

# Judicial Communications Office

Tuesday 7 November 2017

## COURT OF APPEAL OVERTURNS POLICE OMBUDSMAN FUNDING DECISION

### Summary of Judgment

The Court of Appeal today reversed a decision of the High Court that the Department of Justice had failed to provide sufficient funding to the Office of the Police Ombudsman for Northern Ireland.

On 24 March 2017, the High Court declared that the Department of Justice (“the Department”) acted unlawfully by failing to provide a sufficient level of funding to the Police Ombudsman for Northern Ireland (“PONI”) to enable it to carry out its statutory obligation to investigate a complaint Patricia Bell (“the applicant”), within a reasonable period of time. The applicant is the daughter of Patrick Joseph Murphy who was murdered by an unknown gunman whilst working at his shop at Mount Merrion Avenue, Belfast on 16 November 1982.

The Historical Enquiries Team published a report into his death in November 2009. The applicant’s sister made a complaint to PONI the following month but has been advised on a number of occasions that the complaint cannot be investigated due to a lack of funding. The applicant sought a judicial review of the decision. The trial judge concluded that underfunding of the PONI was “most directly” the result of a failure by the Department to provide adequate resources.

#### **Legal Principles Relevant to this case**

*The definition of “As appear to be appropriate”*

Schedule 3 to the Police (NI) Act 1998 provides that the Department shall pay to the PONI such sums as appear to the Department to be appropriate for defraying the expenses of the office. The Court of Appeal construed the meaning of the phrase “such sums as appear to be appropriate” as giving considerable scope to the decision maker.

*The Duty owed by the Department to fund the PONI under the 1998 Act*

In construing the duty of the Department to fund the PONI under the 1998 Act the Court of Appeal held that normally, the question whether the Government allocates sufficient resources to any particular area of state activity is not justiciable. A

# Judicial Communications Office

decision as to what resources are to be made available often involves questions of policy, and certainly involves questions of discretion:

“It is almost invariably a complex area of specialized budgetary arrangements taking place in the context of a challenging economic environment and major cutbacks on public spending. There should be little scope or necessity for the Court to engage in microscopic examination of the respective merits of competing macroeconomic evaluations of a decision involving the allocation of (diminishing) resources. These are matters for policy makers rather than judges: for the executive rather than the judiciary.”

The Court of Appeal further stated that the greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the Court must necessarily be in holding a decision to be irrational. Provided the relevant government department has taken the impugned decision in good faith, rationally, 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 usually be unimpeachable. However, when issues are raised under Articles 5 and 6 of the ECHR as to the guarantee of a speedy hearing or of a hearing within a reasonable time, the Court may be required to assess the adequacy of resources, as well as the effectiveness of administration.

## **The Role of Judicial Review and of the Appellate Court**

The Court of Appeal summarised the role of judicial review and the Appellate Court as follows:

- The burden of proof to establish unlawful conduct rests with the applicant;
- The role of the court in judicial review is supervisory only;
- The court is not concerned with the merits of the decision or decisions at issue;
- The court will not intervene unless a public law wrong has been established;
- Issues which concern the weight to be attributed to various factors in the decision-making process will generally be for the decision maker and not the court subject only to a rationality challenge;
- An appellate court should be slow to second guess the approach of a first instance judge in such matters.

## **Consideration**

The Court of Appeal recognised that in the hearing before the trial judge, the burden of proof rested on the applicant to establish both the unlawful conduct on the part of the Department and that a public law wrong had been committed. Secondly as a

# Judicial Communications Office

general proposition, it is undesirable for the courts to get involved in questions of how either financial priorities are accorded or allocation of resources are determined by governmental departments:

“Whilst the effective operation of the police complaints system to ensure investigations occur within a reasonable time is an extremely important aspect of the Department’s duties, nonetheless it cannot be overlooked that the Department is not the source of budgetary restraints - that being the responsibility of the Executive or of the Treasury or of the Secretary of State for Northern Ireland who provide a block grant to the Executive and who arguably might also have been respondents in the original application. The Department has financial responsibilities for and duties owed to bodies as disparate as the PONI, the PSNI, the prison service, youth justice, family justice etc. Presumably if it provided all the money required by the PONI that would entail taking funds away from some other body or bodies for which it has responsibility. It would be to shut one’s eyes to the real world if it was to be asserted that in a period of unprecedented economic difficulties the Department was not to be permitted to play its part in the belt tightening exercises through-out government. It would of course be laudable if all the needs of the Departmental responsibilities could be met but such hopes are simply not realistic.”

The Court of Appeal said it must also be recognised that there will be cases where a decision maker has a duty to abide by a standard that does not depend on its resources. Impoverishment may not be treated as a relevant reason for failing to perform a statutory duty expressed in objective terms which allows for no discretion. Counsel for the applicant contended that a change of legislation is the avenue for change if Parliament wishes resources to be a factor. The Court of Appeal said that such a situation has to be contrasted with circumstances where the decision maker has a wide discretion that includes responsibility to decide how to distribute resources among competing needs.

It said that the duty contained in Schedule 3 to the 1998 Act clearly imposes a statutory duty on the Department which must be discharged. It does not have an unfettered discretion to frustrate that duty. If the Department refused to make any payment or made a patently derisory payment - because for example government had decided that it preferred to spend all its money on some other purpose such as education or health - it would be in breach of that duty in all but the most straitened or emergency circumstances. The Department could not exercise its discretion in that manner. To do so would inevitably incur judicial reproach but the courts should only intervene if there was clear evidence that the PONI was being starved of funds so as to deliberately frustrate Parliament’s intention to establish that important office and to implement the duties arising therefrom. The Court of Appeal stated that there is not a scintilla of evidence that this case falls within the category referred to in the paragraph above. It referred to a table of payments made by the Department

# Judicial Communications Office

to the PONI between 2012 and 2017 which shows that significant sums were allocated every year albeit there have been reductions since 2012.

The Court of Appeal said that close perusal of the wording of the duty is therefore crucial because the extent to which the duty precludes government departments from ordering its expenditure priorities for itself may vary from one duty to another. In this case, the Court was satisfied that Parliament did not intend that the Department had to provide whatever sums were requested by the PONI for every activity of the PONI or which appeared or were considered necessary or reasonable by the PONI to perform all its duties. Had this been the intention of Parliament, wording to this effect in the legislation would have been comparatively simple to draft:

“Parliament has vested in the Department a wide discretion “to pay such sums as appear to the Department appropriate” (*our emphasis*) for defraying the expenses of the PONI. It is not a specific and precise duty to provide the necessary requirements of the PONI which would impose more readily an obligation of an absolute character irrespective of whether or not the Department has the funding available in its budget.”

The Court said that the phrase “as appears appropriate” is the language of discretion and it confers a very broad latitude and discretion in the relevant statute. It gives considerable scope to the decision maker to make such sums available to the PONI as it deems appropriate having taken into account for example various resource based issues or competing claims within its remit. It cannot be sensibly suggested that, potentially, the entire or the greater part of the Departmental budget would have to be assigned to the PONI if that was what was needed to fulfil his tasks:

“Cast as it is in broad and general terms the duty contained in the statute can readily be construed as affording scope for the Department to take into account matters such as budgetary policy, macroeconomic constraints, the availability of funding within its budget and its responsibilities to other bodies within its remit when deciding how best to perform the duty in its own area. In such a case we consider the Department has a wide measure of freedom over what steps to take in pursuance of its duty. Not only is the responsibility to make the payment placed solely in the hands of the Department but significantly it is only such sums as appear to the Department to be *appropriate* as opposed to such sums as are “necessary “ or “required”. We are satisfied this selection of wording reflects Parliamentary intent and has been deliberately and carefully chosen.”

The Court of Appeal recognised that difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of bodies for whom a Department is responsible. It said that this is not a judgment which the court can make:

# Judicial Communications Office

“Specialized budgetary arrangements taking place in the context of a challenging economic environment and major cutbacks in public spending are an area too complex for this Court. It should not engage in microscopic examination of the respective merits of competing macroeconomic evaluations of a decision involving the allocation of (diminishing) resources. A court is ill-equipped to determine such general questions as to the efficiency of administration, the sufficiency of staff levels and the adequacy of resources for the PONI. These are matters for policy makers rather than judges, for the executive rather than the judiciary and in the instant case, for the Department.”

The Court of Appeal concluded that the Department took the impugned decision in good faith, rationally and compatibly with the express or implied statutory purpose. It said it was aware that an appellate court should be slow to second guess the approach of a first instance judge in such matters but held that the trial judge had failed to adequately address and recognise the nature and width of the broad discretion vested in the Department under Schedule 3 to the 1998 Act and had thus fallen into error.

The Court of Appeal granted the appeal and reversed the findings of the trial judge.

## 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 Court Service website ([www.courtsni.gov.uk](http://www.courtsni.gov.uk)).

**ENDS**

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

Alison Houston  
Lord Chief Justice's Office  
Royal Courts of Justice  
Chichester Street  
BELFAST  
BT1 3JF

Telephone: 028 9072 5921  
E-mail: [Alison.Houston@courtsni.gov.uk](mailto:Alison.Houston@courtsni.gov.uk)