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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **24/03/2022**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

PATRICK FRIZZELL

Appellant:

-and-

CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Respondent:

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Mr Hugh Southey QC with Mr Nick Scott of counsel (instructed by KRW Law) for the Appellant
Mr Tony McGleenan QC with Mr Philip Henry of counsel (instructed by the Crown Solicitor's Office) for the Proposed Respondent (DPP)

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Before: Keegan LCJ, McCloskey LJ and Maguire LJ

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Keegan LCJ and McCloskey LJ (delivering the judgment of the court)

Introduction

[1] This is an appeal from a refusal of leave to apply for judicial review contained in the decision of McFarland J on 24 May 2021. The essence of the challenge is an alleged failure to provide reasons to the appellant by the Legacy Investigations Branch ("LIB") of the Police Service of Northern Ireland ("PSNI") in relation to the progress of an investigation into the death of the appellant's brother. Since the judgment at first instance the Supreme Court has delivered its judgment in the case of *Re McQuillan and Others* [2021] UKSC 55. As a result of this there is no point now taken by the appellant in relation to compliance with the investigative obligation pursuant to Article 2 of the European Convention on Human Rights ("ECHR").

[2] This case concerns the tragic death of the appellant's brother, Mr Brian Frizzell, who in 1991 was killed along with two teenage girls who were working in a mobile

shop. The killings were investigated contemporaneously resulting in the conviction of James Harper for murder which was upheld on appeal. This conviction was on the basis of admissions made at interview that Harper had driven the gunman to and from the shop.

Chronology

The parties have helpfully provided a schedule of agreed material facts as follows:

Circumstances of the murder of Mr Frizzell

(i) On 20 March 1991 the appellant's brother was shot dead alongside two teenage girls, Catriona Rainey and Eileen Duffy, in a mobile shop in which they worked.

(ii) The incident in which Mr Frizzell was killed was the subject of a contemporaneous investigation.

(iii) The only man convicted in relation to the killings was James Thomas Harper who was the getaway driver on the night of the murders.

(iv) As cited in the Court of Appeal judgment following Harper's appeal against conviction, Harper said during police interviews that Alan Oliver was the man who carried out the shootings which killed the appellant's brother and that Anthony McNeill was also involved. Harper also stated that Billy Wright and Mark 'Swinger' Fulton were both involved in the plan to carry out the killing.

(v) Alan Oliver and Anthony McNeill are still alive. Billy Wright and Mark 'Swinger' Fulton are deceased.

(vi) The murder of Mr Frizzell was the subject of an investigation by the Historical Inquiries Team ("HET") and a Review Summary Report ("RSR") was provided to Mr Frizzell on 1 June 2011. Following matters raised by the family in respect of the RSR, the case was marked for further review.

Legacy Investigation Branch Case Sequencing Model

(vii) The LIB is the present unit within the PSNI responsible for legacy cases, which includes reviewing the circumstances of all Troubles related deaths in Northern Ireland and conducting investigations into such deaths, if there is sufficient evidence to do so.

(viii) In and around December 2020 LIB were reviewing around 1,130 cases.

(ix) The reviews are prioritised according to the case sequencing model ("CSM") operated by LIB.

(x) There are four aspects to LIB CSM:

(a) Contemporary persons of interest ("CPOI").
(b) Forensic potential.
(c) Criminal justice status.
(d) Case progression.

(xi) The CSM first considers phase 1, which covers contemporary persons of interest and forensic potential. As the CSM states "having completed the first phase, four groups will emerge as detailed in figure 1." These four groups then are put through phase 2, which addresses criminal justice status and case progression. As the CSM states: "The outcome of phases 1 and 2 will ultimately leave the legacy Investigation Branch with a workload that fits within 16 sectors." The number of contemporary persons of interest featuring in a case and the age of a case are final considerations for sequencing.

(xii) The CSM is subject to annual review and case positions are subject to change.

(The functions of the LIB and the operation of the CSM are also set out in the related judgment of this court in *Re Beatty's Application* [2022] NICA, at [5] – [10]).

Mr Frizzell's case within the LIB

(xiii) The murder of the appellant's brother is to be considered by the LIB. It has been within LIB's caseload since around May 2018.

(xiv) No steps have been taken to advance the appellant's brother's case since it was accepted into LIB's caseload in and around May 2018.

(xv) Information known in relation to Mr Frizzell's murder has been assessed when determining the CSM position. No further information has been given to the appellant about which sectors the case falls into or the reasons why it falls where it does.

Additional Information

[3] In addition to the above we received updated documentation by way of letter from the Crown Solicitor's Office dated 18 February 2022. This advises on the current position within LIB as follows:

> "I have now received instructions and can confirm that the current LIB caseload sits at 1,122 cases. Of those, 23 are currently under review or investigation."

[4] By agreement we have also received an affidavit of Detective Superintendent Stephen Wright dated 23 March 2021 which was filed in the course of the *McGuigan* legal challenge which proceeded to the Supreme Court.

[5] This affidavit describes the structure and operational workings of the LIB. In particular paragraph [17] of the affidavit explains that within LIB there are 50 established posts for police officers and 17 posts for police staff. From para [38] onwards the affidavit expands upon at the structure of the LIB generally. Reference is made to engagement with families at paras [38] and [39] as follows:

> "38. LIB has a written family engagement strategy which is reviewed annually. The current version was revised and adopted in February 2020. The strategy sets out the phases of engagement with families, from initial contact at the commencement of review through to the completion of any investigation.
>
> 39. LIB also has a Family Guidance document which is reviewed annually. It sets out LIB's Terms of Reference, provides an overview of how LIB operates and outlines what families can expect of LIB. The guidance was reviewed and revised in February 2020."

[6] Between paras [40]-[43] the affidavit explains the operation of the CSM which we set out in extenso given the contents as follows:

> "40. … The sequence of cases in accordance with the case sequencing model is reviewed annually, with the result that the sequence of cases changes every year. This occurs as a result of updated information about cases and individuals or inaccuracies/omissions within the existing sequence which become known to LIB. A team of three officers works continuously to update the information which is used to calculate the sequence. A copy of the most recent version of the case Sequencing Model Policy Document is published February 2020 … The model provides an objective basis by which LIB determines the sequence in which it carries out its review and investigation functions in respect of deaths which are considered to be linked to the conflict in Northern Ireland prior to 1998.
>
> 41. The February 2020 document referred to above is a new publication which explains the LIB's current case sequencing model, however, the underlying process remains unchanged from the one described by Detective

Superintendent Murphy in 2015. The process of prioritisation is carried out by reference to four considerations:

(i) Whether any contemporary person of interest is featured as a potential suspect. This criteria prioritises cases in which there may be a current threat to the public and persons who may have had an involvement in historic crimes.

(ii) Whether the case has forensic potential. This criteria is assessed by reference to whether or not exhibits are held for the case.

(iii) The criminal justice status of the case. This criteria prioritises those cases where no individual has been convicted of the primary offence.

(iv) Whether the case is un-advanced. This criteria is assessed by reference to whether the case has ever been reopened for the purpose of a review since the conclusion of the original investigation or whether any review/investigative work was progressed.

42. These criteria are applied sequentially to the known facts of each case, with a yes or no answer provided for each criteria. Cases are then sequenced in accordance with the 16 point grid, depending upon the answers provided for each of the prioritisation factors.

43. The case sequencing model in the case list is reviewed on an annual basis in light of the current information about outstanding cases. This can include information provided by operational divisions of the PSNI and the contents of the HET database which records details of historic cases and investigations. The sequence is not published. Cases are generally unlikely to move in the sequencing order other than a change in the assessment or the possible involvement of someone regarded as a contemporary person of interest."

[7] The next section of the affidavit deals with the current LIB caseload which we have also been referred to. The number of cases has altered since the affidavit was prepared but it is nonetheless helpful to set out the following paragraphs which give more detail in terms of the complexion of the cases as follows:

> "44. There are currently 1,130 cases (*i.e.* incidents) on the LIB caseload for review and potential investigation. These incidents relate to the deaths of over 1,400 persons. LIB has also received nine referrals from the Director of Public Prosecutions under section 35(5) of the Justice (Northern Ireland) Act 2002. These have included major investigations such as the activities of the military reaction force. These investigations are progressed alongside the rest of the LIB caseload and the case sequencing model does not apply to these investigations. …
>
> 45. At the time of swearing LIB is currently working on 15 cases in total. Two of these cases arise from section 35(5) referrals and the remainder arise from the case sequencing model. Since December 2018 LIB has issued nine family reports and has closed all of those cases. A further 19 cases have been the subject of files submitted to the PPS for direction, some of which are currently progressing through the criminal courts.
>
> 46. LIB also deals with a very significant amount of correspondence regarding places which are not currently under review or investigation, or in which a review by HET has been completed. These queries emanate from a range of sources, including family members, advocacy and victims' groups, legal representatives and other government bodies. Last year LIB received 237 such requests. A Detective Chief Inspector leads a team of 10 officers and staff within LIB which deals exclusively with this aspect of our work. It frequently requires detailed research on cases and past investigations/reviews and is a very significant part of the LIB workload."

[8] We pause at this juncture to record that we have ourselves read the Family Engagement Strategy document, the Family Guidance document, the text of the Case Sequencing Model, and the annual review report most recently provided in relation to progress within the LIB.

The Contours of this Judicial Review Challenge

[9] From the papers we can see that a considerable amount of correspondence was sent by the appellant's solicitor in relation to this case to relevant agencies beginning in 2016. We will concentrate on the activity from 29 October 2019 when in correspondence the appellant raises the investigation in this case in the context of a BBC "Spotlight" broadcast which took place on 16 October 2019. During that

programme it appears that a journalist put to a person named Alan Oliver that he was involved in a number of murders which may have included the appellant's brother.

[10] At this stage the appellant wrote to the DPP requesting him to examine the content of the broadcast and potentially invoke his powers pursuant to section 35(5) of the Justice (Northern Ireland) Act 2002. A letter in response dated 11 March 2020 is from Mr Michael Agnew, Deputy Director. This letter contains an explanation of why the Director decided to refuse a section 35(5) referral as follows:

> "The Director has carefully considered your request and recognises the pain and distress which clearly endures for your client. It is also recognised that extremely serious criminality has been alleged which may impact on multiple families of victims, and that you suggest that a wide ranging review is required, most likely linked to ongoing PONI enquiries and with the possibility of a second inquest being requested. However, the Director has concluded that it would not be appropriate for this office to endeavour to undertake a review as requested. As you will be aware, it is the role of the police, not this office, to review cases for potential evidential opportunities that might provide the basis for a criminal investigation. In that regard we are advised that an assessment of any investigative opportunities arising from the Spotlight series is currently being undertaken by PSNI, to whom we have also written.
>
> Furthermore, in addition to the police review specific to the Spotlight series, the death of Mr Frizzell sits within the current work queue of the PSNI's Legacy Investigation Branch. The general purpose of the section 35(5) power is to require the Chief Constable to ascertain and provide to the Director 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. In this case the PSNI has already decided that the case ought to be subject to a review in order to determine whether further investigative opportunities are available. In these circumstances a section 35(5) request will not generate a potential criminal investigation in circumstances where no such potential otherwise exists.
>
> Furthermore, the Director does not consider it appropriate to issue a section 35(5) request in order that a particular case might possibly receive some prioritisation ahead of other cases which are not the subject of such a request. The Chief Constable clearly has limited resources with which

> to undertake the vast number of legacy investigations that currently fall within his remit, all of which involve a death and are therefore of the utmost gravity. There a range of factors that will necessarily feed into any prioritisation decisions that require to be taken and PSNI are best placed, and the appropriate authority, to take them."

The Director's position explained above is not under challenge in this judicial review.

[11] In parallel, correspondence was sent to the PSNI. The substantive LIB response authored by Detective Chief Inspector McKee is dated 20 January 2020. It advises that the LIB were aware of and closely monitored the recent BBC Spotlight series on the Troubles – "A secret history." It further refers as follows:

> "All of the allegations and potential admissions have been catalogued and we are in the process of assessing them. With regard to Brian Frizzell's murder, the current situation within Legacy Investigation Branch was conveyed to yourselves in correspondence dated 31 May 2018."

[12] Further correspondence was then sent to the LIB by the appellant's solicitor. This resulted in a reply of 17 July 2020 from Detective Chief Inspector McKee, which refers, inter alia:

> "Unfortunately, whilst it is our intention to review the investigation into Brian's murder, we have not yet been able to do so. As you are already aware, Legacy Investigation Branch (LIB) cases are managed and progressed according to a Case Sequencing Model (CSM) and prioritised based on various factors … it is not LIB's policy to provide a case's position within the CSM as it is reviewed on an annual basis and positions could change."

[13] Additional correspondence ensued from the appellant's solicitor referring in considerable detail to the case and the evidence which the appellant said was material to the investigation. Contained within this correspondence there is a further request by the appellant's solicitor for information. The reply, on this occasion, comes from Detective Chief Inspector Chris Millar and is dated 18 November 2020. It includes the following passage:

> "Please be advised that it is not Legacy Investigation Branch (LIB) policy to disclose any information regarding contemporary persons of interest and no inferences are to be drawn from this position. All relevant information currently known in relation to Brian's murder has been

> assessed when determining the case sequencing model position and this is reviewed annually as a matter of course, with any new information being taken into account at this stage. I can assure you that LIB remain committed to reviewing the investigation into Brian's murder but unfortunately I am unable to provide you with a definitive timescale. When work is due to commence, officers from LIB will contact the family and ensure that they are appraised of the process and kept updated at all stages of same."

[14] Thereafter, a pre-action protocol letter was sent on behalf of the appellant by his solicitor dated 16 November 2020. This correspondence refers to the grounds of challenge under the following headings. First, it alleges that that the proposed respondent is in breach of the positive procedural obligations imposed by article 2 of the ECHR to ensure a prompt independent and effective investigation. Second, it alleges that the continued reliance by the respondent on the CSM prioritisation system in the circumstances where there is an identified contemporary person of interest ("CPOI") is irrational and unreasonable. Within the correspondence there is also reference to human rights generally and to an alleged breach of statutory duty to investigate by virtue of section 32(1) of the Police (Northern Ireland) Act 2000 ("the 2000 Act").

[15] The response to the pre-action protocol correspondence is dated 4 December 2020. It refers to the fact that the death of Mr Frizzell is to be subject to an LIB review. It states that LIB are currently reviewing some 1,130 cases. It refers to the fact that the reviews are prioritised according to the case sequencing model. The response goes on to state:

> "The operation of the CSM is fundamentally a rational means for the Chief Constable to prioritise the limited resources available to him to conduct reviews of legacy cases. Any claim which contends that the operation of a prioritisation system in respect of the allocation of limited resources is irrational and must fail."
>
> "There is an error in relation to any reference to Article 2 in that the Chief Constable does not accept that he is in breach of any such obligation, the review of the Frizzell case has been allocated a priority commensurate with the factors in the CSM. The Chief Constable does not propose to commence a thematic review because of the alleged activities of a CPOI."

[16] Thereafter, judicial review proceedings were lodged. The Order 53 statement contains two heads of challenge which may be summarised as follows. First, the

appellant raises a claim of illegality on the basis that the proposed respondent had not provided reasons to allow for a full challenge to the decision making process relying on *R v Higher Education Funding Council ex parte The Institute of Dental Surgery* [1994] 1 All ER 651 and *R (Lumba) v Secretary of State* [2012] 1 AC 245.

[17] The second ground of challenge is described as a breach of policy. In this regard the appellant relies upon the Northern Ireland Victims' Charter dated September 2015 and alleges that the impugned decision was in breach of the policy requirements comprised in standard 1.8.

Decision of the Learned Trial Judge

[18] The relief sought by the appellant was a quashing order and a declaration. Both were refused. In the course of his judgment McFarland J at para [14] appears to say that the impugned decision is not susceptible to judicial review. We will deal with that in this judgment along with the two substantive heads of challenge.

[19] In relation to the reasons challenge the learned judge considered that this was more a request for information and was not valid in the context in which it was raised, namely an investigative operational process being undertaken by police. The policy challenge did not feature very heavily before the first instance court and was dismissed. It is of note that in the pre-action protocol correspondence there is no mention of the Victims' Charter. Overall, the decision of McFarland J makes clear that the test for leave was not satisfied in that an arguable case had not been made out.

Context

[20] The context of this case is significant. It arises due to tragic circumstances which occurred during the so-called Troubles in Northern Ireland. It is understandable that the family of the deceased are concerned about these events and have a desire to achieve justice. We are bound to say that this applies to many families in Northern Ireland who have suffered during the Troubles. However, the undeniable fact is that these cases are complicated and that the investigating authorities are subject to the limits of their resources. The large amount of cases now with the LIB highlights the fact that it is a significant undertaking to investigate all of them. Entirely understandably in our view, the proposed respondent in this case makes the point that there should be no hierarchy of victims given the very real and grave circumstances which surround many of these cases.

[21] As already noted this case does not involve an article 2 ECHR claim. Rather it has proceeded on another legal basis. The challenge is primarily framed as an attack on the reasons provided by the proposed respondent in relation to where the case of Mr Frizzell lies within the LIB structure.

[22] Pausing for a moment, it is important to reflect on the exact complexion of the LIB structure. We note that there is no challenge to the CSM policy itself. We can see

that this system is public facing and involves interaction with the families by way of the family engagement strategy. The work of the LIB is also subject to annual review. The irresistible conclusion that we reach is that this is an investigative system which is designed to try to cope with the very many difficult cases before it but in a way that is fluid. There are obvious challenges to dealing with all of the cases not least the application of staff resources to dealing with queries as evidenced in the affidavit of Detective Constable Wright.

[23] The test to be applied in determining an application for leave for judicial review is set out in *Re Omagh District Council's Application* [2004] NICA 10. Permission will be refused unless the court is satisfied that there is an arguable ground for judicial review with a reasonable prospect of success.

Justiciability

[24] An additional limb of challenge now raised by the appellant is to the judge's conclusion that matters such as this are not susceptible to judicial review at all. We can understand why the judge reached this conclusion given that the target of the challenge is in essence the operational workings of a police investigative process. The standard for judicial review in a case such as this is obviously a formidable one given that it concerns the decision making of a public body which is specialist and tasked with investigating crime.

[25] However that does not mean that there is an absolute bar to judicial review. This position correlates with the restricted ambit of review in relation to prosecutorial decisions established by decisions such as *R v DPP ex parte Manning* [2001] QB 330 and *R (Adams) v DPP* [2001] NI.

[26] Thus, insofar as the learned trial judge held that the impugned decision is immune from judicial review challenge this court disagrees. Decisions of this kind, belonging as they do to the ambit of public law and benefitting from no exclusionary principle, are justiciable. However, every case of this genre will be factually and contextually sensitive and the scope of judicial superintendence will, as a general rule, be restricted.

The Common Law Duty to Provide Reasons

[27] This is the cornerstone of the appellant's case. In certain contexts there is a statutory duty on a decision maker to provide reasons for its decision: see for example Rule 57 of The Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (NI) 2020. In any case where (as here) the question arises as to whether a public authority, acting within the ambit of public law, is under a common law duty to provide reasons (or further reasons) for a given decision, act or course of conduct the authority concerned will, typically, have performed an act or made a decision or determination having concrete legal effects and consequences,

normally to the detriment of the challenging party. This, generally, is the essence of justiciability.

[28] Furthermore, in cases where there is no relevant statutory duty, a duty to provide reasons, where it arises in the context of a decision with a statutory underpinning, is generally classed an implied statutory requirement. In other contexts the test to be applied is whether the provision of reasons arises an aspect of common law procedural fairness. See for example *Save Britain's Heritage No Poultry Ltd* [1991] 1 WLR 153 at 170H – 171A (per Lord Bridge), and *Gupta v General Medical Council* [2001] UKPC 61. Thus, in cases such as the present it is necessary to establish that the non-provision, or inadequate provision, of reasons gives rise to procedural unfairness. As stated eloquently by Sedley LJ in *R v Higher Education Funding Council ex Parte Institute of Dental Surgery* [1994] 1 WLR 242, at 258D-E, such instances are identified by the court on a case by case basis: a paradigm illustration of the incremental development of the common law.

[29] Applying the foregoing approach, we consider that the central question in the present case is whether reasons, or further reasons, are required as a matter of common law procedural fairness. This being an intensively context sensitive concept it is trite that there must be penetrating scrutiny of the prevailing context. The factual dimension of the context is rehearsed extensively above.

[30] The statutory dimension of the context is formed by section 32 of the 2000 Act. This provides:

> "32. - (1) It shall be the general duty of police officers-
>
> (a) to protect life and property;
>
> (b) to preserve order;
>
> (c) to prevent the commission of offences;
>
> (d) where an offence has been committed, to take measures to bring the offender to justice.
>
> (2) A police officer shall have all the powers and privileges of a constable throughout Northern Ireland and the adjacent United Kingdom waters.
>
> (3) In subsection (2)-
>
> (a) the reference to the powers and privileges of a constable is a reference to all the powers and privileges for the time being exercisable by a

> constable whether at common law or under any statutory provision,
>
> (b) "United Kingdom waters" means the sea and other waters within the seaward limits of the territorial sea,
>
> and that subsection, so far as it relates to the powers under any statutory provision, makes them exercisable throughout the adjacent United Kingdom waters whether or not the statutory provision applies to those waters apart from that subsection."

[31] Generally, factors such as the relative importance of the subject matter; impact on and detriment to the individual concerned; effects on third parties; detrimental impact on the function being performed by the relevant public authority; the stage of the process concerned at which the entitlement to reasons, or further reasons, is asserted; the finality of the matter under challenge; the factor of limited resources; the nature and functions of the decision making agency; and the availability of other remedies may fall to be evaluated. All of these factors arise in the present context.

[32] Furthermore, the present context has both polycentric and multi-layered features, having regard to the large numbers of interested and affected persons, together with the nature of the function in play, namely the investigation by the Police Service into approximately 1,100 unsolved deaths occurring in terrorist circumstances during a period of some four decades. Another material feature of the context is the information already available to the appellant. Everything rehearsed at paras [2] – [13] and [20] - [22] above must be considered.

[33] The starting point in every treatise of this subject is that there is no general duty at common law requiring public authority decision makers to provide reasons for their decisions. This principle was expressed unequivocally by Lord Clyde in *Stefan v General Medical Council* [1999] 1 WLR 1293 at 1300:

> "The established position of the common law (is) that there is no general duty, universally imposed on all decision makers …"

To like effect is the formulation of Lord Mustill in the seminal decision of *Doody v Secretary of State for the Home Department* [1994] 1 AC 531 at 564E:

> "I accept without hesitation, and mention it only to avoid misunderstanding, that the law does not at present recognise a general duty to give reasons for an administrative decision."

[34] Lord Mustill referred with approval to the factors identified in *R v Civil Service Appeal Board, ex parte Cunningham* [1991] 4 All ER 310 which, he suggested, will "often" be material in implying such a duty. *Cunningham* is an illustration of the context sensitive nature of every debate about whether a common law duty to give reasons arises. The applicant, following his dismissal from the Prison Service and having no statutory right of appeal to an industrial tribunal, had his compensation assessed by the Civil Service Appeal Board in an amount substantially less than a tribunal would have awarded. The Board refused to provide reasons for its decision. Upon the application for judicial review, the Court of Appeal, finding in favour of the applicant, founded on the principles of natural justice and their application to what it considered to be a "fully judicial body" (page 318I). The contextual factors highlighted by Lord Donaldson MR were that the Board determines rights as between the Crown and its employees; no appeal lay against its decisions; and the objections grounded on encroaching formality in the Board's procedures and the intrusion of precedent were "totally unconvincing" (page 319H).

[35] In *Cunningham* the detailed list of relevant considerations to which Lord Mustill was referring is contained in the concurring judgment of McCowan LJ (at 322I – 323C):

> "In reaching a conclusion as to the propriety of Otton J's order, I am influenced by the following factors:
>
> 1. There is no appeal from the board's determination of the amount of compensation.
>
> 2. In making that determination the board is carrying out a judicial function.
>
> 3. The board is susceptible to judicial review.
>
> 4. The procedure provided for by the code, that is to say the provision of a recommendation without reasons, is insufficient to achieve justice.
>
> 5. There is no statute which requires the courts to tolerate that unfairness.
>
> 6. The giving of short reasons would not frustrate the apparent purpose of the code.
>
> 7. It is not a case where the giving of reasons would be harmful to the public interest.

> These considerations drive me to the view that this is a case where the board should have given reasons and I would, therefore, dismiss the appeal."

Strikingly, all three judgments in *Cunningham* founded on the hallowed natural justice decisions of the House of Lords in *Wiseman v Borneman* [1971] AC 297 and *Lloyd v McMahon* [1987] AC 625.

[36] Every respectable judicial review text book begins its treatise of this subject in the same terms as those found in the judgments of Lord Mustill and Lord Clyde (see above). See for example De Smith's Judicial Review (8th Edition) para 7-089. The passages which follow in this text have a distinctly discursive flavour. The authors are clearly in favour of a general common law duty to give reasons for administrative decisions – a reversal of the orthodox, Mustill/Clyde stance. They point to the merits and benefits of such a duty, at paras 7-093 – 7-095. They suggest that the advantages of providing reasons clearly outweigh the disadvantages, at para 7-096.

[37] However, there is limited citation of authority supporting the preference espoused by the authors. Furthermore they do not identify any decision of precedent status supporting their thesis. Within the footnotes one finds a comparatively recent decision in which the Mustill/Clyde formula is unambiguously endorsed: *Hasan v Secretary of State for Trade and Industry* [2008] EWCA Civ 1311. In that case the claimant contended that the Secretary of State was under a public law duty to publish reasons pertaining to the application of specified criteria relating to the ministerial grant of licenses for the export of military equipment to Israel. The learned President, delivering the judgment of the court, stated at para [8]:

> "Certainly the categories of cases in which reasons are required are not closed. But it remains that there is no general duty to give reasons for an administrative decision—see *R v Kensington and Chelsea Royal London BC, ex p Grillo* [1996] 2 FCR 56 at 66, and *Stefan*'s case (1999) 49 BMLR 161 at 168, in the passage quoted by the judge. Lord Clyde there contemplated the future possibility that, upon the direct application of the 1998 Act, it might become appropriate to have a wide-ranging review of the position at common law. The present appeal does not, in my view, call for such a review, if only because the present claimant now has at most only an indirect interest in the subject matter and outcome of the appeal. The judge held in paras [5]–[8] of his judgment that the claimant had sufficient standing to bring the claim, and neither party has questioned that part of the judge's decision. But he may be seen as a nominal representative of the public interest upon which Mr Fordham seeks to rely with reference to human rights considerations, not as an individual whose personal

> human rights are likely to be affected by a decision to grant a licence to export military equipment to any one of 20 countries."

[38] Notably, the court also considered the interplay between any common law duty to provide reasons and the Freedom of Information Act. The judgment observes at para [18]:

> "I agree that the enactment of the 2000 Act would be unlikely to abrogate any previously well recognised common law duty, unless it did so expressly, which the 2000 Act does not. But there is, as I have indicated, no such well recognised common law duty. But I accept Mr Eadie's submission that the 2000 Act may properly be seen as Parliament's considered statutory framework for the disclosure of information held by public authorities, whose enactment militates against the incremental judicial perception of a common law duty to the same or any wider extent. Second, the fact that the complainant failed before the Information Commissioner goes nowhere to suggest that he or others ought to be enabled to succeed by other means. He failed because his application was outside the framework for disclosure enacted by Parliament."

Properly analysed, we consider that there is nothing supportive of the appellant's case in this passage.

[39] On behalf of the appellant there was heavy reliance on certain passages in the judgment of Elias LJ in *R (Oakley) v South Cambridgeshire District Council* [2017] EWCA Civ 71, at paras [29] – [30]:

> "It is firmly established that there is no general obligation to give reasons at common law, as confirmed by Lord Mustill in the ***ex parte Doody*** case. However, the tendency increasingly is to require them rather than not. Indeed, almost twenty years ago, when giving judgment in *Stefan v General Medical Council* (No.1) [1999] 1 WLR 1293, 1300, Lord Clyde observed:
>
> > 'There is certainly a strong argument for the view that what was once seen as exceptions to a rule may now be becoming examples of the norm, and the cases where reasons are not required may be taking on the appearance of exceptions.'

> In view of this, it may be more accurate to say that the common law is moving to the position whilst there is no universal obligation to give reasons in all circumstances, in general they should be given unless there is a proper justification for not doing so…"

We consider this passage to be essentially discursive rather than determinative. This analysis is reinforced by the judge's recognition in para [32] of "… the lack of any general common law obligation to give reasons." Elias LJ does not purport to develop the law. Given that the general principle in play had been enunciated by both the House of Lords and the Privy Council, this is unsurprising. Furthermore, the Lord Justice expressly rejected the argument that reasons should always be given unless the reasoning of the decision maker is intelligible without them: see paras [42] and [55]. He determined, rather, to decide this point of principle on a narrower basis: see paras [58] – [60]. The second judgment of the court is to like effect. Our analysis that *Oakley* did not develop the law in this sphere is confirmed by that of Lord Carnwath in *Dover DC v CPRE Kent* [2017] UKSC 79 at para 54. One may add the footnote that paras [29] – [30] in the judgment of Elias LJ are properly analysed as obiter. *Oakley* featured as the high water mark of the appellant's case.

[40] *Oakley* was one of the four pillars of the appellant's case as presented to this court. The second and third were two further reported decisions. In the first of these, *Lumba v Secretary of State for the Home Department* [2011] UKSC 12 the passage upon which reliance was placed is para [35] of the judgment of Lord Dyson (the main judgment of the court, with whom all other eight members concurred):

> "The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338 E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it. In *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604, para 26 Lord Steyn said:
>
> > 'Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice.'"

[41] *Lumba* concerned the detention of foreign nationals, ministerial policies relating thereto and the non-publication of such policies. We are unable to identify anything

either in the passage cited or in the broader context of that appeal supportive of the appellant's case. Quite the contrary: the present case is one in which the Chief Constable's policy has at all times been published, with the result that the appellant's solicitors were able to engage in extensive correspondence about its application to their client, making suitably informed representations on his behalf. Fundamentally, the appellant has enjoyed, and continues to enjoy, the right declared by Lord Dyson at the outset of this passage. In short, as in *R (Manchester Airports Holdings)* [2021] 1 WLR 6190, the context in *Lumba* bears no comparison to that before this court.

[42] Finally, counsel placed reliance on the passage in the judgment of Lord Mance in *Kennedy v The Charity Commission* [2015] AC 455, at para [56]:

> "The Charity Commission's response to a request for disclosure of information is in the light of the above circumscribed by its statutory objectives, functions and duties. If, as here, the information is of genuine public interest and is requested for important journalistic purposes, the Charity Commission must show some persuasive countervailing considerations to outweigh the strong prima facie case that the information should be disclosed. In any proceedings for judicial review of a refusal by the Charity Commission to give effect to such a request, it would be necessary for the court to place itself so far as possible in the same position as the Charity Commission, including perhaps by inspecting the material sought. Only in that way could it undertake any review to ascertain whether the relevant interests had been properly balanced. The interests involved and the balancing exercise would be of a nature with which the court is familiar and accustomed to evaluate and undertake. The Charity Commission's own evaluation would have weight, as it would under article 10. But the Charity Commission's objectives, functions and duties under the Charities Act and the nature and importance of the interests involved limit the scope of the response open to the Charity Commission in respect of any particular request. I therefore doubt whether there could or would be any real difference in the outcome of any judicial review of a Charity Commission refusal to disclose information, whether this was conducted under article 10, as Mr Coppel submits that it should be, or not."

This passage falls to be analysed in the following way. First, it is self-declared obiter: see para [42]. Second, it appears in a section of the judgment dealing with the (hypothetical) question of remedies under the Charities Act and article 10 ECHR. Third, it features in the specific context of Lord Mance's discourse on the intensity of

review and the interplay between the Wednesbury principle and the EU law principle of proportionality. Fourth, the broader context is that *Kennedy* concerned a Freedom of Information Act 2000("FOIA 2000") request by a journalist for information and the Charity Commissioners' ensuing negative response. Notably, the court also considered the interplay between any common law duty to provide reasons and the FOIA 2000. This aspect of its decision does not avail the appellant.

[43] The further striking consideration is that in *Kennedy* there was a bench of seven in which two of the Justices gave leading judgments, one provided a concurring judgment, two simply concurred with the majority and the final two gave dissenting judgments. The argument presented to this court made no attempt to situate or evaluate para [56] of the judgment of Lord Mance in this discrete context.

[44] Of course it is not difficult to find occasional examples of cases in which courts have been disposed to hold that an implied duty to give reasons existed. Cases belonging to the same category as *Oakley* include *Nubarak v General Medical Council* [2008] EWHC 2830 at [36] especially and *R v Secretary of State for Education, ex parte G* [1995] ELR 58 at [67]. However, it is not possible to discern any coherent and consistent development of the general common law principle enunciated in *Doody* and *Stefan*.

[45] Properly analysed it is evident that in truth the appellant is seeking the provision of pure information from the Chief Constable. We are disposed to accept that this falls under the banner of the provision of reasons, as to hold otherwise would be antithetical to the essence of the common law, which eschews the espousal of narrowly drawn technicalities.

[46] Realistically, in order to be meaningful, the information would have to be voluminous in nature, taking into account all other cases on the list. Furthermore, much of it would inevitably be sensitive and confidential, given that the whole of the subject matter concerns uncompleted police investigations into deaths in the context of the NI conflict, with its multiple sensitive public interest connotations which are well known and have been repeatedly judicially recognised in this jurisdiction.

[47] In addition, there is a public facing specially devised model for the periodic review of the sequencing and priority of every investigation into the subject deaths. The information available to the appellant is sufficient for him to understand how the CSM operates and what this means for the investigation into the death of his brother by the Chief Constable at this point in time. Further, the appellant and his legal representatives have been sufficiently informed to make extensive representations to the Chief Constable and to mount this legal challenge.

[48] In addition to what is rehearsed in [46] – [47] above, we consider that the following amalgam of factors defeats the duty for which the appellant contends: the impugned determination had no adjudicative element; the decision making agency is not a judicialised body; the impugned determination lacks any element of

permanence; rather it is subject to periodic review; an annual report is published; the appellant has an untrammelled right to make representations; there is a published family engagement strategy and published family guidance; the evidence concerning resources demonstrates that the central aims of the LIB would be compromised by the diversion of part of its manifestly limited budget which would follow from success for the appellant; the exercise realistically required in such event would be wide ranging and disproportionate; significant PII issues are likely to arise; such issues could preclude any meaningful response; the appellant would gain nothing more than a time limited and temporary snapshot; in all 1,100 cases there is no finished product: they all concern uncompleted police investigations; given the review mechanism, there is no finality in the impugned decision.

[49] In argument the only context sensitive factor advanced on the appellant's behalf was the importance to him of having any outstanding police investigation completed. While this is perfectly understandable at a human level, it applies of course to all 1,100 cases and we consider that this cannot operate to displace the array of factors ranged against what he seeks. The court concludes, therefore, that the common law duty to provide reasons, or further reasons, advanced by the appellant is not established.

[50] It is appropriate to add that there are certain parallels between the decision impugned in the present case and prosecutorial decisions. In *Re Adams' Application* [2001] NI 1, this court dismissed a reasons based challenge to a DPP decision not to prosecute a police officer for assault on a citizen. The judgment cites uncritically the following passage from the DPP's affidavit evidence justifying the non-provisions of reasons, at 10b:

> "… that to provide a detailed analysis and commentary in this case would make it difficult or impossible to avoid providing detailed reasons in any other case where the decision was taken on evidential grounds …
>
> that to provide a detailed analysis and commentary in this case would impose a considerable logistical burden…
>
> that, if the Department is obliged to supply detailed reasons in every case upon request, it will impose an impossible logistical burden …"

Following an extensive review of the relevant jurisprudence, the court made the following conclusions, at 18c - f:

> "In our opinion the reasoning of the court in the passage which we have quoted from the judgment in Ex parte Treadaway is convincing. We observe that similar reasoning is to be found in a judgment of the Irish Supreme

Court in H v Director of Public Prosecutions [1994] IR 589 (see the judgment of O'Flaherty J at page 602). We do not understand the court in Ex parte Manning to lay down any different rule. Ex parte Treadaway was cited to the court and no criticism of the remarks of Rose LJ is to be found in the Lord Chief Justice's judgment. It seems to us that in referring to expectations rather than obligations he was setting out what he regarded as best practice rather than the duty to which the DPP is subject under the common law. In the present case the learned judge described the position of the DPP in apposite terms when he said at page 27 of his judgment:

> 'The function of the DPP is a complex one. It is not that of an adjudicator between two parties and to that extent alone it is immediately distinguishable from cases such as those of Doody, Higher Education, Murray and Cunningham. Moreover the DPP has to consider and weigh a number of disparate and at times even competing interests e.g. the general public interest at any particular time, the interest of the putative accused, the victim, the supplier of information such as an informant, the various disinterested and interested witnesses. It is a complex and almost unique function. I consider that Parliament has invested him with the discretion to weigh up those disparate and often competing interests and then to make a decision.'

We consider that these factors lead to the conclusion for which the respondent's counsel argued, that the DPP is not subject to the rules known as procedural fairness, because he is not adjudicating in the same way as an administrator. We cannot agree with the judge's conclusion that the DPP is obliged to give reasons in a limited class of cases in which a "trigger factor" operates. We therefore hold that he is not under an obligation to give reasons in any case, unless he chooses to do so, as he has done in some instances cited to us."

Carswell LCJ continued:

> "This ruling is sufficient to dispose of the issue whether the DPP is bound at common law to give reasons for his

> decision. We should add, however, that we agree with the learned judge's conclusion that if the DPP is obliged in some cases to give reasons, none of the facts relied upon by the appellant is sufficient to trigger that obligation.

His reasoning, set out in detail at pages 33 to 37 of his judgment, may be summarised as follows:

> "(a) Victims of assaults committed by police officers do not, without more, have a more compelling case for the receipt of reasons than victims of many other offences which properly excite the indignation of the public.
>
> (b) The fact that servants of the State were involved may be an important matter, but is not in itself sufficient to constitute a trigger.
>
> (c) The investigation was carried out with care by an independent investigator, under the supervision of the ICPC.
>
> (d) The DPP's decision was not so inexplicable and aberrant that intelligible reasons must be given to explain it. There was other information before the DPP which Kerr J did not have. The standard of proof is higher in a criminal prosecution than in a civil action. A case has to be made out against each individual officer if he is to be charged with an offence, again unlike the proof required in the civil claim for damages against the Chief Constable.
>
> We find ourselves in agreement with the judge's reasoning and would have reached the same conclusion if we had held that the DPP had any obligation at common law to give reasons in any circumstances."

The comparison between the DPP and the Chief Constable/Police Service is based on the fact that they are the two primary criminal justice agencies in this jurisdiction, each engaged in decision making which is frequently multi-layered and polycentric. The analogy between *Adams* and certain elements of our conclusion in [48] above is clear. It provides fortification insofar as required. We would add that the correctness of *Adams* was not questioned.

[51] For all of the foregoing reasons, we are not persuaded that the appellant has established any legal basis for the provision of the more expansive information

pursued by him under the banner of the common law duty to provide of reasons, or fuller reasons, for administrative decisions.

[52] The second ground – and fourth pillar (supra) - of the appellant's case is based on the Chief Constable's Victims Charter. This is portrayed as a policy challenge and relates to the Police Service Victim Charter, specifically standard 1.8 which states that a bereaved family member is entitled "to be keep informed/or told what is happening as part of the investigation."

[53] It is telling that this ground did not feature in the pre-action protocol correspondence. One case was cited in argument, namely *R v DPP ex parte C* (*A Child)* [2000] WL 281275. This was a challenge to decisions by the DPP in England & Wales to discontinue prosecution in which the victim information challenge failed. Counsel relied on para 35 of the judgment of the court. We are satisfied that this speculative and obiter passage adds nothing to this ground.

[54] We find it impossible to identify anything in the open textured language of paragraph 1.8 of the Victims' Charter giving rise to a legally enforceable right at the suit of the appellant or a corresponding legally enforceable obligation on the part of the Chief Constable supportive of the appellant's central quest in these proceedings, namely to obtain further information, as set out at [19] above. The (notably limited) argument presented was, in substance, that this instrument creates legal rights and obligations, without more. There was no attempt to construct this within any recognisable public law framework. This argument is unsustainable in consequence. Finally, and in any event we consider that compliance with the Charter has been achieved via the information provided to the appellant.

Conclusion

[55] We dismiss the appeal and affirm the decision of McFarland J refusing leave to apply for judicial review.