Neutral Citation No: [2018] NIQB 33	*Ref:* **KEE10600**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **10/4/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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IN THE DIVISIONAL COURT

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY FRANK MULHERN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION MADE BY THE PUBLIC PROSECUTION SERVICE

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Before: Morgan LCJ and Keegan J

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KEEGAN J (delivering the judgment of the court)

[1] This is an application for leave to apply for judicial review of a decision of the Public Prosecution Service ("PPS") not to bring a prosecution against Mr Freddie Scappaticci for an offence of perjury. The application is dated 22 August 2017. The applicant is the father of Joseph Mulhern who was murdered in 1993 in circumstances associated with the activities of the Provisional IRA and the British Army agent known as "Stakeknife".

[2] The application was made by Mr Southey QC and Mr Bunting BL who appeared on behalf of the applicant. Mr McGleenan QC and Mr McAteer BL appeared on behalf of the proposed respondent. We are grateful to all counsel for their helpful written and oral submissions.

[3] Since their inception the proceedings have progressed and changed somewhat in complexion. The current case finds its expression in the Amended Order 53 Statement which is dated 10 November 2017. In that document the applicant seeks the following relief:

(a) An order of certiorari to bring up and quash the decision of the Director of Public Prosecutions not to prosecute Freddie Scappaticci for an offence of perjury relating to the judicial review claim he issued in 2003;

(b) An order of mandamus to compel the Director of Public Prosecutions to take a fresh, lawful decision on whether to prosecute Freddie Scappaticci for an offence of perjury relating to the judicial review claim he issued in 2003;

(c) A declaration that the said on-going failure is unlawful.

Background

[4] The application is grounded in an affidavit of the applicant dated 21 August 2017. In his affidavit the applicant sets out the circumstances of his son's death. At paragraph 7 of this affidavit he avers that:

> "I know who was responsible for my son's death: it has been widely reported that he was killed by the so-called 'nutting squad' a group within the Provisional IRA which was responsible for internal discipline.
>
> At the time of my son's murder, Freddie Scappaticci was not only a senior member of the Provisional IRA, he was also an agent of the British Army, known as agent Stakeknife."

[5] In his affidavit the applicant states that from 2003 articles began to appear in newspapers followed by television reports to the effect that agent Stakeknife was Freddie Scappaticci. He states that this led to considerable public interest in relation to the issue. He refers to the fact that the public debate prompted a judicial review brought by Mr Scappaticci in 2003. This was a judicial review against the Minister of State at the time who had refused to either confirm or deny the allegations in the press that an undercover agent for the Government was Mr Scappaticci. The context of this case was that Mr Scappaticci had made vigorous denials that he was agent Stakeknife including public statements which he repeated in the affidavit filed in the judicial review proceedings. This judicial review was heard by Carswell LCJ and dismissed in a decision reported at [2003] NIQB 56.

[6] In October 2015 it was announced that agent Stakeknife was to be the focus of an investigation by the Police Service of Northern Ireland ("PSNI") regarding criminal activity involving 24 murders that included Mr Joseph Mulhern the son of the applicant. In June 2016 it was announced that the PSNI investigation would be conducted by officers of Bedfordshire police and that it would be designated

"Operation Kenova". In his affidavit, the applicant avers that he has had direct involvement with Operation Kenova. He states that he has met the relevant personnel on 8 December 2016 and 10 January 2017. The applicant states that at the second meeting he formally made a complaint to Operation Kenova by way of statement in respect of his son's death.

[7] The applicant then refers to the fact that on 11 April 2017 the BBC broadcast a documentary entitled "The Spy in the IRA". This programme alleged that Freddie Scappaticci was agent Stakeknife. The documentary also alleged that the PPS had decided, on a date unknown in 2006, not to prosecute Mr Scappaticci for an allegation of perjury. At paragraph 24 of his affidavit the applicant states that in relation to this public discussion "I was shocked. This was the first time anyone had ever told me of a decision not to prosecute Freddie Scappaticci for the perjury offence that he had already obviously committed."

[8] The applicant's solicitor has also filed an affidavit which is dated 22 December 2017 and which sets out further background. In that affidavit reference is made to a chain of correspondence culminating in a letter of 16 May 2017 in which the applicant invited the Director of Public Prosecutions ("DPP") to make a fresh decision on whether to prosecute Mr Scappaticci for perjury and/or to provide reasons for this decision. A response was received on 22 May 2017. This response reads as follows:

> "The Director has asked me to reply to your letter of 16 May 2017.
>
> You will appreciate that the PPS is unable to make any comment on the suggestion in your letter as to the identity of the agent codenamed Stakeknife.
>
> It is correct however that an individual was reported to the PPS in 2006 for the alleged offence of perjury during court proceedings in 2003 involving the individual referred to in your letter. While it was considered, on the evidence, that perjury was committed, the view was taken that the individual concerned had a viable defence of necessity and a no prosecution decision issued. These matters are now the subject of investigation by Operation Kenova and it would be inappropriate to comment further."

[9] A pre-action protocol letter followed on 19 June 2017 and in this the solicitors acting for the applicant state that the decision taken some time in 2006 not to prosecute Mr Scappaticci was "not relayed to our client, or published until a documentary on 11 April 2017."

[10] The reply to this pre-action correspondence is dated 25 September 2017. This reply refers back to the letter of 22 May 2017. It also refers to a press release which issued in October 2015 and contained the following information:

> "The Director of Public Prosecutions Barra McGrory QC has announced today (Wednesday 22 October 2015) that he has requested that the Chief Constable investigate a range of offences which relate to the activities of an individual who is commonly known under the codename Stakeknife.
>
> The Director of Public Prosecutions has also carried out a review of relevant papers and information within the PPS and has identified one case where he now considers there is sufficient basis to review a prosecutorial decision. This relates to a case involving an allegation of perjury in 2003. The Director explains:
>
> > 'I have serious concerns in relation to this decision. Having reviewed all of the available evidence I consider that the original decision did not take into account relevant considerations and also took into account irrelevant factors. I have concluded that the original decision was not within the range of decisions that could reasonably be taken in the circumstances. This decision has been set aside. In accordance with our code for prosecutors, I have asked the Chief Constable to provide further material so that the matter may be reconsidered'."

[11] This pre-action response confirms that "the investigation remains ongoing and upon completion of same a decision as to whether or not to prosecute will be made. " It continues by asserting that the applicant's proposed challenge, to a decision not to prosecute which has since been set aside, is academic and serves no useful purpose. It contends that the relief the applicant seeks has already been secured, and indeed has already been effected before the date of the pre-action letter and before proceedings were issued. The letter states that a new decision will be taken in due course. The letter states that leave to apply for judicial review will be resisted on this basis and also on the basis of delay.

[12] Following from this correspondence the Amended Order 53 Statement was lodged with the court. This statement is clearly directed to what is described as an "ongoing failure" to make a prosecutorial decision. At an earlier stage in proceedings the senior judicial review judge directed that the papers should be served upon Operation Kenova. This course led to replying correspondence being filed by Chief Constable Boutcher dated 26 January 2018. The correspondence deals with the position of Operation Kenova in relation to the judicial review proceedings. Within the correspondence the following information is provided by Chief Constable Boutcher:

> "While adopting a position of neutrality in the judicial review, I would offer the following two observations in the hope that they may assist the parties and the court:
>
> (1) As set out in Parts 3 to 4 of my above mentioned affidavit, Operation Kenova will ultimately report to PSNI on those matters within our terms of reference and PSNI will in turn report to PPSNI under Section 35(5) of the Justice (Northern Ireland) Act 2002. Accordingly, Operation Kenova will independently investigate and report on the perjury allegations at the heart of this judicial review unless and until PSNI/PPSNI decide otherwise: if a related prosecution were to be brought at this stage, thought may therefore have to be given to the implications for Operation Kenova's scope in terms of reference.
>
> (2) From a policing and investigatory perspective, best practice would dictate that PPSNI simultaneously considers as many interconnected matters as possible in the light of the widest possible range of evidence and potential charges. If the court were to find that PPSNI should take a prosecution decision in relation to the perjury allegations now, before we have investigated and reported on them, PPSNI could only do this by reference to the evidence currently available."

[13] The affidavit referred to by Chief Constable Boutcher is an affidavit filed in related civil proceedings. Paragraph 4 of that affidavit articulates the scope of Operation Kenova as follows;

> "4.1 Operation Kenova's terms of reference are underpinned by four requests made by the Northern Ireland DPP to the Chief Constable of PSNI under Section 35(5) of the Justice (Northern Ireland) Act 2002 and one open PSNI murder file, which have all been transferred to my team for action under Section 98 of the Police Act 1998: request 4 under this section is as follows:
>
> Request 4 – 22 October 2015 – perjury
>
> A Section 35(5) request was also made in relation to a case involving related allegations of perjury, perverting the course of justice and misconduct in public office in 2003.
>
> 5 – Transferred murder file – Mulhern
>
> The PSNI Serious Crime Branch re-opened the investigation into the 1993 murder of Joseph Mulhern in 2011 and forwarded an interim report to the Northern Ireland DPP in January 2016. This case was also transferred to Operation Kenova for continued investigation together with the Section 35(5) requests."

[14] Chief Constable Boutcher's correspondence continues as follows:

> "My position is and always has been as follows, including in all discussions with stakeholders (see para 3.8 of my above mentioned affidavit at Exhibit DM1, Tab 2 at Bundle Part II, page 82):
>
> (a) My absolute priority is the fulfilment of Operation Kenova's terms of reference in the interests of the victims, their families, the wider public and the administration of justice and as a means of helping discharge the State's investigative obligations under Article 2 of the ECHR;
>
> (b) Operation Kenova represents the best and most reliable means of getting to the truth and the matters within our terms of reference, including the perjury allegation; and

(c) We have no wish to impede or inhibit the pursuit by families or victims of access to justice in the civil courts and wish to retain a position of absolute neutrality in relation to all civil claims."

Arguments of the parties

[15] In his written argument Mr Southey highlighted the core fact that the PPS has "deferred a prosecution decision". He also argued that this decision is unlawful for a number of reasons which we summarise as follows:

(i) Breach of the prosecutorial code.

(ii) Lack of consultation with victims.

(iii) Lack of reasons which is particularly stark given the public interest.

(iv) Delay which is inimical to the public interest.

[16] Mr Southey contended that leave should be granted on the basis that the decision is unreasonable, an abrogation of statutory duty, that it creates a lack of independence, and that it fails to take into account the views of the applicant and other victims. Mr Southey invited the court to consider the case of *Pham v Secretary of State for the Home Department* [2015] UKSC 19 when assessing the standard of review in a case of this nature.

[17] Mr McGleenan, on behalf of the proposed respondent, argued that leave should not be granted as this case was not sustainable with any reasonable prospect of success applying *Omagh District Council's Application* [2014] NICA 10. He relied upon the core fact that Operation Kenova is dealing with this and other issues and that that independent police investigation should take its course. Mr Mc Gleenan contended that there was no breach of the code. He argued that it was not unreasonable of the PPS to defer making a decision whilst Operation Kenova was ongoing and that there could be a breach of the code if it did not defer given that a fully informed decision could not be made.

Discussion

[18] A number of issues emerge from the foregoing. The first is the question of delay in bringing proceedings. This was addressed in oral submissions given the court's concerns. In particular the fact that the DPP's press statement refers to the issue in 2015 is pertinent and yet proceedings in this case were only lodged in 2017. We consider that it was appropriate of the proposed respondent to raise this issue and the court also harbours some concerns. However, we are satisfied that the case should not be dismissed on grounds of delay at this stage. We are prepared to accept

the submission made by counsel that the applicant's knowledge cannot simply be equated with the knowledge of the solicitor and we would have allowed the applicant to file an affidavit on this point. We would also have been receptive to deferring the issue of delay to a full hearing if leave was granted.

[19] A second preliminary issue was raised regarding the status of the applicant. We have considered this point but given our overall conclusion which is explained in the subsequent paragraphs we do not reach a concluded view upon it. It is safe to say that the applicant clearly has victim status regarding the activities of agent Stakeknife along with other families that have been affected. In this case we do not need to disaggregate whether he is a victim for the purpose of the perjury allegation.

[20] The core question is whether it is reasonable of the DPP to defer a decision on prosecution for perjury pending the conclusion of the investigation of Operation Kenova. This is described as an on-going failure. It is important to state that the failure is neither that of a decision to prosecute or not to prosecute. The real issue is whether the delay in reaching a prosecutorial decision is reasonable. This is of course in a context where it is accepted that the first decision has now been set aside and so there is a level playing field as to whether or not a prosecution decision will be directed.

[21] This is an application for leave to apply for judicial review. The leave test is framed as an arguable case and we recognise that threshold. However we apply the dicta of *Re Omagh District Council's Application* which determined that where, as here, an inter partes hearing has been convened and the arguments of all parties have been heard and all apparently relevant documents and issues considered by the court, the test for granting leave is that the applicant must show a reasonable prospect of success. We proceed on that basis.

[22] We also recognise that this case is fundamentally a challenge to a prosecutorial decision-making process. We were addressed in relation to this by Mr Southey and he invited us to apply a higher standard of review drawing on *Pham* as authority for this proposition. However, we do not consider that the *Pham* case raises any new jurisprudential signpost for review of a prosecutorial decision. The intensity of review as the *Pham* case establishes depends on the context of the individual case. We remind ourselves of the principles set out by Gillen LJ in the case of *X (A Minor) Application* [2015] NIQB 52. These are explained at paragraphs [30] and [31] of that decision as follows:

> "[30] Where the function of a public body concerns decisions about commencing or permitting legal proceedings, grounds for judicial review are applicable in a restricted way. There is now a well trammelled line of authority to this effect in the context of PPS decisions to prosecute or not to

prosecute, the most recent authority in Northern Ireland being *Re Mooney's (Christopher) Application* [2014] NICA 48 which reviewed all of the salient case law.

[31] Hence for the purposes of the instant case, the relevant principles can be stated as follows:

(1) Absent dishonesty or mala fides or in highly exceptional circumstances, the decision of the PPS to consent to prosecution is not amenable to judicial review: see *R v DPP ex p Kebilene* [2000] 2 AC 326 at 369H-371G: *R (On the Application of Corner House Research and Others) v Director of Serious Fraud Office* [2008] UKHL 60.

(2) A decision not to prosecute is reviewable but will be interfered with sparingly, namely for unlawful policy, failure to act in accordance with an established policy or perversity: see *R v DPP ex p C* [1995] 1 Cr. App. R. 136.

(3) The threshold for the review of decisions not to prosecute may be somewhat lower than that set for decisions to prosecute because judicial review is the only means by which the citizen can seek redress against the decision not to prosecute: see *McCabe* [2010] NIQB 58 at [19-21] and *R v Director of PP ex parte Manning* [2001] QB 330 at para [23].

(4) Essentially there are three reasons for these principles. First, because the power in question is extended to the officer identified and to no one else. Secondly, the polycentric character of official decision-making and public interest considerations are not susceptible to judicial review because it is within neither the constitutional function nor practical competence of the courts to assess their merits. Thirdly, the powers are conferred in very broad and unprescriptive terms (see *Mooney's* case at paragraph [31]).”

[23] Of course we recognise that the particular facts of this case do not fall within a decision either to prosecute or not to prosecute. The issue really is one of delay in reaching a decision and whether or not that is *Wednesbury* unreasonable.

[24] The test for prosecution is well trammelled ground and is set out in paragraph 4.1 of the prosecutorial code.

> "4.1 Prosecutions are initiated or continued by the PPS only where it is satisfied that the test for prosecution is met. The test for prosecution is met if:
>
> (1) The evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction – the evidential test; and
>
> (2) The prosecution is required in the public interest – the public interest test."

Paragraph 4.2 also states:

> "This is a two stage test and each stage of the test must be considered separately and passed before a decision to prosecute can be taken. The evidential test must be passed first before the public interest test is considered. If this is also passed, the test for prosecution is met. The tests are set out in detail at paragraph 4.7 et seq."

[25] Having considered the arguments made by both of the parties, the comprehensive documentation that has been put before the court, and the oral submissions, we do not consider that the decision can be described as unreasonable or irrational such as to render it unlawful. We say this for the following reasons:

(i) Operation Kenova was an important publicly recognised step taken to deal with these very serious allegations of criminal behaviour. It seems to us that the thrust of this investigation cannot be underestimated. We borrow from the words of Chief Constable Boutcher who is tasked with this investigation. He says in his correspondence that Operation Kenova represents "the best and most reliable means of getting to the truth about the matters within our terms of reference, including the perjury allegations." The perjury allegations have been referred under the Justice Act. Insofar as the public interest is engaged we observe that this investigation is a critical step in the search for the truth in relation to the activities of agent Stakeknife.

(ii) We do not consider that the actions of the PPS are in breach of the prosecutorial code. In fact we consider that it would arguably be a

breach of the code to pre-empt the outcome of Operation Kenova and make a decision without being fully informed whilst that investigative work is on-going. The operative part of the Code that is most relevant to this decision-making is paragraph 4.4 which reads as follows:

> "In the vast majority of cases, prosecutors should only decide whether to prosecute after the investigation has been completed and after all the available evidence has been reviewed. If prosecutors do not have sufficient information to take such a decision, they should identify evidential weaknesses and request that the investigator, where possible, provide additional evidence to enable a fully informed decision as to prosecution to be taken."

We also have looked at the corollary of 4.4 which is 4.6 of the code which states as follows:

> "There may be exceptional cases where it is clear, prior to the completion of an investigation, that the public interest will not require a prosecution, in which case a public prosecutor may decide that the test for prosecution will not be met and the case should not proceed further. Prosecutors should only take such a decision when they are satisfied that the broad extent of the criminality has been determined and that they are able to make a fully informed assessment of the public interest. Any such decision must be approved by the relevant assistant director."

(iii) We consider that the approach of the DPP does not offend the public interest. There has been transparency in relation to this issue illustrated by the press statement released in October 2015 by the DPP in relation to the perjury prosecution process and by the public pronouncement of Operation Kenova. We consider that this open approach is particularly important to maintain public confidence. In our view it is significant that an outside police force was brought in to deal with the investigation. The persons affected by the investigation have also been directly engaged with Operation Kenova as confirmed by the applicant.

(iv) We do not consider that any reasons challenge is made out in this case. The decision-making letter sent by the proposed respondent referred to the core issue which is the on-going Operation Kenova investigation and as such we consider that there is no basis for any challenge on this ground.

Conclusion

[26] Accordingly, we do not consider that any irrationality or unreasonableness can be attributed to the proposed respondent in relation to this decision-making process. It cannot be characterised as unlawful. We do however acknowledge the grave subject matter and the very real concerns raised by the applicant in this case. We do not argue at all with the proposition that the activities of agent Stakeknife require proper investigation. There is an important public interest for all of the families affected to discover the truth about these events. We recognise the point made that time marches on, family member's age and that these matters need to be brought to a conclusion. However, we also note that Chief Constable Boutcher is committed to a full investigation of all issues and we trust that he will issue his report within the near future. In the light of the foregoing the applicant has failed to mount an arguable case with a reasonable prospect of success. The application for leave to apply for judicial review must therefore be dismissed.