GENERAL CRIME | CASE COMMENT

DOES THE VICTIMS' RIGHT OF REVIEW INCLUDE A RIGHT TO MAKE REPRESENTATIONS? R (FNM) V DPP [2020] EWHC 870 (ADMIN) CONSIDERED.

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On 8th April 2020 the High Court handed down its decision in the case of *FNM*. At issue was whether a complainant in criminal proceedings could, when asking the Crown Prosecution Service ("CPS") to re-consider a decision not to prosecute a case under the Victims' Right of Review Scheme ("VRR"), make representations to seek to influence the review process, or whether a complainant's right was limited to a review on the material already available.

The complainant, the alleged victim of a rape, contended that the terms of the VRR scheme, properly construed, conferred upon her the right to make representations and have those representations considered by the Director of Public Prosecutions ("DPP"). In any event, the correspondence received from the Crown had given her a legitimate expectation that she would be permitted to make representations and have those considered prior to any decision being taken.

The DPP's position was that the VRR scheme does not entitle a complainant to make representations. The "right" conveyed is simply the right to request a review.

The Victims' Right to Review Scheme

VRR was established in 2013 through CPS guidance, giving effect to the common law principles identified in *R v Killick* [2012] 1 Cr Ap R, which confirmed the right of a complainant to seek a review of a decision not to prosecute without recourse to judicial review. Killick had been jailed for three and a half years for violent sexual attacks on two individuals with cerebral palsy, only after the CPS reversed their initial decision not to charge following a complaint from one of the victims. From 5th June 2013, decisions not to charge, to discontinue or otherwise to terminate proceedings can all be the subject of requests to review under VRR.

At the launch of the widely-publicised scheme, the then DPP, Sir Keir Starmer Q.C., said the CPS recognised complainants as "active participants in the criminal justice system, with both interests to protect and rights to enforce". VRR was established as a right to request a review and not a guarantee that proceedings would be recommenced.

The Guidance accompanying VRR provides materially as follows: where a decision is taken not to bring a prosecution, the complainant must be notified of the right to seek a review. Where a complainant requests a review, there is first an attempt at local resolution, where the decision is considered by the local CPS office, assigning a new prosecutor. If the original decision is upheld, the complainant must receive a proper explanation and be told that he/she can request an independent review from the CPS Appeals and Review Unit ("the ARU"). This will comprise a fresh consideration of the evidence and application of the evidential and public interest tests in the Code for Crown Prosecutors.

Crucially in the case of *FNM*, paragraph 42 of the Guidance states that [*w*]*here a victim has given reasons for requesting a review, the issues raised will be addressed in the decision letter to the victim, where appropriate.* (emphasis added).

Time limits apply but do not appear to be set out with any degree of rigidity. A request for review should "normally" be made within five working days of receipt of the decision not to prosecute. However, requests for review will be considered for up to three months after such communication, that period being extendable in exceptional circumstances.

Ultimately, the purpose of the scheme is that if the decision not to prosecute is found to be wrong, it may be possible to bring proceedings against the suspect. If that is not possible for any reason, the complainant may receive an explanation and an apology.

The facts

At the time of the alleged offence, *FNM* ("C") was 15 years old and vulnerable. She stayed overnight at the house of an older girl she believed was her friend. A young man, "D", was invited over to join what became a mixed group. C had met him once before, where she said he had made unwanted sexual advances towards her, and he was, she said, perfectly aware of her young age. She had been told she would be sleeping in the same room as the young man, D.

C took ecstasy and smoked cannabis with others that evening. She was then persuaded to take a significant number of Xanax pills, after which she remembered very little of the weekend.

She believed, when she came round, that over the course of the weekend she was subjected to a series of sexual assaults by D. She remembered being in bed, clothed, with him on occasions.

The police were called and when they arrived late on the Sunday afternoon she was found in bed, with only her underwear on. She was severely intoxicated and needed help to walk. She could hardly speak. A police officer arriving at the house heard D shout “fuck off, I’m shagging my bird”, shortly before he found C.

Subsequent forensic examination showed that D’s semen was inside her underwear, but not in her body (which she had by then washed), nor on the bedsheets (which had also been washed).

C decided to make a complaint to the police. She was told by an officer that D had been interviewed, had admitted having sex with her, but claimed he thought she was 16 or 17.

The case was referred to the CPS for a charging decision. A Senior Crown Prosecutor wrote to C on 2nd October 2018 and told her that they would not be prosecuting the matter. The reason given was that she was unable to remember what had happened.

The Review under VRR

By 16th May 2019, following some correspondence with the CPS, C challenged the decision, writing to the CPS that she wished them to proceed with her “appeal under the [VRR] process”. She did not, at that stage, make representations as part of her request.

A local review was duly conducted in accordance with the Guidance and the Senior Crown Prosecutor’s original decision was upheld. Reasons given were that there was no evidence other than what the suspect had said in interview, namely that the parties had in fact had sex. The decision went on to detail that the forensic evidence suggested sexual activity but did not prove sexual intercourse had taken place. It said that without C’s full recollection “to explain the gaps” a jury would not know exactly what happened. The flaws in the reasons communicated to the complainant at this stage are obvious, not least in relation to the

perceived absence of proof that sexual intercourse had taken place where this was an admitted fact.

C's father was not satisfied with this decision. He wrote to the CPS saying that they had failed to consider the clear evidence of his daughter's intoxication. His letter was treated as a complaint (and upheld) but, in the meantime, C herself then requested a further review. The CPS responded to her on 5th July 2019 in an email, key extracts of which were reproduced in full in the High Court's judgement:

"….I have spoken to the reviewing lawyer and can see we are due to provide an update regarding the review on 11/07/2019.

The reviewing lawyer had made suggestion (sic) the review will not be complete by the above date and an extension will be required, therefore can I ask for you to send in your representation as soon as possible.

Whilst you, or your legal representative are at liberty to make representations, and whilst the reviewing lawyer will have regard to them as far as possible, it is essential that the independence of the CPS decision is maintained and that the decision can be seen to have been made in accordance with the Code for Crown Prosecutors, based upon the evidence and upon an impartial application of the law to the facts, without fear or favour.

Therefore please note ***27 September 2019*** *for the ARU to provide you with an update pending your representations, may I make you aware we will not be holding the review and nor will we be seeking your representations should they not be forthcoming."*

At the High Court hearing, the concession was made on behalf of the DPP that the email of 5th July "might have been more clearly expressed". This is something of an understatement. The language leaves the meaning opaque in several important respects and the Court had sympathy with C's assumption that no final decision would be taken until 27th September. C engaged legal assistance and began to formulate representations to the CPS, which she believed had been invited.

Without warning, the CPS Appeals and Review Unit made their decision on 9th August 2019 without waiting for C's representations. A Special Prosecutor upheld the decision not to prosecute for any offence. On this occasion, the reasons were that, while there was sufficient evidence that D had had sex with C as per his admission, the central issue was consent. While there was evidence that C was under the influence of something at the material time, the difficulty was it could not be said what condition she was in at the time of the sex. As for

a prospective charge under section 9 of the Sexual Offences Act 2003, the Special Prosecutor said it was “one word against the other” and there was no other evidence that D was aware of C’s age.

The submissions

C’s case before the High Court was that:

1) she had a right to make representations under the VRR; and

2) the CPS had an obligation to consider them once they had been made.

She further submitted that she had a legitimate expectation from the CPS that they would not make a final decision until 27th September 2019, and thus that she had time to submit representations before that date.

C said that there were key issues she wanted to formally raise in her representations which may have altered the outcome of the decision, including her severely intoxicated condition when the police found her, evidence that she was targeted and exploited by older girls and D, and third party evidence that D had been told of her age by others before the incident.

The DPP’s position was that the VRR scheme gives a complainant a right of review but not a right to make representations and therefore to seek to influence the outcome of any such review. The purpose is to provide a mechanism for a fresh consideration of the facts. The DPP submitted that the email on 5th July 2019 could not give rise to an expectation that representations would be considered because VRR simply does not allow for that to happen. It was suggested that, although a C had a right to apply to judicially review a decision not to prosecute, her prospects of success must be very small if the CPS have adhered to the VRR procedure.

The DPP submitted that there were sound public policy reasons not to allow complainants a right to make representations. Decisions had to be impartial, and independent prosecutors were key. It was at the investigation stage where complainants had an opportunity to provide all relevant information they had to the police. The duty of the reviewing lawyer is to weigh the evidence gathered at investigation stage and to dispassionately apply the Full Code Test.

It was further submitted that if VRR were to encompass the possibility of representations from complainants seeking a favourable outcome, it would need clearly defined limits on those representations and their use. Careful consideration would need to be given to disclosure obligations and to suspects' rights. The question was asked: if complainants are not allowed to make representations at charge stage, why should they be allowed to make representations at review stage?

The ruling

The Court stated that the case involved two central questions. First, an issue of general importance, namely whether complainants have a right to make representations at the independent review stage of VRR. Secondly, they considered whether the CPS' email of 5th July 2019 had, in this case, given rise to a legitimate expectation that C's representations would be considered once submitted.

In answer to the first question, the Court reaffirmed that VRR gave a complainant a right to seek an independent review. The court considered that paragraph 42 of the Guidance gave complainants a fair *opportunity* to make representations and have them taken into account, but opportunity was all that was required. There was no duty on the CPS to positively invite representations from complainants seeking a review. The Court accepted the DPP's position that, as complainants have no right to make representations as to charge, it would be curious if they had such a right on review.

The Court found that "still less does a complainant have the right to hold up the review process for any significant period of time to enable her to consult lawyers and formulate a detailed case as though the review were an appeal to a higher court." The Court imagined that, where an application for a review asked for seven or 14 days in which to give reasons, that might be sympathetically considered, but they would not go any further. They agreed with the DPP that time limits are key as suspects have rights too, remarking that many prosecutions are already significantly delayed without building further mechanisms for delay into the process.

Therefore, had the ARU responded to C's original request for a review with a decision to uphold the original decision not to prosecute, C would have no cause of action to seek a judicial review. She would have missed her opportunity to make representations, and that would have been an end to the matter.

However, in this specific case, that was not what had happened. The email of 5th July 2019 had caused C and her father to believe that they had until 27th September 2019 to make representations before the decision would be made. The DPP, in oral submissions, accepted that this was the meaning conveyed by the email. The Court found that "there was a simple failure of due process when the decision… was taken without waiting for the Claimant's representations". They ultimately considered that if the decision was unlawfully taken it should be for the DPP and not the High Court to consider the merits of the review afresh.

Accordingly, the application for judicial review was granted and the ARU decision upholding the original decision not to prosecute D was quashed. C was given 21 days to submit to the CPS her reasons in support of the application for review, after which a fresh decision is to be taken by a member of the ARU not previously involved with the case.

Conclusion

In summary, *FNM* confirmed the following:

- Complainants do not have a *right* to make representations under VRR, but have a fair *opportunity* to do so in accordance with paragraph 42 of the Guidance.
- Time limits should be adhered to and there must be good reason for any departure from them.
- If representations are made, the decision maker is under a duty to consider them, so far as appropriate.
- The CPS is not required to invite any further observations or representations.
- VRR is expressly not a gateway for litigation or formal appeal.

It is an important principle, recognised in the Guidance, that people should be able to rely on decisions taken by the CPS as being final and that such decisions should not normally be revoked. This is essential not just for suspects who cannot be expected to live with the crippling uncertainty of a looming prosecution indefinitely, but also for complainants who deserve to know how their allegation will be dealt with as quickly as reasonably practicable. At present, CPS figures for the second quarter of 2019-2020 indicate that the average time from complaint to charging decision in cases of rape and child sexual abuse is 132 days, up from 108 days in the previous year. For most complainants and suspects, this translates to months of anxiety during which their lives are "on hold" and their mental health suffers. No doubt, reasons cited would include the increasing complexity of investigations due to the

explosion in potentially relevant digital material and the lack of trained disclosure officers to deal with it. The reality too, is that decisions often take very much longer.

There will be circumstances where maintaining public confidence in the criminal justice system requires the CPS to reverse a decision if it is found to be wrong. It is vital therefore, for those asking for review under VRR to understand the Guidance, act within the time limits and to set out any representations as succinctly as possible. Representations are perfectly possible, above and beyond a bare request for a review, but only within the framework of paragraph 42 of the Guidance. There is no bar to obtaining legal advice as to the VRR process and how best to articulate representations in the VRR application, but assistance should be engaged as early as possible.

The decision to grant the application for judicial review in the case of *FNM* was a direct result of the failure of due process in this specific case. The CPS were found to have led a complainant to believe that she had a specified period of time in which to make representations, but had then proceeded to make their decision early, without waiting for those submissions. It should not be considered that this case establishes any wider principle but it serves to reinforce the fact that the only "right" conferred by VRR is the right to request a review.

This note was produced by Orla Daly and Tom Orpin-Massey and should not be taken as constituting formal legal advice. To obtain expert legal advice on any particular situation arising from the issues discussed in this note, please contact our clerking team at barristers@qebhw.co.uk. For more information on the expertise of our specialist barristers in criminal and regulatory law please see our website at https://www.qebholliswhiteman.co.uk/.

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