Judicial Communications Office

26 JANUARY 2018

IN THE MATTER OF AN APPLICATION BY THOMAS RONALD HAWTHORNE AND RAYMOND WHITE FOR JUDICIAL REVIEW

Extract from Judgment

The following is an extract from Mr Justice McCloskey's final judgment delivered this morning.

Remedy

There are two discretions to be exercised by the court. The first is whether to grant any remedy to the successful Applicants. The second, if the court is minded to grant a remedy, is to select the remedy which it considers appropriate. The court cannot invent the remedy to be granted. Rather it must make its selection from a very limited menu.

In exercising the aforementioned discretion, the context is self-evidently important. The main ingredients of the context are the nature of the legal challenge brought by the Applicants, the terms in which the court has found in their favour and the consequences which would flow from electing to grant a particular remedy. Where a judicial review challenge succeeds, it is normal to grant what the court considers to be an appropriate remedy.

The court has made three central conclusions in law. The first is that the Police Ombudsman did not have the legal power to make a "determination" of police collusion in the Loughinisland atrocity. The second is that the Police Ombudsman did not have the legal power to make a "determination" that Mr Hawthorne had been guilty of an "act of negligence". Thirdly, the court has found this discrete "determination" to be unlawful on the further ground of procedural unfairness. By virtue of these conclusions, certain aspects of the report cannot be permitted any enduring existence.

The collusion "determinations" were made by the Ombudsman at a point where a bright luminous line had been reached. His failure to act within the limits of his legal powers occurred because in the relevant passages of the report he traversed this notional line. The Ombudsman committed precisely the same error of law in purporting to make a "determination" that Mr Hawthorne had been guilty of an act of negligence. The additional legal infirmity of procedural unfairness applies also to these passages, together with paragraphs 5.7 and 5.82 of the Ombudsman's report.

There are two further aspects of the judgment of the court to be highlighted. The first is the court's unequivocal finding that certain other passages in the report which were the subject of particular attention in the presentation of the Applicant's case do not apply to Mr Hawthorne. Second, and in particular, he is excluded from the Ombudsman's assessment of "*catastrophic failures in the police investigation*" and the (unlawful) "determination" of police collusion in the atrocity. All of this is spelt out unreservedly in the court's judgment.

I conclude that an order quashing the Police Ombudsman's second Loughinisland report would be unnecessary and disproportionate. I am satisfied that an uncomplicated exercise of excision, or expurgation, can be carried out, leaving most of the report not merely intact but also coherent. This could be achieved by an order of the court incorporating a combination of quashing, mandatory and declaratory elements. I am further satisfied that this remedial course will not dilute or undermine any of the principal conclusions of this judgment.

Finally, <u>if</u> the court were to order a remedy it would incorporate one further component, mandatory in nature, requiring the Police Ombudsman to excise the identified unlawful passages from his report and to re-promulgate the revised report by a specified date.

Prior to finalising and promulgating the issue of remedy, the court was notified in writing of the joint stance on behalf of the Applicants and the Police Ombudsman that the appropriate remedy would be an order quashing the impugned report. The court's deliberations led to the tentative view that the alternative course charted in paragraphs [131] – [135] of the judgment might be appropriate. This was reflected in a formal Notice to the parties, inviting further submissions. This elicited a further written submission from Mr McMillen QC and Mr Brown on behalf of the Applicants. However, there was no response on behalf of the Ombudsman – not even a communication to indicate that no substantive response would be forthcoming. The court considers this discourteous.

<u>Recusal</u>

The court is in receipt of an application for recusal. It is made on behalf of the Respondent (the Police Ombudsman) and is supported by the interested party.

One of the striking features of this application is its <u>timing</u>. The true relevance of the issue of timing is how it is to feature in the court's evaluation and application of the governing test (*infra*). The fair-minded and independent observer, the hypothetical person through whose lens the test of apparent bias falls to be applied, would surely reflect at some little length on the question of why, at every stage when the issue was consciously – and no doubt carefully – considered, experienced legal representatives were unanimous in the view that recusal action was not appropriate. The "stages" to which I refer unfolded at five points: approximately one month before the

substantive hearing commenced; immediately upon completion of the hearing; at the time when the Court's substantive judgment was promulgated; when the Police Ombudsman's Director of Legal Services conferred again with senior counsel; and, finally, on the date of a long arranged listing designed for the purpose of receiving the court's ruling on the ancillary issues of remedy and costs. No argument to the contrary was advanced by any party.

The application, in summary, is based on the involvement of the trial judge as counsel in a 2002 judicial review case**.**

A BBC website report relating to the 2002 judicial review came into the possession of the legal representatives of the Police Ombudsman on 14 December 2017. This contains the following material information: the nature of the 2002 legal challenge; the identity of the judicial review applicant; the identity of the applicant's senior counsel; the main ground of challenge (procedural unfairness); and the grant of leave to apply for judicial review. The evidence discloses the reaction of the Ombudsman and his legal representatives to this discovery. This resolves to two basic, but important, facts. First, the Ombudsman sought the advice of senior counsel, which was provided within 24 hours. Second, having considered same, the Ombudsman determined that there were no grounds for moving a recusal application. The Ombudsman's legal representatives did not see fit to disclose the aforementioned website report to either the legal representatives of the Applicants or those of the interested party. This suggests to the court that the Ombudsman and his legal team were unanimously of the view that this issue was clear cut: there was no evidence to the contrary. Furthermore, they reviewed, and reaffirmed, this stance on or about 08 January 2018.

The factual matrix as regards the interested party and his legal representatives is a little different, inasmuch that while they came into possession of the same information, this did not occur until the immediate aftermath of the promulgation of the court's judgment on 21 December 2017, on the same date. The solicitor's reaction was to confer with counsel and this was followed by an apparently immediate attempt to ascertain whether there was any judgment relating to the 2002 litigation. This confirmed that there was not. Nothing further was done. Almost immediately thereafter, the interested parties' legal representatives received a formal Notice from the court affording them the opportunity to provide a written submission on the issue of remedy. This too did not stimulate any action on their part.

The burst of energy which occurred during the three day period preceding the listing of this case to finalise the issues of remedy and costs (on 12 January 2018) was, according to the evidence, stimulated by a report in the "Irish Times" newspaper the previous weekend. This too is included in the evidence presented to the court. The exercise of juxtaposing the relevant passages in this report with the aforementioned BBC report reveals that the only additional <u>factual</u> ingredient in the former is the disclosure that Mr White had some involvement in the 2002 judicial

review. Mr White was not a party to the 2002 litigation and, therefore, was not represented by any legal practitioner, solicitor or counsel.

I consider it uncontroversial that in every case where a recusal issue arises, the judicial office holder concerned will take into account the following factors, amongst others:

(a) The presumed independence of the judiciary.

(b) The statutory judicial oath of office.

(c) The crucial distinction between a part time judge in legal practice and a full time professional judge.

(d) The passage of time separating the relevant previous event/s from the date upon which the recusal issue arises (some 16 years in this instance).

(e) The likely impact on the hypothetical observer of my reactions and replies in open court, in response to the issues as they were raised by the moving party of the Judge's initial response and reaction to any suggestion of recusal.

(f) Any evidence assembled relating to the Judge's reputation and standing generally.

(g) The character of judicial review litigation, which involves no *lis* inter-partes.

(h) Linked to (g), whether the case to be tried will involve the resolution of disputed factual issues or credibility assessments or fact finding.

(i) The over-riding objective.

(j) (Self-evidently) the contours of the principle of apparent bias and its title deeds, namely fairness to all parties.

(k) Finally, the intrinsically fact sensitive matrix of every case.

Certain distinctive features of the factual matrix fall to be highlighted:

(a) Approximately one month in advance of the substantive hearing, senior counsel representing the Applicants and the Ombudsman discussed the question of whether recusal of the trial judge might be appropriate. They clearly concluded that it would not.

(b) On 14 December 2017, the date upon which the substantive hearing was completed, the Ombudsman's Director of Legal Services requested counsel to advise on the same issue. The written advices of counsel, provided within 24 hours, were that there was no basis for recusal.

(c) The Ombudsman and his Director of Legal Services accepted this advice.

(d) The Ombudsman's legal team at all material times consisted of senior counsel, junior counsel, his Director of Legal Services and a highly reputable firm of solicitors instructed to have carriage of the judicial review proceedings.

(e) From 21 December 2017 the interested party's solicitors and counsel were in possession of the same information which prompted the Ombudsman's request for counsel's advice about one week beforehand. The outcome of their consideration and deliberations was the same of that as the Ombudsman one week previously: no action was to be taken.

(f) The Ombudsman's legal team reaffirmed their previous stance *circa* 08 January 2018.

(g) Though possessed of expanded material information relating to the 2002 litigation, as of 12 January 2018, the scheduled date for promulgation of the court's determination of the issues of remedy and costs, neither the Ombudsman nor the interested party had made any application to the court.

(h) It was only upon the court's insistence on clarity that applications to adjourn (not to recuse) were made later that morning.

(i) In circumstances where the interested party's solicitors have, throughout the flurry of recent correspondence, been especially keen to establish any connections between the second Applicant (Mr White) via the medium of consultations with his counsel relating to the 2002 litigation, the solicitors who represented the judicial review applicant (the Police Association) have stated:

"*We have no record of Mr Raymond White's role ….*

> *Attendance at consultations with counsel and at Court where by* [Mr X – not Mr White] *and a*

Police Federation and Superintendent's Association representative."

The frailties of this trial judge's memory are not confined to lack of recall of the 2002 judicial review (rectified recently, of course). They extend also to the judgment in R v Canning. The court was reminded of this decision by mere happenstance. This court further had no knowledge of the judgment of Maguire J in the Canning judicial review.

Imperfect recall is not confined to this trial judge. The solicitors representing the interested party in these proceedings also represented the Defendant in R v Canning and the same person in Re Canning's Application. Furthermore, the applicant in the latter case was represented by counsel who is also junior counsel for the interested party in these proceedings. Judgment was given just over one year ago. The two cases are inextricably linked. Neither of the Canning decisions was brought to the attention of the court. Given their undisputed relevance, this is presumably attributable to faulty recollection. No other explanation was proffered. There can be no dispute that the imperfect and fallible human memory must be one of the factors which the hypothetical observer would weigh in the present context. None of the parties sought to argue differently.

I turn to dispose of another discrete issue. Mr McGrory QC sought to argue that the Police Ombudsman could not reasonably have brought this application any earlier. The impetus for being driven to make this submission is not difficult to discern. The Ombudsman's legal representatives, in opting to move this application to recuse, were clearly aware of the difficulty presented by the events of 14/15 December 2017, noted in [143] of the judgment. Self-evidently, the Ombudsman could have brought this application at that time. Equally clearly, the Ombudsman and his revamped legal team were also alert to the elephant in the room, namely at the stage when they belatedly decided to advance this application they had, for a period of almost one month, been in receipt of a judgment finding in favour of the Applicants. Furthermore, they evidently considered that they would have to put before the court something to explain why they were, at a belated stage, minded to no longer accept the considered advice of an eminent member of the senior Bar and his junior counsel, given twice – and endorsed by the Ombudsman's Director of Legal Services - having done so during a (contextually) lengthy preceding period.

The suggestion that the information available to the Ombudsman on 14 December 2017 was insufficient to mount a recusal application is in my judgement manifestly unsustainable. The basic, essential facts were known to him as of then. In an attempt to circumvent this hurdle, an elaborate construct has been placed before the court. Its centrepiece is an affidavit sworn by the Ombudsman's Director of Legal Services purporting to depose to the Ombudsman's state of mind and knowledge. The Ombudsman has sworn no affidavit. The impropriety involved in the lawyer's affidavit is unmistakable. It is compounded by the fact that it also fails to comply

with Order 41, Rule 5 of the Rules of the Court of Judicature. This is quite unacceptable. Equally improper is the inclusion of certain averments, in paragraphs 13 and 18 thereof especially ("*… presumably with Mr McCloskey QC*" being a paradigm illustration) which, in addition to being inaccurate rank speculation, are confounded by paragraphs [146] and [156] (i) of this judgment. They also fail to engage with the objectively demonstrable inaccuracies in parts of the 'Irish Times' publication. The lawyer's affidavit further suffers from the impermissible infirmities of expressions of subjective personal opinion, pure comment and sworn argument. An application to receive a further affidavit rectifying these multiple deficiencies would have been favourably received. There was none.

Another element of this construct is the suggestion that the Ombudsman declined to take action at the mid-December stage partly because of his lawyers' assessment following the hearing that the decision of the court was likely to favour the Applicants. This is most difficult to fathom, being couched in terms which appear self-contradictory. It also fails to engage with the reaffirmation of this stance *circa* 08 January 2018. Furthermore, in this context, it is convenient to nail one particular point. Having regard to the totality of the evidence, the communications between the Ombudsman's former senior counsel and senior counsel for the Applicants before the hearing began are a paradigm red herring. The Ombudsman was advised immediately after the hearing that there were no grounds for a recusal application and accepted such advice. He would inevitably have been given the same advice before the hearing began. It is inconceivable that he would not have accepted such advice: the events of 14/15 December 2017 and 08 January 2018 establish this fact beyond peradventure. The submissions of Mr McGrory QC on this discrete issue resolve to a desperate attempt to airbrush this unassailable reality. To summarise, I find the evidence and argument put forward on behalf of the Ombudsman pertaining to the aforementioned issue flimsy, artificial and entirely unpersuasive.

To all of the facts and considerations identified and highlighted above, one adds the unequivocal statement in the most authoritative and comprehensive guidance on this subject, the decision of the English Court of Appeal in Locabail, that the acceptance of instructions to act for or against a party or legal representative in a previous case will not normally warrant disqualification in the instant case. This is a mirror image of the official guidance to all members of the judiciary, contained in the Statement of Ethics for The Judiciary in Northern Ireland. I consider it likely that the independent observer, while of course maintaining an open and circumspect mind, would attribute weight to this. The notional briefing of the observer would also highlight that these are public law proceedings involving no *lis inter-partes*. The observer would further be aware that the substantive judgment of this court has not entailed any evaluation of conflicting evidence, oral or documentary, any credibility assessments of witnesses or the making of factual findings on contentious issues.

I interpose at this juncture the following passage from the opinion of Lord Rodger in R (Al–Hassan) v SSHD [2005] 1 WLR 688, at [9]:

> *"As the facts of the present case demonstrate, however, people who are called on to adjudicate will often have substantial experience in the relevant field and will therefore be familiar with the background issues which they may have encountered previously in various roles. Indeed, the individuals concerned will often be particularly suited to adjudicate on the matter precisely because of the experience and wisdom on the topic which they have accumulated in those other roles. In many continental systems, at various stages of their careers judges spend time as legal civil servants in ministries, drafting and advising on legislation. Undoubtedly, when they return to the bench, it is expected that they will use their experience to enrich their work. Today, British judges draw on their previous work, whether as advocates, legal civil servants or academic lawyers. Therefore, they may well have to decide a point which they had argued as counsel, or on which they had written an article-or, even, which they had decided in a previous case. In various political or other contexts, judges may have publicly advocated or welcomed the passing of the legislation which they later have to apply. Judges who have served in some capacity in the Law Commissions may have to interpret legislation which they helped to draft or about which they helped to write a report. The knowledge and expertise developed in these ways can only help, not hinder, their judicial work."*

Continuing, Lord Rodger stated, at [10]:

> *"It would be absurd, then, to suggest that in such situations their previous activities precluded the judges from reaching an independent and impartial judgment, when occasion demanded. The authoritative decision in* Locabail (UK) Ltd v Bayfield Properties Ltd *[2000] QB 451 is a resounding rejection of any such approach. In any event, if proof were needed, experience confirms that judges are quite capable of acting impartially in such cases."*

Baroness Hale described these passages as *"powerful"*, at [13]. No member of the panel disagreed with them. Al–Hassan is yet another decision – of obvious relevance – to which my attention was not drawn.

Finally, the independent observer would be aware that these proceedings do not involve a once and for all opportunity for the losing party. There is a right of appeal entailing no threshold of permission to appeal and the grounds of appeal may

incorporate a free standing challenge to this ruling. The final ingredient in the independent observer's knowledge would be that the court has rejected the Applicants' contention that the appropriate remedy is to quash the Ombudsman's report in its entirety. The observer would also be aware of the strenuous efforts on the part of the court during the twilight period between promulgation of substantive judgment and finalisation of remedy to bring to the parties' attention the possibility of a remedy involving the excision of certain offending passages from the report and the preservation of the remainder in its entirety. The impetus for considering this possibility was exclusively that of the court (via the medium of a formal direction). The ultimate remedial outcome espoused by the court is one which would preserve most of the impugned report of the Police Ombudsman, falling well short of that urged by the Applicants and not to their liking. It stands in marked contrast to the nuclear option of quashing the report in its entirety. This simple analysis of this discrete issue on which the court was clearly favouring the Ombudsman would point away from, and not towards, any apprehension of subconscious bias.

Weighing all of the above conscientiously and dispassionately, my evaluative conclusion is that the test for recusal is not satisfied. In my judgement, the independent observer would not reasonably apprehend a realistic possibility of subconscious bias in this court's resolution of certain pure questions of law in favour of the Applicants. The application is refused accordingly.

Further Consideration

A broad range of facts, considerations and issues has emerged during the most recent phase of these proceedings. While I have concluded that the test for apparent bias is not satisfied, that in my view is not, in the unique circumstances of this case, dispositive of the question of whether judicial withdrawal at this stage should occur. I consider that judicial withdrawal from a given case is not necessarily dependent upon, or confined to, a successful recusal application.

I have conceived it appropriate to stand back at this stage and to attempt an assessment of the broad, multi-faceted and multi-layered equation which has developed, organically so, in these proceedings. In undertaking this exercise I find myself focusing increasingly on the situation of the families of the murdered victims. They have found themselves actively involved in the Northern Ireland legal system during much of the past six years. Their interaction with this legal system has been far from simple and straightforward. To begin with, they found themselves obliged to bring legal proceedings to challenge the first of the Ombudsman's Loughinisland reports. This had a positive outcome for them, the Ombudsman agreeing to an order quashing the report. Next, the Ombudsman published a new report which satisfied many of the concerns and anxieties of the families. This, however, was followed abruptly by a legal challenge to such report. At the conclusion of the most recent litigation period of approximately 1½ years duration, the families have received a judgment which accedes to this legal challenge.

To describe the events which have materialised in the aftermath of this judgment as unpredictable and unprecedented is to indulge in understatement. The families have become engulfed in a veritable maelstrom. In the midst of this they have found themselves repeatedly travelling to and from the High Court and they have had to try to absorb a concoction of evolving legal advice, further legal submissions, new evidence, a change of counsel, repeated adjournments and intense public and media attention. They have also had to endure all that flows from the persisting uncertainty and lack of litigation finality which these recent events have engendered. Furthermore, I consider that the families cannot be expected to grasp the legal intricacies and complications of the court's evaluation of the application to recuse.

While it is evident that the families have travelled this lengthy, unpredictable and uncertain litigation road with both fortitude and admirable dignity and restraint, the toll on the persons concerned – surviving spouses, children, nieces, nephews and others – must have been immense. I would expect that they have found their six year encounter with our legal system bewildering and confusing.

In these circumstances, I consider it necessary to reflect on the question of whether the families can have genuine confidence in the outcome which would follow if the court were to give effect to its judgment and choice of remedy by the usual medium of a formal final order. In considering this question, it is essential for the court to detach itself as far as humanly possible from the conscientious and dispassionate judicial exercise which has given rise to its substantive judgment and, further, its assessment that the test for apparent bias is not satisfied. I consider that, in the truly unique and unprecedented circumstances of this case, the interests of justice will not be furthered by a formal and final outcome which gives effect to the court's substantive judgment and choice of remedy. Trust and confidence in the legal system are critical ingredients of the rule of law which binds and governs all of society.

In these circumstances, yet another balancing exercise falls to be performed by the court. It is a complex and challenging one, admitting of no obvious or easy answer. Following anxious reflection, my evaluative conclusion is that our legal system will not have served the families well if they are not given the opportunity of having this case heard by a differently constituted court. While I am alert to the remedy of an appeal, this, in my view, is not sufficient to displace this assessment. On the other side of the scales, the Applicants will enjoy all of the guarantees and safeguards which every litigation process provides and, further, they will be at liberty to urge another judge that this court' s analysis of the law is the correct one. They will also be the beneficiaries of a further specific case management direction.

The practical and legal effects of the foregoing are the following:

(i) I decline to draw up an order giving effect to my substantive judgment and assessment of the appropriate consequential remedy.

(ii) There will be a fresh hearing before a differently constituted court.

(iii) The judgment of this court will be neither binding on any party nor executory in nature. It will, rather, assume a hybrid status, somewhat akin to that of an advisory opinion, which features in legal systems other than ours.

In these unique and unprecedented circumstances, I am also obliged to reflect anxiously on the position of the Applicants who, but for these highly unexpected developments, would be the beneficiaries of the Court's substantive judgment.

(i) The crucial issue from the Ombudsman's perspective is this court's construction of the relevant statutory provisions.

(ii) It seems highly unlikely that there could be any legitimate dispute about how this court has formulated the requirements of procedural fairness generally and those pertaining to Mr Hawthorne specifically.

(iii) The Police Ombudsman, as a responsible public authority who, in common with all other litigants, owes to the court the duties of assistance and co-operation enshrined in the overriding objective, will doubtless reflect carefully and conscientiously on each of the foregoing matters.

(iv) The court has devoted a lengthy chapter of this judgment to what it has termed the "*implication/identification*" issue(see paragraphs [50] – [69]), which is quite separate from its conclusions on the two central legal issues. It would, I apprehend, be surprising to most if the Ombudsman were to dissent from the court's analysis and conclusions pertaining to this issue. Indeed, most fair minded and right thinking members of society would probably expect the Ombudsman to welcome them, given the measure of clarity which they import vis-à-vis his report and the deserved fairness and vindication for Mr Hawthorne which they provide.

I have not concealed my sympathies for the families. However, as in every species of litigation, a broader panorama must be reckoned and this includes other actors. Furthermore, the view that any re-hearing before a differently constituted court should be considerably more focused and refined than that which has been transacted must, from any reasonable perspective, possesses much merit and force. The hypothetical observer – fair-minded, balanced, detached, possessed of all the other admirably qualities noted above and alert to the central tenets of the

overriding objective – might readily conclude that any re-hearing of this challenge should be confined to the single and fundamental issue of law relating to the scope of the Police Ombudsman's statutory powers. If the Ombudsman were to take the course mooted in paragraph [189] (iv) of this judgment this would not exclude the possibility of some measured and proportionate qualifying words.

The Ombudsman and those advising him will, I trust, be acutely alert to another **duty** embedded in the overriding objective, namely that which flows from the regrettable fact that there has been an enormous investment of increasingly limited judicial and administrative resources in this case. Any further such investment must be minimised to the greatest extent reasonably possible. Allied to this is the fact that three parties have incurred legal costs which, no doubt, are substantial. As regards two of the four parties concerned, the public will have to pay. I invite the Ombudsman to reflect carefully on this. If the Police Ombudsman were to seek to re-litigate before a differently constituted court certain of the issues exhaustively addressed and determined in this judgment I apprehend that many detached and informed observers would find this surprising. The Ombudsman will also wish to reflect carefully on the consideration that to seek to re-litigate certain of the issues already judicially determined might be considered in breach of his statutory duty to promote public confidence in his office and would not be in the interests of the long suffering families. It could also have still further adverse costs implications for the public purse.

Giving effect to the foregoing, the following discrete provision will be included in the final order of the court: the Police Ombudsman shall, by **23 February 2018,** specify in writing those aspects of the judgment of this court which he will seek to re-litigate before a differently constituted court, with accompanying brief reasons.

Costs

It is to be expected that the Applicants will apply for costs against the Ombudsman. Their brief written submissions on this issue will be provided by **31 January 2018**. The Ombudsman's riposte will be made by **05 February 2018**. The court will determine this issue on paper, without further listing, in the interests of minimising costs.

Recusal applications generally

I consider that great care must be taken in the compilation of every recusal application. First, it is essential that applications of this kind comply with the fundamental requirement of balance. The judge to whom this type of application is directed does not have the benefit of legal advice or representation. Nor is the facility of a judicial or research assistant available. The judge is on his or her own. This is the reality of the situation in which the judge must perform a difficult balancing exercise. It is of not less than fundamental importance that every application of this

kind includes all facts, considerations and legal submissions both in favour of and against recusal.

It will usually be inappropriate for any parties' representatives to draw attention to what another judge has done in some other case. Every case is intensely fact sensitive and judicial automatons are not (at any rate at present) a feature of our legal system. The further truism in play here is that two judges may, entirely reasonably and responsibly, make diametrically opposing conclusions on a recusal application. In the present case reliance was placed upon another case in which a senior judge opted for recusal upon having his attention drawn to the remote historical fact that he had signed a Writ on behalf of one of the parties in a case some 25 years previously. I wish to observe, gently, that there is really no point in bringing to the attention of this court a "precedent" of this nature. The correct analysis, in my view, is that individual recusal decisions will rarely set any precedent for future cases. In law, context is everything.

THE FOLLOWING EXTRACTS WERE PUBLISHED ON 21 DECEMBER 2017

The Applicants, Thomas Ronald Hawthorne and Raymond White, are retired police officers, former members of the Royal Ulster Constabulary ("RUC"). Mr Hawthorne brings these proceedings on his own behalf, while Mr White does so as chairman of the Northern Ireland Retired Police Officers Association (hereinafter *"NIRPOA"*). Their combined challenge relates to the publication by the Police Ombudsman for Northern Ireland (the *"Police Ombudsman"*) of a so-called "public statement", in effect a report, arising out of the Ombudsman's second investigation of the notorious sectarian murders perpetrated at the Heights Bar, Loughinisland, Co Down on 18 June 1994. "*Public Statement*", a statutory term, denotes the Ombudsman's report of June 2016. The first of the Police Ombudsman's investigations in relation to the murders and the surrounding police conduct generated the promulgation of an earlier "public statement" which the families of the deceased challenged by judicial review, culminating in a consensual quashing order. The Applicants' principal quest is to have the June 2016 report quashed by order of this court. The terms "public statement" and "report" are in practice employed interchangeably.

These proceedings, having been initiated in August 2016, leave to apply for judicial review was granted following an *inter-partes* hearing by order dated 06 June 2017. The substantive hearing was conducted on 01 and 07 December 2017. The commendably full co-operation from the parties' representatives has resulted in a time lapse from the initiation of special case management measures, pursuant to [2] above, to the delivery of this judgment being of less than two months. The court will expect this level of cooperation in all " legacy" cases.

Following this lengthy preamble the Executive Summary expresses the following conclusion [p 7]:

> "*Many of the issues I have identified in this report, including the protection of informants through both wilful acts and the passive 'turning a blind eye'; catastrophic failures in the police investigation; and destruction of exhibits and documents are in themselves evidence of collusion …….*
>
> *When viewed collectively I have no hesitation in unambiguously determining that collusion is a significant feature of the Loughinisland murders.*"
>
> [Emphasis added.]

This is, by a distance, the headline passage in the Ombudsman's report.

Thomas Ronald Hawthorne

Mr Hawthorne avers that for policing purposes Northern Ireland is divided into a series of divisions and subdivisions. One of these divisions, illustrated on a map provided to the Court, occupies an easterly/south easterly geographical area beginning at Donaghadee in the north, extending through Ballynahinch and Rathfriland in the west and ending at the eastern extremity of Carlingford Lough. This division has a series of subdivisions, one of which is the Downpatrick subdivision. Loughinisland is situated within this subdivision. Mr Hawthorne was the RUC Commander of this subdivision throughout the entirety of the period which is the subject of the impugned Police Ombudsman's report. He had been Subdivisional Commander previously. In his capacity of Commander, he avers, he had ultimate responsibility for all aspects of policing in the area. This included an overarching, strategic role into the investigation of the murders.

Mr Hawthorne was the first ever Northern Ireland recipient of the Queen's Gallantry Medal. During his lifetime of police service, he was shot and injured by terrorists and his home was attacked by a terrorist bomb.

The balanced and dignified conduct of the families in these proceedings must be unreservedly acknowledged.

The Director's second affidavit came into existence by virtue of a specific direction made by the court mid-trial. It addresses a series of pertinent questions raised by the court, contains self-evidently important information and exhibits significant documents. All of this should have occurred proactively at an early stage of the proceedings. The Director's first affidavit was manifestly incomplete and, in consequence, misleading. No explanation for this failure was proffered.

Against the statutory and evidential background outlined above, the two permitted grounds of challenge are:

(a) The report exceeds the Police Ombudsman's statutory powers.

(b) Mr Hawthorne was denied the common law procedural fairness protections guaranteed to him by the common law.

I shall examine each ground in turn. Before doing so, however, I consider it necessary to address a discrete issue of some importance.

Every "public statement "promulgated by the Police Ombudsman under section 62 of the 1998 Act has legal effects and consequences. Furthermore, as the present challenge demonstrates, each can have a major human impact, and may also impinge on, the legal rights of individuals. In addition such statements are made pursuant to a bespoke statutory framework and their content will very frequently be the yardstick whereby judgements relating to the twin statutory aims of securing the efficiency, effectiveness and independence of the police complaints system and the confidence of the public and of members of the police force in that system, enshrined in section 55(4), will be made. The effect of these factors, in my judgment, is that public statements made under section 62 will be read and construed by the application of a relatively strict prism involving careful judicial scrutiny. The exercise of construction being an objective one, I consider the appropriate test to be that of the hypothetical, impartial, fair minded and reasonably informed reader. Having canvassed this formula at the hearing there was no dissenting submission from either party's counsel.

There can be no plausible doubt that Mr Hawthorne is readily identifiable as the person to whom the various criticisms and negative findings in the report relating to the storage and disposal of the suspected murder vehicle and the simultaneous loss of an interior exhibit apply. The contrary, properly, was not argued. Having conducted the preceding exercise, I have reached the twofold conclusion, albeit by a narrow margin, that (a) the report neither accuses Mr Hawthorne of catastrophic failures in the police investigation nor finds him guilty thereof and (b) Mr Hawthorne is excluded from the report's "unambiguous determination" that collusion was "*a significant feature of the Loughinisland murders*".

The above conclusions are made only after a detailed and painstaking analysis of a forensic nature. They vindicate Mr Hawthorne unreservedly. However, it should not have been necessary for Mr Hawthorne to initiate legal proceedings of this kind in order to secure the judicial analysis, conclusions and vindication of which he is now the beneficiary. The Police Ombudsman's "unambiguous determination" that police officers were guilty of collusion is a determination that such officers participated in the murder of six innocent civilians and the injuries suffered by five innocent civilians on 18 June 1994 at the Heights Bar, Loughinisland. The

determination is expressed in unqualified terms. It is a statement of the most damming kind. The Police Ombudsman's report should have made abundantly clear to the reader that the unequivocal determination of police collusion with UVF terrorists in the murders did not apply to Mr Hawthorne. However, it signally failed to do so. The authors of the report were careless, thoughtless and inattentive in the language and structuring of the document in this respect. While this is quite unacceptable by any standard, more disturbingly it is also antithetical to the statutory purposes.

It is difficult to conceive of a more withering and damming condemnation of professional police officers. "Collusion" in this context must, properly dismantled, connote, or denote, varying degrees of participation by police officers in the murder of six innocent civilians and the infliction of injury on five others. Collusion by police officers with terrorists in the murder of innocent civilians could also entail the commission of offences such as misfeasance in public office and, especially as regards some of the subsequent police conduct which features in the Ombudsman's findings, conspiracy to pervert the course of justice. I consider the language of "indictment" inapplicable as an indictment is a formal statement levelling accusations of criminal conduct against a person presumed innocent. It is accusatory in nature, is the culmination of the due process of the law which has preceded it and is followed by the due process of the criminal trial. The Police Ombudsman did not use the language of accusation. Nor did he opt for the more restrained and softer vocabulary of opinion, belief or suspicion. Rather, he <u>determined</u>, unambiguously, that collusion had occurred. This was an outright and unqualified condemnation. It is properly described as a verdict.

The Police Ombudsman's unhesitating and unambiguous determination that RUC officers were guilty of collusion with UVF terrorists in the execution of the Heights Bar murders in substance differs little, if at all, from a verdict of guilty beyond reasonable doubt. Indeed the "no hesitation" and "unambiguously" ingredients in the Police Ombudsman's <u>determination</u> to this effect could be said to be expressed more forcefully than such a verdict. No police officer was prosecuted for any collusive act – such as murder in the second degree, aiding and abetting the commission of murder, misfeasance in public office or conspiring to pervert the course of justice. Furthermore, no police officer was accused of the commission of a disciplinary offence and prosecuted in that forum. The unhesitating and unambiguous determination that RUC officers had colluded with UVF terrorists in the commission of the Heights Bar murders and other offences was not the product of a criminal trial or a disciplinary process. The equally unequivocal determination that Mr Hawthorne was guilty of negligence in the disposal of the suspected murder vehicle was not the product of any disciplinary procedure.

The effect of this is that none of the police officers to whom these destructive and withering condemnations apply had the protection of due process. They were, in effect, accused, tried and convicted without notice and in their absence. None of the

essential elements of the criminal or disciplinary process existed. In particular, and in very brief summary, there was no accusation, no presumption of innocence, no burden of proof, no opportunity to be heard, no right to confront one's accusers and to cross examine witnesses, no legal representation and no right to disclosure, one of the key features of the modern criminal process.

In my view Parliament cannot have intended that the Police Ombudsman could exercise his power under section 62 in a manner confounding and contradicting the determination he had made under section 58(1). What the Police Ombudsman proceeded to do was the very antithesis of this statutory determination. Nor can Parliament have intended to devise a mechanism, or system, which would have the effect of depriving police officers, serving or retired, of the legal rights, protections and safeguards available to them in the criminal process or, as the case may be, the disciplinary process. Parliament, in my view, cannot have intended to devise a mechanism which would leave such persons utterly defenceless. Nor can Parliament have intended to permit the Police Ombudsman to (in substance) airbrush the fact of no prosecution and conviction and to effectively act as judge and jury. To construe the statutory regime otherwise would give rise to this catalogue of anomalies and incongruities.

The combination of factors highlighted above impels to the conclusion that those aspects of the Police Ombudsman's report reflecting adversely on Mr Hawthorne are vitiated by procedural unfairness. To summarise, he was given no advance notice of certain critical passages; the portrayal of his responding representations was distorted; his representations were evidently misunderstood; and steps having the potential to exculpate him were not taken. The resulting diagnosis of procedural unfairness follows inexorably.

Where the Police Ombudsman, acting within the confines of his statutory powers, proposes to promulgate a "public statement" which is critical of or otherwise adverse to certain persons four fundamental requirements, rooted in common law fairness, must be observed. First, all passages of the draft report impinging directly or indirectly on the affected individuals must be disclosed to them, accompanied by an invitation to make representations. Second, a reasonable period for making such representations must be permitted. Third, any representations received must be the product of conscientious consideration on the part of the Police Ombudsman, entailing an open mind and a genuine willingness to alter and/or augment the draft report. Finally, the response of the individual concerned must be fairly and accurately portrayed in the report which enters the public domain.

The elevated threshold of Wednesbury irrationality, emphasised in recent decisions of the Supreme Court, is not in my opinion overcome:

The effect and outcome of the extensive exercise which the court has undertaken are that the severe public criticism described by Mr Hawthorne in his first affidavit was

not justified, for certain fundamental reasons. First, the Police Ombudsman's damning condemnation of RUC collusion with UVF murderers does not implicate Mr Hawthorne. Second, there is no finding in the Police Ombudsman's report that Mr Hawthorne was culpable of any of the catastrophic investigative failures assessed. Third, the Police Ombudsman's " determination" of police collusion in the Loughinisland murders is unsustainable in law as it was not in accordance with the Ombudsman's statutory powers. Fourth, the offending sections in the Ombudsman's report, including the "determination" that Mr Hawthorne was guilty of an "act of negligence", are breach of the legal requirements of procedural fairness and unlawful in consequence.

This challenge succeeds on the grounds and for the reasons explained above. It is a matter of regret for the court that as a result of this decision finality and closure for the affected families will be postponed once again. However, the task of the court is to conduct an independent and impartial adjudication and to dispassionately apply the relevant legal rules and principles to the material facts. This is the very essence of the rule of law. This exercise yields the outcome that this challenge succeeds.

The primary remedy sought by the Applicants is an order quashing the Police Ombudsman's "public statement". The issues of remedy and costs will be finalised when the parties have had an opportunity to absorb this judgment and consider their client's instructions. The Court will reconvene at 09.45 on 12 January 2018 for this purpose. The Applicant's written representations on both issues will be provided in writing by 16.00 hours on 03 January 2018. The Respondent's response will be provided by 16.00 hours on 10 January 2018. The judgment of the court has now entered the public domain and no embargo applies. The parties' representations will also address the issue of costs.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (www.judiciary-ni.gov.uk).

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST

Judicial Communications Office

BT1 3JF

Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk