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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY LAWRENCE KINCAID FOR JUDICIAL REVIEW

Before Kerr LCJ and Weatherup J

KERR LCJ

Introduction

[1] This is an application by Lawrence Kincaid for judicial review of the avowed failure of the Public Prosecution Service to provide reasons for the decision not to prosecute one Trevor Dowie for shooting the applicant. The decision not to prosecute Mr Dowie is also challenged.

[2] It is common case that in the early hours of the morning of 7 August 2005 the applicant was shot and injured by Mr Dowie. At the time of the shooting, Mr Kincaid was on a motor cycle outside Mr Dowie's house and his companion, William Anderson, was in Mr Dowie's garden throwing garden slates at the window of the house. It is alleged that the applicant was involved with Mr Anderson in an attack on Mr Dowie's home and he has been charged with attempting to intimidate Mr Dowie and with committing criminal damage to his property. The applicant has denied these charges and is awaiting trial.

Factual background

[3] Mr Dowie claims that as he lay in bed asleep on the morning of 7 August 2005 he was awakened by loud bangs which he believed were either petrol or pipe bombs. On going to the window of his bedroom he saw a man astride a motorcycle. He heard this man shout, "Finish them all" or "Finish them

bastards". Mr Dowie then discharged shots from a legally held firearm which he was licensed to have for sporting purposes.

[4] The applicant was shot and injured. The shots fired at him came from above and to the rear, striking his shoulder and lodging behind his heart. His left lung was damaged. Mr Dowie admitted firing the shots but in his statement to the police he claims that the actions he took were in self-defence. He was charged with attempted murder but on 17 August 2006 the applicant's solicitors were informed by letter that a decision had been made not to prosecute Mr Dowie for this offence. The reason given for the decision was that there was "no reasonable prospect of refuting Trevor Dowie's claim that he was acting in self-defence when he discharged his firearm".

The grounds of challenge

[5] As originally framed the application for judicial review contained a challenge to three separate decisions of the Prosecution Service: -

1. The refusal to provide a greater explanation of the reasoning that underlay the conclusion that there was no reasonable prospect of refuting Trevor Dowie's claim that he was acting in self defence;
2. The refusal to provide the applicant with disclosure of Trevor Dowie's caution interview and custody record; and
3. The decision that Mr Dowie should not be prosecuted.

[6] At the beginning of the hearing of the judicial review application Mr McCloskey QC for the respondent accepted that the transcript of the interviews of Mr Dowie by police officers and the custody record relating to the time that he had been detained by police should be disclosed to the applicant and this is therefore no longer an issue in the case. The two remaining issues are whether the reasons given by the Prosecution Service for not prosecuting Mr Dowie are adequate and the propriety of the decision not to prosecute.

The Public Prosecution Service's policy as to the giving of reasons

[7] The policy of the Director of Public Prosecutions as to the giving of reasons whether or not to prosecute was outlined by the Attorney General in a statement to the House of Lords on as follows: -

> "The policy of the Director in the matter of providing reasons for decisions not to initiate or continue prosecutions is to refrain from giving reasons other than in the most general terms. The Director

> recognises the propriety of applying the general practice must be examined and reviewed in every case where a request for the provision of detailed reasons is made. . . . . . The Director, in consultation with the Attorney General, has reviewed his policy in the light of the judgments delivered by the European Court of Human Rights on the 4 May 2001 in a number of Northern Ireland cases, including the case of *Jordan v. United Kingdom*. Having done so, the Director recognises that there may be cases in the future, which he would expect to be exceptional in nature, where an expectation will arise that a reasonable explanation will be given for not prosecuting where death is, or may have been, occasioned by the conduct of agents of the State . . . the Director accepts that in such cases it will be in the public interest to reassure a concerned public, including the families of the victims that the rule of law has been respected by the provision of a reasonable explanation."

[8] The policy applied by the Director before this statement was made was described by the Court of Appeal in *Re Adams' application* [2001] NI 1 in the following passage: -

> "The DPP's policy relating to the giving of reasons is set out in paragraphs 33 to 37 of Mr White's affidavit:
>
>> '33. With regard to the matter of providing reasons for their decision, 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 whether any request for reasons came from the victim, the defendant, or a third party.
>>
>> 34. This general practice is based upon the following main considerations:-

(i) Firstly, if detailed reasons are given in one or more cases, they may 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.

35. In adopting and maintaining the general practice outlined in the foregoing paragraphs, the Director is mindful that Parliament has not seen fit to impose on him any statutory obligation to provide reasons in any particular class of case or generally. The Director believes further that when the question of the provision of reasons is considered in its correct legal context his general practice accords with modern public law principles.

36. The general practice of successive Directors, described in paragraphs 33 and 34 above, has evolved during a period of some years. It has been the subject of periodic consideration, review and legal advice and has sought to take into account material developments in the law. Further, it has been reconsidered periodically in the light of judicial review challenges. It continues to be an evolving practice.

37. The present Director has consistently recognised that the propriety of applying the general practice, described in paragraph 33

> above, must be examined and reviewed in every case where a request for the provision of detailed reasons is made. The Director accepts further that where such requests are received he must consider the applicability of the considerations specified in paragraph 34 above, together with any other considerations which seem to him material, to the particular facts and circumstances of the case in question and assess the weight to be accorded to these considerations."

[8] The Court of Appeal in *Adams* found that the policy was neither irrational nor aberrant and that conclusion was followed and applied in the more recent case of *Boyle v DPP* [2006] NICA 16. In the present application the applicant contended that since his article 2 rights were engaged, *Adams* could not be regarded as a binding authority. Alternatively, while not seeking to challenge the reasonableness of the policy, it was contended that the manner in which the policy had been applied was irrational.

The PPS response to the request for reasons

[9] According to Clive Connell, senior public prosecutor for the Belfast Region, the basis on which further reasons (beyond that outlined at paragraph [4] above) would not be provided was that:-

> "(i) If reasons were given in this case it would make it difficult or impossible to avoid providing detailed reasons in any other case where the decision was taken on evidential grounds.
>
> (ii) Reasons could result in unjust implications being reached against witnesses and/or the accused and could jeopardise their safety. Reliance [was] placed upon an incident in which Mr Dowie's wife and daughter had been held hostage prior to the night of the shooting.
>
> (iii) To provide reasons 'could prompt a debate and/or further enquiries . . . which could have one or more of the undesirable consequences described' at (i) or (ii) above."

The applicant's arguments

[10] Mr Macdonald QC for the applicant submitted that the first ground on which the PPS refused to elaborate on the reasons given for not prosecuting Mr Dowie could not justify the refusal. The potential impact on other cases was, he said, a reason that could be advanced in every case. If this were to be accepted as sufficient justification PPS would never be required to provide reasons because this would always have the potential to lead to requests in other cases.

[11] As to the second reason Mr Macdonald pointed out that the applicant knew Mr Dowie and was aware, through statements made by the Dowie family, that his family have been blamed for the attack on the Dowie family home in February 2005. The suggestion that the provision of reasons for the decision by the PPS not to prosecute would in some way jeopardise the accused or witnesses was unsustainable. No increased risk to the accused or to witnesses could possibly flow from the provision by the PPS of the reasoning applied by them in reaching the decision not to prosecute.

[12] Finally, as to the possibility that disclosure of the reasoning might prompt further debate or inquiries, Mr Macdonald suggested that this could never be a proper basis on which to withhold the reasons not to prosecute. In effect this amounted to the claim that the reasoning process whereby the decision not to prosecute was reached should not be the subject of scrutiny by those directly affected by the decision, the public or the courts.

Are the applicant's article 2 rights engaged?

[13] Initially Mr McCloskey QC for the respondent was disposed to argue that the applicant's article 2 rights were not engaged, suggesting that the right to life (which the article guarantees) and the procedural safeguards necessary to vindicate the substantive rights (such as the duty to conduct a state sponsored, adequate inquiry into a controversial death) only arose where the death occurred at the hands of state agents. After the hearing of the appeal, however, Mr McCloskey submitted a further written argument in which he accepted that recent Strasbourg jurisprudence (such as *Tamli –v- Turkey* [2004] 38 EHRR 3; *Rowley –v- United Kingdom* [Application No. 31914/03 – 22 February 2005; *Oneryildiz –v- Turkey* [Application No. 48939/99 – 30 November 2004]; and *Menson –v- United Kingdom* [2003] 37 EHRR CD220) pointed clearly to the application of the article to deaths other than those caused by state agents.

[14] The *Menson* case in particular illustrates the breadth of application of the duty to investigate that arises under article 2. That case involved the death of a mentally disordered adult after an attack on him by four youths. One of the

complaints related to the adequacy of the police response and investigation generally. The European Court declared the application inadmissible on the ground that it was manifestly ill-founded within the meaning of Article 35/3 but discussed the duty to investigate controversial deaths in the following significant passages at pp. CD228-CD230: -

> "The Court observes that the applicants have not laid any blame on the authorities of the respondent State for the actual death of Michael Menson; nor is it suggested that the authorities knew or ought to have known that Michael Menson was at risk of physical violence at the hands of third parties and failed to take appropriate measures to safeguard him against that risk. The applicants' case is therefore to be distinguished from cases involving the alleged use of lethal force either by agents of the State or by private parties with their collusion (see, for example, *McCann –v- United Kingdom … Jordan –v- United Kingdom … Shanaghan –v- United Kingdom* …), or in which the factual circumstances imposed an obligation on the authorities to protect an individual's life, for example where they have assumed responsibility for his welfare (see, for example *Edwards –v- United Kingdom* …), or where they knew or ought to have known that his life was at risk (see, for example, *Osman –v- United Kingdom* …)…
>
> However, the absence of any direct State responsibility for the death of Michael Menson does not exclude the applicability of Article 2. It recalls that by requiring a State to take appropriate steps to safeguard the lives of those within its jurisdiction … Article 2(1) imposes a duty on that State to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (see *Osman*, cited above, paragraph 115) …
>
> With reference to the facts of the instant case, the Court considers that this obligation requires by implication that there should be some form of

> effective official investigation where there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances. The investigation must be capable of establishing the cause of the injuries and the identification of those responsible with a view to their punishment. Where death results, as in Michael Menson's case, the investigation assumes even greater importance, having regard to the fact that the essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life.
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> …
>
> Although there was no State involvement in the death of Michael Menson, the Court considers that the above-mentioned basic procedural requirements apply with equal force to the conduct of an investigation into a life-threatening attack on an individual regardless of whether or not death results."

[15] We are satisfied that the applicant's article 2 rights are engaged. This was a life-threatening attack on him. The nature of the injuries that he suffered plainly establishes that. It follows that there was a duty on the state authorities to conduct "an effective official investigation … capable of establishing the cause of the injuries and the identification of those responsible with a view to their punishment". The role to be played by the prosecution in that investigation has been recognised by ECtHR in a series of cases emanating from this jurisdiction – see, for instance *Jordan v United Kingdom* [2003] 37 EHRR 2 where the court said at paragraph 121: -

> "The Court does not doubt the DPP's independence. However, where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making. Where no reasons are given in a controversial incident involving the use of lethal force, this may in itself not be conducive to public confidence. It also denies the

> family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision."

Is the PPS refusal to give further reasons a violation of article 2?

[16] It is clear from the jurisprudence of ECtHR that article 2 does not automatically require the Prosecution Service to supply reasons for a decision not to prosecute. In *McShane v United Kingdom* [2002] 35 EHRR 23, the court said at paragraph 117 that it was not persuaded that article 2 automatically required the provision of reasons by the DPP. The essential purpose of the adjectival aspects of article 2 must be clearly recognised in deciding whether reasons require to be given. This was described in *Jordan v United Kingdom* in paragraph 105 as follows: -

> "The obligation to protect the right to life under article 2 of the Convention, read in conjunction with the State's general duty under article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances."

[17] The question therefore arises whether the effective implementation of the domestic laws protecting the right to life and ensuring the accountability of the person responsible for the life-threatening attack on the applicant require that further reasons be given for the decision not to prosecute Mr Dowie. We have concluded that they do not.

[18] In this case the applicant is aware of the statements that Mr Dowie has made during interviews after his arrest. He has been informed that the case has been considered by independent leading counsel. He knows that senior counsel has advised that the evidence is insufficient to afford a reasonable prospect of convicting Mr. Dowie for the offence of attempted murder. Mr Connell's

affidavit explained that this conclusion had been reached because senior counsel considered that there was no reasonable prospect of refuting Mr Dowie's claim that he was acting in self defence when he discharged his firearm in the direction of both the applicant and Mr Anderson. It does not appear to us that to require the Public Prosecution Service to supply details of the reasoning that underlay the decision not to prosecute will assist the applicant's understanding of that decision, much less assist in the effective implementation of the laws protecting the right to life or to make Mr Dowie accountable. A professional, independent judgment has been reached on the basis of evidence that is fully available to the applicant. He may be unhappy about the outcome and aggrieved about the decision but he does not need to know more in order to understand the basis on which it has been reached.

Is the decision to refuse further reasons unreasonable?

[19] In light of our conclusion on the issue of the alleged violation of article 2, this question can be answered shortly. The decision not to provide further reasons cannot be, by any standard, described as perverse. The applicant's solicitors were provided with sufficient information to enable him to clearly understand the reason that a prosecution of Mr Dowie was not pursued. He knew that it was the judgment of independent senior counsel that the claim of self defence proffered by Mr Dowie during interview could not be defeated. He was aware of the evidence on which that judgment was based. It cannot be irrational to refuse to supply further information as to why it was decided not to prosecute.

[20] The specific reasons given by the Prosecution Service for not explaining the decision further are less easy to endorse, however. We tend to agree with Mr Macdonald that the suggestion made by the respondent that if one gives reasons in this case it would be impossible to avoid providing detailed reasons in any other case is one that could be deployed in order to avoid giving reasons in every circumstance. This is a formula that has been repeated in all cases of which we are aware when the decision of the prosecuting authorities not to prosecute has been challenged. It appears to us that it is a factor to which little weight can be attached if the Prosecution Service is to keep faith with its claim that it will consider every request for reasons on its individual merits. If apprehension about creating a precedent is uppermost in the mind of the prosecuting authorities, there is a real danger that proper consideration of a particular request will be devalued. Moreover, since the Prosecution Service has repeatedly stated that each case will receive individual consideration we find it difficult to understand why a favourable decision in this case would inevitably lead to the situation where it would be difficult to resist the giving of reasons in other cases. That said, we must bear in mind that the circumstances in which the court can intervene to quash the decision of the PPS not to prosecute are limited.

[21] In *Mohit –v- The Director of Public Prosecutions of Mauritius* [2006] UKPC 20, Lord Bingham, while noting that prosecutorial decisions of the DPP in Mauritius (who enjoys similar powers and responsibilities to those of the Director of Public Prosecutions in this jurisdiction) are not immune from judicial review, emphasised that the threshold of a successful challenge is a high one. He stated that "… the courts must be very sparing in their grant of relief to those seeking to challenge the DPP's decisions not to prosecute or to discontinue a prosecution …".

[22] In the later decision of *Sharma v Antoine and others* [2006] UKPC 57 Lord Bingham dealt with the issue comprehensively in the following passages: -

> "It is also well-established that judicial review of a prosecutorial decision, although available in principle, is a highly exceptional remedy. The language of the cases shows a uniform approach: 'rare in the extreme' (*R v Inland Revenue Commissioners, Ex p Mead* [1993] 1 All ER 772, 782); 'sparingly exercised' (*R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136, 140); "very hesitant" (*Kostuch v Attorney General of Alberta* (1995) 128 DLR (4th) 440, 449); 'very rare indeed' (*R (Pepushi) v Crown Prosecution Service* [2004] EWHC 798 (Admin), [2004] Imm AR 549, para 49); 'very rarely' (*R (Bermingham) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2006] 3 All ER 239, para 63. In *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 371, Lord Steyn said:
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> > 'My Lords, I would rule that absent dishonesty or *mala fides* or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review.'
>
> With that ruling, other members of the House expressly or generally agreed: pp 362, 372, 376. We are not aware of any English case in which leave to challenge a decision to prosecute has been granted. Decisions have been successfully challenged where the decision is not to prosecute (see *Mohit*, para 18): in

> such a case the aggrieved person cannot raise his or her complaint in the criminal trial or on appeal, and judicial review affords the only possible remedy: *R (Pretty) v Director of Public Prosecutions* [2001] UKHL 61, [2002] 1 AC 800, para 67; *Matalulu*, above, p 736. In *Wayte v United States* (1985) 470 US 598, 607, Powell J described the decision to prosecute as "particularly ill-suited to judicial review."

[23] Although it is clear that the challenge to a decision to prosecute will be even more difficult to sustain than one not to prosecute, many of the reasons for reticence in the matter of a decision to prosecute apply also in the latter case. Some of these were referred to by Lord Bingham in paragraph [14] of his judgment in *Sharma* as follows: -

> "The courts have given a number of reasons for their extreme reluctance to disturb decisions to prosecute by way of judicial review. They include:
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> (i) "the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits" (*Matalulu*, above, p 735, cited in *Mohit*, above, para 17);
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> (ii) "the wide range of factors relating to available evidence, the public interest and perhaps other matters which [the prosecutor] may properly take into account" (counsel's argument in *Mohit*, above, para 18, accepting that the threshold of a successful challenge is "a high one");
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> …
>
> (v) the blurring of the executive function of the prosecutor and the judicial function of the court, and of the distinct roles of the criminal and the civil courts: *Director of Public Prosecutions v*

> *Humphrys* [1977] AC 1, 24, 26, 46, 53; *Imperial Tobacco Ltd v Attorney-General* [1981] AC 718, 733, 742; *R v Power* [1994] 1 SCR 601, 621-623; *Kostuch v Attorney General of Alberta,* above, pp 449-450; *Pretty*, above, para 121.

[24] The reluctance of the courts to intervene in the decision whether or not to prosecute must also be relevant in relation to a challenge to the refusal to give reasons for that stance. While a clear distinction must be maintained between the challenge to the decision not to give further reasons and the decision not to prosecute, many of the policy considerations (such as those adumbrated above) that confine the role of the courts in reviewing a decision whether to prosecute apply to the review of a decision not to give further reasons. Therefore, although we have expressed doubt about the weight to be attached to the consideration that the giving of reasons in this case would create a difficult precedent for further cases, we do not consider that this is sufficient to warrant the exceptional course of judicial intervention.

[25] We have reached the same conclusion in relation to the second and third of the specific grounds given for the decision not to disclose further reasons. While we can see some force in the criticisms made of the relevance of those grounds to the circumstances of this case, we do not consider that they partake of the quality necessary to sustain a charge of irrationality on the part of the decision-maker.

Was the decision not to prosecute irrational?

[26] This can be dealt with briefly. The Public Prosecution Service took the advice of independent leading counsel as to the viability of defeating Mr Dowie's claim that he was acting in self defence. Counsel advised that this could not be defeated. On the known facts this was plainly a tenable view. The decision of the prosecuting authorities to accept that advice simply cannot be characterised as irrational.

Conclusions

[27] None of the grounds of challenge to the decision not to provide further reasons or the decision not to prosecute Mr Dowie has been made out and the application for judicial review must therefore be dismissed.