Neutral Citation No: [2024] NIKB 22	*Ref:*	**SCO12464**
	ICOS No:	**23/103393/01**
*Judgment: approved by the court for handing down (subject to editorial corrections) **	*Delivered:*	**13/03/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY WILLIAM THOMPSON FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE PUBLIC PROSECUTION SERVICE FOR NORTHERN IRELAND

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Re William Thompson's Application (No 3)
(PPS consideration of coroner's referral)

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Karen Quinlivan KC and Andrew Moriarty (instructed by Madden & Finucane, Solicitors) for the Applicant
Tony McGleenan KC and Philip Henry (instructed by the Public Prosecution Service) for the Respondent
Donal Lunny KC and Andrew McGuinness (instructed by the Crown Solicitor's Office) for the Ministry of Defence as a Notice Party

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SCOFFIELD J

Introduction

[1] The applicant is the son of Kathleen Thompson, who was shot and killed in her back garden at Rathlin Drive, Derry on the night of 5-6 November 1971. These proceedings concern the approach adopted by the Director of Public Prosecutions (DPP) when he considered the case after it had been referred to him by the coroner who conducted a recent inquest into the death of Ms Thompson.

[2] The court has already examined a previous application for judicial review by the same applicant, in which he challenged the failure of the DPP to exercise his statutory power to require the police to provide him (the DPP) with further information in relation to the matter: see *Re William Thompson's Application (No 2) (PPS*

request to PSNI for further investigation) [2024] NIKB 9 ("the earlier judicial review"). That decision is presently under appeal.

[3] In the meantime, however, the applicant has mounted a different challenge focused upon the failure of the DPP to reach a substantive decision on the question of prosecution of Soldier D (the soldier whom the coroner found to have been responsible for the shot which fatally wounded the deceased, in circumstances where the firing of this shot by Soldier D was unjustified: see [2022] NICoroner 1). As appears from the earlier judicial review decision, the DPP decided to await further investigation by the police before making a substantive decision. The earlier application for judicial review was addressed to whether, in those circumstances, the DPP had to *direct* such further investigation by the Police Service of Northern Ireland (PSNI) using his statutory powers or whether he was entitled to await the outcome of a further PSNI process which he knew to be in prospect.

[4] The case advanced by the applicant in these proceedings takes a step back and contends that, in fact, the DPP erred by not making a substantive decision on prosecution, or erred in determining that a further police investigation was required (whether directed by him or not), in two respects: (i) because he (wrongly) considered that he required a police investigation file to be submitted to him before taking a substantive decision on the issue of prosecution; and (ii) because he decided how to proceed without having obtained the inquest papers in order to inform his decision-making. I granted leave to apply for judicial review on each of these issues, refusing leave on certain other grounds. Although it would have been preferable if these issues had been raised in the applicant's first application for judicial review against the Public Prosecution Service (PPS), I rejected the proposed respondent's contention that this should act as a bar to the present case being permitted to proceed.

[5] I stayed a ground alleging breach of article 8 ECHR in relation to the DPP's consideration of the case, pending the judgment of Colton J in *Re Dillon and Others' Applications* [2024] NIKB 11. I did not consider that article 8 operates to replicate almost identical rights to those which would arise on the part of a next of kin of a deceased person if article 2 ECHR was engaged (it being agreed in this case that article 2 is not engaged because of the date of the death). There also seemed to me to be force in the proposed respondent's submission that the article 8 authorities relied upon by the applicant as giving rise to rights on the part of a surviving family member where a death has occurred were very far removed from the situation in the present case (where there has been a full inquest and the key issue in these proceedings is the documentation the DPP required or did not require to have before him). Since this issue had been the subject of full argument before Colton J in the *Dillon* case, however, I was content to stay this ground, rather than refusing leave upon it, until his judgment was provided. In light of Colton J's conclusion on this issue (see the discussion at para [216] and following of the *Dillon* judgment, and particularly the conclusions at paras [238]-[241]), I do not intend to revisit the stayed ground.

[6] As in the earlier judicial review, Ms Quinlivan KC and Mr Moriarty appeared

for the applicant; Mr McGleenan KC and Mr Henry appeared for the respondent; and Mr Lunny KC and Mr McGuinness appeared for the Ministry of Defence (MoD) as a notice party. I am again grateful to all counsel for their helpful written and oral submissions.

Factual background

[7] The deeper factual background to this case is set out in the detailed findings of the coroner (Her Honour Judge Crawford), referred to above. The more immediate background is summarised to some degree in the judgment of the court in the earlier judicial review. Some further matters, which sound more directly upon the grounds of challenge in this case, bear repetition or summary.

[8] The inquest heard a considerable amount of evidence over 15 days. This included evidence from former and present members of the Army (including Soldier D), civilian evidence, and expert evidence in the fields of ballistics, pathology and engineering. The coroner handed down a summary of her findings on 29 June 2022. On 8 July 2022, a fully reasoned decision was provided. As she was obliged to do in light of her findings, the coroner made a referral to the DPP pursuant to section 35(3) of the Justice (Northern Ireland) Act 2002 ("the 2002 Act"). There were submissions provided to the coroner by the properly interested persons (PIPs) in the inquest about the materials which she should, or should not, forward to the DPP along with the section 35(3) referral.

[9] The referral of the matter to the DPP was effected by way of a letter on behalf of the coroner from the Legacy Inquest Unit (LIU) dated 7 October 2022. The letter enclosed only a copy of the coroner's findings. The key passages from the referral letter for present purposes are as follows:

> "The Coroner notes that obviously it is entirely a matter for the PPS, applying the Test for Prosecution, to reach its own independent decision on whether or not any person will be prosecuted for any offence. Please consider this letter issued under her direction, along with the enclosed Findings, to be the Coroner's formal written report of the circumstances to you, as required by s. 35(3).
>
> If you require any further material or exhibits, please do not hesitate to contact me and I will ensure that any such request is brought to the attention of the Coroner promptly."

[10] Some seven months after that referral had been made, the PPS wrote to the applicant's solicitors, on 19 May 2023, in terms which contain the decision (or, as the applicant might have it, non-decision) which is under challenge in these proceedings. It is convenient to set out a significant portion of that correspondence:

> "As you are aware, the Coroner referred her findings pursuant to section 35(3) of the Justice (Northern Ireland) Act 2022 ("the 2002 Act") which required her to make a referral in circumstances where it appeared to him [*sic*] that a criminal offence may have been committed.
>
> The Coroner's findings have been carefully considered. It is obviously not possible for the Director to take any decisions as to prosecution based upon the findings of an inquest. The Director can only take decisions following a formal police investigation which results in the submission of a file reporting one or more identified suspects for specific criminal offences.
>
> The issue that the Director has, therefore, been considering at this stage is whether he should exercise his power under section 35(5) of the 2002 Act to require the Chief Constable to ascertain and give him information about any matter appearing to the Director to need investigation on the ground that it may involve an offence committed against the law of Northern Ireland. The Director's power to refer a case to the Chief Constable is a discretionary power. The Director's approach to the exercise of this power has been informed by the judgment of the Northern Ireland Court of Appeal in a case called Beatty vs the DPP and the Chief Constable of the PSNI (delivered on 24 March 2022 …)."

[11] After noting that the PSNI's Legacy Investigation Branch (LIB) were already intending to review the circumstances of the shooting of Ms Thompson and that the case was within the PSNI's case sequencing model, applying the reasoning in the *Beatty* case (discussed in detail in the earlier judicial review), the correspondence continued as follows:

> "The Director has concluded that there is no exceptional circumstance that would justify a referral in this case. In this regard he has carefully considered the substance of the findings and also the fact that the operation of the case sequencing model is dynamic and subject to periodic review.
>
> The PPS review of this case has identified some priority lines of enquiry that would require to be undertaken as part of any future police investigation. Our analysis in that regard will be communicated to PSNI so that they have it available in the event that they subsequently commence a

> review in this case. This office stands ready to assist any police review or investigation with any further prosecutorial advice that may be required. However, it is considered that it is a matter for police as to when any such review of investigation now takes place."

[12] Since the applicant was dissatisfied with this position, pre-action correspondence was sent by his solicitors to the PPS on 29 May 2023. The earlier judicial review then followed, in the course of which the Deputy DPP, Mr Michael Agnew, swore an affidavit on 17 October 2023. This affidavit was furnished to provide further information about the priority lines of enquiry which the PPS had communicated to the PSNI. The applicant says that, at this stage, for the first time, it became clear to him that the DPP's decision of 19 May 2023 had been taken without the PPS having obtained any additional materials arising from or relating to the inquest which gave rise to the coroner's section 35(3) referral. Whether or not he or his representatives should have been aware of this at an earlier stage was a matter of debate at the leave hearing. However, in light of the contents of further correspondence relating to this, and in particular the PPS having declined to answer a specific query designed to address the issue, I considered that it would be unfair to refuse leave on this basis and extended time accordingly. Some of the details of the further pre-action correspondence which followed upon Mr Agnew's affidavit of October 2023 are discussed below.

Summary of the parties' positions

[13] The applicant contends that the DPP erred in law in considering that he could not make a decision on prosecution in the absence of a (further) investigation file from the police, resulting in his not addressing his mind to the key question of whether Soldier D should be prosecuted in relation to the applicant's mother's death. He further contends that the DPP wrongly failed to obtain the inquest materials (namely, all of the materials generated by the inquest) before reaching a decision on prosecution and/or whether and how the police should proceed. This is argued to be irrational, a breach of the DPP's duty of inquiry and/or an unlawful delegation of his decision-making role to the coroner.

[14] The respondent accepts that it is legally possible for a prosecution decision to be made in the absence of a police investigation file having been submitted to him; but contends that this would be highly exceptional and is plainly not appropriate in a case such as the present. He further contends that it was entirely rational for him not to obtain all of the inquest materials but to leave this to the PSNI, which would obtain the materials in due course when reviewing the case, before submitting a fully-informed file and recommendation, with any updated proofs appropriate or required, to the DPP for decision.

[15] The notice party supported the respondent's position, focusing on the lack of clarity as to which 'inquest materials' it was proposed the DPP had been required to

obtain; and the difficulty of defining in cases the DPP ought to proceed, exceptionally, without the benefit of an updated police file and recommendation.

[16] The applicant's riposte was that the respondent's position amounts to little more than a contrivance to avoid the PPS having to consider this case in light of the limitation upon its role in such cases which will soon come about as a result of the provisions of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the Legacy Act").

Relevant statutory provisions

[17] There are only a few statutory provisions relevant to the issues raised by this case. The first is section 35 of the 2002 Act, sub-section (3) of which, pursuant to which the coroner made her referral to the DPP, is in the following terms:

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

[18] The 2002 Act sets out the DPP's functions and powers more generally. Section 31 relates to the conduct of prosecutions. Section 31(1)-(4) provides as follows:

> "(1) The Director must take over the conduct of all criminal proceedings which are instituted in Northern Ireland on behalf of any police force (whether by a member of that force or any other person).
>
> (2) The Director may institute, and have the conduct of, criminal proceedings in any other case where it appears appropriate for him to do so.
>
> (3) This section does not preclude any person other than the Director from—
>
> (a) instituting any criminal proceedings, or
>
> (b) conducting any criminal proceedings to which the Director's duty to conduct proceedings does not apply.
>
> (4) The Director may at any stage take over the conduct of any criminal proceedings which are instituted in

> circumstances in which he is not under a duty to take over their conduct, other than any proceedings of which the Director of the Serious Fraud Office has conduct."

The purported need for a police investigation and file

[19] The respondent's letter of 19 May 2023 (see para [10] above) states, in quite striking terms, that:

> "It is *obviously not possible* for the Director to take *any decisions* as to prosecution based upon the findings of an inquest. The Director *can only* take decisions following a formal police investigation which results in the submission of a file reporting one or more identified suspects for specific criminal offences."
>
> [italicised emphasis added]

[20] The letter goes on to explain that the issue "therefore" for the DPP was whether to direct the police to investigate further or simply to await their doing so as a result of the LIB case sequencing model. In other words, the view taken about the impossibility of the DPP making a determination without a fresh police file was the starting point for his consideration of what to do next.

[21] In his affidavit evidence in these proceedings, Mr Agnew (the signatory of the relevant letter) has provided some further context to the statement highlighted at para [19] above. He points out that the May 2023 letter was in response to several requests from the applicant's solicitor enquiring as to the stage which the PPS's consideration of the matter had reached. He then says this:

> "In the 19th May 2023 letter I was not responding to a specific query raised by the Applicant's solicitor on the issue of whether a decision could be made on the test for prosecution without first having received an investigation file, nor was I seeking to make a statement of general principle on behalf of the PPS."

[22] I accept without reservation what Mr Agnew says about the statement in the letter of 19 May 2023. It was not setting out a general policy position on the part of the PPS; nor was it in response to a direct query. However, it seems to me to have been a clear statement of the position which was adopted in this case and was not the subject of any relevant qualification. Mr Agnew's affidavit appears to me to have been carefully and precisely worded. Perhaps unsurprisingly, it does not amount to a denial that the propositions quoted at para [19] above were operative in the respondent's mind at the time the letter was written.

[23] Moreover, as the applicant has pointed out, later correspondence between the parties in which his representatives took issue with this statement on the part of the PPS resulted in it being underscored, rather than the PPS retreating from it. In particular, in a response to pre-action correspondence of 6 November 2023, the PPS reiterated its previous position and made no mention (as its evidence now does) of the possibility of departing from the normal approach of a police file being required.

[24] There is nothing in the 2002 Act, or otherwise, which suggests that, as a matter of law, a prosecutorial decision can only be made on foot of a police investigative file and report. There is no warrant for viewing this as a condition precedent to any lawful exercise of the DPP's decision-making powers as to prosecutions. Such a file may rarely be available in circumstances where the DPP decides to take over the conduct of proceedings instituted otherwise than by a police force under section 31(4) of the 2002 Act. Those cases may, of course, be contrasted with those in which the DPP himself decides to prosecute. There may well, however, be certain circumstances where a police file is either unavailable or unnecessary, where the DPP could permissibly make a prosecutorial decision in its absence. Perhaps the most obvious occasion where this might arise is where there is a public interest in a prosecution which will be statute-barred by the time a police file is available for some reason.

[25] In his evidence and submissions in these proceedings, the respondent has explained in detail why it is highly desirable for a prosecution, particularly in relation to a serious offence, to be preceded by a detailed and up-to-date police investigation which results in the provision to the PPS of a structured police file with analysis, recommendations and appropriate disclosure schedules. Nonetheless, it is accepted that, as a matter of law, there is no basis for a statement that the DPP can only make a decision to prosecute (or not) following a formal police investigation which results in the submission of a police file reporting an identified suspect for a specific criminal offence. The DPP should remain alive to the possibility of cases arising where such a course is (in his view) expedient or appropriate, notwithstanding the general preferability of a full investigative file being compiled in the usual way. Whether viewed as a material error of law or as an unlawful fettering of the DPP's discretion, I consider that the respondent's decision as to how to proceed as set out in his correspondence of 19 May 2023 is liable to be set aside on this basis.

What relief, if any, should be granted as a result?

[26] As noted above, much of the respondent's evidence in this case was directed to the question of why, normally, the DPP would not make a prosecution decision in the absence of an up-to-date police investigation and file submitted to him for that purpose. The following are the central points established by the evidence (many of which were not seriously disputed by the applicant) in this regard:

(a) As a matter of general practice, prosecutors make decisions on whether to prosecute based on investigation files which have been submitted to the PPS. In the vast majority of cases, these will be files provided by the police, although some other public authorities do undertake investigations and submit files (eg HM Revenue and Customs; the Health and Safety Executive for Northern Ireland; the Northern Ireland Environment Agency; and the Social Security Agency).

(b) If a decision is made to prosecute, the prosecuting authority and investigator must satisfy their respective and collective disclosure obligations and their duty to conduct the criminal proceedings fairly. There are practices and processes in place which act as safeguards to ensure that prosecutions are conducted properly and consistently.

(c) By way of example, police submit investigation files to the PPS in an agreed structure which includes an outline of the case; all evidential product (with an associated index); all unused materials gathered in the course of the investigation (with an associated index); disclosure schedules and a disclosure officer's report. Particular types of cases – for instance those involving alleged sexual or domestic violence offences – call for particular information to be submitted and considered. The provision of material in this way is considered to be an important aspect of internal governance and quality assurance within the PPS, helping the prosecution to discharge its legal obligations and reducing risk of successful challenge to any proceedings brought, either at trial or on appeal.

(d) Even cases which appear straightforward or cut-and-dried can be more complex than they seem, particularly when issues of the admissibility of evidence (including confession evidence) require to be investigated and considered.

[27] In summary, Mr Agnew averred that although there may be an exceptional case "in future" in which it may be possible to make such a decision without having first received an investigation file, the PPS consider that "in the abstract it is difficult to conceive of circumstances in which it would be appropriate to do so." The respondent's case in these proceedings was that it was and is plainly *not* appropriate to proceed to make a decision on the prosecution of Soldier D in the present case without an up-to-date police investigation and the submission of a file bearing the hallmarks discussed above.

[28] Insofar as the applicant contends that there is or should be an expectation that no police investigation (or no further police investigation) will be undertaken because a coroner has referred a matter to the DPP under section 35(3) of the 2002 Act, I reject that submission. A coronial referral is a means by which a case may be brought to the attention of the DPP. It does not follow, nor is there any indication within terms of section 35 itself, that the DPP is then expected to make a prosecutorial decision

immediately or in any particular way. In the earlier judicial review I have already concluded that, when a case reaches the DPP via a coronial referral, he still retains his usual prosecutorial discretion as to how to then proceed (see paras [27]-[29] of the judgment). It will, of course, be relevant that a judicial officer in the form of a coroner has already considered the matter and conducted a coronial investigation, which might well have been very wide-ranging; but it is also the case that the purpose of coronial investigation – unlike a criminal investigation, and much less a prosecution – is not directed towards the establishment of criminal liability. In short, it is not a simple substitute for a thorough criminal investigation which would normally be expected as a precursor to a Crown Court prosecution.

[29] The applicant has relied upon the fact that there would be an original Royal Ulster Constabulary (RUC) investigation file and a subsequent Historical Enquiries Team (HET) file. Earlier investigation files ought to form part of the inquest papers, including previous advice given by the police as to whether or not there should be a prosecution (applying the approach described in *Re the Chief Constable of the PSNI's Application* [2008] NIQB 100). This is plainly a matter to be taken into account but, in my view, it comes nowhere near answering the PPS's concern that it would be appropriate to reassess the entire state of the evidence before making a decision at this point as to the prosecution of Soldier D. As appears from the coroner's findings, the original RUC investigation report was completed in 1971. The coroner noted that there was no evidence of ballistic testing or any forensic investigations; and was critical, as other judges have been before her, of the arrangement whereby the RUC did not interview military witnesses who may have been involved. The respondent notes that the HET exercise was merely a review, rather than an investigation; and that concerns in relation to shortcomings in HET reviews relating to deaths caused by the military were instrumental in the decision of the Policing Board to stand it down. The HET review appears to have taken place in or around 2010. The coroner has also had regard to the HET exercise. Nonetheless, she concluded that "no proper investigation was carried out" into the death. The applicant himself does not advance the case that either the RUC investigation or HET involvement were adequate or effective; quite the contrary. These are no substitute for an investigation file meeting modern standards and requirements.

[30] The matter is therefore one for the exercise of the DPP's discretion. On his behalf, Mr Agnew has averred that the PPS's position is that a further investigation file should be submitted in the Thompson case before a decision is taken on whether the test for prosecution is satisfied. He maintains that this is entirely appropriate given that the offence under consideration (whether murder or manslaughter) is extremely serious. It is particularly significant that the PPS has never previously made a decision to prosecute (or not to prosecute) for an offence of murder without first having received an investigation file. The respondent has pointed to the fact that, in addition to coronial proceedings applying a different standard of proof to criminal proceedings, the coroner's court is not bound by the strict rules of evidence (including, in particular, admissibility rules in relation to certain types of evidence).

[31] The respondent also contends that the lines of enquiry identified to the PSNI by Assistant Director Hardy, which deal with the issue of admissibility of evidence as well as other issues, remain to be exhausted. Indeed, an important consideration for the PPS is that all reasonable lines of enquiry should be shown to have been pursued and that, in almost all cases, it is expected that there will have been an after-caution police interview to enable the suspect to provide an opportunity to comment on the evidence against them. O'Hara J was critical of the failure to conduct such an interview in the case of *R v Soldier A & Soldier C* [2021] NICC 3 (see para [37] of that judgment). This is considered by the respondent to be an acute issue in the present case since, although Soldier D was interviewed by HET and provided a prepared statement, in other legacy cases there have been issues in relation to the admissibility of HET interviews; and there may (it is submitted) be a requirement to put additional inculpatory evidence to Soldier D, including material obtained during the inquest, which was not previously available.

[32] Taking the above issues into account, I would be inclined to limit any relief granted in these proceedings to a declaration that the PPS erred in the manner set out in para [25] above. This is on the basis that, if the matter was remitted to the PPS, it is inevitable that it would reach the same decision (namely, that this is not an appropriate case warranting or requiring a substantive prosecutorial decision to be taken without following the usual approach of requiring the submission of an up-to-date police file) and that such a decision is plainly not irrational. This conclusion is provisional at this point and subject to two further considerations, viz whether such a decision could or should only be made after considering the inquest materials (the applicant's second ground of challenge) and the impact of the Legacy Act ("the timing issue"), each of which is considered further below.

The failure to obtain or consider further inquest materials

[33] The applicant's second main ground of challenge is that the DPP ought not to have determined how to proceed in this case until he had considered the inquest materials generated by the inquest which gave rise to the coroner's report to him. The respondent and notice party were critical of a certain degree of inconsistency in what the applicant meant by the phrase "inquest materials" at various points in the correspondence. However, Ms Quinlivan clarified that the applicant's position is that the DPP ought to have obtained *all* of the materials generated by the inquest (including witness statements, transcripts of oral evidence, expert reports, all material disclosed to the coroner and other materials relating to, for instance, the coroner's tracing exercise designed to identify and locate relevant witnesses).

[34] The applicant initially characterised the coroner's letter of 7 October 2022 (see para [9] above) as including an offer on the part of the coroner to provide any further materials the PPS requested. The letter is not quite framed in such open terms. However, I consider it plain that the coroner was prepared to consider a request for any further materials gathered by her in the course of the inquest (including the hearing transcripts); and also consider it highly likely that the coroner could have,

and would have, disclosed any such materials requested of her by the DPP. I proceed on that basis.

[35] The applicant makes the stark submission that, where a coroner has referred a matter to the DPP in the exercise of their obligations under section 35(3) of the 2002 Act, the DPP is obliged to consider (all of) the evidence and materials considered by the coroner before determining how to proceed. It is insufficient, in the applicant's submission, for the DPP to consider the coroner's verdict without more. Insofar as this submission is advanced as a matter of generality, I reject it. There is no obligation contained within the 2002 Act to this effect. The coroner must merely send a "report" of the relevant circumstances to the DPP. Consistent with the section heading of section 35 ('Information for Director') this is to inform the DPP of those circumstances. In colloquial terms, it is to put the case on the Director's radar. The Act itself says nothing about the extent of information which the DPP is then obliged to obtain and consider. The extent to which the DPP is obliged to obtain further information from the coroner is a matter for his discretion, subject to *Wednesbury* unreasonableness, in accordance with the usual approach to a duty of inquiry in public law where the statutory provision does not set out a lexicon of matters to be considered (see *R (Plantagenet Alliance Ltd) v Secretary of State for Justice and Others* [2014] EWHC 1662 (Admin), at para [100]).

[36] On 23 October 2023, the applicant's legal representatives provided the PPS with some of the inquest papers, comprising four lever arch files of materials (with an index of which I have been provided), including in particular the transcripts of oral evidence at the inquest. They invited the DPP to consider these papers before making a determination as to whether or not to prosecute Soldier D. The applicant also complains that the respondent has refused to consider even these limited papers; and that, by relying only upon the coroner's findings, he has unlawfully delegated his consideration of the case, or the evidence in it, to the coroner.

[37] The respondent's position is that he *will*, in due course, consider all of the evidence provided to the inquest. He says this with confidence because one of the steps which the PPS has asked the PSNI to take before submitting a further file is the obtaining of all of the inquest materials from the coroner. In the respondent's submission, his approach is simply that it is not necessary for him to consider all of those materials now, since the PSNI will do so in due course. He has also pointed out that it cannot simply be assumed that evidence provided in the inquest proceedings will be admissible in criminal proceedings. In particular, consideration would have to be given to the manner in which the inquest materials were collected and whether these would be admissible in a Crown Court trial. Suitable witness statements would have to be prepared meeting certain minimum requirements, including those set out in section 1 of the Criminal Justice (Miscellaneous Provisions) Act (Northern Ireland) 1968. Enquiries would have to be made to ascertain which witnesses were alive and willing to give evidence in criminal proceedings, thereby allowing the PPS to assess the necessity for, and viability of, any hearsay applications.

These are all matters which can and should be addressed by the PSNI in due course when it reconsiders the case.

[38] I accept Mr McGleenan's submission that this case is not one in which any question of unlawful delegation arises, whether at common law or in breach of the Director's obligation under section 42 of the 2002 Act to exercise his functions independently of any other person. The respondent has not delegated to the coroner, nor does he intend to so delegate, his role in making prosecutorial decisions in this case. The applicant complained that the DPP has delegated consideration of the evidence to the coroner, having directed himself (at this stage) only on the basis of her findings. This, the applicant submits, is only the coroner's evaluation of the evidence; whereas the DPP is required to undertake his own assessment of the evidence before making a prosecutorial decision. The respondent accepts this; but, as noted above, his position is simply that the time for his consideration of all of the evidence has not yet come. He will undertake that assessment once the PSNI furnishes a further investigation file which will include all of the inquest materials which he has asked them to obtain.

[39] The other way in which this point was put is that it was "inadequate and a dereliction of the DPP's duties and obligations" to make a decision as to how to proceed without obtaining all of the inquest papers. I consider this to amount to a rationality challenge, namely that the DPP failed to discharge his duty of inquiry by failing to obtain the inquest materials in circumstances where no reasonable DPP could have done so. In the absence of any express duty on the DPP to obtain the inquest materials, the applicant's argument on the second ground can only succeed on the basis of irrationality.

[40] I reject the submission that the respondent has acted irrationally for two reasons. First, the statutory context mentioned above is important. Section 35(3) of the 2002 Act (see para [17] above) requires a coroner only to send to the DPP "a written report of the circumstances", that is, of the circumstances of the death which appear to the coroner to disclose that an offence may have been committed. The statutory scheme neither envisages nor requires that the relevant coroner send to the DPP all of the inquest materials. In many cases it may make sense for them to do so; but this is, in the first instance at least, a matter for the coroner concerned. (In the present case, it is clear that there was specific argument about this issue from the PIPs before the coroner sent her report.) The purpose of section 35(3) is to alert the DPP of a matter which may require his attention. Thereafter, however, he enjoys a measure of prosecutorial discretion as to how to proceed. Consistent with standard public law obligations, it will be a matter for him what further materials he should request from the coroner and at what stage, subject to *Wednesbury* unreasonableness and his *Padfield* obligation to act consistently with the statutory scheme governing his powers and functions. To determine that it was irrational for the DPP to do anything other than seek the full inquest papers immediately and before deciding how best to proceed would cut against both the structure of the statutory scheme and the DPP's well-established independence.

[41] Second, and importantly, the DPP in this case intends to receive and consider all of the inquest materials in due course. Given his obligation to assess all relevant matters when making a prosecution decision, including both inculpatory and exculpatory material, he does not wish to consider only the selected body of inquest materials provided to him by the applicant. This is clear from the fact that Assistant Director Hardy has requested that the police obtain all of the inquest materials and consider them before submitting a further file. In short, he intends to obtain and consider these materials (with the benefit of the PSNI's prior assessment of them) before making a prosecutorial decision. When this is appreciated, the true nature of the applicant's complaint is simply that he has not done so now and short-circuited the further PSNI involvement. Although that is an approach which would plainly have been open to the DPP, I do not believe it can be said to be irrational for him to have decided that the PSNI should obtain these materials first and assess them, at the same time as considering other issues the PPS has asked the PSNI to consider, before submitting the product of all of that in a further investigation file. At that point, an overall decision can be made as to the state of the proofs in relation to any potential prosecution. For these reasons, subject to consideration of the applicant's grounds in combination and the timing issue, I would dismiss the applicant's second ground in each of its aspects.

The combination of the grounds in this case and the timing issue

[42] For the reasons given above, when viewed in isolation, I consider that there is merit in the applicant's first ground, but that relief (other than declaratory relief) should be refused in relation to that ground in the exercise of the court's discretion because the grant of further relief would be of no practical consequence. I also consider that, again viewed in isolation, there is no merit in the applicant's second ground.

[43] I have been troubled, however, by the question of whether, viewed in combination and/or when considered alongside the timing issue arising from the Legacy Act which sets the obvious context for these proceedings, the applicant's grounds should lead to a different result. The grounds potentially have a cumulative effect in the following way. First, it seems tolerably clear that the inquest papers were not requested (at least in part) because the view was taken that no prosecution decision *could* be made without a further police file. Once a further police file was deemed necessary, it was a matter of common sense to require the PSNI to obtain and consider the inquest papers before that further file was submitted to the PPS. On the other hand, had the PPS decided itself to consider the inquest papers, it *might* have considered that a further police file was unnecessary; and/or the DPP might have taken a different view on the question of whether he should exercise his section 35(5) power to require the police to provide him with information (so affording some measure of priority to the further police investigation). Put another way, with the benefit of the inquest papers, the DPP might (it is argued) have decided that the

Thompson case was exceptional, such that further police investigation would have been directed under section 35(5)(a) or foregone.

[44] The extent to which this argument carries weight is related, in significant measure, to the question of whether the inquest papers would have provided adequate answers to the further enquiries which the PPS requested the PSNI to follow up. Put bluntly, if all of these matters were adequately addressed in the inquest papers, or something very close to that, the PPS *might* have decided that a further police investigation was unnecessary or might have used his statutory power to direct the police to provide further (limited) information.

[45] In the hearing before me, therefore, the applicant sought to persuade me that most or all of the further "priority lines of enquiry" identified by the PPS were addressed completely or in some detail in the inquest materials which the respondent could have sought but did not. The respondent has asked the PSNI (a) to look at various matters bearing on the admissibility of key evidence, including the circumstances in which statements were recorded from Soldiers A-D and the circumstances of the HET process; (b) to examine certain matters relating to the original investigation, including the circumstances in which Soldier D's weapon was not seized and the extent of any non-military evidence of what was occurring 'on the ground' at the time of the shooting; (c) to review all previous efforts to trace relevant military witnesses and consider whether any further steps can be taken to locate them; (d) to make enquiries into certain aspects of Soldier D's military service subsequent to the shooting incident; and (e) to obtain all of the inquest materials, including the ballistics and pathology evidence, giving consideration to whether any additional expert evidence is required.

[46] Ms Quinlivan submitted, with some force, that many of these issues will be addressed to a large degree in the inquest papers themselves, which would set out the investigative steps undertaken by the coroner and LIU. Obtaining the inquest papers is something the DPP could easily do, and should have done, she submits. Having done so, it would be a matter for the PPS, rather than the police, to consider the sufficiency of the expert evidence and whether any (further) expert needed to be instructed by the PPS itself. Many of the other issues which the PPS has asked the police to look into will have been addressed in the course of the coronial procedure, including the tracing exercise conducted by LIU, the significant disclosure which the coroner will have obtained, and the witness evidence taken by her.

[47] Although some of these submissions were attractive, the nature of this exercise was unsatisfactory in my view, since (i) I do not have the full detail of the lines of enquiry the PSNI has been asked to pursue (these having been summarised in affidavit evidence only, with the PPS maintaining privilege over the actual communications which set these out); and (ii) I have only limited detail about the inquest materials (having only the applicant's brief summary of these and the index of the four files of material his solicitors submitted to the PPS), albeit some further detail can be gleaned from the coroner's written findings. I am therefore missing

important detail on both sides of the equation. In addition, it seems to me that none of the applicant's submissions deal with the respondent's point that it would be desirable, in advance of any final decision on prosecution, to have had an under-caution interview conducted with Soldier D at which the fullness of any case against him was put to him.

[48] Albeit not without some misgivings, I have not been persuaded that the cumulative effect of the applicant's two grounds should result in any different outcome than when viewing them separately. This is for several reasons. The first is that intervention by the court on this basis appears to me to stray into territory where I would be usurping the proper role and function of the independent prosecutor, or failing to respect his appropriate area of judgment and discretion, in a way which is inconsistent with authority in this area. Such authority suggests that the intervention of the court should be rare, with a strict self-denying ordinance (*per* Lord Burnett of Maldon CJ in *R (Monica) v Director of Public Prosecutions [2018] EWHC 3508*, cited with approval by the Lady Chief Justice in this jurisdiction in the Divisional Court judgment in *Re Duddy and Others' Applications* [2022] NIQB 23, at para [56]). If it is rational for the DPP to determine that he should only make a substantive decision with the benefit of an updated police file and to await provision of the inquest papers when that further file is submitted, it would be quite an intrusion into his discretionary decision-making to hold that it was irrational for him to make any decision as to how to proceed without obtaining the full inquest papers.

[49] The second is that, if the applicant's submission was correct, in every case in which a section 35(3) referral to him was made by a coroner, the DPP would be obliged to obtain and consider all of the inquest materials before being permitted to decide how to proceed. It would be difficult to draw any principled distinction between those cases where this should occur and those where it should not. As I have already said, whilst seeking all of the inquest papers may be a sensible way of proceeding, it seems to me to run contrary to the statutory scheme to elevate this into a legal obligation which crystallises as soon as the report to him is made.

[50] The third issue is this. Ultimately, the applicant's case resolves to a submission that the DPP ought to have adopted a more expedited procedure in this case than he would otherwise consider appropriate in order to ensure that a prosecution decision could be made in advance of the change in legal landscape which will occur on 1 May 2024 as a result of the Legacy Act. This is really the nub of the applicant's desire for urgency at this point (without wishing to underestimate the effect upon him of the earlier delay in this case before a proper investigation was carried out). It is this issue – which I have referred to above as the timing issue – which sets the context for both this and the applicant's previous application for judicial review. As I pointed out in the earlier judgment (at para [44]), the provisions of the Legacy Act do not, of themselves, confer any immunity upon Soldier D. They transfer responsibility for investigations to the new Independent Commission for Reconciliation and Information Recovery (ICRIR), which might grant immunity if certain conditions are met. The applicant is concerned that these conditions may not be particularly

onerous in a case such as the present, where the coroner has already provided narrative findings. As matters stand for now, the applicant's key fear in this regard, namely that Soldier D might receive immunity under the terms of the Act, has receded in light of Colton J's disapplication of the relevant provisions as inconsistent with the guarantee of rights in Article 2 of the Ireland/Northern Ireland Protocol in the *Dillon* case (although that is subject to appeal).

[51] However, in the earlier judicial review, I have already accepted the rationality of the PPS's view that, however tragic the present case, it is not to be viewed as exceptional within the cohort of legacy cases sitting in the PSNI's case sequencing model. In short, it was not irrational for the DPP to decline to use his powers in a way which would give priority to the present case within the LIB case-sequencing model. By the same token, it is not irrational for the DPP to decline to deal with this case in a way which avoids the usual requirement that an up-to-date police file be submitted (in order to promote good decision-making and limit legal risk in any proceedings which follow); nor to decline to seek further materials from the coroner to ascertain whether he should do so; nor to decline to consider only limited materials provided by the applicant in this regard, which will be provided to him as part of a comprehensive package at a later time, for that purpose. Put bluntly, it was not unlawful for the DPP to decline to fast-track this case so as to ensure that a substantive prosecution decision was taken in advance of 1 May 2024 (with the result that criminal proceedings may have been commenced which were not prevented by the grant of any immunity, pursuant to section 42(4)(a) and 63(3) of the Legacy Act).

[52] Where any legal change is introduced from a specified point in time, there will be cases which fall on either side of the line. Whether or not to expedite a case in a certain way in this context is a matter for the DPP's judgment, bearing in mind a range of matters including the allocation of resources to other cases also requiring consideration. Although the seriousness of any potential offence which might be prosecuted may be a factor tending towards expedition, it can also rationally be considered a reason for not cutting corners or taking shortcuts which may turn out to be ill-advised. Although some of the applicant's submissions hinted at this decision having been taken for an improper purpose, this was not an issue which was pleaded in the case. There is also no evidential basis for it, other than the suggestion that the way in which the DPP has proceeded inevitably meant that (as he knew) he was unlikely to be troubled by the case further, since any further police investigation, by the time it would be reached in the case-sequencing model, would be precluded by the terms of the Legacy Act. It was, however, possible that the case could be referred back to the PPS by the Commissioner for Investigations of the ICRIR, if appropriate, under section 25 of the Legacy Act. Presumably, where this occurs, it will be after an investigative file has been prepared and submitted by the Commissioner. It at least seems likely that the DPP could require this in the exercise of his power under section 25(6)(b) of that Act.

Conclusion

[53] For the reasons outlined above, I propose to declare that the respondent erred in law and/or unlawfully fettered his discretion in considering, when he made the impugned decision on 19 May 2023, that he could only take a prosecutorial decision following a further formal police investigation resulting in the submission to him of a file reporting Soldier D for a specific criminal offence. He was not so constrained as a matter of law. He also does not appear to have addressed his mind (at that point) to whether this case was an exceptional case which might permit him to make such a decision in the absence of the usually required investigation file.

[54] However, I do not propose to grant any other relief as a result of this finding. That is because it is clear from the respondent's evidence and submissions that, if the matter were remitted to him for further reconsideration, he would maintain the position that it is necessary for a file to be prepared in the usual way in this case; and it would not be irrational or otherwise unlawful for him to take that view. The grant of further relief would therefore be to no practical purpose.

[55] I dismiss the applicant's further ground that it was unlawful for the respondent to not, at this stage, obtain the full inquest papers from the coroner.

[56] I again acknowledge the applicant's understandable desire that, following the outcome of the inquest into his mother's death, a further decision be taken as expeditiously as possible in relation to the question of potential prosecution of the soldier responsible. In my judgement, however, the DPP was not obliged to act as contended for by the applicant in these proceedings so as to seek to accelerate the decision-making process in a way which is generally considered undesirable. Although it would have been open to him to seek to do so, the role of the court in these proceedings is not to determine how it would have acted in his position nor what is desirable. Rather, it is to conduct an audit of the legality of the DPP's actions, recognising his independence, his expertise, and that the assessment of legal risk as to proceeding in the fashion contended for by the applicant is a matter for him. The evidence filed on his behalf in these proceedings is clearly to the effect that he would make the same decision again (whether or not having the benefit of additional papers from the coroner); and it would not be unlawful for him to do so.

[57] I will hear the parties on the issue of costs.