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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **23/03/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)

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BEFORE A DIVISIONAL COURT

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IN THE MATTER OF AN APPLICATION BY GERRY DUDDY AND OTHERS FOR JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY MARGARET MONTGOMERY FOR JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION BY MICHAEL McKINNEY FOR JUDICIAL REVIEW

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Before: Keegan LCJ, Maguire LJ and Scoffield J

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Ms Quinlivan QC, Ms Doherty QC with Ms Askin, Mr McQuitty, Mr McGowan and Ms Lara Smyth (instructed by Madden & Finucane Solicitors) for the Applicants in Duddy & Ors
Mr Mansfield QC with Mr Coyle (instructed by Des Doherty Solicitors) for Montgomery
Ms Doherty QC with Ms Lara Smyth (instructed by Madden & Finucane Solicitors) in McKinney
Dr McGleenan QC with Mr Henry and Mr Hays (instructed by Public Prosecution Service) for the Respondent
Mr Mulholland QC, Mr Skelt QC, Mr Egan and Mr Anthony (instructed by McCartan Turkington & Breen) for the Notice Parties

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KEEGAN LCJ (delivering the judgment of the court)

I. Introduction

This is a judgment to which all members of the court have contributed.

[1] These related applications for judicial review are brought by family members of the 13 civilians who were killed fifty years ago on 30 January 1972 in Derry as part of the tragic events known as 'Bloody Sunday.' There are three claims for judicial review, all of decisions of the Public Prosecution Service (the 'PPS'). The first two cases concern decisions not to prosecute various soldiers for the deaths of Jackie Duddy, Michael Kelly, John Young, Michael McDaid, William McKinney and Bernard McGuigan. The third case is also brought in relation to William McKinney's death by another family member (Michael McKinney) and this judicial review challenges the discontinuance of a prosecution of Soldier F in relation to his death, Soldier F having been charged with the murder of Mr McKinney.

[2] This event has been the subject of examination at a number of public inquiries, namely the Widgery Inquiry in 1972 and the Bloody Sunday Inquiry chaired by Lord Saville which began in March 2000 and reported in June 2010.

[3] A very brief summary of events in relation to each deceased is as follows:

(i) Jackie Duddy, aged 17, was shot at Rossville Flats. He died as a result of a single gunshot wound to the upper chest. This application to the court for judicial review relates to the alleged involvement of Soldier R in his death.

(ii) Michael Kelly, aged 17, was shot when he was behind the rubble barricade on Rossville Street. He died from a bullet wound to the abdomen. This application to the court relates to the alleged involvement of Soldier F in his death.

(iii) John Young, aged 17, was also shot and killed at the rubble barricade, dying from a gunshot wound to the head and neck. This application relates to the alleged involvement of Soldiers P and J.

(iv) Michael McDaid, aged 20, was shot and killed at or near the rubble barricade. He died as a result of a gunshot wound to his neck and chest. This application to the court relates to the alleged involvement of Soldiers P and J.

(v) William McKinney, aged 26, was shot and killed at Glenfada Park North. He died due to a bullet wound to the back/chest. This application to the court relates to the alleged involvement of Soldiers F and H.

(vi) Bernard McGuigan, aged 41, was shot and killed at the rear of Block 1 Rossville Flats. He died by a single high velocity bullet wound to the left hand side of the rear of his skull. This application to the court relates to the alleged involvement of Soldier F.

[4] The soldiers at issue have been represented as notice parties in these proceedings. An application was made to remove their anonymity, however, as this anonymity has been applied from the time of the events in 1972 in a range of other courts and Tribunals we did not change that position for the purposes of these proceedings.

II. The judicial review applications

[5] Judicial review proceedings in the cases of *Duddy & others* and *Montgomery* were issued in December 2020. Leave to apply for judicial review on all grounds was granted in February 2021 on the papers by Colton J.

[6] On 14 March 2019, a decision was taken to prosecute Soldier F for the murder of William McKinney. This was alongside a decision to prosecute F for the murder of Jim Wray and the attempted murder of Joe Mahon, Joe Friel, Michael Quinn, Patsy O'Donnell and persons unknown. Criminal proceedings against Soldier F commenced before Londonderry Magistrates' Court on 18 September 2019.

[7] The hearing of the evidence in the committal proceedings began on 15 March 2021 and the proceedings were due to be heard in three phases in March, June and September 2021. We understand that the first phase of evidence has been completed which largely involved civilian evidence. On 30 April 2021, prior to the commencement of the second phase of the hearing scheduled to commence on

21 June 2021, Mr Justice O'Hara delivered the ruling in the case of *R v Soldiers A and C* [2021] NICC 3. We discuss this ruling later in this judgment.

[8] As a result of the decision of O'Hara J the PPS notified the applicant Mr McKinney and his solicitors on 6 May 2021 that it was considering whether the ruling "had any potential to impact upon the ongoing case of PPS v Soldier F." Thereafter, a decision to discontinue the prosecution was communicated to the families at a meeting on 2 July 2021. Mr McKinney's family member swiftly brought judicial review proceedings which were heard as an emergency application by the Divisional Court on 8 July before Horner J and Keegan J. The outcome of this hearing was that leave was granted to bring judicial review. It was also agreed that all of the judicial reviews would be heard together on allocated dates in September and that the proceedings before the District Judge would effectively remain adjourned pending the outcome of these proceedings.

III. History of decision making

[9] This sequence begins with the Saville Inquiry Report which was published on 15 June 2010. Immediately following this, the Prime Minister made a statement in Parliament confirming the findings of the Inquiry that:

> "None of the casualties was posing a threat of causing death or serious injury or indeed was doing anything else that could in any view justify their shooting."

[10] On 14 March 2019 the PPS issued its decisions which have already been referred to. On 19 March 2019 the applicants' solicitors wrote to the PPS to advise that the families were seeking a review of the 'no prosecution' decisions. On 25 March 2019 the solicitor for Ms Montgomery wrote to the PPS to request a review of the decision of 14 March 2019. Following this there was a meeting between the Kelly, McDaid and McKinney families and the PPS in June 2019. Thereafter the applicants' solicitors sent detailed submissions to the PPS dated 15 November 2019 in support of the request for a review of the 'no prosecution' decisions. On 29 September 2020 the PPS issued review decisions maintaining 'no prosecution' decisions in respect of Soldier R for the death of Jackie Duddy; Soldier F for the deaths of Michael Kelly and Bernard McGuigan; Soldiers P and J for the deaths of John Young and Michael McDaid; and Soldier H for the death of William McKinney.

[11] Thereafter, pre-action correspondence was sent and following an exchange the judicial review proceedings in the first two applications were issued on 23 December 2020. The judicial review proceedings in relation to the discontinuance case were issued on 6 July 2021.

IV. Substance of the decision making

[12] Post the Bloody Sunday Inquiry Report letters were sent by Madden & Finucane Solicitors on behalf of the families dated 20 January 2011 which asked the Public Prosecution Service to consider prosecution of soldiers for the deaths. This led to an investigation by the Police Service of Northern Ireland ("PSNI") following from which files were submitted by the PSNI to the PPS in November 2016 and 2017. A total of 20 individuals were reported to the PPS for decisions as to prosecution in relation to allegations of criminality on Bloody Sunday. Eighteen of the potential accused were former soldiers of the Parachute Regiment. The remaining two potential accused were alleged to be members of the Official Irish Republican Army.

[13] In March 2019 PPS decisions on prosecution were reached and reasons were provided to the families in individual letters and by virtue of a summary of the decisions which was publically communicated. We have had the advantage of reading the "Bloody Sunday Summary of Decisions Not to Prosecute" of 14 March 2019. These decisions are accompanied by the letters in relation to each deceased which are also dated 14 March 2019. We summarise the reasoning provided as follows with some reference to relevant extracts from the decision making correspondence.

Shooting of Jackie Duddy

[14] The particular soldier reported in relation to criminal offences arising in this case in which Mr Duddy was shot and killed in the car park of the Rossville Flats was Soldier R. In its reasoning the PPS set out that the decision made was one of 'no prosecution.' As in the other cases the PPS raised four preliminary matters in support of its conclusion as follows:

(a) The relevance of the findings of the Bloody Sunday Inquiry – these findings are not admissible for the purpose of criminal proceedings.

(b) The admissibility of previous accounts provided by the soldiers – [the] conclusion is that an account provided by a particular soldier to the Royal Military Police or for the purposes of the Widgery Inquiry or Saville Inquiry is not admissible in criminal proceedings against the same soldier.

(c) The admissibility of previous accounts provided by a particular soldier as evidence against other soldiers, i.e. not those who provided the accounts – [the] conclusion is that there are challenges in terms of admissibility but that they may be admissible depending upon the particular circumstances.

(d) The issues arising in relation to self-defence. The onus on any criminal proceedings would be on the prosecution to disprove this defence beyond a reasonable doubt.

[15] Specifically in relation to Soldier R the correspondence sets out two particular issues which shaped the decision making as follows. First, the PPS state that there are two difficulties in establishing that R was present in the car park of Rossville Flats and discharged his weapon thereby causing the death of Mr Duddy or that he intentionally assisted or encouraged another soldier to do so. In the letter the PPS state that the information available does not establish with the degree of certainty required for conviction in a criminal case which soldier was responsible for killing Mr Duddy. The PPS also point out that the Bloody Sunday Inquiry concluded that the relevant shot was probably fired by Soldier R but the Inquiry itself also noted that a conclusion that something was probable was not one that would likely lead to a prosecution.

[16] The second fundamental difficulty with prosecution that the PPS refer to is that the evidence that identifies R as having fired from a location and in a direction that makes it probable that he was responsible for the death of Mr Duddy is contained in the accounts that he himself provided, which the PPS consider are unreliable.

[17] The PPS also considered the evidence of Soldier OO5 but decided that his account was unreliable. The PPS also considered a Daily Mirror newspaper article published on 11 August 2016, which reported an interview said to be with Soldier R in which Soldier R allegedly admitted to having shot Mr Duddy. The PPS state that enquiries into this matter were made by police but the Daily Mirror subsequently printed a correction in which the newspaper indicated they now have reason to believe that the man who spoke to them was not Soldier R and the information was fabricated.

Shooting of Michael Kelly

[18] The particular soldier reported in relation to potential criminal offences arising from the circumstances in which Michael Kelly died is Soldier F. Again, in the decision making material the PPS set out the four fundamental issues in this case which are referred to at para [14] above. The reasoning given in this case also refers to the fact that the Bloody Sunday Inquiry concluded that Mr Kelly was shot behind the rubble barricade on Rossville Street and that Soldier F was responsible.

[19] The PPS state that "A key factor in this finding was a forensic link between the bullet recovered from Mr Kelly and a rifle that was attributed to Soldier F." Having conducted its examination of this key factor the PPS concludes that the difficulty in terms of any prosecution is the absence of sufficient admissible evidence that Soldier F fired his weapon at the relevant location and that it was his rifle that was forensically linked to the recovered bullet.

[20] The PPS also examined evidence from other soldiers namely, INQ1237, J and G. Having done so the PPS determined that an expert forensic report compiled at the time could be admitted in evidence but that there was not sufficient admissible evidence to link the rifle to Soldier F. This conclusion was reached on the basis that the only evidence of this was an annotation on the expert's report which was not clearly attributed and also evidence to the Widgery Inquiry which the PPS thought was inadmissible. The prosecution also considered the evidence of Soldier 027 but determined that this was unreliable, particularly as he had been described as a "wretched witness" at the Bloody Sunday Inquiry.

Shooting of John Young

[21] The particular soldiers reported in relation to potential criminal offences arising from the death of Mr Young were Soldier P and Soldier J. Soldier E was also identified but is deceased. In the decision making correspondence the PPS sets out the four issues identified at para [14] above. Then there is a specific examination of Mr Young's death which occurred behind the rubble barricade on Rossville Street. The PPS point out that the Bloody Sunday Inquiry's conclusion was that Soldier P was responsible for at least one of the casualties which included Mr Young, that Soldier J may have been responsible for one of these three casualties and that the possibility that Soldier E was responsible for one of them could not be eliminated. The PPS then states the fact that there was no certainty as to who may have shot Mr Young from the evidence available and also that the accounts given by Soldier J were his own accounts and were not admissible.

[22] The PPS examined the evidence of Soldier INQ1237 but considered that evidence was non-specific. It also considered a newspaper article in the Daily Telegraph but again considered that it would be inadmissible. In relation to Soldier P the PPS set out its view that the only evidence that could be adduced in criminal proceedings was that contained in the statement of 017 and the difficulty with that is that the totality of the evidence indicates that Soldier 017's account of Soldier P firing was concocted; and that at the time of the shooting that Soldier 017 describes, Soldier P was in fact firing over the heads of the crowd who were throwing stones at the two soldiers. Therefore, the PPS determined that this was unreliable.

Shooting of Michael McDaid

[23] The particular soldiers reported in relation to potential criminal offences arising from the circumstances of this death were Soldier P and Soldier J. Again, Soldier E was also identified but is deceased. The reasons reached in this case are essentially the same as in the case of Mr Young. In the decision making correspondence the PPS sets out the issues and states its view that notwithstanding the Bloody Sunday Inquiry's conclusion there was insufficient reliable evidence upon which it could base a prosecution.

Shooting of William McKinney

[24] The particular soldiers reported in relation to the potential criminal offences arising from the circumstances of Mr McKinney's death were F and H. Two other soldiers – E and G – were also found by the Bloody Sunday Inquiry to have opened fire in Glenfada Park North but are deceased and so were not the subject of PSNI investigation.

[25] In relation to this case the PPS decision was that "the evidence in relation to Soldier F is sufficient to afford a reasonable prospect of obtaining a conviction so a decision was taken to prosecute Soldier F for this murder." This conclusion is set out in the decision making letter. The PPS decision is based on the conclusion that it could rely on evidence from other soldiers to establish F's presence in Glenfada Park and shooting in Glenfada Park. In addition, the PPS decided that there was insufficient evidence in relation to Soldier H due to the reliability of accounts and that this would be dependent on his own accounts.

V. Review of the original prosecution decisions

[26] Following from the original decisions of the PPS which we have examined above the affected families expressed opposition to the outcomes reached. On 19 March 2019 correspondence was sent by Madden and Finucane Solicitors in this regard. There was a request for a meeting between the families and the PPS and that happened on 26 June 2019. Thereafter, the families formally requested a review of the decision not to prosecute. In support of this position the relevant families sent a legal submission to the PPS of 149 pages signed by all counsel.

[27] This resulted in review decisions which are set out in correspondence to each family from Marianne O'Kane, Senior Assistant Director, dated 29 September 2020. In substance the review decisions effectively maintain the decision of the original decision maker, Mr Agnew, not to prosecute save in one case in relation to Soldier F.

[28] We have considered the review decisions in their entirety. These are lengthy decisions and we refer to some relevant extracts in summary as follows in relation to the relevant cases.

[29] In relation to Mr Duddy's death and the decision not to prosecute Soldier R, it is clear that Ms O'Kane has considered the 149 page legal submission provided to her. Her core reasoning which is replicated in the other cases is found in the decision making correspondence as follows:

> "(a) The findings of the Bloody Sunday Inquiry are not admissible for the purpose of criminal proceedings.
>
> (b) I have concluded that statements made to the RMP [Royal Military Police] are not admissible for the purpose

of any criminal proceedings against the maker of the statement. In reaching this conclusion I take into account the following primary matters:

(i) The compulsion to give evidence on the order of a superior.

(ii) The absence of a caution.

(iii) The failure to inform the soldiers of their entitlement to legal advice.

(iv) The soldier's understanding that they were giving evidence as witnesses – not suspects.

(v) The absence of legal representation.

(vi) The failure to provide a copy of the signed statement to enable any errors to be corrected at an early stage. These factors taken cumulatively, lead me to conclude that in all the circumstances a court would conclude it would be unfair to admit the RMP statements as evidence.

(c) In relation to the cross-checking statements in evidence to the Widgery Tribunal, in addition to the above factors, there was an assurance from a superior officer that the soldiers' statements would not be used against them in any criminal proceedings. I have concluded that this evidence is also not admissible.

(d) In respect of the evidence of Bloody Sunday Inquiry, this was subject to the then Attorney General's undertaking that such evidence would not be used to the prejudice of that person in any criminal proceedings and so is not admissible as against that person in any criminal proceedings, except in relation to any false evidence they may give to the Inquiry (or with having conspired with, aided, abetted, counselled, procured, suborned or incited any other person to do so).

(e) The admissibility of previous accounts from one soldier as against another, must be considered in the context of the particular circumstances in which it was made, before a decision can be reached regarding admissibility.

(f) Where a potential defence of self-defence arises, the onus is on the prosecution to disprove this to the criminal standard; i.e. beyond a reasonable doubt. The specific conclusions in relation to Soldier R were as follows.

(g) Soldier R was identified by the Bloody Sunday Inquiry as the individual who probably shot your brother.

(h) The evidence that identifies Soldier R as being the individual who probably caused your brother's death is contained within his own previous accounts, which I have concluded as not admissible in any criminal proceedings against him.

(i) While there is some evidence from Soldier 005 as to Soldier R's conduct, his account does not correspond with other evidence and Soldier 005 himself indicated to the Bloody Sunday Inquiry that his earlier accounts may be mistaken.

(j) Even if admitted, such evidence as Soldier R may give would tend to support a defence of self-defence, which I conclude the prosecution would not be able to disprove beyond a reasonable doubt.

(k) There is also no admissible evidence to prove that Soldier R was acting as part of a joint enterprise with any other soldier who may have been responsible.

(l) I have concluded that in the absence of admissible evidence upon which the prosecution rely, the test for prosecution is not met against Soldier R in respect of Master Duddy's death.

[30] In relation to Master Michael Kelly's death Ms O'Kane in the decision making letter repeats the core reasoning given in Mr Duddy's case which we have set out at para [29] above and she adds specific conclusions as follows:

"7. Soldier F was identified by the Bloody Sunday Inquiry as the individual who shot and killed your brother. A key factor leading to this finding was a forensic link between a bullet recovered from Master Kelly's remains and a rifle that was attributed to Soldier F.

8. The legal difficulty arising concerns the sufficiency of the available admissible evidence to prove to the criminal standard that it was Soldier F who opened fire at the relevant location, and that he shot and killed Master Kelly, or was engaged in a joint enterprise with another soldier who did so.

9. Soldier F's own accounts of his actions are inadmissible in any criminal proceedings against him.

10. Evidence from Solider INQ1237 referred to Soldier F being present in Rossville Street at the relevant time, however, he cannot now identify the location and, in fact, when shown photos stated that this was not the location he was referring to. When asked by PSNI to clarify his account prior to the original decision being taken by PPS, he was unable to say whether in fact he saw any individual soldier open fire during Bloody Sunday. I conclude that while the evidence of INQ1237 can establish the presence of Soldier F on the ground on Bloody Sunday, his evidence is simply too unreliable to either establish directly or by inference that Soldier F fired his weapon at the relevant time and location.

11. INQ1237 also refers to the ammunition check upon return to their vehicle. While he reports that Soldier F and others (admitted he had discharged his weapon), there is no evidence as to where or in what circumstances he did so, which is significant, bearing in mind that he opened fire at different times and locations.

12. A forensic match exists between the bullet removed from Master Kelly's remains and rifle bearing the serial number A32515, which both the Widgery Tribunal and Bloody Sunday Inquiry found was Soldier F's weapon. I conclude that there is a reasonable prospect of proving that a bullet discharged from SLR A32515 killed Master Kelly. The issue, however, concerns the absence of admissible evidence to prove that it was Soldier F who opened fire using his weapon.

13. The submissions assert that the annotation on the report identifying the serial number of Soldier F's rifle is admissible as hearsay on the basis that it is undeniably reliable. I am respectfully unable to accept that

submission. The contemporaneous documents, while exhibiting the rifle, do not link it to any particular soldier. Further, it is not clear who made the annotation, when (at the time of the ammunition check or thereafter, or on what basis). I conclude that on the absence of evidence in these matters, there is no reasonable prospect of the annotation being admitted as hearsay evidence to prove attribution of the rifle to Soldier F.

14. The potential evidence of Soldier 027 has also been considered, in which he says he saw Soldier F fire at the barricade. I have considered the extent to which reliance could be placed on Soldier 027 as a prosecution witness, either via direct testimony or hearsay account. There are very significant difficulties with Soldier 027's evidence which, if relied upon, would be the sole and decisive evidence against Soldier F in relation to Master Kelly's death. Firstly, Soldier 027 said in his first RMP statement that he could not identify who had fired; secondly, he cannot account for the subsequent version of events he has given that implicates Soldier F; thirdly, the version of events in his RMP statement is inconsistent with other evidence. In all, over his various recorded accounts of events, he has given five variations of what he says he observed.

In relation to Sector 4, he was found to be unreliable, asserting that he saw soldiers, including Soldier F, open fire, when in fact the Bloody Sunday Inquiry concluded that he was not on the ground at that location at the relevant time. Compellingly, the Bloody Sunday Inquiry described him as a wretched witness. While I am not bound by the Bloody Sunday Inquiry's findings, the above is plainly indicative of how the witness presented, how his evidence may unfold in a criminal trial and the weight, if any, that may be attached to it. I have concluded that Soldier 027 cannot be regarded as a reliable witness and cannot be relied upon to support a prosecution of Soldier F.

16. For completeness, I note that there is also no admissible evidence to prove that Soldier F was acting as part of a joint enterprise with any other soldier who may have been responsible.

17. In the absence of admissible evidence to prove directly or by inference that it was Soldier F who fired the fatal shot from rifle A32515, I conclude that the test for prosecution is not met to prosecute him for murder or any other offence in respect of Master Kelly's death."

[31] In relation to Master John Young who was shot on 30 January 1972 Ms O'Kane adopts the core reasoning that is present in the other cases and specifically in relation to this case she adds as follows:

"7. The Bloody Sunday Inquiry concluded that Soldier P was responsible for at least one, and possibly all three, of the fatalities at the rubble barricade, one of whom included your brother; Soldier J may have been responsible for one of these three fatalities and the possibility that Soldier E was responsible for one of them could not be eliminated.

8. Soldier P – the only potentially admissible evidence against Soldier P in any criminal proceedings is in the statement of Soldier 017. The available evidence indicates that Soldier 017's account of Soldier P firing (he said at a nail bomber) was fabricated and that he was firing over the heads of a crowd who were throwing stones at the two soldiers. The Bloody Sunday Inquiry found that the soldiers fired, either in the belief that their targets did not pose a threat or not caring whether this was so. Although Soldier 017 did not see Soldier P fire again, his account is that Soldier P told him he had done so. The difficulty with 017's account is such that, even if, taking the evidence at its height and it could be relied upon as evidence that Soldier P fired his rifle, it could not be relied upon as evidence of the timing of the shot, nor of the circumstances in which the shot was fired.

9. There is also no admissible evidence to prove that Soldier P was acting as part of a joint enterprise with any other soldier who may have been responsible.

10. In the absence of reliable, admissible evidence as to Soldier P's actions, I conclude that the test for prosecution is not met against him for any offence in respect of Master Young's death.

11. The Bloody Sunday Inquiry found that it was a possibility only that Soldier J may have shot one of the casualties.

12. Soldier J's previous accounts are not admissible in any criminal proceedings against him.

13. The evidence of INQ1237 establishes Soldier J's presence at the barricade but does not establish directly or by inference that Soldier J discharged his weapon.

14. During the ammunition check in the vehicle, Soldier J admitted that he had discharged his weapon, although that cannot be linked to the events at the barricade.

15. There is also no admissible evidence to prove that Soldier J was acting as part of a joint enterprise with any other soldier who may have been responsible.

16. In the absence of admissible evidence as to Soldier J's actions I conclude that the test for prosecution is not met against him for any offence in respect of Master Young's death."

[32] In relation to Mr Michael McDaid the decision is essentially the same as that in the previous case relating to Mr Young and the reasoning given is replicated.

[33] In relation to Mr William McKinney the review decision upholds the original decision to prosecute Soldier F and the decision not to prosecute Soldier H. This decision also states *inter alia*:

> "(10) The Bloody Sunday Inquiry concluded that it was more likely than not that Soldier F or H fired the fatal shot that killed your brother.
>
> (11) The ongoing prosecution of Soldier F is on the basis that he entered Glenfada Park North and together with other soldiers, fired a number of shots unlawfully, resulting in two deaths (including Mr McKinney) and four further casualties. The prosecution case is that the soldiers who opened fire were acting as part of a joint enterprise, meaning that they are liable both for their own conduct and the conduct of the others.

(12) The only evidence that identifies Soldier F as having fired is within his own accounts, which I have concluded are inadmissible in any criminal proceedings against him.

(13) The difference in the approach taken to the conduct of Soldier F and Soldier H, arises from the fact that the prosecution can rely on evidence from a number of sources in relation to Soldier F, not including Soldier F's own accounts whereas in respect of Soldier H, there is only his own inadmissible accounts.

(14) In the absence of admissible evidence against Soldier H, I conclude that the test for prosecution is not met to prosecute him for any offence arising from the death of Mr McKinney.

(15) Your solicitor has submitted that Soldier H should also be prosecuted for murder. The first main point is that evidence from Soldier H's own accounts is admissible in a prosecution case against him, I respectfully do not agree.

(16) The second main point is that there is additional evidence from Soldier 027 to confirm that Soldier H was at Glenfada Park North and discharged his firearm at that location. I consider the extent to which reliance could be placed on Soldier 027 as a prosecution witness, either via direct testimony or a hearsay account. In his statement to the Bloody Sunday Inquiry 027 said he did not actually know where Soldier F fired his shots. He referred to his 1972 account and stated that he would have thought the content was true when he wrote it, but he cannot say if it was something he saw or something he was told. I refer to Volume V1 paragraph 98.2 of the Bloody Sunday Inquiry Report which concluded:

> "… we have already expressed the view that he (Private 027) did not arrive in Glenfada Park North until after Lieutenant 119, and that he was not present when the casualties (with the possible exception of Patrick O'Donnell) were shot there. Therefore, his account of the shooting of civilians in Sector 4 is at best second-hand."

> (17) It should also be noted that he admitted certain evidence he gave to the Bloody Sunday Inquiry was "total fabrication." Compellingly, the Inquiry described him as "a wretched witness." While I am not bound by the Bloody Sunday Inquiry's findings, the above is plainly indicative of how the witness presented, how his evidence might unfold in a criminal trial and the weight, if any, that may be attached to it, I have concluded that Soldier 027 cannot be regarded as a reliable witness and cannot be relied upon to support a prosecution of Soldier H.
>
> (18) The only evidence that identifies Soldier H as having fired is within his own accounts, which I have concluded are inadmissible in any criminal proceedings against him. There is no admissible evidence to prove that Soldier H was acting as part of a joint enterprise with any other soldier who may have been responsible.
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> (19) The difference in the approach taken to the conduct of Soldier F and to Soldier H, arises from the fact that the prosecution can rely on evidence from a number of sources in relation to Soldier F, not including Soldier F's own accounts, whereas in respect of Soldier H, there is only his own inadmissible accounts.
>
> (20) In the absence of admissible evidence against Soldier H to implicate him as regards to the death of Mr McKinney, I conclude that the test for prosecution is not met to prosecute Soldier H for any offence."

[34] Thereafter, pre-action protocol letters were sent dated 22 November 2020. The PPS replied to the pre-action correspondence on 29 January 2021 and thereafter leave was granted for judicial review and the proceedings were listed.

VI. The discontinuance decision

[35] Meanwhile, the prosecution in relation to Soldier F proceeded and progressed to the committal stage before the Magistrates' Court. By letter of 4 June 2021 the PPS wrote to the District Judge to indicate that the PPS were considering the implications of the ruling of O'Hara J in the case of *R v Soldiers A and C*. The PPS also decided that it was inappropriate to progress the committal hearing whilst a review of the decision to prosecute was being undertaken and so the hearing was adjourned. The PPS put the family on notice of this and by correspondence of 2 July 2021 explained the outcome of the review of the prosecution of Soldier F following the ruling in *R v Soldiers A and C*.

[36] This correspondence sets out the PPS conclusion in the following terms:

> "I sincerely regret to inform you that, having considered all of the relevant circumstances, including the A & C ruling and advice received from independent Senior Counsel, I have concluded that there is insufficient admissible evidence to provide a reasonable prospect of conviction in this case. On this basis the test for prosecution is no longer met and the PPS is required to take steps to discontinue the court proceedings against Soldier F."

[37] The decision making correspondence also refers to the original decision to prosecute. It refers to the applications to admit hearsay evidence in relation to Soldiers G, H and J. The decision refers to the obligations to review and the *A & C* decision. The core conclusion reached is expressed in the following way:

> "The original decision to prosecute involved a finely balanced judgment that this case could be brought on the basis of the hearsay accounts outlined above. I have had to revisit that judgment in the light of the A & C ruling. Whilst oral evidence has been given in the committal proceedings to prove that offences of murder and attempted murder were committed, the difficulty faced is proving (through admissible evidence) that the accused was one of those who fired. In many respects this has been the difficulty across all of the accused reported to the PPS in connection with the events of Bloody Sunday. Incurable investigative failures at the outset in 1972 have created legal problems that remain many years later. I would also add, for the avoidance of any doubt, that this decision in no way undermines the findings of the Bloody Sunday Inquiry in respect of the circumstances in which your brother was shot and killed. As part of the original decision I was satisfied that there was a reasonable prospect of proving to the criminal standard that the firing in Glenfada Park North was not in lawful self-defence. The review did not relate to the evidence on that issue and my assessment in that regard remains unchanged."

[38] A public statement was issued in relation to this decision. A meeting between the PPS and the families took place on 2 July 2021. Thereafter, the judicial review in the case of McKinney was brought on an urgent basis.

[39] As part of the judicial review these impugned decisions (examined in the foregoing paragraphs) have been provided in evidence on affidavit by Marianne O'Kane sworn on 22 June 2021 in relation to the 'no prosecution' decisions and Mr Michael Agnew sworn on 13 August 2021 in relation to the discontinuance decision.

VII. Issues for determination

[40] To our mind the core question in this case which the PPS had to determine was whether there was a reasonable prospect of conviction and that was dependent on whether there was a reasonable prospect of the evidence being admissible.

[41] Flowing from this, three core issues arise for determination as follows:

(i) Did the PPS err in deciding that there was no reasonable prospect that soldiers' own statements/evidence would be admissible against themselves in any future prosecution? This is the core question in the no prosecution cases, *Duddy & Ors* and *Montgomery*.

(ii) Did the PPS err in deciding that there was no reasonable prospect that soldiers' statements/evidence would be admissible as evidence against other soldiers in the prosecution of Soldier F? This is the core question in the *McKinney* challenge to the discontinuance of the prosecution of Soldier F.

(iii) Were adequate reasons given to the families to explain the decisions made? This challenge relates to all of the cases.

A subsidiary point raised in the *McKinney* case is that there has been a breach of the Victims Charter in relation to how this decision making process was communicated and shared with victims. This leaves open the issue of declaratory relief and so the question is as follows:

(iv) Has there been a breach of the Victims' Charter in the way the PPS interacted with the families?

[42] It was not suggested that there was any question of dishonesty or mala fides on the part of the PPS, so the case boils down to whether there has been an error sufficient to vitiate the decisions made. That involves the application of a high test applied to prosecutorial decisions which we discuss in the following section of this judgment.

[43] Before doing so, we record that this is not a "run of the mill" case. It is framed by its own context in that it is a historical case and as such there are obvious distinctions and evidential issues which simply do not arise in the other cases we have read. The complication is evident when we look to the sources of evidence and the methods of evidence-gathering which applied in this case.

[44] In particular, we have had to examine the admissibility issues pertaining to three phases of evidence-gathering and investigation, namely:

(i) The Royal Military Police ("RMP") statements taken in 1972;

(ii) The Widgery statements taken very shortly thereafter in 1972 and evidence at the Widgery Tribunal; and

(iii) The evidence from the Saville Inquiry.

VIII. The evidence gathering and investigative process

[45] At this stage we make some brief comment about the form of each part of the process. First, the RMP statement taking process. At the time at which these occurred, post-incident investigative procedures were subject to an agreement made in 1970 between the Chief Constable of the RUC and the General Officer Commanding (GOC) of the British Army in Northern Ireland. There was a Force Order in existence at the time which effectively allowed the Royal Military Police to have command of investigations rather than the RUC. This was superseded by a further Force Order in 1973 which revised the investigative process. In 1972 when these events occurred the applicable Force Order from 1970 was entitled "Instructions regarding Complaints against Military Personnel." The instructions stated:

> "Where a Complaint involving Military personnel is received by the police the following instructions will be complied with: (1) A report will be made immediately to the Commander of the Division concerned who will obtain, or cause to be obtained, statements from the complainant and any civilian or police witness involved and will investigate any criminal aspect of the matter. (2) On completion of the police investigation, the Divisional Commander will forward the police report to the Royal Corps of Military Police, who will interview and obtain statements from Military personnel involved or who can assist in the investigation …"

[46] In this case the accounts of soldiers following the deaths were gathered by the RMP and not by the RUC. This practice was subsequently criticised by the then Lord Chief Justice Lord Lowry, who said in 1974 in the Court of Appeal judgment in *R v Foxford* [1974] NI 171 at 180 that "we deprecate this curtailment of the function of the police and hope that the practice will not be revived." This issue of military personnel investigating other military personnel was also criticised in *Re Marie Thompson's Application for Judicial Review* [2003] NIQB 80.

[47] Next, the Widgery process. This Tribunal of Inquiry was established following a resolution of both Houses of Parliament "that it is expedient that a Tribunal be established for inquiring into a definite matter of urgent public importance, namely the events on Sunday 30 January which led to the loss of life in connection with the procession in Londonderry on that day." There was a resolution in identical terms to be found in the Northern Ireland Parliament. The Home Secretary signed a Warrant of appointment for the then Lord Chief Justice of England & Wales Lord Widgery to chair the inquiry, and this declared that the Tribunals of Inquiry (Evidence) Act 1921 should apply and that the Tribunal was constituted as a Tribunal under that Act.

[48] The task of statement taking for this inquiry was twofold. First, this involved a "cross checking" process whereby Colonel Overbury who was a solicitor and Assistant Director in the Army Legal Services was tasked with checking the RMP statements that had already been obtained. The objective was to compare accounts given by soldiers to establish whether any differences could be reconciled or explained. In the case of some soldiers, this resulted in them being interviewed again and further statements being taken. Further written statements were prepared by the Treasury Solicitor's Inquiry Team from both civilian and military witnesses for the Widgery hearings. This process was explained in evidence to the Saville Inquiry by John Heritage who was a senior legal assistant at the time. Following the compilation of statements, oral evidence was given to the Widgery Tribunal by military personnel.

[49] Finally, the Saville Inquiry. On 29 January 1998 the House of Commons resolved that it was expedient that a tribunal be established for inquiring into a definite matter of urgent public importance namely the "events on Sunday 30 January 1972 which led to loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to the events on that day." The Tribunal was chaired by Lord Saville. This Inquiry had available to it the RMP statements, statements made as part of the Widgery process and transcripts of evidence from the Widgery hearings. As part of this inquiry statements were also obtained from military personnel and many military witnesses attended to give evidence to the Inquiry.

[50] In relation to each stage of the examination of these events a large amount of evidence was exhibited to the affidavits. This is understandable given the background to this case, however the court has reminded the parties that this is not a merits-based hearing. The judicial review court exercises a supervisory function. Whilst all of the voluminous documentation has been examined, the court has been careful not to make its own assessment of fact, or to substitute its own view for that of the primary decision-maker, as that would be impermissible. Consequently, we now turn to what specifically is at issue in this review of PPS decision making.

[51] The applicants accept that evidence from the Saville Inquiry is not admissible in future criminal proceedings given clear assurance that it would not be used in this

way. Therefore, the argument has centred on the first two categories of evidence referred to at [44] above and issues of admissibility. The relevant Code is the Code of Practice for Prosecutors in Northern Ireland. The relevant law in relation to hearsay is set out in the Criminal Justice (Evidence) (Northern Ireland) Order 2004. We have also examined the provisions of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE") in relation to the admission of evidence and domestic and European jurisprudence on article 6 of the European Convention on Human Rights ("ECHR"), principally the privilege against self-incrimination. Before examining these provisions we remind ourselves that these judicial reviews are taken against decisions of the PPS which is the independent prosecutorial authority in Northern Ireland. Therefore, we turn to the appropriate test to apply on review of a prosecution decision.

IX. The Test on Judicial Review of Prosecutorial Decision

[52] This case relates to decisions not to prosecute and a decision to discontinue prosecution. It was common case that there is a higher intensity of review in this type of case as opposed to a case of a challenge to a prosecution decision where a defendant retains the ability to challenge evidence, or mount an application for stay as an abuse of process, as part of the criminal proceedings.

[53] The parties were also largely agreed on the principles to be applied. It is common ground that a decision not to prosecute is amenable to judicial review. As Kennedy LJ explained in *R v DPP* [1995] 1 Cr App R 136, broadly three potential grounds of challenge are recognised, namely the application of an unlawful policy; a failure to act in accordance with settled policy in the Code for Crown Prosecutors or associated guidance; and a decision at which no reasonable prosecutor could have arrived. The jurisprudence we have been referred to highlights the fact that successful judicial reviews in this area are rare. These cases serve to underline the need for the court to respect the fact that the task of deciding when, and when not, to prosecute is primarily one for the prosecuting authority and the court's function is one of review.

[54] This position was recognised by Lord Bingham in the case of *R v DPP ex parte Manning* [2001] QB 330. This is a decision of the Divisional Court. It was a judicial review of a 'no prosecution' decision following an inquest verdict of unlawful killing which came after an investigation of a death in prison. The DPP decided not to institute criminal proceedings and a review was sought. At para [23] of the judgment Lord Bingham summarises the test on review as follows:

> "[23] Authority makes clear that a decision by the Director not to prosecute is susceptible to judicial review see for example *R v Director of Public Prosecutions ex parte C* [1995] 1 Cr App 136. But, as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary

> decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no-one else. It makes no difference that in practice the decision will ordinarily be taken by a senior member of the CPS, as it was here, and not by the Director personally. In any borderline case the decision may be one of acute difficulty, since while a defendant whom a jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial. If, in a case such as the present, the Director's provisional decision is not to prosecute, that decision will be subject to review by Senior Treasury Counsel who will exercise an independent professional judgment. The Director and his officials (and Senior Treasury Counsel when consulted) will bring to their task of deciding whether to prosecute an experience and expertise which most courts called upon to review their decisions could not match. In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied."

[55] Ultimately, in *Manning* a quashing order was made requiring a reconsideration of the decision on the basis of failure to take into account material facts and an application of a higher test than was provided for in the Code.

[56] A further case in this area which has been of particular assistance to us is the case of *Regina (Monica) v Director of Public Prosecutions* [2018] EWHC 3508. This is also a decision of the Divisional Court with the judgment being given by

Lord Burnett of Maldon CJ. The context of this case is that an environmental activist sought a review against a decision reviewing and confirming no prosecution against a former police officer who had posed as an undercover activist and was alleged to have committed various sexual offences including rape against another activist.

[57] This challenge was ultimately unsuccessful and in the course of dealing with the issues the Lord Chief Justice sets out some important dicta between paras [44] and [47] some of which we reproduce as follows:

> "44. The circumstances in which this Court will intervene in relation to prosecutorial decisions are rare indeed. The principle of the separation of powers leads, as Sir John Thomas PQBD (as he then was) put it in *L v DPP* [2013] EWHC 1752 at paragraph [7] to the adoption of a "very strict self-denying ordinance."
>
> 45. An authoritative statement of this principle, and its application to cases of this type, was given by Lord Bingham of Cornhill in *R (Corner House Research) v SFO (Justice Intervening)* [2009] 1 AC 756 paras 30-32:
>
> > …
> > '31. 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 from *Matalulu v Director of Public Prosecutions*)
> >
> > > '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 un-prescriptive terms.

> 32. Of course, and this again is uncontroversial, the discretions conferred on the Director are not unfettered. He must seek to exercise his powers so as to promote the statutory purpose for which he is given them. He must direct himself correctly in law. He must act lawfully. He must do his best to exercise an objective judgment on the relevant material available to him. He must exercise his powers in good faith, uninfluenced by any ulterior motive, predilection or prejudice. In the present case, the claimants have not sought to impugn the Director's good faith and honesty in any way.'"

[58] In addition, at para [46] the court distilled the following propositions from the authorities and the principles underlying them:

> "(1) Particularly where a CPS review decision is exceptionally detailed, thorough, and in accordance with CPS policy, it cannot be considered perverse: *L's* case 177 JP 502, para [32].
>
> (2) A significant margin of discretion is given to prosecutors: *L's* case at para [43].
>
> (3) Decision letters should be read in a broad and common sense way, without being subjected to excessive or overly punctilious textual analysis.
>
> (4) It is not incumbent on decision makers to refer specifically to all the available evidence. An overall evaluation of the strength of a case falls to be made on the evidence as a whole, applying prosecutorial experience and expert judgment."

[59] In R (*FB) v DPP* [2009] EWHC 106 (Admin), Toulson LJ summarised the jurisprudence on judicial review of decisions not to prosecute. He said:

> "52. … In summary, judicial review of a prosecutorial decision is available but is a highly exceptional remedy. The exercise of the court's power of judicial review is less rare in the case of a decision not to prosecute than a decision to prosecute (because a decision not to prosecute is final, subject to judicial review, whereas a decision to prosecute leaves the defendant free to challenge the

> prosecution's case in the usual way through the criminal court) but is still exceptional."

[60] In that case, which was a discontinuance of prosecution case, Toulson LJ also examined methods of decision which range from a merits based approach to a predictive analysis described there as a "bookmaker's approach." This case highlights the need to consider the methodology deployed by the prosecutor in any decision as this may affect the outcome of any challenge.

[61] In *R (Bermingham) v Director of the Serious Fraud Office* [2007] 2 WLR 635 Sir John Laws said:

> "… in any event there will have been expert assessments of weight and balance which are so conspicuously within the professional judgment of the statutory decision-maker that there will very rarely be legal space for a reviewing court to interfere."

[62] In this jurisdiction Gillen LJ in the case of *X* [2015] NIQB 52 has also articulated the principles as follows:

> "(1) Absent dishonesty or mala fides or in highly exceptional circumstance, the decision of the PPS to consent to prosecution is not amenable to judicial review: see *R v DPP ex p Kebeline* [2000] 2 AC 326 at 369H-371G: *R (On the Application of Corner House Research and Others) v Director of Serious Fraud Office* [2008] UKHL 60.
>
> (2) A decision not to prosecute is reviewable but will be interfered with sparingly, namely for unlawful policy, failure to act in accordance with an established policy or perversity: see *R v DPP ex p C* [1995] 1 Cr. App. R. 136.
>
> (3) The threshold for the review of decisions not to prosecute may be somewhat lower than that set for decisions to prosecute because judicial review is the only means by which the citizen can seek redress against the decision not to prosecute: see *McCabe* [2010] NIQB 58 at [19-21] and *R v Director of PP ex parte Manning* [2001] QB 330 at para [23].
>
> (4) Essentially, there are three reasons for these principles. First, because the power in question is extended to the officer identified and to no one else. Secondly, the polycentric character of official decision-making and public interest considerations are

> not susceptible to judicial review because it is within neither the constitutional function nor practical competence of the courts to assess their merits. Thirdly, the powers are conferred in very broad and unprescriptive terms (see Mooney's case at paragraph [31]).”

[63] We are also aware of the decisions in *Brady* [2018] NICA 20 and *Mooney* [2014] NIQB 48 in our courts where prosecutorial decisions were quashed for different reasons. Each case will depend on its own facts and context. 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.

(vii) 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.

X. The Code of Practice for Prosecutors in Northern Ireland

[64] It is important to set out the relevant provisions as these frame the decision-making. This case centres on Part 4 of the Code which sets out the test for prosecution as follows:

> “4.1 Prosecutions are initiated or continued by the PPS only where it is satisfied that the Test for Prosecution is met. The Test for Prosecution is met if:
>
> (i) the evidence which can be presented in court is sufficient to provide a reasonable prospect of conviction – the Evidential Test; and

(ii) prosecution is required in the public interest – the Public Interest Test.

4.2 This is a two stage test and each stage of the test must be considered separately and passed before a decision to prosecute can be taken. The Evidential Test must be passed first before the Public Interest Test is considered. If this is also passed, the Test for Prosecution is met. The tests are set out in detail at paragraph 4.7 et seq.

4.3 In applying the Test for Prosecution the Public Prosecutor must analyse and evaluate all of the evidence and information submitted by police in a thorough and critical manner and adhere to those obligations set out in this Code.

4.4 In the vast majority of cases, prosecutors should only decide whether to prosecute after the investigation has been completed and after all the available evidence has been reviewed. If prosecutors do not have sufficient information to take such a decision, they should identify evidential weaknesses and request that the investigator, where possible, provide additional evidence to enable a fully informed decision as to prosecution to be taken.

4.5 Prosecutors also have a general duty to keep prosecution decisions under consideration and take into account any change in circumstances that occurs as the case proceeds. Where new information or evidence becomes available it should be considered along with all the existing information and evidence in the case and the Test for Prosecution applied. Where this occurs and the Test for Prosecution is no longer met the particular charge or charges or indeed the whole case should not proceed.

4.6 There may be exceptional cases where it is clear, prior to the completion of an investigation, that the public interest will not require a prosecution, in which case a Public Prosecutor may decide that the Test for Prosecution will not be met and the case should not proceed further. Prosecutors should only take such a decision when they are satisfied that the broad extent of the criminality has been determined and that they are able to make a fully informed assessment of the public

interest. Any such decision must be approved by the relevant Assistant Director.

The Evidential Test

4.7 Public Prosecutors decide whether there is sufficient evidence to provide a reasonable prospect of conviction against each defendant on each charge.

4.8 A reasonable prospect of conviction exists if, in relation to an identifiable suspect, there is credible evidence which the prosecution can present to a court and upon which an impartial jury (or other tribunal), properly directed in accordance with the law, could reasonably be expected to find proved beyond reasonable doubt that that suspect had committed a criminal offence. This is different to the test which the court will apply, which is deciding whether the offence is proved beyond reasonable doubt i.e. it must be sure that the defendant is guilty before it can convict.

4.9 It is necessary that each element of this definition is fully examined when considering the Evidential Test for each particular offence (see below). The Public Prosecutor must also take into account what the defence case may be and whether it would affect the prospect of conviction. If a case does not pass the Evidential Test, it cannot proceed, no matter how serious or sensitive it may be."

Element	Description
Identifiable Individual	There will often be cases where it is clear that an offence has been committed but there is difficulty identifying who has committed it. Prosecution can only take place where the evidence sufficiently identifies a particular person responsible. Where no such person can be identified, there can be no prosecution.
Credible Evidence	This means evidence which is capable of belief. Prosecutors must have regard to all available evidence and reach a considered assessment as to its credibility and reliability. It may be necessary to consult with a witness

	before coming to a decision as to whether the evidence of that witness is credible. Where there are substantial concerns as to the credibility, or reliability of essential evidence, the Evidential Test may not be capable of being met. There will be many cases in which the evidence does not give any cause for concern, but there will also be cases in which the evidence may not be as cogent as it first appears. It may be that a witness is likely to be so discredited that no court could safely act on his/her evidence. In such a case it may be concluded that there is no reasonable prospect of obtaining a conviction. If, however, it is decided that a court in all the circumstances of the case could reasonably act on the evidence of a witness, notwithstanding any particular difficulties, then such evidence is credible and must be taken into account.
Evidence which the Prosecution can adduce	Only evidence which is available and admissible can be taken into account in reaching a prosecution decision. There are technical legal rules concerning whether or not particular types and pieces of evidence are admissible in court. For example, a court may refuse to admit evidence where to do so would have an adverse effect on the fairness of the proceedings. If evidence is inadmissible then that evidence cannot be weighed in determining whether there is a reasonable prospect of a conviction. Public Prosecutors must therefore consider whether there is a reasonable prospect that evidence will be admitted by the court and if admitted, the weight that a court is likely to attach to it. For example, evidence may be excluded because of the way in which it was gathered. If there is no reasonable prospect of a court admitting certain evidence Public Prosecutors must

	consider whether there is sufficient other evidence for a reasonable prospect of conviction.

XI. Domestic law

[65] The Criminal Justice (Evidence) (Northern Ireland) Order 2004 ("the 2004 Order") governs the admission of hearsay in criminal proceedings. The general rule governing admissibility is set out in Article 18:

> "18.-(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if-
>
> (a) any provision of this Part or any other statutory provision makes it admissible,
>
> (b) any rule of law preserved by Article 22 makes it admissible,
>
> (c) all parties to the proceedings agree to it being admissible, or
>
> (d) the court is satisfied that it is in the interests of justice for it to be admissible.
>
> (2) In deciding whether a statement not made in oral evidence should be admitted under paragraph (1)(d), the court must have regard to the following factors (and to any others it considers relevant) -
>
> (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
>
> (b) what other evidence has been, or can be, given on the matter or evidence mentioned in sub-paragraph (a);
>
> (c) how important the matter or evidence mentioned in sub-paragraph (a) is in the context of the case as a whole;
>
> (d) the circumstances in which the statement was made;

(e) how reliable the maker of the statement appears to be;

(f) how reliable the evidence of the making of the statement appears to be;

(g) whether oral evidence of the matter stated can be given and, if not, why it cannot;

(h) the amount of difficulty involved in challenging the statement;

(i) the extent to which that difficulty would be likely to prejudice the party facing it."

[66] Article 20 of the 2004 Order makes admissible statements from an unavailable witness in certain circumstances:

> "20.-(1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if-
>
> (a) oral evidence given in the proceedings by the person who made the statement would be admissible as evidence of that matter,
>
> (b) the person who made the statement ("the relevant person") is identified to the court's satisfaction, and
>
> (c) any of the five conditions mentioned in paragraph (2) is satisfied.
>
> (2) The conditions are-
>
> (a) that the relevant person is dead;
>
> (b) that the relevant person is unfit to be a witness because of his bodily or mental condition;
>
> (c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;

(d) that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken;

(e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence."

[67] Legal protections provided by PACE are also relevant, principally Articles 74 and 76:

"74.—(1) In any criminal proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this Article.

(2) If, in any criminal proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.

…

(8) In this Article "oppression" includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture)."

76—(1) In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having

> regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

[68] Article 30 of the Magistrates' Court (Northern Ireland) Order 1981 ("the 1981 Order") provides for a preliminary investigation of an indictable offence by a magistrates court. Article 37(1) provides that:

> "Subject to this Order, and any other enactment relating to the summary trial of indictable offences, where the court conducting the preliminary investigation is of opinion after taking into account any statement of the accused and any evidence given by him or on his behalf that the evidence is sufficient to put the accused upon trial by jury for any indictable offence it shall commit him for trial; and, if it is not of that opinion, it shall, if he is in custody for no cause other than the offence which is the subject of the investigation, discharge him."

XII. The decision in *A & C*

[69] The decision of O'Hara J in *A & C* reported at [2021] NICC 3 is obviously of significance in this case. In that case two defendants were charged with the murder of Mr Joe McCann in 1972. The two soldiers A and C provided statements in 1972 to the RMP in a materially similar way to which the soldiers in this case gave the statements in accordance with the *aide memoire* and protocol set out by Warrant Officer Wood (discussed further below). Then both defendants in the *A & C* case were interviewed under caution by the Historical Enquiries Team (HET) in 2010, where they were asked questions on the basis of their original statements. This of course was 38 years later and it is significant to note that both of the defendants had some difficulties with the process after such a lapse of time.

[70] In particular the judge noted that A no longer had any independent memory of the shooting and relied on what was in the documents, his 1972 statement in particular. C did have some independent memory, some parts more detailed than others, even though he was being questioned 38 years later. The conclusion reached by O'Hara J was that all of the evidence was inadmissible pursuant to Article 74(2)(a) and (2)(b) and Article 76 of PACE. At para [37] of the decision he said:

> "What was required in this case and what never took place was that the PSNI should have interviewed the defendants under specific caution, the suspected crime being murder. If that had been done and if admissions had been made, a prosecution would have been possible.

> It is not possible in the present circumstances where what is put before the court is the 1972 statement dressed up and freshened up with a new 2010 cover. It is all still the same 1972 statement. Mr Hart recognised that. The surprise is that more people did not."

XIII. Article 6 of the ECHR

[71] Article 6 of the ECHR is also relevant, namely the right to a fair trial. Encompassed within this right is the right to remain silent and not to incriminate oneself. The Guide on Article 6 of the European Convention on Human Rights, issued by the European Court of Human Rights, updated on 31 August 2021, is useful as at paragraph 201 the scope of the right is defined and explained as follows:

> "201. The right not to incriminate oneself presupposes that the prosecution in a criminal case seek to prove their case against the accused without recourse to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (*Saunders v the United Kingdom; Bykov v Russia*).
>
> 202. The privilege against self-incrimination does not protect against the making of an incriminating statement per se but against the obtaining of evidence by coercion or oppression. It is the existence of compulsion that gives rise to concerns as to whether the privilege against self-incrimination has been respected. For this reason, the Court must first consider the nature and degree of compulsion used to obtain the evidence (*Ibrahim and others v the United Kingdom*).
>
> 203. Through its case-law, the Court has identified at least three kinds of situations which give rise to concerns as to improper compulsion in breach of Article 6. The first is where a suspect is obliged to testify under threat of sanctions and either testifies as a result (*Saunders v the United Kingdom, Brusco v France*) or is sanctioned for refusing to testify (*Heaney and McGuinness v Ireland; Weh v Austria*). The second is where physical or psychological pressure, often in the form of treatment which breaches Article 3 of the Convention, is applied to obtain real evidence or statements (*Jalloh v Germany; Gäfgen v Germany*). The third is where the authorities use subterfuge to elicit information that they were unable to obtain during questioning (*Allan v the United Kingdom*; contrast with *Bykov v. Russia*).

> 204. Testimony obtained under compulsion which appears on its face to be of a non-incriminating nature, such as exculpatory remarks or mere information on questions of fact, may be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial, or to otherwise undermine his credibility. The privilege against self-incrimination cannot therefore reasonably be confined to statements which are directly incriminating (*Ibrahim and others v the United Kingdom*).
>
> …
>
> 206. Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination. In order for the right to a fair trial under Article 6(1) to remain sufficiently "practical and effective", access to a lawyer should, as a rule, be provided from the first time a suspect is questioned by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right."

[72] In *Saunders v UK* [1996] ECHR 65 the European Court of Human Rights examined the position of an accused who was charged with offences of fraud in the course of a company takeover. Part of the evidence was a transcript of exculpatory answers given under statutory compulsion to the investigators commissioned to investigate the circumstances. Although the ultimate conclusion was that this use did violate article 6, the court did point out that no complaint was made as to the fairness of the investigation itself given its purpose in maintaining effective regulation.

[73] In *Saunders* the European Court held that the right to silence and right not to incriminate oneself are generally recognised international standards which lie at the heart of a notion of fair procedure under article 6. In particular, the court said:

> "The right not to incriminate oneself cannot reasonably be confined to statements of admission of wrongdoing or to remarks which are directly incriminating. Testimony obtained under compulsion, which appears on its face to be of a non-incriminating nature – such as exculpatory remarks or mere information on questions of fact – may

> later be deployed in criminal proceedings in support of the prosecution case, for example to contradict or cast doubt upon other statements of the accused or evidence given by him during the trial or to otherwise undermine his credibility. … It follows that what is of the essence in this context is the use to which evidence obtained under compulsion is put in the course of the criminal trial." (paragraph 71)

[74] *Saunders* has been considered by the Supreme Court in the case of *Beghal v DPP* [2015] UKSC 49. This case related to questioning at an airport and in relation to this the court stated as follows:

> "Whilst the mere fact the prosecution is not the purpose of such questioning does not sufficiently reduce the risk, the provisions of section 78 of the Police and Criminal Evidence Act 1984 (do). That section provides that evidence relied upon by the prosecution in a criminal trial may be excluded if it appears to the court that, having regard to all the circumstances, including those in which the evidence was obtained, its admission would have such an adverse effect on the fairness of the proceedings that it should not be admitted. Before the Divisional Court, and likewise in this court, the Crown has been unable to postulate any scenario in which answers obtained under the compulsory powers afforded by Schedule 7 would not fall to be excluded under this section, and there is no known case in which such answers would have been adduced in a prosecution, although on one occasion they were adduced at the request of the defendant … Evidence obtained from the defendant himself (or his spouse) by means of legal compulsion is a classic case of evidence which it will be unfair to admit. Even without the direct application of Article 6 ECHR the outcome of the section 78 judgment is effectively inevitable. Once Article 6, directly binding on a court under section 6(3) of the Human Rights Act 1998 is brought into the equation. There is simply no room for contrary conclusion.
>
> 4. As is shown by *Saunders v United Kingdom* [1997] 23 EHRR 313 below, Article 6 has the effect that any use in a criminal prosecution of answers obtained under compulsion of law will be a breach of the right to a fair trial. The presence or absence or other evidence

> implicating the defendant is irrelevant to this proposition."

[75] *Cross & Tapper on Evidence* (12th edition) provides at page 420 that in keeping with English criminal evidence rules for the gathering of real evidence such as the sound of a person's voice, bodily samples etc subject to any issues of trespass or assault are "untrammelled by the privilege against self-incrimination." *Cross* points out that refusal to comply with such requests could result in adverse inferences being drawn. However, the authors also say that the European Court of Human Rights has rejected attempts to harden the dicta in *Saunders* into unequivocal restrictions on the ambit of the privilege preferring a more open ended approach, expressed thus:

> "Whether a particular applicant has been subject to compulsion to incriminate himself and whether the use made of the incriminating material has rendered criminal proceedings unfair will depend upon an assessment of each case as a whole."

[76] This sentiment finds expression in the more recent Grand Chamber case of *Ibrahim & Others v UK* [2016] ECHR 284. This was a case relating to the London bombing in 2015. The first three applicants were arrested but were refused legal assistance for periods of between four and eight hours to enable the police to conduct "safety interviews." During the safety interviews they denied any involvement in or knowledge of the events of 21 July. At trial, they acknowledged their involvement in the events but claimed that the bombs had been a hoax and were never intended to explode. The statements made at their safety interviews were admitted in evidence against them and they were convicted of conspiracy to murder. The Court of Appeal refused leave to appeal. The fourth applicant was not suspected of having detonated a bomb and was initially interviewed by the police as a witness. However, he started to incriminate himself by explaining his encounter with one of the suspected bombers shortly after the attacks and the assistance he had provided to that suspect. The police did not, at that stage, arrest and advise him of his right to silence and to legal assistance, but continued to question him as a witness and took a written statement. He was subsequently arrested and offered legal advice. In his ensuing interviews, he consistently referred to his written statement, which was admitted as evidence at his trial. He was convicted of assisting one of the bombers and of failing to disclose information about the bombings. His appeal against conviction was dismissed.

[77] In their applications to the European Court of Human Rights the applicants complained that their lack of access to lawyers during their initial police questioning and the admission in evidence at trial of their statements had violated their right to a fair trial. The court reiterated that for the right to a fair trial to remain sufficiently practical and effective, access to a lawyer had to be provided, as a rule, from the first police interview of a suspect, unless it could be demonstrated that in the particular

circumstances there were compelling reasons to restrict that right. Even where such compelling reasons did exist, the restriction should not unduly prejudice the rights of the defence, which would be the case where incriminating statements made during a police interview without access to a lawyer were used as a basis for a conviction (see *Salduz v Turkey*).

[78] Applying this test, the Court examined (a) whether compelling reasons had existed for denying the applicants' access to a lawyer and (b) if so, whether the rights of the defence had been unduly prejudiced. The court found that the police had been under substantial pressure and accordingly there had been an exceptionally serious and imminent threat to public safety that provided compelling reasons justifying the temporary delay of all four applicants' access to lawyers. The court also found no undue prejudice, unlike the position in cases such as *Salduz and Dayanan v Turkey*, as there had been no systemic denial of access to legal assistance in the applicants' cases. There had also been procedural opportunities at trial to allow the applicants to challenge the admission and use of their statements and the weight to be given to them. In each case there had been a significant body of independent evidence capable of undermining their defence at trial.

[79] So, as the authorities state, the right to remain silent is not absolute. In examining whether a procedure has extinguished the very essence of the privilege against self-incrimination, the court will have regard to the overall circumstances and in particular to the following elements:

(i) The nature and degree of compulsion.

(ii) The existence of any relevant safeguards in the procedure.

(iii) The use to which any material so obtained is put.

[80] Furthermore, the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration and weighed against the individual's interest in having the evidence against him gathered lawfully. However, the authorities establish that public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights, including the privilege against self-incrimination (*Jalloh v Germany*). The public interest cannot be relied on to justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings (*Heaney & McGuinness v Ireland*).

XIV. Discussion of the issues

i. Context

[81] At the outset we recognise that the events at issue in this case occurred 50 years ago, yet are still affecting the lives of those concerned. Evidential issues will

undeniably arise in relation to such historic events. They are also important cases in this jurisdiction which engage the public interest as well as those directly affected. As we have said, this court is exercising a supervisory jurisdiction over prosecutorial decision making. This court is not permitted to substitute its own view but rather is required to decide if the decisions at issue have been made in error, allowing the appropriate margin of discretion to the prosecuting authority. The hurdle for this is high, given the legal authorities we have discussed above.

[82] It also goes without saying that there is a particular context to this case as it involves historic events which occurred during a turbulent time in Northern Ireland's history. These events have also been examined in other fora, most recently at the Saville Inquiry. It is right to record that the Inquiry determined in robust terms that responsibility for the deaths lay with the army. It follows from this that the families affected may justifiably think that prosecution of those responsible should ensue. However, the criminal process is distinct from an inquiry or inquest process. Most obviously, a higher standard of proof applies in any criminal process. The criminal law rules, including strict rules in relation to the admissibility and non-admissibility of certain evidence, are also designed to ensure that a fair trial is provided. As O'Hara J made clear in his ruling in the *A & C* case, these same rules apply equally to all; and soldiers accused of serious criminal offences are entitled to no more, but no less, than other defendants.

[83] In addition, a prosecution in a case such as this faces its own particular challenges due to the nature of historic events and the investigative process which was undertaken at the time. The standards of 1972 are not the standards of 2021. And, as counsel correctly acknowledge, fair trial means a fair trial by modern standards.

[84] Notwithstanding the obvious complexities of these cases, each case must be determined on its own facts and the PPS must in accordance with the Code bring a prosecution only where there is sufficient evidence to establish a reasonable prospect of conviction. That is the test in a nutshell. If a PPS decision is flawed recourse to a supervisory court should be available (as here) to allow those affected, within the limitations set out in the authorities discussed above, to have an important decision such as this examined by a judicial body. We understand how significant these events are for those affected and more generally and so we have examined this case carefully and anxiously in reaching our conclusions on the basis of the applicable legal principles which as we have said do not permit us to make a decision ourselves on prosecution.

[85] In reaching our conclusions we also bear in mind that detailed decisions have been provided in these cases. That in itself does not mean that the decisions are inviolate; however it is significant in our view as the decisions themselves reflect the care and attention given to these difficult cases by those tasked with their consideration within the PPS.

[86] In dealing with the issues we have identified at para [41] above we begin by examining the core question regarding the nature of the evidence and then we will relate that to the decisions made in each case. The core question is whether the evidence which is available falls into the category of being obtained under compulsion in 1972. This has a bearing on whether it can be admitted under Articles 18 and Article 20 of the 2004 Order and on whether it would or may be excluded under Articles 74 or 76 of PACE.

ii. Compulsion

[87] Article 18(2) of the 2004 Order sets out the statutory checklist a court has to consider when deciding to admit hearsay evidence and directs a judge to issues of value, whether there is other evidence, the circumstances in which the evidence was made, reliability, and the ability to challenge the evidence. Hearsay will rarely be admitted under Article 18(1)(d) of the 2004 Order where the purpose is to circumvent the statutory constraints imposed by Article 20 (see *R v Ibrahim* [2010] EWCA Crim 1176.) These issues are all in play in this case and feature in the decision making. Also Article 74 of PACE raises oppression and unreliability as grounds for exclusion and Article 76, fairness. Again these features are in play.

[88] In *R v Riat* [2013] 1 WLR 2592 the above legal requirements were explained by the application of six questions which provide a route map from the 2004 Order to PACE. Some other uncontroversial principles have been referred to us as follows. At common law, a confession is generally inadmissible against any person implicated in the confession other than the maker: *R v Hayter* [2005] 1 WLR 605. Article 18(d) allows for admission of a statement if in the interests of justice: *R v Y* [2008] 1 WLR 1683. This residual category was examined by Maguire J in *R v Thompson* [2014] NICC 18. There is no over-arching rule that hearsay evidence which is sole or decisive may never be admitted: *R v Horncastle* [2010] 2 AC 373.

[89] The case of *Thompson* includes a useful consideration of the Article 18(1)(d) test of admission "in the interests of justice"; however the facts of that case must be borne in mind. It involved an application to admit evidence from a deceased witness where there was other evidence available in relation to the index offences. Maguire J referred to the "triangulation of interests" at play and "fair balance" principles and ultimately recited the overarching test which is whether admission of evidence will mean that a fair trial of the defendant is not possible.

[90] Counsel did not dispute this broad framework, however there was a live debate about whether the RMP statements were properly to be viewed as voluntary or compelled. This argument is also made in relation to the Widgery statements. Dealing first with the RMP statements, the argument requires an analysis of the process in place at the relevant time. We were taken to various different documents from the time, in particular, a protocol in relation to the taking of evidence which was created by the Army in the form of an *aide memoire*. Some critique was made of this as to what exactly it meant. However, the Bloody Sunday Inquiry dealt with

this issue in detail in Chapter 173 of its Report which was provided to us during the course of the hearing and we see no reason why we should seek to rewrite this comprehensive inquiry report in this area. Without reciting the entire contents of Chapter 173 we note various parts of it and, ultimately, we consider that this chapter is very clear in relation to the mandatory nature of the statement-taking process in 1972 by the RMP as some of the following extracts show.

[91] Paragraph 173.22 of the Inquiry Report reads:

> "Back in 1970 a decision was reached between the GOC [General Officer Commanding] and the Chief Constable whereby RMP would tend to military witnesses and the RUC to civilian witnesses in the investigation of offences and incidents. With both RMP and RUC sympathetic towards the soldier, who after all was doing an incredibly difficult job, he was highly unlikely to make a statement incriminating himself, for 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 of circumstances."

[92] As the Inquiry said, the effect of this decision was that at the time of Bloody Sunday, soldiers involved in an incident were interviewed by Special Investigation Branch ("SIB") Officers from the RMP and not by the RUC. The protocol devised by Warrant Officer Class I Wood highlighted the strict separation of responsibility, advising SIB officers not to trace or interview civilian witnesses but rather to pass any information on to the RUC. The purpose of the SIB investigation is set out in the protocol prepared by Warrant Officer Class I Wood as follows:

> "The purpose of the SIB enquiry is twofold; to inform the higher military command of what happened and to make evidence available if required to settle any future claim or for a Coroner's Inquest."

[93] Paragraph 173.115 refers to the legal protection given to soldiers and states:

> "Those representing the majority of represented soldiers pointed out that it was mandatory for soldiers to make statements to the SIB. These statements were not made under caution, and soldiers interviewed by the SIB were not represented. In effect, soldiers were interviewed as witnesses rather than suspects. They could have a senior officer present during the interview but this seems to have been a right that was not exercised. The decision to make compliance with an interview mandatory and to

> avoid the caution was a deliberate one, taken in the course of Warrant Officer Class I Wood's drafting of the protocol. It was felt important to find a method of interviewing soldiers outside the constraints imposed by criminal legislation or rules of procedure, mainly the Judges' Rules relating to the giving of a caution. These rules were made by the Judges of the Queen's Bench Division of the High Court of England and Wales as a guide to police officers conducting investigations. Although their origins can be traced back to 1906, the rules in operation at the time of Bloody Sunday were those re-issued in 1964 as "Practice Note (Judges' Rules)." Significantly, Rule II states:
>
> > 'As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.'"

[94] Paragraph 173.116 of the Inquiry Report states:

> "These representatives do not seek to explain how the mandatory requirement imposed on soldiers to give a statement to the SIB without a caution could have brought about any defects or inadequacies in the statements. We ourselves are at a loss to see how this could have happened."

[95] We do not look behind the Bloody Sunday Inquiry Report on this point. We cannot accept Ms Quinlivan's submission that there was some ambiguity about the process. These were involuntary statements, collected by the army for a particular purpose. The evidence from Colonel Overbury given to the Saville Inquiry is also clear. In that he said that he formally ordered soldiers, on the authority of the General Officer Commanding Northern Ireland, to make such further statements as were necessary, to make all statements relating to the events under the inquiry available to the Tribunal and to give evidence thereon at the Tribunal. The document dated 17 April 1972 entitled "Memorandum from Head of DS10 to APS/Secretary of State" also refers to the fact that soldiers were ordered to give evidence. Flowing from the above, it is clear that the army required a collective response and that the relevant soldiers were ordered to provide statements and evidence.

[96] The Army Act 1955 reinforces the fact that soldiers must obey orders. Section 34 specifically refers to the fact that any person subject to military law who disobeys orders is liable to court martial and punishment.

[97] Applying Convention authority which we have set out in the preceding section of this judgment, it is clear to us that this type of compulsion comes within the first category. It is plainly not a case of the statements being compelled by torture or subterfuge. That does not mean that compulsion no longer applies; it just means that the form and type may be different and that has a bearing on how a court would adjudge it. For instance, a statement obtained by torture is unlikely ever to be received. However, there may be a more nuanced approach to the first category which is akin to the circumstances prevailing in *Saunders* and which is similar to the circumstances in these cases. Thus, referral to other cases is not particularly helpful as each case turns on its own facts.

[98] Compulsion still applies as we have found here and, allied to the lack of any other safeguards, it was not unreasonable in our view for the PPS to conclude that there is not a reasonable prospect of the admission of such statements for use against a soldier on a criminal charge. This accords with the decision in *A & C* where domestic and European jurisprudence was examined and, in fact, there was no argument regarding the 1972 statements which are of the same species as the statements in this case. Although the applicants in this case were critical of the concession made by the prosecution in the *A & C* case as to the inadmissibility of their 1972 statements against them, that decision was no doubt made after careful consideration of the circumstances of the taking of those statements and the law. We are not bound by the decision of the Crown Court in *A & C*. However, the approach of the PPS cannot be condemned as irrational and there is no error of law in the judge's reasoning.

[99] We have been rather more troubled in looking at the statements and evidence prepared and given as part of the Widgery Inquiry. In relation to the Widgery process the Bloody Sunday Inquiry Report at paragraph 173.47 explains that "The establishment of the Widgery Inquiry was announced in Parliament on 1st February 1972." The Army set up a team, based at HQNI in Lisburn, to "co-ordinate the work involved in presenting evidence to the Tribunal." The team included Colonel Overbury, who arrived in Northern Ireland on 2 February 1972. He was a member of the Army Tribunal Team tasked with the "Preparation of Army Evidence." In Colonel Overbury's second written statement to this Inquiry, he explained that the part of the team "responsible for gathering evidence and information from the Army" was led by Lieutenant Colonel Hamilton (sometimes known by the cipher INQ 1864).

[100] The provision of evidence was the responsibility of the Assistant Provost Marshall, Colonel INQ 1383, while the task of investigation fell to the SIB of the RMP. Colonel Overbury's recollection was that:

> "Once it was announced that there would be a Tribunal of Inquiry and the Army Tribunal Team was set up, the SIB was requested to carry out a full investigation, in the course of which, they decided to interview many of the soldiers again.'
>
> This involved re-interviewing several times some of the soldiers who had fired live rounds."

[101] The next question is whether the soldiers' rights were also compromised during the Widgery process as they clearly were during the RMP statement-taking process. We have considered this question in the round and are satisfied from the evidence put before us that the army command also required soldiers to give statements. As such it is clear to us that these statements were involuntary rather than voluntary, as with the original RMP statements. We see no real difference between the cross-checking statements and the written statements to the Widgery Tribunal on the one hand and the RMP statements on the other. In reality, these were all part of a sequential process which occurred within a very narrow window of time of some six weeks.

[102] However, that is not the end of the consideration because other matters come into play in terms of what legal protections were on offer during that Inquiry. Two points emerged during the hearing. First, it was argued that no assurance was given akin to that in the Saville Inquiry and so the oral evidence given in the course of the Widgery Inquiry can *prima facie* be used in criminal proceedings. Second, it was argued that soldiers would have been alert to their rights given the presence of army legal advisors and Lord Widgery's opening statement, which specifically referenced the right not to self-incriminate and made general reference to obtaining independent legal advice. We have considered these matters carefully as the arguments were not without merit.

[103] As discussed above, we have first considered the Widgery statements. Having done so it is clear that the statements taken in advance are in the same category as the 1972 RMP statements. The soldiers were not cautioned or thought of as suspects and they did not have independent legal advice. This was again a group response by the army for its own purposes and so there is no substantial difference between these and the earlier statements. It cannot be assumed that the interests of the Army collectively were entirely coterminous with the interests of each individual soldier for the purposes of legal advice. As with the initial RMP interviews, no soldier had the option of simply making a 'no comment' response; nor did they have any opportunity of receiving independent legal advice which might have been to that effect.

[104] The oral evidence at the public inquiry is, we think, potentially of a different species. First, we consider the issue of the purported assurance given to soldiers that their evidence could not, or would not, later be used against them in criminal

proceedings. Having examined the documentation in relation to this, it is clear that the army proceeded on the footing that this evidence would not be used subsequently. That is the clear import of the memos made by Colonel Overbury. However, it is equally clear to us that this was not followed by a formal assurance in writing from either the Attorney General for England and Wales or for Northern Ireland. This is in contrast to the clear assurance given in the Saville Inquiry. Therefore we can understand the point made, particularly by Mr Mansfield, that there was no clear assurance that evidence would not be used in a subsequent format.

[105] However, this must be related to the position of the individual soldiers. We cannot say that any soldier was advised or thought his evidence would subsequently be used for the purpose of criminal proceedings. It seems likely that they were clearly given to expect the contrary, even if this was something of a ploy on the part of the army or the establishment. We nonetheless consider that there must be a subjective element to this, otherwise the whole purpose of article 6 protections would be eroded. There is no evidence that individual soldiers knew anything of their rights and, in a sense, as they were not being treated as suspects the issue probably did not arise at all.

[106] Whilst some of the points made in relation to the oral evidence in the Widgery hearings were of initial attraction to us, overall these arguments do not lead us to think that the evidence given at the Widgery Inquiry hearings would ultimately be treated differently in terms of admissibility in the context of criminal proceedings. It is unfortunately infected with the same problem as the other 1972 evidence, which is the element of compulsion coupled with the absence of individual legal protections. Also, on the basis of the *Saunders* case it does not matter that largely exculpatory statements were made, as these were made in a particular context when the soldiers were not treated as suspects. Thereafter that changed. Also, there was no statutory framework to the process, as in *Saunders*.

[107] Even though (as Dr McGleenan frankly conceded in argument) there was some recognition of additional legal protection at this stage – in the form of some representation on behalf of the Army at the tribunal and an indication from the Inquiry Chairman (assuming this was communicated to individual soldiers) to the effect that witnesses could not be required to answer questions which might incriminate them – we do not consider it enough to cure the basic unfairness which emanates from how this evidence was obtained when viewed in the context of its proposed use now as inculpatory evidence in a criminal prosecution. Of course the fault lies with the Army, which set up a self-serving process from the outset which may well have been designed to protect individual soldiers who would later become suspects. This is also illustrated by the course which Soldier V's interview process took, as Ms Quinlivan convincingly explained that once incriminating evidence emerged in relation to him, it was not used in the process. However, the nature of the process itself appears to us to underline the absence of legal protections for the soldiers concerned who may have been encouraged to make statements which later

transpired to be inculpatory (even in part) which they would not have made in a formal interview under caution with appropriate legal advice. As the section of the Bloody Sunday Inquiry report set out at para [90] above recognises, the fact that soldiers were not being treated as suspects in the investigations immediately following Bloody Sunday may itself have been a factor tending to encourage (partially) incriminating admissions they would otherwise not have made with the benefit of a proper caution and legal advice, rather than being a point in favour of the admission of such statements (as the applicants contended) because of the absence of hostile or threatening conduct towards them during the process.

[108] We accept the arguments made that the prevailing rules in 1972 including the Judges Rules did not require the legal protections of a caution and independent legal representation that are raised now, however that is not the point. The soldiers were not suspects at that time. Subsequently having become suspects, the issue of legal protections became live and the fairness of any trial must be adjudged by application of the rules applicable in 2021.

iii. The No Prosecution Decisions

[109] As we have highlighted above, Ms O'Kane reviewed all of the decisions made. She upheld the no prosecution decisions and the single prosecution decision in relation to Soldier F. The latter decision was overtaken by a subsequent review which we will examine below. First, we have examined the decision of Ms O'Kane to uphold the no prosecution decisions, the rationale for which is comprehensively set out in her affidavit of 22 June 2021 and her decision document of 26 September 2020 which has been provided in these proceedings. These are comprehensive documents. We also note that Ms O'Kane has considerable experience and is a Senior Assistant Director.

[110] In the cases of *Duddy & Others* and *Montgomery* the admissibility of the suspects' admissions is a central issue that Ms O'Kane deals with from paragraph 114 of her decision, first as regards the RMP statements. Her conclusion on this is found at paragraph 132 wherein she states that there is no reasonable prospect of resisting an application under Article 76 of PACE given the circumstances in which these statements were taken. Given what we have said above, this is a reasonable position to take and it is also supported by *A & C* which applies well established domestic and European jurisprudence and is clear on the inherent difficulty of statements such as these being admitted against the maker of them. Ms O'Kane reaches the same conclusion having considered the cross-checking statements and again we can see no fault with that. In her decision she turns to the Widgery statements and again we consider her view to be reasonable given our assessment of this evidence and our overarching conclusions on admissibility which we set out at part (ii) of this section of the judgment.

[111] The one area where we had some concern as to the level of reasoning is the detail, or relative lack of detail, in which Ms O'Kane deals with the oral evidence

provided to the Widgery Tribunal. In doing so, we are conscious that in a judicial review of this nature the court should not be unduly pedantic given that what is at issue is whether the decision maker has conducted an overall evaluation of the strength of the case applying prosecutorial experience and expertise. We also note that whilst the submissions provided by the families to the PPS do deal with admissibility issues in detail, there is no direct emphasis on the issue this court raised in relation to the oral evidence before the Widgery Tribunal in the context of the Chair's opening statement and the protections available to soldiers.

[112] We are content that Ms O'Kane has considered this as part of an overall evaluation of the case, since (as we have held above) essentially the same issues arise in relation to self-incrimination across the evidence gathering process. In any event, we consider that, albeit there was potentially some further protection available to soldiers giving oral testimony to the Widgery Tribunal, that is not determinative. Accordingly, on an overall evaluation we conclude that to consider that the Widgery evidence too was highly likely to be ruled inadmissible in the course of criminal proceedings (in other words, that there was no reasonable prospect of its admission) was not unreasonable.

[113] Ms O'Kane then considered all other material in relation to each specific case and reached her conclusions upon it. In particular, we note her careful examination of the facts of each particular case and we cannot see that an error has been made in her approach or assessment to the chances of these statements being admitted in evidence and/or excluded on the basis of unfairness. We consider that there is some merging of language in relation to these stages in the decision-making; however it would be wrong to be overly pedantic about this, particularly given the fact that the decision is over all so detailed and careful. We are satisfied that it is not fatal to the overall assessment as the decision making is clear as to why Ms O'Kane thinks there is no reasonable prospect of success of admission of the historic soldiers' statements on the basis of compulsion; and also that if admitted they would likely be excluded due to the lack of legal protections which offends article 6.

[114] We have also considered the arguments made about specific cases by Ms Quinlivan and Ms Doherty. There is a very real danger with these points that we are drawn into a merits assessment which is simply not part of the court's function on review. We are satisfied that the PPS has considered each case in the round and cannot be criticised for making a judgement in relation to the cogency and use that the PPS can reasonably make of the evidence. Ms O' Kane has set out the evidence for each sector and fatality in detail from paragraph 82 of her affidavit. We will not repeat this here but suffice to say we can see that Ms O'Kane's reasoning includes careful consideration of civilian and other evidence. Hence, whilst counsel for the applicants are to be commended for their own forensic analysis, we cannot see that the PPS has actually left anything material out of account. In each case the available evidence has been assessed. The challenge really comes down to the weight to be given to different strands of evidence by the PPS but that is firmly within the area of judgment the decision maker has and not something with which we would interfere.

[115] We understand the specific concern raised regarding the potential prosecution of Soldier F for the death of Mr Kelly. From the evidence it is clear that Ms O'Kane also viewed this as a particularly difficult case. The reason for that is because there is forensic evidence in that case linking the death to a particular rifle. There is an expert forensic report which Ms O'Kane has said has a reasonable chance of being admitted. The problem is then connecting that rifle to Soldier F. There is an unattributed annotation on the forensic report which Ms O'Kane says is not enough. We agree. However, during his evidence to the Widgery Inquiry Soldier F accepted that the rifle in question was his in a short exchange. Of course, as we have said he was not an accused at that stage. Had he been provided with independent legal advice and a full caution (including that he had the right to remain silent and that anything he did say may be used against him in criminal proceedings), he may have been advised or chosen not to answer that question. Therein lies the difficulty that the evidence has been given in a public forum but cannot on the face of it be admitted in a criminal prosecution. We share a sense of concern about that ourselves but we cannot see that the PPS has made an error in its assessment which is sufficient to vitiate its decision in law. Of course there is another very obvious gap here which is not directed to the PPS and which relates to the absence of armoury records from this period which may prove the connection. That is a matter for investigators and is beyond the remit of this court.

[116] We accept that in the decision making certain emphasis is not entirely correct, for instance the commentary in relation to two cases of *R v Lemsatef* [1997] 1 WLR 812 and *R v Brown* [2012] NICA 14. However, that is not of sufficient materiality to impugn the entire decision making process. We also reject the argument based upon joint enterprise. This is premised on an alleged misapplication of *Jogee* [2016] UKSC 8. However, we do not think that is correct. Mere presence is not enough on the part of any soldier to establish secondary liability. As this authority clearly illustrates, there must be more and herein lies the difficulty in this case which deals with historical events and inadequate or unavailable evidence. We cannot criticise the PPS decision makers for their careful consideration of this issue.

[117] Also, we do not accept that the PPS decision maker misdirected herself as regards any future Article 76 application. This is not a case where there can be any dispute as to the circumstances in which the evidence was obtained, *i.e.* by compulsion. We are not attracted to the argument that the choice of tribunal is of any significance. In addition, we do not accept the claim that there is a test of exceptionality for exclusion of evidence pursuant to Article 76. We see the consideration as much more open textured than that, requiring a broad analysis of fairness on the facts of each case as O'Hara J applied in *R v Soldiers A & C.*

[118] We are satisfied that Ms O'Kane applied the correct legal test which emanates from the Code which we recite at para [63] above. In this case only the 'evidential test' is in play. This requires a prosecutor to consider whether there is a reasonable prospect of conviction and to determine that a prosecutor must by the Code consider

whether there is a reasonable prospect that evidence will be admitted by the court, and if admitted the weight that a court is likely to attach to it. This is all specified in the Code and allows the prosecutor to consider the evidence and its potential admissibility and to make a judgment about that and the weight likely to be attached to any evidence. We do not accept the argument based on *ex parte Levin* [1997] AC 741 that some higher standard should be applied namely that "no judge properly directed could admit the evidence." We agree with Dr McGleenan's argument on this point noting that *ex parte Levin* is an extradition case and imports a higher standard than the Code for Prosecutors.

[119] In our view Ms O'Kane has applied the Code correctly and reached a decision which was open to her having assessed the strength of the evidence in great detail. In accordance with the Code and applying her judgment we consider that Ms O'Kane has formed a permissible view that there is not a reasonable prospect of the evidence being admitted and in the absence of that evidence there is insufficient other evidence for a reasonable prospect of conviction.

[120] Finally, we consider that Ms O'Kane was cognisant of the context and the public interest associated with this case as she mentions this several times in her decision. However, ultimately she correctly applies the Code to the evidence and makes what we consider is a reasonable assessment as to admissibility of the soldiers' own statements against themselves. We are not mandated in judicial review to form our own view or substitute our view, we must simply decide whether Ms O'Kane as decision maker has made a material error of law or fact or taken an irrational decision or misapplied the policy.

[121] Overall, we do not believe that Ms O'Kane has erred on the basis of any of the grounds argued by the applicants applying the proper test on judicial review. We also record the undeniable fact, acknowledged by the PPS, that unfortunately the investigation of this case was hampered by the unsatisfactory way in which evidence was gathered and by the lack of independence in the investigations at the time.

iv. The Discontinuance Decision

[122] In relation to the *McKinney* challenge to the discontinuance of the prosecution of Soldier F, some different considerations apply as a prosecution was recommended after a detailed process of consideration. The original decision is described as finely balanced. The context of this case is distinct in that papers have been prepared for committal, they have been served and the proceedings are part heard. The decision to discontinue the prosecution was taken in a very short timeframe following the delivery of the *A & C* judgment by O'Hara J.

[123] This prosecution was recommended on the basis of a reasonable prospect that third party statements from *other* soldiers would be admitted at trial in support of a prosecution of F. That decision was actioned and a prosecution was commenced. A committal is part heard, the first stage of which is the service of relevant evidence.

[124] At a committal hearing the court is asked to adjudicate upon whether there is sufficient evidence to return a case for trial in the Crown Court pursuant to the 1981 Order. The District Judge has not yet determined this issue. We are told that in the committal proceedings there is an objection raised to the hearsay evidence being admitted, although we do not have the exact detail of that. The applicants are not parties to those proceedings.

[125] Upon the court seeking some clarification on the approach to the admissibility of challenged hearsay evidence in the committal process we were referred to the case of *Damien McLaughlin* [2016] NIQB 39. In that case an accused challenged the District Judge's admission of interviews conducted by An Garda Síochána with a potential witness notwithstanding defence objections. The District Judge admitted this evidence applying the "interests of justice" residual category under Article 18(d) of the 2004 Order.

[126] The court commented on the role of the District Judge at para [28] of *McLaughlin* as follows:

> "In our view it is difficult to see that there is any principled distinction between the approach to the discretionary judgment to exclude evidence and that to the admission of evidence in committal proceedings where the trial judge will be expected to make a discretionary judicial determination as to whether the evidence should be admitted at trial. This case law supports the proposition that where the trial judge could reasonably admit the evidence the determination of that issue generally should not be removed from him at the committal stage."

[127] This decision also discusses the cases of *Re Allen & Others Application* [1998] NI 46 and *Neill v North Antrim Magistrates Court* [1992] 4 All ER 846. The latter case which is a House of Lords authority also refers to the fact that, if committed, another judge in the Crown Court may look at the issue again before the evidence is received at trial. When this query was raised by this court, all counsel agreed that in practice the Crown Court would adjudicate on this matter. That is subject to the obligation upon the District Judge to apply the provisions of Article 37(1) of the 1981 Order when deciding on committal which is currently part of our legal process pending expected reform.

[128] The considerations that now arise can be encapsulated in fairly simple order. First, it is important to state that the original prosecution decision was not impugned in any way. Second, it is accepted that the PPS were entitled to review the decision following *R v Soldiers A & C.* Therefore, the question is whether in law the decision can be impugned by virtue of the change of mind. In determining the answer to this

question we have examined the reasoning contained in the PPS review decision which is explained in the affidavit provided by Mr Agnew and it is to that that we now turn. We note that Mr Agnew has considerable experience and is the Deputy Director.

[129] In his affidavit Mr Agnew sets out a comprehensive explanation of the original decision to prosecute. In para 20 of the affidavit he highlights the fact that in this particular case there was civilian evidence in relation to the events at Glenfada Park. The gap was that this evidence was not capable of providing the identity of soldiers and that was required as a key fact in the prosecution of Soldier F. Therefore, Mr Agnew explains that further evidence was required. His method is described as follows. First, he ruled out reliance on Soldier F's own statements. However, he decided that the prosecution would rely on the hearsay statements from other soldiers to prove that Soldier F discharged his self-loading rifle (SLR) at a civilian or civilians and by doing so he shot a civilian or civilians. The affidavit explains that the core evidence would come from Soldiers G (deceased), H and J but also potentially 119 and 027.

[130] Mr Agnew says that this evidence "obviously would be a central and decisive matter in any prosecution. The hearsay evidence, taken together, is the only evidence capable of establishing the key fact. Taken together the hearsay evidence is to be regarded as very important, and as decisive. Without it there would be no prosecution. A court therefore will be required to take very considerable care in analysing the apparent reliability of the evidence and the ability of the tribunal of fact to assess its reliability, before allowing the evidence to be adduced."

[131] Mr Agnew also deals with the reliability of the statements. He explains that these are "mixed statements" in that part is to be relied on and part is not. Specifically he refers to the fact that whilst the soldiers refer to F they also make a case of self-defence by stating that all soldiers were shooting at armed civilians.

[132] Mr Agnew sets out the pros and cons of reliance upon this evidence in detail. His original conclusion is explained at para 29 of the affidavit as follows:

> "Having identified the points summarised above, I formed a view on whether there was a reasonable prospect of the evidence being admitted as hearsay evidence. The conclusion was that there was a reasonable prospect, albeit it was expressly noted that the decision was both difficult and marginal."

[133] Thereafter, Mr Agnew explains that the decision was to charge Soldier F with murder in respect of each of the fatalities on a joint enterprise or secondary liability basis. Charges of attempted murder were preferred on the same basis in relation to the non-fatal casualties and a charge of attempted murder of a person or persons

unknown to cater for F's own firing, irrespective of his responsibility for the conduct of others.

[134] The decision to reconsider is set out in the affidavit starting at para 31. The reason given for review is solely the import of the *A & C* decision. As we have said there is no challenge to this, applying paragraph 4.5 of the Code. The core reasoning provided for the discontinuance decision is also contained in para 31 where Mr Agnew highlights four points as follows:

(i) While acknowledging that this case is not identical he argues that *A & C* provides insight as to the way courts will view attempts to use the 1972 compelled statements;

(ii) Acknowledging that the ruling is not binding he states that it is from a senior criminal judge and there was no appeal;

(iii) The application of the test for prosecution requires an informed judgement as to how arguments will fare; and

(iv) The original decision was difficult and marginal.

[135] Para 34 sets out the conclusion reached which was to revise the decision. There, Mr Agnew states that his previous analysis was based on an "underestimation of the consequences for admissibility of the circumstances in which the 1972 statements were taken." He also states that the statements are "demonstrably and admittedly unreliable." He then refers to the difficulty in admitting a statement of a co-accused relying on *R v Crilly* [2011] NICC 14.

[136] Mr Agnew concludes by stating that he originally failed to give sufficient weight to the denial of safeguards that were associated with the circumstances in which the 1972 statements were obtained. He then considers reliability and ultimately concludes that:

> "In all the circumstances, and giving greater weight to the impact of the denial of rights on the issues of fairness and reliability than were given at the time of the original decision to prosecute, I conclude that there is no reasonable prospect of a court ruling in favour of the prosecution's application to admit the 1972 statements. The test for prosecution does not, therefore, remain met and the proceedings against Soldier F should be discontinued."

[137] The above outcome is expressed in strong and definite terms i.e. that there is "no reasonable prospect" of success. It that regard it departs markedly from the previous assessment which was more open. When examining the legality of this

position, we remind ourselves again that the PPS is the specialist, independent adjudicative body. Also, we are not a court of merits review. We have not seen the hearsay applications. In any event, it would be impermissible for us to step into the role of decision maker in relation to the admissibility of these statements. The fundamental question is whether the PPS has made an error in its revised assessment of the strength of the evidence and likely admissibility/exclusion of the evidence of such materiality to impugn the discontinuance decision.

[138] The claim for judicial review is pleaded on the basis of irrationality, of failing to afford the applicant the opportunity to provide views to the PPS, lack of consideration of the Victims Charter and PPS Witness and Victims Policy and failing to await the outcome of the other judicial reviews. It is also claimed that there is an error of law in the application of *R v Soldiers A & C*. The third ground is that there was failure to take into account the public interest and all of the circumstances in which the statements were obtained. The fourth ground relates to reasons.

[139] In assessing the above, the starting point is the stated reasoning for the change of mind which we set out at [133] above. The inexorable conclusion to be taken from this is a belief on the part of the PPS that a prosecution is no longer sustainable due to the effect of the *R v Soldiers A & C* judgment. Therefore, the PPS must argue, applying the language of the Code, that the evidential test, previously established, is no longer met in that there is no reasonable prospect that the third party evidence would be admitted and there is no sufficient other evidence for a reasonable prospect of conviction.

[140] We recognize that this was an extremely difficult case for the PPS to handle. The PPS was faced with a situation which was fast moving given the ongoing committal proceedings and the timing of the delivery of the *R v Soldiers A & C* ruling. This is also a unique situation in that the committal is part heard and an assessment of the evidence in the proceedings is therefore already before a specialist criminal court. In the usual course that would mean that the decision should be taken by the criminal court seized of the matter applying the principle in *R v DPP ex parte Kebeline* [2002] AC 326 which affirms the utility of a specialist criminal court considering such matters. Direct application of this decision is not straightforward for two reasons. First the applicants are not parties to the criminal proceedings. Second, the PPS effectively want to withdraw the evidence from consideration by the court.

[141] The applicant accepts that the case of *R v Soldiers A & C* is a relevant decision and we agree. This case highlights why evidence of this nature obtained by compulsion may be excluded applying PACE. The third party statements which are relevant to the discontinuance decision are also statements made under compulsion for the reasons we have given above. The real difference is the use to which these statements will be put. These are not statements made by the accused in the case as in *A & C* but they are third-party statements which the prosecution want to use against F. Here the hearsay evidence which the PPS had sought to admit is related

to two core factual matters to establish presence and firing at the location in question and if admitted it would implicate F.

[142] In that regard the case of *R v Crilly* [2011] NICC 14 is of some relevance as it deals with exclusion of evidence under PACE from a third party. In that case an important part of the evidence against a murder accused was a verbal confession made by another man implicating him. The statement was excluded because of the methods employed at interview to elicit the evidence. The case is distinguishable on its facts from the present case but it highlights the difficulties in admitting hearsay.

[143] We are not adjudicating on the prospects of admissibility of the evidence ourselves. Rather we are reviewing the PPS judgment on this issue. The PPS accept that the evidence itself has not changed. However, the PPS now considers that there is no reasonable prospect of a conviction due to the difficulties with this evidence being admitted, having considered the decision in the light of recent cases of a similar nature. This is an area of judgment in which the PPS as the specialist adjudicating body has a significant measure of discretion. As we have said the court cannot exercise a merits based review or quash a decision which is a matter of reasonable judgment on the part of the prosecuting decision maker.

[144] We are reminded of the authority we have cited above that "it will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. It follows that the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere." However, in this case, we consider that the discontinuance decision should be quashed for the following reasons.

[145] First, having considered the extensive reasoning given for the original decision to prosecute, it is clear that all of the pitfalls in relation to reliability and admissibility were considered and weighed in the balance before that decision was taken. Mr Agnew summed this process up at para 274 of his decision when he said that "whilst the decisive nature of the evidence and inherent unreliability of the statements weigh heavily against admission, a court would be entitled to conclude that the statements are sufficiently apparently reliable in relation to the narrow fact each of the witnesses has stated in relation to Soldier F discharging his SLR, if not the rest of their accounts. As distinct from other suspects under consideration, here there are three separate witnesses testifying to the same fact. Whilst there may be reasons for them to be untruthful about some aspects of the material events (especially Soldiers H and G who had themselves opened fire and therefore were seeking to justify their actions) there is no compelling reason why they would have lied or been mistaken as to the fact that Soldier F had discharged his weapon. The evidence can be tested and assessed by comparing and contrasting the different accounts given and by Soldier F giving any evidence he wishes as to the material events."

[146] We do not consider that the decision in *R v Soldiers A & C* should have so markedly altered the assessment of Mr Agnew which we have set out above. Fundamentally, that case did not deal with third party statements, which are in a different category and obviously do not attract the same protection from self-incrimination which is the striking characteristic of the other cases we have been examining. Since Mr Agnew recognized that *R v Soldiers A & C* raised a different legal issue than arose in the discontinuance decision, it is not possible to say he erred in law in relation to its effect. However, he still considered it to materially alter matters when – as a matter of both law and fact – nothing material had changed in relation to the prosecution of Soldier F which had been commenced.

[147] In our view it is extremely difficult to predict how a court would determine an application to exclude such third-party hearsay evidence in advance. We acknowledge that the use of such evidence is not without difficulty. However, this situation is not on all fours with *R v Soldiers A & C* where the maker of the statement complained about the fairness of the process and that his privilege against self-incrimination was eroded. Each case will turn on its own facts.

[148] Also, the original decision anticipated an Article 76 challenge and so the only difference is the court's additional reliance on Article 74 in *R v Soldiers A & C*. We do not consider this a proper reason to change position, particularly as there is a live argument raised by the applicant in relation to the applicability of Article 74 to the facts of this case.

[149] In addition, we consider that the case of *R v Crilly* has been afforded too much weight. That case was considered in reaching the original decision but in the discontinuance decision has taken on greater significance for no apparent reason. In any event, it is quite clear that the circumstances there were far removed from a case such as this where the compulsion was part of an investigative process mandated by the army and these statements are effectively being used as witness statements. In *Crilly* the judge found that it would be wholly unfair to require the defendant to rebut the evidence. The judge also said that "it will be for each court to consider the surrounding circumstances in individual cases having regard to the interests of justice or the impact on the fairness of trial." That is exactly the point we make that each case will depend on its own facts.

[150] Overall, we do not consider that the rationale for the change of mind which we have set out above is sustainable. In our view it strays too far away from the original merits based assessment of the PPS in circumstances where in fact little if anything of direct relevance to the Soldier F prosecution has changed.

[151] We agree with Ms Doherty that the fact that this was a difficult and so carefully reasoned decision in the first place actually means that particular care should be taken in any consideration of whether the prosecution decision reached should be changed. This is a rare occasion where we consider the decision should be quashed and reconsidered. We say this primarily because in our view there was no

material change in either the available evidence or applicable legal principles. The decision was based on a prediction as to how a court may rule on admissibility of hearsay. This is a difficult and highly complex legal area. The PPS is certainly entitled to exercise judgment in any case. However, in our view, there is a difficulty with the conclusion that the reasonable prospect of conviction previously found had dissipated so that the prosecution should be discontinued at this stage, when the *R v Soldiers A & C* case which was the catalyst for this was not directly on point.

[152] We also consider that the highly unusual context of this case – where the prosecution was already extant and so the matter could and would shortly have been considered by the relevant court itself – warrants a greater intensity of review than would usually be the case. As discussed above, there is a strong presumption against satellite litigation and, in this case, the PPS reconsideration decision was taken in a context where the criminal courts, which were already seized of the matter by virtue of the original decision to prosecute, would be deprived of the opportunity to consider the question of admissibility; and in circumstances where the PPS would have been aware that this would very likely, if not inevitably, be challenged by way of judicial review.

[153] In addition, just as a more intense review may be appropriate in 'no prosecution' cases, rather than in respect of decisions to prosecute, it may also be appropriate to scrutinize even more closely the rationale for a discontinuance decision where the hopes and expectations of injured parties or their families have been raised by a carefully reasoned prosecution decision in the first instance. In this context, and where nothing material had changed as we have discussed above, we consider that the decision crosses the threshold of irrationality where it simply does not add up or, in other words, there is an error of reasoning which robs the decision of logic: see *R v Parliamentary Commissioner for Administration, ex parte Balchin* [1996] EWHC Admin 152. We will quash that decision accordingly.

[154] It follows that the matter should remain with the PPS to reconsider the decision. There has already been considerable delay in the criminal process and so it may be that the swiftest and most effective course is for the District Judge to simply be asked to rule on the admissibility issue, at least in the first instance. It may be that public confidence and the interests of justice are best served by a definitive judicial determination on this issue by a court properly seized of the merits. These comments are by way of observation only as the PPS will now have to decide on the next steps.

v. The Reasons Challenge

[155] The penultimate challenge relates to reasons and this boils down into quite a net point. The issue in this case is only as to the adequacy of the reasons provided. The point at issue seems to be that whilst substantial reasons have clearly been given the text of the full original decision was not provided. The merit of an argument such as this was examined in *JR92* [2020] NIQB 67 and rejected because it was the

review decision which was challenged. The same type of circumstances apply here in relation to the *Duddy & Ors* set of cases.

[156] At this point we mention a discovery application which we dealt with at an earlier stage. In deciding that application we applied the law contained in *Tweed v The Parades Commission* [2006] UKHL 53. Following from a hearing on this issue, we ordered the entire review decision to be provided to the applicants but we did not consider that it was necessary to order disclosure of the original decision given that it was the review decision which was under challenge. We have kept this matter under review during the hearing and we remain of the view that disclosure of the original decision is not necessary for the fair disposal of the proceedings. The clear rationale of the PPS can be found in the substantial decisions provided by Ms O'Kane in relation to the *Duddy and others* case and by Mr Agnew in relation to the decision not to prosecute. That has been sufficient to allow the applicant to challenge the decisions made. In both cases the reasoning given is detailed and deals with all of the core issues in a satisfactory way. Accordingly, we do not consider that the reasons challenge is sustainable in any of these cases, applying the relevant legal principles.

vi. The Victims Charter and PPS Victims and Witnesses Policy

[157] The last issue raised in the *McKinney* case requires consideration of the Victims' Charter. In terms of the Human Rights guidance on the Victims' Charter we note a number of provisions. First, section 8 of the Justice (Northern Ireland) Act 2004 requires the Attorney General for Northern Ireland to issue guidance to various criminal justice organisations including the PPS on human rights standards to which they must have regard. Paragraph 25 of the guidance issued by the Attorney General for Northern Ireland in March 2014 provides that:

> "During an investigation and when considering and dealing with prosecution for acts or omissions that amount to serious human rights violations (including those carried out by agents and non-state actors) the PPS should have due regard to the principles of adequacy, thoroughness, impartiality and independence, promptness, public scrutiny in the involvement of victims."

[158] The Victims' Charter was issued by the Department of Justice under section 31 of the Justice Act (Northern Ireland) 2015. The Charter implements relevant provisions of the EU Directive establishing minimum standards for the rights, support and protection of victims of crime. Services pursuant to the Charter must be provided by, *inter alia,* the Public Prosecution Service. Paragraph 80 which incorporates Standard 2.2 states as follows:

> "Where an investigation file has been sent to the Public Prosecution Service a decision will be made on whether or not someone will be prosecuted for the offence, based on the test for prosecution. …
>
> **Standard 2.2: Information on a decision to prosecute/not prosecute**
>
> In relation to prosecution decisions (including a decision not to prosecute) you are entitled:
>
> …
>
> - to be informed … without unnecessary delay, of a decision by the Public Prosecution Service to prosecute or not to prosecute an alleged offender."

[159] The Victims' Charter at paragraph 82 also refers to the correct procedure when prosecution decisions change, as follows:

> "In some cases a decision may be taken not to proceed with the original charge or to accept a plea to a less serious offence. This may happen, for example, if the available evidence has changed or a significant public interest consideration has arisen. When considering whether this should be done, the Public Prosecution Service will, whenever possible, and where you want this, explain to you why this is being considered and listen to your views. In some cases it may not always be possible to speak to you if issues have to be dealt with relatively quickly at court."

[160] The PPS Victims and Witnesses Policy 2017 deals with changes to charges at paragraph 2.5, as follows:

> "There are times when a decision is made to change the original decision or take a plea to a less serious offence. When considering whether this should be done, the prosecutor will, whenever possible, explain to the victim why this is being considered and listen to their views. In many cases this may not always be possible, for example, if issues have to be dealt with quickly at court. Where a decision is taken by the PPS to substantially alter a charge, to discontinue all proceedings, or to offer no evidence, the victim will be informed of this decision and given reasons for the decision when requested."

[161] The above provisions were examined in the case of *Brady* [2018] NICA 20 and also in *Mooney* [2014] NIQB 48 which impugned a prosecutorial decision on the basis of a failure to take into account the position of a victim. The circumstances of each case will, of course, dictate the outcome in relation to this and we have accordingly considered the steps taken by the PPS in relation to the cases that are before us.

[162] In reaching our conclusion on this remaining issue we begin by recognising the time and care taken by the PPS in reaching the original decisions. There can be no complaint about that. Also, the deceased's families submitted detailed representations in relation to their case, settled by experienced counsel and so their perspective on all issues was before the decision making authority. We consider that the system of communication and consultation is generally beyond reproach and commend the PPS for that.

[163] However, in the particular circumstances of the *McKinney* case we cannot reach the same conclusion. The review decision was reached without the same level of communication as the original decision. In truth, the real engagement was after the decision had been made. We cannot see that there was any impossibility in consulting and listening to the views of the deceased families in advance.

[164] The issue is not how the decision maker could have been informed by views on legal and evidential matters but rather the facilitating of proper victim input in a high profile case such as this. We do not consider that this would have placed an overly onerous or procedurally difficult burden upon the PPS.

[165] In *Re Aine McMahon's Application* [2012] NIQB 60, the PPS reached a decision to discontinue prosecutions for murder and accept pleas to guilty of lesser charges. The family of the deceased were not properly consulted. Treacy J, in granting a declaration, said that "there is little point in having such a policy if it is not conscientiously adhered to, especially in such serious and deeply tragic cases as the present..."

[166] We do not suggest that perfection can be achieved in every case. We also understand the background of ongoing committal proceedings. A logistical difficulty arises because the deceased's family were not a party to those proceedings. However, they were actively engaged in the ongoing prosecution and the PPS knew that. There was also a previous issue in relation to anonymity which resulted in court proceedings which highlighted the need for engagement. Therefore, we conclude that the deceaseds' families were not properly involved in, or appraised in advance of, the discontinuance decision which was a significant change of course. It follows that the requirements of the Victims Charter have not been adequately met.

[167] The circumstances of this case are exceptional. It is obvious that the coincidence of the *R v Soldiers A & C* ruling whist committal proceedings were

ongoing has contributed to what has happened but nonetheless the views of victims have not been adequately canvassed on this important issue.

XV. Conclusion

[168] We are grateful to all counsel for the diligent way this case has been prepared and presented. We understand that these are complex cases and that there are different interests involved, including the public interest. We have considered all perspectives in deciding this case. We stress again that this is a court of review and not a court of merit and we have exercised our supervisory jurisdiction accordingly.

[169] We will dismiss the judicial reviews in the cases of *Duddy & Others* and *Montgomery*. We do so applying the test on review which we have explained in this judgment.

[170] Our consideration of the discontinuance decision has led to a different outcome for the reasons we have given which are based on the exceptional circumstances of that case. We quash the decision to discontinue the prosecution of Soldier F in the *McKinney* case on the basis of the above.

[171] We also make a declaration in that case for failure to comply with the Victims Charter and policy regarding engagement with victims.

[172] We will hear from counsel as to costs and ask that a draft final order reflecting the decision of the court is submitted within 7 days.