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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION BY CONGETTA OSBOURNE FOR JUDICIAL REVIEW

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Before: Deeny LJ and Burgess J

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DEENY LJ (delivering the judgment of the court)

[1] This is an application for leave to bring judicial review proceedings by Congetta Osbourne as mother and next friend of Catherine Osbourne, a minor. We have had the benefit of written arguments from Mr David Heraghty for the applicant and from Professor Gordon Anthony for the respondent. We have also had this morning the benefit of quite lengthy oral submissions from Mr Heraghty on behalf of the applicant.

[2] Mr Heraghty put the matter forward in his written argument as (1) dealing with an issue of delay to which he had been directed by the previous panel reviewing this matter, and (2) on the merits of the argument. In his oral submissions he sought to expand that somewhat by arguing that there was a breach of policy on the part of the officer of the Public Prosecution Service (PPS) who made the decision and I will turn to that in a moment.

[3] The applicant herself, the minor, was born 10 November 2000 and she was 12 at the time that she had an accident when she was knocked down on a zebra crossing by a driver. The complaint of the applicant and her mother is that following this accident on 5 March 2013 a decision was made not to prosecute the driver for careless driving or indeed anything else. There was correspondence with the PPS querying the failure to prosecute, but a formal decision was given by the Prosecution Service in 2015 declining to prosecute. The applicant and her mother were not satisfied with this or certainly not the mother and there was further correspondence with the PPS culminating in further letters from the PPS on 23 October 2017 and 10 November 2017. In that last letter in particular a decision was confirmed not to prosecute the driver for knocking down this 12 year old girl on 5 March 2013.

[4] As indicated the first issue that the court has to consider is one of delay. That is because even if one grants to the applicant and her advisors an extension to 16 November for receipt of the decision of the PPS as they say was the case, they should have issued the proceedings within three months of that date and did not do so; that is three months in accordance with the Order 53 statement. In the past there would have been the more amorphous requirement of promptitude, but as Mr Heraghty points out that is not a hurdle that he now has to get over. As indicated the previous court directed that affidavit evidence be addressed to that and we have seen that and we have seen the references to it in the arguments of counsel.

[5] I will briefly summarise it on the basis that following the decision the applicant's solicitors wrote a pre-action letter of 28 November which was not responded to within the policy timeframe of 14 days, but apparently only reached the applicant and her family later in December and so that caused a delay in responding to it. There was no delay on the part of counsel who when consulted over the Christmas period wrote an opinion of the merits which was apparently made available on 4 January. Unfortunately there was then delay and the reasons for this are summarised as including confusion as to whether the applicant should be the child or her mother and next friend as Catherine had "recently turned 17". We are a little puzzled as obviously 18 is the age of maturity in this jurisdiction and the law is quite clear that someone remains a minor or "a child" even at 17, but apparently that caused some hesitation. Secondly, it is said that there were delays in securing Catherine's attendance to sign the legal aid application due to school exam pressures. Thirdly, there was further delay occasioned by the applicant and her family travelling to England to attend the funeral of a relative which was said to be in late January or early February. Fourthly, there was further delay due to the fact that Catherine could not provide a national insurance number. That was all for a legal aid application. The legal aid application was only submitted on 7 February.

[6] Now, while those are reasons for delay, the issue the court has to ask itself is whether they excuse the delay. The applicant's position is weakened, it seems to us, by the fact that the application for legal aid could have been prepared in November or December rather than being left to the later period. As I have said at the opening of these remarks the PPS had twice considered this matter at length and had stuck by its earlier decision in its latter letter of 10 November 2017. It was hardly likely therefore that the Walls of Jericho were going to tumble down at the trumpet of the pre-action letter. It is hard to see why these steps, if they were necessary, were not taken at that time. In any event an application was issued on 7 February for legal aid. The legal aid authorities responded with commendable expedition refusing it on 12 February. An appeal was then lodged which was granted on 26 February in principle and the certificate on 1 March and the proceedings were then lodged on 12 March which it can be seen was, depending on your point of view as to receipt of the original letter, some 3 or 4 weeks out of time.

[7] We have to consider Order 53, Rule 4(1) which states that the application be made "within 3 months from the date when the grounds for the application first arose unless the court considers there is good reason for extending the period within which the application shall be made". These cases are fact specific. The court almost invariably as here looks at the merits of the argument to which I will turn in a moment, but this is a case in which we are minded not to grant an extension of time because we do not think the reasons for the delay in applying for legal aid and then lodging the application are "good reasons" or reasons which "excuse" the delay. But we have to look at the merits and we do certainly do that nevertheless because as can be seen from the authorities that often weigh heavily in favour of an applicant in this situation.

[8] We are conscious of the test that is applied in leave proceedings, namely, that set out in the Northern Ireland Court of Appeal decision of *Omagh District Council and the Minister for Health, Social Service and Public Safety* [2004] NICA 10 at paragraph [5]:

> "The court will refuse permission to claim judicial review unless satisfied there is an arguable ground for judicial review on which there is a realistic prospect of success."

[9] So to decide whether there is a realistic prospect of success here we have to consider further the legal background against which a court will intervene in a decision by a prosecuting authority not to prosecute someone. There is a helpful summary of the relevant law in the decision of Lord Justice Gillen sitting in a three judge Divisional Court in the case of *X's Application* [2015] NIQB 52. That was a case, again, of a minor, aged 14. It was a different case from this because it involved an allegation, a serious allegation of sexual abuse. His Lordship summarised the authorities at paragraphs [30] and [31] of the judgment, which I will quote:

> "[30] Where the function of a public body concerns decisions about commencing or permitting legal proceedings, grounds for judicial review are applicable in a restricted way. There is now a well trammelled line of authority to this effect in the context of PPS decisions to prosecute or not to prosecute, the most recent authority in Northern Ireland being *Re Christopher Mooney's Application* [2014] NICA 48 which reviewed all of the salient case law."

And as it happens *Mooney* was not included in the papers for this hearing. His Lordship went on at [31]:

> "[31] Hence for the purposes of the instant case, the relevant principles can be stated as follows:
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> (1) Absent dishonesty or mala fides or in highly exceptional circumstance, the decision of the PPS to consent to prosecution is not amenable to judicial review: see *R v DPP ex p Kebilene* [2000] 2 AC 326 at 369H-371G: and *Corner House Research and Others* [2008] UKHL 60.
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> (2) A decision not to prosecute is reviewable but will be interfered with sparingly, namely for unlawful policy, failure to act in accordance with an established policy or perversity: see *R v DPP ex p C* [1995]1 Cr. App. R. 136.
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> (3) The threshold for the review of decisions not to prosecute may be somewhat lower than that set for decisions to prosecute because judicial review is the only means by which the citizen can seek redress against the decision not to prosecute: see *McCabe* [2010] NIQB 58 at [19-21] and see *Ex parte Manning* [2001] QB 330 at para.[23].
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> (4) Essentially there are three reasons for these principles. First, because the power in question is extended to the officer identified and to no one else. Secondly, the polycentric character of official decision-making and public interest considerations are not susceptible to judicial review because it is within neither the constitutional function nor practical competence of the courts to assess their merits. Thirdly, the powers are conferred in very broad and unprescriptive terms (see *Mooney's* case at paragraph [31])."

And in that case their Lordships went on to decline to grant leave. We note also the decision in *Mohan's Application* [2008] NIQB 106 of Mr Justice Morgan, as he then was, to like effect. That was a motoring case and again he refused leave.

[10] As it was drawn to our attention we briefly mention the case and decision of a Divisional Court in England per Lord Bingham of Cornhill: *The Queen v DPP ex parte Manning* [2001] QB 330. It is unusual as one of the few decisions in which the court

has intervened in a case where the DPP decided not to prosecute. But as always it is important to see the particular facts of the case. {*Mr Manning was "a man of Afro-Caribbean origin" who died of asphyxia while being restrained by two prison officers in prison.*} At paragraph [41] we note that Lord Bingham on behalf of the court said this:

> "We accord great weight to the judgment of experienced prosecutors on whether a jury is likely to convict and Mr Western's review note does not at all read as if composed to reach a predetermined conclusion. The note suggests that the author is seeking to review the case fairly and even-handedly and the final conclusion against prosecution comes as something of a surprise. In the end we are, however, satisfied that there are five points which Mr N as defendant would have to overcome if he were to defeat the prima facie case which in Mr Western's judgment lay against him and these were points which Mr Western did not address and resolve."

And the court goes on to list those five points. So there was clear and manifest error in the court's view on the part of the decision-maker. On that basis they went on to quash the decision. I observe that their decision, as they make clear, was not to order a prosecution; all they were prepared to do was to require the DPP to reconsider it. As the court said elsewhere in its judgment this was a power which the court "would exercise sparingly," albeit as Mr Heraghty said, the bar should not be set too high.

[11] So against that background therefore and in particular the decisions in the courts in this jurisdiction to which I averted we have to consider whether this is one of those exceptional cases where there has been a breach of policy or perversity or if you like irrationality to justify this application.

[12] Mr Heraghty, no doubt mindful of the high hurdle to surmount to find irrationality, sought in his oral arguments, though it was not highlighted in his written argument, to argue that there was a breach of policy. We are not persuaded in that regard. He referred to two possible breaches of policy on the part of the PPS. One was at paragraph 9.5, but 9.5 is really just a statement of good sense. It begins by saying it is important to put the facts of the case in context and it goes on to talk about driving behaviour and conditions and poor visibility. While we are mindful of the strictures Mr Heraghty has addressed to the consideration by the PPS officer it is entirely clear that the context was addressed here. I will return to that in a moment.

[13] The further complaint is that there was a breach of the policy at 21.3 thereof, but 21.3 merely quotes Article 51(6) of the Road Traffic (Northern Ireland) Order 1996 in saying "failure on the part of a person to observe a provision of the Highway Code shall not of itself render that person liable to criminal proceedings, but a failure particularly a serious one may constitute evidence of careless or dangerous driving". So if anything it seems to us that is against the applicant here as making it clear that a breach of the Highway Code does not automatically lead to prosecution or conviction. We do not see that this assists the applicant in this case.

[14] As I have said Mr Heraghty had various strictures on, in particular, the decision letter which he opened fully to us and which we have considered. But we also have to consider this. It is wrong to parse the decision recording letter of a public authority as if it were an act of Parliament. If judicial review courts were to adopt that approach they would effectively require decision-makers to write letters as if they were an act of Parliament. Acts of Parliament, of course, are subjected to the most careful and lengthy scrutiny, at least normally if not in times of emergency, and scrutiny from a wide range of lawyers and laymen. Subordinate statutory provisions similarly are subject to lengthy consultation and consideration. It is important to avoid paralysis in the public service that the courts do not quash decisions of decision-makers because a sentence in a paragraph might have been expressed better or differently or, as in Mr Heraghty's submissions, a phrase within a longer sentence and so we caution against that.

[15] We are driven by his submissions to look at the merits of the argument and we have done so both in the written papers and in the oral submissions, but we are mindful of Professor Anthony's written submission that in doing so we are to a degree stepping beyond the role of the court which is only to look at questions of the sort identified by the Divisional Court in *X*. But just in case this case could constitute irrationality we have carefully considered it. Out of caution we state that it is our role merely to review for these purposes. It may be that if the court or other lawyers considering this in the way that the Director of Public Prosecutions was, considering it on the advice of his subordinate, a different view might have been taken; that is possibly so. That is particularly so in the light of Mr Heraghty's principal submission that this 12 year old girl was struck on a zebra crossing and that the driver admitted that he did not see her until he struck her. So, as Mr Heraghty says, it would appear to be a failure to keep a proper lookout and happily that has led to success for this young lady in her civil action against the defendant which we are told has now been settled. That is something to be noted as a satisfactory outcome for her.

[16] But against that point the PPS had to take into account that, as Mr Heraghty acknowledges, this is not a speeding case. This driver stopped within a couple of feet of the edge of the zebra crossing, within 23 feet of the beacon at the end of the zebra crossing on his side of the zebra crossing. So there is no question on the objective evidence of speeding, although the driver approaching from the other

direction thought he was going 'quite fast.' But that opinion, as those familiar with personal injury cases and road traffic accidents are aware, is of little value in an attempt to estimate the speed of another car i.e. a layperson in an opposite direction. In any event that witness is very much a double edged sword for the applicant because she says, contrary to the case made by the young lady, as she now is, the applicant, she says that the girl ran out from the side of the road, albeit the driver's right hand side of the road. It was not a very wide road so she would only have had to cross 15 feet. So we are talking about a very short space of time in which the driver failed to observe her – literally a second at 10mph. Obviously if he had observed her it may or may not have had an effect on the outcome.

[17] So it seems to us that this was a case, without going into all the details of it, which was carefully considered by the PPS as they are obliged to do and the decision is comfortably within their margin of appreciation. Somebody else may well have taken another view and we appreciate that. But that is not for this court to determine; we are not to substitute one view for the other. We have to decide whether this was an unlawful decision on the part of the PPS and it appears to us not to be an unlawful decision. If we were in any doubt about these two matters, both of delay or the alleged irrationality of the decision, we would put on the scales the argument advanced in his able skeleton argument by Professor Anthony, that we should be careful not to open the floodgates to a series of challenges in road traffic cases to the decisions of the PPS. The floodgates argument is one that has waxed and waned in popularity over the years, but it is one that the court is entitled and obliged to take into account and we have to bear in mind that these decisions are decisions requiring a balanced approach on behalf of this public authority, like other public authorities and as the House of Lords said in the *Corner House* case it is not one where we should lightly interfere with the wide discretion given to the prosecutor partly, this court says, because it may lead to a wholly unwelcome growth in cases of little true merit.

[18] So we do not consider this as a case where delay can be excused and time extended and we do not consider there is an arguable case with a reasonable prospect of success and we therefore refuse leave.