for prosecution in respect of all potential relevant offences identified. She notes that the image appears to show two persons engaged in sexual intercourse, that there is nothing in the image which would identify either person shown, that the image is of reasonably poor quality and that it is not possible to accurately assess the age of the persons in the photo by reference to the image itself. She notes that without the admissions of DB during interview she would not have been satisfied that the evidential test was satisfied for *any* offence. His admissions did not prove when the recording or image were created or when the image was

shared. Further, despite extensive forensic examination of DB's mobile there was no record of the video from which the message was generated or of the image itself. In summary she stated that based on the complainants evidence and the defendant's admissions the prosecution had a reasonable prospect of proving that the defendant was responsible for creating an indecent image of the complainant (when she was a minor (under 18)) and sending it to a third person without her consent.

[19] As noted at paragraph 8 above the applicant amended her pleadings to allege failure of the decision-maker to consider (a) the offence of engaging in sexual activity with a child contrary to Article 20 of the Sexual Offences (NI) Order 2008 and (b) the offence of taking and/or distributing an indecent photograph of a child contrary to Section 3(1) of the Protection of Children (NI) Order 1978. At the hearing the applicant abandoned (b) since it was clear from the penultimate paragraph of page 2 of the 6 September letter she expressly considered that offence. Under the latter legislation a child is a person under 18.

Discussion

[20] Where an initial decision has been reviewed by an internal review mechanism built into the decision-making apparatus in question, can a complainant rely on flaws in the original decision to challenge the legality of the internal review decision?

[21] This challenge takes aim at two decisions issued by the PPS – the initial diversion decision of May 2019 and the internal review decision of September 2019. The facts disclosed in the case papers suggest that there was significant weight in some of the Applicant's complaints in relation to the initial decision, especially in relation to the adequacy of reasons for that decision. However, as a result of the interventions of the Applicant's legal team, an internal review of the diversion decision was undertaken by the PPS and ultimately a fully reasoned review decision was issued.

[22] On this preliminary question it would appear pedantic and counterproductive on the part of this court to review for a second time the materials used to deliver an initial decision when that decision 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. This approach was adopted in L v DPP [2013] EWHC 1752 by the Divisional Court in England and Wales and we consider this to be the current

approach. Therefore, we will treat this case as a challenge to the review decision of 6 September 2019 alone.

[23] The Applicant recognizes that judicial review of prosecutorial decisions is 'exceptional' [see Re Lawrence Kincaid's Application [2007] NIQB 26 at para 24]. She submits that her case meets the requirement of exceptionality because:

> "… there has been a failure to take into consideration all relevant considerations, a failure to discount all irrelevant considerations and a failure to apply the statutory Code and settled Policy of the PPS."

[24] She also claims that:

> "… the Applicant, a vulnerable young victim of serious offences, has been placed beyond the protection of the law (R (B) v Director of Public Prosecutions (Equality and Human Rights Commission intervening) [2009] EWHC 106 (Admin))."

[25] The policy documents which the Applicant asserts have not been applied correctly include the Code for Prosecutors (2016), the Department of Justice Victim Charter 2015 and the PPS Guidelines for Diversion (2008).

[26] The principal grounds upon which it is said that the PPS Code for Prosecutors has not been applied correctly is that the Respondent:

- "failed to take into account the views and impact of the offence on the Applicant and her family"; and

- the gravity of the incident which it is asserted "render the presumption in favour of prosecution a very strong one."

There is also a complaint that the PPS did not provide "accurate and timely case progression information" to the Applicant as required by paragraph 6.1 of the Code.

[27] The alleged breach of the Victim Charter also centers around the alleged lack of adequate information on case progression. The Victim Charter expressly recognises that:

> "**Standard 2.1: Information on alternatives to prosecution**

> In some cases, the police or the Public Prosecution Service may consider it appropriate to deal with an offence without taking it to court. This may prove more effective in preventing further offences and enables the incident to be dealt with relatively quickly. In such cases the police or the Public Prosecution Service will consider your views. …"

The Charter also entitled a victim to be:

> "notified of the reasons why this decision is made …"

[28] Finally, the PPS Guidelines for Diversion are called in aid by the Applicant. These guidelines stated at 1.6 that:

> "Public Prosecutors should positively consider the appropriateness of a diversional option (particularly if the defendant is a youth) when considering where the public interest lies."

[29] At paragraph 2.9 they state:

> "A Public Prosecutor directing on a case should consider the nature of the offence and the attitude of both the offender and the victim. The Public Prosecutor should consider the gravity of the offence and wither it can be suitably dealt with by diversion."

[30] Paragraph 2.11 notes:

> "Whilst the consent of the victim is not necessary, the attitude of the victim should always be considered. The decision whether to offer a diversionary disposal remains one for the Public Prosecutor. Any interference with victims/witnesses will normally preclude diversion. A police report will normally include the views of the victim in relation to the circumstances of the offence and its impact on the victim, the extent of loss and damage, and whether reparation or compensation has been made. Where an issue of diversion may arise, the police report should also contain the views of the victim in relation to the suitability of the case being disposed of by way of diversion."

[31] As noted above, we do not propose to consider the various statutory codes and guidelines in relation to the initial decision not to prosecute but only in relation

to the review decision issued on 6 September 2019 since this latter decision supercedes and replaces the original decision in the case.

[32] We have condensed the Applicant's complaints into four principal grounds namely:

(i) Failure to have regard to the views of the victim and her family;
(ii) Failure to give adequate weight to the gravity of the offence;
(iii) Failure to provide information on case progression; and
(iv) Failure to consider other relevant offences.

[33] The review decision letter expressly addresses the first two complaints. In relation to the views of the victim and her family the letter states:

> "The complainant's views are clearly detailed both in the police report and your letter dated 4 July 2019. I take into account the significant level of upset and distress this matter had understandably caused [the Applicant]."

[34] On this matter and also in relation to the weight attached to the seriousness of the offence she says:

> "I 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 complainant and on her behalf that she wanted [the Notice Party] to be prosecuted."

[35] In relation to the complaint that there was a failure to provide adequate case progression information, material presented on behalf of the proposed Respondent shows that Applicant was sent a standardised case progression on 27 March 2019 and that she did receive this letter because she returned a form that attached to it. This letter provided her with the name and contact details of an individual she could contact in order to receive progress updates about the case.

[36] As noted above the amended grounds allege a failure to consider prosecuting DB for other relevant offences [see para 5 (iv) a) and b) of the Order 53 statement]. Ground b), as explained at paragraph [19] above, was abandoned at the hearing because it was clear that explicit consideration had been given to the offence of taking/and/or distributing an indecent photograph of a child contrary to Article 3(1) of the Protection of Children Order 1978. Under this legislation a child is a person under 18. Ground a) alleges failure to consider the offence of engaging in sexual activity with a child contrary to Art 20 when read with Arts 16 and 17 of the Sexual Offences (NI) Order 2008. However, unlike Art 3, under these provisions it is not sufficient to prove that the complainant was under 18. The prosecution must establish to the criminal standard that the complainant was *under 16* at the time of

the alleged commission of the offence. Furthermore, it is a defence that the defendant *reasonably believed the complainant to be 16* at the time. We accept the prosecution submission summarised at paras [15]-[17] above that the evidential test for this offence is not met in this case.

[37] 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.

[38] In view of the above, we conclude that the complaints made by this Applicant do not stand scrutiny in relation to the review decision issued to her in September 2019. While there may have been some grounds for complaint 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. Accordingly, we refuse leave and dismiss the application for judicial review.