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Ref: McF11524

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

ICOS Nos: 20/050678

Delivered: 24/05/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY ROSALEEN BEATTY
FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**Mr H Southey QC with Mr M Bassett BL (instructed by KRW Law)
for the applicant**

**Dr T McGleenan QC with Mr P Henry BL (instructed by the Crown Solicitor's Office)
for the proposed respondent the Director of the Public Prosecution Service**

**Dr T McGleenan QC with Ms L Curran BL (instructed by the Crown Solicitor's Office)
for the proposed respondent the Chief Constable of the Police Service of
Northern Ireland**

McFARLAND J

Introduction

[1] This is an application for leave to apply for judicial review.

[2] The applicant Rosaleen Beatty ("Ms Beatty") is the sister of Ambrose Hardy ("Mr Hardy") who was killed by gun shots on the night of 3rd/4th February 1973 in the New Lodge area of Belfast. In a letter dated 19th September 2018 to a group called 'Relatives for Justice', the Attorney General for Northern Ireland expressed the opinion that there had been no adequate criminal justice investigation at the time and therefore the inquest into Mr Hardy's death had been deprived of any effectiveness. The Attorney General declined to direct a new inquest as he considered that there needed to be a proper criminal investigation. The Attorney General also expressed a view "*that the better course of action is to ask the Director of Public Prosecutions to consider whether this is an appropriate case for the Director to exercise his power under section 35(5) of the Justice (NI) Act 2002 to require the Chief Constable to investigate.*" (The Attorney General has now directed a new inquest on 12th February 2021 but this development has no impact on the issues in this case.)

[3] Independent of the Attorney General's request to the Director of Public Prosecutions ("the Director"), the police had already begun a criminal investigation into the death of Mr Hardy and that case is being dealt with by its Legacy Investigation Branch ("LIB"). By a letter dated 14th February 2020 the Director declined to exercise his discretion to direct the police to conduct an investigation, and Ms Beatty seeks leave to judicially review that decision.

[4] Ms Beatty is also seeking leave to judicially review the decision of the police to allocate this case to the LIB, on the grounds that it is not an independent investigation and further that it will cause delay.

The Law relating to granting leave

[5] The test to be applied for the consideration for the granting of leave is very well established (see Nicolson LJ in *Omagh District Council* [2004] NICA 10 at [5], and more recently, McCloskey J in *McKee* [2018] NIQB 60 at [17]):

"Each of the Applicant's grounds of challenge is to be evaluated through the prism of the well-established test for leave, namely whether there is an arguable case fit for further and more detailed enquiry by the Court and possessing a reasonable prospect of ultimate success."

Ms Beatty's application in relation to the Director's decision

[6] On the 14th February 2020, the Public Prosecution Service (on behalf of the Director) wrote to 'Relatives for Justice', a representative group which acts on behalf of a number of people including Ms Beatty, stating that the Director would not make a request for information under section 35(5) of the Justice (NI) Act 2002 ("the 2002 Act"), indicating that his reason was that the police were already investigating the matter, and that the Director did not consider it appropriate to issue a specific request so that this case might possibly receive some prioritisation ahead of other cases.

[7] Ms Beatty argues that this decision is unlawful as it amounts to a delegation of prosecution decision making to the police (as per [22] of her skeleton argument).

[8] The Director's function is as is set out in section 31 of the 2002 Act, namely the taking over conduct of all criminal proceedings on behalf of the police, including a power to initiate proceedings in cases where it appears to be appropriate. Section 35 of the 2002 Act does not expand on this power. It is a provision which sets out how information is to be provided to the Director.

[9] The text in its entirety is as follows:

“35. - (1) Where a person is committed for trial, the clerk of the court to which he is committed must send, or cause to be sent, to the Director without delay-

(a) a copy of every complaint, deposition, examination, statement and recognisance connected with the charge, and

(b) a copy of all other documents in his custody which are connected with the charge or, if it is not reasonably practicable to copy any of them, particulars of the documents which it is not reasonably practicable to copy.

(2) Where a complaint has been made before a resident magistrate, a lay magistrate or a clerk of petty sessions, he must (whether or not proceedings have been taken on it) cause to be sent to the Director, on being requested by the Director to do so, copies of all documents in his custody which are connected with the complaint.

(3) Where the circumstances of any death which has been, or is being, investigated by a coroner appear to the coroner to disclose that an offence may have been committed against the law of Northern Ireland or the law of any other country or territory, the coroner must as soon as practicable send to the Director a written report of the circumstances.

(4) The Chief Constable of the Police Service of Northern Ireland must give to the Director information about offences alleged to have been committed against the law of Northern Ireland which are of any description specified by the Director.

(5) The Chief Constable of the Police Service of Northern Ireland must, at the request of the Director, ascertain and give to the Director-

(a) information about any matter appearing to the Director to need investigation on the ground that it may involve an offence committed against the law of Northern Ireland, and

(b) information appearing to the Director to be necessary for the exercise of his functions.”

[10] The primary duty imposed by section 35 of the 2002 Act is placed not on the Director, but upon the courts, the coroners’ service and the police to either report

matters to the Director (sub-sections (1), (3) and (4)) or to respond to requests from the Director for information (sub-sections (2) and (5)). Subsection (5) places a duty upon the police to give the Director information about any matter which appears to the Director needs investigation. The Explanatory Note to that sub-section states that:

“This could be used, for example, where the Director had gained information that indicated a criminal offence might have been committed. He could ensure that it had been thoroughly investigated and request any associated papers in order that a decision could be made ... as to whether any prosecution should be instituted.”

[11] This provision does not constitute a power for the Director to supervise the conduct of investigation by the police.

[12] The argument of the Director is very simple and, I might add, compelling. Subsection (5) does not create a duty on the Director, but merely gives him a discretion to request information. The duty is placed on the police to provide information once the discretion is exercised. The police are already investigating the matter relating to the death of Mr Hardy. A request to the police to essentially investigate a matter which the police are already investigating is superfluous.

[13] The only practical implication of the Director exercising his discretion would be a possibility, and it can be put no higher than this, that this investigation, which is currently being conducted by the LIB, will then become prioritised and be dealt with by another part of the police. Whether it will be quicker than the LIB is a matter for speculation. Ms Beatty believes that it will. The purpose of her application is not that the matter will be investigated by the police, but rather that it be investigated outside the remit of the LIB. The practical outworking of this would be her understanding that this would place the Hardy investigation further up the queue ahead of other cases currently within the remit of the LIB and other investigations currently conducted by the police in relation to current and historic matters.

[14] It is not the function of the Director to attempt to prioritise the investigations being carried out by the police into crime, whether the crimes be current or historic.

[15] This is a challenge to the exercise of a discretion. The challenges to the Director’s decisions are rare. The main focus will be on decisions to prosecute, or not to prosecute, and even then the court’s jurisdiction to interfere is exercised sparingly.

[16] It is worthwhile considering the position of the Director of the Serious Fraud Office, who, unlike the Director has a statutory power to both investigate and prosecute serious fraud. The Director is limited to prosecution of criminal offences and has no investigative role. Laws LJ in *(R) Birmingham v Serious Fraud Office* [2006] EWHC 200 (an extradition matter) at [64] stated that it will take a wholly exceptional

case on its legal merits to justify judicial review of a discretionary decision by the Director of the Serious Fraud Office to investigate a crime or not.

[17] *Bermingham* and other cases were referred to with approval by Lord Bingham when delivering the lead judgment in the unanimous decision of the House of Lords in *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60. That speech is particularly instructive and relevant to the issues in this challenge. At [30] Lord Bingham refers to the role of the Serious Fraud Office and states:

“There is an obvious analogy with the position of the Director of Public Prosecutions. It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator.”

He continued at [31] to explain the reasons for the reluctance to interfere:

*“The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage of *Matalulu*):*

“the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.”

Thirdly, the powers are conferred in very broad and unrestrictive terms.”

Matalulu is a reference to a decision of the Supreme Court of Fiji (*Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712).

[18] Lord Bingham at [32] explained that the discretions are not unfettered –

“Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him.

He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. In the present case, the claimants have not sought to impugn the Director's good faith and honesty in any way."

[19] The Divisional Court (Morgan LCJ, Girvan and Coghlin LJ) in *Christopher Mooney's Application* [2014] NIQB 48 was considering the application of a complainant to review a decision not to prosecute. Although the court was dealing with a different issue, the observations at [22] and [23] of Coghlin LJ when delivering the judgment of the court are instructive concerning the susceptibility of decisions of the Public Prosecution Service to review:

*"[22] The reason for reluctance on the part of the court to intervene is not difficult to ascertain flowing, as it does, from the unique nature of the office of PPS. The PPS does not discharge a judicial function, adjudicating between parties. By the same token, this court does not take decisions as to which cases should or should not be prosecuted. The constitutional position is absolutely clear. It is not the function of this court to substitute its own view for that of the Crown about whether there should be a prosecution. The function of the PPS is extremely complex and, as noted above, has been described as "polycentric". The PPS must consider and weigh a number of disparate and, at times, even competing interests including, for example, the general public interest at any particular time, the interests of the accused, the victim, a supplier of information, such as an informant, and various witnesses both interested and disinterested. As Lord Bingham observed in the passage from his judgment in *Corner House* quoted above the discretionary powers given by Parliament to the prosecuting authority are exclusive to that office. The powers conferred are very broad and unrestrictive and no other authority may exercise those powers or make judgments upon which such exercise must depend.*

[23] However, as the authorities confirm, the breadth and exclusivity of the powers conferred upon the PPS by Parliament do not mean that there are no circumstances under which the court may intervene. The "polycentric character" of decision making by the PPS cannot operate so as to deprive a member of the public of a remedy in appropriate cases."

[20] Ms Beatty has not established any of the grounds identified by Lord Bingham in *Corner House* (lack of good faith and influence by any ulterior motive, predilection or prejudice), or any other grounds to attack the proper exercise of the discretion by the Director in this case. She has not established that there are any arguable highly exceptional features to this decision. There is an ongoing investigation by the police

into the death of Mr Hardy. That is a matter for the police and there can be no legitimate cause for Ms Beatty to argue that the Director should interfere with that investigation, or somehow use the very limited powers contained in section 35(5) to attempt to prioritise this investigation over other investigations and other public duties being carried on by the police.

[21] The supplementary argument that a refusal to exercise the discretion is an unlawful delegation of a prosecution making decision to the police is one that is not over-burdened with merit. The case is currently in the investigation phase, and no prosecution decision has been made. All that the Director has done in this case is allow the police to get on with its role in the investigation. The Director is not delegating that function, as he has no investigatory function to delegate. Nor could one describe the police's role in investigating the matter as a prosecutorial role.

[22] Ms Beatty has not established that she has an arguable case fit for further and more detailed enquiry by the Court and possessing a reasonable prospect of ultimate success. Leave is therefore refused.

Ms Beatty's application in relation to the police

[23] Ms Beatty also challenges the decision by the Chief Constable to allocate the death of Mr Hardy to the police's LIB, on the grounds that LIB is not an independent body and further that there has been delay in investigating the case.

[24] Lord Keith in *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 set out in very clear terms that it is for a chief constable to decide:

"how available resources should be deployed, whether particular lines of inquiry should or should not be followed and even whether or not certain crimes should be prosecuted. It is only if his decision upon some matters is such that no reasonable chief officer of police would arrive at that someone with an interest to do so may be in a position to have recourse to judicial review. So the common law, while laying upon chief officers of police an obligation to enforce the law, makes no specific requirements as to the manner in which the obligation is to be discharged."

[25] Ms Beatty challenges the decision to allocate Mr Hardy's case to a certain unit in the police. That is clearly an operational decision for the Chief Constable. It is for him, and those working under him to determine how they should carry out their duties. The court cannot dictate to the Chief Constable how he should investigate matters, which units should be deployed to investigate and which officers should be deployed. The Chief Constable has determined that this investigation into events which occurred nearly 50 years ago should be investigated by a specialist unit, the LIB. It cannot be argued that that decision was in any way incorrect.

[26] The wider aspect of this challenge relates to the question of independence and delay in the context of the state's obligation to investigate certain deaths and any Article 2 ECHR obligations.

[27] This is a well-trodden path, but it is at least arguable that the current investigation is not EHCR compliant and has been subject to delay.

[28] In the circumstances, leave is granted on these grounds, as are set out on paragraph 1.2 of the Ex Parte Docket.

Orders

[29] Leave is refused in respect of Ms Beatty's application in respect of the Director.

[30] Leave is granted in respect of Ms Beatty's application in respect of the Chief Constable in relation to independence and delay. Given that this application is inextricably linked to other cases which, hopefully, will be resolved with a June hearing in the Supreme Court, I propose to stay this application until further order. No further preparation should be undertaken by either party until such times as the court lifts the stay. There will be liberty to both parties to apply at any stage to remove the stay.

[31] I will hear the parties in respect of any costs orders at this stage.