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*(subject to editorial corrections)**

2014/123282

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY PATRICIA BELL FOR JUDICIAL REVIEW OF THE DECISION OF THE POLICE OMBUDSMAN TO DELAY THE INVESTIGATION OF THE APPLICANT'S COMPLAINT

MAGUIRE J

Introduction

[1] This application for judicial review brings back before the court, although in a somewhat expanded form, issues which were the subject of an extensive judgment delivered by Treacy J on 26 October 2012: see Re Martin's Application [2012] NIQB 89. In that litigation the main issue related to the question of whether the Police Ombudsman ("PO") had failed to carry out an investigation within a reasonable time into certain matters involving the applicant, under section 56 of the Police Act (Northern Ireland) 1998 ("the 1998 Act"). The judge held that there had been such a failure but also held that this had occurred "by reason of chronic underfunding at the material time" which "disabled" the PO from discharging his statutory duty (see paragraph [43]).

[2] In that case the sole respondent had been the PO. In the present case, which essentially involves the same issue, though a different applicant, there are now two respondents. As before, the PO is a respondent. But, in addition, the Department of Justice ("DOJ") has been added as a second respondent as it is the PO's funder. As will be evident in due course, the underlying situation affecting the operation of the PO's office, if anything, has got worse, rather than better since the Martin case was decided. As a result, the PO in these proceedings has conceded that, in respect of the applicant's complaint to him, which also falls to be investigated under section 56, there should be a declaration that the PO has failed to investigate it, in breach of its statutory duty, within a reasonable time. The applicant accepts this concession, as will the court. The effect of this was that (subject to an issue about costs) the hearing

before the court has been concentrated on the question of whether the DOJ has unlawfully failed to provide sufficient funding for the operation of the PO's office. While such a conclusion was not, in terms, made in the Martin judgment by Treacy J, nonetheless the reference to "chronic underfunding" cited above points to the potential for such a finding.

[3] The court is grateful to the parties in this case for the economic way in which the hearing of the application has been conducted. While the papers in the case are substantial (running to nearly 700 pages) the matters in dispute have been distilled to more manageable proportions. The applicant at the hearing – for the purpose of this litigation only – abandoned any case based on Article 2 of the ECHR and this has simplified matters and focussed the challenge significantly.

[4] The outcome has been that it can be said that in this application there is no significant dispute about a range of sub-issues. These include:

(i) The fact that there remains a continuing problem in the form of the PO and his office being underfunded.

(ii) The absence of any significant argument on the part of the DOJ that the PO's concession *vis a vis* the applicant has not been properly made.

(iii) Apart from the submission by the DOJ that it is a matter for the PO to determine how he should spend his budget, the absence of any suggestion by the DOJ that there is fault in respect of the manner in which the PO runs his office.

(iv) The acceptance by the DOJ that there have, since the Martin case, been in operation a now prolonged period in which, to a greater or lesser extent, there have been cuts in funding for the PO imposed as a result of -

    (a) the Department's own budgetary allocation and

    (b) the DOJ's need to itself allocate its budget across the range of its responsibilities.

(v) The general acceptance that attempts to deal with historic cases requiring investigation – such as the Martin and now the present case – through a process of more general reform, initially in the guise of the Stormont House agreement, have by the date of this judgment stalled or otherwise been withdrawn.

The Complaint to the Ombudsman

[5] It is appropriate that the court provides a basic outline of the complaint of the applicant to the PO which lies at the heart of these proceedings. It is the desire of the

applicant to have this complaint investigated which is the inspiration in respect of these proceedings and the court acknowledges this. The simple fact, undisputed by any of the parties, is that this complaint to the PO, discounting an earlier complaint made in 2004/2005, was made in or about 2009 and yet the applicant and her wider family have been told, as will be explained shortly, that it is not expected by the PO that that part of the PO's programme of investigation, to which the complaint belongs, will be completed before 2025. Hence the PO has both anticipated delay in the investigation of this complaint and has forewarned the applicant about it.

[6] The facts related to the complaint are not, it seems to the court, critical in themselves to the outcome of this case, but nonetheless the court will outline them.

[7] The applicant in this case is Patricia Bell. She is the daughter of Patrick Joseph Murphy who was murdered on 16 November 1982 when he was shot dead by an unknown gunman while serving customers at his shop at Mount Merrion Avenue, Belfast. No one has ever been convicted of any offence arising out of the murder (though at one stage three men had been charged with conspiracy to murder). While no paramilitary organisation claimed responsibility for the deceased's death, there is reason to believe that the murder was sectarian and may have been associated with the UVF.

[8] The murder was the subject of a police investigation at the time and an inquest in respect of it was held on 28 June 1983. The inquest findings were succinct:

> "Death by gunshot wounds. Executed by terrorists".

The court makes clear that there is and has been no suggestion that the deceased was other than an entirely innocent victim.

[9] In more recent times the deceased's murder became the subject of a review carried out by the Historical Inquiries Team ("HET") and it published to the family a Review Summary Report on or about 13 November 2009.

[10] Following the publication of the HET review, a complaint was made by a member of the family to the PO in or about December 2009. The complaint disclosed concerns related to what were said to be "crucial flaws and missed opportunities in the course of the original [police] investigation". As a result of receiving the complaint, the officers of the PO recorded a statement of complaint from a family member. In the course of this process additional concerns about "missing records and a lack of records in relation to the arrest and detention of suspects" were also recorded likewise aimed at the original police investigation, as revealed by the HET in the Review Summary Report.

[11] It seems that the family in September 2011 were told by the PO that for reasons which the court need not go into in this judgment, the PO had suspended investigations at that time into what were described as historical investigations by

him, a category of investigations relating to events prior to 1998, including events in this case.

[12] On 16 March 2012 the PO's office decided that the complaint should be approved as being within the remit of the PO. This did not mean that an investigation began immediately. But it did mean that the complaint went to the next stage which involved a preliminary assessment and prioritisation. At this stage the applicant was also told that the government had approved additional funding to resource such historical investigations by the PO.

[13] On 10 October 2012 the complainant was told by the PO that the suspension of historical investigations which had been in place remained. She was also told that, under the prioritisation policy of the PO, the complaint had been given a low priority because it involved allegations of criminality other than murder, criminal conspiracy, perjury or perverting the course of justice by former police officers in relation to a single incident. While the family contest the low priority status given to the complaint, this is not a matter which directly forms part of this judicial review.

[14] On 21 January 2013 the complainant was told that historical investigations were to recommence. A letter was provided to the complainant explaining the investigation process. Work, in accordance with that process, however, would not commence in respect of the complaint until 31 January 2015.

[15] In October 2014 the complainant was advised of various developments:

(i) She was told that staffing within the History Directorate of the PO's office, which was the part of the office dealing with this case, had been reduced by 25%, as had the number of staff employed in it.

(ii) She was told that the programme of investigations as a consequence could not be completed before 2025.

(iii) The letter went on to indicate that "almost certainly" there would be a delay in the investigation of her complaint. The letter concluded with the following passage:

> "I understand this news will be distressing for you and offer my heartfelt apologies for the situation. You should not have to endure such a delay. Unfortunately, however, I need to ask for your patience as we seek to clarify the position with respect to a new timetable for our historical investigations".

[16] It was shortly after the receipt of the above correspondence that the issue of launching a judicial review arose. The complainant's concern rested with what she

saw as a failure by the PO to discharge its function to carry out investigation into the complaint within a reasonable period of time.

Historical Investigations and Delays in Investigating Complaints

[17] In the Martin case, the above topics had been the subject of extensive affidavit evidence, much of which was summarised by the judge in his judgment. The summary can be found between paragraph [12] and paragraph [25] of his judgment. It deals with the development of events to 2012. It is not proposed to repeat all of what the judge had said in that context, though the court has taken account of it. Instead, what the court will do is to seek to encapsulate the principal points in the form of bullet points. The main points which arose in that case were as follows:

- Historic investigations were uncommon in the PO's office until around January 2005.
- Initially a small unit within the office carried out these investigations.
- The Historical Investigations Team of the police began referring large number of historic cases to the PO from around March 2006. These cases were chiefly in relation to deaths for which police officers were believed to be responsible.
- The role of the unit dealing with such cases soon expanded.
- In the period 2006-2007 additional funding, to take account of this responsibility, was sought from and was given by the NIO – the then funder.
- A Historic Investigations Directorate was established in 2010.
- An on-going issue has, however, been that of funding.
- In the period 2006-2010 the PO had publicly raised the issue of adequacy of funding to deal with historic investigations.
- In 2008 a Business Case for additional funding was unsuccessfully placed before the NIO.
- Also in that year, the then PO openly stated that the reality was that he could not meet public expectation concerning his office and deliver on the mandate set by Parliament.
- The Business Case for additional funding was put to the NIO again in 2009 but was rejected. At this time the then PO warned that it would take in excess of 20 years to completely investigate cases in the manner required by the PO's statutory mandate.
- The DOJ became the funder in 2010.
- A more detailed Business Case was presented to the DOJ in September 2011. This warned, *inter alia*, that delays were occurring which were inconsistent with the PO's statutory obligations. In particular, the DOJ were told that "Dealing with the Past on current resources will involve extraordinary delays in many investigations" which would be unlikely to be legally sustainable.
- A revised Business case was re-submitted in January 2012.

The Position Since 2012

[18] Since the Martin judgment there have been various developments which are worthy of note. The court has been provided with three affidavits filed on behalf of the PO. Two are from Mr Adrian McAllister, the Chief Executive within the Office of the PO, and the third is from Mr Paul Holmes, who is currently in charge of the directorate dealing with historic cases, including the applicant's.

[19] In chronological order the highlights of the affidavit evidence may be summarised as follows:

March 2012	The PO's business case in respect of the projected operation of the History Directorate was accepted by DOJ. This offered hope of increased funding.
January 2013	The PO rescinded his suspension of historical investigations. However, at the same time, there emerged an escalation in the number of complaints relating to historic matters being received. As Mr McAllister put it in his affidavit "there were even more historic cases to be dealt with than had been anticipated".
January 2014	PO submitted to DOJ a still further business case for additional resources but this was put "on hold" by DOJ pending ongoing discussions among Executive Ministers about proposed arrangements for dealing with historic cases.
May 2014	On the basis of indications received funding had increased to a budget of £2.08M for 2014/2015 for historic investigations. In addition £400,000 (with further resources in subsequent years) to support historical investigations was to be made available. This, it was believed by the deponent would have supported some 40 staff within the History Directorate.
June 2014	A revised business case was submitted by PO to DOJ under which it was proposed that annual funding would be increased to £3.2M per annum in order to support 55 staff in the completion of investigations relating to a revised historic caseload of 358 matters by 31 March 2019. However neither the funding sought in the June 2014 business case nor the additional £400,000 in fact were provided. Instead there was a reduction in funding with a consequent loss within History Directorate of 25% of staff bringing the number of staff to 30.
October 2014	Slippage in the timing of investigations due to the budgetary position alongside delays experienced in obtaining materials from PSNI. These latter delays eventually resolved in September 2014. Paul Holmes at this time wrote the letter quoted earlier in

this judgment [see paragraph [15] *supra*] indicating that historical investigations may not be completed to 2025. Budget for historical investigations finalised at £1.98M supporting 26 staff.

2015/2016 — Budget allocation of £1.98M. The deponent avers that "this is simply not sufficient to undertake the required workload" within the original plan of a 6 year period. A build-up of funding pressures was also said to be affecting other work of the PO in its Current Directorate. This impact was being especially felt in relation to the Significant Cases Team ("SCT"). The SCT, according to the deponent, was struggling over a significant period of time to cope with the weight of cases in what were, the deponent says, critical investigations for the office.

Ongoing cuts in funding from year to year for historical investigations.

Affidavit of Jane Holmes for DOJ

[20] The court has considered an affidavit prepared on behalf of the Department. The deponent was Jane Holmes, a Grade 7 in the DOJ Legacy Unit. The affidavit takes no issue with the affidavits filed on behalf of the PO. Notably it contains a section on "Ombudsman Funding". The picture presented is that while there has been a sequence of year on year cuts in respect of the Department's budget, efforts have been made to limit the impact on the PO's office

[21] Examples of this were referenced as follows:

- A drop in the Department's unring-fenced resource departmental expenditure limit by 7.2% from 2011 to 2015. The deponent notes that "taking into account the effect of inflation, the real terms impact was significantly greater".

- 2014-15 Department's budget was cut by 4.4%. Hence it was necessary to make reductions to the budget of bodies funded by the Department including PO. The actual cut to the PO's budget for this financial year was 4.4%.

- 2015-16 Department's budget cut by 5%; cut in PO's budget of 2%.

- 2016-17 Projected cuts to Department's budget of 2%.

[22] At paragraph 22 of Ms Holmes affidavit she says:

> "Budget cuts were imposed upon the Department and there was no other option than to impose budget reductions on sponsored bodies. However, every effort

was made to limit the impact on these bodies and the Department has sought to protect the delivery of frontline services as far as possible. The Police Ombudsman along with all other areas of the justice system, had to make cuts".

[23] A further theme within Ms Holmes affidavit is that it is for the PO to manage his own budget allocation.

Relevant Legal Provisions

[24] The PO and his office are creatures of statute and work within a statutory framework. This framework has been in existence since 1998 as a result of the passage of the 1998 Act.

[25] Part VII of the Act is that part of it which deals with police complaints and disciplinary proceedings. The key provisions, for present purposes, are those which relate to the functions of the PO in dealing with complaints about police officers from members of the public. These are:

> "51(1) For the purpose of this Part there shall be a Police Ombudsman for Northern Ireland.
>
> (3) Schedule 3 shall have effect in relation to the Police Ombudsman for Northern Ireland.
>
> (4) The Ombudsman shall exercise his powers under this Part in such manner and to such extent as appears to him to be best calculated to secure –
>
> (a) The efficiency, effectiveness and independence of the police complaints system; and
>
> (b) The confidence of the public and of members of the police force in that system.
>
> 52 (1) For the purpose of this Part, all complaints about the police force shall either –
>
> (a) Be made to the Ombudsman; or
>
> (b) If made to a member of the police force, the Board, the Director or the

Department of Justice, be referred immediately to the Ombudsman.

52 (3) The Ombudsman shall –

(a) Record and consider each complaint made or referred to him under sub-section (1); and

(b) Determine whether it is a complaint to which sub-section (4) applies.

52 (4) Subject to sub-section (5), this sub-section applies to a complaint about the conduct of a member of the police force which is made by, or on behalf of, a member of the public.

52 (8) Subject to sub-section (9), where the Ombudsman determines that a complaint made or referred to him under sub-section (1) is a complaint to which sub-section (4) applies, the complaint shall be dealt with in accordance with the provisions of this part;

54 (1) If –

(a) It appears to the Ombudsman that a complaint is not suitable for informal resolution; or

(b) A complaint is referred to the Ombudsman under section 53(6),

the complaint shall be formally investigated as provided in sub-section (2) or (3).

(2) Where the complaint is a serious complaint, the Ombudsman shall formally investigate it in accordance with section 56.

(3) In the case of any other complaint, the Ombudsman may as he thinks fit –

(a) formally investigate the complaint in accordance with section 56; or

(b) refer the complaint to the Chief Constable for formal investigation by a police officer in accordance with section 57.

56 (1) Where a complaint or matter is to be formally investigated by the Ombudsman under section 54(2) or (3)(a) or 55(3), (5) or (6), he shall appoint an officer of the Ombudsman to conduct the investigation.

(6) At the end of an investigation under this section the person appointed to conduct the investigation shall submit a report on the investigation to the Ombudsman."

Once the investigation is carried out, in accordance with section 58(1), the PO "shall consider any report made under section 56(6)". He must determine whether the report "indicates that a criminal offence may have been committed by a member of the police". Where this is so, the PO "shall send a copy of the report to the Director of Public Prosecutions together with such recommendations as it appears to the PO to be appropriate".

The other main way in which a report under section 56(6) may be dealt with is where it involves the possible step of disciplinary proceedings being taken against the police officer. Section 59(1)(B) requires the PO "to consider the question of disciplinary proceedings". Section 59(2) indicates that "the PO shall send the appropriate disciplinary authority a memorandum containing –

"(a) His recommendation as to whether or not disciplinary proceedings should be brought in respect of the conduct which is the subject of the investigation.

(b) A written statement of his reasons for making that recommendation; and

(c) Where he recommends that disciplinary proceedings should be brought, such particulars in relation to disciplinary proceedings which he recommends as he thinks appropriate."

It seems clear from these provisions that the main role of the PO in respect of disciplinary proceedings is to provide the disciplinary authority with his recommendation as to whether disciplinary proceedings should be brought in respect of the conduct of an officer.

[26] Also of interest are the terms of Regulations 3 and 17 of the Royal Ulster Constabulary (Complaints etc) Regulations 2000 "the 2000 Regulations"). As Regulation 3 indicates these regulations "apply to (a) any complaint made to the Ombudsman".

[27] Regulation 17 reads:

> "Conduct of Investigations
> 17. Investigations under Section 56 or 57 of the Act of 1998 shall be conducted without undue delay".

[28] It is also necessary to refer to Schedule 3 of the 1998 Act which, in accordance section 51(3), has effect in relation to the PO. Paragraph 11 of Schedule 3 deals with the subject of funding and states:

> "11. The Department of Justice shall pay to the Ombudsman such sums as appear to the Department of Justice to be appropriate for defraying the expenses of the Ombudsman under this Act".

The Applicant's Submissions

[29] For the applicant Mr Macdonald QC (who appeared with Mr Devine BL for the applicant) advanced what he described as core submissions which he reduced to writing in a helpful speaking note. These were:

> "1. The failure to investigate the complaint is unlawful as being in breach of the Ombudsman's statutory duty to investigate within a reasonable time. (Conceded by the Ombudsman and not disputed by the Department).
>
> 2. The Ombudsman's breach of statutory duty is no less unlawful by virtue of the fact that he does not have the funds to investigate. (Conceded by the Ombudsman and not disputed by the Department).
>
> 3. The Department has a statutory duty to provide the funding necessary to enable the Ombudsman to discharge its statutory function. (That is the scheme of the Act).
>
> 4. A breach of the Department's statutory duty is no less unlawful by virtue of the fact that the Department has limited or insufficient funds. (As with the Ombudsman, that may be a reason for the breach but not

> an excuse. It would be a strange result if lack of funds could excuse the Department's breach of duty but not the Ombudsman's, when the Ombudsman's breach is directly attributable to the Department's).
>
> 5. As a matter of fact, far from ever making the judgment that the level of funding sought by the Ombudsman is not "appropriate", the Department has consistently recognised that the level of funding sought by him is necessary to enable him to discharge its functions. The only case the Department has ever made is that it has "no option" but to reduce funding for the Ombudsman because it does not have sufficient funding itself.
>
> 6. In any event, whatever latitude were allowed to the Department in exercising its judgment (not "discretion") as to whether the sums sought by the Ombudsman are appropriate to defray his expenses under the Act, it could never properly exercise its power so as to frustrate the intention of Parliament and the object of the Act by denying the funds that the Ombudsman objectively needs to discharge his duties under the Act".

The DOJ's Submissions

[30] Mr Coll QC (who appeared with Mr McAteer BL) for the DOJ in his submissions placed considerable emphasis on the need for the court to respect the role of the Executive arm of Government in establishing the level of funding to be provided to the PO.

[31] In his view the court should be astute not to interfere with a funding decision. Such a decision was, he argued, outside the expertise and experience of the court and involved multi-factorial issues which were beyond the court's competence. The court could only in the most extreme case be justified in intervening.

[32] The language of the provision dealing with the DOJ's funding of the PO was unmistakeable in placing the power to decide in the hands of the DOJ. It could not be the case that the DOJ should have to allocate whatever level of funding as was sought by the PO. Rather the case was one in which it was for the Department to exercise discretion as to the level of funding. In particular, the discretion provided by the statute was expressed in broad terms. It was for the Department to determine what the appropriate level of funding should be.

[33] While counsel accepted that the Department's decision, in domestic law, could be open to challenge on the basis of Wednesbury unlawfulness it could not be criticised for taking into account the overall funding available to it as well as its other vital functions.

[34] The court, Mr Coll pointed out, must resist the applicant's invitation to substitute its own view as to what the appropriate level of funding for the PO should be in the circumstances. To do this, the court would be acting in conflict with the explicit wording of the statutory duty of the DOJ and the latitude that should be available to government, including the Executive, in such matters.

[35] At paragraph 12 of his skeleton argument, Mr Coll put the matter in the following way:

> "The court is of course entitled to review the lawfulness of the impugned decision (as to the level of funding). Given however that the Department's decision-making necessarily involved issues of how best to allocate resources among competing priorities, it is submitted that the appropriate standard of review for such a decision is a low one. A significant degree of deference should be afforded to the decision-maker in such cases".

[36] As far as legal authority was concerned Mr Coll drew the attention of the court to what had been said by Treacy J in the case of Re Independent Care Home Providers [2013] NIQB 29 where at paragraphs [3]-[7] he set forth a number of useful propositions under the heading "General Observations". These were as follows:

> "[3] The applicant has placed a large body of material before the court which appears to relate more to the substantive merits of the respondent's determination that the regional rate set for 2012-13 was, as a matter of fact, fair and affordable. This court must be astute not to allow itself to be drawn into impermissible territory beyond the proper constitutional frontiers of judicial review. Equally however it must not abdicate its responsibility to examine, within the proper scope of judicial review, whether the impugned decision is legally flawed on any of the pleaded grounds.
>
> [4] There is considerable force in the respondent's invitation to the court to examine carefully what role the court can properly discharge in respect of a dispute about fairness and affordability in an area of

> resource allocation within the context of a reducing budget. This is a complex area of specialised budgetary arrangements taking place in the context of a challenging economic environment and major cutbacks on public spending.
>
> [5] In determining the regional rate the Board is exercising a discretion. The relevant legislation does not require that the regional rate is set annually much less prescribe the method by which it should be done.
>
> [6] Provided the respondent has taken the impugned decision in good faith, compatibly with the express or implied statutory purpose(s), following a process of sufficient inquiry and in the absence of any other pleaded public law failing, such a decision will be unimpeachable.
>
> [7] Allegations of lack of sufficient inquiry or adequate consultation are not infrequently deployed in judicial review in an attempt to persuade the ourt to embark on what is, in reality, a thinly disguised but wholly impermissible merits review. Ordinarily in judicial review there should be little scope or necessity for the court to engage in microscopic examination of the respective merits of competing economic evaluations of a decision involving the allocation of (diminishing) resources".

The Court's Treatment of the Issues in Martin

[37] As the Martin case involved similar issues to the present case it is helpful to remind oneself of these central legal approaches of the judge in that case.

[38] At paragraph [3] the judge indicated that what he was dealing with in that case was whether the PO had unlawfully delayed the investigation of the applicant's case. He noted that it was common-case between the parties that there was an implicit obligation on the PO to initiate his investigation within a reasonable time. He later considered the court's approach to review of the PO. Having referred to a number of cases the judge said at [30]:

> "In the light of the statutory provisions governing the [PO] and the authorities referred to it is plain that Parliament has conferred upon him a very wide discretion in respect of the exercise of his powers under Part VII of the 1998 Act. Whilst it is common

> ground that the [PO] is subject to the supervisory jurisdiction of the High Court it is nevertheless plain that a court will not readily interfere".

Later at paragraph [32] the judge indicated that in his view claims in judicial based squarely on delay would be unlikely, save in very exceptional circumstances, to succeed and would be likely to be regarded as unarguable. At paragraph [34] quoting the decision of Stanley Burnton J in the case R (KB & Ors) v the Mental Health Review Tribunal [2002] EWHC 639 (Admin) Treacy J noted that at paragraph [45] it had been said that:

> "Normally, the question of whether the Government allocates sufficient resources to a particular area of State activity is not justiciable. A decision as to what resources are to be made available often involves questions of policy, and certainly involves questions of discretion. These are matters for policy makers rather than judges: for the Executive rather than the judiciary" … .

Later in KB and Others the learned judge said "In general the court is ill equipped to determine general questions as to the efficiency of administration, the sufficiency of staff levels and the adequacy of resources". The judge also quoted extensively from the case of R (FH & Ors) v Secretary of State for the Home Department [2007] EWHC 1571 (Admin). In the course of the judgment in that case at paragraph [11] it had been indicated that if unacceptable delays had resulted they could not be excused by a claim that sufficient resources were not available. It was also noted that in deciding whether delays are unacceptable the court must recognise that resources are not infinite.

[39] In Treacy J's conclusion at paragraph [40] he observed that it was an implicit requirement of the 1998 Act that the relevant investigation be carried out within a reasonable time. But he also noted that the setting of priorities and the allocation of resources is quintessentially a matter within the realm of the decision-maker. The decision-maker would often be faced with competing demands and consequently this was an area into which the court would not likely tread. At paragraph [41] he went on to indicate that the requirement of investigation within a reasonable time had to accord the PO a very considerable degree of latitude and flexibility in the timetabling of investigations and the allocation of finite resources. However if a breach of statutory duty, by failing to investigate within a reasonable time had been established, it was the court's role to so declare. At paragraph [42] he reminded himself that only if delay is so excessive as to be regarded as manifestly unreasonable should a claim be entertained by the court. However, if unacceptable delays have resulted causing a breach of statutory duty, the breach was not remedied because it may in large part have resulted from the provision of woefully inadequate resources. As he pointed out "That may explain how the breach

occurred but it does not remedy it". The judge then draws the conclusion quoted in the first paragraph of this judgment.

The Court's Assessment

[40] No new issue of principle arises in respect of the making of a declaration that the PO has unlawfully and in breach of its statutory duty failed to carry forward the applicant's complaint to investigation within a reasonable time. The PO, as already noted, has conceded this point, in the court's view, correctly. The court has no reason to do other than adopt Treacy J's analysis in Re Martin's Application in reaching this conclusion. There is an implied requirement to carry out the investigation of the applicant's complaint within a reasonable time and it cannot seriously be doubted that the time scale which has emerged in the present case for the consideration of the complaint, even assuming the complaint, on prioritisation, may be viewed as of low priority, is well outside the latitude which the PO has when dealing with the investigation of complaints generally. This is not a case where the problem can be explained away in terms of a sudden spike in the number of complaints received or by a factor such as the complexity of the complaint which has been made.

[41] The court, moreover, has no hesitation in attributing the delay in the PO dealing with this complaint to the chronic underfunding of the PO on the part of the DOJ. This was the view of the matter taken by Treacy J in 2012 and the court regrets to say that in the four years since then the problem, far from being repaired, remains stubbornly in place with the graph pointing downwards rather than upwards, as the squeeze on public sector budgets has continued and deepened. This does not have the hallmarks of a case where there has been a material failure by the staff of the PO to act reasonably in the light of the resources made available to them.

[42] While the decided cases may indeed say that claims based on delay are unlikely to succeed save in very exceptional circumstances, this is an exceptional case. The court, like its predecessor in Martin, cannot accept that unacceptable delay may, from a legal perspective, be excused because wholly or in large part it has resulted from the provision of inadequate resources. It agrees with Treacy J's characterisation that while the absence of adequate resources may explain how the breach occurred, it does not remedy it.

[44] Moving to the applicant's case against the DOJ, as already acknowledged in this judgment, the fact of underfunding of the PO is accepted and cannot be denied. There is no evidence of substance that unreasonable delay has been the result of other factors, though the court can accept that there is some, though limited, evidence, which suggests that some periods of delay may have been brought about by events other than the resources issue. However, read as a whole, the court has no difficulty in concluding that, on the balance of probability, the source of the problem besetting the PO's office lies with the failure of government, most directly the DOJ, to provide adequate resources to the PO. The court can also set aside and dismiss from the case the issue of the systemic reform process, exemplified by the Stormont

House Agreement, which has to date clearly failed to provide any sure way forward or otherwise offered a cure for the problem.

[45] In these circumstances it is the court's view that it is necessary, in considering the applicant's case, not to lose sight of the nature of the role of the PO in the area of investigating complaints, whether they have been brought before the PO by members of the public or by other routes (as was the case in Martin where the matters arose for investigation as a result of a referral from the Chief Constable to the PO). In either case, unless the complaint could go down another channel, as in some circumstances may be the case, for example, where a complaint is made by a member of the public and can be the subject of informal resolution, it will be the statutory duty of the PO to carry out an investigation of it, usually as in this case and in the case of Martin, under section 56. What is to happen has been pre-ordained, at least in general terms, by Parliament in that it has stipulated by law that the complaint is to be investigated by the person appointed who then reports to the PO who then decides what should occur *viz* whether there should be a referral to the DPP or a recommendation in favour of disciplinary action or some other form of action.

[46] Dealing with complaints, therefore, is substantially a matter of the performance of statutory obligations required to be performed by the PO and his staff. Moreover, as Regulation 17 of the 2000 Regulations indicates, apart from the implied obligation to deal with the complaint within a reasonable period of time, there is also an express obligation to conduct the investigation without undue delay. The reality, it seems to the court, without resorting to any issue relating to the ECHR, is that Parliament has established a developed system for dealing with complaints to the PO which the provisions of the 1998 Act reflect. These impose mandatory obligations, though it is accepted that the time which it will be reasonable to take or what constitutes undue delay can be affected by a range of factors: such as the complexity of the case; temporary reductions in the availability of staff to carry out an investigation; or an unexpectedly prolonged investigation in another case which has knock on effects. However, if Parliament had intended that the various provisions of the Act should be directory only or should be capable of being set aside it could so have provided expressly (as indeed in some areas it has).

[47] All of this is relevant because as a general proposition it is to be expected that those who operate the statutory scheme will be aware of and will act consistently with the prescribed process by which the scheme serves its purpose: here, the delivery of an efficient, effective and independent police complaints system and the need to retain the confidence of the public and members of the police force in that system, as referred to in section 51 (4) of the Act.

[48] The general administrative law doctrine exemplified by the House of Lords decision in Padfield v Minister of Agriculture [1968] AC 997 - that powers ought to be exercised to advance the objects and purposes of the statute - needs to be borne in mind when considering the exercise of discretion which is involved in this case

under which the DOJ funds the PO. The Department, after all, is the funder of the PO, as Parliament *via* paragraph 11 of Schedule 3 of the Act indicates. It is therefore of value to return to the language used by Parliament. It is that the DOJ "shall pay to the Ombudsman such sums as appear to the [DOJ] to be appropriate for defraying the expenses of the [PO] under this Act".

[49] It is trite to say that the opening words of this provision are written in mandatory language (the DOJ 'shall provide' to the PO) but Mr Coll is correct in his observation that the following words 'such sums as appear to the [DOJ] to be appropriate' introduce an element of discretion into the formulation with the exercise of discretion being vested in the Department. Thus there is a requirement for the DOJ to exercise judgment but it is judgment associated with the purpose of the legislation, as the 'appropriate' sums are 'for defraying the expenses of the [PO] under the Act'.

[50] The court is un-attracted to the submission contained in the applicant's skeleton argument that the DOJ is obliged to provide the funding wanted by the PO. This would have the effect of removing the effective decision making authority in respect of funding from the DOJ to the PO and cannot, in the court's view, be correct. What would be closer to the mark is the notion that the DOJ enjoys discretion but the width of that discretion may not be as wide as Mr Coll suggests. Like all discretion it has its limits and is required to be exercised taking into account all relevant matters, such as the financial needs of the body to be funded if it is to carry out its duties lawfully. Mr Coll accepts that the use of this discretion is subject to the Wednesbury unreasonableness principle and that this serves to establish at least an outer boundary to the operation of discretion in this case. Accordingly, the Department must act rationally, Mr Coll concedes.

[51] The court considers that Mr Coll's concession is right. The issue in this case then becomes whether the level of funding being provided to the PO in this case offends against that standard – which is one, the court acknowledges, which offers substantial leeway to the decision maker, here the Department. In evaluating this, the court has to take into account that it would be unlikely that Parliament would have intended the funding authority to act in a way which would result in the PO being unable to perform its lawful duties with the consequence that it is put into the position of acting unlawfully. It would surely have been expected that sufficient funding would at the very least be provided to ensure that the core statutory duties of the PO may lawfully be performed.

[52] While it may be that a failure to reach the standard of carrying out an investigation into a complaint within a reasonable time in an isolated case would not call into the question the legality of the funder's budgetary allocation, that is not the present case. Rather the present case is one of systemic and persistent underfunding which is disabling the PO, not in one but in a range of cases, and not in one lone period but over a period now of years, from being unable to meet a not particularly

demanding standard *viz* that of carrying out its investigation into a public complaint against the police within a reasonable time.

[53] The court fully accepts that it should ordinarily forbear from intervening in a funding decision in all but the most exceptional of circumstances, but where such circumstances arise, and where, as here, the funder is well aware of what is going on and has already been the subject of adverse judicial comment in respect of its "chronic underfunding" of a public office, as occurred in the case of the PO some 4 years ago in Martin, the court should not shirk from its duty to declare the law to be as it sees it.

[54] The Wednesbury principle, which it is accepted applies in this case, in the court's opinion, has been breached on the facts as disclosed in this judicial review, as the court fails to see how a rational funder could underfund a statutory body performing key public obligations to the extent of requiring it to act unlawfully without forfeiting his, her or its ability to be viewed as acting reasonably.

[55] In reaching this conclusion, the court wishes to make it plain that this is not a case where the judge has given way to the temptation to substitute his view for that of the DOJ, the legitimate decision maker. The analysis of the court has not been concerned with the merits of how the Department has juggled the various demands on its budget. The court simply is not in the business of preferring the claim of the PO to funding over the claim of others, who look to the DOJ for funding. The issue for the court has instead related to discovering the legal boundaries of the DOJ's discretionary power in this context and to applying these in the light of the factual matrix in this case.

[56] Nor is this a case, the court hastens to add, of the court forcing the DOJ down a particular road by cutting off other ways of dealing with the issues which have arisen. This is not the case. The DOJ have and always have had the ability, if it needed or wished to do so, to reconfigure the police complaints system if it finds that the existing duties which rest on the PO cannot be afforded. With the consent of the legislature, it is possible to put in place alternative means of dealing with police complaints. However what the court thinks cannot be done is to leave undisturbed an existing system which is disabling the PO from securing the lawful performance of its statutory obligations *vis a vis* complaints by providing insufficient funding for the performance by the PO of his statutory duties.

[57] The court in this case is faced with an accepted breach of statutory duty on the part of the PO and an accepted situation in which this has been brought about by underfunding by the DOJ. The same dynamics will apply to a range of similar cases involving others who have made complaints to the PO and who are awaiting an investigation into them to be carried out. This situation must be set against a statutory framework which Parliament has put in place and which imposes legal duties on the PO which are not, it appears, in a range of cases, being performed. The court accepts that it is not well positioned to determine general questions as to the

efficiency of administration or as to how many staff should be employed in the PO's office or as to the sufficiency of the allocation of day to day funding or as to the issue of how scarce resources should be spent within the limits of departmental resources. The court is not requiring the DOJ to come to court with its accounts and is not requiring the DOJ to demonstrate its funding priorities to its satisfaction. But this does not mean that the court should abdicate from performing its duty to declare in an appropriate case that a public authority – even a funding authority - whose power to fund is part of the relevant statutory scheme is acting unlawfully when there is an unreasonable failure to act compatibly with the statutory purpose with the unlawful consequence which has arisen in this case. If this was an isolated case or one in which perhaps remedial action was already underway, the court might well approach the making of any declaration differently, but neither of these are significant factors in this case.

Conclusion

[58] It is unnecessary for the court to make any order as between the applicant and the PO, save for the declaration that the parties have presented to the court and which the court has approved. As regards the applicant and the DOJ the court will declare that the latter has acted unlawfully by failing to provide a sufficient level of funding to the PO to enable the PO to carry out its statutory obligation to investigate the applicant's complaint within a reasonable period of time.

[59] The court will hear the parties on the issue of costs arising in respect of this application.