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(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

Before Kerr LCJ, Campbell LJ and McLaughlin J

KERR LCJ

Introduction

[1] This is an appeal by John Boyle from the decision of Girvan J given on 29 September 2004 dismissing an application for judicial review of the decision of the Director of Public Prosecutions whereby he refused to provide detailed reasons for his decision not to prosecute two police officers for perjury.

Background

[2] On 14 October 1977 Mr Boyle was convicted by His Honour Judge Brown QC sitting without a jury on one count of possession of firearms and ammunition with intent to endanger life and another count of membership of a proscribed organisation. He was sentenced to ten years imprisonment on the first count and to two years concurrent on the second count. A suspended sentence of two years imprisonment that had been imposed on 6 May 1975 was invoked and ordered to run consecutively to the other terms of imprisonment.

[3] The appellant's appeal against conviction and sentence was dismissed on 13 January 1978. On 27 April 2001 the Criminal Cases Review Commission (CCRC) referred the matter to the Court of Appeal on the basis of new evidence that had been made available by scientific developments in electrostatic detection apparatus (ESDA) testing techniques. On 29 April 2003 the Court of Appeal quashed Mr Boyle's convictions. By that time, of course, Mr Boyle had already served the period of imprisonment that had been imposed on the firearms and membership charges.

[4] The allegation against Mr Boyle was that he had taken part in an IRA gun attack on police officers in Franklin Street, Belfast, on 27 May 1976. The case against him was based exclusively on admissions, said to have been made by him to two police officers during interviews that took place on 8 and 9 March 1977, to the effect that he had been giving cover to the gunman who had fired on the police officers. He denied that he had been involved in the actual firing of shots.

[5] In delivering the judgment of the Court of Appeal quashing the convictions Carswell LCJ identified the fifth interview as that during which the relevant admissions were made. The admissions relied on by the Crown during the trial were contained in the notes of that interview and, according to the text of those notes, were as follows: -

> "We continued to question subject about his admissions to us, about being in the Provisionals and he agreed and said 'I am 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 said 'Sure you said yesterday that I am the QM'. When the subject was asked if this was true he agreed.
>
> …
>
> We continued to question subject about this incident and he admitted 'I only done cover with a pistol while another man fired an Armalite'."

[6] Mr Boyle has always disputed that he made any admissions. He claimed that the police officers had written down things that he had not said. These claims were denied by the police. During cross examination in the course of the trial the two officers who had made a record of the fifth interview asserted vigorously that the notes of all interviews conducted by them (including interview five) had been made at the time that the interviews took place. They denied that notes had been prepared after the interview of the appellant.

[7] Kim Harry Hughes, a forensic scientist, provided a report on the ESDA examination of the interview notes. Carswell LCJ summarised the crucial part of the report in the following passage from the judgment of the Court of Appeal that quashed the appellant's conviction:-

> "Having considered his report we are content to accept it, as agreed by the Crown and, having

> looked carefully at the findings which he has recorded, it appears that there is a basis for his conclusion that there must have been another version of the interview note of interview five. We do not base this so much upon the absence of certain passages, which may perhaps at least be explicable by notes having been made on a different surface in the time when those portions were recorded, but what we consider is of substantial significance is verbal differences between the recorded interview and the impressions which were found by Mr Hughes on examination. These are not substantial matters and they do not bring in any other matter which was in itself damaging to the case of the appellant, and we should make that clear that there is no question in this case of matters apparently having been written in which dam him and which are not contained in the impressions. But they vary in certain minor respects in wording which cannot be accounted for, in our opinion, by anything appearing or explicable from the impressions and accordingly we accept the conclusion that Mr Hughes advanced that there appears to have been a different version of interview five in existence at some time."

[8] The CCRC had informed the DPP in April 2001 that it was referring Mr Boyle's 1977 conviction to the Court of Appeal. The Director then referred the matter to the Police Service of Northern Ireland under article 6 (3) of the Prosecution of Offences (Northern Ireland) Order 1972 requesting that an investigation be carried out. PSNI in turn referred the matter to the Police Ombudsman. The Police Ombudsman submitted a file to the DPP on 20 March 2002. As a result the Director briefed counsel for advice and this led to certain queries being raised with the Ombudsman's office. A further report was received from the Ombudsman dated 21 June 2002. This was then briefed to counsel. The Director consulted with counsel, with two investigators from the Ombudsman's office and with Mr Maxwell of the Forensic Agency of Northern Ireland. Following this consultation an opinion was received from independent senior counsel. He expressed the view that there was insufficient evidence to sustain a successful prosecution of any police officer. After consideration of this and a further opinion from counsel the Director concluded that the evidence was insufficient to afford a reasonable prospect of a conviction. A direction not to prosecute was issued on 8 January 2003.

[9] Mr Boyle's advisers took the view that there was *prima facie* evidence that the two detective constables had committed perjury, and, having been notified of the Director's decision not to prosecute, engaged in an exchange of correspondence with the Director and the Police Ombudsman. The most significant letter among this correspondence is that of 6 June 2003 in which the DPP informed the appellant's solicitors: -

- That when a Police Ombudsman investigation file was submitted the Director had to decide whether or not criminal proceedings should be instituted or continued;
- That it was 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;
- That the Director recognised that the propriety of applying his general practice must be examined and reviewed in every case where a request for reasons was made;
- That accordingly the Director had carefully considered whether the general practice should be applied in this case or whether it was appropriate to depart from it. He had concluded that it would be inappropriate to depart from the general practice in this case;
- That the evidence and information reported on by the Police Ombudsman investigators together with their recommendations had been carefully considered by an experienced lawyer in the office. The advice of independent senior counsel had also been obtained. It had been 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 had been issued.

[10] An application for leave to apply for judicial review proceedings was then made on 2 December 2003 in respect of the DPP's refusal to give reasons for the decision not to prosecute. Leave to apply for judicial review was granted on 27 January 2004. On 29 September 2004 Mr Justice Girvan gave judgment on the judicial review dismissing the application.

Perjury

[11] To be convicted of the offence of perjury a defendant must be shown to have deliberately made a statement in evidence in a judicial proceeding that he knew was false or did not believe was true. The statement, viewed objectively, must be material in the judicial proceeding. It is not in dispute that there was *prima facie* evidence that the police officers gave testimony that they knew to be false.

The decision not to prosecute

[12] The Prosecution of Offences (Northern Ireland) Order 1972, SI 1972/538 created the office of the Director of Public Prosecutions in Northern Ireland. The functions of the Director are set out in article 5(1). He is required to consider any facts or information brought to his notice in order to decide whether to initiate or continue any criminal proceedings. Where he thinks it proper he must initiate, undertake and carry on, on behalf of the Crown, proceedings for indictable offences and some summary offences. There is no statutory obligation on the Director to provide reasons for decisions not to prosecute.

[13] The DPP's policy in relation to the giving of reasons for decisions not to initiate criminal proceedings was set out in an affidavit filed on his behalf by Mr John Rea. The following are the relevant passages:

> "22. With regard to the matter of providing reasons for decisions not to prosecute, it has been the general practice of successive Directors of Public Prosecutions for Northern Ireland to refrain from giving reasons for decisions not to institute or continue with criminal proceedings other than in the most general terms. This general practice has been applied in considering whether reasons should be given voluntarily, or on request. It has also been applied irrespective of whether the request for reasons emanates from a victim, an accused person or some other properly interested party.

23. This general practice is based upon the following main considerations:

(i) Firstly if detailed reasons are given in one or more cases, they may well require to be given in all. Otherwise, wrong conclusions may well be drawn in relation to those cases where reasons are refused, resulting either in unjust implications regarding the guilt of individuals or suspicions of malpractice or both.

(ii) Secondly, if reasons are given in all cases and if they consist of something more than generalities, unjust consequences are even more obvious and likely. While in a minority of cases the reasons could result in no damage to a reputation or other injustice to an individual, in the majority, such a result would be difficult or impossible to avoid.

(iii) Thirdly, the reason for no prosecution is often unrelated to any assessment of the issue of guilt or innocence. It may consist of the unavailability of a particular proof, perhaps purely technical but nevertheless essential, to establish the case. In other cases, it may be the sudden death or unavailability of an essential witness or it may arise out of intimidation. There is a risk that to indicate that such a factor was the sole reason for not prosecuting could amount to conviction without trial in the public estimation and deprive the individual concerned of the protection afforded by the impartial and careful analytical examination in open court of the case against him which the judicial system affords.

(iv) Fourthly, in other cases, the publication of the particular reasons for not prosecuting could cause unnecessary pain and damage to persons other than the suspect as, for example, where the decision is determined by an assessment of the credibility or mental condition of the victim or other witnesses.

> (v) Fifthly, there is a further and substantial category of cases in which decisions not to prosecute are based on the Director's assessment of the public interest. The Director is the guardian of the public interest in this sphere. Decisions made on an assessment of the public interest may include cases where the sole reason for non prosecution was the age or mental or physical health of the suspect. In other cases there may be considerations of national security or threat to the safety of individuals. In cases of this nature, the publication of reasons would not be appropriate, and could result in unjust implications being reached regarding the guilt of individuals or lead to the publication of information held in confidence or jeopardise the safety of individuals or threaten national security."

[14] The considerations adumbrated in paragraph 23 of Mr Rea's affidavit are obviously general in nature but he explained that those set out in sub-paragraphs (i) and (ii) applied particularly to the present case. The DPP's position, therefore, is that generally reasons will not be given but this is not an invariable outcome. Reasons will not be given where considerations such as those set out in paragraph 23 apply.

[15] A particular feature of the background to the decision not to give reasons in this case was the role of the Police Ombudsman. For the appellant Mr Treacy QC claimed that the Ombudsman had recommended that the two police officers be prosecuted for perjury. As it happens there was no direct evidence before this court or Girvan J to that effect but in a letter to the DPP the appellant's solicitors asserted that such a recommendation had been made. This has never been challenged. The judgment of Girvan J recorded that the case had been argued before him on the basis that such a recommendation had indeed been made by the Ombudsman. Mr McCloskey QC for the DPP suggested that this should be taken as signifying no more than that the appellant had asserted that this was the recommendation of the Ombudsman. But it was nowhere suggested by the DPP that the court should not act on the basis that such a recommendation had in fact been made. It is clear to us that Girvan J proceeded on that footing and we consider that we are bound to proceed on the same basis.

The arguments

[16] A discrete issue arose at the start of the hearing of the appeal. Mr Treacy pointed out that in his affidavit Mr Rea had stated that senior counsel had concluded that there was insufficient evidence to sustain a successful prosecution. He suggested that this statement amounted to a waiver of legal privilege and that the respondent was obliged to provide the document to the appellant. Mr McCloskey objected to this, saying that the appellant had not given notice of an application for disclosure of the opinion and that no such claim had been made at the hearing at first instance. We considered that the respondent should have been put on notice of the claim and ought to have had the opportunity to respond to it. In order to provide that opportunity it would have been necessary to adjourn the hearing of the appeal. Mr Treacy indicated that his client wished the appeal to proceed. In the event the appeal did not finish as it was expected to on the first day of the hearing. The respondent had the opportunity to consider the matter over a number of days but the matter was not pursued and we did not accede to the application, therefore.

[17] Mr Treacy suggested that the matters outlined in paragraph 23 of Mr Rea's affidavit had clearly not been listed in order of their perceived importance and that, in any event, three of the considerations (*i.e.* those listed at sub-paragraphs (iii), (iv) and (v)) did not arise at all as justification for not providing reasons in the present case. He submitted that the factors identified in sub-paragraphs (i) and (ii) could not militate against the giving of reasons in this instance. It was inconceivable that a requirement to provide reasons in Mr Boyle's case would give rise to a legal obligation to do so in other cases. The circumstances of the present case were, Mr Treacy argued, either unique or wholly unlikely to recur. Those circumstances included the fact that the Court of Appeal had indicated its view that the police officers gave testimony that was demonstrably untrue; that the appellant in consequence had served a period of some six years in prison; and finally that the Police Ombudsman had recommended that the police officers be prosecuted. This concatenation of events made this a wholly exceptional case that ought to require the DPP to depart from his normal practice of not giving reasons for his decision not to prosecute.

[18] On the second consideration (that if reasons were given in all cases damage to the reputation of individuals or other injustice could result) Mr Treacy submitted that there was nothing about the present case which suggested that unjust consequences would flow from the provision of reasons. Although Mr Rea had stated in paragraph 29 of his affidavit that detailed exposition of the reasoning would have some of the undesirable consequences outlined in paragraph 23, this claim had not been developed and there was no means of deciding whether this was in fact a likely outcome. The facts about the case and the reasons that the appellant's conviction had to

be quashed were in the public domain. It was difficult to see, therefore, said Mr Treacy, how the provision of reasons for the decision not to prosecute could result in unmerited consequences to anyone associated with the case.

[19] It was submitted that the DPP did not at any time consider the adverse consequences of the failure to give reasons. There were, Mr Treacy argued, powerful public policy considerations that militated strongly in favour of the giving of reasons. Unless they were provided there would be a lack of open scrutiny of a seemingly perverse decision; the victim would remain aggrieved that those responsible for his incarceration would go unpunished; the public could not be assured that the rule of law had been respected; and any legal challenge to the decision not to prosecute would be effectively thwarted.

[20] In support of the need to give reasons Mr Treacy relied on the decision of the Divisional Court in *R v DPP ex parte Manning* [2000] 3 WLR 463. In that case the applicants' brother, who had been remanded in prison custody, died of asphyxia while under restraint following an altercation with two prison officers. His death was investigated by the police and the papers were referred to the Crown Prosecution Service. At a coroner's inquest the jury returned a verdict of unlawful killing. In communicating his decision not to prosecute, a Crown Prosecution Service caseworker stated that there was insufficient evidence to justify any criminal prosecution and that he was not satisfied the available evidence would provide a realistic prospect of convicting any of the officers of any offence arising out of the deceased's death. The court held that there was no absolute obligation imposed on the DPP to give reasons for a decision not to prosecute; but that, since the right to life was the most fundamental of all human rights and since the death of a person in the state's custody which resulted from violence inflicted by its agents necessarily aroused concern, the Director would be expected, in the absence of compelling grounds to the contrary, to give reasons for such a decision. This was particularly required where the decision related to a death in custody where an inquest jury had returned a verdict of unlawful killing which implicated an individual against whom there was *prima facie* evidence.

[21] Mr Treacy submitted that the reasoning in *Manning* could be applied to the present case where, he contended, the wrongful conviction of the appellant constituted a breach of article 3 of the European Convention on Human Rights and Fundamental Freedoms (prohibition of torture or inhuman or degrading treatment or punishment). In the present context, no distinction was to be drawn between a breach of article 3 and the violation of article 2 that would have arisen in the *Manning* case had the Human rights Act 1998 been in force. Mr Treacy acknowledged that the decision in *Manning* had been considered by this court in *Re Adams' application* [2001] NI 1 and that Carswell LCJ had there observed that the judgment of the Divisional Court in *R v DPP, ex p Treadaway* (1997) Times, 31 October (to the effect that reasons need not be given for a decision not to prosecute) had been cited to the

Divisional Court in *Manning* and no criticism of that judgment had been made. The court in *Adams*, relying on *Treadaway*, concluded that the DPP was not subject to the rules of procedural fairness, because he was not adjudicating in the same way as an administrator and that he was not under an obligation to give reasons in any case, unless he chose to do so. Mr Treacy suggested, however, that the judgment in *Adams* had been overtaken by the decisions of ECtHR in *Jordan v UK* (2003) 37 EHRR 2 and *Finucane v UK* (2003) 37 EHRR 29. In those cases ECtHR had decided that the failure of the DPP to give reasons for his decision not to prosecute amounted to breaches of article 2. The need to allay public concern about such breaches was, said Mr Treacy, just as relevant in the present case as it was in those cases. Once one was 'in the territory' of article 2 or article 3 (both fundamental rights from which no derogation is permitted) the DPP should provide an explanation of his decision not to prosecute unless there was a compelling reason not to.

[22] Even if the appellant's rights under article 3 were not engaged, a more intense level of scrutiny of the decision not to give reasons than that accorded by Girvan J was necessary, Mr Treacy argued. Recent decisions of this court in *Re McBride's application (No 2)* [2003] NICA 23 and *Re McColgan and others* [2005] NICA 21 supported the view that a more searching examination of the reasonableness of this decision was required than was suitable under the traditional *Wednesbury* approach (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). Mr Treacy submitted that the learned judge had failed to conduct a sufficiently rigorous review of the decision to refuse to give reasons.

[23] For the respondent Mr McCloskey pointed out that the policy considered by the Court of Appeal in *Adams* was precisely the same as had been applied by the DPP in this case. The court in *Adams* had approved the policy operated by the DPP in relation to the giving of reasons. The starting point of any discussion about the requirement to give reasons, therefore, was the established lawfulness of the policy. What lay at the heart of the policy was choice. The Director was not under an obligation to give reasons for a decision not to prosecute. He may choose to give a general outline of those reasons but was not legally obliged to do so. This was what he had decided to do in the present case. That approach was four square within the terms of the policy. Since the policy was immune from challenge its application to the present case was likewise unimpeachable.

[24] Mr McCloskey argued that it was misconceived to put forward a series of factors as justifying the need to give reasons. The question must be approached by concentrating on the policy and recognising the general practice that applies *viz* that reasons will not be given. A critical feature of the policy was the exceptionality of the circumstances in which reasons will be given. There was nothing exceptional about this case. The factors outlined by the appellant would be expected to arise in the vast majority of cases.

[25] In any event, Mr McCloskey said, a substantial amount of information has been provided about the decision making process in this case. It has been made clear that the matter was considered by junior and senior counsel and that advice was provided by senior counsel as to the prospects of success for a prosecution. The claim that this was insufficient to allay public concern was unsupported and unjustified. The hurdle for the appellant was to persuade the court that to refuse to go further was irrational. All that was lacking in the information provided to the appellant was a detailed examination of the evidential assessment. The decision not to provide that was clearly within the terms of the policy and did not lapse into irrationality.

[26] Mr McCloskey submitted that the appellant could not rely on the avowed breach of article 3 of the Convention since the act complained of, namely, the alleged perjury of the police officers, had occurred before the coming into force of the Human Rights Act. Mr McCloskey argued alternatively that mere imprisonment did not qualify as a species of inhuman or degrading treatment or punishment. In any event, he claimed the refusal to give further reasons did not violate article 3. The procedural obligation was to provide an effective and independent investigation of the alleged violation. Taking into account the totality of the state response it was clear that this procedural obligation had been fulfilled.

[27] On the claim that the Director had failed to take into account the adverse consequences Mr McCloskey submitted that this was an entirely new argument that had not featured in the appellant's Order 53 statement. It had not been canvassed before Girvan J and the appellant should not be permitted to raise this argument for the first time. In any event, the claim did not tally with the evidence. Mr Rea had made clear (in paragraph 27 of his affidavit) that all the representations made on behalf of the appellant by his solicitors had been considered.

[28] In relation to the argument that the court should subject the Director's decision to a more intense review Mr McCloskey submitted that there was nothing about the present case that called for such a review. The principle of *Wednesbury* irrationality had not been abandoned and this was the only basis on which the appellant could challenge the impugned decision. In order to make good that challenge it was incumbent on the appellant to establish that the only rational course open to the DPP was to give more detailed reasons for his decision than he had done. The appellant had conspicuously failed to do this.

Re Manning and Re Adams

[29] The passage from *Manning* on which the appellant particularly relied appears at paragraph 33 where Lord Bingham of Cornhill said: -

"It is not contended that the Director is subject to an obligation to give reasons in every case in which he decides not to prosecute. Even in the small and very narrowly defined class of cases which meet Mr. Blake's conditions set out above, we do not understand domestic law or the jurisprudence of the European Court of Human Rights to impose an absolute and unqualified obligation to give reasons for a decision not to prosecute. But the right to life is the most fundamental of all human rights. It is put at the forefront of the Convention. The power to derogate from it is very limited. The death of a person in the custody of the state must always arouse concern, as recognised by section 8(1) (c), (3) (b) and (6) of the Coroners Act 1988, and if the death resulted from violence inflicted by agents of the state that concern must be profound. The holding of an inquest in public by an independent judicial official, the coroner, in which interested parties are able to participate, must in our view be regarded as a full and effective inquiry: see McCann v. United Kingdom (1996) 21 E.H.R.R. 97, 163-164, paras. 159-164. Where such an inquest following a proper direction to the jury culminates in a lawful verdict of unlawful killing implicating a person who, although not named in the verdict, is clearly identified, who is living and whose whereabouts are known, the ordinary expectation would naturally be that a prosecution would follow. In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case: to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting be given, to vindicate the Director's decision by showing that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision and to meet the European Court's expectation that if a prosecution is not to follow a plausible explanation will be given."

[30] In *Re Adams* this court expressed the view that the observations of Lord Bingham about the giving of reasons related to the requirements of best practice rather than any duty to which the DPP is subject under the common law. It is to be remembered, of course, that the decision under challenge in *Manning* was the decision not to prosecute rather than the withholding of reasons for that decision. The remarks of Lord Bingham about what would be expected of the Director were therefore, strictly speaking, *obiter*. In any event, in so far as there is any conflict between *Adams* and *Manning* clearly we must follow the reasoning of the former, since it is a decision which is binding on us.

[31] The Court of Appeal in *Adams* was presented with four main arguments which Carswell LCJ summarised at page 12 of the judgment as follows: -

> "—The DPP is subject to a duty to observe the requirements of procedural fairness in reaching his decisions on whether to prosecute.
>
> —That duty gives rise to the need to provide reasons in cases where the obligation is triggered by certain factors.
>
> —The decision not to prosecute is so aberrant that it calls for an explanation. Fairness requires that reasons be furnished, so that the appellant can see whether the decision may be the subject of challenge.
>
> —In the absence of reasons the decision is irrational and it cannot be said that it was taken on lawful grounds."

[32] It is important to note that the source of the avowed obligation to give reasons was the duty to observe procedural fairness. A requirement to give reasons can only arise where there is a procedural compulsion to do so. If there is no duty to observe the rules of procedural fairness, there can be no duty to give reasons. This court in *Adams* concluded that the DPP was not under a duty to observe the rules of procedural fairness. It cited the description of the duties of the DPP given by Gillen J at first instance as the basis for its conclusion. He had described those duties in the following passage: -

> "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."

[33] This court in *Adams* found this appraisal of the DPP's role to impel the conclusion that the DPP was not subject to the rules of procedural fairness and, as we have said, that decision is binding on us. One might observe that the range of responsibilities that the DPP must discharge is perhaps not dissimilar to those that must be undertaken by many decision-makers whose determinations are subject to judicial review but the question whether his decisions in this area should be subject to the rules of procedural fairness is not a debate that is open to us.

The Convention arguments

[34] The act relied on to ground the appellant's claim that there had been a breach of article 3 of the Convention was, obviously, the perjury of the police officers. The issue which immediately arises, therefore, is whether, since this occurred before the coming into force of the Human Rights Act 1998, it is open to the appellant to rely on it. We are satisfied that it is not. We consider that this issue is effectively – and conclusively – settled by the decision of the House of Lords in *Re Jonathan McKerr* [2004] NI 212. In that case the Appellate Committee decided that the procedural dimension of article 2 of the convention does not, within the regime of HRA 1998, apply to deaths which occurred before 2 October 2000.

[35] Lord Nicholls set out the essential reasoning for this conclusion in the following passages from his opinion: -

> "[17] In the present case the question of retrospectivity arises in the context of section 6 of the 1998 Act and article 2 of the convention. It arises in this way. Section 6 of the Act creates a new cause of action by rendering certain conduct by public authorities unlawful. Section 7 (1) (a) provides a remedy for this new cause of action. A person who claims a public authority is acting in a way made unlawful by section 6(1) may bring proceedings against the authority if he is a victim of the unlawful act. Thus, if the Secretary of State's failure to arrange for a further investigation

into the death of Gervaise McKerr is unlawful within the meaning of section 6(1), these proceedings brought by his son fall squarely within s 7; if not, not.

…

[20] … article 2 may be violated by an unlawful killing. The application of section 6 (1) of the 1998 Act to a case of an unlawful killing is straightforward. Section 6(1) applies if the act, namely, the killing, occurred after the Act came into force. Section 6(1) does not apply if the unlawful killing took place before 2 October 2000. So much is clear.

[21] The position is not so clear where the violation comprises a failure to carry out a proper investigation into a violent death. Obviously there is no difficulty if the death in question occurred post-Act. The position is more difficult if the death occurred, say, shortly before the Act came into force and the necessary investigation would fall to be held in the ordinary course after the Act came into force. On which side of the retrospectivity line is a post-Act failure to investigate a pre-Act death?

[22] In my view the answer lies in appreciating that the obligation to hold an investigation is an obligation triggered by the occurrence of a violent death. The obligation to hold an investigation does not exist in the absence of such a death. The obligation is consequential upon the death. If the death itself is not within the reach of section 6, because it occurred before the Act came into force, it would be surprising if section 6 applied to an obligation consequential upon the death. Rather, one would expect to find that, for section 6 to apply, the death which is the subject of investigation must itself be a death to which section 6 applies. The event giving rise to the article 2 obligation to investigate must have occurred post-Act."

[36] Lord Brown of Eaton-under-Heywood expressed the same principle in this way: -

> "[91] The duty to investigate is, in short, necessarily linked to the death itself and cannot arise under domestic law save in respect of a death occurring at a time when article 2 rights were enforceable under domestic law, *i.e.* on and after 2 October 2000."

[37] This reasoning applies *mutatis mutandis* to claimed violations of article 3. If the act complained of occurred before the coming into force of the Human Rights Act, the procedural safeguards associated with the protection of rights under that article may not be prayed in aid in domestic law.

[38] This conclusion relieves us of the need to reach a conclusion on the interesting question as to the circumstances in which imprisonment may be considered to constitute inhuman and degrading treatment for the purposes of article 3. One can recognise the force of the argument that imprisonment properly imposed after conviction cannot give rise to a violation of article 3 but where that has been secured by illegal means such as perjury, self evidently different considerations arise. We will refrain from expressing any final view on this potentially difficult issue, however.

The admissible basis of challenge to the DPP's decision

[39] Given that the DPP's decision may not be impugned on the ground that it was procedurally unfair, what species of challenge is available to the appellant? The decision may certainly be impeached on the ground that it was irrational but two factors must be examined in order to set the context for that examination. The first of these is adumbrated in Mr McCloskey's argument that the validity of the policy of the DPP not to give reasons for a decision not to prosecute save in exceptional cases has been accepted by this court in *Adams.* The second arises from the submission of Mr Treacy that this is the type of decision that should be subject to a more searching or intensive scrutiny. A third consideration will also have to be examined, namely, the sufficiency of such reasons as have been given for the decision.

[40] The policy of the DPP in relation to the giving of reasons was outlined in an affidavit by Mr Alan T G White, a senior member of the DPP's department, for the purposes of the *Adams* case. The relevant parts are in identical terms to the paragraph of Mr Rea's affidavit that we have quoted at [13] above. This court in *Adams* said this of the policy at page 19: -

> "We do not find anything irrational or aberrant in the policy which the DPP has adopted in relation

> to the giving of reasons, which is set out in the portions of Mr White's affidavit which we have quoted."

[41] We consider that we are bound by the assessment that the policy is neither irrational or aberrant. We must therefore approach the question whether the DPP's decision is irrational on the basis that he is entitled to refuse a request that he give reasons for not prosecuting unless he is satisfied that the case comes within an exceptional category and that it does not give rise to the risks that are rehearsed in the policy. This is an important factor in setting the context for the appraisal of the argument that the decision not to give reasons was irrational. Properly analysed, this is not an open-ended review of the decision not to go beyond the reasons provided. Rather it is an examination of the reasonableness of the conclusion reached by the DPP that this case did not warrant a departure from his policy.

[42] The question whether this decision calls for a more intensive review is perhaps less easy to decide. It was suggested in *Re McBride's application for judicial review* [2002] unreported that there was no "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." In that case, however, the decision under challenge by Mrs McBride was to allow two soldiers who had been convicted of the murder of her son to resume their army careers. Here the decision of the DPP is not to depart from a policy that this court has found to be reasonable. The context in the present case does not, therefore, militate strongly towards a more intense review.

[43] We do not find it necessary to express a final opinion on this subject because we are satisfied that the Director's decision cannot be characterised as unreasonable, by whatever standard one examines it. It is, of course, possible to point, as Mr Treacy has done, to seeming anomalies in the decision and to argue that the facts of this case are, if not unique, highly unlikely to be repeated. But we feel quite unable to say that this case would not be used as a precedent by others who felt aggrieved by decisions not to prosecute and that it was unreasonable for the Director to allow himself to be influenced by that consideration. Likewise the factor outlined by Mr Rea in paragraph 23 (ii) seems to us to be a matter of legitimate weight to be taken into account by the DPP. It is to be noted that Mr Rea did not suggest, as Mr Treacy implied, that the giving of reasons in the present case would lead to unjust consequences. It was that those consequences would be likely to flow if reasons were required to be given in all cases.

[44] As we have said, the reasonableness of the Director's decision cannot be judged without reference to the reasons that have in fact been provided. As

Mr McCloskey pointed out, the appellant has been informed that the matter was considered by junior and senior counsel and that advice was provided by senior counsel as to the prospects of success for a prosecution. It is clear that the judgment was made that the chances of obtaining a conviction were estimated not to be sufficiently strong to warrant a prosecution. What was not provided was a detailed account of the reasons that counsel had reached that conclusion. While one can understand and sympathise with the appellant's desire to be informed of this, it is, in our opinion, impossible to say that the decision of the Director not to provide this information was unreasonable.

The alleged failure of the Director to have regard to the adverse consequences of his refusal to give reasons

[45] As Mr McCloskey has said, this point was not raised before Girvan J and it does not feature in the Order 53 statement. Quite apart from these considerations, however, Mr Rea has averred that all the representations made on behalf of the appellant were considered and there is no reason to question that assertion.

Conclusions

[46] None of the grounds of appeal has been made out. The appeal is dismissed and the order of Girvan J is affirmed.