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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

X's (a minor) Application [2015] NIQB 52

IN THE MATTER OF THE APPLICATION BY X (A MINOR) ACTING BY HIS FATHER AND NEXT FRIEND X2 FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE PUBLIC PROSECTUION SERVICE

Before: Morgan LCJ, Coghlin LJ and Gillen LJ

GILLEN LJ (giving the judgment of the court)

Anonymity

[1] We have anonymised the names of the applicant ("X"), his father and next friend ("X2") and the other child in this case ("Y") by the use of initials. The reason for doing this is that children are involved in the nature of this application. We make an order providing that no person shall publish any material which is intended or likely to identify the applicant or any other child involved in these proceedings except insofar (if at all) as may be permitted by direction of the court.

Introduction

[2] The applicant is X, a 14 year old minor who resides with his parents and suffers from a moderate learning disability. He seeks leave to apply for an order of certiorari to quash three decisions of the Public Prosecution Service ("PPS") not to prosecute a 16 year old boy Y whom he alleges raped him, that there was insufficient evidence to afford a reasonable prospect of obtaining a conviction against Y and the conclusion in the review of the decision not to prosecute Y. He further seeks leave to apply for a declaration that the above three decisions are unlawful, ultra vires and of no force or effect.

[3] The test to be applied at the leave stage is conventionally formulated as the applicant needing only to raise an "arguable case". We observe however that this court in Re Omagh District Council's Application [2004] NICA 10 determined that where, as in this instance, an inter partes hearing has been convened and the arguments of all parties have been heard and all apparently relevant documents and issues considered by the court, the test for granting leave is that the applicant must show a reasonably good chance of success.

Factual background

[4] The applicant informed his sister on or about 9 August 2012 that he had been raped by Y, then a 16 year old minor, a number of weeks previously. He told his mother about the incident on 10 August 2012 and then his grandmother who telephoned the police on the same day.

[5] The applicant took part in an "achieving best evidence" (ABE) video-taped interview on 10 August 2012 conducted by police during which he set out allegations against Y. He informed police in the course of that interview that during his school holidays when he was at his grandmother's farm cleaning out a potato picker in a field, Y had trailed him into a shed, pulled his trousers down and inserted his penis into X's anus.

[6] After investigation by the police a file was forwarded to the PPS. A decision was taken by a senior prosecutor that the evidential test was not met and the PPS would therefore not prosecute. That decision was communicated to the applicant's family on or about 8 October 2012 ("the decision letter"). The letter containing this decision included express reference to the right to request a review of the prosecution's decision.

[7] It is the applicant's contention that this letter did not provide detailed reasons for that refusal contrary to paragraph 6.4 of the Policy for Prosecuting Cases for Rape.

[8] A review of that decision was sought by letter dated 24 June 2014 after the applicant's parents had attended their solicitor some months later.

[9] The senior prosecutor for the area took carriage of the review and wrote to the solicitor for the applicant explaining the review process. She requested an explanation for the delay between the no prosecution decision and the request for a review. The respondent alleges that no reply has been received and no explanation for the delay given.

[10] Thereafter an experienced Queen's Counsel and senior public prosecutor ("the QC"), at the request of the PPS, carried out a review of the decision taking into account all of the evidence and information provided by the PSNI in the investigation file, all notes and records made by the original decision-maker and the

correspondence from the applicant's solicitor. The respondent contends that this approach for reviewing a case is as set out at paragraph 4 of the Code for Prosecutors.

[11] That QC consulted with X (albeit he did not speak to him) and his parents. He concluded that there was not sufficient evidence to prosecute and advised that the test for prosecution was not met. Having received this opinion from the QC and completed the review, the respondent concluded that there had been no error of law, no failure to take into account relevant considerations or evidence or to take into account irrelevant factors and no indication of bad faith or other improper motive on the part of the decision-maker.

[12] The outcome of the review was communicated to the applicant in a letter dated 8 December 2014 ("the review letter").

[13] A pre-proceedings letter was sent to the PPS on 24 February 2015 advising that the applicant intended to make an application for judicial review of the decision not to prosecute Y and requesting that the respondent disclose all documentation pertaining to the police investigation of the case.

[14] The applicant contends that no response was received by 6 March 2015 and proceedings were issued on that date being just within three months of the date of the review decision on 8 December 2014.

The parties to this application

[15] Ms Doherty QC appeared on behalf of the applicant with Ms McCartney. Mr Henry appeared on behalf of the respondent. Mr McKenna appeared on behalf of Y. We pay tribute to the care and thoroughness with which the respective arguments, both written and oral, were presented to us.

Decision/review letters

[16] The decision letter of 12 October 2012 from the PPS indicating that a PPS lawyer had carefully considered the case and had taken the decision not to prosecute any person was couched in rather sparse terms without a detailed analysis of the reasons behind the decision. It did indicate that the applicant had the right to request a review of the decision not to prosecute.

[17] The review letter of 8 December 2014 was couched in more fulsome terms. It indicated, inter alia:

- in light of X's moderate learning difficulties Ms O'Kane the Regional Prosecutor for the Eastern Region now wished to obtain senior counsel's opinion as to whether the test for prosecution was met in

order that she could complete her review in light of any advices that counsel might give.

- that a consultation had taken place between senior counsel, the child and its parents.

- that counsel had given the family reasons why he considered the test was not met and the writer now did so separately for the purpose of concluding the review setting out six points in the following terms:

> "1. Whilst I make no criticism of [X] for this, his account is somewhat disjointed and his description of what he says happened is confused.
>
> 2. He had difficulty in recall and providing the detail of what he alleged had occurred.
>
> 3. There are no witnesses.
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> 4. There is no medical or forensic evidence.
>
> 5. There is no other independent evidence in support of the complainant's account.
>
> 6. There is not presently any potential bad character evidence on the part of the defendant.
>
> Whilst [X] does complain of having certain physical symptoms, these arise some time after the incident and set against the absence of any medical findings supporting the complaint would create a real doubt in the mind of the jury as to whether the offence was committed.
>
> The fact that I have concluded the test for prosecution is not met does not mean that [X] is not telling the truth. However the test that I must apply as stated above is whether there is a reasonable prospect of securing a conviction and in this case I have concluded that there is not."

[18] The opinion of the QC dated 23 September 2014 recorded that he was in a position to reach a conclusion on the papers alone but had met the complainant and his parents at their request to explain the test for prosecution, his role and his assessment of the evidence and to see if there was anything that the parents or

complainant knew that might affect the final outcome. That opinion relates all the salient factors in the case and counsel's discussion with the parents of the complainants. He concluded:

> "For the reasons offered, I conclude that the test for prosecution is not met."

Delay

[19] The first hurdle for the applicant to surmount was that of delay. An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made: see Order 58 Rule 4(1).

[20] The courts have consistently emphasised the requirement for promptness in these cases. A recent example is found in Turkington's Application [2014] NIQB 58 where Treacy J said at paragraph [32]:

> "[32] As indicated by the use of the word 'shall' this provision is mandatory. The overriding requirement is that the application for leave must be made 'promptly'. The three-month time limit is a 'back stop' and a claim is not necessarily in time if brought within the three-month outer limit. The time limit for bringing a claim for judicial review is much shorter than for most other types of civil claims. This short time limit is clearly intentional and its rationale is clear. As Lord Diplock said in O'Reilly v Mackman [1983] 2 AC 237, 280H-281A:
>
> > 'the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision'."

The written submissions of the respondent and the third party Y on the issue of delay

[21] We have not rehearsed the arguments on the issue of delay and candour of Ms Doherty because we were able to deal with these matters in favour of the applicant in short compass at the outset of the hearing without calling on her.

[22] Mr Henry and Mr McKenna submitted as follows on the issue of delay:

- There was an initial delay of over 20 months before a review was sought despite the applicant being informed of the right to request such a review in the decision letter of October 2012.

- There was a further delay of one month following the letter detailing the review outcome before a solicitor was instructed.

- A further month passed before the solicitor applied for legal aid.

- The respondent was not informed of any intention to judicially review this matter until some six weeks after the solicitor had been instructed to pursue those proceedings. It appears that the family of the applicant instructed a solicitor on 14 January 2015 but no notification was sent to the respondent until 24 February 2015.

[23] The third party Y makes some further discrete points namely:

- At the very least the promptness requirement is such that this application should be confined to a judicial review of the review decision and not of the original decision.

- Detriment has accrued to the interested party because any prosecution will now be in the adult courts. Accordingly the sentencing principles under the Beijing Rules and the UN Convention on the Rights of the Child identified in A-G's Reference 8, 9 and 10 of 2013 [2013] NICA will now no longer apply. Neither will the provisions of Section 53 of the Justice (Northern Ireland) Act 2002.

- Y has been told twice that there will be no prosecution and now faces yet a third period of uncertainty during a time when he has been under the age of 18 years. No fresh evidence has come to light to change the original prosecution decision and the facts remain unchanged. The requirement to act promptly is particularly important in cases where the absence of a prompt challenge will almost certainly cause hardship or prejudice and affect the interest of third parties (see Doyle [2014] NIQB 82 at [16]).

Conclusions on delay

[24] Whilst a required desideratum in judicial review is promptness of action we have come to the conclusion that the delay is not fatal in this case for the following reasons:

- It must be borne in mind the applicant is a minor with a moderate learning disability and has himself been blameless during this process.

- The court should be slow to withhold potential relief from him because of the delay of his parents and/or solicitor in what is a complex area of law. The interests of children have for many years commanded principled attention for their own sakes, their welfare and the broader interests of society within the context of the overall objectives served by the domestic criminal justice system. Delays in cases of sexual abuse of children are not that unusual. Third parties such as Y often are prosecuted long after the offence has occurred. There is weight to be accorded to the applicant's submission that this is an extremely serious allegation where any notion of impunity and the risk of the commission of more offences by a person with a disposition for commission of sexual offences against young children must be carefully considered and not swept under the carpet provided of course that an arguable case is made out on the merits justifying leave being granted

- The respondent, as is conceded by Mr Henry, has not been prejudiced.

Candour

[25] The respondent relied on the well-established principle that in an ex parte application an applicant is expected to conduct the proceedings with the utmost of good faith and candour. The respondent contends that the applicant's pre-action correspondence and affidavit were silent on the significant fact that senior counsel consulted with the applicant and his parents during the review process.

[26] Secondly, it is contended that the applicant asserts in his affidavit evidence and skeleton argument that on 24 February 2015 correspondence from his solicitor was not acknowledged whilst in fact the respondent did reply on 26 February 2015. This is not referenced anywhere in the applicant's papers. The PPS had replied to the effect that they would respond substantively once the regional prosecutor had the opportunity to consider the matter. Proceedings were issued before she had an opportunity to do so.

[27] We can deal with this ground briefly by concluding that we find no basis for this submission. Whilst it might have been preferable for the applicant to have referred to the PPS engagement of senior counsel, the generic reference to a further

review was probably sufficient to cover the general approach of the respondent. Cases of this kind are rarely if ever dealt with, even at the leave stage, without the opportunity being afforded to the respondent (and indeed in this case the third party Y) to address the court. Inevitably this point was going to emerge and so there was no prospect whatsoever of any important detail being withheld from the court.

[28] Moreover the PPS response to the applicant's solicitor of 26 February 2015 was, perhaps understandably, no more than a holding operation and therefore in effect no substantive response to their letter was ever received prior to the proceedings being issued.

Principles governing the decision not to prosecute

The relevant Code

[29] The Code for Prosecutors Revised 2008 ("the Code") was issued pursuant to the statutory duty placed upon the PPS by Section 37 of the Justice (Northern Ireland) Act 2002. The published Code, *inter alia*, gives guidance on the general principles to be applied when determining whether criminal proceedings should be instituted or, where such proceedings have been instituted, whether they should be discontinued. The Code defines the "Test for Prosecution" at Section 4 in the following terms:

> "**4.1 Test for Prosecution**
>
> 4.1.1 Prosecutions are initiated or continued by the Prosecution Service only where it is satisfied that the Test for Prosecution is met. The Test for Prosecution is met if:
>
> (i) the evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and
>
> (ii) prosecution is required in the public interest – the Public Interest Test.
>
> 4.1.2 Each aspect of the Test must be separately considered and passed before a decision to prosecute can be taken. The Evidential Test must be passed before the Public Interest Test is considered. The Public Prosecutor must analyse and evaluate all of the evidence and information submitted in a thorough and critical manner."

[30] Where the function of a public body concerns decisions about commencing or permitting legal proceedings, grounds for judicial review are applicable in a restricted way. There is now a well trammelled line of authority to this effect in the context of PPS decisions to prosecute or not to prosecute, the most recent authority in Northern Ireland being Re Mooney's (Christopher) Application [2014] NICA 48 which reviewed all of the salient case law.

[31] Hence for the purposes of the instant case, the relevant principles can be stated as follows:

(1) Absent dishonesty or mala fides or in highly exceptional circumstance, the decision of the PPS to consent to prosecution is not amenable to judicial review: see R v DPP ex p Kebilene [2000] 2 AC 326 at 369H-371G: R (On the Application of Corner House Research and Others) v Director of Serious Fraud Office [2008] UKHL 60.

(2) A decision not to prosecute is reviewable but will be interfered with sparingly, namely for unlawful policy, failure to act in accordance with an established policy or perversity: see R v DPP ex p C [1995] 1 Cr. App. R. 136.

(3) The threshold for the review of decisions not to prosecute may be somewhat lower than that set for decisions to prosecute because judicial review is the only means by which the citizen can seek redress against the decision not to prosecute: see McCabe [2010] NIQB 58 at [19-21] and R v Director of PP ex parte Manning [2001] QB 330 at para [23].

(4) Essentially there are three reasons for these principles. First, because the power in question is extended to the officer identified and to no one else. Secondly, the polycentric character of official decision-making and public interest considerations are not susceptible to judicial review because it is within neither the constitutional function nor practical competence of the courts to assess their merits. Thirdly, the powers are conferred in very broad and unprescriptive terms (see Mooney's case at paragraph [31]).

The submissions of counsel on the decision not to prosecute

The applicant's submissions

[32] Ms Doherty in summary made the following points:

- The applicant was a child who suffered from a learning disability. No registered intermediary service was available at the time of his ABE

interview (as would currently be the case) and therefore his account has to be read in this context.

- This is an extremely serious sexual crime and that is an important factor in determining whether or not leave should be granted.

- Apart from the offence of rape, the PPS failed to take into account other possible charges arising out of the fact that, for example, he was dragged into the shed and that his trousers and underpants were taken down.

- A fact that militates in favour of prosecution in this instance is the notion of impunity and the risk of the commission of more offences by a person with the disposition for commission of sexual offences against young children.

- This case is an exceptional one for the reason that the applicant, as a vulnerable young victim of a serious sexual assault, has been placed beyond the protection of the law.

- Four of the factors raised by the PPS in the review letter are not unusual factors and could not of themselves justify a decision of no prosecution i.e. lack of witnesses/medical or forensic evidence/independent evidence /potential bad character evidence in relation to the accused. This is often the case in such instances.

- The applicant was only 11 at the time of the incident. In his ABE interview he provided a clear albeit simple account of what took place. He had never shown previous hostility towards Y or made previous false allegations.

- The review process failed to lend adequate weight to the denial of Y through his solicitor that he had ever been alone in a shed with X in circumstances where X2 had provided a statement that he saw the two boy coming out of the shed. In addition there was the unsolicited comment made by Y to Constable Milligan at the time of his arrest that "it wasn't rape – I was just playing with him".

The submissions of the respondent

[33] Mr Henry made the following points:

- The evidential test of the PPS has not been passed. The public interest test does not need to be considered.

- This matter has been considered by both a highly experienced regional prosecutor and the QC. It would be necessary for the applicant to show that the decision on the review was perverse.

- There are a number of inherent frailties in the account of X. We have referred to these frailties later in this judgment.

The submissions on behalf of Y

[34] Mr McKenna on behalf of Y made the following additional point:

- Invoking CPS v Newcastle Upon Tyne YC [2010] EWHC 2773, it was submitted that by virtue of the fact that Y would now be treated as an adult – whereas he would have been treated as a child/juvenile if prosecuted in 2012 – he had been prejudiced in terms of the options open for youth justice sentencing which were now no longer available to him. We pause to deal briefly with this point. This is essentially a matter going to remedy and does not affect the issue of arguability which is the essence of the leave application. This point has no substance at this stage.

Discussion

[35] We have come to the conclusion that this is not one of the exceptional cases where the decision of the Public Prosecution Service not to prosecute should be amenable to judicial review. We find nothing perverse about the decision or the review process. We conclude that the applicant's case is not arguable and that, alternatively, the applicant has not shown a reasonably good chance of success. We are of this view for the following reasons.

[36] First, there is a clear factual basis for the finding that there are no grounds to mount a prosecution in this case. X's account is fundamentally flawed and provides no foundation for a prosecution. The facts grounding this conclusion include:

- Not only is there an absence of medical evidence of any anal rape (a factor which by itself would not be sufficient to deflect prosecution) but more importantly the child denied suffering any pain during the alleged rape. Given that there was no evidence of any lubrication being used together with the child's assertion that he was standing and not bent over when the act occurred, such a concession would be a fundamental flaw in the prosecution case.

- Moreover during the course of ABE interview, when the child was asked how it felt when the insertion had occurred he said "I forget really". He also said that his backside felt normal after it had occurred.

When asked why he had not mentioned the incident to his father when he arrived on the scene, X said "I forgot about it".

- The father's evidence was that when he saw X together with Y leaving the yard, the rape allegedly having been interrupted, the father noticed nothing untoward about X.

- X initially failed to mention penetration when speaking to the police expressly stating that after his trousers were down nothing happened.

- Whilst, as already indicated, the absence of medical, forensic evidence or independent evidence, and lack of bad character against Y did not by themselves fatally flaw a prosecution, their absence did serve to throw added focus on to the account of X.

- His suggestion that pain started several months after the rape adds to the lack of credibility.

- X's credibility was further greatly damaged when it emerged that the allegation he had made to police that a friend of his had been raped was untrue.

[37] We consider it therefore singularly unsurprising that two highly experienced criminal lawyers namely the regional prosecutor and senior counsel had concluded that the evidential test was not passed.

[38] We find Ms Doherty's assertion that other alternative charges could have been brought untenable. The fact of the matter is that if the anal rape charge had been deliberately left out, it would have fatally damaged his credibility on any other allegation which he made.

[39] The original letter of decision did not include detailed reasons and the reasons given following the review failed to mention a number of the points raised above. However it is clear to us that the letter of December 2014 from the Public Prosecution Service was written with some measure of sensitivity to ensure that an allegation was not made that X was telling lies. The detailed analysis that we have set out above might well have suggested the contrary.

[40] There is no doubt that the moderate learning difficulties of the applicant are a factor but we must bear in mind that the report we have of Special Educational Provision confines the child's difficulties to those of learning calling for Special Educational Provision. There is nothing in that report which would account for the weaknesses in his narrative. The police, the PPS and senior counsel were all aware of this moderate learning difficulty and it was factored into the decision. We are satisfied that this was properly done.

[41] Whilst we recognise that Y has through his solicitor denied being in the shed, accepted that "he was only playing with him" and made a no comment interview, none of these factors - individually or cumulatively - is sufficient to adequately redress the inherent weaknesses in X's account.

Conclusion

[42] We have therefore concluded that leave to apply for judicial review should be refused.