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PUBLIC STATEMENT RELATING TO DECISIONS NOT TO PROSECUTE 24 INDIVIDUALS REPORTED FOR BREACHES OF THE CORONAVIRUS REGULATIONS IN CONNECTION WITH ATTENDANCE AT THE FUNERAL OF BOBBY STOREY ON 30 JUNE 2020.

Introduction

1. The Public Prosecution Service (PPS) has today confirmed that decisions have been taken not to prosecute 24 individuals reported by the Police Service of Northern Ireland (PSNI) in December 2020 for alleged breaches of The Health Protection (Coronavirus, Restriction) Regulations 2020 (“the 2020 Regulations”). These decisions are all connected with the attendance of elected representatives at the funeral of Bobby Storey on 30 June 2020.
2. The Director of Public Prosecutions recognises the high levels of public interest in the events surrounding the Storey funeral and the allegations that elected representatives may have been guilty of breaches of the Regulations. That all individuals should be equal before the law is a cornerstone of a democratic society. In these circumstances, and in order to ensure maximum confidence in the PPS and the rule of law, the Director has decided that it is appropriate for the reasons for these decisions to be made public.

Background

3. PSNI conducted an investigation, led by Deputy Chief Constable Mark Webster of Cumbria Police, into potential breaches of the 2020 Regulations relating to the circumstances of the Storey funeral on 30 June 2020. The investigation focused on 24 identified individuals, all of whom held elected office in Northern Ireland. These individuals were all interviewed under caution and a report, together with the available evidence, was submitted to the PPS on 18 December 2020.

The Approach to Decision-Making

4. The PPS has taken decisions in these cases by independently and impartially 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.
5. In this case the prosecution team were assisted in their application of the Test for Prosecution by detailed written advice from independent and highly experienced Senior Counsel.

The 2020 Regulations

6. The purpose of the 2020 Regulations is to identify permissible behaviour and criminalise impermissible conduct (such as leaving home contrary to Regulation 5 or participating in a gathering contrary to Regulation 6) subject to a defence of 'reasonable excuse'. In the context of this case the key provisions in force on the day of the funeral may be summarised as follows:
- (i) Regulation 5(2)(g) permitted an individual to attend a funeral but (generally speaking) only if the deceased was a close family member or member of the person's household.
 - (ii) Regulation 5(2)(ga) permitted an individual to visit a burial ground to pay respects to a member of the person's household, family member or friend.
 - (iii) Regulation 5(2)(n) permitted an individual to attend a religious service.
 - (iv) Regulation 6 prohibited gatherings in a public place (indoors or outdoors) of more than 30 persons, but provided for a number of exceptions where no numerical restriction would apply, one of which (Regulation 6(c)) related to funerals.
 - (v) Regulation 6A permitted outdoor gatherings for any purpose so long as the number of individuals involved did not exceed 30, but without restriction on the relationship, if any, between the persons gathering together.
7. Regulation 8 made it an offence for a person to contravene a requirement in Regulation 6 or 6A without reasonable excuse, or to contravene a requirement in Regulation 5. Regulation 5 itself permitted an individual to leave one's home if there was a reasonable excuse. Accordingly, while the structure of the individual regulations is different, a defence of reasonable excuse is available in relation to alleged breaches of both Regulation 5 and Regulation 6.
8. The Regulations were first introduced on 28 March 2020. By the time of the funeral on 30 June 2020 there had been nine sets of amending Regulations. There was a tenth set two days later, on 2 July 2020. The content of the Regulations was clearly very fluid in and around the date of the funeral as the eighth and ninth set of amending Regulations were

introduced on 25 and 29 June 2020 respectively. Indeed, different aspects of the eighth set took effect on four different dates between 25 June 2020 and 5 July 2020.

9. The key features, for present purposes, of the changes introduced by these amendments were that:
 - (i) From 28 June 2020 at 11.00pm, religious services, without numerical restriction, were once again permitted.
 - (ii) From 29 June 2020 at 11.00pm, the number of persons who could gather indoors in a public place was increased from 2 to 30; and the number that could gather outdoors was increased from 10 to 30. There remained no restriction on the number of people who could attend a funeral.
 - (iii) From 11.30pm on 2 July 2020, the provision (Regulation 5(2)(g)) that defined the categories of person who could attend a deceased's funeral was repealed. Paragraph 5.9 of the relevant Explanatory Memorandum stated: *"For reasons of consistency and clarity, the reference in regulation 5 to who might attend a funeral should be removed now that the numbers of people permitted to gather outside have been increased..."* From that time visitor attractions, cafés, bars and restaurants were also permitted to re-open.

The Funeral

10. The main funeral event comprised five stages:
 - a. A cortège from Owenvarragh Park to St Agnes' Chapel;
 - b. A funeral service (a religious service in the form of a Mass) at St Agnes' Chapel;
 - c. A cortège from St Agnes' Chapel to Milltown Cemetery;
 - d. A funeral ceremony at Milltown Cemetery; and
 - e. A cremation ceremony at Roselawn Crematorium.
11. The majority of the 24 individuals reported for a decision had participated in some way in one or more of these five stages of the funeral. In some cases the evidence was unclear as to whether individuals had, for example, been part of the main cortège from Owenvarragh Park to St Agnes' Chapel, or whether they had followed behind the cortège. In a small number of cases the individual who was reported had fulfilled a stewarding role at the funeral.
12. A number of the suspects stated in interview that their understanding had been that the amendments on 29 June 2020 permitted up to thirty persons, not members of the same household, to participate in an outdoor gathering. In addition, the point was made that their understanding of the purpose of the recent amendments was to remove the

restriction on non-family members attending funerals and to allow friends to attend. One suspect claimed that the intention of the Executive was to increase social interactions and support networks and narrow the complexities for people gathering for different reasons in the period before the funeral.

13. It was also stated that the public policy on managing coronavirus in the form of guidance and regulations had evolved on a continuing basis. This had frequently led to the drafter of the Regulations playing catch-up with the policy intention. One suspect stated that there was a high level of public confusion in relation to the Regulations in force with another describing them as very dynamic and often ambiguous.
14. During interview after caution many of the suspects also expressed their concern at the number of people who lined the cortége route and stated that it was not their intention to be part of a large gathering. Many were also aware of the earlier engagement by Sinn Fein with police to ensure effective policing of the funeral. A number noted the presence of police on the day and the absence of any indication that their actions were not compliant with the Regulations.
15. All the suspects expressed their regret at the ensuing controversy or that their attendance may have contributed to the undermining of the public health message relating to the COVID-19 pandemic at that time.

Engagement with police in the lead up to the funeral

16. In the week leading up to the funeral there were a series of engagements between Sinn Fein and senior police. The evidence indicated that:
 - (i) Police were aware, no later than 23 June 2020, that the senior Sinn Fein official who engaged with police in relation to the arrangements for the funeral intended to attend himself.
 - (ii) By 24 June 2020 police were aware that Sinn Fein were preparing a management plan for the funeral and police intended to complement the plan in terms of public safety and traffic management. It was intended that there would be a “no surprises” approach.
 - (iii) By 25 June 2020 police understood that the maximum occupancy within the church would be 30 persons (strictly limited to family only), but that this was subject to change with any amendments to the 2020 Regulations.
 - (iv) By 26 June 2020 it was understood that the funeral would be a high profile event that would be attended by a range of senior republican figures and would attract significant media interest. The PSNI Gold Strategy made reference to the functions of police and the need to “*facilitate the funeral arrangements ... in a dignified manner which takes into account the wishes of the family, is sensitive to his*

community and which does not significantly compromise public health in the current pandemic situation."

- (v) Also on 26 June 2020 police requested a meeting with the lead Sinn Fein organiser in order to ensure *"a good mutual understanding of the plan from both perspectives and how we [PSNI] can support and ensure consistent messaging"*. By that date police were aware also that Sinn Fein intended to put in place a comprehensive stewarding plan that would promote social distancing and the free flow of traffic; but were concerned about public safety and requested police assistance in conducting searches on the grounds that all of the senior Sinn Fein leadership would be attending the funeral. The request for searches was agreed.
- (vi) On 26 June 2020 police decided that it was not proportionate to intervene following reports of approximately 400 persons being visible in the area of the Storey home. This was following a discussion with the lead Sinn Fein organiser in which police were advised that stewards were in place to encourage social distancing.
- (vii) Police received a copy of the Sinn Fein plan for the funeral on 28 June 2020. The plan referred to various aspects of the funeral arrangements including that:
 - a. The cortège from Mr Storey's home to St Agnes' Church would be limited to 30 invited guests and that this would be strictly enforced by stewards who would follow the cortège at a distance of 10 metres to prevent other mourners joining the cortège;
 - b. The service at St Agnes' Church would be tightly controlled in accordance with a guest list (although the plan did not indicate how many guests were on the list, nor did it state whether the guests would be confined to family members). However, the evidence was that the Silver Commander understood, in advance of the church service, that it would be attended by a mix of family and Sinn Fein members.
 - c. The cortège to Milltown Cemetery would also be limited to 30 invited guests, with stewards in place to enforce the limit on numbers, control traffic, and prevent mourners joining the cortège; and that, at Milltown Cemetery, the graveside would be restricted to immediate family only. Press and other guests would be placed in a reserved area, and other mourners would be encouraged by stewards to obey social distancing. The plan indicated the positions for up to 94 persons in proximity to the Republican plot.
- (viii) On 29 June 2020 there was a partnership meeting at which the areas where police searches should be focused were agreed. At that meeting it was noted that the stewarding company would have resources available to provide a presence and visibility from immediately after the search at Milltown Cemetery was concluded up until the time of the event, thus providing maximum reassurance for the attendees.

- (ix) The relevant PSNI Operational Order provided that enforcement of any breaches of the 2020 Regulations would be at the direction of the Silver Commander; and that retrospective prosecutions and/or arrests would be considered depending upon the nature and seriousness of the offences.
17. Police assisted with arrangements on the day by, amongst other things, conducting searches and assisting with traffic management.
18. A further feature of the evidence was that senior police were unsighted on the details of the changes to the Regulations that were anticipated in the days leading up to the funeral. The evidence indicated that police understood the relaxation of the Regulations on the evening of 29 June 2020 to impact upon the service at St Agnes' Chapel by permitting people to attend church services so long as social distancing was maintained. It further indicated that attempts were being made on the morning of the funeral to ascertain and understand the changes that had been implemented the previous evening. These efforts were not successful.
19. There was no evidence that anyone sought, or that police provided, any assurances in relation to potential prosecutions for breaches of the 2020 Regulations.

Decision

20. Having carefully considered the available evidence and the advice received from Senior Counsel, it was concluded that there was no reasonable prospect of conviction in respect of any of the reported individuals and that therefore the Evidential Test for Prosecution was not met. In those circumstances the Public Interest Test for Prosecution did not fall to be applied.
21. Whilst it was anticipated that, in the event of prosecution, an abuse of process application would be made, it was considered that this would be unlikely to succeed. A court can grant a stay of criminal proceedings if it considers that there has been an unequivocal representation by those with the conduct of the investigation (or prosecution) that the defendant will not be prosecuted and the defendant has acted on the representation to his detriment. The application in this case would have been based upon an allegation that police facilitated the funeral taking place in the manner that it did and that, in those circumstances, it would now be unfair for criminal proceedings to be commenced. However, it was considered that there was no evidence that PSNI had provided an "unequivocal representation" that no prosecution for breaches of the Regulations would follow Mr Storey's funeral. It was further considered that any issues in relation to the policing of the funeral could have been addressed by the court when considering the application of the defence of reasonable excuse (see below).
22. It was considered, however, that, having regard to all of the relevant facts and circumstances, each of the reported individuals would be able to avail of the defence of "reasonable excuse". Those facts and circumstances included the following:

- (i) The participation of the reported individuals in the funeral cortéges was permitted by Regulation 6A (see stages “a” and “c” at paragraph 10 above). The fact that large crowds gathered to watch did not make participation unreasonable in circumstances where efforts had been made to limit those formally participating to 30 persons. Put another way, it was considered that a court was likely to find it reasonable for those within the cortége to continue to participate as planned, even if the observers were considered to be part of the same gathering such that the limit of 30 persons had been breached.
- (ii) There was no evidence of any potential breaches of the Regulations at Roselawn Cemetery (see stage “e” at paragraph 10 above).
- (iii) In relation to the attendance at St Agnes’ Church and Milltown Cemetery (see stages “b” and “d” at paragraph 10 above), the application of the Regulations was far from straightforward. There had been a series of amendments, as described above, in the days and hours leading up to the funeral. The Regulations were not consolidated until 23 July 2020 and, given the large number of amendments, it was difficult to ascertain the specific provisions in force at the relevant time. Even with a clear understanding of the actual provisions in force, their interpretation and application presented a number of difficulties. All of these circumstances made it extremely challenging for police to understand the line between conduct that was permitted by the terms of the Regulations and that which was prohibited. That was a difficulty faced also by those who attended. For example:
 - a. Whilst Regulation 5(2)(g) restricted attendance at funerals (generally speaking) to close family members of the deceased or members of the deceased’s household (and had been in force since the Regulations were introduced), Regulation 6 had, from 28 June 2020, extended public gatherings to a maximum of 30 persons. Regulation 6(c) disapplied any numerical restriction insofar as attendance at funerals was concerned. There was therefore clearly a significant tension between Regulation 5(2)(g) and Regulation 6(c) which was resolved 2 days after the funeral when the former provision was repealed. As noted above, the Explanatory Note to that amendment stated that the repeal of Regulation 5(2)(g) had been designed to achieve *clarity and consistency*.
 - b. In relation to attendance at the service at St Agnes’ Church, Regulation 5(2)(n) permitted attendance at a religious service in general terms, i.e. without restricting the category or number of persons who could attend. There were finely balanced legal arguments as to whether Regulation 5(2)(n) or 5(2)(g) was the governing provision in relation to the funeral mass.
 - c. In relation to attendance at Milltown Cemetery, Regulation 5(2)(ga) permitted a person to leave their home in order to visit a burial ground to pay respects to a member of the person’s household, family member *or friend*. Again, there was a tension between this provision and Regulation 5(2)(g) and finely

balanced legal arguments as to whether the latter provided a defence for all those in attendance.

- (iv) Significant efforts were made by the organisers to ensure that, so far as was possible, social distancing was maintained and the events took place in a way that minimised the risk of transmission of the virus. The measures that were put in place were followed in the main part by the 24 suspects that were reported for a decision.
- (v) It was considered that, in circumstances where the evidence indicated that those attending considered themselves to be acting in compliance with the Regulations, and the Regulations were, in the respects outlined above, lacking in clarity and coherence, the suspects would likely be able to establish a defence of reasonable excuse.
- (vi) A further but related basis for a viable reasonable excuse defence arose from the engagement with police in the lead up to the event as outlined at paragraphs 16 - 19 above. That engagement was such that police had a good understanding in advance of the plan for the funeral and there was general compliance with the plan on the day. Whilst police reminded the organisers in general terms of the need to comply with the Regulations, there was no evidence that police suggested that any aspect of the arrangements that were communicated to them may have resulted in a breach. As explained above, there was a lack of clarity as to the actual restrictions that would apply on 30 June 2020. Having regard to the nature and extent of the engagement between the organisers and the police in the lead up to the event, there was a strong argument that those who participated in accordance with the plan would have been able to avail of the reasonable excuse defence.
- (vii) In the context of that prior engagement, the approach of police on the day was capable of reinforcing the perception amongst those who attended the funeral that their conduct fell within the specific terms of the Regulations, or that they otherwise had a reasonable excuse to participate in the manner and circumstances in which they did. Police who were on the ground and came into contact with participants did not seek to engage with any of those attending to explain potential breaches, or encourage persons to alter their behaviour. In other words, police did not work through what has become known as the policy of the "4 Es" (Engage, Explain, Encourage and Enforce).
- (viii) Those who were involved in the stewarding of the event were attempting to manage the attendance of large numbers of the general public in such a way as to minimise the risk of any transmission of the virus. The stewarding arrangements were shared with police in advance. In all the circumstances it was considered that those who fulfilled a stewarding role at any of the stages of the funeral would also be able to avail of a reasonable excuse defence.

- (ix) There was evidence that one of the reported individuals who was stewarding on the day attended for a short period of time an indoor gathering with approximately 30-40 other stewards on the morning of the funeral. Whilst the decision in that case was finely balanced, it was concluded that a criminal court would have been unlikely to find that the reasonable excuse that the individual had for leaving his home (i.e. stewarding at the funeral) ceased for the short period of time that he moved indoors and was in the company of the group.

Conclusion

- 23. A decision whether the Evidential Test for Prosecution is met is an exercise of informed judgment as to how a particular case would be likely to fare in the context of a criminal trial. 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.
- 24. In this case the judgment was made independently and impartially by a team of senior prosecutors assisted by Senior Counsel. The conclusion reached was that, whether considered alone or in combination, the two excuses referred to above in relation to: (i) the lack of clarity and coherence within the Regulations; and (ii) the prior engagement with the organisers and the policing approach on the day, would pose an insurmountable difficulty if any of the reported individuals were prosecuted. In these circumstances the Test for Prosecution was not met.

Tuesday 30th March 2021