THE HIGH COURT

[2023] IEHC 328

Record No. 2022/83JR

BETWEEN

MANUELA LACATUS

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

JUDGMENT of Ms. Justice Hyland delivered on the 12 June 2023

Factual background

1. The applicant seeks an Order quashing a decision of Naas Circuit Court of 30 November 2021, affirming a sentence imposed by the District Court of 8 months imprisonment in respect of an offence contrary to s.4 of the Criminal Justice (Theft and Fraud Offences) Act 2001 (the "2001 Act").
2. The matter came before me as a contested leave application on 24 April 2023. Given the nature of the case, I directed that the matter be dealt with as a telescoped hearing. Therefore, I must consider both whether the applicant is entitled to be granted leave on the grounds identified, as well as whether she is entitled to relief on any or all of those grounds. Given the very low bar applicable, I have decided to grant leave on the grounds identified.
3. There is a somewhat complicated history in relation to the stay placed on the decision of the District Court of 12 May 2021. When the Order of the District Court was affirmed in the Circuit Court, an application was made to place a stay on the Order of the Circuit Court pending the judicial review proceedings being determined. That was refused and the Court

of Appeal upheld that refusal. However, a fresh stay was granted on 5 April 2022. For present purposes, the significance of all this is that the applicant has not yet served the sentence of imprisonment imposed upon her.

4. The facts of this case may be simply stated. On 12 May 2021 the applicant appeared before Naas District Court in respect of the following charge of theft:

> "*that you the said accused/defendant, On 30/04/2021 at Lidl Sallins Naas Co. Kildare in said District Court Area of Naas Co. Kildare, did steal property to wit Groceries to the value of €223.90 the property of Lidl Commercial Organisation, Lidl, Sallins, Contrary to Section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001*" (sic)

5. While in Lidl on 30 April 2021, the applicant had paid for certain items but concealed other items in a pram that were not paid for. The applicant had three previous convictions for theft and handling stolen property. The plea in mitigation made on behalf of the applicant was that she was a 23-year-old woman with 4 children who was at that time 5 months pregnant. The District Court Judge imposed a sentence of 8 months imprisonment and fixed recognisances in the event of an appeal.

6. The appeal came before Naas Circuit Court on 30 November 2021 and the applicant pleaded guilty. It was outlined to the Court that the items had been concealed in a pram, that they were recovered in a saleable condition and that the applicant had not come to Garda attention since the date of the offence. A plea in mitigation was made, indicating that the applicant had five children, having since given birth and confirming that applicant had been pregnant at the time of the offence. It was submitted that two of her children have hearing defects and reference was also made by counsel to the fact that the applicant's household had minimal funds and that the goods were taken, out of necessity, for her family. The trial judge affirmed the sentence of the District Court of 8 months and placed

a 3 month stay on the Order based on the age of the applicant's baby at the time, who was 1 month old.

7. Given the nature of the grounds raised, it is necessary to set out in relevant part the ruling of the trial judge:

> *"Judge: Okay, well look, I want to make it clear as I possibly can that people who engage in this, I mean she had the previous history of two offences of theft, she goes into Lidl, there's no excuse whatsoever for it, she hides away property to the value of 223 euro and attempts to leave without paying for it. I absolutely think that people who continue to commit offences of petty theft, and I exclude from this people who are on the breadline or who are in really difficult circumstances but they ought to know that in front of me certainly they are going to face jail, so she is in one of those circumstances. I am satisfied that she just continued to commit these offences and she has a bad previous history, now she has pleaded guilty and she entitled to some mitigation for that. Judge Zaidan gave it to her, in fact he gave her a third off, I presume also he took into account and as I do that the goods were recovered but they're recovered because of the good work of Lidl and the fact that there's in place a good security system to stop people like her from stealing from them. But that all comes at a cost, it comes at a cost to Lidl and it comes at a cost to the general community that they have to take these measures to stop their goods being pilfered. Supermarkets like Lidl, Aldi, Supervalu, etc. etc. they all provide a huge social service as well as making profit for themselves, they all provide us with a great service and people like the defendant are parasites who go in and don't pay for their goods and try and nick stuff. Now, they don't come in front of me with any sympathy, I can guarantee you that much. So the only problem I have, and I'll say this to you Ms. Gillece is that she has a one month old baby…*

Ms. Gillece: Yes Judge

8. Given the age of the baby, the trial judge affirmed the District Court Order of a term of imprisonment of eight months and stayed the warrant for three months.

Relief Sought

9. The applicant sought an Order of *certiorari* quashing the Order of Naas Circuit Court (District Court Appeals) on 30 November 2021 affirming a sentence of eight months' imprisonment such sentence to take effect three months from the date of its imposition. The grounds identified at paragraph E of the Statement of Grounds are as follows:

- That the Circuit Court Judge declined to consider the circumstances in respect of which a sentence of 8 months had been passed, in particular that the theft was of groceries, that they had been stolen by a young mother, that they had been recovered immediately and that she had modest previous convictions;
- That the Judge did not follow the correct approach in deciding upon sentence, namely, engaging in a process of fixing a headline sentence to mark the gravity of the offence, then applying mitigation to reach a sentence appropriate to the applicant as the individual offender, and then consider the suspension of some or all of the sentence;
- That the process of selecting an appropriate sentence on appeal must involve more than a mere consideration of whether a sentence imposed at first instance could be justifiable;
- That a custodial sentence of 8 months on the facts is extreme and out of proportion to the gravity of the offence and the applicant's mitigating circumstances do not appear to have been reflected in the sentence imposed;
- That the sentence is so far outside normal discretionary limits that it amounts to a fundamental error of law;

- That the Judge appears to have applied a fixed policy of sentencing shoplifters;
- That the trial judge described the applicant as part of a group that were "*parasites on society*".

10. Counsel for the applicant strongly urged upon me that, although no one ground of challenge might alone be sufficient, taken together they justified an Order of *certiorari*. That approach does not seem correct to me. If a ground is sufficient to warrant quashing the decision, it does not require the existence of other grounds so as to justify it. If on the other hand the ground is not sufficient to justify *certiorari*, the strength or otherwise of other grounds of challenge is irrelevant.

Statutory offence

11. Section 4 of the 2001 Act defines theft as follows:

> *"4.—(1) Subject to section 5, a person is guilty of theft if he or she dishonestly appropriates property without the consent of its owner and with the intention of depriving its owner of it.*
>
> *...*
>
> *(5) In this section—*
>
> *"appropriates", in relation to property, means usurps or adversely interferes with the proprietary rights of the owner of the property;*
>
> *"depriving" means temporarily or permanently depriving.*
>
> *(6) A person guilty of theft is liable on conviction on indictment to a fine or imprisonment for a term not exceeding 10 years or both."*

12. If the charge is considered a minor offence and thus suitable for disposition at District Court level, the maximum sentence is 12 months. However, as identified in subsection (6), on indictment the maximum sentence is 10 years.

Fixed Policy

13. The applicant argues that the trial judge adopted an impermissible fixed policy when sentencing the applicant. It is submitted this invalidates the decision of the Circuit Court Judge. It is clear from the case law cited by both parties that there is a jurisdiction to quash a sentence where a judge has impermissibly circumscribed the exercise of their discretion by adopting and applying a fixed policy. (See *McGrane v Judge Coughlan* (unreported High Court, 30 June 2005), *Dunne v Judge Coughlan* (unreported, High Court, 25 April 2005) and *Pudliszewski v Judge Coughlan* [2006] IEHC 304). The argument between the parties centres upon whether, in this case, the trial judge in fact impermissibly fettered his discretion. The transcript discloses that the trial judge observed in his ruling that:

> "*people who continue to commit offences of petty theft, and I exclude from this people who are on the breadline or who are in really difficult circumstances, but they ought to know that in front of me certainly they're going to face jail. So, she is in one of those circumstances*"

14. In my view, the trial judge is by these words identifying a category of persons i.e., those who continue to commit petty theft offences, who are certainly going to face jail. He confirms that the applicant is in that category of persons. He then goes on to make an exception to that fixed policy i.e., "*I exclude from this people who are on the breadline or who are in really difficult circumstances"*. In fact, it was pleaded in mitigation that the goods were taken as her household had "*minimal funds*" and that the goods were taken out of "*necessity*" and that she had 2 children with hearing defects. However, he did not avert to that plea and did not consider whether in the light of that plea, she came within the category of exceptions that he had identified.

15. The respondent cites Dunne, in his textbook *Judicial Review of Criminal Proceedings* (*2nd edition)*, to the effect that a sentence that is based upon a fixed or pre-existing sentencing

policy, as opposed to a genuine exercise of discretion having taken all relevant sentencing considerations and principles into account, is amenable to judicial review but argues that this case is not on all fours with the type of cases where convictions have been quashed on the basis that the judge had expressed a rigid and fixed sentencing policy.

16. The respondent argued that the applicant had three previous convictions that the trial judge was entitled to consider, observing that he did not adopt a fixed sentencing policy and his remarks were of a general nature, noting that persistent offenders would eventually face custodial sentences, is an uncontroversial proposition. Additionally, it is submitted that the Judge was entitled to take into account the principle of deterrence in the light of the applicant's previous convictions and further that he qualified his remarks by reference to those in particularly difficult circumstances being extended leniency. Finally, it is contended that the imposition of the stay, on the basis that the applicant had recently given birth, demonstrated that the Judge had engaged in a fact specific assessment.

17. Contrary to the respondent's submissions, it seems to me that the carving out of a subcategory, i.e. those on the breadline or in really difficult circumstances, does not mean the trial judge was not applying a fixed policy, but rather that his fixed policy was subject to exceptions. The respondent accepts that a judge cannot adopt a fixed policy that everyone convicted of a certain offence will without exception go to jail but argues that here the sentence was tailored to reflect the applicant's circumstances. The evidence demonstrates that he imposed a custodial sentence based, not on the specific circumstances of the accused, but on the fact that the accused was in a particular category. The decision as to whether or not she merited a custodial sentence was a significant one, given that she has never served time in custody before. But it is clear that the trial judge did not make this important decision by reference to the nature of the offence and her individual characteristics, but by reference to the fact that she belonged to an identified group of

people. In my view, this is demonstrated by his comment that she is in "*one of those circumstances*". That observation is in my view particularly important. One can readily imagine a circumstance where a judge might observe that persons in a particular category are potentially subject to a particular approach, but then go on to discuss the individual characteristics of that person, making it clear that in fact that person's case was treated by reference to their particular situation. Unfortunately, precisely the opposite position prevailed here, where the trial judge made it clear that he was applying his identified fixed policy to the applicant.

18. The respondent emphasises that the sentence was tailored to the applicant's circumstances, citing the decision to treat the plea of guilty as a factor in mitigation. This is undoubtedly the case, but cannot alter the fact that the decision to give her a custodial sentence was made on the basis of her membership of a particular category.

19. The Circuit Judge is of course entitled to take into account previous offending for similar type offences. This may legitimately be treated as an aggravating factor. But that must be done on an individual basis and not as part of a blanket approach. Here the trial judge identifies that <u>all</u> persons with previous convictions for theft <u>will face jail</u> subject to exceptions. This amounts to a failure to analyse on an individual basis the extent to which the previous offending constitutes an aggravating factor, and the extent to which it should increase the sentence. The application of that fixed policy resulted in a decision to incarcerate the applicant exclusively because of her previous convictions, and her failure to come within the stated exceptions.

20. In a case such as this, where incarceration is only one of a number of options, a policy to move directly to incarceration without considering other options in my view demonstrates a failure to exercise his discretion having taken all relevant sentencing considerations into account. In fact, the position is remarkably similar to that in the case of *Pudliszewski*.

There, the District Judge had said "*the golden rule is that receivers go to jail*" in respect of a plea of guilty to an offence of receiving stolen property. McMenamin J., in an application for judicial review of that decision said that he must ask himself whether the trial judge *"limited or appeared to limit his sentencing options to one and one only which could only result in the imprisonment of the applicant where such disposal was not mandated by the legislature*". Here, in my view, precisely the same situation prevailed.

21. Nor was there any revisiting of the approach of the Court having regard to the particular circumstances of the applicant. The trial judge does not explain why, even on his own approach, he was not treating her as a person who was on the breadline or in difficult circumstances, despite the fact that evidence had been put forward that two of her four children had hearing problems and that the goods were robbed out of necessity. The fact that he decided to stay the sentence for 3 months so that she could have some additional time with her one-month-old baby does not alter the fact that the decision to incarcerate her was based on a fixed approach.

22. Finally, although counsel criticised the trial judge for his remarks about the supermarkets, I should emphasise that I am not quashing the decision on the basis of those remarks. He was entitled to make those comments and they do not form part of the basis upon which I am quashing the decision.

Failure to observe the dignity of the applicant

23. A separate criticism is made of the trial judge's description of "*people like the defendant here are parasites who go in and don't pay for their goods and try and nick stuff. Now, they don't come in front of me with any sympathy I can guarantee you that much*". That comment appears to me to confirm his previous blanket approach i.e., that he is treating the applicant as part of a class of persons, i.e., people who don't pay for their goods in supermarkets, as opposed to individually on the basis of particular circumstances before

him. In other words, it is confirmatory of my previous finding that the trial judge applied a fixed policy.

24. However, I cannot agree with the applicant that the decision should be quashed as being in breach of the constitutional right of the applicant to be treated with dignity. The description of persons who commit the offence as "*parasites*" was inappropriate and injudicious. Nonetheless, in my view it did not go so far as to render the sentence unlawful and subject to being quashed.

Excessive Sentencing

25. The next ground is in respect of alleged excessive sentencing. There is no dispute between the parties but that there is a jurisdiction to quash sentences or other discretionary orders. That jurisdiction was well described by Simons J. in *Mooney v DPP* [2019] IEHC 625 where he identified as follows:

> *"20. In exceptional cases, however, judicial review may also be appropriate where the error touches upon the substance of the decision. Even the broadest statutory discretion is subject to implied limitations. The resulting decision must be reasonable and proportionate … It should be emphasised that this is a very high threshold for an applicant to meet.*
>
> *21. The application of these principles to sentencing in criminal proceedings might be summarised as follows. There will be a range of sentencing decisions which a trial judge can lawfully make. If a decision falls within this range, then the appropriate avenue by which to challenge that decision is by way of an appeal. If, however, the decision falls outside this range, then the decision is amenable to judicial review. An obvious example would be where the District Court purported to impose a sentence in excess of that permitted on summary conviction. Thus, for instance, if the District Court had purported to impose a custodial sentence in*

excess of twelve months imprisonment for the offence of harassment, this would have been unlawful. This is because the maximum sentence on summary conviction is fixed under section 10 of the Non-Fatal Offences against the Person Act 1997 at twelve months.

22. Crucially, however, even a decision which falls within the express statutory limits may nevertheless be so far outside the reasonable discretionary limits that it amounts to an error of law. This point can be illustrated by reference to the following two judgments of the Court of Appeal which were cited in argument before me."

26. Here, the maximum sentence that could be imposed by the District Court, given that it was being treated as a minor offence, was 12 months imprisonment. In those circumstances, it is very difficult to see how one could characterise the 8 month sentence as being an excessive sentence of the sort that would meet the extremely high bar as being "*so far outside the reasonable discretionary limits that it amounts to an error of law*". The cases cited to me concern very extreme decisions. The Irish cases do not in fact concern the length of custodial sentences but rather ancillary orders. For example, in *O'Brien v Coughlan* [2015] IECA 245 the respondent was given a 40-year driving disqualification. In *Mooney,* the District Court had imposed a prohibition on living within 8km of the victim for the rest of the applicant's life.

27. The only basis put forward by the applicant for this ambitious submission was that the particular characteristics of the offence did not merit an eight-month sentence and that it was way outside the range of appropriate sentences for this type of offence. In particular counsel identified the lack of previous prison sentences served, the low value of the groceries being €223.90, the relatively minor history of convictions, being 2 convictions for theft where she had been fined €200 in February 2020 and €80 in 2018 for theft and

possession of stolen property and she had been given a peace bond for 12 months in December 2020 for making gain or for causing loss by deception; the recovery of the groceries, and the fact that the items were taken to look after her young family, being four children with another one on the way, two of whom have a hearing defect. The factors would all be relevant if this were an appeal against sentence, but it is not. Nor is there any evidence before me showing that the sentence imposed was, by reference to existing sentencing data, so utterly outside reasonable discretionary limits that it was an error of law.

28. In those circumstances, given the absolute clarity of the law stating that I cannot enter into a consideration of the merits of the decision given that this is judicial review, and not an appeal, I consider that the applicant has not demonstrated that the length of sentence is so excessive as to come within the jurisdiction to quash as an error of law.

Failure to observe process

29. At Paragraph XV of the Statement of Grounds, it is pleaded that the trial judge did not follow the correct approach in deciding upon sentence, i.e. fixing a headline sentence to mark the gravity of the offence, applying mitigation to reach a sentence appropriate to the applicant as the individual offender, and considering suspension of sentence. Before identifying the arguments of both parties in respect of this ground, it is important to identify precisely the approach of the trial judge in this respect. Having made a decision to sentence the applicant, he did not identify an appropriate notional or headline sentence for the particular offence. He referred to the applicant being entitled to mitigation for her guilty plea and noted that the District Court judge had given "her a third off". He states that he is taking into account the fact that the goods had been recovered. He then considers the question of a stay and, having decided upon a 3 month stay, indicates he will affirm the Order of the District Court of 8 months.

30. The applicant formulated her complaint as a failure to follow the correct process, but by the time the case was heard, she had expanded her case to argue that I should treat the trial judge as having fixed a headline sentence of 12 months, and that this was irrational. She arrived at this position in the following way: given the trial judge indicated he was affirming the District Judge, who had imposed an 8 month sentence and had stated he was giving the applicant one third off in recognition of her guilty plea, it must be inferred that the trial judge also reduced the applicant's sentence by one third for the guilty plea i.e. by 4 months. On that assumption, the trial judge must have started at 12 months as the appropriate notional sentence or headline sentence. The applicant argues that this could not have been the appropriate notional sentence given the factors in this case which would not, on any analysis, make this a case at the top of the range attracting the maximum statutory sentence in the District Court for this type of offence.

31. This expansion of the argument may have been because of the difficulties inherent in her initial position: where there is no transparency about the sentencing process a judge has followed, it is extremely difficult for a court to review the legality of that process. However, the applicant's argument that I should treat the headline sentence as being 12 months, and quash the decision on the basis that it was an irrational approach, is doomed to failure for a number of reasons. First, it was not pleaded. Second, that approach would require me to assume that the trial judge had fixed a headline sentence of 12 months, even though he had not articulated same. It is entirely inappropriate to review the legality of a sentencing decision on the basis of an assumption on my part. Third, even if the trial judge had identified a headline sentence, the correctness of the headline sentence is not a matter for judicial review unless it falls outside the range of acceptable decisions in the circumstances of this case. No such case was made out.

32. Returning to the original argument, i.e., that the correct sentencing process was not followed, counsel was at pains to stress that no challenge was brought on the basis that a headline sentence was not explicitly identified, citing the case of *DPP v Flynn* [2015] IECA 290 in this regard, though the challenge of incorrect process as identified in the Statement of Grounds was maintained.

33. The respondent argued that the sentence cannot be considered in any way excessive, let alone disproportionate enough to quash in circumstances where the maximum sentence under s.4 is 10 years and one year for minor offences. The importance of the discretion of the trial judge in sentencing was emphasised. While accepting that the setting of a headline sentence is best practice, the respondent emphasised that a failure to do so was not an error of principle such that the sentence should be quashed, citing *Flynn* in support of this proposition. Finally, it was argued that context is important, and a busy District Court list does not enable the giving of a detailed set of reasons, as recognised by the Supreme Court in *Kenny v Coughlan* [2014] IESC 15.

34. Separately, the respondent argued that to quash the decision on the basis of a flawed headline sentence or failure to set a headline sentence would be impermissible, because it would be an error within jurisdiction and therefore would not warrant interference. The debate about error within jurisdiction is far from over but the prevailing view now appears to be that an obvious error of approach may be the subject of review. If I were persuaded that a trial judge had failed to observe the correct approach in sentencing a person, then in my view traditional judicial review jurisprudence that permits a court to supervise whether the appropriate legal steps were observed would permit this Court to grant *certiorari* to quash a decision made on the basis of an unlawful approach to sentencing. However, for the reasons identified below, I am not quashing the decision of the respondent on this basis.

Analysis of arguments

35. The approach to be followed by a trial judge when sentencing has been identified with some particularity. The case law on the point was summarised by the Court of Appeal in *Flynn* where Edwards J. noted:

> *"14. There is a strong line of authority starting with The People (Director of Public Prosecutions) v M [1994] 3 I.R. 306; and continuing through The People (Director of Public Prosecutions) v Renald (unreported, Court of Criminal Appeal, 23rd November 2001); The People (Director of Public Prosecutions) v Kelly [2005] 2 I.R. 321; and The People (Director of Public Prosecutions) v Farrell [2010] IECCA 116, amongst other cases, indicating that best practice involves in the first instance identifying the appropriate headline sentence having regard to the available range, based on an assessment of the seriousness of the offence taking into account aggravating factors (where seriousness is measured with reference to the offender's moral culpability and the harm done), and then in the second instance taking account of mitigating factors so as to ultimately arrive at the proportionate sentence which is mandated by the Constitution as was emphasised in The People (Director of Public Prosecutions) v McCormack [2000] 4 I.R. 356."*

36. As Edwards J. observed, this approach was identified as far back as 1994 by the Supreme Court in the case of *DPP v M* [1992] 3 IR 306, where the Court identified the observations of Egan J. as follows:

> *"It must be remembered also that a reduction in mitigation is not always to be calculated in direct regard to the maximum sentence applicable. One should look first at the range of penalties applicable to the offence and then decide whereabouts on the range the particular case should lie. The mitigating circumstances should then be looked at and an appropriate reduction made.*"

A similar approach was taken by Denham J. in the same case, where she referred to Henchy J.'s observations in *State (Healy) v Donoghue* [1976] IR 325 where he stated that the constitution guarantees that a citizen shall not be deprived of his liberty by a trial conducted so as to shut out "*a sentence appropriate to his degree of guilt and his relevant personal circumstances*". Drawing on this, she observed as follows:

> *"[H]aving assessed what is the appropriate sentence for a particular crime it is the duty of the court to consider then the particular circumstances of the convicted person. It is within this ambit that mitigating factors fall to be considered."*

37. In *DPP v Farrell [2010] IECCA 116* Finnegan J., sitting in the Court of Criminal Appeal, decided as follows:

> *"A sentencing court must first establish the range of penalties available for the type of offence and then the gravity of the particular offence, where on the range of penalties it would lie, and thus the level of the punishment to be imposed in principle. Then, having assessed what is the appropriate notional sentence for the particular offence, it is the duty of the sentencing court to consider the circumstances particular to the convicted person. It is within that ambit that the mitigating factors fall to be considered."*

38. Under s. 23 of the Judicial Council Act, the Judicial Council is charged with submitting to the Board of the Judicial Council draft sentencing guidelines. In that context, a report was commissioned by the Sentencing Guidelines and Information Committee on *"Assessing Approaches to Sentencing Data Collection and Analysis"*. The final report was submitted to the Sentencing Guidelines & Information Committee on 5 May 2022. It is available on the Judicial Council website. The five authors of the report are all experts in sentencing and include Mr. Tom O'Malley of NUI Galway, an acknowledged Irish expert on sentencing, as well as members from the University of Strathclyde, University of Oxford

and Arizona State University. In relation to headline sentences, they make the following observation at paragraph 2.6.2.2:

> *"The identification of appropriate headline sentences is critical to the development of a coherent and principled sentencing system. As just noted, the Court of Appeal, since its establishment, has frequently reiterated the importance of specifying in each case the appropriate headline sentence based on the objective gravity of the offence, before adjustments are made for offender-related factors which, for this purpose, include matters such as a guilty plea and co-operation with law enforcement authorities. The Court has stopped short of holding that failure to specify a headline sentence will, in itself, amount to an error of principle but it has left trial courts in no doubt that the two-step approach to sentence selection is the best and most desirable practice. It is reasonable to infer from more recent judgments of the Court that, by and large, trial judges sentencing at first-instance may now be adopting this practice."*

39. The Court of Appeal approach described above was identified in *Flynn*, where Edwards J. observed as follows:

> *"18. Since its establishment this Court has repeatedly and consistently sought to emphasise that this approach is regarded by it as best practice and we have sought to commend to trial judges that they explain the rationale for their sentences in that structured way, not least because a sentence is much more likely to be upheld if the rationale behind it is properly explained. Equally if this Court when asked to review a sentence cannot readily discern the trial judge's rationale or how he or she ended up where they did having regard to accepted principles of sentencing such as proportionality, the affording of due mitigation, totality and the need to incentivise rehabilitation in an appropriate case, it may not be possible to uphold*

the sentence under review even though the trial judge may have had perfectly good, but unspoken reasons, for imposing the sentence in question.

19. However, the mere fact that best practice has not been followed in terms of adequately stating the rationale behind the sentence does not necessarily imply an error of principle. At the end of the day if the final sentence imposed was correct and there was no obvious error of principle the sentence may be upheld."

40. It seems to me necessary to distinguish between a failure to follow the requisite process and a failure to adequately state the rationale behind the sentence, including the identification of a headline sentence. The decision in *Flynn* makes it clear that in the context of an appeal, a lack of reasoning will not invalidate a sentencing decision. I do not read the judgment as meaning that a failure to follow the requisite steps is permissible. No case has been opened to me suggesting that a sentencing judge may ignore the approach first identified by the Supreme Court (as opposed to a failure to adequately state the rationale).

41. However, approaching the provision of reasons as best practice rather than obligatory may potentially have repercussions on the ability of a court to exercise its judicial review function in respect of the review of a sentencing decision for legality (as opposed to correctness). It is trite law that in judicial review, the review court is looking at the legality of the decision, and in particular the legality of the decision-making process. It is almost impossible to ascertain in a sentencing context whether or not the requisite steps have been followed if there is no obligation to state the rationale behind a sentence. Unlike the Court of Appeal, the judicial review court cannot look to the ultimate sentence as a guide as to whether or not the sentencing court took the correct approach (except in extreme cases such as those referred to in *Mooney*, discussed above). In this case, the lack of

identification of a headline sentence by the trial judge prevents any review of the legality of the approach to the headline sentence.

42. A court may be obliged to grapple with these difficult questions at some stage, but this is not the case in which to do so. First, there is no ground challenging the lack of reasons given by the trial judge. Moreover, I have already quashed the sentence due to my finding that the trial judge applied a fixed policy. In those circumstances, it would be inappropriate to consider this issue any further.

Conclusion

43. For the reasons outlined in this judgment, I am quashing the decision of the trial judge to affirm the 8 month sentence imposed by the District Judge. I will hear the parties on costs and remittal on **16 June** at **10.45 remotely**.