Case No: CO/2054/99

IN THE SUPREME COURT OF JUDICATURE
QUEEN'S BENCH DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Wednesday 17 May 2000

B e f o r e :

LORD CHIEF JUSTICE
Of England and Wales (Lord Bingham of Cornhill)
and
Mr JUSTICE MORISON

- -

R.
- v -
The Director of Public Prosecutions,
Ex parte Patricia Manning and
Elizabeth Melbourne

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 180 Fleet Street
London EC4A 2HD
Tel No: 0171 421 4040, Fax No: 0171 831 8838
Official Shorthand Writers to the Court)

- -

Nicholas Blake QC and Dexter Dias (instructed by Bhatt Murphy London N1 6HB) for the applicant
James Turner QC and Richard Barton (instructed by the Treasury Solicitor) for the Director of Public Prosecutions

- -

Judgment
As Approved by the Court

LORD CHIEF JUSTICE:

1. The applicants are sisters of the late Mr Alton Manning ("the deceased") who died in Blakenhurst Prison on 8 December 1995. They seek judicial review of the decision taken on behalf of the Director of Public Prosecutions not to prosecute any defendant for manslaughter as a result of the manner in which the deceased met his death. The grounds of the application are, in brief, that no adequate reasons for the decision were given, that the reasons which were given to the applicants did not reflect the true basis of the decision and the true reasons, now disclosed, are unsustainable.

The facts

2. The deceased was a man of Afro-Caribbean origin aged 33. From August 1995 until his death he was held in Blakenhurst Prison awaiting trial for an offence of violence. He had a record of violence for which he had previously served three custodial sentences. His aggressive behaviour on remand had led to the imposition of disciplinary sanctions.

3. The detailed facts leading to the death of the deceased are in some respects contentious and unclear. But the broad outline of events does appear to be fairly plain. At about 8 pm on the evening of 8 December 1995 two prison officers decided to search the deceased for drugs. He was escorted from his own cell in spur C of House Block 3 at the prison to an empty cell (number 35) on the opposite side of the central passage. There he lifted up his vest and T-shirt so that the top half of his body could be seen. He then, without demur, removed all his clothing below the waist. On being told by one of the officers (Mr Brumby), probably without justification, to squat so that his private parts could be visually inspected for the secretion of drugs, he refused and instead, it seems, launched an attack on the other of the two prison officers present (Mr Reynolds). A violent altercation then followed. Help was summoned. The deceased struggled but was overpowered. He was either led, in a bent over position, or carried from cell 35. He was, on leaving the cell if not earlier, carried by prison officers face down and with his head forward. The senior prison officer present (Unit Manager Nicholson) had control of the deceased's head. Two more prison officers, Mr Day and Mr O'Prey, had hold of his left and right arms respectively, both arms being held behind the back of the deceased with the forearms forced upwards towards his shoulders. Two more prison officers, Mr Reynolds and Mr Brumby, each had hold of a leg. An additional prison officer, Ms Trindle, did not participate physically in the restraint of the deceased, but accompanied the other officers in order to discharge her duty of ensuring that the deceased was able to breathe. There were other prison officers in the vicinity who did not participate in the restraint. The episode was also witnessed by a number of

prisoners. The deceased was carried from cell 35 down the central passage and through a security gate before being carried down some steps to a servery. The distance was short and the time taken a few minutes. Although the evidence was not consistent, it seems likely that the deceased continued to struggle, at any rate intermittently, until he reached the servery. There a handcuff was applied to one of his wrists. Then his body suddenly went limp and blood was seen to come from his ear. Vigorous efforts were made to resuscitate him, but on examination he was found to be dead.

4. Early the next morning a post-mortem examination of the deceased was made by Dr Helen Whitwell, a consultant pathologist whose findings have been accepted subject to points of detail. She found areas of abrasion on the back of the deceased. There was evidence of blood-staining around the face. There were a few tiny petechiae over the conjunctivae of the left eye in particular. She found no obvious marks of injury to the neck, although she noted possible slight discoloration over an area of 3.5 centimetres at the back. She recorded evidence of blood visible to the right middle ear, and blood externally in the right ear. Of the neck structures she reported:

> "The laryngeal structures: There was evidence of haemorrhage with a small amount of bruising in the tissues around the superior thyroid cartilage, and there was bruising around the right thyroid gland. The larynx itself showed congestion with some petechiae. No obvious fracture of the bones was identified."

5. Exploration of the structures of the back revealed extensive bruising with haemorrhage in the central back region extending over 8-9 centimetres. There was further bruising of the muscular tissues in the region of the scapula, more markedly on the right. The pathologist's final conclusions were expressed in these terms:

> "The findings here are of an "asphyxial" death – in particular evidenced by the conjunctival petechiae and bleeding into the ear. Other positive findings include haemorrhage with bruising around the thyroid cartilage and gland with laryngeal congestion and petechiae. There is also evidence of bruising to the muscles over the back of the body.
>
> This death falls into the category of death occurring as a result of respiratory impairment/restriction during restraint leading to asphyxia. In this case there is evidence that airway occlusion arose due to pressure to the neck (as evidenced by the internal findings). In addition, restriction of chest movement whilst on the ground with pressure applied to the back of the chest would occur. Apart from these asphyxia can occur as a result of being in the prone position i.e. when carried face down. This appears to be due to interference with the breathing process itself causing decreased respiratory movement and/or compromise to the airway. Thus, in this case there is likely to have been a combination of mechanisms leading to asphyxia. Physical/emotional exertion as in the fight/flight situation is also likely to have occurred exacerbating the effects of respiratory restriction. The deceased had evidence of narrowing to one of the arteries supplying the heart muscle. This could also have played a role …
>
> In terms of other injury these are in themselves of a relatively minor type and consistent with a struggle situation. They have not caused or contributed to death."

6. The circumstances of the death were investigated by the West Mercia Police, and the papers were referred to a Special Casework Lawyer of the Crown Prosecution Service based in Reading. On 27 September 1996 he wrote to solicitors representing the family of the deceased to inform them that, having applied the Code for Crown Prosecutors, he had reached the conclusion that there was not enough evidence to provide a realistic prospect of convicting any person mentioned in the police report on a criminal charge. Following the appointment of His Honour Gerald Butler QC to inquire into CPS decision-making in relation to deaths in custody and related matters, and in anticipation of his likely recommendations, Senior Treasury Counsel was instructed in September 1997 to advise on whether any prosecution should be brought in the present case. Counsel wrote a detailed advice in which he agreed with the original decision that there was insufficient evidence to provide a realistic prospect of a conviction.

7. As required by section 8 of the Coroner's Act 1988, an inquest was held with a jury into the death of the deceased. There was a lengthy hearing at which the family of the deceased and certain prison officers were represented. The evidence given at the inquest was sharply divided. Mr Nicholson testified that he had, throughout the period when the deceased was carried, controlled his head in the approved Home Office manner, with one hand under the deceased's chin and another on top of his head. He said that during the short journey he had talked constantly to the deceased, and the deceased himself had spoken. He received a measure of support from some other prison officers. By contrast, a number of prisoners said that they had seen the deceased held in a neck-lock with a prison officer's forearm. It was common ground that such a hold was forbidden and dangerous. Before directing the jury the coroner indicated his intention to leave it open to the jury, if so advised, to return a verdict of unlawful killing on the basis of unlawful act manslaughter. Application was made for leave to move for judicial review to quash this decision, but leave was refused. The coroner accordingly left that verdict to the jury, and the jury returned a unanimous verdict of unlawful killing. No attempt has been made to challenge that verdict.

8. By this time responsibility for reviewing the decision not to prosecute in this case had been assigned to Mr Western, a Special Casework Lawyer employed by the CPS whose responsibility was specifically to consider and advise on cases in which death or serious injury had been sustained by persons in police or prison custody. He attended part of the hearing when leave to move for judicial review was sought, and part of the coroner's final direction to the jury, in addition to familiarising himself with the witness statements, transcripts of evidence and other documents in the case. In the light of all this material Mr Western, on 2 October 1998, wrote a note recording his view of the case. In this he summarised what, as he understood, the jury at the inquest had decided.

9. He regarded it as clear that the jury, in delivering the verdict which they did, had shown that they did not believe the prison officers' account of the events leading up to the death of the deceased. Those accounts were to the effect that no excessive force had been exerted against the deceased which could have led to his asphyxiation. Mr Western noted that the coroner had not left gross negligence manslaughter or murder as possible verdicts to the jury, but only unlawful act manslaughter. He understood that the unlawful act to which the coroner had referred the jury had been the unlawful use of force whilst the deceased was being carried from cell 35 to the servery resulting in pressure being put on the throat and the deceased thereby being asphyxiated. The direction of the coroner was, as Mr Western understood, such that the jury's verdict could only have related to Mr Nicholson. His judgment was that while the police papers contained a consistent and credible account given by the prison officers, their cross-examination at the inquest had altered this position substantially. The prison officers had been closely cross-examined to establish that unwarranted violence had been deliberately used by prison staff against the deceased and that there had then been a conspiracy by them to falsity their account of the incident. Mr Western noted that cross-examination had found weaknesses in the prison officers' evidence and that they had given evidence to the inquest which was inconsistent with their statements. Mr Brumby, one of the prison officers who had conducted the initial search of the deceased and who had given evidence at the inquest concerning his justification for ordering the deceased to squat, was regarded by Mr Western as discredited:

> "The only conclusion that it was possible for the Jury to reach was that Brumby was lying about this suspicion."

Mr Western judged that the cross-examination of the prison officers had, overall, produced sufficient inconsistencies and inaccuracies in the evidence of some of the prison officers to give real support to the hypothesis which the cross-examination sought to establish.

10. In reviewing the case Mr Western thought it his duty to look at the whole case afresh, in the light of all the evidence or potential evidence then available, bearing in mind the inevitable differences between a coroner's inquest and a criminal prosecution. This approach was recorded in the review note, and it has not been suggested that it was wrong.

11. Mr Western considered the evidence relating to the cause of the deceased's death, and recorded his conclusions in his review note:

> "6.1 Despite a detailed statement, and extensive examination at the inquest, it is still not clear exactly what physical mechanism led to Mr Manning's death. Despite the inability of Dr Whitwell to specify the precise cause of death, it is my view that this would not present any great difficulty in the event of a criminal trial. I have no doubt that a jury could properly reach the view that Mr Manning died because the way in which he was restrained/carried from his cell to the servery area prevented him from breathing. On that basis I do not consider that the difficulties in attributing specific medical reasons for death would present any significant obstacle to a successful prosecution."
>
> "8.3 The evidence of the cause of death while uncertain in medical terms appears to be quite clear in lay terms and is entirely consistent with the inmate evidence of an arm being across the deceased's throat. The time taken during the course of the carrying can be no more than five minutes, and it does not appear as though any indication was given by the deceased himself, or by others that there may have been some interference with his breathing processes."

12. Although the coroner had not invited the jury to consider a verdict of unlawful killing based on manslaughter caused by gross negligence, Mr Western considered this possible basis of prosecution in his review note. He set out the elements of the offence as requiring the existence of a duty of care, a negligent breach of that duty making more than a minimal or negligible contribution to the ensuing death, and proof that the negligence was such as could be characterised as gross and meriting criminal sanctions rather than mere compensation. He considered that a prison officer must owe a duty to take reasonable care of the health and welfare of a person in his custody, and concluded that gross negligence manslaughter had to be considered as a potential offence in this case since control and restraint techniques specifically dictated that officers must take control of a prisoner's head and ensure that his ability to breathe was not impaired. Mr Western concluded that both Mr Nicholson who had control of the deceased's head and Ms Trindle whose duty was to ensure that the deceased could breathe, owed the deceased a duty of care of which they were in breach and which led to the death. He viewed both Mr Nicholson and Ms Trindle as potential defendants. He concluded, however, that since there was substantial evidence of a violent struggle lasting over a short period of time with no warnings being given of the difficulties in which the deceased was finding himself, the Crown would be unable to establish a case to answer on the ground of gross negligence manslaughter against either of these potential defendants. No complaint is made of that conclusion.

13. In considering unlawful act manslaughter Mr Western again reminded himself of the elements which would have to be established if a prosecution were to succeed: there had to be proof of an unlawful act committed which was dangerous in the sense that any reasonable and sober person would inevitably recognise that the act exposed the victim to the risk of some harm; the unlawful act had also to be more than a minimal or negligible cause of the death. Mr Western considered that the order to squat given by Mr Brumby had not been justified, but did not consider that there was evidence of an unreasonable response by prison officers to the attack by the deceased upon Mr Reynolds inside the cell. There was no available evidence save from the prison officers of what took place in the cell, and the applicants

recognise that in the absence of evidence to challenge the prison officers no complaint can be made of the decision not to base a prosecution on what took place in the cell. Mr Western accordingly considered, and the applicants would accept, that the real question was whether or not the officers had acted reasonably in their restraint and continued restraint of the deceased during his removal from cell 35 to the servery. Of this he said:

> "The conduct of the Officers when escorting Mr Manning from his cell towards the Segregation Unit of the Prison would be subject to the prison rules concerning the use of violence. On all of the available evidence the prisoner was very violent and difficult to control and therefore much force was needed in order to transport him. Wrist locks had been applied in the approved Home Office method and a head restraint had been applied to the Deceased. There are differing accounts over whether or not that head restraint was carried out in approved Home Office fashion, or whether it was more in the nature of a "neck lock". In view of the amount of evidence that a dangerous neck lock was applied to the prisoner, this is an aspect which must give rise to a potential offence and therefore potential defendants must be identified."

14. In Mr Western's view it was only the fatal force to the neck which could be said to be excessive, and accordingly the only potential defendant to a charge of unlawful act manslaughter was Mr Nicholson. Mr Western considered in some detail the witnesses whom the Crown would have to call if Mr Nicholson were prosecuted for unlawful act manslaughter, discarding some of the potential witnesses as so unreliable that the Crown need not call them but acknowledging that other witnesses would have to be called even though their evidence did not help to establish the guilt of Mr Nicholson. Of Ms Trindle he noted:

> "During her evidence to the Inquest she gave an account of observing at all times and ensuring that Nicholson had got a proper restraint on the deceased and that the deceased had never got into a choking position. She confirmed in her evidence that Manning's head was always properly held. If such had been the case then it seems reasonable to assert that Manning would never have died. Accordingly, her testimony cannot be taken as truthful and therefore (even if she is not prosecuted) I do not consider that the Crown would be obliged to call her as part of their case."

15. Another prison officer, Mr Day, had been present throughout the whole incident. Mr Western judged him to be an apparently credible and reasonable witness giving direct evidence of the primary facts, and accordingly concluded that the Crown would be obliged to call him as a prosecution witness although his evidence was likely to assist Mr Nicholson. Mr Western's final conclusions on the prospect of convicting Mr Nicholson of unlawful act manslaughter were expressed in these terms:

> "9.2(b) <u>Unlawful Act (Use of Excessive Force)</u>
>
> The prospective defendant in this case would be prison officer Nicholson. As I have outlined in the previous paragraph there is a body of evidence in the case which would seem to suggest

that at times during the carrying of the deceased prisoner, Mr Nicholson's arm was across the prisoner's throat. It would seem to me that that body of evidence would be sufficient to establish that he would have a case to answer. I must therefore move on to see whether or not I am satisfied that there would be a realistic prospect of conviction in this case.

9.3 The factors in the Prosecution's favour in this case is that the cause of death is entirely consistent with there being an arm across the deceased's throat, or some other physical obstruction which prevented the deceased breathing at the critical times of the carrying. Except in one or two instances the evidence of the other prison officers is silent as to where Nicholson had his hands and arms during the process of the carrying. I anticipate that Nicholson himself would give evidence in accordance with his statement and with the evidence that he gave at Inquest, and that would be to the effect that as far as he was concerned he thought he was applying Home Office approved methods of head retention. It seems to me that the most likely outcome in this case would be that a jury in a criminal trial would be driven to the view that Nicholson's arm or hand had indeed been across the inmate's throat at various times during the violent carrying exercise. There is little in the evidence which would be presented by the Crown which would indicate that such contact was deliberate or indeed continuous. In order to secure a conviction on this basis it would be essential for the Prosecution to show that the excess force being used by Nicholson was a deliberate application of excess force, rather than as a result of attempts to effect a proper restraint which were frustrated by the violence of the struggle. In my view, given all the evidence, there is no realistic prospect that the Crown would be able to establish that this was indeed the case and I therefore take the view that there is no realistic view of conviction of Nicholson of this offence."

16. On 29 December 1998 Mr Western conferred at length with Senior Treasury Counsel originally instructed and the evidence of various witnesses was reviewed. On 12 February 1999 Mr Western, this time accompanied by the Director, again conferred with Senior Treasury Counsel. A minute of this conference contains a brief summary of counsel's advice:

"2.7 Counsel said that there would not be a realistic prospect of conviction as the case involved a violent restraint with a struggling prisoner. When the officers realised something was wrong they stopped carrying Manning and tried to help him. Officer Trindle was supervising the restraint and observed no problem with Manning's breathing.

2.8 Counsel advised as such a short period of time had elapsed between the struggle and restraint, there was no issue of gross negligence. The accounts of the eye-witnesses differed remarkably as to what was a short but very violent struggle."

17. On 18 February 1999 Mr Western again conferred with the Director, this time in the absence of counsel. On this date Mr Western finally took a decision not to prosecute. Although advice had been taken from Senior Treasury Counsel, and the Director had been consulted, the decision was his. On 22 February Mr Western wrote to solicitors now representing the applicants to communicate this decision: he had reached the conclusion that there was insufficient evidence to justify any criminal prosecution, and having reviewed the evidence was not satisfied that it would provide a realistic prospect of convicting any of the prison officers of any criminal offence arising out of the deceased's death. In a press release issued by the CPS on the following day the Director was quoted as saying:

> "The descriptions of eye-witnesses, as so often during a short and violent struggle, vary widely and cannot all be correct.
>
> Mr Manning met his tragic and untimely death during a violent struggle with prison officers. The principal cause of Mr Manning's death was asphyxiation, the result of a single, or, more likely, a number of factors.
>
> It is therefore impossible to say by what act or acts and by whom the asphyxiation was caused, and consequently, it is also impossible to say whether those acts were either unlawful or grossly negligent.
>
> We have therefore concluded that there is no realistic prospect of conviction of any prison officer for manslaughter."

18. The solicitors acting for the applicants were far from satisfied by either the letter or the press release and pressed for a more detailed explanation. In a letter of 14 April 1999 Mr Western wrote:

> "My review was not limited to illegal act manslaughter, but I considered also the possibility of prosecuting certain officers for manslaughter by gross negligence. My review was itself considered in detail by experienced treasury counsel. At the end of my review I considered that there were so many factual inconsistencies in the accounts given by the witnesses whom the Crown would be required to call, and that the medical evidence was so imprecise as to the exact cause of Mr Manning's death, that there was not a realistic prospect of securing a conviction of any person in any criminal proceedings."

19. In a statement made in these proceedings Mr Western has clarified the meaning of his 14 April 1999 letter: he had not intended to imply that the medical evidence did not support the contention that an arm or hand had been placed across the neck of the deceased, and that this had been a causal factor in his asphyxiation, and he had in his review note proceeded on the basis that the evidence did provide a realistic prospect of satisfying a jury that Mr Nicholson's arm had at some stage been across the throat of the deceased and that this had been a causal factor in his death. He explains:

> "What I was more concerned about, in respect of Unit Manager Nicholson (as will also be seen particularly from paragraph 9.3 of my Review Note) was the question of whether there was a realistic prospect of satisfying a jury, beyond reasonable doubt, that any placing by him of an arm or hand across the throat of Mr Manning was unlawful, in the sense of being a deliberate application of excessive force, rather than the result of attempts to effect a proper restraint, which were frustrated by the violence of the struggle, or even of self-defence. It seemed to me that these were points that would inevitably be taken on behalf of Unit Manager Nicholson if he were to be prosecuted. I foresaw that his defence would be to the effect that he did not knowingly place a hand or arm against Mr Manning's throat, but that if, unwittingly, he had done this in the heat of the struggle it had not, in the particular circumstances, been unlawful. In this regard, it seemed to me that the inconsistencies in the evidence of the various eye-witnesses as to the precise circumstances and manner in which Mr Manning was held and in which a hand or arm came into contact with his neck were likely to present a problem for the prosecution and that the medical evidence could not resolve that problem."

20. At this stage the applicants had not seen Mr Western's review note, and being dissatisfied with the explanation given of the Director's decision not to prosecute applied for permission to seek judicial review. On 8 July 1999 Collins J. adjourned the application for oral hearing, observing that the Director should "recognise that there appears to be a cogent argument and so reasons in greater detail than hitherto would seem sensible". Following an oral hearing, Mr Nigel Pleming QC in a reserved decision granted permission to apply. In response to the applicants' evidence served in support of their application, Mr Western's review note was exhibited and for the first time seen by the applicants.

Decision to prosecute or not to prosecute

21. General responsibility for the institution and conduct of prosecutions in England and Wales is entrusted to the Director, subject to the superintendence of the Attorney General, and the responsible staff of the Crown Prosecution Service, although the power to institute a private prosecution is preserved. Section 10 of the Prosecution of Offences Act 1985 requires the Director to issue a Code for Crown Prosecutors giving guidance on general principles to be applied by them in determining, in any case, whether proceedings for an offence should be instituted. The Code applicable in this case laid down two tests before a decision to prosecute would be made. The first test was described as "the evidential test", which had to be satisfied before the second "public interest" test became applicable. The Code provided:

> "5.1 Crown Prosecutors must be satisfied that there is enough evidence to provide a "realistic prospect of conviction" against each defendant on each charge. They must consider what the defence case may be and how that is likely to affect the prosecution case.
>
> 5.2 A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged.
>
> 5.3 When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used and is reliable …"

22. An explanatory Memorandum emphasised that the evidential test was a "realistic prospect of conviction". This had to be satisfied. If it was not satisfied there should be no prosecution, no matter how great the public interest might seem in having the matter aired in court. It was not the role of the CPS simply to give cases a public hearing, regardless of the strength of the evidence. There had to be an objective assessment of that evidence. The CPS should not look for the same standard of proof that a jury or bench of magistrates would need to find before it could convict, which would set too high a standard and tend to usurp the role of the court. The test based on "more likely than not" meant just that.

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 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.

The first issue

24. The first issue argued on this application is whether the Director in a case such as the present is obliged to give coherent and sensible reasons for his decision not to prosecute. Mr Nicholas Blake QC for the applicants accepts that there is no general duty on the Director to give such reasons for any decision not to prosecute, and Mr James Turner QC for the Director accepts that if any reasons are given for such a decision they should be coherent and correct. But there the modest measure of agreement between the parties comes to an end. Whereas Mr Blake contends for a legal obligation on the Director to give reasons for a decision not to prosecute in a case having the particular characteristics of the present case, Mr Turner argues that the Director is subject to no legal obligation to give reasons at all.

25. Mr Blake confines his submission to cases in which the following conditions are fulfilled, as (he submits) they are here:

(1) there has been a death in custody suggesting that unlawful force has been used;

(2) a properly directed jury at the conclusion of a properly conducted inquest has returned a lawful verdict of unlawful killing;

(3) there is credible evidence to identify the person responsible for the use of unlawful force against whom a prima facie case exists.

In such cases, Mr Blake argues, vindication of the rights of victims of arguable violations of rights guaranteed by the European Convention and the requirement of an effective remedy require that either a prosecution should be brought or a sufficiently reasoned decision should be given for not prosecuting.

26. In support of this submission Mr Blake relies in particular on Articles 1, 2 and 13 of the European Convention: the duty of member states to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, the requirement that everyone's right to life should be protected by law and the requirement that everyone whose rights and freedoms under the Convention are violated should have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. Mr Blake relies on decisions of the European Court of Human Rights in Kaya v. Turkey (1999) 28 EHRR 1 paragraph 86; Assenov v. Bulgaria (1999) 28 EHRR 652, paragraphs 102, 104 and 117; Selmouni v. France (2000) 29 EHRR 403, paragraphs 79 and 87; X and Y v. The Netherlands (1986) 8 EHRR 235, paragraph 27; and Aydin v. Turkey (1998) 25 EHRR 251, paragraphs 103 and 104, as establishing the following propositions:

(1) Articles 1 and 2 of the Convention require that when individuals have been killed as a result of the use of force by agents of the state there must be an effective official investigation;

(2) such investigation should be capable of leading to a determination whether the force used was or was not justified in the circumstances;

(3) an effective official investigation should be capable of leading to identification and punishment of those responsible for unlawful violence;

(4) in the absence of such an investigation legal protection of human rights would be ineffective in practice because it would be possible in some cases for agents of the state to abuse the rights of those within their control with virtual impunity;

(5) the inquiry should be conducted diligently with a genuine determination to identify and prosecute those responsible;

(6) where an individual is taken into police custody in good health but is found to be injured at the time of release, it is incumbent on the state to provide a plausible explanation of how the injuries were caused, failing which a clear issue arises under Article 3 of the Convention;

(7) Article 13 of the Convention entails, in addition to a thorough and effective investigation, effective access of the complainant to the investigatory process and payment of compensation where appropriate;

(8) where fundamental values and essential aspects of private life are at stake, effective deterrents may be indispensable, and may only be capable of being provided by the criminal law;

(9) the ultimate effectiveness of a remedy may depend on the proper discharge by the public prosecutor of his functions.

27. Mr Blake relies on certain extra-judicial materials as reinforcing these propositions. He draws attention to the view expressed by His Honour Gerald Butler QC that:

> "It would, of course, be absurd to suggest that in every case the CPS should give reasons for a decision not to prosecute, but there may well be cases where it would be right to do so. I would suggest, for example, that it might be right to do so in those cases where there has been a death in custody, and an inquest jury has returned a verdict of unlawful killing". (Postscript, page 55).

He also draws attention to the report of the European Committee for the Prevention of Torture published in January 2000 which at page 20 said:

> "Reference should also be made to the high degree of public interest in CPS decisions regarding the prosecution of police officers (especially in cases involving allegations of serious misconduct). Confidence about the manner in which such decisions are reached would certainly be strengthened were the CPS to be obliged to give detailed reasons in cases where it was decided that no criminal proceedings should be brought. The CPT recommends that such a requirement be introduced."

28. Mr Blake reminds the court that in the Victim's Charter published by the Home Office it is represented:

> "The Crown Prosecution Service, on request, will meet the family of someone killed as a result of a crime, to explain their decision on prosecution."

29. Among English decisions Mr Blake relies most strongly on the decision of Sedley J. in R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery [1994] 1 WLR 242 at 263 where he said:

> "In summary, then: (1) there is no general duty to give reasons for a decision, but there are classes of case where there is such a duty. (2) One such class is where the subject matter is an interest so highly regarded by the law (for example, personal liberty), that fairness requires that reasons, at least for particular decisions, be given as of right."

30. Mr Blake contends that the security of a person held in custody by the state is pre-eminently an interest highly regarded by the law, as evidenced by the requirement in the Coroners Act that any death in such circumstances should be the subject of an inquest held with a jury.

31. In resisting this argument Mr Turner relies on arguments of law and practice. In English law, he submits, there is no general duty to give reasons for an administrative decision: see R. v. Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531 at 564E. In R. v. Director of Public Prosecutions, ex parte Treadaway (Divisional Court, unreported, 31 July 1997) this Court held that the duty to give reasons arose from a duty to act fairly which bound anyone in an adjudicating role, but that the Director was not, when deciding whether to prosecute, in an adjudicating role and so not subject to these duties (see transcript of judgment, pages 14 to 15). Parliament could have imposed an obligation on the Director to give reasons for such decisions, but had not chosen to do so. This was not surprising, since the Phillips Royal Commission on Criminal Procedure (Cmd. 8092, paragraph 651) had recommended against such a proposal and when giving evidence to the Trade and Industry Committee of the House of Commons on 26 February 1992 the Attorney General had strongly opposed it, recognising the potential injury to a person who was not to be prosecuted but against whom suspicion and accusation would be publicly ventilated (HC 86 – xiv, pages 445 to 446). In so far as there was a Convention requirement for a full, independent and effective inquiry into an unexplained death in custody, that was provided by the coroner's inquest, in which the applicants had been able to participate fully. It was increasingly the practice of the Director to give reasons to interested parties for decisions such as this, for the sake of greater openness, but this was not done as a matter of legal obligation.

32. The practical arguments against imposition of such an obligation, Mr Turner submits, are very strong. The Director might have received information in confidence which he would not be free to disclose; some of the information on which he relied might be subject to public interest immunity; disclosure might prejudice a continuing inquiry or investigation; such reasons might be prejudicial and damaging to a third party and lay the Director open to proceedings for defamation. In a complex case involving a mass of material, the composition of reasons which adequately summarised the reasons for the decision would be a very difficult and time-consuming task, which would involve considerable expense. If in any given case the Director chose to give no reasons, or very general reasons, it was always open to any aggrieved person with a sufficient interest to seek permission to apply for judicial review. If a serious

question were raised and permission were granted, the court would be likely to look for full reasons, as it did here. If no such reasons were forthcoming, the court might draw the inference that the Director had no good reasons. If reasons were given, the court would examine them. Giving reasons in this context would afford the Director the immunity and protection incidental to court proceedings. This was the manner in which any complaint of lack of reasons should be pursued.

33. 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. We would be very surprised if such a general practice were not welcome to Members of Parliament whose constituents have died in such circumstances. We readily accept that such reasons would have to be drawn with care and skill so as to respect third party and public interests and avoid undue prejudice to those who would have no opportunity to defend themselves. We also accept that time and skill would be needed to prepare a summary which was reasonably brief but did not distort the true basis of the decision. But the number of cases which meet Mr Blake's conditions is very small (we were told that since 1981, including deaths in police custody, there have been seven such cases), and the time and expense involved could scarcely be greater than that involved in resisting an application for judicial review. 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 course require.

The second issue

34. The second issue (although expressed by the parties in somewhat different ways) is whether, accepting that the true reasons for the decision not prosecute were those in Mr Western's review note of October 1998, the reasons given to the applicants in February and April 1999 accurately reflected the true basis of that decision. This issue diminished in importance as the proceedings progressed since, whether or not the February and April 1999 reasons were adequate and accurate, the applicants have now obtained a full statement of the reasons, which is open to review.

35. We do not think it necessary to consider this issue at length. It seems to us, however, that Mr Western's letter of 22 February 1999, although informing the applicants of his decision, did very little to elucidate the reasons for it. We do not think the press release accurately reflected the basis of his decision: he had not, as we understand, concluded that it was "impossible to say by what act or acts and by whom asphyxiation was caused" since he had had no doubt that a jury could properly reach the view that the deceased had died because the way in which he had been restrained and carried from his cell to the servery had prevented him from breathing and that there was a prima facie case that this had been the result of pressure by Mr Nicholson's arm or hand across the throat of the deceased. It was perhaps not so much "impossible to say" as difficult to prove that such conduct had been unlawful. Mr Western has accepted that his letter of 14 April 1999 was not happily phrased, and we agree: it suggests that doubt about the medical evidence of causation was the impediment to prosecution, whereas in his review note Mr Western had foreseen little difficulty on this score.

36. It is not suggested that there was here any intention to mislead the applicants. But if, as we accept, the true basis of the decision not to prosecute was that set out in Mr Western's review note, we do not think that was accurately reflected in the press release and the letters to the applicants in February and April 1999.

The third issue

37. The third issue between the parties (again expressed in somewhat different terms) is whether the reasons for the decision set out in Mr Western's review note of October 1998 were in accordance with the Code for Crown Prosecutors and capable of supporting a decision not to prosecute.

38. In pressing for a negative answer to this question Mr Blake concentrates his fire on two main aspects of Mr Western's reasoning in the review note. First, while accepting that under the Code a prosecutor "must consider what the defence case may be and how that is likely to affect the prosecution case", there was here no basis for anticipating a defence of accidental contact between Mr Nicholson's arm or hand and the throat of the deceased such as could have contributed to the death. No prison officer had at any time suggested it. The prisoners who described contact between Mr Nicholson's arm and the throat of the deceased did not suggest that the contact had been accidental. Even more significantly, Mr Nicholson had at no time made such a suggestion, which was indeed inconsistent with the evidence he gave in his initial statement, in his police interview and in his evidence at the inquest when he described a conversation he had had with the deceased while the deceased was being carried to the servery and later handcuffed.

39. Mr Blake's second area of criticism is closely allied to the first. In referring to evidence that Mr Nicholson's arm was across the throat of the deceased "at times" during the carrying of the deceased (paragraph 9.2(b) of the review note), and to Mr Nicholson's arm or hand being across the throat of the deceased "at various times" during the violent carrying exercise (paragraph 9.3) and in opining that there was little in the Crown evidence which would indicate that such contact was continuous (paragraph 9.3), Mr Western was putting an unwarranted gloss on the evidence. There were some witnesses (including Mr Nicholson himself and other prison officers) who said there had been no contact at all. There were others, all prisoners, who had seen such contact. There was no-one who saw any intermittent or occasional contact, and thus there was no evidential basis for this possible conclusion.

40. Mr Turner urges that we should not, whatever our personal impression, substitute our own view for that of an experienced prosecutor endorsed by Senior Treasury Counsel. He rightly reminds us that we have not, like Mr Western, read all the witness statements and transcripts and listened to the tapes of the inquest. We have not, as he had, a comprehensive grasp of the whole case. This was a short, violent incident during much of which the deceased was, it seems, struggling vigorously. A number of prison officers were clustered round the body of the deceased, making it difficult for anyone not directly involved in the restraint, however good his vantage point, to observe exactly what happened, and several of the prisoners had very poor vantage points. The difference between the approved method of holding the head of the deceased and the dangerous headlock method might be very difficult to recognise from a distance with an imperfect view. The inconsistencies between the evidence of different prisoners would undermine their reliability, as might the source of this evidence. While Mr Nicholson himself had consistently denied holding the neck of the deceased in a lock with his arm, and had given an account wholly inconsistent with that accusation, the defence were bound to raise and the jury (on the trial judge's direction) to consider the possibility that such contact had

indeed occurred, in the heat of a violent struggle when Mr Nicholson was seeking to grab and hold the deceased as best he could, even without his being aware of it.

41. We have found this a very difficult issue to resolve. We accord great weight to the judgment of experienced prosecutors on whether a jury is likely to convict, and Mr Western's review note does not at all read as if composed to reach a pre-determined conclusion; the note suggests that the author was seeking to review the case fairly and even-handedly, and the final conclusion against prosecution comes as something of a surprise. In the end we are, however, satisfied that there are five points which Mr Nicholson as defendant would have to overcome if he were to defeat the prima facie case which in Mr Western's judgment lay against him and these were points which Mr Western did not address and resolve. Put in their simplest terms these points are:

(1) If Mr Nicholson's account were accepted, there would be no explanation of how the injury to the throat of the deceased and the interruption of his breathing occurred. It was on this basis that Mr Western concluded that Ms Trindle could not be taken as a truthful witness and was therefore a witness whom the Crown need not call.

(2) If Mr Nicholson's account were rejected it is very difficult to see how it could be regarded as simply mistaken, particularly having regard to his evidence of constantly talking into the ear of the deceased during the journey to the servery and of the deceased himself on occasion speaking.

(3) If Mr Nicholson's account were rejected as untruthful, as Mr Western judged Ms Trindle's account to be, there was no evidence to contradict the evidence of the prisoners who said they saw the head of the deceased held in a headlock.

(4) There was no evidence to suggest that contact was accidental or non-continuous, and that possibility was directly contradicted by Mr Nicholson's own evidence.

(5) There was no medical evidence to suggest that accidental, non-continuous contact between Mr Nicholson's forearm and the neck of the deceased could have caused or contributed significantly to the death of the deceased.

42. In our judgment these are matters which should have been taken into account on an objective appraisal of the prospects of success of a prosecution if brought, and the failure to take them into account vitiates the Director's decision. It also appears to us that Mr Western (inadvertently, we feel sure) applied a test higher than that laid down in the Code. We accordingly quash the decision. In doing so we must emphasise that the effect of this decision is not to require the Director to prosecute. It is to require reconsideration of the decision whether or not to prosecute. On the likely or proper outcome of that reconsideration we express no opinion at all.

43. This is the judgment of the court.

Order: Application allowed with costs; Legal Aid Taxation of Applicant's costs; Respondent, if so advised, to submit in writing within prescribed time limit a question for the court's consideration whether to certify a point of law of general public importance, such question having first been copied to the Applicants and their response obtained.
(Order does not form part of the approved judgment)