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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE (JUDICIAL REVIEW)

BETWEEN:

WILLIAM THOMPSON

Appellant:

and

THE PUBLIC PROSECUTION SERVICE

Respondent:

[No 2]

Before: Keegan LCJ, McCloskey LJ and Horner LJ

Andrew Moriarty (instructed by Madden and Finucane Solicitors) for the Appellant
Tony McGleenan KC and Philip Henry KC (instructed by the PPS) for the PPS
Donal Lunny KC and Andrew McGuinness (instructed by the Crown Solicitor's Office) for the Ministry of Defence, *qua* interested party

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McCLOSKEY LJ (*delivering the judgment of the Court*)

Introduction

[1] This is one of two inter-related appeals which the court has consolidated. The parties in both cases are the same, the cases have a common history and factual matrix, and they share the same evidential substratum. In this appeal the focus of the appellant's challenge is the determination of the PPS that its final decision on whether to initiate a prosecution of any person arising out of the death of Kathleen Thompson should await the outcome of the police investigation and, related thereto (as explained infra), to exercise its power under section 35(5)(a) of the Justice (NI) Act 2002 requiring the PSNI to undertake specified priority further investigative steps. The essence of the second appeal is captured in para [4] of the judgment of Scoffield J ([2024] NIKB 22):

> "The case advanced by the applicant in these proceedings takes a step back and contends that, in fact, the DPP erred

> by not making a substantive decision on prosecution, or erred in determining that a further police investigation was required (whether directed by him or not), in two respects: (i) because he (wrongly) considered that he required a police investigation file to be submitted to him before taking a substantive decision on the issue of prosecution; and (ii) because he decided how to proceed without having obtained the inquest papers in order to inform his decision-making."

The judge added:

> "Although it would have been preferable if these issues had been raised in the applicant's first application for judicial review against the Public Prosecution Service (PPS), I rejected the proposed respondent's contention that this should act as a bar to the present case being permitted to proceed."

This court agrees unreservedly with the sentiment expressed. The pursuit of two separate judicial reviews was quite inappropriate. Hence the full consolidation ordered by this court.

[2] The tragic background to this appeal is rehearsed in paras [1]–[2] of our judgment in the other, consolidated appeal (*Thompson No 1*). The relevant statutory provisions are addressed in para [3].

The Challenge

[3] We shall address *infra* whether, correctly analysed, the target of the appellant's challenge is properly characterised a freestanding "decision." The target is noted in para [1] above. The terms in which it is expressed are contained in the correspondence from the PPS rehearsed in paras [4]–[10] of our judgment in *Thompson No 1*. The essence of the appellant's consequential challenge are conveniently rehearsed in para [13] of the judgment of Scoffield J:

> "The applicant contends that the DPP erred in law in considering that he could not make a decision on prosecution in the absence of a (further) investigation file from the police, resulting in his not addressing his mind to the key question of whether Soldier D should be prosecuted in relation to the applicant's mother's death. He further contends that the DPP wrongly failed to obtain the inquest materials (namely, all of the materials generated by the inquest) before reaching a decision on prosecution and/or whether and how the police should

> proceed. This is argued to be irrational, a breach of the DPP's duty of inquiry and/or an unlawful delegation of his decision-making role to the coroner."

The Judgment under Appeal

[4] The judge focused particularly on the PPS letter of 19 May 2023. He concluded that this betrayed an error of law or fetter of discretion. His reasons for this conclusion are discernible from paras [19] – [23] considered as a whole.

[5] Turning to the question of relief, the judge highlighted the following considerations in particular: PPS decision making is as a matter of practice based upon investigation files provided by the PSNI or certain other public authorities; all PSNI investigation files are compiled in a structured manner agreed with the PPS; the PPS is under no legal obligation to make a prosecutorial decision following a compulsory coronial referral under section 35(3); while the coroner's decision is obviously material, a coronial investigation is not directed to establishing criminal liability and "… is not a simple substitute for a thorough criminal investigation which would normally be expected as a precursor to a Crown Court prosecution"; the PPS position that all available evidence generated from all material sources, including the original RUC investigation file and the later HET file, would have to be considered is unassailable; neither of these preceding investigations is a "substitute for an investigation file meeting modern standards and requirements"; the gravity of the offence for which Soldier D might be prosecuted – murder or manslaughter – is undeniable; historically, the PPS has never made a prosecutorial decision in cases of possible murder without having first received the police investigation file; the further lines of enquiry by the PSNI brought to its attention by the PPS have not been completed; and, in principle, all reasonable lines of enquiry should be completed in every case before a prosecutorial decision is made.

[6] The judge, having identified all of the foregoing facts and factors, determined that in the exercise of its discretion the court should grant a remedy and decided that this should take the form of a declaration reflecting his conclusion noted in para [4] above. The judge next assessed the impact of the impugned decision of the PPS having been made without consideration of the inquest materials generated by the coroner's enquiry and giving rise to the statutory referral of the coroner's report. The judge rejected the appellant's contention that a duty to consider these materials arises automatically upon receipt of a statutory referral. Rather the response of the PPS and the assessment of any action to be taken were matters lying within its discretion. These would be "… subject to Wednesbury unreasonableness, in accordance with the usual approach to a duty of enquiry in public law where the statutory provision does not set out a lexicon of matters to be considered …": para [35]. (Emphasis added)

[7] Next, the judge rejected the appellant's submission that the DPP had "… unlawfully delegated his consideration of the case, or the evidence in it, to the coroner": paras [36] and [38]. The judgment continues at para [40]:

> "The purpose of section 35(3) is to alert the DPP to a matter which may require his attention. Thereafter, however, he enjoys a measure of prosecutorial discretion as to how to proceed. Consistent with standard public law obligation, it will be a matter for him what further materials he should request from the coroner and at what stage, subject to Wednesbury unreasonableness and his Padfield obligation to act consistently with the statutory scheme governing his powers and functions."

The judge's approach was that this discrete ground of challenge could succeed only on Wednesbury grounds. He concluded, at para [40]:

> "To determine that it was irrational for the DPP to do anything other than seek the full inquest papers only and before deciding how best to proceed would cut against both the structure of the statutory scheme and the DPP's well-established independence."

The judge added, at para [41], that the DPP had a duty to assess all available information when making a prosecutorial decision which could not be properly discharged having considered only "… the selected body of inquest materials provided to him by the [appellant]." The DPP's intention to obtain and consider all of the inquest materials is incontestable. Furthermore, he will have the benefit of the PSNI's prior assessment of these materials. Dismissing this discrete challenge, the judge concluded at para [41]:

> "… I do not believe it can be said to be irrational for [the DPP] to have decided that the PSNI should obtain these materials first and assess them, at the same time as considering other issues the PPS has asked the PSNI to consider, before submitting the product of all that in a further investigation file."

[8] The final issue addressed by the judge is described by him as "the timing issue arising from the Legacy Act." The judge highlighted that the court did not have "the full detail of the lines of enquiry the PSNI has been asked to pursue" and had only "limited detail about the inquest materials" and, further, no interview of Soldier D under caution had yet materialised: para [47]. Taking these factors into account, the court was obliged to guard against:

> "… [straying] into territory where [the court] would be usurping the proper role and function of the independent prosecutor, or failing to respect his appropriate area of

> judgment and discretion, in a way which is inconsistent with authority in this area"

[9] Citing *R (Monica) v DPP* [2018] EWHC 8 and *Re Duddy* [2022] NIQB 23 at para [56], the judge determined this issue in the following terms, at para [51]:

> "It was not unlawful for the DPP to decline to fast track this case so as to ensure that a substantive prosecution decision was taken in advance of 1 May 2024 (with the result that criminal proceedings may have been commenced which were not prevented by the grant of any immunity …."

He added, at para [52]:

> "[52] Where any legal change is introduced from a specified point in time, there will be cases which fall on either side of the line. Whether or not to expedite a case in a certain way in this context is a matter for the DPP's judgment, bearing in mind a range of matters including the allocation of resources to other cases also requiring consideration. Although the seriousness of any potential offence which might be prosecuted may be a factor tending towards expedition, it can also rationally be considered a reason for not cutting corners or taking shortcuts which may turn out to be ill-advised. Although some of the applicant's submissions hinted at this decision having been taken for an improper purpose, this was not an issue which was pleaded in the case. There is also no evidential basis for it, other than the suggestion that the way in which the DPP has proceeded inevitably meant that (as he knew) he was unlikely to be troubled by the case further, since any further police investigation, by the time it would be reached in the case-sequencing model, would be precluded by the terms of the Legacy Act. It was, however, possible that the case could be referred back to the PPS by the Commissioner for Investigations of the ICRIR, if appropriate, under section 25 of the Legacy Act. Presumably, where this occurs, it will be after an investigative file has been prepared and submitted by the Commissioner. It at least seems likely that the DPP could require this in the exercise of his power under section 25(6)(b) of that Act."

[10] Finally, noting the vitiating factor identified in para [4] above, the judge determined that it would be inappropriate to grant relief (which, of course, is a matter of judicial discretion) other than the declaration mooted, explaining at para [54]:

> "[54] However, I do not propose to grant any other relief as a result of this finding. That is because it is clear from the respondent's evidence and submissions that, if the matter were remitted to him for further reconsideration, he would maintain the position that it is necessary for a file to be prepared in the usual way in this case; and it would not be irrational or otherwise unlawful for him to take that view. The grant of further relief would therefore be to no practical purpose."

Grounds of Appeal

[11] The formulation of the first two grounds of appeal is that the judge "erred in failing to find that …" The language of the third ground of appeal is that the judge "… erred in concluding that …" The appellant is presumably seeking to make the case that the judgment at first instance is unsustainable in law (subject to the following paragraph). It is therefore incumbent upon the appellant to specify clearly in the grounds of appeal each asserted error of law on the part of the judge. Each of the grounds fails to do so. This court has repeatedly observed that grounds of appeal (in common with judicial review grounds of challenge) which employ the past tense of the verb "to err" without more, ie lacking the necessary accompanying specificity and particularity are meaningless: see in particular the recent judgment of this court in *Re Frane's Application* [2024] NICA 20, at para [9].

[12] The Notice of Appeal has another feature. It is only by a process of intricate examination and interpretation that one discovers that the appellant is not challenging the declaratory order of the High Court. Some analysis is required in consequence. At para [25] of his judgment Scoffield J stated that the decision specified in the PPS letter of 19 May 2023 was "liable to be set aside." In other words, an order of certiorari quashing the impugned decision was a possible remedy. However, as paras [32] and [53] of the judgment make clear, the judge opted to order the more limited, less intrusive remedy of a declaration in specified terms. The appellant is not appealing against this order.

[13] So what remedy is the appellant seeking from this court? When one looks to the Notice of Appeal to answer this question, the search for clarity is unyielding. The statement in the prayer that the appellant be granted "… the remaining relief as set out in the [Order 53] statement …" is both Delphic and uninformative. The appellant has secured from the High Court a declaratory order, in lieu of a quashing order, which is unchallenged. This invites the question: given the foregoing and consistent therewith, what further remedial order could properly and conceivably be granted by this court? The answer is not to be found in the Notice of Appeal.

[14] The exercise of rewinding to first base (figuratively) is instructive. In the first appeal (Thompson No 1), the Order 53 Statement challenges:

> "… the **decision** of the Director of Public Prosecutions not to exercise his power **to refer** the killing of Kathleen Thompson [by Soldier D] to the Chief Constable … as provided for by section 35(5) of the [Justice Act]."
> [emphasis added]

The relief sought is, cumulatively, an order quashing this "decision", an order of mandamus obliging the DPP to take certain action and four separate declarations. This kind of formulation of multiple forms of relief achieves little more than obfuscation and must be deprecated. The first judicial review was initiated on 14 June 2023.

[15] In this (the second) appeal the judicial review proceedings were initiated on 5 December 2023. The impugned "decision" is described as:

> "… the **decision** of the Director of Public Prosecutions not to seek access to the inquest materials and not to direct his mind to the question as to whether the evidence available is sufficient to satisfy the evidential test in order to prosecute Soldier D for the killing of his mother."
> [emphasis added]

The following question is invited: does this linguistic formulation identify, in reality and in substance, a separate, freestanding "*decision*" of the PPS?

[16] In the PAP correspondence in the first appeal, the appellant's solicitors advanced the specific contention that the PPS was obliged to respond to the Coroner's statutory referral thus:

> "The PPS reviews the materials and evidence garnered in the course of the coroner's investigation, including any conclusions arrived at by the coroner in his/her assessment of the evidence. Having evaluated the evidence and the coroner's conclusions, a decision is made as to whether or not there should be a prosecution on foot of the coroner's investigation."

In the second appeal, the PAP letter stated, inter alia:

> "It remains our contention that, upon receipt of a referral under section 35(3) by the coroner, the PPS was obliged firstly to review the materials and evidence garnered in the course of the coroner's investigation, including any conclusions arrived at by the coroner in his/her assessment of the evidence. Having evaluated the evidence and the

> coroner's conclusions, a decision ought then have [sic] been made by the PPS as to whether or not there should be a prosecution, on foot of the evidence secured in the coroner's investigation."

The linguistic differences between the two letters are minimal and inconsequential: the two PAP letters are in essence identical.

[17] The PAP letter in the second appeal contains the following further statement:

> "The applicant has only learned upon service of a second affidavit on behalf of the PPS of 17 October 2023 that the PPS never sought access to the inquest papers when deciding upon whether or not to prosecute Soldier D."

Is this claim tenable? In the relevant affidavit, the PPS deponent explains in the first paragraph that the affidavit is provided "… to address an issue which arose concerning a communication between the PPS and the PSNI …" This is a reference to the PPS action described in the final paragraph of its letter dated 19 May 2023:

> "The PPS review of this case has identified some priority lines of enquiry that would require to be undertaken as part of any future police investigation. Our analysis in that regard will be communicated to PSNI …."

In its next (PAP response) letter of 16 June 2023 it was stated:

> "The PPS has considered the coroner's referral report and 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."

This is an unambiguous statement that the PPS had considered the coroner's section 35(3) report (to be contrasted with the totality of the materials generated by the inquest proceedings) and (b) had in consequence conveyed certain directions to the PSNI regarding further investigative steps. The remainder of the PPS second affidavit simply confirmed the date of these directions (6 June 2023) and a "summary" of them.

[18] In their PAP rejoinder letter in the second appeal, the appellant's solicitors, in a robust rejection of the PPS suggestion that the appropriate course was to expand the then extant judicial review proceedings (ie the first appeal) by the mechanism of amendment, advanced the contention that the PPS had refused to evaluate available evidence and refused to make a decision as to whether or not to prosecute. Neither of these claims is in our judgement sustainable: the correct analysis is that the PPS had determined that specified police investigative steps (which would be additional to any <u>other</u> such steps either in train or to be taken later) were necessary – with the result

that the PPS decision making on any possible prosecution was to be deferred. In the same letter, the solicitors contradicted themselves in the statement that the contemplated further challenge was to "a decision not to prosecute."

[19] The second PPS affidavit is silent on the discrete issue of whether the PPS had considered the inquest materials when taking the chosen action vis-à-vis the PSNI. Given this consideration and the analysis in the immediately preceding paragraph, the suggestion that this emerged for the first time in the affidavit in question is unsustainable. This suggestion is further infected by the language of "whether or not to prosecute Soldier D."

[20] We consider that the stance adopted and action taken by the PPS as communicated in the relevant letters revolved around a single, indivisible decision that the determination of whether Soldier D should be prosecuted for any offence should await in particular receipt of the completed PSNI investigation report (with all the additional ingredients directed) in the context just noted. This is the substance and reality of what occurred. There was no separate decision refusing to consider the full inquest materials, not least because (a) no such refusal was communicated by the PPS in any of the material letters and (b) the non-consideration of the full inquest materials at the relevant time was simply part of the factual matrix in which the central impugned decision was made. The lawyers' attempts to identify separate PPS decisions – for the sole procedural purpose of bringing a second judicial review rather than simply seeking to amend the first one by extension – were in our judgement a combination of the contrived and the artificial.

[21] It is of obvious importance to add that in the PAP correspondence and Order 53 pleadings in both cases, the appellant's solicitors at no time specified either (a) the specific subsection of section 35(5) said to be engaged or (b) the terms in which it was contended that the DPP should have exercised this power. This lacuna, not less than fundamental, continued through to the hearing of these appeals.

[22] Furthermore, while one finds the repeated formulation of "referral to" the PSNI and "not to refer the matter" to the PSNI, there is absolutely no specificity. More importantly, the verb to refer and its derivatives, which we have highlighted in paras [14]–[15] above, do not feature in section 35 and are simply misleading distortions of the statutory language. This misleading language features also in the MOU, discussed in *Thompson No 1* at para [9] ff. Properly analysed, neither of these legal challenges was possessed of the necessary elementary particularity and coherence from day one until the completion of both appeals.

[23] The somewhat laborious exercise carried out in the several preceding paragraphs demonstrates the following:

(i) The PPS made a single, indivisible decision, namely, to defer determination of whether there should be a prosecution of any person for any offence arising out of the death of Kathleen Thompson pending the activation by PSNI of the

specific investigative steps identified by the PPS, to be followed by completion of the full PSNI investigation file and its consideration by the PPS.

(ii) Everything else which the appellant's legal representatives have sought to characterise a PPS "decision" is in substance and reality an aspect or element of the central impugned decision and/or a ground of challenge thereto.

(iii) There was at no time any justification for separate judicial review proceedings.

(iv) It follows that the "decision" which the appellant seeks to impugn in these proceedings is purely fictional. In the alternative and in any event, this court is satisfied that for the reasons given by Scoffield J there was nothing remotely irrational about the evaluative assessments and actions of the PPS under challenge. Furthermore, the judge's assessment that a quashing order would inevitably have resulted in, following the necessary reconsideration, the same PPS stance is in our view unimpeachable. We refer to our judgment in *Thompson No 1*.

(v) And finally, none of the issues raised in this artificial separate challenge can withstand our analysis and conclusions in *Thompson No 1*, paras [14]–[28].

The Respondent's Notice

[24] The PPS challenges the declaration ordered by Scoffield J noted in para [6] above. The impetus for this declaration is the following passage in the PPS letter dated 19 May 2023:

> "It is obviously not possible for the Director to take any decisions as to prosecution based upon the findings of an inquest. The Director can only take decisions following a formal police investigation which results in the submission of a file reporting one or more identified suspects for specific criminal offences."

It was argued by Mr McGleenan that the impugned passage in the letter under scrutiny does not, by its terms and considered in its full context, enunciate the twofold policy that (a) the PPS will <u>never</u> make a prosecutorial decision based only on the findings of an inquest and (b) the PPS will <u>never</u> make a prosecutorial decision in the absence of a police investigation file. Nor does it declare an approach in these terms specific to the present case. We interpose here the observation that the judge's declaration was directed solely to the latter, narrow scenario.

[25] Mr McGleenan's submission that the relevant passage must be evaluated as a whole and in its full context, which includes particularly all preceding inter–partes communications, is unassailable. This court has undertaken this exercise. We take into in particular the following considerations: the seniority of the PPS correspondent;

the PAP context; the preceding communications, which are essentially neutral in substance; the unambiguous terms of the letter concerned; the absence of any application to cross-examine the deponent; and the terms in which Scoffield J determined this issue, at paras [19]–[25].

[26] For our part we consider that the statement in the PPS letter of 19 May 2023 that the Director "can only take decisions following a formal police investigation which results in the submission of a file…"is in unambiguous terms. Thereafter, upon affidavit, Mr Agnew averred that he was not enunciating a general policy. There is an obvious tension between these two positions. While the judge purported to accept the affidavit, the basis on which he did so is not entirely clear. We also take into account that the appellant did not seek to cross examine the deponent. However, the foundation of the declaration determined by the judge seems to have been his analysis that the letter disclosed an approach on the part of the DPP which was unsustainable in law in this case (being a fetter of discretion and an infringement of the hallowed *British Oxygen* principle), to be contrasted with a legally unsustainable wide ranging policy statement.

[27] We are not persuaded that the judge's analysis is undermined by the pre-letter inter–partes communications. Furthermore, we must be mindful of the *DB* principles (*DB v Chief Constable* [2017] UKSC 7). We also acknowledge that the judge debated factors contra-indicating the grant of declaratory relief. Finally, the factor of judicial discretion is also of self-evident importance. On balance, we decline to interfere with this order.

Conclusion

[28] For the reasons given the appeal is dismissed and the respondent's Notice under Order 59, rule 6 RCJ (in effect, though not technically, a cross appeal) is also dismissed. Therefore, the judge's order is affirmed in all respects.

Addendum

The parties have proposed jointly that the court should make no order as to costs inter-partes. While the court is content to so order, the following must be emphasised. As our judgment makes abundantly clear, the pursuit of the second judicial proceedings (this case) was quite inappropriate. This court ordered full consolidation of the two appeals in advance of the hearing (see Order 4, rule 9 and Order 59, rule 10(1) RCJ). It did so for reasons of convenience and expedition and, further, in order to ensure that the single, consolidated appeal which ensued would entail one set of costs only for the applicant. As stated in the White Book commentary:

> "The main purpose of consolidation is to save costs and time …"

[The Supreme Court Practice, Vol 1, para 4/9/2]