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(subject to editorial corrections)**

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Delivered: 28/03/2024

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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

**IN THE MATTER OF APPLICATION BY TERESA JORDAN
FOR JUDICIAL REVIEW**

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

**Karen Quinlivan KC and Lara Smyth (instructed by Madden & Finucane, Solicitors) for
the applicant**

**Tony McGleenan KC and Philip Henry KC (instructed by the High Court and
International Section of the PPS) for the respondent**

**Laura Curran (instructed by the Crown Solicitor's Office) for the PSNI as an
interested party**

SCOFFIELD J

Introduction

[1] The applicant, Teresa Jordan, is the mother of Pearse Jordan who was shot and killed on 25 November 1992 on the Falls Road, Belfast by a police officer known as Sergeant A. There have been a number of inquests opened into his death but the most recent and concluded inquest was held in 2016 before Horner J, sitting as a coroner. In his inquest verdict ([2016] NICoroner 1) he found that, due to the passage of time, he was unable to reach a concluded view as to whether or not the use of lethal force was justified. However, he stated that, insofar as the onus fell on the Police Service of Northern Ireland ("PSNI") to provide a satisfactory and convincing explanation to the inquest for the use of lethal force, it had failed to do so.

[2] Horner J also made findings about two police officers who had given evidence to the inquest, Officers M and Q. He concluded that one or both of these officers had edited the original Headquarters Mobile Support Unit ("HMSU")

logbook made on 25 November 1992, the day upon which Pearse Jordan was shot, by removing all entries made before 5.03 pm. He also concluded that the officers had been untruthful when they gave evidence during the inquest. Having taken the view that there was a basis for concluding that the two officers may have committed offences, namely that they may have sought to pervert the course of justice and/or may have committed perjury, in a further written judgment of 5 December 2016 ([2016] NICoroner 3), the judge gave notice of his intention to report Officers M and Q to the respondent, the Director of Public Prosecutions (DPP) ("the Director"). This was not formally done under section 35(3) of the Justice (Northern Ireland) Act 2002 ("the 2002 Act") given the judge's view of the limits of that provision. Nonetheless, the coroner referred the matter to the DPP.

[3] By way of these proceedings, the applicant is challenging the respondent's failure to make a formal decision as to the prosecution of Officers M and Q. The relevant 'decision' was communicated by way of correspondence dated 11 October 2023. The applicant has characterised it as a non-decision, since the DPP indicated that "there is no decision as to prosecution to take" in respect of the officers because the police "did not consider that there was evidence of an offence and there is no individual reported to whom the test for prosecution could be applied." The applicant challenges this decision on a range of grounds, including that the DPP erred in law; acted in breach of the Code for Prosecutors; improperly delegated his functions or fettered his discretion; and acted in breach of her rights under article 2 ECHR. She has described the "core" of the case as being the alleged improper and unlawful delegation of the respondent's statutory functions to the PSNI.

[4] Ms Quinlivan KC appeared for the applicant with Ms Smyth; and Mr McGleenan KC appeared for the Director with Mr Henry KC. Ms Curran appeared for the PSNI as an interested party, essentially maintaining a watching brief but available to assist the court. I am grateful to all counsel for their helpful and written oral submissions.

[5] I also record that, although the application was initially case-managed by a Divisional Court, both parties subsequently agreed that it did not constitute a criminal cause or matter for the purposes of RCJ Order 53, rule 2 and could be dealt with by a single judge. The Lady Chief Justice then assigned the case to me. I granted leave on the papers in relation to the main grounds of challenge on foot of an amended Order 53 statement provided at that stage in order to emphasise that the applicant was not challenging the substance of the DPP's 'decision' but, rather, the practical allocation of the decision-making function in this case.

Factual background

[6] As noted above, Horner J considered that there was a basis for concluding that the two officers concerned may have committed serious offences (see, in particular, paras 144 and 155 of his findings but, more generally, paras 142-155). The applicant contends that these findings are particularly significant in that, had the

HMSU log book (representing a contemporaneous record of events leading up to the shooting of her son) been available in its entirety, it may have assisted the coroner in reaching a concluded view as to the justification or otherwise for the use of lethal force by Sergeant A. She also believes that the conduct of the officers in the course of the inquest adversely impacted the coroner's ability to reach the truth and was, she further believes, designed to protect Sergeant A. As recorded above, the coroner determined that it was appropriate to report the two officers to the DPP in late 2016.

[7] Over the period of the following eight years, the applicant's solicitors engaged in extensive correspondence with the respondent on her behalf, which has been described in an affidavit sworn by her solicitor, Mr Shiels, and in the affidavit evidence filed on behalf of the respondent from Mr Martin Hardy, an Assistant Director of Public Prosecutions. A very brief summary of the relevant activity during that period is set out below:

- (a) After the matter had been referred to the DPP by the coroner, the DPP asked the PSNI and the Police Ombudsman for Northern Ireland ("PONI") to jointly investigate. The perjury issue was to be investigated by the PSNI and the allegation of evidence tampering was to be investigated by PONI. PONI advised that it would defer any misconduct investigation until the completion of the PSNI investigation into the perjury issue.
- (b) In December 2017 there was an initial PSNI report, prepared by D/Supt Murphy, which outlined his review of the material. No suspects or criminal offending was identified.
- (c) The PSNI then provided a file to the Public Prosecution Service ("PPS") in July 2019, with a further file received in September 2019. The PSNI again concluded that there was insufficient evidence to suspect that a criminal offence had been committed.
- (d) The DPP then instructed counsel to assist with taking the matter forward. The PPS asked the PSNI to obtain additional evidence.
- (e) In the meantime, consideration of the matter by PONI awaited completion of the PSNI enquiries. By January 2020, the PSNI report had been provided to PONI which was progressing its consideration of the matter.
- (f) A response was received by the PPS from PONI in September 2020. This indicated that PONI considered that no further action was required on their part as it did not appear that either officer may have committed a criminal or misconduct offence. (It is entirely unclear what investigation PONI may have undertaken, over and above consideration of the aforementioned police reports, in reaching this conclusion.)

- (g) Thereafter, there was further engagement with the police on a number of additional issues. PSNI was asked to provide further material and senior counsel was also instructed by the PPS in August 2021. Senior counsel also provided some directions in relation to requesting further material from police. Additional information was also sought from the Coroners' Service.
- (h) A significant update was provided to the applicant's solicitors by way of correspondence dated 6 October 2022. It disclosed that the PSNI had submitted a report to the Director but that no individual was reported for any decision as to prosecution. PONI received a copy of the PSNI report "and subsequently confirmed that they did not intend to commence any investigation." There were therefore no decisions as to prosecutions outstanding in respect of the response to the referral from PSNI and PONI. However, at that point the PPS had asked that police further address certain matters which had been addressed in their initial report. A further report from police was therefore awaited.
- (i) The PSNI provided a further report in May 2023. It then provided a further update in September 2023. At all times it (the PSNI) maintained its position that there was insufficient evidence to suspect that an offence had been committed and that it was therefore not going to report anyone to the PPS.
- (j) The PPS also had a further meeting with PONI in September 2023.
- (k) The decision letter was issued on 11 October 2023 (see below).

[8] In the interim, Parliament passed the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the Legacy Act"). This has given rise to additional concern on the part of the applicant since section 41 of that Act provides that no criminal enforcement action may be taken against any person in respect of a 'Troubles-related' offence, unless it is a 'serious' or 'connected' Troubles-related offence for the purposes of the Act. In respect of such offences, only those criminal cases in which a decision to prosecute has issued before section 41 comes into force on 1 May 2024 are permitted to continue. (I queried whether any potential perjury offence occurring in 2016 would constitute conduct "forming part of the Troubles" with the meaning of section 1(5)(a)(ii) of the Act. It seems likely, however, that any potential offence of perverting the course of justice committed by editing the HMSU logbook in 1992 would be a Troubles-related offence to which section 41 applies. For this reason, this application has been listed and determined with a degree of urgency. It is an open question whether such an offence would also be a 'connected' offence, although I proceed for the moment on the basis that it would not. This appears to be the basis upon which Colton J proceeded in his decision relating to this applicant in his recent judgment in *Re Dillon's and Others' Applications* [2024] NIKB 11. Subject to the relief granted in that judgment, which is under appeal, the Legacy Act intends there to be a significant change in the legal landscape as regards

Troubles-related offences – whether serious, connected or in neither of those categories – on 1 May 2024).

[9] Pre-action correspondence was sent to the PPS on 4 September 2023, seeking confirmation that the alleged offences in respect of which Officers M and Q were being investigated should not be deemed to fall within the ambit of the Legacy Act. The applicant also sought confirmation that a decision in respect of the prosecution of Officers M and Q would issue forthwith and, in any event, in advance of the relevant provisions of the legislation coming into force. On 5 September 2023 the PPS responded to indicate that a response would be provided “as soon as possible and in accordance with the time prescribed under the [Judicial Review] Practice Direction”.

[10] On 13 September 2023 the applicant issued proceedings against the PPS challenging the delay in reaching a decision as to the prosecution of Officers M and Q. In the course of the same application, the applicant challenged the legality and Convention compatibility of various provisions of the Legacy Act. On 9 October 2023 Colton J issued a Case Management Directions Order identifying some 20 cases challenging provisions of the Legacy which Act and granting leave to apply for judicial review in some of them. In respect of the applicant’s challenge, the court granted leave solely in relation to her challenges (against the Secretary of State for Northern Ireland) focused upon sections 8 and 41 of the Act. Her application in relation to the DPP was ordered to be managed separately and hived off from the challenges to the Legacy Act. The judge also noted that, in the event that a decision was made in the interim in relation to the prosecution of Officers M and Q, this may have an impact upon her challenge in respect of which leave had been granted. Obviously, no decision to prosecute those officers has been made. The ‘delay’ aspect of the applicant’s challenge to the DPP has also now been overtaken by the decision which is under challenge in these proceedings.

[11] On 11 October 2023, a response to the applicant’s pre-action correspondence was received from the PPS. As indicated above, this response indicated that there was no prosecution decision to be taken in respect of the officers. The relevant portions of that correspondence, which sets out the decision impugned in these proceedings, is as follows:

“As I explained in my letter dated 6 October 2022, no individual was reported to PPS for a decision as to prosecution. The matter had been referred to PSNI by the former Director of Public Prosecutions and PSNI submitted a report in July 2019. That report concluded that there was no evidence of a crime having been committed and advised that police did not therefore intend to investigate the matter further.

Thereafter there was engagement between PPS and PSNI as a result of which further enquiries were undertaken...

As a result of these enquiries an additional report was submitted by PSNI in May 2023 and this report was discussed in consultation with PSNI. PSNI recently confirmed that no further investigative action is currently being undertaken in this case.

In the circumstances as outlined above there is no decision as to prosecution for PPS to take. Police did not consider that there was evidence of an offence and there is no individual reported to whom the test for prosecution could be applied.

At all times the PPS has given careful consideration to whether the PSNI should be required to provide further information to enable the Director to exercise his functions. It was as part of that process that the additional enquiries referred to above were requested and undertaken. It is not for the PPS to direct police investigations, but the PPS has at all times sought to satisfy itself that the request for information has been satisfactorily addressed. The PPS has been assisted in this by advice from Senior Counsel. Having carefully considered all of the relevant facts and circumstances, including advice from Senior Counsel, we have now determined that no further information will be sought from place pursuant to the July 2019 request."

[12] On 18 October 2023, further pre-action correspondence was sent on the applicant's behalf in respect of this decision. A further response to pre-action correspondence was received from the respondent on 24 November 2023, in which the PPS maintained its position. This correspondence notes that the police "concluded that there was insufficient evidence to justify reporting either former officer to the PPS." The letter also contains the following passages:

"The Applicant's letter submits, in terms, that the PPS should have made a decision to prosecute because the Coroner made a section 35(3) referral. Again, there is no support for this in statute or elsewhere.

The Applicant's PAP letter alleges the PPS delegated its decision-making process to the PSNI. That is also incorrect. The PSNI investigates and the PPS makes prosecutorial decisions and conduct any subsequent

criminal proceedings. There is no evidential basis for alleging that the PPS delegated its decision-making process to the police in this case.”

[13] The respondent’s evidence in these proceedings is contained in an affidavit from Mr Hardy sworn on 5 March 2024. Mr Hardy sets out the chronology of steps taken by the PPS in this case. He summarises the circumstances of the case in the following manner:

“However, in summary, the Director of Public Prosecutions (DPP) received a referral from Horner J (as he then was), pursuant to s.35(3) of the Justice (Northern Ireland) Act, who was sitting as a Coroner in the inquest into the death of Pearse Jordan. The Coroner was satisfied that the s.35(3) threshold was met in respect of two officers, M and Q, who he felt may have committed two possible criminal offences. The offences were perverting the course of justice, for editing HMSU records/logs, and perjury, for giving untruthful evidence on oath during the inquest. The DPP at the time, Mr Barra McGrory KC, asked the PSNI to investigate. That resulted in the provision of a police report in 2019. It stated that there was insufficient evidence to suspect a criminal offence having been committed. No suspects were interviewed, no one had been charged and no suspect was being reported to the PPS for a prosecution/no prosecution decision to be made. I instructed junior counsel who is experienced in serious criminal cases to assist me. Thereafter the PPS engaged with the PSNI and asked for further information to be obtained, including both the evidence given during the latest inquest and during the related PII proceedings. Junior counsel and then senior counsel were instructed to assist, and the Deputy DPP raised specific queries with the PSNI after considering their reports. The PSNI was asked to submit an addendum in respect of these additional requests, which it did in May 2023 and then again in September 2023. The PSNI reached the same conclusion as before, namely that there was insufficient evidence to suspect an offence had been committed and it was not therefore going to report any suspects to the PPS, which would prompt a PPS decision on whether to prosecute.”

[14] When this application was originally brought, the applicant suspected that the case had fallen within the scope of a PPS pilot project, which was introduced in late November 2023, which provided that in certain categories of cases the PSNI was no

longer required to submit an investigation file to the PPS where it (the PSNI) had decided to make a recommendation not to prosecute in respect of each of the suspects in the case. The affidavit evidence filed by the respondent makes clear that the present case fell outside that pilot project, not only due to the date of its commencement but also because the pilot applies only to less serious offences (which would not have included the potential offences identified by Horner J). As a result of this, the applicant is not seeking to make any point about that pilot project.

[15] However, she nonetheless contends that it appears from the respondent's evidence that, in substance, the PPS treats cases that are referred to it under section 35(3) of the 2002 Act in the same manner as it does those that fall within the scope of the pilot project referred to above. This is said to be as a result of the application of a 'Memorandum of Understanding between the PSNI and the Director of Public Prosecutions' ("the Memorandum of Understanding"). In particular, the applicant asserts that it is clear that the Memorandum of Understanding confers upon the PSNI the ultimate responsibility of determining whether "it is necessary to forward a file of evidence" for the DPP's consideration. If the PSNI considers that "no such file is required, a closing report will be compiled for the information of the Director." In those circumstances, it appears that the DPP then treats the matter as being one in which there is no decision as to prosecution to take (which is the approach which was adopted in this case).

[16] The Memorandum of Understanding is between the PSNI (Legacy and Justice Department) and the DPP. Rather than dealing with cases referred to the DPP by a coroner under section 35(3) of the 2002 Act as the applicant's submissions suggested, it is designed to explain how the two agencies will interact in relation to requests for further information issued by or on behalf of the DPP under section 35(5) of that Act. It seems primarily designed to provide clarity as to which branch of the PSNI will be engaged; to deal with cases where a DPP request for investigation may straddle a number of different legacy cases; and to address prioritisation and case sequencing. The passage upon which the applicant relies is as follows:

"Investigators will engage with the Public Prosecution Service (PPS) as and when it is necessary to do so. As a minimum they will convene a consultation with the PPS at the conclusion of the investigative work to establish whether it is necessary to forward a file of evidence for their consideration. If no such file is required, a closing report will be compiled for the information of the Director."

[17] I should add that on 28 February 2024 Colton J gave judgment in *Re Dillon's and Others' Applications*, including this applicant's challenge. In relation to section 41 of the Legacy Act, it was held that this provision is incompatible with articles 2 and 3 ECHR, and specifically amounts to a breach of the applicant's rights under article 2 (see paras [208]-[209] of that judgment). As a result, Colton J made a declaration of

incompatibility pursuant to section 4 of the Human Rights Act 1998 that section 41 of the Legacy Act in relation to the prohibition of criminal enforcement action was incompatible with article 2 of the ECHR (see para [713](i)); and also declared that it was incompatible with article 2 of the Ireland/Northern Ireland Protocol (or Windsor Framework) so that, pursuant to section 7A of the EU (Withdrawal) Act 2018, section 41 of the Legacy Act should be disapplied (see para [713](ii)). That is the position as a matter of law as things stand at present; although Colton J's judgment is the subject of appeal by the government.

Relevant statutory provisions

[18] The Director's functions are principally set out in the 2002 Act. Section 35 of that Act is relevant and provides, under the heading 'Information for Director', as follows:

- “(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 –
 - (a) a copy of every complaint, deposition, examination, statement and recognisance connected with the charge, and
 - (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.
- (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—
 - (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
 - (b) information appearing to the Director to be necessary for the exercise of his functions.”

[19] More generally, the Director’s statutory functions in respect of the conduct of prosecutions are set out in section 31 of the 2002 Act, as follows:

- “(1) The Director must take over the conduct of all criminal proceedings which are instituted in Northern Ireland on behalf of any police force (whether by a member of that force or any other person).
- (2) The Director may institute, and have the conduct of, criminal proceedings in any other case where it appears appropriate for him to do so.
- (3) This section does not preclude any person other than the Director from—
 - (a) instituting any criminal proceedings, or
 - (b) conducting any criminal proceedings to which the Director’s duty to conduct proceedings does not apply.
- (4) The Director may at any stage take over the conduct of any criminal proceedings which are instituted in circumstances in which he is not under a duty to take over their conduct, other than any

proceedings of which the Director of the Serious Fraud Office has conduct.

- (5) The Director must give to police forces such advice as appears to him appropriate on matters relating to the prosecution of offences.”

[20] Section 42 of the 2002 Act expressly provides for the independence of the DPP and provides (at section 42(1)) that, “The functions of the Director shall be exercised by him independently of any other person”.

The Code for Prosecutors

[21] The applicant has also relied upon a number of statements in the PPS Code for Prosecutors (“the Code”). This too emphasises the independence of the Director at para 2.11. Para 2.12 also reminds readers that it is an offence, contrary to section 32A of the 2002 Act, for a person to seek to influence a prosecutor, with the intention of perverting the course of justice, in any decision as to whether to institute or continue criminal proceedings.

[22] The Code also explains the relationship between the DPP and PPS on the one hand and the PSNI, as investigator, on the other. Paras 3.1 to 3.3 bear repetition in this regard:

“3.1 Investigation is not the responsibility of the PPS. The PSNI is the principal investigative body which submits files to the PPS. It is the responsibility of the investigator to investigate an allegation that a criminal offence has been committed, to gather evidence in relation to that allegation and to present that evidence to the prosecutor. The PPS will take all appropriate steps to ensure that all cases submitted for its consideration are properly investigated.

3.2 Investigators may submit files in one of two ways:

- (i) by charging a person, or
- (ii) by submitting a report on a person.

3.3 The PPS assumes full responsibility for tracking the progress of the case from the point of charge or receipt of a report from the investigator. The PPS may request further investigation where it considers that additional evidence or information is required in order to take a fully informed prosecution decision.”

Summary of parties' positions

[23] The applicant's primary complaint is that the respondent has delegated his statutory functions to the PSNI which, she contends, "drives a coach and horses" through the clear statutory dichotomy between the roles of the PSNI and the PPS. She relies heavily upon the Court of Appeal's description of the separate functions of the DPP and Chief Constable in *Re Beatty's application* [2022] NICA 13. She contends that it is wrong in any case for the police to have the final say on whether there should be a prosecution but, all the more so, (a) where the case has been referred to the DPP by a coroner under section 35 of the 2002 Act and/or (b) where the case involves potential prosecution of police officers. The result of the approach adopted by the DPP in this case is such that, in Ms Quinlivan's phrase, he is 'hiding behind' the PSNI's decision. The practical result of this is that the applicant is deprived of her right to a reasoned decision (under para 4.67 of the Code) and to a review of the 'no prosecution' decision (under para 4.61 of the Code).

[24] The respondent submits that it is perfectly proper for some cases, where there is no evidence of a crime, to be dealt with by the police without the need for a decision on the matter being taken by the DPP or PPS. That arises where no individual has been 'reported' to the PPS for a prosecution decision because the threshold for the making of such a report has not been reached. That is what occurred in this case, the respondent submits. However, he further contends that there was detailed engagement between the PPS, at a very senior level, and the PSNI; that the police approach was overseen, scrutinised and probed by the PPS; and that, ultimately, the PPS agreed with the PSNI approach so that, even if the matter was to be looked at again, the PPS would inevitably conclude that the test for prosecution under the Code was not met. In these circumstances, Mr McGleenan submitted that there was no breach of any legal obligation on the part of the respondent.

The respective roles of the PSNI and PPS

[25] As mentioned above, the applicant has relied heavily upon the judgment of McCloskey LJ, giving the judgment of the court, in the case of *Re Beatty's Application* [2022] NICA 13 at paras [22]-[25] and [30]. This judgment bears re-examination in order to remind oneself of the respective roles of the PSNI and PPS as explained by the Court of Appeal. I set out a number of passages from the judgment below for that purpose. At para [23] of the judgment, the distinction between the roles was pithily summarised as follows:

"In a sentence, the Chief Constable/Police Service have the duty of investigating suspected offences while, in contrast, the main statutory duties, functions and discretionary powers of the DPP belong to the realm of prosecutorial decisions and the conduct of prosecutions."

[26] McCloskey LJ continued on this theme in para [24]:

“Accordingly, while not overlooking the other specific duties imposed upon the Chief Constable/Police Service, in the matter of suspected offending and bringing offenders to justice their fundamental duty is one of investigation. This agency has no function in the matter of initiating or conducting prosecutions. One of the main effects of the reforms introduced by the Justice Act was to invest this function exclusively in the DPP. Thus, upon the completion of a police investigation into suspected criminality in any given case, a report must be transmitted to the DPP to enable prosecutorial decision making to be undertaken. The investigative/prosecutorial dichotomy is clear.”

[underlined emphasis in original]

[27] The court went on to describe the “hierarchical element” in the relationship, with the DPP having conduct of prosecutions initiated by the police and having power to both advise and direct the PSNI in certain respects. An example given of this hierarchical relationship was that:

“Third, by virtue of Part 2 of the Justice Act in conjunction with section 32 of the 2000 Act, the Chief Constable/Police Service are obliged to accept and, indeed, facilitate the exclusive role of the DPP in the realm of prosecutorial decisions and prosecutions.”

[28] The applicant also relies heavily upon para [26], which contains the following:

“The next feature of the relationship between the DPP and the Chief Constable/Police Service is found in section 35(5) of the Justice Act. This provision expresses most emphatically the investigative/prosecutorial dichotomy already noted. In short, the Chief Constable/Police Service must equip the DPP with all information amassed by them in the course of any given investigation into suspected crime to enable prosecutorial decision making to be undertaken.”

[underlined emphasis in original]

[29] The basic thrust of the analysis in the *Betty* case is that the statutory scheme emphasises a clear dichotomy of roles between the police, who investigate, and the PPS, which makes prosecutorial decisions on the basis of the fruits of any such investigation. It also provides for a layer of oversight by the DPP which the

legislature intended would operate to promote the public interest in the identification, prosecution and conviction of offenders (see para [30]).

The 'non-report' of Officers M and Q to the PPS

[30] The nub of this case is the fact that neither officer M nor officer Q was 'reported' to the PPS for a prosecution decision. It is true that a report or file was sent to the PPS, and updated on a number of occasions, arising out of the additional investigation which the PPS directed the PSNI to undertake following the referral of these officers to the DPP by the coroner. However, in the course of submissions it became clear that, for the respondent, the key matter was that neither officer had been reported for a prosecution decision within the meaning of that term as used in para 3.2(ii) of the Code for Prosecutors (see para [22] above). In the case of *Re Thompson's Application (No 3) (PPS consideration of coroner's referral)* [2024] NIKB 22, I examined the legality of the statement on the part of the DPP that he could "only take decisions following a formal police investigation which results in the submission of a file reporting one or more identified suspects for specific offences". The focus of the argument in that case was about the submission of a file. In the present case, it is more about the *reporting* of a suspect for a specific criminal offence. The two issues appear to be linked, however, since a full investigation file (set out in a structured manner with five parts: the case outline, statements, exhibits, miscellaneous and disclosure) tends only to be provided along with a suspect who is reported to the PPS, along with a recommendation that they be prosecuted or not.

[31] This gives rise to the question of when the police will, and when they will not, provide such a report. Ms Curran informed me on behalf of the PSNI that, in order to report an individual to the PPS for a prosecution decision, they require evidence of a criminal offence having been committed; an identifiable suspect; and some evidence which links the suspect to the offence. Further clarification provided by the PSNI after the hearing explained that, when a complaint is made, a crime reported, or a referral received from the PPS, police initially seek to ascertain if a crime has occurred. This involves the investigating officer applying his professional judgment to determine if any crime has been committed. In this case, the investigating officer concluded that "there was no tangible evidence of criminal conduct and therefore the threshold for reporting any person for prosecution was not met". The issue of a "threshold for reporting" is not expressly dealt with in the Code for Prosecutors, save that para 3.1 of the Code (set out at para [22] above) refers to it being the "responsibility of the investigator to investigate an allegation that a criminal offence has been committed, to gather evidence in relation to that allegation and to present that evidence to the prosecutor". The focus is upon investigating an "allegation" and presenting evidence in relation to the allegation to the PPS, although it might be said that there is no obligation to present the evidence to the prosecutor if there is no evidence *at all*. What is meant by the qualifier "tangible", which has been used by the PSNI in this case, is not clear.

[32] In the present case, it was agreed by all that there were identified suspects (namely officers M and Q) and that there were specific criminal offences which had been identified by the coroner for consideration, namely perverting the course of justice (or a related offence such as conspiracy or an attempt in that regard) and perjury. The issue therefore was the sufficiency of evidence. However, it remains the applicant's case that the assessment of the sufficiency of such evidence as part of the test for prosecution falls to be undertaken by the independent prosecutorial agency.

[33] Although this case does not itself engage the pilot project (referred to at para [14] above), the public statement made by the PPS in relation to this pilot project is illuminating in terms of the general practice in the above regard. It states that, from the commencement of the pilot, the police will be "no longer required to submit all investigation files to the PPS" [my underlined emphasis]. This is explained in the following way:

"Under the previous operating model, police investigators had to submit all files to the PPS where an offence was suspected to have taken place, where there was an identifiable suspect and where there was any evidence, however weak, to link the suspect to the crime.

This included files where there was a police recommendation for 'no prosecution' because, in the view of the Investigating Officer, the evidential Test for Prosecution could not be met."

[34] The statement goes on to explain that under the model being piloted, police would no longer be required to submit certain files where a recommendation not to prosecute was being made for each of the suspects in the case. They would instead be authorised to take a 'No File Decision' in cases involving certain offences where it was appropriate to take no further action. The offences covered by the change would be those known as 'case weight' categories 5 to 8, involving less serious offences. Under the pilot, the PPS would continue to take decisions in the more serious files even where police were recommending no prosecution. These would be cases within the higher case weight categories 1 to 4. That would include the present case.

[35] Although I do not have to decide the issue, in principle it seems to me that it must be the case, as a matter of common sense, that there will be some cases brought to the attention of the police where, either initially or after some investigation, it is clear that there is no question of an offence having been committed (for instance because the complaint is wholly vexatious, malicious or otherwise clearly baseless). I find it difficult to accept that there would be a legal obligation to refer all such cases to the PPS for decision where this would represent a waste of time and resource. For convenience, I refer to such cases as 'hopeless' complaints. The pilot project referred

to above does not merely seek to deal with such hopeless cases but also cases where there may be *some* evidence linking a suspect to an offence but where police would recommend 'no prosecution' because of the weakness of the evidence. Again, the legality of this pilot project is not before the court.

[36] The real question in the present case was whether it was permissible for the police to treat the referral of officers M and Q in the same category as (what I have referred to above as) the hopeless cases where the PPS need not even be troubled by a report requiring a prosecutorial decision. More accurately, the question is whether it was lawful for the PPS to acquiesce in such an approach, bearing in mind that there was detailed engagement with the police by the PPS in respect of this. The DPP's powers under section 35(5)(a) and (b) are plainly wide enough to permit him to require the police to provide a full investigative file and, indeed, a 'report' on an identified individual relating to a specific offence including the relevant police recommendation on prosecution or otherwise. He could require this to be provided if he considered it necessary or desirable in any particular case.

[37] I have concluded that it was not a lawful approach on the part of the respondent to decline to make a prosecution decision in this case on the basis that the PSNI had not formally 'reported' either officer to it for such a decision. There are two basic reasons for this conclusion.

[38] First, this is not a case where the Director was unaware of the suspects or the potential offending which had been identified on their part. In short, it was not a case which never landed on his desk for consideration at all. The officers had been referred to him by the coroner. Although the referral was not strictly speaking pursuant to section 35(3) of the 2002 Act - because the potential offending was disclosed in the course of the inquest but not by the actual "circumstances of [the] death" which the coroner was investigating - the referral was later treated by the PPS as if it had been made under section 35(3). Where such a referral, by a judicial officer, is in terms which specifically identifies potential suspects and potential offences which may have been committed by them, that is equivalent to a report from the police which in due course calls for a decision, one way or another, from the Director in relation to potential prosecution.

[39] Put another way, there is an obligation on the Director to exercise his functions independently of any other person under section 42 of the 2002 Act. Once a referral has been made to him by a coroner in sufficiently specific terms, the Director's functions are engaged (in contrast to a case which is only investigated by the police but never reaches the DPP or PPS). In those circumstances, he must exercise his prosecutorial decision-making function independently; which means in this context that the determination of the sufficiency (or otherwise) of evidence against a suspect is a matter for him alone.

[40] As was addressed in some detail in *Re Thompson's Application (No 2) (DPP request to PSNI for further investigation)* [2024] NIKB 9, such a decision is not required

to be taken immediately. Nor is the immediate exercise of the DPP's powers to direct further investigation under section 35(5)(a) of the 2002 Act the only other possible outcome. The DPP may request or await further investigation by the police, either by directing this or awaiting the outcome of a further investigation which he knows to be pending. In most if not all cases this will be a likely outcome because of the desirability of an investigation file being prepared and provided to the PPS in the usual form, for the reasons discussed in *Re Thompson's Application (No 3)*. There may be other enquiries which the DPP wishes to put in train or other information he wishes to seek. However, once the matter is referred to him by a coroner with sufficient specificity to suggest that an identified individual may have committed an identified offence or offences, that is a trigger for the DPP to determine whether the test for prosecution is met or not. It is clear that this was and remained the Director's intention, after further police investigation, in the *Thompson* cases, leaving aside any potential impact which the Legacy Act may have on what would otherwise have occurred in the normal course. So too in this case, once the appropriate investigations had been exhausted, it falls to the Director to conclude the exercise of his functions by making a prosecutorial decision.

[41] At the very least, I am satisfied that it was a misdirection for the Director to take the view, as set out in the letter of 11 October 2023, that there was "no individual reported to whom the test for prosecution could be applied" [my emphasis]. It was plainly possible to apply the test for prosecution to the two officers who had been referred to the DPP by the coroner. The suggestion that this could not be done was an error of law akin to that disclosed in *Re Thompson's Application (No 2)*, indicating an over-rigid approach in law as to when the DPP could make a prosecutorial decision which finds no basis in the governing statutory provisions.

[42] Second, the result of the process which has been followed or permitted in the present case is such that the applicant has been deprived of any reasons as to why the test for prosecution is not met. Had the decision been taken by the respondent, the applicant would have been entitled, under the Code for Prosecutors, to the provision of reasons as to why the test for prosecution was considered not to have been met, as well as to the right to request a review of the decision (with an associated right to make representations when requesting the review). As matters stand at present, the applicant faces an entirely unexplained discrepancy between (a) strong comments and findings having been made by Horner J suggesting that offences may have been committed, on the basis of his detailed consideration of all of the evidence in the inquest, and (b) an averment from Mr Hardy that there was insufficient evidence to even *suspect* a criminal offence having been committed. As a matter of fairness, the applicant should be given some reasons as to how the assessment of the matter moved from point (a) to point (b). Indeed, one might think that that would also be expected as a matter of fairness to the officers involved, who have been the subject of public criticism in the coroner's rulings referred to above, and out of basic respect for the coroner's assessment of the evidence.

[43] Although the test for a coroner's referral under section 35(3) is not a particularly elevated one, where an identified suspect is referred for an identified (or readily identifiable) offence, it must follow that the coroner considered that there was *some* evidence suggesting that they may have committed that offence. In saying this, I accept entirely both that the coroner's own assessment of the officers' oral testimony would not represent evidence which could be relied upon in a criminal prosecution and also that coroners, like all judges or judicial officers, are not infallible. However, Horner J explained in detail the basis of his concerns about the officers' behaviour by reference to a variety of evidence, including inconsistencies within their own evidence and by reference to other evidence gathered in the course of the coronial investigation. He found certain explanations provided to be plainly wrong, unconvincing or inconsistent with other evidence. He found the officers' evidence contradictory and unworthy of belief in several respects. He expressed the clear view that one or other of them had edited the original log; and was satisfied that there had been a much fuller log than the one they produced. He considered that there was no good reason for certain actions on the part of Officers M and Q. Despite this, the applicant has been deprived of any reasons as to why these matters were not considered to amount to "evidence, however weak, to link the suspect to the crime". I do not consider that the statutory scheme was intended to, or does, operate in that manner. This supports the construction I have set out at paras [38]-[40] above.

[44] I am also strengthened in reaching this conclusion by the fact that, under the Police (Northern Ireland) Act 1998, PONI applies the same threshold as a coroner for referring a case to the DPP after investigation, namely that the investigation report "indicates that a criminal offence may have been committed by a member of the police force": see section 58(2) of that Act. That gives rise to an obligation on the part of the Ombudsman to send a copy of the report to the DPP together with recommendations. The DPP may then direct PONI to provide such further information as appears to him to be necessary for the discharge of his functions. However, it is clear that, in those circumstances, the matter will then fall to the Director for a decision on the recommendation.

[45] The factors mentioned above would lead me to conclude that the respondent has acted unlawfully in failing to make his own prosecutorial decision in this case irrespective of any question of lack of independence. In light of this conclusion, it is unnecessary to determine the applicant's challenge based upon article 2 ECHR. Very limited argument was advanced by either side in relation to this issue and I propose to deal with it only briefly. However, I also consider that the applicant ought to succeed on this ground.

[46] I was initially sceptical as to whether article 2 is engaged in the context of a decision upon potential prosecution in this case arising out of the coroner's referral. The inquest itself has discharged the article 2 procedural obligation to conduct an investigation into the death of Pearse Jordan. However, I proceed on the basis that article 2 is engaged since that was accepted by Colton J, in precisely the same

context, in his decision in *Dillon and Others*: see paras [196], [206]-[209] and [214]-[215]. It is certainly arguable that article 2 protections arise where (potential or alleged) offending strikes at the heart of the State's ability to conduct an effective investigation into a death involving a State agent, by reason of either destruction of important evidence or wilful perjury in the course of the investigation. Colton J appears to have proceeded on the basis that these circumstances did engage article 2 when concluding that section 41 of the Legacy Act, conferring immunity of Officers M and Q, was in breach of the applicant's article 2 rights. There is nothing to suggest to me that he was clearly wrong in so holding. Moreover, the European Court of Human Rights' ("ECtHR") discussion of the requirements of article 2 in *Jordan v United Kingdom* (2003) 37 EHRR 2 make clear that investigations into deaths where State agents were involved must be effective, which includes securing appropriate testimony, and that "any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard" (see para 107).

[47] Ms Quinlivan did not go so far as to suggest that it was a breach of article 2 for the PSNI to investigate Officers M and Q. I also note that PONI was involved in some capacity following the coroner's referral of the matter to the DPP. However, the applicant's point is that there is a lack of necessary independence in allowing the PSNI to have the final say upon whether the two officers in this case require to be considered for prosecution. In the circumstances of this case - where the coroner has referred the matter to the DPP, in the terms and for the reasons which he did, and where the usual approach of the DPP making a prosecutorial decision (even where the evidence linking the suspect to the offence is weak) has not been followed - I consider this complaint to be well-founded. It should not have been for the police to have the decisive decision-making role in this case where a coroner had concerns that police officers had impeded his investigation into the shooting of a civilian by yet another police officer. Although the respondent has objected to the characterisation that the PSNI had any function in prosecutorial decision-making, the fact that the PSNI's conclusion that the officers should not be reported to the DPP resulted in his concluding there was no prosecution decision to make logically has that effect. In my view, taken together with the fact that the approach taken deprives the applicant of reasons for the outcome, this does not meet the requirements of independence and transparency inherent in article 2.

[48] In *Jordan v UK* the ECtHR stressed the importance of the DPP's role in these regards when making prosecutorial decisions in a context where article 2 is engaged. In particular, at para 123 of its judgment, it said this:

"The Court does not doubt the independence of the DPP. However, where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-

making. Where no reasons are given in a controversial incident involving the use of lethal force, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision.”

[49] Before leaving this topic, it is also appropriate to make one or two further observations. First, it seems clear that neither officer was questioned or interviewed as a result of the further investigation or enquiries, under caution or otherwise. Whether or not that is properly to be viewed as surprising, I agree with the applicant’s submission that this should not have been raised by the PPS as a reason for the DPP not being able to take a prosecutorial decision when it was within his gift to direct the police to seek to interview the officers. Second, although it is unsurprising that the full contents of the police enquiries and investigation have not been disclosed in these proceedings, I have some concerns arising from the fact that a view was apparently taken by the PSNI at an early stage (in 2017) that there was no evidence of any potential crime before any of the several later investigations or enquiries which the DPP considered necessary had been undertaken. Third, it remains entirely unclear to me, and therefore no doubt to the applicant, what investigations or enquiries PONI undertook or whether its consideration was simply parasitic upon the PSNI view.

Conclusion

[50] For the reasons set out above, I intend to allow the applicant’s application for judicial review. I do so on the basis that the respondent erred in law as to the meaning and effect of the 2002 Act by concluding that there was “no decision as to prosecution for PPS to take” and/or that there was “no individual reported to whom the test for prosecution could be applied”. In the circumstances of this case, the referral by the coroner gave rise to a decision for the PPS to take, once it was satisfied (as it was) that all further appropriate investigative steps had been undertaken. The further ‘reporting’ of the officers to the PPS by the PSNI was unnecessary in this regard, although the DPP could have required a formal report and recommendation from the PSNI had he wished to receive it. Although the DPP did not intend to delegate his functions to the PSNI in this respect, the error of law identified above had the practical effect that he (unlawfully) did so.

[51] As a result, I will quash the respondent’s ‘decision’ as set out in the PPS correspondence of 11 October 2023 and remit the matter to him for further reconsideration. In light of the case presented on his behalf in these proceedings, unless the Director determines that some further investigative step should in fact now be taken which gives rise to some additional evidence, it appears almost inevitable that the DPP will direct ‘no prosecution’ on the basis that the evidential test has not been met. As explained above, however, in doing so he would be

required to provide at least some reasons to the applicant for this decision. For this reason, the applicant's complaint is not, as the respondent submitted, academic.

[52] Had it been necessary, i.e. if the course adopted by the respondent would otherwise have been lawful as a matter of domestic law, I would also have granted similar relief on the basis that the allocation of decision-making responsibility in this case was in breach of the applicant's rights under article 2 ECHR.

[53] I stayed a ground relying upon article 8 ECHR pending Colton J's decision in the *Dillon and Others* case. I dismiss that ground on the same basis as I did in *Re Thompson's Application (No 3)* (see para [5]). I decline to grant relief on any of the other bases set out in the applicant's Order 53 statement, either on the basis that the ground was not made out or, where it had force, adds nothing to the ground upon which relief is granted above. I did not consider that the submissions in relation to the Memorandum of Understanding between the PSNI and PPS added anything material in the case, given that it does not appear to have been relied upon by the respondent or to have been determinative of the way in which the PPS decision-making was managed in this case; and given further that the Memorandum applies to all cases where a section 35(5) direction has been given but the decisive feature of this case is the effect of the section 35(3) referral by the coroner.

[54] I will hear the parties on the issue of costs.