*Judicial review – decision not to prosecute – reasons given – whether reasons adequate – whether DPP acted within relevant policy – whether DPP should be ordered to prosecute.*

**Neutral Citation No. [2004] NIQB 78** | *Ref:* **GIRC5134**

*Judgment: approved by the Court for handing down* | *Delivered:* **24/11/2004**

*(subject to editorial corrections)*

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION (CROWN SIDE)**

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**IN THE MATTER OF AN APPLICATION BY JULIE DOHERTY FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF A CONTINUING DECISION OF THE DIRECTOR OF PUBLIC PROSECUTIONS**

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**GIRVAN J**

[1] In this application the applicant effectively seeks an order of mandamus compelling the Director of Public Prosecutions to provide reasons for the decision not to prosecute certain soldiers, members of the SAS (described in the papers as soldiers A, B and C) or any other person in respect of the death of Danny Doherty ("the deceased"). Mr Treacy QC who appeared for the applicant in his submissions indicated that if the court declined to grant that relief it should make an order quashing the decision of the Director made in April 1986 not to prosecute and compelling the Director to review the decision not to prosecute.

[2] The background to the application is set out in the affidavits before the court and the exhibits therein referred to. The deceased was shot and killed with one William Fleming ("Fleming") in the grounds of Gransha Hospital, Londonderry on 6 December 1984. The deceased was armed and was believed to have been involved in an attempt to kill an off-duty member of

the UDR. At least five soldiers were involved in the operation. Members of the 14th Intelligence Company as well as three SAS soldiers who opened fire were said to have been present. A total of 59 shots were fired by the soldiers after a motorcycle was rammed by a car driven by one of the soldiers. The two deceased persons did not fire any shots although the soldiers said at least one weapon was pointed. At the inquest held in December 1986 into the deaths a forensic officer told the inquest that he believed William Fleming was knocked off the motorcycle when it was hit by the car. The motorcycle continued for a short distance out of control with both the deceased persons having already been hit by gunfire. The forensic officer said at least six shots were fired at the deceased on the ground. As well as sustaining a number of wounds to the body both the deceased were struck by bullets to the head. The bullets were both high and low velocity ones. At the inquest Major F who was in charge of the operation gave evidence and testified that "If the police had been called two people might not have been dead – with hindsight. The policy is to introduce the police. I used my judgment at the time". The inquest jury found that under the circumstance the five man army unit should have tried to arrest the deceased or at least inform the RUC and his life might have been saved.

[3] Mr Treacy QC referred to what he contended were serious short-comings in the investigation. The records of the interviews of the four soldiers appeared to comprise statements made by each of time having consulted with Major F. No follow up interviews were conducted in relation to the evidence that the deceased was shot while on the ground having come off the motorcycle at a time when he was moving away from the soldiers. Such follow up enquiries as were conducted took place almost two years after the incident in order to establish the position of the soldiers at the time of the shooting. The notes of those interviewed constituted their written statements which tended to suggest an uncritical acceptance of their accounts without any serious questioning as to the justification from the firing of 59 rounds in circumstances where there was in fact no return fire. They were not interviewed after the autopsy or after the receipt of reports from the forensic lab despite the evidence of Danny Doherty being shot in the back and shot while he as on the ground. The initial interviews were conducted without the assistance of maps. The officer in charge of the investigation stated at the inquest "I don't know if any warning was giving to any person. I believe the statement of the soldiers." This, it was contended, evidenced a particularly uncritical approach to the shooting.

[4] There is considerable force in the criticisms of the investigations made by Mr Treacy QC. The valid criticisms underline difficulties which would have been faced by the Crown in the event of the prosecution of the individual soldiers. However, in this case the applicant's case is primarily directed to the issue whether the DPP has given properly detailed reasons for the decision not to prosecute.

[5] Following the decision of the European Court of Human Rights in *Jordan v United Kingdom, McKerr v United Kingdom, Kelly v United Kingdom and Shanaghan v United Kingdom* delivered in May 2001, the applicant's solicitors sought inter alia "full and detailed reasons as to why no one was prosecuted in respect of the deceased's killing". On 9 August 2002 Mr Kitson, Assistant Director in the Department of the Director of Public Prosecutions, indicated that he was giving consideration to the issues raised in the letter. It is fair to say that the letter raised other complex issues over and above the request for detailed reasons. The policy of the DPP in the matter providing reasons not to initiate or continue prosecutions is set out in the judgment of the Northern Ireland Court of Appeal in *Re Adams* [2001] NI 1. It is clear that the Director may in appropriate cases decide to depart from the general practice of refraining from providing reasons other than in the most general terms.

[6] Mr Kitson in his affidavit states that the policy of the DPP in the matter providing reasons for decisions not to initiate or continue prosecutions is also contained in a statement made by the Attorney General in the House of Lords on 1 March 2002. This was part of a package of measures which was designed to meet the concerns expressed by the European Court in a series of cases from Northern Ireland including that of *Jordan v United Kingdom*. The statement stated:

> "The Director, in consultation with the Attorney General, has reviewed his policy in the light of the judgments delivered by the European Court of Human Rights on 4 May 2001 in a number of Northern Ireland cases including the case of Jordan v United Kingdom. Having done so, the Director recognises that there may be cases in the future, which he would expect to be exceptional in nature, where an expectation will arise that a reasonable explanation will be given for not prosecuting where death is, or may have been, occasioned by the conduct of agents of the State. Subject to compelling grounds for not giving reasons, including his duties under the Human Rights Act 1998, the Director accepts that in some cases it will be in the public interest to reassure a concerned public including the families of victims that the rule of law has been respected by the provision of a reasonable explanation. The Director will reach his decision as to the provision of reasons, and their extent, having weighed the applicability of public interest considerations material to the

> particular facts and the circumstances of each individual case."

A question arises as to what is meant by the references to cases "in the future". Mr McCloskey QC on behalf of the respondent argued that the policy therein stated applied only to cases arising after the commencement of the new stated policy. Mr Treacy QC argued that on its true construction it applied to a situation such as the present where although the death occurred in 1986 there remained a need to reassure a concerned public including the family that the rule of law had been respected by the provision of a reasonable explanation. It seems apparent from Mr Kitson's affidavit when it was swore that the view was taken (before the decision in *McKerr* in the House of Lords) that the enigmatic phrase "the policy in question" in his affidavit was referring to the policy of considering whether in a particular case more detailed reasons should be given and was also referring to the policy statement made by the Attorney General on 1 March 2002. If the decision was not being made with any reference to the Attorney General's policy statements it is difficult to see why Mr Kitson referred to it in paragraph 7 and having referred to it and exhibited it, if the decision was not being made to reference to it one would have expected the affidavit to make that clear. The decision to depart from the general practice carried with it the necessary implication that the decision had been made to give a reasonable explanation and in such a way that it would seek to reassure a concerned public including the families of the victim that the rule of law had been respected. The Attorney General's policy makes clear also that the extent of the reasons would be a matter for the Director to determine having weighed the applicability of public interest considerations and the circumstances of each individual case.

[7] In paragraph 9 the following explanation of the decision not to prosecute is set out in Mr Kitson's affidavit:

> "Having carefully considered all the information available to me it is apparent that the decision to direct no prosecution arising out of the death in question was based on a professional and considerate judgment that the evidence available was insufficient to provide a reasonable prospect of obtaining the conviction of any person in respect of any offence arising out of the death in question. In particular, in applying the established test for prosecution, it was concluded that the evidence available was not sufficient to afford a reasonable prospect of rebutting the defence that the firing of the shots by the soldiers concerned constituted the use of reasonable force in self defence or the prevention of crime."

Mr McCloskey contended that the explanation set out in that affidavit was somewhat expanded in a second affidavit of Mr Kitson's sworn on 23 June 2004. This affidavit was the response to points raised in the applicant's solicitors' letter of 4 March 2003. In paragraph 3 of that letter the applicant's solicitors' asserted that the applicant was entitled to detailed reasons for the decision not to prosecute particularly given the finding of the inquest jury, the evidence of soldier F, the number of shots fired at the deceased, the fact that the deceased appeared to have been shot in the back and the fact that no shots were fired at the soldiers involved. In addition the point was made that the soldiers involved in the killing of the deceased fired 59 shots at the two deceased in circumstances where the deceased fired no shots and in return, and according to the autopsy, the deceased was shot in the back. Objectively the sum of the facts which allegedly significantly undermine any case of self defence and the use of reasonable force. In addition the letter posed questions as to whether there was material additional to that placed before the inquest jury available to the DPP, what additional material was available to the DPP, how that material assisted the soldiers' case of self defence and the letter asked for disclosure of the material. Mr Kitson in paragraph 3(a), (b), (c) of his replying affidavit in relation to the additional questions stated that the evidence considered by the inquest jury and the DPP at the time of making the direction of no prosecution was the same with the exception of 24 witness statements of no evidential value. Mr Kitson made the point that the 1986 decision followed consideration of the case at the highest level within the department by the Director, the Deputy Director and senior assistant Director. It was clear to Mr Kitson that the case had received the most careful consideration. Mr McCloskey also took the court through salient portions of the witness statements which were available to the applicant. Mr Treacy argued that paragraph 9 of Mr Kitson's affidavit did little more than state that the prosecution view was that there was insufficient evidence to successfully mount a prosecution or to rebut the defence of self defence. However the explanation must be read in the light of Mr Kitson's second affidavit and in the light of the relevant witness statements which the applicant saw. It is clear that the decision was taken on the grounds of a weighing and assessment of the evidence and not on other grounds (for example that it was not in the public interest to bring a prosecution). In paragraph 7 of my judgment in *Re Marie Louise Thompson*:

> "The court cannot make an order requiring the decision maker to give 'sufficient reasons' to justify the decision."

In this case the Director through Mr Kitson has purported to give explanation as to why no prosecution was mounted. The extent of the reasoning under the terms of the policy was a matter for the Director, taking account of the relevant circumstances. In the present case the applicant is in

effect challenging the decision not to prosecute as being unjustifiable and irrational in the circumstances. Reasons had been given but the applicant does not agree with the reasoning process. That is a different point from whether the court should order the Director to give further reasons. The decision not to prosecute in the present instance cannot in my view be challenged, based as it was on the prosecutor's assessment of the evidence. It has not be demonstrated that the prosecuting authority approached the exercise of arriving at its decision on an incorrect, irrational or improper basis. The no prosecution decision was made in 1986. In 2004 it is much too late for the applicant to seek effectively to reopen a decision made in 1986 and not challenged within a reasonable time thereafter. In the result I dismiss the application.