

# CASE REPORT

## COURT OF APPEAL CLARIFIES THE LAW ON DOWNLOADING PORNOGRAPHY FROM THE WEB

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In the recent years the law courts had to deal with a considerable number of cases involving child pornography received or downloaded through the Internet.<sup>1</sup> Moreover, there has been a considerable number of appeals involving not only sentencing issues but also the interpretation provided to the making offences under section 1(1) of the Protection of Children Act 1978 (the 1978 Act) since the decision of the Court of Appeal in *R v Bowden*.<sup>2</sup> The Court of Appeal has now had an opportunity to explain the law. Yaman Akdeniz reports.

### 1. INTRODUCTION

In the appeal cases involving *R v Graham Wengworth Smith and Miles Jayneos* (CA, [2002] EWCA Crim 665, (No.2001/00251/WA), 7 March 2002), the appellants were convicted of the offence of making an indecent photograph or pseudo-photograph of a child contrary to section 1(1) of the 1978 Act. In the case of Smith, the image in question was received as an attachment to an email message. In the case of Jayneos, the images were downloaded by the appellant from the Internet. In each case, the image in question was saved in the temporary Internet cache as a result of the automatic function of the computer.

So far as Smith's case is concerned, he was convicted of one count of making indecent pseudo-photographs of a child and was sentenced to two years' probation in December 2000, at Lewes Crown Court, before His Honour Judge Kemp and a jury.

The police found an email with attachments in Smith's computer which showed images of a naked girl called Eva, apparently taken by her mother, an internationally renowned photographer. According to the appeal decision the attachments had been sent to the appellant on 26 July 1998 by someone calling herself "Vivienne Nyström", whose email address is "smallthings@hotmail.com". An important fact of the case was that the images were not sent unsolicited to Smith, but according to the case report, Smith asked this person to send him the Eva images. The images in question had not been deleted and remained as an attachment to an email in the Smith's mailbox. The defence on behalf of Smith suggested that:

"upon the proper construction of section 1(1)(a) of the Act the appellant had not 'made' a pseudo-photograph within the meaning of that provision by simply opening an attachment to an email and looking at the images, without doing more."

However, the Crown submitted that the appellant had effectively solicited the photographs by email, had shown an interest in receiving them and in opening them, and in failing to delete them, he had "made" the photographs in question.

Following the interpretation of this issue in the cases of *Bowden*,<sup>3</sup> and *Abbas v DPP*,<sup>4</sup> the trial judge ruled that Smith

"had sought to 'make' photographs, in effect by proliferating them rather than taking the option, which was otherwise available to him, which was to delete them altogether".

The defence, however, argued that section 1(1)(a) of the Act should be construed as narrowly as is reasonably possible, and it should not be construed so as to apply to a case such as the present.<sup>5</sup> The defence's argument was that Smith's actions should be distinguished "from that of a conscious and deliberate downloading of an image from the Internet."

### 2. THE SMITH APPEAL

The Court of Appeal agreed that "a person is not guilty of an offence of 'making' or 'being in possession' of an indecent pseudo-photograph contained in an email attachment if, before he opens the attachment, he is unaware that it contains or is likely to contain an indecent image." This would mean that liability should not arise if the indecent photographs are received unsolicited. Such a defence would have been available under section 6(6)(2)(c) of the Criminal Justice Act 1998 if Smith was charged with a possession offence. Obviously, the courts and the prosecutors would also look into the behaviour and actions of an accused following the unsolicited receipt of such images via email. It is very much doubted that liability would arise if the images and the message in question is immediately deleted upon the realization of its nature. However, it may be a completely different scenario if the images are looked at and the message moved into a folder named hypothetically as "my naughty folder". At that point the unsolicited nature of the message in question may not be so relevant for the purposes of a prosecution under section 1(1) of the 1978 Act.

However, it should be noted that when charged with a section 1(1)(a) offence of making an indecent photograph or a pseudo-photograph, no defence along the lines of section 6(6)(2)(c) of the Criminal Justice Act 1998 is open to a defendant, "that the photograph [or pseudo-photograph] was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time."<sup>6</sup> The defences which are available under section 1(1) of the

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