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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY JOHN BOYLE FOR JUDICIAL REVIEW (No. 2)

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WEATHERUP J

The application.

[1] This is an application for Judicial Review of a decision of the Legal Services Commission dated 7 December 2004 refusing legal aid to the applicant for the purposes of an appeal to the Court of Appeal. The applicant has lodged an appeal to the Court of Appeal against the decision of Mr Justice Girvan dismissing the applicant's earlier application for Judicial Review of a decision of the Director of Public Prosecutions refusing to give reasons for a decision not to prosecute two police officers for perjury arising out of the trial of the applicant on criminal charges. Mr Treacy QC and Mr Green appeared for the applicant and Mr Hanna QC and Mr Good appeared for the Legal Services Commission.

The trial of the applicant.

[2] On 27 May 1976 police officers came under attack by gunfire in Franklin Street, Belfast. The applicant was arrested later that day but released without charge. The applicant was further arrested on 8 March 1977 and interviewed on six occasions. The fifth interview occurred on the afternoon of 9 March and the interviewing officers recorded in interview notes that the applicant made admissions that he had been a member of the Provisional IRA and further that he had acted as cover with a pistol while another man had fired an Armalite at the police on 27 May 1976. The applicant was charged with membership of a proscribed organisation and with possession of firearms and ammunition with intent to endanger life. At the trial the

applicant denied the offences and denied making the the admissions and denied that the interview notes had been written contemporaneously. On 14 October 1977 at Belfast City Commission His Honour Judge Brown convicted the applicant of both charges and sentenced him to ten years imprisonment and with the activation of a suspended sentence his total sentence was 12 years imprisonment.

The appeals to the Court of Appeal.

[3] The applicant's appeal against conviction was dismissed by the Court of Appeal on 13 January 1978. Some years later the facility to undertake ESDA testing was developed and the original interview notes were tested and the results suggested that, contrary to the evidence of the interviewing officers, the interview notes may not all have been made throughout the interview. The Criminal Cases Review Commission referred the applicant's case to the Court of Appeal. The applicant's convictions were quashed by the Court of Appeal on 29 April 2003. Carswell LCJ delivered the judgment of the Court of Appeal. The discrepancies in the interview notes were said not to be substantial matters and they did not bring in any other matter which was in itself damaging to the case of the applicant; however there were variations in certain minor respects in wording which could not be accounted for and so the conclusion was accepted that there appeared to have been a different version of the notes of the fifth interview in existence at some time; accordingly the police evidence to the effect that the notes of interview were made throughout the interview could not have been correct and that immediately raised the question as to whether the credibility of the police officers could have been attacked by the side door at the trial; as the Court of Appeal was unable to say that the judge would necessarily have reached the same conclusion if he had known of the re-writing of the interviews, had the matter had been pursued in evidence before him, there was at least a prima facie case that the notes were re-written and the conviction could not be regarded as safe and accordingly was quashed.

The DPP decision not to prosecute the police officers.

[4] Meanwhile the Director of Public Prosecutions had considered whether the interviewing officers should be prosecuted for perjury in the evidence given at the applicant's trial in 1977. On 8 January 2003 a direction was issued not to prosecute the police officers. There was then an exchange of correspondence between the applicant's solicitors and the DPP concerning the reasons for the decision not to prosecute the police officers. By letter dated 6 June 2003 the DPP set out 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; recognising that the propriety of applying the general practice must be examined and reviewed in every case where a request for reasons was made; considering whether it was

appropriate to depart from the general practice in the particular case and it was concluded that it would be inappropriate and do so; noting that the evidence and information reported and the recommendations of the police ombudsman investigators had been carefully considered by an experienced lawyer in the DPP office and that advice of independent Senior Counsel had been obtained; concluding that the evidence available was insufficient to afford a reasonable prospect of obtaining a conviction against any person. Correspondence continued until 8 October 2003 but no further reasons were given for the decision not to prosecute the police officers.

Judicial Review of the DPP decision not to prosecute

[5] The applicant applied for Judicial Review of the decision of the DPP not to give full reasons for the non-prosecution of the police officers. The DPP policy on the giving of reasons before the commencement of the Human Rights Act had been considered by the Court of Appeal in Re Adams Application [2001] NI 1. The general policy was not to give reasons other than in the most general terms, and when requests were made for more detailed reasons each case was considered on its merits. The same policy was applied to the present case by the DPP letter of 6 June 2003. The Court of Appeal held that the DPP was not under an obligation in any case to give reasons, unless he chose to do so (page 18b). On 1 March 2002 the Attorney General gave a written answer in the House of Lords which modified the DPP policy further to the judgments of the European Court of Human Rights on 4 May 2001 in Jordan and Others v United Kingdom [2001] 11 BHRC 1, concerning the right to life under Article 2 of the European Convention. This modification recognised that in future there may be exceptional cases where an expectation would arise that a reasonable explanation would be given for no prosecution where death was or may have been occasioned by the conduct of agents of the State, where it would be in the public interest to reassure a concerned public, including the families of victims, that the rule of law had been respected by the provision of a reasonable explanation.

[6] By a judgment dated 29 September 2004 Girvan J dismissed the application for Judicial Review of the DPP decision on the reasons for non prosecution of the police officers. Girvan J set out the applicant's position to the effect 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 been convicted and there were compelling reasons why the Director should provide reasons for not prosecuting the police officers; that there was an arguable breach of Article 3 of the European Convention, being the protection against inhuman or degrading treatment, relating to a DPP decision arising after the Human Rights Act came into effect so that there was a duty to give reasons as a result of the ECHR judgment in Jordan v United Kingdom; that the circumstances of the case were such that there should be a heightened level of intensity of review of the DPP decision. In stating his

conclusions Girvan J noted that the DPP policy did not set out criteria for determining what factors took the matter outside the general approach of the DPP of giving no reasons nor did the policy spell out how extensive or detailed the reasons given should be; an applicant challenging a decision by the DPP not to give reasons would have to demonstrate that the decision was irrational or that the decision was made without taking into account relevant considerations or taking into account irrelevant considerations; when the Director did 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. Having examined the circumstances Girvan J did not find that the applicant could establish any grounds for Judicial Review of the decision set out in the DPP letter of 6 June 2003. Further, in relation to Article 3, Girvan J concluded that in the light of the decision of the House of Lords in Re McKerr [2004] 2 All ER 409 the procedural dimension of Article 3 did not apply as the misconduct occurred prior to the introduction of the Human Rights Act on 2 October 2000.

[8] At this stage in the narrative three issues might be noted. First, the application of procedural requirements under Article 3 of the European Convention in relation to the events in the present case. Second, the nature and extent of any obligation on the DPP to give reasons for a decision not to prosecute. Third, the level of intensity of review by the Court of a DPP decision to refuse to give full reasons for non prosecution.

In relation to the first issue the Court rejected the application of Article 3 on the basis that the events in question had occurred before the Human Rights Act came into effect. In relation to the second issue the Court applied the broad Wednesbury test, and by implication had concluded that, in the circumstances of the present case, there was an obligation on the DPP to give reasons for no prosecution, either in general or when the DPP chose to furnish reasons in the letter of 6 June 2003. In relation to the third issue the level of intensity of review being applied by the Court was not stated.

The refusal of legal aid to appeal the dismissal of the Judicial Review.

[9] On 2 November 2004 the applicant lodged a notice of appeal to the Court of Appeal against the decision of Girvan J. On 22 November 2004 the applicant applied for legal aid to pursue his appeal to the Court of Appeal. With that application for legal aid the applicant forwarded a copy of an opinion from Senior Counsel. By that opinion Senior Counsel submitted that Girvan J had applied the wrong test to the DPP decision, that is, he was said to have applied a traditional Wednesbury approach when he ought to have applied a heightened level of review by reference to the nature of the decision and the context in which it was taken; and further Senior Counsel submitted that Girvan J was wrong in applying Re McKerr to the present case. On 22 November 2004 the applicant's solicitor was notified that the application

would be considered by the Appeals Committee of the Legal Services Commission on 26 November 2004. Junior Counsel attended the Appeals Committee on behalf of the applicant. By letter dated 7 December 2004 the Legal Services Commission stated that the appeal

> "……was refused on the grounds that (1) you have not shown reasonable grounds for taking the proposed proceedings and (2) it appeared unreasonable in the particular circumstances of the case that you should receive legal aid."

This decision of the Legal Services Commission communicated to the applicant's solicitors on 8 December 2004 is the subject of this application for Judicial Review.

[10] Article 10 the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 provides –

> "(4) A person shall not be given legal aid in connection with any proceedings unless he shows that he has reasonable grounds for taking, defending or being a party thereto.
>
> (5) A person may be refused legal aid if, in the particular circumstances of the case, it appears -
>
> (a) unreasonable that he should receive it; or
>
> (b) more appropriate that he should receive assistance by way of representation;
>
> and regulations may prescribe the criteria for determining any question arising under sub-paragraph (b)."

[11] By its decision letter dated 7 December 2004 the Legal Services Commission relied on the grounds that the applicant had not shown that he had reasonable grounds for taking the proceedings (Article 10(4)), and on the ground that in the particular circumstances of the case it appeared unreasonable that he should receive legal aid (Article 10(5)(a)). Mr Hanna QC for the Legal Services Commission confirmed that his was a pro-forma method of stating the single ground that the applicant had not shown that he had reasonable grounds for taking the appeal.

The applicant's grounds for Judicial Review.

[12] The applicant's grounds for judicial review were amended to extend to aspects of the Legal Services Commission's decision emerging from the replying affidavit filed by the Chairman of the Appeal Committee. The applicant relied on a wide variety of grounds for Judicial Review and it is proposed to consider matters under the following headings -

(a) the application of Article 3 of the European Convention;

(b) the application of Wednesbury and the intensity of review;

(c) the obligation on the DPP in relation to the giving of reasons;

(d) the application of the test for the grant of legal aid;

Article 3 of the European Convention.

[13] Article 3 of the European Convention provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The applicant contends that there are procedural aspect to Article 3 that would equate to the procedural aspect to Article 2 outlined by the ECHR in Jordan and Others v United Kingdom. These procedural aspects would include a requirement for the giving of reasons and would involve a heightened level of intensity of review of the DPP decision in order to address the human rights dimension. Girvan J rejected the argument under Article 3 by relying on the decision of the House of Lords in Re McKerr which had established, in relation to Article 2, that the procedural aspect arose only where the substantive Article 2 matter, namely the death in question, arose prior to the introduction of the Human Rights Act 1998 on 2 October 2000. Accordingly, as the Article 3 complaint related to the actions of the police in the 1970's, Girvan J found that Article 3 did not apply.

[14] In his opinion to the Legal Aid Commission and in submissions to this Court Mr Treacy QC contended that the relevant substantive Article 3 matters in the present case arose after the commencement of the Human Rights Act and that Re McKerr had no application. This was a reference to the results of the ESDA test bringing to light the changes in the interview notes, the decision on no prosecution, investigation and recommendations of the ombudsman and the decision of the Court of Appeal in quashing the conviction, all occurring after the commencement of the Human Rights Act. I am unable to accept the applicant's argument on this point. The substantive matters that might otherwise give rise to a claim under Article 3 occurred in the 1970's and therefore, in accordance with the approach in re McKerr, no Article 3 claim arises and no procedural claim can be made in reliance on

Article 3. There are no grounds for interfering with the conclusion of the Legal Services Commission that there are no reasonable grounds for appealing against Girvan J's decision to reject the applicant's arguments under Article 3 of the European Convention.

Intensity of review.

[15] The general movement to greater intensity of review was outlined by Lord Steyn in R (Daly) v Home Secretary [2001] 2 AC 532 at paragraphs 27 and 28.

First there was the traditional Wednesbury ground of review based on relevant considerations and rationality (Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 KB 223).

Then there was heightened scrutiny in relation to human rights matters (R v The Ministry of Defence ex parte Smith [1996] QB 517).

Then the heightened scrutiny was found not to be sufficient in human rights cases as it did not equate to the approach of proportionality in addressing legitimate aim and proportionate response (Smith and Grady v United Kingdom [2000] 29 EHRR 493).

Any greater intensity of review than arises under the proportionality approach would involve a shift to a merits review and that goes beyond the role of the courts in Judicial Review.

The heightened scrutiny approach in human rights cases was revisited by the House of Lords in R v Shayler [2002] 2 All ER 477. Lord Bingham stated that with any application for judicial review alleging violation of a Convention right the court will now conduct a much more rigorous and intrusive review than was once thought to be permissible (paragraph [33]). Similarly Lord Hope referred to the greater intensity of review available under the proportionality approach to issues relating to alleged breaches of Convention rights (paragraph [75]).

In Re McBride's Application (No. 2) [2002] NIQB Kerr J endorsed the application of the heightened scrutiny approach to all cases, and not just human rights cases, where the context warrants such an approach -

> "There does not appear to me to be any principled reason that a decision that does not involve a Convention right should be the subject of less intense scrutiny solely on that account. The level of intensity of review must depend on the nature of the interest involved

> and the type of decision that requires to be taken.
>
> Whether the day has arrived when one may consign the principle of Wednesbury irrationality to history is perhaps not of critical importance in this case. What is important is that the level of scrutiny to which the decision under challenge here should be subject is determined by the nature of that decision and the context in which it is taken."

On an appeal to the Court of Appeal Carswell LCJ agreed with the approach of Kerr J set out above as reported at [2003] NI 319 at 345b-c.

[16] The applicant contended before Girvan J that there was a need for a heightened level of intensity of review of the decision of the DPP. At paragraph 10 of his judgment Girvan J acknowledged the applicant's argument on this point even if Article 3 of the European Convention was not engaged. Girvan J then proceeded to consider the DPP policy and the decision, in what might be described as traditional Wednesbury grounds, namely rationality, account of relevant consideration and disregard of irrelevant considerations. The judgment contained no further reference to the point about heightened level of intensity of review and it appears to be implicit that Girvan J rejected the application of any heightened level of intensity of review.

[17] In order to advance the case for heightened scrutiny the applicant emphasises the context of the present case as including the consideration that prima facie the police committed perjury, which strikes at the root of the administration of justice, and in the present case the circumstances included the conviction and sentence of the applicant, the investigation and recommendations of the police ombudsman and the quashing of the conviction by the Court of Appeal. In the above circumstances the applicant contends that the context calls for increased scrutiny of the DPP decision on the giving of reasons for no prosecution. Further the applicant contends that Girvan J did not apply any increased scrutiny to the DPP decision.

[18] A substantial part of Mr Treacy's opinion submitted to the Legal Services Commission dealt with the issue of heightened scrutiny. The affidavit of the Chairman of the Appeal Committee states –

> "7. The Committee considered the respective skeleton arguments presented to Girvan J and noted in that of the applicant of 15 September 2004 references in paras. 24 to 25 concerning the level of

> intensity of review. In so far as the arguments were before Girvan J it was the Committee's opinion that the court would have taken them into account in reaching its decision dismissing the application".

[19] The Appeal Committee's task was to determine whether the applicant had shown reasonable ground for taking the proposed appeal. It cannot be sufficient to conclude that where arguments are not addressed in the judgment being appealed, but have been referred to in skeleton arguments, that the judge must have "taken them into account." They may be taken into account and applied or rejected in whole or in part. The assessment must extend to whether the extent of their application or rejection, as the case may be, provides reasonable grounds for an appeal, and that assessment must involve some consideration of the merits of the approach adopted in the judgment. For these purposes it is not the arguments taken into account by the Judge but the outcome of that exercise that must be assessed in order to determine whether there are reasonable grounds for appeal.

The obligation of the DPP in relation to the giving of reasons for no prosecution.

[20] However the respondent contends that all this is to no avail as the applicant is not entitled to reasons in any event. The respondent refers to Re Adams Application [2001] 1 NI 1 where the Court of Appeal held in relation to a decision made before the commencement of the Human Rights 1998 that the DPP was under no common law obligation to give reasons in any case unless he chose to do so. The Court of Appeal rejected the approach that involved the DPP being obliged to give reasons in a limited class of cases where a trigger-factor was present and in any event went on to reject the proposed trigger-factors advanced by the applicant in that case. Carswell LCJ stated the finding of the Court of Appeal at page 18b –

> "We therefore hold that he (the Director) 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."

[21] In reliance on the above finding Mr Hanna QC for the respondent contends that there was no duty to give any reasons in the present case and accordingly any issue about the level of intensity of review is irrelevant. As stated above, Girvan J applied what may be described as the traditional Wednesbury approach to a decision not to give reasons or to a challenge to inadequate reasons. Counsel for the DPP at the application before Girvan J submitted a skeleton argument contending that there was no obligation to give reasons. That approach does not appear to have been developed before Girvan J.

[22] Thus in the present case there are three approaches being canvassed that a Court might adopt to a challenge to a DPP decision on reasons. The first approach was adopted by the respondent, based on Re Adams Application, namely the absence of entitlement to any reasons at all. The second approach was adopted by Girvan J, namely the Wednesbury approach based on rationality, relevant considerations and absence of irrelevant considerations. The third approach was adopted by the applicant, namely a review of increased intensity to the rationality of the decision as required by the significance of the context in which the DPP decision was made.

[23] The judgment does not proceed on the basis that the applicant is not entitled to any review of a DPP decision on reasons. Girvan J's approach to Re Adams Application does not preclude a challenge to the DPP policy or to the adequacy of reasons that the DPP has chosen to provide in accordance with the policy. Girvan J's approach is not precluded by the decision in Re Adams Application. His approach proceeds to assess the DPP decision on reasons on the basis of Wednesbury, and the applicant objects to the absence of heightened scrutiny. On the issue of intensity of review it will be noted from the comments at paragraph [19] above that it was not sufficient for this purpose that the Appeals Committee stated merely that Girvan J took into account the arguments on the issue of intensity of review. For this reason the decision of the Appeals Committee will be quashed.

The test for the grant of legal aid.

[24] Further the applicant contends that the Appeal Committee did not address the correct question, namely whether there were reasonable grounds for appealing Girvan J's decision on the DPP's refusal to give reasons for non-prosecution of the police officers. The applicant refers to the Chairman's affidavit where it was stated -

> "6. The Committee in considering the judgement of Mr Justice Girvan noted his observations on pages 2 and 3 that in the Court of Appeal's decision 'these were not substantial matters' and they did not bring in any matter which was itself damaging to the case of the appellant. They varied in certain minor respects and wording which would not be accounted for in the court's opinion by anything appearing or inexplicable from the impression."
>
> It was the Committee's opinion that the totality of the material before it did not demonstrate that the police officers had necessarily been guilty of perjury and

concluded that senior counsel's opinion in this regard was not all together supported".

[25] The issue before the Appeal Committee was not the materiality of the variations in the police interview notes or whether the police officers were necessarily guilty of perjury. Senior Counsel's opinion stated the matter on the basis that there was a prima facie case against the police officers. The extent to which the variations were substantial does not bear on the matter of the police officers being guilty of perjury, even if that were the issue. The alleged perjury related to the evidence that the notes were written during the interview, being evidence that could not be supported in the light of the ESDA test. A decision to prosecute does not require a conclusion that the alleged offenders are necessarily guilty. The issues in the proposed appeal concern the reasons for no prosecution and the nature of any review by the Court of such a decision. The Chairman's affidavit did conclude by stating the statutory test and that the applicant had not satisfied that test. The attention paid to the guilt of the police officers may have introduced an irrelevant consideration to the conclusion reached by the Appeals Committee or may have been merely a recitation of a part of the background that did not bear on the conclusion. As the decision will be quashed for the reason set out above it is not necessary to decide this matter and the discussion of this point may be noted on the reconsideration of the application for legal aid.

Conclusion.

[26] (1) The procedural aspects of the Article 3 of the European Convention right not to be subjected to inhuman or degrading treatment (relied on by the applicant to secure the furnishing of full reasons for non prosecution of the police officers for perjury) are not applicable to the present case as the substantive complaints relate to matters occurring before the commencement of the Human Rights Act 1998 on 2 October 2000 (See the decision of the House of Lords in Re McKerr [2004] in relation to the procedural aspects of Article 2).

(2) The Court of Appeal in Re Adams Application [2001] established that the DPP was under no obligation at common law to give reasons for no prosecution in any case (in relation to a DPP decision concerning matters prior to the commencement of the Human Rights Act 1998). The Attorney General's statement of 1 March 2002 amended the DPP policy in relation to deaths at the hands of agents of the State and is not relevant to the present case.

(3) Kerr J in Re McBrides Application (No 2) [2002] considered that heightened scrutiny could be applied to judicial review of all cases, and not

just human rights cases, depending on the nature of the interest involved, the type of decision being taken and the context in which it is taken.

(4) Girvan J considered the DPP decision on Wednesbury grounds, and while noting the applicant's argument on heightened scrutiny, it appears that no heightened scrutiny was applied and there is no outline of the approach to the issue of heightened scrutiny or of the basis of rejection of the applicant's grounds for heightened scrutiny.

(5) The issue for the Legal Services Commission is whether the applicant has reasonable grounds for appealing Girvan J's decision. The approach of the Appeals Committee was to conclude that Girvan J had taken into account the arguments on the issue of intensity of review rather than assessing whether the outcome provided reasonable grounds for appeal. This was an incorrect approach and as a result the decision on the grant of legal aid should be retaken.

(6) In applying the statutory test for the grant of legal aid the guilt of the police officers is not the issue.

[27] The decision of the Appeal Committee will be quashed and the matter reconsidered by the Legal Services Commission to determine whether the applicant has established that there are reasonable grounds for taking the appeal.