

Judicial Communications Office

Wednesday 14 September 2011

DIVISIONAL COURT RULES ON LAWFULNESS OF PUBLIC PROTECTION ARRANGEMENTS

Summary of Judgment

The Divisional Court today gave a ruling in a case where a person acquitted of sexual offences against a child was categorised as a potentially dangerous person presenting a risk of serious harm and had his name included on the national Violent Sex Offenders Register (ViSOR).

On 26 April 2009, the applicant was charged with the offence of rape of a 13 year old girl. He agreed that sexual intercourse had taken place but maintained that he reasonably believed the girl was over 16 years old and that she had consented to the intercourse. He was admitted to bail. A meeting of the Local Area Public Protection Panel (LAPPP) was held on 1 July 2009 and it was determined that the applicant met the criteria for entry to Public Protection Arrangements Northern Ireland (PPANI) assessment as a potentially dangerous person who had been interviewed by police for an alleged or suspected sexual offence against a child and is in the process of being reported with a view to prosecution. The applicant was subsequently interviewed by the police officer who was appointed as his Designated Risk Manager (DRM). That information was taken into account by the LAPPP at its next meeting where the applicant was assessed as a category 2 risk (ie "someone whose previous offending or current alleged offending in the case of potentially dangerous persons), current behaviour and current circumstances present clear and identifiable evidence that they could cause serious harm through carrying out a contact sexual or violent offence"). His name was put on ViSOR. On 2 November 2010 the applicant was unanimously acquitted by a jury.

The applicant brought an application for judicial review challenging:

- The lawfulness of the decision of the LAPPP on the basis that it took into account an irrelevant consideration;
- The lawfulness of the decision of the LAPPP to categorise him as a potentially dangerous person presenting a Category 2 risk of serious harm without regard to the requirements of procedural fairness and/or Article 6 of the ECHR; and
- The lawfulness of the decision to issue the PPANI Guidance to Agencies on the basis that it breaches Article 8 of the ECHR.

Procedural fairness

The applicant claimed that the LAPPP proceeded without taking account of the possibility that the allegations against him were not true. The Guidance does not envisage that the offender/potentially dangerous person ("offender/PDP") will generally participate in the decision to apply the arrangements. Consultation with the offender/PDP only takes place at

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the risk management stage when the offender/PDP meets with his DRM. The DRM's assessment is then reported to a LAPPP meeting. The offender/PDP's category is determined on the basis of the evidence available to the LAPPP.

The Lord Chief Justice, delivering the judgment of the Court, said that the qualifying conditions in this case were that the applicant was interviewed for an alleged sexual offence against a child and that the matter was in the process of being reported with a view to prosecution. He noted that the Guidance does not invite the LAPPP to make any judgment on the validity or otherwise of the allegations or the criminal liability of the person concerned in determining whether the public protection arrangements apply. That was for the criminal court.

The Divisional Court considered that the requirements of procedural fairness in the context of these arrangements did not impose an obligation to hear from the applicant before determining that he fell within the arrangements. The Court considered that the applicant had an opportunity to put forward any representations he wished on how the risk should be managed to his DRM shortly after the arrangements applied to him and subsequently through his solicitor: "He had been interviewed about the allegations and was well placed to deal with the issues". The Court concluded that there was no breach of procedural fairness.

Article 6

The applicant argued that the completion of the assessment of risk and the consequent inclusion of a person on ViSOR before that person is afforded an opportunity to answer the allegations made against him constitutes a breach of his Article 6 rights (ie the right to a fair hearing). He said this was compounded by the absence of an appeal on the merits to a court with full jurisdiction.

The Divisional Court held that the criminal and civil limbs of Article 6 were not engaged. Decisions as to who is subject to the arrangements and the categorisation of those people do not involve the determination of a criminal charge. The Court also found that the determination of categorisation did not engage the civil limb of Article 6 as it was not a determination of any civil right or obligation. It concluded that in this case the inclusion of the applicant's name on ViSOR had no direct effect: "Any effect is dependent upon disclosure [...] which has not been the subject to specific challenge in these proceedings".

Article 8

The applicant submitted that the entry of information about him onto ViSOR and its retention on the database on an effectively permanent basis constituted a disproportionate interference with his enjoyment of his right to respect for private and family life.

The Lord Chief Justice said he had no doubt that there may be many cases where the sharing of the information held on ViSOR will engage Article 8, for example domestic violence allegations often may not lead to a public trial but will form the basis of material taken into consideration in determining risks in connection with the grant of bail. The Court considered that the material accumulated about the applicant, other than the publicly available information about his acquittal, was of a serious nature but accepted that over time

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the disclosure of the circumstances of that acquittal may have receded in memory to the point where its disclosure could engage Article 8.

The Court also accepted that the engagement of Article 8 in relation to the retention and sharing of the type of information contained within ViSOR in respect of the applicant was supported by recent European Court of Human Rights case law. The Divisional Court therefore concluded that the retention and sharing of information through ViSOR in respect of potentially dangerous persons will often and perhaps usually engage Article 8.

The Lord Chief Justice then turned to the question of whether the retention of that information and any subsequent sharing of it is justified. He said that requires consideration of whether the retention and sharing is in accordance with law, is for a legitimate purpose and is proportionate. No issue was taken before the Court about the quality of the law. The Court accepted that the retention of the information is for a legitimate purpose. The Lord Chief Justice said it is necessary, however, to recognise that information on ViSOR is held not just for the purpose of the protection of rights and freedoms of others including children and the management of any risk of harm from PDPs but also to assist in the detection, investigation and prosecution of offenders.

The Lord Chief Justice said that the fundamental argument pursued by the applicant was that the indefinite retention of private information for the purpose of accessing and sharing it without any review of the necessity for continued retention cannot be justified. He said that no complaint within this judicial review had been directed to the management of ViSOR by the PSNI nor had the proceedings been served on them. Consequently, the Court was left with no evidence to indicate how valuable the retention and sharing of information on ViSOR in respect of PDPs is or how it interacts with other sources. The Lord Chief Justice also said that there are significant gaps in the information available to the Court about the manner in which the material is managed within ViSOR. The Divisional Court therefore concluded that the Department of Justice had not provided a justification for the permanent inclusion of PDPs assessed as category 2 or 3 risks on ViSOR.

The Lord Chief Justice added that any issue about the compliance of ViSOR with Article 8 would require a direct challenge to the retention of information on the database and its management. This would require the involvement of the police as a party to the hearing. Neither occurred in this case. It was therefore not open to the Court to declare the indefinite retention of information about PDPs as a breach of Article 8. The Lord Chief Justice stated that, in those circumstances, the Court would invite submissions from the parties as to the most appropriate remedy.

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 Court Service website (www.courtsni.gov.uk).
2. ViSOR was established, following the Bichard Enquiry Report which looked at the public protection arrangements for children and vulnerable adults in the wake of the murders of Jessica Chapman and Holly Wells. It was rolled out on a national basis in

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2004 to provide police and probation services with a register of violent and/or registered sex offenders. The register contains information on the subject's offending history, personal details including photographs and appearance, education, employment and financial information and offender management plans.

3. Article 50 of the Criminal Justice (NI) Order 2008 gave the Secretary of State (now the Minister of Justice) power to issue guidance on co-operation and the sharing of information between agencies for the purpose of contributing to the effective assessment and management of persons which the Department has reason to believe may cause serious harm to the public. Statutory guidance to agencies ("PPANI Guidance to Agencies") was issued by the Secretary of State in 2008.

ENDS

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