Judicial Review – non-prosecution decision – challenge to lack of reasons – policy of DPP on giving reasons – whether breach of the policy – whether Art 3 of ECHR engaged

Neutral Citation no. [2004] NIQB 63 | *Ref:* **GIRC5079**

Judgment: approved by the Court for handing down | *Delivered:* **29/09/04**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY JOHN BOYLE FOR JUDICIAL REVIEW OF THE DECISION OF THE DIRECTOR OF PUBLIC PROSECUTIONS

GIRVAN J

[1] The applicant John Boyle applies for an order of mandamus against the Director of Public Prosecutions to provide full reasons for his decision not to prosecute two police officers for perjury.

[2] The applicant was convicted on 14 October 1977 at Belfast City Commission before Judge Brown QC on one count of possession of firearms and ammunition with intent to endanger life contrary to section 14 of the Firearms Act (NI) 1969 and one count of membership of a proscribed organisation contrary to section 19(1)(a) of the Northern Ireland (Emergency Provisions) Act 1973. He was sentenced to 10 years imprisonment on the first count and 2 years imprisonment on the second count to run concurrently. He was in breach of a suspended sentence of 2 years for an offence of intimidation passed on 25 October 1974 and that sentence was invoked. His appeal against conviction and sentence was dismissed on 13 January 1978. Subsequently the Criminal Cases Review Commission referred the matter back to the Court of Appeal in April 2001.

[3] The allegation against the applicant is that he took part in a Provisional IRA gun attack on police officers in Franklin Street, Belfast, on 27 May 1976. The case against the appellant was based exclusively on admissions obtained in interviews. Interviews took place on six occasions on 8 and 9 March 1977 and were recorded and notes written by Detective Constables Briggs, Logan, Ford and Ormsby. The material interview was interview 5 in which the notes

of interview were set out. The interviewer Detective Constable Briggs signed it as the officer recording the notes and they were counter-signed by Detective Constable Logan. The interview commenced at 2.00 pm on 9 March 1977 and it concluded at 3.35 pm. It is recorded that Detective Constable Ford entered the room at 3.25 pm and he then continued interviewing on his own until 4.45 pm. The material admission relied upon by the Crown which was contained in the notes was that he said according to the text:

> "We continue to question subject about his admissions to us, about being in the Provisionals and he agreed and said 'I'm making no statement.' When asked why he did not want to make a statement to clear the whole lot up he replied 'I can't make a statement I am an officer.' We continued to question the subject and he then says 'Sure you said yesterday that I am the QM.' When the subject was asked if this was true he agreed."

In a further passage:

> "We continued to question the subject about this incident and he admitted 'I only done cover with a pistol while another man fired an Armalite.' "

This was the major evidence against the appellant. The judge did not consider that the forensic evidence was probative or indeed admissible and that the other admissions or passages in interview as relied upon by the Crown were not probative against him, so the case turned upon the acceptance or not by the judge of the veracity of the admissions. The applicant denied that he had made any such admission or that he had admitted either of the offences charged against him and he claimed that the officers were writing down things which he had not said. There was a clear conflict of evidence between Detective Constable Briggs and Logan on the one side and the applicant on the other as to whether he had said what was attributed to him. The appellant's advisors obtained and submitted to the Criminal Cases Review Commission a test conducted by the ESDA process. The Commission then referred the matter to the Court in the light of the findings of Mr Hughes. Having considered his report the Court of Appeal was content to accept it as agreed by the Crown and having looked carefully at the findings which he had recorded, it appeared that there was a basis for his conclusion that there must have been another version of the interview note of interview 5. The Court of Appeal did not base that so much upon the absence of certain passages but what the Court considered was of substantial significance were verbal differences between the recorded interview and the impressions which were found by Mr Hughes on examination. In the Court of Appeal's decision these were not substantial matters and they did not

bring in any matter which was in itself damaging to the case of the appellant. They varied in certain minor respects in wording which could not be accounted for in the Court's opinion by anything appearing or explicable from the impressions. The Court accepted the conclusion that Mr Hughes advanced that there appeared to have been a different version of interview 5 in existence at some time. The officers had maintained quite clearly that the notes of the interview were made throughout the interview and in their own phrase "at the time." Accordingly they had committed themselves in evidence saying that the interview notes were all taken as the interview progressed and did not resile from that. It appeared to the Court of Appeal that that could not be correct and that immediately raised a question whether the credibility of the officers could have been attacked by this side door in the course of the trial. The Court concluded that there was at least a prima facie case that the notes were re-written and the conviction could not be regarded as safe.

[4] In the course of considering the appeal the Director referred the matter to the Police Service of Northern Ireland by virtue of Article 6(3) as a Prosecution of Offences (NI) Order 1972 requesting that an investigation be carried out in respect of the matter arising from the 1977 trial. In turn the matter was referred to the Police Ombudsman for Northern Ireland. A file was received by the Department from the Ombudsman Office in March 2002. The file consisted of a report by a senior investigating officer in the Ombudsman Office, statements, partial transcripts of the trial of the applicant's interviews and other documents. The applicant in his affidavit avers that he believed that the Ombudsman for Northern Ireland recommended a prosecution of the two officers. The affidavit of Mr Wray on behalf of the Director did not challenge that averment and the case was argued on the basis that such a recommendation was made by the Ombudsman.

[5] According to the affidavit of Mr Rae in the Department of the Director of Public Prosecutions, a legal officer in that Department, he said that he considered the file and proceeded to brief both Senior and Junior Counsel with relevant documentation. On receipt of the communication from Junior Counsel an interim direction was issued on 10 June 2002 to the Ombudsman Office raising certain queries. A further report was received from the Ombudsman Office dated 21 June 2002 in response to the Interim Direction and this was briefed to Counsel. Mr Rea consulted with both counsel, two investigators from the Ombudsman's Office and Mr Maxwell of the Forensic Agency of Northern Ireland. Following the consultation an opinion was received from independent Senior Counsel. Legal privilege was not weighed in respect of the opinion in the affidavit. Its conclusion was that there was insufficient evidence to sustain a successful prosecution of any police officer arising out of the events in issue. The opinion and other relevant papers were considered by Mr Rea and by senior members of staff within the Department.

A number of issues were clarified with Senior Counsel which provided an addendum to the original opinion. This confirmed the conclusion referred to. Senior Counsel's written advices were then further considered by Mr Rea and by senior members of staff within the Department. Having consulted with senior members of staff he concluded that the evidence was insufficient to avoid a reasonable prospect of conviction and a direction not to prosecute was issued on 8 January 2003.

[6] By a letter of 20 January 2003 the applicant's solicitor requested reasons for the decision not to prosecute. The Department eventually on 6 June 2003 wrote to the applicant's solicitors. So far as material it stated:

> "In Northern Ireland prosecutions can only be directed where there is sufficient evidence available to afford a reasonable prospect of obtaining a conviction and prosecution is required in the public interest. Where the evidence available is insufficient there can be no prosecution.
>
> It has been the general practice of the Director to refrain from giving reasons for decisions not to institute or continue with criminal proceedings other than in the most general terms.
>
> The Director recognises however that the propriety of applying his general practice must be examined and reviewed in every case were a request for reasons is made. Accordingly, I have carefully considered whether the general practice should be applied in this case or whether it is appropriate to depart from it. I have concluded that it would be inappropriate to depart from the general practice in this case.
>
> I can inform you that the evidence and information reported together with the recommendations of the Police Ombudsman investigators were carefully considered by an experienced lawyer in this office. The advice of independent Senior Counsel was obtained. As a result it was concluded that the evidence available was insufficient to afford a reasonable prospect of obtaining a conviction against any person and accordingly a direction for no prosecution was issued on 8 January 2003. While I understand that this decision may be disappointing to your client I know that he would

> appreciate a prosecution can only take place where there is sufficient evidence to afford a reasonable prospect of obtaining a conviction. I would seek to assure him that the decision was reached after a most careful examination of all the evidence and information reported."

[7] The applicant's solicitors wished to press the matter further in correspondence and there was correspondence passing between the Department and the solicitors relating to aspects of the ill health of one of the suspects. Eventually on 8 October 2003 the Department confirmed that they stood over their decision in the matter and this brought the correspondence to a conclusion.

[8] Mr Rea's affidavit sets out the reasoning behind the general policy and practice the Department are refrained from giving reasons for a decision not to institute or continue with criminal proceedings other than in the most general terms. This general practice is based on a number of considerations which are set out in paragraph 23 of Mr Wray's affidavit. The policy is also referred to in detail in the judgment in *Re: Adams* [2001] 1 NI 1.

[9] On 1 March 2002 the Attorney General in a written answer to a question in the House of Lords make a statement which contains a modification or gloss upon the policy. This indicated that the Director in consultation with the Attorney General had reviewed his policy in the light of the judgements of the European Court of Human Rights on 4 May 2001 in a number of Northern Ireland cases including the case of *Jordan v United Kingdom*. The Director recognised that there might be cases in the future, which he would expect to be exceptional in nature, where an expectation will arise that a reasonable explanation will be given for not prosecuting where death is or may have been occasioned by the conduct of agents of the state. Subject to compelling grounds for not giving reasons including his duties under the Human Rights Act 1998 the Director accepted that in such cases it would be in the public interests to reassure concerned public including the families of victims that the rule of law had been respected by the provision of a reasonable explanation. The Director would reach his decision as to the provision of reasons and their extent having weighed the applicability of public interest considerations material to the particular facts and circumstances of each individual case.

[10] Mr Treacy OC argued that there was a clear prima facie case that the police officers had committed perjury as a result of which the applicant would not or might not have otherwise been convicted of the serious offences and sentenced to a very lengthy period of imprisonment. There were compelling reasons why the Director should provide reasons for not prosecuting the police officers. Where no reasons are given in a controversial

case such as the present it was not conducive to public confidence. It denies the victim access to information about matters of crucial importance to him and prevents any legal challenge to the decision. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. The reasons set out in the affidavit he argued were thin and non-specific. Mr Treacy also argued that there was an arguable breach of Article 3 of the Convention. The decision here was a post Human Rights Act decision arising out of matters which had come to light and been established after the Human Rights Act. Hence he argued there was a duty to give reasons. This he said arose out of the judgments in *Jordan* in the ECtHR. The Article 3 engagement called for a heightened level of intensity of review. Even if Article 3 was not engaged the level of scrutiny of review was unlikely to be less than if the Convention rights were engaged.

[11] In *Re: Adams* [2001] 1 NI 1 in the context of a decision not to prosecute made before the Human Rights Act 1998 had come into force the Court of Appeal ruled that the Director was under no obligation to give reasons in any case unless he chose to do so. The Court accepted the Director's argument that at common law the Director is not subject to the rules known as procedural fairness. The Court rejected the trial judge's conclusion that the Director was obliged to give reasons in a limited class of cases in which a trigger factor operated. The Court of Appeal also made clear that the Director was under no obligation to consult the victim or to furnish the victim with a copy of the investigation report.

[12] The Director follows a policy in relation to the giving of reasons for not prosecuting being the policy referred to in Mr Reas affidavit. As noted this is subject to and qualified by the Attorney General's statement. The Attorney General's statement qualifies the policy in relation to deaths at the hands of agents of the state and the statement makes clear that it related to "cases in the future." Mr Treacy sought to argue that cases in the future involved decisions made subsequent to the statement but I read the policy as referring to actual cases. However that may be, the Attorney General's qualification of the policy has no relevance in the present context since this is not a case involving a death allegedly at the hands of agents of the state.

[13] Under the policy in place at the time when the decision was made the policy recognised that there might be cases where notwithstanding the general rule (whereby no reasons are given for the decision not to prosecute) it would be reasonable and proper to give reasons. The policy does not set out criteria for determining what factors take the matter outside the general approach of giving no reasons. Nor does the policy spell out how extensive or detailed the reasons given should be. An applicant challenging a decision by the Director not to give reasons would have to demonstrate that the decision was irrational or that the decision was made without taking into accounts relevant considerations or took into account irrelevant

considerations. When the Director does give reasons the applicant would have to establish that the reasons were so inadequate that the decision was irrational or influenced by irrelevant considerations or by a failure to take into account relevant considerations.

[14] The actual decision not to prosecute in the present case was arrived at after consultation with two counsel, two investigators from the Ombudsman Office and Mr Maxwell of the Forensic Agency. It is clear that Senior Counsel advised at length and counsel's conclusions were that there was insufficient evidence to justify a prosecution. This opinion was explored with Counsel who wrote an addendum to his opinion. A decision was reached not to prosecute. The affidavit of Mr Rea indicates a careful investigation with input from independent and expert counsel. So Mr Rea's letter of 6 June 2003 did give reasons why a prosecution was not considered appropriate. It did not go into a detailed explanation of the reasoning which would, in Mr Rea's view, have involved a detailed analysis of and commentary on the information and evidence on which the decision was based. The Department considered that to conduct a detailed exercise of that kind would have some of the undesirable consequences referred to by Mr Wray in paragraph 23 of his affidavit which refers to the terms of the policy. The applicant has not demonstrated that the decision made was irrational nor has he demonstrated the Department failed to have regard to relevant considerations or took into account irrelevant considerations. Mr Treacy made the persuasive point that where no reasons are given in controversial cases that is not conducive to public confidence and denies the victim access to information about matters of crucial important to him. A sense of injustice through not having detailed reasons can be engendered in cases whether they are controversial or not. The fact that a case is controversial does not of itself mean the Director should approach the question in a different way from any other case and controversy of itself may indeed enhance the risks that the policy is designed to minimise. Trial by judicial review would be wholly undesirable. The fact that an apparent miscarriage of justice has occurred and the fact that the Ombudsman's Office had taken a view that a prosecution would be appropriate (presumably if the Director considered that it should be brought) would be very relevant factors for consideration by the Department but there is nothing to suggest that either of those factors was overlooked in the decision making process. Mr Treacy argued that in the absence of compelling grounds for refusing to provide reasons the decision was aberrant. To frame the approach in that way is to misconstrue the policy. The policy required the Director to consider whether, contrary to the normal practice of refraining to give reasons, detailed reasons should be given on the decision not to prosecute. For the reasons indicated there is nothing to indicate that the Director failed to properly apply his policy.

[15] Mr Treacy's argued that Article 3 of the Convention was engaged and that in itself called for a different approach to the decision whether or not to

give reasons. The respondent argued that Article 3 was not engaged because there was no evidence of a breach of Article 3 at the time of the interviews of the applicant in view of the Court's conclusion that the case of mistreatment was not made out. He also argued that alleged breaches of Article 3 asserted by the applicant occurred prior to the Human Rights Act and that the procedural dimension of Article 3 did not arise having regard to the approach adopted by the House of Lords in *Re: McKerr* [2004] 2 AER 409. I would accept that if Article 3 was in play that would be a relevant factor to which the Director would had have to have regard in the decision whether or not to give reasons and I would further accept that in view of the way in which the argument was presented by the respondent Article 3 was not considered relevant. However, I accept Mr McCloskey's QC argument that in the light of the decision in *Re: McKerr* the procedural dimension of Article 3 did not apply to the alleged mistreatment of the applicant prior to the Human Rights Act. Accordingly, the Director was not in error in failing to take Article 3 into account in his decision.

[16] In the result I dismiss the application for judicial review.