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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE (JUDICIAL REVIEW)

BETWEEN:

WILLIAM THOMPSON

Appellant:

and

THE PUBLIC PROSECUTION SERVICE

Respondent:

[No 1]

Before: Keegan LCJ, McCloskey LJ and Horner LJ

Andrew Moriarty (instructed by Madden and Finucane Solicitors) for the Appellant
Tony McGleenan KC and Philip Henry KC (instructed by the PPS) for the PPS
Donal Lunny KC and Andrew McGuinness (instructed by the Crown Solicitor's Office) for the Ministry of Defence *qua* interested party

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McCLOSKEY LJ (*delivering the judgment of the Court*)

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Glossary

DPP: The Director of Public Prosecutions
PPS: The Public Prosecution Service
[used interchangeably]
PSNI: Police Service of Northern Ireland
Chief Constable: the Chief Constable of PSNI
[also used interchangeably]

PREFACE

This is one of two inter-related appeals which the court has consolidated. The parties in both cases are the same, the cases have a common history and factual matrix and they share the same evidential substratum. In this appeal the focus of the appellant's challenge is the determination of the PPS that its final decision on whether to initiate a prosecution of any person arising out of the death of Kathleen Thompson should await the outcome of the police investigation and, related thereto (as explained *infra*), to exercise its power under Section 35(5)(a) of the Justice (NI) Act 2002 requiring the PSNI to undertake specified priority further investigative steps. The essence of the second appeal is captured in para [4] of the judgment of Scoffield J ([2024] NIKB 22]:

> "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."

The judge added:

> "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."

This court agrees unreservedly with the sentiment expressed. The pursuit of two separate judicial reviews was quite inappropriate. Hence the full consolidation ordered by this court.

Introduction

[1] This appeal arises in the following way. William Thompson, the appellant, is the son of Kathleen Thompson ("the deceased") who was shot and killed outside her home on 5/6 November 1971. A member of the armed forces, known as "Soldier D", admitted to having fired two rounds from his high velocity SLR rifle into the premises. The deceased was found dead in the rear garden, having been killed by a high velocity bullet wound to her chest.

[2] On 4 August 1972, the Director of Public Prosecutions ("*DPP*"), being the predecessor of the Public Prosecution Service ("*PPS*"), determined that there would be no prosecution arising out of the death. On 2 November 1972, following an inquest, the Coroner returned an open verdict. A fresh inquest was conducted in 2021. On 8 July 2022 the full decision of the Coroner was promulgated. The Coroner found that on the balance of probabilities Soldier D had shot the deceased in circumstances which were not justified. An obligatory referral of the case to the PPS under Section 35(3) of the Justice (NI) Act 2002 (the "2002 Act") ensued. Subsequently, the PPS determined that its final decision should await the outcome of the police investigation and, related thereto (as explained *infra*), exercised its power under Section 35(5)(a) of the Justice (NI) Act 2002 requiring the PSNI to undertake as a priority specific further investigative steps. A challenge by judicial review followed and was dismissed by the High Court. The dismissal is challenged before this court.

Relevant Statutory Provisions

[3] Section 35 of the Justice (NI) Act 2002, entitled "Information for Director", provides:

> "(1) Where a person is committed for trial, the clerk of the court to which he is committed must send, or cause to be sent, to the Director without delay—
>
> (a) a copy of every complaint, deposition, examination, statement and recognisance connected with the charge, and
>
> (b) a copy of all other documents in his custody which are connected with the charge or, if it is not reasonably practicable to copy any of them, particulars of the documents which it is not reasonably practicable to copy.
>
> (2) Where a complaint has been made before a resident magistrate, a lay magistrate or a clerk of petty sessions, he must (whether or not proceedings have been taken on it)

cause to be sent to the Director, on being requested by the Director to do so, copies of all documents in his custody which are connected with the complaint.

(3) 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.

(4) The Chief Constable of the Police Service of Northern Ireland must give to the Director information about offences alleged to have been committed against the law of Northern Ireland which are of any description specified by the Director.

(5) The Chief Constable of the Police Service of Northern Ireland must, at the request of the Director, ascertain and give to the Director—

(a) 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, and

(b) information appearing to the Director to be necessary for the exercise of his functions."

The material provision in the context of these proceedings is Section 35(5)(a).

The Impugned Decision

[4] The manner in which the parties joined issue prior to the initiation of these proceedings must be examined. The narrative begins with a letter dated 7 October 2022 from the Coroner to the PPS pursuant to Section 35(3) of the 2002 Act. Next, by letter dated 19 May 2023 to the appellant's solicitors the PPS wrote:

> "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 to 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 … "
>
> [Following reference to the case of **Beatty**].
>
> "The key consideration in the present case is that the PSNI's Legacy Investigation Branch ("LIB") are already intending to review the circumstances of the shooting of Ms Thompson to determine whether there are investigative opportunities that could form the basis of a subsequent report to the Director for a decision as to prosecution. This case is within what is known as the PSNI's 'case sequencing model.' This is the same situation as in the **Beatty** case …
>
> 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 or investigation now takes place."

[5] The aforementioned letter stimulated a response from the appellant's solicitors in the form of a Pre-Action Protocol ("PAP") letter. The central contention advanced was that Section 35(3), properly construed, does not permit the PPS to decline to take any action upon receipt of a Coroner's report. Three options for a lawful response to receipt of a Coroner's report were canvassed: a decision to prosecute, a decision not to prosecute or a direction to PSNI "… to conduct certain investigations to assist the PPS in its determination as to whether or not to prosecute." Finally, it was contended

that the Beatty threshold of "exceptional circumstances" was clearly satisfied. The PAP letter required the PPS to take the following action:

> "To reconsider the impugned decision supra and then refer the matter to the Chief Constable … pursuant to Section 35(5) …"

[6] The PPS responded to the PAP letter in these terms:

> "1. The LIB of … PSNI has already undertaken to investigate the death of Kathleen Thompson. There is therefore no need for a Section 35(5) direction from the … PPS to bring about such an investigation.
>
> 2. It is not the function of the PPS to supervise police investigations, nor determine the allocation of resources to them and the order in which they are conducted. That is an issue for the PSNI. It has over 1,000 legacy cases to consider …
>
> The CSM is not static and is routinely reviewed. The death of Kathleen Thompson is being investigated within that model.
>
> 3. The PPS has considered the Coroner's referral report and provided the PSNI with directions in respect of the areas it considers police could investigate to assist with its decision on whether or not to prosecute.
>
> 4. There are not exceptional circumstances to warrant issuing a Section 35(5) direction requiring PSNI to investigate when it has already undertaken to investigate."

[7] In the first of two affidavits sworn subsequently, the Deputy Director of Public Prosecutions for Northern Ireland elaborated thus:

> "The PSNI is an independent statutory authority and it manages the allocation and prioritisation of the finite resources available to it for investigations …
>
> There may, from time to time, be exceptional circumstances in which the DPP/PPS wish the PSNI to prioritise a particular case. This was considered in respect of [this] case. However, the DPP concluded that there were no such exceptional circumstances."

The deponent adds:

> "The DPP has considered referrals in a number of other cases. The situations in which such consideration may arise in legacy related cases are:
>
> - Requests from the Attorney General of Northern Ireland
>
> - Referrals from coroners pursuant to Section 35(3) of the 2002 Act ….
>
> - Requests from families of deceased, their soldiers or groups acting on their behalf …
>
> - Other situations not falling neatly into any of the categories above."

This is followed by particulars of 20 cases in which the Attorney General has formally requested the DPP to review previous decisions not to prosecute or to consider exercising his power under section 35(5) and the ensuing decision in each case. This discloses that in six cases the DPP has exercised this statutory power.

[8] In a second affidavit the Deputy Director confirmed that by a letter dated 6 June 2023 Mr Hardy, a Public Prosecutor, requested the PSNI to undertake the "priority lines of enquiry" mentioned in the Deputy Director's letter of 19 May 2023 (supra), providing the following summary:

> "• Mr Hardy asked the PSNI to look at various matters bearing upon the admissibility of key evidence, including the circumstances in which statements were recorded from soldiers A – D; and to provide details of the circumstances and conduct of the review/investigation undertaken by the HET.
>
> • He asked that there be an examination of 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.
>
> • He asked that police review all previous efforts to trace relevant military witnesses and consider whether any further steps can be taken to locate them; and that police make enquiries in relation to

certain aspects of soldier D's military service subsequent to this shooting incident;

- He asked that police obtain all of the inquest materials, including the ballistics and pathology evidence, and give consideration to whether any additional expert evidence is required ie for the purposes of a criminal investigation."

[9] The documentary evidence accompanying the PPS affidavits includes a Memorandum of Understanding ("MOU") the parties whereto are the PSNI and the DPP, dated July 2016. It outlines how the PSNI and PPS will interact in relation to requests for further information issued by the DPP under Section 35(5), the specific context being the work of the PSNI LIB, which is summarised thus:

> "… the LIB has a duty to review cases within its remit and investigate where there are evidential opportunities which have not been previously pursued."

From what follows it is abundantly clear that the death of Kathleen Thompson falls within the LIB remit. Thus, as in every case:

> "… the focus will be on identifying or developing credible opportunities to bring those responsible to justice."

The factor of finite resources is also addressed:

> "Further work of any kind requires resources to be diverted from other work …
>
> The effective investigation of murder and terrorist crime whilst building community confidence is demanding and resource intensive …
>
> Additionally, LIB currently has responsibility for more than 1,000 homicide cases."

The necessity of the Chief Constable to "… fulfil all of his statutory obligations and balance operational demand proportionately" is also highlighted.

[10] Elaborating on the modus operandi of LIB the MOU explains that the function of the Case Sequencing Model (CSM) is:

> "… to enable those cases which present the most likely opportunities to bring offenders to justice, to be dealt with first."

Two points in particular emerge from the remaining passages of the MOU. First, in cases where the DPP exercises the power under section 35(5), ensuing questions of sequencing and priority are a matter for PSNI. Second, the flexibility of the practical operation of the CSM is evident.

The Decision in Beatty

[11] The exercise which this court conducted in *Beatty v DPP* [2022] NICA 13 was one of construing Section 35(5)(a) of the 2002 Act. The judgment notes that in "legacy" cases where this statutory power is exercised the resulting investigation is assigned to a separate, shorter list of pending investigations rather than the CSM. (This important issue is revisited *infra*). This court decided as follows:

(i) Where the DPP exercises the power under Section 35(5)(a) of the 2002 Act this obliges PSNI to conduct an appropriate investigation and report the fruits thereof to the DPP: para [27].

(ii) In determining whether to resort to this power the DPP exercises a discretion of self-evidently extensive scope: para [28].

(iii) The statutory power reflects a legislative intention to provide a further layer of oversight serving to promote the public interest in the identification, prosecution and conviction of offenders, particularly in cases where PSNI has not identified something requiring investigation or, alternatively, has consciously decided that an investigation is not indicated: paras [30] – [31].

(iv) While the Chief Constable/PSNI is an independent public authority, its independence is not absolute by virtue of the hierarchical nature of its relationship with the DPP/PPS: para [22]ff.

(v) Section 35(5)(a) empowers the DPP to require the Chief Constable/PSNI to prioritise an investigation: para [32].

(vi) This power, however, is one of "demonstrably limited scope" for the reasons elaborated in para [33].

(vii) Section 35(5)(a) operates in a highly restricted way in a case already identified by the Chief Constable/PSNI as requiring investigation, further investigation, review or re-investigation, as the case may be, and awaiting completion of an investigation report to the DPP, absent some exceptional circumstance. Thus, this aspect of the DPP's discretionary power is of decidedly narrow compass and it will rarely be appropriate for the DPP to exercise it in a case of this kind: para [34].

Judgment of Scoffield J

[12] Scoffield J examined all the issues with considerable care and made the following conclusions:

(a) Following the exercise of the DPP's power under Section 35(3) the options available to the DPP are not confined to one of the following three exclusive outcomes, namely a decision to prosecute, a decision not to prosecute or a statutory direction for further investigation in light of the intensely discretionary nature of the DPP's functions and the basic division of responsibilities between the DPP and Chief Constable.

(b) Upon receipt of a Coroner's report provided under Section 35(3) the legal duty imposed on the DPP is to consider the report and determine what action, if any, should be taken.

(c) A Coroner's report has the same status as other information about the possibility of the commission of a criminal offence coming into the possession of the DPP.

(d) Following receipt of a Coroner's report it is open to the DPP to opt for awaiting the outcome of further investigation planned by the PSNI.

(e) There is no merit in the argument that the step taken by the DPP of specifying priority lines of enquiry for PSNI was unlawful being a "deliberate and conscious attempt to circumvent, rather than comply with, the legislation."

(f) Resort by the DPP to Section 35(5)(a) for the purpose of bringing about a re-prioritisation of police resources is a residual power to be exercised in exceptional circumstances.

(g) The PPS letter quoted in para [12] of *Beatty* did not subject the DPP to a legal duty to exercise the Section 35(5)(a) power in this case.

(h) The DPP's assessment that this was not an exceptional case (thus warranting the exercise of the statutory power) was not irrational.

(i) The affidavit evidence demonstrates the DPP's awareness of, and willingness to resort to, the power under Section 35(5)(a).

Grounds of Appeal

[13] The grounds of appeal (our summary) are these:

(i) In its response to the coroner's report the PPS options were confined to (a) a decision to prosecute, (b) a decision not to prosecute or (c) a direction (unspecified) to the PSNI under Section 35(5).

(ii) The decision by the PPS to refer this case to the PSNI with "priority lines of enquiry" without an accompanying direction (unspecified) under section 35(5)(a) was unlawful and "a deliberate attempt to circumvent, rather than comply with, the scheme created by legislation [sic]."

(iii) The present case was the "paradigm of an exceptional case" warranting the exercise of the relevant statutory power because the PPS had taken this course in earlier comparable cases.

(iv) The coroner's findings and consequential statutory referral under Section 35(3) make the present case an exceptional one requiring a direction (unspecified) by the PPS to the PSNI under Section 35(5).

(v) The PPS "policy" of "adopting a hands off approach to the prioritisation of" LIB investigative case work is unlawful having regard to the coroner's statutory referral.

(vi) The judge, having acknowledged the implications of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 as regards criminal investigations and prosecutions and having further acknowledged the public interest in the investigation and prosecution of offenders underlying Section 35, erred (in some unspecified way) in concluding that the coroner's statutory referral did not "maintain" a direction (unspecified) to PSNI under Section 35(5).

(vii) The judge erred (in some unspecified way) in failing to find that the PPS decision was irrational.

The Office of DPP

[14] The limits of judicial review of the activities of the DPP have been considered at the highest level in both this jurisdiction and that of England and Wales. The themes which flow through these cases are the complex and unique function of the office of DPP, restrained judicial intervention and low intensity review. These themes echo in the following passage in the judgment of Lord Bingham in *R (Corner House Research) v Serious Fraud Office* [2009] 1 AC 756, at paras [30]-[31]).

> "It is common ground in these proceedings that the Director [Serious Fraud Office] is a public official appointed by the Crown but independent of it. He is entrusted by Parliament with discretionary powers to investigate suspected offences which reasonably appear to him to involve serious or complex fraud and to prosecute in such cases. These are powers given to him by Parliament as head of an independent, professional service who is

> subject only to the superintendence of the Attorney General. There is an obvious analogy with the position of the Director of Public Prosecutions. It is accepted that the decisions of the Director are not immune from review by the courts, but authority makes plain that only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator: R v Director of Public Prosecutions, Ex p C [1995] 1 Cr App R 136, 141; R v Director of Public Prosecutions, Ex p Manning [2001] QB 330, para 23; R (Bermingham and others) v Director of the Serious Fraud Office [2006] EWHC 200 (Admin), [2007] QB 727, paras 63-64; Mohit v Director of Public Prosecutions of Mauritius [2006] UKPC 20, [2006] 1 WLR 3343, paras 17 and 21 citing and endorsing a passage in the judgment of the Supreme Court of Fiji in Matalulu v Director of Public Prosecutions [2003] 4 LRC 712, 735-736; Sharma v Brown-Antoine and others [2006] UKPC 57, [2007] 1 WLR 780, para 14(1)-(6).
>
> …
>
> The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised (as it was described in the cited passage of Matalulu):
>
> > 'The polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits.'
>
> Thirdly, the powers are conferred in very broad and unprescriptive terms."

As regards judicial superintendence, the doctrine of the separation of powers impels to the adoption of a "very strict self-denying ordinance" (per Sir John Thomas in *L v Director of Public Prosecutions* [2011] EWHC 1752 at [7]). The leading decisions in this jurisdiction have followed the same path: see in particular *Re Adams Application* [2001] NICA 2 and, more recently, *Re Duddy and others' Applications* [2022] NIKB 23 at para [54]ff.

The Prioritisation Issue

[15] In both *Beatty* and the present appeals there was an unwritten premise, namely that where the DPP exercises his power under Section 35(5) in relation to any of the approximately 1100 LIB cases, this will achieve some acceleration or prioritisation for the case investigation concerned. In *Beatty* this was in effect an agreed fact. In these appeals this court questioned this and probed this issue in some depth.

[16] In *Beatty,* the question of law which this court formulated at the outset of its judgment, at para [2], was whether:

> "… Section 35(5)(a) invests the DPP with a discretionary power to direct the Chief Constable to accelerate the police investigation … [in an LIB case]."

At para [31] the question was framed thus:

> "… does this statutory power extend to the DPP directing the Chief Constable/ Police Service to prioritise a particular [LIB] investigation?"

[17] At paras [29] and [31] this court identified some scenarios in which the exercise of this power in this way would conceivably be appropriate. At paras [32] and [33] this court supplied an affirmative answer to the question posed. At para [34], elaborating, this court made clear that some "exceptional circumstance" would be required for the exercise of this power in any case "already identified by the Chief Constable/Police Service as requiring investigation, further investigation, review or reinvestigation as the case may be and awaiting completion of an investigation report to the DPP ..." Subject to the possibility of some unusual feature, this description would be expected to apply to every case within the LIB model.

[18] In short, what was in contemplation in *Beatty* was a possible direction to the Chief Constable/Police Service by the DPP requiring that the investigation in a specified LIB case be accelerated, or prioritised. However, it now transpires that what was in the contemplation of the court in *Beatty* was not mirrored by the contemplation of the parties: the two sides were not *ad idem*. We elaborate as follows.

[19] It is evident that in recent years there has developed an understanding, or expectation, evidently shared by the PPS, the Chief Constable/Police Service, families of victims whose cases belong to the LIB model and their legal representatives that where the DPP exercises his power under Section 35(5) in relation to any of the approximately 1100 LIB cases, this will achieve some acceleration or prioritisation for the case concerned. Furthermore, it would appear that this understanding has generated a practice whereby the Police Service accords some priority or acceleration in all such cases.

[20] The question to which this court turns (and which did not arise in *Beatty*) is whether there is any legal basis for this understanding and associated practice. It certainly finds no support in the express terms of Section 35(5). Is there any basis for implying it? True, this statutory provision authorises the DPP to issue instructions or directions within the constraints of the statutory language which the Chief Constable/Police Service must observe. But we can identify nothing in the terms of the statutory language, considered in its full context and with regard to the overarching statutory purpose namely the prosecution and conviction of offenders, warranting any such implication. What was written in para [33] of *Beatty* applies fully in this context:

> "In our estimation the legislature must have intended that, in general, the Chief Constable/Police Service would exercise autonomous control over its modus operandi, its budgetary and policy priorities and allocations, its formulation of criteria in identifying the most pressing cases in its workload and its design of a mechanism for the periodic review of the application of such criteria, all in a context where the particular case under scrutiny has been identified as worthy of investigation, further investigation, review or re-investigation. However, we consider that limited DPP intrusion and superintendence were also contemplated, given our analysis above."

In passing, this is fully reflected in the MOU and a later letter from the DPP to the Chief Constable (*infra*).

[21] This, however, is not determinative of the issue because it is possible, in principle, that either or both of the two criminal justice agencies concerned, namely the DPP and the Chief Constable, has/have adopted a <u>policy</u> to this effect. However, there is nothing of this kind in the evidential matrix before the court. Quite the contrary: while the obvious candidate is the MOU noted in para [9] above, this contains nothing to this effect. The same analysis applies to the affidavits and correspondence assembled in these judicial review appeals and *Beatty*. Furthermore, the later letter from the DPP to AGNI (24 October 2019) (a) postdates the MOU by some three years, (b) did not involve the Chief Constable and (c), notably, in the 11th paragraph, mentions the views *of* "some legal practitioners and interest groups" about the exercise of the section 35(5) power (the sub-text being that this achieves prioritisation of the case investigation concerned). In addition, the language of both the MOU and the aforementioned letter, if anything, contra-indicate any policy to this effect.

[22] The foregoing analysis impels to the following conclusion: where the DPP exercises his power under section 35(5) in relation to any of the LIB cases, this does not as a matter of law require the Chief Constable/Police Service to apply any acceleration or prioritisation to investigation in the case concerned. In practice, some

prioritisation has evidently occurred, as evidenced by the case examples provided in the DPP's affidavit evidence. This may be explicable on the common-sense basis that given the large number of LIB cases and the limited resources available, a Section 35(5) instruction from the DPP is construed as a stimulus, or direction, for prompt specific investigative action in the relevant case.

[23] The court was informed by Mr McGleenan that during the last year the DPP has adopted a practice of not acting under section 35(5)(a), evidently driven by the misconception diagnosed above that this would as a matter of law afford automatic acceleration to the case concerned. This would appear to us to constitute an unlawful fetter of the statutory discretion in question (again subject to full argument in some appropriate future case). The court trusts that LIB cases in which this erroneous approach has been applied will be expeditiously revisited since, as we shall explain, Section 35(5)(a) provides the *vires* for all instructions of the kind communicated by the PSNI in the present case or belonging to the contexts considered in paras [19] and [28]-[29] of *Beatty*.

Did the DPP act under Section 35(5) in this case?

[24] We consider that the answer must be "yes", for the following reasons. Fundamentally, as explained in *Beatty*, the DPP is a creature of statute: see paras [21] – [32]. Thus, the *vires* for the DPP's action in the present case must be found in Part 2 of the 2002 Act (see the summary in *Beatty* at paras [13]–[17]). Labelling, lack of labelling, taxonomy, subjective views and individual assumptions are immaterial in this context. The question for this court is the objective, detached and clinical one of determining the legal character of the DPP's action by reference to the statutory scheme.

[25] Mr McGleenan's argument that the *vires* of the DPP action vis-à-vis PSNI noted in para [2] above reposes in Section 35(3) of the 2002 Act must be rejected. Section 35(3) contains nothing expressly authorising this action and, for the following reasons, there is no warrant for resorting to the doctrine of implied statutory powers.

[26] Of course, the legislature plainly contemplated that upon receipt of a Coroner's report transmitted under Section 35(3) the DPP would consider fully the information provided and determine whether any particular course of action was in its judgement appropriate. The courses of action available to the DPP in this context were confined to those specified in the statutory scheme. They are contained in Part 2 of the 2002 Act (see the summary in *Beatty* at paras [13]–[17]). The powers exercisable by the DPP in the Section 35(3) scenario include those contained in Section 35(5).

[27] In the present case, the action taken by the DPP following consideration of the Coroner's report provided under Section 35(3) was to transmit to PSNI "…some priority lines of enquiry that would require to be undertaken as part of any future police investigation." We are entirely satisfied that this action falls squarely within Section 35(5)(a). The absence of any mention of this statutory provision in the

directions given is immaterial. Equally immaterial is what the DPP or PSNI or any interested party might have thought or believed in this context. This is a hard-edged question of law requiring a purely objective assessment by the court impelling to the answer we have provided. Given this analysis, there is no room for importing something further into the statute by implication.

[28] It follows that the exhortations of the appellant's solicitors that the DPP take positive action in light of the Coroner's report were productive, albeit none of the protagonists was alert to this.

[29] Mr Moriarty was driven to argue that the DPP had no need to transmit the relevant directions to PSNI. This is a forlorn submission, beset by pure conjecture and confounded further by the breadth of the DPP's discretion in play. How that discretion is exercised will depend upon the facts of each case. To be clear, the DPP may proceed to direct a prosecution or no prosecution. That may be without an updated police file in a case where a coroner has sent a report. However, equally, within the broad parameters of his discretion the DPP may seek further information from the police, as here.

[30] We cannot accept Mr Moriarty's argument that such an approach was irrational simply because of the coronial finding that Soldier D had used excessive force. Such a finding does not automatically translate into a viable criminal prosecution. There may for example be a need for further expert evidence, interview under caution, or other investigations all designed to enable the DPP to make an informed assessment of whether the criminal standard can be met upon prosecution (given that the coroner applies the lower civil standard). Furthermore, this submission overlooks the DPP's public law obligation to make prosecutorial decisions on the basis of all information available, which may require the kind of further action taken in the present case.

[31] We consider that the DPP's determination to pursue the course of giving the specified directions to PSNI without first considering the totality of the inquest materials fell comfortably within the margins of actions, or options, rationally available to him, taking into account the framework of legal principle outlined in para [14] above. This is all the more so when one of the directions required PSNI, the specialist criminal investigation agency, to obtain all the inquest materials and, having considered same, to address the question of whether any additional expert evidence should be commissioned. Furthermore, in this way the DPP will in due course have the benefit also of the expert PSNI evaluation of all the available information, to be contrasted with the raw information itself. In this respect, we observe that the court's suggestion at the hearing that the action which the DPP has chosen to take will positively enhance the police investigation and, hence, the final product, was not contested. Finally, the directions bear all the hallmarks of careful and considered thought.

[32] As will appear from the foregoing, this court endorses fully the analysis and conclusions of Scoffield J in paras [39]–[41] and [48]–[51], all key passages in his

judgment. Mr Moriarty's submission that these passages are imbued with judicial irrationality sinks without trace.

Our Conclusions

[33] While the foregoing effectively disposes of this appeal, we shall nonetheless address each of the grounds of appeal individually.

[34] The first ground of appeal challenges the conclusion of the judge specified in para [12](a) above. We agree fully with the judge's conclusion. Parliament has not legislated in the express and specific terms which would be required to invest this ground with any merit and, quite the contrary, has chosen to confer on the DPP a discretion of manifest breadth.

[35] The second ground of appeal challenges the judge's conclusion rehearsed in para [12](e) above. Once again, we agree with the judge. Parliament has not legislated in terms which oblige the DPP to require prioritisation or acceleration when, as in this case, the course of action selected was to communicate to PSNI priority lines of enquiry to be pursued. This ground of appeal fails on the further basis that the assertion of a "deliberate attempt to circumvent, rather than comply with, the scheme created by the legislation" is, in substance, an allegation of improper motive which has no evidential foundation whatsoever, cannot be reasonably inferred from any item or items of evidence and should not have been pleaded or pursued. It would be highly reprehensible if delay was indeed the intention behind such a request but there is no evidential basis for concluding so in this case.

[36] The third ground of appeal challenges the judge's conclusions summarised in para [12](b) and (g) above. We agree with the judge's reasoning and conclusion. Fundamentally, the assessment by the DPP in some other case that receipt of a Coroner's report pursuant to Section 35(3) should stimulate action under Section 35(5)(a) has no bearing whatsoever on how the DPP chose to exercise his discretion in this case. This statutory discretion must be exercised afresh by reference to the available material on a case by case basis in each individual fact specific context. This ground of appeal, properly exposed, would if accepted have the effect of significantly fettering the wide discretion in play, in manifest contravention of basic public law dogma. Furthermore, this ground cannot withstand our analysis that, as explained above, the PPS did act under section 35(5)(a) in this instance.

[37] The fourth ground of appeal challenges the conclusion specified in para [12](h) above. In agreement with the judge, we conclude without hesitation that this ground must fail as the course of action for which the DPP opted is confounded by the terms of and reasoning in the impugned decision letter, as elaborated in the affidavit evidence, which are quite the antithesis of *Wednesbury* irrationality.

[38] The fifth ground of appeal cannot be related to any of the judge's conclusions, as rehearsed in para [12] above. We would add that this ground must fail on the

further basis of outright want of particularity of what is said to have been "unlawful." Subject thereto, it cannot in any event withstand our analysis and conclusions in paras [14]–[28] above. We are unable to identify any separate, coherent challenge in the sixth ground of appeal distinguishing it from other grounds and it fails accordingly. The seventh, and final, ground of appeal is of the omnibus variety, devoid of specificity and separate identity and adding nothing to the preceding grounds.

Disposal

[39] There are lessons to be learnt from this case concerning the *vires* and transparency of DPP decision making and action under the Justice Act which we have now clarified. In short, the DPP should have known and accepted that the instructions conveyed to the PSNI were a Section 35(5)(a) request and identified it as such. This judgment speaks for itself in relation to that issue.

[40] The practical outworkings of a Section 35(5) request are also discussed in this judgment. We can say no more about matters of past or present policy or practice as to resulting prioritisation or acceleration in certain LIB cases. Similarly, it would not be appropriate for us to comment upon the effect of the Legacy Act whilst litigation is ongoing and in a context where no argument on this topic was received.

[41] Finally, we cannot leave this tragic case without expressing our sympathies with the members of the Thompson family whose engagement with the justice system in Northern Ireland has been so protracted and has not yet achieved finality. Their experiences bear eloquent testimony to the multiple challenges and complexities presented by the subject of so – called "legacy" deaths in this jurisdiction. However, applying the relevant legal rules and principles objectively, as this court is solemnly obliged to do in every case, we conclude that the DPP did not act unlawfully.

[42] For the reasons given, we affirm the judgment and order of Scoffield J and dismiss the appeal.

Addendum

[43] The court has considered the parties' submissions regarding costs. The applicant applies for an order for costs against the respondents. We consider this application thoroughly unmeritorious. The applicant has failed at both judicial levels. Furthermore, counsels' submission overlooks entirely, and is confounded by, this court's twofold assessment that [1] the applicant's request to the DPP giving rise to the impugned decision was misconceived and [2] the DPP responded positively, exercising his power under s 35(5) of the Justice Act. Costs shall therefore follow the event in accordance with the strong general rule. Thus the court orders that the applicant pay both respondents' costs, with the usual public funding qualification.