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IN 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

-v-

POLICE OMBUDSMAN FOR NORTHERN IRELAND

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NOTE

This judgment was promulgated in three stages:

[1] – [121], the substantive judgment: 21 December 2017
[122] – [198], ancillary issues: 26 January 2018
[199] – [200], final Order: 09 March 2018

McCLOSKEY J

Introduction

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

[2] This case is a member of the cohort consisting of approximately 45 undetermined judicial reviews raising an assortment of so-called "legacy" issues. "Legacy" is a broad, undefined appellation which denotes, in general terms, public law challenges against an array of Northern Ireland public authorities – the Police Ombudsman, the Chief Constable, the Secretary of State and others – arising out of or related in some way to loss of life (normally) during the period of "the troubles" in the recent history of this jurisdiction. This cohort of cases has been the subject of expedition and special case management measures in this court as a result of a recent initiative of the Lord Chief Justice.

[3] One particular feature of the present case is that these Applicants, unlike many of the other cases in the "legacy" group, are not the next of kin of murdered victims of "the troubles". They are, rather, respectively, a directly affected retired police officer and the representative of NIRPOA, a non-statutory unincorporated entity, composed of retired police officers, each of whom has grave concerns about much of the content of the "public statement" under scrutiny. The first Applicant, Mr Hawthorne, claims to have suffered significant mental anguish, grave reputational damage and a denial of certain fundamental rights. The essence, in part, of the challenge mounted by the second Applicant is that many police officers would claim to have suffered similarly both as regards this "public statement" and others published by the Police Ombudsman from time to time. The court's review is of necessity confined to the Ombudsman's second Loughinisland report.

[4] These proceedings, having been initiated in August 2016, leave to apply for judicial review was granted following an *inter-partes* hearing by order dated 06 June 2017. The substantive hearing was conducted on 1, 7 and 14 December 2017. The commendably full co-operation from the parties' representatives has resulted in a time lapse from the initiation of special case management measures, pursuant to [2] above, to the delivery of this judgment being of less than two months. The court will expect this level of cooperation from the legal profession in all "legacy" cases.

Statutory Framework

[5] The statutory provisions applicable to the framework of these proceedings are arranged in Part VII of the Police (NI) Act 1998 (the "*1998 Act*") which takes the form of a self-contained statutory code. The new statutory office of Ombudsman was thereby established. Given the bulk of the statutory provisions, both primary and subordinate, to be considered they have been assigned to Appendix 1 to this judgment.

[6] While the various constituent elements of Part VII knit together and interact with each other, those components of this statutory code which are of greatest importance in the context of this challenge are:

(a) **Section 51(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."

(b) **Section 58(2):** where, following consideration of a formal investigation report, the Police Ombudsman "*determines*" that an investigation report indicates that a criminal offence may have been committed by a member of the police force, he shall transmit the report to the Director of Public Prosecutions ("DPP") with such accompanying recommendations as appear to him appropriate.

(c) **Section 59(1B):** where the DPP decides not to prosecute, the Police Ombudsman shall consider the question of disciplinary proceedings and shall report in specified terms to the "*appropriate disciplinary authority*", which report shall incorporate his recommendations as to disciplinary proceedings concerning "*the conduct which is the subject of the investigation*".

(d) **Section 62**, which is of pivotal importance in these proceedings:

> *"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."*

Chronology

[7] The following is an outline of the material dates and events:

(i) 18 June 1994: The murder of six innocent civilians and injury of five others at the Heights Bar, Loughinisland, Co Down.

(ii) From 2001: Interaction between representatives of the victims and the Police Ombudsman.

(iii) March 2006: Formal complaint to the Police Ombudsman by the families.

(iv) 2006 – 2009: The Police Ombudsman's first Loughinisland investigation.

(v) September 2009: exchanges between the Police Ombudsman and others prior to promulgation of the first Loughinisland "public statement".

(vi) November 2009: Allegations about the conduct of a serving police officer in relation to the vehicle believed to have been used by the killers, culminating in a Public Prosecution Service ("PPS") decision, in November 2010, that there would be no prosecution applying the "evidential" test.

(vii) June 2011: Publication of the Police Ombudsman's first Loughinisland "public statement".

(viii) September 2011: Judicial review challenge by the families to the Ombudsman's first Loughinisland "public statement".

(ix) July – December 2012: Review of the "public statement" by the Police Ombudsman.

(x) December 2012: The Police Ombudsman consented to the quashing of the "public statement".

(xi) 2013 – 2016: The Police Ombudsman's second Loughinisland investigation.

(xii) 09 June 2016: Publication of the Police Ombudsman's second Loughinisland "public statement", which is impugned in these proceedings.

(xiii) July 2016: PAP correspondence.

(xiv) August 2016: Commencement of these proceedings.

The impugned "Public Statement"

[8] Following the agreed quashing of the initial "Public Statement" and the decision to conduct a further investigation, the Police Ombudsman formulated the following terms of reference: [pp17 – 18]

> a. *"To establish if a member of the RUC or agent of the RUC was directly culpable in the attack and/or any other dimension of the matter such as provision of alibis, disposal of evidence, coaching of witnesses/suspects.*
>
> b. *To establish if the RUC was in possession of intelligence from any sources, including casual contacts, registered informants, other agencies and/or other covert sources which, if acted on, might have prevented the attack. This should extend to knowledge of the activities of the group or individuals suspected of involvement in the preparation, planning or execution of the attack and include the supply or handling of articles used in connection with the incident such as firearms and vehicles.*
>
> c. *To identify those structures and individuals within the UVF suspected of having performed roles relevant to the sanctioning, planning, preparation, execution and post incident acts connected to the attack and whether any of these groups/individuals presented the RUC with intelligence and/or evidence gathering opportunities, which were not acted on by police.*
>
> d. *To establish if the police murder investigation was adversely impacted by the non-dissemination of*

intelligence or otherwise obstructed.

e. *To identify all precursor events, which may be linked to the attack with a view to establishing whether police were presented with intelligence or evidential opportunities which, if properly exploited, might have resulted in law enforcement intervention and prevented escalation of activities, which culminated in the murders at Loughinisland.*

f. *To identify missed investigative opportunities by police, which may have resulted in the continued involvement in serious crime of those loyalist paramilitaries responsible for sanctioning, planning, preparation, participating in, or post incident acts relating to the attack at Loughinisland.*

g. *To establish if police senior command allocated sufficient levels of resourcing to the murder investigation and implemented oversight mechanisms so as to enable an effective investigation to take place.*

h. *To identify the investigation strategy of the police investigation(s) and establish if all reasonable lines of enquiry were pursued in an effective manner, including those relating to forensic opportunities (incorporating ballistics and crime scene examination), telecommunications, passive generators (such as CCTV), intelligence (including tasking of assets known to police, whether under the control of police or other agencies), witnesses and suspects.*

i *If serious, repeated or widespread criminality, misconduct or other failings by police are indicated, identify individual and/or corporate accountability, extending to police senior command."*

[9] A perusal of the impugned report confirms the profound and wide ranging nature of the families' concerns relating to the police investigation and conduct. This litany of concerns was identified by the Police Ombudsman as the "*complaint*" which provided the impetus for the further investigation culminating in the impugned report. The families' concerns encompassed matters including failed forensic evidence gathering opportunities; the police involvement in the destruction of the suspected vehicle in 1995; the genesis of, and police knowledge

concerning, the weapons used in the murder; the police failure to identify a nexus between the Loughinisland murders and other preceding terrorist incidents; flawed police management of the crime scene; the locations of post-murders police vehicle check points; inadequate investigation of an anonymous letter sent to a local councillor; and the involvement of police informants.

[10] The second of the Police Ombudsman's "public statements" relating to his investigation of the Loughinisland murders and surrounding pre-dating and post-dating events, published in June 2016, begins with an "Executive Summary" (10 pages). This records, firstly, the widespread condemnation, both national and international, which the appalling murderous attack attracted. It then notes the following [internal p 1]:

> "*Within a relatively short period of time the police had reliable intelligence on who committed the murders. They recovered the getaway car, the murder weapons and the clothing believed to have been used by the killers. Despite the high profile nature of the killings, the continued demands by families of the deceased for justice, and the many thousands of hours of investigative action by the police not one person has been prosecuted for the killings.*"

The impetus for the second of the Ombudsman's Loughinisland atrocity investigations conducted by the Ombudsman was the receipt of the families' concerns about inadequacies in the police investigation, conducted by the Royal Ulster Constabulary ("RUC") and collusion between the RUC and the perpetrators.

[11] The Executive Summary formulates the following conclusions [p 4]:

> "*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 for the murders.*"

It continues [page 5]:

> *"In addition, an important evidential opportunity was lost by the handling of the car used in the killings."*

[12] Under the rubric "Collusion", the report states [p 5]:

> *"The failures to bring the killers to justice cannot be explained solely by a failure or otherwise of investigative actions. It was a central complaint of the families that there was 'collusion' between elements within the police and loyalist paramilitaries. It is clear that discussion around the issue of collusion in Northern Ireland is extremely controversial and politically sensitive."*

It continues [p 6]:

> *"A critical element of my investigation has been the police use of informants within loyalist paramilitaries. The investigation considered the extent to which the Covert Human Intelligence Source (CHIS) / police relationship undermined policing prior to the Loughinisland murders and the investigation into that attack. It is my view that the nature of the relationship between the police and informants undermined the investigative process in a number of ways …*
>
> *There were many examples of failures to pass on intelligence to investigators. This meant that investigative lines of inquiry were not followed and individuals, who might have been subject to detailed and robust investigation, were effectively excluded from consideration. In the case of the incidents prior to the Loughinisland murders, limited action was taken against the UVF unit suspected of a series of serious crimes.*
>
> *In addition, investigative opportunities were undermined by the way in which information relating to those involved in the ownership chain of the car used in the Loughinisland attack was handled.*
>
> *The police also had intelligence that in August 1994 the murder suspects were warned – by a police officer – that they were going to be arrested. It is unacceptable that if such actions occurred, police failed to act on the information received and did not investigate this allegation further.*

> *The investigation also identified the existence of intelligence sources within loyalist paramilitaries, who were not tasked effectively to obtain information on who committed the attack and to provide information that could further shape investigative action by the Murder Investigation Team. This was a 'hear no evil, see no evil, speak no evil' approach to the use of informants, which potentially frustrated the police investigation into the attack and restricted investigation opportunities and lines of inquiry.*
>
> *I have found that Special Branch held intelligence that paramilitary informants were involved in a range of activities, including command and control of loyalist paramilitaries; the procurement, importation and distribution of weapons; murder; and conspiracy to murder. They have not been subject to any meaningful criminal investigation.*
>
> *It is of particular concern that Special Branch continued to engage in a relationship with sources they identified in intelligence reporting as likely to have been involved at some level in the Loughinisland atrocity. If these individuals were culpable in the murders they took every opportunity to distance themselves by attributing various roles in the attack to other members of the UVF. The continued use of some informants who themselves were implicated in serious and ongoing criminality is extremely concerning."*

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

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

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

[14] Some brief commentary is appropriate at this juncture. The "Executive Summary" of the impugned report promotes three main themes. These are, respectively, a "*catastrophically*" inadequate police investigation into the Loughinisland murders, collusion between the police and Loyalist paramilitaries in respect of the murders and improper police conduct vis-à-vis informants. These three phenomena are moulded together into the passage quoted immediately above.

[15] The five substantive chapters of the Police Ombudsman's report (numbered 4 – 8 respectively) address the following topics separately:

(i) Arms importation and the firearm used in the murders.

(ii) Events preceding the attack.

(iii) Intelligence available immediately prior to the attack and the response of the RUC.

(iv) The RUC investigation of the attack.

(v) Resourcing and subsequent developments in the murder investigation.

The other components of the impugned report are, in summary:

(a) The "Executive Summary" and "Introduction", both considered above.

(b) Chapter 2: "Background of Complaint".

(c) Chapter 3: "The Public Complaint and Terms of Reference" (considered above).

(d) Chapter 9: "Conclusions".

(e) Appendix 1: "Summary of Findings in relation to Core Complaints" (reproduced in its entirety in Appendix 2 to this judgment).

(f) Four other Appendices.

[16] While the impugned report of the Police Ombudsman must, of course, be considered as a whole, the centrepiece of the Applicant's challenge has a strong focus on the Executive Summary, the terms of reference (chapter 3), the RUC investigation of the murders (chapter 7), the "Conclusions" (Chapter 9) and

Appendix 1. I do not overlook that the first Applicant, Mr Hawthorne, in the Schedule at Appendix 3 to this judgment also highlights certain elements of chapter 5 of the report. Most of these relate to the conduct of unidentified Special Branch officers and, taking into account structural and organisational arrangements, are thus some distance removed from the policing landscape within which Mr Hawthorne discharged his sub divisional commander's duties. The offending passages in paragraphs 5.7 and 5.82 are an exception to this assessment.

[17] The criticisms in the Police Ombudsman's "public statement" of the conduct of multiple police officers both before and after the Loughinisland murders are expressed in uncompromising and trenchant terms in three sections of the report particularly: the Executive Summary, chapter 9 and Appendix 1. Unsurprisingly, these three components of the impugned report occupied most attention during the hearing. I have dealt above with the Executive Summary.

[18] I now turn to chapter 9 ("Conclusions") which contains the following criticisms in particular:

(i) The RUC were pre-occupied with the protection of informants, giving this priority over the prevention and detection of crime.

(ii) There were corrupt relations between members of the security forces in South Down and the UVF unit to which the RUC attributed the Loughinisland murders.

(iii) There was an inexcusable failure by the RUC to investigate intelligence that the perpetrators of the murders had been warned by a police officer of their imminent arrest.

(iv) The multiple and fundamental failings in the RUC investigation of the Loughinisland murders included a "*catastrophic*" failure in the "*suspect strategy*"; inadequate investigation of an arrested suspect's alibi; an inconsistent approach to the collection of forensic samples; inadequate investigation of the ownership history of the suspect murder vehicle; an inadequate response to an anonymous telephone call and letter; and an inappropriate willingness to;

> "*…. accept intelligence reporting, which was almost certainly designed to exculpate individuals, who may have been involved and other information designed to distance individuals from the murders.*"

[19] The report continues, in trenchant terms:

> "*The failure to investigate adequately the role of state agents in a range of criminal activities at a strategic and operational level effectively meant that they were protected from serious investigation and continued in their criminal activities.*"

This is followed by the statement:

> "*I can only conclude that the desire to protect informants may have influenced policing activity and undermined the police investigation into those who ordered and carried out the attack. When combined with a flawed investigation of the Loughinisland murders, this has undermined the investigation into those responsible for these crimes and ultimately justice for the victims and survivors.*

This is one of the passages of which Mr Hawthorne complains. The next section of the concluding chapter addresses the familiar conundrum and conflicts which habitually arise in police activities involving informants. It quotes from –

> "*… an 'open letter' written by a former Assistant Chief Constable (ACC), and representative of the Northern Ireland Retired Police Officers Association, in response to Sir John Steven's investigation.*"

[20] The gist of the passages then quoted emerges in the following sentence:

> "*As the intelligence world never viewed its existence as being solely a vehicle by which to serve the needs of crime investigation it, therefore, on specific occasions, quite justifiably adopted, in its opinion, the position that the priority to preserve life and secondly property came at the expense of solving crime.*"

It is evident that the population of the "*intelligence world*" included those members of the RUC who were active in the generation of intelligence and interactive with so-called informants, or State agents.

> "*Thus, in this context, the protection of police informants is not a sinister act but one which is entirely reasonable in order to protect the life of an informant. The Northern Ireland Retired Police Officers Association has also raised the issue in relation to the failure of*

> *government to provide clear and meaningful guidance on the participation of informants in criminal acts."*

[21] The report then notes the absence of specific guidance of this kind until the advent of the Regulation of Investigatory Powers Act 2000. Having quoted again from the retired ACC's statement, the Ombudsman's report continues:

> *"A critical element of this investigation has been the police use of informants. I accept that the use of police informants is an integral part of policing and that their involvement during the 'Troubles' saved many lives. Police, particularly in the heightened circumstances of the 'Troubles' in Northern Ireland could not have undertaken their duties effectively unless they had informants providing information to them ……*
>
> *Notwithstanding my criticism at paragraphs 9.3 and 9.4 of this statement, the police who were responsible for the retrieval of a large number of weapons, which were imported into Northern Ireland, are to be commended. It is unlikely that these weapons would have been discovered if there had not been informers within the ranks of Loyalist paramilitaries reporting to the police."*

[22] Next the report discusses the "*many risks from a policing perspective*" posed by the use of informants. This prompts the following observations [at 9.30]:

> *"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. Modern policing practice attempt to resolve these difficulties through application of the law and specifically RIPA, intensive frontline supervision of officers, clear internal guidelines and authorisation procedures, performance management and integrity testing of individuals. Some of these 'checks and balances' did not appear to exist in Northern Ireland at the time. Indeed I have seen evidence from a senior informant handler (interviewed as part of a different investigation by my Office), that he had so many registered informants that it was difficult to "manage" them effectively and consistently in relation to their criminality."*

In the immediately ensuing passages the Ombudsman, while sympathising with the difficulties posed by "*a lack of suitable guidance*" states [9.32]:

> *"However, a lack of suitable guidance does not excuse the actions of the "intelligence world" if it meant that individuals were protected from investigation into serious crimes as a consequence of their participation as informers."*

[23] The final passages in Chapter 9 of the Ombudsman's report are of particular note. Having appeared to acknowledge the difficult and challenging balance to be struck in the always complex and murky world of police intelligence gathering and the interaction of police with informants, the Ombudsman (in paragraphs 9.2 – 9.36) seems to suggest that there can be no justification for the RUC failure to investigate, adequately or at all, police informants who might have been complicit in the Loughinisland murders. The report then notes the "*many examples*" of failures to provide police investigators with "*intelligence*", thereby compromising and undermining the RUC investigation into the murders. This is followed by the passage [9.39]:

> *"These failings represent more than 'intelligence failures'. At best they are indicative of an 'intelligence mindset', which placed the collection of information before the prevention and detection of crime. At worst they indicate a disregard by some for the suffering of the families involved at the hands of loyalist paramilitary gangs and a corrupting involvement, tacitly or otherwise, in serious criminal acts."*

In the final paragraph of the report the Ombudsman repeats the passage reproduced in [13] above.

Thomas Ronald Hawthorne

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

[25] Mr Hawthorne was the first ever Northern Ireland recipient of the Queen's Gallantry Medal. During his lifetime of police service, he was shot and injured by terrorists and his home was attacked by a terrorist bomb. He avers, *inter alia*:

> "*All of my actions as a dedicated police officer were to serve the community …*
>
> *I took great pride in serving all of the community and providing the best possible service and leadership to ensure that those responsible for criminal acts were brought before the Courts, in the face of tremendous challenges presented by terrorism and the lack of support from some sections of society. In particular, I sought to ensure that every crime was investigated fairly and without fear or favour. It is particularly upsetting that the Ombudsman has found that the investigation entailed collusion with terrorists.*"

Mr Hawthorne further avers that the publication of the report and its aftermath have revived psychological symptoms from which he previously suffered.

[26] Mr Hawthorne emphasises that in the wake of the Police Ombudsman's investigation there was no recommendation for either criminal prosecution or disciplinary action against him or any other police officer, whether serving or retired. His main affidavit continues:

> "*In this case, the procedure adopted by the Ombudsman means that he is the investigator and the final decision maker. Those investigated have no opportunity to test evidence at a hearing, to make meaningful submissions or have any other protections before being found guilty of serious failings or positive wrong doing ….*
>
> *Before a former officer is to be publicly criticised, he is entitled to be afforded the protections of a "PACE" compliant investigation and a full hearing before an impartial body …*
>
> [These failings] ….. *have been compounded by the fact that I was not afforded advance notice of the nature of the criticism and the opportunity to comment, other than in relation to the disposal of the car used by the terrorists.*"

He further avers:

> *"I was never interviewed or spoken to in relation to matters other than the disposal of the vehicle used in the murders."*

[27] Mr Hawthorne suggests that if he had been interviewed by one of the Police Ombudsman's investigators in relation to the vehicle disposal issue, he would have pointed out the supposed existence of a "Police Headquarters file" which sanctioned this course and the availability of relevant evidence from one of his deputies, a Chief Inspector. Neither of these investigative steps was pursued. Mr Hawthorne further draws attention to the evidence which he could have provided on the subject of alleged collusion had he been given the opportunity to do so, together with investigative steps which this ought to have generated. Mr Hawthorne further avers:

> *"I further believe that the Ombudsman misunderstood how policing operated in that area at the relevant time. Whilst he made statements purporting to acknowledge these factors, it is clear that he did not. Instead he applied present day standards of policing to a situation where those standards and procedures were unknown."*

He then criticises the statement in the Ombudsman's report that the focus of the police was confined to "Republican" violence, excluding Loyalist criminality, pointing out that much evidence challenging this assertion could have been provided if a fair opportunity to do so had been afforded.

<u>Raymond White</u>

[28] As noted above, Mr White brings these proceedings in a representative capacity. He represents all members of NIRPOA, an association with a membership exceeding 3,000. The kernel of this organisation's concerns is expressed in these terms:

> *"… the Ombudsman considers that he has a very wide remit to examine any issue with regard to policing so long as he can point to a complaint to support the same. The consequence of this is that the Ombudsman has published a report that criticises retired police officers. The manner in which the Ombudsman has gone about this has had the effect that his criticisms cannot be tested. In effect, retired police officers are subject to scathing criticism, which they believe to be misguided and unjustified, yet they have no opportunity to defend themselves or their reputations."*

As a result, Mr White avers, the confidence of retired police officers in the Police Ombudsman has been undermined.

[29] Turning his focus to the impugned "public statement", Mr White deposes:

> "*The Association believe that within this report the Ombudsman has improperly accused former police officers and the (RUC George Cross) of partiality, ineptitude and collusion ….*
>
> *The impact on this on individual members and the ongoing exposure to such accusations contained in previous reports is a matter of grave concern to the Association. It has had the collective effect on both retired members and their families of reigniting personal anxieties and fear over personal security. In some instances it has aggravated psychiatric conditions and symptoms as memories of the scenes of atrocities visited and the recollection of dealing with both survivors and the families of victims are once again brought to the fore …*"

The following passage in Mr White's affidavit evidence is especially noteworthy:

> "*I respectfully submit that before a former officer is to be publicly criticised, he is entitled to be afforded the protections of a PACE compliant investigation and a full hearing before an impartial body …. Whilst some police officers were given advance notice of the subject matter of specific criticism directed towards them, their response was not detailed within the subsequent report.*"

The following discrete complaint is then formulated:

> "*In addition, the Ombudsman has made determinations about the RUC as a body corporate, which is outside the bounds of his statutory remit.*"

[30] Mr White suggests, in essence, that the willingness of his organisation's members to co-operate with and assist the Police Ombudsman in investigations, has been seriously compromised by a lack of fairness and due process with a resulting marked erosion of confidence in the Ombudsman's office. The evidence establishes that during a protracted period (of several years) attempts to agree a protocol with the Police Ombudsman have borne no fruit. The organisation's enduring concerns include in particular the application of the "Salmon" principles; the need to provide retired police officers with sufficient information to enable an informed response to allegations against them; the Ombudsman's handling of

officer's representations in the text of reports; and the lack of acknowledgement by the Ombudsman of no competence in relation to "*matters which relate to alleged conduct that are disciplinary in nature*".

The Families' Evidence

[31] The families were permitted by the court to intervene in writing, giving rise to an affidavit and skeleton argument on their behalf. Aidan O'Toole, who swore the affidavit, was working in the bar when the murderous attack occurred and sustained a gunshot wound. Mr O'Toole avers that the reaction of the families to the first of the Police Ombudsman's Loughinisland investigation reports was one of profound dissatisfaction, stimulating the judicial review challenge noted above. He states that the June 2016 report:

> "*… allowed us to see precisely what the Ombudsman had considered, the conclusions he reached and the means by which he reached those conclusions.*"

Mr O'Toole deposes that both the Chief Constable and the Prime Minister have unreservedly accepted the impugned report. His affidavit concludes in these terms:

> "*I am deeply distressed by the actions of the Applicants in bringing these proceedings. We waited a very long time for the publication of a statement which properly considered our complaints and that delay …. has been the source of much anxiety for me and for others who were bereaved or injured.*
>
> *The uncertainty caused by these proceedings has just added to that anxiety and has meant we are again in a state of limbo in relation to our position.*"

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

Pre – Publication Events

[32] Mr Hawthorne had some material involvement in the process culminating in the first of the Police Ombudsman's Loughinisland reports in 2011. This is documented in three letters. First, by letter dated 05 December 2007 to Mr Hawthorne, the Ombudsman's Senior Investigating Officer ("SIO") stated:

> "*Police records show that you were one of a number of officers who had some involvement with the investigation into this incident. As part of our*

> *investigation, it is my desire to speak to as many retired officers as possible in order that a complete overview of the investigation can be established. I therefore request a meeting with you to discuss a number of issues that I believe you can clarify surrounding this multiple murder investigation ….*
>
> ***I wish to make it perfectly clear that your status within my investigation is that of potential witness.***"
>
> [Emphasis added.]

The second letter, dated 24 August 2009, contains the following passage:

> "*I enclose for your attention sections of the report relevant to you which the Police Ombudsman intends to provide to the victims' families and their legal representative ….* [in] *week commencing 14 September 2009. This is in response to their numerous allegations as contained within the report that police failed to properly investigate the incident …..*
>
> *I should be grateful if you would consider these sections and report back within 14 days any areas of concern or inaccuracy of facts that you consider relevant in accordance with our agreed signed protocol.*"

(It is agreed between the parties that the reference to "*our agreed signed protocol*" is erroneous.)

[33] The second of the aforementioned letters was followed by the delivery of excerpts from the draft report to Mr Hawthorne. He then responded, in expansive detail, by a letter dated 02 September 2009. This letter contains the following observations and suggestions:

(a) The report should address "*… the local operational policing strategy and tactics prior to the massacre and how my officers, at great personal risk, provided a local policing service while keeping the prevention of terrorist offences as the number 1 priority ….* [thereby] *… giving the general public a more balanced view of policing at that time.*"

(b) Many readers would, inevitably, associate Mr Hawthorne with numerous aspects of the report.

(c) Having expressed his "certain" view that a particular sergeant had acted with the utmost propriety in the disposal of the suspect vehicle, Mr Hawthorne made a series of practical suggestions designed to exhort the SIO to search further for a relevant file which had not been located. Furthermore, the vehicles evidential value had been extinguished and its disposal would have required written CID authorisation.

(d) In addition, the vehicle storage facilities were inadequate, and by reason of volume, indefinite storage was not feasible.

(e) Mr Hawthorne proposed that, given the foregoing, the conclusion in the draft report that the families' complaint of improper police conduct in the storage of the vehicle had been "substantiated" was not tenable.

(f) Rebutting a discrete allegation, Mr Hawthorne stated forcefully that he was <u>not</u> related to any of the murder suspects.

(g) "*To insinuate that I was attempting to pervert the course of justice by assisting terrorists is highly insulting and offensive, but my hurt and pain at this is not on the same level as those who lost loved ones. Like the relatives of the murdered at Loughinisland and the relatives of all those murdered by both Loyalists and Republican terrorists in South Down area, I too would like to see justice served and I will gladly meet with anyone and assist as best I can*."

[34] In a concluding "Summary", Mr Hawthorne exhorted the inclusion in the Police Ombudsman's report of 20 specified adjustments. Their general thrust was that those parts of the draft report which had been disclosed to him were infected by imbalance, inaccuracies and omissions. Based on the evidence available, the next material event was the publication of the first report, in June 2011. The court is unaware of any material intervening developments. In particular there is no evidence of whether Mr Hawthorne's written representations influenced the final product. The single, bare and unparticularised averment in the Police Ombudsman's affidavit evidence touching on this issue does not alter this analysis.

[35] At this point in the narrative the scene switches to the year 2016. By letter dated 14 April 2016 the Ombudsman's Office wrote to Mr Hawthorne alerting him to the draft of the second Loughinisland investigation "public statements" on the ground that he had been involved in the RUC investigation into the murders and inviting representations by 09 May 2016. The text of this letter is as follows:

> "*In the near future the Police Ombudsman intends to publish a public statement in respect of his investigation into the complaint by the victims and survivors of the murders at the Heights Bar, Loughinisland on 18 June 1994. As you were involved in the police investigation into this incident … I am forwarding* [to] *you relevant extracts from the draft statement* ***which contains material which could be considered as criticism of your role.*** *You are referred to as Police Officer 14 in the draft statement …*
>
> *The extracts are supplied to you in advance of the release of the public statement to afford you notice of what will be placed in the public domain and* ***to allow you to respond in writing to this Office should you wish to do so***."
>
> [My emphasis.]

[36] The excerpts from the draft Ombudsman's report provided to Mr Hawthorne were in these terms:

> "*7.111 Although the written authority for destruction of the car cannot be located, it is believed that Police Officer 14, a Police Superintendent responsible for Saintfield Police Station, sanctioned the destruction following submission of a report from Police Officer 13. The bereaved families raised concerns that Police Officer 14 may have been related to one or more of the suspects of the Loughinisland murders. I can confirm that this is not the case.*
>
> *7.113 The* [vehicle] *should not have been stored in a manner which exposed it to the elements and certainly should not have been destroyed without the express permission of Police Officer 8.*"

Nothing else from the draft report was disclosed to Mr Hawthorne in advance of promulgation of the Police Ombudsman's finalised public statement.

[37] Mr Hawthorne replied by letter dated 04 May 2016. At the outset he stated:

> "*I've resided in close proximity to Loughinisland for over 30 years and irrespective of what number you give me, I will be immediately identified by a large number of the*

> *local population, both law abiding and dissident terrorists…*
>
> *During my tenure at Downpatrick I held command positions for some 13 years."*

The remainder of the letter contains the following salient elements:

(i) There was no evidence that he had sanctioned the destruction of the suspect murder vehicle and he denied this emphatically in any event.

(ii) The Ombudsman had failed to implement Mr Hawthorne's suggestions to investigators regarding "*where they should look*".

(iii) The Ombudsman had failed to make any enquiries of Mr Hawthorne's deputy about evidence that a RUC Superintendent, on behalf of the Chief Constable, had "*signed papers in relation to the said vehicle*".

(iv) Mr Hawthorne (for the reasons elaborated) had no conceivable responsibility for the (admittedly) inadequate arrangements for the storage of suspect crime vehicles at Saintfield RUC Station.

[38] Mr Hawthorne's detailed letter continues:

> *"As you are aware, the vehicle in question was examined at the Forensic Science facility at Seapark. I recall being told it was examined with a fine-tooth comb with all evidence retained by the scientists. The vehicle was taken to Saintfield station, on direction of CID, as it was no longer required for forensic examination …..*
>
> *I wasn't even made aware at the time that the vehicle had been deposited at Saintfield as it was the CID who directed that course of action knowing what the storage limitations were …*
>
> *I assume you do realise that in 1994 CID, even at a local level, had their own command and control structure, totally removed from me as the operational commander?*
>
> *As a result of my complaints to divisional authorities of the totally unsatisfactory arrangements for the storage of vehicles at Saintfield, a purpose build secure compound was eventually created at Newtownards."*

Mr Hawthorne's letter concludes in these terms:

> "*In the interest of the families, the survivors and all of the police involved in any way whatsoever, and for the credibility of your office, your report should be unbiased and based on evidence and not supposition, rumour or unsubstantiated opinion ….*
>
> *I reserve the right to take whatever action deemed necessary, including making this letter public at the time of my choosing.*"

[39] The Ombudsman rejoined by a further letter dated 23 May 2016:

> "*Thank you for your letter of 04 May 2016 in which you detail your response to passages from the Police Ombudsman's proposed public statement on Loughinisland which make reference to your role in disposal of the car believed to have been used by those responsible for the murders at Loughinisland …*
>
> *The Police Ombudsman has reflected on your observations and amended the narrative in the public statement as follows ….*"

This is followed by <u>four</u> paragraphs of finalised text (an enlargement of the initial two paragraphs, *supra*). The first, 7.110, recounts that Mr Hawthorne had authorised disposal of the vehicle in response to a police sergeant's request for this "due to its poor condition". The second paragraph, 7.111, states that Mr Hawthorne "*… advised my investigators that he was not responsible for authorising its disposal …*" and asserted that this could only have occurred on the "*instructions of a higher authority*". This is followed by the third paragraph, 7.112:

> "*Both police officers 13 and 14 told my investigators that they believed the SIO of the Loughinisland murder investigation, police officer 8, had given his permission for disposal of the car. As police officer 8 has not engaged with my investigation, I have been unable to verify this with him. I have not identified any documentary record to confirm the murder investigation team were consulted and agreed with disposal of the car.*"

There is no statement of whether the two officers' accounts of the disposal of the suspected murder vehicle had been believed or disbelieved. There follows paragraph 7.113, couched in terms identical to the initial formulation furnished to Mr Hawthorne (per [36] *supra*). The letter finishes

> *"I trust you will find this clarification in order."*

The next material event was the publication of the Police Ombudsman's "public statement" on 9 June 2016.

The Police Ombudsman's Evidence

[40] Chronologically it is appropriate to begin with the second of the two affidavits sworn by the Director of Investigations (Historic). The Director deposes that in late 2013 a senior investigating officer ("SIO") was appointed for the purpose of "*the investigation of public complaints relating to the Loughinisland murders (Operation Sutton)*". The deponent finalised the terms of reference in January 2014. The SIO's report was provided to the Director in December 2014. Thereafter certain further investigative steps were directed. The final investigation report was submitted in August 2015. The Director continues:

> *"… I forwarded a copy of the report to the Public Prosecution Service in September 2015 …*
>
> *I did not believe that an identifiable officer may have committed a criminal offence but I wanted to satisfy myself that the PPS were offered an opportunity to read the investigation report ….*
>
> *I met with the PPS on 14 April 2016. The PPS confirmed to me that having reviewed the investigation report they had not identified sufficient evidence to charge or report any police officer for any offence in connection with the Office's investigation."*

The Director's letter of 17 September 2015 to the PPS states, *inter alia*:

> *"While I do not believe either Operation Sutton or Operation Boston has identified evidence that would support submission of a 'file for direction' to the PPS in relation to a specific, identifiable officer, our enquiries have revealed what would be better described as* ***significant concerns in respect of disciplinary and corporate matters for the RUC which will be detailed in the public statement.*** *However, I would be grateful for your views as to whether you are satisfied, on the basis of the evidence presented in the attached files, with this assessment."*
>
> [Emphasis added.]

[41] In his initial affidavit the Director deals with the vehicle disposal issue in the following way. Adverting to the report's finding that there was "*negligence associated with its disposal*", he avers:

> *"(12) There are three reasons for this conclusion, which has been raised as an issue by Mr Hawthorne in the affidavits he has sworn in these proceedings. All three reasons are outlined clearly within the public statement. It should also be clear that none of the three reasons is as a result of the actions or inactions of Mr Hawthorne.*
>
> *(13) First, the Ombudsman had particular concerns over the failure to retain the yellow twine from the Triumph Acclaim vehicle. This would not have been the responsibility of Mr Hawthorne.*
>
> *(14) Second, the Ombudsman had concerns about the decision to leave the vehicle in the elements, thus leading to its deterioration and contributing to the decision to destroy it. Police Officer 13 advised that it was its poor condition which led to his requesting that it be destroyed. The Ombudsman was of the opinion that the vehicle should not have been retained in such poor conditions.*
>
> *(15) Third, the failure to retain any record relating to the destruction decision (and in particular whether the RUC SIO had approved the decision) was a further element in the Ombudsman's decision-making.*
>
> *(16) A combination of these three elements led the Ombudsman to the determination which he reached in relation to the allegation, namely that there was "negligence associated with its disposal". The appropriate elements of concern which related particularly to Mr Hawthorne were identified to him in the correspondence outlined above; and he was afforded an opportunity to comment in advance of the publication."*

The Director further avers, without elaboration, that the Chief Constable received, and responded to, a draft of the June 2016 report.

[42] The Director's second affidavit, elaborating substantially on his first, discloses the following significant information relating to the Police Ombudsman's second Loughinisland investigation:

(a) The Director appointed a senior investigating officer in late 2013.

(b) The terms of reference for the investigation took effect initially in January 2014 and were adjusted in August 2014.

(c) During the ensuing year the post of senior investigating officer changed hands twice.

(d) The final investigation report was provided to the Director in August 2015.

The Director continues the narrative thus:

> *"I did not believe that an identifiable officer may have committed a criminal offence but I wanted to satisfy myself that the PPS were afforded an opportunity to read the investigation report …."*

[43] The Director explains that his reason for taking this step was expressed in his letter dated 17 September 2015 to the PPS:

> *"While I do not believe either Operation Sutton or Operation Boston have identified evidence that would support submission of a 'file for direction' to the PPS in relation to a specific, identifiable officer, our enquiries have revealed what would be better described as significant concerns in respect of **disciplinary and/or corporate matters for the RUC** which will be detailed in the public statement."* [Emphasis added.]

Continuing, the Director explains that at a meeting in April 2016 the PPS concurred with his assessment: they –

> *"… had not identified sufficient evidence to charge or report any police officer for any offence in connection with the Office's investigation."*

The Director further avers:

> *"It became clear during the course of the Operation Sutton investigation that none of the RUC officers who may have been impacted by the investigation were still serving police officers. As such, I did not prepare a memorandum for the appropriate authority in the terms of the Police (NI) Act 1998."*

The latter is a reference to the procedures prescribed by section 59(1B) and (2) of the 1998 Act.

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

[45] An affidavit has also been sworn by Dr Michael Maguire who has been the incumbent of the office of Police Ombudsman since July 2012. First he explains the events of 2012:

> "(8) *When I came into the post I asked the Court for some time to consider the legal challenge as I wanted to conduct a review of the investigation which had previously taken place. After conducting my own inquiries, reading the relevant material and taking legal advice, I decided that the most appropriate course of action was to consent to an order quashing the previous public statement and to commence a new investigation into the complaints made by the next of kin and survivors.*
>
> (9) *I had considerable reservations about some aspects of the previous investigation and the decisions and determinations which arose from it – although not, I should emphasise, either the decision to investigate or, in principle, the decision to issue a public statement in relation to the investigation."*

The next ensuing averments shed light on the test which Dr Maguire applied in embarking upon the second, post-2012, Police Ombudsman's Loughinisland investigation:

> *"Once the public statement was quashed, there remained the outstanding issue of how the complaint should be dealt with. I exercised my own judgment to decide what the most appropriate course should be.*
>
> *(10) I was satisfied that the material at my disposal at that stage provided me with the reasonable belief that a member of the RUC may*

have committed a criminal offence and may have behaved in a manner which would justify disciplinary proceedings (even if such proceedings would not have been possible). Further, I also believed that the complaint should be investigated because of both the gravity of the matter and the exceptional circumstances arising in all the circumstances. The material which founded this belief is cited throughout the content of the June 2016 public statement from this office."

[46] Dr Maguire addresses the discrete issue of pre-publication consultation in these terms:

> *"I disagree with any contention by Mr Hawthorne or Mr White that relevant officers were not given an opportunity by this office to comment on criticisms made against them in advance of the publication of the public statement in relation to Loughinisland. A number of such letters were sent and any replies received were considered by the Office and, where appropriate, led to amendments to the text. Indeed, in respect of Mr Hawthorne, one can see a clear example of how this process worked, in practice, to give an opportunity to make representations to those who may be affected by a public statement.*
>
> *(16) Where it is thought that the content of a public report could be construed as a criticism of an officer, the relevant officer was provided with an opportunity to comment prior to publication of the final public statement. Where an individual officer could not be identified but the criticism could be considered as against the RUC as a whole, the PSNI was given an opportunity to, and did, draw matters to our attention in relation to such criticism."*

Addressing the issue of "public statements" generally, Dr Maguire deposes:

> *"They are a vital function of the Office in meeting its statutory obligations to ensure that both the public and the police can have confidence in the police complaints system."*

He then explains that since the creation of the Office an array of such statements has been released into the public domain. Some of these take the form of compact

"press releases", while others are in the form of conventional reports of varying length.

[47] Notably, in his brief account of other "public statements", Dr Maguire uses the language of the verb "to substantiate" and its derivations. He avers that, in some of the illustrations provided, allegations against the police were, or as the case may be, were not "*substantiated by this Office*." Indeed, "substantiation of complaints" is one of the prominent themes of Dr Maguire's affidavit, as the following passages demonstrate:

> *"(26) In accordance with the statutory scheme, an officer (where he or she is still serving) will be notified of the complaint and when the investigation has commenced. They will be made aware of the allegations and given an opportunity to comment. At the conclusion of the investigation a report is compiled and it is decided if a file is to be submitted to the PPS and/or the appropriate authority (usually the PSNI). However, a decision will also be reached (regardless of the obligations regarding the criminal/disciplinary aspects) as to whether or not the complaints will be substantiated. Whilst this may depend on the outcome of the criminal/disciplinary proceedings, there will be numerous occasions when it will not.*
>
> *(27) By way of example, if a decision is taken not to submit a file to the PPS or PSNI in relation to an allegation of incivility, the complainant will be informed that his complaint has not been substantiated. Alternatively, there are instances where an allegation of inappropriate use of force is substantiated even though the appropriate officer could not be identified to allow for criminal or disciplinary proceedings.*
>
> *(28) Parliament clearly considered that the Ombudsman has the ability to substantiate a complaint, as can be seen in regulation 27 of the RUC (Complaints etc) Regulations 2000, which I understand will be the subject of submissions on my behalf in due course.*
>
> *(29) Indeed, regulation 27(3) of the 2000 Regulations makes it clear that an Ombudsman has the power to substantiate a complaint in advance of (and separate from) the criminal and disciplinary processes."*

[48] In further support of his stance on this issue, Dr Maguire prays in aid certain published Northern Ireland Office guidance:

> *"(30) When read along with the numerous references to substantiation (or non-substantiation) of complaints contained within the NIO Guidance on Police Unsatisfactory Performance Complaints and Misconduct Procedures (see, for instance, sections 2.36-2.38 and 2.42 of the Guidance as exhibited at pages 665 and 666 of the exhibited bundle) I believe that it is clear that the functions of the Office extend far beyond those outlined by the Applicants."*

While this latter averment is a classic illustration of inappropriate sworn argument, I shall explain in [96] *infra* why I consider it fallacious.

<u>The Applicants' Challenge</u>

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

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

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

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

<u>The "Implication/ Identification" Issue</u>

[50] No police officer is identified by name in the Police Ombudsman's report, which employs the device of numerical ciphers. This prompted a request by the court for the preparation of a schedule of all passages in the impugned report which are referable to and/or associated with and/or in any way affect Mr Hawthorne. This schedule, which incorporates a column containing the Police Ombudsman's comments, is reproduced at Appendix 3 (hereinafter "*the Schedule*").

[51] Upon receipt of the Schedule, it appeared to the court that there had been a shift in the Police Ombudsman's position. In his first affidavit, Mr Hawthorne averred that the impugned report contained accusations of "*partiality, ineptitude and collusion*" against him and other retired police officers. He continues:

> *"During the period considered by the report, I was a Superintendent and held the position of Sub Divisional Commander for Downpatrick Sub Division. I was the*

> *person ultimately responsible for all policing issues in the Sub Division. As such I had detailed and daily briefings and knowledge into the investigation. I note that officers are only identified by cyphers. Despite this, my family and friends (that include other former officers) and people within the area in which I currently reside are well aware of my role within Downpatrick Sub Division and that I have been publicly and severely criticised.*"

In the span of three affidavits, including one sworn mid-hearing, the Police Ombudsman did not challenge any of these averments. Nor was there any challenge to the description of Mr Hawthorne in the pre-proceedings correspondence as a retired police officer. While it is correct that Mr Hawthorne was not identified in this letter, this was rectified some two weeks later when these proceedings were initiated.

[52] The Police Ombudsman's comments on the Schedule fall into three main groups:

(a) Some of the passages relate to matters which were outwith Mr Hawthorne's remit *qua* Sub Divisional Commander for the area in question.

(b) Others, if relevant to his sub division, were the responsibility of other specialist units within the RUC.

(c) The passages relating to the handling and disposal of the suspected murder vehicle had been the subject of pre-publication exchange between the Police Ombudsman and Mr Hawthorne.

Notably, no express reliance is placed on the rationalisation contained in the Director's first affidavit ([41] *supra*).

[53] At a further specially convened hearing, the court sought clarification of the Police Ombudsman's stance on what may be termed the "implication/identification issue". This confirmed that while there were indeed certain points of contention, of late advent, as between Mr Hawthorne and the Police Ombudsman, there were none regarding the relevant averments in the representative challenge of Mr White, which have been unchallenged from the outset.

[54] One of the virtues of this further hearing was the following. It enabled the Court to canvas with the parties' respective counsel the legal test to be applied in the exercise of construing the impugned report. I consider the starting point to be the well-established principle that the construction of every document is an issue of

law for the Court: see, for example, Re McFarland [2004] UKHL 17, per Lord Steyn at [24]:

> *"Such policy statements must be interpreted objectively in accordance with the language employed by the Minister. The citizen is entitled to rely on the language of the statement, seen as always in its proper context. The very reason for making the statement is to give guidance to the public. The decision-maker, here a minister, may depart from the policy but until he has done so, the citizen is entitled to ask in a court of law whether he fairly comes within the language of the publicly announced policy. That question, like all questions of interpretation, is one of law. And on such a question of law it necessarily follows that the court does not defer to the Minister: the court is bound to decide such a question for itself, paying, of course, close attention to the reasons advanced for the competing interpretations."*

This principled approach must, in my view, apply *a fortiori* to every Police Ombudsman's statutory "public statement"

[55] Next, I have given consideration to the familiar statement of principle that certain documents are not to be construed with the strictness applicable to a contract, deed or legal instrument. This principle is frequently applied to documents such as letters, memoranda and electronic communications in a variety of contexts.

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

[57] Having devised the above approach, the court's evaluation of this discrete "implication/identification" issue is as follows. First I take into account the

absence of any challenge to either Mr Hawthorne's relevant averments or the assertions in the PAP correspondence in any of the Police Ombudsman's affidavits or in the course of the substantive hearing. Second, I note the belated ventilation of this issue on behalf of the Ombudsman. I do not view either of these factors through an adversarial or forensic lens. Rather, they are pointers (no more) to how the test of the hypothetical, impartial, fair-minded and reasonably informed reader is to be applied. The possibility of *ex post facto* rationalisation in the Police Ombudsman's response to the Schedule must also be considered given the belated emergence of this issue.

[58] Third, some of the Police Ombudsman's discrete responses to certain of the components of the Schedule (at Appendix 3) invite careful scrutiny. I begin with **Paragraph 7.114** of the impugned report. This states that the integrity of the suspected murder vehicle was "*compromised*" and an important exhibit, some yellow twine in the vehicle's interior, was "*lost*" due to police negligence. This stimulated the following comment on behalf of the Police Ombudsman:

> "*This was the negligence issue which as Mr Holmes* [Director of Investigations] *has averred was not attributable to Mr Hawthorne.*"

This invites two observations. First, neither the averments in the Director's first affidavit to this effect – see [41] above - nor anything equivalent are to be found in the impugned report. Second, I find these averments quite unsatisfactory. They constitute an attempt to distance the relevant passages in the report from Mr Hawthorne (or vice-versa) which, applying the test formulated above, I consider manifestly unsustainable. I consider that no impartial, fair minded and reasonably informed reader of the report would construe these passages as the Director has purported to do in his affidavit. Furthermore, the Director's emphasis on the words "*associated with its disposal*" is at best opaque, conveying nothing clearly to the court. And the final sentence in these averments ("*The appropriate elements ….*") is, in its full context, a mixture of the superfluous and the bizarre. In short I consider that the relevant averments in the Director's first affidavit to amount to unimpressive and unsustainable *ex post facto* rationalisation, imbued with the unintelligible.

[59] Next, the Police Ombudsman's report contains a series of passages relating to the issues of the storage of the suspected murder vehicle, its ultimate disposal and destruction and the loss of a significant evidential exhibit. The report contains an unambiguous <u>determination</u> that there was police negligence in these matters. I consider it unmistakably clear that this determination applies to Mr Hawthorne. No other plausible construction of the report is possible. In passing, what is less clear is whether this determination implicates also the station sergeant who is discussed in the relevant passages. However, there is no lack of clarity, nor any ambiguity, as regards Mr Hawthorne.

[60] I continue the analysis of the Police Ombudsman's response to the individual components of the Schedule as follows:

(a) The statement in **paragraph 7.133** of the impugned report was highly critical of police "follow-up enquiries" in particular in the interviewing of residents, after the murders. The Police Ombudsman's response to this is:

> "*Relates to detectives responsible for the investigation (for which Mr Hawthorne has advised in correspondence he had no responsibility).*"

The simple rejoinder, it seems to me, is that the Police Ombudsman is seeking to distance Mr Hawthorne from the criticisms in these two passages by reliance upon sources, namely an affidavit sworn in these proceedings and a letter written by Mr Hawthorne, which feature nowhere in the report. Furthermore, once again, there is no engagement with the relevant averments in Mr Hawthorne's affidavit.

(b) Similarly, two of the Police Ombudsman's responses to the Schedule regarding passages in the Executive Summary are based on two separate letters written by Mr Hawthorne (considered above) which do not feature in the impugned report in substance or at all.

(c) Certain passages in **paragraphs 5.7 and 5.82** of the impugned report also feature in the Schedule. I reject the Police Ombudsman's riposte that these passages are confined to criticism of unnamed Special Branch officers. Applying the test of the impartial, fair minded and reasonably informed reader, I consider that both textually and in substance they are couched in sufficiently broad terms to encompass the incumbent of the post of Subdivisional Commander in the relevant geographical area during the period under scrutiny, namely Mr Hawthorne.

[61] At this juncture, in due observance of the unyielding principle that the impugned report must be read as a whole, I consider it necessary to examine certain further passages in some forensic detail. This exercise, essentially one of tracing, entails a series of steps and links. I begin with the Police Ombudsman's conclusions in respect of "Allegation 7" by the families, which was framed in the following terms:

> *"A major exhibit in the Loughinisland murder enquiry, the Triumph Acclaim car used by the offenders, was 'wilfully destroyed' some ten months after the attack and the destruction was authorised by a senior police officer, who may be related to individuals implicated in the attack."*

The report concludes:

> *"My public statement outlines the investigation undertaken by my Office to establish the circumstances in which the car was disposed of by police some ten months after the murders at Loughinisland occurred. I have established that the officer responsible for the station yard at Saintfield Police Station sought authority to have the vehicle removed and scrapped. This authority was granted by a senior police officer in charge of the police station and who I am satisfied is not related to individuals suspected of having been responsible for the attack. Both of these officers stated that they believed that the SIO had authorised the destruction. There is no evidence, however, to corroborate these decisions, which I have determined to have been an act of negligence.*
>
> *Whether or not subsequent examination of the car might have yielded further forensic opportunities which, given the conditions in which it had been retained, appears unlikely, the car should not have been destroyed without proper consideration by the SIO in consultation with his forensic advisers. Whilst I have not found evidence of a sinister motive behind the destruction of the vehicle, I have identified negligence associated with its disposal."*

It is common case that the "*senior police officer*" mentioned in these passages is Mr Hawthorne.

[62] In the body of the impugned report this allegation is considered at paragraphs 7.106 – 7.114 under the rubric "Destruction of the Triumph Acclaim HJI 807". This section records, in brief compass, that the vehicle underwent initial examination at NIFSL, was then delivered to Saintfield Police Station on 23 June 1994, was returned to NIFSL on 28 June 1994 for further examination and, on 8 December 1994, was again moved to Saintfield Police Station. On 7 April 1995, the vehicle was destroyed via a tripartite arrangement involving the police, the District Council's Environmental Health Department and a local scrap metal company.

[63] The report then scrutinises the conduct of two officers, namely "police officer 13", the station sergeant and "police officer 14" (Mr Hawthorne). The exercise of considering this section of the report in tandem with the "Allegation 7" focusses attention on the following passages:

> *"7.111 The written authority for disposal of the car cannot be located. Police Officer 14 advised my investigators that he was not responsible for authorising its disposal, making the observation that it would only have taken place on the 'instructions of a higher authority'. The bereaved families speculated that Police Officer 14 could be connected to one or more of those responsible for the murders at Loughinisland, however, I am satisfied that there is no basis for such concerns.*
>
> *7.112 Both Police Officers 13 & 14 told my investigators that they believed the SIO of the Loughinisland murder investigation, Police Officer 8, had given his permission for disposal of the car. As Police Officer 8 has not engaged with my investigation I have been unable to verify this with him. I have not identified any documentary record to confirm the murder investigation team were consulted and agreed with disposal of the car.*
>
> *7.113 The Triumph Acclaim should not have been stored in a manner which exposed it to the elements and certainly should not have been destroyed without the express permission of Police Officer 8.*
>
> *7.114 The forensic examination of this important exhibit was thorough and carried out appropriately. However, the integrity of the exhibit was compromised as I have described. An important exhibit (the yellow twine) was lost."*

The next link in this discrete analysis is the Police Ombudsman's "unambiguous determination" in the Executive Summary, repeated in paragraph 9.40, that "… *collusion is a significant feature of the Loughinisland murders*".

[64] Applying the test of the impartial, fair minded and reasonably informed reader, I have considered the question of whether Mr Hawthorne is one of those police officers to whom this determination applies. The answer to this question is not immediately obvious. The court's search for the correct answer has been a laboured and difficult one. The headline passages in the report, to which the attention of the majority of readers would inevitably be drawn, make no distinction

between "catastrophic" failures in the police investigation and other kinds of failure, such as inadvertent error, minor breaches of protocol or (mere) negligence. Nor is there any qualification in the nexus forged between "*destruction of exhibits and documents*" and collusion. This prompts the observation that the report suffers from regrettably poor drafting, coupled with manifestly inadequate cross-referencing and particularisation.

[65] Notwithstanding this critique, giving due effect to the axiom that the report must be read as a whole, one's attention is drawn particularly to two statements under the rubric of "Allegation 7" in Appendix 1. First, it is stated that no evidence of "*a sinister motive behind the destruction of the vehicle*" has been found. Second, the act of disposal is explicitly classified as "negligence" and this is repeated. Furthermore, the report states clearly that prior to disposal the vehicle had been the subject of "appropriate" forensic examination.

[66] I further consider it necessary, by contrast, to add to this discrete equation the clear findings in various parts of chapter 7 of the impugned report of significant failings in the police investigation. These (of moderately lengthy dimensions) are: no continuity statement in respect of an important exhibit (7.27); the failure to submit cigarette butts and curtains for forensic examination and the apparent loss of such exhibits (7.29); a failure to submit a blanket to a "targeted examination" (7.37); a failure to examine the field where the suspected murder vehicle was discovered (7.46); "*poor decision making*" which "*.. is likely to have undermined significant evidential opportunities*" in the arrest and interviewing strategy applied to the owner of the vehicle; the failure of the Loughinisland murder investigation team to deploy their own detectives in the last mentioned matter which "*served to undermine this crucial line of enquiry*" (7.51); failures by the investigation team to establish the correct identity of a witness who first alerted the police to the suspected murder vehicle and an associated failure to timeously investigate the whereabouts of its owner or the garage to which it had allegedly been taken for repair (7.52); a failure to record an appropriately thorough and detailed witness statement from the person identified as the owner of the vehicle or his partner and a failure to forensically examine his home (7.71 – 7.73); a failure to make any enquiries relating to the person identified by the vehicle owner as the vendor to him (7.75); a lack of "*investigative rigour*" in relation to several persons (7.76); the loss of "*potential evidential opportunities*" due to the "*superficial approach*" to investigation of the vehicle's ownership (7.76); and a failure to critically review the account of the vehicle's owner juxtaposed with the accounts provided by a series of civilian witnesses containing observations of the location and movements of vehicles (7.96).

[67] There can be no plausible doubt that Mr Hawthorne is readily identifiable as the person to whom the various criticisms and negative findings in the report relating to the storage and disposal of the suspected murder vehicle and the simultaneous loss of an interior exhibit apply. The contrary, properly, was not

argued. Having conducted the preceding exercise, I have reached the twofold conclusion, albeit by a narrow margin, that (a) the report neither accuses Mr Hawthorne of catastrophic failures in the police investigation nor finds him guilty thereof and (b) Mr Hawthorne is excluded from the report's "unambiguous determination" that collusion was "*a significant feature of the Loughinisland murders*".

[68] The above conclusions are made only after an elaborate and painstaking analysis of a forensic nature. They vindicate Mr Hawthorne unreservedly. However, it should not have been necessary for Mr Hawthorne to initiate legal proceedings of this kind in order to secure the judicial analysis, conclusions and vindication of which he is now the beneficiary. The Police Ombudsman's "unambiguous determination" that police officers were guilty of collusion is a determination that such officers participated in the murder of six innocent civilians and the injuries suffered by five innocent civilians on 18 June 1994 at the Heights Bar, Loughinisland. The determination is expressed in unqualified terms. It is a statement of the most damming kind. The Police Ombudsman's report should have made abundantly clear to the reader that the unequivocal determination of police collusion with UVF terrorists in the murders did not apply to Mr Hawthorne. However, it signally failed to do so. The authors of the report were careless, thoughtless and inattentive in the language and structuring of the document in this respect. While this is quite unacceptable by any standard, more disturbingly it is also antithetical to the statutory purposes.

[69] The very fact that the Police Ombudsman's affidavits and rejoinder to the Schedule had resort to the rationalisations and responses which I have highlighted is of itself telling. A carefully, professionally and properly compiled report should have left no room for doubt or debate about any of these issues. Furthermore, a report of acceptable standards and quality would have had no potential for the lengthy reflection and debate which have arisen in relation to the substantive passages in chapter 7 (highlighted above) and the Ombudsman's later "negligence" determination.

The *Vires* Ground Of Challenge

[70] The question raised by this ground, the first of the two permitted grounds of challenge, is whether the impugned report is harmonious with the Police Ombudsman's statutory powers and functions. This is a pure question of law which will involve the Court in construing the applicable statutory regime in accordance with well-established principles. The first step in this exercise requires the assessment and identification of the framework to which the statutory regime applies.

[71] As the foregoing paragraphs of this judgment confirm, the Applicant's challenge has focused quite heavily on discrete sections of the report: the Executive Summary, the terms of reference, the investigation critique in chapter 7, the

"Conclusions" (chapter 9) and the "Summary of Findings in relation to Core Complaints" (Appendix 1). The headline feature of the impugned report is, by some distance, the Police Ombudsman's statement regarding police collusion with the UVF, which appears at the beginning and end of the text:

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

The contents of other passages in the report reproduced above and Appendix 2 (reproduced in Appendix 1 hereto) speak for themselves. All of them can be related in one way or another to the headline passage.

[72] Some further examination of the collusion "mini chapter" in the impugned report is appropriate. First, the Ombudsman addresses the definition of "*collusion*". This is followed by a consideration of the interaction between police and informants within Loyalist paramilitaries. Next there is a reference to multiple failures to "*pass on intelligence to investigators*". The report then states without qualification that "*... investigative opportunities were undermined by the way in which information relating to those involved in the ownership chain of the car used in the Loughinisland attack was handled*". This is followed by another unqualified statement that in August 1994 the police were in possession of intelligence that "*… the murder suspects were warned – by a police officer – that they were going to be arrested*". These two damning statements, expressed without ambiguity or qualification, are followed by something which simply does not chime with what immediately precedes it:

> "*It is unacceptable that **if** such actions occurred, police failed to act on the information received and did not investigate this allegation further.*"
>
> [Emphasis added.]

The "*if*" is incongruous, as are the references to the "*actions*" (plural) and "*allegation*" (singular).

[73] This section of the report then resorts to the language of "find" and "determine". The Police Ombudsman states that he has "*found*" that notwithstanding police possession of intelligence of terrorist crimes committed by loyalist paramilitary informants – murder, conspiracy to murder and weapons offences – the perpetrators "*… have not been subject to any meaningful criminal investigation*". This is followed by the Ombudsman's unambiguous determination that collusion was "*a significant feature of the Loughinisland murders*". In short, in this section – one of the most crucial – of the report the Police Ombudsman began by reciting a (mere) allegation of police/loyalist paramilitaries collusion relating (in some unspecified way) to the Loughinisland murders; this is followed by a succession of statements couched in the language of findings; and this mini-chapter ends with the expression of a determination, in emphatic and unequivocal terms, that the collusion alleged had indeed occurred.

[74] It is difficult to conceive of a more withering and damning condemnation of professional police officers. "Collusion" in this context is to be understood in a straightforward, uncomplicated way. Its dictionary definition is to "*make a secret plan with someone to do something illegal or dishonest*". This does not differ in material substance from the definition adopted by the Police Ombudsman (borrowed from Judge Smithwick's report) namely "*to conspire, connive or collaborate*", whether actively or passively. Collusion, in common with every member of the English language, will always take its colour from the context in which it appears. Duly dismantled and unpacked I consider that in this context "*collusion*" connotes, or denotes, varying degrees of participation by police officers in the murder of six innocent civilians and the infliction of injury on five others in the atrocity in question. Collusion by police officers with terrorists in the murder of innocent civilians could also entail the commission of offences such as misfeasance in public office and, especially as regards some of the subsequent police conduct which features in the Ombudsman's findings, conspiracy to pervert the course of justice.

[75] I have described above a "condemnation" of police officers. I consider the language of "indictment" inapplicable as an indictment is a formal statement levelling accusations of criminal conduct against a person presumed innocent. It is accusatory in nature, is the culmination of the due process of the law which has preceded it and is followed by the due process of the criminal trial. The Police Ombudsman did not use the language of accusation. Nor did he opt for the more restrained and softer vocabulary of opinion, belief or suspicion. Rather, he determined, unambiguously, that collusion had occurred. This was an outright and unqualified condemnation. It is properly described as a verdict.

[76] The Police Ombudsman's unhesitating and unambiguous determination that RUC officers were guilty of collusion with UVF terrorists in the execution of the Heights Bar murders in substance differs little, if at all, from a verdict of guilty beyond reasonable doubt. The Police Ombudsman did not mince his words: he made his determinations "*unambiguously*" and with "*no hesitation*". No police

officer was prosecuted for any collusive act – such as murder in the second degree, aiding and abetting the commission of murder, misfeasance in public office or conspiring to pervert the course of justice. Furthermore, no police officer was accused of the commission of a disciplinary offence and prosecuted in that forum. The unhesitating and unambiguous determination that RUC officers had colluded with UVF terrorists in the commission of the Heights Bar murders and other offences was not the product of a criminal trial or a disciplinary process. The equally unequivocal determination that Mr Hawthorne was guilty of negligence in the disposal of the suspected murder vehicle was not the product of any disciplinary procedure.

[77] The effect of the foregoing is that none of the police officers to whom these destructive and withering condemnations apply had the protection of due process. They were, in effect, accused, tried and convicted without notice and in their absence. None of the essential elements of the criminal or disciplinary process existed. In particular, and in very brief summary, there was no accusation, no presumption of innocence, no burden of proof, no opportunity to be heard, no right to confront one's accusers and to cross examine witnesses, no legal representation and no right to disclosure, one of the key features of the modern criminal process.

[78] The question of law which arises out of the matrix identified above is whether the Police Ombudsman was permitted by statute to act in a way which deprived Mr Hawthorne and other RUC officers of an array of due process protections and denied them their fundamental rights. The protections and rights in play are so deeply embedded in our legal system that they are virtually taken for granted. But they were overridden and extinguished in their entirety in the process which the Police Ombudsman adopted in this case.

[79] It is, of course, true that Mr Hawthorne was given, and availed of, the opportunity to comment in advance of publication on a single isolated element of the "public statement" when still in draft. And the court recognises that some account was taken of his response, as a comparison between the original draft text and the final text confirms. However this facility did not extend to the other sections of the report condemning Mr Hawthorne of negligence. The correct analysis, in my estimation, is that this was a heavily circumscribed and narrowly focused consultation exercise. Furthermore, the Police Ombudsman's conduct in this discrete process has invited the criticisms of the court outlined in [68] – [69] above. Finally, it could not be – and was not – argued that this limited facility was the equivalent of affording to Mr Hawthorne the multiple rights and protections which would have been available to him in either a criminal process or a disciplinary process. This it emphatically was not.

[80] Having analysed and evaluated the import and effect of the Police Ombudsman's report, the framework to which the central question of law arising in these proceedings is thus established. This question is whether the

Ombudsman has exceeded his statutory powers. The starting point is uncontroversial. It is common case that the Police Ombudsman's powers in the compilation and promulgation of a "public statement" derive exclusively from Part IV of the 1998 Act. No other source of power exists.

[81] On behalf of the Applicants, Mr McMillen QC (appearing with Mr Brown, of counsel) placed heavy emphasis on what he termed the two "statutory outcomes" viz the courses available to the Police Ombudsman under section 58(2) and section 59(1)(b) of the 1998 Act. He stressed that each of these courses provides the police officer concerned with protection of fundamental rights, in particular the presumption of innocence, the right to be legally represented, the right to be informed of the case to be met and the right to respond: in summary, the panoply of due process rights available in the context of both criminal and disciplinary proceedings. Mr McMillen's central submission was that section 62 of the 1998 Act does not empower the Police Ombudsman to make a public statement which, by virtue of containing a series of findings, determinations and conclusions relating to the commission of grave criminal offences by an identifiable person, effectively circumvents the two processes mentioned and, in so doing, renders nugatory the multiple procedural safeguards which would otherwise be available to the individual. Mr McMillen's ancillary submission was that the seeds of the Police Ombudsman's extravagant trespass beyond the limits of his statutory powers were clearly sown in the terms of reference for the investigation devised at the outset.

[82] The central themes of the argument of Mr McGleenan QC (appearing with Mr McQuitty, of counsel) on behalf of the Police Ombudsman were the uniqueness of the office of the Ombudsman's office, the breadth of the discretionary power created by section 62, which he described as a "*bespoke provision*" specially devised for the Northern Ireland statutory regime and the importance of the statutory aim of engendering public confidence, which is enshrined in section 51(4). Mr McGleenan highlighted that the origins of this aim can be traced to the reports arising out of which the office of Police Ombudsman was established, for the first time, in this jurisdiction. He further submitted that the terms of reference formulated at the outset could not properly act as a fetter on the investigative steps and courses which followed in what would be an unavoidably unpredictable and organic inquiry.

[83] The issue is one of statutory construction, in a context where no individual provision of the statutory regime under consideration, namely Part VII of the 1998 Act, provides a clear answer to the question. Every exercise in statutory construction is, per Lord Bingham of Cornhill in R v Z [2005] UKHL 35 at [17]:

> "*….. directed to a particular statute, enacted at a particular time, to address (almost invariably) a particular problem or mischief.*"

In R (Quintavalle) v Secretary of State for Health [2003] 2 AC 687, Lord Bingham stated at 695:

> "*The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole and the statute as a whole should be read in the historical context of the situation which led to its enactment.*"

[84] I have adverted to the background to this particular statutory regime in [56] above. It is not in dispute that widespread controversy and concerns relating to the predecessor police complaints system in Northern Ireland were one of the drivers of the new statutory code. This is reflected in the aims expressed in section 51(4). While the Police Ombudsman draws particular attention to the "*confidence of the public*" aim, this cannot, in my judgement, be said to possess any greater intrinsic merit or force than the "*confidence … of the police force*" which is mentioned in the same sentence. Furthermore, I consider that one of the unexpressed, but readily implied, aims of the statute must be that the Police Ombudsman would exercise his powers and functions with fairness to all persons who could be adversely affected. Fairness, in this context, must encompass respecting elementary rights and protections of the due process variety.

[85] I am satisfied that in cases where the Police Ombudsman decides to promulgate a "*public statement*" under section 62, this constitutes an exercise of his powers under Part VII. The effect of this is that section 51(4) and section 62 must be considered in tandem. This exercise, in turn, gives rise to the proposition that the legislature has invested a wide discretion in the Police Ombudsman in formulating the contents of every public statement**.** I accept Mr McGleenan's submission to this effect.

[86] However, this discretion is not unfettered. In particular, its exercise must in every case be harmonious with the other provisions of Part VII. Another obvious fetter, in passing, is the requirement imposed by section 6 of the Human Rights Act 1998 that the Police Ombudsman, a public authority, avoid acting incompatibly with a person's protected Convention rights. A third fetter is that the exercise of this discretion must in every case be compatible with the "Padfield" principle namely it must promote the policy and objects of the statute. Fourthly and finally, the exercise of the discretion must be harmonious with public law standards and common law fairness. This inexhaustive assessment does not preclude the recognition of other legal fetters in some future case.

[87] I accept the submission that judicial review of the Police Ombudsman's actions tends to be (in Mr McGleenan's words) of the "light touch" variety.

However, this submission is based upon decisions such as R v Parliamentary Commissioner, ex parte Dyer [1994] 1 WLR 621, R (M) –v Commissioner for Local Administration [2006] EWHC 2847 and Re Martin [2012] NIQB 89, all of which were concerned with the breadth of the discretion engaged in decisions whether to conduct an investigation and issues (as in Martin) such as when to begin the exercise. Furthermore these cases do not speak to the issues of statutory construction raised by the present challenge. Therefore I derive limited assistance from this line of case law. Furthermore, I derive no assistance from the evidence of what the Police Ombudsman or his predecessors have done in the exercise of their power under section 62 in other cases. This evidence, in my judgement, has no bearing on the pure question of statutory interpretation to be determined.

[88] Some reflection on the legal character of the starting point adopted by the Police Ombudsman when embarking upon the second Loughinisland murders investigation is instructive. This entailed the exercise of a discrete statutory power which belongs to the overall legislative framework to be considered. In light of the elapse of a period exceeding 12 months prior to receipt of the triggering complaint, it was necessary, by virtue of Regulations 5 and 6 of the 2001 Regulations, for the Police Ombudsman to form a specified belief, namely to –

> *"…. believe(s) that a member may have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings."*

It was incumbent upon the Ombudsman to form this belief prior to embarking upon the exercise culminating in the impugned "public statement" and, in his affidavit, he deposes specifically that he did so.

[89] This must be juxtaposed with the two "statutory outcome" provisions noted in [80] above and the Police Ombudsman's evaluation of and reaction to the internal investigation report provided to him. At this stage, it was incumbent on the Ombudsman, per section 58(1), to consider this report with a view to making a specific assessment. The statutory question for him was whether the report indicated "*…. that a criminal offence may have been committed by a member of the police force*". As the evidence shows, the Ombudsman addressed this question and answered it in the negative. He even went to the lengths via the extra-statutory route (entirely proper and commendable) of seeking confirmation from the PPS of the correctness of his assessment. Such confirmation was duly provided.

[90] The first effect of the foregoing was that the belief which the Police Ombudsman was required by statute to form – and did form – at the beginning of the investigative exercise was later overtaken and extinguished. Viewed through the prism of the PPS Code for Prosecutors, the confirmation provided to the Ombudsman was, in substance, that there was insufficient evidence to warrant the prosecution of Mr Hawthorne or any other person for a criminal offence. The first

legal consequence of the Police Ombudsman's evaluation of his organisation's investigation was thereby confirmed.

[91] The <u>second</u> effect of the Police Ombudsman's determination under section 58(1) was that since there would be no prosecution of Mr Hawthorne or any other person for any offence falling within the ambit of the triggering complaints or anything else uncovered by the investigation, the forum in which the panoply of legal rights, safeguards and protections would be available to such persons, namely the criminal process, was not going to materialise. The consequence of this was that when the Police Ombudsman proceeded to publish his report in the terms which he chose, Mr Hawthorne and all other affected police officers were in effect defenceless. The contrast with the forum of due process is stark. Their only real protection and bulwark was that of the limitations prescribed by the statutory regime under which the Police Ombudsman was operating at all times.

[92] It is common case that Mr Hawthorne, in common with any other retired police officer implicated in the Ombudsman's findings, determinations and conclusions, was immune from disciplinary action by reason of retirement. However, this does not alter the analysis of denial of due process rights and protections. While the point does not arise directly for determination, the inference that there were no grounds for disciplinary proceedings against any of the officers involved appears reasonable. The Police Ombudsman, in the span of several affidavits, has had the opportunity to counter this suggestion and has not done so.

[93] The preamble to the central question of law to be determined is the following. The Police Ombudsman had, at the investigation triggering stage, formed the belief that a criminal or disciplinary offence may have been committed. Upon receipt of the ensuing investigation report, the Ombudsman determined that the statutory test of whether a criminal offence may have been committed by former police officers was not satisfied. This generates the following question of law: did Parliament contemplate and intend that, through the vehicle of section 62, it was open to the Police Ombudsman to publish a statement awash with findings, determinations and conclusions that police officers had engaged in collusion with the UVF murderers of the Heights Bar victims, thereby committing criminal offences of the utmost gravity? Similarly, did Parliament contemplate and intend that the Ombudsman could make an unambiguous determination that Mr Hawthorne was guilty of negligent conduct of some significance?

[94] I consider that these questions invite a resoundingly negative answer. In my view Parliament cannot have intended that the Police Ombudsman could exercise his power under section 62 in a manner confounding and contradicting the determination he had made under section 58(1). What the Police Ombudsman proceeded to do was the very antithesis of this statutory determination. Nor can Parliament have intended to devise a mechanism which would have the effect of depriving police officers, serving or retired, of the legal rights, protections and

safeguards available to them in the criminal process or, as the case may be, the disciplinary process. Parliament, in my view, cannot have intended to devise a process which would leave such persons utterly defenceless. Nor can Parliament have intended to permit the Police Ombudsman to (in substance) airbrush the fact of no prosecution and conviction and to effectively act as judge and jury. To construe the statutory regime otherwise would give rise to this catalogue of anomalies and incongruities.

[95] This assessment has the further merit that it is harmonious with the second of the statutory aims enshrined in section 51(b) of the 1998 Act. I consider that the impugned actions of the Police Ombudsman were so antithetical to the enjoyment of fundamental rights and protections that they undermine, rather than promote, the confidence of the public and the police force in the police complaints system. Parliament cannot conceivably have intended that such rights and protections could be overridden and extinguished in this way. The principle of legality requires unambiguous statutory language if fundamental rights are to be abrogated: there is none.

[96] At this juncture I revisit the language of "substantiate", considered in [48] above. The Police Ombudsman evidently considered that he was empowered to decide whether those aspects of the families' complaints relating to criminality on the part of police officers were "substantiated". In my judgement the statutory regime does not invest the Ombudsman with this power, or function. First, neither the verb "to substantiate" nor any of its derivatives is to be found in Part VII of the 1998 Act. Nor is there any analogous terminology.

[97] Second, the contention that the Police Ombudsman possesses this power hangs on the thread of regulation 27(3) of the 2000 Regulations and a Government policy document: see his averments in [47] *supra*. Mr McMillen QC described regulation 27 (3) as an "orphan" provision. It empowers the Police Ombudsman to recommend to the Chief Constable that he should pay compensation (a) where the Ombudsman is "*satisfied that a complaint has been substantiated*" and (b) one of three specified statutory conditions applies. Strikingly this is the only element of the overall legislative framework in which the language of "substantiation" is employed. The simple riposte is that the conduct impugned in these proceedings, namely the publication of the "public statement" in the terms under challenge did not involve any exercise of the Police Ombudsman's power under Regulation 27(3).

[98] Regulation 27(3) is remote from both section 62 and the heart of the primary legislation regime. Furthermore, as a matter of rudimentary legal principle this provision of subordinate legislation cannot operate so as to amplify or alter anything in the parent primary instrument. It neither augments nor qualifies the latter. As a matter of elementary principle, being a provision of subordinate legislation it could not do so in any event. Equally, again as a matter of orthodox

and elementary legal doctrine, a later government policy document cannot inform the correct construction of the statutory provisions under scrutiny.

[99] The short point is that the statute does not invest the Police Ombudsman with the power or function of deciding whether a complaint has been substantiated. Rather the statute confers this function on the criminal court and the disciplinary tribunal. I consider that where neither of these processes is invoked and yields a finding of guilt, resort to section 62 for the purpose for which it was employed in the present case is not available to the Ombudsman.

[100] Diverting briefly to the landscape to which Regulation 27 does apply, I accept that the word "*satisfied*" denotes the formation of an evaluative assessment by the Police Ombudsman. While this issue does not arise directly for the court's decision, it seems highly unlikely that the Police Ombudsman could as a matter of law be thus "*satisfied*" in the absence of a finding of guilt via the criminal or disciplinary process. In my view Parliament cannot have intended this to be an assessment of criminal or disciplinary guilt by the Ombudsman. Rather, what the legislature probably had in contemplation was cases in which any nexus between the triggering complaint and the later finding of criminal or disciplinary guilt is sufficiently debateable to require an evaluative judgement to be formed. Any such judgement would be susceptible to the supervisory oversight of the High Court applying the barometer of established public law principles and standards.

[101] I further accept Mr McGleenan's submission that significant concerns about "*more general corporate processes*" within the RUC is one of the important themes of the report. Furthermore, I would be prepared to hold that where a Police Ombudsman's investigation, which in the real world will frequently be organic and unpredictable in nature, finds itself in the territory of corporate policing issues the outcome will not be unlawful merely because the exercise did not specifically invoke the "*current police practices and policies*" provision in section 60A of the 1998 Act from the outset. I add only that in such a case it seems likely that the Ombudsman would, at the appropriate stage, have to comply with the notification requirements of section 60A(3). I further accept that in appropriate cases a "public statement" promulgated under section 62 could lawfully include references to corporate policing practices or policies.

[102] However, none of the foregoing has any impact on the court's assessment above of the exercise of the Police Ombudsman's statutory powers in the fact sensitive context of the present case. It is an inescapable fact that the corporate body of police is made up of individual officers. The corporate dimension of the Police Ombudsman's highly critical findings in substance related to issues of ingrained culture and practice in the murky world of intelligence, informants, police handlers and so forth. But this cannot alter the reality that the Police Ombudsman's litany of discrete criticisms, exemplified in (but not limited to) chapter 7 of the report (see [7] above) and the determination that police officers had

colluded with UVF terrorists in the commission of the Loughinisland atrocity apply to the conduct of individual officers. This analysis is unaffected by the consideration that certain of the Police Ombudsman's highly critical findings and determinations have a corporate dimension.

[103] The foregoing reasoning and analysis give rise to the following conclusion. I hold that the Police Ombudsman's promulgation of the "public statement" of the second investigation into the Loughinisland atrocity was, by reason of the contents of the statement, unlawful as it was not authorised by the statutory regime. Stated succinctly, the Police Ombudsman exceeded his statutory powers. Thus the *ultra vires* ground of challenge succeeds.

The Second Ground: Procedural Unfairness

[104] The starting point as regards this ground of challenge is the long established practice whereby the publication of certain types of report is preceded by so-called "Salmon" letters. This laudable and valuable practice dates from a public inquiry chaired by Lord Justice Salmon many years ago. It entails proactively alerting potentially affected persons to aspects of a draft report reflecting adversely or negatively on them and inviting their representations, if any. The practice is rooted in fairness. Properly analysed, this is mainly (though perhaps not exclusively) fairness of the procedural species. It facilitates participation by the person concerned in the process and gives them an opportunity to defend themselves and influence the outcome. The practice can be readily linked to the hallowed "*audi alteram partem*" principle of the common law.

[105] Notably, as the passages reproduced in [35] above make clear, the Police Ombudsman's agents, when writing to Mr Hawthorne, were alert to the essence and rationale of this practice. In the letter of 24 August 2009 Mr Hawthorne was invited to address "*any areas of concern or inaccuracy of facts*" identified by him in the "*sections of the report relevant to you*" provided. Later, in the analogous letter of 14 April 2016, the expressed reason for providing him with extracts from the draft public statement was that it contained "*material which could be considered as criticism of your role*".

[106] Copious citation of authority in identifying the governing legal principles is unnecessary in this kind of procedural fairness context. In Wiseman v Borneman [1971] AC 297, Lord Morris drew attention to the juridical truism that natural justice is "*fair play in action*", at 309B. Lord Reid, for his part, highlighted the long established principle whereby the court supplements statutory procedures in order to ensure that natural justice is delivered: see page 308C. To like effect, Lord Guest stated:

> "… *The Courts will imply into the statutory provision a rule that the principles of natural justice should be applied.*

This implication will be made upon the basis that Parliament is not to be presumed to take away a party's rights without giving them an opportunity of being heard in their interest."

[107] In Mahon v Air New Zealand [1984] 1 AC 808 Lord Diplock noted that the interests of a person potentially directly affected in an impending report include the individual's career or reputation. The "first rule" which he formulated is that there must be probative evidence of the findings to be made: see 820S. Lord Diplock formulated the "second rule" in these terms:

> *"The second rule requires that any person represented at the enquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision maker, might have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result."*

Finally, in the memorable words of Lord Mustill in Re D (Minors) [1996] AC 593 at 603:

> *"My lords, it is a first principle of fairness that each party to a judicial process shall have an opportunity to answer by evidence and argument any adverse material which the Tribunal may take into account when forming its opinion.* ***This principle is lame if the party does not know the substance of what is said against him (or her), for what he does not know he cannot answer."***
>
> [My emphasis.]

[108] The factual framework to which these principles are to be applied has been outlined above. The first critical fact is that Mr Hawthorne was given the opportunity to comment in advance of publication on only a single, isolated element of the public statement when still in draft, namely that concerning the storage and disposal of the suspected murder vehicle and the simultaneous loss of a significant exhibit. This facility did not extend to any of the other passages implicating and referable to him. I have held above that the Police Ombudsman's detailed critique of other aspects of the RUC investigation into the murders implicates Mr Hawthorne in certain material respects. Notably, the draft determination of negligence was withheld from him.

[109] The second material fact is that the Police Ombudsman's report does not engage with the statement made in Mr Hawthorne's written representations that the investigators had failed to undertake the focused search for relevant documentary evidence which he had urged a long time ago (in 2009). Third, it would appear that the Ombudsman did not act upon Mr Hawthorne's exhortation that this search be carried out prior to publication of the report. This assessment is fortified by the twin considerations that there is no contrary indication in the report and no contrary averment in any of the Ombudsman's affidavits. Fourth, Mr Hawthorne's further exhortation that this step would enhance the credibility of the final report was evidently disregarded: the Police Ombudsman's affidavit evidence has not challenged this.

[110] Fifthly, Mr Hawthorne's defence is inadequately and inaccurately portrayed in the report. It is condensed to the following short sentence:

> "*Both of these officers stated that they believed that the SIO had authorised the destruction.*"
>
> (Appendix 1, Allegation 7)

In the body of the report, this is described variously in the terms of "belief" and "observation" (7.111 – 7.112). I consider that the report misrepresents the defence advanced by Mr Hawthorne in his written representations, the kernel whereof was:

> "*You have failed to provide evidence that I authorised the disposal. I can say without any shadow of doubt that whoever authorised disposal at Downpatrick Station only did so on the instructions of a higher authority.*"

Furthermore, there is no indication of whether Mr Hawthorne's defence was believed. Finally, Mr Hawthorne's status of (mere) "witness" was at no time altered.

[111] The combination of factors highlighted above impels to the conclusion that those aspects of the Police Ombudsman's report reflecting adversely on Mr Hawthorne are vitiated by procedural unfairness. To summarise, he was given no advance notice of certain critical passages; the portrayal of his responding representations was distorted; his representations were evidently misunderstood; steps having the potential to exculpate him were not taken; and he was condemned at the conclusion of an investigative process in which he had at all times been accorded the status of "witness". The resulting diagnosis of procedural unfairness follows inexorably.

[112] I now turn to consider the broader panorama which arises by virtue of the representative challenge brought by the second Applicant, Mr White. The analysis that the Police Ombudsman's report contains condemnations of criminal conduct of

the utmost gravity on the part of multiple police officers is, in my judgement, irresistible. I repeat that these are not couched in the language of suspicion, belief, impression or opinion. They are, rather, formulated as findings, determinations and conclusions. Foremost among these is the Police Ombudsman's unambiguous determination that RUC officers had engaged in collusion with the UVF terrorists who committed the Loughinisland murders.

[113] In my judgement, it matters not that the police officers thus condemned are not identified. There is no suggestion that they would be incapable of being identified. Further, and in any event, as a matter of law it suffices that the officers condemned by the Police Ombudsman have identified themselves as the subjects of the various condemnations. Procedural fairness, in this kind of context, cannot in my view depend upon, or vary according to, the size of the readership audience. If there is any defect in this analysis it is of no consequence given that the overarching purpose of the conjoined challenge of the second Applicant, Mr White, belongs to the broader panorama of establishing that reports of the Police Ombudsman couched in the terms considered exhaustively in this judgment are unlawful as they lie outwith the Ombudsman's statutory powers.

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

[115] If and to the extent that the requirements formulated above were not observed by the Police Ombudsman in respect of any affected police officer procedural unfairness occurred. Beyond this the court does not venture since, as highlighted more than once, Mr White's challenge is representative in nature and the only individual factual framework which the court has considered is that pertaining to Mr Hawthorne.

Irrationality

[116] In the course of considering the procedural fairness ground I wondered whether the Police Ombudsman's determination that Mr Hawthorne had been

guilty of an act of negligence was vulnerable to challenge on the freestanding ground of irrationality. As highlighted above, the nexus between the relevant substantive passages in chapter 7 of the impugned report and the determination of an act of negligence which follows later is not altogether clear. Furthermore, the court's assessment that the portrayal of Mr Hawthorne's defence in the final report distorts the case made by him could be developed, yielding the conclusion that Mr Hawthorne's defence was misunderstood. In addition, the language of the report is problematic: in the key passage (the "Allegation 7" conclusion), the plural "*decisions*" does not readily chime with the singular "*act*". A further ingredient of this assessment is the notable absence of any statement of belief - or disbelief - regarding Mr Hawthorne's defence (or, indeed, that of the station sergeant).

[117] Given these facts and considerations further submissions were invited and these have been duly considered. It is in this context viz the examination of possible irrationality by a court of supervisory jurisdiction that the "light touch" submission, which I have accepted – see [86] above – has particular purchase. I am of the opinion that the Police Ombudsman's determination that Mr Hawthorne committed an act of negligence is suspect and questionable. However, the elevated threshold of Wednesbury irrationality, emphasised in recent decisions of the Supreme Court, is not in my opinion overcome: see Pham v Secretary of State for the Home Department [2015] UKSC 19 and Keyu v Secretary of State for Foreign and Commonwealth Affairs {2015] UKSC 69.

Conclusions Summarised

[118] The effect and outcome of the extensive exercise which the court has undertaken are that the severe public criticism described by Mr Hawthorne in his first affidavit was not justified, for certain fundamental reasons. First, the Police Ombudsman's damming condemnation of RUC collusion with UVF murderers does not implicate Mr Hawthorne. This, regrettably, would not in my opinion have been apparent to most readers. Second, there is no finding in the Police Ombudsman's report that Mr Hawthorne was culpable of any of the catastrophic investigative failures assessed. Third, the Police Ombudsman's "determination" of police collusion in the Loughinisland murders is unsustainable in law as it was not in accordance with the Ombudsman's statutory powers. Fourth, the offending sections in the Ombudsman's report identified above, including the "determination" that Mr Hawthorne was guilty of an "act of negligence", are in breach of the legal requirements of procedural fairness and unlawful in consequence.

[119] It is important to recognise, and emphasise, the nature of the legal challenge which this court has determined. It was an application for judicial review. The judicial review court is not a court of appeal. It exercises no appellate jurisdiction. Nor does it exercise any of the functions of a public inquiry. The judicial review court is also to be distinguished from fora such as the coroner's court, criminal

courts and disciplinary tribunals. It exercises the unique function of reviewing whether a public authority has, in discharging its functions and responsibilities, acted unlawfully. This review invariably takes place within a strictly circumscribed framework. The judicial review court does not substitute its opinion or views for those of the public authority under challenge. Nor does it substitute its findings and conclusions for those of the relevant public authority.

[120] These features of how the judicial review court operates are illustrated by, for example, the fact that this judgment has neither agreed nor disagreed with the Police Ombudsman's determination that there were "*catastrophic failures*" in the RUC investigation of the Loughinisland atrocity. Nor has it been the function of this court to concern itself with the question of whether certain RUC officers did or did not co-operate with the Ombudsman during his investigation. Furthermore, it has not been appropriate for this court to conduct any review of the abundance of factual issues investigated by the Ombudsman relating to events both preceding and following the Loughinisland attack. All of these issues lay beyond this court's competence.

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

Remedy

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

[123] In exercising the aforementioned discretion, the context is self-evidently important. The main ingredients of the context are the nature of the legal challenge brought by the Applicants, the terms in which the court has found in their favour and the consequences which would flow from electing to grant a particular remedy. Where a judicial review challenge succeeds, it is normal to grant what the court considers to be an appropriate remedy. In certain instances the court, rather than granting a remedy, elects to leave its judgment to speak for itself. This option is rarely invoked. It has no appeal in the present case, not least because of the uncertainty which it would generate. It would provide no legal certainty to the Applicants, the Police Ombudsman or the families. Nor would it provide the Applicants with any vindication to reflect their successful challenge. Furthermore,

this "opt out" course would provide the Police Ombudsman with precious little guidance on what to do next as regards the impugned report and what to do differently in the compilation of future reports.

[124] The choice of remedy, on one view, lies between a declaratory order and a quashing order. The distinction between these two forms of remedy is noteworthy. The effect of a quashing order is to render the measure under challenge a nullity in law. The remedy is constitutive in nature. It destroys the legal validity of the impugned measure. Its effect is to oblige the public authority concerned to undertake a conscientious reconsideration, duly educated by the judgment of the court and to make a fresh decision.

[125] A declaratory order (or declaration) is quite different. Fundamentally, it does not require the public authority concerned to do anything. A declaration is not coercive in nature and is not executory. Rather, it pronounces on the main constituent elements of the legal relationship between the parties. This remedy is particularly apposite in cases where the challenge has been rendered academic by intervening events but nonetheless raises issues of sufficient importance to warrant the grant of discretionary public law relief. The declaration is also a paradigm example of the educative role of the court in judicial review. In public law proceedings, the public authorities concerned and the court act in partnership, one of the critical elements whereof is that the former submits to the jurisdiction of the latter and accepts its legal teachings. Versatility and adaptability are the hallmarks of the declaration.

[126] In electing between these two remedies, the Court will derive some guidance from the celebrated statements of Lord McDermott that –

> "*Certiorari is a discretionary remedy and does not usually issue if it will beat the air and confer no benefit on the person seeking it.*"

(R (McPherson) v Ministry of Education [1980] NI 115 at 121 G.) Some further guidance is also available from the approach of the Supreme Court in Hunt –v– North Somerset Council [2015] UKSC 51 and in particular the observation of Lord Toulson at [12]:

> "*….. in circumstances where a public body has acted unlawfully but where it is not appropriate to make a mandatory, prohibitory or quashing order, it will usually be appropriate to make some form of declaratory order to reflect the Court's finding … simply to dismiss the claim when there has been a finding of illegality is likely to convey a misleading impression and to leave the claimant with an understandable sense of injustice. That said, there is no 'must' about making a declaratory order ….*"

[127] Mr McMillen's submission, in essence, is that the Police Ombudsman's second Loughinisland report is so fatally holed that the entire measure must be quashed. He submits that, by this judgment, the court has in effect condemned the entirety of the report process. The legal deficiencies afflicting the report, as diagnosed by the court, pervade the entirety of the document. He contends that the misunderstanding of the Police Ombudsman about the nature and ambit of his legal powers is fundamental in nature. Mr McMillen argues that any order of this Court which leaves the impression of limited or technical success for the Applicants and the enduring legality of the report's conclusions is to be avoided. Anything less than a quashing order, he submits, would run the risk of engendering uncertainty and perhaps confusion. Mr McMillen very properly reminded the court of the decision in Credit Suisse v Allerdale Borough Council [1997] QB 306, an essentially commercial litigation context involving a local council in which the Court of Appeal recognised, in principle, that a financial guarantee could be partly unenforceable, with severance of the remainder.

[128] These arguments operate as a reminder of the broad array of factors which a court may legitimately take into account at the remedies stage of a successful judicial review challenge. They further provide a reminder of the importance of the court maintaining a broad outlook until it has made its final decision on remedies. Thus there is potential danger in undue fixation on the contest between a declaration and a quashing order developing. This is so not least because one of the remedial outcomes which the court must bear in mind is an order which combines different individual remedies.

[129] I have drawn attention above to the particular features and limitations of the judicial review jurisdiction of the High Court. In the present case, one of the corollaries of this is that the court has carried out a very focused supervisory review of the impugned report. This is a reflection not only of the intrinsic nature of judicial review but also the formulation of the Applicant's challenge. This, in legal terms, was a very specific and targeted attack. This is particularly clear from [49] above, conveniently reproduced at this juncture:

> *"[49] Against the statutory and evidential background outlined above, the two permitted grounds of challenge are:*
>
> *(a) The report exceeds the Police Ombudsman's statutory powers.*
>
> *(b) Mr Hawthorne was denied the common law procedural fairness protections guaranteed to him by the common law."*

[130] At this point in the analysis, the attention switches to the court's conclusions, summarised in [118] above. I agree with Mr McMillen that the first of the court's two central conclusions is not confined to Mr Hawthorne. Rather it extends to all police officers embraced and affected by the discrete species of illegality diagnosed by the court. I consider that the judgment makes this abundantly clear and, insofar as necessary, further emphasis is hereby supplied. However the second and third of the Court's main conclusions are of a different variety. Of necessity they relate to Mr Hawthorne only as he is the only police officer whose individual factual matrix was before the court in evidence.

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

(a) The "Collusion" section spanning pages 5 – 7 of the report.

(b) The related passages in chapter 9 ("Conclusions") of the report, namely paragraphs 9.14 – 9.19.

(c) The "Allegation 6" conclusion in Appendix 1, which repeats the headline passage in the above section.

(d) The "Allegation 7" conclusion, also in Appendix 1 ("*My public statement ……… negligence associated with its disposal.*")

(e) The corresponding offending passages in chapter 7 of the report at paragraphs 7.113 and 7.114.

(f) Paragraphs 5.7 and 5.82 of the report: these too cannot stand given my finding – in [60](c) above – that these passages apply to, amongst others, Mr Hawthorne. As he was given no advance opportunity to consider and comment upon them, they are vitiated by procedural unfairness.

[132] The exercise carried out above is both revealing and instructive, as it exposes how much of the Police Ombudsman's report survives the court's determination of the legal issues arising in the Applicant's challenge. The collusion "determinations" were made by the Ombudsman at a point where a bright luminous line had been reached. His failure to act within the limits of his legal powers occurred because in the relevant passages of the report he traversed this

notional line. The Ombudsman committed precisely the same error of law in purporting to make a "determination" that Mr Hawthorne had been guilty of an act of negligence. The additional legal infirmity of procedural unfairness applies also to these passages, together with paragraphs 5.7 and 5.82 of the report.

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

[134] The analysis that large swathes of the Police Ombudsman's report are unaffected by the court's principal conclusions is confirmed by the simple exercise of examining the "Contents" index. The court has found no legal defect in the investigation's terms of reference, the chapter relating to arms importation and the firearm used and the further chapters concerning events preceding the attack and intelligence available to the police and their response immediately prior thereto. Furthermore, the longest chapter in the report, namely chapter 7 ("The RUC investigation of the attack at Loughinisland") has, with the limited exception of the "negligence" passages relating to Mr Hawthorne and two other small entries, been at all times outwith the supervisory purview of the court. In addition chapter 8, the final substantive chapter, relating to "*Resourcing and subsequent developments*" has, in common with other substantive chapters, not featured in these proceedings at all.

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

[136] Finally, if the court were to order a remedy it would incorporate one further component, mandatory in nature, requiring the Police Ombudsman to excise the identified unlawful passages from his report and to re - promulgate the revised report by a specified date. An order of this kind would also, bearing in mind the Ombudsman's power under section 62 of the Police (NI) Act 1998, make clear that re-promulgation would not preclude the inclusion of any further or revised text compatible with the judgment and order of the court. Thus, for purely illustrative purposes, it would be open to the Ombudsman to insert in appropriate places in the report a sentence such as "*Conclusion XX* **[or]** *paragraph [YY] does not apply to Officer ZZ*".

[137] Prior to finalising and promulgating the issue of remedy, paragraphs [122] – [137] above, the court was notified in writing of the joint stance on behalf of the Applicants and the Police Ombudsman that the appropriate remedy would be an order quashing the impugned report. The court's deliberations led to the tentative view that the alternative course charted in [131] – [135] above might be appropriate. This was reflected in a formal Notice to the parties, inviting further submissions. This elicited a further written submission from Mr McMillen QC and Mr Brown on behalf of the Applicants. However, there was no response on behalf of the Ombudsman – not even a communication to indicate that no substantive response would be forthcoming. The court considers this discourteous.

Recusal?

[138] The court is in receipt of an application for recusal. It is made on behalf of the Respondent (the Police Ombudsman) and is supported by the interested party. The application took the form of written submissions of the two aforementioned parties, supplemented by oral argument, together with a specially compiled bundle of new documentary evidence.

[139] One of the striking features of this application is its timing;

(a) These are proceedings of some vintage, having been commenced in August 2016.

(b) Leave to apply for judicial review was granted by order dated 6 June 2017.

(c) At the beginning of October 2017, I became directly involved in the case management of this challenge. During the period October/December 2017 there were two listings before me and I promulgated both written and oral directions.

(d) The substantive hearing dates were 06 – 07 and 14 December 2017.

(e) On 21 December 2017 the court delivered its written judgment, together with a specially devised summary. This entailed the promulgation of paragraphs [1] – [121] of this judgment.

(f) On the same date, the Court gave directions relating to the two ancillary issues to be determined namely remedy and costs.

(g) Between 21 and 28 December 2017 the parties' representatives complied with the Court's request for assistance in identifying typographical and kindred errors.

(h) The parties' representatives duly complied with the court's directions for the provision of written submissions relating to the twin issues of remedy and costs.

(i) The directions given by the Court when promulgating its substantive judgment on 21 December 2017 made provision for (*inter alia*) a further listing on 12 January 2018 for the purpose of completing the judgment by pronouncement of the Court's determination of the issues of remedy and costs.

[140] The relevance of timing in the present context is the following. As I made clear during the hearing conducted on 19 January 2018, there is no prospect of this application being refused on the ground of lateness. While, as I shall make clear presently, it should properly have been brought by the Ombudsman during the window of 14-21 December 2017, I do not propose to treat this failure as a ground for refusing the application. The true relevance of the issue of timing is how it is to feature in the court's evaluation and application of the governing test (*infra*). The fair-minded and independent observer, the hypothetical person through whose lens the test of apparent bias falls to be applied, would surely reflect at some little length on the question of why, at every stage when the issue was consciously – and no doubt carefully – considered, experienced legal representatives were unanimous in the view that recusal action was not appropriate. The "stages" to which I refer unfolded at five points: approximately one month before the substantive hearing commenced; immediately upon completion of the hearing; at the time when the Court's substantive judgment was promulgated; when the Police Ombudsman's Director of Legal Services conferred again with senior counsel; and, finally, on the date of a long arranged listing designed for the purpose of receiving the court's ruling on the ancillary issues of remedy and costs. No argument to the contrary was advanced by any party.

[141] I return to the chronology. Late in the evening of 11 January 2018 the court was alerted for the first time to the possibility of an "application" of some kind on behalf of the Ombudsman by his Director of Legal Services. No particulars or even brief details were provided. No application was filed. At the beginning of the listing on 12 January 2018, I made clear that I considered this casual and inappropriate, having regard to the carefully structured framework which had been devised <u>and</u> the rationale thereof, namely the compelling need to provide the families with litigation finality. Upon learning that this surprising *lacuna* had still not been addressed by the Ombudsman, the court directed that any application be made in writing forthwith and the listing was interrupted in consequence. This resulted in the provision of a written application on behalf of the Ombudsman for an adjournment "*… as a necessary practical pre-condition …. to establish the material facts vis-à-vis recusal as a first step*". A similar stance was adopted on behalf of the interested party. There was no objection by the Applicants. The court, giving determinative weight to the consideration that the families were not pressing for

finality, agreed to an adjournment with a strict timetable. The recusal application materialised in these circumstances.

[142] The application, in summary, is based on the involvement of the trial judge as counsel in a 2002 judicial review case. As stated in open court, the trial judge's conscious recollection of this dates from what was revealed in the flurry of correspondence which materialised just before the listing on 12 January 2018. In brief compass, the challenging party in the 2002 proceedings was the Police Association for Northern Ireland (the "*Association*"). The respondent was the Police Ombudsman. The focus of the Association's challenge was a report published by the Ombudsman relating to the notorious Omagh bomb explosion on 15 August 1998. The primary ground of challenge was that the impugned report was vitiated by procedural unfairness arising out of the Ombudsman's failure to notify the Chief Constable of the RUC, Mr White (then an Assistant Chief Constable) and other officers of the possibility of destructive and damning findings and conclusions relating to (*inter alia*) leadership skills and responsibilities and professional judgement. The case was also made that the report was beset with factual inaccuracies and errors and was *ultra vires* the Ombudsman's statutory powers. This trial judge in the present case was leading counsel for the Association. Leave to apply for judicial review was granted. No substantive hearing followed, the Ombudsman having made certain concessions, in an agreed statement acceptable to the Association, relating to the unfairness of the process culminating in the impugned report.

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

[144] The factual matrix as regards the interested party and his legal representatives is a little different, inasmuch that while they came into possession of the same information, this did not occur until the immediate aftermath of the promulgation of the court's judgment on 21 December 2017, on the same date. The

solicitor's reaction was to confer with counsel and this was followed by an apparently immediate attempt to ascertain whether there was any judgment relating to the 2002 litigation. This confirmed that there was not. Nothing further was done. Almost immediately thereafter, the interested parties' legal representatives received a formal Notice from the court affording them the opportunity to provide a written submission on the issue of remedy. This too did not stimulate any action on their part.

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

[146] An archived court file having been retrieved by the court and disclosed in its entirety to the legal representatives of all parties, certain additional facts can now be added to the equation. Mr White was not a party to the 2002 litigation and, therefore, was not represented by any legal practitioner, solicitor or counsel. He did, however, swear affidavits. So too did the former Chief Constable. In one of the blizzard of recent letters the solicitors who represented the Association in the 2002 litigation have stated that " *attendance at consultations with counsel and at court*" did <u>not</u> involve Mr White. Those who <u>were</u> involved in this way are identified. Any recollection on the part of this trial judge of this kind of minute detail would be readily and unreservedly declared. There is none.

<u>**Governing Principles**</u>

[147] I had occasion to consider the governing principles extensively in ***R –v- Jones*** [2010] NICC 39, in the following passages:

> <u>***"Governing Principles***</u>
>
> *[6] While the importance of judge and jury being entirely impartial is a longstanding feature of the common law, it has been reinforced by Article 6 ECHR, in an era of sophisticated technology and mass communication. In the contemporary setting, the modern jury is in some ways the antithesis of its predecessor of several centuries ago, as highlighted by Campbell LJ in* <u>***Regina –v- Fegan and Others***</u> *[unreported]. See also* <u>***Regina –v- McParland***</u> *[2007] NICC 40, paragraph [20] especially. I consider that the modern law differs in no material respect from the*

pronouncement of Maloney CJ almost a century ago, in ***Regina v Maher*** *[1920] IR 440:*

> *'The rule of law does not require it to be alleged that either A or B or any number of jurors are so affected, or will be so affected; but if they are placed under circumstances which make it reasonable to presume or apprehend that they may be actuated by prejudice or partiality, the court will not, either on behalf of the prosecutor or traverser, allow the trial to take place in that county … **It is a wise and jealous rule of law to guard the purity of justice that it should be above all suspicion**'".*

[Emphasis added].

Thus perceptions are all important: the terms of the immutable rule that justice should not only be done but should manifestly and undoubtedly be seen to be done are familiar to all practitioners. These principles apply to both trial by judge and jury and trial by judge alone.

[7] In considering whether the composition of any court or tribunal poses any threat to the fairness of a given trial, the test to be applied is that of apparent bias, as articulated by the House of Lords in ***Porter v Magill*** *[2002] 2 AC 357 : would a fair-minded and informed observer conclude that, having regard to the particular factual matrix, there was a real possibility of bias? In* ***Regina v Mirza*** *[2004] 1 AC 1118, the question formulated by Lord Hope was whether a juror had "knowledge or characteristics which made it inappropriate for that person to serve on the jury": see paragraph [107]. Bias, in my view, connotes an unfair predisposition or prejudice on the part of the court or tribunal, an inclination to be swayed by something other than evidence and merits".*

[148] The following passage in Locabail is also of some significance:

> *" The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real*

> *ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be".*

The judgment in **Jones** draws attention to certain further considerations:

> *"… there will always be a risk in every litigation context that some recusal applications are made on flimsy , though superficially attractive, grounds and are granted without rigorous scrutiny by an overly sensitive and defensive tribunal…*
> *[10] It is trite that where an application of this kind is made, an asserted risk to the fairness of the trial which is flimsy or fanciful will not suffice. However, the converse proposition applies with equal force. The court is required to make an evaluative judgment based on all the information available. This requires, in the words of Lord Mustill, the formation of "what is essentially an intuitive judgment" (**Doody v Secretary of State for the Home Department** [1993] 3 All ER 92, p. 106e). In making this judgment, the court will apply good sense and practical wisdom. Ultimately, the court's sense of fairness, as this concept has been explained above, and its grasp of realities and perceptions will be determinative."*

The final noteworthy passage in **Jones** is the following:

> *"[17] In every context, the test for apparent bias requires consideration of a possibility, applying the information known to and attributes of the hypothetical observer. Some reflection on the attributes of this spectator is appropriate. It is well established that the hypothetical observer is properly informed of all material facts, is of balanced and fair mind, is not unduly sensitive and is of a sensible and realistic disposition. Such an observer would, in my view, readily discriminate between a once in a lifetime jury and a professional judge. The former lacks the training and experience of the latter and is conventionally acknowledged to be more susceptible to extraneous factors and influences. Moreover, absent actual bias (a rare phenomenon), the proposition that a judge will, presumptively, decide every case dispassionately and solely in accordance with the*

evidence seems to me unexceptional and harmonious with the policy of the common law."

[149] The latter observation may be linked with the judicial oath of office. This is statutory in nature. By section 19 of the Justice (NI) Act 2002 every person appointed to a judicial office specified in Schedule 6 must, as a pre-condition of appointment, either swear or affirm that he/she –

> *"….. will well and faithfully serve in the office of* [name] *and that I will do right to all manner of people without fear or favour, affection or ill-will according to the laws and usages of this realm."*

It may be said that while the oath, or affirmation, has several identifiable components that which shines brightest is the solemn undertaking of judicial impartiality. While the statutory oath (or affirmation) is not determinative of recusal issues, I consider that it must, nonetheless, rank as a factor of some potency, though not a complete answer. This was acknowledged in Davidson v Scottish Ministers [2004] UKHL 34 at [] and [57].

[150] In ***Smith v Kvaerner Cementation Foundations and Bar Council*** [2006] 3 All ER 593, the central issue was that of waiver of objection by a litigant to a part-time judge trying his case. The Court of Appeal held that an effective waiver had not been made. Delivering the judgment of the Court of Appeal, Lord Phillips CJ cited an earlier decision of the Court in ***Jones v DAS Legal Expenses Insurance*** [2004] IRLR 218:

> *"[35] (i) If there is any real as opposed to fanciful chance of objection being taken by that fair-minded spectator, the first step is to ascertain whether or not another judge is available to hear the matter. It is obviously better to transfer the matter than risk a complaint of bias. The judge should make every effort in the time available to clarify what his interest is which gives rise to this conflict so that the full facts can be placed before the parties.*
>
> *(ii) Some time should be taken to prepare whatever explanation is to be given to the parties and if one is really troubled perhaps even to make a note of what one will say.*
>
> *(iii) Because thoughts that the court may have been biased can become festering sores for the disappointed litigants, it is vital that the judge's explanation be mechanically recorded or carefully noted where that facility is not available. That will avoid that kind of controversy about what was or was not said which has bedevilled this case.*

> *(iv) A full explanation must be given to the parties. That explanation should detail exactly what matters are within the judge's knowledge which give rise to a possible conflict of interest. The judge must be punctilious in setting out all material matters known to him. Secondly, an explanation should be given as to why the problem had only arisen so late in the day. The parties deserve also to be told whether it would be possible to move the case to another judge that day.*
>
> *(v) The options open to the parties should be explained in detail. Those options are, of course, to consent to the judge hearing the matter, the consequence being that the parties will thereafter be likely to be held to have lost their right to object. The other option is to apply to the judge to recuse himself. The parties should be told it is their right to object, that the court will not take it amiss if the right is exercised and that the judge will decide having heard the submissions. They should be told what will happen next. If the court decides the case can proceed, it will proceed. If on the other hand the judge decides he will have to stand down, the parties should be told in advance of the likely dates on which the matter may be re-listed.*
>
> *(vi) The parties should always be told that time will be afforded to reflect before electing. That should be made clear even where both parties are represented. If there is a litigant in person the better practice may be to rise for five minutes. The litigant in person can be directed to the Citizen's Advice Bureau if that service is available and if he wishes to avail of it. If the litigant feels he needs more help, he can be directed to the chief clerk and/or the listing officer. Since this is a problem created by the court, the court has to do its best to assist in resolving it."*

The Lord Chief Justice also observed:

> "[29] *This is useful guidance but, as the court made plain, it should not be treated as a set of rules which must be complied with if a waiver is to be valid. The vital requirements are that the party waiving should be aware of all the material facts, of the consequences of the choice open to him, and given a fair opportunity to reach an un-pressured decision."*

[151] In the ***Smith*** case [*supra]*, the issue concerned the composition of an employment tribunal. In the judgment of the Court of Appeal, one finds the following passage:

> "[28] …(*vi) Without being complacent nor unduly sensitive or suspicious, the observer would appreciate that professional judges are trained to judge and to judge objectively and dispassionately. This does not undermine the need for constant vigilance that judges maintain that impartiality. It is a matter of balance. In Locabail , paragraph 21, the court found force in these observations of the Constitutional Court of South Africa in President of the Republic of South Africa & Others v South African Rugby Football Union & Others 1999 (7) BCLR (CC) 725, 753:−*
>
> *'The reasonableness of the apprehension [for which one must read in our jurisprudence "the real risk"] must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or pre−dispositions. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial'*
>
> *vii) Moreover, in this particular case, the charge of impartiality has to lie against the tribunal and this tribunal consisted not only of its chairman but also of two independent wing−members who were equal judges of the facts as the chairman was. Their impartiality is not in question and their decision was unanimous."*

[152] Also noteworthy is the statement in ***Re Medicaments*** [2001] 1 WLR 700:

> "[86] *The material circumstances will include any explanation given by the judge under review as to his knowledge or appreciation of those circumstances. Where that explanation is accepted by the applicant for review it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the viewpoint of a fair−minded observer. The court does not have to rule whether the explanation should be accepted or rejected. Rather it has to decide whether or not the fair−minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced."*

It has also been said that while the properly informed hypothetical observer is presumptively aware of the legal traditions and culture of the United Kingdom, he will be neither complacent nor unduly sensitive or suspicious. Finally, I draw attention to the words of Lord Hope in ***Gillies v Secretary of State for Work and Pensions*** [2006] 1 WLR 751:

> "[17] *The fair-minded and informed observer can be assumed to have had access to all the facts that were capable of being known by members of the public generally, bearing in mind that it is the appearance that these give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed … that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant*".

[153] There is one further consideration worthy of highlighting which, in my view, has not been sufficiently emphasized in the leading cases in this field. It is that no litigant has a right to select or dictate the composition of the court or tribunal in the litigation in which he is involved. The corollary of this is that in every case where a question is raised about the impartiality of the judge or tribunal, a point of substance is necessary and the objection must be substantiated. I consider that this flows from the statement of Laws LJ in ***Her Majesty's Attorney General v Pelling*** [2006] 1 FLR 93:

> "[18] *In determining such applications, it is important that judicial officers discharge their duty to do so and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge they will have their case tried by someone thought to be more likely to decide the case in their favour*".

There may be cases where, either in the context of an objection or of the court's own motion, no further enquiry is necessary because the fact or factor giving rise to concern is so plainly potent. In passing, it was not submitted by the moving party that this was such a case. It seems to me that paragraph [25] of ***Locabail*** can be readily linked to the exhortation of Laws LJ in ***Pelling,*** that, in circumstances of this kind, the court must be alert to ensure that its process is not the subject of "*manipulation and contrived delay*".

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

(a) The presumed independence of the judiciary.

(b) The statutory judicial oath of office.

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

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

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

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

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

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

(i) The over-riding objective.

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

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

[155] What is rehearsed in [154] above will be a useful checklist in many cases. It does not purport to be an exhaustive menu and will require some adaptation in differing litigation contexts. The present context is one of judicial review proceedings involving, at heart, pure questions of law: the interpretation of the Ombudsman's report, the construction of certain statutory provisions and the determination of whether certain undisputed conduct has lain within the confines of the relevant legal powers (also undisputed) or, in certain specific respects, has infringed the common law requirement of procedural fairness.

The Principles Applied

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

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

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

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

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

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

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

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

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

(i) In circumstances where the interested party's solicitors have, throughout the flurry of recent correspondence, been especially keen

to establish any connections between the second Applicant (Mr White) via the medium of consultations with his counsel relating to the 2002 litigation, the solicitors who represented the judicial review applicant (the Police Association) have stated:

> "*We have no record of Mr Raymond White's role ….*
>
> *Attendance at consultations with counsel and at Court whereby* [Mr X – not Mr White] *and a Police Federation and Superintendent's Association representative.*"

[157] In R v Canning [2010] NICC 41, in a ruling consisting of 128 paragraphs, I made a decision staying the prosecution of the accused person on the ground of abuse of process. The case had some notoriety, the trial and the court's decision attracting much publicity. The material features of the course of the trial are set forth in [87] – [91] of the judgment. The essence of the Court's ruling was that the prosecution had become an abuse of process having regard to serial failures in the matter of disclosure to the Accused. The court stated in the final section of its judgment, at [128]:

> "***[128]*** *Finally, the handling of disclosure throughout the history of this prosecution and trial is to be lamented and must be strongly deprecated. It reflects poorly and adversely on the police officers concerned and the police organisation as a whole. It has been the cause of enormous disruption and delay in the transaction of this trial, coupled with associated increased cost to the public purse in an era of acute economic stringency. The failures which have occurred are of some gravity and it is to be expected that the Chief Constable will ensure that their origins and causes are scrupulously investigated, with a view to correcting any weaknesses, cultural or endemic or otherwise, in the police system so as to ensure that there will be no comparable recurrence.*"

The blistering nature of this judicial criticism of the police requires no elaboration.

[158] The decision of this court in R v Canning had a sequel of some significance. As appears from the judgment of Maguire J in Re Canning's Application [2016] NIQB 73 the several public authorities who became involved in the wake of this court's damming criticism of the police included the Police Ombudsman. The judgment states at [7]:

> "*PONI responded to various letters over a substantial period. It confirmed that it did investigate the matter.*

> *What is said to be a summary of its report was provided to the applicant's solicitor. The court has not seen the full report. The summary, in broad terms, notes the referral of the judge's comments to it by the PSNI. As a result PONI investigators spoke to the senior PSNI officer who had reviewed the case. The review apparently concluded that in the case the relevant disclosure officer had no grasp of his obligations under the 1996 Act and had failed to recognise the issues which arose. Two officers, in particular, accepted that they failed to comply with disclosure requirements. As a remedial step, an action plan had been developed to prevent such failings in the future. The summary indicates that the PSNI had since overhauled their disclosure system. The changes were welcomed by PONI in the summary. PONI's conclusion was that the matter had been addressed by PSNI which had identified failings and put new training systems in place to prevent a recurrence."*

A perusal of the remainder of the judgment indicates that in a substantial body of correspondence involving the judicial review applicant's solicitors, there were repeated references to the judgment of this court in R v Canning.

[159] The hypothetical independent observer has the virtue of being in possession of all information having any bearing on the application of the legal test for apparent bias. I consider that this information would inevitably include the two published judgments noted above. Senior counsel on behalf of both the Ombudsman and the interested party readily agreed.

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

[161] Imperfect recall is not confined to this trial judge. The solicitors representing the interested party in these proceedings also represented the Defendant in R v Canning and the same person in Re Canning's Application. Furthermore, the applicant in the latter case was represented by counsel who is also junior counsel for the interested party in these proceedings. Judgment was given just over one year ago. The two cases are inextricably linked. Neither of the Canning decisions was brought to the attention of the court. Given their undisputed relevance, this is presumably attributable to faulty recollection. No other explanation was proffered. There can be no dispute that the imperfect and fallible human memory must be one of the factors which the hypothetical observer

would weigh in the present context. None of the parties sought to argue differently.

[162] Similarly the court's attention was not drawn to the decision in In the Matter of Appeals Pursuant to Section 28(2D) of the Criminal Appeal (NI) Act 1980 v Decisions of the Taxing Master [2011] NIQB 80. Given the issues raised in the present application, this decision may be considered a little more relevant than some of the anecdotal and unattested examples which counsel sought to bring to the court's attention. It suffices to draw attention to the protagonists (without elaboration), the nature of the issue involved and what was at stake for the challenging parties. The case has several thought provoking features in the context of the small jurisdiction that is Northern Ireland, an issue to which I shall return presently.

[163] Some brief reflection on the attributes of the fair minded observer is instructive. This hypothetical person is something of a paragon of virtue. He/she is, at heart, fair minded. Other related qualities include independence and impartiality. The observer is detached and dispassionate, neither complacent nor unduly suspicious. He/she is temperate, measured and balanced. Finally, the observer is well informed. I consider that this must entail possession of knowledge of all facts and factors bearing on the central question, which is whether there is a sufficient and sustainable basis for having reservations about the ability of the assigned judge to avoid subconscious bias against one of the parties.

[164] At this point it is convenient to dispose of one of the issues. Mr McGrory QC, the late replacement counsel instructed (with Mr McQuitty) on behalf of the Ombudsman, sought to argue initially that the hypothetical observer would disbelieve the court's public statement that its first independent recollection of the case in question, 16 years ago, was stirred by the material brought to its attention during the days immediately preceding the date scheduled for pronouncement of remedy and costs viz 12 January 2018. When probed by the court, Mr McGrory modified 'disbelief' to 'scepticism' and, finally, advanced yet another version of this submission which was not readily comprehensible. The 'scepticism' argument is manifestly untenable for the simple reason that this state of mind is not harmonious with the presumed attributes of the hypothetical observer, in particular those of fair-mindedness and intrinsic balance. The submission of Ms Doherty QC on behalf of the interested party on this issue is clearly to be preferred. Ms Doherty readily acknowledged that the court's statement to the aforementioned effect would be believed by the hypothetical observer, not least because there exists no evidence, direct or inferential, calling it into question.

[165] I turn to dispose of another discrete issue. Mr McGrory QC sought to argue that the Police Ombudsman could not reasonably have brought this application any earlier. The impetus for being driven to make this submission is not difficult to discern. The Ombudsman's legal representatives, in opting to move this

application to recuse, were clearly aware of the difficulty presented by the events of 14/15 December 2017and 08 January 2018 noted in [143] above. Self-evidently, the Ombudsman could have brought this application at that time. Equally clearly, the Ombudsman and his revamped legal team were also alert to the elephant in the room, namely at the stage when they belatedly decided to advance this application they had, for a period of almost one month, been in receipt of a judgment finding in favour of the Applicants. Furthermore, they evidently considered that they would have to put before the court something to explain why they were, at a belated stage, minded to no longer accept the considered advice of an eminent member of the senior Bar and his junior counsel, given twice – and endorsed by the Ombudsman's Director of Legal Services - having done so during a (contextually) lengthy preceding period.

[166] The suggestion that the information available to the Ombudsman on 14 December 2017 was insufficient to mount a recusal application is in my judgement manifestly unsustainable. The basic, essential facts were known to him as of then. In an attempt to circumvent this hurdle, an elaborate construct has been placed before the court. Its centrepiece is an affidavit sworn by the Ombudsman's Director of Legal Services purporting to depose to the Ombudsman's state of mind and knowledge. The Ombudsman has sworn no affidavit. The impropriety involved in the lawyer's affidavit is unmistakable. It is compounded by the fact that it also fails to comply with Order 41, Rule 5 of the Rules of the Court of Judicature. This is quite unacceptable. Equally improper is the inclusion of certain averments, in paragraphs 13 and 18 thereof especially (*"… presumably with Mr McCloskey QC"* being a paradigm illustration) which, in addition to being inaccurate rank speculation, are confounded by [146] and [156] (i) above. They also fail to engage with the objectively demonstrable inaccuracies in parts of the 'Irish Times' publication. The lawyer's affidavit further suffers from the impermissible infirmities of expressions of subjective personal opinion, pure comment and sworn argument. An application to file a further affidavit rectifying these multiple deficiencies would have been favourably received by the court. There was none.

[167] Another element of this construct is the suggestion that the Ombudsman declined to take action at the mid - December stage partly because of his lawyers' assessment following the hearing that the decision of the court was likely to favour the Applicants. This is most difficult to fathom, being couched in terms which appear self-contradictory. It also fails to engage with the reaffirmation of this stance *circa* 08 January 2018. Furthermore, in this context, it is convenient to nail one particular point. Having regard to the totality of the evidence, the communications between the Ombudsman's former senior counsel and senior counsel for the Applicants before the hearing began are a paradigm red herring. The Ombudsman was advised immediately after the hearing that there were no grounds for a recusal application and accepted such advice. He would inevitably have been given the same advice before the hearing began. It is inconceivable that he would not have accepted such advice: the events of 14/15 December 2017 <u>and</u> 08 January 2018

establish this fact beyond peradventure. The submissions of Mr McGrory QC on this discrete issue resolve to a desperate attempt to airbrush this unassailable reality.

[168] To summarise, I find the evidence and argument put forward on behalf of the Ombudsman pertaining to the aforementioned issue flimsy, artificial and entirely unpersuasive.

[169] The aforementioned assessment and conclusion also dispose of one of Mr McGrory's main arguments, which was that his client was deprived of the opportunity of bringing a recusal application in advance of the hearing as he was not aware of the inter-counsel communications. For the reasons explained the court finds no merit whatsoever in this contention. Furthermore, it is confounded by the undisputed legal principle that a recusal application can be made at any stage of the proceedings in question. It is distinctly unfortunate that this contention was advanced since one of its effects was to cast a certain shadow over the conduct of both counsel concerned. It is appropriate for the court to state unequivocally that there is no basis or justification whatsoever for such shadow.

[170] In my opinion the application of the governing test requires a balancing exercise on the part of the Court. This task does not partake of the mechanistic or arithmetical. It is, rather, a classic exercise in evaluative judgement. The appearance of bias principle is rooted in fairness and, as Lord Mustill said memorably in Doody (*supra*), fairness entails "*essentially an intuitive judgement*". Before exercising the judgement the scales must, of course, be properly prepared. Hence the anxious task of identifying all material ingredients in the equation carried out above.

[171] I consider that the independent observer would be particularly struck by the joint assessment of the parties' respective leading counsel at an earlier stage of the proceedings; the repetition of such assessment on the Police Ombudsman's side at a later stage; the acceptance of both the Ombudsman and his Senior Legal Adviser of the advice of senior counsel to this effect; the consideration that the interested party's legal representatives, armed with a significant quantity of material information in the immediate aftermath of judgment having been delivered and having pursued their own further enquiries, took no further action; the further consideration that the newspaper publication on 06 January 2018 which is advanced unequivocally as the main impetus for the "recusal activity" of the past two weeks, did not alter or correct the information which, by then, had been in the possession of both the Ombudsman's legal representatives and those of the interested party for some time; the twin considerations that Mr White was not a party in the 2001 litigation and has the status of a nominal, representative litigant in these proceedings; and the absence of any evidence of any communication or interaction involving this trial judge and Mr White in the 2002 litigation, which

was one of the factual issues of particular interest and concern to the interested parties' solicitors in the multiple letters which they wrote.

[172] Other facts and factors which, in my judgement, would be particularly striking to the hypothetical observer include the absence of any suggestion that any aspect of the trial judge's prolonged conduct of these proceedings has entailed even the slightest indication of subconscious bias; equally, the absence of any suggestion to the same effect in any of the 121 paragraphs of the substantive judgment of the court, which has been in the possession of all parties and their representatives since 21 December 2017; the absence of any suggestion of anything in the trial judge's reputation or standing which would fortify the apprehension of subconscious bias; the absence of any suggestion that the trial judge has espoused a view of any of the relevant legal issues at any time in any way – in a judgment, a lecture, a published paper or through any other medium; and the substantial elapse of time, 16 years.

[173] Furthermore, I consider that the interested party would take carefully into account Mr McMillen's submission that one must be careful not to identify the lawyer with the cause and one must also be alert to the legal traditions of this jurisdiction. Included among these are a code of conduct for barristers which enshrines the so-called "cab rank" rule, one effect whereof is that a practising barrister must be prepared to accept instructions both for and against the same client. This has an interesting resonance in the present case given that this trial judge acted in cases both for and against the police when in practice.

[174] Another ingredient in the equation is what the court described as the "Northern Ireland factor" in exchanges with counsel. This arose out of a somewhat opaque statement in Mr McGrory's submission. The upshot of the court's enquiry was an unequivocal acknowledgement by Mr McGrory that in the small jurisdiction of Northern Ireland there must be greater latitude than elsewhere in any context where a nexus can be drawn between an assigned trial judge and the judge's involvement in some previous case prior to appointment to judicial office. In this context I refer to [162] *supra*.

[175] The court also attempted to elicit from Mr McGrory whether he was submitting that any one fact or factor is determinative of this application. This enquiry arose out of his initial submission that the Court must accede to the application on the sole ground that his client had been deprived of the opportunity of bringing it before the hearing. The court has already disposed of this issue above. However, leaving that to one side, I found this submission quite puzzling. Mr McGrory ultimately accepted that this issue (which has no merit in any event) could not be determinative of the application.

[176] To all of the facts and considerations identified and highlighted above, one adds the unequivocal statement in the most authoritative and comprehensive

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

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

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

[178] Continuing, Lord Rodger stated, at [10]:

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

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

[179] Finally, the independent observer would be aware that these proceedings do not involve a once and for all opportunity for the losing party. There is a right of appeal entailing no threshold of permission to appeal and the grounds of appeal may incorporate a free standing challenge to this ruling. The final ingredient in the independent observer's knowledge would be that the court has rejected the Applicants' contention that the appropriate remedy is to quash the Ombudsman's report in its entirety. The observer would also be aware of the strenuous efforts on the part of the court during the twilight period between promulgation of substantive judgment and finalisation of remedy to bring to the parties' attention the possibility of a remedy involving the excision of certain offending passages from the report and the preservation of the remainder in its entirety. The impetus for considering this possibility was exclusively that of the court (via the medium of a formal direction). The ultimate remedial outcome espoused by the court is one which would preserve most of the impugned report of the Police Ombudsman, falling well short of that urged by the Applicants not to their liking. It stands in marked contrast to the nuclear option of quashing the report in its entirety. This simple analysis of this discrete issue on which the court was clearly favouring the Ombudsman would point away from, and not towards, any apprehension of subconscious bias.

[180] It has been repeatedly observed at the highest levels that formation of the evaluative judgment required to determine an application of this kind can be a difficult and challenging exercise. The only absolute rule is that there are no absolute rules: see for example Davidson v Scottish Ministers (No 2) [2004] UKHL 34, at [17] per Lord Bingham. An added difficulty is that the core legal principles, coupled with the general rules framed *in extenso* in Locabail, as endorsed in Al–Hassan, are formulated in open textured terms providing little concrete guidance. I reiterate that the timing of this application, which to many spectators may appear extraordinary, is not in my estimation a ground for refusing it. I address in [195] – [198] below one of the indispensable counterbalances.

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

Further Consideration

[182] A broad range of facts, considerations and issues has emerged during the most recent phase of these proceedings. While I have concluded that the test for apparent bias is not satisfied, that in my view is not, in the unique circumstances of this case, dispositive of the question of whether judicial withdrawal at this stage should occur. The High Court has at its disposal a rich reservoir of powers stored in its inherent jurisdiction: see Ewing v Times Newspapers [2010] NIQB 65 at [10]–[11] especially. I consider that judicial withdrawal from a given case is not necessarily dependent upon, or confined to, a successful recusal application. To instance but one example, a judge could legitimately withdraw from a case notwithstanding that all parties and their legal representatives were unanimous in the view that no grounds for doing so existed.

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

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

expected to grasp the legal intricacies and complications of the court's evaluation of the application to recuse.

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

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

[187] In these circumstances, yet another balancing exercise, in which <u>all</u> parties feature, falls to be performed by the court. It is a complex and challenging one, admitting of no obvious or easy answer. Following anxious reflection, my evaluative conclusion is that our legal system will not have served the families well if they are not given the opportunity of having this case heard by a differently constituted court. While I am alert to the remedy of an appeal, this, in my view, is not sufficient to displace this assessment. On the other side of the scales, the Applicants will enjoy all of the guarantees and safeguards which every litigation process provides and, further, they will be at liberty to urge another judge that this court' s analysis of the law is the correct one. They will also be the beneficiaries of a further specific case management direction: see [193] *infra*.

[188] The practical and legal effects of the foregoing are the following:

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

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

(iii) The judgment of this court will be neither binding on any party nor executory in nature. It will not bind a future court. It will, rather, assume a hybrid status, somewhat akin to that of an advisory opinion, which features in legal systems other than ours.

[189] In these unique and unprecedented circumstances, I am also obliged to reflect anxiously on the position of the Applicants who, but for these highly unexpected developments, would be the beneficiaries of the court's substantive judgment. Having reflected exhaustively on all of the arguments canvassed on behalf of the Police Ombudsman during the most recent phase of these proceedings, I consider it appropriate to highlight the following:

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

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

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

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

[190] I have not concealed my sympathies for the families. However, as in every species of litigation, a broader panorama must be reckoned and this includes other actors. Furthermore, the view that any re-hearing before a differently constituted court should be considerably more focused and refined than that which has been transacted must, from any reasonable perspective, possesses much merit and force. The hypothetical observer – fair-minded, balanced, detached, possessed of all the other admirable qualities noted above and alert to the central tenets of the overriding objective – might readily conclude that any re-hearing of this challenge should be confined to the single and fundamental issue of law relating to the scope of the Police Ombudsman's statutory powers.

[191] If the Ombudsman were to take the course mooted in [189] (iv) above this would not exclude the possibility of some measured and proportionate qualifying words.

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

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

Costs

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

Recusal Applications Generally

[195] I consider that great care must be taken in the compilation of every recusal application. First, it is essential that applications of this kind comply with the fundamental requirements of balance and candour. The judge to whom this type of application is directed does not have the benefit of legal advice or representation. Nor is the facility of a judicial or research assistant available. The judge is on his or her own. This is the reality of the situation in which the judge must perform a difficult balancing and evaluative exercise. It is of not less than fundamental importance that every application of this kind include all facts, considerations, legal submissions and authorities both in favour of and against recusal. The Police Ombudsman's application to the court in this case fell well short of this standard. Lack of balance, factual inaccuracy and incompleteness were three of its chief hallmarks.

[196] Second, the kind of omissions noted in [161] – [162] are to be avoided except where this is not humanly possible.

[197] Third, any affidavit evidence must comply scrupulously with Order 41 and avoid the defects noted in [166] above. Moreover, those who should properly swear affidavits should not shrink from doing so. Finally, the court understands fully why the interested party may have wished to swear an affidavit in the terms which he did. However, he should have been advised that this affidavit was largely inappropriate: first because it is replete with expressions of mere opinion and sworn argument; and, perhaps more fundamentally, the interested party's claim (in his affidavit) to be the independent observer was in my view misconceived since, given his intense interest in these proceedings, he was plainly not endowed with the essential attributes of the hypothetical observer. Ultimately this affidavit achieved nothing of substance.

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

Addendum: Final Order

[199] Pursuant to the further steps and developments directed and contemplated post-judgment in [191] – [193] above and having considered the further representations of all parties, the formulation of the Court's final order can now be undertaken. It is in the following terms:

1) By its judgment delivered on 22 December 2017 this Court decided as follows:

    (a) The first Applicant, Mr Hawthorne, is readily identifiable in the Police Ombudsman's Loughinisland "Public Statement" (the "*Report*") as the person to whom various criticisms and negative findings relating to the storage and disposal of the suspected murder vehicle and the simultaneous loss of an interior exhibit apply: see [67].

(b) Mr Hawthorne is vindicated unreservedly of any accusation, finding or determination of catastrophic failures in the original police investigation or collusion: [67] – [68].

(c) The report fell short of acceptable standards and quality and was thus antithetical to the statutory purposes: [68] – [69].

(d) In consequence of these failings on the part of the Police Ombudsman Mr Hawthorne has suffered unjustified severe public criticism: [118].

(e) The Police Ombudsman's portrayal of Mr Hawthorne's response to the inadequate disclosure made to him before publication of the report was inadequate and inaccurate: [110].

(f) The report's "*determination*" that Mr Hawthorne was guilty of an "*act of negligence*" vis-à-vis the storage and disposal of the suspected murder vehicle and the loss of an interior exhibit are unlawful, being in breach of the legal requirements of procedural fairness.

(g) Mr Hawthorne's status at all stages of the Ombudsman's Loughinisland investigation was that of mere "witness": [110].

(h) The Police Ombudsman failed to take proper investigatory steps regarding the matter of which Mr Hawthorne was accused: [109] and [110].

(i) Turning to the broader, representative challenge of the second Applicant, Mr White, certain fundamental requirements of procedural fairness must be observed by the Police Ombudsman in every case where it is proposed to promulgate a "public statement" which is critical of or otherwise adverse to certain persons: [113] – [114].

(j) If and to the extent that any of these requirements was not observed in the compilation of the report the vitiating factor of procedural unfairness occurred: [114] – [115].

2) Finally, the Court decided that the Police Ombudsman's "determination" of police collusion in the Loughinisland murders is unsustainable in law as it was not in accordance with the Ombudsman's statutory powers: see [70] – [103] and the corresponding conclusion in [118].

3) The Police Ombudsman was required by the Court's Order of 26 January 2018 to take certain steps. The Court has now seen certain *inter – partes* letters, which state:

(i) Those passages in the report reflecting adversely on Mr Hawthorne will be removed: see [131](d) – (f) of the judgment of the Court.

(ii) The report will be amended to include an unambiguous statement that no personal negligence is attributable directly to Mr Hawthorne. *Ditto* none of the investigatory failures identified in the Report.

(iii) In furtherance of (ii), the "Collusion" section of the Report [7] will be amended.

(iv) Reflecting all of the above, the Police Ombudsman will publish an amended Loughinisland Report.

Pausing, it is clear that the Ombudsman has accepted the relevant exhortations in the court's judgment.

4) The purpose of the Court's Order of 26 January 2018 was to identify and refine the issues to be considered in the event of any relisting of this case. The effect of the Police Ombudsman's letters is that none of the issues identified in [1] above is any longer in dispute. The only disputed issue is that specified in [2] above. The net result is unqualified success for Mr Hawthorne in his legal challenge. For the avoidance of all doubt, this court's extant judgment takes full effect, with the exception of [2] above. The judgment will be re-promulgated to make this clear.

5) There are two discrete ancillary issues on which the parties' representatives have joined issue, requiring adjudication by the Court in consequence. The first is whether the Court should make a declaration enshrining and reflecting its assessments, findings and conclusions which have given rise to the Police Ombudsman's concessions reflecting [1] and [3] above. The main governing principles are outlined in [124] – [125] of the Court's judgment. A declaration would both vindicate Mr Hawthorne's unqualified success in his legal challenge and provide him with a coherent and unambiguous judicial statement of the elements of his success. It would also further the aforementioned principles. I have no hesitation in confirming that the Court should make a declaration: see [12] below.

6) The second contentious issue is that of costs. The Police Ombudsman's proposal that Mr Hawthorne recover 50% only of his costs airbrushes all of the foregoing, in particular the unassailable assessment that Mr Hawthorne's legal challenge has succeeded in full <u>and</u> blithely ignores the statements in [68] – [69] of the Court's judgment:

> *"The above conclusions ……… vindicate Mr Hawthorne unreservedly. However, it should not have been necessary for Mr Hawthorne to initiate legal proceedings of this kind in order to secure the judicial analysis, conclusions and vindication of which he is now the beneficiary …*
>
> *The authors of the report were careless, thoughtless and inattentive in the language and structuring of the document …. A report of acceptable standards and quality would have had no potential for the lengthy reflection and debate which have arisen …."*

The Police Ombudsman spurned repeated opportunities to make the concessions ultimately afforded, from the pre-action stage onwards. The conclusion that Mr Hawthorne is entitled to recover his costs in full follows inexorably. The Police Ombudsman's offer of 50% manifestly fails to engage with the realities.

7) As the summary in [1] above demonstrates, the wider challenge brought by Mr White on behalf of retired police officers generally has similarly succeeded, leaving only for re-litigation the issue specified in [2]. The fact that there will be re-litigation of one further issue which the Court determined in favour of Mr White and his Association cannot operate to displace the general rule that costs follow the event. They are not to be faulted for the postponement of <u>one</u> aspect of the ultimate "event". Furthermore Mr White and his Association incurred substantial additional costs in successfully resisting the post-judgment recusal application unsuccessfully pursued by the Police Ombudsman. To this must be added the Court's unreserved criticism of the Ombudsman's conduct of such application and the proceedings generally. In the alternative this may be viewed through the 'wasted costs' prism. The conclusion that Mr White is entitled to recover his costs incurred to date, in full, follows with equal clarity.

8) The Police Ombudsman's retreat from his initial position (offering 50% of Mr Hawthorne's costs) to a later position (suggesting deferral of all cost issues) may be considered symptomatic of many of the shortcomings which have characterised the Ombudsman's conduct of these proceedings, dating from the filing of wholly inappropriate affidavits at a much earlier stage. Furthermore, the Court is bound to deprecate the attempted imposition of a condition that Mr Hawthorne receive 50% (only) of his costs in return for withdrawing from these proceedings. The Court considers this attempt to thwart Mr Hawthorne's constitutional right of access to the court quite improper.

9) This Court is better equipped and positioned to make a fully informed judgment of all of the complex and multi-layered issues bearing on the

resolution of the parties' costs dispute than any other Court could conceivably be at some unspecified future date. The Ombudsman's belated deferral suggestion is therefore rejected. Finally, the resolution of all costs incurred to date at this stage is manifestly in furtherance of the overriding objective.

10) To summarise, the Police Ombudsman will pay all of both Applicants' reasonable legal costs and outlays incurred to date, to be taxed in default of agreement.

11) There will be a relisting before an appropriately constituted Court on 23/24 April 2018 for the purpose of re-examining this Court's conclusions relating to the content and scope of the Police Ombudsman's statutory powers in [70] – [103] of its judgment and the related conclusion in [118].

Declaration

12) **It is hereby declared** ***that the Police Ombudsman's Loughinisland Murders "Public Statement" (the 'Report') is unlawful in all of the following respects, as cross-referenced to the corresponding passages in the judgment of the Court delivered on 22 December 2017:***

(a) ***The first Applicant, Mr Hawthorne, is readily identifiable in the Report as the person to whom various criticisms and negative findings relating to the storage and disposal of the suspected murder vehicle and the simultaneous loss of an interior exhibit apply: see [67].***

(b) ***Mr Hawthorne is vindicated unreservedly of any accusation, finding or determination of catastrophic failures in the original police investigation or collusion: [67] – [68].***

(c) ***The Report fell short of acceptable standards and quality and was thus antithetical to the statutory purposes: [68] – [69].***

(d) ***In consequence of these failings on the part of the Police Ombudsman Mr Hawthorne has suffered unjustified severe public criticism: [118].***

(e) ***The Police Ombudsman's portrayal of Mr Hawthorne's response to the inadequate disclosure made to him before publication of the report was inadequate and inaccurate: [110].***

(f) ***The Report's "determination" that Mr Hawthorne was guilty of an "act of negligence" vis-à-vis the storage and disposal of the suspected***

murder vehicle and the loss of an interior exhibit are unlawful, being in breach of the legal requirements of procedural fairness.

(g) Mr Hawthorne's status at all stages of the Ombudsman's Loughinisland investigation was that of mere "witness": [110].

(h) The Police Ombudsman failed to take proper investigatory steps regarding the matter of which Mr Hawthorne was accused: [109] and [110].

(i) Turning to the broader, representative challenge of the second Applicant, Mr White, certain fundamental requirements of procedural fairness must be observed by the Police Ombudsman in every case where it is proposed to promulgate a "public statement" which is critical of or otherwise adverse to certain persons: [113] – [114].

(j) If and to the extent that any of these requirements was not observed in the compilation of the Report the vitiating factor of procedural unfairness occurred: [114] – [115].

The Court records that the Ombudsman has now [09/03/18] re-promulgated his Loughinisland Report, apparently in accordance with the court's judgment, as regards [1] above.

Formal Ancillary Provisions

13) These are:

(i) The substantive judgment of the Court delivered on 21 December 2017 takes effect in the manner elaborated in [1] – [4] above.

(ii) There shall be no Order regarding the costs of the interested party, save that same be taxed in accordance with Schedule 2 to the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981.

(iii) The Applicants' skeleton argument for the relisted hearing shall be provided by 23 March 2018.

(iv) The Respondent's replying skeleton argument shall be provided by 30 March 2018 and that of the interested party by 09 April 2018.

(v) The revised version of the Respondent's Loughinisland Report, intimated in its aforementioned letters, shall be both [1] published and [2] provided to the

Applicants' solicitors and the Court, in the form of a supplementary bundle, by 16 March 2018.

(vi) One fresh set of the extant trial bundles will be provided by the Respondent to the Court by 23 March 2018.

(vii) Confirmation that the authorities' bundles remain unchanged will be provided to the Court by the same date.

(viii) There will be one final procedural listing at 09.45, 12 April 2018.

Dated this 12 day of March 2018

[200] Paragraph [188] (iii) above must now, self-evidently, be modified, to reflect the terms of the final Order of the Court above. The judgment of the court takes effect to the extent set forth in [199] above.

APPENDIX 1: STATUTORY PROVISIONS

The Police (NI) Act 1998.

Section 51

"(1) 51. - (1) For the purposes of this Part there shall be a Police Ombudsman for Northern Ireland.

(2) The person for the time being holding the office of Police Ombudsman for Northern Ireland shall by that name be a corporation sole.

(3) Schedule 3 shall have effect in relation to the Police Ombudsman for Northern Ireland (in this Part referred to as "the Ombudsman").

(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.

(5) The Independent Commission for Police Complaints for Northern Ireland is hereby abolished."

Section 52

“(1) For the purposes 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.

(2) Where a complaint-

(a) is made to the Chief Constable; and

(b) appears to the Chief Constable to be a complaint to which subsection (4) applies,

the Chief Constable shall take such steps as appear to him to be desirable for the purpose of preserving evidence relating to the conduct complained of.

(3) The Ombudsman shall-

(a) record and consider each complaint made or referred to him under subsection (1); and

(b) determine whether it is a complaint to which subsection (4) applies.

(4) Subject to subsection (5), this subsection 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.

(5) Subsection (4) does not apply to a complaint in so far as it relates to the direction and control of the police force by the Chief Constable.

(6) Where the Ombudsman determines that a complaint made or referred to him under paragraph (1) is not a complaint to which subsection (4) applies, he shall refer the complaint to the Chief Constable, the Board, the Director or the Department of Justice as he thinks fit and shall notify the complainant accordingly.

(7) A complaint referred under subsection (6) shall be dealt with according to the discretion of the Chief Constable, the Board, the Director or the Department of Justice (as the case may be).

(8) Subject to subsection (9), where the Ombudsman determines that a complaint made or referred to him under subsection (1) is a complaint to which subsection (4) applies, the complaint shall be dealt with in accordance with the following provisions of this Part; and accordingly references in those provisions to a complaint shall be construed as references to a

complaint in relation to which the Ombudsman has made such a determination.

(9) If any conduct to which a complaint wholly or partly relates is or has been the subject of disciplinary or criminal proceedings, none of the following provisions of this Part shall have effect in relation to the complaint in so far as it relates to that conduct.

(10) In the case of a complaint made otherwise than as mentioned in subsection (2)(a), the Chief Constable shall, if so requested by the Ombudsman, take such steps as appear to the Chief Constable to be desirable for the purpose of preserving evidence relating to the conduct complained of."

Section 53 (in part)

"(1) The Ombudsman shall consider whether the complaint is suitable for informal resolution and may for that purpose make such investigations as he thinks fit.

(2) A complaint is not suitable for informal resolution unless-

(a) the complainant gives his consent; and

(b) it is not a serious complaint."

Section 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 subsection (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."

Section 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.

(1A) Where an investigation is authorised by virtue of section 85 (read with section 86A) of the Criminal Justice Act 2003 (investigation of the commission of certain offences by persons acquitted), the Ombudsman shall appoint an officer of the Ombudsman to conduct the investigation. [added 21 April 2007]

(2) The Department of Justice may by order provide that any provision of the Police and Criminal Evidence (Northern Ireland) Order 1989 which relates to investigation of offences conducted by police officers (within the meaning of that Order) shall apply, subject to such modifications as the order may specify, to investigations under this section conducted by persons who are not police officers (within the meaning of that Order).

(3) A person employed by the Ombudsman under paragraph 3(1) of Schedule 3 shall for the purpose of conducting, or assisting in the conduct of, an investigation under this section have all the powers and privileges of a constable throughout Northern Ireland and the adjacent United Kingdom territorial waters; and subsection (3) of section 32 of the Police (Northern Ireland) Act 2000 applies for the purposes of this subsection as it applies for the purposes of subsection (2) of that section.

(4) Section 66 applies to a person to whom subsection (3) applies as it applies to a constable.

(5) A person to whom subsection (3) applies shall not be regarded as in police service for the purposes of-

(a) Article 145 of the Trade Union and Labour Relations (Northern Ireland) Order 1995; or

(b) Article 243 of the Employment Rights (Northern Ireland) Order 1996.

(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."

Section 58

"(1) The Ombudsman shall consider any report made under section 56(6) or 57(8) and determine whether the report indicates that a criminal offence may have been committed by a member of the police force.

(2) If the Ombudsman determines that the report indicates that a criminal offence may have been committed by a member of the police force, he shall send a copy of the report to the Director together with such recommendations as appear to the Ombudsman to be appropriate.

(3) Where a report is sent to the Director under subsection (2), the Ombudsman shall, at the request of the Director, ascertain and furnish to the Director all such further information in relation to the complaint or matter dealt with in the report as appears to the Director to be necessary for the discharge of his functions."

Section 58A

"(1) If the Ombudsman-

(a) determines that a report made under section 56(6) or 57(8) does not indicate that a criminal offence may have been committed by a member of the police force, and

(b) considers that the complaint is not a serious one,

he may determine that the complaint is suitable for resolution through mediation.

(2) If he does so, he must inform the complainant and the member of the police force concerned.

(3) If the complainant and the member of the police force concerned agree to attempt to resolve the complaint through mediation, the Ombudsman shall act as mediator.

(4) Anything communicated to the Ombudsman while acting as mediator is not admissible in evidence in any subsequent criminal, civil or disciplinary proceedings.

(5) But that does not make inadmissible anything communicated to the Ombudsman if it consists of or includes an admission relating to a matter which does not fall to be resolved through mediation.

(6) If a complaint is resolved through mediation under this section, no further proceedings under this Act shall be taken against the member of the police force concerned in respect of the subject matter of the complaint."

Section 59

"(1) Subsection (1B) applies if-

(a) the Director decides not to initiate criminal proceedings in relation to the subject matter of a report under section 56(6) or 57(8) sent to him under section 58(2); or

(b) criminal proceedings initiated by the Director in relation to the subject matter of such a report have been concluded.

(1A) Subsection (1B) also applies if the Ombudsman determines that a report under section 56(6) or 57(8) does not indicate that a criminal offence may have been committed by a member of the police force and-

(a) he determines that the complaint is not suitable for resolution through mediation under section 58A; or

(b) he determines that the complaint is suitable for resolution through mediation under that section but-

(i) the complainant or the member of the police force concerned does not agree to attempt to resolve it in that way; or

(ii) attempts to resolve the complaint in that way have been unsuccessful.

(1B) The Ombudsman shall consider the question of disciplinary proceedings.

(2) The Ombudsman 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 the disciplinary proceedings which he recommends as he thinks appropriate.

(2A) In a case mentioned in subsection (1A)(b), the Ombudsman shall, in considering the recommendation to be made in his memorandum, take into account the conduct of the member of the police force concerned in relation to the proposed resolution of the complaint through mediation.

(3) No disciplinary proceedings shall be brought by the appropriate disciplinary authority before it receives the memorandum of the Ombudsman under subsection (2).

(4) The Board shall advise the Ombudsman of what action it has taken in response to a recommendation contained in a memorandum sent to it under subsection (2); and nothing in the following provisions of this section has effect in relation to senior officers.

(5) If-

(a) a memorandum sent to the Chief Constable under subsection (2) contains a recommendation that disciplinary proceedings should be brought; but

(b) the Chief Constable is unwilling to bring such disciplinary proceedings,

the Ombudsman may, after consultation with the Chief Constable, direct him to bring disciplinary proceedings.

(6) Subject to subsection (7)-

(a) it shall be the duty of the Chief Constable to comply with a direction under subsection (5);

(b) the Chief Constable may not discontinue disciplinary proceedings which he has brought in accordance with-

(i) a recommendation contained in a memorandum under subsection (2); or

(ii) a direction under subsection (5).

(7) The Ombudsman may give the Chief Constable leave-

(a) not to bring disciplinary proceedings which subsection (6)(a) would otherwise oblige him to bring; or

(b) to discontinue disciplinary proceedings with which subsection (6)(b) would otherwise require him to proceed.

(8) Regulations made in accordance with section 25(3) or 26(3) may establish, or make provision for the establishment of, a special procedure for any case in which disciplinary proceedings are brought-

(a) where a memorandum under subsection (2) recommending the bringing of those proceedings contains a statement to the effect that, by reason of exceptional circumstances affecting the case, the Ombudsman considers that such special procedures are appropriate; or

(b) in compliance with a direction under subsection (5).

(9) The Chief Constable shall advise the Ombudsman of what action he has taken in response to-

(a) a recommendation contained in a memorandum under subsection (2);

(b) a direction under subsection (5)."

Section 61

"(1) The Ombudsman shall, at the request of the appropriate authority, report to the appropriate authority on such matters relating generally to the functions of the Ombudsman as the appropriate authority may specify, and the Ombudsman may for that purpose carry out research into any such matters.

(2) The Ombudsman may make a report to the appropriate authority on any matters coming to the Ombudsman's attention under this Part to which the Ombudsman considers that the appropriate authority's attention should be drawn in the public interest.

(2A) In subsections (1) and (2) "the appropriate authority" means, in relation to any matter—

(a) the Secretary of State, if the matter relates (in whole or in part other than incidentally) to an excepted matter or reserved matter or to a function conferred or imposed on the Secretary of State by or under a statutory provision;

(b) otherwise, the Department of Justice;

and in paragraph (a) "excepted matter" and "reserved matter" have the meanings given by section 4 of the Northern Ireland Act 1998.

(3) The Ombudsman shall, not later than 3 months after the end of each financial year, make to the Department of Justice a report on the discharge of the Ombudsman's functions during that year.

(4) The Ombudsman shall-

(a) keep under review the working of this Part; and

(b) at least once every five years, make a report on it to the Department of Justice.

(5) The Ombudsman shall send a copy of any report under this section to-

(a) the Board and the Chief Constable; and

(b) if the report concerns any such body of constables as is mentioned in section 60, to the authority maintaining it and the officer having the direction and control of it; and

(c) if the report concerns the National Crime Agency, to the Agency.

(5A) The Department of Justice shall—

(a) lay before the Northern Ireland Assembly a copy of every report received by the Department under this section; and

(b) cause every such report to be published.

(5B) Section 41(3) of the Interpretation Act (Northern Ireland) 1954(c) applies for the purposes of subsection (5A)(a) in relation to the laying of a copy of a report as it applies in relation to the laying of a statutory document under an enactment.

(6) The Secretary of State shall-

(a) lay before both Houses of Parliament a copy of every report received by him under this section; and

(b) cause every such report to be published."

61A. *Reports to Chief Constable and Board.* [added from 4 Nov 2001, rep. 2003 c.6 from 8 April 2003]

Supply of information by Ombudsman to Board. [added from 4 Nov 2001]

"61AA. - (1) The Ombudsman shall compile, and supply the Board with, such statistical information as is required to enable the Board to carry out its functions under section 3(3)(c)(i) of the Police (Northern Ireland) Act 2000.

(2) The Ombudsman shall consult the Board as to-

(a) the information to be supplied under subsection (1); and

(b) the form in which such information is to be supplied.

(3) The Ombudsman shall supply the Board with any other general information which the Ombudsman considers should be brought to the attention of the Board in connection with its functions under section 3(3)(c)(i) of the Police (Northern Ireland) Act 2000."

Section 62

"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."

Section 63

"(1) No information received by a person to whom this subsection applies in connection with any of the functions of the Ombudsman under this Part shall be disclosed by any person who is or has been a person to whom this subsection applies except-

(a) to a person to whom this subsection applies;

(b) to the Department of Justice or the Secretary of State;

(c) to other persons in or in connection with the exercise of any function of the Ombudsman;

(ca) for the purposes of an inspection of the Ombudsman carried out by the Chief Inspector of Criminal Justice in Northern Ireland under Part 3 of the Justice (Northern Ireland) Act 2002; [added SR (NI) 2002/414 from 20 Dec 2002]

(d) for the purposes of any criminal, civil or disciplinary proceedings; or

(e) in the form of a summary or other general statement made by the Ombudsman which-

(i) does not identify the person from whom the information was received; and

(ii) does not, except to such extent as the Ombudsman thinks necessary in the public interest, identify any person to whom the information relates.

(2) Subsection (1) applies to-

(a) the Ombudsman; and

(b) an officer of the Ombudsman.

(2A) [added from 4 Nov 2001, am. 2003 c.6 from 8 April 2003] Subsection (1) does not prevent the Ombudsman, to such extent as he thinks it necessary to do so in the public interest, from disclosing in a report of an investigation under section 60A-

(a) the identity of an individual, or

(b) information from which the identity of an individual may be established.

(3) Any person who discloses information in contravention of this section shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) Nothing in subsection (1)(b) permits the disclosure to the Department of Justice of information—

(a) which has been supplied to the Ombudsman under section 66(1) of the Police (Northern Ireland) Act 2000(a) for the purposes of or in connection with an investigation under section 60A of this Act, and

(b) in relation to which the Ombudsman has been informed under section 66(3)(b) of the Police (Northern Ireland) Act 2000 that the information is, in the opinion of the Chief Constable or the Board, information which ought not to be disclosed on the ground mentioned in section 76A(1)(a) of that Act."

RUC (Complaints) Regulations 2001

Regulation 5: "Conditions to be met for complaints".

"Subject to regulations 6 and 10, the requirements for a complaint received under section 52(1) of the 1998 Act to be dealt with in accordance with the provisions of Part VII of the 1998 Act shall be:

(1) It is made by, or on behalf of, a member of the public;

(2) It is about the conduct of a member which took place not more than 12 months before the date on which the complaint is made or referred to the Ombudsman under section 52(1); and

(3)(a) A statement has not been issued in respect of the disciplinary aspects of an investigation under Article 9(11) of the Order or section 59(2) of the 1998 Act;

(b) the complaint has not been informally resolved in accordance with Article 5 of the Order or section 53 of the 1998 Act;

(c) the complaint has not been withdrawn within the meaning of Regulation 16 of the 1988 Regulations or Regulation 23 of the 2000 Regulations;

(d) the complaint has not been dispensed with under Regulation 17 of the 1988 Regulations or Regulation 25 of the 2000 Regulations;

(e) the complaint has not been otherwise dealt with under regulations made under 64(2)(*d*) or (*e*) of the 1998 Act, or

(f) the complaint has not otherwise been investigated by the police."

Regulation 6: "Exceptions for Certain complaints".

"(1) Regulation 5(2) shall not apply where the complaint is not the same or substantially the same as a previous complaint or matter and the Ombudsman believes that a member may have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings; and the Ombudsman believes that the complaint should be investigated because of the gravity of the matter or the exceptional circumstances.

(2) Regulation 5(2) and (3) shall not apply where new evidence has come to light which is not evidence which was reasonably available at the time of the original complaint, the Ombudsman believes that a member may have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings, and the Ombudsman believes that the complaint should be investigated because of the gravity of the matter or the exceptional circumstances.

(3) Where the Ombudsman decides that a case falls under Regulation 6(1) or (2), he shall investigate it under section 56 of the 1998 Act.

(4) Where the Ombudsman decides that a complaint meets the criteria in paragraph (1) or (2) except that the case is not grave or exceptional and the Ombudsman believes that the member may have committed a criminal offence then he may investigate it by applying section 54(3) of the 1998 Act.

(5) If any conduct to which a complaint wholly or partly relates is or has been the subject of disciplinary or criminal proceedings, the Ombudsman shall have no powers in relation to the complaint in so far as it relates to that conduct."

Regulation 11**:** **"Standard of proof"**

"11.—(1) Where a complaint or other matter relates to conduct by a member which occurred or commenced before 6th November 2000 a charge shall not be regarded as proved unless it is:

(a) admitted by the accused; or

(b) proved by the person presenting the case beyond reasonable doubt.

(2) Where a complaint or other matter relates to conduct by a member which occurred or commenced on or after 6th November 2000 the person considering the case shall not find that the conduct of the member concerned failed to meet the appropriate standard unless the conduct is—

(a) admitted by the member concerned; or

(b) proved by the person presenting the case, on the balance of probabilities, to have failed to meet the standard. "

APPENDIX 2

POLICE OMBUDSMAN'S REPORT – APPENDIX 1

Summary of findings in relation to core complaints made by the bereaved families of those murdered at Loughinisland on 18 June 1994

Allegation 1: Police failed to conduct an effective investigation of the Loughinisland murders.

I have articulated within the body of this public statement that police failed to pursue efficiently relevant lines of enquiry; failed to make timely arrests of suspects; failed to consider linked incidents; and failed to develop and implement a coherent forensic strategy.

Allegation 2: Police failed to keep the bereaved families updated as to progress in the investigation of the Loughinisland murders.

Whilst I accept that in 1994 there was no national police policy in place in respect of family liaison, it was widespread policing practice at the time of the Loughinisland murders to keep bereaved families informed as to developments in such an inquiry. This did not happen with the Loughinisland families until some years following the murders.

Allegation 3: Police failed to make an earnest effort to identify the persons responsible for the Loughinisland murders.

This complaint was primarily directed at the initial police investigative response to the attack at Loughinisland. Within this public statement I have described a catastrophic failure in the early stages of the police suspect strategy.

Allegation 4: Police failed to discharge the State's duties as required by Article 2 of the European Convention of Human Rights (ECHR), as incorporated by Schedule 1 of the Human Rights Act (1998).

I have expressed my opinion on a potential breach of Article 2 ECHR in a previous public statement concerning 'The events surrounding the bombing and murders at 38 Kildrum Gardens on 21 August 1988' where the evidence available persuaded me to do so. In that case I concluded that....*'police were very aware of the threat of the bomb, its location and their own duty to protect the public and maximise the safety of the police and security staff involved in any response. It is apparent that there was no contingency put in place to protect the public from the bomb, and whilst the responsibility for the murders remains with the bombers, there was a failure by the police to protect the lives of the local community who were in such a real and immediate danger....it is my opinion that police failed in their responsibilities to uphold Mr Dalton's right to life'*. That was an exceptional course to take and one which I may take again in the future. In

relation to this matter, I am not convinced that the evidence available allows me to form such an opinion.

Allegation 5: Police colluded with those responsible for the Loughinisland murders.

The bereaved families of those murdered at Loughinisland have articulated a range of issues, which they consider support their complaint of collusion. As articulated in my public statement, *'many of the individual issues, which I have identified in this report, including the protection of informants through both wilful acts and the passive 'turning of a blind eye', catastrophic failures in police investigations and the destruction of records 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'*.

Allegation 6: Forensic exhibits seized during the initial police investigation were not re-examined until mid-2005 following complaints by the families to the Police Ombudsman.

Although it is evident that the campaign for justice driven by the bereaved families of those murdered at Loughinisland has often been the catalyst for progress in the related police investigation, my investigation revealed that a number of exhibits were re-submitted for specialist forensic examination during 1999. Between 2001 and 2004 a period of forensic consultation took place where specialist advisors provided guidance on the best potential to secure forensic evidence in light of new and emerging techniques. A number of exhibits were submitted for re-examination utilising specialist techniques. I am satisfied that this was not as a result of complaints made by the families to my Office.

Allegation 7: A major exhibit in the Loughinisland murder inquiry, the Triumph Acclaim car used by the offenders was 'wilfully destroyed' some ten months after the attack and the destruction was authorised by a senior police officer, who may be related to individuals implicated in the attack.

My public statement outlines the investigation undertaken by my Office to establish the circumstances in which the car was disposed of by police some ten months after the murders at Loughinisland occurred. I have established that the officer responsible for the station yard at Saintfield Police Station sought authority to have the vehicle removed and scrapped. This authority was granted by a senior police officer in charge of the police station and who I am satisfied is not related to individuals suspected of having been responsible for the attack. Both of these officers stated that they believed that the SIO had authorised the destruction. There is no evidence, however, to corroborate these decisions, which I have determined to have been an act of negligence.

Whether or not subsequent examination of the car might have yielded further forensic opportunities which, given the conditions in which it had been retained, appears unlikely, the car should not have been destroyed without proper

consideration by the SIO in consultation with his forensic advisers. Whilst I have not found evidence of a sinister motive behind the destruction of the vehicle, I have identified negligence associated with its disposal**.**

Allegation 8: On 26 July 2005 the bereaved families met with a senior police officer of the PSNI who in addressing resourcing pressures for the police investigation of the Loughinisland murders referred to the loss of numerous experienced detectives due to early retirements under the Patten policing reforms. The families considered these comments to be insensitive.

My investigation spoke with the senior officer concerned who stated that in attempting to explain his difficulties in resourcing major crime inquiries in an open and transparent manner, he had made reference to the loss of experienced detectives but not intended his remarks to be insensitive. There is, however, no doubt that many of the bereaved families were affronted by the suggestion that the PSNI's investigation of the Loughinisland murders was being adversely impacted by early retirements.

Allegation 9: In July 2005 the PSNI's SIO of the Loughinisland murders investigation indicated to bereaved families that forensic evidence had been obtained and that an arrest was imminent. However, the arrest of the individual concerned was not made for some three years.

My investigation has established that police encountered difficulties in locating the suspect involved due to his itinerant lifestyle and that ultimately he was arrested outside Northern Ireland. He was interviewed at length and a file of evidence considered by the Director of Public Prosecutions but no prosecution was directed. I am satisfied that the police have accounted for the three year delay in this arrest.

Allegation 10: Vehicle Checkpoints (VCPs) established by police shortly after the attack at Loughinisland were strategically placed to allow those responsible for the murders access to and from the Heights Bar.

Security Forces responded promptly to the initial report of the Heights Bar attack, establishing VCPs in accordance with an established operational contingency plan. Both RUC and military units were involved, the latter self-deploying to VCPs and patrols. Having considered the timings, potential routes and distances involved, I believe it entirely plausible that those responsible for the murders could have travelled beyond the position of VCPs by the time they were established.

Allegation 11: Police delayed tasking deployment of a military helicopter to search for those responsible for the Loughinisland attack and the vehicle they used to flee the murder scene and once deployed the helicopter only remained in the area for one hour and eighteen minutes.

My investigation has not examined the conduct of any parties other than members of the RUC and PSNI. I have, however, established that a helicopter was requested, tasked and deployed by the military, who on the night of the Loughinisland

murders had access to police communications which was not unusual. Whilst there is no existing record of the flight plan undertaken by the military helicopter my enquiries have not identified any anomalies or irregularities in the timings of either the deployment or flying time of the helicopter involved.

Allegation 12: Police failed to properly investigate an anonymous letter that was forwarded to a local councillor concerning the Loughinisland murders and failed to make a timely arrest of the alleged author of the letter following their identification.

I am satisfied that police involved in the Loughinisland investigation failed to exploit the evidential opportunities presented by the anonymous information they received and as a result may well have lost another significant opportunity to bring those responsible for the attack before the courts.

APPENDIX 3

APPLICANTS' SCHEDULE & RESPONDENT'S RESPONSE

[SEE PARAGRAPHS [50] – [69] OF THE JUDGMENT]

	Note on Matters Affecting Mr White	**OPONI COMMENT**
Paragraph	**Text**	
Exec Summary, p2	The failure by the police to recognise the risks posed by the UVF unit in South Down gives cause for concern. Had this unit been subject to sustained and robust investigation for the previous murders they may have been arrested and brought to justice and may not have been involved in the Loughinisland attack, for which they were suspected. Whether the attack would then have been carried out by another group of individuals will never be known.	CID/SB responsibility (see Mr Hawthorne letter of 04.05.16 '…CID, even at a local level, had their own command and control structure, totally removed from me as the operational commander.')
Exec Summary, p4	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	CID responsibility (see Mr Hawthorne letter of 02.09.09 '… I had no involvement in the nature or direction of the CID inquiry.')

	scene management, house to house enquiries and investigative maintenance.	
Exec Summary, p 5	Throughout my investigation I have identified evidence of the destruction of important police documents such as records relating to the arms importation in late 1987/early 1988 and case-specific material such as forensic exhibits seized as part of the pre-cursor incidents and the Loughinisland murders. In addition, an important evidential opportunity was lost by the handling of the car used in the killings.	No allegation that Mr Hawthorne was involved in any way in this. Events regarding arms importation outside his division.
Exec Summary, p 7	Many of the issues I have identified in this report, including the protection of informants through both wilful acts and the passive 'turning a blind eye'; catastrophic failures in the police investigation; and destruction of exhibits and documents are in themselves evidence of collusion 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.	This is a "corporate" finding.
5.4	During the years preceding the murders at Loughinisland, a series of incidents occurred which police should have recognised as the escalating activities of a small but ruthless unit of the UVF operating from within the RUC's Newcastle	Not the Downpatrick sub-division.

	Sub-Division.	
5.5	Police investigations and intelligence relating to these incidents should have not only alerted police to the existence of this small group of loyalist terrorists but also informed concerted policing efforts aimed at disrupting activities, which presented a significant risk to the local community.	Not directed to Mr Hawthorne. Also, different sub-division.
5.6	Whilst my investigation has identified evidence that by mid-1993 a small team of Special Branch officers based at Newcastle Police Station did come to recognise the threat presented by these individuals, it is equally clear that there was little by way of a sustained policing response to their activities. Instead, the focus of police investigations and intelligence gathering within the Newcastle and Downpatrick Sub-Divisions was almost entirely directed towards the IRA.	There is a reference to intelligence gathering in the Downpatrick sub-division but this was the responsibility of SB officers.
5.7	Whilst recognising the challenges presented to the RUC by republican paramilitaries in South Down during the 'Troubles', the failure to properly acknowledge and address the UVF gang within this area, specifically the Newcastle and Downpatrick Sub-Divisions, demonstrated a lack of focus on the loyalist paramilitaries who were operating in the area resulting in	See above re 5.6

	heightened risk to members of the local community.	
5.14	The police investigation into the murder of Mr Jack Kielty in 1988 was successful in identifying personalities and associations, including those within and associated with the security forces, within a small, embryonic loyalist paramilitary unit operating mainly in the Newcastle Sub-Division of the RUC's 'G' Division. It also identified their developing relationship with elements of the UVF in Belfast. Police did not, however, fully exploit this information by maintaining an interest in the gang as a result of which it re-emerged a number of years later as a fully functional UVF unit, embarking on a campaign of murder that would ultimately escalate to the Loughinisland atrocity.	This was in the Newcastle sub-division. Suspects resided and active in Newcastle sub-division.
5.33	The success of Police Officer 3 in confronting this loyalist paramilitary activity in the RUC's 'G' Division (composed of elements from both the UDA and UVF) can be measured in both the convictions he secured and the disruption caused to them in the area. They were largely inactive, certainly in this Division for a number of years. By 1992, however, individuals connected to the UVF, who had come to the attention of Police during the investigation of Mr	There is some scope for debate about the extent of south Down but the reference here is to the Kielty murder which took place in the Newcastle sub-division. Other incidents occurred in either Belfast or Newcastle sub-Division.

	Kielty's murder had organised themselves into an operational unit of the UVF at the disposal of a Belfast Commander. Having lost sight of the personalities involved due to their focus on the activities of republican paramilitaries in South Down, police in 'G' Division were unaware of this development	
5.82	Accounts of the police officers, who assisted my investigation support the conclusion that the strategic positioning of the RUC in prioritising the policing response to the threat posed by the IRA in South Down was at the expense of disruption and intrusive tactics against the UVF, which its actions in the area warranted.	See above
7.20	My investigation has concluded that at the outset the police investigation was properly resourced but that the inquiry was quickly scaled down due to other investigative commitments. A senior police officer (Police Officer 18), who assumed responsibility for the Loughinisland Murder Investigation in 2005 expressed the view to my investigators that underresourcing of the inquiry by South Region Command during 1994 had an adverse impact on the investigation.	The resourcing of the investigation was not Mr Hawthorne's responsibility (see his letters of 2009 and 2016).
7.101	The vehicle was taken after examination to Saintfield RUC Station, where it was stored in a	Mr Hawthorne did make a comment about this in his 2009 and 2016 letters.

	yard exposed to the elements.	
7.113	The Triumph Acclaim should not have been stored in a manner which exposed it to the elements and certainly should not have been destroyed without the express permission of Police Officer 8.	Mr Hawthorne was permitted to comment on this paragraph.
7.114	The forensic examination of this important exhibit was thorough and carried out appropriately. However, the integrity of the exhibit was compromised as I have described. An important exhibit (the yellow twine) was lost.	This was the negligence issue which as Mr Holmes has averred was not attributable to Mr Hawthorne.
7.133	A review of the HOLMES account by my investigators established that on occasions street indices were marked as complete when a number of addresses had still not been visited and residents interviewed. There is nothing to suggest that follow-up enquiries were conducted at these addresses. This was most noticeable on the Carsonstown Road. House to house enquiries do not appear to have been considered in and around the addresses of those suspects identified during the early stages of the investigation.	Relates to detectives responsible for the investigation (for which Mr Hawthorne has advised in correspondence he had no responsibility).
7.137	The consequence of this was that potential witnesses may have been missed. There was no record of follow-up visits or letter drops to addresses, where no-one had been at home during initial police visits, indicating a lack of thoroughness on	See above.

	the part of police completing and recording these enquiries.	
8.15	As covered earlier in this report the liaison between the murder investigation and the survivors and families of the deceased was less than adequate. However, following the Stephen Lawrence murder review the concept of Family Liaison Officers (FLO) was adopted by the police in Northern Ireland in 2001.	Responsibility rested with SIO/murder investigation.
9.5	I have also concluded that there was a strategic failure by police to identify and implement robust measures to counter the escalating activities of a small unit of the UVF within South Down. I attribute this to: 1. Failures in the policing response to Loyalist Paramilitary activities due to a focus on the IRA as a result of which the activities of the UVF unit in South Down escalated;	CID/SB responsibility.
9.6	There was an inadequate proactive policing response to the threat, which emerged to the local community in 'South Region', as identified by police following the murders of alleged UVF leaders on the Shankill Road on 16 June 1994.	This would have been reliant on assessments provided by SB.
9.40	Many of the individual issues, which I have identified in this report, including the protection of informants through both wilful acts and passive 'turning of a blind eye', catastrophic failures in police	Directed at murder investigation, use of informants by SB and RUC corporate position (and not Mr Hawthorne).

	investigations and the destruction of records 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.	
Allegation 2, p 147	Whilst I accept that in 1994 there was no national police policy in place in respect of family liaison, it was widespread policing practice at the time of the Loughinisland murders to keep bereaved families informed as to developments in such an inquiry. This did not happen with the Loughinisland families until some years following the murders.	Responsibility rested with SIO/murder investigation
Allegation 5, p 148	The bereaved families of those murdered at Loughinisland have articulated a range of issues, which they consider support their complaint of collusion. As articulated in my public statement, 'many of the individual issues, which I have identified in this report, including the protection of informants through both wilful acts and the passive 'turning of a blind eye', catastrophic failures in police investigations and the destruction of records 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	Directed at murder investigation, use of informants by SB and RUC corporate position (and not Mr Hawthorne).

	the Loughinisland murders’	
Allegation 7, p 149	My public statement outlines the investigation undertaken by my Office to establish the circumstances in which the car was disposed of by police some ten months after the murders at Loughinisland occurred. I have established that the officer responsible for the station yard at Saintfield Police Station sought authority to have the vehicle removed and scrapped. This authority was granted by a senior police officer in charge of the police station and who I am satisfied is not related to individuals suspected of having been responsible for the attack. Both of these officers stated that they believed that the SIO had authorised the destruction. There is no evidence, however, to corroborate these decisions, which I have determined to have been an act of negligence. Whether or not subsequent examination of the car might have yielded further forensic opportunities which, given the conditions in which it had been retained, appears unlikely, the car should not have been destroyed without proper consideration by the SIO in consultation with his forensic advisers. Whilst I have not found evidence of a sinister motive behind the destruction of the vehicle, I have identified negligence associated with its disposal.	Mr Hawthorne was permitted to comment on the related paragraphs which resulted in changes being made upon consideration.

Allegation 12	I am satisfied that police involved in the Loughinisland investigation failed to exploit the evidential opportunities presented by the anonymous information they received and as a result may well have lost another significant opportunity to bring those responsible for the attack before the courts.	CID responsibility (see Mr Hawthorne letter of 02.09.09)