



**Public
Prosecution
Service**

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Thursday 29th October 2020

****STRICTLY EMBARGOED UNTIL 12PM****

**PUBLIC STATEMENT AS PPS ISSUES FOUR DECISIONS IN CONNECTION
WITH OPERATION KENOVA FILES**

1. The Director of Public Prosecutions, Mr Stephen Herron, has today confirmed that decisions not to prosecute have issued in respect of four individuals reported on files received from the Operation Kenova investigation team led by former Chief Constable Jon Boutcher. The decisions are all connected with an allegation that an individual committed perjury in the course of making affidavits sworn between 2003 and 2006, and the circumstances in which a decision was subsequently taken not to prosecute that individual.

The Approach to the Provision of Reasons

2. The Director recognises the particular sensitivities in relation to Operation Kenova and the strong public interest in providing transparency as regards any decisions as to prosecution that are taken and the reasons for them. His starting point, therefore, is to provide, where possible, a full public explanation of any decisions not to prosecute. This is considered particularly important in maintaining public confidence in the independence and impartiality of the Public Prosecution Service (PPS) decision making.

3. In Operation Kenova a constraint arises from issues touching upon the identity of informants and the Director has to carefully balance the public interest in providing detailed reasons with the potential for the provision of any such reasons to create or increase any risk to life. The Director is also required to weigh the risk of damage to national security arising from any departure from the 'Neither Confirm Nor Deny' (NCND) policy, including any negative impact upon the ability of the security forces to recruit and retain informants as part of their intelligence gathering efforts. The courts have recognised, as does the Director, that the principle of NCND must be applied consistently in order to be effective.
4. In respect of potential damage to the public interest as referred to above, the Director has sought and received advice from Government which he has carefully considered and balanced, together with the other relevant public interest factors, in determining the level of detail that can be provided. The outcome of that balancing exercise is that the Director considers that the information contained within this statement represents the limits of what he can properly put into the public domain at this time in relation to the reasoning for the decisions that he has taken.

Background

5. In December 2005 a complaint was made to the Stevens Inquiry in relation to an allegation of perjury by an individual in the context of legal proceedings brought in the High Court. The alleged perjury was contained in an affidavit sworn in February 2004. The complaint was referred to the Police Service of Northern Ireland (PSNI) who initially considered that the allegation was not capable of being investigated. However, a later review of that decision led to an investigation which mistakenly focused on a different affidavit sworn in May 2003 in the context of earlier High Court proceedings. This investigation resulted in the submission of a file to the PPS in December 2006. Having considered the evidence and information contained on that file it was concluded

that the Test for Prosecution was not met and a decision not to prosecute issued in December 2007.

6. In 2015 the former Director of Public Prosecutions, Mr Barra McGrory QC, issued requests pursuant to section 35(5) of the Justice (Northern Ireland) Act 2002 for the Chief Constable to investigate a range of offences relating to the activities of an individual commonly known under the codename 'Stakeknife'. Mr McGrory also reviewed the previous decision in relation to the perjury allegation and set it aside. The Operation Kenova team thereafter conducted an extensive and detailed investigation into all of the relevant circumstances and submitted reports to the PPS. This resulted in significant additional information being provided to the PPS which was not previously available to prosecutors. This included information relating to the full circumstances of the swearing of both affidavits referred to above, and also two further affidavits sworn in August 2003 and June 2006.
7. As part of their investigations Operation Kenova also interviewed under caution two former members of the Security Service and a former lawyer within the Public Prosecution Service. All three were reported to the PPS for decisions as to prosecution in addition to the individual who had sworn the affidavits.

The Approach to Decision-Making

8. The Director has received advice from independent and highly experienced Senior Counsel, David Perry QC, in order to assist him with each of the decisions that he has taken. Having reviewed the available evidence and information as submitted by Operation Kenova he has reached his decisions by applying the Test for Prosecution. This is the same approach to decision-making that is applied in all cases. It involves two stages:
 - (i) Consideration of whether the available evidence provides a reasonable prospect of conviction (the Evidential Test for Prosecution); and

- (ii) Consideration of whether prosecution is in the public interest (the Public Interest Test for Prosecution). It is only if the Evidential Test is met that the prosecutor proceeds to consider and apply the Public Interest Test.
9. In this case the Director was required to take a decision as to prosecution in respect of a lawyer who previously worked in the PPS. This clearly raised an issue of an actual or perceived conflict of interest. The Director therefore took independent legal advice from Senior Counsel and also consulted with the then Attorney General for Northern Ireland, John Larkin QC, in relation to how he should approach this particular decision having regard to the potential conflict of interest. The Director concluded that it was appropriate that he personally act as decision-maker in the case as the institution of criminal proceedings is one of the statutory functions with which he is entrusted. He sought to address the risk of any potential perception of impartiality by seeking advice as regards the prospects of conviction from independent Senior Counsel, who was briefed with all of the relevant evidence and information. In the event that the Director disagreed with the advice of Senior Counsel, he had intended to consult further with the Attorney General in relation to how he might best proceed in order to maintain confidence in the decision-making process. In the circumstances of this case that eventuality did not arise.

The Perjury Allegations

10. As indicated above, the Director considered an allegation of perjury in respect of four affidavits sworn by the first reported individual.
11. In order to prove an allegation of perjury there are a number of elements that must be proven to the criminal standard. These are that:
- (i) A person was lawfully sworn as a witness;

- (ii) The witness was sworn in a judicial proceeding;
 - (iii) The witness made a statement which he knew to be false or did not believe to be true;
 - (iv) The statement was made wilfully;
 - (v) The statement is material in the judicial proceedings.
12. In applying the Test for Prosecution a prosecutor is also required to consider any potential defence that may arise in the particular circumstances and whether or not the available evidence provides a reasonable prospect that any burden on the prosecution to disprove it could be discharged.
13. The Director considered that three of the four affidavits under consideration contained no false statement. In one affidavit there was a statement which there was a reasonable prospect of proving that the reported individual knew to be untrue or did not believe to be true. However, he concluded that there would be a significant difficulty for the prosecution in establishing that the false statement was material to the legal issue to be determined in the judicial proceedings in which it was sworn.
14. The Director further considered whether, if it were possible to prove that the false statement was material in the judicial proceedings in which it was sworn, the prosecution would be able to disprove beyond a reasonable doubt any defence of duress of circumstances. Having carefully considered all of the evidence obtained by Operation Kenova he considered that the available evidence did not provide a reasonable prospect of doing so. The Director concluded that in all the circumstances there was no reasonable prospect of conviction for an offence of perjury and that the Evidential Test for Prosecution was not met.
15. The Director also considered the offence of perverting the course of justice. This offence is committed where a person:

- (i) acts or embarks on a course of conduct;
 - (ii) which has a tendency to;
 - (iii) and is intended to;
 - (iv) pervert the course of public justice.
16. The Director also concluded that there was no reasonable prospect of conviction for this offence. There was insufficient evidence to prove that the false statement was intended, or had a tendency to, pervert the course of justice. Furthermore, the defence of duress of circumstances would have been available in respect of this offence also and could not have been disproved.
17. In these circumstances the Public Interest Test for Prosecution did not fall to be applied in respect of any potential offence.

The Misconduct Allegations

18. The relevant offence that fell to be considered in respect of the three further individuals was misconduct in public office. This offence requires proof of the following elements:
- (i) A public officer, acting as such;
 - (ii) wilfully neglects to perform a duty and/or engages in wilful misconduct;
 - (iii) to such a degree as to amount to an abuse of the public's trust in the office holder;
 - (iv) without reasonable excuse or justification.
19. The second individual reported to this office was a former member of the Security Service who played a role in connection with one of the sets of proceedings referred to above that included briefing others with decision-

making responsibilities. The allegation was that the officer misconducted themselves by failing to disclose certain relevant information to others in the course of a briefing and subsequently. However, having carefully considered the available evidence, the Director concluded that there was no evidence that could reasonably sustain an allegation of misconduct in public office and that the Test for Prosecution was not met. Important considerations included the fact that information of the nature alleged to have been withheld was, when properly analysed, of no significance to the decisions that were under consideration at the time. Furthermore, general information of the nature alleged to have been withheld was in fact provided by the individual subsequently and at a time when the proceedings remained live.

20. The third individual reported to this office was also a former member of the Security Service who had had some engagement with the original PSNI investigation team. The allegation against them was that they had failed to inform police and the PPS about the existence of an affidavit sworn by the first reported individual which was in addition to that which police were investigating. However, the Director concluded that there was no evidence that could provide any reasonable prospect of conviction in this case. The individual reported was not in possession of, and had not seen, the second affidavit. The existence of the second affidavit was a matter that was already within the public domain by virtue of certain media reporting and other senior officers within PSNI were already aware of the proceedings in which it had been sworn. Furthermore, the actual content of the second affidavit was in fact incapable of having any bearing on the outcome of the police investigation or any subsequent decisions as to prosecution.
21. The fourth individual reported to this office was a former prosecutor who had been involved with the original decision not to prosecute the first reported individual that was taken in 2007. Having carefully considered the available evidence the Director concluded that there was no reasonable prospect of conviction. The Director concluded that the decision that the former prosecutor had taken had been correct, or, at the very least, a decision that could

reasonably have been taken on the evidence that was available at that time. Furthermore, there was no evidence of any bad faith or impropriety in terms of how the prosecutor sought to fulfil their responsibilities in this case.

Pending Prosecutorial Decisions

22. There are further files submitted in response to the section 35(5) requests which remain under prosecutorial consideration. These concern a range of potential offences including murder, false imprisonment and assault. The Director will be making contact with the families directly affected by these cases in the coming weeks and decisions will issue in due course.

ENDS