

Operation Exposure

The case of JR 38 (a minor) in the Supreme Court

Introduction

The Supreme Court recently gave judgment in the matter of JR38 [2015] UKSC 42. This matter related to an appeal from the Divisional Court in Northern Ireland cited as [2013] NIQB 44. The case was brought by a 14 year old boy whose photograph had been published by the PSNI in local papers and in a leaflet distributed by the PSNI in the Derry/Londonderry area under an operation codenamed Operation Exposure. The photographs were images which were captured on CCTV during periods of interface violence in 2010. The young person issued Judicial Review proceedings claiming that his Article 8 rights had been breached by the publication of his image.

Background to Operation Exposure

In 2009, Inspector Burrows maintained that under section 32 of the Police (Northern Ireland) Act 2000 the police service had a duty to seek public assistance to identify the suspects in order to investigate crime and to take measures to bring offenders to justice. After serious interface violence in the Fountain Street/Bishop Street area of Derry/Londonderry in that year, the PSNI had gathered extensive CCTV images of suspects, mainly young people, whom the PSNI believed were being encouraged by their respective paramilitary groups and vigilantes. These young people had been difficult to detain at the time of the disorder due to the layout of the area which made it easier for the young people to escape into areas which the PSNI could not, for various reasons, follow them.

Inspector Burrows then reached agreement with the three main local newspapers to publish CCTV images of the unidentified suspects and to appeal to the public for assistance in identifying the suspects. After Derry/Londonderry District Partnership voiced concern along with the District Commander the publication of the pictures was postponed to allow time to draw up guidance and seek clarification from the PSNI's Human Rights Legal Advisor. This was to be known as 'Operation Exposure'.

The Operation Exposure guidance document was drafted and included guidance to specifically ensure protection for the young people who may be identified as a result of the images being released. The guidance included matters such as, *"the release to the media*

must be judged necessary.....and the caption accompanying each image must reflect the presumption of innocence.. (and that).... only images of suspects in relation to imprisonable offences could be considered for inclusion”.

In March 2010, the re-drafted ‘Operation Exposure’ was relaunched with the additional safeguards.

In spring/summer 2010, after serious public disorder and violence in the Foyle district, the PSNI had again gathered CCTV images of suspects. The PSNI had previously used different tactics in an attempt to identify some of the suspects which were unsuccessful. The images were released to local newspapers in a series of phased releases starting on 16 July 2010. In early August 2010 a leaflet containing unidentified images was also released. The PSNI’s intention for Operation Exposure was to divert youths away from violence, wherever possible. A total of 37 children and young people were identified and five were charged (those charged had committed very serious offences or had previous convictions) and the remainder were offered youth diversion or youth conferencing.

The Applicant

JR38, who had a previous caution for riotous behaviour, was arrested on 1 July 2010 for offences which took place in June 2010 as a result of the internal circulation of the CCTV images within the PSNI. After being arrested, JR38 accepted that the CCTV showed him at the interface but did not show him engaged in any criminal activity.

The applicant submitted an application for Judicial Review in September 2010 of the PSNI’s decision to release the images to the media and in a leaflet which resulted in his photograph being published in the Derry Journal.

Divisional Court

On the 21 March 2013 the Divisional Court in Northern Ireland heard from Counsel for the applicant who claimed that under Article 8 of the European Convention on Human Rights (ECHR), the publication of the photographs was a breach of the applicant’s rights, in particular, the PSNI’s failure to gain the consent of the applicant’s parents before taking, retaining and distributing the pictures. Also, the publication of the pictures removed his right to be presumed innocent and the pictures being published in that particular context stigmatised him. In addition, it was argued that in the interests of the grounds set out in

Article (8)2 of the ECHR, publication of the pictures was not required to prevent further disorder or offences or to protect the rights and freedoms of others.

The Divisional Court (Morgan LCJ, Higgins LJ and Coghlin LJ) dismissed the application for Judicial Review. The majority decision concluded that the applicant's Article 8 rights were engaged but that the interference was justified as it was necessary in the circumstances, and that the publication was necessary for the administration of justice and was not excessive. The Court did not accept the characterisation of the operation as a "name and shame" policy but held that it was:

"A process which was designed to protect the public by preventing reoffending and ensuring that the children involved were diverted if at all possible. That reflected the need to protect the children and address their welfare in circumstances where they were exposed to sectarian public disorder. The risk of stigmatisation could not outweigh those factors".

NICCY is pleased at the comments by Lord Chief Justice Morgan who, in delivering his judgment recognised the responsibility of the criminal justice system to protect the rights and best interests of the child when they come into contact with the criminal justice system. He further recognised that children should be subject to more protection and their identity should be protected to reduce stigmatisation.

Supreme Court

The case was appealed to the Supreme Court and in the judgment Lord Kerr (with whom Lord Wilson agreed) examined the question of whether Article 8 was engaged in this case. He set out the arguments surrounding the issue of whether a person is entitled to the protection of Article 8 when in public, but knowingly and intentionally involved themselves in activities which were or may be recorded or reported in a public manner.

Lord Kerr stated:

"the notion that a child's best interests can be properly catered for by supposing that when he or she engages in criminal activity in a public place, because he or she cannot therefore have a reasonable expectation of privacy, publication of his or her photograph, while engaged in that activity, does not come within the ambit of Article 8 is, at best, incongruous, and is distinctly out of step with the philosophy which underpins Article 3(1) of UNCRC. That philosophy, so far as it relates to

criminal proceedings against children, is prominently proclaimed in Article 40(2)(vii) of the Convention which requires states who are party to the Convention to ensure that the child's privacy is fully respected at all stages of the proceedings. The Beijing Rules accord similar importance to the need to insulate children from the disclosure of their identity when they are involved in criminal proceedings. They were adopted by the General Assembly resolution 40/33 of 20 November 1985. Rule 8 provides:

8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published."

NICCY welcomes Lord Kerr's references to, and consideration of, the UNCRC and the Beijing Rules in considering this case. We were pleased to note the Court has given due consideration to Article 3 of the UNCRC which requires, inter alia, Courts to ensure that the best interests of the child are a primary consideration. We also recognise that Article 16 of the UNCRC which concerns the child's right to privacy is engaged and that Article 40, which in addressing the issue of children in the criminal justice system, states "the child's right to privacy must be respected at all times". It is the weight Lord Kerr attributes to these instruments which leads him to conclude that he is satisfied there was an interference with the appellants Article 8 right.

Once established that the appellants' article 8 rights were engaged consideration then must be given to whether the interference was justified. In determining this, three tests must be considered: is the interference in accordance with law and pursuing a legitimate aim and it must be 'necessary in a democratic society' (proportionate in the circumstances).

Lord Kerr concluded that in balance, the interference was justifiable and proportionate. Less intrusive measures were not feasible and this was a last resort. Also as the Lord Chief Justice stated in para 32 of his judgment;

"section 32 of the Police (Northern Ireland) Act 2000 imposes a general duty on police officers to prevent the commission of offences and, where an offence has been committed, to take measures to bring the offender to justice. In light of its acknowledged responsibilities to children the police service devised Policy Directive

13/06 entitled PSNI Policing with Children and Young People. It aims to identify children and young people at risk of becoming involved in offending and works with partner agencies in the provision of support and intervention. It contains an express commitment to adhere to ECHR rights as well as the international standards in the UNCRC and the Beijing Rules. Policy Directive 13/06 is available to the public”.

Lord Toulson disagreed with Lord Kerr and agreed with Higgins LJ who, in his Divisional Court judgment opined that this situation is far removed from the values which Article 8 was designed to protect. He makes clear that he does not suggest there could never be circumstances in which the publication of photographs which are the subject of this case could fall within the scope of the appellant’s Article 8 rights. *“When the authorities speak of a protected zone of interaction between a person and others, they are not referring to interaction in the form of public riot. That is not the kind of activity which Article 8 seeks to protect.”*

Lord Toulson, unlike Lord Kerr, did not seem to give weight to the fact the appellant was a child; *“the fact that the appellant was a child at the relevant time is not in my opinion a reason for departing from the test whether there was a reasonable (or legitimate) expectation of privacy, but it is a potentially relevant factor in its application”*. NICCY were disappointed to note that Lord Toulson made no reference to the UNCRC unlike Lords Kerr and Higgins (in the Divisional court).

Conclusion

On 1 July 2015 the Supreme Court (Lord Kerr, Lord Clarke, Lord Wilson, Lord Toulson and Lord Hodge) delivered their judgment which unanimously concluded that if there was an interference with Article 8 then it was justified. The Supreme Court did not agree on whether there had been a violation of Article 8, only that if there had been, it was justified in the circumstances. NICCY is encouraged that the main instruments in the protections of child rights in the youth justice system, the UNCRC and the Beijing Rules, were not only considered but directly informed the case. Although the interference was judged to be justifiable it is clear from the decisions of both courts, that children, although they may be engaged in activity which may be anti social or criminal, are entitled to enhanced protection (more so because they *are* children) by all agencies associated with the criminal justice system, at all stages.