



Public Law Project

Rt Hon Amber Rudd MP
2 Marsham Street
London
SW1P 4DF

Your Ref:

Our Ref: OAK1.3/KW

Date: 27 July 2017

cc Meg Hillier MP

Dear Ms Rudd

Re: Terry Stewart; [REDACTED]

We write on behalf of our above named client to request that you exercise your power under s166 of the Policing and Crime Act 2017 to add the offence of soliciting or importuning under s32 Sexual Offences Act 1956 to the list of offences which can be disregarded under s92(1) Protection of Freedoms Act 2012.

Background

In 1981 our client, who is a gay man, was arrested and charged with the offence of soliciting or importuning in a public place (“importuning”) under section 32 of the Sexual Offences Act 1956. He appeared before a magistrate at Bow Magistrates’ Court where he pleaded not guilty and requested a hearing before the Crown Court. The hearing took place at Inner London Crown Court of 13 June 1981. Mr Stewart was found guilty by the jury on a majority decision. He was fined £20.

Our client’s conviction remains on Police National Computer records. It is disclosed by Disclosure and Barring Service (“DBS”) checks, where it appears on our client’s DBS certificate as a conviction for ‘man importuning’ under s32 Sexual Offences Act.

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Our client is unable to apply to the Home Office under the 'disregard' scheme, which allows men with historic convictions for consensual gay sex offences to apply have them disregarded, because the offence of importuning is not one of those to which the scheme applies. For the reasons set out below, the offence meets the criteria at s166 of the Crime and Policing Act, which gives you the power to add further offences to the disregard scheme.

Legal framework

Sexual Offences Act 1956

Section 32 of the Sexual Offences Act 1956 states:

It is an offence for a man persistently to solicit or importune in a public place for immoral purposes.

Sexual Offences Act 2003

The offence of importuning was repealed by the Sexual Offences Act 2003. In a consultation paper published in July 2000, titled 'Setting the Boundaries: Reforming the law on sex offences', the Home Office set out the reasons for its recommendation that s32 should be repealed. The basis for its recommendation was that s32 was primarily being used to regulate same sex behaviour in public.

At paragraph 6.6.12 the consultation paper states that

"This offence appears to relate to soliciting for sex in a similar way that the Street Offences Act 1959 deals with soliciting by women. In fact this very broad offence is primarily used to regulate same sex behaviour in public. The offence was originally introduced to regulate the activity of men seeking the services of female prostitutes and the offence can only be committed by a man although the victim of the importuning may be another man or woman. In practice the charge is one laid almost exclusively against men soliciting other men. Case law indicates that even soliciting another man for lawful sexual activity can be considered an immoral purpose."

The paper goes on to state at paragraph 6.6.13:

"Importuning and gross indecency are the two most commonly used offences used against men who are seeking sexual partners in or around public toilets ('cottageing') and 'cruising'. In the case of Crook v Edmondson (1966), the Court of Appeal concluded that sexual intercourse with a female prostitute was not an immoral purpose, for the purposes of this section. By inference therefore the offence applied to soliciting for same-sex activity. The case of R v Goddard (1991) later confirmed the offence as primarily one of regulating homosexual activity when it was held that the charge might only be used against a man soliciting a woman for unlawful sexual purposes i.e. where the woman was under the age of 16, or with an adult woman other than a prostitute. A man can be said

to be ‘soliciting’ even by physical action alone: by a smile, wink, gesture or some other physical signal.”

And at 6.6.15:

“The very broad wording of the section enables it to be interpreted very widely and section 32 has become a means of regulating behaviour between homosexual men which, if conducted between men and women would be seen as no more than ‘chatting-up’. The reasoning on the meaning of ‘immoral purposes’ seems to operate from a presumption that homosexual behaviour is inherently immoral. Although case law shows that the offence can be used for heterosexual soliciting, a man will only be guilty of soliciting a woman if his actions are unpleasant, offensive and disturbing to the victim. No such requirement has been applied to homosexual soliciting”

And at 6.6.17:

“It would seem sensible that soliciting for the purposes of prostitution should be regulated similarly for men and women; we would suggest that the Street Offences Act 1959 should be extended to cover soliciting in public places by both men and women.”

(emphasis added throughout)

The offence was repealed by section 140 of the Sexual Offences Act 2003. Schedule 7 lists the offences which were repealed by the Act, which include other offences which had been contained within the 1956 Act:

Sexual Offences Act 1956 (c. 69)	Sections 1 to 7. Sections 9 to 17. Sections 19 to 32. Sections 41 to 47. In Schedule 2, paragraphs 1 to 32.
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Protection of Freedoms Act 2012

In 2012 the Protection of Freedoms Act made provision for men with historic convictions for consensual gay sex offences to apply to the Home Office to have them ‘disregarded’. At the second reading of the Bill, the then Home Secretary said:

“Today’s Bill rights historic wrongs. Consensual sex between men over the age of consent was decriminalised in 1967, yet more than 40 years on, gay men can still be penalised and discriminated against because of convictions for conduct which is now perfectly lawful. It is right that we should change the law and wipe the slate clean. The Bill establishes a scheme whereby an individual with a conviction that would today not be considered an offence would be able to apply to the Home Office to have the conviction and caution disregarded. If an application were

approved, details of the conviction or caution would be removed from police records and the individual would be able legally to conceal their previous conviction in any circumstances. It would also no longer appear on a criminal record disclosure.”

In the Public Bill Committee on the Bill the Parliamentary Under-Secretary of State for the Home Department said:

“The Government are committed to equality and we believe that one of the most unfair and unjust historical inequalities is the discrimination against men who have a conviction for something that has, for a long time, not been illegal, but which can, nevertheless, show up on a criminal record check. That situation might prevent an individual from taking up certain opportunities in life, such as applying for particular occupations, or volunteering — not because they present a risk, but simply because they do not want to risk anyone finding out about their past. They may not have told their family or partner about the matter, and allowing that history to be revealed can have devastating effects on lives.”

(emphasis added throughout)

Section 92 of the Protection of Freedoms Act gives the Home Secretary the power to ‘disregard’ convictions or cautions for certain offences which have been repealed. Section 92(1) lists the offences which can be disregarded:

*(1) A person who has been convicted of, or cautioned for, an offence under—
(a) section 12 of the Sexual Offences Act 1956 (buggery),
(b) section 13 of that Act (gross indecency between men), or
(c) section 61 of the Offences against the Person Act 1861 or section 11 of the Criminal Law Amendment Act 1885 (corresponding earlier offences),
may apply to the Secretary of State for the conviction or caution to become a disregarded conviction or caution.*

This list does not include soliciting or importuning under s32 of the Sexual Offences Act 1956.

Offences under s92(1) can only be disregarded if they also meet the criteria in s92(3):

*the Secretary of State decides that it appears that—
(a) the other person involved in the conduct constituting the offence consented to it and was aged 16 or over, and
(b) any such conduct now would not be an offence under section 71 of the Sexual Offences Act 2003 (sexual activity in a public lavatory).*

Section 96 of the Protection of Freedoms Act states that:

*(1) A person who has a disregarded conviction or caution is to be treated for all purposes in law as if the person has not—
(a) committed the offence,
(b) been charged with, or prosecuted for, the offence,
(c) been convicted of the offence,*

(d)been sentenced for the offence, or
(e)been cautioned for the offence.

...

(4)Any obligation imposed on any person by any enactment or rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person is not to extend to requiring the disclosure of a disregarded conviction or caution or any circumstances ancillary to it.

The Protection of Freedoms Act 2012 provides that a person with a conviction or caution for certain offences, including gross indecency and buggery, both of which were repealed by the 2003 Act, can apply to the Home Office for the offence to be disregarded. The effect of the disregard is that the conviction or caution is deleted from the Police National Computer and can no longer be disclosed on a DBS check. However, the offence of soliciting or importuning was *not* included in the list of offences which can be disregarded.

On 21 October 2016 the Commons debated the Sexual Offences (Pardons Etc) Bill. Matthew Pennycook MP stated during the debate that *“I have just named an offence—soliciting and importuning—which is not covered by the disregard process. I hope the hon. Gentleman will agree that making that a criminal offence is now considered unjust by the House and by society. However, it is not covered by the scope of that process. Does he accept, therefore, that the disregard process has limitations that are addressed in this Bill?”*

Justice Minister Sam Gyimah MP stated in response *“On a point of clarification, section 32 of the Sexual Offences Act 1956, to which he referred and which made soliciting and importuning a crime, was repealed in 2004. However, soliciting still remains a crime.”*

The Street Offences Act 1959

Section 1 of the Street Offences 1959 states that:

(1) It shall be an offence for a person aged 18 or over (whether male or female) persistently to loiter or solicit in a street or public place for the purpose of prostitution

Soliciting for the purpose of prostitution is therefore an offence. However, it is and always has been, a separate offence to importuning.

The Street Offences Act 1959, which had previously related only to soliciting by women, was amended by the Sexual Offences Act 2003 to include soliciting by men. This change was made following the recommendation of the 2001 consultation paper, and amended the Act to include *soliciting by men for the purpose of prostitution*, a much narrower offence than the offence of soliciting or importuning under s32. It is clear from the background to the 2003 Act, that importuning was an offence distinct from the soliciting offence under s1 of the 1959 Act.

Policing and Crime Act 2017

Under s166(1) the Secretary of State has the power to add further offences to the list of offences specified in s92(1) of the Protection of Freedoms Act.

(1) The Secretary of State may by regulations made by statutory instrument amend section 92 of the Protection of Freedoms Act 2012 (power of Secretary of State to disregard convictions or cautions) so as to add further offences to the list of offences specified in subsection (1) of that section.

(2) An offence may be added to that list only if—

(a) it was an offence under the law of England and Wales,

(b) it has been repealed or, in the case of an offence at common law, abolished, and

(c) either—

(i) the offence expressly regulated homosexual activity, or

(ii) although the offence did not expressly regulate homosexual activity, it appears to the Secretary of State that those responsible for investigating occurrences of the offence targeted occurrences involving, or connected with, homosexual activity.

Section 165(2) of the Act states:

(2) If, at the time this section comes into force, the person's conviction or caution has become a disregarded conviction or caution under Chapter 4 of Part 5 of the Protection of Freedoms Act 2012, the person is pardoned for the offence.

The effect of section 165(2) of the Policing and Crime Act 2017 is that an individual whose conviction or caution has been disregarded will also be pardoned for the offence.

Rehabilitation of Offenders Act 1974

Section 1 of the Rehabilitation of Offenders Act states that after an applicable period, a conviction will be treated as “spent”.

Section 4 of the Act states that the effect of a conviction becoming spent is that a person does not have to disclose it.

The Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 exempts certain professions from the rule about non-disclosure. The Order lists the excepted professions and disapplies section 4 of the Act in relation to those professions.

Article 3(3) of the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 states that the exception does not apply to “a protected caution or a protected conviction”. Protected cautions and convictions are defined in Article 2A as:

(1) For the purposes of this Order, a caution is a protected caution if it was given to a person for an offence other than a listed offence and— (a) where the person was under 18 years at the time the caution was given, two years or more have passed since the date on which the caution was given; or (b) where the person was 18 years or over at the time

the caution was given, six years or more have passed since the date on which the caution was given.

(2) For the purposes of this Order, a person's conviction is a protected conviction if the conditions in paragraph (3) are satisfied and— (a) where the person was under 18 years at the time of the conviction, five years and six months or more have passed since the date of the conviction; or (b) where the person was 18 years or over at the time of the conviction, 11 years or more have passed since the date of the conviction.

(3) The conditions referred to in paragraph (2) are that— (a) the offence of which the person was convicted was not a listed offence; (b) no sentence mentioned in paragraph (4) was imposed in respect of the conviction; and (c) the person has not been convicted of any other offence at any time.

Article 2A(5)(d) states that included the “listed offences” referred to in sections (1)-(3) include “an offence specified in Schedule 15 of the Criminal Justice Act 2003.”

“Soliciting by men” is listed at paragraph 91 of Schedule 15 of the Criminal Justice Act.

Police Act 1997

Section 113A of the Police Act 1997 states that a criminal record certificate will include any “relevant matter” as defined by subsection 6D. Section 113A(6D) lists the offences which are “relevant matters”, including, under 113A(6D)(e) “an offence specified in Schedule 15 to the Criminal Justice Act 2003”.

As above, “Soliciting by men” is listed at paragraph 91 of Schedule 15 of the Criminal Justice Act.

The Rehabilitation of Offenders Act 1972 requires our client to disclose his spent conviction for importuning in situations where a DBS check is required. The Police Act 1997 requires the DBS to include his conviction on his DBS certificate.

Conclusion

As set out above, the disregard scheme was intended to allow men in the situation of our client, who have historic convictions for consensual gay sex offences, to apply to have those convictions or cautions disregarded from their record. The Policing and Crime Act now also provides for men whose convictions or cautions have been disregarded to be formally pardoned.

Our client has a conviction for an offence which has been recognised as having been used in a discriminatory way against gay men. The offence has been repealed on that basis, but his conviction remains on his record and in circumstances where he is required to disclose convictions, he must disclose it. The DBS service has no discretion not to disclose the conviction on a DBS certificate. Our client is unable to apply for his conviction to be disregarded and cannot therefore be pardoned.

You have the power under s166 of the Policing and Crime Act to add the offence of importuning under s32 Sexual Offences Act to the list set out in the Protection of Freedoms Act. It is clear that the offence of importuning meets the criteria required by s166: a) it was an offence b) it has been repealed by the 2003 Act c) although it did not expressly regulate homosexual activity, it is clear, from the Home Office's own consultation paper, that those "*responsible for investigating occurrences of the offence targeted occurrences involving, or connected with, homosexual activity.*"

We request that you now exercise that power, and lay regulations amending s92(1) of the Protection of Freedoms Act 2012 to include persons who have been convicted or cautioned under s32 Sexual Offences Act 1956.

Please respond by 24 August 2017. We look forward to hearing from you.

Yours sincerely

A handwritten signature in black ink that reads "Katy Watts". The signature is written in a cursive, slightly slanted style.

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