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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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DIVISIONAL COURT

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IN THE MATTER OF AN APPLICATION BY MARGARET MARY BRADY FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE DEATH OF DANIEL HEGARTY, A CHILD, SHOT DEAD IN DERRY ON 31 JULY 1972

AND IN THE MATTER A DECISION OF THE DIRECTOR OF PUBLIC PROSECUTIONS DATED 2 JULY 2021

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Michael Mansfield KC and David Heraghty (instructed by Desmond J Doherty Solicitor) for the Applicant
Tony McGleenan KC and Philip Henry (instructed by the PPS) for the Respondent
Mark Mulholland KC, Rosie Walsh and Gordon Anthony (instructed by McCartan Turkington Breen Solicitors) for the Notice Party

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Before: Treacy LJ, Colton J and McFarland J

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TREACY LJ (*delivering the judgment of the court*)

Introduction

[1] The applicant in this matter challenges a decision of the Director of Public Prosecutions ("DPP") dated 2 July 2021 (reaffirmed on 10 October 2022) whereby he discontinued the prosecution of the notice party, Soldier B, for the murder of her brother, Daniel Hegarty. The impugned decision was taken in light of the ruling of the Crown Court in *R v A&C* [2021] NICC 3, which concerned the admissibility of statements given by soldiers in 1972 and (with the benefit of legal advice) to the Historical Enquiries Team ("HET") in 2010.

[2] The principal issue raised by these proceedings is whether the decision to discontinue the prosecution is wrong in law applying well established principles. The applicable principles are not in dispute.

Applicable Principles

[3] The extent to which a prosecutorial decision is amenable to judicial review and the relevant caselaw on the issue is set out in *Re McKinney's Application* [2022] NIQB 23 at [52]-[63]. There is a clear and recognised distinction between a challenge to a decision to prosecute, and one not to prosecute. In relation to the latter, judicial review is the only available remedy, hence a more anxious degree of scrutiny is required. This is even more so in a discontinuance case such as the instant one. In relation to *McKinney's Application*, also a discontinuation case, this court stated at [153]:

> "In addition, just as a more intense review may be appropriate in 'no prosecution' cases, rather than in respect of decisions to prosecute, it may also be appropriate to scrutinize even more closely the rationale for a discontinuance decision where the hopes and expectations of injured parties or their families have been raised by a carefully reasoned prosecution decision in the first instance …"

Irrationality Test

[4] Para 153 of *McKinney's Application* states:

> "… we consider that the decision crosses the threshold of irrationality where it simply does not add up or, in other words, there is an error of reasoning which robs the decision of logic: see R v Parliamentary Commissioner for Administration, ex parte Balchin [1996] EWHC Admin 152. …"

[5] In the recent case of *Craig Thompson's Application* [2022] NIKB 17, Humphreys J noted:

> "[33] In *Re McKinney's Application* [2022] NIQB 23 the Divisional Court recently approved the rationality test espoused by Lord Woolf in *R v North and East Devon HA ex p. Coughlan* [2001] QB 213:
>
> > 'Rationality, as it has developed in modern public law, has two faces: one is the barely

> known decision which simply defies comprehension; the other is a decision which can be seen to have proceeded by flawed logic.'" [para 65]

Background and history

[6] The applicant previously brought a successful challenge to the March 2016 decision of the then DPP not to prosecute Soldier B for the killing of her 15-year-old brother, Daniel Hegarty. The decision of the Divisional Court in that case is reported as *Re Brady* [2018] NICA 20. That decision sets out some of the background.

[7] The British Army was deployed in the summer of 1972 to clear "No-Go" areas in Londonderry. This operation was known as 'Operation Motorman.' In the early morning of 31 July 1972 at around 04:15 hours, Soldier B was one of a company of soldiers who had been deployed in the Creggan Heights area of the city as part of operation Motorman. Soldier B was armed with a 7.62 x 51mm calibre General Purpose Machine Gun ["GPMG"]. His company was led by Soldier A.

[8] At around the same time three local people were also out in the street at Creggan Heights. These locals were Thomas Hegarty aged 18, his brother Christopher Hegarty aged 16, and their cousin Daniel Hegarty aged 15. At some time shortly after 04:15 there was a burst of machine gun fire. When it ended Daniel Hegarty lay dead in the street having been shot twice in the head. Christopher Hegarty was injured.

[9] Soldier B was not interviewed by the police in 1972. He made a statement to the Royal Military Police ("RMP") Army Special Investigation Branch on the day of the shooting which contains a declaration in the following terms:

> "I declare that this statement consisting of pages, each signed by me is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence at a preliminary enquiry or at the trial of any person, I shall be liable to prosecution if I have willfully stated in it anything which I know to be false or do not believe to be true."

[1] In his statement Soldier B says he came through the back garden of a house in Creggan Heights. Just as he got to the gate at the front of the house, he heard movement and shouting to his right. He heard someone shout, 'The bastards are in' and 'Get the fucking bastards.' He then saw three youths running towards him. Twice he shouted clearly for them to 'Halt", then he shouted, "Halt or I'll fire." The youths ignored these warnings and continued running towards him. He says:

> "I then saw the leading youth was holding something in his right hand. I thought it was a revolver. It was bulky and could easily have been a nail bomb or similar object." … "I cocked the weapon and when the youths were about 25 metres away, I aimed at the leading man and fired a quick burst of three x 7.72 rounds."

Two of the Hegarty youths immediately fell to the ground. The third ran away.

[11] The statement summarised above was recorded and signed by Soldier B at 20.10 hours on 31 July 1972. It is broadly supported by a similar statement from Soldier A given at 21:12 hours on 31 July 1972.

[12] A different account is given by Thomas Hegarty in a statement dated 21 September 1972. This statement was not signed by Thomas at the time but in a later signed statement given in October 2005 he refers to the 1972 statement and says, "I agree with its general content." The 1972 statement describes how he, Christopher and Daniel all left from his [Thomas's] house and headed down Creggan Heights towards Circular Road. On the way they met a young fellow whose name Thomas did not know. This person warned them not to go any further as the army was coming down the alleyways between the houses. The three Hegartys then saw two or three soldiers coming down an alley known as 'Watery Lane.' These soldiers stopped at the junction of Watery Lane and Creggan Heights at a spot further down the road from the point that the three youths had reached. Thomas states that he and the two boys immediately turned back and went up the same side of the street that they had come down. At some point Thomas began crossing the road to the opposite pavement and the others followed him. He had just reached the footpath on the other side of the road and was next to the garden fence of 114 Creggan Heights when he heard a burst of four shots. He saw a gun barrel sticking out of the side of the gate post of No 114. Daniel and Christopher both fell.

[13] This account is similar to one made by Christopher Hegarty from a bed in Altnagelvin Hospital on 1 August 1972 - the day after Daniel's death. These two statements are similar in that neither refers to any warning issued by any soldier.

[14] There are two narratives about what happened in the encounter between the two soldiers and the three civilians on that fateful morning. On one account a group of aggressive, threatening youths, one of whom was believed to be armed, approached soldiers they had already 'spotted' with the express and obvious intent of attacking them. The soldiers issued three clear warnings for them to halt but the youths continued their menacing approach. They were then fired upon from a distance of some 25m, and these shots resulted in the death of Daniel Hegarty and the wounding of his cousin Christopher.

[15] In this scenario Soldier B's action is capable of being seen as the legally justified response of a frightened young soldier who believed he was facing a serious and imminent threat - a lawful act of self-defence.

[16] In the second scenario a group of three local youths were retreating from the risk of an encounter with soldiers. They were heading in the direction of their home and were unaware of the two soldiers positioned in the front garden of 114 Creggan Heights. They were not challenged or warned by these soldiers. They only became aware of the presence of the soldiers when shots rang out from virtually point-blank range killing Daniel and wounding Christopher.

[17] In this scenario the action of Soldier B is capable of being found to be the unjustified use of force causing the unlawful death of Daniel Hegarty and the unlawful wounding of another.

History of Investigations

[18] Several investigations have taken place into these disputed events: (i) a police investigation resulting in the submission of a file to the DPP. On 17 July 1973 the DPP directed that the file be marked 'no prosecution' apparently on the legal basis that there was no reasonable prospect that the defence of self-defence could be disproved. The Historical Enquiries Team ('HET') were not impressed by the file that was submitted at that time, stating, "[we] have looked at the original RUC file in connection with Daniel's death. Frankly, it is shocking…"; (ii) an inquest was held on 16 October 1973 in compliance with now long out-dated rules and standards. Soldier B was not a compellable witness at the inquest and did not give evidence, but his RMP statement was read out. An open verdict was recorded; (iii) in 2006 the HET investigated the circumstances of the shooting leading them to make arrangements to conduct an interview under caution with soldier B. Some days prior to the interview his solicitors, unsolicited, furnished the interviewers with a pre-prepared nine-page statement made under caution. B was not arrested and attended the interviews as a "voluntary attendee." He was interviewed under caution. The interview was conducted in accordance with PACE and was tape recorded. He relied on his pre-prepared statement during interview, made no comment in reply to questions, denied any recollection of his original 1972 statement and indicated that he could not comment upon its accuracy. Officers of the HET were unable to identify Soldier A and hence no further evidence was available from him. On 19 December 2006 the HET submitted an advice file to the PPS because the HET review had disclosed additional factors "… notably the additional statement from Soldier B, which had not been available to the [DPP] when the first consideration of the issues was made in 1973"; (iv) on 28 March 2008 the PPS wrote to the applicant and confirmed that it had "…reviewed the decision of no prosecution taken in 1973 following the further investigation by the HET [and] … concluded that the original decision of no prosecution taken in 1973 should stand." This decision letter does not indicate that any further steps (such as commissioning

ballistic evidence) were taken beyond a review of the decision in light of the material furnished to it by the HET review. The letter states:

> "Soldier B has asserted that he honestly believed that he was under attack. It is considered that there is no reasonable prospect of the prosecution being able to prove beyond reasonable doubt that he did not so believe which is the criminal standard required to secure a conviction. In reaching this conclusion the prosecution noted that there was no evidence apart from what was asserted by the soldiers that your brother or either of his cousins was armed."

[19] The 2008 review decision did not expressly mention or address any of the concerns raised by the HET about Soldier B's 2006 account and which underpinned their referral to the PPS.

The Attorney General's Referral and the 2011 Inquest

[20] In 2011 the Attorney General, in the exercise of his statutory powers, directed that a fresh inquest be undertaken in this case. For the purposes of the inquest the coroner commissioned a ballistics expert, Leo Rossi, to provide a report on the fatal shooting. This was the first such report commissioned in this case. He was provided with the copies of the background material which included the ost mortem report, the original inquest papers and the report of the HET which at pages 31-32 analyses Soldier B's 2006 statement. Further evidence in the form of a witness statement was also obtained from Major Dickson who in 1972 had been the commanding officer of Soldiers A and B. The inquest took place between 5 and 9 December 2011. Both Rossi and Dickson gave evidence. Soldier A had still not been identified and the inquest was informed that Soldier B was unfit to attend. Soldier B did not attend but his contemporaneous 1972 account to the RMP and his 2006 account to the HET were both placed before the jury. Soldier A's contemporaneous 1972 account was also placed before the jury. The jury also heard or received relevant civilian, ballistics and other evidence.

The Findings of the Inquest Jury

[21] At the conclusion of all the evidence the jury found that Daniel Hegarty died on 31 July 1972 "… on the footpath approx 8-10 feet from the left gatepost at 114 Creggan Heights Derry/Londonderry." Among the key findings of the jury were the following:

> "(i) The findings of Leo Rossi, Forensic Scientist, contradict Soldiers B and A's statements regarding the positioning of the gun and the proximity of Daniel and Christopher to the discharged weapon;

(ii) Daniel, Christopher and Thomas posed no threat to anyone;

(iii) We believe no soldier shouted sufficient warnings … and contrary to the statements from Soldiers A and B we do not believe soldier B provided sufficient warnings before opening fire, therefore warnings should have been given."

[22] In view of the verdict and it appearing that an offence may have been committed, the Senior Coroner for Northern Ireland, Mr John Leckey, referred the matter to the DPP 'for reconsideration pursuant to section 35(3) of the Justice (NI) Act 2002. Insofar as is relevant section 35(3) provides:

> "Where the circumstances of any death which has been … investigated by a coroner *appear to the coroner to disclose that an offence may have been committed against the law of Northern Ireland* …, the coroner must as soon as practicable send to the Director a written report of the circumstances …"

[23] Mr Leckey's referral to the DPP was made by letter dated 19 December 2011. In March 2016 the DPP issued a 'no prosecution' decision. Following the review of his decision directed by the Court the respondent issued a fresh no prosecution decision on 18 September 2017

[24] The Divisional Court in *Re Brady* [2018] NICA 20 quashed the decision not to prosecute. The reasons for its decision are summarised at para [94] of the judgment.

[25] Following that decision the new DPP, who had no prior dealings with the case, undertook to make a fresh decision. He instructed independent senior counsel who also had no prior involvement in the case. Senior counsel provided a first draft opinion on the 18 May 2018. Upon consideration of senior counsel's advices, the DPP reached his decision on the evidential test concluding that there was a reasonable prospect of securing a conviction.

[26] In its decision letter dated 15 April 2019 the PPS stated:

> "The Director, having completed a review of this matter, has concluded that the test for prosecution is met in respect of Soldier B for the murder of Daniel Hegarty and the wounding with intent of Christopher Hegarty, and proceedings will issue accordingly.

> As you are aware the Director, with the benefit of advices from Senior Counsel, had first concluded that the evidential test for prosecution was met. As Soldier B's ill health was clearly an issue requiring careful consideration as part of the application of the public interest test, a further medical report was obtained and shared with you to allow submissions to be made. In line with the Code for Prosecutors, the Director has concluded, given the serious nature of the charges, that the public interest test for prosecution is also met …"

[27] Soldier B judicially reviewed the fresh decision to prosecute. The Divisional Court rejected his challenge, and this is reported at [2020] NIQB 76.

[28] From the foregoing summary it is clear that in various formats Soldier B has asserted for approximately 50 years that he was the person who discharged the rounds that killed Daniel Hegarty and wounded his cousin Christopher. Over that entire period of time he has accepted that he was the shooter, notably in his 2006 statement. He never disputed and still does not dispute that he was the shooter. On the contrary, he has always made the case that he acted in self-defence as outlined above. It is inherent in self-defence cases that the person asserting the defence recognises that he did commit the act in question but asserts that the act was legally justified. For almost 50 years Soldier B has engaged in a course of conduct with various public authorities on the undisputed basis that he did shoot Daniel. Soldier B's 1972 and 1986 statements were put in evidence before the inquest as his account of what he said happened. Soldier B and his solicitor have engaged directly over many years with the PPS regarding the issue of prosecution on the basis that he was indeed the shooter but he acted in self-defence. In doing so he relied heavily on his 2006 account which in turn was relied upon by the PPS to justify their 2016 decision not to prosecute. Further, in the judicial review challenges recounted above, where Soldier B was either a notice party or an applicant, it was uncontroversial that Soldier B was the shooter.

The impugned decision to discontinue the prosecution

[29] Prior to the current decision to discontinue the prosecution the DPP had decided with the benefit of advice from independent senior counsel that the test for prosecution for murder was satisfied. A challenge by Soldier B to that decision was unsuccessful. The evidence upon which the DPP concluded that the evidential test is met has not changed. The decision to prosecute was made on the basis that there was credible evidence upon which the tribunal of fact might reasonably be expected to find the offences proved to the criminal standard. That evidence still exists.

[30] As noted earlier, on 19 December 2006, the decision by the HET to submit a file to the PPS was made because their investigation disclosed additional factors "… notably the additional [2006] statement from Soldier B, which had not been available

to the [DPP] when the first consideration of the issues was made in 1973." This is the statement he made under caution, with the benefit of legal advice, following full disclosure and which he, via his solicitor voluntarily, provided in advance of his interviews. He relied upon that unsolicited and voluntary statement at interview but refused to answer any questions in respect of its content.

The Current Decision

[31] The reason for the current impugned decision to discontinue the prosecution is set out in the DPP'S letter dated 2 July 2021. Having referred to and considered the decision of O'Hara J in the Crown Court in *R v A&C* the DPP stated as follows:

> "The evidence and information now available presents a confused picture in terms of the nature and purpose of the HET investigation in this case and there are a number of significant parallels with the *A & C* case. For example, *at no point in the lead up to the submission of the 2006 Statement, or the subsequent interview, or indeed thereafter, did HET inform Soldier B that he was suspected of having committed a criminal offence. Internal HET documentation suggested that some consideration was being given to an offence of perverting the course of justice, with no mention of homicide*. … The interview itself was conducted under caution but no offence (not even perverting the course of justice) was specified. Soldier B was not told that he was a suspect; nor was he told that the purpose of the interview was to obtain evidence in relation to any offence of which he was suspected. In summary, there was, as in the *A and C* case, at least a degree of ambiguity about the purpose and potential consequences of HET's investigating officers interviewing former soldiers. Furthermore, there was no evidence to indicate that the HET officers were seeking to interview Soldier B under caution because they had themselves formed a reasonable suspicion that Soldier B had committed an offence of homicide.
>
> In addition to the ambiguity as to the role of the HET in this case, there were two further important points. First, the 2006 Statement was given in direct response to HET's request to interview Soldier B under caution. It was considered that a court would be likely to find that the failure to identify an offence, or inform Soldier B that he was a suspect, was a significant deficiency that tainted the 2006 Statement.

Second, the process leading to the 2006 Statement involved the use by HET of the 1972 Statement and it would appear that the actions of Soldier B and his legal representative were carried out without them being informed of the full picture in relation to compulsion and denial of access to legal advice on which the 1972 Statement was founded. Furthermore, the 1972 Statement was placed at the centre of the HET investigation by virtue of the offences that they were considering (perverting the course of justice by providing untruthful information in the statement) and also as a result of how they used the statement. It was disclosed in advance of the interview, as described above, without its inadmissible nature being revealed and was read out at the start of the interview, indicating that HET was using it as an investigative, and potentially evidential, tool.

Having regard to all of the relevant facts and circumstances, including the ruling in the *A and C* case, the conclusion reached following the review of the Soldier B case was that there was no reasonable prospect of a court admitting the 2006 Statement. This was on the basis that:

(i) A court was likely to find that the 1972 statement was obtained by oppression and that the oppression was continuing at the time of the 2006 Statement, and tainted the process by which that statement was given.

(ii) There was no reasonable prospect of proving that the 2006 Statement was not obtained in consequence of something said or done which was likely to render unreliable a confession made by Solder B. The court would conclude that the things said or done in this regard were: (a) the use of the 1972 Statement in the HET investigation without disclosing its inadmissible nature; (b) the failure to identify an offence in connection with the proposed interview under caution; (c) the failure to inform Soldier B he was a suspect; (d) the ambiguity in the role HET was carrying out (which explains (b) and (c) above).

(iii) The same factors would inevitably lead a court to conclude that it would be unfair to allow the prosecution to rely on the 2006 Statement, and that

therefore it ought to be excluded under Article 76 of PACE.

Conclusion

The 2006 Statement was the key evidence upon which the prosecution relied in order to make its case. Without it there was no other admissible evidence relating to the discharge of a weapon by Soldier B, such as ballistics evidence. Neither the firearm nor the bullet casings were retained or submitted for forensic analysis in 1972. Therefore, in the absence of Soldier B's 2006 account, there was no reasonable prospect of conviction, and the Test for Prosecution was no longer met.

For the avoidance of any doubt, I would emphasis that my decision not to prosecute in no way undermines the findings of the inquest held into Daniel's death. The decision is due to the fact that essential evidence is not available having regard to the rules of evidence that apply in criminal proceedings."

[32] As is apparent from the terms of the letter, the rationale for the decision resolves to the contention that, without the 2006 statement, there is no admissible evidence identifying Soldier B as the shooter.

The 2006 statement

[33] We set out below the salient facts surrounding the circumstances in which this statement was made.

[34] As noted above, in 2006 the HET conducted an investigation into the shooting. This led it to make arrangements to conduct an interview under caution with Soldier B. By letter dated 14 September 2006 Detective Superintendent Philip James of the HET, wrote to Soldier B's solicitor in the following terms:

"Dear Mr Grimes,

I am writing with reference to the investigation into the death of Daniel Hegarty.

As discussed with Brian Murphy we are proposing to interview [B] under caution regarding this case. As this is an investigation into **an offence** in Northern Ireland, we will be conducting the interview under the guidelines of

> the Police and Criminal Evidence Act 1984. The interview will be conducted on audiotape.
>
> …"

[35] In advance of the interview by email of 11 October 2006, following an assurance that they had been provided with full disclosure, Soldier B's solicitor, unsolicited, furnished a copy of his signed written statement to DCI Murphy and DS Mattholie. The email notes that the statement was made under caution and that the wording at the top of the statement is taken from PACE Code C Annex A para (a). The email requests consideration of whether it is necessary to put Soldier B through the stress of an interview "in order to put a file together that can be submitted to the CPS for review." It also asks that consideration be given to adopting one of two alternative courses:

> "1. That you complete and submit a file and enclose this statement *in place of* an interview; or 2. That you complete and submit a file at this stage (including this statement) and seek the advice from the CPS as to whether in the light of all the circumstances of the case, there is any merit or necessity in interviewing our client at all."

[36] In support of the request the email identifies a number of factors:

> "The written statement … **is equal in status to a written statement provided at interview** … the PACE Codes make provision for statements provided under caution outside of the interview setting (see Code C para 12A). This provision is recognition that there are unusual circumstances where it maybe a suspect's "express wish" to provide a statement … [B] has provided a full statement, extending to 9 pages, that includes as clear and detailed an account as he can provide … in the absence of further disclosure (and we understand there is none), our client would be advised to remain silent at interview." [Our emphasis]

The email goes on to consider the issue of inferences being drawn from silence and the prospects for a successful prosecution.

[37] The opening declaration in his nine-page pre-prepared statement under caution to his solicitor states:

> "**I make this statement of my own free will**. I understand I do not have to say anything but that it may harm my

> defence if I do not mention when questioned something which I later rely on in court. **This statement may be given in evidence**". [Our emphasis]

[38] This declaration is then signed and dated as is the statement itself.

[39] The statement records that he has been shown the 1972 statement. He states that he does not remember the details of the statement being taken, does not remember signing anything, had no recollection at all of what he said and cannot comment on the accuracy of what the statement says. **He does however accept that he is the person described as Soldier 'B.'**

[40] He states in para [3] that after a gap of 34 years his memory of the incident is very vague in places. He continues "… I attempt to set out what I can now recall of the incident." [our emphasis]

[41] Soldier B then gives a detailed account of the lead up to the shooting and the shooting itself:

> "32. Dropping to my knee would be the natural thing to do. The machine gun was extremely heavy (at least 27lbs) and would always be fired using the bipod that was attached to the front or other support, either the soldier operating it lying behind it on the ground, or with the bipod resting on a wall or something to enable him to fire it from a raised position.
>
> 33. The machine gun was on my right-hand side resting on the ground.
>
> 34. Immediately I either heard or saw three men coming towards me from my right. I believe that I may have heard them first and I believe that the shouting was abusive or threatening in some way.
>
> 35. This all happened immediately that I turned the corner and dropped to my knee. It was immediately my perception that these men were running towards my position and that they had aggressive intentions, ie that they were intending to cause harm to me or the soldiers that I was with.
>
> 36. My memory is that this was immediate. There was no time to think. Certainly, I had not set up my machine gun. It was simply resting to my right on the ground.

37. I had not seen any civilian prior to this.

38. I then remember other soldiers shouting. In fact, I do not even think that I was the first to shout.

39. I cannot remember exactly what I shouted or how many times, but it would have been "halt" or "halt or I'll shoot."

40. The lighting was poor, and I do not think that there was any illumination to the front of the houses.

41. I cannot say enough times that this happened very quickly and that my perception was that I was about to be attacked.

42. My memory is that one of these men had a hand raised. I may have thought that he was carrying a nail bomb, as I was certainly aware of the IRA using such devices. I may also have thought that it was a gun. I cannot now remember. In any event, these three men were running towards me, and I believed that they were about to attack me or those that I was with. I was the nearest person to them, and it was clearly in my mind that I was the person who had to do something to stop them.

43. I find it very hard to remember the distance that they were from me when I first saw them or the distance that they were when I fired shots. The statement it is said that I made at the time, which I do not now recall, suggests that I said that they were 25 metres away when I fired the shots. I think it is very unlikely that I would have said 25 metres as I am and have always been a "feet and inches" man. I would not know what 25 metres is.

44. Having had a chance to consider that distance, I believe that the distance was less than 25 metres. Obviously, the 34 years that have passed and the speed of the incident itself make it very hard to be at all certain. I have been shown various other statements taken at the time, which suggest that the distance that I was from the men when I fired the shots was less than 10 feet. I do not dispute that this is possible. I simply have no real recollection of exactly how far away they were when I pulled the trigger.

45. I believe that I probably cocked the weapon as the warnings were being shouted. As they continued to run towards me and had not responded to the shouts from others and myself, I pulled the trigger on the machine gun that was still down by my side. I simply aimed as best as I could and fired from that position. The butt of the machine gun may not even have come off the ground. There was not time for me to take a properly aimed shot as this would have required me to set up the bipod and lie down behind the weapon. It would not have been an option to raise a weapon of this weight to my shoulder and, in any event, even if I were strong enough, I do not think that there would have been time.

46. All I can remember is that they were moving quickly towards me, and I had no time to think about what I was going to do. We all shouted at them to stop. They didn't stop. I fired. It was a split second decision. It was a decision taken because I honestly believed that we were in immediate danger of death or serious injury from these three men, and because this was the only action that I could take in the circumstances.

47. I squeezed the trigger once and several shots fired.

48. I do not remember seeing the men falling after the shots.

49. I immediately heard "move, move, move" and I moved up the road to my left. I think I moved up to a junction where we took up position.

50. I am not sure for how long I was in this position.

51. I remember a Saracen armoured car was parked in a lay-by opposite my position and I remember petrol bombs coming over a wall and landing on or by this vehicle. I think the driver panicked and drove the Saracen, which knocked over the wall. I think a solider was slightly injured as a result of this.

52. At some point, I remember that I was picked up in a Landrover and taken to some kind of school hall. I was the only person who was picked up. I think the school hall was being used as some kind of temporary headquarters.

> 53. I believe that this all happened fairly quickly. I did not speak to anyone else prior to speaking to the two people who came and asked me questions about the shooting. I do not remember any of the other soldiers with me saying anything in particular about what had happened, ie no one expressed criticism or support for what I had done as far as I can remember.
>
> 54. I remember that I was spoken to by two men in civilian clothing and they wrote something. I cannot remember if it was read to me or if I signed anything. I have no recollection of what I said to these men at all.
>
> 55. I was extremely shaken following this incident. I think I was returned to the factory or warehouse where we were billeted before the operation and I remember sleeping in."

[42] The letter and attached statement were forwarded by email to DCI Murphy and DS Mattholie. DCI Murphy responded very swiftly:

> "I acknowledge receipt of your email and enclosures which I must say surprised me. I had no indication that you intended forwarding a statement to me from your client. In any case, as I am sure you understand, this is a police enquiry and as such your client has to be interviewed by police officers who will ask questions as deemed appropriate. This is what would happen in any enquiry throughout the UK. It is not normal practice to forward a prepared statement to the police and this negates the need for interview by police. Our position remains unchanged."

[43] By correspondence dated 30 October 2006 DCI Murphy of HET set out the areas that they would like to explore during interview all of which relate to the issue of justification/self-defence. The areas to be explored included "clarification of the dispute in terms of the distance from the youths when your client fires his weapon", "explanation of what the youths were holding in their hands", "exploration of the warning given by your client prior to firing", "consideration of how your client was feeling during this operation and at the time of firing" and "discussion about his conduct after the shooting incident." On 6 November 2006 Soldier B's solicitor responds drawing attention to and relying upon those areas of Soldier B's statement that it is said cover the points raised. This correspondence constitutes explicit acceptance that B was the shooter and that he continues to make the case that he was acting in self-defence.

[44] It is important to note the point is made by Soldier B's representatives that the 1972 statement, is unsigned, shows no evidence of having been read or agreed by Soldier B and "… has not subsequently been adopted by our client. We refer you to paragraphs 1, 2 and 54 of his statement."

[45] The response under the first question as to distances from the youths when he fired quotes from his 2006 statement that … he had no recollection of exactly how far away they were when "… I pulled the trigger." The email reiterates that if it is intended to interview Soldier B in any event, that interview should take place as soon as possible "to enable the file to be provided to the CPS for review…" **It is clear that the reference to the file being provided to the prosecuting authority can only have been for the purpose of deciding whether Soldier B was to be prosecuted or not in connection with the death of Daniel Hegarty.**

[46] Prior to any interview taking place a document dated 16 November 2006 was prepared by the police investigators entitled 'Request for ~~Prosecutorial~~/Pre-Charge Advice' with an attached Summary of Evidence. This document was completed by AI Jon Wright of the HET and forwarded to Pamela Atchison of the PPS 11 days before he and DC Dowsett interviewed Soldier B. Under the heading "NATURE OF OFFENCES" the words "Murder/Perverting the course of justice" appear. Under the heading "DATE AND TIME OF OFFENCE" it states "from 04:15am Monday 31.7.72." Under the heading "ADVICE SOUGHT" it reads:

> "Sir,
>
> It would be anticipated that a decision as to whether to prosecute would be based upon all available evidence which would generally include details of a police interview. At this stage no such interview has taken place although the soldier has been interviewed by his solicitor and a series of questions and answers recorded. Although this initially appears to be comprehensive it raises many further questions which the police would wish to ask. It has been suggested that the soldier would react to any police questioning with a No Comment approach, but it is often the case that despite advice they chose to respond. The following documentation is therefore submitted for your information and attention to establish if it is necessary to interview the soldier or whether you feel enough information exists upon which to make a decision."

On 22 November 2006 Ms Atchison responded that "… this was an investigative matter for the police."

[47] The interviews took place on 27 November 2006. Soldier B's solicitor was present during the interviews which were recorded. He was cautioned at the beginning of the interview. No specific offence was mentioned in the caution. He relied on his 2006 statement but refused to answer any questions regarding the content of his statement.

[48] Some months after the police interviews Soldier B's solicitor wrote on 27 February 2007 to the 'reviewing lawyer' in the PPS. The purpose of this letter was to make representations to the effect that Soldier B should not be charged with any criminal offences. The letter provides a chronology that commences with "July 2006 – Soldier B informed of investigation into the death of Daniel Hegarty and the interest of the PSNI in the role played by Soldier B in that death." The chronology has an entry as follows, "18 December 2006 – telephone conversation between John Wright (one of the interviewing officers) and Jonathan Grimes [solicitor]. Informed that he [Wright] was going to see the PPS on 19 December 2006 as they were now reviewing the case." The letter goes on to make representations based on "the assumption that the alleged offence under consideration is some form of unlawful homicide." It continues "it has also been suggested to us in the course of the investigation there is some consideration of Soldier B being involved in attempting to pervert the course of justice by tailoring, or allowing to have tailored by others, his 1972 statement so as to make out a case of lawful self-defence within the rules of engagement then in force." The letter states that in his 2006 statement Soldier B puts forward a "strong case for self-defence in the face of a perceived threat" and later that "... on the basis of evidence available to a court that it would be hard to prove that B was responsible for committing an "unlawful homicide." The public interest test is addressed, and it is stated, *inter alia,* that:

> "There is no question that the incident under investigation is a serious one. Indeed, it is hard to conceive a more serios incident than one in which a person is killed …there is no evidence to suggest … that there is any question of malicious intent on the part of soldier B. As we understand it, the issue appears to be whether shots were fired in advance of a warning being shouted, possibly as a result of panic … or whether soldier B acted in lawful self-defence as he maintains."

[49] There is a HET message form dated 7 March 2008 which records details of B's solicitor ringing to find out about the "murder" investigation. The form states:

> "[Soldier B's solicitor] rang … asking if we had any further information on the murder of Daniel Hegarty.
>
> He is representing the soldier in this case and hasn't heard of any progress."

The message ends by saying:

> "details pass to A/I Jonathan Wright to contact solicitor direct."

Discussion

[50] The 2006 statement was made with the benefit of legal advice, after a caution administered by his own solicitor, and following full disclosure. He was not required to make any such statement. He chose to do so. Having chosen to make a lengthy statement he was not required to furnish it to the police, but he chose to do so. The statement was unsolicited. The fact that he unilaterally furnished it seems to have taken the interviewers by surprise. It appears he furnished it in an attempt to avoid having to attend an interview. Eventually he did attend an after caution interview, relied on the pre-prepared statement and refused to answer any questions regarding its content.

[51] There is evidence that his 2006 statement was (i) independent of his 1972 statement; (ii) did not have an operating influence on Soldier B's decision to make a statement under caution in the manner considered in *R v A&C* at [33](viii); (iii) did not influence the contents of the 2006 statement. At para 2 of the 2006 statement, Solder B states that he does not remember the details of the 1972 statement being taken or of signing it. Nor does Soldier B comment on the accuracy of what it says.

[52] We note that Soldier B did not adopt his 1972 statement. This is clear from the letter of 6 November 2006 from Soldier B's solicitor which states:

> "… the statement of 'Soldier B' dated 31 July 1972 is unsigned, shows no sign of having been read *and/or adopted* by our client, and has not been subsequently adopted by our client. We refer you to paragraphs 1, 2 and 54 of his [2006 prepared] statement in this regard." [our emphasis]

[53] In his prepared statement, Soldier B gives a very detailed account of events. The contents of the solicitor's letter referred to above suggests that Soldier B did not feel bound by what was said in 1972. The 2006 statement is made under caution (as administered by his solicitor) following full disclosure and with the benefit of legal advice. B's solicitor stressed the voluntariness of the 2006 statement in the ways set out below. In the covering letter sent along with the prepared statement, Soldier B's solicitor states that:

> "For clarity, the wording at the top of this statement is taken from Code C Annex D para (a) 2."

which provides as follows:

ANNEX D WRITTEN STATEMENTS UNDER CAUTION

(a) Written by a person under caution

1. A person shall always be invited to write down what they want to say.

2. A person who has not been charged with, or informed they may be prosecuted for, any offence to which the statement they want to write relates, shall:

(a) unless the statement is made at a time when the restriction on drawing adverse inferences from silence applies, see Annex C, be asked to write out and sign the following before writing what they want to say:

'I make this statement of my own free will. I understand that I do not have to say anything but that it may harm my defence if I do not mention when questioned something which I later rely on in court. This statement may be given in evidence.'

[54] This letter also states that:

> "The PACE Codes make provision for statements provided under caution outside of the interview setting (see Code C para 12A). This provision is recognition that there are unusual circumstances where it may be a suspect's **'express wish'** to provide a statement. B has provided a full statement, extending to 9 pages, that includes as clear and detailed account as he can provide." (our emphasis)

[55] The unsolicited provision of this statement by Soldier B through his solicitor took place almost seven weeks before the formal police interview on 27 November 2006. Prior to making the 2006 statement he is cautioned by his solicitor in the terms noted above. At the formal police interview he is also cautioned but not for a specific offence. On the material available a trial judge could reasonably conclude that when he made the statement and when being interviewed, he understood that it was to address in particular the issue of unlawful homicide and, relatedly, perverting the course of justice. He knew that a file would be provided to the PPS (the NI equivalent of the CPS referenced in the correspondence). He and his solicitor also knew that the purpose of sending a file to the PPS for review was to enable a decision to be made as to whether he would be prosecuted (or not) for unlawful homicide (eg letter from Soldier B's solicitor to the reviewing lawyer in the PPS

dated 27 February 2007 referencing "unlawful homicide" and the HET record of Soldier B's solicitor ringing to find out about the "murder" investigation).

[56] The content and structure of the prepared statement suggest that it was designed to provide an answer to the incriminating evidence which had been disclosed in advance and ultimately, to put forward a defence of self-defence, which is what it purports to do.

[57] As noted above, the evidence upon which the DPP had earlier decided that the test for prosecution was met had not changed materially or at all by the time he made the decision to discontinue the prosecution. The justification for discontinuance was the Crown Court decision in *R v A&C,* another case, on different facts, wherein the trial judge concluded that the statements of the soldiers in the circumstances of that case could not be admitted in evidence. That case is distinguishable from the factual situation in the present case. The focus of the present application has been on the decision of the DPP that following *R v A&C,* the 2006 statement would likely be excluded leaving no admissible evidence that B is the shooter. The facts in Soldier B's case are different from *R v A&C.* In the present case there was a concerted effort to provide a statement in 2006 that, the solicitor stressed, could and should be regarded as a voluntary statement uninfluenced by the 1972 statement. The provision of this statement appears to have been for the dual purpose of advancing his case of self-defence and avoiding an interview. This also is material upon which a trial judge could reasonably hold that the statement was admissible.

[58] The DPP's decision letter makes no reference to any of the material which we have set out herein. Nor does the decision address the specific circumstances surrounding the making of the 2006 statement or the differences between the present case and *R v A&C.* That was a decision made by the judge in the Crown Court, who having heard evidence and detailed argument, concluded on the facts of that case that the statements would be excluded. That is ordinarily the forum where such decisions are made.

[59] In light of the material we have examined above there appears to be a sufficient basis upon which a trial judge could reasonably conclude that Soldier B and his solicitor were clear about the purpose of the HET interview and the nature of the offences under consideration. The DPP's letter appears to focus on the interview and *not* the pre-prepared statement which was furnished almost seven weeks prior to the interview to the evident surprise of the interviewers who received it. In light of the material we have referred to it would be open to a trial judge to conclude that the statement was voluntary, untainted by oppression or unfairness and therefore admissible. There is also material upon which the trial judge could conclude that Soldier B knew he was a suspect and that his statement could be used in evidence. He could also reasonably conclude that there was no ambiguity about the purpose and potential consequences of the process.

[60] Having regard to the foregoing we are driven to conclude after anxious consideration that the DPP's conclusion that there was no reasonable prospect of a court admitting the 2006 statement is irredeemably flawed. His conclusion was reached on the basis that a court was likely to find that the 1972 statement was obtained by oppression "and that the oppression was continuing at the time of the 2006 statement, and tainted the process by which that statement was given". Even if one assumes, that a court is likely to find the 1972 statement inadmissible the rest of the decision does not follow. Soldier B himself asserts in the 2006 statement that he can't remember what he said in 1972, doesn't know if was accurate or not and has not adopted it.

[61] We repeat what we have said above about the circumstances in which the pre-prepared pre-interview statement under caution to his own solicitor was made, volunteered to the interviewers long before the interview, relied upon during interview, when he knew its evidential status and that it would form part of the file to be considered by the PPS when determining again whether the test for prosecution was met – it being plain to all that consideration would be focussed on whether the use of lethal force was justified or not. In our view there is no rational basis for the DPP to have concluded that there was no reasonable prospect of the statement being admitted.

[62] For broadly the same reasons we consider that there is no rational basis for the conclusion that there was no reasonable prospect of proving that the 2006 statement was not obtained in consequence of something said or done which was likely to render unreliable a confession made by Soldier B.

Mistake of Fact

[63] The decision letter included the following unqualified statement:

> "at no point in the lead up to the submission of the 2006 Statement, or the subsequent interview, or indeed thereafter, did HET inform Soldier B that he was suspected of having committed a criminal offence. Internal HET documentation suggested that some consideration was being given to an offence of perverting the course of justice, with <u>no mention of homicide</u>."

[64] This unqualified statement underpinning the DPP's reasons for his decision is simply wrong:

- An RMP document dated 16 June 2005 refers to a request having been made by HET for "assistance to be provided in pursuance of a number of lines of inquiry regarding the alleged murder of Mr DA Hegarty" [document 1]. The letter of request from the HET is dated 3 March 2005. It is from D/Supt

Philip James of HET to RMP, Special Investigations Branch. It requests the same information that document 1 refers to as having been requested. The letter does not contain the word murder or other homicide related term [document 1A]. The RMP appear to have understood from the history and context that this request related to an "alleged murder".

- Internal pre-charge advice document sent by the PPS to HET dated approximately one week before the 'no comment' interview. This document does describe the offences as 'Murder/perverting the course of justice.' [document 2]

- At the end of its summary of evidence document the HET stated that 'advice is sought regarding the interviewing of [Soldier B]. It is our intention to interview [Soldier B] **on suspicion of murder** and perverting the course of justice.' [document 3]

- On 7 March 2008, a HET message form records that Soldier B's solicitor rang, asking if there was any further information on the murder of Daniel Hegarty. [document 4]

[65] The applicant's solicitor first raised issues of discovery/duty of candour in the pre-action letter of 20 July 2021. Following an aborted leave hearing of 26 April, the applicant's solicitor sent email correspondence dated 27 April again requesting copies of the correspondence between the HET and Soldier B's solicitors on the subject of and leading up to the provision of the prepared statement in October 2006 and the holding of interviews on 27 November 2006. These had originally been requested at para 10 of the pre-action letter. At para 9 of the proposed respondent's PAP reply of 17 August 2021, the DPP declined to provide the correspondence and repeated an earlier assertion that Soldier B was not informed he was a suspect nor told that the purpose of the interviews was to obtain evidence in relation to *any* offence of which he was suspected. The applicant's solicitor's email of 27 April referenced the HET correspondence with the MOD and continued:

> "… at the end of [the HET's] **Summary of Evidence** document the HET stated that 'advice is sought regarding the interviewing of [Soldier B]. It is our intention to interview [Soldier B] on suspicion of murder and perverting the course of justice.' Furthermore, internal documents dated from approximately one week before the interview describe the offences as 'Murder/perverting the course of justice.'
>
> Finally, on 7th March 2008, a HET Message Form records that Soldier B's solicitor rang, asking if there was any further information on the murder of Daniel Hegarty. It seems tolerably clear that the HET were investigating the

> murder of Daniel Hegarty and wished to interview Soldier B on suspicion of that offence. It is anticipated that this will have been communicated to Soldier B's solicitors in correspondence from the HET."

The solicitor requested copies or at least the gist in order that the proposed respondent comply with its duty of candour to the court.

[66] There then followed repeated requests to the PPS from April to September by the applicant's solicitor for the documentation requested. Following an email of 23 September, which the applicant's solicitor described as his final request as he could not let the matter drift further the PPS responded on 30 September. In response to the request for discovery the PPS volunteered, without any explanation, that they had "identified" two documents that were **not** placed before the DPP before he made the impugned decision, **nor** were they shown to independent counsel who provided advice. The letter said that both counsel and the DPP were considering those materials and that it was anticipated that the PPS would be writing to the applicant's solicitor about them the following week and "at the same time we will answer your request for discovery."

[67] By letter dated 10 October 2022, PPS noted that the request for discovery had identified specific items referred to as documents 1-4. The letter also stated that the PSNI were asked to "review" their materials to see if there was anything 'relevant' that was not previously given to the PPS and considered by the DPP. The PPS identified one further document which they refer to as document 1A, as it is associated with document 1.

[68] The letter stated that the DPP had previously considered document 2 and document 3 but not document 1, document 1A or document 4.

[69] Document 4 is a HET message form dated 7 March 2008 which post-dates Soldier B's 2006 statement and 2006 interview. It states:

> "[Soldier B's solicitor] rang … asking if we had any further information on the murder of Daniel Hegarty.
>
> He is representing the soldier in this case and hasn't heard of any progress."

The message ends by saying:

> "details pass to A/I Jonathan Wright to contact solicitor direct."

[70] Accordingly, relevant documents that had been furnished that were **not** considered by the DPP or independent counsel included two that were furnished to

the PPS [document 1, document 4] and document 1A which was not furnished to the PPS by the PSNI.

[71] Document 2 is a pre-charge advice document sent by the PPS to the HET which the letter of 10 October states "was considered by the DPP before he made his impugned decision." This document asked for advice on whether to interview. The author, John Wright of HET, has written into the 'Nature of Offence' section the words "murder/Perverting the course of justice." Document 3 is the 'Summary of Evidence' document attached to the request for pre-charge advice. The letter states "it was also considered by the DPP before he arrived at the impugned decision…" The HET's summary of evidence concludes by referring to plans to interview a number of soldiers and states:

> "It is our intention to interview [B] on suspicion of murder and perverting the course of justice."

[72] The letter of 10 October states that after reviewing these documents the DPP's decision of 2 July 2021 remains unchanged. The letter continues as follows:

> "The decision letter [of 2/7/21] stated that while there was mention of perverting the course of justice in the HET materials, there was no mention of homicide. The DPP no longer maintains that position. On examination it *appears* there was reference to two associated HET documents, namely the pre-charge advice request (Document 2) and the attached summary of evidence (document 3). However, the DPP considers that this does not provide a basis to alter his original decision. His reasoning remains unchanged … *In particular,* there is no evidence Soldier B or his solicitor were informed prior to making the 2006 statement and subsequently attending interview that he was suspected of committing an offence; similarly, during that interview he was not told he was a suspect nor that the purpose of the interview was to obtain evidence in relation to any offence of which he was suspected, nor was any offence specified." (our emphasis)

[73] It was plainly wrong for the DPP to have stated in definitive and unqualified terms that **"internal HET documentation … [made] no mention of homicide."** It is clear that the documents did contain such references. The DPP no longer maintains that position but that was his understanding when he made his decision. This gives rise to a clear possibility that the decision was taken while operating under a material mistake of fact and for this reason the decision cannot stand.

[74] It is clear that that it was erroneous for the respondent to have concluded that the investigation did not have the offence of murder in mind. The documentary

material, including material said to have been considered by the respondent, plainly demonstrate that the offence of murder was under consideration. The impugned decision is vitiated by mistake of fact.

Failure to consult - Victims Charter/Human Rights Guidance/Victims & Witnesses Policy (Grounds 5(j)-(n))

[75] We were referred to *McKinney's Application* at [157]-[167], where the same grounds arose. The relevant facts in *McKinney's* case bear some similarity to this case, albeit as the applicant acknowledges, there is a factual distinction. In the instant case, the prosecution of Soldier B by indictable summons was listed for committal but that listing was vacated in advance, in the light of the *R v A&C* [2021] NICC 3 decision. In *McKinney*, a preliminary investigation had already commenced and was at hearing and it was adjourned in the light of the *R v A&C* decision. We agree that very little turns on this distinction.

[76] The applicant submits that in her particular case, there are two discrete components to the breach of these policies. First, the same component as arose in *McKinney* is present. That is to say, the views of the applicant should have been canvassed before any decision to discontinue the prosecution was taken.

[77] The second component relates to what is submitted is a further and much more practical rationale for these policies - the possibility that matters raised by a victim might inform the decision-making process. We were invited to consider the discovery requests made by the applicant and the product of those requests.

[78] We consider that the failure to consult with the applicant before taking the decision to discontinue the prosecution was unlawful having regard to the decision in *McKinney*. In this applicant's case it is submitted that the consequences of the failure to consult are more far-reaching than in *McKinney*. That is because engagement with the applicant and her solicitor prior to the making of the impugned decision could conceivably have resulted in a different decision being made. The applicant has drawn the respondent's attention to the fact that the respondent's reasoning is flawed, in that murder is mentioned in the HET materials, in pertinent terms, and prominently. She had also material suggesting that Soldier B's solicitor was fully aware of the subject matter of the investigation and the nature of the potential charges. Had the respondent complied with the relevant policies and engaged with the applicant, his attention would have been drawn to the HET documents and correspondence between the HET and Soldier B's solicitor in the mid-2000s before making a decision. This would also have provided an opportunity for the applicant and her lawyers to distinguish the HET dimension in the Soldier B case from the *R v A&C*. It was submitted that the information about the PSNI's view on the identity of Soldier A addressed below is a further relevant factor which would have been illuminated if there had been the appropriate engagement. In the *McKinney* case, the remedy which arose was limited to declaratory relief, which was appropriate on the facts of that case, but since consultation in this case could have

led to a different outcome it is argued that quashing of the impugned decision would be the appropriate remedy. We accept that the failure to consult was in breach of the relevant policies and unlawful given, in particular, what was at stake for the applicant. We will invite the parties to agree the proposed terms of a declaration.

Determination that there was no reasonable prospect of Soldier B's 1972 statement being admitted at trial (Ground 5(b)(i) & (ii))

[79] In *R v A&C,* the question of the inadmissibility of RMP statements pursuant to Article 74 of PACE (compulsion) and/or Article 76 (fairness) was ruled upon. The same issues were considered in some detail in *McKinney's Application*. The applicant submits that for the following reasons, the instant case is distinguishable from those instances. The applicant is surely correct in arguing that the question of compulsion should not be approached in a theoretic fashion, but rather from the perspective of whether it actually took place. Mr Mansfield submitted that there must be an evidential basis for contending that Soldier B, <u>in reality</u> acted under some form of compulsion. The fact that RMP officers had the power to compel is he submitted insufficient without more. At para [54] of his 2006 statement, Soldier B simply describes being spoken to by two men in civilian clothing. He points out that in the approximately 17 years since the HET re-investigated the death of Daniel Hegarty and during the reconsideration of the earlier decisions not to prosecute, Soldier B has never made any assertion that his 1972 statement was other than a voluntary one. He has been represented by a solicitor throughout that extended time period. It is submitted that it is unlawful on grounds of unreasonableness for the respondent to decide this issue as on the facts in this case, it was not open to him to determine it. The matter was one for the trial judge.

[80] The applicant's arguments on this issue were persuasively advanced. However, we consider that the decision of the DPP on this issue was one that was reasonably open to him especially having regard to the decision of the court in *McKinney*.

Soldier A's identity

[81] A free standing and discrete issue was raised on the issue of Soldier A's identity. The applicant contends that the respondent's affidavit evidence provides grounds for a separate, entirely new and free-standing basis upon which Soldier B can be identified as the shooter. Mr Mansfield submits that, contrary to what is asserted in the impugned decision letter of 2 July 2021, it appears that Soldier A's identity has been ascertained. It follows, he submits, that his statement is *prima facie* admissible for the purposes of identifying Soldier B.

[82] It is common case that if this former soldier cannot be identified, his statement is inadmissible in criminal proceedings. If identified and alive, Soldier A would be a compellable witness in any prosecution of Soldier B. If identified but deceased

(which appears to be the position) his statement is *prima facie* admissible pursuant to the statutory hearsay provisions. Whether the statement is actually admitted is a matter for the trial judge. In accordance with *McKinney's Application*, original RMP statements such as the one made by Soldier A in this case, are *prima facie* admissible to identify and provide evidence against another soldier such as a shooter, see [35]-[39] & [122]-[154]. In *McKinney's Application*, this was the basis on which the decision to discontinue the prosecution of Soldier F for the murder of Mr William McKinney was quashed.

[83] In the impugned decision letter of 3 July 2021 in this case, the respondent contended that Soldier A's identity had not been established. Indeed, this seems to have been the position of the HET and respondent over recent years. The background to how matters developed is as follows. The commanding officer of the patrol, Captain Dickson identified Soldiers A and B to the HET. Through his solicitor, Soldier A disputed this identification. Upon learning this, Captain Dickson effectively retracted this identification, but this was on the basis of Soldier A's dispute. In response to that Captain Dickson said that he may have been mistaken about it.

[84] The applicant contends that in light of very recently exhibited materials Soldier A's identity is known. In response to a request by Mr Doherty that the PPS and/or PSNI investigate a recent Scot's Guards event marking the 50th Anniversary of Operation Motorman, on 23 August 2022, Stephen Wright of the PSNI sent email correspondence to Martin Hardy of the PPS stating, *inter alia*, that it was his "… belief that the soldier identified by Captain Dickson was likely to be Soldier 'A' but is now deceased." In other words, the PSNI consider that Captain Dickson was in fact correct in his identification of Solider A.

[85] In her affidavit Ms Dougan, on behalf of the DPP, at paras [32]-[35] reproduces the entirety of the aforementioned email correspondence at para [34] and at para [35], concludes that, "The PSNI's position is that all reasonable lines of inquiry have been pursued. The PPS accept the PSNI's reasoned response on this investigative issue." The applicant argues that this appears to suggest that amongst other things, the respondent accepts the PSNI's view that the person Captain Dickson identified is likely to be Soldier A. The question of whether this level of certainty is sufficient to render Soldier A's statement admissible under the hearsay provisions will involve consideration of a range of factors and, no doubt, some detailed matters of law. However, it is pre-eminently a matter for the trial judge. Leave was sought to further amend the Order 53 statement to deal with this post-leave matter on the basis that it has only arisen. In light of our earlier findings that the decision to discontinue the prosecution cannot stand we consider that this may be a matter that will require further exploration. Beyond that we propose to go no further on this point.

[86] A reasons challenge was also raised which is somewhat academic in light of our primary conclusions.

Overall Conclusion

[87] The net effect of what we have said in our judgment is that for the reasons given above the decision discontinuing the prosecution cannot stand.