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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BEFORE A DIVISIONAL COURT

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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

Before: Treacy LJ and Colton J

TREACY LJ (delivering the judgment of the court)

Introduction

[1] The present case began as an application for leave to challenge a decision made on 9 March 2016 by the then Director of Public Prosecutions ("DPP") not to prosecute a soldier ['Soldier B'] for the killing of the applicant's 15 year old brother, Daniel Hegarty, on 31 July 1972.

[2] The relief sought included an order of *certiorari* to quash the impugned decision, an order of *mandamus* requiring the respondent to reconsider his decision, and a range of declarations related to alleged infringements of various rights and protections afforded to the applicant either by law or by operation of various Codes, Charters and Guidance documents designed to protect the interests of victims of crime and to make clear the settled policy approaches which the public can expect the Public Prosecution Service (PPS) to abide by when making prosecutorial decisions.

[3] That application for leave was heard by a Divisional Court comprised of Weatherup LJ and Keegan J. The Court granted leave to apply for judicial review and made various directions including that the respondent review its impugned decision of 9 March 2016. The Court also directed that in the event of the review producing a negative outcome that the applicant could seek leave to amend the

Order 53 Statement. The matter was also listed for full hearing on 28 September 2017.

[4] On foot of these directions there was a further exchange of materials between the parties after which the DPP conducted an internal review of the decision not to prosecute Soldier B, so delivering one of the reliefs sought by the applicant in her original Order 53 Statement. Subsequent to the service of the applicant's skeleton argument for the full hearing the Director issued a fresh decision on 18 September 2017 concluding that there was no reason to depart from his original 2016 decision that the available evidence does not provide a reasonable prospect of proving beyond reasonable doubt that Soldier B did not fire in self-defence and that, therefore, the test for prosecution was not met.

[5] The DPP asserted in correspondence that the internal review which it had undertaken had answered the complaints raised in the Applicant's original Order 53 Statement and that the only outstanding matter to be considered was the question of costs. The applicant asserted that her original complaints remained live and was granted leave to amend her Order 53 Statement in order to bring the decision of 18 September 2017 into the scope of her original claim.

[6] This present application raises significant issues regarding the delay in promulgating the decision not to prosecute in 2016. The judicial review is however principally concerned with the alleged irrationality/perversity of the decision that the evidential test for prosecution is not met. The decision of 18 September 2017 is a confirmation of the earlier March decision.

General Background of Case

[7] The British Army was deployed in the summer of 1972 to clear "No-Go" areas in the City of L'Derry. 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. Although only 18 years old himself, 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] The above facts are not in dispute. In terms of the details of the encounter between the two soldiers and the three civilians, two mutually exclusive accounts

have emerged. In terms of the evidence gathered at or near the time of killing the two accounts are summarised below.

[10] Soldier B was not interviewed by the police in 1972 [see pages 18-21 of the exhibited HET report]. He made a statement to the 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."

[11] 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.' He says: '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.

[12] 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 which states:

> "I am a member of A Coy, 1 RS based at Drumahoe, Londonderry. On 31 July 1972, about 04.15 hrs I was leading a section from my company into Creggan Heights. Our task was to hold the junction of Bligh's Lane and Creggan Heights. Then we advanced across the open ground to the rear of Creggan Heights and moved through an alleyway at Grid: 41611654.
>
> SOLDIER B who was armed with a GPMG affixed to which was a belt containing 25 x 7.62 rounds, lead the way through the alleyway and under my instructions set

the GPMG up on the pavement at the mouth of the alleyway.

As SOLDIER B was getting into position three running figures appeared from somewhere near the alleyway at Grid: 461652. They were running along the road towards us. SOLDIER B shouted at the men to stop but they continued to run towards us. SOLDIER B shouted for them to stop again but they took no notice. At this time the three men were about 20 feet away from us and several of my patrol, including myself, shouted at the three men to stop. They still continued to run towards us.

At this time I was standing next to SOLDIER B who was in a kneeling position with his GPMG. It was obvious that the three men had no intention of stopping and SOLDIER B cocked his GPMG and fired 3 x 7.62 rounds at the three gunmen.

The next thing I saw was two of the running men fall forwards, one after the other on the pavement about six feet in front of us. The third man I did not see or know what happened to him. Following this I noticed that one man on the pavement was moving the top half of his body feebly. The second man was on the pavement made no movement at all.

Immediately after this incident I re-deployed my section at the junction of Bligh's Lane and Creggan Heights and about thirty minutes later an ambulance was seen in the area.

Due to the incident happening so fast and together with the visibility at the early hour in the morning it is almost impossible for me to give an accurate description of the three men.

The operational task dictating otherwise, the two bodies were not examined. I am therefore unable to say whether they were armed with any sort of offensive weapon.

Signed: SOLDIER A

The above statement was recorded and signature witnessed by me at 21.12 hrs on 31 July 1972 at St Peter's School Creggan.

Signed: CPL"

These statements are similar in that both refer to warnings shouted by the soldiers.

[13] 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 4 shots. *He saw a gun barrel sticking out of the side of the gate post of No 114.* Daniel and Christopher both fell.

[14] 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.

[15] There is other evidence in this case including witness statements from people living close to the scene and medical evidence from the post mortem examination of Daniel's body. There was no ballistic evidence obtained in 1972. Some of this material will be considered below in the context of the challenge to the rationality of the respondent's decisions. For now we refer to the evidence gathered in the immediate aftermath of the incident and from the direct participants in the incident to illustrate a core aspect of this case - which is this. 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.

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

[17] 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.

[18] 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

[19] 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' [see HET report at internal pages 17-21] apparently on the same legal basis as later review decisions that there was no reasonable prospect that the defence of self-defence could be disproved". The HET were not impressed by the file that was submitted 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 would not have given evidence but his RMP statement would have been read. An open verdict was recorded; (iii) the Historical Enquiries Team (HET) conducted a review into the shooting in 2006. At this time the HET made arrangements to conduct an interview after caution with soldier B. He was not arrested and attended as a "voluntary attendee". He was interviewed under caution, the interview was conducted in accordance with PACE and was tape recorded. He made no comment in reply to questions but before the interview commenced produced a pre-prepared nine page statement via his solicitor [the HET consideration of soldier B's 2006 account commences at internal page 31 of the RSR Summary]. Soldier B denied any recollection of his original 1973 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. It was and remains the case that Soldier A has not been identified or located. 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".

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

The Attorney General's Referral and the 2011 Inquest

[21] 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 Post Mortem Report, the original inquest papers and the report of the HET which at pages 31-32 analyses his 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 Soldier B was unfit to attend. Soldier B did not give evidence but his contemporaneous 1972 account to the RMP *and* his 2006 account to the HET were both placed before the jury. Before us there appeared to be some doubt about whether Soldier B's 2006 account was placed in evidence before the jury. Accordingly, the Court directed further evidence on this matter. In fact there is now no doubt that the jury were fully aware of the contents of Soldier B's 2006 statement - see fifth affidavit from the applicant's solicitor Desmond J Doherty. 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

[22] 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."

[23] 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 .."

[24] Mr Leckey's referral to the DPP was made by letter 19 December 2011. Despite numerous letters from the applicant's solicitor over many years the DPP did not issue his impugned decision until 8 March 2016, four years and three months, all but one day, from the date of the Senior Coroner's referral. Following the review of his decision directed by the Court the respondent issued a fresh decision on 18 September 2017 confirming his original decision.

The Present Case

[25] In this case the applicant seeks a judicial review of the two most recent decisions of the DPP described above.

[26] The grounds of this application as set out in the original Order 53 Statement are:

"(a) The period of in excess of 4 years taken to make the impugned decision amounts to undue and unlawful delay in terms of the Applicant's right to justice as a victim of crime.

(b) The Respondent's conclusions based upon the ballistics evidence are irrational in all the circumstances.

(c) It was not open to the Respondent to find that the ballistics evidence was consistent with the account of the shooting given by Soldier B.

(d) The ballistics evidence contradicts and undermines Soldier B's evidence in important and material respects.

(e) The Respondent erred in failing to fully take into account any views the Applicant may have had with respect to the decision not to prosecute and the reasons for same.

(f) Bearing in mind the Applicant's legitimate interests by virtue of her status as a victim of crime, the Respondent has breached her article 2 rights as:

> i. he has failed to secure the effective implementation of laws which protect the right to life by identifying and punishing those responsible and
>
> ii. he has failed to afford the Applicant sufficient involvement in the procedure which has resulted in the impugned decision.

(g) In the light of the presence of the fresh ballistics evidence and the Respondent's reliance on same to ground a decision not to prosecute, the Respondent's failure to canvass the Applicant's views on this evidence and on its impact on the evidential test in advance of the impugned decision is in breach paragraph 80 and Standard 2.2 of the Victim Charter.

(h) The Human Rights Guidance requires the Respondent to take a particular approach to cases involving serious human rights violations by the state actors in terms an enhanced requirement to bring persons suspected of such crimes to justice (paragraphs 25 to 28). The Respondent has acted other than in accordance with this guidance and has thereby acted unlawfully.

(i) The Human Rights Guidance imposes an enhanced duty to give reasons for a decision not to prosecute where the death has been caused by a state actor (paragraph 34). The Respondent has failed to fully comply with that duty and has thereby acted unlawfully.

(j) The Respondent has breached the policy requirements to arrange a consultation with the Applicant before a decision adverse to her interests was taken in order to explain any legal or evidential difficulties with the case (paragraph 2.2 and Chapter 3).

(k) In failing to consult with the Applicant or otherwise take account of her views in advance of the making of the impugned decisions, the Respondent has breached paragraphs 2.2.

(l) The manner in which the Respondent made the impugned decision was in breach of the Code.

(m) In reaching the impugned decision, the Respondent failed to have any or any sufficient regard to certain features of the evidence. Furthermore, the Respondent gave undue and disproportionate weight to aspects of the evidence which he erroneously characterised as being consistent with other evidence.

(n) The impugned decisions result in a disproportionate interference with the Applicant's right to respect for her physical and psychological integrity as provided for by Article 8 of the Convention;

(o) The impugned decisions breach Articles 6 and 11 of the Directive;

(p) The impugned decisions breach Articles 1, 3 and 7 of the Charter;

(q) The impugned decisions breach Articles 2, 3 and 4 of the Framework Decision;

(r) In finding there to be no reasonable prospect of proving beyond reasonable doubt that Soldier B did not genuinely perceive that an attack by the IRA on his patrol was imminent, the Director has acted unreasonably and in a manner that no reasonable Director would have acted."

[27] Following the second decision of the DDP the applicant lodged an application to amend the Order 53 Statement which was granted by this Court. The relevant amendment is as follows:

> "The decision letter of 18 September 2017 underlines and confirmed the irrationality of the Director's approach to this case. It is explicitly clear that the Director has approached the question of whether the prosecution test is met on the basis of a scenario which was never advanced by Soldier B. The Director's suggestion that it is appropriate to take into account a factual scenario which was never advanced by Soldier B is a perverse one." [Order 53(4)(d)(ii)]

The Parties' Arguments on Scope

[28] The Respondent's skeleton argument reviewed the history of these proceedings to date, stressing in particular the grant of leave by the Divisional Court, the directions given by that Court and the actions of the respondent in response to those directions. These actions included giving the applicant access to some internal materials held by the respondent which had influenced his thinking when making the March 2016 decision, receiving the applicant's detailed written representations in relation to those materials, and then conducting an internal review of that decision. The respondent notes that this review was informed by all the representations received from the applicant.

[29] In light of this history the respondent submits that the Court should dismiss certain grounds of challenge relating to the failure to take into account the Applicant's views. The grounds which the Respondent suggests have now become academic are:

> Grounds 4(e)-4(g), 4(J)-4(l) and 4(o)-4(q).

[30] For her part the applicant has stressed 'that the irrationality ground concerning the Director's assessment of the ballistics evidence is the primary ground she wishes to focus upon.'

[31] She also states:

> "With respect to declaratory relief, the Applicant places particular emphasis upon the following:- Paragraph 3c(i) (delay), (iii) (irrationality) and (iv) (breach of article 2 rights)."

[32] We agree with the respondent that some of the applicant's complaints in relation to the first decision have been somewhat overtaken by the respondent's actions pursuant to the directions of the Divisional Court upon the grant of leave. We propose therefore to focus our consideration on the issues of the impugned 'no prosecution' decisions and the delay of over 4 years from the Coroner's referral to the PPS in December 2011 to the no prosecution decision from the PPS in March 2016. This approach of course does not preclude consideration of the various

guidance documents to which we were referred to the extent that such documents are relevant to the remaining heads of claim.

The Applicable Legal Principles

[33] Both parties accept the principle that decisions by the DPP not to prosecute are amenable to judicial review. R v Director of Public Prosecutions, Ex p C [1995] 1 Cr App R 136 established that a decision not to prosecute could be reviewed:

> "(1) because of some unlawful policy…
>
> (2) because the Director of Public Prosecutions failed to act in accordance with her own settled policy as set out in the Code; or
>
> (3) because the decision was perverse. It was a decision at which no reasonable prosecutor could have arrived."

[34] The availability of judicial review on these grounds has since been confirmed in cases such as R v DPP ex parte Manning [2001] QB 330.

[35] It is clear that the power to review decisions of the DPP must be used sparingly. In ex parte Manning Lord Bingham made the following remarks:

> "[23]… the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no one else…So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied."

Role of the Public Prosecution Service

[36] The Public Prosecution Service (PPS) is established by the Justice (Northern Ireland) Act 2002 ("the 2002 Act"). The 2002 Act defines the PPS, its statutory duties and commitments and the legislative framework within which it provides its services. The PPS "… is designed to incorporate good practice on a national and international basis". The Director of Public Prosecutions (DPP) is the head of the

service. Its role is to conduct prosecutions in Northern Ireland. That the DPP in Northern Ireland has a wide discretion when making prosecutorial decisions is a well-established principle. The discretion which he exercises exists within the context of a range of applicable legal standards, principles, codes and guidance documents, the most relevant of which are set out below.

Human Rights Guidance

[37] Section 8 of the Justice (Northern Ireland) Act 2004 requires the Attorney General for Northern Ireland to issue guidance to various criminal justice organisations including the PPS on human rights standards which to which they must have regard. Section 8 provides:

> "(2) In the exercise of its functions, such an organisation shall have regard to any guidance for the time being in operation under this section; but this does not affect the operation, in relation to any such organisation, of section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act in a way incompatible with a Convention right)."

[38] Paragraph 25 of the Guidance issued by the Attorney General for NI in March 2014 provides as follows:

> "During an investigation and when considering and dealing with prosecution for acts or omissions that amount to serious human rights violations (including those carried out by agents and non-state actors) the PPS should have due regard to the principles of adequacy, thoroughness, impartiality and independence, promptness, public scrutiny and the involvement of victims."

[39] A potential prosecution arising from an incident where an agent of the state caused the death by machine gun fire of a child in disputed circumstances is clearly a matter to which paragraph 25 will apply.

Directive 2012/29/EU ("the Directive")

[40] This establishes minimum standards on the rights, support and protection of victims of crime. It includes the following:

> "Article 6
>
> Right to receive information about their case
>
> 1. Member States shall ensure that victims are notified *without unnecessary delay* of their right to receive

the following information about the criminal proceedings instituted as a result of the complaint …..

(a) Any decision not to proceed with or to end an investigation or not to prosecute the offender;

Article 11:

Rights in the event of a decision not to prosecute

2. Member States shall ensure that victims ... have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law…"

The Victim Charter

[41] The Victim Charter was issued by the Department of Justice under section 31 of the Justice Act (Northern Ireland) 2015. The Charter implements relevant provisions of the EU Directive establishing minimum standards on the rights, support and protection of victims of crime (2012/29/EU). Services pursuant to the Charter must be provided by, *inter alia*, the Public Prosecution Service. Paragraph 80 and Standard 2.2 state:-

"80. Where an investigation file has been sent to the Public Prosecution Service a decision will be made on whether or not someone will be prosecuted for the offence, based on the test for prosecution. ….

Standard 2.2: Information on a decision to prosecute/not prosecute

In relation to prosecution decisions (including a decision not to prosecute) you are entitled: …

• to be informed … *without unnecessary delay*, of a decision by the Public Prosecution Service to prosecute or not to prosecute an alleged offender; …."

Code for Prosecutors

[42] Section 37 of the 2002 Act requires the DPP to prepare a Code of Practice for public prosecutors. The applicable Code at the time of the first impugned decision was the 2008 Code. This Code set out the aims of the PPS in the following terms:

[43] The aim of the Prosecution Service at para 2.13 states:

> "To provide the people of Northern Ireland with an independent fair and effective prosecution service."

[44] It explains what the PPS understands by these terms as follows:

> "**Independence**
>
> The Prosecution Service will be wholly independent from both police and government….. its decisions will be based on an impartial and professional assessment of the available evidence and the public interest.
>
> **Fairness**
>
> All actions will be undertaken with complete impartiality, to the highest ethical and professional standards….'
>
> **Effectiveness**
>
> All prosecution decisions will be taken and every prosecution conducted in an effective and efficient manner. We will provide value for money, while delivering a *timely* and quality service."

The Victims and Witnesses Policy

[45] This is a non-statutory policy document issued by the PPS which emphasizes the importance of witnesses and victims to the effective operation of the criminal justice system. The applicable policy was issued in 2007. It includes the following:

> "The purpose of this policy is to explain the standards of service that victims and witnesses can expect from the Public Prosecution Service ("PPS")…
>
> The PPS is committed to ensuring that the interests of victims are considered at every stage of the criminal justice process. Before taking a decision, a Prosecutor will consider all of **the available evidence,** following the guidance set out in the PPS's Code for Prosecutors and other related policies….."

Role of the PPS in the Impugned Decisions

[46] In the present case the respondent received the referral from the Senior Coroner in December 2011. His duty in such circumstances was to review the file

and decide whether or not there was sufficient credible evidence available to commence a prosecution of Soldier B. Such decisions must be made on the basis of the prosecution test.

The Test for Prosecution

[47] Prosecutions are initiated or continued by the Prosecution Service only where it is satisfied that the test for prosecution is met. The test for prosecution is met if:

> "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:
>
> (i) the evidence which can be presented in court is sufficient to provide a reasonable prospect of conviction – the evidential test; and
>
> (ii) prosecution is required in the public interest – the public interest test.
>
> 4.2 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."

[48] The first sentence of this test is important. It states:

> "Prosecutions are initiated or continued by the Prosecution Service only where it is satisfied that the test for prosecution is met."

[49] These words reflect a critical aspect of the duty on prosecutors namely their duty to keep decisions *to* prosecute under constant review. This duty of vigilance is essential to the balance of interests which our entire prosecutorial apparatus is designed to create and to maintain. Fully aware of the constantly contingent nature of the decision it will make, the prosecutor must apply the evidential test to the file it has received. When considering whether or not the available evidence is sufficient 'to provide a reasonable prospect of conviction' the prosecutor must be guided by its own Code which states at para 4.8:

> "… A reasonable prospect of conviction exists if, in relation to an identifiable individual, there is credible evidence which the prosecution can adduce before a court upon which evidence an impartial jury (or other

> tribunal), properly directed in accordance with the law, may reasonably be expected to find proved beyond reasonable doubt the commission of a criminal offence by the individual who is prosecuted."

[50] Para 4.9 of the Code states:

> "It is necessary that each element of this definition is fully examined when considering the evidential test for each particular offence (see below). The Public Prosecutor must also take into account what the defence case may be and whether it would affect the prospect of conviction. If a case does not pass the evidential test, it cannot proceed, no matter how serious or sensitive it may be."

[51] There is a second stage public interest test which is only considered where the first stage evidential test is met. This is a matter to which we will return later.

Discussion

[52] The significant issues raised by these proceedings include the delay in promulgating the decision not to prosecute and the alleged irrationality of the decision that the evidential test for prosecution is not met.

[53] Mr Leckey's referral was made on 19 December 2011. The circumstances of the death having been investigated and in view of the verdict the matter was referred to the DPP for reconsideration because it appeared to the Senior Coroner that an offence may have been committed. In those circumstances the Coroner was obliged under section 35(3) of the 2002 Act "as soon as practicable to send to the Director a written report of the circumstances…". The initial decision not to prosecute was made in 1973; following Soldier B's 2006 statement and the HET referral a second decision not to prosecute was made in 2008. By the time of the Coroners referral to the DPP in December 2011, 39 years had passed since the killing of Daniel Hegarty. It was incumbent on the DPP to promptly consider, on the available evidence, whether the test for prosecution was met. Despite numerous letters from the applicant's solicitor over many years the DPP did not issue his impugned decision until 9 March 2016, four years and three months, all but one day, from the date of the Senior Coroner's referral.

[54] Despite repeated, patient and reasonable inquiries from the applicant's solicitor Mr Desmond Doherty, no decision was forthcoming. On 12 January 2015 the Assistant Director John Rea wrote in response to the applicant's letter of 17 December 2014 and stated "…. the report from Mr Mastaglio, together with Counsel's opinion in respect of that report, is currently with the Director. I hope to be in a position to write to you about the case *shortly*". That did not happen. Numerous further letters ensued in an attempt to elicit a decision but to no avail.

Somewhat troublingly by letter dated 16 June 2015 (three and a half years post-referral) the Assistant Director raised a completely new consideration stating:

> "Dear Sirs
>
> **DANIEL HEGARTY (DECEASED)**
>
> Thank you for your clients' concern at the time that it has taken to reach a final decision and regret the further anxiety this has caused. There remains one outstanding enquiry. The Director has had sight of a medical report on Soldier B dated September 2013 and has requested his solicitors to provide an up to date report so that he may be fully informed of all public interest considerations before making his decision. I have reminded Soldier B's solicitor of the urgency of this matter on 1 June and again today.
>
> I have mentioned this correspondence to the Director and he has asked me to assure you that a decision will be made as soon as possible."

[55] This letter is troubling because prosecutions are initiated or continued by the PPS only where it is satisfied that the Test for Prosecution is met. The Code for Prosecutors states at 4.2 that this is a 2 stage test (the evidential test and the public interest test) and "that 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". The sequence described in the correspondence demonstrates that the Director was considering public interest considerations at this stage. Consistently with the Code such consideration presupposes that the evidential test had been passed – otherwise why consider it? You don't move to the second stage unless the first stage has been passed. There is good reason why the Code requires this staged approach since if it is not followed there is an obvious danger that matters completely extraneous to the evidential test could come into play in the evaluation of the evidence. That is why it is not permissible to have both matters under consideration at the same time. In the absence of any explanation on this point the approach set out in the correspondence demonstrates that the Director misapplied the test for prosecution. Unfortunately in this case we do not have any affidavit from the former Director even though he was the actual decision maker. The affidavit filed on behalf of the respondent does not address this point which was, in fairness, not a point raised by the applicant. This correspondence also reveals that the legal representatives of the potential defendant, Soldier B, were involved in making representations. The dates, scope, content and treatment of these representations to the Director is unknown to the applicant and the Court other than to say that the Director was considering that B's evidence

related at least to the public interest at a time before the Director issued his decision on the evidential test.

[56] The final ballistics report was received on 14 October 2014 and senior counsel provided his final written advices on 30 November 2014. The lengthy March 2016 letter does not explain the delay in issuing the decision, the respondent's affidavit evidence does not explain the delay and the respondent's skeleton argument does not even address it. We are satisfied that the prolonged 4 year delay between the referral from the Senior Coroner to the promulgation of the March 2016 decision was manifestly excessive, inexplicable, unjustified and unlawful.

[57] As the PPS recognised, Mr Rossi's evidence played an important part in the jury's findings. Essentially his evidence was that the head wounds to Daniel Hegarty showed a trajectory which was almost parallel to the ground and that if the deceased had been 8-10 feet from the muzzle of the gun the shots could not have been fired from ground level. He further stated that tests showed that the gun could not be aimed and fired from a kneeling position. Soldier A in his statement made at the time stated that, on his instructions, Soldier B had set up the machine gun on the pavement and that he was standing next to Soldier B who was in a kneeling position with the machine gun when Soldier B fired three rounds from his GPMG at the three "gunmen". Soldier B in his original statement made on 31 July 1972 said he fired aimed shots. He made no reference to the position of the weapon. In his evidence to the inquest Mr Rossi ruled out the possibility that the shots had been fired *"from tripod ground position"*. The clear implication from this was that the accounts given by Soldier A and Soldier B were unreliable. The jury found that Mr Rossi's evidence contradicted statements of Soldiers B and A regarding the positioning of the gun and the proximity of Daniel and Christopher to the discharged weapon. Following the verdict of the jury, its key findings and the referral of the matter by the Senior Coroner to the DPP for reconsideration the Director did not then, on the available evidence which included the transcripts of the inquest evidence, issue a decision to prosecute.

[58] The decision letter of March 2016 states that in order to explore fully with Mr Rossi the weight that might be attached to his evidence in a criminal prosecution and the conclusions that could be properly drawn from his observations Senior Counsel and the Assistant Director consulted with Mr Rossi.

[59] Ms McKevitt, senior public prosecutor, swore an affidavit on 15 August 2017 on behalf of the respondent. At paragraph 8 of her affidavit she sets out a chronology detailing "…the various stages leading up to the impugned [March 2016] decision". One of those stages is recorded at 8(g) as follows:

> "23 November 2012 – senior counsel consults with Mr Rea and Leo Rossi. Mr Rossi confirms he was not previously aware that Soldier B had recorded a 2006 statement and therefore wasn't aware of same when he

> reported in 2010 or when he gave his evidence at the inquest."

[60] This goes well beyond saying that Mr Rossi was not supplied with the 2006 statement but records that he wasn't even aware that B had recorded a 2006 statement. We are surprised at the assertion that Mr Rossi was not aware that B had recorded a 2006 statement, wasn't aware of it when he reported in 2010 or when he gave his evidence at the inquest. Mr Rossi's 2010 written statement expressly records that he *was* furnished with the HET report. The opening paragraph of his 2010 report entitled "Purpose of Report" states:

> "On the 22 March 2010 Mr J L Leckey Senior Coroner for Northern Ireland asked me to provide a report on the fatal shooting of Daniel Hegarty from a firearms/Ballistics perspective. I was provided with copies of background material which included the Post Mortem report, the original inquest papers *and the report of the Historical Enquiries Team*."

[61] On the assumption that the ballistics expert read that report he *must* have been aware that soldier B had made a 2006 statement. This is especially so since it is overwhelmingly likely that the HET report, the 2006 statement and the HET analysis of the statement precipitated the referral by the AGNI to the Coroner. Mr Rossi also had the Chart A Scene Assessment Map "plotting events as described by witnesses and representing likely and relative positions of soldiers and victims". This document is also expressly referred to in Mr Rossi's 2010 statement. The Chart repeatedly refers to the 2006 statement of Soldier B. The HET report analyses aspects of Soldier B's statement as does their Scene Assessment Map. At pages 31-32 of the HET Report it is stated:

> "This more recent statement obtained from Soldier B places a different perspective on his original account. In the most crucial passages it deals with the distance issues."

At paragraph 43 of his statement, when commenting upon the earlier reference to 25 metres, Soldier B stated:

> "I think it is very unlikely that I would have said 25 metres as I am and always have been a 'feet and inches man'. I would not know what 25 metres is."

At paragraph 44 Soldier B goes on to say that:

> "Having had a chance to consider that distance, I believe (it) 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.

Soldier B has almost gone as far as to deny his earlier reference to being 25 metres away when he fired the shots, even though he made a signed statement to this effect at the time to Staff Sergeant Sherlock of the Army Special Investigation Branch.

He now seems to accept that he shot Christopher and Daniel at very close range, as described by Thomas and Christopher. This is a fundamental divergence from his original account. It raises a number of issues. If the confrontation happened at such close range, and at such speed, there is no way that the earlier accounts of repeated shouted warnings, as verified by Soldier A, can be accurate.

The alleged warnings

Soldiers A and B provide the primary evidence in their original statements that a warning was given before Daniel and Christopher Hegarty were shot. This evidence is now given further consideration.

Soldier A describes Soldier B shouting at the men on two successive occasions but each time they took no notice and continued to run towards their position. Soldier A then recounts a third warning, this time delivered by himself and other unidentified members of his patrol, again without success.

Soldier B corroborates Soldier A and states he shouted clearly for them to halt but they took no notice. He called on them again to halt and then, for a third time, Soldier B said he shouted 'Halt or I'll fire. They ignored my warnings and continued running towards me.'

Soldier B's prepared statement delivered to the HET is consistent with his earlier account on this matter."

[62] Solider B's 1973 and 2006 statements were given in evidence before the jury and the interested parties would have been furnished with them in the usual way. Plainly the Coroner and his counsel had copies of the 2006 account. Rossi was examined on oath, questioned by the interested parties and was not asked to return.

[63] The issue of Mr Rossi's state of awareness of Soldier B's 2006 account appears to have precipitated the consultation on 23 November 2012 referred to by Ms McKevitt in para 8(g) of her affidavit which I have commented upon above. The Director's decision letter puts it somewhat differently in that it is said that they (ie those attending the November consultation) discovered that Rossi had been supplied with the original statement of Soldier B in 1972 but not his 2006 statement to the HET. However Mr Rossi was plainly aware of the 2006 account at least to the extent that it is referred to in the HET report albeit they do not set out the portions referenced in the next paragraph.

[64] In his 2006 statement Soldier B stated as follows:

> "31 I passed round the back and side of the house, passing the other soldiers who were lined up there and dropped to my knee at the edge of the house.
>
> 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 bi-pod that was attached to the front or other support, either with the soldier operating it lying behind it on the ground, or with the bi-pod 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 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 a 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 ….*
>
> 45 I believe that I probably cocked the weapons 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 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 a bi-pod and lie down behind a 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 there would have been time."

[65] We consider that rationally viewed Soldier B in his 2006 statement fully committed to a clear, positive and materially unequivocal case which is wholly inconsistent with any suggestion by B that he fired the GPMG other than from ground level or from a raised or elevated position whether from the shoulder or any position from there to the hip. Nor reasonably and objectively viewed does B express any material or relevant caveat to the position of the GPMG at the time of firing. The ballistics evidence is consistent with the civilian evidence that the gun was fired from someone leaning with the gun on the fence post (see transcript page 267). Mr Rossi ruled out the possibility that the GPMG was fired from the tripod ground position (page 267). Soldier B made the case that he fired from ground level. He never made the case that he fired the gun from a raised position. The fact that a weapon *could* be fired from a raised position (as the ballistics and civilian evidence indicates) is not to the point so far as the credibility of Soldier B is concerned when he is making a case which is contradicted by and inconsistent with the scientific and other evidence.

[66] The respondent in its skeleton argument acknowledges that if a defendant in a criminal case made a positive and unequivocal case to police that he acted in a specific way, at trial the prosecution can hold them to account. If, as here, evidence can be adduced to undermine the defendant's case that would be useful evidence for the prosecution. "They could use it to attack the credibility of the defendant" (para 14 respondent's skeleton). The respondent submits that the position is different '*where*' the suspect gives an account that is uncertain, vague or contains specific caveats about accuracy. This is because, the respondent submits, even if the prosecution can adduce evidence which tends to undermine the account of the accused, the damage to their credibility "is less than in the first situation … [because] the defendant had not fully committed to their earlier statement". The problem with this analysis, which reflects the Director's reasoning is that so far as the positioning

of the gun is concerned this Court does not consider that rationally viewed there is any material uncertainty, vagueness or caveat in the 2006 account. Simply put, Soldier B never made the case that he fired the GPMG from a raised position. His case was that the weapon was discharged from ground level. In our view there is no material uncertainty in the "defendant's account" (sic para 16 of skeleton). Accordingly the Director is in error in holding that "… it is reasonable and proper for the prosecuting authority to consider variations on the account given". The damage to the defendant's credibility is not lessened by the postulation of a scenario by a ballistic expert which is wholly inconsistent with the defendant's account. In fairness to the respondent they do not seek to make that case but instead put an unrealistic and untenable construction on Soldier B's damaging 2006 account. Although not necessary to our decision we do observe that the HET, following the 2006 account, referred the matter to the PPS to review the issue of prosecution.

[67] The applicant drew attention in its submissions to the fact that Senior Counsel on 9 November 2012 provided an opinion to the PPS in which he recited the relevant information that caused him to then conclude that, in principle, the prosecutorial test *was* now met (see page 317 para 5). Following receipt of this opinion a consultation was arranged with Mr Rossi before a final decision (see para 10, page 318).

[68] On 23 November 2012 a consultation took place between the ballistics expert Mr Rossi, Mr John Rea - then Assistant DPP, and Senior Counsel. According to a document dated 29 November 2012, written by Mr Rossi and entitled 'Test for Prosecution' at this consultation:

> "John Rea asked me the following:
>
> 'Are your findings necessarily inconsistent with the account given by Soldier B in his statement made in October 2006 or are there *any* circumstances in which your findings and his account could be consistent with each other'." (our emphasis)

[69] In light of this question Mr Rossi read and evaluated the 2006 statement in the light of his ballistics findings. On 29 November 2012 he sent his conclusions back to the respondent. He found that 'the version of events in the 2006 statement is inconsistent' with the ballistic evidence. It is not at all obvious why a decision *on the available evidence* was not taken at this stage.

[70] On 4 December 2012 a second consultation was arranged between Mr Rea, Mr Rossi and Senior Counsel at which the PPS, endorsed by Senior Counsel, directed Mr Rossi to conduct further ballistic testing in relation to some of the contents of the 2006 statement.

[71] On 23 January 2014 Senior Counsel issues a fourth opinion setting out his provisional view that the prosecutorial test *would continue to be satisfied* unless the new ballistic testing establishes that there is a reasonable possibility that the

deceased could have been shot *in the manner described by the soldier* from a distance of 8-10 feet and caused the wounds. I will call this proposition X. No ballistic evidence that this Court has seen ever established this proposition. Again, this being so, it is not obvious why a decision was not then taken on the available evidence. The first and fourth opinions made comment on the prosecution test. The intervening second and third opinions did not. They contained observations and directions in relation to the ballistics issues.

[72] Additional ballistics testing was conducted on 15 March 2013 by Mr Rossi and a second ballistics expert. The results established that some of the contents of the 2006 statement could not be correct.

[73] On 9 June 2014 Senior Counsel provides a further written advice. This advice is not exhibited to the respondent's affidavit. At this stage Counsel does not consider that the test for prosecution is met. There is no explanation for the change in view. Counsel's advices to the PPS are privileged and are not normally disclosed. A decision was taken by the PPS to disclose some of the written advices because Mr Rossi provided a number of his opinions to the PPS by adding his own commentary to the text of Senior Counsel's written advices rather than providing it in a separate document. In order to understand Mr Rossi's contributions, it was necessary to include the sections of Counsel's advices that Mr Rossi was responding to. After the draft judgment was handed down the respondent's counsel was made aware of another opinion from Senior Counsel, which had been omitted from the papers provided to them. Neither counsel were previously aware of this document. The Court was informed by letter dated 8 March that the document is dated 17 April 2015 and in it Senior Counsel confirmed his earlier view that the prosecution test was not met. It is not suggested that this should affect the draft judgment or the disposal of the proceedings.

[74] 14 October 2014 - a report is received from a third ballistics expert (Mr Mastaglio) who has now been instructed in the case. This confirms in substance the evidence of Mr Rossi. It does *not* confirm proposition X.

[75] 30 November 2014 – Senior Counsel provides a further opinion confirming that he does not think the prosecution test is met.

[76] Almost a year and a half later, on 8 March 2016 - the DPP issues his first decision letter. In the decision letter it was indicated that given the significance of the forensic evidence and its potential for challenging the account given by Soldiers A and B, the PPS had decided to seek a further opinion from an alternative expert, Mr Mastaglio. The decision letter sets out the conclusions of Mr Mastaglio and in particular the following two paragraphs which were underlined in the decision letter:

> "It would be an easy task for a fit young solder to lift and discharge a GPMG whilst kneeling. The weapon could be

> discharged from the shoulder or any position from there to the hip. Aimed fire would be possible from the shoulder.
>
> If Soldier B was approximately 10 feet from the decedent when he opened fire, the weapon could had [sic] been discharged with its muzzle at the same level as the decedent un-tilted head, or if the muzzle was pointing upwards, with the weapon being discharged from an aiming position, with the decedent's head tilted downwards a few degrees at the same angle as the muzzle's elevation, the observed bullet tracks would have resulted."

[77] The Director places particular reliance on these two passages. As for the first underlined paragraph, we agree with the applicant that this was a pointless hypothesis to consider given that Soldier B not only says this is not what happened, but also says that the gun would have been too heavy to lift to his shoulder. It is that hypothesis that the expert then tests and draws conclusions from. The second underlined paragraph appears to test whether in those circumstances, the observed bullet tracks could have resulted where the distance involved is approximately 10 feet. The DPP concludes that these paragraphs are particularly significant as they explain the circumstances in which the weapon could, on the postulated hypothesis, have been discharged causing the fatal wounds with the observed bullet trajectories. Whilst they may indeed explain how this *could* take place they also demonstrate that Soldier B's 2006 account is inconsistent with the hypothesis, which could further undermine his credibility. Unless the Director is specifically dealing with a hypothesis that Soldier B's account was *untruthful* and he in fact raised the gun for the purposes of aimed fire, why would this scenario be considered? We fail to understand how on a basis that is entirely different from the account given by Soldier B or by anyone else the Director could rationally conclude, as he did, that the ballistics evidence is not as compelling as it appeared at the inquest.

[78] Soldier B never asserted he fired the gun from the position adumbrated in the postulated hypothesis in the first underlined extract. The applicant submits with some force that the inquest jury would have approached the consistency or otherwise of B's evidence with the updated ballistic evidence on the basis of what B said about the positioning of his weapon on the ground, and not upon any alternative hypothesis put forward by an expert. It is argued on the basis of B's account to the HET and the updated ballistic evidence that the jury would have been driven to conclude that B was lying about the position in which he held and fired the gun, and that in all likelihood, he had in fact (contrary to his positive and unequivocal case) raised the gun to shoulder height and fired a burst of 4 rounds at Daniel's head at very close quarters. The postulated hypothesis raises a different scenario from the account advanced by B and would, if tested, attract considerable scrutiny.

[79] The respondent, in its skeleton argument, submitted that there are two fundamental problems with the applicant's rationality challenge namely:

> "a. The applicant fails to recognise that Soldier B has not definitively committed himself to his 2006 account on firing position – he stated that it was 34 years ago, that his memory has been affected by the passage of time, and he caveated his account by referring to what *may* have happened. That being the case, it was appropriate for the Director to consider other firing position scenarios not specifically raised by him.
>
> b. the Applicant's argument appears to mistakenly presuppose that a finding by a jury on the accuracy or inaccuracy of Soldier B's 2006 description firing position (ignoring for a moment his caveat based on the passage of time) would, of itself, determine the guilty or not guilty verdict. It is one of many factors, albeit an important factor, that will speak to his credibility. Credibility comes to the fore when considering whether he honestly felt it was necessary to use force. Whilst a factual finding that his 2006 statement is wrong on his description of firing position would tarnish his credibility, *it would not automatically lead to conviction."* (our emphasis)

[80] Presumably these arguments are intended to reflect the Director's thinking in making the impugned decisions. It is plain that the approach adopted is not consistent with the test for prosecution. The test for prosecution requires the prosecutor to address the question whether there is credible evidence upon which the tribunal of fact may reasonably be expected to find the offence proved to the criminal standard. In other words *could* a properly directed jury be reasonably expected to find the offence proved. The test is not whether the evidence would "automatically lead to conviction". That is the criminal test which the jury applies and not the evidential test which is mandated by the Code for Prosecutors. In approaching the matter in this way the decision maker has improperly raised the threshold of the evidential test.

[81] When in December 2011 the Director was asked by the Senior Coroner to reconsider the matter (because it appeared to him that an offence may have been committed arising out of the death investigated), the circumstances were already such as to indicate that the 'available evidence' was ***likely*** to be credible evidence which the prosecution could adduce before the tribunal of fact. This evidence had recently been tested in a four-day inquest. The findings of the inquest jury showed that it had believed the civilian accounts and the ballistics evidence and that it had

disbelieved the soldiers' accounts. Also, the file had been referred by the very experienced Senior Coroner for Northern Ireland under section 35(3) of the Justice (NI) Act 2002. The Coroner can only make such a referral if it appears to him 'that an offence may have been committed against the law of Northern Ireland'.

[82] Irrespective of the Coroner's view it remains the duty of the respondent to satisfy itself that the evidential test is met before it commences any prosecution. The Director enquired about the effect of Soldier B's 2006 statement in relation to the ballistics evidence. As part of his evaluation of the evidence he also sought counsel's opinion on the issue of whether or not the prosecutorial test was met. On 9 November 2012 - Senior Counsel provided his initial opinion to the effect that it *was* met.

[83] The treatment of the evidence from this point on causes concern. The PPS, having received clear advice from an experienced QC, does not act on that advice. Instead it meets with the ballistics expert and asks whether 'there are **any circumstances**' in which his findings and his Soldier B's account '**could be consistent** with each other".

[84] Mr Rossi reviews his findings in relation to the 2006 statement, concludes that the two are inconsistent and informs the respondent accordingly. This information is given 6 days after the question is posed to the expert but the respondent does not act upon it. Instead it arranges a second consultation and instructs the expert to carry out more testing. It also seeks out another expert, now the third expert from the same discipline to be brought into this case, and instructs him to review the ballistics evidence one more time.

[85] At the same time as the respondent is displaying a difficulty in accepting the findings of any of its ballistics experts it also evinces a difficulty in accepting the legal advice it is receiving from its Senior Counsel. On two occasions, Counsel tells the respondent that he considers the evidential test to be met. The first time was on the 9 November 2012 and again on 28 January 2014. Counsel's position changed for unexplained reasons on 9 June 2014. However, for a period of two years and seven months the respondent was being advised by everyone he had consulted on the matter that the evidence of Soldier B was inconsistent with the ballistic findings and that the evidential test was met - yet he did not issue a decision to that effect.

[86] We must recall that the respondent's duty upon receipt of a referral is to make a decision as to whether or not the prosecutorial test is met. In the Code the PPS makes the commitment to the public that 'its decisions will be based on an impartial and professional assessment of *the available evidence'*…. In making its decision the PPS must first consider the evidential test as previously set out above.

What was the duty of the PPS when this file was received?

[87] The duty of the PPS was to make the decision whether or not the prosecutorial test was satisfied by the available evidence at that time. In making these decisions the PPS must have proper regard to all the relevant guidance which is summarised above and which should inform the approach it will take to the question it must answer. The PPS also makes these decisions being fully aware that all decisions to prosecute are subject to continuing review as explained. Within all these contexts the PPS must approach each case by asking 'Is the evidential test satisfied in this case?'

[88] Its own Code for Prosecutors says:

> ''… A reasonable prospect of conviction exists if, in relation to an identifiable individual, there is credible evidence which the prosecution can adduce before a court upon which evidence an impartial jury (or other tribunal), properly directed in accordance with the law, may reasonably be expected to find proved beyond reasonable doubt the commission of a criminal offence by the individual who is prosecuted.'

[89] In the present case there is no doubt that Soldier B fired the fatal shots. In 2011 there were strong indicators in the file that the evidence against him was sufficiently credible to meet the prosecution test. This evidence had recently been tested over the course of 4 days in the context of an inquest. The jury in that inquest had produced clear findings which show it disbelieved the core elements of the case being made by Soldier B and Soldier A. The only remaining question was whether another tribunal of fact 'may *reasonably be expected* to find proved beyond reasonable doubt the commission of a criminal offence by the individual who is prosecuted'. Although this test relates to a criminal trial, the standard to be applied when using the evidential test is **not** the criminal standard. The PPS itself does not need to be satisfied 'beyond reasonable doubt' that there WILL be a conviction on this evidence - if that were the standard no criminal trial would ever get off the ground. The PPS only needs to be satisfied that there is credible evidence upon which a tribunal of fact could reasonably be expected to find proved the commission of a criminal offence by Soldier B. As pointed out above the Director's approach, encapsulated in the submissions of his Counsel, betoken the application of a more stringent test in this case than that warranted by the Code for Prosecutors. This in our view is a misapplication, changing the evidential test from a filter into a barrier.

Conclusion

[90] This judicial review is primarily concerned with the rationality of the impugned decision of the Director on the available evidence that the test for prosecution is not met in respect of the fatal shooting of Daniel Hegarty and the wounding of his cousin by Soldier B on 31st July 1972. It is also concerned with the significant issue of the delay in promulgating the impugned decision.

[91] Before summarising our conclusions, we again remind ourselves that authority makes clear that a decision not to prosecute is susceptible to judicial review. The decided cases also make it clear that it is a power to be sparingly exercised for the reasons adumbrated by Lord Bingham in the passage set out earlier in this judgment. It is only if a decision is bad in law that the court is entitled to intervene. At the same time, Lord Bingham cautioned that the standard of review should not be set too high, since judicial review is the means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied.

[92] There is an important distinction between decisions to prosecute and decisions not to prosecute. Decisions to prosecute are attended with a range of safeguards. They are subject to *continuing review* by the PPS so that if, at any stage, the evidential test for prosecution is no longer satisfied the prosecution must withdraw the charge(s). So, for example, if someone is charged with an offence and later forensic or other evidence emerges this may require the prosecution to review its decision to prosecute. If, having reviewed it, the evidential test is no longer satisfied the charges must be withdrawn. In addition those who are prosecuted have a variety of other public and transparent safeguards. Thus, an accused can argue at *committal* that there is insufficient evidence to justify the return. If returned for trial the accused can make, if appropriate, a "*No Bill" application*; seek the *exclusion of critical evidence*; apply for a *direction* at the end of the prosecution case and failing that, invite the jury at the conclusion of all of the evidence to conclude that the case has not been proved beyond reasonable doubt and to return a *verdict* of not guilty. Further, if convicted he can exercise his right to seek to *appeal* the matter.

[93] On the other hand a decision that there should be no prosecution is effectively final in a case such as the present and devoid of such safeguards other than the possibility of making representations and the limited jurisdiction of the court on judicial review to quash a no prosecution decision. It goes without saying that the decision to prosecute or not to prosecute is one of immense significance for those affected.

[94] We conclude as follows:

(i) For the reasons summarised at para [52]-[56] we are satisfied that the prolonged 4 year delay between the referral from the Senior Coroner to the promulgation of the March 2016 no prosecution decision was manifestly excessive, inexplicable, unjustified and unlawful.

(ii) For the reasons set out above we consider that the Director was in a position, on the available evidence, to take a prosecutorial decision promptly following the receipt of Mr Rossi's conclusions on 29th November 2012 (see paras [66]-[70], [80]-[85]) and, in breach of the Code, failed to do so. Had the decision been taken at that time it seems inevitable in light of the scientific evidence and the legal advice that

the Director must have concluded that the test for prosecution was then satisfied.

(iii) For the reasons set out at para [54]-[55] above we consider that there are good grounds for considering that the Director misapplied the test for prosecution. Since the matter was not however raised in argument and we have not received submissions on the point we will not express a final view without giving the parties further time, if required. We make it clear however that any decision on this point does not affect the other conclusions to which the Court has come.

(iv) For the reasons set out at para [78]-[79] and [88] we consider that the Director imposed too stringent a test when considering whether the evidential test was satisfied.

(v) We are satisfied for the reasons set out in the judgment that the reasoning leading to the impugned decision not to prosecute is irredeemably flawed. In particular the decision of the Director is founded on an unreasonable and rationally unsustainable hypothesis which is inconsistent with the case made by Soldier B.

[95] For these reasons the judicial review is allowed. We will quash the decision not to prosecute and hear the parties as to what further, if any, relief is required. The applicant is of course entitled to her costs.

Postscript [following short further hearing on 21st May 2018]

[96] In light of paras 54-55 of the Court's judgment, leave was granted to the applicant to amend the Order 53 Statement. It was asserted in para 4(s) that by giving consideration to the public interest test before he had made a determination on the evidential test, the former Director acted contrary to para 4.1.2 of the Code and thereby misapplied the test for prosecution. We received affidavit evidence from the former Director, Mr Barra McGrory QC, and the former Assistant Director, John Rea. Mr McGrory QC has averred as his reason for obtaining up to date medical evidence on Soldier B that "once alerted to the existence of a health issue, which may have been relevant to the application of the evidential test, it was open to me to ensure that up to date medical evidence was available before reaching any conclusion on whether there was a reasonable prospect of a conviction". In the context of this case counsel for the applicant and the PPS both agree that Soldier B's health was *not* relevant to the application of the evidential test (our emphasis).

[97] At paragraph 6 of his affidavit, the former Director references the letter dated 16 June from Mr Rea. He deposes that he was not aware of that letter at the time and did not approve the content of it. He became aware of it upon reading the draft judgment. He repeats that he sought the medical information for the reason outlined in the preceding paragraph. He goes on to say that, as matters developed,

Soldier B's health issues played no part in the final determination of the evidential test which was focused upon the validity of the defence of self-defence. At paragraph 7 he records that "whilst previously I had inclined to the view that the prosecution test was met in favour of prosecution, in or around late January 2016 I decided that the evidential test was not met". By the time of his final determination on the evidential test he was in receipt of a medical report commenting on Soldier B's current state of health but he avers that it was not however considered as a factor in his determination of whether or not the evidential test was met. At paragraph 8 he records that PPS prosecutors frequently receive material, usually contained within a PSNI file, that speaks only to the public interest test but is known to the prosecutors before they determine the evidential test. Such factors he states are "disregarded" when deciding whether there is a reasonable prospect of securing a conviction in keeping with the Code for Prosecutors. He avers that there was no breach of the sequential nature of the prosecution test in this case and no public interest factors where considered when he was deciding on the evidential test.

[98] Mr Rea, who retired from the PPS in September 2015, confirmed that he did not show the letter of 16 June to Mr McGrory and that he would not, as a matter of practice, have sought approval for correspondence unless it was of particular significance. He was acutely aware of the desire of all parties for a decision to be made as soon as possible. He was also aware that the Director had not come to a final decision on whether the evidential test was met. Mr Rea avers:

> "The possibility remained that his decision would be that the evidential test was met and that it would then be necessary for him to weigh up all relevant public interest considerations including the current state of Soldier B's health. It was clearly desirable to begin the process of obtaining up to date information in this regard prior to a final evidential decision being made so as to avoid any further delay should the need arise for the public interest to be considered. When I wrote that the Director had requested an up to date report so that he might be fully informed of all public interest considerations before making his decision I was referring to the fact that steps were being taken to enable a final decision as soon as possible including, if necessary, a decision as to the public interest. I did not mean to imply that the Director would take into account any public interest considerations when applying the evidential test for prosecution."

[99] It is less than satisfactory that two different reasons have been advanced for obtaining this further material: (i) the Director's reason that the material might be relevant to the application of the evidential test and (ii) the Assistant Director's reason that the material was requested to enable a decision on public interest should

the need arise. Further, counsel for the applicant *and* the PPS both agree that soldier B's health was *not* relevant to the application of the evidential test.

[100] The former Director has however confirmed on oath that he did not take Soldier B's health into account when determining the evidential test and that there was no breach of the sequential nature of the prosecution test. This averment is consistent with the fact that the issue of Soldier B's health is not referred to in any of the material disclosed relating to the communications between the Director, Senior Counsel and the ballistics expert which ultimately led to the decision not to prosecute. Given the state of the evidence and the terms of the amended grounds of challenge we do not consider that the pleaded ground has been made out.