No. CO/3753/2019

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

DIVISIONAL COURT

[2020] EWHC 929 Admin

Royal Courts of Justice

Tuesday, 17 March 2020

Before:

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
LORD JUSTICE SINGH

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
END VIOLENCE AGAINST WOMEN COALITION — Claimant

- and -

DIRECTOR OF PUBLIC PROSECUTIONS — Defendant

MS P. KAUFMANN QC and MS J. MACLEOD and MS E. MOCKFORD (instructed by Centre for Women's Justice) appeared on behalf of the Claimant.

MR T. LITTLE QC and MS C. DOBBIN (instructed by the Government Legal Department) appeared on behalf of the Defendant.

J U D G M E N T

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION:

1 This is the judgment of the Court.

2 This is an application for permission to bring a claim for judicial review. Although there are seven grounds of challenge, the fundamental complaint made by the claimant is that the defendant has changed the policy of the Crown Prosecution Service ("the CPS") in relation to the prosecution of rape and other sexual offences since about late 2016. The claimant submits that there has been a change of policy from the merits-based approach to the bookmaker's approach, which is unlawful. In the alternative, the claimant contends that the defendant has taken steps which amount to a change in practice, even if not in policy. The defendant denies that there has been any change of policy or practice.

3 This hearing was directed by Supperstone J to consider a number of matters which potentially arose, in part, by way of case management and to consider the question of whether permission to bring a claim for judicial review should be granted. At the oral hearing before us this morning we have heard submissions about whether permission should be granted or not. We are grateful to all counsel and those instructing them for their written and oral submissions. There are very detailed written submissions in the case and a large volume of evidence running to 12 lever arch files and a bundle of authorities. We have considered all the relevant materials, even though we do not refer to everything in this judgment. For reasons the parties will well understand, we have decided to give an *ex tempore* judgment this afternoon which focuses on the essential issues.

4 We recognise that this case arises in a wider context in which there is understandable and legitimate concern about the reduction in the number of cases in which prosecutions for rape and other serious sexual offences are being brought. We also recognise the importance of the sensitive issues, in particular to those who have been the victims of any sexual offence and, in the context of this case, the offence of rape. Indeed, these concerns are shared not only by the claimant, but also by the defendant and others. They have led to the establishment of a Government review led by the Ministry of Justice, which is due to report in the near future and which is examining the position in the criminal justice system more widely, including the police. The fact that such a review is taking place does not mean that this claim for judicial review cannot be considered. In a claim for judicial review, this court can concern itself only with issues of law which properly arise before it. This court cannot enter into wider questions of policy or adjudicate absent an arguable case for judicial review.

5 The Code for Crown Prosecutors contains a two-stage test for deciding whether a criminal prosecution should be brought. This applies in all criminal cases, not only those alleging serious sexual offending. It has been described in these proceedings as the "full code test". The first stage is the evidential test, that there is sufficient evidence to provide a realistic prospect of conviction. The second stage is the public interest test, whether even in a case where there is sufficient evidence to bring a prosecution the public interest would be served by bringing it. In the present proceedings we are concerned only with the evidential test.

6 The full code test states in part as follows:

> "The Evidential Stage.
>
> 4.6 Prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. They must consider what the defence case may be and how it is likely to affect the

> prospects of conviction. A case which does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.
>
> 4.7 The finding that there is a realistic prospect of conviction is based on the prosecutor's objective assessment of the evidence, including the impact of any defence and any other information that the suspect has put forward or on which they might rely. It means that an objective, impartial and reasonable jury or Bench of magistrates or judge hearing a case alone, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a different test from the one that the criminal courts themselves must apply. A court may only convict if it is sure that the defendant is guilty."

It is important to appreciate that the evidential test, as set out in the Code itself, emphasises that the test is an objective one and requires that an objective, impartial and reasonable jury or Bench of magistrates, properly directed and acting in accordance with the law, is more likely than not to convict the defendant of the charge alleged.

7 The Code has been through various editions. The Sixth Edition was published in 2010, and took into account the decision of the Divisional Court in *R (B) v DPP* [2009] EWHC 106 (Admin); [2009] 1 WLR 2072. In that case, in which the main judgment was given by Toulson LJ, the court said that the bookmaker's approach was unlawful and that a merits-based approach had to be used. The Sixth Edition of the Code incorporated the merits-based approach into the evidential test and still does so. The Seventh Edition of the Code came into force in January 2013 and the Eighth Edition has been in force since 26 October 2018.

8 As well as the Code there has been, from time to time, guidance issued by the defendant to Crown prosecutors in relation to serious sex offences. Up to about late 2016, this guidance expressly referred to the merits-based approach. It is accepted on the part of the defendant that detailed legal guidance referring to the merits-based approach was removed, along with references to the merits-based approach in training material in a process beginning around late 2016.

9 Nevertheless, the defendant contends that there has been no change in substance. In particular, he contends that the substantive guidance applying to the avoidance of stereotypes, myths or prejudices is still in force. That is clearly correct (see, in particular, Chapter 21 headed "Societal Myths"). Furthermore, and fundamentally, the defendant submits that the merits-based approach was and is not something different from the evidential test, but remains incorporated within it.

10 Complaint is also made on the part of the claimant about a series of training sessions known as "Roadshows" which were held in 2016 to 2017. It is said that the impression was given at these Roadshows that weak cases should be dropped and that a certain percentage of convictions should be pursued. A performance indicator was given of 60 per cent.

11 On behalf of the claimant, there has been filed evidence which includes witness statements from XX, who is an anonymous source working as a RASSO (rape and serious sex offences prosecutor) in the CPS. The evidence also includes three reports from an expert, Professor Abigail Adams. One of the reasons why this hearing was directed by Supperstone J was to consider the admissibility of those statements.

12 The evidence filed on the behalf of the defendant, in a much more detailed way than would normally be the case before permission is granted, consists in large part of the statement of

Gregor McGill, the Director of Legal Services at the CPS. Mr McGill denies that there has been any change of policy or practice on the part of the CPS. He acknowledges that a figure was given of 60 per cent of convictions to be achieved, but says this was not a minimum target, rather an ambition or aspiration. He stresses that what the CPS has applied at all material times is the full code test and that the merits-based approach is embedded within the evidential test. Reference may be had, if more detail is required, to Mr McGill's witness statement, in particular at para.3, paras. 20 to 25, and paras.31 to para.33. At para.3 of his witness statement Mr McGill states that the defendant has not encouraged prosecutors to adopt a bookmaker's approach or changed its approach to tackling myths, stereotyping or prejudices in the context of serious sexual offences.

13 The defendant also relies on a report published on 18 December 2019, after these proceedings were commenced, by Her Majesty's Crown Prosecution Service Inspectorate ("HMCPSI") on a schematic review of rape cases. This found, on the sample of cases reviewed by the independent inspectorate, that in 98 per cent of cases the CPS had applied the full code test correctly (see para.5.33 of the report). See further, in particular, paras.1.27 to 1.28, where the report rejected the assertion that the CPS was too risk-averse. The report found that even in those cases where the decision by the CPS was considered to be incorrect the error, as seen by the report, was sometimes to prosecute where there should not have been a prosecution and sometimes for there not to be a prosecution when there should have been. In other words, the mistakes went in both directions. This was not supportive of the view that the CPS was only proceeding with cases that were perceived to be strong. Although detailed criticism was made by counsel for the claimant of the report, both in writing and in oral submissions before us, and although counsel for the defendant accepted that there were some errors in the understanding of HMCPSI, we are satisfied that those criticisms and errors do not undermine the fundamental conclusions which were made in the report and which were based upon an examination of a large number of individual case files in which charging decisions had been made.

14 The claimant advances seven grounds of challenge in this claim for judicial review:

(1) the defendant has unlawfully adopted the bookmaker's approach;

(2) the adoption of the bookmaker's approach is in breach of Article 3 and 8 of the European Convention on Human Rights;

(3) the change of policy by removing the specific guidance on the merits-based approach is irrational;

(4) there has been a change of practice leading to a systemic illegality arising from the removal of specific guidance on the merits-based approach. This aspect of the case was given particular prominence in the oral submissions made by Ms Phillippa Kaufmann QC, for the claimant. She submitted that the change made by the defendant has created an unacceptable risk of confusion on the part of individual prosecutors and, therefore, a risk that they will adopt the bookmaker's approach even if that is not what is required as a matter of policy.

(5) there were material flaws in the procedure adopted, in particular, that there was no consultation on the change of policy of practice;

(6) there was discrimination in breach of s.19 and s.29 of the Equality Act 2010, as well as Article 14, read with Articles 3 and 8 of the ECHR;

(7) there was a breach of the duty of transparency. The claimant contends that ground 7 arises even if the defendant did not change his approach at all; it submits that it is a fundamental tenet of public law that policies relating to the exercise of statutory powers must be transparent and clear.

15 As it seems to us, the claimant's grounds of challenge all, with the possible exception of ground 7, rest upon a factual foundation which is fundamentally disputed by the defendant. The defendant, in particular in the witness statement of Mr McGill, denies that there has been any change of policy or practice as alleged by the claimant. This case is unusual, therefore, if not unique, in that the legal grounds of challenge are not the primary subject of dispute between the parties, even though this is a claim for judicial review. There can be cases in which, even in judicial review claims, the court must resolve disputed questions of fact. Very often, in a claim for judicial review, there is no need to do so, either because the material facts are not in dispute, or the factual dispute is not material to the legal issues which the court does have to determine. Nevertheless, in suitable cases the court must and will resolve a dispute of fact. It has the usual means at its disposal to do so, including the disclosure of documents and, where necessary and appropriate, cross-examination of witnesses. However, the fundamental principle still applies, that normally the person who asserts a fact to be true bears the burden of proving it. Furthermore, in judicial review proceedings the normal principle is that the courts will proceed on the basis of the written evidence presented by the person who does not have the onus of proof (see Clive Lewis, **Judicial Remedies in Public Law 5th edition 2015** para.9-121 and the cases cited in particular at footnote 413, including the decision of the Divisional Court in *R v Border Visitors at Hull Prison ex parte St Germain* [1979] 1 WLR 1401, at 1410 Geoffrey Laeg LJ).

16 In the written submissions for the claimant, particular reliance was placed on the decision of the Court of Appeal in *R (FZ) v Croydon LBC* [2011] EWCA Civ 59 [2011] PTSR 748, in particular, at paras.9 and 29, Sir Anthony May P. In that case, at para.9, the court said that:

> "In a judicial review case concerning age assessment, the court should ask whether the material before it raises a factual case which, taken at its highest, could not properly succeed in a contested factual hearing. If so, permission should be refused. If not, permission should normally be granted, subject to other discretionary factors, such as delay."

17 In our view, even applying that test to the present context, taking the evidential material filed on behalf of the claimant at its highest, we have come to the conclusion that on the critical issue of fact which is in dispute in this case, the claim could not properly succeed. The meaning of a policy is a question of law, rather than one of fact (see *Tesco Stores v Dundee City Council* [2012] UKSC 13; [2012] PTSR 983). That much is common ground. It is therefore one for the court itself to determine. In our view, it is clear that the full code test has included, at all material times, and still does include, the merits-based approach. The merits-based approach is no more than a requirement that the prosecution consider the case as hypothetically coming before an objective and properly directed jury or Bench. This is included in the wording of the evidential test in the code itself. At the hearing before us, Ms Kaufmann herself acknowledged that the merits-based approach is not different for the full code test. It was, in her submission, "explication" of it in "tricky cases". Furthermore, although the merits-based approach guidance did include specific instruction on how to apply the approach mandated in the case of *B*, the guidance on avoiding stereotyping and myths about rape victims remains in place and this goes to the heart of what the merits-based approach sought to achieve. It does not follow that removal of the merits-based guidance involves the removal of this aspect of the evidential test. Furthermore, the

roadshows cannot be regarded as having involved an instruction that the merits-based approach should not be followed. That would require the court to give preference to the evidence of XX over that of Mr McGill, which the court is not in a position to do. For the reasons already identified, the court must accept the evidence of the defendant on disputed issues of fact.

18 The defendant's evidence that there has been no change in practice is supported by the recent report by the HMCPSI of December 2019. That report concluded that around 98 per cent of cases examined by the report apply the full code test correctly. While it is true that the review did not collect evidence on why the charging rate has been declining in the last few years, the onus lies upon the claimant to establish that the decline is caused by a change in approach which, in our judgment, it has not been able to do. In that context, we think it highly significant that the expert evidence filed on behalf of the claimant by Professor Adams, including in her supplementary reports, is very carefully worded and does not give any conclusive view as to the question of causation - see in particular para.42 of her first report, where Professor Adams indicates that there are other potentially relevant events relating to the significant fall in rates of charging and conviction in serious sex offences cases. This causes difficulties, she says, for her analysis. The fundamental problem is that it is not possible directly to observe what the charging rate would have been in the absence of the change in merits-based approach guidance and workshops. The question is often a hypothetical one. The highest that Ms Kaufmann was able to put it was by reference to para.47 of the report of Professor Adams, where she says that the trends are "consistent with 'a change in the practice of charging rate cases brought about by the removal of the merits-based approach guidance and other events, such as the roadshows'". In our view, that is insufficient to lay the factual foundation which lies at the heart of the claimant's case. Furthermore, the evidence of XX is, at best, anecdotal and is contradicted by the evidence of Mr McGill in circumstances in which the court has to accept the evidence of Mr McGill.

19 We have also carefully considered the summaries of 20 cases in a confidential annexe attached to the witness statement of Harriet Wistrich. In our view, these have very little probative value, they are simply some of the many cases that the CPS has to deal with. They do not undermine the finding by the report of 2019 that in 98 per cent of cases the full code test has been correctly applied. In our view, the report also undermines the submission by Ms Kaufmann that the defendant has created a systemic and unacceptable risk that some individual prosecutors will wrongly apply the bookmaker's approach or be risk averse. The findings of the independent inspectorate do not support that contention; indeed, they contradict it.

20 Nor was there any arguable breach of a procedural duty, whether a duty of consultation or the public sector equality duty in s.149 of the Equality Act 2010. This is for two reasons. First, there was no duty of that kind in circumstances where there was no material change to policy or practice being made by the defendant. Secondly, the evidence of Mr McGill makes it clear that while the defendant does consult on proposed changes to the Code, he does not have a practice of consulting whenever some guidance is updated (see para.56 and para.58 of his witness statement). For those reasons, grounds 1 to 6 must fail, as the factual foundation for them cannot arguably be established.

21 Furthermore, ground 7 must also fail. Although the claimant asserts that this does not require there to have been a change in approach, either in policy or in practice, in truth there is no lack of transparency once it is appreciated that the policy of the defendant remains as set out in the full code test. That Code is, of course, published and is therefore transparent.

22 For those reasons, permission to bring this claim for judicial review is refused.

23 In the circumstances, it is unnecessary for us to consider separately the case management issues which might otherwise have arisen. Even if the evidence of XX were admissible in anonymous form, and even if the expert evidence of Professor Adams were admissible it could not bear the weight which the claimant seeks to put on that evidence.

24 We need not address the question of whether permission should be refused on other discretionary grounds, such as delay in bringing these proceedings. We note that the defendant, in his skeleton argument for this hearing, does not contend that permission should be refused on grounds of delay. We would refuse permission on the more fundamental ground that the claim is not properly arguable.

25 In all the circumstances, we do not need to address the application by the claimant for a costs-capping order.

26 The question of the costs of the proceedings to date may still have to be resolved. We invite submissions on that and any other consequential matters which follows from the judgment we have just given.

CERTIFICATE

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This transcript has been approved by the Judge.