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Judgment: approved by the Court for handing down | *Delivered:* **13.12.2004**

(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

ANNA McCONWAY

Applicant/Appellant;

and

NORTHERN IRELAND PRISON SERVICE AND CHIEF CONSTABLE

Respondents.

Before: Nicholson LJ, McCollum LJ and Campbell LJ

NICHOLSON LJ

Introduction

[1] This is an appeal from the order of Kerr J (as he was then) that applications for judicial review against the Northern Ireland Prison Service and the Chief Constable of the Police Service for Northern Ireland which were, ultimately, conjoined be dismissed.

[2] The impugned decision of the Prison Service was made on 22 June 1999. The substance of the decision was not to provide the appellant with security clearance to provide counselling services to prison officers. Three decisions made on behalf of the Chief Constable were challenged. The first was a decision to generate and maintain private and confidential information about the appellant. The second was a decision to inform the Prison Service on 14 June 1999 that the appellant was a security risk. The third was to refuse access to the information in October 2002.

[3] The Grounds of Appeal against the judgment of Kerr J are set out in the Notice of Appeal and are as follows:-

Grounds of Appeal

1. Northern Ireland Prison Service

The learned judge erred in law rejecting the appellant's contentions that:

1.1 The impugned decision was vitiated by material error of fact, being based on incomplete and misleading information.

1.2 The impugned decision took into account irrelevant considerations.

1.3 The impugned decision left out of account relevant considerations.

1.4 The impugned decision was vitiated by the absence of any or adequate enquiry.

1.5 The decision making process was procedurally unfair.

1.6 The impugned decision was vitiated by the application of a rigid policy and a corresponding failure to properly consider the individual circumstances of the appellant's case.

2. Chief Constable

The learned judge erred in law in rejecting the appellant's contentions that:

2.1 The impugned decisions were vitiated by material error of fact, being based on incomplete and misleading information.

2.2 The impugned decision took into account irrelevant considerations.

2.3 The impugned decisions left out of account relevant considerations. The impugned decisions were made in circumstances where there had been a failure to comply with paragraphs 19 and 20 of the Home Office Guidelines and were vitiated accordingly.

3. Both Respondents

The learned judge erred in law in rejecting the appellant's contentions that:

3.1 The impugned decisions infringed the appellant's right under Article 8 of the European Convention on Human Rights, contrary to Section 6 of the Human Rights Act 1998.

3.2 The impugned decisions violated the appellant's rights under Article 1 of the First Protocol, contrary to Section 6 of the Human Rights Act 1998.

4. Relief

And further take notice that the appellant seeks the following relief:

4.1 An order setting aside the judgment and Order of the learned trial judge.

4.2 Insofar as necessary, an Order – pursuant to RSC Order 59, Rule 13 – staying enforcement of the said judgment and Order until determination of this appeal.

4.3 Such further or other Order as the court may consider just and appropriate.

4.4 An Order for the costs of both hearings.

The facts placed before us

[4] It appears to us to be necessary to set out a number of facts stated on affidavit on behalf of the parties before we deal with the arguments presented to us.

[5] The first affidavit of the appellant sworn on 16 March 2000, grounding the application, referred to the fact that she was a Counselling Psychologist, having obtained a degree, followed by a Masters' Degree in Counselling in 1999. On 25 January 1999 an organisation known as "Core Care" wrote to her, asking if she would be interested in working in association with them. She joined Core Care on 13 April 1999 as an associate counsellor to receive referrals from them on an "as needed" basis. They were awarded a contract with the first respondent and in May 1999 she was asked to counsel two prison officers. She contacted them and arranged times for counselling sessions. The first of these was held on 15 June 1999.

[6] She was required to fill in a security questionnaire and it was indicated that her security would be checked. She filled in the questionnaire and returned it. On 22 June 1999 she was informed by Core Care that the first respondent had not granted her security clearance.

[7] On 28 June 1999 she was sent a document by Core Care which they had received on 22 June from a Mr Wallace of Prison Operations stating that she had not been security cleared. Through her solicitor she sought an explanation by letter dated 1 July 1998 for the refusal of security clearance. On 23 July 1999 the first respondent informed her solicitor that it was satisfied that security clearance had been withheld for proper reasons. The letter was signed by RB Wallace. After further correspondence her solicitor was told that security clearance was withheld for the purpose of protecting national security and, because the information upon which it was based was extremely sensitive, nothing further could be said. Her solicitor asked for information about rights of appeal and was informed on 1 February 2000 that she had no right of appeal as she was not their employee. She commenced an application for judicial review against the Prison Service grounded on her first affidavit. She later brought proceedings by way of judicial review against the Chief Constable.

[8] Mr Wallace replied to her first affidavit on behalf of the first-named respondent by way of affidavit on 11 May 2000. He is an Assistant Director. At paragraph 5 he pointed out that Core Care and the appellant were aware of the need for security clearance. The police provided the Prison Service with confidential comment on her security vetting and he decided that she should be refused security clearance as it would be contrary to the interests of national security to provide same. After her solicitor had made representations the police had been asked to double check the information and stated that the information came from a reliable source and was accurate. Another member of the Prison Service endorsed the earlier decision of Mr Wallace.

Mr Wallace stated that the first respondent had been given the information on a confidential basis and, therefore, only the broad basis of the decision had been communicated to the appellant's legal adviser. As a result of the judicial review proceedings the first respondent had sought the views of the police who indicated that disclosure of the information in substance or summary could not be made without real harm being done to the public interest as it was necessary to protect the source of the information and the information itself.

[9] Mr Wallace swore a second affidavit on 30 August 2000 stating that the police had further considered the question of disclosure of the information and had decided that the letter from the police to the first-named respondent

could be disclosed without real harm to the public interest. He exhibited the letter to his affidavit. The letter reads:-

> "Anne McConway, 6 The Park, Dunmurry BT17, 0ER
> D.O.B., 2.2.54
>
> We have on record a person whose details are identical with those of your subject. She is held on record in December 1986 when it was reported that she had passed details of a member of the RUC to the Provisional IRA. The above information given in this report is extremely sensitive and as such should be treated accordingly".

It was signed by D/I Edwin McKee and dated 14 June 1999.

[10] Further attempts by her solicitor to have access to files held by Special Branch in relation to her were disallowed by PD Hamill, Assistant Legal Adviser to the Police, pursuant to "the Chief Constable's practice".

[11] The appellant made an affidavit on 20 October 2000, described as her third affidavit. This would appear to be her first affidavit in the proceedings against the Chief Constable. At paragraphs 4 to 15 she set out an account of why she thought these allegations referred to in the letter from the police to Core Care (which she completely denied) were made. In 1986, she stated, she was living at 8 Beechill Grove, Derriaghy. Her younger brother who lived with her parents in Andersonstown was involved in joyriding and she agreed with the Probation Board that her brother should come to live with her. Detective Constable Douglas was the RUC officer involved with her brother's case and she had spoken to him on numerous occasions. He usually called when her husband was at work and the children were at school. He asked her to go to lunch or dinner or for a drink with him on numerous occasions but she always refused. This was in the early part of 1986. In September 1986 she was leaving her daughter to school in Dunmurry. She was approached by Detective Constable Douglas in plain clothes and he told her that a couple of people wanted to talk to her and asked her to get into a car. There were two other persons in plain clothes in the car whom she believed to be police officers. They said that she could be very helpful to them and if she was in bars around Andersonstown she could keep an eye on what was happening and report to them. She said that she did not frequent bars and did not want to get involved. About a week later Detective Constable Douglas was outside the school again with two plain clothes police officers. She told him that she did not want anything to do with his proposition and to leave her alone.

[12] She had a friend who was an ex-RUC officer who knew senior RUC officers and he gave her the name and telephone number of a senior police officer so that she could make a complaint. She was told when she rang him in Armagh that he was at the incident room in Ballynahinch investigating a murder and she was given that telephone number. She rang him and he said that he would speak to Detective Constable Douglas and make sure that she was not hassled again. She also referred to another matter involving the selling of her home at Beechill Grove at Christmas 1986 or early 1987.

[13] Detective Superintendent Gamble swore an affidavit on 8 February 2001 in which he stated that at common law police officers, including Special Branch Officers, had powers to collect and retain information about offenders and offences and also had statutory powers. They were accountable to the Chief Constable. Special Branch Officers' functions were set out in guidelines on the work of Special Branch set out in Home Office Guidelines adopted by the Special Branch. In addition the Chief Constable had issued standing instructions (known as the "Code") which governed the use of information by police officers generally. The present system of security vetting was published in a statement made to the House of Commons by the Prime Minister on 15 December 1994. He exhibited the Guidelines and the statement. National security in Northern Ireland in relation to Irish related terrorism was placed on a statutory basis by the Regulation of Investigating Powers Act 2000.

Special Branch maintained records of reports from sources. Each source was dealt with by at least two handlers who, with their superiors, assessed the source and any item of information received from that source. The source and the information in this case was graded B2, being the highest grading attributable to human intelligence. He had reports on the appellant dated 18 November 1986 and 3 December 1986 together with the summary furnished to Detective Inspector McKee in June 1999. He had identified the source by reference to the Code on the reports. He knew this source to have supplied reliable information to Special Branch over a period of 20 years. He had identified the handlers who had left the RUC. It was not possible to date (8 February 2001) to obtain any information from the source or the handlers because of the circumstances pertaining to the source and the handlers. There was no record of the report of 3 December 1986 having been referred to for any purpose from 1986 until the first respondent's request of 1999.

He had spoken to the officer named by the appellant in her affidavit of 20 October 2000 (Detective Constable Douglas) who confirmed contact with the appellant in 1986, that he had received a warning of a personal threat which was unconnected with her and consulted Special Branch Officers about it. As a result of that contact he was asked to be present and was present when approaches were made to her outside her daughter's school, that he placed the first as on 21 October 1986 and the second contact approximately

one week later but could not now identify the officers. The Detective Superintendent was unable to identify them. He spoke to the Superintendent in Armagh where Douglas was stationed. He had no specific recollection of speaking to Douglas. Detective Constable Douglas recollected the Superintendent speaking to him and indicating that the recruitment of sources should be left to Special Branch and that Detective Constable Douglas should not be involved. Events surrounding the sale of the appellant's house did not appear to be relevant. He decided that Special Branch reports could be disclosed to the appellant subject to deletions, some of which identified codes and systems and others which identified persons and practices, all of which ought to be withheld in the public interest.

[14] Paragraph 20 of the Guidelines reads:-

> "It is also important to ensure that, wherever possible, information recorded about an individual is authenticated and does not give a false or misleading impression. Care should be taken to ensure that only necessary and relevant information is recorded and retained. Each Special Branch should, therefore, maintain an effective system both for updating information where necessary and for the identification and destruction of information which can no longer be clearly related to the discharge of its functions."

[15] Detective Inspector McKee also swore an affidavit on 8 February 2001. He was an Officer of Special Branch as was Detective Superintendent Gamble. He stated at paragraph 4 that he was furnished with two reports dated 18 November and 3 December 1986 which he exhibited with some deletions on public interest grounds based on security considerations. The report of 3 December 1986 formed the basis of his letter of 14 June 1999 to the first-named respondent. The report had been graded by the handlers as B2. The figure 2 meant that the information was graded as "probably true". He did not carry out any other investigations. He based his decision to write to the first-named respondent on the Special Branch report. Had there been any further information available to Special Branch to "up-date" the reports he would have received that information.

[16] The report of 3 December 1986 referred to the occupation of Anne Marie McConway as Kiss-O-Gram Girl with two addresses, 8 Beechill Road, Milltown, Belfast and 6, The Park, Dunmurry Lane.

The information which was partially deleted (or redacted) stated:-

> ""A/n (interpreted for the Court by Counsel for the Chief Constable as "Above-named") is well-known in PIRA circles …. (deleted). A/n has informed …. (deleted) that a policeman named …. (deleted) has asked her out. PIRA have instructed her to confirm the arrangements as they intend to kidnap …. (deleted). Change of address for a/n."
>
> We were informed by Counsel for the respondent that the policeman's name was Douglas. Then there was a heading:
>
> "Text of Report"
>
> Provisional I.R.A
>
> Ann McConway has informed …. (deleted) that …. (deleted) CID, had telephoned her and called at her home. He has asked her out for a Christmas meal. Northern Command via …. (deleted) have instructed her to confirm the arrangements but not to appear, they intend to kidnap …. (deleted).
>
> Comment
>
> Ann McConway has been identified as Anne Marie McConway née Dowds DOB 2.2.1954 8 Beechill Grove, Derriaghy, Lisburn with a previous address at 19B Somerset Walk, Rathenraw, Antrim. Enquiries would indicate that PIRA are aware of …. (deleted) home address and the fact that he is attached to RCS Armagh. Relevant authorities informed …. complied with. Further enquiries would tend to suggest that McConway may not be talking to …. (deleted) direct but he is obtaining his information via as yet an unidentified third party."

Much of the entry and of the text of the report of November 1986 is deleted. The last sentence appears to state:-

> "Anne McConway is employed as a Kiss-O-Gram girl and is well known in PIRA circles."

[17] The appellant made another affidavit (described as her "second" affidavit at paragraph 1) in response to the affidavits of Gamble and McKee on 8 March 2001. This would have been her second affidavit in the judicial review brought against the Chief Constable. At paragraph 3 she refers to the two Special Branch reports and the statement that a police officer asked her out. She states that she believes that the reports tend to corroborate her averments in this respect. At paragraph 5 she states that the only person in whom she confided the unwelcome attentions of Detective Constable Douglas was the Superintendent to whom she reported the matter around November 1986. She states that she did not even confide in her husband at that stage as he was short-tempered. She claims that she repeatedly rejected the attentions of Detective Constable Douglas. She said that from August to Christmas 1984 she worked part-time in the delivery of singing telegrams but in 1986 was employed as a Human Resources Worker by the RAC. She stated that she contacted the Superintendent within three days of the second approach of the Special Branch around the beginning of November 1986 and did not receive any further invitations or attention from Detective Constable Douglas thereafter, nor did his invitations entail a Christmas meal. She refers to the fact that there is no reference in the Special Branch records to the attempts by Special Branch to recruit her or her rejection of these attempts or to the approaches to her by Detective Constable Douglas and her rejections of these approaches or to her complaint to the Superintendent and the consequential admonishment of Detective Constable Douglas or to her true occupation. She draws attention to the fact that it was alleged that the source had obtained his information through an unidentified third-party, "untried and untested". She points out the confirmation in Gamble's affidavit of her approach to the Superintendent and his admonishment of Douglas. At paragraph 13 she contends that the first-named respondent was not properly briefed. At paragraph 15 she complains that the Chief Constable's officers have not complied with paragraph 20 of the Guidelines. At paragraph 17 she complains that even if the information was true, which she vehemently denies, she understands that convicted terrorists and terrorist leaders are considered for ministerial appointments and recruitment to the Police Service for Northern Ireland and that this was not taken into account and highlights the disproportionate nature of the decisions which she is challenging.

[18] Detective Superintendent Gamble replied by affidavit of 22 March 2001. He states at paragraph 2 that "from my knowledge of the source he received his information from within the IRA." The "unidentified third party" is, he says, the "messenger" between the appellant and the IRA. The person from whom the source learned of the appellant's involvement is named in the report but his name is deleted and Gamble says that he knows him to have been a member of Northern Command. The source is identified in the report and the source's contact is named and was a member of Northern Command. In response to the appellant's reference to convicted terrorists and terrorist leaders being considered for recruitment to NIPS

Sergeant Gamble said recruitment to the Police Service does not extend to those who have served a sentence of imprisonment or received a suspended sentence of imprisonment nor to those convicted of serious arrestable offences and a period of five years must elapse before those convicted of arrestable offences are considered.

The decision of the Northern Ireland Prison Service

[19] Kerr J set out the history of events at paragraphs 2 to 12 of his judgment in a more concise way than we have done. He also set out the arguments of Mr McCloskey QC, advanced to him on behalf of the appellant in relation to the decision of the Prison Service and concluded that in the circumstance the Prison Service could not have been required to do more than they did. They asked the police to double-check their information and, apart from Mr Wallace, they had the material given to them evaluated by another official who had not previously been associated with the case. They could not have been expected to divulge the material which they had been given in confidence and, when the police gave permission to release the material at a later stage, they did so promptly. We respectfully agree that they acted properly.

[20] We do not find the arguments advanced to this court on behalf of the appellant as to the decision of the Prison Service any more compelling than the arguments advanced at first instance. They could not have been aware of Detective Constable Douglas's behaviour or of the Special Branch officers' attempts to recruit the appellant as an informant or of her complaint to the Superintendent or of his "admonishment" of Detective Constable Douglas or of "the unidentified, untried and untested messenger" who allegedly passed on information to the source. They did not get the redacted Special Branch record. They received the letter of 22 June 1999 which, when informed that they could so, they passed onto the appellant. Nor could it be argued, realistically, that they should have allowed her to make representations before they reached their decision. They could have allowed her to make representations before they reached their decision and they could have allowed her to make representations after they were permitted to release the letter of 22 June. Had they received representations they would have had to refer them back to the police and would have been met with the answers given by Detective Superintendent Gamble and Detective Inspector McKee. When the Prison Service made the decision which is the subject of challenge, they knew the gist of the allegations against the appellant but they were given that information in confidence. The appellant knew that her contractual rights with Core Care were subject to a security vetting which she did not pass.

[21] Article 8 of the Convention did not apply to the decision of the Prison Service. Article 8.2 provides that there shall be no interference by a public authority with the exercise of the right to respect for private and family life except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety…. or for the protection of the rights and freedoms of others. In our view the Prison Service would be protected by Article 8.2 if it applied. We have taken into account what was said by Lord Steyn in ex parte Daly [2001] 3 AER 433 at 445, paragraphs [26] and [27] and the cases cited therein.

The decisions made on behalf of the Chief Constable

[22] These decisions are stated to be (i) a decision to generate and maintain private and confidential information about the appellant apparently made around December 1986 but not discovered by the appellant until the year 2000, (ii) a decision to inform the Prison Service on 14 July 1999 that the appellant "… is held on record in December 1986 when it was reported she had passed details of a member of the RUC to the Provisional IRA, (iii) a decision made on or about 3 October 2000 whereby the appellant's request for access to the information/documents in question was refused.

[23] As stated already, Detective Inspector McKee's letter of 14 June 1999 to the Prison Service was disclosed to the appellant with the permission of the RUC. In February 2001 the appellant received redacted versions of the security records containing information about her as part of the evidence on behalf of the second-named respondent in these proceedings.

[24] Core Care had been required to obtain security clearance for the appellant. Accordingly Detective Inspector McKee must have been aware that she was about to engage in confidential work involving contact with prison wardens. When he looked at her file which had been commenced around 1986, he must have realised that it started thirteen years before the inquiry was made and that nothing had been added, that his letter to the Prison Service would effectively put an end to her career in so far as it involved work with the Prison Service. We accept that he had to act promptly but take the view that he should have informed the Prison Service that she could not have security clearance until further enquiries were made and might not get security clearance at all. He should then have made enquiries about the source of the information and his handlers. He would have found out that the source had died some years before 1999 and that his handlers had retired and could not be contacted at that stage. He should have been aware that it was possible to check the accuracy of significant elements of the information through Detective Constable Douglas. We know this because counsel for the second-named respondent informed the court that in the redacted part of the security record, Douglas was named as the person who had asked Mrs McConway to a Christmas meal. Presumably

Douglas was warned of the threat on his life and the details of it. He could confirm whether he had asked her out, whether she had accepted and whether he then did not follow up any acceptance by her because of the warning. Alternatively he could clear her completely by stating that he had not asked her out for a Christmas meal or that she had refused his invitation. Detective Inspector McKee did nothing more than send the letter of 14 June 1999 and when asked to double-check did nothing, believing that if there was any new information he would have received it.

[25] At a later stage when she had initiated proceedings against the Chief Constable Detective Superintendent Gamble discovered that the source was dead and the handlers were retired, although traceable, we surmise, since they would have been in receipt of pensions and, therefore, their addresses would be known. But Douglas was still in the CID. Detective Superintendent Gamble spoke to Douglas who told him that he had received a warning of a personal threat which was unconnected with Mrs McConway. It is apparent that he had a very clear recollection of the events of October and November 1986, thirteen years earlier. He remembered the date on which Mrs McConway was approached by Special Branch officers. He was present. He recalled the second approach and he recalled that his own Superintendent had told him not to get involved in recruiting informers. That there should be two personal threats to his life at that time seems highly unlikely. That he should have been informed of a threat unconnected with Mrs McConway, but not of a threat involving her, seems highly unlikely. In 1986 he may not have been anxious to admit that he asked a young married woman out for a Christmas meal, if he did. But in 2000 or 2001 he was being asked about an incident with security implications which had occurred more than fourteen years previously. Presumably the redacted information on file indicated that he had been warned about her. What was needed from him were answers to two questions which would clear her name or prove a significant part of the Special Branch information to be accurate, so long as he told the truth. Did he ask her out for a Christmas meal? If yes, did she accept? Neither question was asked. Or if they were asked, the questions and answers were not recorded. In our view Detective Inspector McKee or someone delegated by him to do so should have interviewed Douglas in order to authenticate and keep the file up-to-date and should have asked these questions.

[26] Detective Superintendent Gamble in his second affidavit sworn on 22 March 2001 states at paragraph 2:-

> "At paragraph 8 of her second affidavit the applicant refers to the intelligence report as being from an unidentified third party. This is a mistaken interpretation of the text of the report. The source is known and highly graded as referred to in my first affidavit. From my knowledge of that source he

> received his information from within the IRA as was the case for many years. The "unidentified third party" is the "messenger" between the applicant and the IRA. The person from whom the source learned of the applicant's involvement is named in the report but his name is deleted and I know him to have been a member of Northern Command."

Analysis of this paragraph causes us unease. It has, of course, to be placed alongside the Special Branch Report which it seeks to interpret. The two passages of the Report are:-

> "Northern Command via … (redacted) have instructed her to confirm the arrangements [with Detective Constable Douglas] but not to appear …" and … "McConway may not be talking to … (redacted) direct but he is obtaining his information via as yet an unidentified third party."

[27] We accept that the source of the intelligence report is "known and highly graded" but it still remains a fact that the reliability of the intelligence depends on an "as yet unidentified third party." This suggests that at that time they expected to be able to identify the third party since the source must know who the third party was. Yet this was not followed up. The use of the words "third party" do not suggest to us a member of the IRA but we are prepared to accept the assertion of Detective Superintendent Gamble that this is alleged to be a "messenger" between the appellant and the IRA, namely a messenger between the appellant and the source. If the messenger is "as yet unknown", one would expect a follow-up as to the identity of the messenger or a record that the messenger has been identified and is A.B. The messenger cannot be a member of Northern Command because then he would not be unidentified. It cannot be said that his name has been deleted. Why should a member of Northern Command, already directly in touch with Mrs McConway, speak to the source? Paragraph 2 of Detective Superintendent Gamble's second affidavit is difficult to comprehend as he would personally have no knowledge that a member of Northern Command was directly in touch with Mrs McConway.

[28] We respectfully agree with Kerr J (as he was then) that the police were entitled to make a record of the information about the appellant and to open a file on her. We agree that this was not an infringement of her Article 8 rights and we bear in mind that the decisions of the police were made in December 1986, June 1999 and on or about 3 October 2000. The two former decisions were made before the Human Rights Act came into force and the last played no significant part in the presentation of the appellant's case. So we make no ruling as to whether her Article 8 rights were affected by the last decision:

see *Leander v Sweden* [1987) 9 EHRR 433 and *Esbester v UK* 18 EHRR C D 72 cited by the learned judge in support of the view that her Article 8 rights were not infringed.

[29] We respectfully differ with the learned trial judge on the facts of the case, not the law. At paragraph 30 Kerr J states that Mr McCloskey QC's submissions about the retention of the recorded material and the failure to update it were predicated on the unspoken premise that not only was the appellant entirely innocent of the allegation made against her but also that the police had the means of establishing her innocence or, at least, the unreliability of the information.

[30] He went on to say at [31] that it was "inevitable that information obtained from informers would not always – or even usually – be amenable to verification". We respectfully agree. But in this case two facts were capable of verification; (a) that Detective Constable Douglas had asked Mrs McConway out for a Christmas meal and (b) if he did, that she accepted. If one or other was untrue, then the whole of the information was unreliable. We assume that this point was not made to Kerr J. If the material indicated that this was what had allegedly happened, it need not have been redacted. If Detective Constable Douglas had claimed fourteen years late that this was what happened, then Special Branch would have been entitled to rely on the source and Mrs McConway's claim would have failed for the reasons given by the learned judge.

[31] Paragraph 20 of the Guidelines was breached in that important information recorded about Mrs McConway which could have been authenticated, was not. The second respondent chose not to authenticate it for the purposes of the hearing before the learned judge or before this court. Accordingly in our view the appellant is entitled to succeed in her attack on the decision of 14 June 1999. She denied on affidavit that Detective Constable Douglas had asked her out for a Christmas meal or that she had accepted. She had telephoned the detective constable's Superintendent who had "reprimanded" him for inappropriate conduct. There are conflicting accounts as to the matter or matters about which he was reprimanded and the second-named respondent was put on notice of the conflict. We are entitled in our view to infer that Detective Constable Douglas was not prepared in 2000 or 2001 to verify two essential facts which were within his knowledge. In default of such verification, the file should have been updated so as to disclose the lack of authentication or provide a plausible explanation for the lack of it. Had this been done we consider that Detective Inspector McKee may have given security clearance to Mrs McConway if Detective Constable Douglas had been contacted in June 1999 and had given the information which he gave to Detective Superintendent Gamble. It is a matter for Special Branch to update Mrs McConway's file, taking into account our judgment.

We invite the parties to agree a draft order or provide us with their proposals as to the order which the court should make.

We do not criticise the first decision made on behalf of the Chief Constable and we note that in para [35] of his judgment Kerr J states that "….it seems likely on the available evidence, she was innocent of any wrongdoing". It is, therefore, on a very narrow factual ground that we respectfully differ from his decision. It is unnecessary to express a view about the third decision.