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Case No: CO/3863/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 24/01/2022

Before:

LORD JUSTICE POPPLEWELL
and
MR JUSTICE DOVE

- -

Between:

THE QUEEN on the application of
ALINA JOSEPH

Claimant

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS

Defendant

- -
- -

Michael Mansfield QC and Philip Rule (instructed by Imran Khan and Partners) for the **Claimant**
Duncan Penny QC and Paul Jarvis (instructed by **the Crown Prosecution Service**) for the **Defendant**

Hearing date : 13 January 2022

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Approved Judgment

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Lord Justice Popplewell:

Introduction

1. The claimant is the mother of Christopher who died on 1 July 2019 aged 13. She brings an application for judicial review of the decision of a Specialist Prosecutor Ms MacDaid, following a review pursuant to the Victims Right of Review ("VRR") scheme, that no proceedings should be brought against a suspect, Q, who was 14 at the time of Christopher's death. Ms MacDaid concluded that there was sufficient evidence to give rise to a realistic prospect of Q being convicted of the offence of unlawful act manslaughter, but that a prosecution would not be in the public interest.

2. At the time of his death, Christopher was living with his mother and six brothers and sisters in Mountain Ash, South Wales. He attended the local comprehensive school where he had a wide group of friends and was popular. On the day in question some sixteen of these friends, all aged 13 or 14, were playing in and around an area known as the Red Bridge over the Cynon River. Some of the boys were jumping into the river; others in the group were sitting chatting. Christopher was at one point standing next to the bridge on a concrete ledge which was in part topped with layers of large stones. He was in his bathing shorts and was prevaricating as to whether to jump in. Q was seen to push him in the back causing him to fall into the river. He immediately got into difficulties because he could not swim. Others jumped in to help him, including Q. However they were unable to assist him as he kept pulling them under water in panic, and tragically he drowned.

3. Christopher's family believed this to be a racially motivated hate crime as Christopher was black and all the other children present were white. Ms MacDaid gave careful consideration to this suggestion and addressed it in detail in her review, concluding that there was no evidence to support it. There is no challenge to that aspect of her decision and I need say no more about it.

The policy guidance

4. The principal policy guidance for prosecutorial decisions is contained in the Code for Crown Prosecutors ("the Code") issued by the Director of Public Prosecutions pursuant to section 10 of the Prosecution of Offences Act 1985. Paragraph 2.10 of the Code provides that prosecutors must also comply, amongst other things, with policies and guidance of the CPS issued on the behalf of the DPP unless there are exceptional circumstances. Such CPS guidance covers specific offences and offenders. The guidance relevant in this case includes the CPS Guidance on Youth Offenders ("the Youth Offenders Guidance") and the CPS Guidance on Homicide (murder and manslaughter) ("the Homicide Guidance").

The Code

5. The Code test as to whether to start or continue a prosecution has two stages, the evidential stage and the public interest stage (paragraphs 4.1 and 4.2). In relation to the evidential stage, prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction, which means that the defendant is more likely than not to be convicted of the charge alleged (paragraphs 4.6 and 4.7). The public interest stage of the test requires that, where the evidential stage is passed, prosecutors

must go on to consider whether a prosecution is required in the public interest (paragraph 4.9). A prosecution will not automatically take place merely because the evidential stage is met: a prosecution "will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour" (paragraph 4.10).

6. Prosecutors are required to consider each of the questions set out in paragraphs 4.14(a) to (g) in identifying and evaluating relevant public interest factors tending for and against prosecution. They are not exhaustive; not all the questions may be relevant in every case; and the weight to be attached to each of the factors identified as relevant will vary according to the facts and merits of each individual case (paragraphs 4.11 to 4.12).

7. Paragraph 4.14(a) identifies as a factor the seriousness of the offence, requiring an assessment of both culpability and harm. Paragraph 4.14(b) addresses culpability and provides that the greater the suspect's level of culpability, the more likely it is that a prosecution is required. It goes on to say that culpability is likely to be determined by six factors, namely: (i) the suspect's level of involvement; (ii) the extent to which the offending was premeditated and/or planned; (iii) the extent to which the suspect has benefited from criminal conduct; (iv) whether the suspect has previous criminal convictions and/or out of court disposals and any offending whilst on bail or while subject to a court order; (v) whether the offending was or is likely to be continued, repeated or escalated; and (vi) the suspect's age and maturity (which is specifically addressed in paragraph 4.14(d)).

8. Paragraph 4.14(c) addresses the circumstances of the victim and the harm caused to the victim. Prosecutors should take into account views expressed by the victim or the victim's family about the impact which the offence has had, subject to the proviso that the CPS cannot act for victims or their families and prosecutors must form an overall view of the public interest.

9. Paragraph 4.14(d) requires the prosecutor to consider the suspect's age and maturity at the time of the offence. It provides that the criminal justice system treats children and young people differently from adults and that "significant weight must be attached to the age of the suspect if they are a child or young person under 18". It goes on to provide that the best interest and welfare of the child or young person must be considered including "whether a prosecution is likely to have an adverse impact on their future prospects that is disproportionate to the seriousness of the offending". Prosecutors are required to have regard to the principal aim of the youth justice system which is to prevent offending by children and young people. Prosecutors are required to consider the suspect's maturity as well as their chronological age. The sub-paragraph provides that "as a starting point the younger the suspect, the less likely it is that a prosecution is required." This is qualified by guidance that there may be circumstances which mean that notwithstanding that the suspect is under 18 or lacks maturity, a prosecution is in the public interest, and this includes where the offence committed is serious.

10. Paragraph 4.14(e) requires the prosecutor to consider the impact on the community. The bullet points under this paragraph suggest that what it has in mind are the adverse effects of the offending on the community, including the prevalence of offences.

The Youth Offenders Guidance

11. The Youth Offenders Guidance sets out that the key considerations governing the decisions made by Crown Prosecutors in dealing with youths are those contained in:

    (a) section 44 of the Children and Young Persons Act 1933 which requires the courts to have regard to the welfare of the young person;

    (b) section 37 of the Crime and Disorder Act 1998 which requires the principal aim of agencies involved in the youth justice system to be the prevention of offending by young persons; and

    (c) the Code, which requires consideration of the interests of a youth amongst other public interest factors when deciding whether the prosecution is needed.

12. It provides that all major decisions in relation to youth offenders will be taken by a Youth Offender Specialist who must be a senior Crown Prosecutor with adequate experience and appropriate skills. In particular any decision to prosecute must be made by a Youth Offender Specialist.

The Homicide Guidance

13. The Homicide Guidance provides that "the public interest in prosecuting homicide cases is high as the harm caused will inevitably be of the utmost seriousness. … Subject to sufficiency of evidence a prosecution is almost certainly required, even in cases such as 'mercy killing' of a sick relative."

Procedural history

14. The initial account given by the children present on 1 July 2019 was that Christopher had slipped or fallen in, not that he had been pushed. This was what two of the children said in the 999 call and what the group said to the police officer attending the scene on the day. Five of the children made statements to the police over the following few days, and all maintained that Christopher had fallen or jumped in. Q's account was that Christopher had lost his balance as he had been leaning over.

15. Q later told his mother something different, namely that he had accidentally slipped into Christopher, causing his fall. This led to the five children being reinterviewed, and to interviews of the other children present, which all took place about ten days to a fortnight after the incident. Four of the children newly interviewed said that they had seen Q push Christopher in. Others maintained that he had slipped or fallen, or that they had not seen how he came to go into the water. Q's new account was that he ran down towards the rock and slipped, falling into Christopher and causing Christopher to fall into the water. Q was subsequently reinterviewed in August 2019, maintaining his account of accidently slipping into Christopher, and rejecting the accounts of those other children who said they had seen him push Christopher.

16. The matter was initially reviewed by Mr Dewar, a Senior Crown Prosecutor in CPS Cymru Wales, who decided that there was sufficient evidence for a charge of unlawful act manslaughter against Q but that it was not in the public interest for such a charge to be brought. Given the serious nature of the case, his decision was considered and approved by senior area managers including the Chief Crown Prosecutor for CPS

Cymru Wales before being communicated. It was notified to the claimant in a four page letter dated 19 February 2020 which explained the reasoning for the decision.

17. Following a referral under the VRR scheme, the case was referred to the CPS Appeals and Review Unit ("the ARU") where it was considered by Ms MacDaid. Ms MacDaid has extensive experience in prosecutorial decisions. She has been employed by the CPS since 2001, following 11 years of self-employed practice at the Bar. Since 2011 she has worked in the ARU, which provides a central service for the CPS in relation to appeals to the Court of Appeal, Supreme Court and Administrative Court; and which is also responsible for the final independent stage of VRR scheme reviews in about 40% of cases. She is a Youth Offender Specialist.

18. Ms MacDaid reviewed the evidence in the case and reached the conclusion that Mr Dewar's decision was correct. The exercise she carried out, and the reasons for her decision, are apparent from two contemporaneous documents. The first is an impressively thorough and detailed 143 paragraph Review Note dated June 2020 ("the Review Note"); the second is a 13 page letter dated 20 July 2020 notifying the claimant of the decision ("the Notification Letter"), which provides a detailed explanation of the reasoning, although not as detailed as the Review Note. The Review Note was not provided to the claimant at the time, but was produced by Ms MacDaid as an exhibit to a witness statement she made on 22 June 2021 following the order of Cheema-Grubb J in these proceedings granting permission to apply for judicial review, which included an order for disclosure of the evidence upon which the decision was based so far as required by the Crown's duty of candour and the overriding objective. In correspondence, and in the claimant's written skeleton argument, criticism was made of the extent of this disclosure. In oral argument Mr Mansfield QC did not press this complaint. He was right not to do so. I am satisfied that the disclosure was in accordance with the order made, and in accordance with the Crown's duty of candour and the relevant authorities (including *S v The Crown Prosecution Service* [2016] 1 WLR 804 per Sir Brian Leveson P at [24]-[25]) as to the limited extent to which such disclosure is appropriate.

The Review Note and Notification Letter

19. The Review Note reveals the following:

    (1) Ms MacDaid considered the statements and recorded interviews of all the children who were present at the incident and a number of those who were not. There were also many other statements from other young people, and adults, which she did not receive but which were well described and summarised in a witness matrix compiled by the Major Incident Team. The incident occurred in a small community, the young people were all at the same comprehensive school, and unsurprisingly there was considerable talk and speculation about what had happened at the river. Ms MacDaid regarded the evidence of those who were at the river as being the most relevant. Ms MacDaid also had (a) the investigation team's pre-charge advice (MG3); (b) statements from those at the school, friends and family, Christopher's football coaches, police and rescue workers; (c) unused schedules; (d) many photographs and aerial shots of the bridge and the surrounds at which the events in question took place; and (e) a letter from the claimant's then solicitor setting out her concerns about the investigation and the decision not to bring a prosecution.

(2) Many of the statements from the children present said that prior to going into the water, Christopher was wearing only his bathing shorts having taken off his top and footwear, and put his glasses on the bridge. A common theme was that Christopher wanted to go into the water and said he intended to, but was prevaricating about doing so. The children all referred to the place from which Christopher had gone into the water as the "rock".

(3) In the interviews which took place about 10 days to a fortnight after the incident, four of the children (D,G,H & P), said that they had seen Q push Christopher. In D's case this was inconsistent with the statement of V, who was not at the river but said that D had told her that he had not seen a push. In addition, A now said that Q had later told him that he had pushed Christopher; and that shortly before Christopher went into the water Q had asked him, A, "Shall I push Christopher in?", which he had ignored. A said that although he had not seen Christopher going into the water he saw Q right on the edge of the rock immediately afterwards, laughing and with his arms in front of him, which looked like he had pushed Christopher in. Other statements (B,E and F, the last being on the "rock" with Christopher at the time) supported the accounts initially given to the police of Christopher falling or jumping. Ms MacDaid concluded at paragraphs 109ff of the Review Note that the picture from the differing accounts, including those given in the 999 call, to the police officer attending on the day and in the first round of statements, could still be regarded as confusing, but that nevertheless there was reliable and credible evidence that Q pushed Christopher which was sufficient to support a charge. She went on to say that given the inconsistencies in the accounts, and the real possibility that the credibility of witnesses could be further undermined by the likelihood of the children not having been paying attention to what was happening on the "rock" at the time and/or being influenced by what others had later said and/or a fear of getting into trouble, she had no doubt that Q would rely on the differing accounts; and that if Q were charged all the young people would have to give evidence.

(4) As to Q's state of mind, Ms MacDaid recognised that the offence of unlawful act manslaughter involves an objective test of the risk of some harm, but also concluded that Q would himself have appreciated a risk of danger to Christopher in the light of his account in interview that he considered the risks before he himself jumped into the river because he was not a very strong swimmer and was worried that he would hit the bottom before he saw that others like A who were taller did not do so. Q admitted that he knew that Christopher was not good at swimming and that the risks to Christopher would be the same as for him. Ms MacDaid concluded that the Crown would not be able to prove that Q knew that Christopher could not swim. Ms MacDaid went on to conclude that "What Q did can be described as a prank, he was clearly just messing about." There was no evidence in the statements she had read that there was any malice to his actions or intent to cause harm. "There is no evidence that it was … premeditated or planned. It was clearly an ill thought out spontaneous act done in jest with tragic consequences."

(5) In addressing the public interest stage of the Code test, Ms MacDaid followed the structure of the Code as to the relevant considerations:

a. She addressed first the seriousness of the offending by reference to the harm caused and the suspect's culpability. As to the harm, she recognised that an incident resulting in death is a serious offence and that the consequences

were of the utmost seriousness, not only to Christopher but also to his family, on whom his death had had a devastating effect. As to culpability, she said that this was a childish prank as opposed to a deliberately hostile or violent act; and that the nature of the unlawful act, a push, was likely to be regarded as tending towards the lower end of the scale of culpability for a manslaughter charge. The incident was spontaneous, not premeditated or pre-planned. There was no criminal benefit, Q had no criminal convictions or cautions, and he was unlikely to reoffend.

b. Addressing Q's youth and maturity, Q was 14 ½ at the time of the incident, now one year older, and Ms MacDaid concluded that a homicide conviction would have a significant adverse impact on his future prospects which would be disproportionate to the assault he committed, albeit an assault with catastrophic consequences. She recognised that he had not accepted in interview that he had pushed Christopher; in this respect she said she was conscious of his young age and lack of experience with the criminal justice system and said that he must have been very afraid what would happen to him if he told the truth, such that his lack of full admission in interview would not alone make it in the public interest to prosecute.

c. Ms MacDaid went on to consider the impact of a prosecution on the community. There had been a public meeting in February 2020 to discuss how the community would react if Q were charged. It was attended by various agencies and the police, as well as the Family Liaison Officer to represent the views of Christopher's family. Ms MacDaid had the summary of the meeting in an email, and discussed the views expressed at the meeting at some length with the senior police officer present. As to Q, the police and children's services were very concerned for Q's safety were the matter to go to court. He was presenting challenging behaviour at school as a result of his peer group saying he had killed someone and had said to his social worker that he would kill himself if sent to prison, a threat treated as very real. A charge would have a devastating effect on Q's family, and the safeguarding and other implications for Q and his family were said to be huge, with services picking up the negative impact for years. In relation to the other children present at the river, the view was that any charge would have a massive impact on them. They were socially immature, and vulnerable and challenging in school; educational psychology services were still involved with a lot of them. There were huge concerns about the traumatic effect of their being put through a court process in which they would face cross-examination on their conflicting accounts. "The fallout of any prosecution would be massive." The picture for the wider community was that a prosecution would open up old wounds and rock the return to normality which the community was experiencing. "The overall view is that the community would be further torn by a prosecution."

(6) The final paragraphs of the Review Note merit quotation in full:

"**<u>Conclusions</u>**

141. The consideration of the factors counting for and against a prosecution is not a mathematical exercise in which a specific

numerical weight can be attached to each factor. However, my conclusions are as follows:

The following key factors weigh in favour of a prosecution:

(i) An incident resulting in the death of a child is a most serious offence. When committed by an adult offender it would almost always be in the public interest to prosecute in such a case.

(ii) Christopher's death has had a devastating impact upon his family and friends.

The following key factors weigh against a prosecution:

(i) The suspect was 14½ years old at the time of the offence. Significant weight must be attached to this.

(ii) There is no evidence that the offence was premeditated or pre-planned. The evidence establishes that it was a foolish act, carried out in jest, which resulted in Christopher losing his life and tragedy for his family.

(iii) The suspect has no previous convictions or cautions.

(iv) The Code and the relevant guidance clearly reinforce that the best interests and welfare of the child or young person must be considered. A prosecution and conviction will have a significantly detrimental effect on the suspect's future prospects. A criminal conviction would have a severe impact on any prospects of education and employment.

(v) Prosecutors must have regard to the principal aim of the youth justice system, which is to prevent offending by children and young people. It is highly unlikely, on the information currently available, that this type of offending will be repeated.

142. Having considered all these points with care, I have concluded that the factors militating against a prosecution in this case outweigh the factors in favour of a prosecution. For these reasons, I am of the view that it is not in the public interest to prosecute the suspect.

143. The original decision not to charge was correct."

20. The Notification Letter reveals the same reasoning, without setting out in such detail the evidence of each of the children or the evidence about the effect of a prosecution on the children and the community. In the public interest section it echoes the words of para 4.10 of the Code that if the evidential stage is met a prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour. Its conclusion contains

the list of factors counting for and against a prosecution in materially identical terms to that set out in para 141 of the Review Note, save in two respects: sub-paragraph (i) simply says "An incident involving the death of a child is a most serious offence"; and there is an additional subparagraph as one of the key factors weighing against a prosecution namely "(vi) The welfare and impact on Christopher's friends of giving evidence and reliving the events when they witnessed the death of their friend". It is reasonable to assume that this last factor, which had been identified in detail in the Review Note, had been omitted from the key factor list in the conclusion section of that document by an oversight, which was remedied when the Notification Letter was drafted and sent. That is consistent with the claimant's case that this was a factor which had been taken into consideration, but which should not have been.

The grounds

21. The claimant was granted permission to advance five grounds which I summarise as follows:

(1) the decision failed to give proper weight to the fact that the offence involved the death of a child;

(2) the decision gave undue weight to the impact of a prosecution on the future of Q;

(3) the decision failed to consider and give effect to the aggravating factors that Q told lies and failed to show remorse;

(4) the decision wrongly took account of the effect of a prosecution on witnesses, alternatively failed to have proper regard to the mitigation of that effect by the use of special measures;

(5) the decision suffered from fundamental or material factual error.

The law

22. We were referred to a number of authorities, but the applicable principles can conveniently be taken from the summary contained in the judgment of Lord Burnett of Maldon CJ and Jay J in *R (Monica) v Director of Public Prosecutions* [2019] QB 1019 at [44]-[46]:

> " *Judicial review of prosecutorial decisions*
>
> 44 The circumstances in which this court will intervene in relation to prosecutorial decisions are rare indeed. The principle of the separation of powers leads, as Sir John Thomas P put it in *L v Director of Public Prosecutions* [2011] EWHC 1752 at [7]; 177 JP 502, to the adoption of a "very strict self-denying ordinance".
>
> 45 An authoritative statement of this principle, and its application to cases of this type, was given by Lord Bingham of Cornhill in *R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening)* [2009] AC 756, 840—841, paras 30—32:
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> > "30. It is common ground in these proceedings that the Director is a public official appointed by the Crown but independent of it. He is entrusted by

> Parliament with discretionary powers to investigate suspected offences which reasonably appear to him to involve serious or complex fraud and to prosecute in such cases. These are powers given to him by Parliament as head of an independent, professional service who is subject only to the superintendence of the Attorney General. There is an obvious analogy with the position of the Director of Public Prosecutions. It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator: *R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136, 141*; R v Director of Public Prosecutions, Ex p Manning* [2001] QB 330, para 23; *R (Bermingham) v Director of the Serious Fraud Office* [2007] QB 727, paras 63—64; *Mohit v Director of Public Prosecutions of Mauritius* [2006] 1 WLR 3343, paras 17 and 21 citing and endorsing a passage in the judgment of the Supreme Court of Fiji in *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712, 735—736; *Sharma v Brown-Antoine* [2007] 1 WLR 780, para 14(1)—(6). The House was not referred to any case in which a challenge had been made to a decision not to prosecute or investigate on public interest grounds.
>
> "31. The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage from *Matalulu v Director of Public Prosecutions*) 'the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits'. Thirdly, the powers are conferred in very broad and unprescriptive terms.
>
> 32. Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. In the present case, the claimants have not sought to impugn the Director's good faith and honesty in any way."

46 We distil the additional propositions from the authorities and the principles underlying them:

> (1) Particularly where a CPS review decision is exceptionally detailed, thorough, and in accordance with CPS policy, it cannot be considered perverse: *L's case* 177 JP 502, para 32.
>
> (2) A significant margin of discretion is given to prosecutors: *L's case*, para 43.

(3) Decision letters should be read in a broad and common sense way, without being subjected to excessive or overly punctilious textual analysis.

(4) It is not incumbent on decision-makers to refer specifically to all the available evidence. An overall evaluation of the strength of a case falls to be made on the evidence as a whole, applying prosecutorial experience and expert judgment."

23. Also relevant is the principle that a public authority is bound to adhere to its lawfully adopted policy save where there is good reason for departing from it: *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at [26], [202]; *R (Lee-Hirons) v Secretary of State for Justice* [2017] AC 52 at [17], [50]; *R (Hemmati) v Secretary of State for the Home Department* [2019] UKSC 56 [2021] AC 143 at [50]. The DPP must therefore have regard to and apply the Code and the relevant CPS policy guidance in making prosecutorial decisions unless there is good reason not to do so.

Analysis

Ground 1: failure to have regard to and apply the Homicide Guidance

24. Mr Mansfield QC described ground 1 as his main submission. I detected two aspects to it, each reliant on the wording in the Homicide Guidance that in the case of a death a prosecution will "almost certainly" be required. The first was that Ms MacDaid had not had any regard to the Homicide Guidance, that is to say had not had it in mind at all. The second was that she had failed to adhere to it: she had failed to apply the overwhelming weighting which such guidance provided should be given to the loss of life.

25. As to the first aspect, Mr Mansfield placed particular emphasis on the fact that Ms MacDaid had not referred to the Homicide Policy in the Notification Letter or Review Note, and submitted that the evidence in her witness statement that she had had regard to it should be rejected because the statement was made for the purposes of the present challenge, and amounted to ex post facto rationalisation of something which formed no part of the reasoning at the time (cf *R (D) v Secretary of State for the Home Department* [2003] EWHC 155 (Admin) [2003] 1 FLR 979 at [19]). I cannot accept this submission. The Notification Letter said that her decision was based on the Code and "our published policies". The Homicide Guidance would have been, as Mr Mansfield himself submitted, "meat and drink" to someone with Ms MacDaid's functions and experience in relation to prosecutorial decisions, and it is not to be supposed that she failed to have regard to it merely because she did not specifically identify it as one of the policies she said she had applied. Moreover the terms of paragraph 141(i) of the Review Note ("when committed by an adult offender it would almost always be in the public interest to prosecute") essentially paraphrase the very passage in the Homicide Guidance upon which Mr Mansfield's argument is founded ("almost certainly be required"), and provide powerful evidence that she had it in mind.

26. As to the second aspect, Mr Mansfield's submission was that in cases of loss of life, the Homicide Guidance was paramount and required an almost certain prosecution if the evidential test were met; and that the lesser weighting indicated in paragraph 4.10 of the Code ("usually") was inapplicable to cases in which the offence was one of

homicide. The Homicide Guidance was, as he put it, the overriding policy; the test expressed in paragraph 4.10 of the Code was only applicable to non-homicide cases.

27. In my view this is to misconstrue the policy guidance. Where policy guidance is to be found in a number of documents, the documents must be construed together and in their context. The Code directs the test which is to be applied at the public interest stage, which is that in all cases there is a weighting in favour of a prosecution unless the balancing of the public interest factors outweighs it. This is what is meant by "usually" in paragraph 4.10. In the balancing of the public interest factors, paragraphs 4.14(a) and (c) make clear that the nature of the harm caused is an important factor to be taken into account. Paragraph 2.10 of the Code requires the prosecutor to apply the CPS policies, but these will not always pull in the same direction. The Homicide Guidance is addressed to homicides generally, without regard to the position of young persons. The prosecutor must also have regard to the Youth Offender Guidance which involves important factors which weigh against a prosecution of young persons, which do not apply to adults. Indeed this is recognised in the Code itself at paragraph 4.14(d), which requires the prosecutor to attach "significant weight" to the age of the suspect if under 18. It is anathema to the kind of polycentric decision-making involved in prosecuting young persons to treat the Homicide Guidance as paramount, to the exclusion of the guidance in the Youth Offender Guidance and paragraph 4.14 of the Code itself. Both the language and the context of the policy guidance taken as a whole suggest a more nuanced approach to the weight to be attached to the fact that the offence involves a death.

28. It is apparent from the terms of the Review Note and the Notification Letter that Ms MacDaid attached very considerable weight to the fact that the case involved the death of a child. The former starts its legal analysis of the public interest stage by stating that "There is no doubt that an incident resulting in death is a serious offence" and puts at the forefront of its section on the harm caused the observation that "the consequences of the suspect's actions caused devastating harm to Christopher and to all of his family and friends". In paragraph 141(i) it identifies as the first key factor in favour of a prosecution that "an incident resulting in the death of a child is a most serious offence and one which "it would almost always be in the public interest to prosecute" in the case of an adult. The Notification Letter again records in its concluding section that a key factor in favour of prosecution is that an incident resulting in the death of a child is a most serious offence. There is no basis for suggesting that the weight given failed to give effect to the policy guidance, or that the conclusion involved in the balancing exercise was outside the range of reasonable evaluative judgments which were open to an experienced prosecutor charged with responsibility for such decision making. On the contrary this is an example of a case described in paragraph 32 of *L's case* where a detailed and thorough review decision is in accordance with CPS policy and cannot be considered perverse. That conclusion is reinforced by the fact that the same prosecutorial decision was reached on the same public interest grounds by three other prosecutors with considerable relevant experience and expertise, namely Mr Dewar, the Head of CPS Cymru Wales and Ms MacDaid's Head of Unit.

29. This is sufficient to dispose of this ground. I should add, however, that Mr Mansfield's submission was misguided in its focus on the wording of the Notification Letter alone. The court must have regard to all the relevant contemporary documentation which evidences the decision-making process. That includes the Review Note, which at

paragraph 141(i) essentially records, and purports to apply, the relevant part of the Homicide Guidance upon which Mr Mansfield's argument was founded. As was emphasised in paragraph 46(3) of *Monica*, the documents evidencing the decision-making process must be read in a broad and common sense way without being subjected to excessive or overly punctilious textual analysis. When the Review Note and Notification Letter are read together in this way, they leave no room for doubt that Ms MacDaid had in mind and applied the relevant passage in the Homicide Guidance.

Ground 2: undue weight to the impact of a prosecution on the future of Q

30. This ground discloses no public law basis for impugning the decision. The impact of a prosecution on Q, a child, was clearly an important factor to be taken into account. The weight to be attached to it in the balancing exercise was a matter for the judgement of the prosecutor. The claimant's argument that excessive weight was attached to it was in reality parasitic on the first ground that the loss of life should have been regarded as the paramount and determinative factor, an argument which I have rejected.

Ground 3: failure to consider and give effect to the aggravating factors that Q told lies and failed to show remorse

31. This ground can be briefly dealt with. Ms MacDaid recorded in her Review Note the changing account given by Q; her conclusion that he had lied in his two interviews under caution; and his continuing failure to admit that he pushed Christopher. She said in paragraph 131 that she was taking into account that Q had not admitted this in interview. This was a factor she expressly took into account. As to its weight, she went on to say that she was conscious that Q's young age and lack of experience of the criminal justice system meant that he must have been very afraid of what would have happened to him if he told the truth. Despite Mr Mansfield's criticisms, this seems to me an entirely reasonable conclusion, and certainly a legitimate one for someone with specialist expertise and experience in youth justice. There is no basis for suggesting that the weighting she gave this factor was perverse.

32. Mr Mansfield also relied on the account of two of the witnesses, B and C, who each said that on an occasion when a number of the other children were gathered about 11 days after the incident, in one case in the park and in the other in Q's garage, Q had given his account of slipping and falling into Christopher. It was suggested that this was to be interpreted as Q seeking to persuade the other witnesses to lie, characterised in the skeleton as a conspiracy to pervert the course of justice. There is no warrant for such a suggestion; in the aftermath of this tragedy, Q and the other children present were bound to discuss what had happened amongst themselves when gathered together in their friendship groups (many described Christopher as a "best friend"); the fact of Q giving his account to his friends is not of itself evidence of trying to persuade others to give a false account, and neither B nor C suggested that Q had asked others to support his account. The only evidence of Q addressing what others should say points in the opposite direction: A said when re-interviewed that when Q told him that he had pushed Christopher, and A said that A would have to have to tell the police that, Q said that he did not blame A for doing so and not to cover up for him.

Ground 4: wrongly taking account of the effect of a prosecution on witnesses, or failure to have proper regard to the mitigation of that effect by the use of special measures

33. This submission was based on the fact that the Code specifically includes as a relevant factor to be considered the impact of the *offending* on the community, but does not address the impact of a *prosecution*. However the Code does not purport to be exhaustive in identifying the relevant considerations in any given case, as it makes clear at paragraph 4.12. It seems to me self-evident that the adverse effect of a prosecution on child witnesses is capable of being a relevant consideration, as is a wider impact on the community in appropriate cases. In the written skeleton argument, although not developed in oral argument, it was also submitted that Ms MacDaid should have taken account of the possibility that a prosecution might have resulted in Q pleading guilty so as to avoid the need for witness evidence to be given. Ms MacDaid's judgment, which cannot conceivably be characterised as irrational, was that the conflicting accounts of the children and the other factors she identified would likely lead to a trial. On any view there was a very real possibility, at the lowest, that a prosecution would result in a large number of the children giving evidence, with the adverse consequences identified in the Review Note, based on evidence from numerous agencies including social services and educational psychologists. That was a factor to which Ms MacDaid was entitled to accord significant weight in the public interest balance. It is inconceivable that someone with Ms MacDaid's experience would not have had in mind that special measures could be employed for such witnesses, that being the norm for vulnerable child witnesses; and it is clear that she did indeed have that in mind from paragraph 136 of her Review Note where she referred to the huge concerns about putting them through a court process "even if they were protected to a point". This was a realistic recognition that special measures would not avoid the traumatic impact of giving evidence and being cross-examined in a trial likely to attract considerable publicity.

Ground 5: material or fundamental error of fact

34. This ground involved a number of different criticisms of the conclusions of Ms MacDaid which informed her assessment of the public interest factors. In reality the points were advanced in support of the contention that Ms MacDaid had left material factual matters out of account in reaching her evaluative judgements, and/or that the judgements she made were irrational. They were somewhat unfocussed, but I understood there to be five main points.

35. First it was said that Ms MacDaid's reference throughout her contemporaneous documents to the "rock" or "rocks" as the point from which Christopher went into the water meant that she had misidentified where the relevant events occurred, which was at the ledge beside the bridge. Mr Mansfield said that there were some low lying rocks by the side of the water further down the river away from the bridge, and suggested that Ms MacDaid had misunderstood that the relevant events had happened there. There is no realistic basis for the suggestion. In their interviews all the children referred to the place as a rock or rocks, save one who referred to it as a ledge. That was an understandable description given that it was in part covered in uneven stone slabs. There was no conflict between any of them about where the events had happened. Many described it as by the bridge. Q specifically pointed it out on photos as near the concrete area by the bridge. When recounting the evidence of the children in interview Ms MacDaid simply adopted their language, but she also included within her Review

Note two photos from amongst the many she had from the investigation, which she said set the scene of the bridge and what she described as "the concrete ledge" to its left from which some of the boys jumped. The photos must have been chosen in order to show what Ms MacDaid understood to be the relevant scene of events. They correctly identified the ledge where Mr Mansfield said Christopher had been when he was pushed into the river. The photos did not show any low lying rocks further down the river. There is no sensible basis for suggesting she misunderstood where Christopher was when he was pushed.

36. A related point was that Ms MacDaid had misunderstood the degree of risk involved, and therefore the culpability of Q, arising from the fact that the point from which he was pushed into the water was estimated by the claimant to be about 6m above water level and the water was murky. The submission was founded upon her failure specifically to mention either of these matters in her Review Note or Notification Letter. However there is no reason to suppose that she failed to take them into account. She had access to all the visual evidence of the scene and included two photographs in her Review Note which illustrated the height of the ledge and colour of the water. She addressed the danger involved in her assessment of the ingredients of the offence of unlawful act manslaughter, and referred to the risk to Christopher being evidenced by Q's evidence of the risk he foresaw for himself, which was expressed in terms of the water being deep enough for a jump, and therefore necessarily connected to the distance of fall.

37. Criticism was also made of Ms MacDaid's conclusion that the Crown would not be able to prove that Q knew that Christopher could not swim. There is no reason to treat this as an unrealistic judgement on the basis of the conflicting evidence from the various children recorded in the Review Note. One of the children, H, said that Q knew that Christopher could not swim as a result of a conversation at the river the previous day. Some of the children said that they knew Christopher could not swim, but on the basis of what he had told them elsewhere or previously. One said he told "them all" he could not swim. However a number of the children said that they did not know that he could not swim. A's statement was that Christopher said to those present that he *could* swim, and was only joking when he said he couldn't, an account with credible detail of his actual words. C said that Christopher said he was going to jump off but was scared because he (Christopher) "did not know" if he could swim. Ms MacDaid's assessment of what a jury would make of this evidence cannot properly be criticised.

38. Criticism was also aimed at her conclusion that the push was not "premeditated or planned", but was an "ill thought out spontaneous act done in jest" and a "prank". Mr Mansfield placed reliance on A's evidence that Q had asked shortly before the incident whether he should push Christopher in. However, Ms MacDaid's conclusion accorded with the evidence she recorded. She had carefully considered and dismissed as irrelevant various school reports of bullying earlier in the year, none of which involved the friendship group who were at the river that day. Four of the five children who saw Q push Christopher referred to it being a joke or messing about, and the fifth said nothing to the contrary. A's account of Q asking whether he should push Q in was that it was said very shortly before Q went into the water.

39. Finally it was said that Ms MacDaid failed to give sufficient attention to the fact or significance of members of the group, including Q and Christopher, having gone to the bridge the previous day, when some of the group, but not Christopher, had jumped into

the water. Ms MacDaid specifically recorded these facts. The only matter of significance about them upon which Mr Mansfield placed particular reliance was the account of H that Q knew that Christopher could not swim as a result of a conversation at the river the previous day. This was also recorded by Ms MacDaid. As I have explained, it was only one element of conflicting evidence which did not invalidate her conclusion that the Crown would not be able to prove beyond reasonable doubt that he knew.

Conclusion

40. Accordingly I would dismiss the application.

Mr Justice Dove:

41. I agree.