

# Judicial Communications Office

17 December 2020

## COURT DISMISSES CHALLENGE TO DPP'S DECISION TO PROSECUTE SOLDIER

### Summary of Judgment

The Divisional Court<sup>1</sup> today dismissed an application challenging the Director of Public Prosecution's decision to prosecute a former soldier for the murder of Daniel Hegarty and the wounding with intent of Christopher Hegarty in 1972.

#### Background

Soldier B ("the applicant"), a former member of the British Army, challenged the decision of the Public Prosecution Service ("PPS") to prosecute him for the murder of Daniel Hegarty and the wounding with intent of Christopher Hegarty. Both victims were struck by rounds fired from a machine gun by the applicant on 31 July 1972 during Operation Motorman. The primary focus of the applicant's challenge was the contention that the decision is unlawful on the ground that it is in breach of his right to life under Article 2 ECHR and contrary to the Human Rights Act 1998 by reason of the medical evidence as to the consequences of the decision on him.

In 2016, the then Director of Public Prosecutions ("DPP") decided that Soldier B should not be prosecuted. This decision was quashed by the Divisional Court in *Re Brady* [2018] NICA 20. The new DPP, who had no prior involvement in the case, undertook a fresh consideration of the case. He wrote to the applicant's solicitor to say he had completed the evidential test review and that he was moving to the public interest limb. He noted that one of the public interest factors engaged was whether the applicant suffers from significant ill health and in particular the effect a prosecution might have on his health and what effect his ill-health might have on the trial process. Lawyers acting for the applicant had submitted medical reports in 2015 to the former DPP. The new DPP sought additional medical reports and the opinion of independent Senior Council who had no prior involvement in the case. The DPP issued his decision by letter dated 15 April 2019 in which he stated that the public interest test was also met and concluding that there was a reasonable prospect of securing a conviction. The DPP considered there was a strong public interest presumption in prosecuting charges as serious as murder and concluded that, in the circumstances of this case, the presumption was not displaced although he acknowledged that it must be kept under review.

#### PPS Code for Prosecutors

In paragraphs [37] - [42] the Court detailed the relevant provisions from the Code which set out the two limbs which must be satisfied in order for the PPS to conclude that the test for prosecution has been met: the evidential test and the public interest test. Once the prosecutor is satisfied that the evidential test has been met the next consideration is whether the public interest requires prosecution through the courts. The Code states that the presumption is that the public interest requires prosecution where there has been a contravention of the criminal law. In some cases the

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<sup>1</sup> The Panel was Lord Justice Treacy, Mr Justice O'Hara and Sir John Gillen. Lord Justice Treacy delivered the judgment of the Court.

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serious nature of the case will make the presumption a very strong one. Paragraph 4.14 of the Code lists some of the considerations against prosecution which may be relevant and require to be considered in each case. The Court noted that there was no challenge to the decision that the evidential test had been made in this case save for the contention that the evidence had not materially changed since earlier decisions not to prosecute and the decision on the evidential test was therefore vitiated by inconsistency that was irrational.

## **Satellite Litigation**

There is a strong public interest presumption against satellite litigation in criminal cases as the accused is able to raise any relevant issues before the trial judge or on appeal. Satellite challenges cause significant delay. The Court said this case was a prime example as the applicant's legal team had requested that the criminal process be held in abeyance in light of the initiation of the judicial review process. The Court observed that had this approach not be requested the grounds underpinning the present application could have been dealt with by in-trial applications and determined in their proper forum:

“Criminal courts routinely in this jurisdiction deal with issues in and around defendants’ ill-health, whether in the form of abuse of process applications, fitness to plead applications, applications to adjourn, applications to adjust the trial process to accommodate those needs, or to excuse defendants, if required, from attending for their trial. Courts are empowered and required to put in place appropriate measures to address and mitigate so far as reasonably possible any identified risks to life and health and to put in place any special measures to address the needs of vulnerable witnesses, victims or defendants.”

The Court said that the application made in this case is a “bold one and highly unusual if not unprecedented”. It was not satisfied that there were exceptional circumstances justifying departure from the general rule forbidding satellite litigation in criminal cases but felt that in this case it was appropriate to address all matters substantively.

## **The Applicant’s Grounds of Challenge**

The applicant challenged the DPP’s decision to prosecute him on a number of grounds:

### **1. Material Considerations**

It was contended that the DPP either failed to “have any regard whatsoever” to the medical evidence or failed to give it sufficient weight and left out of account the delay between the date of the alleged murder and wounding with intent and the likely date of trial. The Court said there was an “air of unreality” about this complaint as the DPP had commissioned medical evidence to inform his judgment. It referred to the “lengthy engagement” on the subject of the applicant’s ill-health between the PPS and his solicitors and the further report obtained by the Director in 2019. The Court considered it was clear that the issue of the applicant’s health was given very careful consideration in deciding whether the public interest test for protection was met and was satisfied that there was no legitimate basis for contending that the DPP failed to take into account properly or at all the medical evidence he had obtained.

The applicant also challenged the provisions of the Code which set out matters to be considered when determining the public interest test on the basis that they appear to require the PPS to

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leave out of account legally relevant matters in respect of a decision to prosecute. The applicant claimed that the Code apparently accepts that a defendant's ill-health can be relevant to an assessment of the public interest but only if the case is not a serious one. By implication it was argued that this meant that the applicant's ill-health would either have been considered and then disregarded or left out of account altogether.

The Court said that whilst the Code could in certain respects be more clearly expressed it was abundantly clear that the DPP did not interpret or apply the Code as requiring him to leave out of account legally relevant questions. It said it was abundantly clear from the detailed engagement between the DPP and the applicant's solicitors that the ill-health of the applicant was not disregarded or left out of account. It said the public interest limb of the prosecution test contains a presumption in favour of prosecution if the evidential test is met or where there has been a contravention of the criminal law:

*"Where, as in the present case, there is evidence sufficient to provide a reasonable prospect of conviction for murder the circumstances in which the PPS in the exercise of its discretion could reasonably and rationally conclude that it was not in the public interest to prosecute for murder are likely to be rare."*

The Court added that the factors identified as relevant and the weight to be attached may vary in each case and one factor in favour of prosecution may outweigh several factors against. It did not accept that the impugned paragraphs of the Code properly read in their overall context require or permit the leaving out of account relevant considerations. Moreover, the Court was quite satisfied that the PPS did not consider themselves constrained in the manner suggested. Further, as part of that careful consideration, the PPS obtained further medical reports which were shared with the applicant to enable submissions to be made: *"On the contrary, it is plain that the Director conducted a good faith exercise in which he fully took into account and carefully considered the applicant's ill-health as well as the detailed written submissions advanced on the applicant's behalf."*

The Court concluded that the relevant provisions of the Code, properly and fairly read in their entirety, did not support the applicant's contention. It said this was reflected in the fact that the DPP did not interpret or apply the Code in a manner which he considered required him to leave out of account legally relevant questions.

## **2. Procedural Unfairness**

It was contended that the DPP's decision was procedurally unfair and vitiated by a failure to give reasons contending in particular that his Article 8 right is engaged because no reasons for the prosecution have been given notably addressing the medical evidence. The Court said the applicant in this case could be in no doubt about the issues which informed the decision to prosecute referring to the lengthy engagement by correspondence between the PPS and his solicitors over many years and the PPS's response to the pre-action protocol letter which provided ample exposition of the DPP's reasons. It rejected the challenge to the sufficiency of reasons.

## **3. Irrationality**

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It was contended that the DPP's decision was irrational as the evidence in the case had "neither materially changed nor improved" since earlier decisions not to prosecute. The Court, however, said it had not been established that the DPP's decision was so unreasonable that no reasonable prosecutor could have taken it. Nor had it been established that the DPP failed to take into account all material considerations. It rejected this ground of challenge.

## **4. Illegality - the Convention Challenge - Articles 2, 3 and 8**

This was the primary focus of the challenge. The applicant contended that the DPP's decision to prosecute was unlawful on the basis that it violates Article 2 of the ECHR. Reliance was also placed upon Article 3 and 8.

It was argued that the decision was in breach of the applicant's right to life under Article 2 as public bodies cannot take steps that result in loss of life other than where such loss of life occurs within the narrow parameters established by Article 2(2) ECHR. It was asserted that the PPS knowingly took the decision to prosecute for murder and wounding with intent notwithstanding the medical evidence that such a decision would increase the applicant's risk of death given his ill-health and in the alternative that any such increase is neither justified nor proportionate.

The applicant also contended that the decision breaches his right to be free from inhuman and degrading treatment under Article 3 ECHR as the medical evidence suggested that he would not be able to participate effectively in the trial process, that other ill-health is likely to result and that the applicant will be knowingly subject to an increased risk of sudden death. Alternatively, the applicant also relied on Article 8 contending that public bodies can interfere with a person's right to bodily integrity only where it is proportionate and in the public interest to do so and where reasons have been provided for that interference.

The applicant argued that notwithstanding that there was sufficient evidence to prosecute for murder and wounding with intent it was not lawfully open to the DPP to conclude that the public interest required a prosecution. This contention was based on the medical reports. The Court said it was not the rule that all offences for which there is sufficient evidence must be prosecuted and that prosecutors must exercise their discretion as to whether prosecution is required in the public interest. In so doing, prosecutors are "taking decisions for the benefit of society as a whole". The presumption is that the public interest requires prosecution when there has been a contravention of the criminal law and that the serious nature of the case will make the presumption a very strong one. The factors identified as relevant and the weight to be attached to any individual factor may vary in each case and one factor in favour of a prosecution may outweigh several factors against.

The Court said it was clear from the evidence that the issue of the applicant's ill-health was given very careful consideration by the DPP having properly taken into account the medical evidence he had obtained. It said that having considered the medical reports in this case it did not consider that the risk identified is of such a nature as to require an assessment by the DPP that the public interest was not met on the basis that do so would violate the applicant's right to life under Article 2. It said the medical reports reveal, in effect, an unquantifiable increase in risk from a pre-existing condition occasioned by the stress of being prosecuted for serious crime and that this is ordinarily unlikely to be a proper basis for condemning the decision to prosecute as unlawful and in breach of Article 2:

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“Indeed, if such a risk in effect required the prosecutor to conclude that the public interest test for prosecution is not met it would have far-reaching repercussion for the criminal justice system which regularly involves dealing with defendants (and others) who have severe mental and/or physical ill-health problems which in many cases will be inevitably and adversely affected by prosecution. Moreover, if the argument of the applicant was accepted it would confer *de facto* immunity on any suspect with a medical condition capable of similarly increasing risk consequential upon higher levels of stress resulting from a decision to prosecute. If correct, a serial killer or rapist could not lawfully be prosecuted if the medical evidence established that a decision to prosecute would thus expose him to that risk.”

The Court said that risks arising from ill-health are commonplace in the criminal justice system and such risks are accommodated within the existing legal framework of criminal trials and the adoption of special measures enabling the court to take, so far as reasonably possible, appropriate measures to mitigate risk.

It noted that there is no support in ECtHR jurisprudence for the argument that even if the conduct for which a person is prosecuted was not within Article 8, the article may apply to the decision to prosecute because of the attendant consequences. In the context of Article 8, the Court cited the Supreme Court decision in *SXH v CPS* [2017] UKSC 30 where it was stated that it was difficult to envisage circumstances in which the initiation of a prosecution against a person reasonably suspected of committing a criminal offence could itself be a breach of that person’s human rights: “Whether it is in the public interest to prosecute is not the same as whether a prosecution would unjustifiably interfere with a right protected by Article 8”. The Court noted that “a decision to prosecute does not of itself involve a lack of respect for the autonomy of the defendant but places the question of determining his or her guilt before the court, which will itself be responsible for deciding ancillary questions of bail or remand in custody or the like”. It accepted the submission that the decision in *SXH* rendered the applicant’s claim for breach of Article 8 untenable.

The Court then referred to the case of *R(D) v Central Criminal Court* [2003] EWHC 1212 (Admin) which considered the obligations on prosecuting authorities where it is alleged that Article 2 and 3 obligations were engaged. In that case, the Court stated that it was the obligation of the prosecutor “to be aware that proceeding with the trial is going to create a significant risk, or increased risk to life or limb of the defendant and his family. [The prosecutor] should then ask himself what measures can be taken to minimise that risk”.

The Court stated that in the present case the DPP identified the risk arising from the applicant’s ill-health and thoroughly investigated it. It said the DPP sought the advices of counsel who directed that updated medical evidence should be obtained to assess the applicant’s current condition and that specific queries should be put to the medical expert. The Court noted that the DPP shared the medical evidence with the applicant’s solicitor and received submissions based upon it:

“We accept that in making the decision to prosecute the DPP weighed the appropriate considerations. He was aware, *inter alia*, that it is open to the applicant to mount an abuse of process application arising out of his medical condition with such evidence as he chooses to place before the court; that the trial

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process would allow for various measures to mitigate risk; that all prosecution decisions are kept under review after a decision to prosecute is made.”

The Court concluded that it was satisfied that the steps taken by the prosecutor were appropriate:

“Further, there is a sensitive, well tested, calibrated system of safeguards and adequate protection within the criminal process requiring and allowing special measures to address and mitigate, so far as possible, risk arising from physical or mental ill-health. The system of safeguards and protections is sufficient to satisfy the obligations of the State under Article 2 and 3.”

The Court dismissed the application for judicial review.

## NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

**ENDS**

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