Neutral Citation No: [2026] NIDiv 1	*Ref:*	**KEE12907**
	ICOS No:	**24/029659/01**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**23/01/2026**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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DIVISIONAL COURT

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IN THE MATTER OF AN APPLICATION BY MARY BRANIFF FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

Between:

MARY BRANIFF

Applicant

and

THE PUBLIC PROSECUTION SERVICE

Proposed Respondent

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Mr Southey KC with Mr Conan Fegan (instructed by KRW Law Solicitors) for the Applicant
Mr McGleenan KC with Ms Herdman (instructed by the Crown Solicitor's Office) for the Respondent

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Before: Keegan LCJ and Treacy LJ

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KEEGAN LCJ (*delivering the judgment of the court*)

Introduction

[1] The applicant, Mary Braniff, is the wife of Anthony Braniff who was murdered in September 1981 by the IRA after being labelled as an informer. This murder was investigated by Operation Kenova due to the alleged involvement of a state agent(s) including an agent with the codename Stakeknife.

[2] Operation Kenova has produced an interim report and now a full report which exposes a shocking picture as to the actions and management of state agents in Northern Ireland including Stakeknife in the context of many murders and other serious crimes. The applicant has also received a family report which deals with the

specific circumstances surrounding Anthony Braniff's murder. Civil proceedings taken by the family and others in relation to an agent, codenamed Stakeknife, are adjourned for mediation. We understand that one other judicial review in relation to Operation Kenova's recommendations and the consequent decisions not to prosecute has been stayed whilst the Public Prosecution Service ("PPS") review that decision.

[3] It is in the above context that the application for judicial review against the proposed respondent, the PPS, arises. Two decisions of the PPS are under challenge:

(i) The proposed respondent's decision of 6 February 2024, that there would be no prosecution in Mr Braniff's case; and

(ii) The proposed respondent's decision dated 21 March 2024, that there would be no consideration given to health and safety issues arising from the findings of Operation Kenova.

[4] We have, on request of both parties, dealt with this case as a Divisional Court given the fact that the first decision of 6 February 2024 is clearly a criminal cause or matter although the second decision is not. After hearing submissions, we also allowed additional evidence to be filed by the applicant without any objection by the PPS before we completed our consideration of this case. This evidence was exhibited to an affidavit of Mr Kevin Winters dated 14 October 2025 and comprised the family report provided by Operation Kenova in Mr Braniff's case and the family reports provided to other Kenova families.

[5] Having considered all of the material available to us and the submissions made by counsel, we must decide whether to grant leave for judicial review applying the test expressed in *Ni Chuinneagain's Application* [2022] NICA 56 which has been consistently applied in this jurisdiction, namely whether there is an arguable case with a reasonable prospect of success.

This challenge

[6] The amended Order 53 statement of 23 April 2024 seeks orders of certiorari quashing the decisions challenged, orders of mandamus requiring the proposed respondent to retake the decisions challenged and declarations that the decisions challenged were unlawful. The grounds of challenge are alleged illegality on three fronts namely that European Union ("EU") law required the prosecution of health and safety offences on the basis of article 2(1) of the Windsor Framework given the standards set by articles 2 and 3 of the European Convention on Human Rights ("ECHR"); that there was a failure to ensure that full information was provided on the question of health and safety offences or the proposed respondent ignored relevant information; that the no prosecution decision was based on a misdirection as to the offence of misconduct in public office. The second ground refers to the

alleged failure to take into account material considerations. The third ground claims irrationality. The fourth ground also claims breach of EU law.

[7] This Order 53 statement is overly prolix, repetitive and confusing in parts. This pleading has not assisted our consideration. However, aided by helpful oral submissions of both counsel we have identified that the core challenge is to an alleged failure on the part of the proposed respondent to prosecute anyone or any corporate entity for health and safety offences. The gravamen of the claim falls into three brackets as follows:

(i) There was a misdirection by the PPS regarding the offence of misconduct in public office.

(ii) The PPS failed to consider health and safety offences and corporate guilt adequately or at all.

(iii) Pursuant to the Windsor Framework, there is a breach of EU law in the decision taken not to prosecute.

Context

[8] Operation Kenova was commissioned by Sir George Hamilton, the then Chief Constable of the Police Service of Northern Ireland, ("PSNI"), following directions issued by the Director of Public Prosecutions for Northern Ireland ("DPPNI") to PSNI under section 35(5) of the Justice (Northern Ireland) Act 2002. Kenova commenced in June 2016.

[9] This as an independent police investigation into allegations that an alleged security force agent known as Stakeknife committed various offences during the Troubles and related allegations made against members of the security forces, other government agencies and the Provisional Irish Republican Army ("PIRA"). Subsequently, some unsolved murders were also considered as part of related work comprised in Operation Mizzenmast, Turma and Denton. Operation Kenova has published an interim and final report and family reports which cover the actions of an agent codenamed Stakeknife and the role of security services including M15 in handling him.

[10] The final report which is now a matter of public record endorses the interim report. The only qualification is that the final report reflects new information which was belatedly disclosed by MI5 which revealed that it had a greater awareness and involvement in the handling of the agent Stakeknife than previously stated. In March 2024 MI5 informed Kenova and took steps to make additional material available.

[11] The final report states at 3.3 and 3.4 that, for an overview of the interim report, reference should be made to the statement by the former Officer in Operational

control of Kenova and current Chief Constable of PSNI, Mr Jon Boutcher, at the press conference launching its publication on 8 March 2024 as follows:

> "During the Troubles, the security forces operated in a uniquely challenging environment. When provided with secret intelligence about the plans and intentions of the Provisional IRA, and other such groups, they had to assess risks and consequences with limited information, guidance or training. They did so under exceptionally stressful conditions and extreme time pressures and were sometimes presented with dilemmas that had no 'right answer' because protecting one individual would expose another. Mistakes were inevitable. However, a lack of regulation, oversight and leadership were also important factors. In particular, the absence of an effective legal and policy framework governing the use of agents during the Troubles was a very serious failing: it put lives at risk, it left those on the frontline exposed and let down and it fostered a maverick culture for some where agent handling was sometimes seen as a high-stakes 'dark art' and was practised 'off the books.' This was combined with the evolution of a situation whereby intelligence and investigatory functions were seen as separate and the security forces repeatedly withheld and did not action information about threats to life, abductions and murders in order to protect agents from compromise. As a result, murders that could and should have been prevented were allowed to take place with the knowledge of the security forces and those responsible for murder were not brought to justice and were instead left free to re-offend again …"

With regard to the agent Stakeknife, Mr Boutcher went on to say the following:

> "'Stakeknife' was the code-name for an Army agent within the IRA's Internal Security Unit whose true identity has been the subject of public claims, speculation and litigation for some 20 years. While Stakeknife was undoubtedly a valuable asset who provided intelligence about the IRA at considerable risk to himself, claims that he was responsible for saving 'countless' or 'hundreds' of lives are hugely exaggerated. Most importantly, these claims belie the fact that Stakeknife was himself involved in very serious and wholly unjustifiable criminality whilst operating as an agent, including murders. Indeed, the claims about countless lives being saved by Stakeknife are inherently implausible and should have rung further

> alarm bells: any serious security and intelligence professional hearing an agent being likened to 'the goose that laid the golden eggs' - as Stakeknife was - should be on the alert not least because the comparison is rooted in fables and fairy tales. To address speculation to the contrary, I now make clear Stakeknife was one individual.
>
> We cannot know every occasion when information provided by Stakeknife was used to avoid or prevent harm, but Kenova has recovered and reviewed some 90% of the written intelligence reports attributable to him and my estimate of the number of lives saved in reliance on this information is between high single figures and low double figures and nowhere - nowhere - near hundreds. Crucially, this is not a net estimate because it does not take account of the lives lost as a consequence of Stakeknife's continued operation as an agent. From what I have seen, I think it probable that this resulted in more lives being lost than were saved. Most fundamentally, even if it were possible accurately and reliably to say that a particular agent within a terrorist group did more good than harm, the morality and legality of agents doing any harm - with the knowledge of or on behalf of the state: is something that we would never ever allow today."

[12] The above quotations highlight the significance of operation Kenova and the grotesque criminal activity it covered resulting in multiple murders which accompanied the activities of the agent codenamed Stakeknife during a period in Northern Ireland's troubled past. It goes without saying that this activity has affected many bereaved families and engaged the public interest at a high level.

[13] Both parties also accepted that the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the 2023 Act") is material in that it placed a primary responsibility on the Independent Commission for Reconciliation and Information Recovery ("ICRIR") to take forward Troubles investigations of this nature and recommend prosecutions rather than the PSNI. A Bill is tabled which would repeal elements of this Act and remodel the ICRIR into a Legacy Commission. However, the responsibility for Troubles investigations and recommendation of prosecutions remains unchanged in the proposed legislation in that going forward this would lie with the Legacy Commission.

[14] Section 35(5) of the Justice (Northern Ireland) Act 2002 ("the 2002 Act") is also material to the overall context and reads as follows:

> "(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 decisions under challenge

The first decision: 6 February 2024

[15] The letter of 6 February 2024 contains the first decision under challenge. This is correspondence from the PPS in response to a request for reasons why there was no prosecution in the Braniff case. The letter refers to the fact that there were originally three suspects in relation to Mr Braniff's murder. One had died, and so a decision as to prosecution was required to be taken regarding the remaining two suspects. Suspect 1 is a retired soldier who had been working within the Force Response Unit ("FRU"). He was an agent handler. Suspect 2 was an IRA member at the time of the death of Mr Braniff.

[16] In relation to suspect 1 the decision letter states as follows:

> "Consideration was given to whether there was a reasonable prospect of conviction of suspect 1 for the offence of misconduct in public office. Much of the case that was put to suspect 1 arose from the fact that the FRU were running a source who was involved in PIRA ISU interrogations which could, and on a number of occasions did, result in the death of the victim. However, in relation to suspect 1's general conduct regarding the running of the source, it was considered that there was no reasonable prospect of conviction for the following reasons."

[17] Seven reasons are then provided in the letter which we summarise as follows:

(i) There were, in the opinion of the PPS, significant difficulties in proving by way of admissible evidence the source's involvement.

(ii) There was significant legal uncertainty as to whether the source was a party to any conspiracy to murder.

(iii) Whether or not the source was, as a matter of law, party to the conspiracy to murder their PIRA associates by virtue of their participation in interrogation. The legal position was unclear that the handlers had received legal training or advice and, therefore, whether or not they could be criticised for believing that the participation of the source in interrogations in such circumstances could be permitted was a difficulty.

(iv) There was no clear guidance for handlers as to what was acceptable at the time when running agents who were embedded within proscribed organisations.

(v) There is a body of evidence capable of supporting suspect 1's claim that the intelligence that he and his co-handlers received was passed on to senior army officers and to the Royal Ulster Constabulary ("RUC") Special Branch ("SB").

(vi) There is evidence which supported the proposition that both the RUC SB and M15 were aware of the fact that the FRU was running an agent within PIRA Internal Security Unit ("ISU").

(vii) There is no evidence to establish that the source was ever directly involved in the shooting of victims referred to or was present when they were shot.

[18] The decision letter goes on to explain that in relation to suspect 2, the case consisted entirely of intelligence material, and it involved multiple hearsay which the PPS considered was highly unlikely to be admitted in any criminal trial of suspect 2. The correspondence states that suspect 2 was interviewed under caution by Operation Kenova. He made a statement through his solicitor denying any knowledge of or involvement in the murder and did not reply to questions put to him during the interview. In these circumstances, the PPS concluded that there was no reasonable prospect of conviction of suspects 1 and 2 and the test for prosecution was, therefore, not met.

[19] A public summary of this decision not to prosecute and other similar decisions was also issued on 6 February 2024 by the PPS. Some reliance has been placed upon para 27 of that document in relation to the offence of misconduct in public offence. The relevant part reads as follows:

> "This offence is concerned with neglect to perform a duty, which is deliberate, as opposed to accidental, and which much be accompanied by an awareness of a duty to act or a subjective recklessness as to the existence of the duty. Where misconduct, as opposed to wilful neglect, is alleged, this refers to deliberate or reckless conduct which goes beyond mere neglected duty and is often akin to

> corruption. The threshold for such an offence is a high one and a mistake, even a serious one, will not be sufficient to meet this threshold. It is necessary to show that the officer acted in bad faith, for example, by having no honest belief that they were acting lawfully. This relates to the offence of misconduct in public office."

The second decision: 21st March 2024

[20] Following the first decision of 6 February 2024 and the public statement of Mr Boutcher of 8 February 2024, the PPS were pressed by the applicant's solicitor on the question of the potential for individual or corporate responsibility under health and safety provisions. This request generated the second letter from the PPS which contains the impugned decision of 21 March 2024. By this stage a pre-action protocol letter had also issued.

[21] The 21 March letter from the PPS repeats the contents of the 6 February 2024 letter but goes on to address potential liability in relation to health and safety offences. The gravamen of the PPS decision on this issue is found in the following paragraphs:

> "There may conceivably be exceptional circumstances where PPS would consider prosecution of an individual or corporate entity in circumstances where they were not specifically investigated and reported for a decision by an investigator. However, a prosecution of such complexity would only realistically be brought on the basis of an investigation that considered and investigated all the issues that would be relevant to any such criminality. Operation Kenova has not identified and investigated criminality of the nature that you say should now be prosecuted by the PPS. The material provided in your letter of 21 February 2024 has been considered, but it does not appear to disclose any basis for considering a further section 35(5) request to PSNI to address this issue. Requests for review are considered in accordance with para 4.59 et seq of the Code for Prosecutors.
>
> However, properly constructed your letters do not contain a request for a review of the decisions not to prosecute suspect 1 for misfeasance in public office and suspect 2 for murder. Rather, the gravamen of your letters is that the other persons or corporate entities should be considered for prosecution for a range of other offences. It is not possible to review the decisions in respect of suspect 1 or 2 on this basis. The complaints

you raise are directed to the scope of the Operation Kenova investigation. Although it is correct that PPS had a role in the original section 33(5) requests, thereafter the response to those requests through the mechanism of Operation Kenova was a matter for PSNI."

Our conclusions

[22] We begin with what we see as the most straightforward issue, namely whether there is an arguable case that the PPS has acted unlawfully in failing to recommend any prosecution against two identified individuals, ie suspect 1 – the FRU army handler and suspect 2 – the IRA member. Respectively, they were considered as suspects for offences of misconduct in public office and murder.

[23] In determining this first issue, we are mindful of the high threshold that is required for a no prosecution decision to be successfully impugned. This was explained by the Divisional Court in an application by *Duddy and others* [2022] NIQB 23, in which Keegan LCJ summarised the position as follows at para [63]:

> "[63] … Following from the above, we in this court distil the following:
>
> (i) Prosecutorial decisions are not immune from judicial review, but the review must bear in mind the nature of the decisions at issue.
>
> (ii) Absent mala fides or dishonesty there must generally be a clear error of law or breach of policy.
>
> (iii) There is a possibility that cases may also hinge on an error of fact, however that will also be in rare cases and the error of fact must be stark and material.
>
> (iv) There is a significant margin of discretion available to the prosecutor in reaching a judgment in a particular case.
>
> (v) Decisions may also be quashed on satisfaction of the traditional judicial review ground of irrationality or unreasonableness.
>
> (vi) The court cannot exercise a merits-based review or quash a decision which is a matter of reasonable

judgement on the part of the prosecuting decision maker."

[24] The letter of 6 February 2024 in relation to the PPS no prosecution decision is clear and comprehensive. It sets out seven reasons why the decision was taken not to prosecute which have not been seriously challenged. There is no claim of procedural impropriety or *mala fides*. The only substantial point raised is whether, by virtue of a public statement, the wrong legal test was applied in relation to considering the ingredients of the misconduct in public office offence.

[25] The limited nature of this aspect of the challenge is unsurprising as in Mr Braniff's case there is a valid question as to whether there is the necessary evidential basis upon which the PPS decision not to prosecute can be impugned. That is because there was no evidence to suggest that the source was involved in Mr Braniff's murder. Rather, as the decision letter makes clear the intelligence material suggested that the source became aware that the IRA were intending to murder Mr Braniff and on receiving information concerning the general location in which he was being held, the source made attempts to identify where he was being held. The source then arranged a meeting with their handlers and provided information which was passed to police who made attempts to disrupt the planned murder. These attempts were unfortunately, unsuccessful.

[26] This factual position is validated by the family report that we have now read. The summary of key findings highlights several matters, but most particularly at paras 5, 6 and 7 refers as follows:

> "5. Kenova have received information that shows that the agent Stakeknife was involved in the early stages of the internal security unit investigation into Anthony Braniff. This led to Anthony's suspension from PIRA and then an interrogation by other members of the PIRA ISU.
>
> 6. The actions of the PIRA ISU led to the murder of Anthony by PIRA.
>
> 7. The agent, Stakeknife did provide information which resulted in the RUC and army taking action to try to save Anthony, however, because the address of where Anthony was being held was not known by Stakeknife, the actions of the security forces proved unsuccessful."

[27] In light of the above factual matrix, there was no evidence to suggest that suspect 1 received or was otherwise aware of the information from the source in respect of Mr Braniff in the relevant time. In any event, the report now provided to

the family suggests that the information provided had been recorded and disseminated and led to an attempt to disrupt the murder. As such, it is not arguable that the challenge in relation to suspect 1 raises an arguable case with a reasonable prospect of success. Properly analysed the PPS decision aligns with the factual background and is a decision well within the PPS's discretion. It cannot be said to be irrational or unreasonable.

[28] In addition we find that whilst the public statement perhaps gives the impression that the test for misconduct in public office was elevated to include malice this is not material and does not vitiate the decision in relation to suspect 1. That is because the PPS was entitled to find that the test for prosecution was not met based on the *actus reus* of this offence in any event.

[29] The challenge in relation to suspect 2 was tepidly advanced for obvious reasons. The difficulties in successfully prosecuting him are comprehensively explained in the PPS decision making letter which we summarise at para [18] herein. We did not hear any convincing argument as to how that prosecution decision in relation to suspect 2 could be impugned. There is no arguable case with a reasonable prospect of success. We also dismiss this aspect of the challenge. This means that we refuse the application for leave to apply for judicial review of the PPS decision not to prosecute suspects 1 and 2. The first decision contained in the 6 February 2024 letter from the PPS is entirely lawful and should stand.

[30] The remaining issue is more complicated, that is whether there has been a failing by the PPS to consider adequately or at all whether any individual or corporate entity should have been prosecuted for health and safety breaches. This is an unusual and challenging claim to make. It is based upon the Health and Safety at Work (Northern Ireland) Order 1978 ("the 1978 Order"). Section 5 of the 1978 Order sets out the general duties of employers. Section 5(2) provides in relevant part:

> "(1) It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety."

[31] Section 8 of the 1978 Order sets out the general duties of employees. Section 8A provides:

> "8. It shall be the duty of every employee while at work—
>
> (a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work; …"

[32] Section 31A of the 1978 Order makes breach of these duties a criminal offence. The applicant refers to one case in November 2007 of unlawful police killing which has been prosecuted under the Health and Safety at Work Act 1978 which is the equivalent English provision. This was when the Commissioner of the Metropolitan Police Service was convicted of health and safety offences in respect of the fatal shooting of Jean Charles de Menezes by Metropolitan police firearms officers on 22 July 2005.

[33] The applicant relies on the de Menezes case and the PPS's public statement of 6 February 2024 along with Mr Boutcher's public statement of 8 February 2024 to claim that the PPS has either not adequately, or at all, considered health and safety offences which may have been committed. The applicant also draws in aid a series of further family reports (without objection from the PPS) which on the face of it refer to failings in individual cases by virtue of the fact that at the time the guidelines for handling agents by the FRU were manifestly inadequate and, in any event, not followed by the RUC.

[34] The PPS position which is also found in correspondence to the applicant's solicitor of 16 February 2021 is that this issue should be considered on a collective basis. So, while some of the other family reports that we have read appear to evidence a stronger claim in relation to this issue we do not consider that this applicant is prevented from bringing a case in relation to the systemic issues that arise in relation to the regulation of state agents. In any event Mr McGleenan did not suggest that we dismiss this aspect of the challenge for lack of standing.

[35] Turning to the substance of the point, the Kenova family reports reference the fact that, the Home Office provided guidelines on agent handling in a Home Office Circular 97/1969 which include the following terms:

> "(a) No member of a police force, and no police informant, should counsel, incite or procure the commission of a crime.
>
> (b) Where an informant gives the police information about the intention of others to commit a crime in which they intend that he shall play a part, his participation should be allowed to continue only where:—
>
> (i) he does not actively engage in planning and committing the crime;
>
> (ii) he is intended to play only a minor role; and
>
> (iii) his participation is essential to enable the police to frustrate the principal criminals and to arrest them (albeit for lesser offences such as attempt or

conspiracy to commit the crime or carrying offensive weapons) before injury is done to any person or serious damage to property.

The informant should always be instructed that he must on no account act as agent provocateur, whether by suggesting to others that they should commit offences or encouraging them to do so, and that if he is found to have done so he will himself be liable to prosecution

(c) The police must never commit themselves to a course: which, whether to protect an informant or otherwise, will constrain them to mislead a court in any subsequent proceedings. This must always be regarded as a prime consideration when deciding whether, and in what manner, an informant may be used and how far, if at all, he is to be allowed to take part in an offence. If his use in the way envisaged will, or is likely to, result in it being impossible to protect him without subsequently misleading the court, that must be regarded as a decisive reason for his not being so used or not being protected.

(d) The need to protect an informant does not justify granting him immunity from arrest or prosecution for the crime if he fully participates in it with the requisite intent (still less in respect of any other crime he has committed or may in future commit).

(e) The handling of informants calls for the judgment of an experienced officer. There must be complete confidence and frankness between supervising officers and subordinates, and every chief officer of police should ensure effective supervision of his detectives; a decision to use a participating informant should be taken at senior level.

(f) Payment to informants from public funds should be supervised by a senior officer.

(g) Where an informant has been used who has taken part in the commission of a crime for which others have been arrested, the prosecuting solicitor, counsel, and (where he is concerned) the Director of Public Prosecutions should be informed of the fact and of the part that the informant took in the commission of the

> offence, although, subject to (c) above, not necessarily of his identity.
>
> (h) Careful instruction should be given to detectives in training."

[36] These guidelines speak for themselves to what is required in the running of state agents. However, the Operation Kenova conclusion is that the RUC did not apply the guidelines in the 97/1969 circular. The evidence is that this failure to apply guidelines was because the RUC regarded the guidelines as inadequate for dealing with terrorist related crime as they considered restrictions contained within them were unrealistic if police were to continue paramilitary penetration and source penetration. The effect of this approach was that that there were no rules applied. Thus, it is unsurprising that Operation Kenova interim report stated as follows:

> "We have identified incidents in which the intelligence sections of the security forces were aware that someone was at risk of being kidnapped and interrogated by PIRA and did not pass on this information. They neither warned the person concerned about the danger that existed nor took action to protect them."

[37] Therefore, the argument is advanced by the applicant that given the fact there was a departure from the guidelines and given the serious criminality which ensued that some individual or corporate responsibility flows in relation to the handling of the agent codenamed Stakeknife. In his supplementary submissions Mr Southey makes the point that the issue is not whether agent Stakeknife could have been prosecuted before the murder of the applicant's husband. The issue is whether there was sufficient material to require action be taken to protect the health and safety of those potentially harmed by state agents or the subject of intelligence from state agents.

[38] In answering this aspect of the challenge the PPS rely on the fact that it received and considered files from Operation Kenova in respect of each of the deaths in the family reports now put before us. One request for review of a decision not to prosecute in the McKiernan case was received and is being dealt with. Therefore, the PPS position is that the evidential material underlying the family reports has been considered but given the nature of the evidence across Kenova and the issues arising, the PPS did not consider it possible or appropriate to take decisions in respect of any one case separately as all incidents must be considered collectively. Therefore, the PPS maintained that there was no obligation for a further direction to police pursuant to section 35(5) of the 2002 Act that is to refer the matters to the police to consider health and safety offences based on the evidence received.

[39] The applicant maintains that her family report suggests that intelligence was not passed on to RUC CID. In addition, reliance is placed upon the entire body of

family reports which graphically expose the scale and extent of what was happening in the context of multiple murders. These reports are helpfully summarised by Mr Southey as follows:

(a) The report into the murder of Patrick Murray (15 August 1986) states that no action was taken to protect him despite an awareness that he was at risk. Intelligence was also withheld from investigating officers. An informant was involved in this investigation and others that led to deaths. Further, Agent Stakeknife was part of the team that killed Patrick Murray. The case was described as 'shocking'.

(b) The report into the murder of David McVeigh (9 September 1986) shows that intelligence was not shared with the investigating officers. Further, Agent Stakeknife was part of the team that killed David McVeigh.

(c) The report into the murder of Thomas Wilson (24 June 1987) states that Agent Stakeknife was part of the team that killed Thomas Wilson. It also implicates another state agent, Suspect 1, was involved and protected.

(d) The report into the murder of Anthony McKiernan (19 January 1988) states that there was actionable intelligence that could have prevented the abduction and murder. There was also intelligence that could have led to a prosecution. An informant participated in the abduction and unlawful imprisonment that led to the murder. The failure to act against the informant allowed him to participate in other murders.

(e) The report into the murder of Joseph Mulhern (23 June 1993) states that intelligence was not shared with investigating officers.

[40] The PPS state that all of this evidence was considered and that the family reports add nothing. However, we consider that it is arguable that the 21 February 2024 letter from the PPS is a partial response because there is limited engagement with the issue of potential prosecution for health and safety offences, the matter not having been previously considered. Therefore, we find that it is arguable that there is an omission in the decision making by the PPS on this issue. We reach this conclusion acknowledging the fact that the impugned decision was provided by the PPS very soon after the interim report and the public statement of Mr Boutcher and so some further time to reflect may have been useful.

[41] The conclusions found in the interim Operation Kenova report also arguably provide some support to the argument:

> "My overriding concern is the lack of understanding at a senior level within the Army as to what was happening in the field and the lack of meaningful senior supervision or oversight. While I appreciate the enormous challenges

> faced at the time, this was an area that should have been the subject of much closer scrutiny. There was a conscious lack of professional curiosity from the very senior leadership of the Army in relation to the recruitment and in relation to the recruitment and running of FRU agents. [67.7]"

[42] Accordingly, we are satisfied that an arguable case has been made in relation to the second decision which merits the grant of leave and the filing of evidence. This outcome should not be taken as any guarantee of success but rather a reflection that evidence is required from the proposed respondent (and any interested parties) and further examination of the issue is required. We are also mindful that the entire cohort of Kenova cases are affected and so the issue will arise again if not determined.

[43] As to the alleged breach of the Windsor Framework, there is obvious strength in the PPS submissions that the Charter of Fundamental Rights ("CFR") and/or Council Directive 89/391/33C could not have been relied on to impose a duty to prosecute prior to the UK's departure from the EU, or at all because the 1978 Order was in force prior to exit from the EU and remains in force following the UK's departure from the EU. Therefore, it is hard to see how a diminution of rights has occurred because of the UK leaving the EU. However, the Supreme Court will determine this issue and decide whether the CFR is the foundation for such a claim. We reach no conclusion on this aspect of the challenge which should be stayed pending the *Dillon* decision.

[44] We also acknowledge the utility point raised by Mr McGleenan to the effect that even if a public law challenge were successful on the issue we have identified as being arguable, the court could not provide effective relief. Against that, Mr Southey argued that a judicial review of the alleged omission is of value in effectively setting the parameters for any investigation that may have to take place. We can see both sides of this argument. However, we think that it would be premature to rule upon utility at this juncture whilst legacy matters continue to be debated in Parliament and in the absence of evidence from the proposed respondent. This point is therefore reserved to the judge who will be hearing the case.

[45] The matter upon which we have granted leave is not a criminal cause or matter and so the case should now proceed before a single judicial review judge who can make the necessary directions and hear all future applications. This course preserves appeal rights. It will be apparent from what we have said in this judgment that the Order 53 statement requires amendment. It may also be the case that there are other interested parties who should be involved in any future judicial review if it proceeds. As there is at least one other Kenova case already before the judicial review court and there may be others pending it would be appropriate to have all related cases listed together.

Overall conclusion

[46] Accordingly, we refuse leave in relation to the no prosecution decisions of suspects 1 and 2 which is the criminal cause or matter. We grant leave on whether any individual or corporate entity should be prosecuted for health and safety offences which may arise from the management of state agents simply on the basis that an arguable case is made which requires the filing of evidence. The case will be listed before the judicial review judge for further directions in light of our judgment. The parties can liaise as to the appropriate time to have the case listed and send the necessary correspondence to the judicial review office.