Neutral Citation No. [2016] NIQB 6

Ref:	**WEA9831**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**13/01/2016**

IN THE HIGH COURT OF JUSTICE IN NORTHEN IRELAND

BEFORE A DIVISIONAL COURT

Clarke's (Cormac) Application [2016] NIQB 6

AN APPLICATION BY CORMAC CLARKE
FOR JUDICIAL REVIEW

Morgan LCJ, Weatherup LJ and Weir LJ

WEATHERUP LJ (delivering the judgment of the Court)

[1] This is a rolled-up hearing of an application for Judicial Review of decisions of the Director of Public Prosecutions to discontinue a prosecution. Mr Macdonald QC SC and Mr Heraghty appeared for the applicant, Mr McGleenan QC and Mr Kennedy for the Public Prosecution Service ("PPS"), the proposed respondent, and Mr McGuckin for Caoimhin Morgan, the notice party.

[2] On 31 December 2014 an altercation occurred between the applicant and Mr Morgan as a result of which the applicant sustained injuries that involved him being detained overnight in hospital. The applicant made a complaint to police. Mr Morgan was interviewed by police. At his first PACE interview he made no comment. He was granted police bail and returned for interview, at which time he claimed that he had acted in self-defence. He was charged with assault occasioning actual bodily harm. The PPS directed a prosecution of Mr Morgan. He elected for trial by jury. The case was listed at Dungannon Magistrates' Court on 17 September 2014 to fix a date for a preliminary inquiry.

Decision of 17 September 2014

[3] On 30 July 2014 the applicant's solicitor had written to the PPS requesting information about the case against Mr Morgan. The PPS responded to the applicant's solicitor's letter on 17 September 2014. Eilis McGrath, Regional Prosecutor of the Southern/Western region, stated that further to the defendant's

election for trial in the Crown Court the case had been reviewed by the PPS under the Code for Prosecutors and it was stated:

> "I have reviewed all of the evidence and information on file and have concluded that this decision is outside the range of decisions that a reasonable Prosecutor would take in the circumstances. I have decided that there is no reasonable prospect of conviction and that the likelihood is that if this case was tried then Mr Morgan would be acquitted. That being so I have decided that the prosecution of Mr Morgan should be withdrawn.
>
> No doubt this decision will be disappointing to you. I note in particular that there is no CCTV evidence and no independent witnesses. I further note that the Defendant has raised the issue of self-defence."

[4] The applicant's solicitor requested a formal review of the decision and Ms McGrath for the DPP responded on 10 November 2014. The letter explained that the file had been reviewed by a Senior Public Prosecutor in accordance with practice upon the defendant electing for trial by jury. The Senior Prosecutor had referred the matter to Ms McGrath and she in turn took further advice from independent Counsel. Ms McGrath explained why she considered the prosecution was unsustainable –

> "…. the Defendant admitted striking Mr Clarke, but claimed to have been acting in self-defence, averring a pre-emptive strike. Once this defence had been raised, it fell to the prosecution to disprove it to the criminal standard. Given that there were no other witnesses to the altercation and no CCTV and in absence of any other relevant evidence, I considered that there was insufficient evidence to provide a reasonable prospect of conviction.
>
> No consultation was held with Mr Clarke during the review process as his evidence was already available in his statement. It was not usual practice for PPS to hold such consultations unless the prosecutor identified a specific reason."

[5] By affidavit Ms McGrath averred that she employed a practice whereby upon an election for trial by a defendant, the test for prosecution would be considered by a Senior Prosecutor. This was said to be part of the continuing duty of the prosecution to keep under consideration the test for prosecution in every case. The practice was said to contribute to the consistency and quality of decision making.

Decision of 14 May 2015

[6] On 23 December 2014 the applicant lodged this application for leave to apply for Judicial Review of the PPS decision to discontinue the prosecution. Thereafter the PPS undertook to review the decision. By letter of 14 May 2015 Aubrey Murray, Regional Prosecutor of the Northern Region, having consulted with the applicant on 5 March 2015, stated his conclusion that there was no reasonable prospect of the prosecution proving that Mr Morgan did not act in self-defence and accordingly concluded that the test for prosecution was not met. He stated that in reaching his conclusion he had the benefit of an opinion from independent prosecuting counsel who concurred with his view that there was no reasonable prospect of a conviction.

[7] Mr Murray set out the difficulties as he saw them in disproving the defence of self-defence as including the following –

(i) The absence of evidence from any independent witnesses.

(ii) The absence of any CCTV evidence despite further inquiries having been made in this regard.

(iii) The fact that there had been an earlier altercation between Mr Clarke and Caoimhin Morgan in which there was no clear evidence capable of establishing who had been the aggressor.

(iv) The fact that Caoimhin Morgan alleged that, when they again met outside the nightclub, Mr Clarke was asking for a fight; and that Mr Clarke, whilst suggesting a specific reason for doing so, admits suggesting that they fight "one on one".

(v) The fact that while Mr Clarke is alleging that he was attacked by four males, according to Constable Baker's statement, the nature of his complaint at the scene to Constable Baker was that he was attacked by a single male.

[8] By affidavit Mr Murray averred that the case was allocated to him by a Senior Assistant Director on 21 January 2015 and his role was stated to be to conduct a review under paragraph 4.11.3.1 of the Code for Prosecutors. He consulted with the applicant on 5 March 2015 because, as this had not been done as part of the process that led to Ms McGrath's decision, he felt that there may have been a failure to take into account a relevant consideration, namely the victim's views. In the circumstances he felt that there was a ground for reviewing the decision and moved on to consider the test for prosecution. By a second affidavit Mr Murray set out the material that he considered in conducting his review.

[9] Stephen Burnside, Assistant Director of Public Prosecutions, averred that the PPS has no formal policy of reviewing a decision to prosecute due to the fact that a defendant has elected for trial by jury. A prosecutor does however have a general duty to keep under consideration at all times the test for prosecution in every case. This it is said can be and is done at a time that a defendant has elected for trial when the necessary papers are being prepared for the Crown Court however it equally can be conducted at other times throughout the prosecution process.

Grounds for Judicial Review

[10] In light of the further PPS decision of 14 May 2015 the application was amended. The applicant's grounds as set out in the amended Order 53 Statement are as follows:

(a) The original decision to prosecute was made by an experienced public prosecutor and in accordance with the [Code for Prosecutors].

(b) No party to the prosecution requested a review of the aforementioned decision, this review having been instituted at the prosecutor's own motion.

(c) The aforementioned review was stimulated by a single event, the defendant's decision to elect for trial by jury.

(d) Moreover there is in existence a policy or practice of reviewing decisions to prosecute upon a defendant electing for trial by jury [referring to the first sentence of proposed respondent's letter of 10 November 2014].

(e) The decision of 10 November 2014 was based upon the fact that the applicant's evidence was not corroborated by any independent evidence. Insofar as this reflects a policy or practice of PPS not to prosecute except where such evidence is available, this policy or practice is manifestly perverse.

(f) The impugned decision is contrary to paragraphs 4.1, 4.2.2 and 4.11 of the Code.

(g) In any event, the respondent has breached the general provisions of the Code including paragraphs 2.2, 6.1.1 and 6.2.2.

(h) In failing to consult the applicant prior to the making of the first impugned decision the respondent has acted contrary to the policy as expressed at [paragraphs 3 and 4 of the Victims and Witnesses Policy].

(i) The first impugned decision results in a disproportionate interference with the applicant's right to respect for physical and psychological integrity as provided for by Article 8 of the European Convention on Human Rights ("ECHR").

(j) The first impugned decision breaches Articles 6 and 11 of [Directive 2012/29/EU].

(k) The first impugned decision breaches Articles 1, 3 and 7 of the [Charter of Fundamental Rights and Freedoms].

(l) The first impugned decision breaches Articles 2.3 and 4 of the [EC Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings].

(m) The second impugned decision of 14 May 2015 amounts to no more than a repetition of the unlawful first impugned decision and is therefore unlawful for precisely the same reasons.

(n) The further review and subsequent second impugned decision were stimulated solely by the issuing of these Judicial Review proceedings.

(o) The second impugned decision arises out of the same unlawful act, the first impugned decision, which was itself a review of a lawful decision to prosecute, which in turn resulted from the defendant's decision to elect for jury trial.

(p) The second impugned decision is based upon the same considerations as the first impugned decision.

(q) To the extent that the recent review was in any sense a lawful exercise, any discretion could only be lawfully exercised in favour of setting aside the first impugned decision.

(r) Overall, the Director has acted unreasonably in a manner that no reasonable Director would have acted.

PPS Policy Papers

[11] The applicant relied on two internal PPS documents, the Code for Prosecutors and the Victims and Witnesses Policy. The Code for Prosecutors (revised 2008) was issued pursuant to the statutory duty placed on the PPS by section 37 of the Justice (Northern Ireland) Act 2002.

Paragraph 2.2 states that the aim of the Prosecution Service as being to provide the people of Northern Ireland with an independent, fair and effective prosecution service.

Paragraph 4.1.1 states that prosecutions are initiated or continued by the Prosecution Service only where it is satisfied that the Test for Prosecution is met. The Test for Prosecution is met if:

> i. the evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and
>
> ii. prosecution is required in the public interest – the Public Interest Test.

Paragraph 4.2.2 states in relation to the Evidential Test (*with italics as in the text)* -

> A reasonable prospect of conviction exists if, in relation to an *identifiable individual*, there is *credible evidence* which the *prosecution can adduce* before a court upon which evidence *an impartial jury (or other tribunal)*, properly directed in accordance with the law, may reasonably be expected to find proved *beyond reasonable doubt the commission of a criminal offence* by the individual who is prosecuted.

Paragraph 4.11 states in relation to the review of prosecution decisions (*hereafter italics added*) -

> 1. People should be able to rely on decisions taken by the Prosecution Service. Normally, if the Prosecution Service tells a suspect or defendant that there will not be a prosecution, or that the prosecution has been stopped, that is the end of the matter and the case will not start again.
>
> 2. However, there may be reasons why the Prosecution Service will review a prosecution decision, for example, where new evidence or information becomes available or a specific request is made by a person, typically a victim, involved in the case. It is impossible to be prescriptive of the cases in which a review will be undertaken and a flexible approach is required.
>
> 3. Where a review is to be conducted the following approach is to be taken:
>
> > 1. *If no additional evidence or information is provided in or connected with the request to review the original decision*, the case

will be considered by a Public Prosecutor other than the Public Prosecutor who initially took the decision now under review.

That Public Prosecutor conducting this review will consider the evidence and information reported in the investigation file, together with the decision which has been reached. There are two potential outcomes of such a review:

i. If the Public Prosecutor who considers these materials concludes that *the decision was within the range of decisions that a reasonable prosecutor could take in the circumstances, then the decision stands* and the request for review dealt with on that basis.

As a general rule, a decision will fall within the range of decisions that a reasonable prosecutor could take if there has been:

- No error of law;
- No failure to take into account relevant considerations;
- No evidence of taking into account irrelevant factors; and
- No indication of bad faith or other improper motive.

ii. If the Public Prosecutor who considers these materials concludes that *the original decision was not within the range of decisions that could reasonably be taken in the circumstances, then that prosecutor will apply the Test for Prosecution and reach a fresh decision* in the case. This may require further enquiries being made by police in pursuance of section 35(5) of the Justice (Northern Ireland) Act 2002 or the obtaining and considering the advice of counsel or, in appropriate cases, arranging to consult with witnesses.

2. *If there is additional evidence and information provided in or connected with a request to review a decision as to prosecution,* the case will be reconsidered by the Public Prosecutor who initially took the decision now under review.

That Public Prosecutor conducting this review will consider the evidence and information reported in the original investigation file, the decision which was reached and the additional evidence and information provided. There are two potential outcomes of such a review.

i. The Public Prosecutor who considers these materials will apply the Test for Prosecution and reach a fresh decision

in the case. This may require further enquiries being made by police in pursuance of section 35(5) of the Justice (Northern Ireland) Act 2002 or the obtaining and considering the advice of counsel or, in appropriate cases, arranging to consult with witnesses.

ii If the Public Prosecutor applying the Test for Prosecution concludes that there is no sufficient basis for changing the original decision having regard to any new materials now available then the case will be referred to another Public Prosecutor who will conduct a review of the decision in accordance with paragraph 4.11.3.1.

Paragraph 6.1.1 in the section on victims and witnesses provides in relation to prosecution decisions -

> Although the evidence in respect of a particular criminal offence may be sufficient to provide a reasonable prospect of conviction, the Prosecution Service has also to decide whether prosecution is required in the public interest. In this regard, the proper interests of the victim or witness will be taken into account along with other relevant factors to determine whether or not prosecution is required.

[12] The PPS issued a Victims and Witnesses Policy in March 2007.

Paragraph 2.2 provides in relation to the evidential test -

> It may be necessary in some cases to consult with victims or witnesses before a decision to prosecute could properly be made.

Paragraph 2.3 provides in relation to the public interest test -

> When considering the public interest test, an important factor we take into account is the consequences for the victim of the decision whether or not to prosecute, and any views expressed by the victim or the victim's family.

Paragraph 3 deals with consultations.

Paragraph 4.3, in the section on taking account of victim views, provides in relation to proceeding with a lesser charge –

> In some cases a decision may be taken not to proceed with the original charge directed or to accept a plea to a lesser charge. This may arise, for example, if there is a change in the evidence available or a significant public interest consideration has arisen. *When considering*

> *whether this should be done, PPS will, whenever possible, and where the victim wishes, explain to the victim why this is being considered and listen to anything the victim wishes to say.* However, sometimes these issues have to be dealt with relatively quickly at court in circumstances where it is not always possible to speak to the victim.

Additional Materials relied on by the applicant

[13] Article 8 of the ECHR provides that everyone has the right to respect for his private and family life, his home and his correspondence. A decision not to prosecute may engage Article 8 as the right to respect for private and family life includes physical and psychological integrity. R (Waxman) v CPS [2012] EWHC 133 (Admin).

[14] The applicant also called in aid the Directive on Victims of Crime, the Charter of Fundamental Rights and Freedoms and the EC Framework Decision on Victims of Crime. These materials do not add to the domestic obligations otherwise applicable in the present case.

[15] European Directive 2012/29/EU establishes minimum standards on rights, support and protection of victims of crime. Article 6 provides that Member States shall ensure that victims are notified without unnecessary delay of their right to receive information about criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by the victim and that, upon a request, they receive information concerning any decision not to proceed with or to end an investigation or not to prosecute the offender which shall include reasons or a brief summary of reasons for the decision concerned. Article 11 provides that Member States shall ensure that victims have the right to a review of a decision not to prosecute and that victims are notified without unnecessary delay of their right to receive and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request.

[16] The Charter of Fundamental Rights and Freedoms provides at Article 1 that human dignity is inviolable and must be respected and protected, at Article 3 that everyone has the right to respect for his or her physical and mental integrity and at Article 7 that there is respect for private and family life.

[17] The EC Council Framework decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings, at Article 2, provides that each Member State shall ensure that victims have a real and appropriate role in the criminal justice system and shall be treated with due respect for the dignity of the individual and that the rights and legitimate interests of victims be recognised. Article 4 provides that each Member State shall ensure that victims have access to information of relevance for the protection of their interests.

Judicial Review of decisions not to prosecute

[18] It is well recognised that a decision not to prosecute is amendable to Judicial Review. In Adam's Application [2001] NI 1 Carswell LCJ stated that the power to review the decisions of the DPP should be sparingly exercised and in the case of a decision not to prosecute the Court can be persuaded to act if and only if it is demonstrated that the PPS arrived at the decision because -

1. of some unlawful policy.

2. the PPS failed to act in accordance with its own settled policy as set out in the Code.

3. the decision was perverse, a decision at which no reasonable prosecutor could have arrived.

4. the decision was taken for improper motive.

5. the decision was made in bad faith.

[19] The approach was outlined by Lord Bingham in R v DPP ex parte Manning [2001] QB 330 as follows –

> "The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no one else….
>
> In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review is the only means by which the

> citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied."

[20] More recently the Divisional Court considered a PPS decision to withdraw a summons in Mooney's Application [2014] NIQB 48. Coghlin LJ referred to the Code for Prosecutors at paragraph 6.1.1, where, in relation to the public interest test, the proper interests of the victim or witnesses will be taken into account along with other relevant factors to determine whether or not a prosecution is required. Coghlin LJ also referred to the Victims and Witnesses Policy at paragraph 4.3 in relation to proceeding with a lesser charge where the PPS will, whenever possible, and where the victim wishes, explain to the victim why a change is being considered and listen to anything the victim wishes to say. The evidential test was met but the summons was withdrawn in the public interest without consultation with the victim. There was found to have been a breach of paragraph 6.1.1 of the Code and paragraph 4.3 of the Policy. The PPS accepted that the decision should be quashed on the ground that there was a failure to comply with the Policy. Coghlin LJ stated that there had been an unexplained failure to take into account and comply with the relevant requirements contained in public documents and that the decision had been reached without regard to important provisions of the Code and the Policy concerning the public interest, namely the requirement to take into account the proper interests and the views of a victim with regard to reconsideration of a decision to prosecute.

[21] The applicant's challenge includes Wednesbury unreasonable/rationality grounds. The applicant contends for a flexible approach to such review, referring to what is described as the apparently inexorable move by the Supreme Court away from the Wednesbury standard of review and towards a proportionality test. The applicant cited Keyu v Secretary of State [2015] UKSC where it was said the issue had been considered extensively (which decision was then pending in the Supreme Court and has now issued). This Court was invited to bring to bear upon its decision the recent jurisprudence on intensity of review.

[22] In Keyu the Supreme Court resisted any restructuring of the basis of review. Lord Neuberger stated that domestic law may already be moving away to some extent from the irrationality test in some cases. The future of rationality and proportionality is clearly an issue that will engage a full Supreme Court before long. In the meantime the traditional Wednesbury approach remains. It is recognised that context determines the intensity of review and the Wednesbury test may involve more anxious scrutiny where the context so requires. However more anxious scrutiny does not entail the Court in examining the merits of the decision and the primary decision maker remains the designated authority, in this case the PPS. It may indeed be the case that anxious scrutiny does not lie easily with 'irrationality'. This Court will approach the issue in this case by considering whether a decision can be regarded as plainly wrong.

The review of 17 September 2014

[23] The PPS undertook a review of the decision to prosecute upon the applicant's election for trial by jury. The PPS states that there is no formal policy of review of prosecutorial decisions in the event of a defendant's election for trial by jury. However, it is clear that it is the current practice to do so in the PPS Southern/Western region and that the initial review decision of 17 September 2014 was undertaken on foot of such a practice in the light of the applicant's election for trial by jury. Ms McGrath, the Regional Prosecutor, states -

> "I employ a practice whereby upon an election for trial by a defendant that the test for prosecution be considered by a senior prosecutor."
>
> "Whilst this practice is not a formal policy of the PPS it is a practice that I have introduced and implemented in my region with a view to meeting the strategic and operational objectives of the PPS."

[24] The applicant objects to the PPS undertaking a review upon the applicant's election for trial by jury. It is said to be an irrelevant consideration. The Court is unable to accept this contention. The PPS may, from time to time, review the decision to prosecute. They may elect to do so in a variety of circumstances. The Regional Director has elected to do so upon a defendant's election for trial by jury. This is said to provide a further level of evaluation of the test for prosecution in the provision of a quality service. This is a decision within the management and administration of the regional office. There are no grounds to interfere with the decision to review the prosecution.

[25] The outcome of the review was notified to the applicant's solicitor by letter dated 17 September 2014. The PPS appears to have proceeded under Paragraph 4.11.3.1 of the Code relating to cases where no additional evidence or information was provided. Under that paragraph the prosecutor first of all should consider whether the original decision was within the range of decisions that could reasonably be taken in the circumstances and if that is not the case, secondly, the prosecutor should apply the test for prosecution and reach a fresh decision. The outcome was that the original decision to prosecute was found to be an unreasonable decision and that the case failed the evidential test for prosecution.

[26] The applicant contends that the conclusions on both issues were unreasonable. Having concluded that the original decision to prosecute was outside the range of reasonable decisions a different outcome was inevitable. The conclusion on the range of reasonable decisions was based on the evidential test. Prosecutors

may disagree on a decision whether to prosecute. It is a higher hurdle for one prosecutor to conclude that another's decision is outside the range. However that is a judgment that a prosecutor is entitled to make. Was that judgment warranted in the present case? The Court will not intervene unless that judgment was plainly wrong.

[27] The Evidential Test is based on a reasonable prospect of conviction. Paragraph 4.2.2 of the Code defines 'a reasonable prospect of conviction' as requiring an identifiable individual, in this case the defendant, and credible evidence, being that of the applicant, and further a judgment by the prosecutor that the Court may reasonably be expected to find the criminal offence proved beyond reasonable doubt. In the letter of 17 September 2014 Ms McGrath stated her conclusion that there was no reasonable prospect of conviction and that the likelihood was that if the case were tried then Mr Morgan would be acquitted. What clearly exercised Ms McGrath, as appears from the letter, was that the defendant had raised the issue of self-defence. The Court cannot conclude that Ms McGrath was plainly wrong in deciding that the decision to prosecute was outside the range of reasonable decisions.

[28] The applicant contends that the review decision was based on the absence of corroboration, which it is said cannot be a requirement for a decision to prosecute. Ms McGrath made reference to the absence of other witnesses and CCTV and other evidence. However this Court is satisfied that, while the absence of other evidence was a consideration, it was not the sole basis on which the decision was made and the PPS was not applying a policy or practice that required corroboration.

[29] However, there is the issue of engagement with the applicant as the victim. Paragraph 6.1.1 of the Code, as relied on in Mooney, provides that in considering the public interest test the proper interests of the victim will be taken into account. The PPS refers to this provision as relating to the public interest test whereas the present case did not satisfy the evidential test. However paragraph 4.3 of the Policy does concern consultation with the victim in considering whether to proceed with the original charge, and provides that the PPS will, whenever possible and where the victim wishes, explain to the victim why the issue of whether to proceed is being considered and listen to anything the victim wishes to say. There was no such consultation with the applicant prior to the issue of the letter of 17 September 2014 and no attempt to do so and no suggestion that it was not possible to do so. Accordingly there was a failure to comply with paragraph 4.3 of the Policy in taking the decision of 17 September 2014.

The review of 14 May 2015

[30] Upon the application for Judicial Review the PPS agreed to conduct a further review of the decision on prosecution. An issue arose as to whether the review of 2015 was a review of the original decision to prosecute or a review of the decision of

Ms McGrath not to prosecute. It is apparent from the PPS letter of 14 May 2015 that Mr Murray's review was of the decision to withdraw the prosecution of the defendant, that is, the decision of Ms McGrath of 17 September 2014. This is further apparent from paragraph 4 of Mr Murray's first affidavit where he stated that the reason that the case was allocated to him was that the applicant was challenging the decision made by Ms McGrath.

[31] For the further review Mr Murray consulted with the applicant and his father on 5 March 2015. By the letter of 14 May 2015 it was confirmed that there would be no prosecution of the defendant. It is clear from Mr Murray's affidavit that his review was conducted under paragraph 4.11.3.1 of the Code. This paragraph is stated to apply when there is no additional evidence or information provided in or connected with the request to review the original decision. On this occasion there may be said to have been additional evidence and information arising from the consultation with the applicant and the provision of photographs and possibly other material.

[32] Accordingly, the applicant contends that any review should have been undertaken by the original decision maker under paragraph 4.11.3.2 rather than a new decision maker under paragraph 4.11.3.1 of the Code. The former paragraph provides that if there is additional evidence and information provided in or in connection with the request to review a decision as to prosecution, the case should be reconsidered by the public prosecutor who initially took the decision now under review, that is Ms McGrath. The review process provides that consideration will be given to the additional evidence and information and there are two potential outcomes. The public prosecutor will apply the test for prosecution to reach a fresh decision. If the public prosecutor applying the test for prosecution concludes that there is no sufficient evidence for changing the original decision then the case will be referred to another public prosecutor who will conduct a review under 4.11.3.1, as Mr Murray did.

[33] In that event the two kinds of review, those with and those without new evidence and information, are inter-related and ultimately will involve two prosecutors applying the test for prosecution. It is probably the case that those drafting the Code did not intend to address a review of a review, as occurred in the present case, and the Code should not be interpreted as if it were a statute. In so far as this case involved new evidence or information for the purposes of the review concluded on 14 May 2015 this Court is satisfied that there has been sufficient compliance with the provisions of the Code.

[34] The applicant contends that Mr Murray, in undertaking the review of the earlier decision under paragraph 4.11.3.1 of the Code, should first have asked himself whether the original decision to prosecute was within the range of decisions that could reasonably have been taken and if that was not the case he should then have applied the test for prosecution. Rather, says the applicant, Mr Murray did not undertake this exercise but merely applied the test for prosecution.

[35] However, it follows from Mr Murray having undertaken a review of Ms McGrath's decision, rather than a review of the original decision to prosecute, that he would, in applying the test for prosecution and being satisfied that the case failed that test, have been satisfied that her decision was within the range of reasonable decisions.

[36] Mr Murray expanded on the reasons for the decision to withdraw the prosecution when he listed the five particular difficulties referred to above. In the words of Lord Bingham, it will often be impossible to stigmatise a judgment on such matters as wrong. The Court cannot be satisfied that Mr Murray's decision was plainly wrong.

[37] R (Waxman) v CPS [2012] EWHC 133 (Admin) illustrates that in certain circumstances Article 8 imposes on the State a positive obligation to take effective action to protect a person's private and family life, including his physical and psychological integrity. This gives rise to a duty on the part of the State to maintain and operate an adequate system for affording protection against acts of violence by private individuals. The ECHR has found a breach of Article 8 where there has been a complete breakdown in the administration of justice and failure to prosecute attackers and frustration of a claimant's right to pursue a private prosecution. However there may also be a breach of the State's positive duty under Article 8 without there being a fundamental failure of the system. In Waxman there had been harassment of a vulnerable person. In the light of the history of the case and the serious effects of the behaviour the State was found to be in breach of duty in failing to pursue a prosecution of the offender.

[38] Breaches of Article 8 have been found where the physical and psychological integrity of a person have been affected by sustained action against that person not being addressed by State action to afford protection. This Court is satisfied that the circumstances of the present case involving a disputed confrontation between the parties on one evening do not give rise to a positive obligation on the part of the State to prosecute Mr Morgan.

[39] The Court has found that the review decision of 17 September 2014 resulting in the withdrawal of the prosecution involved a failure to comply with paragraph 4.3 of the Policy in relation to consultation with the applicant as the victim. That decision was overtaken by the further review decision of 14 May 2015 which did comply with the provision as to consultation with the applicant. Accordingly no relief is required in respect of the previous failure. The Court has not been satisfied on any of the applicant's other grounds for Judicial Review. The application is dismissed.