[2019] IEHC 796

THE HIGH COURT
JUDICIAL REVIEW

2018 No. 834 J.R

BETWEEN

S (IDENTITY PROTECTED)

APPLICANT

AND

THE DIRECTOR OF THE GARDA JUVENILE DIVERSION PROGRAMME
THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENTS

JUDGMENT of Mr Justice Garrett Simons delivered on 22 November 2019

INTRODUCTION

1. The Oireachtas has put in place a detailed legislative framework under Part 4 of the Children Act 2001 which provides for the diversion of juvenile offenders from the criminal justice system in certain circumstances. In brief outline, juvenile offenders, who have admitted responsibility for their actions, may, instead of being subject to prosecution, be subject to alternative measures including cautions and ongoing supervision. This is described as the "Diversion Programme". The decision as to whether to admit an individual offender to the Programme is to be made by reference to the statutory criteria prescribed under the Act.

2. These judicial review proceedings present an important issue of principle as to the operation of the Diversion Programme, namely, whether there is ever an obligation to provide *reasons* for a decision not to admit an offender to the Programme. This issue of principle arises against a backdrop where the Programme Director appears to be operating under an incorrect interpretation of the legislation. The question of interpretation centres on whether the threshold for admission to the Diversion Programme is to be determined by reference to the age of an offender as of the date of the commission of the offence, or, alternatively, their age as of the date when charges are being considered. The Programme Director maintains the mistaken position that once a juvenile offender has reached the age of eighteen years, then he or she cannot be admitted to the Programme irrespective of their age as of the date of the offence. Counsel on behalf of the Programme Director has informed the court that the Programme is applied to such aged-out offenders on a *concessionary* basis only, i.e. on a non-statutory or *ex gratia* basis. There is, however, no affidavit evidence before the court in this regard.

3. The Director of Public Prosecutions, through her counsel, accepts that the Programme Director's interpretation of the legislation is incorrect.

4. Notwithstanding their disagreement as to the interpretation of the legislation, both of the State respondents submit that there is no obligation to provide reasons to an offender who has been denied the benefit of the Diversion Programme. Both State respondents submit that a decision not to admit an offender to the Diversion Programme is subject to the same attenuated standard of judicial review as are decisions of the Director of Public

Prosecutions. It is said to follow from this that an obligation to give reasons could only ever arise where *mala fides* or some improper motive or policy has been demonstrated.

FACTUAL BACKGROUND

5. The Applicant has been charged with a number of offences under the Child Trafficking and Pornography Act 1998. More specifically, the Applicant has been accused of (i) the sexual exploitation of a child; (ii) the possession of child pornography for the purpose of distribution and sale; and (iii) the possession of in excess of 500 images of child pornography.

6. These offences occurred at a time when the Applicant had not yet reached the age of eighteen years and was, accordingly, a "child" for the purposes of the Children Act 2001.

7. The nature of the offences has been set out in detail in the Statement of Opposition filed on behalf of the Director of the Garda Juvenile Diversion Programme *("the Programme Director*"). In order to avoid any risk of prejudicing a criminal prosecution, certain details have been deliberately omitted from the brief summary below.

8. The offences came to the attention of An Garda Síochána as a result of a complaint made by the parents of a young male child. It seems that the young child had been engaged in exchanges on social media with another individual. The social media account used by this second individual represented that the account holder was an eleven-year-old girl. (In fact, the account holder was the Applicant, a male aged seventeen years of age). The account holder requested that the young child send certain pornographic images of themselves *via* the social media app.

9. These matters subsequently came to the attention of the young child's parents, and they made a complaint to An Garda Siochana. Following an investigation, the police traced the social media account to an IP address at the Applicant's family home. The police applied for and executed a search warrant in respect of the family home on a date during the summer of 2017. The Applicant acknowledged that the social media account in question was his, and handed over certain mobile devices to the police. On examination, a mobile phone held by the Applicant was found to contain over 500 images of child pornography.

10. The Applicant indicated through his solicitor that he was accepting responsibility for his criminal behaviour and that he would consent to being cautioned and supervised.

11. The Applicant's parents secured a referral to a clinical psychologist, and the Applicant has attended ever since for regular appointments.

12. The Applicant was formally arrested a number of months later. The Applicant had, by this time, reached the age of eighteen years.

13. There was then a lengthy exchange of correspondence between the solicitors acting on behalf of the Applicant and An Garda Síochána. The solicitors addressed each of the statutory criteria governing admission to the Diversion Programme, and outlined why it was said that the circumstances of the Applicant's case fulfilled same.

14. The Applicant was interviewed by two Juvenile Liaison Officers ("*JLOs*") from An Garda Síochána. Each of the JLOs prepared a suitability report in respect of the Applicant. These reports recommended that the Applicant not be included in the Diversion Programme. The investigation file, together with the suitability reports, was then forwarded by a Garda Inspector to the Programme Director.

15. The Programme Director, Superintendent Colin Healy, has sworn an affidavit in these proceedings. He describes his decision-making as follows.

> "42. I, then Director of the Programme, duly considered the file, the Suitability Reports, the correspondence from the Applicant's Solicitor and the psychological Reports provided and, having discussed the matter with the Gardai involved, decided that the Applicant was unsuitable for inclusion in the Programme.
>
> 43. On 4 September 2018, having considered further submissions from the Applicant's Solicitor, I confirmed that the Applicant remained unsuitable for inclusion in the Garda Youth Diversion Programme. In response to letters of 6 and 25 September 2018 from the Applicant's Solicitor seeking reasons for the Applicant's unsuitability, on 1 October 2018 I replied that:
>
> > The Applicant's referral does not fulfil the criteria for inclusion in the Garda Diversion Programme. The matter has been referred to the Superintendent, [Location Redacted] Garda Station for his attention."

16. More generally, the Applicant is currently in third level education. He has not come to the adverse attention of An Garda Síochána since the events the subject-matter of these proceedings.

PART 4 OF THE CHILDREN ACT 2001

17. Part 4 of the Children Act 2001 has put in place a detailed legislative framework which is intended to regulate the diversion of juvenile offenders from the criminal justice system. The purpose and objective of the Diversion Programme are set out as follows at sections 18 and 19.

> "18. Unless the interests of society otherwise require and subject to this Part, any child who —
>
> (a) has committed an offence, or
> (b) has behaved anti-socially,
>
> and who accepts responsibility for his or her criminal or anti-social behaviour shall be considered for admission to a diversion programme (in this Part referred to as the Programme) having the objective set out in section 19.
>
> 19.(1) The objective of the Programme is to divert any child who accepts responsibility for his or her criminal or anti-social behaviour from committing further offences or engaging in further anti-social behaviour.

(2) The objective shall be achieved primarily by administering a caution to such a child and, where appropriate, by placing him or her under the supervision of a juvenile liaison officer and by convening a conference to be attended by the child, family members and other concerned persons."

18. The legislation prescribes certain qualifying criteria which must be fulfilled before a "child" (as defined) is eligible to be considered for admission to the Diversion Programme ("*the Programme*") as follows. The offence or anti-social behaviour must have occurred at a time when the offender was under the age of eighteen years. The offender must accept responsibility for his or her criminal or anti-social behaviour, and must consent to be cautioned, and, where appropriate, to be supervised by a juvenile liaison officer.

19. (For the sake of completeness, it should be noted that the Minister for Justice and Equality is empowered under section 47 of the Children Act 2001 to make regulations providing that prescribed criminal behaviour "of a serious nature" shall be excluded from admission to the Programme (unless the Director of Public Prosecutions directs otherwise). To date, the Minister has not made any such regulations. In principle, therefore, the Programme is available—and has been applied in practice—even in the case of serious offences such as murder. (See page 17 of the Section 44 Monitoring Committee Report).

20. Once these qualifying criteria have been fulfilled, it is then the "function" of the Programme Director to decide whether to admit a child to the Programme. (Section 24(1)). The principal statutory criteria which govern this decision are as follows.

(i) The Director must be satisfied that the admission of the child to the Programme would be appropriate, in the best interests of the child and not inconsistent with the interests of society and any victim. (Section 23(2)).

(ii). When the admission of a child to the Programme is being considered, any views expressed by any victim in relation to the child's criminal or anti-social behaviour shall be given due consideration, but the consent of the victim shall not be obligatory for such admission. (Section 23(4)).

21. The legal effect of admission to the Programme is to bar a prosecution for that offence. See section 49 as follows.

"49.(1) A child shall not be prosecuted for the criminal behaviour, or any related behaviour, in respect of which he or she has been admitted to the Programme.

(2) A child who has been admitted to the Programme in respect of anti-social behaviour shall not be the subject of an application for an order under section 257D in relation to any such behaviour which occurred prior to such admission."

THE APPLICANT'S CASE

22. The Applicant has submitted that the Programme Director appears to be applying a blanket policy to exclude any one over the age of eighteen years from the Programme.

This approach is said to involve an incorrect interpretation of section 23 of the Children Act 2001.

23. The Applicant has exhibited the 2017 Annual Report of the Committee Appointed to Monitor the Effectiveness of the Diversion Programme *("the Section 44 Monitoring Committee Report*"). The statistics in this report appear to indicate that no one over the age of eighteen years has been admitted to the Programme. See, in particular, pages 12 and 13 of the report.

24. Leading counsel on behalf of the Applicant, Mr James Dwyer, SC, submits that in the absence of a statement of reasons, it is not possible to say to what extent the decision in the present case was informed by this mistaken interpretation of the eligibility criteria.

25. As explained under the next heading below, however, matters moved on at the hearing in that counsel for the Programme Director made submissions which confirmed the existence of this error of law.

DISAGREEMENT AS TO INTERPRETATION OF CHILDREN ACT 2001

26. During the course of the hearing before this court, a significant disagreement emerged as between the Programme Director and the Director of Public Prosecutions as to the correct interpretation of Part 4 of the Children Act 2001. This disagreement centres on whether the threshold for admission to the Diversion Programme is to be determined by reference to the age of an offender as of the date of the commission of the offence, or, alternatively their age as of the date when charges are being considered.

27. It may assist the reader in understanding the nature of this disagreement to pause briefly at this point, and to set out the provisions of section 23 of the Children Act 2001 which are relevant to this issue, namely subsections (1) and (5).

> "23.—(1) Subject to subsection (6), a child may be admitted to the Programme if he or she—
>
> (a) accepts responsibility for his or her criminal or anti-social behaviour, having had a reasonable opportunity to consult with his or her parents or guardian and obtained any legal advice sought by or on behalf of him or her,
> (b) consents to be cautioned and, where appropriate, to be supervised by a juvenile liaison officer, and
> (c) is 10 years of age or over that age and under 18 years of age,
>
> but paragraph (b) shall not apply where the Director is satisfied that the failure to agree to being cautioned or supervised is attributable to undue pressure being brought to bear on the child by any person and, in that event, the child shall be deemed to have consented for the purposes of that paragraph.
>
> [...]

(5) For the purposes of subsection (1)(c), the age for admission to the Programme shall be the age of the child on the date on which the criminal or anti-social behaviour took place."

28. The Programme Director maintains the position that once an offender has reached the age of eighteen years, then he or she is not legally entitled to be admitted to the Programme. (DAR, 14.30, 10 October 2019). Leading counsel on behalf of the Programme Director, Mr Michael Durack, SC, justifies this approach by pointing out that all of the provisions in respect of eligibility for the Programme relate to a "child", and that the definition of a "child" is someone who is under eighteen years of age. The Applicant had reached the age of eighteen years shortly after he was first questioned in relation to the offences.

29. Counsel further submits that the only point when the *date of offence* is mentioned is under subsection 23(5). That subsection, it is said, deals with the position where undue pressure is being brought to bear on the child by any person. It is only in those circumstances that the date of commission of offence then becomes the operative date. (It appears from this submission that the paragraph under subsections (a), (b) and (c) is read as qualifying only subsection (c)).

30. Counsel on behalf of the Programme Director has informed the court that, in considering his admission to the Programme, the Programme Director was affording the Applicant a *concession* which does not appear to be provided for under a strict construction of the section. This issue is not addressed on affidavit.

31. The Director of Public Prosecutions, through her counsel, Ms Sunniva McDonagh, SC, submits that this interpretation of the legislation is incorrect. A similar submission is made on behalf of the Applicant by his counsel, Mr James Dwyer, SC.

32. I am satisfied that the interpretation put forward by the Director of Public Prosecutions and the Applicant is correct. The qualifying age for admission to the Diversion Programme is to be determined by reference to the age of an offender as of the date of the commission of the offence. The Programme Director's interpretation is incorrect, and involves a misreading of the distinct provisions addressing the contingency of a child being subject to undue pressure. The language of section 23 is clear, and there is an express link between subsections (1)(c) and (5) (set out above). The age for admission to the Programme is the age of the child on the date on which the criminal or anti-social behaviour took place.

DETAILED DISCUSSION

OVERVIEW

33. The two principal issues which fall for determination in these proceedings are as follows. First, whether a decision not to admit an offender to the Diversion Programme is subject to the same attenuated standard of review as a decision of the Director of Public Prosecutions. Secondly, in the event that the attenuated standard of review does apply,

it will then be necessary to consider whether intervention by the court by reference to this standard is justified on the facts of the present case.

34. Before turning to address these two issues, it may assist in setting the context to explain briefly the current legal requirements in relation to the duty to give reasons. These are set out, primarily, in the judgment of the Supreme Court in *Mallak v. Minister for Justice and Equality* [2012] IESC 59; [2012] 3 I.R. 297.

35. The judgment locates the source of a duty to give reasons as lying within the general principles of natural and constitutional justice.

> "[54] The general principles of natural and constitutional justice comprise a number of individual aspects of the protection of due process. The obligation to give fair notice and, possibly, to provide access to information or, in some cases, to have a hearing are intimately interrelated and the obligation to give reasons is sometimes merely one part of the process. The overarching principle is that persons affected by administrative decisions should have access to justice, that they should have the right to seek the protection of the courts in order to see that the rule of law has been observed, that fair procedures have been applied and that their rights are not unfairly infringed."

36. The judgment, at a later point, summarises the present state of the law as follows.

> "[68] In the present state of evolution of our law, it is not easy to conceive of a decision maker being dispensed from giving an explanation either of the decision or of the decision making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.
>
> [69] Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them."

37. As appears from these passages, one of the principal determinants of whether a particular individual is entitled to a statement of reasons in respect of an administrative decision is whether that individual can be said to be a person affected by the decision. The individual does not necessarily have to establish that the decision has interfered with a "right" of theirs before they are entitled to reasons. It may be sufficient to trigger a duty to give reasons that the individual has an interest in ensuring that the decision had been reached in accordance with the relevant statutory provisions.

ATTENUATED STANDARD OF REVIEW

38. It is well established that a decision on the part of the Director of Public Prosecutions not to prosecute is subject to an attenuated form of judicial review. Whereas the case law stops short of conferring an *immunity* from judicial review, the threshold before a court will intervene is very high. An applicant who seeks to challenge a decision of the Director of Public Prosecutions must, in effect, establish that the impugned decision had been reached *mala fide* or had been influenced by an improper motive or improper policy.

39. Leading counsel on behalf of the Programme Director, Mr Michael Durack, SC, submits that the decision not to admit an individual to the Diversion Programme is analogous to a decision by the Director of Public Prosecutions not to prosecute. Much reliance is placed upon the judgment of the High Court (Hedigan J.) in *Kelly v. Director of Public Prosecutions* [2009] IEHC 200, which, in turn, cited the judgment of the Supreme Court in *Dunphy (A Minor) v. Director of Public Prosecutions* [2005] 3 I.R. 585.

40. In order to assess the correctness of this submission, it is necessary first to examine the case law in relation to the Director of Public Prosecutions with a view to identifying the rationale underlying the application of an attenuated standard of judicial review to the DPP. Thereafter, it will be necessary to consider whether a similar rationale can be said to apply to the Programme Director.

41. The starting point for this exercise is the judgment of the Supreme Court in *State (McCormack) v. Curran* [1987] I.L.R.M. 225. The applicant in *McCormack* had been accused of an offence which had been committed in Northern Ireland. The Criminal Law (Jurisdiction) Act 1976 allowed for the possibility of an offence committed in Northern Ireland being prosecuted within the State. For this to happen, the Director of Public Prosecutions would have to issue a warrant for the arrest of the person charged in Northern Ireland, with a view to their being prosecuted within the State for an extra-territorial offence as defined. The Director had, however, declined to prosecute the applicant.

42. One of the principal issues in the proceedings was whether the decision of the Director not to prosecute the applicant was amenable to judicial review. Finlay C.J. rejected the contention, made on behalf of the Director, that his decisions were not as a matter of public policy ever reviewable by a court.

43. The judgment indicates, however, that the form of judicial review is attenuated.

> "In regard to the DPP I reject also the submission that he has only got a discretion as to whether to prosecute or not to prosecute in any particular case related exclusively to the probative value of the evidence laid before him. Again, I am satisfied that there are many other factors which may be appropriate and proper for him to take into consideration. I do not consider that it would be wise or helpful to seek to list them in any exclusive way. If, of course, it can be demonstrated that he reaches a decision *mala fide* or influenced by an improper motive or improper policy then his decision would be reviewable by a court. To that extent I reject the

contention again made on behalf of this respondent that his decisions were not as a matter of public policy ever reviewable by a court.

In the instant case, however, I am satisfied that no *prima facie* case of *mala fides* has been made out against either of the respondents with regard to this matter. Secondly, I am satisfied that the facts appearing from the affidavit and documents do not exclude the reasonable possibility of a proper and valid decision by the DPP not to prosecute the appellant within this jurisdiction and that that being so he cannot be called upon to explain his decision or to give the reasons for it nor the sources of the information upon which it was based."

44. As appears, the threshold for review is whether the decision can be demonstrated to have been reached *mala fides* or had been influenced by an improper motive or policy.

45. The principles in *State (McCormack) v. Curran* were considered in detail by the Supreme Court in *H. v. Director of Public Prosecutions* [1994] 2 I.R. 589. The applicant in that case had sought an order of mandamus requiring the Director to prosecute an individual in respect of alleged child sexual abuse. The Supreme Court refused to grant an order of mandamus. O'Flaherty J. stated that if the Director were to be subjected to frequent applications by discomfited persons for mandamus to compel him to bring prosecutions, his office would be stretched beyond endurance in seeking to justify that which should not require to be justified. The Supreme Court fully endorsed the approach in *McCormack*.

46. Before leaving *H. v. Director of Public Prosecutions*, it is instructive to consider the arguments which had been advanced in justification of the attenuated standard of judicial review. Counsel on behalf of the Director had submitted that there will often be good and cogent reasons why the Director of Public Prosecutions should decide not to prosecute and where it would be inappropriate that his reasons should be brought into the public arena. Counsel had instanced examples such as where, though there might be a strong suspicion of guilt on the part of an accused, the proof of guilt would simply not be forthcoming. It would be very wrong for the Director to make a statement to the effect that while he suspected someone was guilty of an offence he could not hope to sustain a conviction. Counsel also cited the need to protect confidential informants.

47. The principles governing judicial review of a decision of the Director of Public Prosecutions were again considered in the more recent judgment in *Eviston v. Director of Public Prosecutions* [2002] 3 I.R. 260. This case involved a challenge to a decision to prosecute. On the facts of that case, the Director, having originally stated that he would not prosecute the applicant for an offence, made a subsequent decision to prosecute. The Supreme Court, per Keane C.J., explained the effect of the earlier case law as follows.

> "It is an important feature of the decisions in the *State (McCormack) v. Curran* [1987] I.L.R.M. 225 and *H. v. Director of Public Prosecutions* [1994] 2 I.R. 589 that, in each case, the court was concerned with (a) a decision not to prosecute in a particular case and (b) a challenge to the merits of that decision. The decisions,

accordingly, go no further than saying that the courts will not interfere with the decision of the respondent not to prosecute where:-

(a) no *prima facie* case of *mala fides* has been made out against the respondent;
(b) there is no evidence from which it could be inferred that he has abdicated his functions or been improperly motivated; and
(c) the facts of the case do not exclude the reasonable possibility of a proper and valid decision of the respondent not to prosecute the person concerned.

They also make it clear that, in such circumstances, the respondent cannot be called upon to explain his decision or to give the reasons for it or the sources of the information upon which it is based."

48. All parties at the hearing before me placed emphasis on the judgment of the Supreme Court in *Murphy v. Ireland* [2014] IESC 19; [2014] 1 I.R. 198. This judgment was concerned with a different type of decision made by the Director of Public Prosecutions, namely the statutory decision to certify that charges should be tried in the Special Criminal Court. The Director must certify that the ordinary courts are, in her opinion, inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of such person on such charge.

49. The Supreme Court, per O'Donnell J., held that there was a (limited) obligation on the Director to give reasons for a decision of that type.

"[43] Where the Director is making a decision that is subject to only limited review by a court and has the result that a trial which would otherwise take place before a jury would be heard without a jury, then the Director is under a duty to give reasons for that decision which extends to why he or she considers that the ordinary courts are not suitable for a trial of this accused. As indicated in *Mallak v. Minister for Justice* [2012] IESC 59, [2012] 3 I.R. 297, in an appropriate case, it may be sufficient to state that no reason can be given, without impairing national security. A statement of reasons that the Director believes the accused to be a member of, or associated with, an organisation that is prepared to interfere with the administration of justice, or even justifying the non-delivery of such reasons, will be sufficient, unless the accused challenges the decision and provides sufficient information to the court, to presumptively undermine the Director's reasons. As, for example occurred in *The State (Lynch) v. Cooney* [1982] I.R. 337, it may be permissible, at that stage, for the Director to amplify and explain any reasons, if thought desirable. It follows, however, that the entitlement to obtain such reasons does not carry with it any right contended for by the plaintiff to obtain the gist of information grounding such a decision or to have a hearing or to make submissions before a decision is made. The facts and argument in a case such as this lie in a fairly narrow compass. The question, in any case, is whether the Director was entitled to consider that the ordinary courts were inadequate to secure the administration of justice in a particular case. Review of such a decision should be the exception and never the routine, and only when an accused person can put forward a substantial case that

the decision making process has miscarried. The legal position outlined above balances the desirability of reasoned decision making to strengthen the administration of justice with the necessity to ensure that the process is tightly controlled to avoid routine disclosure and review, which could undermine it."

50. As appears from the above, the obligation to state reasons derives from the legal effect of a decision to certify, namely that the accused will not be entitled to a jury trial, and from the fact that the Director's decision is not subject to appeal or review. This is distinguished from other types of decision made by the Director, such as, for example, the decision that an offence should be tried before the District Court.

51. At an earlier point, the judgment in *Murphy v. Ireland* endorses the correctness of the line of case law running from *State (McCormack) v. Curran*.

> "In the light of subsequent decisions of this court quashing decisions of the Director, it is necessary to qualify that statement so as to provide that a decision of the Director is reviewable if it can be demonstrated that it was reached *mala fides* or influenced by improper motive or improper policy, or other exceptional circumstances. However, as so qualified, the decision in *The State (McCormack) v. Curran* [1987] I.L.R.M. 225 has remained the law. In *H. v. Director of Public Prosecutions* [1994] 2 I.R. 589, the High Court held that, while the Director could not, in general, be compelled to explain or give reasons, such an obligation could arise once a decision was challenged. The High Court relied on the decision in *International Fishing Vessels Ltd. v. Minister for the Marine* [1989] I.R. 149 which is one of the foundation cases on the domestic law of the duty to give reasons. However, the Supreme Court unanimously overturned this decision. O'Flaherty J. upheld the submission that the Director was not obliged to give reasons. He particularly distinguished *International Fishing Vessels Ltd. v. Minister for the Marine* because of the limited scope of reviewability of the Director's decisions, at p. 603:-
>
> > 'Thus, Blayney J. [in *International Fishing Vessels Ltd. v. Minister for the Marine]* starts from the premise that the decision of the Minister is open to full judicial review. However, it is clear from the decision in *The State (McCormack) v Curran* [1987] I.L.R.M. 225 that the discretion of the Director of Public Prosecutions is reviewable only in certain circumstances as set out by Finlay C.J. …
> >
> > It would seem then that as the duty to give reasons stems from a need to facilitate full judicial review, the limited intervention available in the context of the decisions of the Director obviates the necessity to disclose reasons.'
>
> Denham J., at p. 606, held that since the facts did not exclude the reasonable possibility of a proper and valid decision then, citing *The State (McCormack) v. Curran* [1987] I.L.R.M. 225 at p. 237, the Director 'cannot be called upon to explain his decision or to give reasons for it nor the sources of the information upon which it is based'.

52. The most recent judgment of the Supreme Court on the approach to be taken to decisions by the Director of Public Prosecutions appears to be *Marques v Minister for Justice and Equality* [2019] IESC 16. Those proceedings involved a challenge to the exercise of the Minister's discretion in extradition matters. Extradition may be refused by the Minister for an offence, which is also an offence under the law of the State, if the Director of Public Prosecutions or the Attorney General has decided either not to institute proceedings or to terminate proceedings against the person claimed in respect of the offence. On the facts, the extradition of the applicant had been sought by the United States of America in respect of his alleged involvement in offences related to the distribution of pornographic images of children. The Director of Public Prosecution, knowing of the extradition request, had declined to prosecute the applicant within this jurisdiction. The applicant sought to challenge the failure of the Minister to exercise their discretion to decline to extradite. It was argued that, in the absence of a statement of reasons by the Director as to why she had decided not to prosecute the applicant, the Minister could not properly exercise their residual discretion under section 15(2) of the Extradition Act 1965.

53. The Supreme Court ruled against the applicant on the basis that the final political decision as to whether to accede to or to refuse an extradition resides with the Minister alone. The Minister's decision need not be informed by the Director's decision not to prosecute the offence locally. The Minister's decision has nothing to do with whether the prosecuting authorities thought that, for instance, the offence was more closely connected to the requesting country, or whether the evidence was likely to be excluded under Ireland's criminal justice system.

54. For present purposes, the relevant aspect of the judgment is its endorsement of the general principle that the Director of Public Prosecutions is not obliged to give reasons for a decision as to whether to prosecute or not. The Supreme Court in Marques cited with approval the following passage from *Monaghan v. Director of Public Prosecutions* [2007] IEHC 92, [9].

> "In fulfilling his function, the Director of Public Prosecution is not to be obliged to give reasons for his decision as to whether to prosecute or not unless it can be demonstrated that such a decision was made in bad faith or under the influence of an improper motive or policy; *The State (McCormack) v. Curran* [1987] I.L.R.M. 225. Partly, the reasoning behind the series of decisions which later upheld that principle may be based on public policy in the sense that for reasons to be given as to why a prosecution should not be initiated, for instance due to lack of evidence, or the loss of evidence, such a declaration might undermine the presumption of innocence in favour of the accused. In addition, an extra administrative burden might be unjustifiably thrust upon the office of The Director of Public Prosecutions in explaining, and then defending, every decision made pursuant to the powers vested in the office by the Prosecution of Offences Act. Once there is a reasonable possibility that a valid decision has been made by the Director not to prosecute, or to prosecute, a decision by the Director is not reviewable by the High Court; *H v. D.P.P.* [1994] 2 I.L.R.M. 285. The Director is not exempt from the general

constitutional requirements of fairness and fair procedures. The proof of the absence of such principles in any decision made by the Director of Public Prosecutions cannot be gathered through a speculative application for discovery; *Dunphy (a minor) v. D.P.P.* [2005] I.E.S.C. 75. There must be, at the least, evidence suggestive of an impropriety before the court would allow a proceeding for discovery to be initiated against the Director of Public Prosecutions."

RATIONALE FOR ATTENUATED REVIEW OF DPP

55. As appears from the foregoing survey of the case law, it remains the position that decisions of the Director of Public Prosecutions are still subject to an attenuated form of judicial review. One consequence of this is that the obligation upon the DPP to state reasons is correspondingly limited. The Director has not, however, escaped entirely the implications of the judgment in *Mallak*.

56. The attenuated form of judicial review can be justified on a number of grounds. First, the Director exercises a very broad discretion in making decisions on whether or not to prosecute in any particular case. The legislation which establishes the office of Director of Public Prosecutions, namely the Prosecution of Offences Act 1974, is not prescriptive as to the criteria to which the Director must have regard in making decisions. The exercise of such a broad discretion does not readily lend itself to control by the courts. A decision on whether or not to prosecute may have been informed by a number of factors, such as the strength of the evidence, the public interest in the prosecution, the seriousness of the alleged offence or the need to prioritise finite financial resources. Such matters fall towards the policy end of the spectrum of decision-making, and the courts would normally defer to the designated decision-maker.

57. Secondly, were the High Court, in the exercise of its supervisory jurisdiction, to be too willing to engage with the "merits" of a positive decision to prosecute an individual, it might inadvertently trespass on the role of the criminal courts. If, for example, a decision to prosecute was being challenged on the basis that there was insufficient evidence to justify the prosecution, the High Court might be invited to rule on matters relating to, say, the admissibility or strength of evidence. It is arguable that such matters are best left to the court of trial.

58. Thirdly, the imposition of an obligation on the Director to justify her decisions would impose an excessive or disproportionate administrative burden on her office.

59. The sensitive nature of the decision-making also militates against the imposition of a duty to give reasons. This is especially so in the case of a decision not to prosecute. The disclosure of reasons for such a decision to a third party, i.e. a person other than the alleged offender, might adversely affect the first person's right to a good name. To take one obvious example: if a decision not to prosecute had been informed by concerns as to the quality of the evidence available, this might lead to an inference that the individual involved was, in truth, guilty and that a prosecution had not been brought merely for want of formal evidence.

60. Equally, a decision not to prosecute might involve the implication that the victim would not be a credible witness. The publication or disclosure of such observations on the part of the Director would, self-evidently, be harmful to the reputation and good name of those involved.

61. Similar concerns have been articulated, more eloquently, by the High Court (Hogan J.) in *Flynn v. Medical Council* [2012] IEHC 477; [2012] 3 I.R. 236, [27] and [28].

> "There is no doubt but that the issue as to whether a prosecutor or other statutory personage is required to give reasons for their failure to take either a criminal prosecution or regulatory action is a vexed and troubling one. This is especially true in relation to criminal prosecutions where it is generally thought indecorous for a prosecutor to have to give reasons - certainly detailed reasons - for failing to prosecute a particular case. If, for example, the Director of Public Prosecutions was required to give detailed reasons for such a decision, it might be damning of a particular accused while providing cogent reasons for not acting. The Director might, for example, think that the evidence was strongly suggestive of guilt, yet decline to prosecute because of concerns regarding the reliability of a particular witness or the admissibility of key evidence.
>
> Few accused persons placed in that situation would view this state of affairs with equanimity and, hence, for these practical and pragmatic reasons the courts have been reluctant to impose such a requirement on the prosecuting authorities. This is why the Supreme Court concluded in *The State (McCormack) v. Curran* [1987] I.L.R.M. 225, at p. 237, that it would only be appropriate for a court to intervene by way of judicial review of a decision not to prosecute where such decision was taken 'mala fide or influenced by an improper motive or improper policy'. This approach has been consistently followed ever since in the context of criminal prosecutions: see, e.g., *H. v. Director of Public Prosecutions* [1994] 2 I.R. 589 and, in the context of criminal investigations, *Fowley v. Conroy* [2005] IEHC 269, [2005] 3 I.R. 480."

62. I respectfully endorse this analysis.

KELLY V. DIRECTOR OF PUBLIC PROSECUTIONS

63. The principal question for determination in these proceedings is whether the same rationale extends to a decision on the part of the Programme Director not to admit a juvenile offender to the Diversion Programme. It is submitted on behalf of the two respondents that the question of the applicability of the attenuated standard of review to the Programme Director has been concluded by the judgment of the High Court (Hedigan J.) in *Kelly v. Director of Public Prosecutions* [2009] IEHC 200 ("Kelly"), and that this court is bound to follow that judgment.

64. The judgment in *Kelly* was delivered in respect of two related judicial review proceedings. The two respective applicants had been charged with offences under the Non-Fatal Offences against the Person Act 1997 and the Criminal Justice (Public Order) Act 1994. The charges related to an incident in which two Polish nationals had been attacked by a

number of youths. The victims had received stab wounds, and one required emergency surgery in order to prevent the loss of his life.

65. The two applicants had been interviewed subsequently by a Garda Juvenile Liaison Officer *("the JLO")* with a view to her preparing a report as to their suitability for admission to the Diversion Programme. The JLO had sworn an affidavit in each of the two judicial review proceedings explaining the reasons why she had recommended that the applicants were not suitable for inclusion in the Programme. The content of these affidavits is summarised at paragraph [12] of the judgment as follows.

> "While the applicant's [sic] were being considered for admission into the Programme, the Garda investigation into the alleged offences of the 10th of February 2007 was continuing. On the 2nd of April 2007, a medical report on the injured parties was sought on behalf of the Director of the Programme. The investigation ultimately concluded on the 11th of April 2007 and on the same day, Garda Gralton submitted her reports to the Director of the Programme. In both cases, Garda Gralton concluded that the offences alleged were of a very serious nature, involving two separate attacks on foreign nationals who received very significant injuries. She was also of the opinion that there had been a racial undertone to the attacks. In the case of the first named applicant, Garda Gralton noted additionally that he had declined to make a full admission of the offences. In the case of the second named applicant, Garda Gralton made reference to the fact that he had previously been directed to the Programme on a number of occasions. On the basis of all of these factors, Garda Gralton concluded that neither applicant was suitable for admission to the Programme."

66. The judgment goes on to explain at paragraph [13] that the (then) Programme Director's decision not to admit the applicants to the Programme had been predicated in each case on the JLO's report; the juvenile referral form prepared in respect of the applicant; and the investigation file pertaining to the incident.

67. The matter is put as follows at paragraph [32] of the judgment.

> In the present case, the Director accepted the view of Garda Gralton that the offences alleged were of such a serious nature, and occurred in such aggravating circumstances, as to render the perpetrators unsuitable for admission to the Programme. Furthermore, I am satisfied that the Director was entitled to take account of the fact that the second named applicant had benefited from the scheme on several previous occasions. This is also clear from the Dunphy decision. In that case, Hardiman J. stated the following at page 598:-
>
> > 'It is… true that the fact that a juvenile has had the benefit of the scheme on one occasion is a proper matter to be taken into account when considering whether she should have the benefit of the scheme again… There is clearly scope for the view that the applicant should not again be given the benefit of the diversion scheme, either on the basis that she had not profited from her

previous experience of the scheme, or on the basis that the vindication of the law in the fraught matter of unlawful drugs required that a person who had not taken a previous opportunity offered by the Diversion Scheme should not be given the benefit of it on another occasion, or indeed for a combination of these views.'[

I am therefore unable to accept that there was any violation of the provisions of the 2001 Act in the present case which would impel the Court to grant the relief sought."

68. The grounds of challenge advanced in *Kelly* were more wide-ranging than in the present case. In particular, the applicants had argued that they should have been afforded the right to make representations before the report of the JLO had been finalised and submitted to the Programme Director. It had been further argued that the applicants ought to have been permitted to make representations before the Programme Director made his ultimate decision, and that the Programme Director should have provided reasons for his determination on the matter.

69. As appears from the passages of the judgment in *Kelly* cited above, the rationale for refusing to admit the two applicants into the Diversion Programme had been disclosed as part of the affidavits filed in the judicial review proceedings by An Garda Síochána. In particular, the applicants were made aware that the decision was informed by considerations such as the serious nature and aggravating circumstances of the offences; the racial undertone of the offences; the failure of the first applicant to make a full admission to the offences; and the fact that the second applicant had benefited from the Programme on several previous occasions.

70. The High Court appears to have accepted that these considerations were all matters which the Programme Director could lawfully take into account in the exercise of his discretion under section 23(2) of the Children Act 2001.

71. Hedigan J., at paragraph [31] of the judgment, drew an analogy between the discretion exercised by the Programme Director under section 23(2) of the Children Act 2001, and that exercised by the Director of Public Prosecutions.

"31. It is quite clear that under section 23(2) of the 2001 Act, the Director is required to assess any candidacy for the Programme in a manner which achieves a balance between the best interests of the particular candidate and those of any victims as well as society as a whole. This accords with the generally wide discretion which is afforded to prosecuting authorities when deciding whether to bring criminal proceedings against a particular individual. In *Eviston v. Director of Public Prosecutions* [2002] 3 IR 260, Keane J. examined the authorities on this point and concluded as follows at page 294:-

'It is an important feature of the decisions… that, in each case, the court was concerned with (a) a decision not to prosecute in a particular case and (b) a

challenge to the merits of that decision. The decisions, accordingly, go no further than saying that the courts will not interfere with the decision of the respondent not to prosecute where:-"

(a) no prima facie case of mala fides has been made out against the respondent;
(b) there is no evidence from which it could be inferred that he has abdicated his functions or been improperly motivated; and
(c) the facts of the case do not exclude the reasonable possibility of a proper and valid decision of the respondent not to prosecute the person concerned.'

The application of these principles to decisions made under the Programme, albeit in its previous non-statutory incarnation, was affirmed by Hardiman J. in *Dunphy (A Minor) v. Director of Public Prosecutions* [2005] 3 IR 585. I am satisfied that they should also apply in relation to Part IV of the 2001 Act."

72. The judgment goes on to state at paragraph [34] that it is well established that executive decisions made at the outset of a prosecution for a criminal offence are not reviewable save in the most exceptional circumstances. At paragraphs [37] and [38], it is stated that any obligation on the part of the Programme Director to provide a reasoned decision is "heavily restricted" by the nature of the decision being made by the Director. The court concluded by rejecting the argument that the Director had any obligation to inform the applicants of his reasons for excluding them from the Programme.

73. Having carefully considered the judgment in *Kelly*, it does not appear to me to be conclusive of the issues which fall for determination in the present case. One of the central issues to be determined is how the principles in the landmark judgment in *Mallak* apply to a decision not to admit an offender to the Diversion Programme. The judgment in *Kelly* had been delivered several years prior to *Mallak*, and, thus, by definition, could not have addressed this question.

74. Moreover, there does not appear to be any reference in the summary of the submissions of the parties, as set out in the *Kelly* judgment, to the legal implications flowing from the fact that the previous non-statutory scheme operated by the Director of Public Prosecutions has now been put on a statutory basis. Nor is there any reference to the fact that the decision on whether or not to admit an offender to the Diversion Programme is now a function of An Garda Síochána, and not of the Director of Public Prosecutions. These issues do not appear to have been argued before the High Court in *Kelly*. A point not argued is a point not decided.

75. Finally, as the passages from *Kelly* set out above indicate, the reasons for non-admission of the applicants to the Programme had been disclosed in the affidavits filed in the judicial review proceedings. In a sense, therefore, the argument as to whether the Programme Director was obliged to give reasons had become academic. The applicants were fully aware of why they had been denied admission to the Programme.

76. For the sake of completeness, it should be noted that the same type of grounds which justify distinguishing *Kelly* apply with even greater force to the judgment of the Supreme Court in *Dunphy (A Minor) v. Director of Public Prosecutions* [2005] 3 I.R. 585.

77. The offences at issue in that case had occurred prior to the commencement of Part 4 of the Children Act 2001. The applicants were relying instead on the non-statutory scheme which was administered primarily by the Director of Public Prosecutions. The points of distinction made above as to the differences between the statutory and the non-statutory schemes were simply not before the Supreme Court.

78. The Supreme Court, per Hardiman J., applied the attenuated standard of review to the decision to deny one of the two offenders the benefit of the non-statutory scheme. The Supreme Court held that the alleged disparity in treatment was capable of justification on the ground that the excluded offender had previously had the benefit of a caution in respect of an earlier offence. See paragraphs [36] and [37] of the judgment as follows.

> "That is undoubtedly true. It is equally true that the fact that a juvenile has had the benefit of the scheme on one occasion is a proper matter to be taken into account when considering whether she should have the benefit of the scheme again. There is no suggestion that the other girl had any previous involvement in the scheme, or any previous convictions. There is clearly scope for the view that the applicant should not again be given the benefit of the diversion scheme, either on the basis that she had not profited from her previous experience of the scheme, or on the basis that the vindication of the law in the fraught matter of unlawful drugs required that a person who had not taken a previous opportunity offered by the diversion scheme should not be given the benefit of it on another occasion, or indeed for a combination of these views. Having regard to the fact that it is for the applicant to demonstrate that the facts "exclude the reasonable possibility of a proper and valid decision by the [respondent]" it is unnecessary to make further findings. There is clearly scope for the view that the decision to divert the other girl involved into the juvenile liaison scheme, and the respondent's decision to prosecute the applicant, are each quite consistent with total propriety in the respective decision-making processes.
>
> This being so, I believe that the applicant has made no showing at all towards discharging the burden that indisputably lies on her, even in a suggestive or prima facie fashion."

79. The applicant in *Dunphy* was thus aware of the reasons for her exclusion from the non-statutory scheme.

FINDINGS OF THE COURT:

PROGRAMME DIRECTOR IS SUBJECT TO JUDICIAL REVIEW

80. The principal features of the Diversion Programme have been set out, in summary form, at paragraphs 17 *et seq*. above. The legal status and statutory functions of the Programme Director are so very different from those of the Director of Public Prosecutions

as to make it inappropriate to treat the former as being subject to the same attenuated form of judicial review as the latter. This conclusion is premised on the following considerations.

81. First, the decision as to whether or not to admit an offender to the Programme resides exclusively with An Garda Síochána. The Garda Commissioner is required to assign an officer, not below the rank of superintendent, with the function of Director of the Diversion Programme. It is the "function" of the Programme Director to decide whether to admit a child to the Programme. (Section 24(1)). The Director of Public Prosecutions is bound by the decision of the Programme Director. This is because the making of a decision by the Programme Director to admit an offender to the Programme bars any prosecution for the criminal behaviour, or any related behaviour, in respect of which he or she has been admitted. (Section 49).

82. In the absence of any regulations having been made under section 47, the Director of Public Prosecutions no longer has any role in relation to the threshold decision as to whether to admit an offender to the Programme. This is to be contrasted with the position in respect of the previous non-statutory scheme as described in the judgment in *Dunphy (A Minor) v. Director of Public Prosecutions* (at paragraphs [32] to [34] of the judgment).

83. Put shortly, admission to the Programme does not come within the umbrella of the Director of Public Prosecution's decision-making. If an attenuated form of review is to apply, then it must be justified by the nature of the Programme Director's function.

84. This leads on to the second point. The Oireachtas has made a policy choice to divert certain juvenile offenders from the criminal justice system. The Programme Director is the person designated to give effect to this legislative intent. The decision as to whether or not to admit any individual offender to the Programme must be made by reference to the statutory criteria prescribed. Whereas Part 4 of the Children Act 2001 does undoubtedly confer a margin of discretion on the Programme Director, this discretion is constrained and he must observe the statutory criteria. The Programme Director is in a very different position than the Director of Public Prosecutions. The latter is entirely independent in the exercise of her functions, and the Prosecution of Offences Act 1974 is not prescriptive as to the criteria to which the Director must have regard in reaching prosecutorial decisions.

85. It would risk undermining the legislative intent underlying Part 4 of the Children Act 2001 were the Programme Director to be accorded the benefit of the same attenuated form of judicial review as the DPP. To do so would mean that there was no effective procedure in place by which non-observance of the statutory criteria could be corrected.

86. Thirdly, there are certain *conditions precedent* to the making of a decision to admit a juvenile offender to the Programme. It is only where these have been fulfilled that the statutory discretion comes into play. Relevantly, the offender must have been under eighteen years of age at the time the offence occurred. If the Programme Director were

to have misinterpreted or misunderstood the statutory qualifying criteria, then this would represent an error of law on his part. This error would be amenable to correction by way of judicial review.

87. Fourthly, a further consequence of the fact that the range of considerations to be taken into account by the Programme Director is narrower is that the imposition of a requirement to state reasons would not present the same sensitivities as in the case of the Director of Public Prosecutions. By definition, a decision on admission to the Programme only properly arises for consideration where the offender has accepted responsibility for his or her criminal or anti-social behaviour. Thus, the type of difficult issues in relation to evidence and proof which often arise for consideration by the Director of Public Prosecutions will not have to be considered by the Programme Director. It should also be borne in mind that there are express statutory provisions which render inadmissible evidence obtained in the course of the consideration of admission to the Programme. (Section 48 of the Children Act 2001).

88. Moreover, any duty to state reasons can properly be confined to the giving of reasons to a juvenile offender who seeks admission to the Programme. There would be no obligation to provide reasons to third parties. Accordingly, the type of concerns identified at paragraph 59 above will not arise.

SUMMARY

89. Having regard to all of these considerations and, in particular, to the fact that the decision to admit an offender to the Programme must be made in accordance with prescribed statutory criteria and that the Director of Public Prosecutions has no function in this regard, the decisions of the Programme Director do not attract the same standard of attenuated judicial review as is applicable to the Director of Public Prosecutions. This does not mean, of course, that it is "open season" in respect of decisions made under Part 4 of the Children Act 2001. The Programme Director, as with any other public authority charged with the exercise of a statutory discretion, is entitled to curial deference. A court will not intervene to set aside a decision on the merits unless an applicant for judicial review can establish that the decision is "unreasonable" or "irrational" in the sense that those terms are used in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, and *Meadows v. Minister for Justice and Equality* [2010] IESC 3; [2010] 2 I.R. 701. An applicant for judicial review will have to hurdle this very high threshold before he or she could succeed in setting aside the decision on the merits.

90. It follows as a consequence of this finding that his decisions are amenable to judicial review that the Programme Director is, in principle, required to provide reasons, if requested, to a juvenile offender who has been refused access to the Programme. Whereas a juvenile offender does not have a "right" to be admitted to the Programme, they do have an obvious interest in ensuring that the decision has been reached in accordance with the relevant statutory provisions. See, by analogy, *Mallak v. Minister for Justice and Equality* [2012] IESC 59; [2012] 3 I.R. 297.

91. The reasons can be stated in short form, and there is no obligation on the Programme Director to provide a discursive explanation. In the unlikely event that the statement of reasons would involve the disclosure of sensitive material, then the Programme Director can decline to provide reasons on that basis.

92. An example of the type of reasons which would pass muster is provided by the facts of *Kelly v. Director of Public Prosecutions* (discussed earlier). On the facts of that case, the decision not to admit the two applicants to the Programme had been informed by the serious nature and aggravating circumstances of the offences; the racial undertone of the offences; the failure of the first applicant to make a full admission to the offences; and the fact that the second applicant had benefited from the Programme on several previous occasions. A short statement along these lines would fully discharge the duty to give reasons. Moreover, it would not involve the disclosure of any sensitive information.

93. Returning to the facts of the present case, the Programme Director has declined to provide any reasons whatsoever for his decision not to admit the Applicant to the Programme. The Applicant is entitled to reasons, or, at the very least, to an explanation as to the basis on which the Programme Director purports to withhold reasons. The Applicant is, therefore, entitled to an order setting aside the decision and directing that the matter be reconsidered in light of the findings of the court. I discuss the precise form of order towards the end of this judgment.

INTERVENTION JUSTIFIED EVEN ON ATTENUATED STANDARD

94. For the reasons set out under the previous heading, I have concluded that decisions made by the Programme Director pursuant to Part 4 of the Children Act 2001 do not attract the attenuated standard of review applicable to decisions of the Director of Public Prosecutions.

95. Lest I be incorrect in this finding, I propose to consider, separately, the question of whether the circumstances of the present case would justify intervention even on the attenuated standard of judicial review.

96. The case law discussed earlier emphasises that even the decisions of the Director of Public Prosecutions are not entirely immune from judicial review. Rather, an applicant who seeks to challenge such a decision must demonstrate that there is, for example, evidence from which it can be inferred that the DPP's decision has been influenced by an improper motive or policy.

97. On the facts of the present case, the material before the court establishes that there is a *prima facie* case for saying that the Programme Director's decision may have been informed by a mistaken interpretation of the eligibility criteria governing admission to the Programme. More specifically, as the disagreement between the two State respondents illustrates, the Programme Director appears to have been labouring under a misapprehension that an offender who has reached the age of eighteen years is ineligible for admission to the Programme. Certainly, the language used in the correspondence, i.e. the Applicant's "referral does not fulfil the criteria for inclusion in the Garda Diversion

Programme", suggests that the decision may well have been grounded on the fact that the Applicant had turned eighteen.

98. It has been suggested in oral submissions before this court that the possibility of admission to the Programme may have been extended to the Applicant on a concessionary basis. There is, however, no affidavit evidence to this effect before the court.

99. If the impugned decision not to admit the Applicant to the Programme was, indeed, reached on this mistaken interpretation of the legislation, then this would represent a good ground for setting aside the decision even on the attenuated standard of judicial review. A decision-maker must ask himself the correct question, and the misinterpretation of a condition precedent to the exercise of a statutory discretion would render the decision invalid. See, by analogy, *White v. Dublin City Council* [2004] IESC 35; [2004] 1 I.R. 545.

100. The respective counsel acting on behalf of the Programme Director and the Director of Public Prosecutions both, very properly, conceded that it was not possible to tell from the decision (and subsequent correspondence from the Programme Director) whether he was, indeed, guilty of this misinterpretation. The decision-making is inscrutable. The refusal of the Programme Director to provide reasons in the particular circumstances of this case frustrates the High Court's supervisory jurisdiction by way of judicial review. To permit the Programme Director to maintain this Sphinx-like approach would run the risk of allowing a serious error of law on the part of a statutory decision-maker to go unchecked. This would be contrary to the rule of law.

REPORTING RESTRICTIONS

101. In order to be *eligible* for consideration for admission to the Programme, it is necessary for an offender to accept responsibility for his or her criminal or anti-social behaviour. In the event that the offender is not admitted to the Programme, this acceptance or admission cannot be relied upon in evidence at a subsequent criminal trial. (Section 48).

102. In the ordinary course of events, the making of such admissions would only be known to the offender, his or her legal team and the relevant gardaí. The admissions would not have been widely circulated.

103. The Applicant in the present case finds himself in a very different position. The fact of his having made a series of admissions of criminal wrongdoing has been disclosed as part of these judicial review proceedings. It would undermine the statutory prohibition on the use of such admissions at a subsequent criminal trial if the fact that the Applicant had made these admissions were to be published as part of the reporting of these judicial review proceedings. If, for example, the Applicant's name and the details of the case (including his admissions) were to be published, then there is a real risk that this might come to the attention of members of a jury in any subsequent criminal proceedings. This would then give rise to a real risk of an unfair trial.

104. To mitigate this risk, it seems sensible that restrictions should be imposed on the reporting of the judicial review proceedings. For this reason, I made an order at the outset of the proceedings prohibiting the publication of any material which is capable of allowing the Applicant to be identified. This order continues in force.

105. For similar reasons, the precise details of the alleged offences have been omitted from this judgment.

106. All parties were agreed, in principle, that reporting restrictions should be imposed on these proceedings. The parties are not, however, agreed as to the jurisdictional basis for such reporting restrictions. The Applicant seeks to rely on the provisions of section 45 of the Courts (Supplemental Provisions) Act 1961, saying that these judicial review proceedings fall within the definition of a "minor matter". The judgment of the High Court (Humphreys J.) in *McD. v. Director of Public Prosecutions* [2016] IEHC 210 is cited in support of this interpretation.

107. The State respondents, conversely, rely on the court's inherent jurisdiction to protect the integrity of the trial of the criminal charges currently pending against the Applicant. The judgments in *Irish Times Ltd. v. Ireland* [1993] 1 I.R. 359; *Independent Newspapers (Ireland) Ltd. v. Andersen* [2006] 3 I.R. 341; and *Doe v. Revenue Commissioners* [2008] 3 I.R. 328 are cited in support of this proposition.

108. For the reasons set out in *L.E. v. Director of Public Prosecutions* [2019] IEHC 471, [80] and [81], I do not think that the provisions of section 45 of the Courts (Supplemental Provisions) Act 1961 can be relied upon to impose reporting restrictions on the criminal trial of an adult in respect of offences alleged to have been committed at a time when the offender was a "child" (as defined).

> "With respect, I am not satisfied that Section 45(1) of the Courts (Supplemental Provisions) Act 1961 can be interpreted in this way. It is well established that statutory exceptions to the constitutional imperative that justice should be administered in public must be strictly construed, both as to the subject matter and the manner in which the procedures depart from the standard of a full hearing in public. See *Gilchrist v. Sunday Newspapers Ltd*. [2017] IESC 18; [2017] 2 I.R. 284. It seems to me that in circumstances where the Oireachtas has made express provision under [Section 93] of the Children Act 2001 for restricting the reporting of criminal proceedings involving offences alleged to have been committed by children, but has omitted to extend that protection to cases where the hearing takes place after the child has become an adult, weight should be given to this legislative preference. It is not open to this court to sidestep this legislative preference by calling in aid the general provisions of Section 45(1) of the Courts (Supplemental Provisions) Act 1961. The specific circumstances in which criminal proceedings in respect of offences alleged to have been committed by minors can be held otherwise than in public is regulated under the Children Act 2001. There is an obvious tension between the principle that justice be administered in public, and a desire to shield child defendants from publicity lest it frustrate their rehabilitation

or undermine their future prospects in life. The compromise chosen by the Oireachtas is to provide anonymity in cases where the defendant is still a 'child' as defined at the time of the criminal proceedings. If the child has reached the age of majority, then they are confined to the benefit of Section 258 of the Children Act 2001. Section 258 provides, in effect, that criminal convictions for offences committed as a child shall be expunged after a period of three years. This is subject to certain exceptions, e.g. it does not apply to an offence which is required to be tried by the Central Criminal Court, or where the defendant has been dealt with regarding an offence in that three-year period.

Whereas there might well be different opinions as to whether this compromise is the most appropriate one, that is not a matter for this court. The interpretation of [Section 93] of the Children Act 2001 is unequivocal, and the benefit of the reporting restrictions is not available in the case of an adult defendant."

109. The proper jurisdictional basis for the reporting restrictions is, instead, to be found under the court's inherent jurisdiction to protect the integrity of a criminal trial.

110. The precise form of the reporting restrictions imposed is set out below under the heading "Form of Order".

CONCLUSIONS

111. A decision by the Programme Director, made pursuant to Part 4 of the Children Act 2001, not to admit a juvenile offender to the Diversion Programme is amenable to judicial review. Such a decision does not attract the attenuated standard of review which is applicable to decisions of the Director of Public Prosecutions.

112. The Programme Director is, therefore, required to provide reasons to a juvenile offender who has been denied access to the Programme, if requested. This follows from the general principles set out in *Mallak v. Minister for Justice and Equality* [2012] IESC 59; [2012] 3 I.R. 297.

113. This does not mean, of course, that it is "open season" in respect of decisions made under Part 4 of the Children Act 2001. The Programme Director, as with any other public authority charged with the exercise of a statutory discretion, is entitled to curial deference. A court will not intervene to set aside a decision on the merits unless an applicant for judicial review can establish that the decision is "unreasonable" or "irrational" in the sense that those terms are used in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, and *Meadows v. Minister for Justice and Equality* [2010] IESC 3; [2010] 2 I.R. 701. An applicant for judicial review will have to hurdle this very high threshold before he or she could succeed in setting aside the decision on the merits.

114. Lest I be incorrect in the findings above, I am satisfied that even if the attenuated standard of judicial review were applicable, the peculiar circumstances of the present case would have triggered an obligation to state reasons. The material before the court establishes that there is a *prima facie* case for saying that the Programme Director's

decision had been informed by a mistaken interpretation of the eligibility criteria governing admission to the Programme. More specifically, the Programme Director appears to have been labouring under a misapprehension that an offender who has reached the age of eighteen years is ineligible for admission to the Programme. On its correct interpretation, section 23 of the Children Act 2001 provides that the age threshold for admission to the Diversion Programme is to be determined by reference to the age of an offender as of the date of the commission of the offence.

115. The refusal of the Programme Director to provide reasons in the peculiar circumstances of this case frustrates the High Court's supervisory jurisdiction by way of judicial review. To permit the Programme Director to maintain a Sphinx-like approach would run the risk of allowing a serious error of law on the part of a statutory decision-maker to go unchecked. This would be contrary to the rule of law.

FORM OF ORDER

116. I propose to make the following orders. An order of *certiorari*, by way of application for judicial review, setting aside the decisions of 30 July 2018 and 4 September 2018 refusing to admit the Applicant to the Diversion Programme. These orders reflect the relief sought at (d) (1) and (2) of the Statement of Grounds.

117. An order pursuant to Order 84, rule 27(4) of the Rules of the Superior Courts remitting the matter of the Applicant's admission to the Diversion Programme to the incumbent Programme Director for reconsideration in light of the findings of this court as set out in this judgment. It would not be appropriate in the circumstances of the present case simply to direct that the decision-maker furnish reasons retrospectively. This is because the (former) Programme Director appears to have been operating on a fundamental misinterpretation of Part 4 of the Children Act 2001. This undermines confidence in the earlier decision-making process. It is preferable, therefore, that the question of the Applicant's admission to the Programme be considered afresh, i.e. as opposed to reasons being provided ex *post facto* for the original decisions of July and September 2018. The matter is to be reconsidered by an officer other than Superintendent Colin Healy.

118. The order restraining the Director of Public Prosecutions from pursuing the prosecution of the Applicant is to remain in force. The Director of Public Prosecutions has liberty to apply, on seven days' notice to the Applicant, to have this order vacated in the event that the reconsideration of the matter does not result in a decision to admit the Applicant to the Diversion Programme. Any such application should be made to me in the first instance.

119. The reporting restrictions are to continue. In this regard, I will make an order that no material is to be published which might lead to the identity of the Applicant being disclosed. In particular, and without prejudice to the foregoing, publication of the Applicant's name; his date of birth; his address; and details of the school and third level institution which he has attended is prohibited. Similar reporting restrictions apply to the victim of the offences. No details of the alleged offences, other than the summary set out in this judgment, are to be published.

120. I will hear counsel in relation to costs and as to the form of stay to be granted in the event of an appeal.