Neutral Citation No. [2012] NIQB 60

Ref: **TRE8558**

Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Delivered: **9/7/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

MacMahon's (Aine) Application [2012] NIQB 60

IN THE MATTER OF AN APPLICATION BY AINE MacMAHON FOR JUDICIAL REVIEW OF DECISIONS MADE AND POLICIES IMPLEMENTED BY THE PUBLIC PROSECUTION SERVICE AND THE POLICE SERVICE OF NORTHERN IRELAND

TREACY J

Introduction

[1] The applicant is the former partner of Gerard Devlin. Mr Devlin was stabbed to death on 3 February 2006 in the Ballymurphy area of Belfast. Five members of the extended Notarantonio family were charged with murder and related offences. On the day the trial was due to commence, 24 September 2008, the defendants entered guilty pleas to lesser charges and the prosecution accepted the pleas.

[2] The applicant challenges:

(i) the decision of the PPS to discontinue prosecutions for the murder of Gerard Devlin;
(ii) the failure of the PPS to consult with her or inform her about that decision either before it was made or before it was given effect;
(iii) the failure of the PPS to explain that decision to her after the event; and
(iv) the refusal of both the PPS and PSNI to allow her access to the depositions and other relevant documents in the case, redacted as may be necessary.

Factual Background

[3] The trial in respect of the death of Gerard Devlin was due to commence on 24 September 2008. Five defendants had each been charged with murder and Gerard Devlin's family understood the trial would proceed as a murder trial. On the morning of the trial the defendants were re-arraigned and each of them pleaded guilty to lesser charges.

- Francisco Notarantonio pleaded guilty to manslaughter, affray, malicious wounding with intent and attempted malicious wounding with intent and was sentenced to a total of 11 years imprisonment and 1 year probation;
- Christopher Notarantonio pleaded guilty to affray and was given a suspended sentence of imprisonment of 1 year;
- William Notarantonio and Paul Burns pleaded guilty to affray and were sentenced to 2 years imprisonment;
- Anthony Notarantonio pleaded guilty to affray, his license was revoked and he was sentenced to 2 years imprisonment and 18 months probation.

<u>R v Francisco Antonio Notarantonio & Ors</u> [2008] NICC 39 - Sentencing Remarks of Stephens J delivered 25 November 2008.

[4] Stephens J stated that Francisco Notarantonio had pleaded guilty to the manslaughter of Gerard Devlin, making an affray, malicious wounding of Anthony McCabe and attempted malicious wounding of Thomas Loughran. He outlined that during the course of a brutal street fight involving a significant number of people, Francisco Notarantonio armed himself with a chef's knife which had an 8½ inch blade and he then proceeded, within a very short period of time, to swipe the knife at one person, stab another in the chest and fatally stab a third person. He noted that Mr Mooney QC stated that the prosecution had accepted the guilty plea to manslaughter on the basis 'that it cannot be proved that (you) had the necessary intent for murder'. Francisco Notarantonio accepted that he must have made contact with Gerard Devlin though he had no recollection of doing so. That defendant did not accept that he had any intention to kill or cause really serious harm to Gerard Devlin.

[5] Stephens J recounted that Francisco Notarantonio picked up a knife that was lying on the ground and his intentions were formed a very short time before the knife was used. However, once armed the defendant was 'quite deliberate in its use against three individuals all of whom were unarmed'. It was not clear when Gerard Devlin suffered the fatal stab wound. None of the witnesses actually witnessed the moment of the stabbing. The Judge noted, however, that Francisco Notarantonio admitted that he had a knife during the brawl and, although he did not admit stabbing anyone, he

was observed by one witness to have a knife in his possession after the stabbing of Anthony McCabe and Gerard Devlin. With regard to that defendant's attitude the Judge referred to Francisco Notarantonio's statement that he 'had no intention of hurting anyone' and that he 'never wished Mr Devlin any harm'. He also deeply regretted the consequences of his actions for which he took full responsibility. The Judge could not accept that he did not intend to hurt anyone in view of his pleas of guilty to the Section 18 offences which require an intention to cause grievous bodily harm.

Affidavit evidence in relation to Grounds (i) to (iii):

(i) the decision of the PPS to discontinue prosecutions for the murder of Gerard Devlin;

(ii) the failure of the PPS to consult with her or inform her about that decision either before it was made or before it was given effect;

(iii) the failure of the PPS to explain that decision to her after the event.

History of meetings between the applicant and the PPS

[6] The first meeting between the Devlin family and Junior Prosecution Counsel occurred on 7 September 2008. On 22 September there was a meeting between Prosecution and Defence lawyers. On 23 September, a meeting occurred with Senior Prosecution Counsel, Mr Terence Mooney QC and it was explained to the family that the defendants were maintaining their not guilty pleas and the case was proceeding as a murder trial. The applicant claims there were no more than one or two further meetings in addition to those above.

[7] The applicant claims that during the meetings the Devlin family had not been warned by the PPS that pleas to lesser charges would be acceptable. The applicant also states that any difficulties in proceeding with the murder charges were not discussed with the family. On 23 November 2011, prior to the sentencing hearing, there was a further meeting with Mr Mooney QC. On 25 November the family attended a meeting with Mr Mooney QC and Mr Burnside from the PPS to discuss the complaint which had been made by Mr Pat Devlin, Gerard Devlin's father.

Proceedings on 24 September 2008

[8] The applicant states that when the pleas to lesser offences were entered, she left the Court with her family to go to the witness room to explain to the deceased's parents what had happened. A police liaison officer

in attendance was not able to provide an explanation and he left the room before returning and inviting the applicant and family members to speak to Senior Prosecution Counsel. In a meeting, which the applicant states lasted no more than two minutes, Mr Mooney QC told the group it was, 'unexpected but expected'. The family members in attendance at the meeting then rejoined the greater family group to explain to them that there would be no trial. The applicant states that as they left the Court the defendants and their families were laughing and jeering at them.

The Applicant's Affidavit Evidence

[9] The applicant provided evidence by affidavit sworn on 1 October 2010. She states she and Gerard Devlin had been partners for 20 years and they had 6 children together, 5 of whom presently reside with her. Ms MacMahon did not witness Gerard Devlin being stabbed but did see him fall over Anthony Notarantonio's car outside the latter's home at 18 Whitecliff Parade and she comforted Mr Devlin as he died. She states that other members of the Notarantonio family continued to attack members of Gerard's family, namely, his uncle Thomas Loughran, at this time. After the traumatic circumstances of Mr Devlin's death the applicant did not involve herself in the discussions between the family, the PSNI, the PPS and solicitors. The family members who became involved in these discussions were Bernadette O'Rawe and Richard O'Rawe (Mr Devlin's aunt and uncle).

[10] The applicant attended court on the day of the trial with Bernadette and Richard O'Rawe and Mr Devlin's parents, Mary and Patrick Devlin. In advance of the trial the applicant's solicitors, Kevin R Winters & Co, had been making representations to the PSNI and PPS in connection with the family's request for the release of copies of depositions. The solicitors also requested, by letters dated 31 July 2007, that the family should be able to liaise more closely with the PPS and PSNI in relation to the case. On 8 August 2007 the PPS responded to the solicitors advising that it would be inappropriate to release copies of the depositions but pre-trial the prosecution witnesses could have access to their statements in order to refresh their recollections.

[11] On 3 October 2007 the PPS wrote to the solicitors to advise that they wished to avoid taking additional statements at this point and that any concerns with witness statements should be addressed at consultation with Prosecution Counsel at the appropriate stage. On 5 October 2007 the solicitors responded to the PPS requesting copies of statements made and advising that, 'our clients feel extremely vulnerable and exposed and would like to have the security of knowing that they can talk to someone within the prosecution generally in order to allay such fears and concerns.' On 16 October 2007 the PPS wrote to the solicitors referring them back to the PPS response of 3 October 2007.

[12] The applicant avers that on the day the trial was due to commence, she attended Court as a prosecution witness. That morning she and other family members were brought into a room with Prosecution Barristers and the investigating police officers and informed that that 'this was not a case of murder but manslaughter,' and that 'the PPS had accepted pleas to the lesser charge of manslaughter.' The applicant states it is clear that these decisions had already been taken due to the fact that those responsible for Mr Devlin's murder had been re-arraigned and had pleaded guilty to lesser offences. She avers that neither she nor any other member of the Devlin family had been consulted about these decisions and the arrangements had been agreed and concluded before anyone discussed it with her or the family. The applicant was upset and angry at this news and left the room to break the news to Mr Devlin's parents.

[13] Subsequently, the applicant and other family members instructed the solicitors to make representations to the PPS, the PSNI and other bodies to ascertain how and why these decisions were taken. The applicant did not attend discussions with the police and the PPS. The applicant has learnt that the Coroner has confirmed there will be no inquest into Mr Devlin's death due to the fact that a trial has taken place. The applicant does not agree that the circumstances surrounding Mr Devlin's death have been fully explored. She states that it is only upon receipt of depositions that she and her lawyers can consider whether the decision to accept pleas to lesser charges was consistent with the evidence.

Affidavit Evidence of Bernadette O'Rawe

[14] Bernadette O'Rawe, Mr Devlin's aunt, provided two affidavits sworn on 27 January 2011 and 9 June 2011. In her first affidavit she avers that she attended a meeting the day before the trial was due to commence with Mr Terry Mooney QC Senior Prosecution Counsel, Junior Prosecution Counsel, members of the PSNI, her husband Richard O'Rawe, Pat Devlin (Mr Devlin's father), the applicant and other family members. She states that at the meeting they were told that the defendants were maintaining their not guilty pleas and the case was proceeding as a murder trial. There was no discussion as to difficulties in proceeding with the murder charges.

[15] Mrs O'Rawe avers that during a previous meeting, Junior Prosecution Counsel advised that Barry Caldwell, a prosecution witness, had withdrawn his evidence and that this caused some difficulty for the Prosecution. She states the family was not informed that this development would cause the Prosecution to accept pleas to lesser charges.

[16] Mrs O'Rawe attended Court on 24 September 2008 as a prosecution witness. She states there was a delay of about 45 minutes before the proceedings began. Senior Prosecution Counsel advised the family to take Mr

Devlin's mother out of the Court while the details of his death were outlined to the Court.

[17] When the defendants pleaded not guilty to murder, Mrs O'Rawe and the other family members left the Court in protest and states the defendants were laughing and sniggering at the family. Mrs O'Rawe went to the witness room to advise Paddy and Mary Devlin that there would be no trial.

[18] Mrs O'Rawe and other family members then had a discussion with Senior Prosecution Counsel, Junior Prosecution Counsel and members of the PSNI. Mr Mooney QC said the pleas were, 'unexpected but expected'. The family voiced their dissatisfaction. The meeting lasted no longer than two minutes. The family members in attendance broke the news to the wider family in the witness room.

[19] Mrs O'Rawe avers that in the course of five meetings with the PSNI and three meetings with the PPS prior to and on the date the trial was to commence, it was not suggested that the trial would not proceed as a murder trial. Subsequently, Ms O'Rawe became aware that a meeting occurred on 22 September 2008 which was attended by PSNI, the PPS, Prosecution Counsel and Defence Counsel.

Affidavit of Stephen Burnside, Senior Assistant Director, PPS

[20] Mr Burnside, Senior Assistant Director, provided affidavit evidence sworn on 20 May 2011. Mr Burnside avers that in his former role as Regional Prosecutor for Belfast Region of the PPS, he was personally involved in the pre-trial prosecution of Christopher, William and Anthony Notarantonio and Paul Burns. He engaged with Senior Counsel, Mr Mooney, and Junior Counsel, Mrs McKay, in relation to aspects of the prosecution case and confirms that on the morning of 24 September 2008 the PPS and Prosecution Counsel fully expected the trial to commence.

[21] Mr Burnside avers there had been discussions between the prosecution and defence about aspects of the case on Monday 22 September 2008. He had not been involved in those discussions which took place between the respective Senior Counsel for the Defendants and Mr Mooney. Defence Counsel discussed potential pleas of guilty with Mr Mooney but on the evening of 22 September there was no indication by the Defendants' legal representatives that the matter would proceed otherwise than by way of contested trial. Mr Burnside states that given there had been no change in the defence position, there was no reason to report these discussions to the family of the deceased.

[22] During that day Mr Burnside avers he had discussed with Senior Prosecution Counsel scenarios that might emerge if some or all of the

defendants changed their plea. He also had discussions with Counsel as to evidential difficulties that had arisen in the case and that might arise if some of the defendants pleaded guilty to lesser charges. Mr Mooney QC and Mr Burnside agreed in principle, the course that the PPS would take in the event that pleas of guilty were entered. Mr Burnside avers that this sort of preparation is a common feature of major criminal trials.

[23] He confirms that neither the PPS nor Prosecuting Counsel had an indication prior to the commencement of the trial that the Defendants would ask to be re-arraigned and he was not present in Court on 24 September when pleas of guilty were entered. Mr Mooney QC had provided advices in relation to the potential developments in the case and Mr Burnside had accepted his advices. Mr Burnside states it was on that basis that he had given authority for acceptance of the pleas of guilty as discussed, should this circumstance arise. He had instructed Counsel that the basis of the pleas should be explained to police and the victim's family. He states that as the Defence indicated that the matter was to proceed, there was no reason to report these discussions at this stage. Mr Burnside avers that the attitude of the Defence as discussed with Mr Devlin's family on 23 and 24 September 2008 was accurate.

[24] Mr Burnside refers to the applicant's solicitors' letter to the PPS of 6 October 2008 in which an explanation for the acceptance of pleas to lesser offences was requested. Mr Burnside responded by letter dated 14 October 2008 in which he set out Senior Prosecution Counsel's view upon the entering of guilty pleas by the accused:

> "Mr Mooney advised that there was no longer a reasonable prospect of a conviction for the offences not proceeded with. The factors he highlighted were the evidential difficulties which had arisen as the trial was due to commence and the particular admission of one of the Accused to striking the fatal blow. In particular the basis for the original prosecution of all the Accused for murder was that of joint enterprise. There was no direct evidence of which person in particular had stabbed Gerard Devlin. In the new circumstance of one Accused admitting that stabbing, it was concluded that the evidence against the others did not sufficiently prove their state of knowledge beyond a reasonable doubt. In particular, the absence of an independent witness weakened the whole case considerably. In respect of Francisco Notarantonio, Mr Mooney advised that the defence he was to mount to the murder charge could not be successfully refuted by the Prosecution given the state of the

evidence now left available."

[25] The letter states that it was deemed appropriate to accept the pleas as entered and not to proceed with the remaining counts. Mr Mooney QC returned to the Court with these instructions. The letter provides that the Prosecution would have preferred to have had a more detailed conversation with the family during the course of conversations between Counsel but the information they had from the Defence made that futile. The letter also states that the Police and Junior Prosecuting Counsel had consulted often with the family and all prosecutors involved in the case were fully aware of the family's views.

[26] By letter of response dated 24 October 2008 the applicant's solicitors confirmed their instructions that at no time was there any consultation with the family about the dramatic change of direction in the case. The letter requested further information as to why they were deprived of having input into discussions in the case and the nature of the evidential difficulties. The solicitors asked why the evidence of Francisco Notarantonio's admission that he administered the stab wound which killed Gerard Devlin, was a reason not to proceed with the trial. The letter sets out the family's understanding that there were witnesses who saw Francisco Notarantonio stab both Gerard Devlin and Tony McCabe and that four of the accused made statements indicating that they went out to maim Gerard Devlin 'in a bad way'.

[27] By letter to the solicitors dated 13 November 2008 Mr Burnside confirmed that no decision had been made concerning any pleas to be offered on Monday 22 September and that, had the Defence informed the PPS of their intentions on Monday, the matter would have been discussed at the meeting with the family the following day. The letter asserts that the unexpected turn of events on the Wednesday morning, the day of the trial, meant that the Prosecution had to fulfil its duty to the Court and the public in a very short period of time. The letter states that in preparation for the trial some evidence which had been previously available was withdrawn and this changed the nature of the available admissible evidence. The Prosecution were not confident that a hearsay application would be successful. Mr Burnside states that there was no evidence prior to Francisco Notarantonio's plea to manslaughter that he had stabbed Gerard Devlin. He further states that there were no witnesses who saw Francisco Notarantonio stab Gerard Devlin although there was direct evidence that he did stab Tony McCabe.

[28] Mr Burnside states that, in interview, all the accused made the case that at all times they acted in self-defence and did not intend to injure Gerard Devlin; he did not see any statement from them indicating that they went out to, 'maim Gerard Devlin in a bad way'. The letter sets out that there were no fingerprints found on the knife and rejects the solicitors' allegation that there

was a failure by the fingerprint section. Mr Burnside emphasises that due to the state of the evidence in this case there was a very real possibility that a Court would acquit the accused.

[29] In his affidavit Mr Burnside confirms the account outlined in the correspondence. He refers to his letter to the solicitors of 8 April 2010 in which he stated he had already apologised to the family for the lack of an explanation of the processes that took place in Court on the day on which the trial was due to commence, in the period between the unexpected entering of pleas of guilty and Mr Mooney accepting those pleas on behalf of the Prosecution. He restated that the decision to accept the guilty pleas should have been explained to the family members prior to being announced in Court and again advised that this had not been possible due to the press of time and the events of that day.

[30] In his affidavit Mr Burnside confirms that the apology should not be taken as an indication that the PPS decision to accept the guilty pleas would have been any different in light of the representations made by the family members as the PPS and Counsel were already aware of the views of the family. He states that it was his view, informed by the opinion of the Senior Prosecution Counsel and the views of the then Senior Assistant Director of the PPS, that the pleas of guilty altered the consideration of the test for prosecution in such a way that the proper course for the PPS to take was to accept those pleas.

[31] Mr Burnside, in his affidavit, denies that the PPS breached Art 2 of the Convention. He avers that the PPS acted fully in accordance with the Code for Prosecutors and the Victims and Witnesses Policy.

Second Affidavit by Bernadette O'Rawe

[32] Mrs O'Rawe provided evidence by second affidavit, sworn on 9 June 2011, in order to clarify her first affidavit, correct inaccuracies and address the affidavit evidence filed by Mr Burnside. Mrs O'Rawe avers that the failure to inform the family that the PPS had agreed in principle what course would be taken in the event that pleas of guilty would be entered cannot be explained on the basis of any press of time or the maintenance of the Defence position. She infers that the course of action must have been communicated to the Defence as they would have been unlikely to have pleaded to the lesser charges without knowing that the Prosecution would accept the pleas.

[33] She states that if, on the morning of the trial, the PPS was still proceeding on the basis that the test for prosecution was met in respect of the murder charges, it is difficult to understand how it could no longer be met when all that happened that day was that all the defendants admitted being involved in an affray at the scene of the killing and one admitted to killing

Gerard Devlin with a knife.

[34] Mrs O'Rawe avers that the withdrawal statement of Barry Caldwell was known to the PPS well before the hearing but it was not suggested that the withdrawal was fatal to the prosecution. She argues this cannot be relied upon as a change in circumstances on the day of the trial.

Further evidence in relation to the decisions taken by the PPS

[35] Sir Alasdair Fraser, Director of the PPS, provided a written response to David Ford MLA, in relation to this case, on 8 December 2008. He states that, before the commencement of the trial, Mr Mooney QC arranged to consult with a number of witnesses and reviewed the evidence then available. Having done so, he informed the Regional Prosecutor that certain important evidence was no longer available as direct witness evidence and that, in the light of this development, he had accordingly given further consideration to the strength and cogency of the case as it then stood. Mr Mooney QC and the Regional Prosecutor agreed, in principle, to a course which would be adopted if such pleas were entered.

[36] Sir Alasdair states that when the defendants entered pleas of guilty to a number of offences Mr Mooney QC asked for a short adjournment to consider this new development. Reviewing the evidence, including the fact that certain important evidence was no longer available to the prosecution as direct witness evidence and the fact that one individual had now accepted that he had inflicted the fatal wound, he considered that the test for prosecution was no longer met save in respect of the offences for which pleas had been entered. The Regional Prosecutor agreed with this conclusion. Sir Alasdair states that while Senior Counsel was able to inform the family of the course that would be followed, 'it was very regrettable that the press of time and events did not permit him to discuss the matter fully and explain to them the basis on which these pleas were accepted.'

[37] Sir Alasdair comments that on entering the plea to manslaughter Francisco Notarantonio accepted responsibility for having inflicted the wound which caused the death of Gerard Devlin, though he stated he had no recollection of doing so and he did not accept that he had an intention to kill or cause really serious injury to Gerard Devlin. This was accepted by the Prosecution on the basis that on the evidence then available there was no reasonable prospect of proving, to the high standard required, the requisite intent for murder. Having regard to the lack of clarity in relation to what had occurred and the fact that one defendant had accepted responsibility for inflicting the fatal stab wound, it was concluded that there was no reasonable prospect of obtaining the convictions of the other defendants for any offence directly related to the death of Gerard Devlin.

[38] Sir Alasdair avers that it is a matter of considerable regret that Senior Counsel was unable to confer with the family when the pleas of guilty were entered on the opening day of the trial.

[39] In a letter from the applicant's solicitors to the Coroners Service dated 15 June 2009, they refer to a consultation attended by the PPS at which the PPS 'accepted...that there was an error on the part of Senior Crown Counsel in failing to consult the family of the deceased about the change of course that the case would take'. In a further letter to the PPS dated 4 March 2010 the solicitors refer to a DPP public meeting on 25 February 2010 during which, 'there was a clear acceptance on the part of the PPS that errors and mistakes had been made during the course of the trial of R v Notarantonio and others'. The letter states that this acceptance was confirmed in the Irish News on 3 March 2010. By letter to the solicitors of 8 April 2010, Mr Burnside states that he has apologised to the family in respect of the lack of a proper and detailed explanation to them of the processes in court on the day the trial was due to commence and had confirmed this apology in the press.

Affidavit Evidence in relation to Ground (iv):

> (iv) the refusal of both the PPS and PSNI to allow her access to the depositions and other relevant documents in the case, redacted as may be necessary.

[40] In pursuing their request for copy depositions in this case the applicant's solicitors corresponded with the PPS, the Lord Chief Justice's Office, the Attorney General and the PSNI. Mr Raymond Kitson, Assistant Senior Director of the PPS, wrote to the solicitors on 16 December 2009 advising he had received Senior Counsel's advices on the matter. Senior Counsel had advised that the police investigation file is the property of the police and is forwarded to and received by the PPS on the understanding that documents contained in the file are being provided for the purposes of consideration of the issue of prosecution, and for the purposes of prosecution, if one results. It followed from this that, ordinarily, the PPS cannot disclose documents, provided by police, to a third party for a purpose outside that which governs their provision by the police to the PPS. Accepting those advices, Mr Kitson stated that he had written to the ACC Criminal Justice asking the police to consider the request for copy trial papers.

Affidavit of Will Kerr, Assistant Chief Constable, PSNI

[41] ACC Kerr provided an affidavit sworn on 12 May 2011 in which he addresses the applicant's application to the Court to quash a decision of the PSNI made on 3 March 2010, refusing to provide the applicant with all depositions in the criminal prosecution of those accused of involvement in the death of Gerard Devlin.

[42] The letter of 3 March 2010 asserts that in the absence of a specific legal basis, the PSNI is unable to release investigation files. The letter states that statements are made to police for the purposes of criminal proceedings and it is not open to the police service to disclose such statements, in the absence of specific consent from the witness.

[43] ACC Kerr avers that in the course of obtaining statements for the purpose of the criminal proceedings, assurances would have been given to the witnesses that the statements would be used for no purpose other than the prosecution of criminal proceedings. He states that the PSNI maintain the position that the witness statements and other documentary materials assembled for the purpose of the prosecution of the case should not be released. ACC Kerr states that he considered the issues raised by the applicant's solicitors subsequent to the decision of 3 March 2010 and affirmed his original decision on 19 April 2010.

Affidavit of Paul Pierce, Solicitor

[44] Mr Pierce provided affidavit evidence sworn on 10 June 2011. He refers to ACC Will Kerr's assertion that those persons who made witness statements in this case would have been given assurances that the statements would not be used other than for the prosecution of criminal proceedings. Mr Pierce states that from his own experience, he is not aware that a witness who decides to make a statement to the PSNI in respect of criminal proceedings is given such assurances.

Relief Sought

[45] The applicant seeks:

(a) declarations that:

(i) the PPS unlawfully failed to respect her status and rights as a victim of serious crime;

(ii) the decision of the PPS to discontinue prosecutions for murder was unlawful;

(iii) the failure to consult with the applicant in advance of the discontinuation of the murder charges was unlawful;

(iv) the failure of the PPS to properly explain the reasons for their decision after the event was unlawful;

(b) an Order compelling the PPS to provide a full and detailed

explanation of the reasons why in each case they discontinued prosecutions for murder and accepted pleas by the defendants to lesser charges;

(c) in respect of the case papers, an order to quash the decisions of the PPS and PSNI to refuse to provide the applicant with the depositions in the case (redacted if necessary) and an order compelling the respondents to provide the applicant with copies of all the depositions in the case (redacted as may be necessary) together with all the documentation and information relevant to the decision to discontinue prosecutions for murder.

Article 2

[46] Art. 2 ECHR states:

> 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution the sentence of a court following his conviction of a crime for which this penalty is provided by law'

[47] The applicant argues the respondents have breached Art. 2 in two respects:

(a) the respondents have failed to secure effective implementation of laws which protect the right to life by identifying and punishing those responsible; and

(b) the respondents have failed to permit a sufficient element of public scrutiny or to afford the next of kin involvement in the procedure.

First Ground of Challenge Under Art. 2:

(a) failure to secure effective implementation of laws which protect the right to life by identifying and punishing those responsible

Applicant's Argument

[48] With regard to (a), the applicant argues that the PPS has violated her rights (as a victim of serious crime and those asserted on behalf of the deceased) by failing properly to perform their prosecutorial function. She refers to Jordan v UK (2003) 37 EHRR 2 at para 107 in which the Court relied upon Kaya v Turkey (1999) 28 EHRR 1 and Ogar v Turkey (2001) 31 EHRR 40 in holding that:

> "The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (Kaya) and to the identification and punishment of those responsible (Ogar)."

[49] The applicant contends that the laws cannot be said to have been effectively implemented where offenders have been able to evade the responsibility for their actions as a result of the PPS's inexplicable decision to accept pleas that plainly did not meet the gravity of their offending. The PPS had decided that the test for prosecution had been met in relation to all of the defendants and absent some material change of circumstances that fundamentally undermined the prosecution case, the defendants should have stood trial for murder. The applicant argues the PPS has not yet indicated how exactly the prosecution case suddenly became so fundamentally undermined that the prosecutions for murder had to be discontinued. She contends that those responsible for killing Mr Devlin have been neither identified nor punished for their crimes despite the availability of sufficient evidence against them to do so as adjudged by the PPS. It is submitted that due to this failing the PPS have failed to secure the effective implementation of the laws which protect the right to life in breach of Art. 2.

Respondent's Argument

[50] The respondent submits that the substantive right to life provision has been interpreted by the European Court as encompassing a procedural obligation to conduct a particular type of investigation in circumstances where the substantive right to life has been or is alleged to have been breached by the actions of an agent of the state. The respondent notes that in Jordan the boundaries of the Art. 2 procedural obligation were identified in respect of investigations into the use of lethal force by the state but argues that this case is unlike Jordan in that it does not involve any allegation of the use of lethal force by a state agent and therefore the nature of any Art. 2 procedural obligations must be viewed in that context.

[51] The respondent refers to Oneryilidz v Turkey (2004) 41 EHRR 325 in which the Court noted that the Art 2 procedural obligation can extend beyond circumstances where there has been the use of lethal force by the state. However, the scope of the obligation was also delineated by the Court at para96:

> "(96) It should in no way be inferred from the foregoing that Article 2 may entail the right for an applicant to have third parties prosecuted or

sentenced for a criminal offence (see, *mutatis mutandis*, Perez v. France [GC], no. 47287/99, § 70, ECHR 2004-I) or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence (see, *mutatis mutandis*, Tanlı v. Turkey, no. 26129/95, § 111, ECHR 2001-III).

On the other hand, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts (see, *mutatis mutandis,* Hugh Jordan, cited above, §§ 108 and 136-40). The Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Article 2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined."

[52] The respondent submits that the applicant claims that she has no complaint about the conduct of the police investigation and that her complaint is that the persons prosecuted for Mr Devlin's murder were not convicted of murder and sentenced to lengthy terms of imprisonment. It is the respondent's case that this type of reasoning was rejected by the Court in Onerylidiz.

[53] Alternatively, the respondent argues that through the prosecutorial process the State has discharged the Art 2 procedural obligation. There has been a public trial which has resulted in the conviction of one defendant for the unlawful killing of Mr Devlin. An ancillary purpose of the Art 2 obligation is to ensure that the facts relating to the deaths become known to the public and to the victims relative's. In this case tragically, the victim's family were also eyewitnesses to the unlawful killing of Mr Devlin. In addition, Stephens J has provided a detailed analysis of the factual background in the course of his sentencing judgment.

Second Ground of Challenge under Art. 2:

(b) the respondents have failed to permit a sufficient element of public scrutiny or to afford the next–of-kin involvement in the procedure.

Applicant's Argument

[54] With regard to the second challenge under Art2, the applicant relies upon the decision of the European Court of Human Rights in Jordan at para99 which provides:

> "…there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."

[55] In relation to access to the depositions, the applicant asks the Court to consider para 133 of Jordan which provides:

> "As regards access to documents, until recently the applicant was not able to obtain copies of any witness statements until the witness concerned was giving evidence. This was also the position in the McCann case, where the Court considered that this had not substantially hampered the ability of the families' lawyers to question the witnesses. However it must be noted that the inquest in that case was to some extent exceptional when compared with the proceedings in a number of cases in Northern Ireland. The promptness and thoroughness of the inquest in the McCann case left the Court in no doubt that the important facts relating to the events had been examined with the active participation of the applicants' experienced legal representative. The non-access by the next-of-kin to the documents did not, in that context, contribute any significant handicap. However, since that case, the Court has laid more emphasis on the importance of involving the next–of-kin of a deceased in the procedure and providing them with information."

[56] In this case the applicant doubts that the important facts relating to the events have been examined with the active participation of her legal representatives. She also argues that the PPS have not recognised the importance of involving the next-of-kin of a deceased in the procedure and

providing them with information.

[57] The applicant states the Prosecution rely on competing human rights reasons for the decision not to provide the materials ie, s. 55 of the Data Protection Act 1998 and s6 of the Human Rights Act 1998 ("HRA"). The applicant does not accept that such violations would occur and, in any event, Art. 2 provides a specific legal basis for the release of the documents. With regard to ACC Kerr's averment that assurances would have been given to the witnesses that the statements would be used for no purpose other than the prosecution of criminal proceedings, the applicant does not accept that this is the normal practice. In addition, the applicant argues that such statements are made available in a variety of circumstances including the provision of such statements to litigants involved in road traffic claims and to victims in inquests.

Respondent's Argument

[58] The respondent refers to the decision of the Third Section of the European Court of Human Rights in Ramsahai and Others v The Netherlands (Application no. 52391/99):

> "410. The applicants would have wished specific additional investigations to have been carried out and to have been informed of the progress of the investigation as it went along.
>
> 411. The disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects for private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Article 2. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures (see, among other authorities, *McKerr*, cited above, § 129).
>
> 412. Similarly, the investigating authorities cannot be required to indulge every wish of a surviving relative as regards investigative measures. In any event, the Court has found the investigation into the death of Moravia Ramsahai to be sufficiently effective."

[59] This case was appealed to the Grand Chamber which held at paras 347-350:

> "347. The disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects for private individuals or other investigations. It cannot therefore be regarded as an automatic requirement under Article 2 that a deceased victim's surviving next of kin be granted access to the investigation as it goes along. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures (see, among other authorities, *McKerr*, cited above, § 129).
>
> 348. The Court does not consider that Article 2 imposes a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation.
>
> 349. The Chamber found that the applicants had been granted access to the information yielded by the investigation to a degree sufficient for them to participate effectively in proceedings aimed at challenging the decision not to prosecute Officer Brons. The Court notes that neither party has offered any further argument on this subject; for its part, it agrees with the Chamber and sees no reason to take any different view of the matter.
>
> 350. There has not therefore been a violation of Article 2 in this regard."

[60] The respondent argues that the disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects for private individuals or other investigations. It cannot therefore be regarded as an automatic requirement under Art. 2 that a deceased victim's surviving next-of-kin be granted access to the investigation as it goes along. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures.

[61] The respondent argues that the European Court has held that the Art. 2 procedural obligation is one of means and not result. It is submitted that the applicant's complaint is one of result rather than procedure as she has identified no material procedural irregularity in the state's investigation. In addition, the complaint about insufficiency of involvement and access to documents must be subjected to the same objective analysis the Grand Chamber outlined in Ramsahai.

[62] At para107 of Jordan the Court held:

> 'This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including inter alia eyewitness testimony, forensic evidence and where appropriate, an autopsy…Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will fall foul of this standard'.

[63] The respondent submits it is significant that the Art. 2 procedural obligation imposes obligations upon the State in general rather than upon specific public authorities. The correspondence indicates the Coroner has taken the view that an inquest into the death of Gerard Devlin is unnecessary as the criminal trial and judgment have sufficiently established who the deceased was, and how, when and where he came by his death and that this has been done in a manner in which the public interest is satisfied.

[64] The respondent argues that there may be exceptional features in a case which cause the Art2 obligation to be extended into the trial process as opposed to the investigative process but there are no such features present in this case. Onerylidiz is the only case in the Strasbourg jurisprudence which extends the Art2 procedural obligation beyond the boundaries of the investigation into the trial. They submit it is illogical to invite the Court to find a breach of the Art2 obligation to investigate in circumstances where there is no criticism made of the investigation; and that the Trial Judge performed the duty of the Court as identified at para96 of ***Onerylidiz*** in submitting the case to the careful scrutiny required by Art2, so that the deterrent effect of the judicial system in preventing violations of the right to life is not undermined.

[65] The respondent refers to the appeal brought by Francisco Notarantonio against the 12 year custody probation order imposed upon him by Stephens J in R v Notarantonio [2011] NICA 54. Submitting that the Court of Appeal is charged with freestanding obligations under the Convention pursuant to the HRA, the respondent notes the Court upheld the sentence and made no adverse comment in relation to Art. 2 compliance.

The Applicant's Arguments in relation to Article 8

[66] The applicant argues the PPS and PSNI denial of access to the information and documentation sought is in breach of Art8 which provides:

> "1. Everyone has the right to respect for his private

> and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

[67] The applicant submits that she is entitled by virtue of Art8 to know about the circumstances surrounding the death of her partner and the reasons why the persons responsible were not prosecuted. The applicant contends that Art 8 not only protects the individual against arbitrary interference by public authorities but places a positive obligation upon the State to demonstrate respect for private and family life. The applicant refers to McGinley and Egan v UK (1998) 27 EHRR 1 at para98[1] (access to medical information regarding nuclear tests; Gaskin v UK (1989) 12 EHRR 36 at para42[2], (access to information regarding childhood).

[68] The applicant refers to Marckx v Belgium (1979) EHRR 330 (para31) where the Court said:

> "As the Court stated in the Belgian Linguistic Case, the object of the Article is 'essentially' that of protecting the individual against arbitrary interference by the public authorities. Nevertheless,

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[1] 98. The Court considers that the United Kingdom cannot be said to have "interfered" with the applicants right to respect for their private or family lives. The instant complaint does not concern an act by the State, but instead its alleged failure to allow the applicants access to information.

Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life. In determining whether or not such a positive obligation exists, the Court will have regard to the fair balance that has to be struck between the general interest of the community and the competing interests of the individual, or individuals, concerned (see the Gaskin v. the United Kingdom judgment of 7 July 1989, Series A no. 160, p. 17, 42).

[2] 42. In accordance with its established case-law, the Court, in determining whether or not such a positive obligation exists, will have regard to the "fair balance that has to be struck between the general interest of the community and the interests of the individual ... In striking this balance the aims mentioned in the second paragraph of Article 8 may be of a certain relevance, although this provision refers in terms only to 'interferences' with the right protected by the first paragraph - in other words is concerned with the negative obligations flowing therefrom ..." (see the Rees judgment of 17 October 1986, Series A no. 106, p. 15, para. 37).

> it does not merely compel the state to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life."

[69] The applicant argues that Art8 has been held to include the right to respect for 'physical and psychological integrity'. (Botta v Italy (1998) 26 EHRR 241 (paras32-34), R(on the application of Bernard and Another) v London Borough Council of Enfield [2002] EWHC 2282 (para32) and R (on the application of N) v Secretary of State for the Home Department [2003] EWHC 207 (paras106 and 111).

[70] The applicant contends that the family cannot move on with their private and family lives while so many questions about Gerard Devlin's death and its investigation remain unanswered. It is the applicant's case that the family of the victim still does not know what the evidential difficulties were that led to a decision to accept a plea to the lesser charges. In addition, the applicant rejects the suggestion that the views of the family were canvassed by the PPS. The applicant argues that respect for their private and family life requires the provision of the information and documentation which could help explain the circumstances in which Mr Devlin was killed and the basis upon which the murder charges were not pursued.

[71] In the context of complaints against the police and PII (not asserted here) the applicant refers to a substantial harm test which was approved by the UK Government in its response of March 1999 to recommendation 10 of Sir William MacPherson's report into the death of Stephen Lawrence, which suggested that investigating officers' reports resulting from public complaints should not attract PII as a class and that they should be disclosed to complainants subject only to a 'substantial harm' test: see para5 of Home Office Note May 1999. Para 10 of the Note emphasises the importance of openness and transparency in order to ensure public confidence in the complaints system.

[72] The applicant refers to Goodridge v Chief Constable of Hampshire Constabulary [1999] 1 All ER 896, in relation to the issue of the disclosure of police investigation reports. Moore-Bick J considered the defendant had provided 'no indication that their particular content might make disclosure undesirable'. He examined the documents and found the balance was in favour of disclosure, which he subsequently ordered. The document in question was a police investigation report into a controversial murder in which there was alleged police involvement. With regard to the subject case the applicant argues the respondent has not provided a good reason to outweigh the applicant's interest in disclosure and therefore respect for the applicant's rights under Art8 requires disclosure of the Report.

[73] The applicant submits that insofar as the Court in Re Adams [2001] NI 1 held that there is no general duty to consult victims or to disclose the contents of an investigation file or give reasons for a failure to prosecute, this decision can be distinguished on the basis that it:

(i) related to a decision made before the HRA 1998 came into force;

(ii) the dicta about the effects of the Convention were obiter;

(iii) the ECHR has since then handed down its decisions in ***Jordan*** and other cases;

(iv) the formal policy of the DPP concerning the giving of reasons has changed;

(v) there is a new Code for Prosecutors which creates duties in respect of victims;

(vi) Adams can be distinguished on the facts in that there was insufficient evidence to support a prosecution in that case.

[74] Further the applicant submits that in the triangulation of interests operating in the criminal justice system, the interests of victims will be properly protected only if they have remedies that are practical and effective, not theoretical and illusory. When the prosecuting authority loses sight of those interests and this case reflects a failure on the part of the PPS to recognise that victims have rights, not just a role in the prosecution process.

Articles 2 and 8 – International Standards

[75] The applicant relies on EC Council Framework Decision of 15 March 2001 on The Standing of Victims in Criminal Proceedings, Recommendation Rec (2006) 8 of the Committee of Ministers to Member States on Assistance to Crime Victims (Council of Europe). The applicant argues the behaviour of the PPS has infringed Arts 2, 3, 4 and 6.

[76] The applicant contends the conduct complained of does not comply with the requirements or standards in paras 2.1, 4.4, and 6 of the Recommendation R (2006)8 of the Committee of Ministers to Member States on Assistance to Crime Victims (Council of Europe).

[77] The applicant argues the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985 is also applicable and the conduct complained of does not comply with the standards stipulated in paras 4-6 of the Declaration.

Routine Disclosure

[78] The applicant argues that the Coroner provides all relevant witness statements and other material to the next-of-kin in inquests and there is no reason why the same facility should not be provided to a victim or to a victim's next-of-kin in circumstances such as the present.

Entitlement on the Specific Facts of the Present Case

[79] The applicant contends that even if the Court finds that a notional victim does not have an invariable right to be consulted or to be given access to the investigation file or even reasons for decisions of a prosecutor, the applicant was entitled in the circumstances of the present case to receive those facilities. In the present case, the applicant was entitled to be given access to the file.

The Respondents Argument in relation to Art8

[80] The respondent submits that the argument about access to documents fails under the Art 8. banner for the same reasons it fails under the Art. 2 argument.

[81] The respondent notes the applicant has been provided with several letters from the PPS which provide an explanation for the decision to accept a guilty plea to manslaughter rather than pursue the murder trial. The applicant can complain that she does not like or understand the explanations given but she cannot argue that no explanation was ever afforded. The respondent also submits that the denial of access to depositions and papers held confidentially by the PSNI is not a breach of the right to respect for her private and family life.

[82] The respondent submits the substance of the argument raised by the applicant was the subject of reasoned consideration by the Court of Appeal in Re Adams. In that case the Court accepted that the unique nature of the role of DPP led to the conclusion that the DPP is not bound by the rules of procedural fairness because he is not adjudicating in the same way as a professional administrator.

[83] The respondent acknowledges the applicant's suggestion that Adams should be doubted because it predated the patriation of the European Convention on Human Rights into domestic law. The respondent submits, however, that it is apparent that the Court took full cognisance of Convention jurisprudence in reaching their conclusions and in doing so made reference to Assenov v Bulgaria, Gulec v Turkey and Ogur v Turkey. The respondent argues that the Court of Appeal ruling in Adams is directly applicable to the

present case.

[84] The question of the extent of the obligation upon police to disclose investigation materials was considered by Kerr J in Re A [2001] NI 335. The Court expressly examined the question of whether Convention jurisprudence required access to the investigation file and accepted the Respondent's contention that there was no freestanding right to have such access. At p348b Kerr J stated:

> "It does not follow that, in every instance, in order to be effective, an investigation must be conducted by allowing the victim access to all the information available to the investigating authorities."

[85] The Court also examined whether the need to protect confidentiality in investigation files was consonant with international standards. At p 349(g) it stated:

> "There is an obvious public interest in keeping some aspects of a criminal investigation confidential. The United Nations Guidelines on the Role of Prosecutors para13(c) provides:
>
> > 'In the performance of their duties prosecutors shall keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise'."

[86] This international standard is reflected in the domestic law of the United Kingdom. In Taylor v Serious Fraud Office [1999] 2 AC 177 the House of Lords held that an implied undertaking applied to material disclosed by the prosecution in criminal proceedings. Lord Hoffman said:

> "The implied undertaking in criminal proceedings is designed to limit the invasion of privacy and confidentiality caused by compulsory disclosure of documents in litigation. It is generated by the circumstances in which the documents have been disclosed, irrespective of their contents. It excludes all collateral use, whether in other litigation or by way of publication to others."

[87] An [1999] 2AC 177 at 211:

> "Many people give assistance to the police and other

> investigatory agencies, either voluntarily or under compulsion, without coming within the category of informers whose identity can be concealed on grounds of public interest. They will be moved or obliged to give the information because they or the law consider that the interests of justice so require. They must naturally accept that the interests of justice may in the end require the publication of the information, or at any rate its disclosure to the accused for the purposes of enabling him to conduct his defence. But there seems to be no reason why the law should not encourage their assistance by offering them the assurance that, subject to these overriding requirements, their privacy and confidentiality will be respected."

Kerr J refers to this passage in Re A [2001] NI 335 at 350:

> "These passages identify the public interest in maintaining confidentiality for police investigations unless the interests of justice require otherwise. Unless it can be shown that there are compelling reasons for disclosing the contents of a police investigation file, its vital confidentiality should be preserved."

[88] The respondent submits that the ruling of the House of Lords in Taylor provides the legal support necessary for the position taken by ACC Kerr in relation to the confidential nature of witness statements.

Applicant's arguments in relation to breaches of PPS Policy

[89] The applicant argues the PPS acted in breach of its own policy as outlined in the 'PPS Code for Prosecutors', paras 5.3.5(c), 6.1.1 and 6.2.1. The impugned decision was announced without the applicant or any member of the deceased's family having previously been informed of the decision or given reasons for it or given the opportunity to make representations about it or their proper concerns and interests being taken into account. Para 5.3.5 provides:

> "5.3 Accepting Guilty Pleas to Lesser Offences
>
> 5.3.1 Decisions to prosecute, including the specific offences to be prosecuted, are taken by the Prosecution service in accordance with the test for Prosecution to which all Public Prosecutors must

adhere. Such decisions are taken after a careful assessment of all the evidence and information reported, including any obvious or likely defence and the requirements of the public interest.

5.3.2 The general principle is that the decision to prosecute, and the offences to be prosecuted, should not be altered, unless there is a proper reason, once they have been taken and formally issued by the Prosecution service.

5.3.3 The defence may on occasion approach the Prosecution Service with an offer to plead guilty to only some of the charges that they are facing, or to a lesser charge or charges, with the remaining charges not being proceeded with.

…

5.3.5 The acceptance by the Prosecution Service of such an offer from the defence must be consistent with the evidence and information available at the time and meet the requirements of justice. The following may be relevant factors:

a) whether the court can properly sentence the defendant for his or her criminality;

b) any relevant information concerning the defendant's previous convictions and likelihood of reoffending; and

c) the proper interests of victims and witnesses."

[90] Para 6.2 provides:

"6.2 Services

6.2.1The Prosecution service is committed to delivering a comprehensive set of services to victims and witnesses, from the point that the Prosecution Service assumes responsibility for a case until the case is disposed of. The range of services to be provided to victims and witnesses include:

Information Provision

> Delivery of information at key milestones in the progress of a case for example, prosecutorial disposal decision, notification of any major changes to the case, etc: "

[91] The applicant contends this was also in breach of the PPS policy as expressed in the PPS – Victims and Witnesses Policy (published March 2007) in that the PPS:

(i) Failed to explain legal or evidential difficulties to the applicant;

(ii) Failed to ensure the that the applicant's interests were considered at every stage of the criminal process;

(iii) Failed to explain to the applicant why the PPS was considering whether to accept a plea to a lesser offence;

(iv) Failed to listen to anything that the applicant wanted to say in respect of the proposed decision to accept a lesser charge.

Respondents' arguments in relation to Breaches of Policy

[92] In relation to the Code for Prosecutors the respondent argues that the proper interest of victims and witnesses were taken into account in this case. ACC Kerr avers there were at least 5 meetings between the next-of-kin and the PPS lawyers and relevant police officers before the trial commenced. Correspondence from the PPS highlights the extent to which the next-of-kin were kept informed. The Code lists factors which may be taken into account by the PPS when reaching a decision about an offer to plead guilty to a lesser charge. Weight was given to the interests of the victims but that was not the sole factor to be weighed in the discretionary balance.

[93] The respondent refers to para 6.1.1 which provides:

> "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 witnesses will be taken into account along with other relevant factors to determine whether or not prosecution is required."

[94] The respondent contends that para 6.1.1 is not relevant to the instant case as a prosecution was initiated and pursued. With regard to para 6.2.1 of the Code, the respondent notes that this section of the Code outlines the PPS

aspiration that victims and witnesses be given information at key milestones in the progress of the case. The policy does not require that victims and witnesses be informed in advance of any potential decision to accept a plea to a lesser charge. The policy was complied with in this case.

[95] The respondent rejects the applicant's assertions that there has been a breach of the PPS Victims and Witnesses Policy (2007). The respondent contends that the Policy clearly anticipates the scenario which arose unexpectedly at the opening of the criminal trial in October 2008. At para 4.3 the Policy provides:

> "4.3 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 offence. 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 or not 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."

[96] The respondent argues the caveats identified in the policy were applicable in the instant case.

Respondents' Argument in relation to Reviewability of PPS Decisions

[97] The respondent argues that any challenge to the decision making processes of the PPS must overcome the general principle that the power to review decisions of a public prosecutor must be exercised sparingly by the Court. It is submitted that this principle is well settled in relation to decisions to prosecute and not to prosecute and that the same approach should be applied to decisions made during the course of a prosecution itself.

[98] In Re McCabe [2010] NIQB 58 para 19 et seq, Coghlin LJ ,delivering the judgment of the Court, summarised the relevant jurisprudence:

> "[19] It is clear that, in appropriate cases, the court does have power to review decisions of the Director. In Re Adams Application for Judicial Review [2001] NI 1, at page 12, Carswell LCJ described the grounds of

challenge upon the basis of which judicial review could be mounted thus:

(i) The decision was tainted by the DPP applying an unlawful policy.

(ii) The decision was tainted as a result of the DPP failing to act in accordance with its own settled policy.

(iii) The decision was tainted on grounds of perversity.

(iv) The decision was infected by an improper motive.

(v) The decision was made in bad faith.

[20] In Sharma v Antoine and Others [2006] UKPC 57 Lord Bingham dealt with the matter in the following terms at para [14] of his judgment:

> 'The courts have given a number of reasons for their extreme reluctance to disturb decisions to prosecute by way of judicial review. They include:
>
> i) The great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits (Matalulu, above page 735, cited in Mohit, above, para 17);
>
> ii) The wide range of factors relating to available evidence, the public interest and perhaps other matters which [the prosecutor] may properly take into account'

(counsel's argument in Mohit, above, para 18, accepting that the threshold of a successful challenge is 'a high one')…

v) The blurring of the executive function of the prosecutor and the judicial function of the court, and of the distinct roles of the criminal and civil courts; Director of Public Prosecutions v Humphries [1977] AC 1, 24, 26, 46, 53; Imperial Tobacco Limited v Attorney-General [1981] AC 718, 733, 742; R v Power[1994] 1 SCR 601, 621-623; Kostuch v Attorney-General of Alberta, above, pp. 449-450; Pretty, above, para 121.'

[21] The threshold for review of decisions not to prosecute may be somewhat lower than that set for decisions to prosecute and, in that context, the remarks of Lord Bingham CJ in R v Director of Public Prosecutions, ex parte Manning [2001] QB330 at para 23 are apposite:

> '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 be fair 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 should not be set too high, since judicial 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.'

Such an approach was accepted as correct by the Privy Council in Mohit v Director of Public Prosecutions of Mauritius [2006] UKPC 20. Similar principles have been endorsed in this jurisdiction by Weatherup J in Hamill's Application [2008] NIQB 73 and Kerr LCJ in the Divisional Court decision of Re Lawrence Kincaid [2007] NIQB 26."

[99] The respondent argues that given the applicant is not seeking to challenge a decision to prosecute or not to prosecute but is, rather, seeking to impugn prosecutorial decisions made within the confines of the trial process itself, the degree of deference highlighted in the jurisprudence is all the greater in this context.

[100] The respondent refers to Pretty v DPP [2001] UKHL 61 in which the House of Lords criticised challenges to decisions made by the DPP. Lord Hobhouse stated at para123:

> "I would stress that the procedure of seeking to by-pass the ordinary operation of our system of criminal justice by raising questions of law and applying for the judicial review of 'decisions' of the Director cannot be approved and should be firmly discouraged. It undermines the proper and fair management of our criminal justice system".

[101] The respondent argues that the decision to accept a plea of guilty in the present case ought to be immune from the supervisory jurisdiction of the Court and, in this context, the factors identified in Adams are relevant. Further, there is no suggestion that the decisions made on the day the trial was due to commence, 24 September 2008, arose because of the application of an unlawful policy, the decision was not perverse, nor is there any argument about bad faith. The fact that others might disagree with the decisions is not sufficient to warrant the criticism of the Court. For the respondent, the decision to accept a plea of guilty falls within the discretion of the director and engages the type of 'polycentric' decision-making identified by Lord Bingham in Sharme v Antoine and others.

Discussion

[102] The applicants complain about the failure of the PPS to consult or inform her about the decision to discontinue prosecutions for the murder of the applicant's partner Gerard Devlin. Following a meeting on Monday 22 September 2008 between the prosecution and defence teams a meeting took place the following day (23 September) between Senior Prosecuting Counsel and the family. During this meeting it was explained that the defendants were maintaining their not guilty pleas and that the case was proceeding (the following day) as a murder trial. The possibility of pleading to lesser charges and the attitude of the PPS thereto was never raised. According to Mr Burnside the PPS and Senior Prosecuting Counsel fully expected the trial to commence as indicated to the family. Although never mentioned to the deceased's family on the 23rd , discussions had already taken place between the Defence Senior Counsel and Senior Prosecuting Counsel on the evening of 22 September. Although defence counsel discussed potential pleas of guilty with Mr Mooney QC there was, according to Mr Burnside, no indication the matter would proceed otherwise than by way of contested trial. Nonetheless Mr Burnside and Mr Mooney discussed scenarios that might emerge if some or all of the defendants changed their plea. He also had discussions as to evidential difficulties that had arisen in the case and that might arise if some of the defendants pleaded guilty to lesser charges. Mr Mooney and Mr Burnside agreed, in principle, the course the PPS would take in the event pleas of guilty were entered – a form of preparation he avers is a common feature of criminal trials.

[103] I was informed neither the PPS nor Senior Prosecuting Counsel had any indication prior to the commencement of the trial that the defendants would ask to be re-arraigned although Senior Prosecuting Counsel had provided advices in relation to potential developments in the case which he accepted and on the basis of which he had given authority for the acceptance of the pleas of guilty, as discussed, should this circumstance arise.

[104] None of this was mentioned or foreshadowed at the meeting with the family either at the meeting with the family on the 23rd or before the commencement of the trial on the 24th. He had instructed counsel that the basis of the pleas should be explained to police and the victim's family but states that as the defence had indicated matters were to proceed there was no need to report those discussions at that stage.

[105] Based on the foregoing it might seem a little improbable that the defendants were entering unconditional pleas without at least a tacit understanding that they would be accepted. Understanding or not, the PPS had authorised in advance the taking of the course which was ultimately taken. I find it difficult to accept that the pleas were unexpected. Whatever may be the exact position, the fact remains that the decision to accept the

guilty pleas should have been explained to the family members prior to being announced in court. In fairness to the PPS Mr Burnside has already apologised in correspondence and repeated this in his affidavit. It is very unfortunate the matter was not discussed fully with the family and the basis on which the pleas were accepted explained.

[106] It may well have been that had that procedure been followed at the time the concerns or suspicions of the family could have been allayed or dispelled. The failure to follow that procedure may have fuelled rather than allayed their misgivings. I do not accept that pressure of time and the events of the 24th made it impossible to provide the explanation to which as a matter of published PPS policy they were entitled under the Code of Practice and the PPS Victims and Witness policy set out above.

[107] There is little point in having such a policy if it is not conscientiously adhered to, especially in such serious and deeply tragic cases as the present. The PPS should ensure that those involved in making decisions governed by the Code of Practice and Victims policy are reminded of its requirements.

[108] Whilst I fully understand that the applicant remains unhappy with the decision to discontinue the murder charges, I do not accept that there has been ongoing default in explaining the basis of its decision. In short the matter having been reviewed in the light of developments, expected or not, altered the consideration of the test for prosecution in such a way that the PPS considered, based on advice from very experienced Senior Prosecuting Counsel, that the proper course was to accept those pleas.

[109] The decision to discontinue the prosecution for murder is also impugned. In appropriate cases the court has power to review decisions of the PPS. See the summary of the relevant jurisprudence by Coghlin LJ in Re McCabe [2010] NIQB at para 19 which I have set out at para 98 above. Since a decision to prosecute in most cases turns on the exercise of an informed judgment involving an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences it will, Lord Bingham observed, often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. In my judgment no public law basis has been established for disturbing the prosecutorial judgment which was made within the confines of the trial process itself.

[110] The applicant has also argued that she is entitled to the depositions and other documents sought. As the domestic and convention jurisprudence establishes it does not follow automatically that an effective investigation requires allowing the victim access to all the information available to the investigating authorities. There is an obvious interest in preserving confidentiality. The implied undertaking applied to material disclosed by the prosecution in criminal proceedings was explained by the House of Lords in

Taylor [see paras 86-87 of this judgment]. I can discern no compelling reason in this case for disclosing the contents of the investigation file and/or depositions.

Conclusion

[111] I am prepared to grant a declaration to reflect the court's finding that the PPS breached its own policy as set out above. The other grounds of challenge are rejected.