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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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

Appellants

AND IN THE MATTER OF A DECISION BY OF THE POLICE OMBUDSMAN FOR NORTHERN IRELAND

Respondent

AIDAN O'TOOLE

Notice Party

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Before: Morgan LCJ, Stephens LJ and Sir Donnell Deeny

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MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal from a decision of Keegan J dismissing the appellants' application to quash a Public Statement ("PS") made by the Police Ombudsman for Northern Ireland ("the Ombudsman") pursuant to section 62 of the Police (Northern Ireland) Act 1998 ("the 1998 Act") relating to a complaint by victims and survivors of an attack by Ulster Volunteer Force ("UVF") gunmen in which six people were killed and five people injured at the Heights Bar, Loughinisland, on the evening of 18 June 1994. Mr McMillen QC appeared for the appellants with Mr Brown, Mr McGrory QC with Mr McQuitty for the Ombudsman and Ms Doherty QC with Mr Devine for the Notice Party, Mr O'Toole. We are grateful to all counsel for their helpful oral and written submissions.

The Ombudsman

[2] In November 1995 Dr Maurice Hayes, a senior Northern Ireland civil servant, was asked to prepare a report on the adequacy of the police complaints system in

Northern Ireland. He considered that the existing system was inadequate and in a report published in January 1997 recommended the appointment of a police ombudsman. That recommendation was accepted and implemented by Part VII of the 1998 Act.

[3] The establishment of the office through the 1998 Act was discussed by the Patten Commission on Policing in Northern Ireland, of which Dr Hayes was a member, at paragraph 6.39-6.42. Although the Commission expressed some surprise that the 1998 Act have been approved by Parliament some weeks after the Commission had been established to examine the role of policing in Northern Ireland the Commission generally approved the establishment of the office of the Ombudsman which accorded with principles set out by Professor Philip Stenning in his review of the complaints process in British Columbia.

[4] The Patten Commission made the following recommendations:

> "• The Police Ombudsman should be, and be seen to be, an important institution in the governance of Northern Ireland, and should be staffed and resourced accordingly. Budgets should be negotiated with, and finance provided through, the Northern Ireland Office (or its successor department), both for the core staff of the office and to provide for exceptional demands created by large-scale investigations.
>
> • The Ombudsman should take initiatives, not merely react to specific complaints received. He/she should exercise the power to initiate inquiries or investigations even if no specific complaint has been received.
>
> • The Ombudsman should be responsible for compiling data on trends and patterns in complaints against the police, or accumulations of complaints against individual officers (and appropriate systems for managing such data will be needed – see also Chapter 10 on Management and Chapter 11 on Information Technology), and should work with the police to address issues emerging from this data. It is important that management at all levels should use information from the complaints system as a tool of management and to identify training needs. The Policing Board should utilise such data in developing or reviewing policies or practices. There should be no doubt of the Ombudsman's power to investigate and draw conclusions from clustering in patterns of complaints

and to make recommendations for change to police management and the Policing Board.

- The Ombudsman should have a dynamic cooperative relationship with both the police and the Policing Board, as well as other bodies involved in community safety issues.

- The Ombudsman should exercise the right to investigate and comment on police policies and practices, where these are perceived to give rise to difficulties, even if the conduct of individual officers may not itself be culpable, and should draw any such observations to the attention of the Chief Constable and the Policing Board.

- The Ombudsman should have access to all past reports on the RUC"

[5] The Office of Police Ombudsman for Northern Ireland was established by section 51 of the 1998 Act. Section 51(4) provided that the Ombudsman should exercise his powers in such manner and to such extent as appears to him to be best calculated to secure the efficiency, effectiveness and independence of the police complaints system and the confidence of the public and the members of the police force in that system.

[6] Section 52 provides that all complaints about the police force should either be made to the Ombudsman or if made to a member of the police force or other identified criminal justice institutions be referred immediately to the Ombudsman. His first task is to determine whether it is 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 (a qualifying complaint). If he determines that it is not a qualifying complaint he must refer it to the Chief Constable, the Policing Board, the Director of Public Prosecutions or the Department of Justice as appropriate. A complaint relating to the direction and control of the police force by the Chief Constable is not a qualifying complaint. The time limit for the presentation of a complaint is fixed by the RUC (Complaints etc) Regulations 2001 at 12 months and could only be extended where there were exceptional circumstances or the matter is grave.

[7] Section 53 requires the Ombudsman to consider whether the qualifying complaint is suitable for informal resolution. That requires that the complainant gives consent and that the Ombudsman does not consider it a serious complaint. A serious complaint is defined as a complaint alleging that the conduct complained of resulted in the death of, or serious injury to, some person. If the Ombudsman considers that the complaint is suitable for informal resolution he must refer it to the appropriate disciplinary authority who will seek to resolve it informally. If informal

resolution turns out not to be possible the disciplinary authority must refer the complaint back to the Ombudsman for investigation pursuant to section 56.

[8] Section 54 requires that the Ombudsman formally investigate all serious complaints but may refer other qualifying complaints to the Chief Constable for formal investigation by a police officer. Section 55 requires the Chief Constable to refer to the Ombudsman for formal investigation any matter which appears to the Chief Constable to indicate that conduct of a member of the police force may have resulted in the death of some other person and certain criminal justice organisations are given power to refer matters which are not the subject of a complaint for investigation where it appears that a member of the police force may have committed a criminal offence or behaved in a manner which would justify criminal proceedings.

[9] Section 55(6) provides that the Ombudsman may of his own motion formally investigate any matter which appears to him to indicate that a member of the police force who is not the subject of a complaint may have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings if it appears to the Ombudsman that it is desirable in the public interest that he should do so.

[10] Section 56 provides that where a complaint or matter is to be formally investigated the Ombudsman must appoint an officer of the Ombudsman to conduct the investigation. Officers of the Ombudsman have all the powers and privileges of a constable throughout Northern Ireland and are subject to the Codes of Practice under the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE") in the conduct of interviews. At the end of the investigation the officer appointed to conduct the investigation must submit a report to the Ombudsman. Similarly, where a police officer is tasked with conducting the investigation the officer must submit a report on the investigation to the Ombudsman under Section 57(8).

[11] Where the Ombudsman determines that the report indicates that a criminal offence may have been committed by a member of the police force he must send a copy of the report to the Director of Public Prosecutions together with such recommendations as appear to the Ombudsman to be appropriate. Where he determines that the report does not indicate that a criminal offence may have been committed by a member of the police force and that the complaint is not a serious one he may determine that the complaint is suitable for resolution through mediation and act as a mediator if the parties agree.

[12] Section 59 describes the circumstances in which the Ombudsman must consider the question of disciplinary proceedings. That arises if he determines:

(i) that the report received does not indicate that a criminal offence may have been committed by a member of the police force and the complaint was not suitable for resolution through mediation or the mediation has failed, or

(ii) that the DPP has decided not to initiate criminal proceedings in relation to a report sent to him or those proceedings have concluded.

[13] In those circumstances the Ombudsman must 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;
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> (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 the disciplinary proceedings which he recommends as he thinks appropriate."

This section has provisions to enable the Ombudsman to ensure that any recommended disciplinary proceedings are pursued.

[14] Section 60A was added in April 2003. It provides that the Ombudsman may investigate a current practice or policy of the police if the practice or policy comes to his attention under Part VII and he has reason to believe that it would be in the public interest to investigate the practice or policy. There are exclusions in relation to matters concerned with conduct within the remit of the tribunal established under the Regulation of Investigatory Powers Act 2000. If he decides to exercise this power the Ombudsman must immediately inform the Chief Constable, the Policing Board and the Department of Justice of his decision to conduct such an investigation, his reasons for making that decision and the practice or policy into which the investigation is to be conducted. This section imposes a requirement on the Ombudsman to report on the investigation to the Chief Constable and the Policing Board and in certain circumstances to the Secretary of State and the Department of Justice.

[15] Section 62 is the provision at the centre of the dispute in this appeal and provides:

> "The Ombudsman may, in relation to any exercise of his functions under this Part, publish a statement as to his actions, his decisions and determinations and the reasons for his decisions and determinations."

[16] Section 63 relates to restriction on disclosure of information but enables the Ombudsman to disclose information in connection with the exercise of any of his functions in the form of a summary or general statement where the Ombudsman

thinks it necessary in the public interest to identify a person to whom the information received relates.

[17] Section 64 provides for regulations and in particular subsection (n) provides for regulations enabling the Ombudsman, in such cases as may be prescribed, to make a recommendation to the Chief Constable for the payment by the Chief Constable to the complainant of compensation of such amount as the Ombudsman considers appropriate but not exceeding certain limits. On foot of that power paragraph 27 of the Royal Ulster Constabulary (Complaints etc) Regulations 2000 ("the 2000 Regulations") provides:

> ***"Recommendations on compensation for complainants***
>
> 27.-(1) Where the Ombudsman is satisfied that a complaint has been substantiated, the Ombudsman may recommend to the Chief Constable that he should pay compensation to the complainant where:
>
> (a) the complainant has suffered measurable financial loss resulting from the action complained of, or
>
> (b) the complainant suffered physical injury, or
>
> (c) the complainant has suffered considerable distress or inconvenience.
>
> (2) The sum recommended for compensation shall not exceed that payable in the small claims court.
>
> (3) It shall not be disclosed in any criminal or disciplinary proceedings that compensation has been recommended or paid."

[18] What this review of the legislation establishes, therefore, is that there are a number of gateways leading to the conduct of an investigation by the Ombudsman. The first is through section 52(4) where there is a complaint about the conduct of a member of the police force made by or on behalf of a member of the public. The conduct of which complaint is made need not include a criminal offence or a disciplinary matter. The 2000 Regulations recognise this by reference to provisions dealing with unsatisfactory performance but the determination of whether the complaint is a qualifying complaint is for the Ombudsman to determine by virtue of section 52(4). It is not necessary that the person making the complaint identifies any particular member of the police force. It was this power which the Ombudsman exercised in this case.

[19] The other gateways are through section 55. That can be as a result of a referral by the Policing Board, the Department of Justice or the Secretary of State where it appears to any of them that a member of the police force may have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings. Section 55 also requires that the Chief Constable refer to the Ombudsman any matter which appears to the Chief Constable to indicate that the conduct of a member of the police force may have resulted in the death of some other person. The Chief Constable may also refer to the Ombudsman any matter which appears to the Chief Constable to indicate that a member of the police force may have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings.

[20] The Director of Public Prosecutions ("DPP") must also refer to the Ombudsman any matter which appears to him to indicate that a police officer has committed a criminal offence or may, in the course of a criminal investigation, have behaved in a manner which would justify disciplinary proceedings. Finally, section 55(6) gives the Ombudsman power of his own motion to formally investigate any matter which appears to him to indicate that a member of the police force may have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings in the absence of a complaint if it appears to the Ombudsman that it is desirable in the public interest that he should do so. The routes under section 55 are qualified largely by reference to the possibility of the commission of a criminal offence or disciplinary misconduct and that may suggest that the discretion of the Ombudsman to determine the extent of the investigation is wider where the section 52(4) route is engaged.

[21] The scheme of the legislation requires the Ombudsman to make determinations on whether a member of the police force may have committed a criminal offence or whether disciplinary proceedings are appropriate. The Ombudsman has no adjudicative role in respect of the outcome thereafter. Part VII of the 1998 Act does not impose any express duty on the Ombudsman to substantiate or dismiss any complaint.

[22] The only reference to the substantiation of a complaint is found in Regulation 27 of the 2000 Regulations. There are, however, obvious instances where a complaint may be well founded although no recourse to the DPP or the disciplinary authority would be appropriate. A criminal offence may appear to have been committed but it may not be possible to identify the offender. Disciplinary proceedings may not be possible because the officer has resigned in the interim. The complaint may relate to unsatisfactory performance. This is not a comprehensive list of the circumstances in which such cases could arise.

[23] There are few references to the involvement of the complainant after the complaint has been lodged. The 2000 Regulations provide for a copy of the complaint to be given to the complainant once it is accepted by the Ombudsman. Those Regulations also provide that the complainant must be informed if the

Ombudsman refers the complaint to a disciplinary committee and must also be informed if he agrees that the complaint should be withdrawn before that committee. The only references in Part VII of the 1998 Act to the involvement of the complainant is where an informal resolution or mediation is suggested and the complainant agrees to either course. If there is no express duty on the Ombudsman to determine whether to substantiate the complaint and inform the complainant of the outcome what decision making power or duty does the Ombudsman have and if the Ombudsman has such a power or duty how is he to exercise it? The answer to those questions are to be found by examining the Act and its context as a whole. Those are the crucial issues in this appeal.

The complaint

[24] The shooting was reported to police within 10 minutes of its occurrence and vehicle checkpoints were set up expeditiously in the area. The offenders were not intercepted. The police investigation thereafter has continued and the latest information available to the court is that the matter was transferred to the Legacy Investigation Branch of the PSNI in 2014. The investigations have not led to the apprehension of those responsible.

[25] In late 2001 the Loughinisland families first contacted the Ombudsman's office to raise concern about the circumstances of the attack and subsequent police investigations. Discussions continued until March 2006 when a formal complaint was made by the families. That complaint concerned:

(i) Alleged failure by police to conduct an effective investigation of the murders, including failing to keep the bereaved families updated as to progress in the enquiry.

(ii) (ii) Alleged failure of the police investigation to discharge the state's duties as required by Article 2 of the European Convention on Human Rights as incorporated by Schedule 1 of the Human Rights Act 1998.

(iii) Alleged collusion between the RUC and those responsible for the murders.

That resulted in the publication of a formal statement in June 2011 by the predecessor of the Ombudsman who made the impugned statement. The bereaved families were dissatisfied with the 2011 statement and issued judicial review proceedings to quash it. By consent that public statement was quashed in December 2012.

[26] Thereafter the families engaged in further discussions with the newly appointed Ombudsman and sought to support the allegation of collusion by reference to issues around the Triumph Acclaim motor vehicle in which the attackers made their escape. That vehicle was destroyed by police in 1995. It was also

contended that there was a failure to make prompt arrests despite the early availability of related intelligence.

[27] In January 2014 terms of reference for the proposed investigation by the Ombudsman were established dealing with the resourcing and conduct of the investigation, the manner in which intelligence was available and used to assist the investigation, the extent to which the UVF gang might have been disrupted as a result of investigations into pre-cursor events and the extent to which there was any involvement directly or indirectly in connection with the attack by a member of the RUC or agent of the RUC. An officer was appointed pursuant to section 56 of the 1998 Act to conduct the investigation.

[28] The weapon used in the murders at the Heights Bar was a VZ58 assault rifle. It is common case that there was a loyalist arms importation of such weapons during 1987/88 and that the murder weapon was part of that importation. It was alleged that the RUC were aware of the planned importation and colluded with loyalists by either facilitating the purchase and importation or failing to take appropriate and effective steps to disrupt the importation. Such weapons were used by loyalist paramilitaries in the murder or attempted murder of at least 70 people in Northern Ireland between 7 March 1988 and 3 May 2005. The terms of reference of the investigation were amended in August 2014 to include the investigation of issues related to the importation of these arms in 1987/88.

[29] The investigation was concluded by September 2015 and the Ombudsman submitted an investigation report to the PPS indicating that it was not believed that the evidence would support submission of a file for direction to the PPS in relation to a specific, identifiable officer but that the enquiries revealed what would be better described as significant concerns in respect of disciplinary and/or corporate matters for the RUC. It was intended that these would be detailed in a subsequent public statement. The Ombudsman's Director of Investigations (Historic) met with the PPS on 14 April 2016 and the PPS confirmed that they had not identified sufficient evidence to charge or report any police officer for any offence in connection with the investigation.

[30] At first instance before Keegan J it was contended that the Ombudsman had conducted his investigation for the purpose of preparing a PS rather than for the purpose of investigating the complaint. We consider that the steps set out above plainly demonstrate that the investigation was one directed at the complaint. The Ombudsman indicated expressly in his affidavit that the investigation of the complaint was his purpose and we consider that there was no basis for going behind that statement. The matter was not pursued on appeal.

The public statement

[31] The Ombudsman issued the PS on 9 June 2016. It consists of an executive summary followed by nine chapters and an appendix which includes a summary of

findings in relation to the core complaints. In respect of those core complaints in some cases the Ombudsman sets out a narrative explaining why the complaint is made out and in others a narrative explaining why the complaint is not made out. Although he does not use the terminology of substantiated or dismissed the narrative amounts to the same thing.

[32] Keegan J set out briefly the broad elements of the PS from [8]-[13] of her judgment:

> "[8] The Executive Summary refers to the fact that the investigation has sought to answer this and other important questions raised by the families of those who were killed and injured. The Ombudsman then states as follows:
>
> > "Let there be no doubt, the persons responsible for the atrocity at Loughinisland were those who entered the bar on that Saturday evening and indiscriminately opened fire. It is also important to recognise that despite the findings identified in this report there have been many within the RUC (Royal Ulster Constabulary GC) and the PSNI (Police Service of Northern Ireland) who have worked tirelessly to bring those responsible to justice. I am grateful to those members of the public and retired police officers who assisted my enquiries. However my investigation into this area was constrained by a refusal of a number of key people to speak to my investigators."
>
> [9] This public statement then sets out various matters in relation to the background to the attack which I reference in summary only. The Executive Summary refers to intelligence suggesting that the attack at Loughinisland was carried out by a UVF (Ulster Volunteer Force) unit in reprisal for the killings on the Shankill Road of senior UVF figures on 16 June 1994. The second sub-section refers to importation of weapons in 1988 and refers to this fact and states:
>
> > "However, an understanding of what happened in Loughinisland begins with the importation of arms by Loyalist paramilitaries in late 1987/early 1988. My investigation has found that the VZ58 rifle which was used in the Loughinisland attack was

part of the shipment which entered Northern Ireland at that time. "

[10] In dealing with the events leading up to the Loughinisland attack the Ombudsman states as follows:

"My investigation into the Loughinisland killings examined the events leading up to the murders. It found that Special Branch had reliable intelligence that there was to be an arms importation in 1987/1988. Moreover, reliable intelligence indicates that police informants were involved in the procurement, importation and distribution of these arms. To fail to stop or retrieve all the weapons, despite the involvement of informants in the arms importation was a significant intelligence failure."

[11] Reference is then made to incidents prior to the Loughinisland murders as part of the analysis of the police investigation. The Executive Summary reads:

"The families have complained that the police failed to conduct an adequate investigation into the murders. My conclusion is that the initial investigation into the murders at Loughinisland was characterised in too many instances by incompetence, indifference and neglect. This despite the assertions by the police that no stone would be left unturned to find the killers. My review of the police investigation has revealed significant failures in relation to the handling of suspects, exhibits, forensic strategy, crime scene management, house to house enquiries and investigative maintenance. The failure to conduct early intelligence led arrests was particularly significant and seriously undermined the investigation into those responsible to the murders."

[12] The Ombudsman then states that failures to bring the killers to justice cannot be explained solely by a failure or otherwise of investigative actions. It is at this point the Ombudsman turns to the complaint of the families that there was collusion between elements within the police and Loyalist paramilitaries. He states *inter alia* that:

"It is clear that discussion around the issue of collusion in Northern Ireland is extremely controversial and politically sensitive. There has been considerable debate in academic publications, reports by non-Governmental agencies and in the various enquiries into alleged allegations of State related killings in Northern Ireland. No consensus has emerged as to what it actually means. I am of the view that individual examples of neglect, incompetence and/or investigative failure are not (de facto) evidence of collusion.

However, a consistent pattern of investigative failures may be considered as evidence of collusion depending on the context and specifics of each case. This is particularly the case when dealing with police informants, who were participating in crime.

Having considered the numerous definitions of collusion that have emerged over the years, I have decided the most compelling approach is that provided by Judge Smithwick's definition in his inquiry into collusion between members of An Garda Síochána and the Provisional IRA.

> 'The issue of collusion will be examined in the broadest sense of the word. While it generally means the commission of an act, I am of the view that it should also be considered in terms of an omission or failure to act. In the active sense, collusion has amongst its meanings to conspire, connive or collaborate. In addition I intend to examine whether anybody deliberately ignored a matter or turned a blind eye to it or have pretended ignorance or unawareness of something morally, legally or officially to oppose.'"

[13] Having examined the complaint of collusion the Ombudsman concludes as follows:

"Many of the issues I have identified in this report including the protection of informants through both wilful acts and the passive turning a blind eye are in themselves evidence of collusion as defined by Judge Smithwick. When viewed collectively I have

> no hesitation in unambiguously determining that collusion is a significant feature of the Loughinisland murders.""

The proceedings

[33] An application for judicial review to quash the PS was initiated in August 2016 on the basis first that the report exceeded the Ombudsman's statutory powers and secondly that the first named appellant was denied the procedural fairness protections guaranteed to him by the common law.

[34] Leave was granted and the application came on for hearing before McCloskey J. He gave judgment on 21 December 2017. He reviewed the PS and considered that it contained a determination of negligence in relation to the first named appellant and did not expressly exclude him from the allegation of collusion. The first named appellant was given the opportunity to comment in advance of publication on only a single, isolated element of the PS concerning the storage and disposal of the suspected murder vehicle and the simultaneous loss of a significant exhibit. There was no reference to the first appellant's representations that there should be a focused search for further relevant documentary evidence. There was an inadequate and inaccurate portrayal of his defence in the report and no evidence that his defence was believed. In those circumstances the PS was vitiated by procedural unfairness. There is no appeal from that finding.

[35] In light of that finding the PS was amended to exclude certain references in relation to the first named appellant and a statement was issued on 9 March 2018 making it clear that the Ombudsman's determination of collusion in the report did not apply to the first named appellant. McCloskey J also addressed the *vires* issue and found in favour of the appellants. An application for recusal was then made after the liability judgment on 12 January 2018 prior to a remedies hearing. For the reasons set out in this judgment McCloskey J recused himself on the *vires* issue and directed that it should be heard before a different judge.

[36] It was in those circumstances that the matter then came on for hearing before Keegan J. For the purposes of this appeal there were two grounds to be addressed by her:

> "(b) The respondent acted ultra vires in coming to conclusions, decisions or determinations as to whether criminal offences, or disciplinary offences had been committed by police officers as opposed to making recommendations to the appropriate authorities in relation to the same. Accordingly, the respondent had no power to issue a report on matters that did not relate to the exercise of his

powers or as to decisions or determinations that he was lawfully permitted to arrive at.

(d) The respondent has wrongfully employed the making of a statement provisions, permitting the making of a statement as per section 62 of the Police (Northern Ireland) Act 1998, for the purposes of making a comment upon the Royal Ulster Constabulary George Cross as a body corporate."

[37] At [66] of her judgment Keegan J identified the appellants' argument as contending that the Ombudsman should really only issue a public statement when a statutory outcome was reached such as a recommendation for criminal or disciplinary proceedings. The argument being advanced was that the most the Ombudsman could report on was that he did not believe that any criminal or disciplinary charges were merited. To go further was to step outside the statutory role. In the appeal the thrust of the argument was that the error of the Ombudsman was in making adjudications on the commission of criminal offences and disciplinary contraventions by police officers and it was those determinations that were outside his lawful powers.

[38] Keegan J accepted that the PS as revised to accommodate the finding in relation to Mr Hawthorne did not constitute a finding of a criminal or disciplinary offences against any individual. She considered that the investigative duty on the Ombudsman involved a need to bring some resolution to families in an incident of this kind arising from the Troubles where no prosecutions have been brought. It was contrary to the legislative intention to limit the role of the Ombudsman in the manner contended for and such a limitation would have constituted a breach of the investigative obligation placed upon the state by virtue of Article 2 of the ECHR. Accordingly, she dismissed the application.

The Principles Governing a PS

[39] Part VII of the 1998 Act is replete with actions, decisions and determinations in respect of which the Ombudsman is either under a duty or can exercise a power. Under section 52(3) the Ombudsman is under a duty to record and consider each complaint and to determine whether it is a complaint to which subsection (4) applies. Section 54 requires that where a complaint is a serious complaint the Ombudsman must investigate in accordance with section 56. Section 55(6) empowers the Ombudsman to decide to investigate a possible criminal offence or disciplinary misconduct without complaint. Section 58 provides for the action the Ombudsman must take on receipt of an investigative report and section 59 requires the Ombudsman to consider disciplinary proceedings in certain circumstances. Where he has not determined that a criminal offence may been committed he has to decide what recommendation to make to the disciplinary authority providing

reasons and particulars. Section 62 is carefully crafted so that it is in respect of those actions, decisions and determinations required under the 1998 Act that a PS can be made. It follows that there is an expectation that any PS will disclose what statutory steps were taken and the reasons for those steps.

[40] It is clear that the principal role of the Ombudsman is investigatory. The complaint defines the contours of the investigation and in this case informed the terms of reference about which no complaint has been made. There is no power or duty created by the statute for the Ombudsman to assert a conclusion in respect of criminal offences or disciplinary misconduct by police officers. The Ombudsman is required to provide recommendations to the DPP if he considers that a criminal offence may have been committed. Such a recommendation is a decision which could form part of a PS. Once he makes such a recommendation he has no role thereafter apart from supplying information on request.

[41] When making a report to the disciplinary authority he is again required to make a recommendation as to whether proceedings should be brought and a statement of his reasons for making the recommendation. When he recommends proceedings he must provide particulars. Thereafter, his only role is in communicating the outcome to the complainant. In respect of complaints about criminal proceedings and disciplinary misconduct he is not, therefore, given power to make any determination about the complaint.

[42] We agree with the learned trial judge that the requirement in section 51(4)(b) that the Ombudsman shall exercise the powers in such manner and to such extent as appear to be best calculated to secure the confidence of the public and the members of the police force in the system is a significant material consideration in deciding to issue a PS and the terms in which it should be crafted. It is important to recognise, however, that the statute itself has sought to set out a framework within which the confidence of both the public and the police force should be secured.

[43] That framework specifically excluded any adjudicative power for the Ombudsman in the determination of criminal matters or disciplinary matters. The confidence of the public and police force was to be secured by way of the independence, efficiency and effectiveness of the investigation coupled with an adherence to the requirements of the criminal law before any finding of a criminal offence could be made against a police officer and the conduct of a disciplinary hearing with all the protections afforded within that system before disciplinary misconduct could be established. The thrust of the appellants' case is that the statutory scheme would be undermined if the Ombudsman was entitled to use section 62 as a vehicle for the making of such findings. We agree that the legislative steer is firmly away from the Ombudsman having power to make determinations of the commission of criminal offences or disciplinary misconduct but will address later how this affects the content of a PS.

[44] The learned trial judge was directed to case law supporting competing contentions about the extent of the discretion available to the Ombudsman. She correctly analysed R(Chief Constable of West Yorkshire) v IPCC [2015] PTSR 72 which was advanced by the appellants as demonstrating a narrow approach to the discretion. The judge recognised, however, that the statutory scheme in play made clear what was permitted. The court was not concerned with a provision such as section 62.

[45] The respondent relied on R v Parliamentary Commissioner ex p Dyer [1994] 1 All ER 375. It is correct that Simon Brown LJ referred to the width of the discretion available to the Commissioner in that case as being strikingly clear. That, however, was because section 5(5) of the Parliamentary Commissioner Act 1967 provided that in determining whether to initiate, continue or discontinue an investigation under the Act, the Commissioner "shall act in accordance with his own discretion". It is difficult to conceive of a provision granting a wider discretion to any public body. In addition the Commissioner was given express power where it appeared to the Commissioner that injustice had been caused in consequence of maladministration to so find. In our view these provisions bear no relationship to the carefully crafted allocation of responsibility set out in Part VII of the 1998 Act and we do not find that case of assistance in determining the extent of the Ombudsman's powers under this legislation.

[46] Although the incident in question happened in June 1994 there has been considerable investigative work carried out subsequent to the coming into force of the Human Rights Act 1998 and indeed the case is still the subject of investigation. We did not detect any disagreement that the investigative obligation under Article 2 of the ECHR was engaged in domestic law as a result of the Supreme Court decision in McCaughey [2012] 1 AC 725.

[47] The investigative role of the Ombudsman was expressly relied upon by the United Kingdom Government and referred to in the Joint Committee on Human Rights Seventh Report of Session 2014/15. The relevant passage is set out by the judge at [60]. The procedural obligation under Article 2 requires that an effective and independent investigation is conducted and that there is a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. As the papers show the Ombudsman has published a PS on a significant number of occasions, some of which have demonstrated by investigation that concerns about the commission of offences or misconduct were misplaced. In other cases recommendations about future conduct have been highlighted. Many of these are examples of contribution to the satisfaction of the Article 2 obligation.

[48] What Article 2 required in domestic law was addressed by the House of Lords in Regina (Middleton) v West Somerset Coroner and Another [2004] 2 AC 182. The issue in that case was similar. The Coroner was prohibited from making a finding of criminal liability but Lord Bingham concluded:

> "Where, in such a case, an inquest is the instrument by which the state seeks to discharge its investigative obligation, it seems that an explicit statement, however brief, of the jury's conclusion on the central issue is required."

[49] How that was to be achieved was addressed by Lord Bingham in a further passage:

> "36. This will not require a change of approach in some cases, where a traditional short form verdict will be quite satisfactory, but it will call for a change of approach in others: paras 30-31 above. In the latter class of case it must be for the coroner, in the exercise of his discretion, to decide how best, in the particular case, to elicit the jury's conclusion on the central issue or issues. This may be done by inviting a form of verdict expanded beyond those suggested in form 22 of Schedule 4 to the Rules. It may be done, and has (even if very rarely) been done, by inviting a narrative form of verdict in which the jury's factual conclusions are briefly summarised. It may be done by inviting the jury's answer to factual questions put by the coroner. If the coroner invites either a narrative verdict or answers to questions, he may find it helpful to direct the jury with reference to some of the matters to which a sheriff will have regard in making his determination under section 6 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 : where and when the death took place; the cause or causes of such death; the defects in the system which contributed to the death; and any other factors which are relevant to the circumstances of the death. It would be open to parties appearing or represented at the inquest to make submissions to the coroner on the means of eliciting the jury's factual conclusions and on any questions to be put, but the choice must be that of the coroner and his decision should not be disturbed by the courts unless strong grounds are shown.
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> 37. The prohibition in rule 36(2) of the expression of opinion on matters not comprised within sub-rule (1) must continue to be respected. But it must be read with reference to the broader interpretation of "how" in section 11(5)(b)(ii) and rule 36(1) and does not preclude conclusions of fact as opposed to expressions of opinion. However the jury's factual conclusion is conveyed, rule 42 should not be infringed. Thus, there must be no

finding of criminal liability on the part of a named person."

The Ombudsman's role is not the same as the role of a jury in a coroner's investigation as the jury is required to address the questions posed under the Coroners Act (Northern Ireland) 1959 but this passage is of some assistance in informing the Ombudsman's contribution to the satisfaction of Article 2.

[50] The Patten Commission expressly recognised the importance of the Ombudsman in securing accountability and public trust in the police. We recognise, however, that the Ombudsman is not the only vehicle for the delivery of this obligation and in Rosaleen Dalton's Application [2020] NICA 27 at [139] this court noted the jurisprudence of the ECtHR giving the state a margin of appreciation as to how the obligation should be delivered. We agree, however, that the Ombudsman should consider carefully his role in securing accountability in an Article 2 case when considering whether to make a PS.

[51] Article 60A provides for the Ombudsman to investigate current police practices and policies. In order to exercise this power the practice or policy has to come to attention under Part VII and the Ombudsman has to have reason to believe that it would be in the public interest to investigate the practice or policy. There are precise arrangements as to notification and reporting in relation to the practice or policy. There is no such provision in respect of historic practices or policies which are no longer current.

[52] We consider that the express reference to the practice or policy being current was designed to exclude investigations into historic practices or policies. That does not mean, however, that the impact that a practice or policy may have had on the conduct of a particular investigation is outside the scope of the Ombudsman's remit. There is a distinction between the investigation of a practice or policy which would involve its application in relation to the range of cases to which the practice or policy applied and considering the impact that a particular practice or policy may have had on the manner in which a particular investigation was carried out. The latter is plainly within the remit of the Ombudsman insofar as it impacts upon that investigation.

[53] The earlier decision of McCloskey J has discussed the need for procedural fairness as an intrinsic part of the exercise of publication of a PS. It must also be borne in mind that matters bearing on personal honour and reputation fall within the scope of Article 8 and where they attain a certain level of gravity and are made in a manner causing prejudice to personal enjoyment of the right to respect for private life they are entitled to protection (see Pfeifer v Austria 48 EHRR 175).

[54] Finally, there is the issue of whether the Ombudsman can substantiate or dismiss a complaint. Where the complaint relates to the commission of a criminal offence or disciplinary misconduct by a member of the police force we consider that

the scheme of the 1998 Act does not provide a role for the Ombudsman in the adjudication of the complaint. Where, however, the complaint is in respect of other matters such as incivility or unsatisfactory performance we consider that the intention of the Act as disclosed in section 64(2)(n) was to enable the Ombudsman to provide limited compensation and that such an award could only be made in circumstances where the complaint was satisfied. That is effectively recognised in the 2000 Regulations.

[55] There may well be circumstances, of which this appeal may be an example, where a police officer will have resigned as a result of which the officer would no longer be subject to any disciplinary process. By virtue of section 63(1)(e) of the 1998 Act the Ombudsman has limited powers in a PS to identify a person to whom information relates if it is necessary in the public interest. That is a strict test. We accept that a person can be identified by inference, a so-called jigsaw identification. We do not consider that the power to make a PS provides the Ombudsman with the power to make determinations in respect of retired officers. We accept, however, that the statutory scheme does enable the Ombudsman in respect of such officers to indicate what recommendations might have been made, what reasons there were for the making of such recommendations and whether disciplinary proceedings would have been appropriate.

[56] All of that must, however, be circumscribed by the requirement for procedural fairness and the need to ensure that the Article 8 interests of the retired officers are respected.

Conclusion

[57] The complaints by the families were largely focused upon failures in the investigative process disclosing criminal conduct as a result of attempts to protect those responsible for the murders. In a letter from Mr Holmes, the Ombudsman's Director of Investigations (History), to the Public Prosecution Service on 17 September 2015 enclosing the investigation report he stated that he did not believe that the investigation had identified evidence that would support submission of a file for direction to the PPS in relation to a specific, identifiable officer. What was revealed he described as significant concerns in respect of disciplinary and/or corporate matters for the RUC which would be detailed in the PS.

[58] It is striking that nowhere in the PS did the Ombudsman state that he had determined that the report under section 56 did not indicate that a criminal offence may have been committed by a member of the police force. In light of his comments about the approach to the sharing of intelligence and the effect it may have had on the outcome of the investigation one would also have expected the PS to set out the reasons for that decision.

[59] The debate in this case principally revolved around the comments of the Ombudsman in his summary conclusions in Chapter 9 of the PS. In that chapter at

paragraph 9.9 he concluded that corrupt relationships existed between members of the security forces in South Down and the UVF. He set out the interpretation of "collusion" which he considered appropriate in this context. From paragraphs 9.19 to 9.27 he set out the position of the Northern Ireland Retired Police Officers Association. Those comments identified the critical part that intelligence had to play in the fight against terrorism and asserted that the intelligence world quite justifiably adopted on specific occasions the position that the priority to preserve life and secondly property came at the expense of solving crime.

[60] On that basis the argument was that any interference with the investigation of serious crimes was not with the intention of disrupting that investigation but for the purpose of preserving life. That included both the life of the informant and the life of others who would be saved as a result of the informant's information. It was submitted that such an approach was perfectly lawful.

[61] Between paragraphs 9.28 to 9.38 he set out the competing argument that informant handling requires the balancing of the potential value of the informant which may save lives and the nature and scope of activities in which they are likely to be involved. He acknowledged that the intelligence community in Northern Ireland sought political guidance as to how these matters might be resolved but that was not forthcoming. He concluded in 9.40 that the protection of informers through both wilful and passive acts constituted collusion as defined by Judge Smithwick. At paragraph 4.200 he also expressed his view that it was indefensible for the Special Branch not to disseminate intelligence implicating those involved in the importation of weapons in 1987/88.

[62] The essence of his conclusion was set out at paragraph 9.34:

> "In the aftermath of serious crime police should not be complicit in concealing information which could assist related investigations; should not, as in the case of murders which preceded the Loughinisland attack, shield the identity of possible suspects who should have been subject to investigation; and should not fail to disseminate intelligence in order to protect the source of the information."

[63] Apart from the passages set out at paragraph 4.200, 9.9 and 9.40 the nine chapters of the substantive PS provide what the Ombudsman stated at paragraph 1.12, namely as comprehensive a narrative as possible. The determinations he made in the three offending paragraphs were not in our view decisions or determinations to which section 62 applied and overstepped the mark by amounting to findings of criminal offences by members of the police force. The remaining paragraphs were part of the narrative. We do, however, accept that in light of the families' complaint in the context of Article 2 it would have been appropriate for the Ombudsman to

acknowledge that the matters uncovered by him were very largely what the families claimed constituted collusive behaviour.

[64] We do not dissent from the view of Keegan J that she was not minded "to step into the territory of critiquing modes of expression" in exercising her supervisory jurisdiction but we consider that the emphatic conclusions reached by the Ombudsman in the three offending paragraphs go beyond mere modes of expression and exceed his powers. We do, nevertheless, uphold the decision of the judge at first instance not to strike down the PS because of what was written therein. In light of our conclusions regarding the offending paragraphs the parties may wish to have an opportunity to consider the issue of remedy, although the appellants may be content with the expression of this court's view as sufficient remedy for them.