

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**  
**QUEEN'S BENCH DIVISION**

**IN THE MATTER OF AN APPLICATION BY MARIE LOUISE THOMPSON  
FOR JUDICIAL REVIEW OF A DECISION OF THE DIRECTOR OF  
PUBLIC PROSECUTIONS**

**SKELETON ARGUMENT**

1. The Applicant is applying for judicial review of:
  - i) The failure of the DPP to provide full and sufficient reasons for the decision not to prosecute Soldier D or any other person in connection with the death of Kathleen Thompson.
  - ii) The failure to review the decision not to prosecute in light of the evidence available which implicates Soldier D for unlawful killing.
  - iii) The decision not to prosecute Soldier D for the unlawful killing of Kathleen Thompson.
  - iv) The decision not to direct the Chief Constable to conduct further investigations into the death of Kathleen Thompson.
2. The Applicant's mother Kathleen Thompson lived at 129 Rathlin Drive, Creggan, Derry in November 1971. Shortly after midnight there was a raid by members of the Royal Green Jackets on 58 Rathlin Drive, Creggan. In the course of that raid a soldier, identified only as 'D' admitted having fired 8 shots with his SLR while in the area. He specifically made the case that he fired shots into the rear of 129 Rathlin Drive.
3. Shortly after the raid Kathleen Thompson was found dead in the rear of 129 Rathlin Drive. She had been killed by a bullet wound to her chest, the bullet was a high velocity bullet.

4. An Inquest into the death of Kathleen Thompson was heard on the 2<sup>nd</sup> November 1972 and the jury returned an open verdict. The Applicant has obtained the Inquest papers which contain the soldiers statements, statements from a number of civilian witnesses and the autopsy report.

Inadequacy of the Police Investigation

5. As is evident from the Inquest papers exhibited to the pleadings, the statements taken from the 4 anonymised soldiers were taken not by the RUC but by the Royal Military Police.
6. INQ 3 a former member of the Royal Military Police gave evidence to the Bloody Sunday Inquiry that at the time of the deceased's death the Chief Constable and the General Officer Commanding had reached an agreement about the conduct of investigation of lethal force incidents where soldiers were responsible for the use of lethal force. The agreement was that the "RMP would tend to military witnesses and the RUC to civilian witnesses in the investigation of offences and incidents."
7. That this agreement governed the conduct of the police investigation into the death of Kathleen Thompson is confirmed by correspondence of the 27<sup>th</sup> February 2003 received from the DPP which details the evidence considered by the DPP at the time of the direction of no prosecution. [p.117] The only statements from military witnesses are the 4 statements taken by the RMP. The RUC did not therefore take any statements from military witnesses.
8. It is also therefore the case that the list of documents detailed in the said correspondence constitutes the entire criminal investigation file. [p. 119]

9. It is contended that the police investigation was inadequate by any standards for the following reasons:

- a) The interviews conducted by the RMP which form the basis of the statements taken from military personnel took place over a total of 2 hours between 3.30am - 5.30am, a total of half an hour per statement. Given that D was the prime suspect an interview of half an hour can be regarded as totally inadequate. Similarly the length of time given for the interviews of the 3 military eye-witnesses are inadequate.
- c) The statements made by the 4 soldiers who were operating as a unit and were in close proximity to each other at the time of the shooting are contradictory in significant respects: only one soldier aside from soldier D claims to have seen a gunman; none of the soldiers other than soldier D claims to have heard shots. Despite this neither soldier D nor the other soldiers were ever re-interviewed in order to explore the discrepancies within their statements.
- d) There is evidence that a bullet was removed from the scene yet there is no evidence that any forensic examination was carried out to determine the source of the bullet or whether the bullet was the bullet which killed Kathleen Thompson.
- e) No scenes of crime log appears to be in existence and there is no evidence that any adequate examination of the locus of the death took place.
- f) There is no report in existence from either a ballistics or forensics expert. (see correspondence from the DPP dated 27 February 2003) There is moreover no evidence of any forensic examination being carried out on the weapon used by soldier D or any of the other soldiers present on the night to identify the weapon from which the bullet came.
- g) The RUC photographer who took photographs of the scene took those 10 months after the fatal shooting (p. 28 of the Pleadings) No attempt was therefore made at the time to assess the credibility of the soldiers accounts in light of evidence relating to the physical location of the shooting.

10. This Applicant took proceedings against the Secretary of State for breach of her Article 2 rights. Kerr J. part-heard the case, proceeding to assess the adequacy of the

police investigation, while deferring the determination as to whether the Applicant could rely on the Human Rights Act to enforce her Article 2 rights in domestic law pending the outcome of *McKerr v. Secretary of State*. Kerr J. concluded that the State

“had not conducted an investigation sufficient to comply with the obligations under article 2 of the European Convention on Human Rights. In reaching that conclusion I do not rely on the contemporary standards . . . **Judged by the standards that applied in 1971-1972 when the investigations into the death of the deceased were conducted, I am satisfied that such procedural safeguards as were required to ensure that article 2 was complied with were not fully implemented by the respondent in this case.**” [para. 1]

11. Kerr J. did not detail all of the deficiencies in the investigation conducted by the state save to point out that:

“the soldier who effectively discharged the shot which caused the death of Mrs Thompson and those who were with him at the time were interviewed by a member of the Royal Military Police. I do not consider that this satisfied the duty imposed on the police at the time to properly investigate this fatal shooting. In my view it was not open to them to delegate that critical responsibility to another agency such as the Royal Military Police. **Quite apart from that however, the fact that each of the interviews cannot have lasted any more than half an hour; the fact that clear discrepancies appear in the statements made, discrepancies which have not been the subject of further challenge or investigation, are sufficient to demonstrate the inadequacy of the investigation into the death of the deceased.**” [para. 2]

12. In all the circumstances it is safe to conclude that the police investigation conducted in 1972 was entirely inadequate and ineffective. The extent to which the soldiers and in particular Soldier D was tested in relation to his justification for the shooting, self-defence, is of course extremely pertinent to the DPP’s decision whether or not to prosecute and whether or not that justification would be made out at trial.

13. It is further contended that the investigation failed to meet the standards required under domestic law.
14. The agreement between the Chief Constable and the GOC not only violated the requirement of independence under Article 2 of the Convention the agreement also offended domestic law.
15. It is the duty of the police to investigate lethal force incidents. That duty cannot be delegated to anyone and the actions of the Chief Constable in delegating to the RMP the interviewing of military personnel in lethal force incidents which involved the military were a breach of his obligations under domestic law.
16. It is moreover evident from the statement of INQ 3 that the manner in which the RMP conducted any investigation fell far short of the standards required under domestic law as well as Convention standards. He stated that “the RMP investigator was out for information for managerial, not criminal purposes, and, using their powers of discretion, it was equally unlikely that the RUC would prefer charges against soldiers except in the most extreme circumstances.”
17. The existence of the policy agreement between the GOC and the Chief Constable of the RUC that the RMP take statements from military witnesses in lethal force incidents flies in the face of the obligations of the police force to conduct criminal investigations and to implement the criminal law in an impartial and unbiased manner. It amounts to an unlawful delegation of their powers. The statement of INQ 3 demonstrates in clear terms that the sole purpose of this agreement was to protect the military operating in Northern Ireland from the enforcement of the criminal law when they were involved in lethal force incidents.

18. It is our contention therefore that the investigation fell short of the requirements under domestic law as well as the requirements under the European Convention on Human Rights.

Request for Reasons

19. By correspondence dated the 14<sup>th</sup> August 2001 the Pat Finucane Centre writing on behalf of the Applicant wrote to the DPP asking, *inter alia* for reasons for the decision not to prosecute. [p.59]
20. On the 31<sup>st</sup> January 2002 Mr Kitson, writing on the DPP's behalf stated that "the Director considers that section 6 [of the Human Rights Act] does not oblige him to acceded to the request enshrined in your letter." [p.65]
21. The Applicant lodged proceedings and on the 5<sup>th</sup> September 2002 leave was given by the High Court to amend the Order 53 statement in order to add the following ground of challenge:
- "That in refusing to provide reasons in this case the Director has failed to apply his general practice and has failed to review his policy of refusing to give reasons despite a request for the provision of detailed reasons."
22. By way of response Mr Kitson writing on behalf of the DPP concluded that it was appropriate to depart from the general practice of not giving reasons in the instant case. [p.103]
23. He went on to state that the reasons for the decision not to prosecute were as follows:
- "the decision to direct no prosecution was based on a professional and considered judgment that the evidence available was insufficient to afford a reasonable prospect of obtaining a conviction of any identifiable

individual in respect of any offence arising out of the death in question. In particular, applying the established test for prosecution, it was conducted [*sic*] that the evidence available was insufficient to afford a reasonable prospect of proving beyond reasonable doubt who had fired the shot which killed the deceased. It was further concluded that even if the evidence available was sufficient to afford a reasonable prospect in establishing who fired the fatal shot, there was not, in any event, a reasonable prospect of rebutting the defence that this constituted the use of reasonable force in self-defence.” [p. 103]

24. The correspondence went on to state that “I have not undertaken a review of that decision and do not consider it appropriate to do so.” [p. 103]

25. By correspondence dated the 5<sup>th</sup> November 2002 [pp. 106-9] the Applicant’s legal representatives sent correspondence in reply to the correspondence from Mr Kitson. In summary the correspondence:

- a) Took issue with the suggestion that it was not possible to identify the person who fired the fatal shot, as the evidence in the police investigation file establishes fairly conclusively that Soldier D fired the fatal shot.
- b) Took issue with the suggestion that a defence of self-defence could have been advanced in circumstances where there was no evidence to suggest other than that Kathleen Thompson was shot and killed while standing unarmed in her own rear garden.
- c) Stating that given the decision of the Lord Chief Justice in *R v. Foxford* which deprecated the practice whereby statements from military witnesses

were taken by the RMP rather than the RUC, a review of the decision should be undertaken.

26. A substantive reply was received by correspondence dated the 27<sup>th</sup> February 2003 and in relation to the issues raised above, the Applicant was advised as follows:

a) “In relation to the issue as to the identity of the person who fired the shot which killed the deceased you make a make a number of points. From the information available to me it is apparent that the factors which you highlight were considered by those who took the decision on the case.

It is also apparent that other matters were considered, including the fact that the bullet was not recovered and the relevant positions of soldier ‘B’ and the deceased and the passage of the bullet through Mrs Thompson. Additionally, I observe that there was no witness available to the actual shooting of Mrs. Thompson.” [pp. 117-118]

b) In relation to the issue of self-defence reliance was placed upon the statements of military personnel referring to a male person holding a .22 rifle and a shot appearing to come from the rear of 129 Rathlin Drive. [p.118]

c) In relation to the issue of a review of the decision, the Director concluded that it was not appropriate to review the decision for the following reasons:

i) The absence of fresh evidence, not available to those who made the original decision;

ii) The case had been considered by experienced lawyers within the Department;

iii) There was nothing to suggest that the process whereby the decision not to prosecute was “**aberrant. On the contrary, it was clearly, on the information which had been available to those who reached the original decision of no prosecution, a decision which was within the range of decisions which would reasonably have been made.**” [p.118]



27. He went on to conclude that “I am presently of the view that the fact that statements from military personnel were taken by Royal Military Police and not after caution is not of itself sufficient to cause me to review the decision for no prosecution.” [p.119]
28. The correspondence also identified the documents which constituted the police investigation file as it had been forwarded to the DPP. Those documents which comprised the police investigation file and had not formed part of the Inquest papers were subsequently disclosed by the PSNI. A list of documents can be found at pp. 123-4 and the documents can be found at pp. 126-142.

DPP’s Policy in relation to the provision of Reasons

29. The DPP’s current policy in relation to the question of whether or not to provide reasons for decisions not to initiate or continue prosecutions was outlined by the Attorney General on 1 March 2002, in answer to a question from Baroness Whitaker in the House of Lords:

“The policy of the Director in the matter of providing reasons for decisions not to initiate or continue prosecutions is to refrain from giving reasons other than in the most general terms. **The Director recognises the propriety of applying the general practice must be examined and reviewed in every case where a request for the provision of detailed reasons is made. . . .**

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 the 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 . . . the Director accepts that in such cases it will be in the public interest to reassure a concerned public, including the families of the victims that the rule of law has been respected by the provision of a reasonable explanation.”

30. Thus the policy of the DPP, both pre-and post-incorporation of the Convention was to examine and review the propriety of applying the general practice upon an application for reasons. In the instant case the DPP has apparently done so and has concluded that this is a case in which he should depart from his general policy. Nonetheless he has in fact in our submission failed to provide detailed reasons for his decision not to prosecute.
31. It is our contention that the DPP is in breach of his own policy and his own conclusion on the facts of the instant case that he should provide detailed reasons because he has provided the most general reasons for his decision and has failed to provide full and sufficient reasons to explain the decision not to prosecute.
32. The reasons which have informed the DPP’s decision to review his policy in relation to the provision of reasons in exceptional cases are also relevant to a determination of this issue. The DPP has reviewed his policy in light of the criticisms of the European Court of Human Rights of the failure to provide reasons for the decision not to prosecute in *Jordan v. UK* et al.
33. The relevant passage from the decision of the European Court of Human Rights in relation to the failure of the DPP to give reasons for his decision states as follows:

“123. The Court does not doubt the independence of the DPP. However, where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence

in his decision-making. Where no reasons are given in a controversial incident involving the use of lethal force, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision.

124. In this case, Pearse Jordan was shot and killed while unarmed. **It is a situation which, to borrow the words of the domestic courts, cries out for an explanation.** The applicant was however not informed of why the shooting was regarded as not disclosing a criminal offence or as not meriting a prosecution of the officer concerned. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Article 2, unless that information was forthcoming in some other way. This however is not the case.” (*Jordan v. United Kingdom*)

34. It is this reasoning which informed the decision of the DPP to review his policy and to give reasons in exceptional cases. As with the case of Pearse Jordan the decision not to prosecute soldiers for the shooting of Kathleen Thompson “cries out for an explanation”. It is thus contended that the Director should be ordered to provide full and sufficient reasons for the decision not to prosecute.

#### Refusal to Review the Decision not to Prosecute

35. It is further contended that on the facts of the case available to him at the time the DPP ought to have prosecuted and that when reviewing the case, on the facts the DPP ought to have reversed the earlier decision not to prosecute and initiated a prosecution.
36. The DPP determined that the decision not to prosecute should not be reviewed in the instant case for the following reasons:

- i) The absence of fresh evidence, not available to those who made the original decision;
- ii) The case had been considered by experienced lawyers within the Department;
- iii) There was nothing to suggest that the process whereby the decision not to prosecute was “aberrant. **On the contrary, it was clearly, on the information which had been available to those who reached the original decision of no prosecution, a decision which was within the range of decisions which would reasonably have been made.**” [p.118]

37. It is submitted that in failing to review the decision not to prosecute the Director failed to give any or any sufficient weight to:

- i) The inadequacy of the police investigation;
- ii) The conclusions of Kerr J in *Thompson v. Secretary of State*

38. With regard to the adequacy of the police investigation it is averred by Mr Kitson at paragraph 8 of his affidavit that:

“I can neither confirm nor contradict the statement of Army officer “INQ 3”. I note the suggestions in these materials that in *November 1972* the DPP having expressed concerns, revoked the Royal Ulster Constabulary’s discretionary power to permit the armed forces to investigate certain incidents. It would appear that prior to this change of arrangements, military personnel were interviewed by representatives of “SIB”, who took statements from them.”

39. It nonetheless appears to be conceded that given the material date for the change in investigative procedures, the investigation into this Applicant’s mother’s death pre-dates those changes.

40. In the event that there is room for doubt in respect of this issue the following should be pointed out:

- (i) The DPP have confirmed that the Applicant has access to the entire contents of the police investigation file prepared for the DPP. That file comprises statements taken from the soldiers by the RMP, there are no statements taken by members of the RUC.
- (ii) It has moreover been accepted by Kerr J in *Thompson v Secretary of State* that this was the practice at the time. [para 2 judgment]

41. It should further be noted that it is not accepted that the RUC had a “discretionary power to permit the armed forces to investigate certain incidents”, as Kerr J concluded:

**“I do not consider that this satisfied the duty imposed on the police at the time to properly investigate this fatal shooting. In my view it was not open to them to delegate that critical responsibility to another agency such as the Royal Military Police.”** [para. 2 judgment]

42. It is contended that the decision not to prosecute was aberrant given the DPP’s knowledge at the time and know about the RUC/RMP Agreement. Moreover, given that the DPP intervened to prevent that practice from continuing, just months after the conclusion of the investigation into the Applicant’s mother’s death, the DPP were aware at that time that such a practice was highly irregular, improper and undermined entirely the efficacy of any investigation into the Applicant’s mother’s death.

43. In those circumstances, when reviewing the facts of the case, the decision whether or not to prosecute and whether it was in fact the correct decision must necessarily be reviewed and in the instant case should have led to a decision to prosecute the shooters.

44. In the alternative it is contended that in light of the ineffectiveness of the investigation conducted into the Deceased's death as detailed above the DPP ought to have exercised his statutory power under section 6(3) of the Prosecution of Offences (NI) Order 1972 to direct the Chief Constable to conduct further investigations into the death of Kathleen Thompson.
45. According to the Respondent such a power is usually exercised "when information comes to the attention of the DPP from a source such as a member of the public, a public representative or a member of the Judiciary, at a time when there is no ongoing police investigation."
46. In considering whether the power should be exercised the DPP has concluded that "at the time of the submission of the police investigation file to the DPP in 1979 there was no basis for the exercise in any particular way of the power under Article 6(3) of the 1972 Order. Further, I have concluded that there are no new or additional matters arising from this Judicial Review which would require the Director to exercise the power under Article 6(3) in any particular way at this stage."
47. The Respondent in this case will be aware that in a judicial review taken by this Applicant against the Secretary of State Kerr J concluded that the State:  
  
"had not conducted an investigation sufficient to comply with the obligations under article 2 of the European Convention on Human Rights. In reaching that conclusion I do not rely on the contemporary standards . . .  
  
**Judged by the standards that applied in 1971-1972 when the investigations into the death of the deceased were conducted, I am satisfied that such procedural safeguards as were required to ensure that article 2 was complied with were not fully implemented by the respondent in this case."** [para. 1]

48. Kerr J. did not detail all of the deficiencies in the investigation conducted by the state save to point out that:

**“the soldier who effectively discharged the shot which caused the death of Mrs Thompson and those who were with him at the time were interviewed by a member of the Royal Military Police. I do not consider that this satisfied the duty imposed on the police at the time to properly investigate this fatal shooting. In my view it was not open to them to delegate that critical responsibility to another agency such as the Royal Military Police. Quite apart from that however, the fact that each of the interviews cannot have lasted any more than half an hour; the fact that clear discrepancies appear in the statements made, discrepancies which have not been the subject of further challenge or investigation, are sufficient to demonstrate the inadequacy of the investigation into the death of the deceased.”** [para. 2]

49. Given those conclusions by a member of the judiciary about the nature and conduct of the investigation conducted in 1972 it is contended that this is a case in which the DPP ought to exercise his discretion under Article 6(3) in the even that the decision not to prosecute was not reversed.

50. For the above reasons it is submitted that:

- i) The Applicant is entitled to a more reasoned analysis of the decision not to prosecute;
- ii) The DPP ought to review the decision not to prosecute;
- iii) The decision not to prosecute ought to be quashed, or in the alternative,
- iv) The DPP should direct the Chief Constable to conduct a fresh investigation into the Applicant’s mother’s death.

13<sup>th</sup> September 2004

Seamus Treacy QC SC

Karen Quinlivan