Judicial Communications Office

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COURT DISMISSES APPEAL IN "TALK TALK CYBER ATTACK" CASE

Summary of Judgment

The Court of Appeal[1] today dismissed an appeal by Aaron Sterritt against whether the Department of Justice's decision not to commence a legislative provision left him without adequate legal protection at the time of his arrest and violated his right to respect to private life under Article 8(1) ECHR.

Introduction

The legal challenge brought by Aaron Sterritt[2] ("the Appellant") arose out of events which unfolded in the public domain immediately subsequent to 26 October 2015, when he was aged 15 years. On that date the Appellant was arrested by police on suspicion of having committed offences under sections 1, 2 and 3 of the Computer Misuse Act 1990. Some seven hours later, following interview, he was released without charge and was subjected to the requirement of having to comply with the conditions of police bail. On the same date the Police Service of Northern Ireland ("PSNI") issued a press release which stated that a boy aged 15 years had been arrested. There was no disclosure of the Appellant's name, address or photograph. On 27 October 2015 the PSNI issued a further press release, linked to the first, stating that a boy aged 15 years had been released on bail pending further police enquiries. The conduct of PSNI was not the subject of challenge in these proceedings.

The events giving rise to the Appellant's arrest were popularly labelled the "Talk Talk Cyber Attack". They attracted considerable media interest. During the week following the Appellant's arrest and release on bail several major national media outlets[3] published information which, variously, identified the Appellant by name and the town in which he lived, contained his partly pixelated photograph and described his social interest in online pursuits. The material also emerged in certain websites and Twitter. On 30 October 2015, five days following the Appellant's arrest and release, injunction proceedings were commenced in the High Court. Interim prohibitive injunctions were made against both Google and Twitter, while the relevant newspaper organisations removed the offending materials from their respective websites and provided appropriate undertakings to the Appellant.

On 12 April 2017 the prosecution of the Appellant was initiated. On 20 September 2017 he pleaded guilty to one offence of "hacking" in the Youth Court. On 26 February 2018 he received a disposal consisting of a Youth Conference Order.

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[1] The panel was the Lord Chief Justice and Lord Justice McCloskey. Lord Justice McCloskey delivered the judgment of the Court.

[2] Aaron Sterritt previously had the protection of anonymity in these proceedings, suing as "JKL". This issue was raised with the parties by the court, mindful that he is now 18 and, further, that there is extensive information about his case in the public domain arising out of the publicity attendant upon his initial arrest and questioning by the police and his later prosecution and conviction. The Appellant's representatives, drawing to the attention of the court the decision in *R v Cornick* [2014] EWHC 3623 (QB), accepted that there is no basis for extending the grant of anonymity.

[3] The Daily Mail, Daily Telegraph and The Sun.

The Appellant's Primary Case

The central complaint upon which the Appellant's challenge is based is that the failure of Department of Justice ("DOJ") to commence section 44 of the Youth Justice and Criminal Evidence Act 1999 ("the 1999 Act")[4] has given rise to a *lacuna* in the Northern Ireland legal system which left him without adequate legal protection at the material time, giving rise to a violation of his right to respect to private life under Article 8(1) ECHR in consequence.

Justiciability

The first question to be determined is whether the Appellant can bring his case within the machinery of the Human Rights Act 1998 ("the HRA"). The starting points are that the 1999 Act is primary legislation within the scheme of HRA and section 44 of the 1999 Act has not been commenced. In circumstances where the DOJ has not exercised its power to bring section 44 of the 1999 Act into force, on the assumption that this failure entails acting incompatibly with the Appellant's rights under Article 8 ECHR, is this act immune from challenge by reason of section 6(6) of HRA 1998? This broad question can be narrowed down to whether a statutory rule made under the Statutory Rules (NI) Order 1979 ("the 1979 Order") is captured by the "*order, rules regulations …*" (etc) definition in section 21(1)(f) of HRA 1998? If "yes", the measure under consideration in this case would be one made under primary legislation which "*… operates to bring one or more provisions of* [that primary] *legislation into force …*"

By reason of section 6(1) and (6) of HRA a failure on the part of a public authority to make "primary legislation", as defined, does not entail acting incompatibly with any of the protected Convention rights. In standard terms, the failure by DOJ to bring section 44 of the 1999 Act into force would not be a failure *to make primary legislation* as it has already been made and the mechanism for commencing section 44 is a statutory rule under the 1979 Order, which is a measure of subordinate legislation. Thus, subject to statutory prescription, the primary legislation "shield" would not be available to DOJ. However, such prescription is (in this context) to be found in section 21(1)(f) of HRA. This enshrines a general rule and an exception. The general rule is that any order, rule, regulation, scheme, warrant, bylaw or other instrument made under primary legislation has the status of "*subordinate legislation*". The exception to this general rule applies where any of the foregoing measures is made under primary legislation and is devised to either bring into force any of the provisions of the primary legislation concerned or to amend any primary legislation.

In this way the question ultimately becomes: does a statutory rule made under the 1979 Order fall within the compass of section 21(1)(f) of HRA? More specifically, does the statutory language of "*… rules … or other instrument made under primary legislation*" apply to a statutory rule made under the 1979 Order? The Court considered that the answer must be affirmative:

> "Every member of the section 21(1)(f) cohort is, plainly, a measure of subordinate legislation. Section 21(1)(f) enshrines the familiar dichotomy of dominant primary legislation and subservient subordinate (or secondary) legislation. One of the long established features of United Kingdom primary legislation is a mechanism whereby certain of its provisions are initially dormant, to be brought into operation by the

[4] Section 44 of the Youth Justice and Criminal Evidence Act 1999 provides that whenever a criminal investigation begins into an alleged offence in England and Wales or Northern Ireland, no information enabling the identification of any person suspected of committing the offence may be reported by the media if he is under 18.

executive via a subordinate legislative measure. We consider that this analysis clearly applies to the expansive language of section 21(1)(f). Having regard to the clearly ascertainable legislative intention underpinning sections 6 and 21 of HRA 1998, in tandem with the expansive and unambiguous nature of the statutory language employed and taking into account also that this is an imperial statute in which special provision is made for the three devolved administrations (Scotland, Wales and Northern Ireland), we are satisfied that the absence of any reference to the 1979 Order is a matter of no moment."

Reflections on the Appellant's Primary Human Rights Case

While strictly unnecessary to do so, given the foregoing conclusion, the Court considered that it would be of benefit to address the substantive issues raised, taking into account that the court received full argument. The DOJ's response to the Appellant's case was that the non-commencement of section 44 of the 1999 Act lies within its margin of appreciation (in Strasbourg terms), or discretionary area of judgement (in domestic law terms), and, therefore, does not constitute an interference by omission with the Appellant's right to respect for private life.

The Court in its evaluation of the scope of DOJ's margin of appreciation also took into account the following:

- the offending publications did not involve the dissemination of something belonging to the Appellant's private life;
- the criminality stimulating the Appellant's arrest and interview and the ensuing publications was a matter of legitimate public interest;
- the subject matter of the publications was not of the lurid or salacious variety;
- the measures adopted to secure a person's right to respect for private life are not the subject of broad consensus among Council of Europe Contracting Parties;
- the two rights lying at the heart of the balancing exercise – Article 8 and Article 10 – are in principle are worthy of equal respect;
- the offending publication was effected by the print media and not the audio visual media; and
- the restraints for which the Appellant contends would have been operative at the pre-publication stage, thereby imposing a blanket prohibition on dissemination of the information under scrutiny.

In addition, a constant theme of the ECtHR jurisprudence is that State agencies rather than courts are, in principle, better equipped to undertake the kind of evaluative judgements involved in determining how best to secure the right to respect for private life within the domestic legal order and in weighing the panoply of considerations bearing on the balance to be struck between the competing Article 8 and Article 10 rights.

The relevant factual matrix contains a multiplicity of ingredients which do not all point in the same direction. It is incumbent on the court to stand back and view these as a whole, while giving effect to the principles derived from the ECtHR jurisprudence. This requires the formation of a judicial evaluative judgement which is alert to the operation of certain constraints on the judicial role in this kind of case. One aspect of this is that this court should exercise "*caution*" (in the language of the Strasbourg Court) given the wide margin of appreciation available to the State in this discrete litigation context.

Weighing all of the foregoing, had it been necessary to resolve the Appellant's primary human rights case the Court said it would have concluded that the failure of DOJ to act in the manner of which the Appellant complains, namely its non-commencement of s 44 of the 1999 Act, did not as regards the offending publications by non-State actors interfere with the Appellant's right to respect for his private life. In short, DOJ had not exceeded its margin of appreciation. For the reasons given, no interference by DOJ with the Appellant's right to respect for private life under Art 8(1) has been established. Therefore the court's enquiry does not progress to Art 8(2). The Court commented that if and insofar as the Appellant's legal challenge has highlighted any possible *lacuna*, the response to this will be a matter for the agencies concerned.

The Court went on to provide guidance to courts conducting criminal proceedings to which Article 22(1) and (2) of the 1998 Order apply on how they should exercise the judicial discretion created by these statutory provisions. It said the ECtHR has described the rights guaranteed by Article 8 and Article 10 ECHR as deserving of "*equal respect*". In cases where it falls to the court to balance these rights the context will of course be all important:

> "The age of the defendant will be a matter of unmistakable significance. The open justice principle is at its strongest in respect of the right of the press to publish a fair and accurate account of court proceedings. Even here, however, the legislative steer is towards the anonymisation of children and young people charged with offences. The court concerned will be obliged to act compatibly with the defendant's right to respect for private life under Article 8 ECHR. This exercise will entail balancing the principle of open justice and the freedom of expression rights enjoyed by media organisations under Article 10 ECHR."

The Court commented that the international standards will be of particular importance. As a matter of legal doctrine, these standards influence how Article 8 is to be applied in any given case and how balancing exercises involving *inter alia* Article 8 are to be resolved:

> "The clear and consistent orientation of these standards is to allocate to an elevated plane the importance of protecting the privacy of children involved in the criminal justice system. This is expressed in the terms of an imperative, with a clearly explained rationale. Thus it is to be expected that the Article 8 rights of children involved in criminal proceedings will prevail in all but the most exceptional circumstances."

Logically, the aims and objectives of the international standards and the protection provided by Article 8(1) ECHR must apply with equal force to children whose encounter with and involvement in the criminal justice system is at a preliminary stage (as in this case) falling outwith the framework of Article 22(1) and (2) of the 1998 Order. The express terms of the UNCRC provisions, in tandem with the open textured language of the other international standards highlighted, strongly support this analysis. Therefore cases in which a public authority can lawfully depart from this norm – such as *Re JR 38* [2015] UKSC 42 – will be rare. It follows that if a public authority such as the PSNI or the DPP had made the publications impugned by the Appellant it is highly unlikely that justification could have been established.

Reflections on the Appellant's alternative case: Articles 6 and 8 ECHR in tandem with Article 14

The late emergence of this alternative case when the appeal was first listed before the Court of Appeal gave rise to a remittal order pursuant to which Colton J delivered a second judgment. At the same time the Court of Appeal court permitted amendment of the Appellant's pleading. Whereas the Appellant's primary case is founded on an asserted breach of his right to respect for private life protected by Article 8(1) ECHR his alternative case, invoking Article 14 ECHR, entails the contention that he was the victim of discriminatory treatment *within the ambit of* not only Article 8 but also Article 6. This is reflected in the corresponding relief now pursued:

> "*A declaration that the failure to provide the* [Appellant] *with pre-charge anonymity created unlawful discrimination contrary to* [his] *rights under Article 14* [ECHR] *in conjunction with Article 6 and/or Article 8.*"

It was not contested on behalf of DOJ that the Appellant's case satisfies the ambit test vis-à-vis both Article 6 and Article 8. The Court said there are two features in particular of Article 6 which resonate in the case of this Appellant. First, the autonomous concept of a "*charge*" within the Article 6(1) framework materialises when the situation of the person concerned is *substantially affected*[5] In the present case, while the information available is not particularly detailed, the Court said it was disposed to accept the agreement between the parties that this test was satisfied in the relevant circumstances, namely the arrest of the Appellant on suspicion of having committed the relevant offence, ensuing interviews by the police and his release from custody without any withdrawal of the suspicion of his criminality. In Article 6 terms the criminal process involving the Appellant had begun.

The second resonant feature of Article 6(1) on the facts of the Appellant's case concerns the protections against publicity which Article 6 is capable of providing. Article 6 specifically permits derogation from the general principle of publicity where *inter alia* the interests of juveniles or the protection of a party's private life so require. Given the two features noted the Court said it was prepared to accept the parties' joint position that the ambit test is satisfied in this case.

Progressing to the second test, the starting point is that the Appellant cannot lay claim to any express status in the Article 14 "list". The question therefore becomes whether he possesses an "*other status*". The Court considered that the "*status*" of the Appellant at the material time was that of a child suspected of, but not charged with, a criminal offence in the context of a continuing police investigation. It said the single principle which probably emerges most clearly from the fog is that the judicial determination of "*other status*" in a given case should incline towards the expansive and not the restrictive. The Court said the answer to the Article 14 "*other status*" question in this case had not emerged as obvious. Its conclusion, not without reservations, is that the status asserted by the Appellant namely, in his short hand that of *pre-charge suspect,* ranks as an "*other status*" within the embrace of Article 14 ECHR.

The first two of the sequential and cumulative Article 14 tests having been resolved in the Appellant's favour, the Court said it came to the third, namely that of comparator. Having regard to the treatment of which the Appellant complains, is the situation of the members of the group with which he seeks to compare himself analogous? In his consideration of this issue Colton J, in his second judgment, drew attention to the distinction between the investigatory stages of a criminal process and the post-charge phase. The Court considered he was correct to do so. It said there are

[5] See *Ambrose v Harris* [2011] UKSC 35, at [62] and *O'Neill v HM Advocate (No 2)* [2013] UKSC 36, together with the recent review of the leading authorities in the decision of this court in *R v Dunlop* [2019] NICA 72 at [25] – [26].

multiple distinctions between the situation of a person (merely) suspected of an offence and that of a person charged with (or accused of) an offence. The factors common to these two situations are few. While each falls within the realm of criminal justice, or the criminal process, and each typically involves the police agency, with lawyers usually involved, this in substance is the extent of the comparison. The differences between the two situations, both practical and legal, are material and extensive. The analogy between the two situations is in our view vague and flimsy. The Court considered that the members of the comparator group chosen by the Appellant differ from him so substantially that, within the Article 14 framework, they cannot be considered to be in a relevantly analogous situation.

Having regard to the analysis and conclusion the Court said that had it been necessary to determine the Appellant's alternative Article 14 case it would have rejected it. If and insofar as the Court would have been wrong to do so it turned to consider the last of the Article 14 tests, namely justification in shorthand and, more precisely, legitimate aim and proportionality[6]:

> "To summarise, the DOJ made a choice in the exercise of its discretion. This occurred in a context of competing qualified Convention rights which the ECtHR has described as of equal stature and importance. There is no indication that in making its choice it left anything material out of account or permitted the intrusion of anything immaterial or extraneous. Nor is there any suggestion of the careless or capricious. The fact that this measured choice had unwelcome and unpleasant, though short lived, consequences for the Appellant – and only him – does not warrant the conclusion that a proper and fair balance between the two competing Convention rights was not struck. In *DA* terms, the balance has to be merely tenable. In non-*DA* terms, the balance must withstand somewhat more rigorous judicial scrutiny. We consider that the application of both standards of review yields the same result. Thus on the assumption that our rejection of the Appellant's "comparator" case – [74] above – is erroneous, had it been necessary to do so we would have held that his Article 14 challenge must fail in any event."

Omnibus Conclusion

The Court concluded that the Appellant has no sustainable case against DOJ under the Human Rights Act and dismissed the appeal. It said it would have dismissed the appeal on its merits in any event, for reasons differing somewhat from those of the trial judge.

NOTES TO EDITORS

1. 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

If you have any further enquiries about this or other court related matters please contact:

[6] This required the Court to consider in particular the decision of the Supreme Court in *R (DA and Others) v Secretary of State for Work and Pensions* [2019] UKSC 21, a path traversed recently in the decision of the NI Court of Appeal in *Re Stach [2020] NICA 4.*

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