Neutral Citation Number: [2020] EWHC 870 (Admin)

Case No: CO/4417/2019

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**
**DIVISIONAL COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/04/2020

**Before** :

**LORD JUSTICE BEAN**
and
**MRS JUSTICE CARR**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **R (FNM)** | **Claimant** |
| **- and -** | |
| **THE DIRECTOR OF PUBLIC PROSECUTIONS** | **Defendant** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Dan Squires QC and Joanna Buckley** (instructed by **Bhatt Murphy**) for the **Claimant**
**Sarah Whitehouse QC** (instructed by **CPS**) for the **Defendant**

Hearing date: 2nd April 2020

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

**Lord Justice Bean :**

*Introduction*

1. This is the judgment of the court following a "rolled up hearing" on the Claimant's claim to challenge the decision of the Defendant ("the DPP") of 9 August 2019 not to prosecute a suspect ("T") for the offences of rape, sexual assault against a child and/or any other offence against the Claimant ("the Decision"). The Decision followed the Claimant's exercise of her right to a review under the Victims' Right to Review Scheme ("the VRR Scheme"). We grant leave.

2. The Claimant's case is that the Decision was taken without affording her a fair opportunity to make representations, resulting in a decision that was unlawfully taken. She contends that the terms of the VRR Scheme, properly construed and in light of the common law requirements of procedural fairness, conferred upon her the right to make representations which would be taken into account by the DPP when conducting the VRR review. Further and in any event, the Claimant contends that in the light of express assurances given to her by the DPP, she had a legitimate expectation that she would be permitted to make such representations. She states that the Decision (and the manner in which her case was handled) has had a serious impact on her, exacerbating her pre-existing mental health problems.

3. The DPP's position until the end of the hearing before us was to deny the claim in its entirety. His position was that the VRR Scheme does not confer upon a complainant a right to make representations and there was no procedural unfairness. Nothing said by the DPP to the Claimant amounted to a sufficiently clear assurance such as to create a legitimate expectation on her part that she would be permitted to make representations. At the end of the hearing, however, Ms Whitehouse QC for the DPP invited us to rule in the DPP's favour on the question of whether or not a complainant has a right to make representations within the VRR Scheme but indicated that, were the Claimant to submit her representations within 21 days, the Claimant's case would be reviewed, taking those representations into account.

4. The claim therefore raises, amongst other things, the question of what right, if any, a complainant has to make representations under the VRR Scheme as a matter of principle.

5. We should note at the outset a question of terminology. Paragraph 14 of the VRR Guidance defines a victim, for the purposes of the VRR Scheme, as "a person who has *made an allegation* that they have suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by criminal conduct" [emphasis added]. The term used in the criminal courts, until and unless it is admitted or proved that the person making the allegation has indeed suffered harm caused by criminal conduct, is "complainant"; and we shall use that term in this judgment when referring to people invoking the VRR.

6. Evidence has been lodged in support of the Claimant's case in the form of statements from her and her father, and also from Ms Kate Ellis, a solicitor at the Centre for Women's Justice, and Mr Michael Oswald of Bhatt Murphy Solicitors, who act for the Claimant. A reporting restriction order has been made in order to protect the interests

of the Claimant, preventing the reporting of any matter which would directly or indirectly identify her.

*Background facts*

7. The Claimant says that in November 2017, when 15 years old and vulnerable, she went to stay overnight at the house of an older girl whom she believed at the time to be a friend. T was invited to join what became a mixed group. The Claimant had met him once before, when he had made unwanted advances to her, and states that T had been made expressly aware of her age. The Claimant took Ecstasy and smoked some cannabis. She was then persuaded to take a significant number of Xanax pills, after which she remembered very little of the weekend. She was told that she would be sleeping in the same room as T. She remembers being in bed clothed in T's presence. She believes that she was then subjected to a serious sexual assault (or assaults) by T. When police arrived in the late Sunday afternoon she was found in a bed in her underwear only, severely intoxicated, needing help to walk and hardly being able to speak. A police officer later told her and her parents that when the police arrived, T was heard to shout "fuck off, I'm shagging my bird". Subsequent forensic examination showed T's semen inside her underwear, but not inside her body (which she had by then washed) nor on the bed sheets (which had also by then been washed).

8. Although she did not think so at the time, the Claimant began, to her shock, to realise that T may have had sexual intercourse with her without her knowledge. She decided to pursue matters with the police. A police officer told her that T, having initially denied it, later admitted that he had had sexual intercourse with her, believing that she consented and was 16 or 17 years old.

9. The case was referred to the CPS by Thames Valley Police. On 2 October 2018 a Senior Crown Prosecutor informed the Claimant of his decision not to prosecute:

> "…..[i]n your account you were unable to remember what happened. The difficulty with this case is that we cannot prove what happened….Having assessed all the different pieces of evidence, I have concluded that there is not enough evidence for there to be a realistic prospect of the prosecution being successful in court."

10. Following a telephone meeting between the Claimant, her parents and the CPS on 6 December 2018, Thames Valley Police were asked to take further statements from the parents. In about April 2019 the Claimant's father was told (by telephone) that the CPS still did not intend to prosecute T.

11. Following an initial unsuccessful attempt to email, on 16 May 2019 the Claimant confirmed that she wished the CPS to "proceed with her appeal under the [VRR] process".

*The VRR Scheme*

12. The VRR Scheme was introduced in 2013 through published guidance setting out its operation; the current guidance is dated July 2016 ("the Guidance"). The Scheme gives effect to the common law principles identified in *R v Killick* [2012] 1 Cr Ap R 10 and

Article 11 of Directive 2012/29/EU ("the EU Directive"), both confirming the right of a complainant to seek a review of a decision not to prosecute. At the time of its launch the then DPP (Sir Keir Starmer QC) commented that the VRR Scheme recognised complainants as "active participants in the criminal justice system, with both interests to protect and rights to enforce". The Guidance emphasises (at [8]) that the right is to request a review of the decision not to prosecute. It is not a guarantee that proceedings will be (re)commenced.

13. The Guidance 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 not to prosecute is considered by the local CPS office (assigning a new prosecutor to look at the decision and ensure that a proper explanation is given if not provided previously). If the original decision not to prosecute 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 reconsideration of the evidence and the public interest i.e. the new reviewing prosecutor will approach the case afresh to determine whether the original decision was right or wrong" (see paragraph 31).

14. The Guidance goes on to say (at paragraph 33) that it is an important principle 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. However, in orderto maintain public confidence in the criminal justice system, the CPS will sometimes have to look at a prosecution decision and change it, if it is found to be wrong.

15. At paragraph 42, the Guidance states:

> "Where a victim has given reasons for requesting a review, the issues raised will be addressed in the decision letter to the victim, where appropriate."

16. If the decision not to prosecute is found to be wrong, it may be possible to bring proceedings against the suspect. If not possible, the complainant may receive an explanation and an apology.

17. Time limits apply: a request for review should ordinarily be made within 5 working days of receipt of the notification decision, though one can be made up to 3 months after such communication (extendable in exceptional circumstances). The CPS aims to complete the review within 6 weeks; if that is not possible, it must provide updates as to its progress. Suspects/defendants are only made aware of the complainant's request for a review where the original decision is overturned.

*The review of the Claimant's case under the VRR Scheme*

18. On 30 May 2019 the Acting District Crown Prosecutor conducted the review, upholding the Senior Crown Prosecutor's decision not to prosecute, stating:

> "In your case, there is no evidence other than what the suspect has said in interview, that you had in fact had sexual intercourse. The forensic evidence supports only that there was certainly

> sexual activity but does not prove sexual intercourse took place….Without a full recollection of all the events and without any evidence to explain the gaps, a jury would not be able to be sure about exactly what happened. Without being sure, the jury will be told by the judge that they must give the suspect the benefit of the doubt and find him not guilty…..Any doubt or "grey area" in the evidence must be resolved in favour of the defendant."

19. The Claimant's father wrote on 9 June 2019 expressing concern at the decision noting amongst other things that the Acting District Crown Prosecutor had not considered the evidence that the Claimant was incapacitated. This was treated by the CPS as a complaint, which was subsequently upheld (on 7 July 2019) on the basis of the failure to address the question of the Claimant's capacity to consent at the time.

20. In the meantime, on 12 June 2019, the Claimant had requested a further review. Having discussed matters further with her father (who had by now sought advice from his local MP about the VRR process), the Claimant emailed again on 1 July 2019:

> "With respect to the request I made to you on the 12th June 2019 to further review my case, I would like to request that you put this on hold whilst we take further legal advice, and would be grateful if you would confirm a new decision in accordance with that."

She wanted to get guidance from someone who understood the relevant legal process.

21. By email on 5 July 2019 a VRR manager at the ARU responded. It is the central document in the claim and we set out the relevant paragraphs in full:

> "….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 soon 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."

22. The Claimant and her father state that they understood from this email that a final decision would not be made until 27 September 2019 and that if the Claimant made representations before that date, they would be considered. The Claimant was due to meet solicitors to discuss the position on 13 August 2019.

23. Without the Claimant submitting any representations, the ARU made the Decision on 9 August 2019, a Specialist Prosecutor upholding the decision not to prosecute T for any offence. The Specialist Prosecutor noted that T had said in interview that he had vaginal intercourse with the Claimant once at the time when the police arrived. The Claimant had not said "no" at any point; she looked fine to him and he was not aware that she had taken Xanax. The Specialist Prosecutor concluded that there was sufficient evidence to prove that the T had sex with the Claimant, the central issue being whether she had capacity to consent and whether T reasonably believed she was consenting. Whilst there was evidence that the Claimant was under the influence of something which affected her, the difficulty was that it could not be proved what condition she was in at the time of the sexual activity. The Claimant herself said that there were times when she was aware of what was happening. It was possible that, although she did not remember, she appeared capable of making a choice at the crucial time. The conclusion was:

> "..it would not be possible to prove that at the time that the sexual activity occurred you were not capable of consenting because you lacked the capacity to do so through your consumption of drugs and possibly alcohol…. In my view, a jury hearing the evidence in this case would not be sure that the suspect did not reasonably believe that you were consenting."

24. As for the possible offence of sexual activity with a child, the Specialist Prosecutor referred to the direct conflict of evidence between the Claimant and T – it was one person's word against another. There was no other evidence suggesting that T should have known the Claimant's age. In those circumstances, the jury would have to give the benefit of the doubt to T.

25. On 10 August 2019 the Claimant's father expressed his astonishment to the CPS that the decision had been taken without waiting for the Claimant's legal representation and before the deadline of 27 September 2019 and warned of legal action. A letter before claim followed from the Claimant's solicitors on 17 October 2019. The CPS responded on 30 October 2019, refusing to reconsider the Decision. The current proceedings were issued on 11 November 2019.

*The Claimant's case in summary*

26. The Claimant submits that the mechanism open to complainants to seek review of prosecutorial decisions under the VRR Scheme is of particular importance given the difficulty of challenging such decisions on their merits subsequently (see e.g. the remarks in *R(L) v DPP* [2013] EWCH 1752 (Admin) at [3] to [12] and in *R (Torpey) v DPP* [2019] EWHC 1804 (Admin) at [27]). But there is no bar to review on other public law grounds and there is no reason why the requirement to act fairly and comply

with rules of natural justice should not apply to the VRR process. Fairness requires an opportunity for someone such as the Claimant, who would be affected by the outcome of the review, to make representations to seek to procure a favourable outcome (see *R v SSHD ex p Doody* [1994] 1 AC 531 at 559-560; *Bank Mellat v HM Treasury (no 2)* [2014] AC 700 at [179]; *R(Osborn) v Parole Board* [2014] AC 1115 at [67], [68] and [71]). On the undisputed evidence of Ms Ellis and Mr Oswald, the CPS routinely allows complainants to make representations, in some cases leading to a reversal of decisions not to prosecute.

27. As for legitimate expectation, where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so, of which the court is the arbiter. There is no need to show that the person relying on it has suffered a detriment (see re *Geraldine Finucane* [2019] 3 All ER 191 at [62] and [63]).

28. Against this legal background, the Claimant submits first that she had a right to make representations, a right which encompasses a) an entitlement to a fair opportunity to make submissions to the decision maker, seeking to procure a favourable result, before the decision is made and b) an obligation on the decision maker to consider those representations in the decision.

29. It is contended that there are three separate bases for the establishment of that right:

    i) The terms and operation of the VRR Scheme. Reference is made to [42] of the Guidance, said to carry implicitly the right of the complainant to an opportunity to make representations; the CPS' Guidance to Prosecutors ("the Reconsideration Guidance") referred to at [35] of the Guidance which refers to the views of the victims being potentially relevant; the practice of the CPS (of routinely accepting representations from complainants) when conducting reviews under the VRR Scheme; and the purpose of the VRR Scheme;

    ii) The requirements of common law procedural fairness in the context of the VRR Scheme. The Decision was one which plainly adversely affected the Claimant and in relation to which she had something of relevance to say;

    iii) The Claimant's legitimate expectation created by the email of 5 July 2019. The logical conclusion from the plain wording of the email was that the CPS would consider representations from the Claimant and would not make a final decision in relation to her requested review until 27 September 2019. There was a sufficiently clear and unambiguous statement by the DPP as to the procedure that would be followed such as to create a legitimate expectation. Whilst not necessary to prove, the Claimant did in fact suffer detriment in that she was unable to submit any representations before the Decision was made.

30. It is then said that the communication of the Decision prior to 27 September 2019 was a clear breach of the Claimant's right to have a fair opportunity to make representations.

31. As for the DPP's suggestion that it would not be unfair to allow the DPP to resile from its clear representation to the Claimant, there are a number of matters already identified (and there may have been more) that the Claimant would have wished to raise that may have altered the outcome of the Decision:

i) Contrary to the Special Prosecutor's analysis, there was evidence of the Claimant's condition at the crucial time: the police and her parents saw her at or very shortly after this time. There may have been others and/or CCTV footage of the Claimant at the police station;

ii) There is evidence that the Claimant was targeted and/or otherwise exploited by two older girls and T. The existence of a concerted plan would be something obviously relevant to the question of consent;

iii) It was not only the Claimant who told T her age. The two older girls told T the week before that the Claimant was only 15 years old. Both a police officer and the Claimant's mother overheard one of the older girls telephone the Claimant telling her not to tell the police that T had had sex with her.

*The DPP's case in summary*

32. The DPP submits that the VRR Scheme does not confer upon a complainant a right to make representations. The email of 5 July 2019 might have been more clearly expressed, and may have given rise to an expectation that the Claimant would be permitted to make representations; but it cannot give rise to a legitimate expectation that the Claimant had a right to make representations if the VRR Scheme does not provide for any such entitlement.

33. As a general point, the DPP submits that, whilst a decision not to prosecute following a review under the VRR Scheme is amenable to judicial review, the prospect of success will be very small where there has been a review in accordance with the VRR procedure (see *R (L) v DPP* [2013] EWHC 1752 (Admin) at [7] and [12]).

34. First, the DPP submits that the terms and operation of the VRR Scheme did not create a right on the part of the Claimant to make representations. The right conferred was to request a review, not to seek to influence its outcome. There is nothing in the Guidance to confer the latter right. The purpose of the VRR Scheme is to provide a mechanism for a fresh reconsideration of the facts (see [31]). Reliance is placed on *R(S) v The CPS; R(S) v Oxford Magistrates' Court* [2016] 1 WLR 804where the court rejected the submission that the Guidance was unlawful because it did not provide any opportunity for a suspect to make representations to a reviewing prosecutor, commenting at [17]:

> "…the Guidance requires the independent prosecutor to take account only of information available at the time of the decision under review. That information will include any explanation put forward by the suspect/defendant during the investigation prior to the decision under review. Natural justice does not require a decision maker who is assessing only pre-existing material and who is prohibited from taking into account new evidence or information from the party seeking the review to invite a response from a third party who may be affected by the result of the review. "

35. It is submitted that, just as a suspect may put forward an explanation in the course of an investigation, so too a complainant has the opportunity to give an account.

36. Ms Whitehouse drew a distinction between the ability of a complainant to make representations which representations, if made, will be considered in the review and a right (in the sense of an entitlement) to do so. The former is accepted by the DPP; the latter is not.

37. The DPP submits that there are sound reasons for not reading into the Guidance a right to make representations for a person requesting a review. The independence of prosecutors is central to the criminal justice system of a democratic society (see paragraph 2.1 of the Code for Crown Prosecutors). The reviewing independent prosecutor has all of the relevant material, including the account(s) given by a complainant to the police. The investigation stage of a case is the opportunity for complainants to ensure that the police are in possession of all the relevant information. The duty of the reviewing independent prosecutor is to weigh the evidence gathered by the investigating officers dispassionately and to apply the Full Code test.

38. The procedure does not therefore encompass the general possibility of representations from complainants seeking a favourable outcome. Were it to be otherwise, there would need to be clearly defined limits for such representations (and their use) identified; there would have to be a timetable set and consideration given to the rights of suspects and disclosure. Complainants do not have any right to representations at the charging stage; to vest such a right at the final stage of the VRR process would risk the creation of a wider right inimical to the established and proper operation of the criminal justice system in which the Crown prosecutes on behalf of the state in the public interest, and not as the agent of an aggrieved individual.

39. As for procedural unfairness, there is no such unfairness for complainants not to have automatic rights to make representations. Their voices are heard when they make allegations to the police, in written statements and/or recorded interviews.

40. As for legitimate expectation, the email of 5 July 2019 cannot on the face of it give rise to a legitimate expectation that the Claimant had a right to make representations if the VRR scheme did not confer such a right on complainants.

41. As for any expectation raised that the CPS would consider her representations/she would be permitted to make representations, it is accepted for the DPP that the Claimant is entitled to an apology for the lack of clarity in the email of 5 July 2019. The VRR manager meant that the CPS would not be delaying the review to await the Claimant's representations, though his use of the word "holding" was ambiguous, which ambiguity was then compounded by reference to a deadline for provision of an update. However, the DPP submits that the Claimant was not given a clear representation that the review would await her representations. It stated no more than that the Claimant was at liberty to make representations. The Decision was in any event taken almost 5 weeks after the email of 5 July 2019 was sent.

42. Further, the DPP originally submitted that, even if a representation to that effect was clearly made, there would be no unfairness in allowing the DPP to resile from it. The outcome would not have been materially different. The matters relied on by the Claimant are largely comments on the material that was already before the Special Prosecutor. The suggestion of targeted exploitation is unevidenced. If significant further evidence were to come to light, the decision not to prosecute could be reviewed.

However, this line of argument was rightly not pressed for the DPP during the course of the hearing.

*Analysis*

43. It seemed to us on reading the papers and skeleton arguments that the case involves consideration firstly of an issue of general importance, namely whether complainants such as FNM have the "right to make representations" before a decision is taken at the independent review stage of the VRR scheme; and secondly of an issue specific to the present case, namely the difficulties caused by the CPS' email of 5 July 2019.

*Is there a "right to make representations"?*

44. Despite the somewhat confrontational tone of the pre-action exchange of letters, and the apparent divergence of the submissions for each side in skeleton arguments, when the parties' positions on this issue were explored in the course of oral argument it turned out that there was little if any dispute as to the principles to be applied.

45. The VRR Scheme gives a complainant dissatisfied with a decision not to prosecute the right to seek an independent review which is carried out by the ARU. Paragraph 42 of the Guidance states that where the complainant has given reasons for requesting the review, the issues raised will be addressed in the decision letter, where appropriate. We consider that paragraph 42 gives the complainant a fair *opportunity* to make representations and to have them taken into account by the decision-maker, in accordance with *Doody* and the other leading authorities on which Mr Squires QC for the Claimant relies.

46. This, in our view, is all that is required. There is no duty on the DPP positively to invite representations from complainants seeking a review: indeed the Claimant did not contend that there was. We accept Ms Whitehouse's submissions that complainants have no right to make representations before the original decision is taken on whether or not to charge the suspect, and it would be curious if they had any such right on review greater than the opportunity given by paragraph 42 of the Guidance.

47. 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. In argument before us the Claimant did not contend for such a right but submitted that complainants are entitled to a fair opportunity to make representations. No doubt, unless the case is one of particular urgency, where an application for a review contains a request for (say) a further 7 or 14 days in which to give reasons in support, that request would be sympathetically considered, at least where the request is made well before the expiry of the 3 month time limit provided for in paragraph 54 of the Guidance. But we would not go any further than that. We agree with the submission of Ms Whitehouse that the time limits set out in the VRR Scheme are there for good reason: suspects have rights too. We observe with regret that in many cases there is already excessive delay in the prosecution process, without building in potential for further delay by requiring the DPP to invite the complainant to make representations at the review stage and to wait for the reply before reaching a decision.

48. The matter can be tested in this way. On 12 June 2019 the Claimant requested a review, without giving reasons or asking for a short period of time in which to give them. We asked Mr Squires whether it would have been unlawful if the ARU had responded on 26 June 2019 with a Decision Letter upholding the decision not to prosecute T; he replied, quite rightly, that it would not. If that had been what happened, the Claimant would have had no cause of action for judicial review.

49. However, that is not what happened. We turn, therefore, to the particular facts of this case, and to the email of 5 July 2019.

*The email of 5 July 2019 and its consequences*

50. In the DPP's skeleton argument it was accepted that the email cited at paragraph 21 above was "confusing" and that the Claimant was entitled to an apology for that, but it was submitted that the email did not amount to a clear promise that the review decision would await her representations. Nevertheless there is no dispute that the Claimant and her father understood it to mean that they would have until 27 September 2019 to make representations before the decision would be taken; we indicated that this was the meaning conveyed to each of us by the email; and Ms Whitehouse realistically accepted that this was indeed the meaning it conveyed.

51. In those circumstances there was a simple failure of due process when the decision of 9 August 2019 was taken without waiting for the Claimant's representations. As we have noted above, Ms Whitehouse rightly did not press the argument originally put forward that further representations would have made no material difference to the outcome. If the Decision was unlawfully taken, it should be for the DPP and not this court to consider the merits of the review afresh.

*Conclusion*

52. We grant the application for judicial review and quash the decision of 9 August 2019 upholding the original decision not to prosecute T. The Claimant will have 21 days from the date on which this judgment is handed down 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.