**THE HIGH COURT**
**JUDICIAL REVIEW**

**Record No.: 2013/670 JR**
**2014/122 JR**

**Between/**

**ALI CHARAF DAMACHE**

**Applicant**

**and**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**
**IRELAND**
**THE ATTORNEY GENERAL**

**Respondents**

**and**

**THE MINISTER FOR JUSTICE AND EQUALITY**

**Notice Party**

**and**

**THE IRISH HUMAN RIGHTS AND EQUALITY COMMISSION**

**Amicus Curiae**

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# OUTLINE SUBMISSIONS OF THE AMICUS CURIAE

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## Introduction

1. It is the respectful view of the *amicus curiae* that no administrative organ of the State should be immune from judicial review. It is fundamental to a country based on the rule of law that such organs must act within the law, and so be subject to scrutiny by the Courts.

2. That said, the exercise of a discretion by an administrative body, and the nature of that discretion, may narrow considerably the scope for judicial review. A decision whether to bring a prosecution or not in a particular case is the exercise of a discretion by the Director of Public Prosecutions ('the DPP'). In the view of the *amicus*, the scope for reviewing a decision of the DPP is necessarily limited. However, that does not mean that the DPP has quasi-immunity from judicial review by reason of some form of special status. Rather, by the application of established legal principles, i.e. that Courts will be slow to interfere with the exercise of a discretion by a specialist decision-maker, the range of grounds upon which a decision of the DPP can be reviewed will be narrow. In the view of the *amicus*, it is unlikely that a decision of the DPP will be successfully reviewed by an applicant unless it is shown to be based on a misunderstanding of the law, or is inconsistent with the DPP's own rules or guidelines, or is contrary to the fundamental rights of an affected person.

3. In order for the DPP to be the subject of judicial scrutiny, it must provide reasons for its decisions. An examination of the legality of a decision may require analysis of the reasons for that decision: *Mallak v. Minister for Justice, Equality and Law Reform*[1].

4. The *amicus* (when the Irish Human Rights Commission) previously expressed its concern at the broad discretion of the DPP in assigning offences to the Special Criminal Court, and its failure to provide reasons for such decisions[2]. However, the Supreme Court has since held that the reason for such a decision should be disclosed, or a justification provided for not giving a reason: *Murphy v. Ireland*[3], at paragraph 44.

5. In the view of the *amicus*, it is incumbent on the DPP to provide its reasons for a decision, when requested to do so, or to justify why the disclosure of its reasons is contrary to the public interest.

**The European Convention on Human Rights ('the ECHR')**

6. In *Jordan v. UK*[4], the European Court of Human Rights found that in certain circumstances there was an obligation on the DPP in Northern Ireland to provide reasons for a decision not to prosecute. Pearse Jordan was shot by security forces in Northern Ireland. The DPP decided not to prosecute the police officers involved. The European Court of Human Rights held that the refusal to disclose the reasons for this decision would "*not be conducive to public confidence*" and "*denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision*."

7. The relevant part of the European Court of Human Rights' decision is as follows:

> "*122. The Court recalls that the DPP is an independent legal officer charged with the responsibility to decide whether to bring prosecutions in respect of any possible criminal offences committed by a police officer. He is not required to give reasons for any decision not to prosecute and in this case he did not do so. No challenge by way of judicial review exists to require him to give reasons in Northern Ireland, though it may be noted that in England and Wales, where the inquest jury may still reach verdicts of unlawful death, the courts have required the DPP to reconsider a decision not to prosecute in the light of such a verdict, and will review whether those reasons are sufficient. This possibility does not exist in Northern Ireland where the inquest jury is no longer permitted to issue verdicts concerning the lawfulness or otherwise of a death.*
> "*123. The Court does not doubt the independence of the DPP. However, where*

1 [2012] 3 I.R. 297

2 It addressed the U.N.'s Human Rights Committee on the failure of the Government to address the mechanism for referring cases to the Special Criminal Court, particularly in light of the Committee's findings in *Kavanagh v Ireland*, Communication No. 819/1998, CCPR/C/71/D/819/1998, 2001, and the recommendations of the Hederman Committee.

3 [2014] IESC 19

4 (2003) 37 EHRR 2

*the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making. Where no reasons are given in a controversial incident involving the use of lethal force, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision.*

"*124. In this case, Pearse Jordan was shot and killed while unarmed. It is a situation which, to borrow the words of the domestic courts, cries out for an explanation. The applicant was however not informed of why the shooting was regarded as not disclosing a criminal offence or as not meriting a prosecution of the officer concerned. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Article 2, unless that information was forthcoming in some other way. This however is not the case.*

8. The Court in concluding that there had been a breach of Article 2 of the ECHR held that among the shortcomings was:

> "*142. … a lack of public scrutiny, and information to the victim's family, of the reasons for the decision of the DPP not to prosecute any police officer …*"

9. It concluded:

> "*144. The Court would observe that the shortcomings in transparency and effectiveness identified above run counter to the purpose identified by the domestic courts of allaying suspicions and rumours. Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force. Lack of such procedures will only add fuel to fears of sinister motivations, as is illustrated inter alia by the submissions made by the applicant concerning the alleged shoot-to-kill policy.*
> *"145. The Court finds that there has been a failure to comply with the procedural obligation imposed by Article 2 of the Convention and that there has been, in this respect, a violation of that provision.*"

10. In *Finucane v. United Kingdom*[5], the European Court of Human Rights found a violation of Article 2 of the ECHR on the ground that various authorities had failed to carry out a prompt and effective investigation into the allegations of collusion by security personnel in the killing of Mr. Finucane. Of the DPP in Northern Ireland, it stated:

> "*82. The Court does not consider it possible at this stage for it to determine what in fact occurred in 1990-91 and in 1995 when decisions were taken concerning the prosecution of persons possibly implicated in the Finucane murder (see paragraphs 16 and 27 above). However, where the police investigation procedure is itself open to doubts as to its independence and is*

5 App. No. 29178/95, 1st July 2003

*not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making. As the Court observed in* Hugh Jordan *(cited above, § 123), the absence of reasons for decisions not to prosecute in controversial cases may in itself not be conducive to public confidence and may deny the family of the victim access to information about a matter of crucial importance to them and prevent any legal challenge of the decision.*
"*83. Notwithstanding the suspicions of collusion, however, no reasons were forthcoming at the time for the various decisions not to prosecute and no information was made available either to the applicant or the public which might have provided reassurance that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Article 2, unless that information was forthcoming in some other way. This was not the case.*"

11. In this jurisdiction, the DPP, as an "organ of the State" is required by section 3 of the ECHR Act 2003 to act in a manner that is compatible with the ECHR.

12. If the DPP is not obliged to give reasons for its decisions, when requested to do so, it is difficult to see how it could be held to its duty under section 3 of the ECHR Act 2003. An appropriate mechanism to challenge a decision of the DPP is by judicial review.

**The situation in England and Wales**

13. In a judicial review challenge to a decision not to prosecute made by the Crown Prosecution Service of England and Wales the Lord Chief Justice, Lord Bingham, handing down judgment for a Divisional Court of the English High Court, stated, in *R. v. Director of Public Prosecutions, ex parte Manning*[6]:

*23. Authority makes clear that a decision by the Director not to prosecute is susceptible to judicial review: see, for example,* R. v. Director of Public Prosecutions, ex parte C *[1995] 1 Cr. App. R. 136. But, as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no-one else. It makes no difference that in practice the decision will ordinarily be taken by a senior member of the CPS, as it was here, and not by the Director personally. In any borderline case the decision may be one of acute difficulty, since while a defendant whom a jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial. If, in a case such as the present, the Director's provisional decision is not to prosecute, that decision will be subject to review by Senior Treasury Counsel who will exercise an independent professional judgment. The Director and his officials (and Senior Treasury Counsel when consulted) will bring to their task of*

6 [2001] QB 330

*deciding whether to prosecute an experience and expertise which most courts called upon to review their decisions could not match. In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied.*

14. As the Crown Prosecution Service states on its website, its decisions have been challenged successfully on judicial review on a number of different grounds, and **reasons** for a decision by the Service to prosecute, or not to prosecute, should be carefully recorded. It states:

> *"A decision by the Crown Prosecution Service to prosecute or not to prosecute may be judicially reviewed. If an application for judicial review is successful, the court will direct the CPS to reconsider its position. The final decision is, however, for the CPS. It is clear from the case law below that the courts are likely to order the CPS to review its prosecutorial decisions where:*
>
> *Law*
> *It is apparent that the law has not been properly understood and applied (**R v DPP, ex p. Jones (Timothy)** [2000] Crim LR 858).*
>
> *Evidence*
> *It can be demonstrated on an objective appraisal of the case that some serious evidence supporting a prosecution has not been carefully considered (**R (on the application of Joseph) v DPP** [2001] Crim LR 489; **R (on the application of Peter Dennis) v DPP** [2006] EWHC 3211);*
> *It can be demonstrated that in a significant area a conclusion as to what the evidence is to support a prosecution is irrational (**R v DPP, ex p. Jones (Timothy)** [2000] Crim LR 858; or*
> *The decision is perverse, that is, one at which no reasonable prosecutor could have arrived (**R v DPP, ex p. C** [1995] 1 Cr App R 136).*
>
> *Policy*
> *CPS policy, such as that set out in the Code for Crown Prosecutors, has not been properly applied and/or complied with (**R v DPP, ex p. C** [1995] 1 Cr App R 136; **R v DPP, ex p. Manning** [2001] QB 330; **R v Chief Constable of Kent, ex p. L; R v DPP, ex p. B** (1991) 93 Cr App R 416). This includes situations where irrelevant considerations have been taken into account (**R v DPP, ex p. Jones (Timothy)** [2000] Crim LR 858);*
> *The decision has been arrived at because of an unlawful policy (**R v DPP, ex***

***p. C** [1995] 1 Cr App R 136); or*
*It can be demonstrated that the decision was arrived at as a result of fraud, corruption or bad faith (**R v DPP, ex p. Kebilene** [2000] 2 AC 326; **R v Panel on Takeovers and Mergers, ex p. Fayed** [1992] BCC 524).*

*Previous Judicial Decisions*
*Where an inquest jury has returned a verdict of unlawful killing, the reasons why a prosecution should not follow are not legally and evidentially robust, and have not been clearly explained (**R v DPP, ex p. Manning** [2001] QB 330; **R (on the application of Peter Dennis) v DPP** [2006] EWHC 3211); or*
*Where there have been proceedings in the civil court, the civil courts decision has not been carefully considered (**R v DPP, ex p. Treadaway, The Times**, October 31 1997).*

*It is essential to ensure that the reasons for decisions, and in particular public interest considerations giving rise to decisions, are documented. This record can be used, if necessary, to demonstrate that the decision to prosecute was taken only after a full and proper review of the case. Interested parties should also be informed of the reasons for decisions.*
*Where a decision is challenged, and is likely to be the subject of a judicial review, the decision should be re-reviewed. Where, on a re-review, it is decided that the original decision was wrong, immediate action should be taken (if possible) to rectify the decision. This will result in quicker resolution of the issue for all parties and may avoid the need for judicial review proceedings to be brought."*

15. Decisions made by Crown Prosecution Service in England and Wales have been the subject of a number of judicial review challenges, some of which have succeeded: see a summary provided by the Crown Prosecution Service's website at Appendix A.

## The DPP's Guidelines

16. The office of the Director of Public Prosecution was established by Prosecution of Offences Act, 1974, as an independent office. The Director makes decisions independently of all other bodies and institutions, including both the Government and the Garda Síochána, and decisions are taken free from political or other influence.

17. In its "Guidelines for Prosecutors, Revised November 2010", it states "*... it will generally be in the public interest to prosecute a crime where there is sufficient evidence to justify doing so, unless there is some countervailing public interest not to prosecute*", and "*... the interest in seeing the wrongdoer convicted and punished and crime punished is itself a serious public consideration. The more serious the offence, and the stronger the evidence to support it, the less likely that some other factor will outweigh that interest.*"

18. See further Chapter 12 regarding review of decisions not to prosecute.

**The applicant's case for obtaining reasons from the DPP**

19. In *State (McCormack) v Curran*[7] Walsh J. stated:

> *"The enforcement of the law of this State and the prosecution and punishment of the perpetrators of criminal acts within this jurisdiction must be given precedence over the actual or constructive surrender of such persons to another jurisdiction for the same or any other crime and it is the duty of the appropriate prosecuting authority to act accordingly."*

20. The applicant has requested that the DPP furnish him with the reasons why she has decided not to prosecute him in the State. He has raised *prima facie* serious issues that his human rights may be violated during the course of, and following, trial in the United States of America, should that State's extradition request be granted. If he is prosecuted in this jurisdiction, there will be no extradition.

21. Having raised prima facie issues concerning his legal rights, it is the respectful view of the *amicus* that the DPP is obliged in law to furnish the applicant with the reasons for her decision not to prosecute him or, at minimum, provide a justification for not providing those reasons. Failure to do so deprives the applicant of any possibility of knowing if the DPP has carried out her function in respect of his case lawfully.

22. Among the questions which arise in the applicant's case is whether the possibility of him being extradited was a relevant consideration in the DPP's decision not to prosecute[8]. The DPP's position on this is not fully clear. The DPP's letter to the applicant's solicitor dated 28th January 2014 indicates that no new issues had arisen which would merit reconsideration of the March 2011 decision not to prosecute. Paragraph 2 of the respondents' Statement of Opposition stresses that the terms of s.15 of the Extradition Act 1965 indicate that the Oireachtas did not intend that the DPP "*would have the role of deciding on issues of forum for the purposes of extradition*". This may or may not be the case, but of potential relevance to the DPP is the possibility of an Irish citizen being extradited in respect of the same conduct on which the DPP has made a decision not to prosecute. The DPP's position on whether forum can ever be a consideration and whether it was a consideration in this case is unknown, largely due to the opacity of the DPP's decision-making process.

23. The DPP's own Guidelines list as a relevant consideration the question of *"whether the consequences of a prosecution or a conviction would be*

7. *State (McCormack) v Curran* (1987) ILRM 225.

8 Given that no extradition request had been received at the time that the DPP made her initial decision not to prosecute in March 2011, and the fact that s.15 of the Extradition Act 1965, as it then was, effectively precluded the applicant's extradition, the possibility of extradition was logically not a relevant consideration for the DPP at that time. This had changed by the time the DPP refused to revisit her decision in 2014 however, and for the purposes of these submissions, references to the decision not to prosecute should be taken as references to the decision not to revisit the earlier decision not to prosecute in light of the changed circumstances.

*disproportionately harsh or oppressive in the particular circumstances of the offender"*[9]. Logically, if the risk of a disproportionately harsh or oppressive outcome for the suspect is to be a concern for the DPP, then the question of whether there is a risk of such an outcome arising from a decision not to prosecute should be an equally valid consideration, albeit one which will arise less frequently.

24. If the DPP is obliged to assess the risk of a disproportionately harsh or oppressive outcome arising from a decision not to prosecute, then she cannot do so without examining the entire factual matrix. If, for instance, the existence of an extradition request were to be excluded as a relevant consideration, then the DPP's assessment of risk to an Irish citizen suspect would be incomplete. It is submitted that in determining whether the decision not to prosecute will be proportionate and in accordance with constitutional and ECHR principles, every consequence of the decision must be open for examination.

25. That is not to say that all consequences will have equal weight – a decision not to prosecute a suspect with mental health difficulties in respect of €50 worth of criminal damage to property may well result in the owner of the property never being compensated, and yet this might be seen as outweighed by the risk of the prosecution having a disproportionately harsh effect on the suspect.

26. The *amicus* is therefore of the view that the possibility of the applicant being extradited to the United States, being as it is a consequence of the decision not to prosecute him, was a relevant consideration for the DPP in coming to that decision.[10] The weight to be given to that consideration is a matter for the DPP and the scope for judicial review of any balancing exercise of competing considerations carried out by the DPP may be narrow. However, in order to maintain public confidence in the DPP's office through transparency, the *amicus* submits that there should be some indication that the possibility of extradition was at least a consideration for the DPP. The appropriate manner in which to give such an indication would seem to be through the giving of reasons for the decision not to prosecute.

27. There would appear to be no obvious policy considerations which would prevent the giving of reasons for the decision not to prosecute in the applicant's case. Even if there had been such policy considerations, the *amicus* submits that in that case these could and should have been put forward as a justification for not giving reasons, an option envisaged in *Mallak* at paragraph 77 and in *Murphy* at paragraph 40.

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9 *Guidelines for Prosecutors* - November 2010, at paragraph 4.22(d). Interestingly, the risk of State oppressiveness to an individual is listed as a factor which would tend to show that the *"public interest"* is in not prosecuting that individual. Although the public interest will often be portrayed as being in contrasting terms to the interests of the individual, the maintenance of a compassionate administrative system based on the rule of law is undoubtedly in the public interest, and so the public interest and the interests of the individual at risk of oppression are the same in such circumstances.

10. Or more accurately, in coming to the decision not to revisit the earlier decision not to prosecute.

28. In the written submissions of the DPP, the significant shift in the courts' approach to the duty to give reasons represented by the *Mallak*, *Rawson* and *Murphy* decisions of the Supreme Court is said not to apply to the applicant's case, as the decision not to prosecute does not affect *"the rights and obligations of individuals"*. This phrase has its origin (in this context) in the decision of Clarke J. in *Rawson* and, if interpreted narrowly, could have a significant limiting effect on the application of a duty to give reasons. The applicant in the present case may not have a *"right"* to be prosecuted in this jurisdiction in respect of the conduct for which his extradition is sought. However, the *amicus* is of the view that it would be unrealistic to contend that the decision of the DPP not to prosecute the applicant can have no effect on his rights.

29. The applicant claims, *inter alia*, that there is a real risk that his Constitutional and ECHR rights right not to be subjected to torture, inhuman or degrading, or to be tried in a manner that is flagrantly unjust, would be breached if he is extradited to the United States. Quite apart from the issue of whether these claims have any basis, it seems clear that no possible such risk could arise if the DPP had decided to prosecute the applicant in this jurisdiction. Thus the decision not to prosecute does have a potential effect on the exercise by the applicant of certain fundamental rights under both the Constitution and the ECHR. The effect may well be indirect, but in the submission of the *amicus* it is sufficiently proximate to require reasons on the particular facts of his case.

**The E.U. Victims' Directive**

30. As recognised by O'Donnell J. at paragraph 40 of the Supreme Court decision in *Murphy*, the common law is to a certain extent catching up with statutory developments as regards the duty to give reasons. He gave the example of s.18(2) of the Freedom of Information Act 1997. The continuing move towards more transparent governance is also a core feature of the European Union. Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (known as the "Victims' Directive") is to be transposed by the State by 16th November 2015[11]. Article 6(1) of the Directive provides:

> *"1. Member States shall ensure that victims are notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by the victim and that, upon request, they receive such information:*
> *(a) any decision not to proceed with or to end an investigation or not to prosecute the offender."*

31. Article 6(3) provides that the reasons for a decision not to prosecute must be given to victims of crime in most cases:

11 Article 27.

> *"3. Information provided for under paragraph 1(a) and paragraph 2(a) shall include reasons or a brief summary of reasons for the decision concerned, except in the case of a jury decision or a decision where the reasons are confidential in which cases the reasons are not provided as a matter of national law."*

32. Furthermore, Article 11(1) specifically provides for a victim's right of review of a decision not to prosecute:

> *"1. Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law."*

33. The *amicus* does not contend that the applicant in the present case is in the same position as a victim of crime who seeks reasons for a decision not to prosecute, or that the policy behind the above-cited provisions of the Victims' Directive can be seamlessly applied to the applicant's case by analogy. However, the Victims' Directive is relevant to the present case as a further example of the need for transparency on the part of the DPP.

## Conclusion

34. The applicant's case presented unusual issues for the DPP to consider, particularly after a request for extradition had been received from the United States and after a fundamental change to s.15 of the Extradition Act 1965 had come into force. The *amicus* is of the respectful view that the DPP should give reasons for its decision not to prosecute the applicant or, at minimum, explain on what basis it seeks to withhold those reasons. It remains unclear whether the DPP views the existence of a request for the extradition of an Irish citizen as a factor which can or should be taken into account when deciding whether to prosecute that citizen.

Michael Lynn S.C.
Anthony Hanrahan B.L.

2nd December 2014

On behalf of the Irish Human Rights and Equality Commission, acting as Amicus Curiae