

**Law Officer for Public Benefit in England and Wales
(*de facto* but not yet *de jure*)**

ISSUE: The Public Prosecution Service (PPS) in Northern Ireland announced on Thursday 14 March 2019 that Soldier F would be prosecuted on two counts of murder and four counts of attempted murder in relation to events in Derry/Londonderry on 30 January 1972 known as Bloody Sunday.

QUESTION: The *de facto* Law Officer for Public Benefit (LawPB) in England and Wales has to determine whether this prosecution is for the Public Benefit from an ‘irenical perspective’, as that term was judicially defined on 9 October 1998, in a charity law case before the Chancery Division of the High Court in London, and affirmed by the Court of Appeal on 28 June 2000.

Note: ‘irenical’ means ‘aiming or aimed at peace’.

JURISDICTION:

(a) PPS It has decided that the ‘Test for Prosecution’ in the case of Soldier F has been met. This means that in the view of the PPS in Northern Ireland:

- (i) ‘...the evidence which can be adduced in court is sufficient to provide a reasonable prospect of conviction – “the Evidential Test”’; and
- (ii) ‘...a prosecution is required in the Public Interest – “the Public Interest Test”.’

Each stage will have been separately considered but the Public Interest Test could only have arisen when the Evidential Test had been satisfied. In this case, the PPS has the right and the duty to bring such a prosecution to court.

(b) LawPB While his *de facto* jurisdiction does not cover Northern Ireland the consequences of the PPS decision to prosecute Soldier F affect the whole United Kingdom including England and Wales. His Test for answering the Question differs from that of the PPS as follows:

- (i) Public Benefit must be capable of proof, if not self-evident; whereas
- (ii) The ‘Public Interest Test is met when the public interest considerations in favour of prosecution outweigh those against prosecution.’

The foundational principle of an ‘irenical perspective’ was certified in a recent claim for judicial review as ‘**totally without merit**’ at the instigation of the Attorney General, endorsed by the Appeal Court which had affirmed it in 2000. Hence LawPB has had to take over *de facto* the role which English Attorneys General abdicated *de jure* as both Law Officers and public protectors of charity.

FACTUAL BACKGROUND:

(a) The Saville Inquiry

- (i) The material facts contained in Lord Saville's Report of the Bloody Sunday Inquiry (15 June 2010) are accepted by LawPB.
- (ii) The context of the march organised on Sunday 30 January 1972 was one of escalating conflict and violence in Northern Ireland between nationalists and unionists, heightened by the introduction of internment without trial of suspected terrorists in August 1971. The march in Derry/Londonderry was organised to protest against internment without trial.
- (iii) Lord Saville's overall assessment was that: 'The firing by soldiers of 1 PARA on Bloody Sunday caused the deaths of 13 people and injury to a similar number, none of whom was posing a threat of causing death or serious injury.' On direct responsibility for this, Lord Saville's overall conclusion was that '... there was a serious and widespread loss of fire discipline among the soldiers of Support Company.' Soldier F was one of those against whom specific findings were made.

(b) The Prosecution

- (i) As Lord Saville made clear in a recent BBC interview, stressing the difference between his inquiry and any criminal investigation by the police (resulting in a PPS decision to prosecute): 'We were not there for that purpose – we were there simply to try to find out what happened.'
- (ii) Former soldiers were given anonymity and assurances that their testimony to the Saville Inquiry would not be used in any subsequent criminal proceedings. 'If we had not given those assurances, backed by the director of public prosecutions, people could quite legitimately have refused to answer questions on the grounds that answering might incriminate them,' Lord Saville added.
- (iii) With respect to Soldier F, there are differences between the charges made by the PPS in Northern Ireland and the Saville Inquiry findings:

PPS: Soldier F charged with murder of James Wray and William McKinney.

Saville: 'More likely than not' that Soldiers F or H fired the shot that mortally wounded William McKinney.

'More likely than not' that Soldiers G or H fired the first shot to hit Jim Wray. He was shot twice, the second time 'probably' by G or H.

'Sure' that Soldier F mortally injured Michael Kelly; 'Sure' that Soldier F fired at and shot Bernard McGuigan and Patrick Doherty (both killed); and 'it is highly probable' that Soldier F was also responsible for shooting Patrick Campbell and Daniel McGowan (both wounded).

PPS: Soldier F charged with attempted murder of Joseph Friel, Michael Quinn, Joe Mahon and Patrick O'Donnell.

Saville: 'Probable' that Soldier E fired the shot that injured Patrick O'Donnell.

'More likely than not' that Soldiers F or G shot and wounded Joe Friel;
'More likely than not' that Soldiers F or H shot and wounded Joe Mahon;

'More likely than not' that Soldiers G or H shot and wounded Michael Quinn.

It was unclear whether Joe Friel and Michael Quinn 'were specifically targeted, or were hit by shots fired indiscriminately...'

(iv) On 14 March 2019 Northern Ireland's PPS explained their decision not to prosecute 17 out of 18 former members of the Parachute Regiment and either of the two alleged Official IRA members. It acknowledged:

- * The differences between a public inquiry and criminal proceedings meant that the PPS could not rely, for the purposes of a prosecution, on significant evidence available to the Bloody Sunday Inquiry on which to make its findings;
- * The rules designed for criminal proceedings meant that the soldiers' own accounts of their actions on Bloody Sunday would not be admissible against the soldiers who made them.

Then the PPS explained in considerable detail why the prosecution could not rely on most of the findings of the Bloody Sunday Inquiry because the standard of proof for conviction in a criminal court – 'beyond reasonable doubt' – was not met. In particular:

- * Soldiers F and H had been reported in connection to the charges of murder and attempted murder (outlined above) but two other soldiers alleged to have been involved, Soldiers G and E, had died. There was no evidence that Soldier H had fired at the time the casualties were sustained other than his own inadmissible accounts. In the PPS view, there was a reasonable prospect of conviction only against Soldier F.

(c) The Belfast Agreement

This was a political agreement between the British and Irish governments, together with most of the political parties in Northern Ireland, which was reached on 10 April 1998. It is also known as the Good Friday Agreement. Most of the Agreement dealt with the establishment of a new devolved government for Northern Ireland whereby unionists and nationalists could share power. Three other aspects of the Agreement are relevant to mention here:

- (i) Prisoners: Both Governments ‘put in place mechanisms to provide for an accelerated programme for the release of prisoners,... convicted of scheduled offences in Northern Ireland, or in the case of those sentenced outside Northern Ireland, similar offences (referred to hereafter as qualifying prisoners).’ It was made clear that ‘Prisoners affiliated to organisations which have not established or are not maintaining a complete and unequivocal ceasefire will not benefit from the arrangements.’ Both Governments would ‘... set prospective release dates for all qualifying prisoners... the intention would be that... any qualifying prisoners who remained in custody two years after the commencement of the scheme would be released at that point.’
- (ii) Reconciliation and Victims of Violence: The Agreement states that ‘The participants believe that it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation.’ It goes on: ‘It is recognised that victims have a right to remember as well as to contribute to a changed society. The achievement of a peaceful and just society would be the true memorial to the victims of violence.’ The participants ‘... recognise and value the work being done by many organisations to develop reconciliation and mutual understanding and respect between and within communities and traditions, in Northern Ireland and between North and South, and they see such work as having a vital role in consolidating peace and political agreement...’
- (iii) (Education on) Decommissioning: There is little or no explicit word on the role of education in the Agreement but the participants recall ‘that the resolution of the decommissioning issue is an indispensable part of the process of negotiation’; note the progress of the Independent International Commission on Decommissioning and Governments in developing feasible schemes for ‘... achieving the decommissioning of illegally held arms..’; and reaffirm ‘... their commitment to the total disarmament of all paramilitary organisations.’

(d) Other Material Facts

- (i) The Northern Ireland (Sentences) Act 1998, which gave effect to the early release scheme in the Belfast Agreement does not cover offences committed before August 1973. The Government’s draft Bill proposes to extend the scheme to cover the period from January 1968.
- (ii) ‘The sole prosecution is seen as a “terrible disappointment” by some of the families of the 13 people killed.’ [BBC website, 14 March 2019.] An appeal against the PPS decisions not to prosecute is in prospect.
- (iii) The Government is reported to be offering full legal support to Soldier F. It is also seeking urgent reform of legacy issues from ‘The Troubles’. A veteran’s group speaks of ‘betrayal’ in relation to such prosecutions.

LEGAL FRAMEWORK

(a) Background: A few months after the Belfast Agreement, a charity law case was heard in the Chancery Division of the High Court in London concerning the Project on Demilitarisation (Prodem). Its importance here is in the legal framework for education in the advancement of international peace provided on 9 October 1998. Together with the subsequent Court of Appeal judgment of 28 June 2000, which dealt definitively with the public benefit issues, they represent the only comprehensive judicial assessment of the role of education in securing a state of peace and avoiding a state of war in the modern history of English charity law.

The relevant elements of that legal framework are:

(b) The Purpose: Securing a state of peace is an educational, rather than a political, end.

(c) The Problem: No-one knows what political policy will secure a state of peace and avoid war, e.g. 'bargaining from strength' or disarmament.

(d) The Solution: A competition of methods of analysing international disputes judged against 'irenical' criteria, as provided by the judicial definition in the Prodem case [1998] of education in the legally charitable sense:

On the negative side: education as to the 'evil effects of war', or organised violence, and thus having an 'irenical perspective'.

On the positive side: education starts from '... the premise that peace is preferable to war, and puts consequent emphasis on peaceful, rather than military, techniques for resolving international disputes.'

Thus the Prodem case achieved a judicial reconciliation of what had been a problematic area, with respect to (ii) below:

(i) On the one hand, a common law understanding dating back to the Preamble to the Statute of Elizabeth [1601], which refers to taxes for the 'setting out of soldiers', that 'Trusts directed to promoting the security of the nation by military means have generally been held to be charitable.'

(ii) On the other hand, the promotion of national security by peaceful means based on an 'irenical perspective'.

Both (i) and (ii) are potentially for the public benefit; (ii) is distinguished from pacifism; and neither involves promoting controversial political policies, although Prodem was judged by both Courts to have done so. Neither judgment was reached by entirely lawful and objective means.

(e) The Result: Education on an 'irenical perspective' foresees whether a climate for peace or war is being created in any given international conflict.

(f) Outcomes: The subsequent course of events in the conflict area will show which analysis truly foresaw whether it was becoming more peaceful or not.

APPLICATION OF THE LEGAL CONCEPT OF PUBLIC BENEFIT TO MATERIAL FACTS OF THIS CASE:

Is the Prosecution of Soldier F for the Public Benefit from an Irenical Perspective?

1. The findings of LawPB in this Communique are purely advisory. However, it may not be possible to ignore or reject the consequences of ignoring or rejecting these findings.
2. In the normal course of events there would be no distinction between the Public Interest and the Public Benefit Test of charging a person with murder or attempted murder where the Evidential Test is met. The difference with respect to Soldier F, or like cases, is that the charges relate to the Troubles in Northern Ireland from 1968 to 10 April 1998 when the Belfast Agreement was reached. This means that, for public benefit, the case against Soldier F, or like cases, must be considered from a judicially defined 'irenical perspective'.
3. On the PPS evidence, with respect to Soldier F:
 - a. This will be revealed in the forthcoming court case.
 - b. There is a presumption of innocence and Soldier F has a right to a fair trial.
 - c. LawPB can, therefore, make no comment but draws attention to the factual differences (recorded on pages 2 and 3 above) between the Saville findings and what the PPS has charged Soldier F with, as a relevant consideration.
4. On the public interest considerations, with respect to the prosecution of Soldier F:
 - a. '... the [Saville] Tribunal obtained from the Attorney General on 23rd February 1999 an undertaking that no evidence given by a witness before this Inquiry would be used against that witness in any criminal proceedings. In March 2002 the undertaking was clarified to confirm that it extended to evidence relating not just to the events of 30th January 1972 itself, but to all evidence relevant to the events of that day. The giving of the undertaking meant that the risk of self-incrimination could not arise and, therefore, that no witness would be entitled to rely on the privilege against self-incrimination as a reason for refusing to answer a question.'
 - b. Following a Court of Appeal decision upon judicial review of an earlier Tribunal ruling, the Saville Tribunal ordered that '... all soldiers alleged to have played a part on Bloody Sunday should be granted anonymity'.
 - c. The assurances that evidence given by a witness would not be used against that witness in any criminal proceedings, but not the Tribunal ordering that soldiers (like Soldier F) be granted anonymity, featured in the PPS Summary of decisions not to prosecute, concerning the Evidential Test. The maintenance of the anonymity of Soldier F was emphasised in the PPS decision to prosecute Soldier F.
5. LawPB's assessment of the PPS 'Test for Prosecution' from an irenical perspective:
 - a. *Is the public benefit of the prosecution of Soldier F (or like cases) self-evident?*

No. The matter is politically controversial, so it is not possible to argue such a prosecution is self-evidently for the public benefit. While the families of the victims of Bloody Sunday would see a benefit, as part of their long search for truth and justice, this is not necessarily so for others.

b. *Is the public benefit of the prosecution of Soldier F (or like cases) capable of proof?*

Yes, in legal theory, if a verdict is reached that almost everyone can accept (as in many politically uncontentious murder trials).

However, in the light of the following factors there is little reason to expect this:

- The Saville Inquiry over 12 years, and sparing no financial cost, aimed to get at the truth of what happened but that did not achieve closure for many of the victims' families concerned;
- The prosecution of Soldier F, whether it leads to acquittal or conviction on some or all charges or a mis-trial, is also unlikely to achieve closure because justice, no matter how impartially administered, will be welcomed by supporters of any party that prevails but not by those of a party that does not;
- Other prosecutions of Soldiers present on Bloody Sunday would be sought or blocked as well as prosecutions of members of former paramilitary bodies for their alleged offenses.

No, in legal practice (no matter how judicially fair and impartial the process), for such prosecutions, acquittals or convictions – even if followed, in the latter case, by early release, which would not currently apply pre-August 1973 – would feed into the competing narratives of unionist and nationalist communities in Northern Ireland and of the British and Irish States.

6. *Is the public benefit of assessing the wider and longer-term implications of the prosecution of Soldier F (or like cases) capable of proof from an irenical perspective?*

Yes. According to irenical criteria (in italics), for example:

- a. Prosecution of Soldier F *undermines the spirit if not the letter of the assurances about prosecution and anonymity given by the Saville Inquiry*. The choice is Inquiry or Prosecution, not the one leading to the other. That should have been made clear from the beginning in relation to the Good Friday Agreement. Truth can be the basis for either reconciliation or justice in a politically charged atmosphere.
- b. The tragedy of Bloody Sunday is not solely down to 1 PARA, still less to Soldier F. While Lord Saville easily dismisses the more obvious conspiracy theories about the role of the UK political and military authorities planning to use excessive force, *neither they nor their paramilitary opponents applied what may now be called an irenical perspective*: armed force was not a last resort and military training and paramilitary tactics at the time reflected this.
- c. *The morale and effectiveness of the UK armed forces* is a top national priority and prosecutions for alleged offences during the Troubles, however justified in theory, may serve to undermine this.

So, if the prosecution of Soldier F (or others) contributes to: reconciliation in Northern Ireland; the application of an irenical perspective across the UK and Ireland; and the morale and effectiveness of the UK armed forces, this assessment will have been falsified.

7. Conclusion

Soldier F is not a sacrificial lamb nor, from the evidence in the Saville Report, worthy to be considered as such. The undoubted failure to apply an 'irenical perspective' on 30 January 1972 cannot be laid at the door of one soldier or even a group of soldiers on that day. While the term had not been coined then, or judicially defined, the importance of emphasising peaceful, rather than military, means of resolving international disputes has come to the fore since the end of the Great War and the Paris Peace Conference in 1919.

The Saville Report's dismissal of the claims of some of the victims' families that the British and Northern Ireland governments bore a heavy responsibility for what happened is untenable. This is not, of course, because they intended the shootings on that day but due to their creation, however unwittingly, of a climate for organised violence, if not war, by a set of coercive measures, such as internment, and by a failure at that time to address the legitimate grievances of discrimination against the Catholic minority. Such a climate made likely, or even inevitable, a tragedy like Bloody Sunday and many other terrible events for which paramilitary bodies also bear responsibility throughout these islands.

Overall, then, it must be concluded that creating a climate for peace in Ireland, North and South, and on mainland Britain, which received a major impetus from the Belfast Agreement, necessitates putting public benefit above public interest in meeting the Test for Prosecution. The PPS was not obliged to do so, and it may not have occurred to them. Yet just as the Evidential Test for criminal trials is higher than that of the Saville Inquiry, so public benefit stands over public interest in peacefully resolving international disputes.

Thus, I conclude:

- a) The prosecution of Soldier F (or like cases) is not for the public benefit even though the PPS has determined that the Evidential Test has been met.

Moreover, consideration should be given by the British and Irish governments to the benefits of legislation, in keeping with the letter and spirit of the Belfast Agreement, to:

- b) End all prosecutions against both current and former UK service personnel for any alleged offences committed between 1968 and 10 April 1998; and
- c) End all prosecutions against former members of paramilitary bodies, disarmed under the Belfast Agreement, for alleged offences committed over the same time period.

Thereby the spirit of the first Good Friday might infuse the Agreement of 21 years ago and education, in the legally charitable sense, be empowered to play its part in the process.

Signed:

Peter M. Southwood (Dr)
Law Officer for Public Benefit in England and Wales
(*de facto* but not yet *de jure*)

Date:

Email: consultant@directionofconflict.org Website: www.directionofconflict.org

Copyright

The author believes that quotations from other works in this article are within the limits of fair dealing for the purposes of criticism, review or quotation.

If publishers have any concerns to raise, they are requested to contact this author with the details so that the matter can receive early attention.

REFERENCES

ISSUE Public Prosecution Service, 'Bloody Sunday Prosecution Decisions', News Release (14 March 2019)

QUESTION Carnwath J. in Southwood & Parsons v H M Attorney General, High Court Case No: CH 1995 S No. 5856 concerning the Project on Demilitarisation (9 October 1998), para. 26. See: <http://www.ipp2000.org/ipplaw.html>

Chadwick LJ in Southwood & Parsons v H M Attorney General, Court of Appeal No: CHANF 98/1405/CMS3 concerning the Project on Demilitarisation (28 June 2000), paras 27 and 29. See: <http://www.ipp2000.org/ipplaw.html>

J.B. Sykes (ed), The Concise Oxford Dictionary of Current English, 7th Edition (Oxford University Press, 1984), p. 529.

JURISDICTION:

(a) PPS See: <https://www.ppsni.gov.uk/Prosecution-Decisions-6768.html>

More detailed information on the 'Public Interest Test' is available in: Public Prosecution Service, Code for Prosecutors (PPS, Belfast, July 2016), paras 4.10-4.17.

(b) LawPB (i) Slade J. in McGovern v Attorney General [1982] Ch 321 at 333G-334B.

On the claim for judicial review see: <https://www.directionofconflict.org/what-we-do> 18 January 2019 - 'Additional information'

On the same web page, the Letter and Article no. 2 of 6 March 2019 explain the background more fully in laypersons' terms.

FACTUAL BACKGROUND:

(a) Inquiry (i) Rt Hon The Lord Saville of Newdigate (Chairman) et al, Report of the Bloody Sunday Inquiry, HC29, 10 volumes (TSO, 15 June 2010), especially vols I and X.

(ii) Saville Inquiry, Vol. I, pp. 48-49.

(iii) Rt Hon The Lord Saville of Newdigate (Chairman) et al, Principal Conclusions and Overall Assessment of the Bloody Sunday Inquiry, HC30, (TSO, 15 June 2010), pp. 57-58.

(b) Prosecution (i) & (ii) BBC interview with Lord Saville reported on 13 March 2019 at: <https://www.bbc.co.uk/news/uk-northern-ireland-47548352>

(iii) PPS, News Release (14 March 2019).

Saville Inquiry, Principal Conclusions, pp. 32-45. The PPS prosecutions are, though, in line with Saville's more general assessment in para. 3.107 on p. 43.

(iv) PPS, Bloody Sunday – Summary of Decisions Not to Prosecute (14 March 2019), pp. 1-6 and 11-12. The latter covers 'sector 4' from the Saville Inquiry analysis.

- (c) Belfast The Agreement reached in multi-party negotiations, 10 April 1998. Available at: <https://www.gov.uk/government/publications/the-belfast-agreement>
- (i) The Agreement, '10. Prisoners', paras 1-3.
- (ii) The Agreement, '6. Rights, Safeguards and Equality of Opportunity' – 'Reconciliation and Victims of Violence', paras 11-13.
- (iii) The Agreement, '7. Decommissioning', paras 1-3
- (d) Other (i) Written Answer from Secretary of State for Northern Ireland on 11 March 2019. See UK Parliamentary website or Hansard.
- (ii) & (iii) BBC report at: <https://www.bbc.co.uk/news/uk-northern-ireland-47540271>
On the veterans' group see: <https://www.ukandspain.com/justice/>

LEGAL:

- (a) Background The case, cited above, concerning the Project on Demilitarisation (Prodem) consists of a High Court (HC) judgment [1998] and a Court of Appeal (CA) judgment [2000].
- (b) Purpose Both the HC at paras 23, 26 and the CA at paras 27, 29 accepted that, in general, achieving international peace is a charitable object, rather than a political one.
- (c) Problem The CA stated that the problem is that 'The court is in no position to determine that the promotion of the one view [as to how best to secure peace and avoid war] rather than the other is for the public benefit.'
- [To this LawPB would add that politicians and academics cannot determine this either because the success or failure of one policy, which was adopted, can never prove anything about the success or failure of another policy which was never tried.]
- (d) Solution The HC accepted at para. 31 that the competing means of evaluating conflict areas suggested in the last Prodem Briefing was, in principle, within the scope of charity and the CA provided the precise wording at paras 29, 30 of a trust that would be charitable in law thereby allowing the main part of the work of Prodem to be continued in the International Peace Project²⁰⁰⁰ (charity reg. no. 1101966).
- More fully, see HC at paras 18-26 and CA at paras 27-30 and for full analysis:
Peter Southwood, 'Death of a Peace Settlement – Birth of a Principle', Article no. 1 (18 January 2019); and
'A Bleak House Today: How English Charity Regulators Missed the Mark in 2000 and Beyond', Article no. 2 (6 March 2019)
Both articles available at: <https://www.directionofconflict.org/what-we-do>
- (e) Result See, for example, Peter Southwood (ed.) The Israeli-Palestinian Conflict, Briefing No. 1 (International Peace Project, January 2006), Chapter 3. IPP Briefing available at: <http://www.ipp2000.org/> (bottom of home page).
- (f) Outcomes Several examples are given in Articles no. 1 and 2, cited above.

APPLICATION

- 4 Saville Inquiry, Vol. X, pp. 7-10; PPS, Summary, p. 4; PPS New Release, p. 2, note 2.

End of Communiqué