| Neutral Citation No: [2024] NIKB 9 | *Ref:* SCO12383 |
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| *Judgment: approved by the court for handing down (subject to editorial corrections) ** | *ICOS No:* 23/050223/01 |
| | *Delivered:* 09/01/2024 |

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**KING'S BENCH DIVISION**
**(JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY WILLIAM THOMPSON FOR JUDICIAL REVIEW**

**AND IN THE MATTER OF A DECISION OF THE PUBLIC PROSECUTION SERVICE FOR NORTHERN IRELAND**

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***Re William Thompson's Application (No. 2)***
***(DPP request to PSNI for further investigation)***

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**Karen Quinlivan KC and Andrew Moriarty (instructed by Madden & Finucane, Solicitors) for the Applicant**
**Tony McGleenan KC and Philip Henry (instructed by the Public Prosecution Service) for the Respondent**
**Donal Lunny KC and Andrew McGuinness (instructed by the Crown Solicitor's Office) for the Ministry of Defence as a Notice Party**

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**SCOFFIELD J**

## *Introduction*

[1] The applicant is the son of Kathleen Thompson, who was shot and killed in her back garden at Rathlin Drive, Derry on the night of 5-6 November 1971. These proceedings concern a decision on the part of the Director of Public Prosecutions (DPP) not to exercise his statutory power to require the Police Service of Northern Ireland (PSNI) to ascertain and provide to him additional information in respect of the death of the applicant's mother, after he (the DPP) had had the case referred to him by the coroner who conducted a recent inquest into the death of Ms Thompson.

[2] Ms Quinlivan KC and Mr Moriarty appeared for the applicant; Mr McGleenan KC and Mr Henry appeared for the respondent; and Mr Lunny KC

and Mr McGuinness appeared for the Ministry of Defence (MoD) as a notice party. I am grateful to all counsel for their helpful written and oral submissions.

*Factual background*

[3] Shortly after midnight on 6 November 1971, there was a raid by members of the Royal Green Jacket Regiment on a house across the road from the applicant's mother's home, in Rathlin Drive, Derry. A soldier, identified as 'Soldier D', admitted firing eight rounds from his high-velocity SLR rifle whilst in the area in the course of the operation. Soldier D made the case that he had fired two shots into the rear of the applicant's mother's home. Shortly after the raid, the applicant's mother was found dead in the rear garden area of her home. She had been killed by a high velocity bullet wound to her chest.

[4] A decision not to prosecute Soldier D in respect of Mrs Thompson's death was made by the then DPP on 4 August 1972. Thereafter, an inquest was held into the death of Kathleen Thompson on 2 November 1972 before Major Hubert O'Neill, Coroner. An open verdict was returned.

[5] Many years later, on 30 August 2013, the Attorney General for Northern Ireland ("the Attorney General") directed the Coroner for Northern Ireland to hold a fresh inquest into Kathleen Thompson's death. That inquest was duly convened. Evidence in the fresh inquest commenced on 5 March 2018, before Her Honour Judge Crawford sitting as a coroner ("the coroner"). The evidence concluded on 23 June 2021. The coroner handed down her findings on 29 June 2022, with a summary only of her findings being outlined in court on that date. Around a week later, on 8 July 2022, a fully reasoned decision was handed down and this has been provided to the court in the course of these proceedings.

[6] For present purposes, it is relevant that the coroner found, on the balance of probabilities, that Soldier D shot the applicant's mother in circumstances that were not justified. As she was obliged to do in light of this finding, the coroner made a referral to the DPP pursuant to section 35(3) of the Justice (Northern Ireland) Act 2002 ("the 2002 Act"). This provision is set out below.

[7] Subsequent to that referral, by correspondence dated 19 May 2023, the Public Prosecution Service for Northern Ireland (PPS) advised that it would not be possible to prosecute Soldier D in relation to the death of Kathleen Thompson until such time as a police investigation into the death had concluded. This correspondence further indicated that the DPP would not refer the matter to the Chief Constable in exercise of its powers under section 35(5) of the 2002 Act.

[8] Specifically, the correspondence stated as follows:

> "The issue that the Director has, therefore, been considering at this stage is whether he should exercise his

> power under section 35(5) of the 2002 Act to require the Chief Constable to ascertain and give him information about any matter appearing to the Director to need investigation on the ground that it may involve an offence committed against the law of Northern Ireland. The Director's power to refer a case to the Chief Constable is a discretionary power. The Director's approach to the exercise of this power has been informed by the judgment of the Northern Ireland Court of Appeal in a case called Beatty vs the DPP and the Chief Constable of the PSNI (delivered on 24 March 2022 …)
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> The key consideration in the present case is that the PSNI's Legacy Investigation Branch are already intending to review the circumstances of the shooting of Ms Thompson to determine whether there are investigative opportunities that could form the basis of a subsequent report to the Director for a decision as to prosecution. The case is within what is known as the PSNI's "case sequencing model". This is the same situation as the Beatty case referred to above and the Court of Appeal confirmed that it will rarely be appropriate for the DPP to exercise the section 35(5) power in a case already identified as one requiring review or investigation and prioritised in accordance with the PSNI case sequencing model. The Court described the power of the Director to refer in these circumstances as being *"of decidedly narrow compass"* and intended to operate in a *"highly restricted way… absent some exceptional circumstances."*
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> The Director has concluded that there is no exceptional circumstance that would justify a referral in this case. In this regard he has carefully considered the substance of the findings and also the fact that the operation of the case sequencing model is dynamic and subject to periodic review."

[9] The correspondence of 19 May 2023 went on to indicate that the PPS review of the case had identified "some priority lines of enquiry that would require to be undertaken as part of any future police investigation." It indicated that the PPS analysis in that regard would be communicated to the PSNI so that the police would have it available in the event that they subsequently commenced a review in the Thompson case. It was further noted that the PPS were ready to assist any police review or any investigation with any further prosecutorial advice which may be required; but that it was considered "that it is a matter for police as to when any such review or investigation now takes place."

[10] Since the applicant was dissatisfied with this stance, pre-action correspondence was sent by his solicitors to the PPS on 29 May 2023. There was a reply from the PPS on 16 June 2023 in which it maintained its position. These proceedings were commenced in advance of the PPS response having been received, on 14 June 2023.

[11] Leave to apply for judicial review having later been granted, the respondent's position has been set out in an affidavit from Mr Michael Agnew, the Deputy Director of Public Prosecutions. This is consistent with the DPP's position as set out in its response to pre-action correspondence. As the PSNI had already undertaken to review Mrs Thompson's case for further investigation (when it was reached applying the case sequencing model used by the Legacy Investigation Branch (LIB)), the DPP considered that there was no need to use his section 35(5)(a) power to bring the case to their attention. It was for the PSNI to independently manage its resources and assess the issue of prioritisation. Although the DPP could, exceptionally, require a case to be prioritised by the PSNI, this had been considered in the present case and the DPP concluded that there were no such exceptional circumstances warranting that course.

***Summary of the parties' positions***

[12] The applicant contends that, in adopting the approach which it did, the PPS misconstrued section 35 of the 2002 Act, which requires to be read as a whole. In his submission, the obligation on the coroner to refer the matter to the PPS by virtue of section 35(3) informs the approach to the interpretation of the DPP's powers under section 35(5). The result, he submits, is that, in circumstances where the PPS then neither makes a decision to prosecute or not to prosecute, the matter should be referred to the Chief Constable pursuant to section 35(5). The applicant further contends that it was wrong for the PPS to identify further lines of enquiry for the police without formally requiring them to be addressed by means of a section 35(5)(a) request; and that, in any event, the circumstances of the present case give rise to "exceptional circumstances" within the meaning of that phrase as used in the judgment of the Court of Appeal in the *Beatty* case (on which the respondent relies and which is discussed in some detail below).

[13] The respondent contends that, in reaching his decision, he did not misunderstand section 35 of the 2002 Act; that he acted consistently with the guidance provided by the Court of Appeal in the *Beatty* case; and that it was within the range of reasonable decisions open to him to conclude that this case was not of such an exceptional nature to merit a section 35(5)(a) requirement, in order to re-prioritise the further police investigation of the case, when the PSNI was already aware of the case and was intending to investigate it further in due course. The MoD confined its submissions to the final limb of the applicant's case, namely the exceptionality issue. In summary, it submitted that there was nothing to show that the present case was exceptional, as compared with the broad range of other cases

currently within the LIB caseload, nor even as compared with other cases where a section 35(3) report had been made by a coroner further to a legacy inquest.

***Relevant statutory provisions***

[14] This case centres upon the meaning and effect of section 35 of the 2002 Act, which is headed 'Information for Director', and is in the following terms:

> "(1) Where a person is committed for trial, the clerk of the court to which he is committed must send, or cause to be sent, to the Director without delay—
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> (a) a copy of every complaint, deposition, examination, statement and recognisance connected with the charge, and
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> (b) a copy of all other documents in his custody which are connected with the charge or, if it is not reasonably practicable to copy any of them, particulars of the documents which it is not reasonably practicable to copy.
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> (2) Where a complaint has been made before a resident magistrate, a lay magistrate or a clerk of petty sessions, he must (whether or not proceedings have been taken on it) cause to be sent to the Director, on being requested by the Director to do so, copies of all documents in his custody which are connected with the complaint.
>
> (3) Where the circumstances of any death which has been, or is being, investigated by a coroner appear to the coroner to disclose that an offence may have been committed against the law of Northern Ireland or the law of any other country or territory, the coroner must as soon as practicable send to the Director a written report of the circumstances.
>
> (4) The Chief Constable of the Police Service of Northern Ireland must give to the Director information about offences alleged to have been committed against the law of Northern Ireland which are of any description specified by the Director.

> (5) The Chief Constable of the Police Service of Northern Ireland must, at the request of the Director, ascertain and give to the Director—
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> (a) information about any matter appearing to the Director to need investigation on the ground that it may involve an offence committed against the law of Northern Ireland, and
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> (b) information appearing to the Director to be necessary for the exercise of his functions."

[15] The most relevant portion of this provision for present purposes – namely subsection (5)(a) – was discussed by the Court of Appeal in its decision in the *Beatty* case, to which I now turn.

***The Beatty case***

[16] In *Beatty v DPP* [2022] NICA 13, the court described the central issue raised by the appeal as being the correct construction of section 35(5)(a) of the 2002 Act (see para [1] of the judgment). In that case, the applicant was seeking a section 35(5)(a) request from the DPP in order to accelerate the police investigation into the death of her brother, Ambrose Hardy, in 1973. A new inquest had been ordered by the Attorney General but had not yet been conducted. Prior to that, however, the Attorney General had expressed concern about the utility of an inquest in the absence of a proper criminal investigation. He had therefore invited the DPP to direct a further police investigation using his power under section 35(5)(a). The DPP had declined to do so, and this decision was then the subject of the judicial review proceedings. McFarland J declined to grant leave in respect of the challenge to the DPP's decision and this was the subject of an appeal to the Court of Appeal.

[17] In a characteristically detailed judgment given by McCloskey LJ on behalf of the court (Keegan LCJ, McCloskey LJ and Maguire LJ), the learned Lord Justice began by discussing the issue of 'legacy deaths' in Northern Ireland and how these were being dealt with by the LIB of the PSNI (including by way of prioritisation through the case sequencing model). It was recognised that, where the DPP requested information using his power under section 35(5)(a) of the 2002 Act, the resulting investigation would sit outside the case sequencing model (see para [10] of the judgment). In other words, such a case would be moved onto a separate, shorter list of pending investigations.

[18] The DPP's decision in the *Beatty* case (discussed at paras [11] and following of the judgment) was to the effect that, since the necessary investigations were currently within the LIB's "work queue" and the PSNI would be reviewing them in due course to see whether further investigative opportunities were available, a

section 35(5)(a) request would not be made. Any such request would "not generate a potential criminal investigation where no such potential otherwise exists". Further, the DPP did not consider it appropriate to make such a request simply in order to ensure the prioritisation of a particular case (ahead of others where no such request had been made).

[19] The Court of Appeal then turned to examine the broader statutory framework and the particular provision of section 35 which lay at the heart of the appeal. Before setting out section 35 in full, McCloskey LJ observed that it "must be considered as a whole" (see para [16] of the judgment). Having set out the terms of section 35, the judge then set out relevant provisions of the Explanatory Notes to the 2002 Act – emphasising in particular the statement in relation to the section 35(5) power that, "These provisions do not, however, constitute a power for the Director to supervise the conduct of investigations by the police" – albeit the court ultimately found no particular assistance in the Explanatory Notes.

[20] The Court of Appeal went on to construe section 35(5)(a) in paras [21] to [38] of its judgment, with the key portions for present purposes being found at paras [26]-[36]. At paras [27]-[28] the following analysis is found:

> "[27] Via the foregoing route and bearing in mind the context which it establishes one arrives at the provision lying at the heart of these proceedings, namely section 35(5)(a) of the Justice Act. As already noted, the second part of this subsection – (b) – does not arise in these proceedings. Section 35(5) extends the theme, already identifiable, of the Chief Constable/Police Service being obliged to comply with certain requirements of the DPP. In this instance, the obligation begins with a requirement to "ascertain and give …". This clearly denotes the two fold obligation of investigating and reporting the fruits of the investigation to the DPP.
>
> [28] The request which the DPP is empowered to make of the Chief Constable/Police Service must relate to "… any matter appearing to the Director **to need investigation** on the ground that it may involve an offence committed against the law of Northern Ireland …" [emphasis added]. I consider that this provision contemplates the phenomenon, readily belonging to the real world, that the DPP may come into possession of material – of whatever kind, ranging from bare allegations to physical evidence – raising the question of whether an offence has been committed. Such material could emanate from, for example, a public representative, a concerned citizen, a person claiming to be a victim of crime, a

> criminal justice agency or any of the non-statutory agencies who are active in the criminal justice sphere. If this material contains indications of the possible commission of an offence, the DPP must decide whether it needs investigation. This would entail the exercise of a discretion of self-evidently extensive scope."
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> [bold and underlined emphasis in original]

[21] The court addressed the purpose of the section 35(5)(a) power at para [30] of its judgment:

> "[30] Developing the analysis, we consider the following to be clear. The legislature, in enacting section 35(5)(a), has made provision for the possibility that the Chief Constable/Police Service, for whatever reason, may not have identified a particular occurrence or chain of events as requiring the investigation of possible offending or may have consciously decided that an investigation is not indicated. While there might possibly be other scenarios, these two, realistically, are the most likely that were in the contemplation of the legislature. Parliament has provided that in such circumstances a further layer of oversight serving to promote the public interest in the identification, prosecution and conviction of offenders is appropriate. The good sense of a provision of this kind is beyond dispute. Furthermore, it not only promotes the aforementioned public interest but also enhances the accountability of the Chief Constable/Police Service and fortifies the protection and wellbeing of all members of society."

[22] In light of this analysis, the court considered that – in addition to the more usual cases where the DPP, having received a police investigation file, requested further specific and supplementary investigative steps – section 35(5)(a) also addressed cases where the PSNI either had "no awareness or knowledge of the possible commission of an offence or, alternatively, have made a conscious decision not to initiate or continue an investigation which the DPP considers questionable": see para [31] of the judgment.

[23] The remaining question for the court was whether the relevant statutory power extended to a further scenario, namely where the DPP simply wished the PSNI to prioritise an investigation. This discussion is of particular relevance in the present case. The question was answered by the Court of Appeal at paras [32] to [34] of its judgment, in the following terms:

"[32] The statutory language does not expressly accommodate this possibility. However, the whole of the statutory regime and its full context, together with the separate statutory regime regulating the Chief Constable/Police Service, must be considered. Approached in this way, the feature of the statutory arrangements which stands out is that highlighted above, namely the hierarchical nature of the relationship. Furthermore, section 35(5)(a) must be construed in a manner which furthers the legislative intention already identified namely the public interest in the investigation, prosecution and identification of offenders. The Chief Constable/Police Service is of course an independent public authority: but its independence is not absolute, given the assessment in paras [22]–[31] above. This analysis impels to supplying a positive answer to the question posed in para [31] above.

[33] However, we consider such a power to be of demonstrably limited scope. In our estimation the legislature must have intended that, in general, the Chief Constable/Police Service would exercise autonomous control over its modus operandi, its budgetary and policy priorities and allocations, its formulation of criteria in identifying the most pressing cases in its workload and its design of a mechanism for the periodic review of the application of such criteria, all in a context where the particular case under scrutiny has been identified as worthy of investigation, further investigation, review or re-investigation. However, we consider that limited DPP intrusion and superintendence were also contemplated, given our analysis above.

[34] Our second main conclusion is the following. We consider it clear that section 35(5)(a) was intended by the legislature to operate in a highly restricted way in a case already identified by the Chief Constable/Police Service as requiring investigation, further investigation, review or re-investigation as the case may be and awaiting completion of an investigation report to the DPP, absent some exceptional circumstance. Thus, this aspect of the DPP's discretionary power is of decidedly narrow compass. The effect of this analysis is that it will rarely be appropriate for the DPP to exercise this power in a case of the present kind. However, we decline to exclude the possibility that such a case might materialise. We consider

> that this approach is harmonious with our assessment of the relevant statutory provisions above, in particular our analysis of the statutory relationship between the two agencies."

[24] One might summarise the above as follows. The primary function of section 35(5)(a) is one of the DPP giving further directions to the PSNI where a police file had been received but the PPS had identified gaps which it wished to be filled or, more rarely, where the PPS became aware of matters requiring investigation in circumstances where the PSNI was either unaware of a potential offence or relevant circumstances (and therefore was not intending to investigate them) or where the PSNI had (wrongly, in the PPS's view) decided not to investigate. The breadth of the power extends to circumstances where the PSNI is already intending to investigate, such that its use is simply because the DPP wishes to take steps to prioritise that investigation; but it would rarely be appropriate for the DPP to use the power in this way given the basic position that the Chief Constable is responsible for allocating investigative resources. Something exceptional would be required for the DPP to do so. The nub of the current dispute is whether, and if so how, that arises in the present case. In the circumstances of the *Beatty* case, although the section 35(5) power could be used to seek to prioritise an investigation, there was nothing which would warrant the DPP using it in that way and, indeed, the contention that it was unlawful for him not to have done so was not arguable (see paras [36] and [39] of the judgment).

***Alleged misdirection in law***

[25] The applicant emphasises the Court of Appeal's reference in *Beatty* to the need to read section 35 of the 2002 Act as a whole. Since a coroner who considers that an offence may have been committed is required to make a report to the DPP and to do so "as soon as practicable", the applicant reads into the DPP's powers an implied obligation to take some "positive action" on foot of such a report. Such positive action must, on the applicant's case, consist of a substantive decision in relation to prosecution or no prosecution or, failing that, a section 35(5)(a) request for further investigation in order to put the DPP into a position to make such a decision.

[26] The respondent does not dissent from the proposition that, once a coronial report under section 35(3) has been provided, he is required to do something. In his submission, however, that is no more than giving careful consideration to the content of the report. What, if anything, he decides to do thereafter is, the respondent submits, a matter of discretion. The applicant says mere consideration of the coroner's report is not "meaningful action", since it achieves "absolutely nothing". Only an obligation to do more than that – by way of substantive prosecutorial decision or a requirement of further PSNI investigation – would properly reflect the statutory intention, he submits.

[27] I do not accept the construction of section 35 which is advanced by the applicant, nor the additional implied duty upon the DPP which it would entail. It seems to me to read much too much into the passing observation made by McCloskey LJ in para [16] of the *Beatty* judgment that section 35 "must be considered as a whole". That is undoubtedly correct, as indeed it is in relation to most if not all statutory provisions which fall for interpretation by courts of law. McCloskey LJ also emphasised, however, that the "discrete provision" which lay at the heart of that case was found within section 35. He went on to analyse the relevant sub-section separately and did so in a lengthy passage of the judgment (discussed above) which was quite removed from the observation upon which so much of the applicant's case has been built. Perhaps most importantly, the submission that a coronial referral under section 35(3) in some way ties the hands of the DPP to one of three exclusive outcomes – a decision to prosecute, a decision not to prosecute or a statutory direction for further investigation – cuts against the Court of Appeal's explanation of the intensely discretionary nature of the DPP's functions and the basic division of responsibilities between him and the Chief Constable.

[28] When a coronial report is provided under section 35(3), the DPP is obliged to consider it and determine what, if any, action he should then take. The threshold for the making of such a report (namely that the circumstances "appear" to the coroner to disclose that an offence "may" have been committed) is not a particularly elevated one. Consistent with the DPP's functions more generally, when he receives this information he then has to exercise prosecutorial discretion as to how to proceed. I see no reason why, as a matter of statutory construction, information coming to the DPP from a coroner under section 35(3) requires to be treated differently from other information which comes into his possession relevant to the possible commission of a criminal offence. Parliament could have imposed additional obligations upon him in those circumstances but, had it wished to have done so, could (and would, in my view) have expressed this in clear terms. Although the coroner must act with expedition – perhaps in case the PSNI or PPS may wish to invite the coroner to adjourn an ongoing inquest where such a report is made, pending further investigation or criminal proceedings – I do not consider that the terms of section 35(3) constrain the exercise of the DPP's discretion under section 35(5).

[29] Accordingly, where the DPP receives such a report from a coroner, he is not necessarily required simply to issue a substantive decision at that point *or* direct further investigation. Where, as here, he is satisfied that further investigation would be appropriate but is aware that the PSNI is intending (in due course) to undertake that investigation, it is open to him to await the outcome of that investigation. He has a discretion to issue a section 35(5)(a) request, in order to prioritise that investigation, but is not obliged to do so as a matter of general practice nor by way of an implied duty to be found within section 35 of the 2002 Act. I do not consider that the respondent erred in law as to the meaning or effect of section 35 in this case. His actions will, of course, still be subject to the

supervisory jurisdiction of the High Court on normal judicial review grounds, albeit recognising the reduced intensity of review applicable to decisions of an independent prosecutorial authority (see, for example, *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756, at paras [30]-[31]).

***The Padfield issue***

[30] An interesting feature of this case is the fact that, notwithstanding that the PPS has not formally exercised the Director's section 35(5)(a) power to require the Chief Constable to ascertain and provide information, it has nonetheless identified "priority lines of enquiry" which it is asking the PSNI to examine when it comes to review the Thompson case. In some of the respondent's correspondence, this is referred to as the PPS having "already issued directions on issues to be investigated." Elsewhere, it is noted that the PPS has "provided the PSNI with directions in respect of the areas it considers police could investigate to assist with its decision on whether or not to prosecute." Some further details about this correspondence have been provided in Mr Agnew's second affidavit. In light of this interaction, the respondent suggested in a response to pre-action correspondence that the issue in this case was "largely academic" because what the applicant was requesting had "in effect, already been done."

[31] Insofar as the respondent maintains that the case is academic, I do not accept that submission. The truth is that a formal requirement under section 35(5)(a) of the 2002 Act will serve to prioritise further investigation of the applicant's mother's case. This might be thought to arise because, once a requirement has been imposed upon the Chief Constable to ascertain information and provide it to the DPP under section 35, there is an implied obligation to do so within a reasonable period of time. In any event, whether or not that is correct, and whatever arguments there may be about what does or does not constitute a reasonable period in this context, it is accepted as a matter of fact that a section 35(5)(a) requirement will result in an outstanding police legacy investigation being 'moved up the queue.' As Mr McGleenan explained in the course of submissions, it is perhaps more accurate to say that a PPS request under section 35(5) moves a case into a different queue; that is to say, it is then dealt with as part of a separate cohort of cases within the LIB caseload to which the case sequencing model does not apply (see also para [10] of the *Beatty* judgment). The PPS was aware of this at all material times.

[32] It was always the case, therefore, that the DPP had the power – by the exercise of his section 35(5)(a) power – to accord at least some additional level of priority to a particular investigation in respect of which he required the provision of information. (Whether or not that would have resulted in any meaningful expedition given the timescales about which the applicant is concerned arising from the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the Legacy Act") is another matter. I have insufficient information about this to form any firm view although I suspect that, even if a section 35(5) request were to have been made, this may not have given rise to the speedy progress for which the applicant

might hope, given the other cases already being dealt with by LIB on foot of such a request.) In any event, the outworking of the approach the DPP has adopted in the present case, intentionally so, is *not* to confer *any* additional priority on the outstanding investigation into Mrs Thompson's death. That is the real issue in practical dispute between the parties; and I am not satisfied that it is devoid of practical impact.

[33] The applicant also asserts, however, that the identification of "priority lines of enquiry" for the police without formally requiring these to be addressed under section 35(5)(a) is unlawful as a "deliberate and conscious attempt to circumvent, rather than comply with, the legislation". In other words, given that the DPP wants further investigative steps to be undertaken, it is argued to be unlawful for him to simply ask the PSNI to do so without exercising his specific statutory power under section 35 in this regard. It is common case that the exercise of any discretion conferred upon the DPP must be consistent with the promotion of the statutory purpose for which it has been given (see the *Corner House Research* case (supra), at para [32]).

[34] Although this submission is superficially attractive, I cannot accept it for a number of reasons. First, it runs contrary to the clear guidance given by the Court of Appeal in *Beatty* that the DPP should generally not use his section 35(5)(a) power where the PSNI is already intending to conduct a further review or investigation. In such circumstances, the use of the power is addressed to re-prioritising police resources rather than merely ensuring that the DPP receives information he requires. Second, it also runs contrary to the general approach, endorsed by the Court of Appeal, that prioritisation and allocation of resources should be left to the Chief Constable. Third, the purpose of the relevant provisions of the 2002 Act are to ensure that matters requiring investigation are investigated and that the DPP receives information he requires. It is not primarily concerned with the speed or prioritisation of investigations, or as between pending investigations. Fourth, and relatedly, the key concern in this case arises because of a combination of the number of outstanding legacy cases, the operation of the LIB case sequencing model, and the concerns about the viability of certain prosecutions after the coming into force of the relevant provisions of the Legacy Act. However, these are all matters totally extraneous to the 2002 Act, and which were unknown at the time of its enactment. Fifth, and finally, the 2002 Act provides the DPP with a broad power which plainly encompasses the giving of advice to the police, and cooperation or collaboration with them, outside the bounds of the section 35(5)(a) power, which could comfortably permit the type of exercise which the PPS has undertaken here. This is found in the general power of competence contained in section 30A(2) of the 2002 Act (even assuming that the identification of further lines of enquiry does not fall within the duty to give advice under section 31(5) of the 2002 Act). Section 35(5)(a) is not an exclusive statutory route by which such communication is permitted.

[35] It is well known that the LIB has finite resources with which to address a very significant caseload. All of these cases involve a death and could therefore be

said to be of the utmost gravity. The PPS has a general policy approach that it should leave the question of prioritisation of LIB investigative casework to the police. That appears to me to be a lawful approach to adopt as a base position, provided of course that exceptions can be made in truly exceptional cases. The DPP's general approach in this regard is consistent with what was said in the House of Lords' decision in *Hill v Chief Constable of West Yorkshire* [1989] AC 53, at 59E-F. It is for a chief officer of police to decide how his or her available resources should be deployed. That is subject to judicial review on very limited grounds. As the Court of Appeal held in *Beatty*, it is also subject to superintendence by the DPP because the statutory scheme is such as to permit him to direct the PSNI to prioritise a particular investigation (see para [31] of the judgment). However, adopting a 'hands-off' approach to this function as a general position is plainly consistent with the basic allocation of responsibilities as between criminal justice agencies. I would be content to adopt the respondent's description of his power to use a section 35(5)(a) direction for the purpose of bringing about a re-prioritisation of police resources as a "residual power" to be exercised in exceptional circumstances.

[36] In light of the above, I do not consider that the respondent was acting contrary to the statutory purpose of the 2002 Act by indicating to the PSNI the issues he would like to be addressed when the Thompson case was reached for further investigation or review but in declining to impose a requirement upon them to do so at this point through the use of a section 35(5)(a) request.

***The exceptionality issue***

[37] In the alternative, the applicant submits that his mother's case represents one of those "exceptional circumstances" envisaged by the Court in *Beatty* where, exceptionally, the DPP should exercise his power to require investigation of a matter which the PSNI already intend to investigate at some further point. This seems to me to be the nub of this case. In this regard, the applicant places heavy reliance upon a letter from the PPS which was quoted in the *Beatty* judgment referred to above (see para [12] of that judgment). In the course of that letter, it was noted that the DPP had a discretion, rather than a duty, to require the PSNI to undertake investigation. It went on to note that "examples of where it has been deemed appropriate to exercise this discretion include… where a suspected offence is identified during an inquest and reported to the DPP by a Coroner." On this basis, the applicant contends that the respondent has previously accepted that it would be an appropriate exercise of the DPP's discretion to refer the matter to the PSNI for (further) investigation in circumstances such as the present.

[38] I do not accept that reliance upon the quoted letter is a proper basis for a finding that it was unlawful for the PPS not to formally refer the case to the PSNI for investigation at this point. The respondent contends that the letter referred to in the *Beatty* case was providing examples of situations in which it *may* be appropriate to make a section 35(5)(a) request and, moreover, that all of the examples cited involved situations in which the PSNI was not already aware of the potential

offending. There is some support for this reading of the letter in its text, in that it refers to cases "where *additional* offences have been revealed in the course of a criminal trial and require investigation, or where a suspected offence is *identified* during an inquest and reported to the DPP by a Coroner" [italicised emphasis added]. In any event, the letter was simply setting out examples where it had previously been "deemed appropriate" to exercise the discretion to make a section 35(5) request; not describing circumstances where this was mandatory.

[39] The applicant relied upon a number of additional features of this case, identified in the coroner's findings, on the basis of which he further contended that this case was exceptional. These include the lack of an honest belief on the part of Soldier D that he was under fire at the material time; that his actions were plainly contrary to the relevant guidance in relation to the deployment of lethal force; and that, at the inquest, he presented a contrived and self-serving account. These are certainly matters which the respondent could take into account, and which it has been confirmed upon affidavit that he did take into account, having carefully considered the substance of the detailed findings provided to him by the coroner. The question for this court, however, is whether, in light of these factors, it has been shown to be irrational for the respondent not to have taken the step of directing an investigation when one was pending in due course. Although it would have been open to the DPP to have done so, I do not consider that it was irrational for him to consider that this case was not exceptional to such a degree that he ought to.

[40] In para [34] of the judgment in *Beatty*, upon which the respondent heavily relied, the Court of Appeal was careful to express itself in terms which emphasised the "highly restricted" circumstances in which such a direction would be appropriate; the "decidedly narrow compass" of this aspect of the DPP's discretionary power; and the rarity with which it would be appropriate for the DPP to bring about a re-prioritisation of police resources in that way. The Court of Appeal said it would "decline to exclude the possibility that such a case might materialise" but obviously thought it would be extremely rare. If a case where a coroner had referred the matter to the DPP was a "paradigm" of such an exceptional case (as the applicant submits) the Court of Appeal could readily have said so. In my view, McCloskey LJ was likely considering a case or circumstance of greater rarity than that. As the PPS submitted, it is now not unusual in legacy cases for a section 35(3) referral to be made by a coroner in a legacy inquest. Most, if not all such referrals, involve deaths caused by state actors.

[41] The respondent's affidavit evidence describes a range of different types of ways in which cases are referred to the PPS, either with an invitation for the DPP to direct further investigation or in circumstances which warrant consideration of the exercise of that power. These referrals may come from aggrieved families; from coroners; or from the Attorney General. There have been 20 such requests in recent times from the Office of the Attorney General. The respondent's replying affidavit also lists seven legacy inquests in which section 35(3) reports were provided to the DPP by the relevant coroner. Even allowing for the fact that some of these arose

only quite recently, in only one such case was a section 35(5)(a) request made by the DPP to the PSNI. In that case, relating to the death of Daniel Carson, the PSNI had confirmed that the death was not already within its LIB case sequencing model; that is to say, the PSNI was not then itself planning on returning to the investigation. The affidavit evidence shows that the DPP is prepared, in certain circumstances, to make section 35(5)(a) requests; although generally not in response to referrals or coroners' reports where the matter is already due for police review or re-investigation in due course.

[42] As already noted, the LIB's caseload relates to many hundreds of deaths. Many will involve families just as aggrieved at the loss of their loved one as is the applicant. Sadly, several of the factors relied upon by the applicant are not properly to be viewed as exceptional in this context. Moreover, any view about the exceptionality of this case as compared with others within the LIB caseload can only properly be considered with some sound evidential basis for comparison (as recognised by the Court of Appeal at para [36] of its judgment in *Beatty*). Viewed in this way, I am not persuaded that it was irrational for the respondent not to view the present case as exceptional *or* not to require further investigation using his section 35(5)(a) power. The key issue is the coroner's referral and its terms, which is the main distinguishing feature from the *Beatty* case. Although these arguably could have provided a basis for the DPP to decide that he wanted the Thompson case to be prioritised, it was not irrational for him to determine that this was insufficient for him to exercise his section 35(5) power in the highly restricted way envisaged by the Court of Appeal in para [34] of its judgment.

[43] It is also relevant to note that the PSNI would have been aware of the coroner's referral to the DPP and of her findings. Since the case sequencing model is not static and is constantly kept under review, it was (and is) open to the police to modify the scoring (and therefore the priority) given to this case if that is appropriate in light of the coroner's findings.

***Conclusion***

[44] I can understand the applicant's concerns as to urgency in light of the provisions of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023, which also featured in the course of submissions in this case. Assuming the Act withstands the outcome of the ongoing legal challenges to it, any criminal investigation undertaken by the police which remains extant on 1 May 2024 will be ceased and will then only be taken forward by the new Independent Commission for Reconciliation and Information Recovery: see section 38 of that Act. The possibility is also opened up of securing immunity from prosecution for serious offences in certain circumstances (see section 19), although prosecution for offences such as murder and manslaughter will remain possible in the absence of the grant of such immunity (see section 40). There is a predictable desire on the part of the applicant that any criminal justice process relating to the death of his mother is progressed under the present arrangements, rather under than the new

arrangements with all of the uncertainty that may bring. However, many other bereaved families find themselves in the same position. It is a regrettable feature of the current situation that such families may find or consider themselves to be in some form of competitive scramble for priority.

[45] Nonetheless, for the reasons given above, I have not found any of the applicant's grounds of judicial review in relation to the DPP's decision made out. I therefore dismiss the application.