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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY DAVID ADAMS
FOR JUDICIAL REVIEW

GILLEN J

The applicant in this case is David Adams. He has instituted these proceedings for the purpose of seeking judicial review of two decisions of the Director of Public Prosecutions ("DPP") made on 6 August 1999 and 7 September 1999. It is claimed that in the course of these decisions the DPP declined to direct a prosecution against any police officer involved in the arrest, assault and detention of the applicant on 10 February 1994 and that he failed to provide adequate and intelligible reasons for his decision.

On 10 February 1994 a planned police operation took place in Belmont Avenue, Belfast to foil a terrorist attack which, according to intelligence reports, was to occur that morning. The police were successful in preventing the attack and in arresting those involved one of whom was the applicant in this case. He and the others who were arrested with him were convicted on 17 May 1995 of a number of serious criminal offences including conspiracy to murder. They were sentenced to lengthy terms of imprisonment. The plaintiff alleged that after he had been apprehended by the police, he was subjected to a series of assaults by them. The violence inflicted on him was, he claimed, wholly unnecessary to

effect his arrest. He instituted civil proceedings for compensation against the Chief Constable of the Royal Ulster Constabulary ("the Chief Constable"). On 18 February 1998 he obtained £30,000 damages on foot of an award made to him by Kerr J. In the course of his conclusions Kerr J said at page 42 of his judgment:

> "There are elements of the plaintiff's story which I do not believe as I have made clear in my commentary on his evidence. I have not been persuaded of the accuracy of other parts of his story. I consider that he may well have exaggerated his description of the number of blows that he was struck. I have concluded however that the essential core of his version of how he was injured must be accepted."

A police investigation file in respect of allegations of criminal conduct against police officers made by the applicant was received by the DPP from the Royal Ulster Constabulary on 29 July 1994. Following completion of the criminal proceedings against the applicant a direction of no prosecution was issued to the Chief Constable. Subsequent to the judgment of Kerr J in February 1998 and following a request from the applicant's solicitors, Madden & Finucane, a further interim direction was issued by the DPP to the Chief Constable on 27 February 1998 asking whether police intended to carry out further investigations in light of the judgment. On 11 March 1998 the DPP was informed by the Chief Constable that the circumstances of the case had been referred to the Independent Commission for Police Complaints ("ICPC") who had agreed to supervise a further investigation. The DPP was further informed that the Chief Constable had asked the Chief Constable of Strathclyde Police to nominate a suitable investigating officer. Pursuant to this, Assistant Chief Constable James Orr was nominated and approved by the ICPC ("ACC Orr"). On 16 December ACC Orr's report was submitted to the DPP's office by the Chief Constable accompanied by a certificate from the ICPC dated 8 December 1998 stating that, in the opinion of the ICPC, the investigation had been comprehensive and carried out extremely thoroughly to the satisfaction of the Commission.

In an affidavit on behalf of the respondent dated 10 December 1999 sworn by

Alan White, barrister at law, ("White's first affidavit") he averred that he had considered the investigation file of ACC Orr which contained a number of sections and which are set out between paragraphs 17 and 22 of his affidavit. At paragraph 24 he averred that he had briefed senior counsel with the papers and asked him to consult with whichever witnesses he considered necessary and advise whether there was a reasonable prospect of convicting any police officer of an assault on the applicant or any other criminal offence arising from the facts and circumstances reported. At paragraph 27 he averred that on 7 May 1999 senior counsel and himself consulted with the independent forensic pathologist and a police officer on observation duty on 10 February 1994 (both of which pieces of evidence had not been heard at the civil proceedings). Mr White averred at paragraph 30 that he had concluded there was insufficient evidence to afford a reasonable prospect of obtaining a conviction of any police officer involved in the events in question for any criminal offence. On 6 August a direction of no prosecution issued to the Chief Constable. This is the first decision that forms the subject of this judicial review.

Between August and November 1999 correspondence was exchanged between the DPP's office and the applicant's solicitors and two human rights organisations. In the course of the correspondence the Director was requested to explain in detail the basis of the direction for no prosecution. By way of letter dated 7 September 1999 Mr White reiterated that the decision of no prosecution had been issued on 6 August 1999. He refused to make public the report of ACC Orr or the information contained in the police investigation file. The applicant argues that he also failed to provide what the applicant has characterised as adequate and intelligible reasons for his decision not to direct a prosecution against any police officer involved in his arrest, assault and detention. This is the second decision that is challenged.

By this application the applicant challenges both decisions. He seeks an order of certiorari to quash the decisions, a declaration that the decisions were unlawful and an order of mandamus directed to the DPP requiring him to make a determination in this matter in accordance with correct principles of law and practice and taking into account all relevant

matters.

In its original form, the statement served on behalf of the applicant under Order 53 of the Rules of the Supreme Court (Northern Ireland) 1980 adumbrated the following main grounds:

(a) That the evidence available was manifestly sufficient to warrant the prosecution of the police officers involved in the assaults on the applicant as reflected in the findings of the learned trial judge in the civil action. A series of findings of the trial judge is then outlined.

(b) That the Director mis-directed himself in law and four respects in which he had so mis-directed himself are set out.

(c) That the Director had failed to take into account a number of matters which are therein set out.

(d) That the Director had taken into account and had given undue weight to a number of matters which are therein set out.

(e) That the Director had applied the wrong test, namely the test for prosecution applicable generally in cases of suspected offenders rather than a test that gave proper weight to special factors in cases of alleged police mis-conduct.

(f) That the Director had failed to act fairly in arriving at the said decision in that he failed to make available to the applicant copies of either Assistant Chief Constable Orr's report of his investigation or the written advices of senior counsel on the merits of a prosecution and had failed to give the applicant a proper opportunity to make informed representations in the light of the said report and advices.

(g) That the Director had failed to provide adequate and intelligible reasons for his decision not to prosecute.

(h) That the decisions were completely unreasonable in all the circumstances and were wrong in law.

On 3 March 2000, by order of Kerr J, the Order 53 statement was amended to include

the following grounds:

(i) The decision of 6 August 1999 was tainted by bad faith on the part of the Royal Ulster Constabulary.

(j) The respondent failed to take any or adequate account of the applicant's human rights and thereafter outlined a number of human rights which he alleged had been ignored.

In the course of the hearing, on 8 March 2000 I permitted a further amendment. Whilst I consider that leave to amend a grounding statement will only be granted in exceptional circumstances, I consider that in this instance it was necessary to determine the issues in suit between the parties. The amendments were as follows:

(k) The Director failed to apply his own policy concerning reasons in that he failed to take any or adequate account of the individual distinguishing features of the case which would or could have warranted a departure from his normal practice of not providing reasons. Thereafter seventeen failures were alleged.

(l) The Director erred in his approach to the question whether he ought to provide reasons in this case in that he applied the wrong test to the determination of the question namely whether the provision of reasons would have some of the undesirable consequences outlined in paragraph 34 of Mr White's affidavit instead of the correct test, namely whether the particular circumstances of this case as specified warranted a departure from the normal practice.

Mr Harvey QC, who appeared on behalf of the applicant with Mr Macdonald, founded his case on two broad submissions. First, that the DPP had failed to provide reasons why a prosecution was not brought in this case. The decision to refuse to give reasons he argued was a free standing issue which can and should be the subject of judicial review. Secondly, he submitted that the decision not to prosecute, taken in the absence of reasons, was irrational and unlawful. In making his case he relied on a number of arguments which I shall deal with in the course of this judgment. He indicated at the outset that he was relying

also on the submissions to be made by Mr Treacy BL who had obtained leave from Kerr J to intervene in these proceedings on behalf of the Northern Ireland Human Rights Commission (hereinafter referred to as "HRC").

The general principles which have substantially governed my consideration of the arguments put before me in this matter are as follows:-

1. The nature of judicial review

It is trite law to state that an application for judicial review is not an appeal. In particular it is not an appeal against the merits of the decision being challenged. In general that means that conclusions of fact, judgment and discretion are undisturbable. The court will review the way in which a decision has been made to determine whether there has been unlawfulness, unreasonableness or unfairness. This has recently been restated by Lord Clyde in Reid v Secretary of State for Scotland (1999) 1 AER 506:

> "Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own opinion about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse or irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal efficiency, as for example, through the absence of evidence or of sufficient evidence to support it or through account being taken of irrelevant matter or through a failure for any reason to take account of a relevant matter or through some mis-construction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence."

2. The trend towards openness

In recent cases on judicial review, a trend towards an increasing insistence on greater openness in matters of government and administration may be discerned. Moreover that momentum seems to have generated a greater willingness to intervene in cases where reasons have not been given and an increased recognition of the duty on decision-makers of various types to furnish reasons. In Doody v Secretary of State for the Home Department (1993) 3 AER 92 at page 107E ("Doody's case") Lord Mustill said:

> "I find in the more recent cases on judicial review a perceptible trend towards an insistence in greater openness, or if one prefers the contemporary jargon `transparency', in the making of administrative decisions."

More recently in Stefan v G.M.C. (1999) 1 WLR page 1300 ("Stefan's case") Lord Clyde said:

> "The trend of the law has been towards an increased recognition of the duty upon decision-makers of many kinds to give reasons. This trend is consistent with current developments towards an increased openness in matters of government and administration."

3. The circumstances in which there is a duty to give reasons

An assessment of such circumstances must commence by recognising that despite the trend towards recognition of the duty to give reasons, a court must not lose sight of the established position of the common law that there is no general duty to give reasons for administrative decisions universally imposed on all decision-makers. (See Stefan's case and Doddy's case). This must be tempered to some extent by the remarks of Lord Clyde in Stefan's case at page 1301A:

> "There is certainly a strong argument on the view that what were once seen as exceptions to a rule may now be becoming examples of the norm and the cases where reasons are not required may be taking on appearance of exceptions. But the general rule has not been departed from …"

Against this background, the following principles may be deduced in approaching the circumstances where a duty to give reasons arises:

(i) When a statute has conferred on anybody the power to make decisions affecting individuals, the court will not only require the procedures prescribed by statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural standards as will ensure the attainment of fairness (R v Civil Service Appeal Board ex p. Cunningham (1991) 4 AER 310 ("Cunningham's case") and R v Ministry of Defence ex p. Murray (1998) COD page 134 ("Murray's case").

(ii) In Stefan's case where the body making the decision was exercising a judicial function, Lord Clyde dealt with the common law principles at page 1300E:

> "But it is well established that there are exceptions where the giving of reasons will be required as a matter of fairness and openness. These may occur through the particular circumstances of a particular case. Or, as was recognised in Reg v Higher Education Funding Council, ex parte Institute of Dental Surgery (1994) 1 WLR 242, 263, there may be classes of cases where the duty to give reasons may exist in all cases of that class. Those classes may be defined by factors relating to the particular character or quality of the decisions, as where they appear aberrant or to factors relating to the particular character or particular jurisdiction of a decision-making body, as where it is concerned with matters of special importance such as personal liberty."

(iii) I observe that a not dissimilar approach was adopted by Sedley J in R v Higher Education Funding Council ex parte Institute of Dental Surgery (1994) 1 AER 651 ("Higher Education case"). This case dealt specifically with the duty of administrative bodies to give reasons for their decisions either on grounds of fairness or simply to enable any grounds for judicial review of a decision to be exposed. Sedley J said at page 670C:

> "But purely academic judgments, in our view, will as a rule not be in the class of case exemplified (though by no means exhausted) by Doody's case, where the nature and impact of the decision itself calls for reasons as a routine aspect of procedural fairness. They will be in the Cunningham case class, where

> some trigger factor is required to show that, in the circumstances of the particular decision, fairness calls for reasons to be given."

Mr Smith QC criticised this part of the judgment as introducing an all too vague category of "trigger factors" which he submitted was devoid of ascertainable meaning. I consider, however, that the court was not introducing a separate entity by referring to trigger factors, but simply indicating the manner in which the court should approach identifying a class of case where there is a duty to give reasons. Recognition of such a class is "triggered" for example by an issue of personal liberty or an obviously aberrant decision.

In this context Sedley J helpfully proposed a number of factors in favour of giving reasons and factors not in favour of requiring reasons at page 665J:

> "The giving of reasons may among other things concentrate the decision-maker's mind on the right questions; demonstrate to the recipient that this is so; so that the issues have been conscientiously addressed and how the result has been reached; or alternatively alert the recipient to a justiciable flaw in the process. On the other side of the argument, it may place an undue burden on decision-makers; demand an appearance of unanimity where there is diversity; call for the articulation of sometimes inexpressible value judgments; and offer an invitation to the captious to comb the reasons for previously unsuspected grounds of challenge. It is the relationship of these and other material considerations to the nature of the particular decision which will determine whether or not fairness demands reasons. In the light of such factors each case will come to rest between two poles, or possibly one of them: the decision which cries out for reasons and the decision for which reasons are entirely inapposite."

(iv) Murray's case largely reflects the principles that I have already set out. The Divisional Court at page 136 stated inter alia:

> "(e) In deciding whether fairness requires a tribunal to give reasons, regard will be had not only to the first instance hearing but also to the availability and the nature of any appellate remedy or remedy by way of judicial review:
>
> (i) the absence of any right of appeal may be

a factor in deciding that reasons should be given (Cunningham at 322J);

and

(ii) if it is `important' that there should be an effective means of detecting the kind of error (by way of judicial review) which would entitle the court to intervene then the reasoning may have be to disclosed.

(f) The fact that a tribunal is carrying out a judicial function is a consideration in favour of a requirement to give reasons and particularly where personal liberty is concerned.

(g) If the giving of a decision without reasons is `insufficient to achieve justice' then reasons should be required."

4. Standard of reasons required

It is difficult to state with any degree of precision the standard of reasoning a court will demand. Much depends upon the particular circumstances and the statutory context in which the duty to give reasons arises. Consequently the courts have not attempted to define a uniformed standard or threshold which the reasons must satisfy. Assistance may be gained as to the form which a decision should take from In the Matter of an Application by the Fair Employment Commission for Northern Ireland for Judicial Review (1990) 10 NIJB 38 (per Carswell J as he then was), Cunningham's case, Doody's case, Higher Education case and In the Matter of an Appeal by Kevin Farrell against the Refusal of Leave to Apply for Judicial Review (unreported, Court of Appeal in Northern Ireland, 29 June 1996 per Nicholson LJ) and the authorities therein discussed. However, I consider that one cannot do better than refer to the observations by Lord Clyde in Stefan's case:

"The extent and substance of the reasons has to depend upon the circumstances. They need not be elaborate or lengthy. But

> they should be such as to tell the parties in broad terms why the decision was reached. In many cases very few sentences should suffice to give such explanation as was appropriate to the particular situation".

5. Fairness

The applicant in this case has submitted in paragraph 3F of his statement that in addition to the failure on the part of the director to furnish any or adequate reasons, he has failed to act fairly in arriving at the said decision in that he failed to make available to the applicant copies of either Assistant Chief Constable Orr's report of the investigation or the written advices of senior counsel on the merits of the prosecution. The latter point with reference to senior counsel's opinion was abandoned by Mr Harvey QC in the course of submissions. The statement goes on to submit that the Director failed to give the applicant a proper opportunity to make informed representations in the light of the said report and advice. It is appropriate, therefore, that I should consider the general principles governing the concept of procedural fairness in judicial review.

The trend towards greater openness is reflected in the requirements of fairness. The duty of fairness is a flexible and evolving concept. Mr Smith QC on behalf of the respondent submitted to me that procedural fairness only arises where a decision confers a benefit or an advantage on another person. Whilst such circumstances will be most compelling, as a general proposition I consider this to be too restrictive and inflexible. Lord Mustill in Doody's case said of the concept of fairness at page 106E:

> "What does fairness require in the present case. My Lords, I think it unnecessary to refer by name or to quote from any of the often cited authorities in which the courts have explained what is generally an intuitive judgment. They are far too well known. From them I derive the following.
>
> (1) Where an act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
>
> (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and

in their application to decisions of a particular type.

(3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependant on the context of the decision, and this has to be taken into account in all its respects.

(4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.

(5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his behalf either before the decision is taken with a view to producing a favourable result or after it is taken, with a view to procuring its modification or both.

(6) Since the person effected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will often require that he is informed of the gist of the case which he has to answer".

The path of the authorities and the modern trend is traced in such leading textbooks as De Smith, Woolf & Jowell on Judicial Review of Administrative Action, 5th Edition at page 404 where the author states:

"Surely the time has come to recognise that the duty of fairness cannot and should not be restricted by artificial barriers or confined by inflexible categories. The duty is a general one governed by the following propositions:

(1) Where a public function is being performed there is an inference in the absence of express requirement to the contrary that the function is required to be performed fairly.

(2) The inference will be more compelling in the case of any decision which may adversely effect a persons rights or interests or when a person has a legitimate expectation of being fairly treated.

(3) The requirement of a fair hearing will not apply to all

> situations of actual detriment. There are clearly some situations where the interest affected will be too insignificant or too speculative or too remote to qualify for a fair hearing.
>
> (4) Special circumstances may create an exception which negatives the inference of a duty to act fairly. The inference can be rebutted by the needs of national security or because of other characteristics of the particular function. For example, a decision to allocate scarce resources amongst a large number of contenders which need to be made with dispatch may be inconsistent with an obligation to hold a fair hearing.
>
> (5) What fairness requires will vary according to the circumstances … (there are) a large variety of decisions which, because of the nature of the issues should be determined or the seriousness of their impact upon important interests, require some kind of a hearing (which may not even involve oral representations) but not anything that has all the characteristics of a full trial.
>
> (6) Whether fairness is required and what is involved in order to achieve fairness is for the decision of the courts as a matter of law. The law is not one for the discretion of the decision-maker. The test is not whether no reasonable body would have thought it proper to dispense with a fair hearing. The Wednesbury reserve has no place in relation to procedural impropriety".

I consider, therefore, that the concept of fairness is an evolving one and its standards are not immutable. I accept the proposition of Mr Harvey QC on behalf of the applicant that where procedural fairness is required the Wednesbury test is inappropriate. The test is not whether the court considers that no reasonable body would have so acted. Rather the test is simply whether or not the body has acted with procedural fairness. Moreover I endorse the view that whilst fairness is dependant on the context of the decision nonetheless the standards of fairness may, where they are unclear or incomplete, move or change with the grain of our times. It is in this context that international standards do fall to be considered. Counsel for the respondent has criticised this approach on the basis that it creates uncertainty and vagueness which in essence should be anathema to legal principle. One must be mindful

however of what Lord Reid said in Ridge v Baldwin (1964) AC 40 at page 64/65:

> "In modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it does not exist".

Judicial review, therefore, will naturally search for precision as an aid to the prediction and prescription of administratively fair and correct procedures but it cannot afford to abandon flexibility as a principle. The evolving nature of the standards of fairness and the trend in favour of openness was illustrated to me by Mr Treacy with two further current examples. First, in a Home Office circular of 28 April 1999 entitled "Deaths in police custody: guidance to the police on pre-inquest disclosure". This circular recognises the need in such inquests for pre-inquest disclosure to the family of the deceased including in some instances, where it is in the public interest, even the investigating officer's report. Secondly, the Review of the Criminal Justice System in Northern Ireland. Whilst this is not a legal document and without standing as a precedent, it espouses the need for a prosecutor to give as full an explanation as possible to someone with a proper and legitimate interest in a case as to why there has been no prosecution "without prejudicing the interests of justice or the public interest". It recommends that the presumption should shift towards giving reasons where appropriate (see paragraph 4.167).

6. International standards

As a general proposition there is merit in the suggestion that the common law or public law standards, the boundaries of which are not immutable and which do tend to evolve with the passage of time, should be open to guidance from relevant international standards and principles where there is uncertainty, ambiguity or incompleteness in the law. Insofar as the concept of fairness is an evolving one, that evolution can take these standards into account in the course of a restrained review at domestic as well as at the international level.

In this context the Northern Ireland Human Rights Commission("HRC") sought and

obtained leave from Kerr J to intervene in the above proceedings. Mr Harvey QC, who appeared on behalf of the respondent, indicated that he wished to adopt the arguments of the HRC as part of his case and did not intend himself to deal with this aspect. For this reason I permitted the HRC to make oral representations in addition to their written submissions. My ruling therefore should not be taken as a precedent for similar applications to intervene in future cases. In normal circumstances written submissions may well suffice to fulfil the role of an intervener where leave has been granted. Mr Treacy BL, who appeared on behalf of the HRC, invited the court to take into account a number of European and international standards. In a well presented argument it was his submission that whilst the court was not bound in each instance to take them into account they ought to provide appropriate guidance in my approach to current common law or public law standards. His submissions were:-

1. That the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (hereinafter called "the Convention") is a source of such guidance. He relied on Article 2 of the Convention which guarantees the right to life. In McCann and others v UK (1996) 21 EHRR 97 there is authority for the proposition that Article 2 had to be applied so as to make the safeguards practical and effective. The obligation to protect the right to life under this provision, read in conjunction with the State's general duty under Article 1 of the Convention "to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention", required by implication that there should be some form of effective official investigation when individuals had been killed as a result of the use of force by, inter alios, agents of the State. Mr Treacy argued that Article 2 was a fundamental right which, together with Article 3 which provides that no-one shall be subjected to torture or to inhuman or degrading treatment or punishment, enshrines some basic values of democratic societies making up the Council of Europe. He drew to my attention that unlike most provisions of the Convention, Article 3 is not subject to any exceptions under Article 15 of the Convention.

2. That Articles 2 and 3 embodied procedural safeguards intended to ensure that the

substantive rights guaranteed by these provisions are practical and effective. He outlined examples of this as follows:

(a) Aydin v Turkey (1998) 25 EHRR 251 ("Aydin's case"), Aksoy v Turkey (1997) 23 EHRR 553, para 95 ("Aksoy's case") and Assenov v Bulgaria (1999) 28 EHRR 652 ("Assenov's case") were authority for the proposition that a notion of an effective remedy for a breach of Article 3 entails, in addition to payment of compensation, a thorough and effective investigation capable of leading to the identification and punishment of those responsible.

(b) Aydin is authority for the proposition that effective access on the part of the complainant to the investigatory procedure is also necessary. It is noteworthy at this stage however to observe that Aydin's case does not appear to define what the nature of that access to the investigatory procedure should be.

(c) Gulec v Turkey (1999) 28 EHRR 121 paras 77 and 78 and Ogur v Turkey Application No 21594/93 judgment of the court 20 May 1999 ("Ogur's case") were authorities for the proposition that investigations must be independent and public and that the victim's family should have a role in the investigation including access to the case file. In particular in the Ogur case, pages 6, 7, 10 and 12 of that judgment reveal that the court at least had been given access to incident reports signed by members of the security forces who had been engaged in the shooting of the applicant's son, plans of the scene, investigations of the scene by the Prosecutor, reports of the senior police officer and a schedule of the documents in the case file prepared by the Public Prosecutor together with documents from the investigation carried out by the investigating officer.

3. That in the instant case, where he submitted the applicant had been subjected to torture or inhuman or degrading treatment by police officers, the notion of an effective remedy should include a thorough and effective investigation capable of leading to identification and punishment of those responsible including effective access to the whole investigatory

procedure (see p 654 of Assenov's case). It was his submission that this had not been done and that the investigation process by the Director of Public Prosecutions had been lacking in transparency.

4. That the applicant was entitled in common law to and had been deprived of an effective redress and remedy, an effective review process, access to an independent process of investigation, a prompt and impartial investigation and proper treatment as a victim. He drew my attention to, and I have read, the following international instruments:

(a) Article 13 of the Convention.

(b) Principles 22-24 of the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

(c) Principle 4 of the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

(d) The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Articles 2(1), Article 12, Article 13 and Article 14.1.

(e) The United Nations Declaration of Basic Principles for Justice for Victims of Crime and Abuse of Power (1985).

(f) The United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (1996).

(g) The United Nations International Covenant on Civil and Political Rights and the Declaration on the Police.

(h) The Moscow Declaration.

Mr McCloskey QC, who appeared on behalf of the respondent with Mr Smith QC, in an equally well presented argument, submitted that Mr Treacy's case was implausible in that it amounted to an invitation to give effect to these rights by way of back door incorporation. In essence Mr McCloskey's argument is that a national court in our legal system is not

competent to give effect to any of the international instruments or treaties on which the respondent relies unless they have been incorporated by legislation.

The genesis of the respondent's argument in this regard is Regina v Secretary of State for the Home Department ex parte Brind and others (1991) 1 AC 696 ("Brind's case"). In this case, the applicants sought to invoke Article 10 of the European Convention in the face of a bar by the Home Secretary on the broadcasting of the direct spoken words of members of certain terrorist organisations in Northern Ireland. The House of Lords however held that the presumption that legislation complies with a treaty obligation only applies in the case of a true ambiguity and does not apply to limit the meaning of clear general words. At page 747G, Lord Bridge said:

> "It is accepted of course by the applicants that like any other treaty obligations which have not been embodied in the law by statute, the Convention is not part of the domestic law, that the courts accordingly have no power to enforce convention rights directly and that, if domestic legislation conflicts with the Convention, the courts must nevertheless enforce it. It is already well settled that, in construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with the Convention, the courts will presume that Parliament intended to legislate in conformity with the Convention, not in conflict with it. Hence, it is submitted, when a statute confers upon an administrative authority a discretion capable of being exercised in a way which infringes any basic human right protected by the Convention, it may similarly be presumed that the legislative intention was that the discretion should be exercised within the limitations which the Convention imposes. I confess that I found considerable persuasive force in this submission. But in the end I have been convinced that the logic of it is flawed. When confronted with a simple choice between two possible interpretations of some specific statutory provision, the presumption whereby the courts prefer that which avoids conflict between our domestic legislation and our international treaty obligations is a mere canon of construction which involves no importation of international law into the domestic field. But where Parliament has conferred on the executive an administrative discretion without indicating the precise limits within which it must be exercised, to presume that it must be exercised within the Convention limits would be to go far beyond the resolution of an ambiguity. It would be to

> impute to Parliament an intention not only that the executive should exercise the discretion in conformity with the Convention, but also that the domestic courts should enforce that conformity by the importation into domestic administrative law of the text of the Convention and the jurisprudence of the European Court of Human Rights in the interpretation and application of it …. When Parliament has been content for so long to leave those who complain that the Convention rights have been infringed to seek the remedy in Strasbourg, it would be surprising suddenly to find that the judiciary had, without Parliament's aid, the means to incorporate the Convention into such an important area of domestic law and I cannot escape the conclusion that this would be a judicial usurpation of the legislative function."

It was Mr McCloskey's argument that only where there was ambiguity in English primary or subordinate legislation could Convention or treaty rights be deployed for the purpose of the resolution of an ambiguity. Accordingly it was impermissible to import such standards into the common law even if, contrary to his assertion, the concept of procedural fairness applied in this instance to the Director's decision. He argued that the principles of fairness in the common law were settled and accordingly ambiguity did not arise in their interpretation. Insofar as there was text book authority and judicial authority to the contrary, Mr McCloskey argued that such authority either ignored Brind or betrayed a misunderstanding of it. In his submission, the most recent opportunity for the House of Lords to have modified Brind, if that was their wish, arose in R v Director of Public Prosecutions ex parte Kebeline and others (1999) 4 AER 801. This case considered the DPP's continuing consent to prosecute the applicants for offences under Section 16A of the Prevention of Terrorism (Temporary Provisions) Act 1989 in light of Article 6(2) of the European Convention and pending the coming into force of Section 22(4) of the Human Rights Act 1998. The applicants' argument was rejected and Lord Steyn said at page 833B:

> "There is a clear statutory intent to postpone the coming into effect of provisions of the 1998 Act. A legitimate expectation, which treats inoperative statutory provisions as having immediate effect, is contradicted by the language of the statute."

Accordingly, Mr McCloskey borrows this quotation to fuel his argument that Parliament has now entered into this field and that in this twilight period until the Human Rights Act 1998 is brought into effect, the boundaries are clearer than ever between domestic law as it now applies and the new law when it comes into effect. Finally, Mr McCloskey argues that many of these international instruments relied on by Mr Treacy do not even have the status of treaties in international law and are therefore even further removed from creating any guiding principles.

I consider that the respondent's argument imposes too great a constraint on the development of the common law and too restrictive an interpretation upon the view of the majority in Brind's case. In Derbyshire CC v Times Newspapers (1992) 1 QB 770, in a case dealing with the entitlement of a local authority at common law to sue for libel to protect its governing reputation, the Court of Appeal considered the impact of Brind. At page 812B, dealing with Article 10 of the European Convention, Balcombe LJ said:

> "Article 10 has not been incorporated into English domestic law. Nevertheless it may be resorted to in order to help resolve some uncertainty or ambiguity in municipal law: per Lord Ackner in Reg v Secretary of State for the Home Department, ex parte Brind (1991) 1 AC 696 … Article 10 may be used when considering the principles upon which the courts should act in exercising a discretion e.g. whether or not to grant an interlocutory injunction per Lord Templeman and Lord Ackner in Attorney General v Guardian Newspapers Limited (1987) 1 WLR 1248 … Article 10 may be used when the common law (by which I include the doctrines of equity) is uncertain. In Attorney General v Guardian Newspapers Limited (No. 2) (1990) 1 AC 109 the courts at all levels had regard to the provisions of Article 10 in considering the extent of the duty of confidence. This did not limit the application of Article 10 to the discretion of the court to grant or withhold an injunction to restrain a breach of confidence. Even if the common law is certain the courts will still, when appropriate, consider whether the United Kingdom is in breach of Article 10."

Later Balcombe LJ said at page 813B:

> "In my judgment, therefore, where the law is uncertain, it must be right for the court to approach the issue before it with a predilection to ensure that our laws should not involve a breach

of Article 10."

I do not consider that such an approach does depart from the authority of Brind. I am reinforced in this view by the judgment of Sedley J in the case of R v Secretary of State for the Home Department, ex parte McQuillan (1995) 4 AER page 400. This case involved the review of an exclusion order under Section 5 of the Prevention of Terrorism (Temporary Provisions) Act 1989 prohibiting the applicant from being in or entering Great Britain on the ground that he was or had been involved in acts of terrorism. The question arose as to whether the Secretary of State's decision contravened Articles 2 and 3 of the European Convention recognising the right to life and the right not to be subjected to inhuman treatment. Sedley J said at page 42F:

> "The principles and standards set out in the Convention can certainly be said to be a matter of which the law of this country now takes notice in setting its own standards. … Once it is accepted that the standards articulated in the Convention are standards which both march with those of the common law and inform the jurisprudence of the European Union, it becomes unreal and potentially unjust to continue to develop English public law without reference to them."

This appears to have been the approach adopted by Kerr J in R v McMullan and others (unreported 4 October 1994). In that case, one of the issues before the court, was whether the existence of a violation of the European Convention was a factor within the embrace of the broad discretion vested in the court by Section 11(3) of the Northern Ireland (Emergency Provisions) Act 1973. Having reviewed all the authorities, Kerr J said at page 12:

> "In my judgment, therefore, where the law is uncertain, it must be right for the court to approach the issue before it with a predilection to ensure that our law should not involve a breach of Article 10 (of the Convention)."

These propositions have found respectable support from a number of leading text books, namely:

(a) De Smith, Woolf and Jowell, Judicial Review of Administrative Action 5th Edition at page 329/330.

(b) Brownlie on Principles of Public International Law 5th Edition at page 49.

(c) Lester and Pannick on Human Rights Law and Practice 1999 Edition at page 9 paragraph 1.31. At page 15 the authors state:

> "Prior to the coming into force of the Human Rights Act 1998, the European Convention on Human Rights, although an international treaty which binds the United Kingdom (and obliges the United Kingdom as a matter of international obligation to amend our laws and procedures where they are found to have breached the Convention), therefore has a limited, albeit important, effect in domestic law in creating rights and duties. In particular:
>
> > `(1) Courts seeks to interpret ambiguous legislation consistently with the Convention.
> >
> > (2) Courts seek to apply the common law (where it is uncertain, unclear or incomplete) and exercise judicial discretions, consistently with the Convention.
> >
> > (3) Although public authorities such as Ministers of the Crown, exercising discretionary powers have no duty to exercise such powers consistently with the Convention, the human rights context is relevant to whether the Minister or other public authority acted reasonably and had regard to all relevant considerations.'"

(d) Harris, O'Boyle and Warbrick on the Law of the European Convention on Human Rights 1995 Edition at page 452.

(e) D J Harris "Cases and Materials in International Law" 5th Edition 1998 at page 91 paragraph 4.

Two basic tenets govern the operation of these principles in this sphere. First, as Lord Wilberforce said in Balthwayt v Baron Cawley (1976) AC page 426:

> "I do not doubt that conceptions of public policy should move

> with the times and that widely accepted treaties and statutes may point the direction in which such conceptions, as applied by the courts, ought to move."

Secondly, however, this must be tempered by what Lord Simon said in the same case at page 427:

> "I must not be taken thereby to be implying that it is for the courts of law to embark on an independent and unfettered appraisal of what they think is required by the public policy on any issue. Courts are concerned with public policy only in so far as it has been manifested by Parliamentary sanction or embodied in rules of law having binding judicial force. As of such rules of law, Your Lordships have the same power to declare, to bind and to loose as in regard to any other judicial precedent. Rules of law expressing principles of public policy therefore fall to be treated with the same respect and circumspection, the same common sense and regard to changing circumstances, as any other rules of law."

I conclude therefore that to permit international standards to serve as a useful guide rather than as a prescriptive rule in those areas where procedural fairness is uncertain, ambiguous or incomplete is not to adopt forbidden reasoning. I consider that to do so where appropriate shows a proper sensitivity to the limits of permissible judicial creativity and to be no less than constitutional propriety requires.

I must now consider how these general principles are applicable to the particular circumstances of this case:

1. The first matter to be determined is whether or not there is a duty on the DPP in the instant case to give reasons to Mr Adams for the decision not to direct a prosecution against all or any police officers involved in the arrest, assault and detention of the applicant. Applying the criteria that I have set out earlier in this judgment, my views are:

(a) I find nothing in the statutory function of the Director that imposes a duty to furnish reasons for a decision not to prosecute in these circumstances. The functions of the Director are defined in Article 5(1)(a) of the Prosecution of Offences (Northern Ireland) Order 1972 ("the 1972 Order"):

> "Without prejudice to the operation of the succeeding provision

of this Article, it shall be the functions of the Director -

(a) to consider or cause to be considered with a view to his initiating or continuing in Northern Ireland any criminal proceedings or the bringing of any appeal or other proceedings in or in connection with any criminal cause or matter in Northern Ireland, any facts or information brought to his notice, whether by the Chief Constable acting in pursuance of Article 6(3) of this Order or by the Attorney General or by any other authority or person.

(b) to examine or cause to be examined all documents that are required under Article 6 of this Order to be transmitted or furnished to him and where it appears to him to be necessary or appropriate to do so to cause any matter arising thereon to be further investigated.

(c) where he thinks it proper to initiate, undertake and carry on, on behalf of the Crown, proceedings for indictable offences and for such summary offences or classes of summary offences as he considers should be dealt with by him."

Under Article 5(2) he is responsible to the Attorney General for the due performance of the functions of the Director under the Order. Article 6 deals with the delivery of information to the Director and at Article 6(3) the Order states:

"It shall be the duty of the Chief Constable, from time to time, to furnish to the Director facts and information with respect to -

(a) indictable offences alleged to have been committed against the law of Northern Ireland;

(b) such other alleged offences as the Director may specify;

and at the request of the Director, to ascertain and furnish to the Director information regarding any matter which may appear to the Director to require investigation on the ground that it may involve an offence against the law of Northern Ireland or information which may appear to the Director to be necessary for the discharge of his functions under this Order."

Clearly therefore there is no statutory obligation to provide reasons.

(b) I find nothing in the statute which implies that any additional procedural standard by way of a requirement to give reasons in these circumstances is imposed. The Order is entirely silent in this matter and having read through the Order in its entirety I find nothing that implies such a duty.

(c) Does the common law impose such a duty? There is no general duty to give reasons for administrative decisions. Following Lord Clyde's admonition in Stefan's case at page 1300E, I must now determine whether this case is one of the exceptions where the giving of reasons will be required as a matter of fairness and openness. This may occur through the particular circumstances of the case or if it falls into a class of case where the duty to give reasons exists eg because of the particular character or quality of the decision. I have considered, per Sedley J in the Higher Education case, whether there is a trigger factor causing me to recognise this as being in one of the classes referred to Stefan's case. In looking at this issue I must have regard not only to the character of the decision of the Director but also the character and jurisdiction of the Director as a decision-making body.

The function of the DPP is a complex one. It is not that of an adjudicator between two parties and to that extent alone it is immediately distinguishable from cases such as those of Doody, Higher Education, Murray and Cunningham. Moreover the DPP has to consider and weigh a number of disparate and at times even competing interests eg the general public interest at any particular time, the interest of the putative accused, the victim, the supplier of information such as an informant, the various disinterested and interested witnesses. It is a complex and almost unique function. I consider that Parliament has invested him with the discretion to weigh up those disparate and often competing interests and then to make a decision. It is a reflection of this complex function that has led to the conclusion in a number of authorities that judicial review should be sparingly exercised when dealing with the office of the Director of Public Prosecutions. The position is well summarised in the judgment of Kennedy LJ in R v DPP ex parte C (1995) 1 CAR 136 ("ex parte C (1995)"). This case

considered the decision of the Director not to prosecute in a case of alleged buggery. Having reviewed all the authorities, Kennedy LJ said at page 141:

> "From all of those decisions it seems to me that in the context of the present case this court can be persuaded to act if and only if it is demonstrated to us that the Director of Public Prosecutions acting through the Crown Prosecution Service arrived at the decision not to prosecute:
>
> (1) because of some unlawful policy (such as the hypothetical decision in Blackburn not to prosecute where the value of goods stolen was below £100);
>
> (2) because the Director of Public Prosecutions failed to act in accordance with his own settled policy as set out in the code; or
>
> (3) because the decision was perverse. It was a decision in which no reasonable prosecutor could have arrived.
>
> Mr Supperstone sought to satisfy us under all three heads but he did not suggest anything like improper motive or bad faith."

More recently in R v Director of Public Prosecutions ex parte Treadaway, The Times, 31 October 1997 ("Treadaway's case"), at page 8, Rose LJ said:

> "Mr Burnett accepted that, in light of recent authorities … this court has a reviewing function in relation to the decisions of the Director. But it is `very limited indeed' (see per Steyn LJ in Elguzouli v DAF Commissioner for Police (1995) QB 335 at 346H of the former report) and must be exercised sparingly and only when the decision challenged is wholly irrational or perverse or such as no reasonable prosecutor could make."

This was a case involving the decision of the DPP not to prosecute a number of police officers in the West Midlands Police Serious Crime Squad and the issue arose as to whether or not reasons for that refusal ought to have been given. At page 14 Rose LJ said:

> "Whether or not reasons ought to have been given in this case does not arise for determination if the primary challenge based on breaches of the code succeeds. For present purposes it suffices to say that the authorities on which Mr Owen relies are

> in our judgment wholly distinguishable. They all relate to cases where the body which is required to give reasons has an adjudicating function in relation to the person seeking reasons and therefore must act fairly to him so that, according to the circumstances, reasons may be necessary. The role of the DPP however is not an adjudicating role between two parties. Her function is to decide, in the public interest, whether a prosecution should be brought. And, as all the authorities make plain, the nature of the decision-making process is crucial when deciding whether fairness requires the giving of reasons. As Mr Burnett for the DPP pointed out, a duty to give reasons arises from a duty to act fairly. If the public confidence in the criminal justice system is to be maintained, a decision by the Director not to prosecute can properly be the subject of scrutiny by judicial review. But it does not follow that reasons for such a decision must be given, even in the limited class of case for which Mr Owen so contends."

A similar approach to the Office of the Director of Public Prosecutions had been adopted outside this jurisdiction. In H, applicant v Director of Public Prosecutions and the Commissioner of Garda Sicohana (1994) 2 IR 589 the case concerned an application to compel the DPP to institute a prosecution or to give reasons for not doing so and to supply the applicant with such statements and documentation. In the Supreme Court O'Flaherty J said at page 602:

> "I would also uphold the submissions made on behalf of the Director of Public Prosecutions that certainly as far as this case is concerned he was not obliged to give his reasons for not bringing a prosecution and I would in general uphold the appropriateness of that course of action for the reasons submitted on his behalf before us … In deciding whether to bring or not to bring a prosecution the Director is not settling any question or dispute or reciting rights or liabilities; he is simply making a decision on whether it is appropriate to initiate a prosecution. If he does, it is afterwards for the courts to decide whether a conviction may be sustained. The stance taken by the Director of Public Prosecutions is that he should not, in general, give reasons in any individual case as to why he has not brought a prosecution because if he does so on one case he must be expected to do so in all cases. I would uphold this position as being a correct one."

Mr Smith submits that given the nature of the DPP's functions, procedural fairness is not the criterion to be applied where a victim seeks review of a decision not to prosecute or a failure to provide reasons for not instituting a prosecution. Whilst I consider this is too absolute a position, I am persuaded that it is only in the exceptional circumstances postulated by Lord Clyde in Stefan's case that such an obligation would arise. The recent decision in the Divisional Court in England in R v Director of Public Prosecutions ex parte Patricia Manning and Elizabeth Melbourne (unreported 17 May 2000) is a good example of such a circumstance. In that case a prisoner had died in the course of a struggle with prison officers whilst he was in custody. Death was a result of fatal force to the neck which had been applied by one particular officer. An inquest was held with a jury into the death and a verdict of unlawful killing on the basis of an unlawful act of manslaughter was returned. The DPP issued a decision not to prosecute. A judicial review of that decision was instituted by relatives of the deceased on the grounds, inter alia, that no adequate reasons for the decision were given. At page 22 Lord Bingham LCJ said:-

> "It is not contended that the Director is subject to an obligation to give reasons in every case in which he decides not to prosecute. Even in the small and very narrowly defined class of cases which meet Mr Blake's conditions set out above, we do not understand domestic law or the jurisprudence of the European Court of Human Rights to impose an absolute and unqualified obligation to give reasons for a decision not to prosecute. But the right to life is the most fundamental of all human rights. It is put at the forefront of the Convention. The power to derogate from it is very limited. The death of a person in the custody of the state must always arouse concern, as recognised by section 8(1)(c), 3(b) and (6) of the Coroners' Act 1988, and if the death resulted from violence inflicted by agents of the State that concern must be profound. The holding of an inquest in public by an independent judicial official, the coroner, in which interested parties are able to participate must in our view be regarded as a full and effective inquiry (see McCann v. United Kingdom [1996] 21 EHRR 97, paragraphs 159 to 164). Where such an inquest following a proper direction to the jury culminates in a lawful verdict of unlawful killing implicating a person who, although not named in the verdict, is clearly identified, who is living and whose

> whereabouts are known, the ordinary expectation would naturally be that a prosecution would follow. In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case: to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting be given, to vindicate the Director's decision by showing that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision and to meet the European Court's expectation that if a prosecution is not to follow a plausible explanation will be given."

Mr McCloskey urged on me that this case had been wrongly decided. I do not agree. I consider it is no more and no less than a working illustration of that exceptional class of case where even a Director of Public Prosecutions will be required to furnish reasons to a victim for failing to prosecute.

Moreover there may well be occasions when the Director may furnish reasons in specific cases for example on foot of a policy adopted, a code drawn up, the public interest, or even as part of the gathering momentum of transparency and openness in public affairs. Ultimately the DPP is accountable to the Attorney General and to Parliament and it would be strange if current public concern for victims was not reflected to some degree in the Director's approach to his functions. I was referred to two decisions of Kerr J namely In the matter of an Application by Margaret Laverty for Leave to Apply for Judicial Review (unreported, 28 April 1998) and In the matter of an Application by Chalmers Brown for Judicial Review (unreported, 13 December 1996) and to R v The Crown Prosecution Service ex parte Maureen Hitchins (unreported 13 June 1997) in England where reasons had been provided by the Director for a decision not to prosecute. Such cases however in my view do not necessarily spring from a duty to act with procedural fairness but as a result of a case by case consideration by the Director and as a consequence of the discretion vested by Parliament in him to act in the public interest. In my view, so long as in this case the Director has looked at the matter on an individual basis, in light of the policy he has adopted, has considered in terms if this is one of the exceptional cases such as Manning and has not

fallen foul of the principles set out by Kennedy LJ, then he is not bound to adopt the same approach to the giving of reasons in this case as he may have adopted in other individual instances.

Mr Harvey rightly concedes that there can be no general rule that the Director must give reasons in every case. Rather he argues, relying on the principles to which I have referred in the cases of Doody, Murray, Cunningham and Higher Education, that this is one of those trigger cases requiring reasons or alternatively one of those cases that "cries out" for reasons. In essence the circumstances which he argues triggers the need for reasons are as follows:

(a) The public hearing of the civil action before Kerr J which he argues amounted to a finding of a serious attack by police officers with sectarian overtones upon the applicant. The judge's findings as to the medical evidence, the evidence of independent civilian witnesses and the substantial award of damages are all said to fuel the strength of this point.

(b) The applicant suffered extremely serious injuries which it is argued constitutes torture within the meaning of Section 134 of the Criminal Justice Act 1988.

(c) The conduct of the police officers constitutes serious breaches of international human rights standards.

(d) There has been widespread concern on the part of the public and human rights organisations about the need to make the offending police officers accountable for their actions.

(e) It is a unique case in that an independent police force was brought in to carry out an investigation. The Independent Commission for Police Complaints has been involved in the case and had issued a public statement on 6 March 1998 in which it said, inter alia:

> "We would like to assure the public and all those directly involved in the case that the Commission supervising member and his team will ensure that the inquiry is conducted in a

thorough, impartial and efficient manner."

The chairman of the ICPC had also indicated that the Commission had considered an external officer should be appointed because of the specific nature of the case and the need for an investigation which was "transparently independent".

(f) He argued that the conduct of the Director, the Chief Constable and the ICPC and all the other circumstances specified above gave rise to a legitimate expectation on the part of the applicant that reasons for any decision of the Director would be provided in the interests of transparency and accountability.

I am not persuaded that these factors, individually or cumulatively, do constitute a trigger requiring reasons to be furnished to Mr Adams beyond those already given in general terms by the DPP. Whilst undoubtedly serious assaults such as this by the police on members of the public are matters of profound concern, I cannot see why, without more, victims in such instances should have a more compelling case or should enjoy greater rights than a plethora of other victims. The potential category is endless. Victims of rape, child abuse, bombing outrages and the relatives of murder victims and children killed by joyriders are but examples of an endless list of high profile outrageous offences which have all individual claims for special treatment especially where the victim's and the public's perception may be that the perpetrators are well known to the police. I consider it would be invidious and indeed illogical for a Director to be obliged to draw a line between those victims whose cases were in a special category justifying reasons being given and those which were not when the line is based solely on the identity of the offender and the publicity given to the offence. Such a division itself would constitute a potent stimulus for judicial review. Where however there are additional factors, such as are found in Manning's case, the fact that servants of the State were involved may be an important matter but by itself I do not consider it to constitute a sufficient trigger. In this case, unlike many other victims, and the family in Manning's case, Mr Adams has had his assault thoroughly investigated not only by the police but also by the DPP, an independent police force supervised by the Independent Commission for

Police Complaints, an independent senior counsel and a full public hearing before a High Court judge. It is not without note that the Independent Commission for Police Complaints for Northern Ireland wrote to the Chief Constable on 8 December 1998 stating, inter alia:

> "In addition to my view of the quality of the investigation which is covered formally in the statement, I would like to add that I consider this to have been the most thorough and comprehensive investigation that I have been involved in since the Commission came into being in 1988. I am particularly pleased that this was the case in this the first occasion that we have required the appointment of an investigating officer from outside the RUC."

However Mr Harvey argues that the additional factor in this case is that there was a full and effective inquiry before Kerr J and that in light of his finding the decision not to prosecute was so inexplicable and aberrant that the ordinary expectation would be that the Director would vindicate his decision by giving intelligible reasons. Accordingly I must consider this proposition in the present context of procedural fairness although I consider precisely the same reasoning will be applied when considering whether or not the decision not to prosecute was irrational under the Wednesbury principles to which I will turn later in this judgment. I do not consider that one can characterise the decision of the Director in this case as being inexplicable or aberrant. In the first place, the Director had before him a number of matters which were not before the learned trial judge. These included forensic medical evidence, additional witness statements and information provided by Assistant Chief Constable Orr. One of the witness statements included an eye-witness undercover police officer allegedly at the scene. This evidence was not only subjected to the scrutiny of the Director, but also to that of an independent senior counsel as well as that of the Assistant Chief Constable Orr and the ICPC. The standard of proof in a criminal matter would of course be different from that in the civil proceedings before Kerr J. It must be appreciated that whilst there obviously was clear evidence before Kerr J that Mr Adams had been assaulted by police officers for which the Chief Constable was vicariously liable (the injuries

virtually speak for themselves in this regard), a wholly new process has to be considered when ascertaining if there is sufficient evidence for specific criminal proceedings to be preferred against individual officers.

Mr Harvey has drawn my attention to a number of specific passages from the judgment of Kerr J, namely pages 28, 30, 38, 39 and 43 indicating that the learned judge had expressed substantial reservations about the truth and accuracy of the evidence of at least three officers, namely Forsythe, McBrien and Berry. I do not consider it however an irrational leap of logic, particularly where there has been additional evidence, for the Director to have concluded that in law the evidence did not reach the standard appropriate to institute criminal proceedings. Two matters illustrate this possibility. First, Mr Harvey argues that Sergeant Rainey should have been the subject of prosecution for failing to observe or note Mr Adams' injuries upon his arrival at Castlereagh. Of this officer Kerr J said:

> "Constable McBrien believed that Sergeant Rainey should not have seen the plaintiff's injuries. I cannot believe that he did not - particularly, since, as custody sergeant he had a responsibility to ensure that the condition of the plaintiff on arrival at Castlereagh was noted on the detention schedule."

However, as Mr Smith pointed out to me, a charge against Sergeant Rainey for neglect of duty by a police officer requires a number of detailed legal considerations. Mere non-feasance is not sufficient and it requires proof of deliberate failure and wilful neglect. As Lord Widgery CJ said in R v Dytham (1979) QB 722:

> "This involves an element of culpability which is not restricted to corruption or dishonesty but which must be such a degree that the mis-conduct impugned is calculated to injure the public interest so as to call for condemnation and punishment."

This is a balanced judgment which has to be made by the Director taking into account all the evidence and I do not believe that failure to institute a charge such as this necessarily connotes circumstances which are aberrant or irrational. The learned trial judge did not have to consider this specific charge and doubtless did not even have it in mind when making the

comments which he did on Sergeant Rainey. Similarly the suggestion by Mr Harvey and Mr Macdonald that there was a basis for charges of assault against officers at Castlereagh individually or as being involved in a joint enterprise. The constituent elements of joint enterprise also require individual legal perusal. A person is not guilty merely because he is present at the scene of a crime and does nothing to prevent it. In each case the Crown would have to prove, in the absence of any positive act, a prior agreement or some positive act of assistance or encouragement voluntarily done. The fact that officers may have been less than frank does not by itself necessarily prove that they have each participated to the degree necessary to satisfy a court that they were jointly involved in a criminal offence. Accounts of the individual participation of each officer or even the identity of each officer may well have been conflicting. An example of this was that Mr Adams himself was clearly mistaken in suggesting that Sergeant Berry participated in the attack at Castlereagh Police Office. As Kerr J remarked at page 42 of his judgment the applicant was given to inaccuracy and exaggeration albeit that the judge also concluded that plaintiff was assaulted in Castlereagh in the manner alleged by him. In contrast in Manning's case the inquest jury verdict implicated a person who, although not named in the verdict, was clearly identified in the specific crime of unlawful killing.

Parliament has vested in the Director the discretion to decide if the evidence is sufficiently strong in each case to merit such a prosecution. I am not persuaded that the Director in this instance, having taken all the steps and having obtained the advice referred to in the affidavits, has acted in such an aberrant, inexplicable or irrational manner that the case cries out for reasons to be furnished as to why he has so acted other than those furnished by him in very general terms. This is particularly so where he has acted after having had the consideration of the case by an independent police officer, an independent statutory body and an independent senior counsel. I consider this case is wholly distinguishable from that of Treadaway where there was clear evidence that the judgment in question had not received a sufficiently careful analysis if a decision not to prosecute was to be made. I find no such

evidence in this instance.

Mr Harvey also submits that there have been a number of other breaches of the duty to act fairly. In particular he argues that there has been a failure to make available to the applicant copies of either Assistant Chief Constable Orr's report of the investigation or the written advices of senior counsel on the merits of the prosecution. In final submissions Mr Harvey, in a wise concession, made clear that he was not pursuing the latter matter. Unlike the instance in the Kebeline case, senior counsel's opinion in the instant case is clearly privileged and a victim would not have a legitimate expectation to see that opinion. If authority for this proposition be needed it is found in Re Shearer's application (1993) 2 NIJB 12 at pages 31-37. Not dissimilar principles govern the retention of ACC Orr's report. In R v Director of Public Prosecutions ex parte Hallas (1988) 87 Cr App R 340 one of the issues that arose was whether an individual who has instituted a private prosecution has a right to the production of documents such as police statements, reports and photographs held by the Crown Prosecution Service. At page 342 Lloyd LJ said:

> "This court cannot make an order for the production of documents against the Crown Prosecution Service any more than I could make an order for the production of documents against any member of the general public unless the applicant can show some right to have those documents produced. The fact that the applicant may want to see the documents for a purpose which is perfectly legitimate, as I readily accept on the facts in this case, does not give him any legal right to see those documents. Unless the applicant's legal rights had been infringed, this court simply has no jurisdiction to help the applicant, however much it may like to do so."

The function of the DPP is again relevant in this regard. The Director, having the discretion vested in him to consider whether or not to issue a prosecution, must balance a number of rights which may be transgressed by the disclosure of material. The victim is not the sole person whose rights have to be considered. The role of disclosure in the administration of justice was dealt with in Taylor and others v Serious Fraud Office and others (1998) 4 AER 801 ("Taylor's case"). The House of Lords considered the immunity of

potential witnesses in criminal proceedings and those investigating a crime or possible crime. Lord Hope said at page 817C:

> "But the administration of justice is not all about fairness to the defendant. It is about the interests of those individuals who may be affected by dissemination of the material. There is a public interest also in the detection or punishment of crime. If that interest is put at risk because of the consequences of the disclosure rules, the balance between public interest and the interests of the individual is disturbed. It needs to be adjusted in favour of the public interest. This cannot be done by reducing the scope of the disclosure rules. That would prejudice the right of the defendant to a fair trial which is always paramount."

Accordingly I do not consider the applicant has any legal right to see ACC Orr's report.

Similar reasoning governs my view that the submission in this case that Mr Adams was unfairly deprived of access to the material considered by the DPP is without foundation and is not an example of procedural unfairness. In Taylor's case, Lord Lloyd continued at page 817:

> "The risk to the administration of justice lies in the inhibiting effect of collateral use of this material. A criminal investigation may travel in various directions before it settles down and concentrates on the activities of those against whom the prosecutor believes there is sufficient evidence. Those who provide information to investigators usually do so in the belief, which may or may not be expressed by them, that the information has been given out of a sense of public duty and in confidence. That information may, if it is to be useful to an investigator, contain material which is defamatory."

Lord Hoffman dealt with the same theme at page 810J when he said:

> "Many people give assistance to the police and other investigatory agents either voluntarily or under a compulsion, without coming within the category of informers whose identity can be concealed on the grounds of public interest. They will moved or obliged to give information because they or the law consider that the interests of justice so require. They must

> naturally accept that interests of justice may in the end require the publication of the information or at any rate its disclosure to the accused for the purpose of enabling him to conduct his defence. But there seems to me 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."

I consider there are no such overriding requirements in this case and the public interest would not be best served by affording access to the file to Mr Adams.

Mr Harvey argued that the Director failed to act fairly in that he did not provide the applicant with a proper opportunity to make informed representations in the light of ACC Orr's report and senior counsel's advices. In essence this amounts to a claim by Mr Adams that the decision of the DPP was rendered unfair by the failure to consult him. I find no authority that indicates there is any general duty of consultation. I am reinforced in that view by the recent authority of R v Director of Public Prosecutions ex parte C reported 10 March 2000. I believe the reasoning is summarised at page 10 of that judgment where it states:

> "If there were a duty to consult, Mr Spencer contends that there would have to be a general duty to consult every victim. It would be impossible to draw the line where Mr Southey had drawn it or indeed anywhere else. Mr Spencer contends that the victim's position is appropriately covered by the Code at 6.7 that reads:
>
> > `The Crown Prosecution acts in the public interest, not just in the interests of any one individual. But Crown prosecutors must also always think very carefully about the interests of their victim, which are an important factor, when deciding where the public interest lies.'"

In this case, a young rape victim had not been consulted by the Crown Prosecution or indeed even informed of the decision not to proceed with her case. I see nothing in the applicant's case that distinguishes it from the general proposition that there is no duty to consult the victim for discontinuance of proceedings.

A further submission on behalf of the applicant was to the effect that a judicial review in itself created the need for reasons to be given so that the court will know whether grounds for challenge exist. I do not agree with this proposition because to so hold would create a general duty to give reasons in the face of a common law principle which establishes that there is no such general duty (see Higher Education Funding case at page 665D). The determination of whether or not reasons require to be given is a free standing issue. In Manning's case Bingham LCJ said at page 23:

> "In any event it would seem to be wrong in principle to require the citizen to make a complaint of unlawfulness against the Director in order to obtain a response which good administrative practice would in the ordinary consequence."

The judicial review itself cannot create the need for reasons. There is either an entitlement or there is not. It is for the court to determine whether or not reasons ought to have been given.

However irrespective of the general position, Mr Harvey argues that in this particular case the Director does have a policy with reference to the giving of reasons and this policy has been operated unfairly. Not only does Mr Harvey point to cases, to which I have adverted, in the past where reasons have been given, but in this instance he fastens on to the proposition that in considering his policy, the Director has confused two questions. It is submitted that the Director has failed to ask at the outset if reasons ought to be provided in view of the unique features mentioned above and thereafter to ask if the undesirable consequences of reasons being given should have an impact on that decision. Mr Harvey submits that Mr White on behalf of the Director has fallen into the false logic of saying that because one or more of the undesirable consequences of giving reasons obtains, reasons cannot be given ie he has failed to consider the appropriate starting point, namely whether there are sufficient features to take this case out of the general rule.

On behalf of the respondent, Mr White averred at paragraph 33 of his affidavit of 10 December 1999 ("the first White affidavit") as follows:

> "With regard to the matter of providing reasons for their

decisions, it has been the general practice of successive Directors of Public Prosecutions for Northern Ireland to refrain from giving reasons for decisions not to institute or continue with criminal proceedings other than in the most general terms. This general practice has been applied in considering whether reasons should be given voluntarily, or on request. It has also been applied where any requests for reasons came from the victim, the defendant or a third party."

Mr White then goes on in paragraph 34 to outline five main considerations which govern this general practice:

"(1) Firstly, if detailed reasons are given in one or more cases, they may require to be given in all. Otherwise wrong conclusions may well be drawn in relation to those cases where reasons are refused, resulting either in unjust implications regarding the guilt of individuals or suspicions of mal-practice or both.

(2) Secondly, if reasons are given in all cases and if they consist of something more than generalities, unjust consequences are even more obvious and likely. While in a minority of cases the reasons could result in no damage to a reputation or other injustice to an individual, in the majority, such a result would be difficult or impossible to avoid.

(3) Thirdly, the reason for no prosecution is often unrelated to any assessment of the issue of guilt or innocence. It may consist of the unavailability of a particular proof, perhaps purely technical but nevertheless essential, to establish the case. In other cases, it may be the sudden death or unavailability of an essential witness or it may arise out of intimidation. There is a risk that to indicate that such a factor was the sole reason for not prosecuting could amount to conviction without trial in the public estimation and deprive the individual concerned of the protection afforded by the impartial and careful analytical examination in open court of the case against him which the judicial system affords.

(4) Fourthly, in other cases, the publication of the particular reasons for not prosecuting could cause unnecessary pain and damage to persons other than the suspect as, for example, where the decision is determined by an assessment of the credibility or mental condition of the

victim or other witness.

(5) Fifthly, there is a further and substantial category of cases in which decisions not to prosecute are based on the Director's assessment of the public interest. The Director is the guardian of the public interest in this sphere. Decisions made on an assessment of the public interest may include cases where the sole reason for non-prosecution was the age or mental or physical health of the suspect. In other cases there may be considerations of national security or threat for the safety of individuals. In cases of this nature, the publication of reasons would not be appropriate and could result in unjust implications being reached regarding the guilt of individuals or lead to the publication of information held in confidence or jeopardise the safety of individuals or threaten national security."

In paragraph 37 of the affidavit Mr White avers:

> "The present Director has consistently recognised that the propriety of applying the general practice described in paragraph 33 above must be examined and reviewed in every case where a request for the provision of detailed reasons is made. The Director accepts further that where such requests are received he must consider the applicability of the considerations specified in paragraph 34 above, together with any other considerations which seem to him material, to the particular facts and circumstances of the case in question and assess the weight to be accorded to those considerations."

I should say at this stage that I consider that there is nothing unfair about this general approach or about the reasons underlying the adoption of this policy. Moreover I see nothing aberrant or unlawful in the adoption of such a policy.

I have also read the contents of paragraph 8 of Mr White's affidavit of 21 March 2000 ("White's second affidavit") where the deponent has meticulously gone through each sub-paragraph of paragraph 3K of the plaintiff's statement as amended. I conclude that in applying the policy which I have set out above, the Director did consider the appropriate factors contained within paragraph 3K. Insofar as he did not take into account any of those

factors my views are as follows:

(a) I do not consider that the failure of the Chief Constable to appeal the decision of Kerr J is a pertinent factor. This does no more than underline the findings of that decision. That should not influence the Director's general practice.

(b) The Director did not consider the international human rights standards as amongst the factors or contentions that he took into account. I do not consider that he is legally bound to do so on the authority of Brind's case. If I am wrong in this, as indicated later in this judgment, I am of the opinion that even had these factors been taken into account, they would not have had any material impact in this instance. This applies both to paragraph 3K(ix) and 3K(x).

(c) I do not consider that the fact that the Director had written to the Chief Constable enquiring whether he intended to conduct a further investigation into the matter in light of the judgment in the civil action as set out in paragraph 3K(xii) was a relevant factor to be taken into account.

(d) I do not consider that the conduct of the Director, the Chief Constable and the ICPC and all the other circumstances specified in paragraph 3K gave rise to a legitimate expectation on the part of the applicant that reasons for any decision of the Director would be provided in the interests of transparency and accountability. I see nothing in the conduct of any of these persons or any of the circumstances that would have induced in Mr Adams a reasonable expectation that he would receive reasons. The concept of legitimate expectation is founded upon a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law which requires regularity, predictability and certainty in governments dealing with the public. However I have found that procedural fairness in this case does not require that reasons be given other than in the general terms provided. The height of any legitimate expectation is that the policy will be applied fairly and I consider that this

has been performed properly by the Director. Accordingly I see no basis on which a legitimate expectation of the type alleged could be founded.

Consequently I consider that the Director did take into account all those matters which might have had the potential to take this particular case outside his general policy. He then considered the impact of attempting to give reasons in this instance. I do not accept therefore that he confused the two questions raised by Mr Harvey.

I now consider the Director's application of the policy in this instance. Mr Harvey argues that the exercise of his discretion must be informed by fairness. He submits this has been an inexplicable decision not to prosecute and therefore the failure to give reasons effects the whole process and the decision itself. In this case he says the policy has not been applied fairly and the explanation given by the Director for not providing detailed reasons is flawed with unfairness. The first affidavit of Mr White deals with this matter at paragraphs 41 to 43:

> "41. I consider that to provide the detailed exposition of the reasoning sought by the applicant's solicitor would, of necessity, involve the detailed analysis of and commentary upon the information and evidence upon which the decision was based. I was of the opinion that, in the circumstances of this case, to conduct a detailed exercise of this nature would have some of the undesirable consequences outlined at paragraph 34 above.
>
> 42. In particular I was of the opinion:
>
> (1) That to provide a detailed analysis and commentary in this case would make it difficult or impossible to avoid providing detailed reasons in any other case where the decision was taken on evidential grounds.
>
> (2) That to provide a detailed analysis and commentary on this case would impose a considerable logistical burden. In this regard I would refer to the number of witness statements and other documents contained in the police investigation file. In addition, a total of eight officers were interviewed under caution about a

variety of allegations and a detailed exposition of the reasoning behind the decision might require to address each allegation against each officer.

(3) That if the department is obliged to supply detailed reasons in every case upon request, it will impose an impossible logistical burden.

(4) That to promulgate a detailed analysis of and commentary upon the evidence against the police officers who were potential defendants in this case would result in damage to their reputations or other injustice, such as adverse imputations against them, in a situation where they would be deprived of the protection afforded by an impartial and careful analytical examination in open court of the case against them, which the judicial system affords.

(5) That to promulgate a detailed analysis of, and commentary upon, the evidence or accounts of witnesses involved in the case could result in damage to their reputations or other adverse imputations against them, as this would involve assessments of their reliability and credibility of such witnesses and an evaluation of the reliability, consistency and credibility of their evidence.

(6) That to provide detailed reasons in the terms and to the extent contemplated above could prompt a debate and/or further enquiries, possibly in the public domain, which could have one or more of the undesirable consequences described in the foregoing sub-paragraphs.

43. The above considerations impelled me to the conclusion, having carefully considered the request made, and the various factors and contentions advanced in support thereof, that, in the circumstances of this case, a departure from the Director's general practice described at paragraph 33 above would not be appropriate."

A number of disparate interests, including the public interest, have to be weighed by the Director whilst implementing this policy. The very nature of the interest which he is

protecting may preclude him from going beyond general reasoning because to enter into detailed reasoning may promote the very mischief which the Director is anxious to avoid. It is against this background that I have concluded that the application of this policy has not been applied unfairly, if that was to be the test to be applied and has not been applied irrationally in a Wednesbury sense. Thus:

(a) Given the difficulties to which I have adverted in distinguishing this case from the host of other equally prima facie deserving cases for decisions, a detailed analysis or commentary in this case might well produce the difficulties referred to by Mr White at paragraph 42(1). Moreover even the gist of the reasons may conceivably bring about the mischief that he is seeking to avoid and I consider therefore that it must be within the discretion of the Director to consider the appropriate weight to be given to this possibility.

(b) I consider that the logistical burden is another factor which it is entirely appropriate for a Director to take into account. It is likely that such a factor will have perhaps less weight than some of the others given the personnel available at the Director's disposal but this does not dilute the general principle that it is open to a public authority in the exercise of its discretion to take account of resources. If this alone was the only factor then there might well be grounds for challenge, but when it is taken as simply one factor in the weighing process, I find nothing objectionable or unfair about it.

(c) It has been accepted by the applicant that there was no suggestion that detailed reasons had to be provided in every case.

(d) The protection of the putative defendants in any criminal matter is a key interest which the Director has to address. The presumption of innocence must remain unimpaired. I think there is merit in the point made by Mr Smith that one must remember that these police officers were not parties to the civil proceedings, they did not have personal representation and they were not entitled to direct how the defence was conducted before Kerr J. The evaluation of how their interests are to be protected is I

believe a matter for the discretion of the Director and I see nothing unfair or irrational about his conclusion that in this instance they would be deprived of their protection if a detailed analysis of the evidence against them was made at this stage as set out at paragraph 42(4). Even the gist of reasons could well result in damage to their reputations or other injustice.

(e) I believe that a similar discretion is vested in the Director when considering the witnesses involved. Taylor's case provides a clear line of authority exhorting protection of such people against the prejudice occasioned by disclosure of reasons in a case such as this. Once again Parliament has vested in the Director the obligation to carry out this weighing process and I see nothing in paragraph 42(5) that suggests that that process has been carried out unfairly or irrationally.

(f) There clearly will be public debate about this matter and this is therefore a factor which must be weighed by the Director in deciding what explanation or reason he is prepared to afford for the decision not to prosecute. Once again I consider that it is appropriate that he should exercise his discretion in this matter and I see nothing to suggest that he has acted unfairly or irrationally in looking at this criterion at paragraph 42(b).

I must consider now whether or not the application of procedural fairness in this case is to be influenced or guided by the international standards to which I have referred earlier in this judgment. It is my view that where the evolving concept of procedural fairness is uncertain, ambiguous or incomplete then the court can take these standards into account. There is no arbitrary limit to cases which may come within the gathering ambit of the exceptions to the general rule not to give reasons as outlined by Sedley J in Higher Education Funding case, Lord Clyde in Stefan's case or the principles set out in Doody's case or Murray's case. In the circumstances of this particular case however I do not find there is any element of uncertainty, ambiguity or incompleteness in the principles of procedural fairness which fall to be applied. The principles I have visited in the preceding paragraphs of this

judgment all seem to me to be tolerably clear and wedded to authoritative precedent. In terms I find nothing to bring this case within the parameters of the statement of Balcombe LJ in Derbyshire CC v Times Newspapers (1992) 1 QB 770 at page 812B and which I have referred to at pages 21 and 22 of this judgment. Consequently I do not consider that the international standards referred to require to be invoked as a further guide.

If however again I am wrong in this and if the evolving nature of the concept of fairness and of public law has created ambiguity, uncertainty or incompleteness in the principles I have considered, or indeed if the international standards per se must be taken into account in determining standards of fairness, then I must turn to these standards and consider their relevance to this case. Having done so, I have concluded that I can find no breach of any of these standards when applied in this instance.

At the heart of Mr Treacy's submissions lay the argument that by virtue of the assault on Mr Adams by servants of the State they had committed an act of torture, contrary to Article 3 of the Convention. As a result a number of matters are triggered:

A An effective investigation

Assenov's case, he argues is authority for the proposition that the behaviour of the police has triggered the need for an effective official investigation, leading to the identification and punishment of those responsible, an effective access to investigations and an effective remedy. Transparency, he submits, is at the core of the issue. However even a cursory consideration of the facts of the authorities upon which he relies betrays the yawning factual chasm between those cases which formulate the principles on which he relies and the present case. They simply do not bear comparison.

Two cases illustrate the difference between the present case and those authorities. In Assenov's case, at page 701 paragraph 103 it is clear that the alleged beating in that case was witnessed by approximately 35-40 witnesses but that no attempt was made to contact or question these witnesses in the immediate aftermath of the incident. Instead a statement was taken from only one independent witness who could not recall the events. There had been a

deplorably ineffective investigation into the claim that he had been beaten by police officers. In Aydin's case at paragraph 106 it is clear that the victim had made allegations of torture, rape and ill-treatment by police. A similarly deplorable investigation had ensued. The public prosecutor had not visited the scene of the incident, had made no attempt to ascertain if the location the victim described was consistent with her allegations, had questioned no police officers in the critical initial stages of the investigation and had conducted that part of the inquiry by correspondence. I believe that any court, irrespective of Article 3 of the Convention, would have concluded that there was a totally inadequate investigation and any conclusion to the contrary would have been irrational.

In contrast in this case, I see no such evidence of an ineffective investigation. The allegations in this case have not only been subjected to the scrutiny of the RUC, but also by a new investigation by an independent police force supervised by an independent statutory body, namely the Independent Commission for Police Complaints for Northern Ireland. This body concluded that there had been a thorough investigation. Thereafter independent senior counsel played a role in further assessing the investigation. It seems to me therefore that there is absolutely no basis for suggesting that there has not been an effective investigation of these matters.

B Access to investigations

Although Mr Treacy drew my attention to the cases of Aydin, Aksoy v Turkey (1997) 23 EHRR 553, Kaya v Turkey (1999) 28 EHRR 1 and Assenov's case, I find nothing in these cases that defines precisely the criteria applicable to such a concept. Perhaps recognising this, Mr Treacy in this context largely relied on Ogur's case. Once again however the facts of the case bear no comparison to the present instance. In Ogur's case, the victim had been killed in the course of an operation conducted by the security forces at a local building site. As paragraph 85 of the decision makes clear, the investigating officer had not even considered it necessary to identify and question the members of the security forces who had taken part in the operation. The Commission considered that the investigation carried out at a national

level into the death had not been conducted by independent authorities, had not been thorough and had taken place without the applicants being able to take part. In short there had been a total cloak of secrecy over the whole proceedings. At paragraph 92 of the judgment, the court noted that during the administrative investigation, the case file was inaccessible to the victim's close relatives who had no means of learning what was in it.

I do not believe that this is a free-standing decision to the effect that access to a case file must be provided in any investigation in order to comply with European standards of public law. To hold this, would be to overturn the principles I have referred to in Taylor's case. I find nothing in any of the European standards urged on me which conflicts with the principles set out in Taylor. Indeed, turning to the second skeleton argument of the HRC, I note that the guidelines on the role of prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders specifically states that prosecutors shall "keep matters in their possession confidential unless the performance of duty or the needs of justice require otherwise". Unlike Ogur's case, Mr Adams was invited to contribute albeit at first he refused to do so. I see nothing to suggest that he or his advisers were not informed of the progress of the investigation. Moreover, as I have already indicated, direct access to every aspect of the case was given to an independent police force and an independent statutory body as well as senior counsel. The principles in Taylor's case must be a guide in the area of access and within those constraints I am not persuaded that there has been any failure in this case to afford appropriate access to the investigations.

C Effective remedy

Thirdly, I do not believe that as a victim Mr Adams has been deprived of an effective remedy. The practical impact of the aggregation of remedies has to be considered (see Silver v United Kingdom (1983) 5 EHRR 347 and Lester and Pannick on Human Rights Law and Practice 1999 Edition at paragraph 4.13.17). In this context I think there is strength in Mr McCloskey's submission that the applicant has had a catalogue of domestic redress available to him which he lists as follows:

(a) His complaint about the conduct visited on him.

(b) The initial investigation carried out by the RUC.

(c) The evaluation of his allegations by the Director of Public Prosecutions.

(d) The investigation by the independent police force.

(e) The supervision by the statutory body.

(f) The overview by the Director of Public Prosecutions part of which was carried out by independent senior counsel.

(g) His right to make a claim for damages.

(h) The trial by an impartial tribunal and the granting of a large award.

(i) His right to challenge in this court the decision of the Director.

(j) The full hearing of the matter before me.

(k) His right of appeal against any decision made by me.

I consider, therefore that Mr Adams has been afforded an effective remedy against the wrongs visited on him in this instance.

It is my conclusion therefore that insofar as the European international standards which have been urged on me must inform the concept of procedural fairness in this particular case, I find no disharmony between those standards and our domestic law. Accordingly had I been obliged to decide whether or not there had been a breach of procedural fairness to Mr Adams in light of the international standards submitted to me, I would have concluded that there had been no such breach and that he had been accorded appropriate procedural fairness.

Mr Harvey's second primary argument was that the decision not to prosecute, taken in the absence of reasons, was irrational and unlawful. I consider that the principles governing this approach are those set out by Kennedy LJ in ex parte C (1995) and to which I have already referred in this judgment. I shall deal with these principles in turn:

1. I find nothing unlawful in the policy of the Director in this case. I have dealt in some detail with this policy earlier in this judgment and insofar as I have found that there was nothing aberrant or unfair in its adoption, I find it a lawful exercise of the Director's

discretion.

2. I have already dealt in this judgment with both the policy of the Director and his application of the policy in this instance. For the reasons I have already set out, I consider he has acted in accordance with that policy.

3. For the reasons I have previously adumbrated at pages 34-36 of this judgment I do not find the decision not to prosecute perverse or that it was a decision at which no reasonable prosecutor could have arrived. Mr Harvey argued that the granting of leave by Kerr J was sufficient to constitute prima facie grounds of irrationality on the part of the Director. I reject this proposition. In Re Cookstown District Council (unreported, June 10, 1996 Northern Ireland QBD), Kerr J held that:

> "The requirement to raise an arguable case is a modest one. It need only be shown that if the assertions made by the applicant prove to be correct, it would be tenable to claim that he may be entitled to judicial review of the decision challenged."

Moreover in Re Gary Jones (unreported, July 10, 1996 Northern Ireland QBD), Campbell J (as he then was) said that the test for the grant of leave was whether the judges is satisfied:

> "That there is a case fit for further investigation and a full inter partes hearing of the substantive application for judicial review."

I do not consider therefore that the granting of leave does constitute prima facie finding of irrationality because leave falls far short of any such finding.

Finally, I do not find any basis for suggesting that there was improper motive or bad faith on the part of the Director in this matter. It was submitted on behalf of the applicant that there was mala fide on the part of the RUC in that evidence was produced to the DPP eg the undercover police officer at the scene, which was not discovered to the plaintiff in the civil action or produced in evidence at the hearing before Kerr J. I do not see how mala fide on the part of the police or Chief Constable would in any event visit improper motive or bad faith on the part of the DPP whose task is to consider pursuant to a statutory obligation

material disclosed to him by the Chief Constable. Secondly, I see nothing suggestive of mala fide on the part of the police or the Chief Constable in producing this additional evidence. An independent senior counsel has consulted with this witness and one must assume has given the matter close and independent perusal. Where there has been this and other independent scrutiny, I see no basis for the case that the DPP's decision-making power was infected with improper motive, fraud or dishonesty. I am therefore not persuaded that this applicant has succeeded in discharging the heavy burden which is necessary to condemn a decision as Wednesbury unreasonable.

Accordingly I have concluded that the application in this matter must be refused.

The applicant's costs as a legal aided person will be taxed in accordance with the relevant schedule of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (CROWN SIDE)

IN THE MATTER OF AN APPLICATION BY DAVID ADAMS
FOR JUDICIAL REVIEW

JUDGMENT

OF

GILLEN J
