Judicial review – non-prosecution of soldiers in fatal shooting – whether decision bad in law – challenge to lack of reasons – policy of DPP is giving reasons – whether breach of policy – whether DPP should have ordered fresh investigation

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2002 No. 52

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY MARIE LOUISE THOMPSON FOR JUDICIAL REVIEW

GIRVAN J

[1] This application for judicial review arises out of the tragic death of Kathleen Thompson ("the deceased") on 6 November 1971 at Rathlin Drive, Londonderry. The applicant, the daughter of the deceased, challenges the sufficiency of the reasons provided by the Director of Public Prosecutions ("the Director") for not prosecuting a solider identified as Soldier D or any other person in connection with the death of the deceased; the decision of the Director not to undertake a formal review of the original decision not to prosecute and the decision not to direct the Chief Constable to conduct further investigations into the death of the deceased. In addition the applicant seeks to set aside the actual decision not to prosecute made in 1972.

[2] The proceedings began in March 2002. The original statement pursuant to Order 53 Rule 3(2)(a) ("the Order 53 Statement") was lodged on 6 March 2002. Leave to apply was granted at that stage in April 2002. The Order 53 Statement was amended in June 2002, March 2003, June 2003 and eventually May 2004. The decision not to prosecute was made on 4 August 1972 some 32 years ago. On 27 February 2003 the Director made clear that it

was considered inappropriate to review the decision. In common with many judicial review applications, this case has grown and developed with many new points emerging and being added to the original statement over time. Much of the difficulty in the present case has been engendered by developments in the law particularly in the field of human rights law. It is to be hoped that the principles of law applicable in the fields covered by this case are at last becoming sufficiently clear to bring this and other cases of a similar kind to finality.

[3] On 5 November 1971 a platoon of Royal Green Jackets under the command of solider B was directed to carry out a search of 58 Rathlin Drive, Cregagh in Londonderry and to detain a male person. In the early hours of 6 November 1971 some 8 men in the platoon under the command of solider A went to the house and during the search a number of people began banging dustbin lids and blowing whistles. On completion of the search they were ordered to withdraw. Further down Rathlin Drive shots were fired. According to the statement of Solider D as he was opposite a row of houses in the east of Rathlin Drive he heard a single shot possibly fired by a point 22 rifle. He said that the shot appeared to come from the rear of 129 Rathlin Drive. He turned round and saw a flickering light and the figure of a person behind the fence of 129 Rathlin Drive. He heard voices from the rear of 129 Rathlin Drive. An object was thrown in his direction. He did not see it land for what it was. He took aim and fired 2 rounds. The figure disappeared as soon as he had fired. The soldiers were told to keep moving. Fifteen yards down the road he then saw something was a lighted fire being thrown at him. It exploded close to him in a puff of smoke. He fired 3 more shots. Nothing indicated a hit. Then another black object was thrown and exploded close to him. He fired another 3 shots with nothing to indicate a strike. When moving from the South Way area he heard a number of shots being fired but he could not say from where. Solider C saw what seemed to be a piece of wood from 129 Rathlin Drive, followed by a flash. He heard something pass to the left of his head. At the rear of 129 Rathlin Drive he claimed to see a male person who appeared to have a rifle. There were 2 or 3 other people one of them a female behind him. He said he took aim with his rifle but then he heard 2 shots and he saw the gunman slump towards the fence. He heard a woman scream. He did not hear any shots. He claimed that the gunman was heavily built and about 6ft tall wearing dark clothing. He referred to the subsequent incidents referred to by solider D. He thought it was CS gas canisters that were being fired. Solider A said he heard a bang and saw a flicker of light from the rear of 129 Rathlin Drive and he said he saw a dustbin lid and piece of wood appear from over the fence of 129 Rathlin Drive. He saw D bring his rifle to aim and fire 2 single shots. Because there was a large crowd at the corner of Rathlin Drive and South way he told D and C to keep moving. He saw the members of B Company in the Royal Green Jackets firing CS gas grenades from high ground. He saw D fire 2 rounds of shots and he ordered D to stop firing. The evidence of the deceased's husband indicated that his

wife was not armed. She went through the kitchen towards the back garden and shouted to a neighbour. His daughter switched on a wall light in the porch but he told her to put it out and to get down on the ground. His evidence referred to a crowd of 20 to 30 people at the junction of Rathlin Drive and South way and to CS gas being fired by the soldiers. He heard shots being fired in South Way. He subsequently found his wife shot in the garden.

[4] Investigations into the incident appeared to have been carried out in an entirely unsatisfactory way. The soldiers were interviewed by members of the Royal Military Police not by members of the Royal Ulster Constabulary. The short interviews did not appear to have been carried out in depth. There is nothing to indicate a searching or rigorous enquiry. There was no scene of crime investigation, and no forensic evidence was gathered. The post mortem report on the deceased indicated that it was a high velocity bullet which had killed the deceased but the bullet was not forensically examined. In a separate judicial review application before Kerr J the court accepted the contention made by the applicant that the investigation was inadequate:

> "By any standard it is clear that the investigation into the death of Mrs Thompson was not effective. Even allowing for the constraints that might have obtained at the time and the difficulty in visiting the locus where the shooting happened I am satisfied that a more rigorous examination than that which took place ought to have occurred. It is therefore clearly demonstrated by the applicant that the investigation was not adequate."

The present case however raises issues not as to the adequacy of the investigation itself (on which there is no longer any issue) but as to the decision making process relating to the question whether one or more of the soldiers at the scene should have been prosecuted.

[5] The applicant seeks a declaration that the decision not to prosecute solider D for the unlawful killing of the deceased was perverse and unlawful and that the decision should be set aside. Notwithstanding Mr Treacy QC's eloquent submissions I am unpersuaded that there is any basis for the proposition that the decision not to prosecute was irrational or that the decision maker failed to have regard to relevant considerations or took into account irrelevant considerations. The decision followed consideration of the case at the highest level within the Department by the Director, Deputy Director and a senior lawyer. On the information available to the Director and having regard to the very inadequacy of the investigation the decision not to prosecute was well within the range of decisions which could properly have been made by a reasonable prosecuting authority properly directing

itself. Mr Treacy sought to argue that the evidence clearly established that it was a bullet from solider D which had caused the death of the deceased and the express conclusion by the department that the evidence was insufficient to afford a reasonable prospect of establishing the identity of the person who fired the fatal shot was perverse. Mr Treacy called in aid a reference in Kerr J's judgment to the effect that the solider who effectively discharged the shot which caused the death of the deceased and those who were with them at the time were interviewed by a member of the Royal Military Police. However in that case the court was not addressing the question of the adequacy of the evidence in relation to a prosecution. On the material before the Director and in the light of the absence of forensic evidence and a proper scene of crime investigation the conclusion by the Department on the identify of the gunman could not be described as irrational. Moreover the decision that it could not be shown that the solider was not acting in self defence was entirely rational. The applicant seeks to challenge a decision made in 1972. I accept the argument put forward by the respondent and set out in paragraphs 4.7 et seq in the skeleton argument that the delay in the making of the application to challenge the 1972 decision is fatal to the application. The applicant has established no good reason for the delay. Since 1972 there have, of course, been many changes in developments in public and Convention law but that cannot justify the making of an application so long after the effective decision. It is neither fair nor reasonable that the integrity and competence of the original decision makers should be open to attack over 30 years after the event.

[6] In response to the applicant's attack on the sufficiency of the reasons provided by the Director for not prosecuting solider D or any other person in connection with the death Mr Kitson explained the reasons for the 1972 decision. The decision making process had been carried out by the Director, the Deputy Director and a senior lawyer within the department. They had clearly made a professional and considered judgment that the evidence available was insufficient to afford a reasonable prospect of obtaining a conviction of any identifiable individual in respect of any events arising out of the death, that being the established test for prosecution. In particular it was considered that the evidence available was insufficient to afford a reasonable prospect of proving beyond reasonable doubt who fired the fatal shot. It was further concluded that even if this significant obstacle could be overcome there was no reasonable prospect of rebutting the defence that the firing constituted the use of reasonable force in self defence. Other factors included the non-recovery of the fatal bullet, the relative positions of solider B and the deceased and the passage of the bullet through the body of the deceased. There was no witness to the actual shooting. There was evidence in the statement from military personnel that a male person was holding what appeared to be a point 22 rifle, the shot was probably fired by this rifle and the shot appeared to originate from the rear of number 129 Rathlin Drive.

[7] The applicant seeks an order of mandamus to compel the Director to provide full "and sufficient" reasons. There is nothing to indicate that the Director failed to properly apply and follow his policy in relation to the giving of reasons. There is nothing to indicate that he had not correctly understood and interpreted his policy. If the applicant is to succeed she must establish that the only rational decision available to the Director was to provide still more detailed reasons (of unspecified depth and ambit) for the non-prosecution decision. He had given reasons. If in a given case reasons are given which are manifestly bad reasons these would indicate that the decision maker had failed to take into account relevant considerations or had taken into account irrelevant considerations. In an appropriate case this may well result in the decision not to prosecute being quashed so the matter is re-considered by the Director. The court cannot however make an order requiring the decision maker to give "sufficient reason" to justify the decision. I am satisfied in the circumstances that the reasoning process as set out by the Director and as explained in the affidavit evidence did not reveal any erroneous approach on the part of the decision maker. I can detect no error of law, no failure to take into account relevant considerations, no evidence of taking into account irrelevant factors and the decision was within the range of decision that a reasonable prosecutor could take in the circumstances.

[8] In relation to the decision by the Director not to undertake a review of the decision not to prosecute, Counsel for the respondent argued that in fact Mr Kitson had effectively undertaken a review of the 1972 decision and that in the re-consideration he had taken into account no extraneous circumstances, ignored no relevant factors and did not lapse into irrationality. The applicant's case essentially amounts to the proposition that in the circumstances the 1972 decision should have been treated as improperly arrived at and that the whole matter should have been reviewed again with a view to deciding whether it would be appropriate to institute a prosecution now, some 32 years after the event when there is still no forensic evidence, no proper scenes of crime report and a wholly inadequate investigation. The decision not to review in these circumstances manifestly cannot be demonstrated to be irrational or unlawful.

[9] In his argument Mr Treacy QC challenged the decision of the Director not to direct the Chief Constable to conduct further investigations in the death of the deceased. The matter is referred to in the Order 53 Statement as amended in paragraph (vii) of the Grounds although it is to be noted that no relief is actually sought in terms in relation to the decision not to ask the Chief Constable to carry out such an investigation. Mr Kitson in his affidavit pointed out that the power conferred on the Director by Article 6(3) of the Prosecution of Offences (Northern Ireland) Order 1972 is to exercise in circumstances where information comes to the attention of the Director from a source such as a member of the public, a public representative, a member of

the judiciary at a time when there was no ongoing police investigation. It was apparent from the information available to him that a police investigation had been conducted when the matter was originally referred to the DPP. The possible exercise of the power under Article 6(3) would have been a matter for the discretion of the senior lawyer within the Department with responsibility for the case. Since the initiation of the application for judicial review he had given consideration to the possible exercise at this belated stage of the power under Article 6(3) he considered all the information, representation and arguments generated by the application for judicial review and concluded that it would not be appropriate to exercise the power under Article 6(3) in any particular way at this stage. It cannot be said that that decision by the Director was irrational or unlawful.

[10] In the result the applicant has failed to make out any grounds for the grant of judicial review in this matter and accordingly the application is dismissed.