



Neutral Citation Number: [2020] EWHC 2962 (Admin)

Case No: CO/2160/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/11/2020

Before :

LADY JUSTICE CARR DBE
and
MR JUSTICE PICKEN

Between :

R (on the application of) MARTIN REDSTON **Claimant**
- and -
DIRECTOR OF PUBLIC PROSECUTIONS **Defendant**

Michael Mansfield QC and Philip Rule (instructed by **Hacket & Dabbs LLP**) for the
Claimant
Duncan Atkinson QC and Tom Williams (instructed by the **Crown Prosecution Service**) for
the **Defendant**

Hearing date: 3 November 2020

Approved Judgment

Lady Justice Carr DBE :

Introduction

1. This is the judgment of the Court to which both members have contributed.
2. It concerns a renewed application for permission by a Renewal Notice dated 4 August 2020 following refusal of permission on paper by Swift J provided to the parties on 31 July 2020.
3. We announced our decision to refuse permission at the conclusion of the hearing on 3 November 2020, indicating that we would give our reasons for doing so in writing later. These are those reasons.

Facts in summary

4. The Claimant, Mr Martin Redston ('Mr Redston'), seeks permission to challenge by way of judicial review the decision of the Defendant, the Director of Public Prosecutions ('the DPP'), not to refer the case of Mr Dominic Cummings, Chief Adviser to the Prime Minister, to the police for investigation of a potential breach of Regulation 6, Health Protection (Coronavirus, Restrictions) (England) Regulations (SI 2020/350) (the 'Regulations'), and/or a potential offence of public nuisance, contrary to common law.
5. The context is well known. On 23 March 2020, the Prime Minister announced a national lockdown. The Regulations came into force three days later, at 1pm on 26 March 2020. These included Regulation 6, which stipulated in subsection (1) that "no person may leave the place where they are living without reasonable excuse". Subsection (2), then, set out scenarios which would amount to a reasonable excuse.
6. On 22 May 2020 it was reported in the press that on 27 March 2020 Mr Cummings had made the journey from London to Durham and, furthermore, that, before travelling to Durham, he went to work at Downing Street after his wife had become ill with Covid-19 symptoms rather than isolating at home for 14 days. It was reported further that, whilst staying away from his home in London, on 12 April 2020, Mr Cummings also made a journey to Barnard Castle.
7. On 23 May 2020, the Attorney-General, Ms Suella Braverman, tweeted that "protecting one's family is what any good parent does" before going on to refer to a statement from 10 Downing Street as clarifying the situation and observing that "it is wholly inappropriate to politicise it". The 10 Downing Street statement described Mr Cummings' actions as having been "in line with coronavirus guidelines".
8. On 25 May 2020, Mr Cummings held a press conference in the Rose Garden at 10 Downing Street. He gave explanations as to why it was that he travelled from London to Durham, and subsequently, whilst at Durham, to Barnard Castle.
9. It is Mr Redston's position that the DPP ought, in the circumstances, to have referred the matter to the police in order for there be an investigation into Mr Cummings' movements.

10. This, Mr Redston suggests, should have been done notwithstanding that on 28 May 2020 the Durham Constabulary issued a press release in which it was stated:

"Durham Constabulary does not consider that by locating himself at his father's premises, Mr Cummings committed an offence contrary to Regulation 6 of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. (We are concerned here with breaches of the Regulations, not the general Government guidance to 'stay at home'.)

On 12 April 2020, Mr Cummings drove approximately 26 miles from his father's property to Barnard Castle with his wife and son. He stated on 25 May 2020 that the purpose of this drive was to test his resilience to drive to London the following day, including whether his eyesight was sufficiently recovered, his period of self-isolation having ended.

Durham Constabulary have examined the circumstances surrounding the journey to Barnard Castle (including ANPR, witness evidence and a review of Mr Cummings' press conference on 25 May 2020) and have concluded that there might have been a minor breach of the Regulations that would have warranted police intervention. Durham Constabulary view this as minor because there was no apparent breach of social distancing."

11. On 3 June 2020, solicitors acting for Mr Redston, Hackett & Dabbs LLP, wrote to the DPP in these terms:

"We, along with leading and junior counsel, are instructed by Mr Martin Redston. As a resident of London Mr Redston has been subject to the restrictions imposed in order to do reduce the risk of the spread of the pandemic caused by the virus commonly referred to as 'Covid-19'.

We write in relation to the actions of Dominic Cummings, the chief adviser to the Prime Minister Boris Johnson. We are aware that, during the lockdown which was imposed on 23rd March by the Prime Minister, Dominic Cummings left London on 27th March and travelled approximately 260 miles north to Durham in a car together with his wife and child. His wife was infected by coronavirus at the time. At the relevant time the law required all persons to remain at home save for prescribed purposes a healthy person might need to leave or in case of an actual emergency. The journey would take 5 hours or so, not allowing the breaks and stops on the way.

In the home, under strict guidance in the interests of public health, the person would self-isolate and seek to distance themselves as an infected person from the members of the same household. The other members of the household were not to

leave the house for 14 days, so as to prevent spread of the infection to others in the community."

12. The letter went on to refer to Mr Cummings having left work on 27 March and gone home to see his wife, who was exhibiting symptoms before returning to work and then driving to Durham, and to his subsequent visit to Barnard Castle.

13. The letter then continued as follows:

"We are concerned that no action has been taken in relation to the actions of this public figure. Due consideration or investigation of these issues is clearly in the public interest. Whilst we acknowledge that there is no obligation on a private prosecutor to notify the CPS, the DPP or any other state agency, that a private prosecution is contemplated or due to commence we are writing as a matter of courtesy to provide you with the opportunity to respond to this matter to notify us as to whether you are considering this matter, or intend to do so, or are pursuing a prosecution in this regard.

We would wish to highlight to you the potential that the absence of a thorough police investigation or state inquiry risks (a) the loss of additional evidence that might be gathered by prompt investigation (for example the CCTV, ANPR, or debit or credit card records to indicate the events and timings of the journey to Durham); and (b) a very serious loss of public confidence in the due process of the rule of law and confidence in the accountability of government officers and employees, directly harmful to the needs of public compliance with the rules and guidance in relation to the measures to combat a serious public health threat to life and of serious harm and injury."

14. The response to this letter came in the form of an email from the DPP's Private Secretary on 8 June 2020 acknowledging receipt and explaining that the matter "has now been passed to colleagues in our Special Crime Division, who will provide a response to you in due course".

15. Hackett & Dabbs LLP replied the same day, as follows:

"We are unclear as to nature this response and are writing to you again in order to seek clarification thereof. Our letter sought a substantive response by 9 June as you will appreciate, and this is an acknowledgement only, received this afternoon.

Consequently we would be grateful for your urgent responses to the following question by 12 noon Tuesday, 9 June 2020.

Please confirm if there is presently an open and active consideration of the actions of Mr Cummings during the lockdown period to which we have referred in our letter dated 3 June 2020? i.e. is a decision, concerning those specific events,

still to be reached in relation to the question of prosecution for breach of Regulation 6 of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020/350? If the answer is yes, please indicate when this consideration commenced, and by when you are expecting to reach a decision. We would ask for an explanation as to why no decision has been reached to-date."

16. On 9 June 2020, Hackett & Dabbs LLP sent the DPP a further letter with the heading "URGENT - LETTER BEFORE ACTION - JUDICIAL REVIEW". The second paragraph stated:

"Having received no response to our letters by close of today, 9 June 2020, we are writing to provide you with notice, in accordance with the Pre-Action Protocol for Judicial Review, of our intention to commence judicial review proceeding should this matter not be capable of being resolved satisfactorily."

17. Having then addressed matters required by the relevant Pre-Action Protocol, including setting out grounds for judicial review which at that stage included the allegation that the DPP had unreasonably or otherwise unlawfully failed "to inquire or investigate the actions of Dominic Cummings", the letter ended:

"We look forward to your response by 6 PM on Thursday, 11 June 2020. We reserve the right to issue proceedings thereafter without recourse to you."

18. On 10 June 2020, Mr Michael Gregory, Senior Specialist Prosecutor at the Special Crime and Counter Terrorism Division of the CPS, wrote to Hackett & Dabbs LLP. The letter was headed:

"Response to Pre-action Protocol Letter".

19. After certain preliminaries, Mr Gregory stated as follows:

"I should make it abundantly clear that it is not the function of the CPS, as set out in the Prosecution of Offences Act 1985, to investigate allegations of crime. It has no and never has had any powers to carry out or direct police forces to carry out investigations. Investigations into alleged criminal conduct are a matter for the relevant police force.

The police have not referred this matter to the Crown Prosecution Service, therefore, we are not at present considering it.

Your [sic] also ask whether there is active consideration of the conduct of Mr Cummings. Whether there is an active police investigation into Mr Cummings' conduct is a matter you should address to the relevant police forces directly.

Any decision to take over or not take over a private prosecution will be done in accordance with the law. Our policy on private prosecutions can be found on our website ...".

20. Hackett & Dabbs LLP replied to this letter the same day in these terms:

"We note that you have accordingly clarified that you are not considering any prosecution in this case.

You suggest that the matter is for the police and, it would appear from the terms of your letter that, a suggested lack of powers is relied upon. We would respectfully draw to your attention that it is the DPP's own published policy that the CPS may receive an allegation of an offence from a person other than the police and 'In such cases, you will need to decide whether the police should investigate the matter' and 'if you conclude that there should be further investigation, you should refer the matter to the police. If in doubt, it may be preferable to request an enquiry'.

We note that you have decided not to refer this matter to the police."

21. Mr Gregory replied on 11 June 2020, stating as follows:

"Your letter seems to set that the CPS does in fact have the power to direct the police to conduct an investigation. I assume that the unnamed policy referred to, in support of this assertion, is in fact the 'Police and CPS Relations Guidance' ('the Guidance'), which can be found on our website ...

The Guidance sets out the principles of a constructive working relationship between the police and CPS, summarised as responsibilities to inform, consult and advise. The Guidance stipulates that the functions of the CPS and the police are different and distinct. It makes clear that CPS must not assume the role of investigator or direct police operational procedures. This is consistent with the content of my letter yesterday. Nothing that appears elsewhere in the Guidance detracts from this.

Fundamentally, the ability of the CPS to refer an allegation to the police does not confer with it the power to direct the police to investigate. The quote you chose to select from the Guidance therefore lacks the context given by the document as whole.

The allegation against Mr Dominic Cummings has received significant media attention and we are aware from media reporting that it has already been considered by one police force, Durham Constabulary. It is not therefore necessary for the CPS to make the police aware of the allegation.

For the sake of clarity, please identify in any future correspondence the policy/guidance that you are referring to".

Grounds of challenge

22. On 16 June 2020, Mr Redston issued a claim form seeking judicial review, in which the relevant decision was described as being: "The Defendant's failure to exercise his discretion to consider the case raised with him" with the date of that decision being given as 10 June 2020.
23. This was accompanied by an application for urgent consideration which was rejected by Swift J on 17 June 2020.
24. Mr Redston's Detailed Statement of the Facts and Grounds of Claim, running to some 38 pages, advanced seven grounds in support of the application for judicial review:
 - i) Ground 1 alleges a failure to consider the exercise of the DPP's discretion to refer the matter to the police in order that, thereafter, the DPP may perform his function as an independent prosecutor to review the facts.
 - ii) Ground 2 alleges a failure to consider all relevant considerations, and/or material matters were not taken into account or properly taken into account, at all or lawfully and/or fundamental error of fact.
 - iii) Ground 3 alleges a failure to exercise the discretion to refer the matter to the police so that thereafter the DPP may perform his function as an independent prosecutor consistent with the Prosecution of Offences Act 1985.
 - iv) Ground 4 asserts that the absence of a referral is Wednesbury unreasonable or irrational.
 - v) Ground 5 avers that the non-referral is in breach of section 6 of the Human Rights Act 1998.
 - vi) Ground 6 alleges a lack of the appearance of independence in the decision-making of the DPP in this case arising from (a) the scheme of subordination to the Attorney-General, and/or perpetuated by (b) the failure to engage with the question over Mr Cummings' actions and stance taken and/or (c) the failure to reply to the written request for details of all contact with any Minister etc to be disclosed.
 - vii) Lastly, Ground 7 complains of a failure to meet the requirements of transparency and openness required of a public body.
25. It is said for Mr Redston that the case is "of vital importance to the maintenance of the rule of law and demonstration of the separation of powers that guarantee to the citizenry the fair and transparent operation of the legal system of a healthy democratic state where no individual is above the law, nor seen to be above the law".

Refusal by Swift J

26. It is convenient to set out in full the reasons given by Swift J when deciding to refuse permission to apply for judicial review on the papers.

27. His first reason was as follows:

" ... it is not reasonably arguable that the power alleged (i.e. the power to refer these matters to the police for investigation) exists. In this regard, I accept the analysis of the provisions of the Prosecution of Offenders Act 1985 set out in the Defendant's summary grounds (see at § § 17-21). The Defendant's essential function is prosecutorial, not investigative. This state of affairs is not altered by anything in the Code for Crown Prosecutors, or the Guidance issued by the Defendant in December 2018 'Police and CPS Relations'. As to this latter document, I accept the submissions made by the Defendant at § § 32-34 of the Summary Grounds. In this case, the Durham Constabulary had already investigated the complaints made against Mr Cummings; the outcome of that investigation was summarised in a public statement made on 28 May 2020. In this context, it is not arguable that the power relied upon that by the Claimant, existed."

28. Swift J went on to give the following as an additional reason for refusing permission:

"In any event, even if existence of the power relied upon by the Claimant is assumed, the Claimant's case of illegality based on it, is not reasonably arguable given (a) the investigation that had already been undertaken by the Durham Constabulary; and (b) the outcome of that investigation, explained in the 28 May 2020 public statement. Given those conclusions it would not be reasonably arguable that any failure by the Defendant to require (effectively) re-investigation of the complaints against Mr Cummings was unlawful on any of the grounds now advanced by the Claimant. In particular, to the extent that any of the positive obligations under any of ECHR articles 2, 3 and/or 6 arose, those obligations had already been discharged in the course of the police investigation."

Grounds of renewal

29. Mr Redston renews his application for permission to seek judicial review on all seven grounds set out in the Grounds of Claim.

30. In doing so, he suggests that Swift J was wrong to approach the matter on the basis that the DPP had no relevant discretion and wrong also to rely upon the fact that the Durham Constabulary had already undertaken an investigation into Mr Cummings' activities. As to the latter in particular, it is submitted that that investigation (and the 28 May 2020 public statement concerning it) "did not in fact feature as a consideration in the decision challenged".

31. Complaint is also made that Swift J omitted to address Ground 6, described in the Renewal Notice as being "the very important issue as to the appearance of independence and impartiality on the part of the DPP when tasked to make decisions in relation to those connected to government, and the relationship with the Attorney-General and its impact upon independence".

Reasons for refusal

32. We have considered carefully the Detailed Statement of the Facts and Grounds of Claim, the Reply to the Defendant's Detailed Grounds for Contesting the Claim, the Renewal Notice, the skeleton lodged on behalf of Mr Redston on the renewal hearing, alongside the supplementing oral submissions from Mr Mansfield QC on behalf of Mr Redston.
33. Despite the large volume of written material advanced, we are able, nevertheless, to express our reasons for refusing permission relatively succinctly.
34. Before turning to the grounds themselves, we make some initial observations:
- i) First, we asked at the hearing whether Mr Redston had raised any complaint with either the Durham Constabulary or the Metropolitan Police Service. We were told that Mr Redston had done so (following the refusal of permission on paper) but that nothing had come of this. It follows that referrals have in fact now been made to both potentially relevant police forces (albeit not by the DPP).
 - ii) Secondly, and whilst we do not refuse permission on this basis, it is at least questionable whether Mr Redston has a "sufficient interest in the matter to which the application [for judicial review] relates" as required by s. 32 of the Senior Courts Act 1981. The threshold for standing in judicial review has generally been set at a low level; however, when it comes to criminal cases there is no need for a third party to seek to intervene (see *R v SSHD ex p Bulger* [2001] EWHC Admin 119 at [20] and [21]). Mr Mansfield QC for Mr Redston submits that it is not necessary that Mr Redston should have such a personal interest given that the Regulations apply to every single citizen. The matter is one of public interest with repercussions for public confidence. The fact remains that there is no suggestion that Mr Redston personally was put at risk by the actions of Mr Cummings, or any substantive indication as to why he has been put at risk through either any undermining of the rule of law or public health regulation as a consequence of any action (or inaction) by the DPP.
 - iii) Thirdly, the premise of the claim, namely that by his letter of 10 June 2020 the DPP took a decision not to refer Mr Cummings' conduct to the police (or that Mr Redston's solicitors' letter of 3 June 2020 was a complaint or request for decision) is not borne out by a fair and proper reading of the correspondence in question:
 - a) Mr Redston's solicitors' letter of 3 June 2020 was not a complaint or a request for a decision but, rather, a request for information allied with the giving of notice of possible private prosecution. Equally, Mr Redston's solicitors' letter dated 8 June 2020 asked for confirmation "if there is presently an open and active consideration of the actions of Mr

Cummings". It was neither a complaint nor a request for a decision, albeit that the letter went on to ask "when you are expecting to reach a decision" assuming, that was, that the DPP was in the process of making a decision. The same reasoning applies to the 'letter before action' dated 9 June 2020;

- b) Perhaps unsurprisingly in these circumstances, the DPP's letter of 10 June 2020 did not reflect or contain any decision by the DPP. Mr Gregory for the DPP was merely responding to Mr Redston's request for information, stating that (as a matter of fact) there had not been a referral to the police, and that the DPP did not have power to do so. He was not communicating any positive decision by the DPP not to refer the matter to the police.

35. This last point is a point of substance, to which we return below.
36. It is convenient to address Grounds 1 to 5 together, since they each depend on Mr Redston establishing that the DPP has power to refer a matter to the police for investigation. It goes without saying that, if the DPP has no power to refer, then, there can have been no unlawful failure to exercise a discretion to do so.
37. S.2 of the Prosecution of Offences Act 1985 ('the 1985 Act') provides for the appointment of the DPP by the Attorney General. S.3 sets out the DPP's functions. Its material parts are set out in the Appendix to this judgment.
38. Before the hearing it appeared to be common ground that the 1985 Act does not confer a statutory power on the DPP to refer a matter to the police for investigation. What was being relied on was an extra-statutory discretion (see, for example, paragraph 3 of the Reply).
39. However, Mr Redston's case, as advanced by Mr Mansfield orally at the hearing, is that there is indeed a statutory power to refer, contained in s. 3(2)(e) of the 1985 Act. It is said that the DPP has a key duty of oversight of the prosecutorial system and that s. 3(2) of the 1985 Act provides for important discretionary powers as part of that function. S. 3(2)(e) refers to the DPP having a duty "to give, to such extent as he considers appropriate, advice to police forces on all matters relating to criminal offences". This wording is said to be wide enough to embrace a power to refer and, as such, is the basis for the power to refer which it is submitted is to be found in the Code for Crown Prosecutors (the 'Code') and, most significantly, the CPS Legal Guidance entitled "*Police and CPS Relations*" issued (or, more accurately, updated) in December 2018 (the 'December 2018 Guidance'), which we come on to consider shortly.
40. We are clear that s. 3(2)(e) of the 1985 Act cannot arguably assist Mr Redston. Nor, we are equally clear, does the Code or the December 2018 Guidance arguably give rise to or support the existence of the power contended for.
41. The 1985 Act demonstrates a deliberate statutory distinction between the investigative role of other agencies (such as the police (s. 3(2)(a)), the National Crime Agency (s. 3(2)(ee)) or the Revenue and Customs (s. 3(2)(ef))), on the one hand, and the prosecutorial role of the DPP, on the other. The DPP is not an investigator and, as such, has no power to refer the matter to the police for investigation. As Rafferty LJ put it in

R (on the application of the DPP) v Sunderland Magistrates' Court [2014] EWHC 613 (Admin) at [15] and [17]:

"The Crown Prosecution Service, we should remind ourselves, has no and has never had any investigative powers. Its functions and its duties are set out in the Code for Crown Prosecutors issued by the Director of Public Prosecutions, a public declaration of the principles which drive decisions made by the Crown Prosecution Service and its officers. ... The functions and the duties of Crown Prosecutors are set out in section 2, and section 3 offers guidance on their decisions to prosecute. It recites that the police and other investigators are responsible for conducting enquiries into an allegation of crime. Every case a prosecutor receives from the police or others is reviewed. Prosecutors must ensure that they have all the information needed before an informed decision about how best to deal with the case is made. This will often involve their providing guidance and advice to the police and others. However, prosecutors cannot direct the police or other investigators."

42. Rafferty LJ went on at [20] to observe as follows:

"... the role of the Crown Prosecutor is not that of an investigator nor can it ever be... Any guidance provided by a Crown Prosecutor is issued only to the police or other investigative agencies and is discretionary."

43. Mr Mansfield submits that the distinction between investigation and prosecution is no reason to regard s. 3(2)(e) of the 1985 Act as being limited in scope such that it does not include a power to refer to the police for investigation.

44. However, as a matter of plain language, a mere referral is not advice. Mr Mansfield characterised the referral sought as amounting to a "nudge" to the police that the matter is worthy of investigation. That would not arguably amount to advice. Advice is something qualitatively different.

45. Mr Redston recognises that he cannot go further and suggest that the DPP has the power to direct the police to investigate: any such power or discretion would run counter to the distinction between investigative responsibility and prosecutorial responsibility which is so clearly expressed in the 1985 Act. We consider that even a "nudge" represents an impermissible trespass over the investigation/prosecution boundary. A mere referral would not be a meaningful step. It is instructive in this respect that the letter before action, amongst other things, asserted an "unreasonable or otherwise unlawful failure to ... investigate the actions of Dominic Cummings". What Mr Redston in truth seeks is something more than a mere referral.

46. Turning to the Code, s. 10 of the 1985 Act provides that the DPP:

"...shall issue a Code for Crown Prosecutors giving guidance on general principles to be applied by them -

- (a) in determining, in any case -
 - (i) whether proceedings for an offence should be instituted or, where proceedings have been instituted, whether they should be discontinued; or
 - (ii) what charges should be preferred;
- ...".

47. The Code provides as follows:

3.1 In more serious or complex cases, prosecutors decide whether a person should be charged with a criminal offence and, if so, what that offence should be. Prosecutors may also advise on or authorise out-of-court disposals as an alternative to prosecution. They make their decisions in accordance with this Code, the DPP's Guidance on Charging and any relevant legal guidance or policy. The police apply the same principles in deciding whether to start criminal proceedings against a person in those cases for which they are responsible.

3.2 The police and other investigators are responsible for conducting inquiries into any alleged crime and for deciding how to deploy their resources. This includes decisions to start or continue an investigation and on the scope of the investigation. Prosecutors should advise the police and other investigators about possible reasonable lines of inquiry, evidential requirements, pre-charge procedures, disclosure management and the overall investigation strategy. This can include decisions to refine or narrow the scope of the criminal conduct and the number of suspects under investigation. Such advice assists the police and other investigators to complete the investigation within a reasonable period of time and to build the most effective prosecution case.

3.3 Prosecutors cannot direct the police or other investigators. However, prosecutors must have regard to the impact of any failure to pursue an advised reasonable line of inquiry or to comply with a request for information, when deciding whether the application of the Full Code Test should be deferred or whether the test can be met at all."

48. It is submitted for Mr Redston that these passages reflect the important extra-statutory role of the DPP in advising the police in relation to investigations. However, we consider that these passages in the Code reinforce the DPP's position, rather than that of Mr Redston: it is the responsibility of the police and other investigative agencies to conduct enquiries into any alleged crime, not that of the DPP. The Code states expressly that "Prosecutors cannot direct the police or other investigators". There is not the slightest hint in these passages that the DPP has the suggested power to refer for investigation.

49. It follows that we reject the contention that the Code arguably contains the suggested power to refer.
50. Mr Mansfield concentrated mainly on the December 2018 Guidance. Under the heading "Principle" the December 2018 Guidance opens thus:

"The relationship between the CPS and the police is an important one. The police have a key role in the prosecution process: they are responsible for the detection and investigation of criminal offences. ...

In working closely with the police, it is important not to compromise the independence of the CPS. The functions of the CPS and the police are different and distinct. In giving advice to the police, the prosecutor must not assume the role of investigator or direct police operational procedures.

However, providing advice to the police in all matters relating to criminal offences is one of the core statutory functions of the CPS. Prosecutors should therefore be alert and open to all appropriate opportunities for giving such advice, where it may contribute to the effectiveness of an investigation and prosecution."

51. The December 2018 Guidance identifies that prosecutors can provide advice where it may contribute to the effectiveness of an actual (i.e. not merely potential) investigation and prosecution. We do not consider that it arguably suggests that the CPS can make a referral so as to cause an investigation to commence. This is apparent from the passages set out above. However, the same clearly applies to a number of other sections which follow, dealing with "Informal Advice", "Early Investigative Advice", "Pre-Charge Advice and Charge Decision", "Information Required for Investigative Advice and Charging Decisions", "Appropriate and Inappropriate Requests for Advice", "Communications between CPS and Police - Legal Professional Privilege or Public Interest Immunity".
52. In this context the section immediately following the "Principle" section headed "Guidance" is also instructive. It states:

"The relationship between the CPS and the police carries with it responsibilities to:

- inform
- consult
- advise

consultation and the provision of information are two-way activities. At many stages in the prosecution process it is essential that both responsibilities are successfully performed:

for example, at review, with proposals to discontinue and in the filling the prosecution's disclosure duties.

The duty to advise the police to arise from the provisions of section 3(2)e of the Prosecution of Offences Act 1985, from paragraph 2.2 of the Code for Crown Prosecutors and the Director's Guidance on Charging. It is a logical extension of the CPS function to conduct criminal proceedings commenced by the police. Timely advice from the CPS can ensure that, from the start, cases are properly brought. In large, serious and complex cases in particular, the proactive early involvement of the prosecutor can bring considerable benefits to both the police and the CPS in conducting an effective prosecution; refer to the Director's Guidance on Charging, elsewhere in this guidance.

Advice may be requested by the police, or it may be necessary to give advice without a specific request having been made (for example, where a change in the law may urgently affect the investigation of offences or the presentation of evidence).

General advice or explanations can be given to the police, provided that they are consistent with CPS national guidance.

On most occasions, the police will request advice on specific cases or areas of concern. Such

- Informal advice
- Early investigative advice
- Pre-Charge advice and Charge Decision."

53. This demonstrates clearly the meaning and scope of the advice contemplated under s. 3(2)(e) of the 1985 Act (to which express reference is made): namely general advice (such as the CPS Legal Guidance dated 26 March 2020 (and updated on 12 June 2020)) dealing with the Regulations, or advice on specific cases or issues. The emphasis throughout is on the ability of the CPS to give "advice", which, as we have explained, is something quite different from a power to refer a specific matter to the police for investigation.

54. Mr Mansfield relies most heavily on the section headed "Procedure - Requests for Police Enquiries", which is in these terms:

"You may receive an allegation, from a person or body other than the police, that a criminal offence has been committed.

Examples might include:

- a complaint by a private individual

- a referral by a judge or magistrate regarding matters arising at court
- a complaint from a local authority

In such cases, you will need to decide whether the police should investigate the matter. Factors which may influence your evaluation may include:

- the source of the allegation
- whether any previous complaints have been made
- whether there has already been a police investigation
- the nature and seriousness of the offence
- the likely result if enquiries are made

If you conclude that there should be further investigation, you should refer the matter to the police. If in doubt, it may be preferable to request an enquiry."

55. Mr Mansfield submits that this section has s. 3(2)(e) of the 1985 Act as its "genesis". This is a case, he contends, in which "a complaint by an individual" has been made, namely Mr Redston, through his solicitors' letter to the DPP dated 3 June 2020. On that basis, it is said that the DPP has the power to refer to the police for investigation; so it is open to Mr Redston to challenge through judicial review what is said to be a decision to refuse to refer.
56. There are a number of fundamental difficulties with this submission.
57. First, nowhere in this section of the December 2018 Guidance is there any reference to the DPP giving "advice", the word used in s. 3(2)(e). We say again that we do not accept that it is arguable that a decision on the part of the DPP to refer a matter to the police (or to give the police a "nudge") can properly be described as the DPP giving advice as contemplated by s. 3(2)(e). Amongst other things, as we have previously explained, any such power or discretion would run counter to the statutory distinction between investigative responsibility and prosecutorial responsibility.
58. Moreover, we accept the DPP's submission that the section must be read not only in the light of the general principles relating to the DPP's role and functions, but also in the context of the December 2018 Guidance as a whole and its overarching "Principle". The December 2018 Guidance makes it very clear that "the prosecutor must not advise on the appropriateness or the efficacy of any operational matter" and "the decision on how to implement the CPS advice (if it is accepted) as a matter entirely for the police". Even, therefore, when advice has been sought by the police in relation to an existing or contemplated investigation, it is emphatically not for the DPP to tell the police what to do.

59. Secondly, the section is clearly not targeted at circumstances such as the present, where there has already been a previous police investigation. This is demonstrated by the fact that this is a factor which is listed as having an influence on the evaluation which a prosecutor should undertake.
60. Thirdly and relatedly, what is envisaged in the section is a situation where something comes to the attention of the CPS which is not generally known. In that event, the CPS must decide what to do with the information. In the present case, Mr Cummings' activities were widely known. In our view, the wording has no application in such a case. The CPS was in no better position to refer the matter to the police than any member of the public, including Mr Redston himself. We now know that he has done just that.
61. Fourthly and in any event, we do not accept that the letter dated 3 June 2020 from Mr Redston's solicitors arguably constituted "*a complaint by a private individual*". On the contrary, as we have previously explained, the letter sought information from the DPP, apparently also indicating an intention on the part of Mr Redston to commence a private prosecution against Mr Cummings. The letter asked, in effect, whether the DPP had already referred the matter to the police for investigation. It did not invite the DPP to do so. (The reference to a possible private prosecution was in fact inconsistent with the notion that Mr Redston was making a complaint with a request that the DPP refer the matter to the police for investigation (and a possible prosecution by the authorities)).
62. Nor, as we have previously explained, did the DPP's letter of 10 June 2020 arguably amount to a decision. Mr Gregory was simply informing Mr Redston's solicitors that there had not been a referral with an explanation also that the DPP did not have power to make one.
63. It follows, in the circumstances, that we consider Grounds 1 to 5 to be unarguable.
64. Although conscious that Swift J went on to give as an alternative reason for refusing permission the fact that, even if the DPP had the power alleged by Mr Redston, Mr Redston's case of illegality based on it is nonetheless not arguable given that the Durham Constabulary had already investigated Mr Cummings' activities, we prefer not to base our decision on this further point. This is because, given that the DPP never considered exercising the power because he did not consider that it existed, it is not now open to the DPP to invite the court to proceed on the basis that a decision not to refer was made when plainly that was not what happened.
65. We should say something further concerning Ground 5 specifically, namely the suggestion that non-referral was in breach of section 6 of the Human Rights Act 1998.
66. Mr Redston's position is that the failure to refer constitutes a breach on the part of the DPP of the duty to safeguard citizens to the greatest possible extent from the real risk of a breach of Articles 2 and 3 ECHR, and that this is a positive obligation. It is said that, following *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 at [2], there is a duty "to establish a framework of laws, precautions, procedures and means of enforcement which will to the greatest extent reasonably practicable, protect life". Mr Redston seeks to argue that the DPP has failed in this obligation because he has not taken "reasonable steps to ensure public safety to the greatest extent practicable by the maintenance of public confidence in accountability to and enforcement of the law that

is designed to protect the public ... from the ongoing threat of COVID-19" by not referring the matter to the police.

67. The DPP accepts that the duties under Articles 2 and 3 duty apply to him, but submits that the Articles confer procedural rights as to an effective investigation into whether a person's life has been unlawfully taken or into whether they have been unlawfully subject to torture or inhuman or degrading treatment. He relies, for these purposes, on authorities such as *Armani da Silva v UK* (2016) 63 EHRR 12.
68. In order to establish a breach of Article 2 on the facts of this case, it would have to be shown that the DPP was under a duty to direct an investigation and that there had not, in fact, already been an effective investigation by, in this case, the Durham Constabulary. No arguable basis for such an assertion has been advanced. Furthermore, even if there were a duty on the part of the DPP, and even if there had not already been an effective investigation, for any Article 2 claim to succeed, it would also need to be shown that Mr Cummings' actions resulted in a risk of human death. Similarly, in order for an Article 3 claim to succeed, it would need to be shown that Mr Cummings' actions in themselves constitute a breach of somebody's right to be free of torture or inhuman or degrading treatment. This is the effect of decisions such as *Osman v UK* (2000) 29 EHRR 245, *Sarjantson v Chief Constable of Humberside Police* [2014] QB 41 and *Assenov v Bulgaria* (1999) 28 EHRR 652.
69. Mr Redston can only point to what the DPP fairly describes as an "unproven and speculative assertion" that Mr Cummings' actions "increased the risk that members of the public might feel emboldened to breach Government guidance pertaining to the lockdown, which might in turn put their lives at risk, and might have caused possible unidentified loss of life". This is insufficient.
70. Mr Redston's alternative case has no real prospect of success.
71. Finally, complaint is made that Swift J did not address Ground 6 in terms. We suspect that he did not do so because he regarded it as a ground that was obviously totally without merit. The same applies, we are clear, in relation to Ground 7 also, the two grounds being closely related.
72. For Mr Redston reference is made to the well-known test for independence in *Porter v Magill* [2002] 2 AC 357, namely whether "*the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias*". His position is that in this case there is a lack of appearance of independence arising from what is described as the "*superintendence*" of the Attorney General over the DPP (said to be "*anachronistic*" and "*unhealthy*"). He submits, in particular, that the "*Framework agreement between the Law Officers and the Director of Public Prosecutions*" dated 13 March 2019 "*is a product of historical development unfit for modern practice*" and, furthermore, that the "*events here involving the A-G's public comments over Mr Cummings throws this into sharp focus*".
73. In the light of our conclusion in relation to the earlier grounds, it is self-evident that there can be no merit in Grounds 6 and 7 either. This is because, if the DPP has no power to make a decision in the way alleged by the Mr Redston, then there can be no relevant apparent lack of independence about which it is open to the Claimant to complain. There is, in short, no decision the independence of which can be impugned.

74. Even if the DPP had the power contended for by Mr Redston, we would still regard his contention as hopeless since we accept the DPP's submission that it is a point without any evidential justification or substance. We note, furthermore, that in *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756 Lord Bingham observed as follows at [30]:

"It is common ground in these proceedings that the Director is a public official appointed by the Crown but independent of it. He is entrusted by Parliament with discretionary powers to investigate suspected offences which reasonably appear to him to involve serious or complex fraud and to prosecute in such cases. These are powers given to him by Parliament as head of an independent, professional service who is subject only to the superintendence of the Attorney General. There is an obvious analogy with the position of the Director of Public Prosecutions. It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator: *R v Director of Public Prosecutions, Ex p C* [1995] 1 Cr App R 136, 141; *R v Director of Public Prosecutions, Ex p Manning* [2001] QB 330, para 23; *R (Birmingham and others) v Director of the Serious Fraud Office* [2006] EWHC 200 (Admin), [2007] QB 727, paras 63-64; *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20, [2006] 1 WLR 3343, paras 17 and 21 citing and endorsing a passage in the judgment of the Supreme Court of Fiji in *Matalulu v Director of Public Prosecutions* [2003] 4 LRC 712, 735-736; *Sharma v Brown-Antoine and others* [2006] UKPC 57, [2007] 1 WLR 780, para 14(1)-(6). The House was not referred to any case in which a challenge had been made to a decision not to prosecute or investigate on public interest grounds."

75. We would add that we see no merit in the reliance placed by Mr Redston on any utterance from the Attorney-General in support of Mr Cummings. We fail to see how this provides any support for the proposition that there is an apparent lack of independence on the part of the DPP, who has made no similar public statement.
76. For these reasons, we reached the clear conclusion that Mr Redston's challenge was not arguable and refused the renewed application for permission.

APPENDIX

Section 3 of the Prosecution of Offences Act 1985 provides materially as follows (with emphasis added):

“(1) The Director shall discharge his functions under this or any other enactment under the superintendence of the Attorney General.

(2) It shall be the duty of the Director, subject to any provisions contained in the Criminal Justice Act 1987 —

(a) to take over the conduct of all criminal proceedings, other than specified proceedings, **instituted on behalf of a police force** (whether by a member of that force or by any other person);

(aa) to take over the conduct of any criminal proceedings **instituted by an immigration officer** (as defined for the purposes of the Immigration Act 1971) acting in his capacity as such an officer;

(ab) to take over the conduct of any criminal proceedings **instituted in England and Wales by the Revenue and Customs**;

(ac) to take over the conduct of any criminal proceedings **instituted on behalf of the National Crime Agency;**

(b) **to institute and have the conduct of criminal proceedings** in any case where it appears to him that—

(i) the importance or difficulty of the case makes it appropriate that proceedings should be instituted by him; or

(ii) it is otherwise appropriate for proceedings to be instituted by him; ...

(ba) **to institute and have the conduct of any criminal proceedings** in any case where the proceedings relate to the subject-matter of a report a copy of which has been sent to him under paragraph 23 or 24 of Schedule 3 to the Police Reform Act 2002 (c. 30)(reports on investigations into conduct of persons serving with the police);

(bb) where it appears to him appropriate to do so, **to institute and have the conduct of any criminal proceedings in England and Wales relating to a criminal investigation by the Revenue and Customs;**

(bc) where it appears to him appropriate to do so, **to institute and have the conduct of any criminal proceedings relating to a criminal investigation by the National Crime Agency;**

(c) to take over the conduct of all binding over proceedings instituted on behalf of a police force (whether by a member of that force or by any other person);

(d) to take over the conduct of all proceedings begun by summons issued under section 3 of the Obscene Publications Act 1959 (forfeiture of obscene articles);

(e) **to give**, to such extent as he considers appropriate, **advice to police forces on all matters relating to criminal offences;**

(ea) to have the conduct of any extradition proceedings;

(eb) to give, to such extent as he considers appropriate, and to such persons as he considers appropriate, advice on any matters relating to extradition proceedings or proposed extradition proceedings;

(ec) **to give**, to such extent as he considers appropriate, **advice to immigration officers** on matters relating to criminal offences;

(ed) **to give advice**, to such extent as he considers appropriate and to such person as he considers appropriate, in relation to—

- (i) criminal investigations by the National Crime Agency, or
 - (ii) criminal proceedings arising out of such investigations;
- (ee) **to give**, to such extent as he considers appropriate, and to such persons as he considers appropriate, **advice** on matters relating to—
- (i) a criminal investigation by the Revenue and Customs; or
 - (ii) criminal proceedings instituted in England and Wales relating to a criminal investigation by the Revenue and Customs;
- (f) **to appear for the prosecution**, when directed by the court to do so, on any appeal under—
- (i) section 1 of the Administration of Justice Act 1960 (appeal from the High Court in criminal cases);
 - (ii) Part I or Part II of the Criminal Appeal Act 1968 (appeals from the Crown Court to the criminal division of the Court of Appeal and thence to the Supreme Court); or
 - (iii) section 108 of the Magistrates' Courts Act 1980 (right of appeal to Crown Court) as it applies, by virtue of subsection (5) of section 12 of the Contempt of Court Act 1981, to orders made under section 12 (contempt of magistrates' courts); . . .
- (fa) **to have the conduct of applications for orders** under section 22 of the Anti-social Behaviour, Crime and Policing Act 2014 (criminal behaviour orders made on conviction)] and section 14A of the Football Spectators Act 1989 (banning orders made on conviction of certain offences);
- (faa) where it appears to him appropriate to do so, **to have the conduct of applications** made by him for orders under section 14B of the Football Spectators Act 1989 (banning orders made on complaint);
- (fb) where it appears to him appropriate to do so, **to have the conduct of applications** under section 27 of the Anti-social Behaviour, Crime and Policing Act 2014 for the variation or discharge of orders made under section 22 of that Act;
- (fc) where it appears to him appropriate to do so, **to appear on any application** under section 27 of that Act made by a person subject to an order under section 22 of that Act for the variation or discharge of the order;
- (ff) **to discharge such duties as are conferred on him** by, or in relation to, Part 5 or 8 of the Proceeds of Crime Act 2002 (c. 29) (civil recovery of the proceeds etc. of unlawful conduct, civil

recovery investigations and disclosure orders in relation to confiscation investigations);

(g) to discharge such other functions as may from time to time be assigned to him by the Attorney General in pursuance of this paragraph...

(3) In this section— ...

“criminal investigation” means any process—

(i) for considering whether an offence has been committed;

(ii) for discovering by whom an offence has been committed; or

(iii) as a result of which an offence is alleged to have been committed;....

“police force” means any police force maintained by a local policing body. . . and any other body of constables for the time being specified by order made by the Secretary of State for the purposes of this section;...”