

Judicial Communications Office

30 September 2020

COURT DISMISSES APPEAL AGAINST DOWNSTREAM MONITORING OF POLICE INTERVIEWS

Summary of Judgment

The Divisional Court¹ today dismissed an appeal against the downstream monitoring of police interviews concluding that a Position Statement issued by the Association of Chief Police Officers had given the necessary quality of law to give rise to foreseeability in respect of the practice.

Risteard O’Murchú and Arlene Shannon (“the applicants”) were arrested in connection with criminal offences. In each case the investigating officer indicated that it was proposed that there should be downstream monitoring (“downstreaming”) of their interview as a result of which persons who were not in the interview room would both see and hear what was occurring. No additional recording of the interview was involved in this process. The applicants were both concerned that other people could be viewing or listening and both claimed they had previously been approached about becoming an informant. In each case their solicitor contended that downstreaming was not in accordance with law. As a result of that objection judicial review proceedings were lodged although the PSNI (“the respondent”) decided to proceed with the interviews without downstreaming.

Codes of Practice relevant to interviews

Articles 60 and 60A of the Police and Criminal Evidence Order 1989 (“PACE”) impose a duty on the Department of Justice to issue a code of practice in connection with the tape-recording and visual recording with sound of interviews of persons suspected of the commission of criminal offences which are held by police officers at police stations. Article 65 of PACE requires the Department to issue codes of practice in respect of the arrest, detention and questioning of persons by police officers. The codes deal with some aspects of what happens in the interview room and the arrangements for the retention of the recordings.

The codes of practice do not touch upon downstreaming. The relevant codes under PACE and the Terrorism Act 2000 provide that before the interview commences each interviewer shall identify themselves and any other persons present to the interviewee. Code E provides that access to interview recordings must be strictly controlled and monitored to ensure that access is restricted to those who have been given specific permission to access materials for specified purposes when this is necessary. That includes police officers and prosecution lawyers as well as persons interviewed if they have been charged or informed they may be prosecuted.

In England and Wales the Home Office updated its codes of practice following a statutory consultation process in 2018. Code E 2018 relates to the audio recording of interviews and contains the provisions relating to the use of remote monitoring.

¹ The panel was the Lord Chief Justice, Lord Justice Treacy and Mr Justice Huddleston. The Lord Chief Justice delivered the judgement of the court.

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Policy and Guidance

The respondent indicated that downstream monitoring has been used by police forces in the United Kingdom since the 1990s. The Court referenced the development of the policy and guidance in paragraphs [8] to [11] of its judgment. It noted that the Association of Chief Police Officers of England and Wales and Northern Ireland (“ACPO”), now known as the National Police Chief’s Council, issued a position statement entitled “The remote monitoring of suspect interviews” setting out guidance on remote monitoring of interviews. It was noted that remote monitoring can improve the quality of an investigative interview and should be viewed as an essential when investigating major crime and an integral component part of any suspect interview strategy. The decision to remotely monitor an interview should be made by a senior investigating officer. The fact that an interview or part of an interview was to be remotely monitored should be recorded in the suspect’s custody record which should also state the purpose of the monitoring and the names of everyone monitoring it.

The College of Policing first published guidance on investigating interviewing in October 2013 and has continued to modify it up to 18 March 2019. It includes guidance on downstream monitoring.

Reasonable expectation of privacy

It was argued by the applicants that each had a reasonable expectation of privacy in respect of the conduct of the interviews. It was further submitted that the downstreaming and monitoring of their interviews was not in accordance with law. The Court said there was a distinction between this jurisdiction and England and Wales where the Home Office had updated Code E to provide the necessary legal basis. The respondent argued that the applicants could not establish a reasonable expectation of privacy relating to the use or intended use of downstream monitoring because each was already held in a custodial environment where CCTV monitoring and recording applied throughout the periods of detention. No challenge was made to that CCTV monitoring and recording and the only persons to use downstream monitoring or intending to do so did so with the intention of monitoring the respective interviews. All had direct professional involvement in the investigations and would in any event have been lawfully entitled to examine the content of those interviews.

The Court considered the reasonable expectation of privacy test in paragraphs [14] to [21] of its judgment. The first question is to determine whether a reasonable expectation of privacy is established. If there could be no reasonable expectation of privacy, or legitimate expectation of protection, it would be hard to see how there could nevertheless be a lack of respect for Article 8 rights. The Court agreed that the question of engagement is different from the issue of justification and said the authorities remind the court not to confuse these separate issues. It considered, however, that the reasonable expectation of privacy question and the issue of justification are not distinct silos in that matters related to the factual and legal background may be relevant to both. The Court said this case is an example of such a situation.

“Although the parties approached the case on the basis that the engagement question was distinct from the quality of law issue with the latter arising only at the justification stage we consider that [the case law], leads to the conclusion that in this case the quality of law issue is material to the engagement question and should be considered at that stage. That is because the respondent’s essential submission is that the safeguards provided by the guidance documents are part of the background to be

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taken into account in determining the applicant's reasonable expectation of privacy has been engaged."

Quality of law

There was no dispute about the relevant principles applying to the "in accordance with the law" test. The impugned measure should have some basis in domestic law requiring that it should be accessible to the person concerned who must be able to foresee its consequences for him and the measure must be compatible with the rule of law.

The applicants pointed to the contents of the amended Code E in England and Wales describing the range of safeguards which should be applied in respect of downstreaming. The safeguards satisfy the tests of accessibility and foreseeability and can only be used for proper police purposes as set out in section 32 of the Police Act (Northern Ireland) 2000. The Court said it was difficult to see that a failure to comply with the safeguards would of itself render the contents of any interview inadmissible but such a failure could be material in determining whether or not there had been a breach of Article 8 since any interviewee would have a reasonable expectation that the protections in respect of the conduct of each interview would be observed.

The Court noted that the promulgation of guidance in respect of remote monitoring of recorded interviews was first published by circular from the Home Office in September 1995. The purpose of the circular was to make sure that suspects and their legal representatives were fully aware of what was happening and that there was no possibility of privileged conversations being listened to. The procedural safeguards were then set out. Those procedural safeguards are replicated in the ACPO Position Statement, the Guidance from the College of Policing on remote monitoring and the amended Code E in England and Wales.

The 1995 Home Office Circular did not expressly apply to Northern Ireland and there was no indication that downstream monitoring was a feature of investigations in this jurisdiction at that time. The Court said, however, that the PSNI is a member of ACPO. The ACPO Position Statement set out guidance on the remote monitoring of interviews with suspects and the 1995 Home Office Circular was expressly incorporated into it and each of the protections contained in the Circular are expressly repeated.

The Court held:

"This was not a discussion document or a recommended course of action. It was a commitment made by the relevant professional bodies tasked with the conduct of the interviews of suspects in their jurisdictions as to how downstream monitoring would be carried out. The Position Statement was plainly challengeable by way of judicial review and its promulgation gives rise to legal consequences in that it created a legitimate expectation that downstream monitoring would be carried out in accordance with the Statement. We are satisfied, therefore, that the ACPO Position Statement had the necessary quality of law to give rise to foreseeability in respect of downstream monitoring."

Conclusion

The Court commented that the interview of suspects under caution after arrest gives rise to an obvious interference with the ability to engage in one's everyday activity but also involves a

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considerable adverse reflection on character. It said this is particularly so in cases where the background of the allegation is connection to terrorism. Case law required the court to take into account the protections offered by the codes of practice concerning the conduct and recording of interviews and the controls on access to those recordings. The Court said that the ACPO Position Statement must be added to that list:

“The circumstances of the detention and interview of each applicant arose from the proper interest of police in the investigation of crime but at the time of each interview neither applicant had been charged with any offence. Each was subject to state detention which would give rise to anxiety in any reasonable person. The issue of the engagement of Article 8 should not be confined to the narrow issue of the downstreaming of the interview. It is not necessary for us to determine whether in those circumstances Article 8 is engaged but if it is engaged we are satisfied that the ACPO Position Statement has the necessary quality of law.”

The Court dismissed the application.

NOTES TO EDITORS

This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

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