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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: 24/03/2022

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
(QUEEN'S BENCH DIVISION)

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BETWEEN:

ROSALEEN BEATTY

Appellant:

-and-

DIRECTOR OF PUBLIC PROSECUTIONS AND CHIEF CONSTABLE OF THE  
POLICE SERVICE OF NORTHERN IRELAND

Respondents:

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Mr Hugh Southey QC and Mr Mark Bassett, of counsel (instructed by KRW Law  
Solicitors) for the appellant  
Mr Tony McGleenan QC and Mr Philip Henry, of counsel (instructed by the Crown  
Solicitor's Office) for the respondent

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Before: Keegan LCJ, McCloskey LJ and Maguire LJ

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**McCLOSKEY LJ** (delivering the judgment of the court)

*Introduction*

[1] The central issue raised by this appeal is the correct construction of section 35(5)(a) of the Justice (Northern Ireland) Act 2002. This provides:

“The Chief Constable of the Police Service of Northern Ireland must, at the request of the Director, ascertain and give to the Director –

- (a) Information about any matter appearing to the Director to need investigation on the ground that it may involve an offence committed against the law of Northern Ireland ....”

("Director" denotes Director of Public Prosecutions, hereinafter the "DPP"). We shall describe the Chief Constable and the Police Service of Northern Ireland as the "Chief Constable" and the "Police Service" respectively – and, for convenience, as a single entity.

[2] Rosaleen Beatty, the appellant, by her application for judicial review failed in her quest to persuade the High Court that section 35(5)(a) invests the DPP with a discretionary power to direct the Chief Constable to accelerate the police investigation into the death of her brother, Ambrose Hardy ("the deceased"). This death occurred in one of a series of incidents on 3/4 February 1973 in the New Lodge Road area of North Belfast giving rise to a total of six deaths. It is alleged that members of the British armed forces perpetrated these deaths without legal justification. Almost 50 years later these events and fatalities remain matters of considerable notoriety and controversy. On 27 March 1975 there was an inquest into Mr Hardy's death giving rise to an open verdict. There is to be a new inquest (*infra*).

### *Factual Matrix*

[3] In addition to the events noted above, the material dates and events belong to a more recent period, of some four years, beginning in April 2017. These may be summarised thus:

- (i) In April 2017 the Appellant's solicitors applied to the Attorney General for Northern Ireland ("AGNI") to exercise his statutory power to direct that a fresh inquest be held.
- (ii) By its reply by letter dated 19 September 2018 the office of AGNI rejected the request under section 14(1) of the Coroner's Act (NI) 1959. The letter stated *inter alia*:

"Having considered the matter the Attorney considers that there was no adequate criminal justice investigation at the time and its absence deprived the inquest of much of any effectiveness as it could even then be expected to have had ....

These deaths ought to have been properly investigated. A case of alleged deliberate killing of multiple persons such as this, whether all six be regarded as one group or two groups, would have required a properly focused police investigation ...

Given that an inquest is not designed as a substitute for a proper criminal justice investigation, the Attorney General

does not think that directing an inquest now would contribute materially to identifying and punishing the perpetrator or perpetrators of these killings ...

[The DPP is empowered] under s 35(5)(a) of the Justice (NI) Act 2002 to require the Chief Constable to investigate. The Attorney has today written to the Director of Public Prosecutions with such a request.”

- (iii) Between October 2018 and January 2020 the DPP communicated with the Police Service and the Ministry of Defence (“MOD”) requesting certain information and giving rise to the generation of a “paper trail issue paper” in January 2020.
- (iv) By its letter dated 14 February 2020 the DPP communicated its decision not to exercise the power contained in section 35(5)(a) (see *infra*).
- (v) An exchange of pre-action protocol (“PAP”) letters between the appellant’s solicitors and the DPP and the Police Service followed.
- (vi) In July 2020 the proceedings giving rise to this appeal were commenced.
- (vii) On 12 February 2021 the AGNI communicated a formal statutory direction to the Presiding Coroner requiring inquests to be conducted into the six deaths.

[4] This case, together with a related case (that of Patrick Frizzell), was heard by McFarland J on 13 April 2021. On 21 May 2021 judgments were delivered in both cases. In the present case leave to apply for judicial review was refused vis-à-vis the DPP. While leave was granted in respect of the Police Service that has become academic in light of the recent decision of the Supreme Court in *Re McQuillan and Others* [2021] UKSC 55. The appellant has discontinued his case against the Police Service in consequence.

### *“Legacy” Deaths in Northern Ireland*

[5] The “Troubles” in Northern Ireland raged for a period of almost 30 years. Intermittent terrorist crime has, sadly, continued subsequently. The phenomenon of unsolved deaths has been one of the most debated and controversial issues in this jurisdiction since the conclusion of the Belfast/Good Friday Agreement in 1998 (“the 1998 Agreement”) which represented a joint attempt by all communities to usher in a peaceful, post-conflict era. The now familiar appellation “legacy cases” is the convenient label applied to some 1,400 conflict related deaths in Northern Ireland, all unsolved.

[6] Successive Chief Constables have tried different initiatives to tackle this conundrum. This appeal is concerned with the specially devised police investigative mechanism established in 2015. This entailed the creation of the Legacy Investigation Branch (“LIB”) within the Police Service under the control of the Chief Constable.

[7] This court, in common with the Supreme Court in *McQuillan and Others*, has considered evidence relating to the composition, aims, activities and workload of the LIB. Some brief details will suffice for present purposes. The LIB is composed of 50 police officers and 17 administrative support staff. As of 18 February 2022 the workload of LIB consisted of 1,122 cases (ie incidents) involving the deaths of over 1,400 people. Within the last three years approximately 28 of these cases were completed. About two thirds of these “completions” resulted in the submission of files to the DPP for directions on prosecution and some prosecutions have followed. In the remaining third of cases nine “family reports” were issued: these are evidently cases in which no file is submitted to the DPP, presumably on account mainly of the paucity of evidence yielded by the investigation.

[8] Taking into account the large number of deaths being investigated, the vintage of many of the incidents and the limitations of its resources it is unsurprising that the LIB has devised a prioritisation mechanism. This is known as the Case Sequencing Model (the “CSM”). It is described in the evidence as –

“... an objective basis by which LIB determines the sequence in which it carries out its review and investigation functions in respect of deaths which are considered to be linked to the conflict in Northern Ireland prior to 1998.”

The prioritisation sequence is determined by the application of four criteria. These are (a) whether any “contemporary person of interest” is considered to be a potential suspect, (b) whether the case has “forensic potential”, (c) whether there has been any relevant previous conviction and (d) whether the case is “unadvanced” i.e. whether any investigative step has post-dated an original police investigation. The affidavit evidence explains further:

“These criteria are applied sequentially to the known facts of each case, with a yes or no answer provided for each criterion. Cases are then sequenced in accordance with a 16 point grid, depending upon the answers provided to each of the prioritisation factors.”

[9] The operation of the CSM is not static. Far from it. The affidavit evidence explains:

“The sequence of cases in accordance with the [CSM] is reviewed annually, with the result that the sequence of cases changes every year. This occurs as a result of updated information about cases and individuals or inaccuracies/omissions within the existing sequence which become known to LIB. A team of three officers works continuously to update the information which is used to calculate the sequence ....”

One can readily understand why, as the deponent further explains, a reassessment of any given case by reference to the first of the four governing criteria is most likely to lead to promotion in the sequencing order. The latter is not published.

[10] Cases in which the DPP has exercised its power under section 35(5) of the Justice Act form a discrete cohort of the LIB workload. The evidence includes a list of all such cases and some information about them. The deponent further explains:

“These investigations are progressed alongside the rest of the LIB case load and the case sequencing model does not apply ....”

One of the illustrations of such cases provided is the investigation of the MOD Military Reaction Force requested by the DPP.

### *The Impugned Decision*

[11] The impugned decision of the DPP is contained in a letter dated 14 February 2020. This letter is directed to the organisation Relatives for Justice, which, on behalf of relatives of the six deceased persons, had become involved in correspondence with the DPP. The letter was written by the Deputy Director on behalf of the Director. It conveyed the Director’s decision not to exercise his power under section 35(5). The impugned decision is couched in the following terms:

“The general purpose of the section 35(5) power is to require the Chief Constable to ascertain and provide to the Director information about any matter appearing to the Director to need investigation on the ground that it may involve an offence committed against the law of Northern Ireland. Enquiries have been made in respect of each of the cases referred to PPS, and police have confirmed that they currently sit within the work queue of the PSNI’s Legacy Investigation Branch. PSNI have, therefore, already decided that the cases ought to be subject to a review in order to determine whether further investigative opportunities are available. In these circumstances a section 35(5) request will not generate a

potential criminal investigation in circumstances where no such potential otherwise exists.

...

Furthermore, the Director does not consider it appropriate to issue a section 35(5) request in order that a particular case or cases might possibly receive some prioritisation ahead of other cases which are not the subject of such a request. The Chief Constable clearly has limited resources with which to undertake the vast number of legacy investigations that currently fall within his remit, all of which involve a death and are therefore of the utmost gravity. There are a range of factors that will necessarily feed into any prioritisation decisions that require to be taken and PSNI are best placed, and the appropriate authority, to take them."

The Deputy Director added that the consent of the AGNI had been sought – and obtained – to disclose the content of the aforementioned letter of 19 September 2018.

[12] The PAP correspondence exchange noted above followed. This disclosed some detail of the DPP's letter to the Chief Constable and the reply of the latter, generated by the aforementioned letter of the AGNI. It discloses further that the Chief Constable's response was in the following terms:

"The Chief Constable replied on the 11<sup>th</sup> April 2019. In respect of the New Lodge shootings. He said:

'... an investigation into the activities of the Military Reaction Force (MRF) is currently being actively progressed by LIB and that it relates to a series of shootings during the period 1971 – 1973.

[In respect of the Phase One shootings] circumstances do not appear to mirror the modus operandi of the other incidents within the MRF investigation, we are cognisant of the concerns raised by the families and so we are examining this case in some detail in order that we can be fully satisfied as to whether or not it should be included as part of the MRF investigation. I am of course willing, in due course, to share more information, including the rationale for any decisions that we made in this respect with you.

I can also confirm that the MOD accepted that soldiers shot Messrs Campbell, Maguire, Loughran and Hardy

during an exchange of gunfire in the New Lodge area, as part of a follow up security operation in response to the [the Phase One shootings]. The circumstances of these shootings appear to be distinct from the modus operandi of the other MRF related shootings insofar as the soldiers appeared to have been part of static points within the New Lodge, not part of a roving mobile patrol as in the MRF related incidents.

The MOD was contacted on 10<sup>th</sup> January 2019 in order to identify and trace Soldiers B, C, Q and S but, unfortunately, we have not been able to positively identify these soldiers. However, as the review into the deaths of Messrs Campbell, Maguire, Loughran and Hardy sits within the LIB caseload, the issue of identification of Soldiers B, C, Q and S will be revisited when a review is commenced. Due to the extent of the LIB caseload, I am not currently in a position to confirm a more precise timeframe for when this review will take place.”

The DPP’s letter continues:

“The PPS does have a discretion (not a duty) to compel the PSNI to provide information about any matter appearing to the Director to need investigation on the ground that it may involve an offence committed against the law of Northern Ireland or information necessary for the exercise of his statutory function. Examples of where it has been deemed appropriate to exercise this discretion include where additional offences have been revealed in the course of a criminal trial and require investigation, or where a suspected offence is identified during an inquest and reported to the DPP by a Coroner.

...

It is not a proper use of the DPP’s discretion to seek to compel the police to conduct a review of a case when they have already undertaken to do so. There is no utility in such a direction, nor is there any conceivable breach of Article 2 of the ECHR for not employing the discretion in those circumstances.

Further, as explained in the PPS’s letter dated 14<sup>th</sup> February 2020, it is not appropriate to attempt to use

s35(5) as a device to effect some influence on the prioritisation of cases in the PSNI's LIB caseload. Such decisions, which are based on a number of variables, are for the PSNI."

### *The Broader Statutory Framework*

[13] The Justice Act is one of a series of measures of primary legislation enacted in the wake of the 1998 Agreement. Foremost among these measures was the Northern Ireland Act 1998. Other comparable measures of primary legislation include the two Police Acts of 1998 and 2000. While in this appeal the focus is firmly on section 35(5)(a) of the Justice Act, it is necessary to situate and evaluate this discrete provision in its wider statutory context. This exercise entails consideration of the functions and duties of both the DPP and the Chief Constable/Police Service under the separate statutory regimes which apply to these agencies respectively.

[14] Part 2 of the Justice Act constitutes a discrete chapter with the title "Law Officers and Public Prosecution Service." Sections 22 - 28 establish, and regulate, the post of AGNI and the out-workings thereof. The remainder of Part 2, consisting of sections 29 - 42, is exclusively concerned with a reconfiguration of the regime for prosecutions in Northern Ireland. This was previously regulated by the Prosecution of Offences (NI) Order 1972 (the "1972 Order"), which was repealed in its entirety, by section 86 of and Schedule 13.

[15] Section 29 of the Justice Act established a new statutory entity, namely the Public Prosecution Service for Northern Ireland (the "PPS") under the governance of a DPP and a Deputy DPP. The ensuing provisions, broadly, consist of a series of "musts" and "mays" *i.e.* duties and discretions. It suffices to highlight, firstly, section 31(1) and (2):

"(1) The Director must take over the conduct of all criminal proceedings which are instituted in Northern Ireland on behalf of any police force (whether by a member of that force or any other person).

(2) The Director may institute, and have the conduct of, criminal proceedings in any other case where it appears appropriate for him to do so."

Next, section 31(5) provides some insight into the relationship between the DPP and the PSNI:

"The Director must give to police forces such advice as appears to him appropriate on matters relating to the prosecution of offences."



It will be noted that there is no mention here of investigation of offences.

[16] Section 35, wherein reposes the discrete provision lying at the heart of these proceedings, must be considered as a whole. Under the rubric "Information for Director" it provides:

"(1) Where a person is committed for trial, the clerk of the court to which he is committed must send, or cause to be sent, to the Director without delay –

- (a) a copy of every complaint, deposition, examination, statement and recognisance connected with the charge, and
- (b) a copy of all other documents in his custody which are connected with the charge or, if it is not reasonably practicable to copy any of them, particulars of the documents which it is not reasonably practicable to copy.

(2) Where a complaint has been made before a resident magistrate, a lay magistrate or a clerk of petty sessions, he must (whether or not proceedings have been taken on it) cause to be sent to the Director, on being requested by the Director to do so, copies of all documents in his custody which are connected with the complaint.

(3) Where the circumstances of any death which has been, or is being, investigated by a coroner appear to the coroner to disclose that an offence may have been committed against the law of Northern Ireland or the law of any other country or territory, the coroner must as soon as practicable send to the Director a written report of the circumstances.

(4) The Chief Constable of the Police Service of Northern Ireland must give to the Director information about offences alleged to have been committed against the law of Northern Ireland which are of any description specified by the Director.

(5) The Chief Constable of the Police Service of Northern Ireland must, at the request of the Director, ascertain and give to the Director –

- (a) information about any matter appearing to the Director to need investigation on the ground that it may involve an offence committed against the law of Northern Ireland, and
- (b) information appearing to the Director to be necessary for the exercise of his functions.”

Section 37 makes obligatory the publication of a “Code for Prosecutors.” By section 38, the DPP is bound by the equality and non-discrimination duties enshrined in section 75 of the Northern Ireland Act. Section 39 requires the DPP to publish an annual report.

[17] The DPP (as under the 1972 Order) operates under the superintendence of AGNI. Per section 40:

“(1) This section applies for so long as the Attorney General for England and Wales is Attorney General for Northern Ireland.

(2) The Director must exercise his functions under the superintendence of the Attorney General for Northern Ireland and is subject to any directions given by him; but a failure to comply with this subsection does not affect the validity of anything done by or on behalf of the Director.

(3) The Attorney General for Northern Ireland may remove the Director or Deputy Director from office on the ground of misbehaviour or inability to perform the functions of the office.”

Section 40 must be juxtaposed with section 42, which provides for the independence of the DPP:

“(1) The functions of the Director shall be exercised by him independently of any other person.

(2) The Director must consult the Attorney General for Northern Ireland and the Advocate General for Northern Ireland –

- (a) before issuing or making alterations to a code under section 37, and

- (b) before preparing his annual report.
- (3) The Attorney General for Northern Ireland and the Director may (from time to time) consult each other on any matter for which the Attorney General for Northern Ireland is accountable to the Assembly.
- (4) The Advocate General for Northern Ireland and the Director may (from time to time) consult each other on any matter for which the Advocate General for Northern Ireland is accountable to Parliament.
- (5) The Director must send a copy of each annual report prepared by him to –
  - (a) the Attorney General for Northern Ireland, and
  - (b) the Advocate General for Northern Ireland.
- (6) The Attorney General for Northern Ireland must lay before the Assembly a copy of each annual report received by him under subsection (5); and the Advocate General for Northern Ireland must lay before each House of Parliament a copy of each annual report so received by him.
- (7) If a part of an annual report is excluded from publication under section 39(4) –
  - (a) the same exclusion is to be made from the copies which are laid under subsection (6), and
  - (b) a statement that the part has been excluded is to be laid with those copies.”

The superintendence provision of section 40(1) and (2) must be considered in conjunction with the removal provisions in section 40(3) and section 43. In short, AGNI hires and fires – subject, of course, to the specific statutory constraints and requirements and relevant common law principles and any applicable human rights protections.

[18] Turning to the Chief Constable and PSNI, the key statutory provision is section 32 of the Police (NI) Act 2000 (the “2000 Act”). This provides:

“32. - (1) It shall be the general duty of police officers-

- (a) to protect life and property;
  - (b) to preserve order;
  - (c) to prevent the commission of offences;
  - (d) where an offence has been committed, to take measures to bring the offender to justice.
- (2) A police officer shall have all the powers and privileges of a constable throughout Northern Ireland and the adjacent United Kingdom waters.
- (3) In subsection (2)-
- (a) the reference to the powers and privileges of a constable is a reference to all the powers and privileges for the time being exercisable by a constable whether at common law or under any statutory provision,
  - (b) "United Kingdom waters" means the sea and other waters within the seaward limits of the territorial sea,

and that subsection, so far as it relates to the powers under any statutory provision, makes them exercisable throughout the adjacent United Kingdom waters whether or not the statutory provision applies to those waters apart from that subsection.

[19] On behalf of the appellant this court has been exhorted to take into account the Explanatory Notes accompanying the Justice Act. These make clear that the purpose of the Act is to implement the recommendations of the Criminal Justice Review Group in its report, "Review of the Criminal Justice System in Northern Ireland." This was a major piece of work. Part 2 of the statute is explained in these terms:

"43 This Part of the Act implements the recommendations in Chapter 4 of the Review, establishing a Public Prosecution Service for Northern Ireland and providing for the appointment of the Attorney General for Northern Ireland after the devolution of justice functions. After devolution, the Attorney General for England and Wales will hold the new post of Advocate General for Northern Ireland. This

Westminster figure will be responsible for matters relating to prosecutions that are not within the competence of the devolved administration, for example matters relating to national security and international relations.

*Section 31: Conduct of prosecutions*

60 This section sets out the core functions of the Prosecution Service. It will be the responsibility of the Prosecution Service to undertake all prosecutions for both indictable and summary offences committed in Northern Ireland that were previously the responsibility of the Director of Public Prosecutions for Northern Ireland or the police ...

*Section 35: Information for Director*

69 Subsection (5) requires the Chief Constable to send information to the Director at his request about criminal offences that may have been committed or any other information that the Director might need in order to carry out his functions: this reflects provisions currently in force in Article 6(3) of the Prosecution of Offences (Northern Ireland) Order 1972. This could be used, for example, where the Director had gained information that indicated a criminal offence might have been committed. He could ensure that it had been thoroughly investigated and request any associated papers in order to ensure that a decision could be made by the Prosecution Service as to whether any prosecution should be instituted. **These provisions do not, however, constitute a power for the Director to supervise the conduct of investigations by the police."**

[emphasis added]

[20] Generally, the modern Explanatory Note dates from certain Parliamentary changes of practice introduced in 1997, following a review by the relevant committees of the two Parliamentary chambers. This was updated following a further review in 2015. In their self-describing terms they routinely contain what might be described as a form of disclaimer, stating that their purpose is to assist those reading the Bill, to help inform debate thereon and emphasising that they do not form part of the Bill and have not been endorsed by Parliament. Consistent with these considerations, it is stated in Craies on Legislation (12<sup>th</sup> Ed) at paragraph 9.5.5:

“The result is that Explanatory Notes cannot be regarded as an authoritative statement of Parliament’s intention in enacting a piece of legislation. But they can be regarded as an authoritative statement of the Government’s intention in proposing legislation.”

In Chapter 27 of the same work, the author returns to this subject in some further detail.

### *Section 35(5) Construed*

[21] Authoritative guiding principle is not lacking. In *R v Secretary of State for Health, ex parte Quintavalle (on behalf of Pro-Life Alliance)* [2003] UKHL 13 Lord Bingham of Cornhill stated at para [8]:

“The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.”

More recently, in *R (on the application of O & Others) v Secretary of State for the Home Department* [2022] UKSC 3 the Supreme Court stated at para [29]:

“The courts in conducting statutory interpretation are “seeking the meaning of the words which Parliament used”: *Black-Clawson International Ltd v Papierwerke*

*Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated: “Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.” (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396).

Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397:

“Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.”

[22] The starting point is that the DPP and the Chief Constable/Police Service are creations of statute. Thus, any search for the legal duties and functions of either must be focused on the relevant statutory provisions. In passing, while certain police powers and duties may continue to repose in the common law, this issue does not arise in the present case.

[23] It seems uncontroversial to suggest that the DPP and the Chief Constable/Police Service are the two most important criminal justice agencies in Northern Ireland. Having regard to what they are obliged by statute to undertake, the duties, functions and discretionary powers applicable to each, while different, are unmistakably inter-related. In particular, there is an inextricable nexus between section 32(1)(d) of the 2000 Act and Part 2 of the Justice Act. The differing spheres of operation of the two agencies is exposed by the simple exercise of juxtaposing section 32(1)(d) of the 2000 Act with section 31(1) – (2) and (4) of the Justice Act. In a sentence, the Chief Constable/Police Service have the duty of investigating suspected offences while, in contrast, the main statutory duties, functions and discretionary powers of the DPP belong to the realm of prosecutorial decisions and the conduct of prosecutions.

[24] Accordingly, while not overlooking the other specific duties imposed upon the Chief Constable/Police Service, in the matter of suspected offending and bringing offenders to justice their fundamental duty is one of investigation. This agency has no function in the matter of initiating or conducting prosecutions. One of the main effects of the reforms introduced by the Justice Act was to invest this function exclusively in the DPP. Thus, upon the completion of a police investigation into suspected criminality in any given case, a report must be transmitted to the DPP to enable prosecutorial decision making to be undertaken. The investigative/prosecutorial dichotomy is clear.

[25] While the DPP and the Chief Constable/Police Service are independent statutory agencies performing their respective statutory duties, functions and discretionary powers independently of each other, there is nonetheless a certain hierarchical element in their relationship. This flows from certain provisions of the Justice Act. First, by section 31(1), the Chief Constable/Police Service were obliged to yield to the transfer of all prosecutions to the DPP: there was no element of choice. Second, by section 31(5), the DPP must provide the Chief Constable/Police Service with such advice as appears to him appropriate on “matters relating to the prosecution of offences”. This notably opened textured language could conceivably encompass everything from best practice in the conduct of police interviews through to the preparation and compilation of police reports to the DPP and the interaction of police officers with the DPP thereafter at the various pre-trial staging posts, throughout a trial and, indeed, subsequently. Third, by virtue of Part 2 of the Justice Act in conjunction with section 32 of the 2000 Act, the Chief Constable/Police Service are obliged to accept and, indeed, facilitate the exclusive role of the DPP in the realm of prosecutorial decisions and prosecutions.

[26] The next feature of the relationship between the DPP and the Chief Constable/Police Service is found in section 35(5) of the Justice Act. This provision expresses most emphatically the investigative/prosecutorial dichotomy already noted. In short, the Chief Constable/Police Service must equip the DPP with all information amassed by them in the course of any given investigation into suspected crime to enable prosecutorial decision making to be undertaken. Notably, it is the DPP who (in the statutory language) “specifies” the composition of the list of offences to which this absolute police duty applies.

[27] Via the foregoing route and bearing in mind the context which it establishes one arrives at the provision lying at the heart of these proceedings, namely section 35(5) (a) of the Justice Act. As already noted, the second part of this subsection – (b) – does not arise in these proceedings. Section 35(5) extends the theme, already identifiable, of the Chief Constable/Police Service being obliged to comply with certain requirements of the DPP. In this instance, the obligation begins with a requirement to “ascertain and give ...” This clearly denotes the two fold obligation of investigating and reporting the fruits of the investigation to the DPP.



[28] The request which the DPP is empowered to make of the Chief Constable/Police Service must relate to "... any matter appearing to the Director **to need investigation** on the ground that it may involve an offence committed against the law of Northern Ireland ..." [emphasis added]. I consider that this provision contemplates the phenomenon, readily belonging to the real world, that the DPP may come into possession of material - of whatever kind, ranging from bare allegations to physical evidence - raising the question of whether an offence has been committed. Such material could emanate from, for example, a public representative, a concerned citizen, a person claiming to be a victim of crime, a criminal justice agency or any of the non-statutory agencies who are active in the criminal justice sphere. If this material contains indications of the possible commission of an offence, the DPP must decide whether it needs investigation. This would entail the exercise of a discretion of self-evidently extensive scope.

[29] The broad language of section 35(5)(a) would clearly encompass what the court understands to be a typical illustration of the exercise of this power namely the transmission of specific directions from the DPP to the Chief Constable/Police Service to carry out further specified investigations following the receipt and consideration of a police investigation file. This requires no elaboration.

[30] Developing the analysis, we consider the following to be clear. The legislature, in enacting section 35(5)(a), has made provision for the possibility that the Chief Constable/Police Service, for whatever reason, may not have identified a particular occurrence or chain of events as requiring the investigation of possible offending or may have consciously decided that an investigation is not indicated. While there might possibly be other scenarios, these two, realistically, are the most likely that were in the contemplation of the legislature. Parliament has provided that in such circumstances a further layer of oversight serving to promote the public interest in the identification, prosecution and conviction of offenders is appropriate. The good sense of a provision of this kind is beyond dispute. Furthermore, it not only promotes the aforementioned public interest but also enhances the accountability of the Chief Constable/Police Service and fortifies the protection and wellbeing of all members of society.

[31] Giving effect to the foregoing analysis, we consider it clear from the statutory context as a whole that section 35(5)(a) is, in addition to the "further directions" scenario noted above, directed to situations where the Chief Constable/Police Service have no awareness or knowledge of the possible commission of an offence or, alternatively, have made a conscious decision not to initiate or continue an investigation which the DPP considers questionable. All three scenarios readily fall within the statutory language of "any matter appearing to the Director to need investigation ...". The question which arises is: does this statutory power extend to the DPP directing the Chief Constable/Police Service to prioritise a particular investigation?

[32] The statutory language does not expressly accommodate this possibility. However, the whole of the statutory regime and its full context, together with the separate statutory regime regulating the Chief Constable/Police Service, must be considered. Approached in this way, the feature of the statutory arrangements which stands out is that highlighted above, namely the hierarchical nature of the relationship. Furthermore, section 35(5)(a) must be construed in a manner which furthers the legislative intention already identified namely the public interest in the investigation, prosecution and identification of offenders. The Chief Constable/Police Service is of course an independent public authority: but its independence is not absolute, given the assessment in paras [22] – [31] above. This analysis impels to supplying a positive answer to the question posed in para [31] above.

[33] However, we consider such a power to be of demonstrably limited scope. In our estimation the legislature must have intended that, in general, the Chief Constable/Police Service would exercise autonomous control over its *modus operandi*, its budgetary and policy priorities and allocations, its formulation of criteria in identifying the most pressing cases in its workload and its design of a mechanism for the periodic review of the application of such criteria, all in a context where the particular case under scrutiny has been identified as worthy of investigation, further investigation, review or re-investigation. However, we consider that limited DPP intrusion and superintendence were also contemplated, given our analysis above.

[34] Our second main conclusion is the following. We consider it clear that section 35(5)(a) was intended by the legislature to operate in a highly restricted way in a case already identified by the Chief Constable/Police Service as requiring investigation, further investigation, review or re-investigation as the case may be and awaiting completion of an investigation report to the DPP, absent some exceptional circumstance. Thus, this aspect of the DPP's discretionary power is of decidedly narrow compass. The effect of this analysis is that it will rarely be appropriate for the DPP to exercise this power in a case of the present kind. However, we decline to exclude the possibility that such a case might materialise. We consider that this approach is harmonious with our assessment of the relevant statutory provisions above, in particular our analysis of the statutory relationship between the two agencies.

[35] We have not overlooked the principle enunciated by the House of Lords in its unanimous decision in *Hill v Chief Constable of West Yorkshire* [1989] AC 53, at 59E/F (per Lord Keith):

**“By common law** police officers owe to the general public a duty to enforce the criminal law ...

But ... a chief officer of police has a wide discretion as to the manner in which the duty is discharged. It is for him

to decide how available resources should be deployed, whether particular lines of inquiry should or should not be followed and even whether or not certain crimes be prosecuted. It is only if his decision upon such matters is such as no reasonable chief officer of police would arrive at that someone with an interest to do so may be in a position to have recourse to judicial review.”  
[Emphasis added]

Having regard to the specific statutory context to which this judicial review challenge belongs we consider that this principle applies subject to our conclusions expressed above.

[36] Returning to the present case, in response to this court’s invitation to formulate his core submission, senior counsel for the appellant contended: “The DPP should look at the circumstances of this case and conclude that this is a case for priority police investigation.” We consider that this submission founders on (a) the legal rock of the *Wednesbury* principle, (b) the court’s construction of section 35(5)(a) and, finally, (c) the factual rock of no evidence whatsoever pertaining to either the material facts and features of the other 1000 plus cases or the evaluative reasoning and assessment of the Chief Constable/PSNI relating thereto in the application of the CSM, as reviewed periodically. In short, this case has no feature which would warrant the exercise by the DPP of the relevant statutory power, as construed by the court, in the manner advocated by the appellant.

[37] While, ultimately, counsel attempted to seek refuge in the *Padfield* principle this did not arise until the stage of replying to the submissions of respondent’s counsel – thus constituting a new, previously unheralded argument – and in any event must fail on the basis of a failure to identify any specific policy or object of the Justice Act frustrated by the impugned decision.

[38] The central contention advanced on behalf of the appellant is that the impugned decision of the DPP is vitiated on the ground that it was based on a misconstruction of section 35(5)(a) of the Justice Act. While that decision adopted a construction narrower than that espoused by the court, it is nonetheless consonant therewith. The impugned decision is not vitiated by error of law in consequence.

### ***Conclusion***

[39] At first instance McFarland J held that the appellant’s case did not overcome the well-established threshold of an arguable case fit for further investigation by the court, refusing leave to apply for judicial review accordingly. This court concurs with the judge’s decision. The appeal is, therefore, dismissed.

[40] Finally, in our determination of the appeal we have derived no particular assistance from the Explanatory Note to the Justice Act. The relevant passages,

reproduced above, are essentially neutral regarding the statutory construction exercise which the court has undertaken.