



PUBLIC STATEMENT RELATING TO DECISIONS TO DISCONTINUE
PROCEEDINGS AGAINST SOLDIER F AND SOLDIER B FOLLOWING REVIEWS
CONDUCTED IN LIGHT OF THE RULING IN R v SOLDIERS A AND C

Introduction

1. The Public Prosecution Service (PPS) has today confirmed that reviews have been completed in two cases involving the prosecution of former soldiers for shooting incidents that took place in 1972. In both cases a decision has been taken that the Test for Prosecution is no longer met and that therefore the proceedings should be discontinued.
2. The first case related to the prosecution of Soldier F for the murders of William McKinney and James Wray, and the attempted murders of Joe Friel, Michael Quinn, Joe Mahon and Patrick O'Donnell during events in Londonderry 30 January 1972 known as Bloody Sunday.
3. Soldier F was the only individual reported by the Police Service of Northern Ireland (PSNI) in connection with the events of Bloody Sunday in respect of whom a prosecution was commenced. A [summary](#) of reasons for the decisions not to prosecute all of the other reported individuals was published at the time of those decisions in March 2019. The key difficulty faced by the prosecution related to the inadmissibility, for the purpose of criminal proceedings, of the previous statements made by soldiers in 1972 and also their later accounts provided to the Bloody Sunday Inquiry which reported in June 2010.

4. The second case related to the prosecution of Soldier B for the murder of Daniel Hegarty, and the wounding of Christopher Hegarty, in the Creggan area of Derry in the early hours of 31 July 1972.
5. There have been a number of previous decisions as to prosecution in the Soldier B case. Decisions not to prosecute issued in 1973, 2008 and 2016. The 2016 decision was challenged by way of judicial review and was quashed (*Brady, Re Judicial Review* [2018] NICA 20). A fresh decision resulted in a prosecution and this was challenged, unsuccessfully, by the defendant (*B, Re Application for Judicial Review* [2020] NIQB 76). Final preparatory steps were being taken to formally serve papers on the defendant when a review was commenced in the circumstances outlined below.

The Circumstances of the Reviews

6. All decisions as to prosecution are taken by applying the Test for Prosecution. This 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.
7. In any case, when a decision to prosecute is taken, there is a duty on the prosecutor to keep under review whether the Test for Prosecution remains met. Paragraph 4.5 of the Code for Prosecutors states:

“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 that Test for Prosecution is no longer met the particular charge or charges or indeed the whole case should not proceed.”

8. The new information that triggered these reviews was the ruling of Mr Justice O’Hara on 30 April 2021 in the case of *R v. Soldier A and Soldier C* [\[2021\] NICC 3](#) (the “A and C” case). That ruling related to the admissibility of interviews conducted by the PSNI Historical Enquiries Team (**HET**) in 2010, statements prepared by the soldiers in advance of those interviews, and also statements made by the soldiers to the Royal Military Police (**RMP**) in 1972. Whilst it was accepted by the prosecution that the denial of legal rights and safeguards when taking the original 1972 statements would normally render them inadmissible, it was argued that the HET interviews, which were voluntary and conducted under caution and with the benefit of legal advice, were admissible, and that the adoption of the 1972 statements in those interviews rendered the 1972 statements themselves admissible.
9. The prosecution submissions were rejected by O’Hara J who acceded to the defence application to exclude all of the evidence referred to above. The key aspects of the ruling in A and C in relation to the **1972 statements** were:
 - (i) The procedure under which RMP statements were taken following a shooting was part of an “appalling practice”, which was designed in part to protect soldiers from being questioned by the Royal Ulster Constabulary and, ultimately, from being prosecuted. This was a practice worthy of continued judicial condemnation.
 - (ii) The compulsion, absence of a caution and lack of access to legal advice meant that it was inevitable the statements would be excluded as a matter of fairness pursuant to Article 76 of PACE, under common law principles, and having regard to Article 6 of the European Convention on Human Rights.

- (iii) The procedure under which the statements were taken amounted to “oppression” of the defendants, and the circumstances in which the statements were made were such that any confession made was likely to be unreliable. The evidence would therefore be excluded under both ‘limbs’ of Article 74(2) of PACE.
- (iv) The procedure under which the statements were taken was not designed to establish criminal liability. Conspicuously missing from the statements was detailed analysis or explanation of what was in the minds of the soldiers when they fired, and why they felt entitled to fire. The remit of the procedure meant that the makers of the statements were not questioned in detail, and that the accounts were limited. This was a further matter relevant to the question of fairness under Article 76.

10. The key aspects of the ruling in relation to the **HET interviews** were:

- (i) The purpose of a HET investigation was to seek to provide resolution. In an appropriate case a file would be submitted to the PPS. Later, in 2010, procedures were changed to ensure that cases that might lead to a prosecution were transferred to the PSNI. In 2013, a report criticised HET’s use of interviews under caution, because its officers were not in fact investigators.
- (ii) Accordingly, there was at least a degree of ambiguity about the purpose and potential consequences of HET’s investigating officers interviewing former soldiers: *“Was it simply to help understand what had happened before? Were they investigators in the criminal sense at all?”*
- (iii) The interviewing officers did not themselves reasonably suspect that the defendants had committed a crime. They expected that any criminal investigation, if required, would be conducted by the PSNI after HET had completed its work. They did not consider that they were themselves conducting a criminal investigation.

- (iv) Although the defendants were cautioned, this was a practical decision and not an indication that a crime had been committed. No offence was identified in respect of the caution. This was a fundamental breach of the Code of Practice governing the conduct of investigative interviews.
 - (v) The defendants' solicitors were not informed of the circumstances in which the 1972 RMP statements were obtained. Had the true position been known, it was barely conceivable that they would have advised the defendants to answer questions. In this way, the denial of rights in 1972 tainted the subsequent process.
 - (vi) The attempt to adduce the interviews was no more than an attempt to adduce the 1972 statements, dressed up in another form.
 - (vii) The HET interviews were inadmissible under both limbs of Article 74(2) of PACE. There was continuing oppression which had not been removed in the interview process. The things said or done in relation to unreliability included the ambiguity surrounding the purpose of the HET interviews. The prosecution had come nowhere near satisfying the burden of proof. In any event, the HET interviews would be excluded under Article 76 of PACE on the basis that it would be unfair to admit them.
11. As is explained further below, the matter at issue in the Soldier F case (which involves the use of 1972 compelled statements against a co-accused), in particular, is not identical to that which featured in *A and C*. However, it was considered that the ruling in *A and C* did provide insight as to the way courts will view attempts to use the 1972 compelled statements, or evidence in some way derived therefrom, as evidence in the context of criminal proceedings.
12. Furthermore, this was a ruling by the Senior Criminal Judge which is emphatic in its terms and was made after detailed submissions. The prosecution accepted that it was a reasonable ruling and no appeal was brought. It was considered that the ruling would feature prominently in applications to exclude the key prosecution evidence in both the Soldier B and Soldier F cases, and that any

Trial Judge will find it of persuasive value and weight when determining whether such evidence should be admitted.

13. The application of the Test for Prosecution in any case involves the exercise of an informed judgment of how the arguments in relation to admissibility will fare in the context of adversarial proceedings and judicial scrutiny, and of the likely outcome. This is reflected within the description of the Test for Prosecution in the Code for Prosecutors which identifies, as one of its elements, a judgment as to what an impartial tribunal “*may reasonably be expected to find*”. When deploying complex, difficult or novel legal arguments the assessment of this element of the Test may (by necessity) have to be exercised without the benefit of the issues in question having been subjected previously to a practical outworking. It is incumbent upon the prosecution to use the experience and insight gained from completed cases to inform a professional judgment as to whether a Court is likely to admit evidence of a similar nature that is relied upon in subsequent cases.

The Soldier F case

14. The key issue in the original decision to prosecute Soldier F was whether the available evidence provided a reasonable prospect of proving that he discharged his weapon in Glenfada Park North. Previous statements made in 1972 by Soldier F in relation to his conduct were considered inadmissible for this purpose. As is explained in more detail in the 2019 [summary of reasons](#) for the no prosecution decisions referred to above, this was because the statements were compelled and made without the benefit of a caution (i.e. a warning as to the use that could be made of them) or legal advice.
15. The only other evidence that specifically identified Soldier F as one of those who fired in this area came from other soldiers. The decisive evidence in this respect was contained in compelled statements made in 1972 by two soldiers who also

fired shots in Glenfada Park North and were therefore effectively co-accused. One of the soldiers was deceased and the other, who later professed no current recollection of Soldier F firing, would have been entitled to rely upon the privilege against self-incrimination to refuse to answer questions if called as a prosecution witness. Some supporting evidence was available in statements made in 1972 by a third soldier who was alleged to have fired his weapon unlawfully before entering Glenfada Park North, and also later professed to have no meaningful recollection of events. Legal applications to admit the 1972 statements of these soldiers as hearsay evidence against Soldier F were therefore a key feature of the prosecution case.

16. The original decision to prosecute recognised the difficulty in relying upon the hearsay accounts from these soldiers to establish that Soldier F fired in Glenfada Park North. However, a finely balanced judgment was made that, having regard to all the relevant circumstances, there was a reasonable prospect of a Court admitting the evidence. The key points in support of the application to admit the hearsay evidence were that the prosecution was seeking to use the evidence to prove a simple and contained fact, namely that Soldier F and other soldiers opened fire at civilians at the material time; the hearsay statements supported each other in that regard; and there was no reason to conclude that the statements would be unreliable on that point. It was accepted that the statements were, in other material respects, such as whether the civilians present in Glenfada Park North posed a threat to the soldiers, demonstrably unreliable. However, the approach to be adopted was to invite the Court to consider certain parts of the statements as reliable (such as who fired and when) and other parts (for example, those relating to the justification for firing) as unreliable.
17. The review of the Test for Prosecution in the Soldier F case involved a re-evaluation of the prospects of these statements being admitted that was undertaken with the benefit of the judgment in *A and C*. The key features of that judgment are set out above and included a judicial finding that the circumstances in which the 1972 statements were made amounted to oppression; and, further, that those circumstances were likely to render any confession made unreliable.

In reviewing the prospects of conviction it was considered that greater prominence and weight had to be given to the denial of fundamental rights that was associated with the 1972 statements and the overarching tendency to unreliability that this created. Having done so it was concluded that, on balance, an attempt to admit the evidence and invite the Court to separate out the reliable and unreliable parts of the 1972 statements for the purpose of proving that Soldier F fired, was unlikely to succeed.

18. In reviewing the merits of the potential hearsay applications greater weight was also given to the impact of the denial of rights on the overall question of fairness. The stance taken by the court in *A and C* demonstrated in clear terms that compelled statements of the kind under consideration are regarded as legally flawed and evidentially diminished. Whilst it was always appreciated that this protects the maker of the statement, having reviewed the matter carefully it was no longer considered realistic to proceed on the basis that the protection afforded by the existence of fundamental rights will be confined such that a court would permit the statements to be deployed against another accused.
19. 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, it was concluded that there was no reasonable prospect of a court acceding to an application to admit as hearsay evidence the 1972 compelled statements. The Test for Prosecution was, therefore, no longer met.

The Soldier B case

20. A key piece of evidence relied upon by the prosecution in the Soldier B case was a written statement given by Soldier B to HET in 2006 (**the 2006 Statement**), in which he admitted firing the shots that hit Daniel and Christopher Hegarty. Expert evidence was available as to how the weapon was or may have been positioned at the time it was discharged and the prosecution case was that the expert evidence provided a basis for concluding that elements of the 2006

Statement, on which the defence of self-defence was based, were not correct. This statement was also the only evidence that was potentially admissible and identified Soldier B as the person who shot Daniel and Christopher Hegarty. Soldier B had also given a statement in 1972 but this, like the 1972 statements in the Soldier F case, was compelled and made without a caution or access to legal advice. It was therefore considered inadmissible.

21. No issue relating to the admissibility of the 2006 Statement had featured in previous analyses, or legal challenges, relating to this case. The evidence that was adduced before the Court and the ruling of O'Hara J in the *A and C* case highlighted this as a potential issue in the Soldier B case; and therefore, as part of the review undertaken, further enquiries were made in relation to the precise circumstances in which the 2006 Statement was made and the interviews by the HET were conducted. The 2006 Statement had been provided to HET at a time when Soldier B's legal representative was suggesting that it could stand in place of an after caution interview. Ultimately the HET settled upon proceeding with an after caution interview during which Soldier B made no comment.

22. The evidence and information now available presents a confused picture in terms of the nature and purpose of the HET investigation in this case. For example, at no point in the lead up to the submission of the 2006 Statement, or the subsequent interview, or indeed thereafter, did HET inform Soldier B that he was suspected of having committed a criminal offence. Internal HET documentation suggested that some consideration was being given to an offence of perverting the course of justice, with no mention of homicide. Contact between the HET and Soldier B's solicitor included a suggestion by HET that Soldier B would be keen to bring the matter to a "*conclusion*", to, "*enable him to bring his own level of resolution to bear.*" The interview itself was conducted under caution but no offence (not even perverting the course of justice) was specified. Soldier B was not told that he was a suspect; nor was he told that the purpose of the interview was to obtain evidence in relation to any offence of which he was suspected. In summary, there was, as in the *A and C* case, at least a degree of ambiguity about the purpose and potential consequences of HET's investigating officers interviewing former soldiers. Furthermore, there was

no evidence to indicate that the HET officers were seeking to interview Soldier B under caution because they had themselves formed a reasonable suspicion that Soldier B had committed an offence of homicide.

23. In addition to the ambiguity as to the role of the HET in this case, there were two further important points. First, the 2006 Statement was given in direct response to HET's request to interview Soldier B under caution. It was considered that a court would be likely to find that the failure to identify an offence, or inform Soldier B that he was a suspect, was a significant deficiency that tainted the 2006 Statement.
24. Second, the process leading to the 2006 Statement involved the use by HET of the 1972 Statement and it would appear that the actions of Soldier B and his legal representative were carried out without them being informed of the full picture in relation to compulsion and denial of access to legal advice on which the 1972 Statement was founded. Furthermore, the 1972 Statement was placed at the centre of the HET investigation by virtue of the offences that they were considering (perverting the course of justice by providing untruthful information in the statement) and also as a result of how they used the statement. It was disclosed in advance of the interview, as described above, without its inadmissible nature being revealed and was read out at the start of the interview, indicating that HET was using it as an investigative, and potentially evidential, tool.
25. Having regard to all of the relevant facts and circumstances including the ruling in the *A and C* case, the conclusion reached following the review of the Soldier B case was that there was no reasonable prospect of a court admitting the 2006 Statement. This was on the basis that:
 - (i) A court was likely to find that the 1972 statement was obtained by oppression and that the oppression was continuing at the time of the 2006 Statement, and tainted the process by which that statement was given.

- (ii) There was no reasonable prospect of proving that the 2006 Statement was not obtained in consequence of something said or done which was likely to render unreliable a confession made by Soldier B. The court would conclude that the things said or done in this regard were: (a) the use of the 1972 Statement in the HET investigation without disclosing its inadmissible nature; (b) the failure to identify an offence in connection with the proposed interview under caution (c) the failure to inform Soldier B he was a suspect; (d) the ambiguity in the role HET was carrying out (which explains (b) and (c) above).

- (iii) The same factors would inevitably lead a court to conclude that it would be unfair to allow the prosecution to rely on the 2006 Statement, and that therefore it ought to be excluded under Article 76 of PACE.

26. The 2006 Statement was the key evidence upon which the prosecution relied in order to make its case. Without it there was no other admissible evidence relating to the discharge of a weapon by Soldier B, such as ballistics evidence. Neither the firearm nor the bullet casings were retained or submitted for forensic analysis in 1972. Therefore, in the absence of Soldier B's 2006 account, there was no reasonable prospect of conviction and the Test for Prosecution was no longer met.

ENDS