Inquiry into Crown Prosecution Service Decision-Making in Relation to Deaths in Custody and Related Matters

His Honour Gerald Butler QC

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Section 1

Foreword

1. On 4 April 1994, Mr. Richard Joseph OBrien died while in police custody. On 16 December 1994, Mr. Oluwashijibomi Lapite died while in police custody. On 28 July 1997, I was appointed to conduct an Inquiry. My Terms of Reference were as follows:

> (i) To conduct an Inquiry into the consideration by the Crown Prosecution Service (CPS) of the Lapite and OBrien cases.
>
> (ii) To consider the circumstances in which the CPS prepared and presented material to the Divisional Court in the Lapite and OBrien cases.
>
> (iii) To consider the process and quality of casework decision-making in death in custody cases (whether of the Police or the Prison Service) handled by Central Casework and, if the Inquiry considers it necessary, in other parts of the CPS.
>
> (iv) To consider, in the light of the matters set out above, what changes (if any) are needed in the approach taken by the CPS to cases involving deaths in custody (whether of the Police or the Prison Service).
>
> (v) To make recommendations as appear appropriate.

2. On 31 July 1997, my Terms of Reference were expanded. I was further requested to consider the implications for the CPS of the judgement delivered that day by the Divisional Court in the case of R v DPP ex parte Treadaway.

3. On the date I was appointed there was already in existence a wide-ranging Review into the CPS under the chairmanship of Sir Iain Glidewell. The report of that Review will, I understand, be concluded later this year. I do not, of course, know what the recommendations of that Review will be. I proceed on the assumption, as I must, that Central Casework will continue in existence.

4. Throughout this Inquiry I have received the fullest co-operation from the CPS. I have also taken evidence from many others who are not in the employ of the CPS. Their names are listed in the Appendix to this report. I thank them all for their assistance. I would specifically mention and thank Mr. Ben Emmerson, who was Counsel in the case of Mr. Oluwashijibomi Lapite (its full title being R v DPP ex parte Jones) and Mr. Raju Bhatt and Ms. Fiona Murphy, solicitors in the employ of Messrs. B.M. Birnberg & Co, who represented the applicant in that case and the applicants in the cases of Mr. Richard OBrien (R v DPP ex parte OBrien) and R v DPP ex parte Treadaway. I found their comments and suggestions particularly helpful.

5. I also express my thanks to Mrs. Cathy Kennedy of The Treasury Solicitors, for her valuable assistance throughout. The views I express are, of course, entirely my own.

His Honour Gerald Butler QC

Section 2
Introduction

1. The Prosecution of Offences Act 1985 (the 1985 Act) provided for the establishment of the CPS for England and Wales. The Director of Public Prosecutions (DPP) is Head of the CPS. The present DPP is Dame Barbara Mills QC, who has held that post since April 1992. The 1985 Act places upon the DPP the duty to institute and have the conduct of criminal proceedings in any case where it appears to the DPP that the importance or difficulty of the case makes it appropriate that proceedings should be instituted, or where it is otherwise appropriate for proceedings so to be instituted. Of course, the DPP cannot personally institute or supervise the conduct of all criminal proceedings undertaken by the CPS. Under the Act, Chief Crown Prosecutors (CCP) are the employees of the CPS made responsible to the DPP for supervising the operation of the CPS in their Area. There are 14 separate Areas of the CPS. The Area with which I am concerned is that known as Central Casework. The name of this Area was, in August 1995 (or very shortly thereafter), changed to Central Casework from Headquarters Casework consequent upon a Senior Management Review Report of August 1995. This Area ceased to be located solely in London. An office of Central Casework was opened in York in order to deal with Central Casework cases arising (very broadly speaking) in the northern area of England.

2. Central Casework deals with cases of the most serious kind, such as, for example, cases where there has been a death in police custody, cases involving terrorism, and those dealt with under the Official Secrets Act. The remit of Central Casework does not specifically extend to deaths in prison custody but, I was told that in practice, such cases do generally reach, and are dealt with by, Central Casework often as a result of them being placed on what is known as a Sensitive Case List.

3. It is the Attorney General who appoints the DPP. Section 3(1) of the 1985 Act provides that:

> *The Director shall discharge his functions under this or any other enactment under the superintendence of the Attorney General.*

Quite what is meant by the term superintendence is perhaps not entirely clear. But it is certain that the Attorney General, who is the Governments Senior Law Officer, (followed by the Solicitor-General) does not himself make decisions to prosecute, although there are certain categories of offence that need his specific consent before a prosecution is launched. A death in police or prison custody is not such an offence. The DPP is politically independent, but is accountable for the work of the CPS to Parliament, through the Attorney General.

4. Section 10 of the 1985 Act provides as follows:

> *(1) The Director 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; and*
> >
> > *(b) in considering, in any case, representations to be made by them to any magistrates court about the mode of trial suitable for that case.*
>
> *(2) The Director may from time to time make alterations in the Code.*
>
> *(3) The provisions of the Code shall be set out in the Directors report under section 9 of this Act for the year in which the Code is issued; and any alteration in the Code shall be set out in his report under that section for the year in which the alteration is made.*

Section 3

The Code for Crown Prosecutors

1. In June 1994, the third edition of *The Code for Crown Prosecutors* was published. It is a document of great importance, and I shall set out those parts of it which are of particular relevance. They are as follows:

> *2.2 The duty of the Crown Prosecution Service is to make sure that the right person is prosecuted for the right offence and that all relevant facts are given to the court.*
>
> *2.3 Crown Prosecutors must be fair, independent and objective. They must not let their personal views of the ethnic or national origin, sex, religious beliefs, political views or sexual preference of the offender, victim or witness influence their decisions. They must also not be affected by improper or undue pressure from any source.*
>
> *3.2 ... The Crown Prosecution Service and the police work closely together to reach the right decision, but the final responsibility for the decision rests with the Crown Prosecution Service.*
>
> *4.1 There are two stages in the decision to prosecute. The first stage is the evidential test. If the case does not pass the evidential test, it must not go ahead, no matter how important or serious it may be. If the case does pass the* ***evidential test****, Crown Prosecutors must decide if a prosecution is needed in the public interest.*
>
> *4.2 The second stage is* ***the public interest test****. The Crown Prosecution Service will only start or continue a prosecution when the case has passed both tests.*
>
> *5.1 Crown Prosecutors must be satisfied that there is enough evidence to provide a realistic prospect of conviction against each defendant on each charge. They must consider what the defence case may be and how that it likely to affect the prosecution case.*
>
> *5.2 A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged.*

2. I need say nothing more about the public interest test. It is perfectly clear that in cases of the kind with which I am concerned, if the evidential test is met, then it is difficult to imagine circumstances in which it would not be in the public interest for there to be a prosecution.

3. In June 1996, there was issued by the CPS a revised Explanatory Memorandum for use in connection with *The Code for Crown Prosecutors*. It reiterates that:

> *If the evidential test is not satisfied, there must not be a prosecution, no matter how great the public interest may seem in having the matter aired in court.*

I would agree entirely with that statement and find it difficult to understand how anybody can sensibly suggest otherwise. It stresses the need for an *objective assessment of the evidence*. It also urges Crown Prosecutors, in determining whether there should or should not be a prosecution, to consider whether there are any further reasonable lines of enquiry which should be pursued which may strengthen or weaken either the prosecution or defence case.

4. Neither the Code nor the Explanatory Memorandum, no doubt because it is regarded as axiomatic and something every lawyer in the CPS will know, states the test that has to be applied by magistrates, or by a jury as directed by the judge, before they can convict. It is this: they must be satisfied beyond reasonable doubt of guilt or, as it is sometimes put, they must be sure of guilt. This is a high standard of proof. It means that before a prosecution can be launched the Crown Prosecutor must be satisfied that a properly directed reasonable jury (or the magistrates) trying the case will more likely than not be satisfied beyond reasonable doubt of guilt.

5. Whether or not the evidential sufficiency test, as it is called, is met will in some cases provide no real difficulty. But it will often be the position that the decision is a difficult and demanding one. For example, there might be complex issues of

admissibility of evidence to be considered. Again, it will be necessary to consider whether further lines of enquiry should be pursued. The law itself may not be clear. Perhaps in practice the greatest of all the ponderables, however, will concern issues of credibility - if there are conflicts of evidence how are they to be resolved?

Section 4

Central Casework: The Decision-Making Process

The Chain of Decision

1. When the CPS was established in 1986, a unit called Headquarters Casework inherited serious work of the kind which had been dealt with previously by the DPPs Office. This included all police complaints work. By police complaints work I mean all cases involving the possible criminality of police officers, other than ordinary motoring offences not involving death. There were five Divisions of Headquarters Casework, one being the Police Complaints Division (PCD). The Head of PCD was a Grade 5 Civil Servant. Within PCD were three teams, each team headed by a Branch Crown Prosecutor (BCP) who was Grade 6. The lawyers working in each team were either Senior Legal Assistants (SLA) or Senior Crown Prosecutors (SCP) who were Grade 7. The procedure generally adopted in PCD was this. Each police complaints case would first be allocated to a BCP. The review of the case would then be dealt with either by the team leader himself, or he would pass it to one of his Grade 7 lawyers for review. The BCP would normally carry out the review himself only where the case was of a straightforward kind which could be dealt with speedily, and when it was perfectly obvious almost at first sight that there was insufficient evidence for a prosecution to be launched. When the Grade 7 lawyer was asked to review a case, it was his duty to read and consider the whole of the documentation including, of course, all witness statements. He would then provide to the BCP a written analysis of the case, together with his recommendation as to whether or not there should be a prosecution. The Grade 7 lawyer had no power to make the decision as to whether or not there should be a prosecution. If the recommendation to the BCP was that the evidence was insufficient or inadequate for there to be a prosecution, then the BCP would, if he accepted that recommendation himself make the decision that there would be no prosecution and that would be the end of the matter. If the recommendation was either that there should be a prosecution, or that there should not be a prosecution on public interest grounds, then the papers, together with the written analysis of the Grade 7 lawyer, would be sent for decision to the Grade 5 Head of Division. The effect of this procedure was that subject to a discretion of the Grade 5 Head of Division to refer the matter for consideration to a higher grade should he think it appropriate, it would be the Grade 5 Head of Division who would always take the decision for the bringing of a prosecution, and who would also take all decisions not to prosecute on grounds of public interest. In practice, few cases were referred higher by the Grade 5 Head of Division.

2. Mr. Jeremy Naunton was Head of the PCD between July 1992 and September 1995. He told me that he had given the direction that every case involving a death in police custody should be seen by him for final decision. It was his practice in such cases not merely to read the review note, together with any comments made by the BCP, but also to read all of the relevant documentation. It was his view that if he was making a decision as to whether or not there should be a prosecution, then it was essential that he read the whole of the relevant documentation. I return to this later.

3. When Central Casework came into existence, there was ultimately a re-organisation into four Divisions. The Prosecutions Division dealt with police complaints work, together with other prosecution work which was of a sensitive and complex nature. The procedure for dealing with cases of death in police custody was as follows. After receipt of the papers from the police they would be sent to a BCP. They would then be considered either by the BCP or, more likely, he would send them to a PCP who would be a Grade 6 or Grade 7 lawyer, for his consideration. Whoever dealt with the papers would be the reviewing lawyer. That lawyer was required to make a note summarising the evidence and to conclude with a recommendation, with reasons being given, as to whether or not there should be a prosecution. If it was the BCP who was the reviewing lawyer, that note, together with the file, would be sent to the Assistant Chief Crown Prosecutor (ACCP) for his consideration. From the ACCP the case would be sent to the CCP for yet further consideration. If, however, the reviewing lawyer was a PCP, then the chain was even longer. The file would go from the PCP to the BCP; from the BCP to the ACCP; and from the ACCP to the CCP.

Nor was this the end of it. For some years prior to the guidance now in existence, which is set out in a document dated 23 April 1996 and which I come to in a moment, it was the duty of the CCP to ensure that the DPP was informed or consulted in some of the more sensitive cases as, for example, those likely to generate concern or widespread interest in Parliament or the media, or involving a major public figure. On 23 April 1996 by a document headed *Guidance on Informing and Consulting the Director and Law Officers*, this duty was put on a more formal footing. It is an important document, still in force, and I shall therefore have to deal with it in a little detail.

4. It had come into existence as a result of a decision taken in Central Casework in September 1995 to prosecute a police constable for murder. The DPP had neither been informed nor consulted about this decision. Nor had the Attorney General been told. The concern of the DPP was such that on 19 December 1995 and following an earlier meeting between the DPP and Mr. David Kyle (then CCP at Central Casework) at which the matter was discussed, the DPPs Private Secretary sent a memorandum to Mr. Kyle in the following terms:

> *As I anticipated, the Director has confirmed that she wishes to be made aware of any cases involving a death in custody* ***before*** *the decision is made by charging or continuing prosecution.*

5. The document itself was intended to set out *the general principles and practical considerations which should be applied when considering whether or not to consult or inform the Director, and the Law Officers and their staff, about cases*. At paragraph 1.2 the words consult and inform were defined for the purposes of the guidance as follows:

Consult = to seek information or advice from, or to confer, so that the views of the person who is consulted can be taken into account.

Inform = to give or reveal information to, once a decision has been taken. It may be that the Director or Law Officers, as the case may be, will spontaneously comment even though a matter is initially referred for information purposes only.

6. Paragraph 2.2 is as follows:

> *Deciding when to contact the Director, LSLO* [Legal Secretariat to the Law Officers] *staff or the Law Officers, and whether they should be consulted or informed, will inevitably require the exercise of discretion and judgement. It is important, however, that contact is made at an appropriate stage in the case, particularly when it is anticipated that case decisions may need to be explained or defended publicly. It may therefore be necessary for consultation to take place before a final decision is made.*

7. Paragraph 3.1 explained that it was not possible to provide definitive criteria for deciding whether a case should be brought to the attention of the Director, LSLO staff or the Law Officers, although it was stated to be the responsibility of the CPS Areas to ensure that both the Director and the Press Office were consulted or informed about cases of a sensitive nature. A list of cases was set out indicating those cases when the DPP should be consulted or informed at the earliest opportunity. This list included *charges against police officers where death or serious injury is involved.*

8. In the light, in particular, of the cases of Mr. Oluwashijibomi Lapite and of Mr. Richard OBrien paragraph 3.2 should be noted. It was in the following terms:

> *Consideration should always be given to whether the Director should take a decision personally. The Law Officers may wish to discuss the matter with her, or she may wish to do so with the Law Officers, or seek their advice. Individual judgement should be exercised but, if in doubt, the Director or her Private Office should be asked for guidance.*

A standard briefing format was annexed to the guidance.

The Instruction of Counsel

9. On 7 March 1997, there was issued by way of Casework Services Bulletin No.5 a document setting out guidance to Central Casework as to when Counsel should be asked to advise prior to a decision being taken to prosecute or not to prosecute. The move for guidance of this kind to be drafted began with an internal CPS minute of 19 October 1995 from the DPP, in which she made reference to complaints of the Solicitor-General that: ... *we have not briefed Counsel in appropriate cases at an early enough stage*. The 18 months from genesis to fruition was taken up with consideration and amendment of various drafts that ran (if that is the appropriate verb) between the DPP and others in the CPS, the Law Officers, and Counsel who had been asked to assist in the drafting. Perhaps it is my inexperience of such procedures that leads me to wonder at such a lengthy period of gestation. But what is perfectly clear from the evidence I heard is that prior to March 1997, and as a matter of policy, the instruction of Counsel was discouraged within Central Casework. Documentation as to this is hard to find, but I refer to the minute of a Branch Crown Prosecutors meeting of 11 January 1996, where there is this:

> *[Grade 5 ACCP] advised that use of Counsel should be kept to a minimum and not used until it is absolutely necessary, i.e. a case has been committed to the Crown Court where we have no rights of audience.*

10. The March 1997 guidelines came too late to have any effect upon the decision-making process in the cases of Mr. Lapite and Mr. OBrien, where the decisions not to prosecute were reached without the intervention or advice of Counsel. But the

guidelines govern the position as it is today, so it is important that I make known what they are. At paragraph 1 the purpose of the guidelines is stated as follows:

> *These guidelines are provided for prosecutors to ensure that, where necessary, and particularly in those cases that may be referred to the Law Officers, advice from counsel is obtained before the decision whether to prosecute, or to continue with the prosecution, is taken. Equally, the guidelines should ensure that advice from counsel is not obtained for cases unnecessarily.*

Then at paragraph 2, it is stated that:

> *It may be necessary or prudent to seek advice from counsel at an early stage of the proceedings if there are difficult evidential issues; if the case is known to be sensitive; if there is a need to emphasise to the public the thorough independence of the decision-making process; if the case involves issues of law where a particular specialism is required; in large cases where a strategic approach is required; in complex cases where a tactical contribution is required.*

I agree entirely with what is there stated, and I return to the matter later.

Section 5

The Case of Oluwashijibomi Lapite

The Death in Police Custody

1. Mr. Oluwashijibomi Lapite died in the early hours of Friday 16 December 1994 shortly following his arrest by PC Wright and PC McCallum on suspicion of being in possession of a controlled drug, namely crack cocaine. Evidence as to the circumstances in which Mr. Lapite met his death comes from PC Wright and PC McCallum (in their Incident Report Books), together with the medical evidence, and the evidence received at the Inquest. There were two independent eye-witnesses of the struggle following the arrest although they were able to add little. Other police officers arrived on the scene at a time when Mr. Lapite may well have been unconscious and close to death. During the course of the investigation by Detective Superintendent McKay, PCs Wright and McCallum declined to answer any questions. They did, however, give evidence at the Inquest which took place between 22-25 January 1996. The accounts of the incident in the report books of PCs Wright and McCallum were largely identical. They stated that they were on duty in plain clothes in an unmarked police vehicle and driving in Upper Clapton Road, London E5, when they saw Mr. Lapite leaving a club at which they believed controlled drugs were often supplied. They followed Mr. Lapite and eventually saw him bend down and place something by a tree. They pulled alongside him and told him that they wished to search him for drugs. No drugs were found on him during the search. They then went over to the tree and PC McCallum picked up two clingfilm wraps of a white crystalline substance. According to the officers, Mr. Lapite admitted that they were rocks. Tests subsequently established the substance to be crack cocaine with a street value in excess of 4,000. Mr. Lapite was arrested and the police officers each took hold of an arm and walked him towards their police vehicle. There then began a violent confrontation. What precisely happened thereafter has been the subject of minute analysis in the documentation I have seen. I will only mention at this point that PC Wright accepts that he applied a neck hold to Mr. Lapite on two occasions before Mr. Lapite was brought to the ground and PC McCallum accepts that he kicked Mr. Lapite on the head when he, Mr. Lapite, was on the ground. The reason for this, according to PC McCallum, was that Mr. Lapite had his hands round PC Wrights neck and it was PC McCallums belief that PC Wright was in real danger. The struggle terminated with the tragic death of Mr. Lapite. The likely cause of death was said to be asphyxiation due to compression of the neck. Mr. Lapite had previously taken cocaine which added to the dangers arising from any constriction of his neck.

The Consideration of the Case in Central Casework

2. After the report of the police investigating officer was delivered to the CPS on 25 May 1995, it was passed to Mr. Robert Munday (Grade 7 PCP) for review. His review was 20 pages long. It contained a summary and analysis of the evidence. He concluded as follows:

> *(i) PCs Wright and McCallum were lawfully restraining Lapite in order to enforce a legitimate arrest.*
>
> *(ii) It cannot be conclusively established that PC Wright deliberately applied a neck lock to Lapite for a third time after Lapite had broken away from that hold on two earlier occasions. However, to restrain him by means of a neck lock would not be unreasonable in view of the serious nature of the offence for which Lapite had been arrested and the level of force used by Lapite in an effort to escape - biting, kicking and seizing possession of PC Wrights hand-cuffs.*

He then went on to deal with the effect of the cocaine taken by Mr. Lapite, and at (v) there was this:

> *Having taken a lawful and reasonable decision to arrest Lapite for possession of drugs, the Officers were forced to react to his own violent response to that arrest. It would not be reasonable to expect the Officers in such a situation to perceive that Lapite was suffering from the effects of cocaine, or for them to form the further perception that any steps they took to effectively restrain him could lead to a risk of his suffering harm.*

After dealing with the kick to Mr. Lapites face by PC McCallum, Mr. Munday said this:

> *(vii) I therefore conclude that, in the course of their struggle with Lapite, neither PC Wright nor PC McCallum*

committed an unlawful act which sober and reasonable people would inevitably have recognised would have subjected Lapite to the risk of harm. There is insufficient evidence to prosecute either Officer for an offence of manslaughter, or for any other offence arising from Lapites death.

3. Mr. Mundays team leader, Mr. Andrew Faiers (Grade 6 BCP), forwarded the complete file, including Mr. Mundays review note, to Mr. Naunton for his consideration. Mr. Faiers note included the following comment:

I do not consider that we can prove the intentional or reckless application of excessive (and therefore unlawful) force by either officer to effect the arrest and I share Mr. Mundays view that the evidence does not provide a realistic prospect of convicting either officer for manslaughter or any other offence.

4. In his note of 3 July to Mr. Faiers, Mr. Naunton asked for Mr. Faiers further views on the kick to Mr. Lapites head, but Mr. Naunton observed that he agreed that the evidence was insufficient to prosecute either officer. The decision was taken not to prosecute. Mr. Naunton has told me, and I accept, that he himself read the totality of the relevant documentation, and that it was he who made the decision that there should be no prosecution.

5. Between 22-25 January 1996, an Inquest was held into Mr. Lapites death at St. Pancras Coroners Court before the Coroner, Dr. Stephen Chan. The jury returned a verdict of death by unlawful killing. Consequent upon that verdict, the file was referred to Mr. Munday for his re-consideration. He now had, in addition to the material he previously had, transcripts of the proceedings in the Coroners Court, together with a small bundle of further witness statements which had been taken since he had made his original review note. His further review note ran to some 11 pages. He noted that evidence given by PC Wright at the Inquest was, certainly in one respect, different from the account that PC Wright had made in his Incident Report Book. In his Incident Report Book PC Wright had said that his arm was getting tighter and tighter around Mr. Lapites neck during the struggle, and that he was unable to free it, whereas at the Inquest, he had said that his arm was not in contact with Mr. Lapites neck. His conclusions contained the following paragraph:

... the Inquest failed to make any distinction between the two neck holds used by PC Wright during the early part of the struggle, until he and Lapite fell to the ground, and the later pressure against Lapites neck which occurred involuntarily when Wrights arm was trapped against the front of Lapites body and when, according to Wright, Lapites own jersey became pressed against his neck. In view of the evidence that Lapite was struggling strenuously and violently with both police officers in the intervening period, indicates that the two neck locks initially used by PC Wright to restrain him before the men fell to the ground, did not immediately cause Lapite to suffer from asphyxiation. Instead, the Inquest appears to have proceeded on the assumption that the neck injuries and asphyxiation suffered by Lapite were due to pressure on Lapites neck, which was the result of neck locks voluntarily applied by PC Wright. This assumption is not in full accordance with the evidence.

He finished as follows:

... I remain satisfied that there is insufficient evidence available to provide a realistic prospect of a conviction in respect of any criminal offence by any police officer, arising from this incident.

6. This fresh review note was sent by Mr. Munday to Miss Clare Reggiori (Grade 6 BCP) for her consideration. She herself prepared a background note for the DPP (10 April 1996). She also prepared a note for Mr. Graham Martin (Grade 5 ACCP). By his note of 17 July to Mr. David Kyle (Grade 4 CCP) Mr. Martin expressed his agreement that the original decision not to prosecute was correct.

7. The following day, Mr. Kyle sent to the DPP a briefing note prepared by Mr. Munday on the case, together with a letter from Mr. Lapites solicitors, Messrs. B.M. Birnberg & Co, and a briefing note on that letter that had been prepared by Mr. Munday. The DPP had already received an 18 page briefing note that had earlier been prepared by Mr. Munday. Mr. Kyle made the following comment in his minute to the DPP:

Both Graham Martin and I consider that, although these accounts given by the officers are not entirely consistent with their injuries, there is clear evidence that Lapite put up a struggle and that he was under the influence of drugs which contributed to his death.

Notwithstanding the Inquest verdict, we feel that we could not prove to the required standard that the officers were using excessive force in carrying out a lawful arrest and that accordingly the original decision was correct.

8. On 19 July, the DPP wrote on that minute as follows: *I assume this is for information only - or am I expected to do something?*

On the same day, Mrs. Toni Fisher, Private Secretary to the DPP, sent a minute to Mr. Kyle in these terms: *The Director has assumed that the briefing is for information only, in which case she has noted the position ...*

No doubt after discussing the matter with Mr. Kyle, Mrs. Fisher minuted the DPP in the following terms:

> *David Kyle has explained that the supporting briefing note was for current action and asked for a decision. He would therefore be grateful for your opinion.*

In the course of her minute in reply to Mr. Kyle (22 July), the DPP said this:

> *5. The constriction to Mr. Lapites throat which led, in conjunction with the cocaine intoxication, to his death was undoubtedly caused by PC Wright. PC Wright has claimed that this was an accidental constriction, and there is no evidence to refute his account.*
>
> *6. There is some cause for concern in the numerous injuries found on Mr. Lapites body compared with the relatively small number of injuries to the police officers. However, this does not affect the principal issue in this case, namely, is there a realistic prospect of conviction based on deliberate and unlawful constriction to Mr. Lapites throat. I agree with the conclusion of the background note that there is no such realistic prospect of conviction.*

9. On 26 July, Miss Reggiori, at the direction of Mr. Kyle, sent to Mr. Stephen Wooler of the Legal Secretariat to the Law Officers, a briefing note on the evidence in the case, the letter dated 6 June 1996 from Messrs. B.M. Birnberg & Co. to the CPS, the background note on the letter from Messrs. B.M. Birnberg & Co. and the minute from the Director of 22 July which I have referred to in the paragraph above. The briefing note included the following:

> *The Director has considered this matter and has concluded that there is insufficient evidence to provide a realistic prospect of a conviction against either Police Constable McCallum or Police Constable Wright. The Director requests that the Law Officers be informed of her decision. She would welcome any comments they may have.*

10. Mr. Wooler replied on 31 July 1996 as follows:

> *The Attorney General [Sir Nicholas Lyell] has considered the papers, including the letter from Messrs. B.M. Birnberg & Co. He comments that the analysis put to the Director and her consideration of all the issues had been carefully carried out and he has no reason to disagree with her conclusions. He has asked me to thank the Director and say that he has no other comments.*

The Judicial Review

11. Leave to apply for judicial review of the decision not to prosecute was granted to the applicant, Olamide Jones, on 5 December 1996. The Notice of Motion for Judicial Review is dated 12 December. In summary, the applicant sought to quash the decision taken by the CPS not to prosecute, and sought an order that the case should be remitted to the DPP for re-consideration of the question of whether the police officers concerned should be prosecuted. The decision not to prosecute was alleged to be irrational and perverse, and based on the adoption of some unlawful policy. It was alleged that there was a failure to act in accordance with the settled policy as laid down in The Code for Crown Prosecutors. (There was also an argument based upon the absence of reasons being given for the decision not to prosecute which is a matter I touch on at the conclusion of this report). Mr. Munday received the file, and on 13 December he asked his line manager, Miss Reggiori, ... what further action (if any) we should now take. He mentioned that he had not been concerned in a judicial review before.

12. Mr. Munday then prepared a draft affidavit on behalf of the CPS, and, in accordance with the suggestion of Miss Reggiori that Mr. Ian Burnett, Counsel, should be instructed to deal with the matter on behalf of the CPS, he submitted his draft affidavit to Mr. Burnett. In paragraph 2 of that affidavit he stated that the decision made by the CPS was on purely evidential grounds and in accordance with The Code for Crown Prosecutors. He went on as follows:

> *Pursuant to such criteria the Crown Prosecutor must be satisfied that there is sufficient admissible, substantial and reliable evidence to provide a realistic prospect of conviction on the charge or charges under consideration. It was because I and other Crown Prosecutors tasked with the consideration of this case were not so satisfied that charges of murder or manslaughter were not brought in this case.*

13. At paragraph 5 of his draft affidavit he set out the law as to unlawful act manslaughter correctly. The offence is committed where death results consequent upon an unlawful act of the accused and when that unlawful act is one which all sober and reasonable people would inevitably realise must subject the victim to at least the risk of some harm resulting therefrom, albeit not serious harm.

But at paragraph 21 of the draft affidavit he re-stated the test in a different form:

> *... a deliberate use of unlawful force which would inevitably be recognised by sober and rational people as subjecting Mr. Lapite to a risk of serious harm ....* (My underlining).

This is plainly incorrect. The test is not whether there is a risk of serious harm, but a risk of some harm, whether that harm be serious or not.

14. On 13 January 1997, the DPP was informed of the judicial review proceedings. On 3 February, Mr. Munday met Mr. Burnett in conference. Either then, or a little later, the draft affidavit was amended in a number of respects. One amendment related to the mechanism of the strangulation of Mr. Lapite. Another amendment related to the decision-making process within the CPS. As to that, the draft affidavit was amended to read as follows:

> *My initial view that the evidential sufficiency test was not met was considered independently by others at more senior levels to my own within the Crown Prosecution Service. The letter informing Messrs. B.M. Birnberg & Co. of the decision (dated 12 August 1996 ...) was signed by Miss Clare Reggiori who was Head of Prosecutions Branch 1 of Central Casework. She reviewed the papers and formed an independent view. So did Mr. Graham Martin, the Head of Prosecutions Division, and Mr. David Kyle, the Chief Crown Prosecutor for Central Casework. All of those senior officials took the same view as I had. Even so, the decision in this case was taken by the Director of Public Prosecutions who formed her own view, and decided that there should be no prosecution.*

The affidavit was sworn in this form. I have no doubt at all that Mr. Munday believed what he said to be an accurate statement of the position. There was no correction of the erroneous statement of the law of manslaughter.

15. Proceedings for judicial review had also been brought against the Police Complaints Authority. I am not concerned with those proceedings. Nevertheless, I should mention that on 25 June 1997, the Police Complaints Authority conceded that their reasoning had been flawed when they determined that there would be no disciplinary proceedings against the police officers, and on 23 July they consented to an order against them to review the matter afresh.

16. On 30 June, Messrs. B.M. Birnberg & Co. wrote to the CPS seeking elucidation of the paragraph in Mr. Mundays affidavit concerning the decision-making process to which I just referred, in the following terms:

> *... reference is made to others at more senior levels within the Crown Prosecution Service who are said to have considered the case independently before reaching the same conclusion as Mr. Munday. ... We assume that the analysis of the relevant evidence as set out in the affidavit is shared by and is common to each of the said individuals, including the Director herself, but we shall be grateful for your confirmation to that effect by return.*

17. On 3 July, Mr. Munday sent a minute to the Private Office of the DPP. He asked that a copy of his affidavit (attached to the minute) should be placed before the Director for her consideration and comment concerning his remarks as to those whom he said had given consideration to the case papers. By letter dated 9 July to Mr. Kyle, who was by that date no longer in the employ of the CPS, Miss Drusilla Sharpling, who was now the CCP in Central Casework, sought confirmation from Mr. Kyle as to the part he had played in the decision-making process. Mr. Kyle replied on 11 July, saying this:

> *... I can confirm that my contribution to the decision in this case was based on the comprehensive briefing provided by Robert Munday. I did not personally read any of the evidence on which the briefing was based.*

On 11 July, Mr. Munday wrote to Messrs. B.M. Birnberg & Co. a letter containing the following paragraph:

> *In accordance with paragraph 3 of my affidavit of 6 February I am in a position to confirm that the Director considered the case on the basis of detailed briefing on which my affidavit is based. Miss Reggiori similarly relied on briefing but also considered parts of the case papers including the coroners summing up. Unfortunately, Graham Martin has since died and I am unable now to confirm what material he considered. I am able to confirm that every individual separately arrived at the same conclusion.*

By this date the reply from Mr. Kyle had not been received at the CPS. On the same day, 11 July, Mr. Munday again saw Mr. Burnett in conference. By then, Mr. Bhatt of Messrs. B.M. Birnberg & Co. had sworn a further affidavit in which he argued that Mr. Munday was incorrect in his conclusions relating to the mechanism of death. He also further raised the argument in the application that Mr. Munday had misstated the law as to manslaughter in his affidavit. On 14 July, Miss Sharpling saw Mr. Burnett in conference. She told him that the description of the decision-making process set out in Mr. Mundays affidavit was not accurate. There was also discussed at that conference a handwritten note that had been prepared by Mr. Munday dealing

with and seeking to refute Mr. Bhatts argument concerning the mechanism of death. This note had been left with Mr. Burnett by Mr. Munday on 11 July. Mr. Munday then left to go on holiday. He had sought and received permission to do so despite the imminence of the judicial review hearing. At 14 July meeting with Miss Sharpling, Mr. Burnett compared Mr. Mundays original briefing notes, which had been left with him for the first time on 11 July, with the new handwritten note. Mr. Burnett and Miss Sharpling concluded that the original briefing notes and the handwritten note left on 11 July were in conflict. Mr. Burnett formed the view, both by reason of the error concerning the decision-making process, and the conflict to which I have just referred, that the CPS should submit to the order sought by the applicant and that the CPS should re-review the decision not to prosecute. The DPP accepted this advice.

18. The attendance note made by Miss Sharpling of the meeting at which it was agreed that the CPS should no longer oppose the application, is in the following terms:

> ***Conclusions***
>
> *3. The misstatement of the law is contained in Affidavit and briefing. It is also correctly stated in places in those documents.*
>
> *4. There is documentary material available in the file which suggests that the conclusions drawn as a result of the accidental tightening of clothing was a material consideration in the decision not to prosecute. If that consideration played a major part in the decision making process, such conclusions should have been checked by way of a further pathologists report. That was not done and on the face of it, the decision making process may have been flawed.*
>
> *5. The cumulative effect of both these points suggests that the CPS ought to re-consider the decision-making process and re-review the case.*
>
> *6. In effect this would mean that we accept the applicants grounds on the limited point outlined in para. 2 (The misstatement point is not material).*

The DPP has written on this attendance note I agree.

19. By letter of 14 July from the CPS, Messrs. B.M. Birnberg & Co. were informed of this decision. In her briefing for the Law Officers of 17 July, having set out the background to the case, Miss Sharpling said this:

> *4.2 R v DPP, ex parte Olamide Jones*
>
> *This case involves the death of Shiji Lapite on 15 December 1994 following a struggle with police on the street as they attempted to arrest him on suspicion of being in possession of drugs. Cause of death was attributed to asphyxiation through the application of a neck hold by a police officer and to a lesser extent the effects of cocaine.*
>
> *The reviewing lawyers affidavit which was filed in accordance with usual procedures contained two inaccuracies:*
>
> - *A misstatement of the definition of the law relating to manslaughter.*
> - *An apparent acceptance of the possibility, which the reviewing lawyer did not think would be displaced by evidence, that the asphyxiation was caused by clothing which had become entangled in the struggle. The pathological evidence available at the time did not support this theory.*
>
> *Having consulted the Director and following conference with Counsel, the CPS has decided to invite the Court to quash the decision not to prosecute and thereafter to re-review the case.*

Then, in her briefing to the Law Officers of 25 July, Miss Sharpling again referring to the affidavit of Mr. Munday, said this:

> *3.2 That affidavit contained a number of errors;*
>
> - *The nature of the decision making process.*
> - *A mis-statement of the law relating to manslaughter (see page 9 of the affidavit)*
>
> *If the level of force intentionally applied by one or both of the suspect officers resulted in Mr. Lapites death and was such as would inevitably be recognised by sober and reasonable people as subjecting Mr. Lapite to the risk of serious harm.*
>
> *This should have read:*

risk of some harm albeit not serious harm (see DPP v Newbury, [1997] AC 500).

- *The apparent acceptance of a possibility, which the reviewing lawyer did not think could be displaced by evidence, that the constriction to Mr. Lapites neck was caused by clothing in consequence of PC Wrights arm becoming entangled. The pathological evidence did not support that theory. (See pages 8/9 in item 3 and paragraph 21 of Mr. Mundays affidavit, item 5). Pathological evidence served by the Applicant in the Judicial Review showed that such theory was untenable.*

Miss Sharpling then referred to the decision-making process, mentioning that: *Although Miss Reggiori had considered some evidential material, no other named individual had considered anything other than briefing*. Her conclusions, under the heading Outcome were the following:

> *5.1 As a result of the combination of errors, in particular the assertions about cause of death, the Director decided to submit to certiorari and re-review the decision. Although the mis-statement of law was regrettable it did not have a significant bearing on this decision.*
>
> *5.2 The decision to submit to certiorari was communicated to the solicitors for the Applicant on 17 July. The re-review will be conducted by a senior lawyer from the North of England and the reasons will be provided to the Applicant.*

Section 6

The Case of Richard Joseph OBrien

The Death in Police Custody

1. On 3 April 1994, Mr. Richard Joseph OBrien was at a christening celebration with his wife and his two eldest sons, James and Richard. The celebration took place at a public house in south east London. After closing time, the party moved on to a dance at The English Martyrs Hall, Wadding Street, SE17. At about midnight, a disagreement between two women led to an outbreak of fighting. The police were called. People were asked to leave. In the events which followed Mr. and Mrs. OBrien and Richard OBrien were arrested. Mr. OBrien was held by police officers face down on the ground with his hands handcuffed behind his back. He was thereafter placed in a police van, still face down, and taken with his wife and Richard to Walworth Road Police Station where he was found to have no signs of life. Attempts to resuscitate him failed. A pathologist subsequently concluded that the cause of death was postural asphyxia following a struggle against restraint. An Inquest into the death was between 31 October and 10 November 1995. It is relevant to mention that Mr. OBrien was some 59 tall, but was exceedingly obese. He weighed some 19st. or perhaps more.

2. There were a number of eye-witnesses to the arrest of Mr. OBrien and the events which occurred thereafter. Statements were taken by Detective Superintendent David Bailey, who conducted the police investigation. There were others who gave evidence at the Inquest. In his statement to the police, Richard OBrien said that while waiting for transport with his father, a police officer asked them to move on. According to Richard OBrien, his father told the police officer that he was waiting for his wife and transpor t to take them home. Some minutes later Mr. OBrien was again asked to move on and Mr. OBrien gave the same explanation but, according to Richard OBrien, this police officer, PC Ilett, persisted with his request. According to PC Ilett, Mr. OBrien stepped up close to him, was abusive towards him and repeatedly pushed him in the chest. PC Ilett said that Mr. OBrien appeared to be drunk. The evidence of the pathologist was that Mr. OBriens blood alcohol level indicated the consumption of some five or six pints of lager. He was a heavy drinker and a very large man. This amount would not have affected him as it would someone less used to drink. PC Ilett arrested Mr. OBrien for being drunk and disorderly. Richard OBrien has said that the police officer pushed his father on the chest and he did not recall any words being exchanged between them. Both Richard OBrien and Mrs. OBrien spoke of seeing PC Ilett pushing Mr. OBrien. It is PC Iletts evidence that he arrested Mr. OBrien by taking hold of Mr. OBriens left arm, that Mr. OBrien struggled to avoid arrest, and that PC Palmer and PC Barber came over to assist PC Ilett in the arrest. PC Ilett sought to handcuff Mr. OBrien. There was a struggle, and the three officers moved Mr. OBrien across the road to the area of the police van. When they reached the pavement the struggle caused Mr. OBrien to fall to the ground. Other officers, namely, PC Magnus and PC Lockwood then arrived. PC Lockwood said he assisted in rolling Mr. OBrien on to his front and took hold of his right arm. PC Magnus took his left arm. PC Lockwood then handcuffed Mr. OBriens right wrist (his left wrist had already been handcuffed) and the two pairs of handcuffs were joined together. PC Ilett placed a knee in Mr. OBriens back and held Mr. OBriens head with one hand. PC Lockwood told the Inquest that when he handcuffed Mr. OBrien he, PC Lockwood, was probably kneeling with one knee on his lower back and that after he had put the handcuffs on he knelt on Mr. OBriens backside with both knees. He said that he was not aware whether anyone else was kneeling on Mr. OBriens back or any other part of his back near his neck, as he was concentrating on what he was himself doing. He maintained at the Inquest that even after Mr. OBrien was handcuffed he, Mr. OBrien, continued to try to free himself by kicking out and that he was throwing his body and head around. PC Lockwood said that PC Ilett restrained Mr. OBriens head by pushing it to the ground. PC Palmer said that he took hold of Mr. OBriens left leg. PC Barber said that he held Mr. OBriens right leg, then took his left leg from PC Palmer, crossed both legs over and bent them, and pushed Mr. OBriens heels up towards his buttocks.

3. Richard OBrien said that he saw police officers surrounding his father, and he tried to pull his father from them. Mrs. OBrien has said that she saw her husband lying face down on the ground and she heard Richard OBrien shouting and screaming. She told the Inquest that at one point her husband was lying on his stomach and that police officers were pinning him down. She spoke of one officer kneeling beside her husband with a knee in the back of his neck, another kneeling on her husbands legs and two further policemen physically holding him down. She said his face was squashed into the pavement. Mrs. Bridget OBrien, (who is not related to Mr. OBrien) who gave evidence at the Inquest, spoke of seeing Mr. OBrien on the ground with three or four policemen around him, and one police officer with his knee in the lower side of Mr. OBriens back. Mr. Paul Cook, who gave evidence at the Inquest, said that he saw a man on the ground with two officers kneeling on his back

in a position roughly at the top of his shoulder blades. There is considerable dispute as to what was said when Mr. OBrien was being held on the ground. I return to this later.

4. After being restrained on the ground, a number of police officers picked Mr. OBrien up and carried him to the police van. There is a conflict of evidence as to the condition of Mr. OBrien at this point, and as to what happened and what was said in the van.

5. A pathologist conducted a post-mortem on 4 April. Her conclusion was that Mr. OBrien died as a result of postural asphyxia following a struggle against restraint. She found a considerable number of injuries to the face and head with some blood trickling which appeared to be very fresh and to have occurred very shortly before death. There was a petechial rash to the face, and some petechial haemorrhages over the eyelids and lining of the mouth. The 13 separate injuries to the face were mainly grazing and bruising. There were grazes to the top of the head, including a vertical bruise in the central part of the forehead, minor abrasions to the left side of the top of the head and an area of linear and parallel grazes to the right side of the head towards the front.

There was some deep bruising to the area underlying the graze of the left side of the head and an injury above the right eyebrow, with swollen bruising and several abrasions and lacerations and some stipple grazes present on the outer part of the eye. There were abrasions over, and to the side of, the bridge of the nose. There were deep grazes to the left cheek. She found bruising injuries to the right upper arm, the outer parts of the shoulders and tears in the muscles to the shoulders.

The Consideration of the Case in Central Casework

6. The CPS received the police investigation report on 14 December 1994. On 16 December the case was passed for review to Mr. Munday by Mr. Faiers. Mr. Munday prepared a 15-page review note of the case by 9 January 1995. He stated in the note that:

> *The question of the criminal liability of some, or all, of those officers for causing his death by manslaughter must be considered on the basis of both constructive and reckless manslaughter.*

He defined constructive manslaughter as follows:

> *The accused must have caused the victims death by an act which was unlawful and which must be such as all sober and reasonable people would inevitably recognise must subject the victim to, at least, the risk of some physical harm resulting therefrom, even if not serious harm.*

He defined reckless manslaughter as follows:

> *The accused must have caused the victims death by an act, whether unlawful or not, which creates an obvious and serious risk of bodily harm (probably serious bodily harm).*

7. I have already mentioned that there is a dispute as to what was said when Mr. OBrien was being held on the ground. Mrs. OBrien, both in her statement and at the Inquest, has maintained that she heard her husband repeating a number of times the following words: Bring me up, bring me up, I cant breathe. You win, you win. She also said that she heard the officer who was kneeling on the back of his neck reply We always win. Richard OBrien made a statement (and he gave evidence at the Inquest) that he heard words of a similar kind spoken. A bystander, a Mr. Coffey, who made a statement to the police, but did not give evidence at the Inquest, said he heard Mr. OBrien saying You win, I cant breathe, and Mr. Coffey said that he told the police officers to Let him up. He also says that he heard an officer saying We always win. He also spoke of another man saying What are you doing to this man?, he cant breathe .... In his first review note, made prior to the Inquest, Mr. Munday dealt with the evidence as to this as follows:

> *There are inconsistencies between the statements of those who say that the attention of PC Ilett and PC Lockwood was drawn to the fact that the deceased was having difficulty in breathing. However, if such information was given to the officers, did their failure to alter the position in which the deceased was lying amount to an act which created an obvious and serious risk of his suffering bodily harm?*

After further analysis of the evidence (and it is important that I point out that the police officers deny that they were ever so told), he says this:

> *In those circumstances, I am of the opinion that the continued detention of the deceased was lawful and that his retention in that position did not create an obvious and serious risk of his suffering bodily harm even if the officers were told by the deceased or by others that he had difficulty in breathing.*

His final conclusion is this:

> *The deceaseds death was due to compression of the diaphragm and interference with his respiratory movement as a result of lying prone on the ground. The action taken to restrain him in that position was a lawful one and did not create an obvious and serious risk of the deceased suffering bodily harm as a result. In my view, there is insufficient evidence to convict any officer of any offence arising from the death of Mr. Richard OBrien.*

8. Mr. Faiers sent a 1-page note to Mr. Naunton agreeing with Mr. Mundays conclusion. On 16 January, Mr. Naunton in a minute to Mr. Faiers, asked for Mr. Mundays views on any negligence which might have occurred after Mr. OBrien was put in the police van. Mr. Munday prepared the further note that he was asked to prepare on 25 January. Having considered the further note, Mr. Naunton concluded he was not satisfied that there was sufficient evidence to provide a realistic prospect of conviction against any police officer for the manslaughter of the deceased. He added: However, the matter will be re-considered in the light of any further evidence that comes from the Inquest. At the Inquest, the jury returned a verdict of unlawful killing.

9. There was then a long delay occasioned by reason of the slow delivery of the transcripts of the Inquest to the CPS. They were delivered in four instalments between 4 April and 2 September 1996. The case was returned to Mr. Munday for further review in the light of the evidence given at the Inquest and the jurys verdict. Mr. Munday prepared a 65- page summary of the evidence given by the witnesses.

He further prepared a 13-page document entitled Review of the Transcripts of Evidence in which he discussed some of the evidential issues which arose during the Inquest and which had not been covered in the notes which he had earlier prepared in his first review. He also prepared a 6-page background note in which he summarised the facts and the evidential issues, as he saw them, that arose. He concluded:

> *No fresh evidence emerged from the Inquest ... to positively indicate that any police officer was given cause for concern about the deceaseds physical condition up to the point when he was loaded into the van.*

He maintained his original view that there was insufficient evidence available to support a charge against any person arising from the death of Mr. OBrien.

10. In a 2-page note to Mr. Martin, Miss Reggiori agreed with Mr. Mundays conclusions. In his 1-page minute of 12 September 1996 to Mr. Kyle, Mr. Martin agreed with the conclusions that had been reached. He summarised the matter in this way:

> *The major problem appears to be that Mr. OBrien was placed face down with his hands behind his back. I am not satisfied that we could show that the level of force used against Mr. OBrien was unreasonable nor that, in placing him on the ground in this way, it would have been obvious that he was at risk of suffering physical harm. In fact, the evidence suggests that his exceptional obesity made it extremely difficult for him to breath. The officers attribute the fact that his struggling and shouting subsided to the fact that he was drunk and I do not see us being able to establish gross negligence upon the basis of any delay in trying to resuscitate him or seek medical attention.*

11. On 18 September, Mr. Kyle sent to the DPP a minute on the case, together with a briefing note. Under Action Required, there is this:

> *Decision by Director as to whether the evidence is sufficient to justify proceedings for manslaughter against any police officer.*

As part of the key considerations set out in the minute, Mr. Kyle says this:

> *I agree that there is not a realistic prospect of a criminal jury concluding that the way in which Mr. OBrien was treated was grossly negligent. In particular, the evidence by his wife and son that Mr. OBrien said, when on the ground, I cant breathe, let me up is not confirmed by any police officer.*

Under Recommendations, there was this: The Director is invited to conclude that the evidence is insufficient to justify proceedings.

12. On 19 September 1996, the DPP replied to Mr. Kyle as follows:

> *Thank you for your minute dated 18 September 1996. I have read it and the accompanying briefing note. I agree that despite the Inquest jurys verdict of unlawful killing, the evidence available in the case remains insufficient to*

prosecute.

13. On 20 September 1996, Miss Amanda Illing, Private Secretary to the DPP, wrote to the Legal Secretariat to the Law Officers, enclosing the briefing note and accompanying documents relating to the death in police custody of Mr. OBrien. Her letter said that the Director had agreed with the recommendation that despite the Inquest jurys verdict of unlawful killing, the evidence available in the case remained insufficient to prosecute. At that time, the Attorney General was away from the Department. The papers were placed, in his absence, before the Solicitor-General who indicated that he had no comment, but was nonetheless grateful for the opportunity to do so on what he recognised was a very sensitive case.

14. On 2 October, Mr. Munday, as he had been instructed to do, wrote to Mr. OBriens solicitors, Messrs. B.M. Birnberg & Co, saying this:

> *I write to confirm that following the verdict of unlawful killing returned by the jury at Southwark Coroners Court at the inquest into the death of Mr. OBrien in November 1995, a transcript of the evidence given at that hearing has been considered by the Director of Public Prosecutions.*
>
> *The Director is of the opinion that the evidence presented to the Coroners jury is insufficient to support a realistic prospect of convicting any person of any criminal offence arising from Mr. OBriens death. Accordingly, she has decided that criminal proceedings should not be instituted.*

The Judicial Review

15. On 18 February 1997, leave to apply for judicial review was granted to Mrs. OBrien. The Notice of Motion was served on the CPS on 27 February. By minute of 28 February, Miss Reggiori asked Mr. Munday to draft his affidavit in response, and to prepare instructions to Counsel. She suggested that Mr. Burnett be instructed, as in the case of Mr. Lapite. On 21 March, a background note that had been prepared by Mr. Munday, dealing with the issues involved, together with a copy of the affidavit that Mr. Munday had drafted, were sent to Miss Reggiori. On 25 March, the background note was forwarded to the DPP. On 27 March, Mr. Burnett was instructed. The papers he was sent included a draft affidavit of Mr. Munday. At paragraph 3 of that affidavit, Mr. Munday said this:

> *The letter informing Messrs. B.M. Birnberg & Co. of the decision ... was signed by myself. The papers had previously been passed to Miss Clare Reggiori, who was Head of Prosecutions Branch 1 at Central Casework. She reviewed the papers and formed an independent view. So did Mr. Graham Martin, the Head of Prosecutions Division, and Mr. David Kyle, the Chief Crown Prosecutor for Central Casework. All of those senior officials took the same view that I had. Even so, the final decision in this case was taken by the Director of Public Prosecutions who formed her own view, and decided that there should be no prosecution.*

I have no doubt that Mr. Munday believed this to be an accurate statement of the position. Miss Reggiori saw the draft affidavit before it was sworn. Again, I have no doubt that she believed it to be accurate in this regard. The affidavit was sworn by Mr. Munday on 22 April, after making some amendments following his conference with Mr. Burnett on 17 April.

16. On 14 July, Mr. Burnett sent a facsimile transmission to Miss Sharpling (CCP). It contained the following passage:

> *In view of our discussion with the Director today, I have looked at Mr. Mundays evidence in the OBrien case. Could you look at his affidavit in particular paragraphs 2 and 3 which:-*
>
> *(a) say the DPP made her own judgement about the evidence; and*
>
> *(b) that she considered all the papers.*
>
> *Since the DPP has said she would only look at briefing notes, I am concerned about the accuracy of this part of the evidence.*
>
> *I have just received the factual argument in OBrien which I attach for reference.*
>
> *Perhaps we can have a chat ....*

Mr. Burnett was there referring to passages which appeared in the sworn affidavit, which, so far as relevant, were as follows:

> *... At each level within the CPS, and by the DPP herself, the verdict of the jury was accorded great respect. Nonetheless, it was the task of the DPP to form her own view about the prospects of securing a conviction for manslaughter. She had to make a judgement about the nature, quality and strength of the available evidence in the*

context of her considerable experience in the criminal law and of criminal trials. Each of us at the other levels within the CPS did the same.

The decision under challenge in this case was made by the Director of Public Prosecutions after consideration of all the papers. Independent views about whether any charges should result from the death of Mr. OBrien were expressed by me, by Miss Clare Reggiori who is Head of Prosecutions Branch 1, by Mr. Graham Martin, the Head of Prosecutions Division, and by Mr. David Kyle, the Chief Crown Prosecutor for Central Casework. At each level there was an independent assessment of the strengths of the potential case against the police of ficers involved. There was unanimity in all views that the evidence did not justify prosecution. That was also the view of the Director of Public Prosecutions.

17. By her minute on 18 July, Miss Sharpling informed the DPP that it would be necessary to correct such inaccuracies. She sent to the DPP for her consideration a draft letter which she thought it right should be sent to the applicants solicitors and placed before the Court. The DPP approved of the course to be taken, but suggested that consideration be given to include in the letter something to the effect that she, the DPP, neither saw nor approved Mr. Mundays affidavit.

18. On 18 July, a letter was sent to Mr. Burnett dealing with this matter, which was attached to a skeleton argument. The letter, so far as relevant, was in the following terms:

I am writing to clarify what may be a misunderstanding about the nature of the decision-making process contained in paragraph 3 of Mr. Mundays affidavit of 22 April 1997 ...

When a file of evidence is submitted by the police, it is allocated to a Crown Prosecutor the reviewing lawyer who reviews the case from the available evidential material and decides whether a prosecution should be initiated or continued. Before formalising the decision on prosecution in important and sensitive cases, senior managers are informed or consulted on the proposed outcome in briefing documents prepared specifically for that purpose. Evidential material may on occasions form part of the briefing document.

In this case, briefing documents were provided to senior managers including the Director of Public Prosecutions, for information and consultation purposes. The Director did not, however, consider any evidential material, or see and approve the affidavit and was not therefore undertaking a reviewing lawyer role.

19. At the next hearing in the Divisional Court, Counsel for the applicant submitted to the Court that it had become impossible to determine who had made the decision, and sought discovery of the underlying briefing material to clarify the position. The CPS did not object to providing that material. At the hearing on 24 July, the full briefing notes were disclosed by the CPS to the applicant. In the course of his argument, Counsel for the applicant not only referred to the problems arising from identifying the decision-taker, but also referred to what he submitted were discrepancies between the briefing notes and Mr. Mundays affidavit. There was a short adjournment. After discussion between the DPP, Miss Sharpling and Mr. Burnett, the decision was taken that the CPS would no longer contest the application, and would agree to re-consider the decision not to prosecute.

20. In her briefing note of 25 July, Miss Sharpling informed the Law Officers of what had taken place. In the course of that note, Miss Sharpling referred to the DPP being consulted, but she did not at any time review the evidence. Miss Sharpling continued: It was clear that such a blatant inaccuracy could not go uncorrected. She went on as follows:

This major inaccuracy then triggered a reconsideration of the briefing/case notes and affidavit in order to explore any potential discrepancies between them.

She then added:

There was a serious discrepancy between the briefing notes and the affidavit.

- *The briefing note asserted that:*

  His [Richard OBrien] retention in that position did not create an obvious and serious risk of his suffering bodily harm, even if the officers were told by the deceased or by others that he had difficulty in breathing.

- *The affidavit stated:*

  The deceased said I cant breathe ... if the deceased did make such a remark to them (the police) then they would have been aware that their restraint of the deceased was creating an obvious and serious risk of causing him harm.

Her minute then referred to the comments of Lord Justice Rose in the Divisional Court to the effect that the Court had grave concerns over the identity of the decision-taker, the discrepancies between briefing/case notes of Mr. Munday and Mr. Mundays affidavit, and the late disclosure of briefing/case notes. Her conclusion is in the following terms:

> *5.1 There was a clear misunderstanding as to the nature of the decision making process. This is evidenced by briefing and casenotes throughout the progress of this case. Unfortunately it has not been possible to check on Mr. Mundays understanding of the position as he is abroad on holiday.*
>
> *5.2 As soon as the differences were identified and the implications assessed, full disclosure was made to the applicant and the Court. No adverse comment was made.*
>
> *5.3 Clearly mistakes were made throughout this case and it is regrettable that the discovery of these was made at such a late stage in the proceedings.*
>
> *5.4 A full investigation will take place in the context of the review.*

Section 7

The Case of Derek John Treadaway

1. In 1983, Mr. Derek John Treadaway was convicted of offences of robbery and conspiracy to rob. He was sentenced to 15 years imprisonment. At his trial he had alleged that a confession he had signed was extracted by the oppression and violence of a number of police officers. He subsequently sued in the Queens Bench Division of the High Court for damages, making the same allegations as he had made at his criminal trial. His action succeeded. On 28 July 1994, he was awarded damages by Mr. Justice McKinnon. The case was sent to the Crown Prosecution Service for their consideration as to whether or not any of the police officers involved should be prosecuted. On 4 August 1995, it was decided (not by the DPP herself who took no part in this decision, nor the subsequent re-consideration to which I will refer in a moment) that there was no realistic prospect of conviction of any of those police officers. It would seem that the decision as to whether or not to prosecute was not at any time considered above Grade 5 level. Mr. Munday had no part in the consideration of this case.

2. On 18 November 1996, Mr. Treadaways convictions for the offences of robbery and conspiracy to rob were all quashed in the Court of Appeal (Criminal Division). Putting the matter broadly, it was held that Mr. Treadaways confession was unreliable in the light of Mr. Justice McKinnons judgment and that the evidence of the accomplices who had been called by the prosecution at the trial was tainted. After the quashing of these convictions the question of whether or not any of the police officers concerned should be prosecuted was re-considered at Central Casework. On 11 December 1996, the decision that there should be no prosecutions was affirmed.

3. Mr. Treadaway sought judicial review of the decision not to prosecute. He was successful in that application (31 July 1997), and the decision not to prosecute was quashed. The case was remitted for re-consideration by the CPS. I will not set out here the detailed reasoning of the Divisional Court which led them to this conclusion. I will summarise it shortly as follows:

> (i) Mr. Justice McKinnon had heard and assessed the witnesses and had concluded, on the high standard of proof necessary, that Mr. Treadaway had been assaulted by the police officers. This was a decision, the Divisional Court decided, that had not received the very careful analysis it deserved;
>
> (ii) The August 1995 conclusions (they were fully analysed in the judgment of the Divisional Court) repeatedly demonstrated a flawed approach and were made in breach of the evidential test in paragraph 5 of The Code for Crown Prosecutors.

4. I am asked to consider the implications for the CPS of the judgment of the Divisional Court in this case. The judgment, of course, speaks for itself. It highlights the need for the most careful consideration of all relevant factors. I would add that it will very often be right in cases of this kind for the advice of Treasury Counsel to be obtained. I do not say that the recommendations I make for death in custody cases need always be followed where there are allegations of serious assault against the police. But, dependent upon the particular facts, it will often be right to do so. Factors to be considered will include, the seriousness of the injury and the complexity of the factual or legal issues.

Section 8

An Assessment of the Consideration Given by the CPS to the Cases of Oluwashijibomi Lapite and Richard Joseph OBrien

Generally

1. My experience as a judge in the criminal courts over some 15 years, persuades me that any attempt to forecast the decision of a jury in a criminal prosecution is fraught with difficulty. That forecast, however, is not quite the forecast that has to be made by the CPS when determining whether or not they should bring a prosecution. All subjective elements must be put aside. Thus, it is sometimes said by those who work within the criminal justice system that juries seem reluctant to convict police officers. That may well be so, but it is a subjective and therefore irrelevant consideration so far as the CPS is concerned. There are, however, and as I have already mentioned, many matters which are often of considerable difficulty and complexity which do have to be considered. Such considerations might be considerations of fact, of law, or a mixture of law and fact. Examples that I have already given are issues such as credibility and admissibility of evidence. Nor is the law itself always clear far from it. Thus, it might have been thought obvious as a proposition of law that the offence of assault occasioning actual bodily harm (Section 47 of the Offences Against the Person Act 1861) would have been committed if the prosecution proved an assault, together with proof of the fact that actual bodily harm was caused to the victim by that assault. But it took over one hundred years from the section being enacted before it was made clear by the House of Lords (the highest court in the land) that this was indeed the law (see, R v Savage, [1992] 1 AC 699). Prior to this, the law had been in a state of confusion consequent upon a series of conflicting decisions of the Court of Appeal on a matter which the sensible layman might have thought clear. So the burden on whomsoever takes the decision as to whether or not there is a realistic prospect of conviction is often difficult and onerous. It is essential to ensure, therefore, that it is a decision that is taken at an appropriate and clearly identifiable level, and made by a person who has given full consideration to all relevant material.

2. I have concluded that the system I have outlined does not ensure this. It was inefficient and fundamentally unsound. I have so concluded for the following reasons:

> (i) Nobody in the cases of Mr. Lapite and Mr. OBrien accepts that he or she took the decision that there would not be a prosecution. Save for the DPP herself, all those concerned in the decision-making process after the Inquest verdicts, believed that it was the DPP herself who took the decisions not to prosecute. She believes that she took neither of those decisions. Indeed, she told me that it was not possible, in her view, for her to have taken either of the decisions herself, as she had not read and considered all of the relevant material, but had relied on briefing notes. I would agree that the person who takes the decision to prosecute or not to prosecute does need to read and consider the totality of the relevant documentation. But it does not follow from this that the DPP did not in fact make the decisions in the cases of Mr. Lapite and Mr. OBrien not to prosecute. Indeed, I believe she did. As I set out above, the papers were sent to her for this very purpose: for the case of Mr. Lapite, see Section 5, paras. 7-9; for the case of Mr. OBrien, see Section 6, paras. 11-12. I accept she did not understand herself to be doing so, but it was a thoroughly unsatisfactory situation. Perhaps it is trite to say so, but a person who knows he has direct responsibility for a decision will have his mind concentrated wonderfully.
>
> (ii) Where time is expensive, as in the CPS, available resources must be utilised efficiently. There were here too many people involved in a duplication of functions.
>
> (iii) As the cases of Mr. Lapite and Mr. OBrien ascended each grade in the CPS, in any event after the re-consideration by reason of the Inquest, so the amount read and considered differed. The inability to detect error increased as did the risk of perpetuating error. There is a striking example of this in the case of Mr. Lapite. Although it is not always entirely clear what documentation was read by whom, the error in the definition of manslaughter that crept in, and to which I have referred above, appears to have been spotted by nobody or, perhaps, more accurately, was commented on by nobody, even though it is a mistake of a basic kind. It is not, as I show later, a mistake that was in any way fundamental to the decision taken not to prosecute but it does not instil confidence in the decision-making process.

(iv) The end result is that in the cases of Mr. Lapite and Mr. OBrien the only person in Central Casework who considered the whole of the relevant documentation after the Inquest verdicts was a Grade 7 PCP, namely, Mr. Munday. This is not a level at which a decision whether or not to prosecute can be made in cases of this kind. I have read the transcripts of the Inquests. They are more revealing than any summary could be. But each higher grade looked at summaries only.

5. I believe that both the cases of Mr. Lapite and Mr. OBrien were of such sensitivity, importance and difficulty, that they cried out for Counsels advice to be sought with regard, in particular, to what, if any, further enquiries should be made by the police. It was not. I know that guidelines were in course of promulgation (see Section 4, para. 9) but some interim guidance ought to have been in place.

The Quality of the Consideration Given

6. A distinguished American once observed that Hindsight is always 20/20. A former British Prime Minister recently accused a committee who had produced a scathing report (whether rightly or wrongly is not for me to say), of using the merciless wisdom of hindsight to flay nearly all concerned. The fact is that in the real world decisions have to be taken on the basis of the information at that time available and in the circumstances as they are then. Mature reflection after the event can lead to very difference conclusions from those originally arrived at. I have to, and do, bear this in mind. That is why I have in this Report focused on the operation of the system itself rather more than on the intricate detail of the reviews. My prime concern has been to see that there is put in place an efficient system for the future. It would be unpardonable, however, if decisions as to whether or not to prosecute in cases of this kind were influenced in any way by unfair bias, or taken after slapdash consideration.

7. It was Mr. Munday who was the reviewing lawyer in both of these cases. As I have already mentioned, apart from Mr. Naunton pre-Inquest, it was he, and only he, who considered all the relevant material both before and after the Inquest verdicts. I have read carefully through the documentation he produced. I interviewed him at some length. In the result, I am satisfied that in reaching the views that he did, namely, that there was no realistic prospect of conviction in either case, he did so honestly and without unfair bias. Further, he did his best to pursue a careful and thorough approach. That is not to say that his work was flawless or that I agree entirely with him. As to that, I would, in particular mention the following:

(i) Mr. Munday (and all those who subsequently considered the cases) was entirely right in principle to conclude that the verdicts of the Inquest juries of unlawful killing were one factor, and one factor only to be considered when determining the question as to whether or not there was a realistic prospect of conviction. Lord Justice Auld in R v DPP, ex parte Jennifer Jones (Divisional Court, 6 June 1996) said this: . . .The jurys verdict is not determinative in this matter. In my view it is for the prosecutor to make up his own mind on the evidence before him. There, the decision of the CPS not to prosecute an owner of a building for manslaughter after a fire, where there had been a verdict of unlawful killing at the Inquest, was held not to be perverse. Again, in R v DPP, ex parte Hitchins (Divisional Court, 13 June 1997) an application for judicial review failed even though the decision not to prosecute was taken after a verdict of unlawful killing at an Inquest. Lord Justice Brooke said that the verdict was . . . an important matter for the Crown Prosecution Service to take into account. But it could not be regarded as conclusive. But it is important to remember that the cases of Mr. Lapite and Mr. OBrien turned to a very large extent on the credibility of those involved. That credibility was tested at the Inquests. In both of the cases, the jurors at the Inquests saw and heard the witnesses. They returned verdicts of unlawful killing. I would have found that very persuasive had I been the person who had to decide whether or not prosecutions should be launched. I appreciate, of course, that an Inquest is not a trial. This was put very clearly by Lord Chief Justice Lane in R v South London Coroner, ex parte Thompson, [1982] 126 SJ 625, where he said this:

. . .it should not be forgotten that an Inquest is a fact-finding exercise and not a method for apportioning guilt. . . . In an Inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use.

I have already noted (Section 7) the importance afforded by the Divisional Court to the decision of Mr. Justice McKinnon in the case of R v DPP, ex parte Treadaway. This was a proceeding in a civil court, without a jury. I think it not unarguable that the decision of a jury, albeit of a coroners court, in cases where credibility is of such importance, ought to be regarded as of at least as much weight, particularly bearing in mind it is a jury who will have to determine issues of credibility in a criminal trial.

(ii) I have already referred to the unfortunate error as to the definition of manslaughter made by Mr. Munday in the case of Mr. Lapite. In fact, in his background or review notes Mr. Munday stated the test correctly save on one occasion. And it is right I should say that the error was not relevant to the decision taken not to prosecute as there was no material issue as to the degree of harm to be recognised. Whether it was serious or not was not relevant. But it is an error that does not inspire confidence. I learned to my considerable surprise during the course of this Inquiry that there is no formal compulsory training for those employed in Central Casework. If, as is the case, it is thought necessary that the Judiciary should receive compulsory training, as they should, then I would have hoped that it would have been thought right that so should those employed in Central Casework. This must take place in the future. I deal with the need for compulsory training at Recommendation 6. Miss Sharpling, now CCP at Central Casework, had begun to look at this and other matters that she felt needed to be reviewed soon after she became CCP. Partly by reason of this Inquiry she has as yet found herself unable to put her ideas into operation. She did not become CCP at Central Casework until after the decisions were made not to prosecute in the cases of Mr. Treadaway, Mr. Lapite and Mr. OBrien.

(iii) Because of the nature of the decision-making process within Central Casework (see, Section 4) Mr. Munday made, and was asked to make, numerous lengthy notes and summaries in both the cases of Mr. Lapite and Mr. OBrien. It is this multiplicity of notes, many of them lengthy, that caused confusion at the time of the judicial reviews. I will give one striking example for each case. In the case of Mr. Lapite there was a great deal of argument as to the mechanism of death. I will not here examine the minutiae of this argument. Suffice it to say that it is said or suggested on behalf of the applicant in the judicial review proceedings that Mr. Munday subscribed to a theory that the mechanism of death may have been accidental strangulation caused by a ligature effect when PC Wrights arm was said to have become entangled in the clothing of Mr. Lapite, and that this was a theory that was excluded by the medical evidence. On my reading of Mr. Mundays reasoning, however, (whether of the notes or of his affidavit) he does not say or suggest this. But when there are so many pages of so many notes made at so many different times, it is certainly possible to argue that he did so implicitly. In the same way, an important issue arose in the judicial proceedings as to the treatment by Mr. Munday of the dispute as to whether Mr. OBrien called out for air when he was being held on the ground by police officers. As to this, there was an apparent inconsistency of approach shown by Mr. Munday: see what is said by Miss Sharpling in her minute that I have referred to at Section 6, para. 20. But what in fact had happened was that there were being compared a view expressed by Mr. Munday in his original review note that he had made prior to the Inquest, and which was a note not sent to the DPP, with a different view he had formed after the Inquest and in the light of the evidence there given. He tells me, and I have no reason to doubt it, that he had changed his view. Those who make judgements often do so. But without his explanation (as I have mentioned, he was on holiday at the time of the judicial review hearing) a flat contradiction was apparent.

(iv) A rigorous forensic analysis undertaken with the benefit of hindsight and without time constraints inevitably reveals errors of detail in Mr. Mundays work. But to criticise him now for this when it is the system, not he, that has failed would be grossly unfair. The burden placed upon him was too great.

(v) It is no part of my duty to advise the CPS as to whether prosecutions should be brought in either or both of these cases, and I do not do so. That is one reason why I have chosen not to examine in depth in this Report every one of the numerous issues raised in the judicial reviews. My concern has been a somewhat wider one. But I will say this. There was taken at Central Casework after the Inquests in these cases a more pessimistic view of the prospects of conviction than I would have taken had I been asked to determine the question as to whether or not there was a realistic prospect of conviction. In saying this I realise that the recent prosecutions of police officers after the death in custody of Mrs. Joy Gardner and the death in custody of Mr. David Ewin (Mr. Munday was the reviewing lawyer in each of these cases) ended in acquittals. But each case depends very much on its own facts. I should add that Counsel who is at present advising the CPS as to whether or not prosecutions should be brought in either or both of these cases has told me that he has been provided with a quantity of relevant new material for his consideration, including new medical evidence.

The Judicial Reviews

8. The judicial reviews of Mr. Lapite and Mr. OBrien were clearly of great importance to the CPS. A casual observer would not have appreciated this bearing in mind the way they were dealt with. Mr. Munday was effectively left to bear the burden on his own. There were no guidelines within Central Casework to assist him. Nor had he any previous experience of proceedings of this kind. I make no criticism of the late disclosure of the background or review notes. He was not told to disclose them by any of his superiors within Central Casework or by Counsel. More important, I would not have thought it necessary for them to be disclosed unless circumstances subsequently arose to make that course necessary.

9. From the CPS point of view, the judicial reviews were something of a disaster. They were too important for them to be dealt with without the assistance of outside solicitors. The assertions made by Mr. Munday as to the consideration given to the cases by those senior to him in the CPS were made, I have no doubt whatsoever, in good faith. Had the Treasury Solicitors Department been instructed to act for the CPS from the outset, I anticipate such assertions would not have been made. I feel sure that they would have insisted that before either affidavit was sworn all those to whom Mr. Munday referred be asked to comment. The true position would then have emerged and would, no doubt, have been stated accurately in the affidavit. Quite what would have been said as to the identity of the decision-maker, I do not know. What I have no hesitation in concluding, however, is that there was no attempt made by anybody at any stage in the CPS knowingly to deceive the Divisional Court, or the applicants and their solicitors and Counsel. There was confusion and mistakes were made; but there was no conspiracy.

Section 9

Other Death In Custody Cases

1. I was concerned to consider how Central Casework dealt with and considered death in custody cases other than those that I have previously mentioned in this report. I chose to look at the period beginning January 1994. It was quickly apparent that many of them provided no basis whatsoever for a prosecution as there could be no realistic suggestion that there had or might have been an unlawful killing or some offence committed. Put another way, there was no realistic prospect of conviction of anybody. In some of these cases, the person held in custody had committed suicide. In others, the deaths had been of natural causes or as a result of accident. By way of example, I would mention the case of Mr. Mika Rissanen. He was an in-patient at the Royal Free Hospital in Hampstead. He dived through a window and landed on a narrow verandah. He died after running along the verandah and dropping six floors to a roof at third floor level. At the time he was under arrest for false imprisonment and criminal damage. He was in the custody of two police officers. On 15 May 1995, a PCP wrote a 2-page review note on the case. The conclusion was this:

> *There is no proper basis here on which one can consider charging any person with any criminal offence arising from the circumstances in which Mika Rissanen took his life.*

This conclusion was accepted by each of the two higher grades who next looked at the case. This was plainly right. In each case of this kind at which I looked I found the review note adequate and sufficiently comprehensive, although I would have preferred to have seen it better structured. The only other comment I would make with regard to cases of this kind is that it was not always clear to me from my examination of the files, at what level the decision not to prosecute was made. Certainly, in these straightforward cases I saw no evidence that the DPP herself made the decision.

2. There were, of course, a number of these further death in custody cases that I looked at that were of complexity and difficulty. In broad terms, the system of reaching the decision as to whether or not to prosecute was in line with the system that I have already outlined and criticised. The cases of this kind that I considered were adequately and conscientiously reviewed by the reviewing lawyer. I deal separately with the case of Brian Douglas at paragraph 3. All of these reviews were conducted pre-Inquest. Had a verdict of unlawful killing been found in any of these cases at the subsequent Inquest (not all have yet been completed) there would have been a re-consideration within Central Casework, as was done in the cases of Mr. Lapite and Mr. OBrien. Such re-consideration should take place in the case of every death in custody; I have dealt with this in Recommendation 4. But looking only at the evidence available I would not disagree with the decisions taken not to prosecute. The deceased were the following:

- Michael Dempsey
- Robert Dixon
- Donovan Williams
- John Boden
- Wayne Douglas
- James Gailey
- David Howell
- Ian Muskett
- Ziya Bitirim
- Alton Manning (prison custody)
- Dennis Stevens (prison custody)

A number of death in custody cases, including some of those I have just mentioned, have been or are being looked at and considered or re-considered under the safeguard provisions announced at the time of the setting-up of this Inquiry. These provisions provide as follows:

> *No prosecuting decision in these cases [death in custody cases] will be taken without independent advice from Treasury Counsel: if the DPP disagrees with this advice, the Attorney General and the Solicitor-General will be informed and consulted.*

They were subsequently extended to include all cases involving consideration of possible serious assault charges against the police. I have been told that at 6 January 1998, 100 cases, of which 28 concern a death in custody, had been sent to Treasury Counsel under these provisions. Treasury Counsel has so far advised upon 28 of these cases. In only one of them has Treasury Counsel advised a prosecution when the reviewing lawyer at the CPS had not, and that related not to a charge of assault, but to an accompanying charge of attempting to pervert the course of justice.

3. It is, I think, of importance that I make plain that I saw nothing whatsoever in any of these cases that would support any suggestion that there is within Central Casework a bias in favour of or against the police or any section of the community. Of course, there can always be a difference of emphasis. But even lawyers can and do disagree. Making a judgement as to whether there is or is not a realistic prospect of conviction is far from an exact science. A striking example of this arose in another of the cases that I considered, namely, that of Mr. Brian Douglas. Having considered the papers, Senior Treasury Counsel advised that he was satisfied that it would not be right to bring proceedings either for manslaughter, or for attempting to pervert the course of justice, against these officers. There were, however, two contrary opinions obtained on behalf of the relatives of the deceased each by a Queens Counsel with experience in the criminal law. Senior Treasury Counsel maintained his position even after he had read these opinions. The decision was taken not to prosecute. I have expressed my concern at this decision to the DPP and to the CCP at Central Casework. I have been given an undertaking that this case will receive full and careful re-consideration.

4. What, however, is clear is this. Any decision as to whether or not there should be a prosecution in a case where there has been a death in custody is always a decision of great importance. If a prosecution is wrongly brought (by that I mean where there is no realistic prospect of conviction) the consequences can be catastrophic for the person prosecuted and his family. If a prosecution is not brought when it should be, then the family and friends of the deceased will suffer a deep sense of grievance, accompanied by a loss of confidence in the criminal justice system. Further, there is plainly a powerful public interest in the prosecution of police officers who have committed an offence of such gravity. It is my belief that the consequences of a failure to prosecute in cases where there has been a death in custody, in circumstances where a prosecution should have been brought, are so serious that I have concluded that I should deal with this situation specifically in my recommendations. I say this for the following reasons:

> (i) A decision not to prosecute can very rarely be successfully challenged. The reasons for the decision are not given, so that a judicial review can be mounted only in exceptional circumstances as, for example, where there has been a verdict of unlawful killing at a coroners Inquest, or, as in the case of R v DPP, ex parte Treadaway, after a favourable decision in civil proceedings. Even then, the Divisional Court can do no more than order the decision of the CPS not to prosecute to be re-considered by them. As I understand the law, it would be unable to direct that there should be a prosecution.
>
> (ii) When there has been a decision taken to prosecute, there are a series of checks and balances within the system to avoid injustice. The first will be at the committal proceedings in the magistrates court, under Section 6(1) of the Magistrates Courts Act 1980, as amended by Section 47 of the Criminal Procedure and Investigations Act 1996. The result is that if the magistrates court is of the opinion that there is not sufficient evidence to put a defendant on trial at the Crown Court, it must discharge him. Then, if a defendant has been sent for trial to the Crown Court, a submission of no case to answer may be made at the close of the prosecution case which will succeed, and the defendant will be discharged, where the prosecution evidence taken at its highest is such that a jury properly directed could not properly convict: see, R v Galbraith, 73 Cr.App.R. 124. Finally, of course, and quite apart from the power of the jury to stop the case against a defendant at any time after the close of the prosecution case, the jury, if not sure of guilt, must acquit.
>
> (iii) It is a perception, and I believe it is one that is commonly held not only in ethnic minorities but more widely, that the close working relationship between the CPS and the police leads to favoured treatment of the police. As I have already said, from the cases that I have examined, I do not believe this to be a justified perception. It is, however, an understandable perception.

These are all matters I have borne in mind when making my recommendations.

5. There is just one further matter I should mention under this head. I have already expressed my surprise and concern at the absence of any formal compulsory training in Central Casework. It is also surprising (and a matter of concern) that it was not until 1996 that there was established a Crown Prosecution Service Inspectorate. The prime objectives of the Inspectorate are to provide an assurance to the DPP about the quality of the casework throughout the CPS, and to make recommendations designed to achieve improvements in the quality of casework and identify and promote good practice. As yet, the Inspection Team has not visited Central Casework. I have been assured that it intends to do so within the immediate future. Had this not

been the case, my recommendations would have included a requirement as to this.

Section 10

Summary of Main Conclusions

1. All cases of death in police custody are sent to Central Casework for decision as to whether or not there should be a prosecution. A prosecution will only be brought, as with all cases, if there is a realistic prospect of conviction, and if a prosecution is in the public interest (see, Section 3). It is almost inconceivable that the public interest test will not be satisfied in the case of a death in custody. Not every death in prison custody need at the present time be sent for consideration to Central Casework (see Recommendation 1).

2. The system that was employed by Central Casework to arrive at a decision as to whether or not to prosecute is set out at Section 4. It is a system that I regard as inefficient and fundamentally unsound (see, Section 8, para. 2). The vice of the system is clearly demonstrated by the cases of Mr. Lapite and Mr. OBrien. The decision-maker must be clearly identifiable and be of appropriate seniority see Recommendation 2.

3. A decision not to prosecute, if erroneously made, can have even more undesirable consequences for the public interest than an erroneous decision to prosecute (see, Section 9, para. 3). The advice of Counsel must be sought more often than it has in the past.

I try to deal with this at Recommendations 3 and 4.

4. The judicial review proceedings in the cases of Mr. Lapite and Mr. OBrien were dealt with in an unsatisfactory manner by the CPS. But there was no dishonest or deceitful conduct. There are no guidelines in existence setting out the procedure to be followed when the CPS are made respondents to judicial reviews that raise matters of sensitivity, importance or complexity (see, Section 8, para. 9) (see Recommendation 5).

5. In none of the cases that I looked at and considered, including those of Mr. Lapite and Mr. OBrien, did I find unfair bias. The overall standard of the review notes was adequate (see, Section 9). This was found not to be so, however, in the case of R v DPP, ex parte Treadaway. I have dealt at some length with the cases of Mr. Lapite and Mr. OBrien and I cannot adequately summarise them.

6. There is no formal compulsory training programme within Central Casework. This must be addressed (see, Recommendation 6).

Section 11
Recommendations

Recommendation 1:

All cases of death in custody, whether of the Police or Prison Service, should be dealt with at Central Casework.

Recommendation 2

Every death in custody case should be sent for decision as to whether or not to prosecute to the Assistant Chief Crown Prosecutor (ACCP). The ACCP will read and consider the whole of the relevant documentation and prepare a note in a standardised and structured form stating his decision with the reasons for that decision. That is the person who has made the decision whether or not to prosecute.

I accept there may be wholly exceptional cases where the documentation is so voluminous that the decision-maker might need to rely, in part, on a briefing note. However, none of the death in custody cases that I read - and these recommendations are, of course, concerned only with such cases - would have fallen into this category.

> **NOTE 1:**
> Of course, in reaching the decision, the ACCP can seek assistance from and consult with others, or if it is appropriate, instruct Counsel to advise. He may also wish further enquiries to be made and further information provided.
>
> **NOTE 2:**
> Nothing in these recommendations affects the 23 April 1996 guidance referred to at Section 4, para. 3.
>
> **NOTE 3:**
> There may be cases where it is thought right that the decision-maker should be the CCP or even the DPP. If so, Recommendations 2, 3 and 4 should be followed with, where appropriate, the CCP or the DPP substituted for the ACCP.
>
> **NOTE 4:**
> Consideration should always be given as to whether these recommendations should be followed in cases where there has been a serious injury in police custody (see, Section 9).

Recommendation 3:

If the decision is made to prosecute, then a prosecution may be expected to follow. If the decision made is not to prosecute, then the case will be sent for advice on that decision to Senior Treasury Counsel. That need not be done if the case is of a kind where it is plain beyond any reasonable doubt that there is no realistic prospect of conviction. If Senior Treasury Counsel agrees that there should be no prosecution, then no prosecution will follow. If Senior Treasury Counsel advises that there should be a prosecution, the matter has to be re-considered by the ACCP. If the ACCP accepts the advice, as I would normally expect to be the case, prosecution will follow. If the ACCP disagrees, there will be a full re-consideration of the matter at CCP level or above. No doubt, if such an exceptional situation arose, the DPP would wish to be fully involved. But it must be made absolutely clear who has made the decision.

Recommendation 4:

All decisions not to prosecute should be re-considered after the Inquest has been held. The re-consideration should follow the procedures outlined at Recommendations 2 and 3.

Recommendation 5:

Guidelines should be formulated for the procedures to be followed where the CPS are respondents to judicial review proceedings. Those guidelines will include a direction to consider the instruction of the Treasury Solicitors Department when

the proceedings are sufficiently sensitive, important or complex.

Recommendation 6:

There should be prepared and instituted a compulsory training programme for all those employed at Central Casework. It is not for me to formulate that programme. It must encompass at least the following areas:

(i) understanding and consistency of application of the realistic prospect of conviction test with particular reference to the kind of work received at Central Casework;

(ii) developments and changes in the law; and

(iii) the structure and drafting of review notes.

Section 12

Postscript

1. Under the Police and Criminal Evidence Act 1984, there is laid down a procedure under which it is the police who investigate and report to the CPS on a death in custody. I make no comment whatsoever on the standard or quality of the police reports that I have seen during my Inquiry. In principle, however, I have always regarded this as a questionable procedure. Certainly, I am not alone in feeling uneasy about it. It is no part of my Inquiry to make a recommendation on the matter, and it would be wrong for me to do so. But I regard this issue to be of such importance that I feel I ought to mention it so that those in a position to do so might give it their consideration.

2. The CPS does not give reasons for a decision not to prosecute and I can see many good arguments why this should be so. But the courts are continually broadening the areas in which it is thought right that reasons for a decision should be given. The latest of these cases is R v Ministry of Defence, ex parte Murray, *The Times*, 17 December 1997. It would, of course, be absurd to suggest that in every case the CPS should give reasons for a decision not to prosecute, but there may well be cases where it would be right to do so. I would suggest, for example, that it might be right to do so in those cases where there has been a death in custody, and an Inquest jury has returned a verdict of unlawful killing. And no doubt there might be other cases. I do not propose to make a recommendation with regard to this. I would hope that this, again, is something that will be given further consideration in appropriate quarters.

Appendix

CPS Employees

Dame Barbara Mills QC
Christopher Newell
Drusilla Sharpling
Roger Daw
Andrew Faiers
Philip Jones
Brandon Longden
Clare Reggiori
Katey Rushmore
Robert Munday
Steve Poole

Former CPS Employees

David Kyle
Jeremy Naunton

Others

Stephen Wooler
Ben Emmerson
Raju Bhatt
Fiona Murphy
Ian Burnett
Sir Montague Levine
Andrew Coyle
Martin McHugh
Christopher Burke