Neutral Citation No. [2004] NIQB 79 | **WEAC5128**

Judgment: approved by the Court for handing down | *Delivered:* **26/11/2004**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY ROMUALD ANDELA MINDOUKNA FOR JUDICIAL REVIEW

WEATHERUP J

The application.

[1] This is an application for judicial review of various decisions of the Director of Public Prosecutions in relation to events involving the applicant and others on 31 August 1999 and 1 September 1999.

The background.

[2] The background events are set out in the affidavit of the applicant's solicitor. The applicant is a Camaroon national and professional soccer player who came to Northern Ireland to try out for Derry City Football Club in the summer of 1999. On 31 August 1999 the applicant married Colleen McGuinness who resided in Marlborough Street, Londonderry. On the evening of 31 August 1999 Colleen McGuinness's two brothers, Raymond and James McGuinness and her sister, Tracey Kelly, arrived at the house and are alleged to have removed Colleen McGuinness from the house and subjected the applicant to racist abuse and threats of violence. Later that evening Raymond McGuinness and James McGuinness called at Strand Road RUC Station to complain about the applicant's marriage to Colleen McGuinness and to question its legality. Later that evening the applicant called at Strand Road RUC Station to complain about the abduction of his wife, the racial abuse and his concerns about any return of members of the McGuinness family to the applicant's house. The applicant returned home and at about midnight his wife's two brothers and sister are alleged to have returned to the house and subjected the applicant to racial abuse and to have spat on him and threatened him.

[3] On 1 September 1999 at about mid-day Liam Deery the landlord of the house, Terence Crossan and Sean Young, respectively an uncle and a brother-in-law of the applicant's wife, are alleged to have entered the house and assaulted the applicant. He was chased into the street in a state of undress and then assaulted in the street. Police attended the scene as a result of several 999 calls. The applicant was taken to hospital by ambulance where he was found to have injuries amounting to actual bodily harm.

[4] The applicant was leaving Altnagelvin Hospital at about 2.15 pm on 1 September 1999 when he encountered Sean Young who had been involved in the earlier incident at his house. Each alleged that he was attacked by the other. The applicant was arrested by police at the hospital. The following morning he made a statement of complaint about the two earlier incidents at his home on 31 August 1999 and 1 September 1999. The applicant was charged with causing grievous bodily harm with intent arising out of the incident at the hospital on 1 September 1999.

[5] The applicant made various complaints about the police investigation into the events of 31 August 1999 involving Raymond McGuinness, James McGuinness and Tracey Kelly. Further the applicant makes various complaints about the police investigation into the events of 1 September 1999 involving Sean Young, Liam Deery and Terence Crossan. In the event the DPP directed no prosecution against any person in respect of any of the alleged offences occurring at the applicant's home. The applicant complained about charges being preferred against him in respect of the incident at the hospital. He was returned for trial in the Crown Court. At the trial he made two abuse of process applications, both of which were rejected by the trial Judge. In August 2001 the applicant was acquitted of the charge by the decision of the jury.

[6] Further to the acquittal of the applicant in August 2001 there was an exchange of correspondence between the applicant's solicitors and the DPP. The correspondence comprised the applicant's solicitor's letter of 3 September 2001, the DPP reply of 17 May 2002, a further letter from the applicant's solicitor on2 July 2002 and the DPP's further reply dated 3 October 2002.

<u>The applicant's solicitor's letter of 3 September 2001 to the DPP.</u>

[7] By letter dated 3 September 2001 the applicant's solicitor requested information from the DPP, first of all in relation to the events of 31 August 1999 and the reasons for no prosecution and the materials upon which the DPP made that decision; secondly, in relation to the events of 1 September 1999 at the applicant's house, information concerning the reasons for no prosecution and the materials upon which the decision was based; thirdly, a request for a review of the previous decisions not to prosecute; fourthly, in relation to the prosecution of the applicant, the date of the decision to prosecute, the identify of the person

who make the decision and the materials upon which the decision to prosecute had been made.

The DPP's reply of 17 May 2002.

[8] The DPP's reply of 17 May 2002 confirmed that the DPP had carried out a review of the decisions not to prosecute in respect of the events of 31 August 1999 and 1 September 1999. In respect of the incident of 31 August 1999 it was stated that the police investigation file had been received by the department on 5 April 2000 and it was concluded that the evidence available was insufficient to afford a reasonable prospect of obtaining a conviction against Raymond McGuinness, James McGuinness or Tracey Kelly for any offence and accordingly a direction for no prosecution issued had on 14 April 2000. It was stated that a review had been carried out at a senior level within the department and again it had been concluded that there was insufficient evidence to afford a reasonable prospect of conviction. In respect of the incident of 1 September 1999 it was stated that the police investigation file had been received in the department on 21 January 2000 and had been considered by the same lawyer in the DPP office and it had been concluded that the evidence available was insufficient to afford a reasonable prospect of obtaining a conviction against Terence Crossan, Liam Deery or Sean Young for any offence and accordingly a direction for no prosecution had issued on 14 April 2000. It was stated that a review had been carried out at a senior level within the department and it was again concluded that the evidence was insufficient to afford a reasonable prospect of conviction.

[9] In respect of the request for reasons for the decisions the DPP letter stated that the general practice was to refrain from giving reasons for decisions not to institute or continue criminal proceedings other than in the most general terms. However it was recognised that the general practice had to be examined and reviewed in every case where a request for reasons was made. It was stated that it had been concluded that it would be inappropriate to depart from the general practice in the cases in question.

[10] In respect of the applicant's request that the DPP specify the materials upon which the decisions were based, the DPP letter referred to the decision of the House of Lords in *Taylor and Others v The Serious Fraud Office and Others* [1998] 4 All ER 801 and the public interest considerations involved in limiting disclosure of materials in the investigation process. The letter stated that it had been concluded that to provide the applicant with the generality of information requested would be outside the ambit of the protective rule established in the *Taylor* case. It was further stated that it had been considered whether in the interests of justice the materials requested should be disclosed to the applicant and it had been concluded that such disclosure was not required. The letter stated that the DPP also considered whether the combination of section 6 of the Human Rights Act 1998 and Article 3 of the European Convention obliged the

DPP to make the information available to the applicant and it had been concluded that there was no obligation to provide the information requested.

[11] In relation to the decision to prosecute the applicant it was confirmed that the decision was issued on 1 June 2000 and that the matter had been considered together with the police investigation files in respect of the other two incidents as well as the police investigation file in respect of the applicant received on 9 December 1999.

The applicant's solicitor's further letter of 2 July 2002 to the DPP.

[12] The applicant's solicitor responded to the DPP on 2 July 2002. It was asserted that Article 3 of the European Convention was engaged and the requirement for an effective official investigation entitled the applicant to detailed reasons and the material upon which decisions were based. Further a request was made for reasons for not departing from the general policy in relation to reasons in the light of the DPP's obligations as a public authority under section 6 of the Human Rights Act 1998. The applicant's letter then proceeded to set out a number of considerations in relation to the applicant's submission that there should be prosecutions in respect of the incidents and further to set out considerations in relation to the inadequacy of the police investigation. It was contended that there had been no effective official investigation for the purposes of Article 3 of the European Convention and that the DPP ought to exercise the powers under section 6(3) of the Prosecutions of Offences (NI) Order 1972 to request the Chief Constable to conduct further investigations.

The DPP's further reply of 3 October 2002.

[13] By its reply of 3 October 2002 the DPP adhered to the views and conclusions set forth in the letter of 17 May 2002. In relation to Article 3 of the European Convention and section 6 of the Human Rights Act it was stated that on further reflection and having considered Counsel's advice it was not considered that either the 1998 Act or Article 3 of the Convention was of application. It was stated that it was not proposed to issue any directions to the Chief Constable under Article 6(3) of the Prosecutions of Offences (NI) Order 1972.

The Grounds for Judicial Review.

[14] The above correspondence provides the framework for this application for judicial review. The applicant challenges five decisions of the DPP –

> (i) the decision that the applicant's rights under Article 3 of the European Convention were not engaged and that the DPP had no obligations under the Human Rights Act 1998;

(ii) the refusal of the DPP to provide the applicant with full and detailed reasons for the decision not to prosecute any person in respect of the assaults on the applicant;

(iii) the decision of the DPP to refuse to provide to the applicant disclosure of the material upon which the DPP decided not to prosecute;

(iv) the decision of the DPP not to prosecute any of the alleged assailants;

(v) the failure of the DPP to exercise the statutory powers under section 6(3) of the Prosecution of Offences (NI) 1972 to direct the Chief Constable to conduct further investigations in the incidents.

The respondent's affidavit.

[15] The replying affidavit of William Alexander Ronald McCary of the DPP adds further details to the processing of the police prosecution files. The police investigation file in respect of the incident of 1 September 1999 was received by the department on 21 January 2000; on 27 January 2000 an interim direction was issued to the Chief Constable seeking further information and raising certain queries; on 16 February 2000 additional police papers were received; on 22 February 2000 a further interim direction was issued and additional police papers in response were received on 28 February 2000; on 21 March 2000 a further interim direction was issued and additional information received; on 14 February 2000 a decision was made that there was insufficient evidence to prosecute. In respect of the incident of 31 August 1999 a police investigation file was received by the department on 5 April 2000 and on 14 April 2000 a decision was made not to prosecute. Further to the applicant's solicitor's letter of 3 September 2001 a review of the decisions not to prosecute was undertaken by staff at a senior level. Further to the applicant's solicitor's letter of 2 July 2002 the DPP decided to obtain an opinion from Senior Counsel and this was received on 25 September 2002.

Racism.

[16] The applicant emphasised the allegations of a racist element directed against the applicant in the course of the events of 31 August and 1 September 1999 and in the conduct of the police investigation and in the exercise of the respondent's powers. The applicant referred to a number of Reports that had been issued in England in relation to the investigation of racist incidents in support of the contention that there had been inadequacies in the investigation of the events involving the applicant. The report of the Stephen Lawrence Inquiry of February 1999 defined a racist incident as "any incident which is perceived to be racism by the victim or any other person" (recommendation 12).

In relation to the prosecution of racist crime it was recommended that the Crown Prosecution Service should consider that in deciding whether a criminal prosecution should proceed, once the Crown Prosecution evidential test was satisfied, there should be a rebuttable presumption that the public interest test should be in favour of prosecution (recommendation 33); that police and Crown Prosecution Service should ensure that particular care is taken at all stages of prosecution to recognise and include reference to any evidence of racial motivation (recommendation 34); that the Crown Prosecution Service ensure that a victim or victim's family should be consulted and kept informed as to any proposal to discontinue proceedings (para 35); that the Crown Prosecution Service should have a positive duty always to notify the victim and victim's family personally of any decision to discontinue (recommendation 36); that the Crown Prosecution Service ensure that all decisions to discontinue any prosecution should be carefully and fully recorded in writing and that save in exceptional circumstances such written decisions should be disclosable (recommendation 37).

[17] The Association of Chief Police Officers has produced a "Hate Crime Manual" in which the example issued by Leicestershire Constabulary was dated April 2002, revised March 2003. In section 6 under the heading "Effective Investigation" particular reference is made to victims of hate crime often requiring and deserving an enhanced response, this being proportionate treatment as being the victim of a hate attack is a unique and frightening experience (para 6.3); the primary aim of the process of investigation is to investigate, identify and prosecute perpetrators to the satisfaction of the victim and community (para 6.10); responsibilities of investigating officers include evaluation why a prosecution is not viable and may include consultation with other agencies such as the Crown Prosecution Service and full details of the decision making process and of those involved must be recorded on crime reports/prosecution files (para 6.13).

[18] The Home Office Code of Practice published in May 2000 was a response to recommendation 15 of the Stephen Lawrence Inquiry that codes of practice be established to create a comprehensive system of reporting and recording of all racist incidents and crimes. Paragraph 5.18 of the Code of Practice states that in response to recommendation 35 of the Stephen Lawrence Inquiry Report the Crown Prosecution Service has taken on the responsibility of explaining to victims the reasons for dropping or downgrading charges and have set up pilot projects in several areas to establish effective ways of doing so and to identify the resources required to introduce a nationwide scheme with the aim of having such a system in place by April 2001.

[19] The Home Office publishes annual reports on the implementation of the action plan for the recommendations of the Stephen Lawrence Inquiry Report. The third annual report on progress dated June 2002 includes under the heading "Victims, Witnesses and Legal Proceedings" stated that responsibility for

informing victims and their families of discontinuance decisions has passed from the police to the Crown Prosecution Service and that new procedures in which more detailed information is given direct to victims on the reasons for Crown Prosecution Service decisions to drop or substantially alter charges are being introduced throughout the Crown Prosecution Service with implementation to be completed by October 2002. Further it is stated that the Crown Prosecution Service also aims to improve its developing service to victims while at the same time introducing new procedures for providing information to all witnesses and the Crown Prosecution Service hope to pilot those new procedures in 2003-2004 with the aim of introducing them nationally in 2004-2006.

[20] The respondent contends, and it has not been contested by the applicant, that the supporting documents introduced by the applicant and referred to above apply to police forces and to the Crown Prosecution Service in England and further that the implementation documents were issued after the events giving rise to the present application. There were no equivalent materials furnished in the present case applicable to investigations and prosecutions in Northern Ireland arising out of events occurring in 1999. The Court does not under-estimate the significance of activity that is perceived to be racial crime or a racist incident. To the extent that the police investigation might have been deficient in any respect there are complaints procedures that might be under-taken. The applicant has issued legal proceedings in the County Court against the Chief Constable and named police officers seeking damages and a declaration that the actions of the police in relation to the applicant contravened the Race Relations (Northern Ireland) Order 1997. Accordingly there are appropriate remedies available to the applicant against the police. However the present application is not a judicial review of the decisions of police but of the decisions of the DPP.

(1) Article 3 of the European Convention.

[21] The applicant contends that Article 3 of the European Convention is engaged and that there is an obligation on the State to provide an effective official investigation. Article 3 of the European Convention provides -

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 3 imposes on the State a substantive obligation not to subject anyone to torture or inhuman or degrading treatment and also imposes a procedural obligation to secure an official independent investigation of credible allegations of torture or inhuman or degrading treatment.

[22] The respondent contends that as the events in question occurred in August and September 1999, before the introduction of the Human Rights Act

1998 on the 2 October 2000, Article 3 of the European Convention is not engaged as the 1998 Act does not have retrospective effect. In *Re McKerr* [2004] 2 All ER 409 the House of Lords held that the procedural requirement for an effective, official investigation in relation to the right to life under Article 2 of the European Convention did not create an obligation to hold an investigation into a death occurring before the Human Rights Act 1998 came into force on 2 October 2000. Lord Nicholls stated that section 6 of the 1998 Act created a new cause of action by rendering certain conduct by public authorities unlawful. In the case of an unlawful killing, section 6 applies if the killing occurred after the Act came into force and does not apply if the incident took place before 2 October 2000. The obligation to hold an investigation is triggered by the occurrence of the violent death – it is consequential upon the death. For section 6 to create an obligation to hold an investigation, the death which is the subject of the 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 the 1998 Act (para. 22).

Lord Hoffman stated that the 1998 Act had created domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a State and their meaning and application is a matter for domestic courts, not the court in Strasbourg (para. 65). At paragraph 69 he continued –

> "Your Lordships' House have decided on a number of occasions that the Act was not retrospective. So the primary right to life conferred by art 2 had no application to the person who died before the Act came into force. His killing may have been a crime, a tort, a breach of international law but it could not have been a breach of s 6 of the Act. Why then should the ancillary right to an investigation of the death apply to a person who died before the Act came into force? In my opinion it does not. Otherwise there can in principle be no limit to the time one would have to go back into history and carry out investigations."

[23] I accept the respondent's contention that the same approach must apply to Article 3. The acts of the alleged assailants occurred in 1999 before the 1998 Act came into effect on 2 October 2000. As the obligation to carry out an effective, official investigation is consequential upon the alleged events that require investigation, there can be no such obligation in relation to events occurring prior to 2 October 2000 and hence no such obligation arising in the present case. In *Re McKerr* it was held that there was no obligation in respect of events occurring prior to 2 October 2000 and there could be no "continuing" duty giving rise to obligations after the Human Rights Act 1998 came into effect.

On the same basis I am satisfied that there is no basis for a continuing Article 3 obligation to complete an effective investigation in the present cases.

[24] The operation of Article 3 was considered by the European Court of Human Rights in *Libita v Italy* [6 April 2000]. The applicant alleged inhuman and degrading treatment during his detention in prison and further alleged inadequate investigation of his complaints. The ECHR found that there was insufficient evidence for it to conclude that the applicant had been subjected to inhuman and degrading treatment in breach of Article 3 but did find a lack of a through and effective investigation into the credible allegation made by the applicant that he had been ill-treated in detention and accordingly held that there had been a violation of Article 3.

[25] The substantive requirements of Article 3 were reviewed by the ECHR at paras 120-121. Ill-treatment must maintain a minimum level of severity if it is to fall within the scope of Article 3; the assessment of this minimum is relative as it depends on all the circumstances of the case such as the duration of the treatment, its physical and mental effects and in some cases the sex, age and state of health of the victim; treatment has been held to be "inhuman" because inter alia it was pre-medicated, was applied for hours at a stretch and caused either injury or intense physical and mental suffering; and also "degrading" because it was such as to arouse in its victim feelings of fear, anguish and inferiority capable of humiliating and debating them; allegations of ill-treatment must be supported by appropriate evidence; to assess the evidence the court adopts the standard of proof beyond reasonable doubt but such proof may follow from the co-existence of sufficiently strong, clear and concordat inferences or of similar unrebutted presumptions of fact.

[26] The ECHR considered the procedural requirements of Article 3. Where an individual makes a "credible assertion" that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the State there should be an effective, official investigation; as with an investigation under Article 2 such investigation should be capable of leading to the identification and punishment of those responsible; otherwise the general legal prohibition of torture and inhuman and degrading treatment and punishment would be ineffective in practice (para. 131).

[27] The applicant contends that the police investigation itself amounted to inhuman and degrading treatment. Reliance is placed on allegations of racial discrimination in the conduct of the investigation and on the submission that racial discrimination is a ground for finding degrading treatment constituting a substantive breach of Article 3. *East African Asians case* [1973] 3 ECHR 76 and *Abdulaziz Cabalas and Bilcandili v UK* [1985] 78 RR 471 are cited in support of that approach. Assuming for the purposes of the applicant's argument that the police conduct amounted to inhuman and degrading treatment, the police investigations were undertaken in 1999 and 2000 and the police prosecution files

submitted to the DPP and directions issued in each case prior to the commencement of the 1998 Act. Article 3 remains inapplicable in the present case.

[28] In *Re Jordan's Application* [2004] NICA 29 the Court of Appeal, in dealing with a death that had occurred before 2 October 2000, held that the effect of *Re McKerr* did not alter the statutory requirement under Section 3 of the 1998 Act to read legislation in a way that is compatible with Convention rights and obligations, in so far as that is possible, so as to provide a Convention compliant interpretation of legislation governing the conduct of inquests. Such an approach will apply to inquests to be held in respect of deaths occurring before 2 October 2000. However I do not find that the approach of the Court of Appeal in *Re Jordan's Application* alters the conclusion reached above in relation to the operation of the procedural requirements of Article 3 of the Convention in relation to acts occurring prior to the commencement of the 1998 Act.

[29] In *Menson v United Kingdom* (6 May 2003) The ECHR emphasised the particular importance of an investigation in relation to racially motivated attacks. The victim had died as a result of a racially motivated attack. The applicants complained of a breach of the positive obligation under the Article 2 right to life to ensure the conduct of an effective independent investigation. Complaints about the police investigation included the failure to treat the incident as racially motivated crime and the presence of racism within the police. In relation to procedural requirements the ECHR stated (paragraph 1) that –

> "…where that attack is racially motivated, it is particularly important that the investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence."

However the ECHR did not examine the complaints in the context of Article 2 and the circumstances of the case because of three considerations. The State's legal system demonstrated the capacity to enforce criminal law regardless of race, the domestic investigation of the complaints against the police was awaited and the alleged discriminatory approach of the investigation fell to be examined, if at all, under the Article 6 right to a fair trial. On proceeding to consider the matter under Article 6 the ECHR accepted that the domestic legal system provided access to the courts for determination of the complaint and there was no breach of Article 6.

[30] The present case might be considered in the light of the three considerations. The circumstances of the present case do not indicate that the

legal system is incapable of enforcing the criminal law regardless of race. The contest concerns the absence of prosecution in this particular case and it has not been advanced that criminal law system does not have the capacity to enforce the criminal law regardless of race. This application addresses the decision making of the DPP in relation to the absence of prosecution. If there had been a decision to prosecute there is nothing to indicate that such decision would not have been implemented regardless of race. In relation to the investigation of complaints against the police there is in place a system for investigation open to the applicant. In relation to Article 6 the applicant has access to the courts for the determination of legal proceedings in connection with the events in question. Whether by reference to Article 3 or otherwise there are mechanisms applicable to any obligation to complete an effective investigation of the events involving the applicant and to the scrutiny of that investigation.

(2) Reasons for a direction of no prosecution.

[32] The response to the applicant's request for reasons for the decisions not to prosecute any persons in respect of the incidents in question was to state that it had been concluded that there was insufficient evidence to provide a reasonable prospect of obtaining a conviction of any of the persons concerned in respect of any criminal offence arising out of the offences in question. The general practice of the DPP in relation to the giving of reasons has been stated to be that reasons will not be given but upon a request for reasons in any case there will be a review of the position. In the present case the respondent's affidavit sets out that general policy in the terms that appear in *Re Adams Application* [2001] NI 1 at pp10-11. In that case the Court of Appeal held that the DPP, in making a decision that there should not be a prosecution, was not subject to the rules of procedural fairness because he was not in an adjudicating role between two parties since his function was to decide in the public interest whether a prosecution should be brought and he was under no duty to give reasons. Further it was held that decisions made prior to the commencement of the 1998 cannot be regarded as continuing acts so as to allow an applicant to rely on Convention Articles.

[33] Further to the decision of the ECHR in *Jordan v United Kingdom* [2001] 11 ECHR 1 there was a review of the existing policy and a change was implemented. The Attorney General gave an written answer in the House of Lords on 1 March 2002 and stated that having reviewed the policy on the giving of reasons –

> "…..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 were death is, or may have been, occasioned by the conduct of agents of the State.

> Subject to compelling grounds for not giving reasons, including his duties under the Human Rights Act 1998, the Director accepts that in such cases it will be in the public interest to reassure a concerned public, including the families of victims, that the rule of law has been respected by the provision of a reasonably explanation. The Director will reach his decision as to the provision of reasons, and their extent, having weighed the applicability of public interest considerations material to the particular facts and circumstances of each individual case."

[34] The change was limited to the extent set out in the Attorney General's statement and applied to certain cases where death was or may have been occasioned by the conduct of agents of the State. In *Re Jordan's Application* [2004] NI 198 the DPP had issued a direction of no prosecution in 1993. After the decision of the ECHR a further request was made to the DPP for reasons for the direction of no prosecution. The applicant then challenged the refusal to give reasons. The Court of Appeal held that there was no continuing obligation to review the decisions made before the 1998 Act.

[35] Requests for reasons were made in the present case and it appears from the respondent's affidavit that a review was undertaken in the light of the various requests, representation and contentions advanced in the correspondence received from the applicant's solicitors. Counsel's opinion was sought and obtained. The respondent considered that there should be no prosecutions and further considered that to provide the detailed reasoning sought by the applicant's solicitors would have necessarily involved a detailed analysis of and commentary upon the information and evidence upon which the decision was based. It was concluded that this would have the undesirable consequences that the respondent sought to avoid in adopting its general policy. Accordingly it was concluded that it would not be appropriate to depart from the general practice.

[36] The applicant contends that the amended policy reflects the procedural requirements of Article 2 and that there should be a similar amendment in order to meet the procedural requirements of Article 3. Accordingly the applicant contends that the present case demands the giving of reasons and further that the respondent should identify the criteria it applies to determine whether to make an exception to general policy and to furnish reasons. Even assuming that the extension of the provisions in relation to the giving of reasons in respect of Article 2 cases might be applied to Article 3 cases, I have found that Article 3 is not applicable as events precede the coming into effect of the 1998 Act.

[37] As to the present case being one where reasons ought to be given the applicant advances a number of considerations that it is contended ought to lead

the DPP to depart from the general policy and furnish reasons. They include the fact that the case raises the issue of inhuman and degrading treatment; the alleged failures in the police investigation; the alleged racist conduct; the findings of the trial Judge; the acquittal of the applicant. These considerations have been known to the DPP but have been found not to amount to grounds for making an exception to the general policy. There are no judicial review grounds for interfering with that conclusion.

[38] As to the explanation for not giving reasons in a particular case, the Court of Appeal held in *Re Adams Application* that the respondent was not under an obligation at common law to give reasons in any case. Similarly I would hold that the respondent is under no obligation to explain the criteria by which it is decided not to give reasons in particular cases or to explain a decision not to give reasons in a particular case, at least in circumstances where it is established that decisions were made in accordance with the considerations that ground the general policy. As the respondent has averred in the present case that an explanation for the absence of reasons would undermine the considerations that ground the general policy I am satisfied that the respondent is not obliged to set out any additional criteria or to furnish reasons in this case.

(3) Disclosure of prosecution material.

[39] The applicant claims disclosure of the materials upon which the respondent made its decisions. In *Re Adams Application* the Court of Appeal considered whether a proper and effective investigation for the purposes of Article 3 of the European Convention required a victim to have access to the investigation file. It was held that the decisions of the ECHR do not lay down any ruling that for an investigation to be regarded as effective the claimant must have access to the investigation papers; that is merely one element among others with may demonstrate the inadequacy of an investigation; in any event the ECHR may have had in mind inspection of a document of the nature of the examining magistrates file in an inquisitorial system and that quite different considerations might apply to the investigation files of the police and prosecutor under our criminal law system.

[39] In considering the issue of access to the investigation file in *Re A's Application* [2001] NI 335, in relation to an effective investigation for the purposes of Article 2 of the European Convention, Kerr J accepted the respondent's argument that the Strasbourg jurisprudence does not recognise a free standing right to access to the investigation file. He referred to the United Nations Guidelines on the Role of Prosecutors and stated that there is an obvious public interest in keeping some aspects of a criminal investigation confidential. This international standard was said to be reflected in the domestic law of the United Kingdom as stated in *Taylor and Others v the Serious Fraud Office* [1999] 2 AC 177. Kerr J's conclusion (at page 350d) stated that unless it could be demonstrated

that there were "compelling reasons for disclosing the contents of a police investigation file, its vital confidentiality should be preserved."

[40] Counsel for the applicant states that the request for disclosure had three primary objectives. First, access to the report of the investigation officer was sought in order to determine the impact on the respondent's decisions of the alleged racism of the police in investigating the events and the concerns raised by the applicant about the conduct of the police investigation. Second, disclosure was required to determine whether the respondent's decision maker had access to all the materials to which the applicant had access. Third, disclosure was required to determine whether the respondent's decision maker had access to additional material to which the applicant had not had access.

[41] The applicant brought his concerns to the respondent and itemised the matters on which he relied. The critique of the police investigation was raised in the criminal proceedings against the applicant. In the post acquittal correspondence with the respondent the applicant's concerns were set out and the skeleton arguments in the criminal proceedings were attached to the correspondence. The respondent's reply indicated that careful consideration had been given to the various representations made and factors highlighted in the applicant's solicitor's correspondence. I am not satisfied that there is any compelling reason in the present case why the applicant should have access to the investigation file.

[42] The applicant makes particular reference to alleged racism in the investigation of these events. The applicant's solicitor's correspondence makes clear that there are allegations of racism and the respondent has stated that account was taken of those allegations in reviewing the decision to prosecute. Further the applicant's solicitor also places particular reliance on a 999 call relating to the incident in Marlborough Street on 1 September 1999 and to the contents of the statement to police made by the caller. Again it is stated that this matter was taken into account by the respondent in carrying out the review of the decision not to prosecute. These particular matters considered individually or with all other considerations do not amount to a compelling reason for the applicant to have access to the investigation file.

(4) The decision not to prosecute.

[43] The applicant contends that the respondent ought to have directed prosecution of the alleged assailants. In *Re Adam's Application* the Court of Appeal stated that the Court does have power in appropriate cases to review the decisions of the DPP "though the power is one to be sparingly exercised" (page 12c). The grounds for intervention in respect of a decision not to prosecute involve unlawful policy; failing to act in accordance with settled policy; where the decision was perverse; improper motive and bad faith (page 12d-f).

[44] The applicant refers to the applicant's complaints of threats and assaults on 31 August 1999 and 1 September 1999; a complaint made by assailants to the police about the applicant's marriage to their sister; the contents of the 999 call to the police on 1 September 1999; the injuries to the applicant observed by police on 1 September 1999; the relationships between the two groups of assailants and their relationship with the applicant's wife and their grievance against the applicant; the attendance of Sean Young at the hospital where the applicant was being treated on 1 September 1999. I accept the respondent's argument that the applicant is directing attention to the merits of the decisions not to prosecute rather than public law grounds for judicial review of a DPP decision not to prosecute. The judgment has been made that there is an insufficient evidential basis for prosecution and it is a judgment with which the applicant disagrees. It has not been established that there was any unlawful policy or failure to act in accordance with settled policy or irrationality or failure to take account of relevant considerations or regard for irrelevant considerations or any improper motive or bad faith.

(5) DPP direction to the Chief Constable.

[45] The applicant contends that the respondent failed to issue a direction under section 6(3) of the Prosecution of Offences (NI) Order 1972 acquiring the Chief Constable to undertake further investigations. By the letter of 2 July 2002 the applicant's solicitors requested the respondent to exercise its statutory powers under section 6(3) of the 1972 Order. By its reply of 3 October 2002 the respondent stated that having considered the matter it was not proposed to issue any direction to the Chief Constable under section 6(3) of the 1972 Order. It has not been established that there was any legal error in the respondent's decision.

[46] For the reasons set about above I have not been satisfied on any of the grounds relied on by the applicant. The application for Judicial Review is dismissed.