OPERATION KENOVA – SUMMARY OF DECISIONS NOT TO PROSECUTE

PART A – GENERAL MATTERS

1. Introduction

1.1 The Public Prosecution Service (PPS) recognises the significant level of public interest in the Operation Kenova investigations and in the decisions as to prosecution in relation to individuals who have been reported by the Kenova investigation team. The PPS considers that, in the interests of transparency and the maintenance of public confidence, it is important that it provides a public explanation of the reasons for the decisions not to prosecute a number of individuals reported for offences connected with the Kenova investigation. This document makes publicly available a summary of no prosecution decisions that have now issued, and the reasons for them.

1.2 A separate public statement issued on 29th October 2020 in respect of decisions not to prosecute four persons reported to the PPS by Operation Kenova in October 2018. Those decisions were in connection with an allegation that an individual committed perjury in the course of making affidavits sworn between 2003 and 2006.

1.3 This statement relates to decisions taken in respect of 15 individuals across 5 files submitted by Operation Kenova. One of these files involved a joint investigation by Operation Kenova and the Police Ombudsman's Office. Decisions in relation to 10 further files remain outstanding. It is anticipated that those decisions will issue in early 2024.

1.4 The PPS had previously intended to issue all decisions (apart from those issued on 29 October 2020) at the same time. This was because there was an individual who had been reported as a suspect on all but one of the files and it was considered that the strength of the evidence (as well as the nature of any obligations to disclose non-evidential material) would be best analysed once all the relevant files had been considered. However, that individual has since died, and the decisions can now be issued on the basis of a two-staged approach. There are a number of common issues which arise in the outstanding files in relation to which the opinion of independent Senior Counsel is awaited. The opinion of Senior Counsel will assist with the decision-making in those cases and that is why decisions in those cases cannot issue at this time.

1.5 The fact that the individual referred to above has died means that no decisions as to prosecution have, or will, issue in respect of their alleged criminality. This is in keeping with the approach of the PPS in all cases in which a reported suspect dies before a decision issues and is a generally recognised prosecutorial practice. Three further suspects (two civilians and one police officer) reported on the other files covered by this statement have also since died and no decisions will therefore issue in respect of them either.

1.6 We have taken the approach of anonymising both the victims and the witnesses to whom we refer in this statement and have provided limited detail in relation to the factual background to each of the incidents. This victim-centred approach was taken having received advice from Operation Kenova who had themselves consulted with the families involved. It is intended to minimise any potential re-traumatisation of the victims and families who have suffered so much as a result of these crimes. Personalised additional detail is being provided in private communications to the victims and families, each of whom will also be offered a meeting to explain the decision in their case.

2. Background to Operation Kenova and File Submissions

2.1 Operation Kenova commenced its work in 2016. The full terms of reference under which its investigations were conducted are available here. The basis for the initial terms of reference stemmed from a series of referrals issued by former Directors of Public Prosecutions to the Chief Constable under Section 35(5) of the Justice (Northern Ireland) Act 2002. The initial investigative remit was to establish:

- Whether there is evidence of the commission of criminal offences by the alleged agent known as Stakeknife, including but not limited to, murders, attempted murders or unlawful imprisonments.

- Whether there is evidence of criminal offences having been committed by members of the British Army, the Security Services or other Government agencies, in respect of the cases connected to the alleged agent known as Stakeknife. Regard in this context will be given to the Article 2 (ECHR) rights of victims and the associated responsibilities of the British Army, the Security Services, or other Government agencies.

- Whether there is evidence of criminal offences having been committed by any other individual, in respect of the cases connected to the alleged agent.

- Whether there is evidence of the commission of criminal offences by any persons in respect of allegations of perjury connected to the alleged agent.

2.2 In February and June 2020 Operation Kenova submitted files to the PPS in respect of a number of separate incidents that occurred between 1981 and 1990. Additional files were submitted between May and November 2021 and again in February 2022. These extended the date range of incidents under consideration to between 1979 and 1994. The investigations were extensive and complex, and it is estimated that the files submitted to the PPS comprised over 60,000 pages.

2.3 The alleged offending reported included murder, conspiracy to murder, false imprisonment, conspiracy to pervert the course of justice and misconduct in public office.

2.4 A total of 28 suspects were reported on the files referred to at paragraph 2.2 above. 14 are civilians alleged to have been members of the Provisional Irish Republican Army (PIRA). 12 are retired soldiers who served in the British Army at the relevant times. Two are retired police officers who were members of the Royal Ulster Constabulary (RUC) at the relevant time. As explained above, three civilians (including the individual referred to at paragraph 1.4) and one retired police officer have died since the files were submitted to the PPS and therefore decisions are required in relation to 24 suspects.

2.5 In respect of the civilians alleged to have been members of PIRA who have been reported, the Kenova investigation related to their alleged role in the false imprisonment and murder of, or conspiracy to murder, individuals whom PIRA accused of being security force informants. Some of those reported are alleged to have had roles within PIRA's "Internal Security Unit" which conducted internal security enquiries including investigations of suspected informants. Regarding the retired police officers reported, the Kenova investigation related to their role in the investigation of an incident of false imprisonment and an allegation that they conspired to pervert the course of justice in respect of that investigation. Regarding the former soldiers reported, the Kenova investigation related to their role within, or advising, the Force Research Unit (FRU), a unit within the British Army located in Northern Ireland which recruited and managed agents, and more specifically their role in the handling and management of the agent known by the codename Stakeknife.

3. <u>The Approach to Decision-Making</u>

3.1 Having reviewed the available evidence and information as submitted by Operation Kenova, and having considered detailed written advice from Senior Counsel, Senior Prosecutors have taken 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.

3.2 In assessing whether there is a reasonable prospect of conviction, only evidence which is available and admissible can be taken into account. There are legal rules concerning whether particular types of evidence are admissible in court, some of which are described in more detail below. If there is no reasonable prospect that a court will admit certain evidence, then it cannot be weighed in determining whether there is a reasonable prospect of a conviction. The PPS must also undertake a considered assessment of the provenance, credibility, and reliability of all available evidence. Where there are substantial concerns in relation to the credibility or reliability of evidence, the Evidential Test may not be capable of being met. The evidence available must be sufficient to provide a reasonable prospect of reaching the high standard of proof required in a criminal trial, namely “beyond reasonable doubt”.

3.3 The no prosecution decisions outlined in this document were all taken on the basis that the Evidential Test for Prosecution was not met as the available evidence did not provide a reasonable prospect of conviction. In these circumstances the Public Interest Test did not fall to be applied.

4. Overarching Issue – Admissibility of Intelligence Records

The General Challenges

4.1 A significant body of material considered by prosecutors as part of the Operation Kenova files comprised intelligence records. Intelligence records are generally not considered to be evidence that can be used in any prosecution for three main reasons.

4.2 First, those who provide intelligence (and do not later become prosecution witnesses) do so on the basis that their assistance will not be revealed. The identification of someone who has provided intelligence in relation to the activities of proscribed organisations will in most, if not all, cases create an obvious risk to their life. If it were perceived by the public that the authorities were prepared to breach the obvious confidentiality which applies to the provision of information in such circumstances, this would also have the potential to severely impair intelligence gathering activities in the future and to damage national security.

4.3 Second, intelligence is not generally intended to be deployed as evidence in criminal proceedings and it is not therefore recorded and processed with the rigours and standards of a criminal trial in mind. Most evidence adduced at a criminal trial is in the form of live witness evidence. This allows the defence to test the evidence through questioning of the witness and allows the jury (or Judge sitting alone) to observe this process and make an assessment of the truthfulness and reliability of the evidence. Those who provide intelligence (sometimes referred to as “informants” or “sources”) have not provided the information for use evidentially in the form of a witness statement and are generally not prepared to give evidence in a criminal trial. Consequently, the prosecution would be required to rely upon a documentary record of what they have said (i.e. an intelligence record) which does not contain any of the safeguards that apply to formal witness statements, e.g. they have not been read, checked and signed by the source and there is no declaration as to the truth of what is stated therein.

4.4 Third, there are often significant hearsay issues in relation to intelligence material. The information that the source has provided may not relate to events that they directly observed themselves. It will often be something that they have been told by a second person about what happened. That second person may not have been a direct participant in the relevant events and may have received the information from a third person. An attempt to use intelligence in criminal proceedings can, in this way, give rise to issues of "multiple hearsay". The difficulties with such hearsay evidence are explained further below.

The Challenges in these Cases

4.5 An important and recurring feature of the cases dealt with in this statement is that the original record of what the source told the authorities is *not* available. What is available differs from case to case, but it is often several stages removed from the original record. In other words, the *available* intelligence may have been recorded in a report, but that report may have been derived from an earlier report which itself was based upon an original record, neither of which are available. Therefore, the available document may itself be a multiple hearsay record of what the source said to the authorities; and, as explained above, the information that the source possessed and told the authorities may already have been a multiple hearsay account of what was alleged to have occurred. The available record may also contain a "sanitised" form of the information originally recorded that is intended to protect the identity of the source. This process of sanitisation gives rise to real risks that important details may have been omitted, or the true meaning of the original account may have been distorted. It is often difficult to identify from an intelligence report exactly what it is that the source is alleged to have said, as opposed to what information may have been included by the author of the report as additional context that is based upon information obtained from other unidentified sources.

4.6 In light of these difficulties the intelligence records were generally treated in the normal way by the Operation Kenova investigators. They informed the investigation and guided some of the questioning of suspects, but they were not revealed, or deployed openly, against civilian suspects in the course of the

after-caution interviews. Rather, the approach taken was to include them on the files submitted and PPS were asked to consider whether they could potentially be deployed in evidence to allow a prosecution to be brought where otherwise it may not have been possible. If an intelligence record(s) was potentially capable of being deployed evidentially, and if it could allow the Test for Prosecution to be met in circumstances where it otherwise would not, then Operation Kenova would have: (a) undertaken more detailed investigations as to whether it could be deployed without causing a risk to the life or personal safety of the source or another; and (b) depending upon the outcome of stage (a), considered a further after caution interview so that the suspect had an opportunity to comment upon the evidence that was now being relied upon.

4.7 In respect of the cases covered by this public statement, the PPS was asked to consider various intelligence records as part of the materials submitted by Operation Kenova. Having carefully reviewed the records, the circumstances in which they were created, the nature of any supporting evidence and the legal considerations that would apply to applications to adduce this type of evidence, it was assessed that there was no reasonable prospect of the intelligence being admitted as evidence in court. This was due to the types of hearsay issue that have been outlined above and are described in further detail below. Furthermore, even if the hearsay records were admitted the weight that a Court would be likely to attach to them would be very limited. In each of the cases covered by this statement, therefore, the available intelligence records did not advance the prospects of conviction.

4.8 In this document we have taken the approach of indicating, in general terms, those cases and circumstances in which we were asked to consider intelligence records. However, it would not be practicable to describe, within this document, the legal analysis in relation to the admissibility of each intelligence record that was undertaken. It is also not considered appropriate to outline in detail the content of the intelligence records in circumstances where there is a risk of inadvertent identification of sources and where the records have not been put to the relevant suspects for them to have had an opportunity to respond to them. However, we provide below some additional information in relation to the legal

framework that governs the admissibility of hearsay evidence so that some of the challenges can be more fully understood.

5. Hearsay Evidence and the Law

5.1 Hearsay evidence is evidence of a statement made "out of court", i.e. not in the witness box, where that statement is relied upon to prove the truth of the matter stated. The key statutory provisions governing the admission of hearsay evidence are found in the Criminal Justice (Evidence) (Northern Ireland) Order 2004.

5.2 The relevant law is relatively detailed and technical. However, some of the key considerations in relation to the admissibility of hearsay evidence in the form of intelligence records may be summarised as follows.

5.3 First, where the identity of the maker of the relevant statement cannot be ascertained, there is very limited scope for it to be admitted in criminal proceedings. This was the position in respect of some of the intelligence documents considered in these cases where the identity of the source who reported information to the authorities had not been ascertained. There were also difficulties in proving who within FRU or the RUC created the documents which were available, or the precursor documents from which the available document was created (but which were themselves no longer available).

5.4 Second, there is provision for the admission of "business documents" as hearsay evidence, but the relevant provisions require that the person who supplied the information in the statement had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with. As indicated above, in some cases the information recorded in an intelligence document was, or may not, have been known to the source directly. Furthermore, a Court can rule such documents inadmissible if satisfied that the statement's reliability as evidence is doubtful.

5.5 Third, there are other exclusionary powers vested in the Court that are based upon the probative value of hearsay evidence. A Court can direct a jury to acquit if the case against a defendant is based wholly or partly on hearsay evidence and the evidence provided by the hearsay statement is so unconvincing that, considering its importance to the case against the defendant, a conviction for the offence would be unsafe. In a number of the cases under consideration the intelligence records would have comprised a key part of the prosecution case, due to the absence of other compelling evidence. There were also issues in relation to the reliability of the information recorded in them that were extremely difficult to assess at this remove.

5.6 There are additional safeguards that apply to multiple hearsay meaning that, subject to certain exceptions, it will only be admissible if the Court is satisfied that the value of the evidence in question, taking account of how reliable the statements appear to be, is so high that the interests of justice require the later statement to be admissible for that purpose. It was invariably the case that the intelligence records considered in these cases involved multiple hearsay.

5.7 There is also a general discretion to exclude evidence where it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

5.8 Fourth, whilst each case requires a fact-specific analysis, relevant considerations in relation to admissibility are likely to include:

(i) If the hearsay evidence is the sole or decisive evidence, particularly careful scrutiny is required to determine whether its admission would be fair in all the circumstances.

(ii) The circumstances in which the statement was made. In the current cases there was general evidence in relation to the processes involved in the creation of intelligence documents, but an absence of evidence in relation to the creation of the specific documents that were relevant in each of the individual cases. This was a factor that tended against admission.

(iii) The reliability of the maker of the statement. In many cases the source of information was someone who themselves was involved in IRA activity and whose credibility would have been in issue.

(iv) How reliable the evidence as to the making of the statement appears to be. There were some cases where there was a firm basis to suspect that an intelligence record may have been manipulated and this had the potential to give rise to concerns as to the reliability of other records, particularly in circumstances where there was no live witness who could speak to the creation of the record to be potentially relied upon.

(v) Whether the evidence is multiple hearsay, in which case the threshold for admission is generally even higher.

(vi) Whether the maker of the statement was potentially a co-accused. The Courts are wary of admitting a hearsay accusation by one suspect against another due to the possibility of a motive to blame or shift responsibility to another that cannot be explored through cross-examination of the witness. In some cases the intelligence was provided by a source who either was, or may have been, a participant in the events that were the subject of potential charges.

6. Bad Character Evidence

6.1 For the purposes of criminal proceedings, the law defines "bad character" as evidence of, or of a disposition towards, misconduct. "Misconduct" in this context includes both evidence of the commission of offences or evidence of other reprehensible conduct and the law excludes from this definition evidence which has to do with the offence with which the individual is being prosecuted. The relevant law is set out in Part II of the Criminal Justice (Evidence) (Northern Ireland) Order 2004. The type of evidence most commonly admitted in criminal proceedings under these provisions is evidence of criminal convictions.

6.2 Evidence of bad character can only be admitted against a defendant in criminal proceedings if it falls within one of seven “gateways” set out in the legislation. One of these gateways relates to evidence which is relevant to an important matter in issue between the defendant and the prosecution and can include evidence which is relevant to the issue whether the defendant has the propensity to commit offences of the kind with which he is charged. In deciding whether to admit such evidence a court must consider whether evidence of the defendant having such a propensity nevertheless makes it no more likely that he is guilty of the offence. Where a defendant applies to exclude such evidence in criminal proceedings, a court must not admit it if it appears to the court that the evidence would have such an adverse effect on the fairness of the proceedings that it ought not to admit it. In general, the Court will refuse to admit evidence of bad character if it appears that the prosecution is seeking to use it to bolster a weak case.

6.3 In the cases under consideration, a number of suspects had previous convictions. These were considered as potential bad character evidence. However, the very nature of the allegations in these cases was such that the potential pool of suspects were members, or associates of members, of the PIRA. As such, the fact that a particular suspect had a conviction indicative of involvement in PIRA activity made it no more likely that they committed the alleged offence than some other PIRA member or associate. Some further explanation of the limitations of the evidence of bad character in these particular cases is provided below.

PART B – DECISIONS

7. Murder of Victim A – 1981

7.1 **Victim A** was last seen alive on a date in 1981 by a family member (hereafter referred to as "the witness"). His body was found a significant period of time later and the cause of death was subsequently established to be a bullet wound to the head.

7.2 The witness provided a statement to police following the disappearance in which they stated that Victim A had last been seen alive when he left a house in the company of two acquaintances with whom he had been socialising the previous evening. One of these acquaintances was **Suspect 1**[1]. Two of the other individuals whom she named as present at the social gathering the previous evening were **Suspect 2** and **Suspect 3**.

7.3 Over the days and weeks that followed, the witness became aware that a number of Victim A's acquaintances, including the three suspects in this case, had all left the area in which they lived at around the same time. However, over a period of months all these acquaintances had returned. The witness did not provide a further statement to Operation Kenova and was unwilling to cooperate with the investigation.

7.4 There was a second potential witness who had provided an account to police in 1982. The account from this individual was contained in an after-caution interview at a time when they were being treated as a suspect, and they had never provided a witness statement. They also described the social gathering referred to above and stated that Victim A left the house the following day with Suspect 1 (and the same second acquaintance who had been named by the witness). They claimed to be aware, through information provided by another person, that Suspect 1 and Victim A had been drinking together at licenced

[1] The suspects in each case are referred to in this document as Suspect 1, Suspect 2, etc. The use of similar ciphers across different cases does not indicate that the same individuals are involved. In other words, the cipher "Suspect 1" refers to different individuals when used in respect of different incidents.

premises later that same day. They too declined to engage with the Operation Kenova Investigation Team.

7.5 There was relevant intelligence material but no further admissible evidence in this case. Some of the intelligence material was undermining of the case against the suspects.

7.6 Suspect 1 had terrorist convictions relating to activity in 1983 and Suspect 2 had convictions for firearms offences in 1974. These convictions were considered as potential evidence of bad character, but the suspects were acquaintances of Victim A and it was not considered that the convictions were probative of the issue of whether they had played any role in his abduction and murder.

7.7 Each of the three suspects were interviewed but provided no comment in response to the questions asked by police.

7.8 In circumstances where the witness was not cooperating and unwilling to give evidence, their 1981 statement to police was hearsay and unlikely to be admitted. The after-caution interview of the second individual who also declined to engage with Operation Kenova was hearsay and unlikely to be admitted. Even if either of these accounts were admitted, they did no more than place Victim A in the company of Suspect 1, an acquaintance of his, on the date that he was last seen. Neither account placed Suspect 2 or Suspect 3 in the company of Victim A immediately prior to his disappearance and did no more than establish that these suspects, who were also acquaintances of Victim A, had been in his company on the previous evening. There was evidence on the file that provided a context for Victim A and the suspects leaving the local area which was inconsistent with the allegation of the suspects' involvement in a conspiracy to kidnap and murder Victim A. There was no evidence to establish the date on which Victim A was abducted or killed and, in these circumstances, the available evidence provided no reasonable prospect of conviction.

8. Murder of Victim B – 1987

8.1 **Victim B** was last seen alive by a witness on a date in 1987. His body was discovered three days later. A post-mortem examination showed that the victim had suffered two bullet wounds to the head which caused rapid death.

8.2 The witness provided a statement to the police as part of the initial investigation. They provided a further statement to the Historical Enquiries Team ("the HET") in December 2007 and another to Operation Kenova in July 2017. In their statement to Operation Kenova, they referred to **Suspect 1** as being in the company of Victim B when they last saw him. Suspect 1's name had been provided by the witness to the HET also, although it was not included in the witness statement recorded at that time and there is no record of the witness providing the name to police in 1987.

8.3 About two weeks after Victim B was murdered, the family received a letter from Victim B. Operation Kenova confirmed that the letter had been posted from Dundalk. The envelope containing the letter was subjected to forensic examination. A mixed DNA profile was obtained from the inner gummed flap of the envelope and an analysis of this profile provided evidence that the majority of the DNA came from a member of Victim B's family. There was extremely strong support for the proposition that a partial DNA profile within the mixture could be attributed to **Suspect 2**. There was also a possible minor contribution from one or more other persons.

8.4 DNA was obtained from the stamp attached to the envelope, but this belonged to an unidentified individual, i.e. someone other than Suspect 2.

8.5 Suspect 1 had terrorist convictions from 1973. These were considered as potential evidence of bad character but had little probative value in the circumstances of this case. Victim B would have associated with members of the IRA, including Suspect 1 whom he knew through work. The 1973 convictions were not considered probative of whether the association between Suspect 1 and Victim B at the time of the sighting in 1987 was linked to his subsequent abduction and murder.

8.6 Suspect 2 had convictions relating to an armed robbery in 1987. However, these too had little probative value as they provided no assistance in proving the circumstances of any contact with the envelope referred to above, or in otherwise linking him to these offences.

8.7 There was also intelligence relating to an alleged role on the part of Suspect 1 but no further admissible evidence in this case.

8.8 Suspects 1 and 2 were interviewed by Operation Kenova but neither suspect answered any questions. In prepared statements both denied involvement in offences relating to Victim B's murder.

8.9 In relation to Suspect 1, the key strand of evidence was the sighting of Suspect 1 in the company of Victim B three days before his body was discovered. Suspect 1 and Victim B were known to each other through work and the fact that they were in each other's company was not considered to be in any way unusual by the witness. There was no evidence to prove the sequence of events from the time of the sighting to Victim B's subsequent abduction and murder. The available evidence was insufficient to prove that Suspect 1 had any role in the murder and the Test for Prosecution was not met.

8.10 The key evidence against Suspect 2 was the DNA evidence referred to above. Suspect 2 was believed to reside in Dundalk. The DNA evidence was supportive of contact by Suspect 2 with the gummed flap of the envelope although issues of secondary or tertiary transfer would arise, i.e. whether Suspect 2's DNA was transferred directly to the envelope as a result of him touching it; or whether it was possible that another person had come into contact with tiny amounts of Suspect 2's DNA and thereafter transferred Suspect 2's DNA on to the envelope. Furthermore, there was no evidence to date any contact with the envelope other than the obvious inference that it occurred on some date before the letter was sent. The letter was received approximately two weeks after the murder. There was no other evidence capable of establishing the circumstances in which contact with the envelope may have taken place, e.g. whether it was at a time when the letter was being placed inside it, or on some earlier occasion.

8.11 In all the circumstances it was considered that the available evidence was insufficient to prove that Suspect 2 played any role in the abduction and murder, or that he had committed any other criminal offence. In these circumstances there was no reasonable prospect of conviction, and the Test for Prosecution was not met.

9. Murder of Victim C – 1993

9.1 On a date in 1993 **Victim C's** remains were recovered from a remote rural area. A phone call had been made the previous day identifying where the body was located. A post-mortem examination showed that the victim had suffered a single bullet wound to the head which caused rapid death. A soft tissue injury to the neck had been caused by a second bullet.

9.2 A subsequent inquest found that the date of death had been the day before the body was discovered.

9.3 Victim C was last seen alive approximately 11 days before the date of death by a family member (hereafter referred to as "the witness") in the company of a person, **Suspect 1**, known to the witness and to Victim C.

9.4 The witness made a number of statements to police including one that referred to the sighting above of Victim C with Suspect 1. However, the witness declined to sign the statement and was unwilling to provide evidence. The witness believed that Suspect 1 took Victim C away, on false pretences, to be debriefed by the PIRA and shot.

9.5 In May 2011 the witness signed the statement referred to above, but before doing so the identities of the persons that they had named were, at the request of the witness, anonymised. This approach was said to have been taken for the safety of the witness and their family. An exception was made by the witness in relation to the identity of one individual named within the statement, but that individual is no longer alive. Suspect 1 was therefore not identified within the signed statement. The witness re-signed this anonymised version of the

statement for Operation Kenova in January 2017. They also made an additional statement in relation to relevant events pertaining to the deceased individual that they had not previously mentioned to police. The witness has since died.

9.6 There was also intelligence relating to an alleged role on the part of Suspect 1 but no further admissible evidence in this case.

9.7 There was no evidence of Victim C's movements or associations in the days after he was last seen. There was a report compiled by the Stevens 3 investigation which referred to an unconfirmed sighting of Victim C in Belfast only two days before the date of his death, but the original record was not available.

9.8 Suspect 1 was interviewed under caution but remained silent throughout.

9.9 The evidence against Suspect 1 was the unsigned witness statement in which the witness named Suspect 1 in the company of Victim C approximately 11 days before Victim C was killed. As the witness was deceased and, in any event, had been unwilling to give oral evidence in relation to Suspect 1, the unsigned witness statement was hearsay evidence. There were certain aspects of the account provided by the witness that were inconsistent or appeared to be contradicted by other evidence and information in the case. There was no reasonable prospect of the hearsay statement being admitted as the sole evidence against Suspect 1. Even if the statement were to be admitted as evidence, it was considered that it would have been insufficient to prove that Suspect 1 committed any offence in connection with the murder of Victim C.

9.10 The available evidence provided no reasonable prospect of conviction, and the Test for Prosecution was not met.

10. False Imprisonment of, and conspiracy to murder, Victim D, on 5-7 January 1990[2]

10.1 On 5 January 1990 **Victim D** was lured to an address in West Belfast where he was detained and questioned by members of the PIRA security team. He was rescued by police and army who arrived at the address at approximately 5.10pm on 7 January 1990 and arrested eight persons who were present at or near the scene.

10.2 On 8 May 1991 the eight persons who were arrested were convicted of the false imprisonment of Victim D. Seven of the eight were prosecuted for conspiracy to murder Victim D, but all were acquitted of that offence. Decisions not to prosecute two further individuals were taken on a file subsequently submitted by police in 1993. One of these two individuals is Suspect 2 referred to below.

10.3 In 2008 the Criminal Cases Review Commission referred the convictions to the Court of Appeal and on 9 January 2009 the Court of Appeal quashed the convictions of all eight defendants.

10.4 As a result of the Operation Kenova investigations, decisions as to prosecution have been taken in relation to two individuals.

10.5 The allegations were that **Suspect 1** had been at the address on 5-6 January 1990 as part of the IRA team involved in the detention of Victim D.

10.6 It was further alleged that **Suspect 2** met Victim D at a different address in West Belfast and took him, under false pretences, to the address at which he was detained on 5 January 1990. Suspect 2 was alleged to have left the premises on 6 January 1990.

10.7 In relation to Suspect 1, the available evidence was a record of what the householder had told police during his detention at Castlereagh Police Station following his arrest on 7 January 1990. This individual had died in November 2017. Whilst he had spoken to the Operation Kenova team before his death, he

[2] Some more specific detail has been provided in relation to this case as the events described were the subject of criminal proceedings that took place in public.

had not provided them with a witness statement and had made it clear from the outset he would not attend court. He had acknowledged that he had told the police in interviews what had occurred, without expressly confirming that it had been the truth.

10.8 In the course of his 1990 police interviews the account of the householder had changed from an almost blanket denial to a full admission of his involvement in the false imprisonment of Victim D. The admission included a reference to three men alleged to have been involved, two of whom he identified by their first names only. One of those two is alleged to be Suspect 1. When the householder provided an after-caution witness statement at the end of the interview process he did not name any of the men whom he had earlier mentioned, but instead provided a description of them.

10.9 It was considered that the hearsay account of the householder was unlikely to be admissible in any trial of Suspect 1. The reasons for this included:

(i) the discrepancies in the different accounts provided by him;

(ii) the fact that the physical descriptions of the men as recorded in his after-caution witness statement did not, in a number of instances, match the actual appearance of the men whom he had earlier identified by name;

(iii) the difficulty that the defence would face in exploring, at this remove and in the householder's absence, the reasons why his evidence might be unreliable;

(iv) the potential for unreliability arising from the circumstances in which the householder was detained and questioned by police and denied access to legal advice; and

(v) the absence of other evidence capable of providing support for the hearsay evidence of the householder.

10.10 Even if the hearsay evidence were admitted, a Court would be unlikely to attach any significant weight to it having regard to the issues outlined above and the difficulty in testing and assessing its reliability. As noted above, the evidence only identified Suspect 1 by his first name and this, in itself, was an obvious

weakness. Suspect 1 was interviewed but made no comment. In these circumstances the available evidence provided no reasonable prospect of conviction of Suspect 1.

10.11 In relation to Suspect 2, the available evidence comprised the account of Victim D and an account from a second witness.

10.12 As regards the evidence of Victim D, there were considerable inconsistencies between different accounts that he had provided to investigators. There had been a finding by the Judge who heard the trial in 1991 that Victim D was a man who was fully prepared to lie on oath to advance his own interests and that the Court should not act on his evidence unless his evidence were confirmed by other evidence. There was information relating to Victim D's own IRA involvement that would have required to be disclosed and would have impacted upon his credibility as a witness.

10.13 It is not possible to provide details of the evidence that the second witness could potentially provide without risking their identification. The second witness provided a statement on the basis that it could be used in the event of a prosecution, but the PPS has been advised by Operation Kenova that this public statement should not contain information that might potentially lead to their identification. In these circumstances we are unable to provide any detail of the evidence that they might have provided. However, it was clear that there were substantial credibility issues that arose in relation to the witness and that the witness's evidence was incapable of strengthening the prosecution case to the extent required for the Test for Prosecution to be met.

10.14 Suspect 2 also had terrorist convictions from 1976. However, it was considered that these were of very limited value in terms of their ability to support the identifications of the two witnesses. In the circumstances of this case any identification (whether truthful, untruthful or mistaken) by these witnesses would be likely to relate to a PIRA member given the role ascribed to Suspect 2 by them. A terrorist conviction in 1976 did not make it more likely that the identifications were correct.

10.15 There was also intelligence relating to an alleged role on the part of the suspects but no further admissible evidence in this case.

10.16 In all the circumstances it was considered that a Court would exercise considerable caution before placing reliance upon the evidence of either of the two witnesses. Whilst they provided some support for each other in respect of the case against Suspect 2, the evidence of both witnesses presented considerable challenges and it was considered that, even in combination, it failed to provide a reasonable prospect of conviction.

11. **Perverting the course of justice / Misconduct in Public Office**

11.1 A file was received in relation to an allegation that two police officers and six military personnel had been involved in a conspiracy to pervert the course of justice in relation to the investigation and potential prosecution of a suspect against whom there was an allegation of false imprisonment. This file arose from a joint investigation in which the Police Ombudsman's Office investigated the alleged criminality on the part of the police officers. One of the police officers died subsequent to the submission of the file and therefore decisions were taken in relation to the remaining seven suspects.

11.2 The overarching allegation was that an agreement had been reached to improperly interfere with the course of the investigation so as to ensure that the suspect did not stand trial. The evidence in relation to the allegation comprised a number of documentary records, including some created within FRU, which purported to represent a record of relevant meetings and events.

11.3 Five of the six military suspects were members of FRU at the time. The allegation was that they were either directly involved in, or were briefed about, the meetings and were parties to the alleged conspiracy. When interviewed by Operation Kenova they all made no comment in relation to the allegation and evidence that was put to them.

11.4 The sixth military suspect was an Army lawyer and it was alleged that he provided FRU with legal advice in relation to the alleged conspiracy. When interviewed he denied any knowledge of events recorded in the relevant notes.

11.5 There was no evidence that the police suspect participated in the key meetings or discussions of which FRU had made a record. Rather, he was alleged to have played a role in implementing aspects of the alleged conspiracy at a later stage when the suspect was detained in police custody and when a file was submitted to the DPP. During interview under caution by Operation Kenova and the Police Ombudsman's Office, he denied the allegations and provided an explanation and justification for his actions.

11.6 There were no witnesses who could give direct evidence of any of the discussions which took place, or of a conspiracy in this case. The key evidence was hearsay evidence in the form of the FRU documentary records referred to above. These records were not a verbatim account and were not made by persons who had been party to the relevant discussions; rather, the authors had received information about the discussions (at least) second hand. Some of the available records were created several days after the relevant discussions. Others comprised diary entries which indicated that meetings had taken place, but which provided no assistance in proving what had been discussed. There was other evidence that cast doubt on the accuracy and completeness of FRU records generally and one of the key documents in the present case contained a material error which had been subject to a subsequent correction. The documents contained only a high-level summary of discussions and the persons to whom comments were attributed had not had the opportunity to see or comment upon them. In such circumstances, and where the records comprised the key evidence against the suspects and were of doubtful reliability, it was likely that a Court would have ruled them inadmissible.

11.7 Even if the records were admitted, their contents were such that it was unclear as to whether the discussions had progressed beyond a consideration of potential options to an agreement as to future action, as would be required for a criminal conspiracy. Careful consideration was given to whether inferences of a prior agreement could be drawn in light of subsequent events that took place in the course of the relevant investigation, but such inferences could not properly be drawn on the basis of the available evidence.

11.8 Other offences were considered in this case, including misconduct in public office. However, having regard to the admissibility and reliability issues referred to above, and the absence of any clear evidence an agreement or unlawful action on the part of any of the reported officers, it was considered that the Test for Prosecution was not met for this offence either.

12. Conclusion

12.1 It will be apparent from the reasons provided above that there was a considerable amount of relevant intelligence material but that there were, in these cases, insurmountable difficulties as regards using that intelligence material as evidence.

12.2 The challenges in deploying intelligence material as evidence in a criminal prosecution has the effect that, where there is an absence of credible, reliable and admissible evidence, it is not possible to bring prosecutions. However, that intelligence material may be of assistance to investigators in understanding what has happened in a particular case and in providing answers to the questions that families and victims may have about their case.

12.3 We understand that Operation Kenova will be providing families with reports in relation to cases in which the victim was killed. It may be possible for Operation Kenova to provide families with more information by this means than would be appropriate for the PPS to provide, either publicly or privately, when explaining the reasons for a decision not to prosecute. The same is likely to apply in relation to any further engagement that Operation Kenova have with victims and families in non-fatality cases which are not the subject of any further report.

Public Prosecution Service

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