

Neutral Citation: [2017] NIQB 64

Ref: MOR10363

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 30/06/2017

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY
FOR JUDICIAL REVIEW BY CIARAN MCMURRAY

AND IN THE MATTER OF A DECISION OF POLICE SERVICE OF NORTHERN
IRELAND

Before: Morgan LCJ and McBride J

MORGAN LCJ (delivering the judgment of the court)

[1] The applicant is a suspect in a criminal investigation and seeks leave to challenge a policy or decision of the Police Service of Northern Ireland ("PSNI") to exclude him and his legal advisers from the selection process when choosing a suitable set of images to be used in the VIPER identification procedure. Mr Lavery QC and Mr Devine appeared for the applicant and Mr McGleenan QC for the proposed respondent.

Background

[2] The applicant is accused of being involved in a burglary which allegedly took place on 29 March 2017 at approximately 5.00am. It was made known that there are witnesses available who purport to be able to identify the individual who burgled the property. The applicant asserted that he was keen to engage in this process as, if they are right, then this will help to exclude him from having any involvement. He understands the importance of this procedure in his case as a whole and wants to avail of all of the safeguards that have built up around this procedure.

[3] The applicant was told that the police, unusually, propose to carry out this procedure without allowing him or his solicitor the opportunity to have any input into how the comparator photographs are chosen. This is a new development. Previously, both the applicant and his solicitor would have had an opportunity to participate in this aspect of the procedure. However, this has now changed without any warning or consultation.

[4] On the 5 May 2017, the applicant's solicitors sent a pre-action protocol letter to Inspector Kenny at VIPER Musgrave Street and set out the nature of the complaint in the following terms:

"Throughout the entire period of the operation of such procedures, it has always been the position that the suspect's solicitor was allowed to consider and look through the database of comparator photos and assist with the process and/or at least confirm that there was no issue with the comparators chosen.

The Viper Procedure until now was in three stages.

(a) Image capture:

Suspect and solicitor attended, the video of the suspect was recorded and other individuals for line ups chosen, if the suspect had an unusual physical feature, (eg a facial scar or tattoo etc) which did not appear on other individuals that are available to be used, steps would be taken to conceal the location of the feature on all images, ie the suspect and other individuals. A note would be sent by the VIPER officer and attached to the file asking for the ear or neck to be pixelated or concealed with a black dot for example.

Importantly, the solicitor and suspect would also have input as to where the suspect will appear in the line-up.

(b) Either, the solicitor or client attends the Viper 2 stage. The completed line up is viewed and signed off on before any witness viewing.

(c) Witness viewing. A solicitor can attend or in some instances the procedure is video-taped.

As a result of the PSNI re-interpreting PACE Code D, Annex A, the process is now changed as the solicitor and suspect can no longer consider the database for

the most appropriate comparators. This was an important and useful protection for the accused and the integrity of the process. This has now been removed unilaterally and without consultation. The applicant challenges the decision/policy to change the practice in this way; and, the failure to carry out a proper consultation process in respect of this.”

[5] The response from the PSNI indicated that it had changed its practice on 22 March 2017 and that during the first stage the image of the suspect would be captured but the comparable individuals would be selected from the database by the identification officer. It was common case that this was in accordance with the procedure set out in Annex A of Code D of the Codes of Practice under PACE. The response to the pre-action protocol suggested that this would save time at the initial stage because of difficulties in making arrangements for attendance. This was disputed by the applicant.

The applicant’s case

[6] Mr Lavery submitted that the prosecution’s monopoly over the investigative stage of the case is ameliorated by the suspect’s solicitor playing as full a role as is reasonably possible in ensuring fairness. The ability therefore to have input into this evidence and ensure that the comparators selected all bear the best resemblance to the suspect, is critically important. There have been concerns raised by various criminal law solicitors because firstly, suspect and solicitor rights are being undermined; and, secondly, the absence of a consultation process in respect of the of practice leaves legal advisors unable to explain adequately or at all why these changes, which prejudice the suspect, have been brought about.

[7] The applicant submitted that the decision was in breach of his substantive expectation that his solicitor would have input into the choice of comparators or at the very least in breach of his secondary case procedural legitimate expectation to be consulted by the proposed respondent.

Consideration

[8] There is a particularly helpful analysis of the principles of legitimate expectation in the judgment of Laws LJ in Bhatt Murphy (a firm) and another v The Independent Assessor [2008] EWCA Civ 755. The analysis distinguishes between procedural and substantive legitimate expectation. In the paradigm case of procedural legitimate expectation the court will not allow the decision maker to effect the proposed change without notice or consultation in the absence of compelling reasons. In a substantive case the promise or practice is one of present and future substantive policy. Both types of legitimate expectation are concerned with exceptional situations. A public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such a body to involve a section of the

public in its decision-making process by notice or consultation if there has been no promise or practice to that effect.

[9] Laws LJ continued at paragraph [43]:

“Where a substantive expectation is to run the promise or practice which is its genesis is not merely a reflection of the ordinary fact that a policy with no terminal date or terminating event will continue in effect until rational grounds for its cessation arise. Rather it must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy’s continuance is assured.”

He went on to say that though in theory there may be no limit to the number of beneficiaries of such an expectation in reality it was likely to be small. The first reason for this was that it was difficult to imagine a case in which government would be held legally bound by a representation or undertaking made generally or to a diverse class. The second was that the broader the class claiming the benefit the more likely it was that a supervening public interest would be held to justify the change of position complained of.

[10] We do not accept that there is an arguable case that the applicant can establish a substantive legitimate expectation in this case. There was nothing that the applicant could point to in this practice from which one could derive a clear and unambiguous representation devoid of qualification that the practice would continue (see Loreto Grammar School’s Application [2012] NICA 1). That alone is fatal to the contention advanced. If the contention was correct it would have to apply to whatever number of suspected persons in Northern Ireland had identification issues which raised the use of the VIPER process. Representations of a substantive legitimate expectation are described as being in the nature of a contract and such an extended class of persons is plainly beyond the concept of a promise to an individual. In fact in this case the applicant did not, of course, know of the practice until he was informed by his solicitor. There was no basis for the suggestion that there was a legitimate expectation that the PSNI should be prevented from altering their practice in a manner which continued to conform with Annex A.

[11] The alternative submission advanced was that this was a secondary procedural legitimate expectation as a result of which there was a requirement for consultation before altering the practice. Such a requirement can, of course, arise as a result of a promise or established practice of consultation. No such promise or practice was given here. At paragraph [49] of Bhatt Murphy Laws LJ held that in the absence of such an assurance of consultation the secondary case of legitimate expectation will not often be established. In those circumstances there generally will be nothing in the case save the decision by the authority in question to effect a change in its approach to one or more of its functions. Generally there can be no objection to that for it involves no abuse of power.

[12] In this case the applicant contended that the exclusion of the solicitor and suspect from the selection of individuals for lineups was unfair. We do not accept that submission. The fairness of the VIPER procedure has been secured by the detailed arrangements set out in Annex A. Those arrangements are applied by police forces throughout the United Kingdom in order to ensure fair process. The process which the PSNI has adopted since 22 March 2017 is the same as that used by many police forces in Great Britain.

[13] Secondly, there is no challenge to the procedure set out in Annex A in these proceedings and no suggestion that the procedure itself is unfair. Thirdly, there is no suggestion that the process which the PSNI now use represents to any extent a departure from the fair provisions set out in Annex A. Fourthly, Annex A provides that the suspect and the solicitor must be given a reasonable opportunity to see the complete set of images before they are shown to any eyewitness. If the suspect has a reasonable objection to the images of any of the participants the suspect can state the reasons for the objection and practicable steps must be taken to remove the grounds for objection. That represents a high degree of participation for the suspect and his solicitor in the VIPER process. Finally, of course, the ultimate protection for the suspect lies in the trial process should the allegation be pursued.

[14] In light of the factors set out above we consider that there is no arguable case that the alteration of the practice by the PSNI created any unfairness and similarly no abuse of power. There was no promise or assurance of consultation and in our view no entitlement to such consultation can be derived from the circumstances of this case.

Conclusion

[15] For the reasons given we consider that the applicant has not demonstrated an arguable case with a reasonable prospect of success and accordingly we dismiss the application for leave.