Alyson Kilpatrick BL
[redacted]

FAO: OFFICER IN OVERALL COMMAND
RE: OPERATION KENOVA AND RELATED MATTERS
INDEPENDENT REVIEW OF ARTICLE 2 COMPLIANCE

UPDATE 2 – RECENT EVENTS

11 January 2021

1. I provided my first (interim) report in February 2020. This second update reflects my observations following a number of important developments. At the outset and to summarise, I can say that I remain entirely satisfied as to the legal (Article 2 ECHR) compliance of the Kenova investigation. My first report sets out the criteria for compliance and should be read together with this further update.

2. My final report will be provided in due course but given a number of recent matters it seems to me this brief update, explaining my reasons for that interim view, is pertinent and timely. In this update I will address effectiveness and independence in the context of: (i) resources; (ii) oversight; (iii) recent decisions by the Director of Public Prosecutions (DPP) to not prosecute four individuals; and, recent media coverage.

3. As always, what follows must be seen in the light of what the European Court of Human Rights (ECtHR) emphasised in *McCann v UK* (1995): the substantive obligation to protect life would be meaningless in the absence of a commensurate procedural obligation to conduct an effective investigation intended to expose any breach and hold the perpetrators to account.

Resources and oversight

4. I observed, in my first update, the potential obstacle to Article 2 compliance presented by funding arrangements. Funding, i.e., decisions concerning funding, is critical to fortifying or emasculating the effectiveness and independence of an investigation. I commented previously that for Mr Boutcher to remain independent in the legal sense he should be able to determine the level of resources he needs to complete his investigations, and how to allocate them. I cited the old adage "he who pays the piper...". I did not need to remind Mr Boutcher, who is only too aware of the pressures applied.

5. I added "The structures and practical arrangements for ensuring that resources are adequate must be kept under close scrutiny. It should not be for those potentially implicated (remembering the court's finding in *McQuillan* etc. as to practical independence of the Police Service of Northern Ireland (PSNI)), to control access to the tools necessary to reach factual findings and hold those responsible to account." Human rights observance must result in the practical and effective protection of specific rights. That means practical arrangements are relevant to my assessment of Article 2 compliance. That is particularly the case when they have the potential to undermine the independence of investigators' decision-making.

6. Resourcing is an ongoing concern because it has a critically important impact upon the effectiveness and 'reach' of the investigation and is, potentially, a significant factor in determining whether or not the investigation remains independent in the legal sense. I do not suggest that Kenova should be free from governance oversight or not accountable for public expenditure but how it is and the means by which it is held to account are important in the context of Article 2. For that reason, I have sought information from Mr Boutcher relating to governance and oversight. He has provided that information, which has raised issues for me as to the impact of recent events on Article 2 independence and practical effectiveness. Proper oversight and guardianship can stray into interference (intentional or unintentional). That must be avoided.

7. To illustrate, it is worth recalling that compliance with the Human Rights Act 1998 is required by all public authorities, including but not limited to the PSNI, the Security Service, the Armed Forces and the regulatory and oversight bodies. Responsibility for compliance with Article 2 of the ECHR (enforceable directly by the 1998 Act) lies with the State i.e., the United Kingdom. In other words, the State must secure the procedural obligation to conduct an Article 2 investigation into deaths in which the State might be implicated. It does so by making sure that an effective independent investigation is undertaken. By way of example, if the Fire Service is alleged to have failed in its obligation to protect life, it will be investigated by an official body unconnected with the Fire Service. Similarly, if the PSNI is alleged to have been responsible for an unlawful death, the PSNI must not investigate that death. In the Kenova cases, it is not the PSNI that is alleged to have been involved but its immediate predecessor, the Royal Ulster Constabulary (RUC). The courts have decided that the PSNI is not sufficiently independent in the practical sense to investigate the RUC's alleged

involvement. The Operation Kenova team was established to avoid conflicts of interest and failings in the practical arrangements for independence.

8. What has happened here is that the State has accepted its responsibility to discharge its Article 2 obligations in a number of cases by establishing an independent team (unconnected with the PSNI) to carry out the investigations. There must be a clear line separating that team from the PSNI. That independent team must be resourced. For practical accounting reasons the PSNI has a small role in funding but that role is, or should be, limited to an accounting function. A small number of people have suggested or assumed (wrongly)[1] that the Kenova team is seconded to the PSNI and therefore is subject to the control of the PSNI and thereafter to the Policing Board through the PSNI. Both suggestions are incorrect but the consequences of proceeding on such false bases has, or has the potential to, seriously affect the Article 2 compliance of Kenova. I will be returning to this in my final report but for present purposes make the following observations.

9. Oversight and accountability for resources has the potential to influence directly and indirectly the provision and allocation of resources. Operational decision-making therefore can be adversely influenced by oversight and accountability arrangements. That in turn can have a fundamental impact upon operational independence. The means adopted to conduct oversight and provide public reassurance as to Article 2 compliance does not reduce down to oversight of operational issues including value for money. In any event, oversight should not be undertaken by those potentially implicated. An independent investigation is not one overseen by or accountable to those implicated or those with some other conflict of interest in the investigation. With an Article 2 investigation, given the very different nature of it, it is my view that oversight and accountability must also be independent. I therefore have reviewed the arrangements and the interactions between the relevant bodies. Of particular note is the ongoing assertion of governance over funding for the investigations.

10. The PSNI should not interfere in operational decisions taken by the Operation Kenova team, which includes operational spending decisions. It follows that the independent team's assessment of what is necessary to properly fund the investigation should be accepted for the purpose of determining the extent of funding necessary. Thereafter, the independent investigation team must be free to decide how to best allocate that funding. If the PSNI decides to manage those decisions for itself, it will be undermining the ability of Operation Kenova to discharge an Article 2 investigation and be counter-productive. It must also be remembered that the investigation includes the activity of State agents and goes beyond local policing. Only the Operation Kenova team knows what is necessary to conduct the investigation effectively. As emphasised in *Armani Da Silva v UK* (2016), independent investigators are best placed to determine what is needed to secure all elements of compliance. Those investigators must be free to conduct a thorough, objective and impartial analysis. Failing to follow an

[1] For the sake of clarity, no member of the team is seconded. They operate separately from the PSNI with their command structure being that of Bedfordshire Constabulary. This is an important factor which, if misunderstood, will affect the perception of independence. That is why it is so critical that the oversight arrangements are understood and reported upon properly.

obvious line of inquiry for example would undermine to a decisive extent the investigation's ability to establish the circumstances of the case and the identity of those responsible. Similar principles apply in relation to oversight.

11. The Policing Board is responsible for oversight of PSNI's compliance with the Human Rights Act 1998 but this is not, or should not be, a gateway to practical or operational management or influence of Operation Kenova. If it were, there would be a real risk to the operational and Article 2 independence of the investigation. I have considered in this context the requests made by the PSNI and the Policing Board for oversight of the Kenova cases including in respect of resourcing and management decisions.

12. Clearly, the NI Policing Board is responsible for holding the PSNI Chief Constable to account and that includes by assessing and reporting upon the PSNI's compliance with the Human Rights Act 1998. That is an important function which goes to the heart of the policing arrangements in Northern Ireland. That function is however limited; it does not extend to operational decision-making (at least not until after the event) and never includes involvement in live criminal investigations (other than to comment upon the framework within which Article 2 investigations are conducted). That is as it should be. What the Policing Board does not do is provide independent scrutiny of the independent teams appointed to carry out Article 2 investigations. It remains responsible, within its range of statutory powers and duties, for holding the PSNI to account but it must recognise its limits in respect of these Article 2 investigations. Otherwise, it risks the very thing it seeks to avoid – interfering unduly with and undermining the Article 2 compliance of those investigations.

13. The Policing Board cannot secure Article 2 independent oversight of the PSNI because it cannot concern itself in live investigations and, in any event, is prevented from influencing operational decisions. That includes decisions as to funding. The funding for and spending decisions on a live investigation are operational matters. The Board's role is limited to monitoring whether the PSNI is complying with the Human Rights Act 1998 and commenting on operational decisions but only after the event. In this context it can be noted that Operation Kenova is an investigation set up by the State to discharge the *State's* ECHR obligations. It is not a PSNI obligation, albeit the PSNI receives (as a matter of accounting) the funding for the investigation, which it administers to the independent team who are carrying out the investigation. As said above, the courts have already decided that the PSNI cannot carry out an Article 2 investigation because it is not sufficiently practically independent. All of that means that the Board has no role in overseeing the operation of the Kenova investigation and the Kenova investigation is not accountable to the Board for its operation or any operational decision-making. As explained below, this is not a negative consequence, it simply reflects the reality of the practical and legal situation when an Article 2 criminal investigation is underway.

14. The Board, through its Performance Committee, can seek reassurance that the investigation's framework is set up to comply with Article. 2[2] but operational decisions, including spending decisions, taken in the course of investigation are well beyond its remit. Despite that, the Board has sought and received ongoing assurance as to the Article 2 compliance of the Kenova framework. By way of example, Mr Boutcher has briefed the Board fully on all elements relevant to compliance. The Board has visited and made inquiries directly of the Kenova team and the Independent Steering Group. Furthermore, the Board's independent human rights lawyers have been given access to Kenova to assess compliance. They have reported to the Board on their assessments.[3] I understand the former Board Chair and Chief Executive were satisfied, in response to invitations by the Kenova team, that no further meeting was necessary to satisfy the Board.[4] Despite that, by letter dated 17 January 2020, the former Board Chair requested, from the Chief Constable PSNI, detailed information "in respect of investigations currently ongoing" including: a list of the new investigations/cases included within the Kenova remit and costs associated with each; timescales for completion of each investigation; a breakdown of the overall staffing resources allocated to each; terms of reference for investigations and reviews etc.[5]

15. At first blush it is hard to object to such apparently reasonable requests until, that is, one recalls that these investigations are not only live criminal investigations but they are investigations which must be conducted by an independent team and within the parameters required by Article 2. To be compliant, the PSNI Chief Constable handed the investigations over to Mr Boutcher and his team. Once the investigation is handed over, it should be left to that independent team. It would be inappropriate for the PSNI to retain control and it is inappropriate for the Board to exercise any tangential control through the PSNI. If these investigations were not Article 2 investigations of so-called legacy cases, the PSNI would not be required to provide running commentary or account to the Board on the investigations. That same principle applies (but more so) in relation to the Board's involvement with Kenova.

16. Accordingly, neither the PSNI nor the Board should exert any influence over decisions such as what is a good use of investigators' time or resources. To illustrate the point, consider another live murder investigation into a contemporary murder. The Board would not describe a line of enquiry as reasonable or unreasonable and would not seek to influence (directly or indirectly) the progress of the investigation. It leaves all of those assessments and decisions entirely to the investigators. Where the murder investigation is an Article 2 investigation the same must apply. Quite simply, this is either independent or it is not. If it is independent it must be conducted independently with all that goes with that.

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[2] And it has - through its human rights advisors (see human rights annual reports and notes to Board), the attendance of Mr. Boutcher at the Board and, the attendance of the Chief Executive and Former Chair of the Board at the Independent Steering Group.

[3] See e.g., Human Rights Annual Reports and Minutes of Board and Committee meetings.

[4] See email exchange and policy log.

[5] Letter Anne Connolly to Simon Byrne, dated 17 January 2020.

17. I have also considered in that context the relationship between the Kenova team and the Police Ombudsman. The powers and duties of the Police Ombudsman in respect of complaints and criminal investigations into serving PSNI members are well known. I do not rehearse them here but note simply that the Ombudsman is responsible for complaints made about serving officers and some staff but not for general scrutiny or oversight that has not been provided by statute. I understand an issue has been raised in respect of the accountability of Kenova staff to the Police Ombudsman. In one sense it is irrelevant in the absence of any complaint having been made about any person connected with Kenova but the issue has had an impact which I should address. My consideration is limited to that which is relevant to public confidence and Article 2 ECHR.

18. It has been suggested that because Kenova staff are not accountable, under the legislation, directly to the Police Ombudsman, there is an "accountability gap". Suggestion of such an accountability gap has the potential to undermine public confidence in and effectiveness of the investigations. I have reviewed the relevant material and the advice of Senior Counsel who has set out the accountability arrangements in place and have no concern whatever about the issue. There is no accountability gap; a difference in the statutory underpinning for PSNI's accountability and Kenova staff's accountability does not equate to a difference in the *quality* of accountability or oversight.

19. In any event, Operation Kenova does not enjoy a reduced level of scrutiny or oversight; quite the contrary. Operation Kenova's oversight comprises many bespoke independent elements, which combined satisfy the Article 2 requirements for public scrutiny. There are too many levels of oversight to list in this interim report but by way of example, there is an Independent Governance Board, an Independent Steering Group, and a Victims' Focus Group, all of which can comment publicly on the human rights compliance of the investigation. The Kenova Officer in Overall Command also routinely engages with the widest range of established victims' groups and representatives. That engagement is meaningful and transparent. Additionally, as a barrister in private practice, I have been appointed to conduct a review of the investigation from a human rights perspective. My review will be published when complete.

20. In terms of any assessment of value for money, the National Police Chiefs' Council Homicide Working Group has also been appointed to conduct an independent review including of that aspect of the investigation. Questions about value for money must not be confused with questions about human rights compliance or with scrutiny of the efficiency and effectiveness of the PSNI. Importantly, Operation Kenova is not a scheme to address legacy (into which others may have an input); it is an investigation into criminality including a number of murders. It must be seen that way. It merits repetition - this is not about limiting accountability or transparency, both of which are essential and present. Rather, it is about getting the appropriate oversight and transparency *best suited* to ensure Article 2 compliance. They are not one and the same.

21. I can think of no other level of governance or element of oversight that is required. In fact, as suggested in this interim report, any further inappropriate oversight is likely to have a chilling or stifling effect on the progress of the investigations.

Decisions by the DPP

22. The Public Prosecution Service (PPS) is independent of the PSNI and the Operation Kenova investigation team. It is solely responsible for reaching decisions about prosecutions. It is not for me to second guess those decisions but I have considered whether the decisions - to not prosecute four individuals – informs me as to the Article 2 effectiveness of the Operation Kenova investigation. Given the sensitive nature of those decisions I will not comment further than to say that the investigation of the four individuals was exemplary and the reasons for the decisions not to prosecute did not include a failure of the investigation.[6]

23. There is another issue that has given cause for concern - which I can and should address now – the relevance of national security interests to investigatory or prosecutorial decisions; in particular, reference in the DPP's decision to the government policy known as 'Neither Confirm nor Deny' (NCND), as a factor relevant to the decision not to prosecute. This is an issue which is linked to Operation Kenova's ability to discharge the State's obligation under Article 2.

24. NCND is a policy, application of which is relied on by various public authorities to resist the disclosure of sensitive information, which would otherwise be disclosed. It has been used in response to freedom of information applications and media investigations. It has also been relied upon to resist the disclosure of material and information in the course of litigation. NCND is a departure from the usual rules of procedure underpinned by natural justice. It should therefore be used only exceptionally. Or, as Lord Kerr (dissenting) put it in *Home Office v Tariq* the "withholding of information from a claimant which is then deployed to defeat his claim is, in my opinion, a breach of his fundamental common law right to a fair trial." See also Lord Dyson's observation in *Al Rawi v The Security Service* "the open justice principle is not a mere procedural rule. It is a fundamental common law principle". Importantly, Lord Justice Maurice Kay warned the courts to be vigilant when considering NCND "...it is not a legal principle. Indeed, it is a departure from procedural norms relating to pleading and disclosure. It requires justification similar to the position in relation to public interest immunity (of which it is a form of subset). It is not simply a matter of a governmental party to litigation hoisting the NCND flag and the court automatically saluting it. Where statute does not delineate the boundaries of open justice, it is for the court to do so."

25. The High Court in Belfast has also considered the issue. In *Re Scappaticci,* Mr Scappaticci challenged the refusal of the Minister of State at the Northern

[6] I have provided separate comment to the Officer in Overall Command which is not suitable for public release but which confirms that the decisions do not affect my assessment of Operation Kenova.

Ireland Office to neither confirm nor deny that he was the undercover agent referred to in the media as Stakeknife. He argued that the Government owed him a duty as per Article 2 ECHR (the right to life) to confirm that he was not an agent. His application was considered by Lord Chief Justice Carswell who observed: "To state that a person is an agent would be likely to place him in immediate danger from terrorist organisations. To deny that he is an agent may in some cases endanger another person, who may be under suspicion from terrorists. Most significant, once the Government confirms in the case of one person that he is not an agent, a refusal to comment in the case of another person would then give rise to an immediate suspicion that the latter was in fact an agent, so possibly placing his life in grave danger." That is, essentially, the rationale for NCND more generally. Importantly, however, Carswell LCJ recognised that NCND was not a doctrine set in law. The case proceeded on the implicit understanding that it could be breached in certain cases. The LCJ set out the factors he took into account in reaching his decision in that case "My conclusion on this part of the case is that the Minister's decision did not constitute a breach of the positive obligation placed upon her as a public authority and upon the Government to take appropriate steps to safeguard the applicant's life. In reaching this conclusion I have taken into account the several factors which I have mentioned, the risk to the applicant's life, the extent to which a statement from the Minister would protect him, the risk that departure from the NCND policy in this case would endanger the lives of agents on other occasions and the effect on the Government's ability to continue to obtain intelligence in order to combat terrorism. Having weighed these matters, I am of the firm opinion that the Minister's decision not to depart from the NCND policy did not constitute a breach of Article 2."

26. The blanket application of NCND is *not* required by law *or* policy yet it continues to be applied. It is still sometimes said that to ever confirm or deny would be to render the policy pointless. In other words, the policy is only successful if applied consistently in all situations; if the identity of an agent was ever confirmed or denied inferences would be drawn from future failures to confirm or deny and that, in turn, endangers people and the operational ability to recruit future agents and protect current agents. While that reasoning is superficially plausible it does not bear close scrutiny.

27. In future cases, if a court is satisfied that the lives of agents would be endangered and there would be an impact on operational activity it would be reasonable to assume that application of NCND by a public authority would be held to be rational. Similarly, if NCND is used to protect an ongoing undercover operation a court is likely to accept the response and refuse to compel disclosure. Accepting that NCND may be appropriate depending upon the circumstances of an individual case, it is clear that it may also impede access to justice in others, and undermines the procedural obligation to provide an Article 2 compliant investigation. Each incidence of NCND must be considered and justified on a case-by-case basis. That is entirely consistent with the rule of law; the so-called consistency principle or blanket policy is not. Lord Justice Mitting explained it this way NCND "does not ... have a life of its own" and rejected the consistency principle.

28. In the context of litigation, Lord Justice Maurice Kay described NCND as a subset of Public Interest Immunity (PII). PII is the process by which a public authority can apply for a certificate to protect material from disclosure. Unlike the NCND response, which is an administrative policy used to avoid requests for information where the very existence of the material may be in question, PII requires the applicant to satisfy a court that to disclose the material would be detrimental to the public interest. PII can be used in any legal proceedings. The important safeguard within PII is the opportunity for a Judge and, where necessary, special counsel, to look at the material and decide whether it should or should not be disclosed. In the case of *Wiley*, Lord Templeman said "A claim to public interest immunity can only be justified if the public interest in preserving the confidentiality of the documents outweighs the public interest in securing justice." An NCND response, even one made in the course of litigation, is less amendable to scrutiny or review; courts often have to make decisions with little or no information and simply accept government assurances. One may only hear "it relates to national security". In a report, in 2011, it was noted as follows: "it is somewhat disturbing that the courts have been so willing to accommodate NCND even at the cost of considerable damage to the principles of open justice and procedural fairness and ultimately their own integrity."[7]

29. In *DIL v Commissioner of Police of the Metropolis* the 'official confirmation' issue was considered by Mr Justice Bean. DIL concerned a claim for damages arising out of long-term and intimate sexual relationships with alleged undercover police officers. The MPS relied on the "well established policy that the police will neither confirm nor deny ... whether a particular person is either an informer or an undercover officer... The [NCND policy is to] protect undercover officers and to uphold the effectiveness of operations and the prevention and detection of crime." Bean J. however, held there was "no legitimate public interest" in maintaining NCND in response to general allegations and, critically, with regard to specific allegations against undercover officers, he observed that they had been named by the media. That being the case, he held, NCND could not be relied upon in relation to the individuals who had been publicly named by the MPS or had self-disclosed. In relation to those who had not been named officially or self-disclosed he accepted the NCND policy - against disclosure.

30. Lord Justice Pitchford, in setting out the legal framework and procedures for the Undercover Policing Inquiry, said "I accept the invitation by the police services and the Home Office to treat with due respect the risk assessments made by those who are expert in policing and the risks attendant on the exposure of identities and police operations. However, this acceptance does not mean that I shall accept every expression of opinion offered to me, particularly when the opinion is offered at the level of generality." Subsequently, Pitchford LJ ordered the Metropolitan Police Service to provide open and closed versions of risk assessments in respect of the real and cover names of individual undercover officers. As explained, because an exception to the NCND policy "may have the impact of weakening its effect, it does not follow that making the exception will cause significant damage to the public interest." The Information Tribunal has

[7] Note 3, Freedom from Suspicion (2011).

also considered the issue and found that the Secretary of State applied the NCND policy more widely than was necessary to protect national security. It observed that a blanket exemption would relieve the Service of "any obligation to give a considered answer to individual requests." If NCND is used to conceal illegal conduct or because disclosure is inconvenient or embarrassing the very essence of the rule of law is undermined. Certainly, the Article 2 procedural obligation is unlikely to be satisfied.

31. Assuming the above principles are applied and Article 2 is considered in each case NCND does not as a matter of policy or law infringe Article. 2, in my view. Crucially, however, those decisions are not to be made or influenced by those implicated.

Media coverage

32. There has been recent media coverage of and commentary upon the appropriateness of the Officer in Overall Command having attended a seminar which included an academic presentation of a model for dealing with future legacy cases. My only reasonable concern in relation to that can be whether it has any impact upon my assessment of Operation Kenova's independence and effectiveness. My clear view is that it does not. I was aware of the seminar, as were many others. There was no 'secret' about it but I do recognise that it resulted in negative comment. Whatever the case is about the merits of the seminar itself, Mr Boutcher's attendance causes me no concern from an Article 2 perspective. The seminar was not to discuss Kenova cases and did not concern the investigation. Essentially, Operation Kenova has set the bar for Article 2 victim centred investigations, so opportunities are sought to learn from the team. Moreover, the Officer in Overall Command avails himself of learning opportunities. His investigation relies heavily on the trust and co-operation of victims and survivors and their families so he is interested in any seminar that might better inform him as to his work. That has nothing to do with independence but is a matter for him, exercising his independent judgement. Having considered the matter further I am entirely content that there has been no undermining of independence nor should there be any perception of it.

Conclusion

33. In concluding this brief update, I can indicate that the Operation Kenova investigation continues as one with human rights at its core. It continues to manage in a complex and changing environment without undermining its effectiveness or losing its independence. In the event, however, that it is not resourced sufficiently or operational decisions are influenced by or made by others I am unlikely to be able to provide further reassurance. The Officer in Overall Command is mindful of his need to assert his independence and he is right to do so. Assuming he maintains that position he will ensure the trust and confidence of the families and wider public and play his part in discharging the State's Article 2 obligations.

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11/01/21