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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATIONS BY

(1) JR216, RAYMOND FITZSIMONS (AS CHAIRMAN OF THE NORTHERN IRELAND RETIRED POLICE OFFICERS' ASSOCIATION) and THE POLICE FEDERATION FOR NORTHERN IRELAND;
(2) APPLICANT A, APPLICANT B and RAYMOND FITZSIMONS (AS CHAIRMAN AND REPRESENTATIVE OF THE NORTHERN IRELAND RETIRED POLICE OFFICERS' ASSOCIATION); and
(3) JR217;

FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF THE POLICE OMBUDSMAN FOR NORTHERN IRELAND

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David McMillen KC and Richard Smyth (instructed by Edwards & Co, Solicitors) for the applicants in the first and third cases
David McMillen KC and Andrew Brown (instructed by McCartan Turkington Breen, Solicitors) for the applicants in the second case
Simon McKay (instructed by the Legal Directorate of the Office of the Police Ombudsman) for the proposed respondent in the first and second cases
Neasa Murnaghan KC and Steven McQuitty (instructed by the Legal Directorate of the Office of the Police Ombudsman) for the proposed respondent in the third case
Karen Quinlivan KC and Leona Askin (instructed by Madden & Finucane) for two interested parties in the first case
Sean Devine (instructed by KRW Law) for interested parties in the first and second cases

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SCOFFIELD J

Introduction

[1] There are three applications for leave to apply for judicial review before the court which raise the same or similar issues. In each case, the challenge is directed towards a public statement made by the Police Ombudsman for Northern Ireland (PONI) ("the Ombudsman") under section 62 of the Police (Northern Ireland) Act 1998 ("the 1998 Act"):

(a) In the first case, there are three applicants: JR216, a retired police officer; Mr Raymond Fitzsimons, acting as Chairman of the Northern Ireland Retired Police Officers' Association (NIRPOA); and the Police Federation for Northern Ireland ("the Federation"). They seek to challenge the decision of the proposed respondent to publish a statement on 13 January 2022 relating to the investigation into police handling of certain paramilitary murders and attempted murders in the North West of Northern Ireland during the period 1989 to 1993. The statement related to the Ombudsman's investigation known as 'Operation Greenwich.' The first applicant in this case worked as a detective in the RUC's North Region at the time of the policing activities there which were the subject of the Ombudsman's investigation.

(b) In the second case, there are three applicants: Applicant A, a retired police officer; Applicant B, a retired police officer; and Mr Fitzsimons, again acting as Chairman and representative of NIRPOA. They seek to challenge the decision of the proposed respondent to publish a statement on 8 February 2022 relating to the investigation into police handling of loyalist paramilitary murders and attempted murders in South Belfast during the period 1990 to 1998. The statement related to the Ombudsman's investigation known as 'Operation Achille.' The first applicant in this case is a retired Chief Inspector and was also the officer in charge of the Weapons and Explosives Research Centre (WERC) during the period covered by the Ombudsman's investigation. The second applicant is a retired Detective Constable who was tasked as an agent handler in South Belfast during a significant period covered by the Ombudsman's investigation, who has particular concern about the Ombudsman's conclusions and determinations which are relevant to Special Branch.

(c) In the third case, the applicant (JR217) is a retired police officer who seeks to challenge a statement published by the Ombudsman on 10 June 2022 in relation to complaints about the arrest and detention of four persons detained at Strand Road Police Station in Derry/Londonderry between 26 February 1979 and 1 March 1979. This was in relation to the Ombudsman's investigation known as 'Operation Farrier.' The applicant was one of the officers involved in the questioning of the complainants whilst they were in detention and about whose conduct they complained.

[2] Mr McMillen KC appeared for all three applicants, with Mr Smyth in the first and third case and with Mr Brown in the second case. Mr McKay KC appeared for the Ombudsman in the first and second cases. Ms Murnaghan KC appeared with Mr McQuitty for the Ombudsman in the third case. Ms Askin appeared (led by Ms Quinlivan KC) for family members of two of the deceased whose murders were considered in the Ombudsman's statement in the first case; and Mr Devine appeared for a family member of one of the deceased whose murder was considered in the statement which is the subject of each of the first and second cases respectively. I am grateful to all counsel for their helpful written and oral submissions.

[3] In several respects, these cases are a sequel to the decision of the Court of Appeal in *Re Hawthorne and White's Application* [2020] NICA 33, which is discussed in greater detail below. Each side relies upon that judgment as support for their position. Unfortunately, it seems clear that, notwithstanding the determination of the Court of Appeal in that case and the guidance which its judgment contains, the precise nature of the Ombudsman's role in relation to legacy investigations, and the extent of her powers in respect of statements issued by her following such investigations, remains a running sore between her office on the one hand and former officers who are or may be the subject of such investigations and their representative bodies on the other.

[4] Colton J, who was previously case managing these proceedings, listed the three leave applications in succession and allocated one day to each hearing. I have heard extremely detailed argument over four days in the course of the leave hearings and do not purport that the following ruling does full justice to all of the points which have been explored to greater or lesser degrees. The purpose of this written judgment is to express my conclusions on the main points in issue between the parties at this stage and to give clarity on which aspects of each case is being permitted to proceed and why. It is longer than one might expect for a ruling on applications for leave; but this reflects the breadth and depth of argument deployed on each side in each case.

[5] The purpose of the leave stage in judicial review proceedings is to weed out cases (or sometimes individual grounds within cases) which ought not be permitted to proceed because there is some 'knock-out blow' which renders it inappropriate for the court to proceed to determine the issue substantively. The knock-out blow may relate to the substance of the case, where it is hopeless or does not raise an arguable ground with a realistic prospect of success; or may relate to procedural objections, such as the applicant's lack of standing or their delay in commencing proceedings. In the present cases, the proposed respondent has raised objections on all of these fronts. I consider that there is merit in some of the objections she has raised. However, my ultimate conclusion is that each case raises some ground or grounds which can appropriately, and should, be considered in substance by the court. In part, this is in order to provide an opportunity for further argument on, and for the court to provide further guidance in relation to, the nature and extent of the

Ombudsman's powers following as delineated by the judgment in *Hawthorne and White*. I do so in the knowledge that this may be an issue which in due course warrants further consideration by the Court of Appeal, since its judgment in *Hawthorne and White* is being claimed by each side in these cases as supporting their position.

Relevant statutory provisions

[6] The Ombudsman's powers are governed by the statutory regime set out in Part VII of the 1998 Act. I do not propose to set out the relevant provisions at any length; but the statutory scheme provides important context for the central grounds advanced by the applicants. Section 52 is an important provision, governing the receipt and initial classification of complaints. Inter alia, the Ombudsman must determine whether a complaint is one to which section 52(4) applies, that is "a complaint about the conduct of a member of the police force which is made by, or on behalf of, a member of the public" but *not* a complaint "in so far as it relates to the direction and control of the police force by the Chief Constable" (see section 52(5)). Section 54 provides for the formal investigation of certain complaints, which are then investigated in accordance with section 56. Section 55 permits the Ombudsman to consider other matters, including the formal investigation "of [her] own motion" of any matter which "appears to the Ombudsman to indicate that a member of the police force may have (i) committed a criminal offence; or (ii) behaved in a manner which would justify disciplinary proceedings; and … is not the subject of a complaint" if that appears to her desirable in the public interest (see section 55(6)).

[7] The process for a formal investigation by the Ombudsman is sketched out in section 56. An officer of the Ombudsman must be appointed to conduct the investigation. The Department of Justice ("the Department") may by order provide that any provision of the Police and Criminal Evidence (Northern Ireland) Order 1989 shall apply; and it has done so (see the Police and Criminal Evidence (Application to Police Ombudsman) Order (Northern Ireland) 2009). At the end of an investigation under section 56, the person appointed to conduct the investigation shall submit a report ("the investigation report") to the Ombudsman (see section 56(6)).

[8] Sections 58 and 59 are important in the present context. They provide for steps to be taken *after* investigation by the Ombudsman, either in terms of criminal proceedings or disciplinary proceedings against a police officer. The Ombudsman must consider the investigation report "and determine whether the report indicates that a criminal offence may have been committed by a member of the police force" (see section 58(1)). If the Ombudsman determines that the report indicates that a criminal offence may have been committed by a member of the police force, she shall send a copy of the report to the Director of Public Prosecutions ("DPP") together with such recommendations as appear to her to be appropriate (see section 58(2)). If there is no indication in the investigation report that a criminal offence may have been committed by a member of the police force and the complaint is not a serious

one, the Ombudsman may determine that the complaint is suitable for resolution through mediation (see section 58A).

[9] If the Ombudsman determines that the investigation report does not indicate that a criminal offence may have been committed by a member of the police force (and the complaint is not suitable for resolution through mediation) *or* the DPP decides not to initiate criminal proceedings in relation to the subject matter of a report which the Ombudsman has sent to him *or* criminal proceedings so initiated have been concluded, the Ombudsman shall then consider the question of disciplinary proceedings (see section 59(1)-(1B)). She shall then send the appropriate disciplinary authority a memorandum containing her recommendation as to whether or not disciplinary proceedings should be brought in respect of the conduct which is the subject of the investigation. The Ombudsman also has powers to direct the Chief Constable to bring such disciplinary proceedings.

[10] Additionally, under section 60A(1) the Ombudsman "may investigate a current practice or policy of the police if (a) the practice or policy comes to [her] attention under this Part, and (b) [she] has reason to believe that it would be in the public interest to investigate the practice or policy." Where the Ombudsman decides to conduct an investigation of this type, she must immediately inform the Chief Constable, the Policing Board and the Department of her decision and her reasons for making it (see section 60A(3)).

[11] The Ombudsman must make certain reports relating to her functions under section 61, which is not relevant for present purposes. These proceedings are largely concerned with the meaning and effect of section 62, entitled 'Statements by Ombudsman about exercise of [her] functions', although the statements so issued are frequently referred to as 'reports.' Section 62 provides simply as follows:

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

[12] Section 63 relates to restrictions on disclosure of information received by the Ombudsman or one of her officers. It is potentially relevant to the question of publication of information in a section 62 statement.

[13] Section 64 of the 1998 Act provides that the Department may make regulations as to the procedure to be followed under Part VII; and that it must make regulations providing for various matters, including procedures for the making of complaints. The Department may also by regulations provide that, subject to exceptions, the complaints regime shall not apply to a complaint about the conduct of a police officer which took place more than the prescribed period before the date on which the complaint is made or referred to the Ombudsman. This allows the Department to impose a time limit on historic investigations, subject to exceptions.

The Secretary of State may also make similar regulations for purposes connected with excepted or reserved matters.

[14] In 2001, before policing and justice was devolved and, so, before the rule-making power in section 64 of the 1998 Act was conferred on the Department, the Secretary of State made the RUC (Complaints etc) Regulations 2001 (SR 2001/184) ("the 2001 Regulations") under section 64 of the 1998 Act. There were also earlier regulations in the form of the RUC (Complaints etc) Regulations 2000 (SR 2000/218) ("the 2000 Regulations"), although they are less significant for present purposes. The 2001 Regulations apply to any complaint made on or after 6 November 2000 or to any other matter brought to the Ombudsman's attention on or after that date. Regulations 5 and 6 are both important in the context of the present applications.

[15] Regulation 5 of the 2001 Regulations sets out conditions to be met for complaints to be received under section 52(1) of the 1998 Act and dealt with in accordance with the provisions of Part VII. It must be made by, or on behalf of, a member of the public. It must also be 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) (see regulation 5(2)). That time limit is subject to exceptions in regulation 6, discussed further below. There are additional requirements in regulation 5(3) which are designed, amongst other things, to ensure that the investigation of a complaint is not duplicative or repetitive where it has previously been considered in certain circumstances. Of significance in the third case is the requirement in regulation 5(3)(f) that the complaint must be one which "has not otherwise been investigated by the police."

[16] Regulation 6 sets out some exceptions to these requirements. So, the time limit in regulation 5(2) does not apply where certain conditions are met and the Ombudsman believes that the complaint should be investigated because of the gravity of the matter or the exceptional circumstances. Importantly, regulation 6(5), which reflects section 52(9) of the 1998 Act, provides as follows:

> "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."

Summary of the parties' arguments

[17] The applicants have a wide range of arguments, but these boil down to an assertion that the practice of the Ombudsman has developed far beyond her intended statutory role. The applicants emphasise the carefully crafted and structured nature the powers and functions set out in the 1998 Act and the limited nature of the statutory determinations which they submit the Ombudsman is

required to make. These are centred on whether a criminal offence may have been committed requiring referral to the DPP and/or whether a disciplinary offence may have been committed requiring referral to the appropriate disciplinary authority. When the focus remains on these functions, the Ombudsman may properly be seen to be primarily an investigative authority (much like the police) and a filter into *other* processes which are charged with making the substantive determinations about whether a police officer has acted in a way which amounts to criminal conduct or professional misconduct. If such a decision is in prospect, the Ombudsman should pass the matter on to another decision-maker with a bespoke procedural regime containing a wide range of safeguards for an accused officer. Instead, on the applicants' case, the Ombudsman has taken onto herself an extra-statutory role, through the mechanism of section 62 statements, which sets her office up as not only an investigator but also as the arbiter of conduct in respect of officers whose reputations may be sullied by the publication of a statement effectively condemning them in the public eye, without their having the benefit of the protections built into the criminal justice or police disciplinary systems. On the applicants' case, once the Ombudsman has made the required statutory determinations about referral for criminal or disciplinary proceedings, she is functus officio. Her power under section 62, such as it is, is to explain the reasoning for the statutory determinations she has made in relation to referral (or not) for criminal or disciplinary proceedings; but certainly not for her to reach a conclusion in substance on the propriety of police officers' conduct.

[18] The Ombudsman understandably relies upon the breadth of the wording of section 62 and the fact that it is a bespoke provision which does not find a ready analogue in other police complaints regimes. She contends that she has a wide discretion as to how she describes the outcome of investigations undertaken by her, particularly where there are no criminal proceedings and no disciplinary proceedings (often, in the context of legacy investigations, in circumstances where no disciplinary proceedings could now be brought because the relevant officers have since retired) and where the resolution of the complainants' complaints and concerns can really only be achieved by her explanation of what her investigation has uncovered. She has raised a variety of procedural objections to the grant of leave, which are discussed in further detail below; but also contends that the substance of the applicants' challenges has already been resolved in the *Hawthorne and White* litigation and is, in any event, an inappropriate attempt to take issue with the merits of her conclusions.

The test for leave on the merits

[19] The standard which the court will apply when considering the merits of arguments upon which an applicant seeks the grant of leave to apply for judicial review has recently been authoritatively clarified by the Court of Appeal in *Re Ni Chuinneagain's Application* [2022] NICA 56. It is that test which I apply in these cases. Accordingly, references to 'arguability' below are to be construed as a reference to arguable grounds with a realistic prospect of success.

The Hawthorne and White litigation

[20] As noted above, similar arguments as to the limits of the Ombudsman's powers, and how the courts should approach the Ombudsman's statements under section 62, were considered in a previous application for judicial review brought by two retired police officers, Messrs Hawthorne and White. Those proceedings related to the present Ombudsman's predecessor's publication of a report into the notorious Loughinisland atrocity.

[21] Neither party took issue with the suggestion in the initial judgment of McCloskey J (as he then was) in *Re Hawthorne and White* [2018] NIQB 5, at paras [54]-[56], that the correct construction of a public statement issued by the Ombudsman is a matter for the court and that the appropriate test in that regard is how the text would be understood by "the hypothetical impartial, fair minded and reasonably informed reader", reading the text in context and the report as a whole. (That judgment has an unusual status, since McCloskey J withdrew from the case following, although not as a result of upholding, a recusal application which arose at the remedies stage of the proceedings. He then relisted the case for hearing before a different judge, whilst at the same time expressing the view that the analysis set out in his judgment could be approached as if it were an "advisory opinion": see para [188]. Keegan J (as she then was) then re-heard the case, on a limited basis. On the above point, however, no party appears to have dissented from McCloskey J's reasoning either then, or now.)

[22] McCloskey J indicated that a determination that there had been collusion was a matter of the utmost seriousness for professional police officers and appeared also to adhere to the view, in that case at least, that a determination that officers had engaged in collusion was a determination that they had been guilty of criminal conduct (see paras [74] and [112] of his judgment). Keegan J later noted that whilst collusion had "sinister connotations" it "is not a criminal offence in itself" (see para [44] of her judgment).

[23] McCloskey J accepted that section 62 of the 1998 Act gave the Ombudsman a "wide discretion" in formulating the contents of a public statement but also made clear that this discretion "is not unfettered" and must be exercised harmoniously with the remainder of the statutory scheme, amongst other things (see paras [85]-[86]). He considered that Parliament had not intended or authorised the type of findings and determinations made in the public statement in that case: see paras [94]-[95] and [99]. The emphasis in his judgment was on the lack of procedural fairness for officers, or retired officers, criticised in this way; but he also broadly found for the applicants on the question of the statutory scheme.

[24] Keegan J then considered the *Hawthorne and White* case on the pure issue of statutory construction relating to whether or not the Ombudsman had exceeded his powers: see [2018] NIQB 94. She did so on the basis of a revised public statement

which had by then been issued. Contrary to McCloskey J's approach, she did not find any of the grounds made out and dismissed the application for judicial review. On the key issue of statutory construction, Keegan J said that she did not reach a concluded view on many of the arguments presented but adopted "a more straightforward approach", namely that it was a function of the Ombudsman to investigate complaints and that his section 62 power permitted him to report on that investigative function (see para [55]). In reaching this conclusion, Keegan J also took account of the statutory aims in section 51(4) of the 1998 Act – including the obligations on the Ombudsman to exercise his powers in the way which appeared to him best calculated to secure the efficiency, effectiveness and independence of the police complaints system and the confidence of the public in that system – and the Ombudsman's role in assisting to fulfil the state's obligations under article 2 ECHR (see para [67]). However, Keegan J also considered that the revised report did not contain a finding of either criminal or civil responsibility against any individual (see para [69]). Nonetheless, she sounded a note of caution: although "not of a mind to step into the territory of critiquing modes of expression" in the course of a judicial review application, she said that it was "obvious that matters such as this need to be presented in a very careful way given the various parties who are affected."

[25] The case was then appealed by the applicants to the Court of Appeal. It gave judgment in June 2020: see [2020] NICA 33; [2021] NI 357. The applicants were largely successful in their appeal. The Court of Appeal held, in particular (at para [21]), that:

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

[26] At paras [40]-[41], Morgan LCJ said this:

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

> makes such a recommendation he has no role thereafter apart from supplying information on request.
>
> When making a report to the disciplinary authority he is again required to make a recommendation as to whether proceedings should be brought and a statement of his reasons for making the recommendation. When he recommends proceedings he must provide particulars. Thereafter, his only role is in communicating the outcome to the complainant. In respect of complaints about criminal proceedings and disciplinary misconduct he is not, therefore, given power to make any determination about the complaint."

[27] Although the Court of Appeal agreed with the judge below that the section 51(4)(b) aim of securing confidence in the system was a significant material consideration in deciding whether to issue a public statement, and in what terms, it also said it was important to recognise that the 1998 Act itself has sought to set out a framework within which the confidence of both the public and the police force should be secured. At para [43]:

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

[28] To like effect, at paras [54] and [55], the Court of Appeal said this:

> "Finally, there is the issue of whether the Ombudsman can substantiate or dismiss a complaint. Where the complaint relates to the commission of a criminal offence or

> disciplinary misconduct by a member of the police force we consider that the scheme of the 1998 Act does not provide a role for the Ombudsman in the adjudication of the complaint. Where, however, the complaint is in respect of other matters such as incivility or unsatisfactory performance we consider that the intention of the Act as disclosed in section 64(2)(n) was to enable the Ombudsman to provide limited compensation and that such an award could only be made in circumstances where the complaint was satisfied. That is effectively recognised in the 2000 Regulations.
>
> There may well be circumstances, of which this appeal may be an example, where a police officer will have resigned as a result of which the officer would no longer be subject to any disciplinary process. By virtue of section 63(1)(e) of the 1998 Act the Ombudsman has limited powers in a PS to identify a person to whom information relates if it is necessary in the public interest. That is a strict test. We accept that a person can be identified by inference, a so-called jigsaw identification. We do not consider that the power to make a PS provides the Ombudsman with the power to make determinations in respect of retired officers. We accept, however, that the statutory scheme does enable the Ombudsman in respect of such officers to indicate what recommendations might have been made, what reasons there were for the making of such recommendations and whether disciplinary proceedings would have been appropriate."

[29] The Court of Appeal appears to have left some room for the publication of statements where there was no reference for criminal or disciplinary proceedings: perhaps where a criminal offence may have been committed but it was not possible to identify the officer concerned; where disciplinary proceedings would have been appropriate but could not be pursued because the officer in question had resigned in the interim; or where the complaint was about a performance issue which did not even get to the level of misconduct (see paras [22] and [54]). The court later noted that this was a case where the Ombudsman had not recommended prosecution. There was no evidence relating to a specific, identifiable officer but the Ombudsman considered the investigation had given rise to significant concerns in respect of disciplinary and/or corporate matters for the RUC and it was proposed to address these in a subsequent public statement (see para [29]).

[30] The strong thrust of the Court of Appeal judgment, however, is that the Ombudsman's role is investigatory and not adjudicative or conclusory. She has no

power to make determinations or adjudications on the substance of conduct which would amount to a criminal act or professional misconduct.

[31] The Court of Appeal also noted that the UK Government had relied upon the investigative role of the Ombudsman as contributing to its satisfaction of the article 2 ECHR investigative obligation. In this regard, the Court drew an analogy with the decision of a coroner (or coronial jury) in an article 2 case, where they could not express an opinion on issues of criminal or civil liability but could set out conclusions of fact. At the same time, the Court recognised that the Ombudsman's role is not the same as that of a coroner or their jury. Indeed, Mr McMillen relied upon the fact that the coroner explicitly has an adjudicative or decision-making function in relation to the substance of what happened; whereas the Ombudsman does not.

[32] The outworking of the court's reasoning is contained in para [63], which is important in the present context:

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

[33] Precisely what this paragraph means and how it is to be applied in future was an issue of debate in the course of the leave hearings in these three cases. For present purposes, and subject to further argument, I take the following from the Court of Appeal's decision in this paragraph (read with other portions of the judgment). First, three portions of the Loughinisland public statement were unlawful. They 'overstepped the mark' because they amounted to findings of criminal offences by members of the police force, which the Ombudsman was not entitled in the exercise of his powers to reach and/or publish. That was so even though those passages did not purport to say expressly that officers had been guilty of criminal conduct. Second, it is open to the Ombudsman to give a narrative about what happened (at least in cases where article 2 is engaged). Where the narrative spills over in substance into a determination or finding of a criminal offence or misconduct, the Ombudsman will have gone too far. Although the court was

sympathetic to Keegan J's reluctance to get into critiquing modes of expression, it held that the conclusions reached by the Ombudsman in the three paragraphs mentioned did "go beyond mere modes of expression and exceed his powers." (A remedy was later agreed whereby published versions of the Loughinisland statement had to carry a rider in respect of those portions of it and be accompanied by the decision of the Court of Appeal, so that the two could be read together.)

[34] The arguments in these cases indicate that considerable difficulty has arisen in relation to precisely what was meant by the last sentence of para [63] of the Court of Appeal's judgment. The present Ombudsman appears to have read this as licence to make findings of "collusive behaviour" on the part of police officers. (What precisely is meant by that phrase is considered in further detail below). On the other hand, this sentence can be read as authorising only that the Ombudsman state, as a matter of fact, that his investigation had "uncovered" circumstances which were largely "what *the families claimed* constituted collusive behaviour"; that is to say, that the Ombudsman could confirm his investigation supported the occurrence of facts upon which the families relied as founding *their* belief that there was collusion, without the Ombudsman expressing any qualitative view of his own on this issue.

[35] Regrettably, the three cases presently before the court indicate that there is continuing uncertainty and contention about how the Court of Appeal's judgment is to be applied. Even leaving aside the contentious issue of collusion, or the related concept of collusive behaviour, in all three cases (including the third which is not a collusion-type case) the Ombudsman takes the view that she has neither expressly nor impliedly published a conclusion in respect of criminal offences or disciplinary conduct, whereas the applicants strongly dispute that. The proposed respondent says that this ground has already been addressed in the *Hawthorne and White* litigation; and the applicants say the Ombudsman has failed to understand and apply the core reasoning of the Court of Appeal in that litigation.

Merits in the first and second cases

Is it arguable that the Ombudsman has overstepped the mark here?

[36] I have formed the conclusion that it is plainly arguable that certain portions of the Ombudsman's reports in the first and second cases have overstepped the mark in a similar way to that evident in the Court of Appeal's conclusions in the *Hawthorne and White* litigation.

[37] A difficulty presented in both the first and second cases is precisely what the Ombudsman means when reference is made to "collusion" (or where there is reference to the related concept of "collusive behaviours"). The Ombudsman has discussed possible definitions of collusion at some length in the statements which are the subject of the first and second cases. She has noted that there is no universally agreed definition of collusion. There is then discussed a number of definitions or descriptions of the concept which have previously been used,

including by Sir John Stevens, by Judge Peter Cory and by the Smithwick Tribunal, each of whom has addressed allegations in this sphere. The Ombudsman has also drawn attention to the fact (see para 3.24 of the Operation Greenwich statement) that one of her predecessors described collusion as "something which may or may not involve a criminal act" and she said that she broadly concurred with his views.

[38] Nonetheless the Ombudsman did identify a number of common features in the various approaches to the concept of collusion (set out at para 3.25 of her report in the first case). Significantly in my view, one of those common features was that "collusion by its nature involves an improper or unethical motive." (In the report in the second case this is phrased slightly differently in one instance but in the same terms in another: see para 18.121, albeit the word "ethical" is obviously used in error instead of "unethical.") The Ombudsman further indicated that she was "in favour of broad definitions encompassing collusive behaviours" [underlined emphasis added], which she considered to reflect the views of Lord Stevens and Judge Cory. Having considered the Court of Appeal's judgment in the *Hawthorne and White* case, she said the following at para 3.33 of her report in the first case:

> "My interpretation of this judgment is that, in the absence of determinations of criminality or misconduct by the appropriate authority, my role is limited to commenting on the matters raised in the complaint. My investigation having established the detailed narrative based on the complaint, I can conclude whether the evidence identifies collusive behaviours on the part of the police, as alleged. In arriving at my conclusions on indicators of collusive behaviour I am mindful of the broad definitions of collusion provided by Lord Stevens and Judge Cory."

[39] The Ombudsman went on to make a number of what are arguably findings or determinations in the statement in the first case. Most of these are set out in Chapter 22 of the statement, which details the Ombudsman's conclusions. In that chapter (at para 22.1) the Ombudsman recounts that, "The main purpose of this public statement, therefore, is to address the matters raised by the families who have made complaints to my Office." (A similar statement is made in the report in the second case, at para 18.1). She later comments (at paragraph 22.83) that the evidence that she has gathered "supports a number of the complaints and concerns made by the families." The statement says that it will "now detail these and also address complaints that there was 'collusion' in respect of police actions relating to a number of the attacks referred to in this public statement" [underlined emphasis added]. At para 22.107, the Ombudsman indicates that she has taken into account the limitations on her powers to decide on the complaint of collusion. However, she then says:

> "I am of the view that, having considered all the circumstances in this case, my investigation into these

public complaints has identified the following collusive behaviours on the part of the police."

[40] To like effect, at para 22.132, the Ombudsman states that her investigation "has identified actions and omissions of police, which in my view, constitute collusive behaviours." Then, at para 22.133, there is a summary of the Ombudsman's conclusions in relation to collusive behaviours, with virtually the entirety of which the applicants take issue. It is in the following terms:

> "I have earlier in this public statement referenced the broad definition of collusion which Sir John Stevens provided as including '*wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, through to the extreme of agents being involved in murder*.' This investigation has identified all of these elements the conduct of former RUC officers in relation to a number of attacks that are the subject of this public statement. In particular, I am of the view, in respect of the following matters, <u>that the families concerns about collusive activity are legitimate and justified</u>:
>
> 1. Intelligence and surveillance failings identified by Dr Maguire in his report of the Loughinisland attacks;
>
> 2. The failure to adequately manage the risk to the lives of a number of victims outlined in this public statement, and in particular the failure to warn those individuals of the threats to their life;
>
> 3. The passing of information by members of the security forces to paramilitaries has been identified as collusion by Sir Desmond De Silva. The failure by police to adequately address UDR officers passing information is in my view a serious matter that can be described as collusive behaviour;
>
> 4. I have identified that the deliberate destruction of files, specifically those relating to informants that police suspected of serious criminality, including murder, is evidence of collusive behaviour. The absence of informant files and related documentation is particularly egregious, where there was suspicion on the part of handlers or others that informants may have engaged in the

most serious criminal activity engaging Article 2 of the Convention;

5. Failures identified in this public statement by Special Branch to disseminate intelligence to the CID Teams investigating the murders;

6. Failures in the use and handling by Special Branch of an informant suspected of being involved in serious criminality, including murder;

7. Failures by Special Branch in the North West region to adequately manage those high risk informants, which they suspected of being involved in serious criminality, including murder;

8. The passive 'turning a blind eye' to apparent criminal activity, or failing to interfere where there is evidence of wrongdoing on the part of an informant, in particular to the deliberate failure of informants to provide information on a specific attack, and the continued use of an informant suspected of involvement in serious criminality, including murder."

[41] The applicants submit that this was plainly not a case of simply providing a narrative or fact finding. Rather, the Ombudsman has expressly said that concerns about "collusive activity are legitimate and justified."

[42] In the report in the second case, at the end of chapter 4, the Ombudsman has said simply: "My conclusions in respect of the allegations of collusion are outlined later in this public statement" [underlined emphasis added]. On the applicants' case, this represents an instance of the true nature of the Ombudsman's analysis being revealed and it being made plain that the Ombudsman was in fact purporting to reach conclusions about whether or not collusion had occurred. She later indicates that she has found "collusive behaviours" on the part of the police. Certain portions of the report then specifically categorise actions or omissions as collusive behaviour (see, e.g., paras 18.131 and 18.137). At para 18.143, the Ombudsman lists a range of conduct which she says "constitutes what [the Court of Appeal in *Hawthorne and White*] refer to as 'collusive behaviours.'" As noted above (see para [34]) there is an issue as to precisely how the Court of Appeal used that phrase and whether, as the Ombudsman appears to have concluded, the Court of Appeal endorsed her use of that phrase as a means of expressing a view about the nature or significance of certain acts or omissions.

[43] The applicants contend that the findings of collusive behaviour are equivalent to findings of collusion; and that any such finding almost certainly represents a finding that a criminal offence has been committed by a police officer. In the rare circumstances, if any, where collusion does not represent a criminal offence, it will at the very least have constituted a disciplinary offence, the applicants submit. In the affidavit evidence filed on behalf of the applicants reference is made to a number of possible disciplinary offences in this regard including (a) *discreditable conduct* (including where a member acts in any manner reasonably likely to bring discredit on the reputation of the police force); (b) *neglect of duty* (including where a member without good and sufficient cause neglects or omits to attend to or carry out with due promptitude and diligence anything which it is his duty as a member to attend to carry out); and (c) *wilful or careless falsehood* (including where a member either wilfully or without proper authority or through lack of due care destroys or mutilates any record or document made or required for police purposes).

[44] The applicants also draw attention to the fact that the Ombudsman relied upon and (they submit) adopted a portion of the Loughinisland statement which, they also submit, was part of that report (para 4.200) which the Court of Appeal had expressly held to have overstepped the mark in the earlier litigation.

[45] There is an argument that the Ombudsman has been unnecessarily pushed into dealing with allegations of collusion, when this is a concept with no universally agreed definition (as the Ombudsman accepts). It is entirely understandable that the families of victims who suspect collusion will make that the subject of complaint. For instance, in the report in the second case, the Ombudsman has made clear that allegations of collusion were a feature of the public complaints (see chapter 3 and paras 18.9 and 18.12). It is also understandable that the Ombudsman may wish to address those complaints. But, as the Court of Appeal has established (see para [28] above), there is no obligation on the Ombudsman to substantiate or dismiss a complaint in the precise terms in which it is formulated by the complainant. The key issue is always the underlying conduct; and where the conduct amounts to a criminal or disciplinary offence, the applicants submit that the Ombudsman is not the arbiter.

[46] This brings me to the meaning of the phrase "collusive behaviours." Mr McMillen argued that this is effectively a synonym for collusion. Mr McKay argued that it was merely a finding of a factual behaviour which may *or may not* indicate that collusion has occurred, i.e. an indication only that collusion *might* have occurred.

[47] Looking at the matter in the round, I am satisfied that it is arguable that the Ombudsman's statements in both the first and second cases have 'overstepped the mark' in a similar manner as occurred in the *Hawthorne and White* case. In particular, it is arguable that the hypothetical impartial, fair minded and reasonably informed reader would not construe the Ombudsman's findings of collusive behaviours in the way in which she has contended before the court that that phrase was used or

should be read. That is partly because of the lack of clarity in the phrase itself. One possible reading of that phrase, and arguably its natural meaning, would be that it describes behaviours or actions which constituted collusion. But it is also because, in other portions of the statements, reference is made simply to addressing the issue of collusion. In contrast, there appears to be a limited basis for the suggestion that the identification of "collusive behaviours" is only the identification of behaviours which may *or may not* constitute collusion. The word "indicator" is used (for instance, see para [38] above) but in reference to indicators *of* collusive behaviour, rather than to clarify that collusive behaviours are simply possible indicators that collusion may have occurred. In addition, to describe collusive behaviours as indicative only may equally refer to behaviours which indicate that collusion *has* occurred, rather than merely indicating that collusion *may have*, or may not have, occurred. It is also plainly arguable that if the reports are properly to be read as making findings of behaviour which do constitute collusion that that would also amount to a finding of criminal behaviour or, at the very least, professional misconduct (particularly given the Ombudsman's identification of an improper or unethical motive as inherent in the concept of collusion).

[48] To reflect the arguability of this issue and the requirement for further argument on it, I propose to grant leave on grounds (5) and (6) in the first case; and on ground (i)(b) in the second case. I do not consider the proposed respondent's objection that this is to seek to relitigate issues which have previously been decided by the Court of Appeal to be a proper basis for the refusal of leave, even though it is undoubtedly the case that there is some overlap between the grounds advanced in these cases and those advanced in *Hawthorne and White*. Firstly, as noted above, there seems to remain significant uncertainty about precisely how the Court of Appeal's decision is to be applied; and, secondly, there is an arguable case that the Ombudsman has acted unlawfully having regard to points previously resolved in the applicants' favour.

Criticism of police force as a whole or of unidentified officers

[49] The applicants also maintain their challenge based on the suggestion that the Ombudsman has used her public statements to make findings against, or criticisms of, the police force *as a whole* rather than, as they contend is required, focusing on the alleged misconduct of individual and identifiable officers.

[50] Both McCloskey J (at paras [101]-[102]) and Keegan J (at para [49]) rejected the applicants' complaint in the *Hawthorne and White* case that the Ombudsman had wrongly criticised the police force as a whole, or as a body corporate, on the simple bases that the Ombudsman had looked at the actions of individual officers (although sometimes many such officers) and the police force was, after all, made up of individual officers.

[51] The Court of Appeal identified this as an issue in the appeal (see para [36] of Morgan LCJ's judgment) but does not appear to have addressed it in any further

substance in its decision. I take from this that it was not minded to upset the conclusion of the judge below on the issue. The Court of Appeal did accept that the Ombudsman could only investigate *current* policies and practices on the part of the police under the 1998 Act; but also drew a distinction between the investigation of a historic policy or practice *per se* (which was not permissible) and the *impact* of such a policy or practice in the circumstances of a particular complaint, which was considered to be permissible: see para [52] of its judgment.

[52] As the Court of Appeal identified, it was not intended that the Ombudsman would investigate historic practices or policies; nor is she to investigate complaints which are about the direction and control of the police force by the Chief Constable (see section 52(5) of the 1998 Act and regulation 5 of the 2000 Regulations). Nonetheless, it is entirely understandable that major investigations conducted by her office will examine the conduct of more than one police officer and often a significant number of such officers or a grouping of them. That is even more likely to be the case where the Ombudsman, for reasons of efficiency, groups the investigation of complaints into one investigative operation, as occurred in the first two cases.

[53] The Court of Appeal also clearly considered that the Ombudsman could investigate the conduct of an officer even where their identity is unknown (provided it is clear that the person complained about was actually a police officer). This was an example of where a section 62 statement might appropriately be made, where the Ombudsman would have referred for prosecution or disciplinary action but could not do so because the relevant officer could not be identified, and this could be explained. The Ombudsman is also clearly entitled to consider the actions of groups of officers. There may be issues of procedural fairness where the conduct of a wide group of officers is considered and the absence of identification of the officers concerned may lead the public to wrongly conclude that a particular officer was the subject of an adverse finding. That will be highly fact-specific (and would of course be less problematic if the applicants were to ultimately succeed on their primary case). However, I do not consider that the reasonable hypothetical reader of the impugned statements in these cases would consider that the Ombudsman was making, or purporting to make, findings about the police force as a whole or as a body corporate. I am not persuaded that the applicants' challenge on this basis is arguable.

Remaining issues in the first case

[54] In a reformulated Order 53 statement, a number of the grounds upon which leave was initially sought in the first case have been abandoned, namely grounds (1), (2), (3), (7), (8) and (9). In large measure, this reflected the proposed respondent's objections in relation to delay where the ground of challenge initially advanced was directed to the *commencement* of the Ombudsman's investigation, which occurred many years ago.

[55] A key issue in the first case is the question of whether members of the public ought to have been told that they were under threat from loyalist paramilitaries. This was the subject of a Force Order which was in force at the time (Force Order 33/86, entitled 'Threats against the Lives of Members of the Security Forces, VIPs or other individuals'; later replaced by Force Order 60/91 which was in materially similar terms). The import of this Order was that the relevant Sub-Divisional Commander would "take whatever action he wishes necessary", unless the information received indicated that an attack on any person was imminent, in which case the member receiving the information was to "immediately take all necessary action to inform the person at risk." The applicants' case is that the relevant police officers complied with that Order and that the Ombudsman's concern is essentially about the contents of the Order itself, such that it is really a 'direction and control' case. The Ombudsman was concerned that the Force Order was applied inconsistently and without proper risk assessment being undertaken. She seems likely to me to have taken the view in some instances that a threat should have been deemed to be imminent, thus requiring notification, when it was not so considered at the time; and perhaps in others to have taken the view that, even if the threat was not imminent, it was nonetheless not a proper exercise of the relevant officer's discretion not to provide a warning. The applicants are critical of the Ombudsman's views and conclusions on these issues, contending inter alia that she has failed to reflect the complexity of providing a warning which might jeopardise the intelligence source from which the information about the threat had come. They contend that the Ombudsman's approach amounted to a conclusion that the system established by the Force Order was not good enough and/or that merely following the Order amounted to collusive conduct in some instances.

[56] In this case, although not without some hesitation, I consider that there is an arguable case that the way in which the Ombudsman has dealt with the relevant Force Order may contravene the prohibition on investigating historic practices or policies (as opposed to current practices or policies under section 60A) and/or may contravene the prohibition in section 52(5) against treating as a complaint under section 52 a complaint which "relates to the direction and control of the police force by the Chief Constable." On the other hand, it is arguable that her views on these matters fell on the right side of the distinction drawn by the Court of Appeal between investigating a policy or practice and investigating the *impact* of that policy or practice in individual cases. However, I propose to grant leave on ground (4)(i) and (iv) to reflect this issue, which I consider to require further exploration and argument.

[57] Pleaded grounds (10)-(13) in the first case are presented under the heading "irrationality and relevant considerations." This is a challenge to the rationality of certain conclusions reached by the Ombudsman. It also contains an allegation that the Ombudsman formulated her statement on the basis of the retrospective application of modern standards of law and practice, rather than those which were in force at the time. A key focus of this element of the applicants' challenge is that the Ombudsman also formulated conclusions within her statement with insufficient

evidence to support them. In submissions, Mr McMillen drew attention to a range of instances where it was contended that the mere absence of a record many years later (for example, in respect of a member of the public being warned about a threat against them) was essentially taken without more by the Ombudsman to equate to evidence of no warning having been given.

[58] I propose to refuse leave in relation to grounds (12) and (13) which do not in my view add materially to the challenge founded on the nature and purpose of the statutory scheme. Subject to one limited exception, I also propose to refuse leave on grounds (10) and (11). This is partly because of the extremely high bar for the court's intervention where the challenge is, in effect, to the Ombudsman's factual consideration of matters addressed within her investigation. It is also, however, also on the basis of the proposed respondent's objection on standing, which is discussed further below. The Ombudsman has clarified that JR216 has *not* been the subject of criticism in this report. She relies on the fact that *none* of the former officers who were the subject of criticism or potential criticism during the investigation have applied for judicial review. This public confirmation may hopefully assuage some of the concerns JR216 has about potential impact on his reputation arising from the report. In my view, however, he should not be considered to have standing (and nor should NIRPOA) to challenge specific findings or conclusions on the facts of the case which do not relate to him, and which have been clarified as not relating to him. Although I have concluded that NIRPOA does have standing to raise important points of principle or general application in terms of how the Ombudsman approaches legacy investigations and related section 62 statements, I see no reason why (acting as a representative body) it should be permitted to challenge specific factual findings or conclusions relating to officers who have not chosen to mount such a challenge themselves.

[59] The limited exception mentioned at para [58] above is that leave is granted in respect of ground (11)(ii), although solely in relation to the issue of whether those subject to paramilitary threat should have been advised of that. Generally speaking, I do *not* consider the applicants to have raised an arguable case that the Ombudsman applied modern standards of law and practice in forming her conclusions; save for the point made that the question of when those potentially subject to threat ought to have been informed may have been looked at through the prism of the positive obligation to take reasonable operational steps in response to a real and immediate risk which was only later the subject of a seminal judgment by the European Court of Human Rights in *Osman v The United Kingdom* in 1998.

[60] Finally, the applicants in the first case also mount two grounds – (14) and (15) – under the heading of procedural unfairness. I propose to refuse leave on those grounds also. The Ombudsman did engage in a Maxwellisation process which has now been adopted in light of the judgment of McCloskey J in *Hawthorne and White*. To some degree, the real mischief at which ground (14) is aimed is again repetitive of the key aspect of the challenge, namely that the Ombudsman has trespassed into an arena which is not statutorily within her remit. JR216 is concerned that he had no

prior warning of the contents of the report (because it did not refer to him specifically) so as to enable him to comment in advance of its publication. The key issue therefore may be thought to be whether the reasonable objective reader might consider that he is the subject of criticisms within the report because of the broad way in which they are framed. The Ombudsman accepts (at para 1.13 of her statement) that she has criticised the actions of a number of RUC officers serving during the relevant period but that, given the passage of time, it is not possible to identify all those responsible for actions or omissions criticised by her. She therefore provided an opportunity for any identifiable officer who was subject to criticism to respond – but it is clear that this did not encompass everyone. However, as noted above, her case is now that the present applicant, JR216, is not subject to criticism in the report. In those circumstances, and armed with that confirmation, I do not consider that there is any merit in his pursuing a claim that the Ombudsman has acted unfairly towards him.

[61] The final ground alleges procedural unfairness in breach of article 6 ECHR in that it took nine years for the Ombudsman to conclude her investigations. Even assuming that article 6 was engaged, because JR216 had in some way had his article 8 reputational rights determined, I do not consider that this ground materially adds to the key issues in this case. This is not primarily a case about delay in the publication of the Ombudsman's report. It would not in my view be a profitable use of the court's time and resources to enquire in detail into the reasons for the Ombudsman's investigation taking as long as it did. Previous litigation has highlighted that, particularly in the field of legacy investigations, lack of resources means that the Ombudsman's process takes much longer than she and many others would wish. Enquiring about the circumstances of why this complex investigation took so long to conclude would in my view serve no useful purpose.

Remaining issues in the second case

[62] As in the first case, in the second case many of the originally pleaded grounds are no longer pursued for a variety of reasons. Fewer grounds were maintained in the Order 53 statement in the second case. Broadly speaking, I adopt the same approach to the second case as that described above in relation to the first. I refuse leave on ground (i)(b) and (c) and ground (vi)(b) for the reasons set out at paras [49]-[53] above. Although Applicant A was subject to the Maxwellisation process, his evidence states that the findings particular to WERC are set out in Chapter 6 of the impugned statement; yet no passage from Chapter 6 is challenged in the applicants' schedule of elements in the Ombudsman's public statement to which objection is taken. The proposed respondent has identified three passages in Chapter 18 which relate to the work of WERC (namely paras 18.97, 18.101 and 18.103). She correctly submits that no particularisation is provided as to why the applicant says these findings were not open to her as a matter of fact (as opposed to the legal objection made in relation to the extent of the Ombudsman's powers under the statutory scheme). Nor was I taken to any section of Chapter 6 or those paragraphs of Chapter 18 mentioned above in the course of oral submissions during

the leave hearing. It is confirmed that Applicant B was not investigated as part of the investigation and that there is no personal criticism of him. I refuse him leave on the standing ground (as with JR216 above); and refuse Applicant A leave on the merits in relation to his irrationality challenge at ground (iii)(b). I also refuse leave on the procedural fairness grounds – at (iii)(c); (iv)(a); and (vi)(c) and (d). This is on the basis that Applicant A had the benefit of a Maxwellisation process, in which he engaged, and which resulted in modification of the Ombudsman's statement; that Applicant B has not been criticised in the report; and, more widely, on the bases mentioned at paras [60]-[61] above.

The merits in the third case

[63] The Operation Farrier investigation commenced in or around 2003 when complaints were received from four individuals who had been arrested and detained at Strand Road RUC Station in 1979, initially in connection with punishment shootings and then in connection with the murder of a Lieutenant Kirby. During the course of their detention, all of the complainants gave 'confessional statements' in respect of punishment shootings and the murder. They alleged that those statements were not given voluntarily and that police officers had mistreated and coerced them. The Ombudsman notes that they complained that police had been guilty of perverting the course of justice and that they also made a number of further specific allegations. The complaints are summarised at paragraph 3.1 of the Ombudsman's statement, including complaints of ill-treatment, including physical and mental abuse; that the complainants were threatened; that they were not allowed access to a solicitor or family member; that the statements were fabricated and obtained by oppressive and coercive means; and that they only agreed to make the statements as they were frightened and wanted to be released from custody; as well as some other matters. The applicant was one of the officers whose role it was to interview the arrested individuals. On foot of the confessions, a criminal trial was to take place but the four complainants left the jurisdiction. The case was adjourned pending their return but, in or around 1998, the criminal proceedings were discontinued and the complainants were told that they were free to return to Northern Ireland. They later complained to PONI about their treatment by police and the making of involuntary statements.

[64] I accept that there is an arguable case in relation to breach of regulation 6 of the 2001 Regulations and section 52(9) of the 1998 Act on the basis that the Ombudsman's statement addresses issues which had been the subject of a recommendation for prosecution and there had been criminal proceedings which concluded (without a conviction). The proposed respondent submitted a recommendation to the PPS in 2012. This was to the effect that there should be no prosecution. However, JR217 and another officer were nonetheless prosecuted for perverting the course of justice. The particulars of the offence were as follows: "namely you recorded a written statement after caution from Gerald Kieran McGowan which was not his independent account of his involvement of the murder of Lieutenant Stephen Andrew Kirby." (The applicant was *not* charged in relation to

the statements of another complainant, Mr Kelly.) The applicant pleaded 'not guilty.' In January 2015, he was acquitted by the jury upon a direction from the trial judge. Almost six years later, in October 2021, he received a letter explaining that PONI was intending to issue a public statement in relation to the investigation. He contends that he understood the matter to be closed after he was prosecuted but acquitted.

[65] The Ombudsman has two responses to the applicant's case based on regulation 6. First, she says that this is a 'gateway' provision, designed to be applied (only) when the complaints are received and that it does not relate to her power to issue a public statement under section 62. Second, she submits that, in any event, the subject matter of the criminal proceedings was very narrow, namely the recording of a written statement which was not an independent account. This did *not* address other elements of the complainants' complaints, such as physical ill-treatment (which had been the subject of a police disciplinary investigation) but also elements such as the use of a coercive atmosphere and other means of oppression, which (she contends) it was still open to her to investigate. Relying on Departmental guidance issued in relation to police complaints procedures, the Ombudsman observes that it is important to break a complainant's complaint down into the various allegations of different types of behaviour.

[66] However, in my view it is clearly arguable that regulation 6(5) and, particularly, section 52(9) are not provisions which apply only when a complaint is received. If, later, the relevant conduct has been the subject of disciplinary or criminal proceedings, that arguably has the effect of depriving the Ombudsman of any further role at all in relation to that conduct, whether by way of additional investigation or publication of a section 62 statement. Where and to the extent that section 52(9) applies – which is a contentious issue in this case – it provides that "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", which would include the dis-application of section 62. There may be force in the Ombudsman's point that, even assuming she was wrong in her interpretation of these provisions, in the circumstances of this case that still did not preclude her from investigating *some* of the matters contained in the complaints made to her. However, this is an issue which requires further consideration and argument.

[67] I also accept that there is an arguable case in relation to breach of regulation 6(5) because there had been previous disciplinary investigations conducted by the police. The Ombudsman has recorded (at para 3.3 of her statement) that she could not investigate the allegations of physical ill-treatment or assault made by the complainants "as these complaints were investigated at that time by the RUC's Complaints and Discipline Branch" (CDB). The CDB investigation included forensic investigation but also a review of relevant police documentation, including medical records, and interviews of witnesses (including the provision of written statements under caution by the officers involved). The focus appears to have been on investigation for the offence of assault. The CDB forwarded a file of evidence to the

DPP who directed 'no prosecution.' The applicant's case is that, taken together, the previous police investigation and the criminal prosecution (which, he contends, relied on a range of matters in support of the suggestion that the account recorded was not voluntary so as to amount to perversion of the course of justice) left little to nothing in respect of which the Ombudsman retained any statutory function, having regard to the statutory scheme.

[68] I further consider that there is an arguable case in relation to some of the findings in the third case overstepping the mark such as to be beyond the Ombudsman's powers. The applicant contends that an objective reasonable reader would consider that the Ombudsman has concluded that he mistreated and coerced some of the complainants in circumstances which would plainly have constituted a disciplinary offence at the time. Some of the applicant's criticisms of alleged conclusions in the Ombudsman's report are stronger than others; but I do not propose to parse these at this stage and so will simply grant leave on the entirety of the applicant's ground (3). Inter alia, the statement contains the following (although this is not exhaustive of the portions of the report which the applicant claims went too far in light of the Ombudsman's statutory role):

(a) An acceptance of the expert evidence that two statements signed by two of the complainants were "too similar to have been produced independently" and that the expert evidence "supports the allegation of Mr McGowan the police told him what to put in his statement" (para 8.25 and 8.26);

(b) A statement of the Ombudsman's "view, given the available evidence, that the statements from Messrs Toner, Crumlish, McGowan, and Kelly were obtained unfairly and were not 'voluntary' in the sense described in the Judges' Rules" because of a variety of circumstances which she then set out;

(c) Her conclusion expressed in para 8.39 in the following terms:

> "… I have concluded that the evidence obtained during this investigation supports their complaints that the 'confessional' statements were obtained in a 'coercive atmosphere,' and in circumstances which did not comply with Home Office guidance. This investigation has also established that the statements were obtained unfairly as they had no access to legal representation and were provided in order to secure their release from custody."

(d) An expression of her view that a variety of factors " had the cumulative effect of creating an oppressive and fearful environment" such that the confession statements given "were not obtained fairly but by coercion and/or oppression."

(e) A finding at para 8.76 that the complaints were "legitimate and justified regarding their mental ill-treatment, detention and interviewing by police", including "the manner in which 'confessional' statements were obtained from them by police".

(f) An expression of the Ombudsman's view at para 8.77 "given the young age of the four complainants, their lack of access to legal advice, and the oppressive atmosphere surrounding their detentions that this was indicative of an unfair process" and that "the irregularities and coercive atmosphere in which the 'confessional' statements were obtained were indicative of the statements having been obtained unfairly, and not freely and voluntarily in the sense described in the Judges' Rules."

[69] I do not consider that the applicant has an arguable case in relation to his grounds (4), (5) or (6). The fourth ground relates to the reliance placed upon the weight of an expert whom it was acknowledged (after this issue was raised in the applicant's representations) had made a significant error of fact. The Ombudsman recognised this, took it into account, and referred to it in her report. She nonetheless considered that this did not undermine the reliance which could be placed on other aspects of the expert's opinion (see para 8.27 of the statement). It seems to me that the applicant's challenge on this aspect of the matter is a *Wednesbury* challenge in territory where the weight to be given to the evidence is classically a matter for the Ombudsman.

[70] The fifth ground relates to the Ombudsman's apparent refusal to state in the report that no injuries were noted on the complainants at any point. The applicant notes that, although the complainants alleged that they were physically assaulted, all four complainants were examined by police doctors and one (Mr Kelly) also visited his own doctor. Although it seems that no physical injuries were identified by any of the medical practitioners during any of the medical examinations of the four complainants, this was not noted in the Ombudsman's report. The complainants were also examined by prison doctors and no note was made of physical injuries. I can understand the applicant's concern that this results in an imbalanced or incomplete picture being provided on one particular, potentially significant, element of the complaint. However, this appears to me to be a case of the applicant seeking to re-write a portion of the report to include circumstances favourable to him. It is not a case of the Ombudsman having allegedly gone beyond her powers, such as is alleged at ground (3). Although the Court of Appeal made a passing comment about something it might have expected to have seen in the Ombudsman's statement in the *Hawthorne and White* case (see para [58]), it did not go as far as to say that imbalance in how a report deals with a particular issue would of itself give rise to illegality (in the absence of irrationality or some obvious abuse of power). Moreover, in this case, the Ombudsman has made reference (at para 7.25) to the *officers'* reliance on the fact that no physical injuries had been found; and she has also given a rational reason why she chose not to include this detail (namely that, since physical ill-treatment had been investigated by the police previously, she was

precluded from looking at this issue at all and had made clear that she was not doing so).

[71] Ground (6) – related to the Ombudsman's alleged refusal to provide the applicant with an excerpt of the draft public statement relating to the determination of the criminal proceedings against him (a portion of the report which was not critical of him) – was not pressed by Mr McMillen at the hearing; and I would not have been inclined to grant leave upon it in any event. It is not where the meat of this case lies.

[72] Finally, I also propose to refuse leave on the applicant's ground (7), which contains an allegation of (the appearance of) unlawful predetermination. This is on the basis of a comment made by one of the Ombudsman's investigators, in the course of an interview with one of the complainants on 27 September 2005, to the effect that the complainants *had* been "dealt with illegally", which was said to be "a fact of the matter." The investigator continued to say, "… it was against the law what they were doing to you at the time and we've got to try and show that." This was before the applicant was interviewed (which occurred in 2012). In addition to this, the applicant relies upon the fact that there were issues with disclosure in the course of the criminal proceedings against him, which led the Ombudsman to ask the Independent Office of Police Complaints to examine the conduct of his office. (It seems that written statements prepared from tape-recorded interviews with the complainants did not, at least in some respects, adequately reflect what had been actually alleged in the course of the oral interviews – which only came to light when the tape recordings were provided on discovery in the criminal proceedings and listened to by the applicant's legal representatives. In particular, one complainant's tape-recorded interview was found to differ from the witness statement which had subsequently been signed by him. This is candidly accepted in the Ombudsman's report, at para 5.109. It also seems that this is what led the PPS not to proceed with the case against the applicant and his co-accused.)

[73] I do not consider that there is an arguable case, with a realistic prospect of success, that the Ombudsman's statement was infected with actual or apparent bias (or predetermination) as a result of these factors. As to the comments made by the investigator, I accept Ms Murnaghan's submission that this is an issue which needs to be looked at in the full context of the Ombudsman's investigation. I can quite see why the applicant was disturbed by the way in which the matter was put: it seems to indicate a clear view of the outcome at an early stage of the investigative process. It *might* be that there is some legitimate explanation as to why the investigator felt it appropriate to express a view on the ultimate merits of what had happened (for instance, as a device to reassure a reticent complainant or to win their trust to encourage them to speak freely) without actually pre-judging the substance of the complaint. However, even leaving that aside, I do not consider that this isolated issue, some 17 years before publication of the impugned statement by the Ombudsman, could arguably be said to render the entirety of the subsequent investigation and the present Ombudsman's statement on it unlawful. That is

particularly so given that, as Ms Murnaghan informed me from the Bar, the particular investigator moved on from the investigation and the Ombudsman's office when the investigation was still in its early states. The separate disclosure issues which arose in the criminal proceedings do not alter my view in relation to this, even when they are taken into account.

[74] A significant amount of argument at the leave hearing related to the relevant rules and standards which ought to be applied. The Ombudsman noted that there was, at the time of the arrest of the complainants, no legislation governing the actions of police officers interviewing suspects. She has placed particular reliance on the Judges' Rules which were in force at the time. The applicant contends that the Ombudsman has wrongly applied standards applicable to the admissibility of confession evidence, a matter of the law of evidence, as a standard of police conduct. He also complains that the Ombudsman has failed to adequately reflect the position under the relevant emergency legislation at the time, namely section 6 of the Northern Ireland (Emergency Provisions) Act 1973 under which a statement by the accused would be admissible unless there was *prima facie* evidence that the accused had been subjected to "torture or to inhuman or degrading treatment in order to induce him to make statement." On this basis, the applicant contends that, even if the Ombudsman was correct to apply admissibility criteria as standards of police conduct, she still addressed herself to the wrong legal test. I do not propose to grant leave specifically in relation to this issue since, as Mr McMillen candidly accepted in the course of exchanges, it does not form the basis of any pleaded ground of challenge. Nonetheless, this may be an issue which requires to be considered further in the course of the substantive hearing in the context of determining whether any finding which may have been made by the Ombudsman (or which would reasonably have been understood to have been made by her by the hypothetical reader) did or did not amount to misconduct at the relevant time.

Standing and capacity to bring the proceedings

[75] A significant part of the argument at the leave hearings in the first and second cases related to the standing of the various applicants and whether they had sufficient interest to mount the challenges they had brought. The proposed respondent relied upon the recent decision in England and Wales in *R (Good Law Project) v Prime Minister and Another* [2022] EWHC 298 (Admin), in which a Divisional Court reviewed a range of authorities in relation to standing in judicial review at paras [16]-[29]. Amongst the principles emerging from that review are the following:

(a) Standing and the merits of the case – including the nature of the relevant power or duty, the nature of the alleged breach, and the subject-matter of the claim – can often not be separated.

(b) There are likely to be differences between cases brought by individuals and those brought as a group challenge. Within the category of group challenges,

there are also different types: those where the group sues on behalf of its members, where it does so representing (or purporting to represent) the interests of others, and where it does so claiming to represent the public interest.

(c) There has been a liberalisation of the approach to standing in judicial review over the last four decades but, where a challenge has been permitted to proceed even though the applicant is not themselves directly affected, this is usually (although not exclusively) a case brought by a specialist interest group in its own field of interest and in some form of representative capacity.

(d) The approach to standing is based upon the concept of interests, which will be context specific, including by reference to the purpose of judicial review in the particular context of the case and the issues raised by the application.

(e) The test for standing is discretionary and not hard-edged. A relevant consideration in that regard may be whether there are obviously better-placed challengers.

[76] Applying those principles to the facts of the present cases, my basic conclusions in respect of standing are as follows. It is not open to a police officer who is *not* the subject of specific criticism in a PONI report to challenge the detailed findings of that report (which do not relate to them) by way of judicial review. An officer who is *actually* the subject of criticism, or adverse findings, would plainly have standing to bring such proceedings. In the third case that is what happened; and the proposed respondent has not raised a standing objection in that case for obvious reasons. In contrast, in the first and second cases two officers (JR216 and Applicant B respectively) have sought to challenge findings in PONI statements which the Ombudsman says clearly do not relate to them, since they were not the subject of criticisms in those reports. In light of that clarification, I do not consider that they have sufficient interest to challenge the statements merely on the basis that they are concerned that others *might think* that they have been referred to in the Ombudsman's report. Applicant A is in a different situation, since he was subject to a Maxwellisation process and the proposed respondent must therefore accept that he is a subject of (at least part of) the impugned statement in the second case. On that basis, I consider that he does have sufficient interest to challenge the contents of the report, if he can establish arguable grounds.

[77] Different considerations arise in relation to the 'institutional' applicants which are seeking to bring these proceedings in a representative capacity on behalf of their members. On a similar basis to the above, I do not consider either NIRPOA or the Federation to have standing to challenge on the merits (i.e. by way of an irrationality challenge) particular findings on the facts of a case which do not relate to, or give rise to, criticism of them. The officers who are actually the subject of those criticisms, and who were involved in the specific events which are the subject of an adverse

finding, are much better placed challengers in such cases and have an obviously and significantly more direct interest.

[78] Nonetheless, I consider there to be a valid distinction to be drawn between, on the one hand, challenges to the substance of the decision-making or detailed fact-finding undertaken by the Ombudsman in the circumstances of a particular investigation and, on the other hand, challenges grounded on the Ombudsman having allegedly misunderstood the statutory scheme which governs her functions and having exceeded her role. Complaints of the former type are case-specific and likely to be factually dense. Complaints of the latter type are more structural in nature and likely to have a broader application to the operation of the police complaints system established by the 1998 Act in a variety of cases, both past and present. Put shortly, the representative organisations have a legitimate interest in ensuring that the statutory scheme is properly applied by the Ombudsman, since that will or may affect a wide range of their members, but they do not have a legitimate interest in ensuring that the Ombudsman reaches the 'right' conclusion on each and every issue in each and every case she investigates. That is a matter for challenge by the officer, or retired officer, who is the subject of any such criticism (such as JR217 in the third case).

[79] A generous approach to standing on behalf of the representative organisations involved in the type of cases I have mentioned is in my view supported by the statutory scheme. One of the aims the Ombudsman must consider under section 51(4)(b) is the confidence of members of the police in the police complaints system. If an organisation which is representative of members of the police force, or retired members, brings a challenge related to the operation of the police complaints system (as opposed to merely cavilling with the findings in a particular case) I consider it obvious that they should be considered to have a sufficient interest for the purposes of Order 53, rule 3(5).

[80] I have taken into account the Ombudsman's point that the PSNI has been provided with copies of the public statements and has not sought to challenge them. However, I do not consider this to deprive NIRPOA or the Federation of sufficient interest, on behalf of their members generally, to raise grounds of challenge which allege a failure to operate within the constraints of the statutory scheme. The proposed respondent has also raised objections which, rather than pure standing points, relate to whether the Federation and NIRPOA have capacity to bring these proceedings, to which I now turn.

The Police Federation

[81] The Police Federation is part of the Police Association for Northern Ireland. The Police Association was established by the Police Act (Northern Ireland) 1970. Section 17(1) of that Act provided that:

> "There shall be a Police Association for Northern Ireland (in this Act referred to as the "Police Association") for the purpose of representing members of the police force in all matters affecting their welfare and efficiency, other than questions of promotion and discipline affecting individuals."

[82] Regulation 3 of the closely ensuing Police Association for Northern Ireland Regulations (Northern Ireland) 1971 (SR 1971/232) ("the 1971 Regulations") provided that the Association would comprise three sections, once of which was the Police Federation for Northern Ireland. Regulation 29 of the 1971 Regulations provided that the funds of the Federation shall not, without the consent of the Ministry, be used otherwise than for defraying expenses lawfully incurred in accordance with the Regulations; and that, without prejudice to the generality of the foregoing, the funds of the Federation may be applied in accordance with the rules laid down by the central committee.

[83] For present purposes, the Police Association is given statutory recognition in section 32 of the 1998 Act. It provides that:

> "(1) There shall continue to be a Police Association for Northern Ireland for the purpose of representing members of the police force in all matters affecting their welfare and efficiency, except for –
>
> (a) questions of promotion affecting individuals; and
>
> (b) (subject to subsection (2)) questions of discipline affecting individuals.
>
> (2) The Police Association may represent a member of the police force at any proceedings brought under regulations made in accordance with section 25(3) or 26(3) or on an appeal from any such proceedings."

[84] Similar provisions to those referred to in the 1971 Regulations are now made in the Police Association for Northern Ireland Regulations (Northern Ireland) 1991 (SR 1991/168) ("the 1991 Regulations"). Regulation 3 essentially replicates regulation 3 of the 1971 Regulations and regulation 22(1) now provides as follows:

> "The funds of the Federation shall not, without the consent of the Secretary of State, be used otherwise than for defraying expenses incurred in accordance with the provisions of this Part and shall not be used for any

> purpose other than the purposes authorised by section 17 of the Police Act (Northern Ireland) 1970."

[85] The Police Federation also has rules, which are made under regulation 23 of the 1991 Regulations. Rule 3 refers to the statutory limitation of the Federation's interests in the following terms:

> "The Federation shall consider only matters affecting the Health and Safety, welfare and efficiency of the Police Service including Student Officers. It shall not consider questions of discipline affecting individuals (other than in relation to the representation of an individual at any disciplinary proceedings, or on an appeal from such proceedings) or of promotion affecting individuals."

[86] Mr Liam Kelly, the Secretary of the Federation, has sworn an affidavit in the first case supporting it in that capacity. He has provided some detail about the history and purposes of the Federation. Mr Kelly has also indicated that the Federation is involved in these proceedings in pursuit of its role as a representative body for former officers who were of federated rank, given their concerns about the impact on the interests and reputation of such officers as a result of what they consider to be sweeping findings in the Ombudsman's statements. Mr Kelly also contends that the issues which arise in the proceedings are relevant for present members of the PSNI whom the Federation represents, as they go to the limits and boundaries of the present police complaints system as contained in the 1998 Act. Finally, he notes that the Federation Central Committee unanimously decided (on 10 February 2022) to bring proceedings in the first case.

[87] Notwithstanding Mr Kelly's averments and what might in lay terms be considered a legitimate interest on the part of the Federation in relation to the subject matter of these proceedings, I consider the Ombudsman's objection to the Federation participating the proceedings to be well founded. The Federation's governing provisions expressly exclude it from considering questions of discipline which affect individuals (and it is inevitably part of the applicants' case in these proceedings that the Ombudsman's statements are a question of discipline and do affect individuals). The Federation's ability to involve itself in disciplinary matters is also expressly limited to the representation function which is referred to above. I do not consider that it can properly be contended that the Federation's participation in these proceedings falls within its welfare remit, since (even assuming that officers' welfare is affected by the publication of the Ombudsman's statements) to construe the Federation's welfare function in that way would negate the clear and express exclusion of the Federation having an interest in disciplinary issues, subject to the limited exception mentioned.

[88] Accordingly, I propose to refuse the Federation leave to apply for judicial review in the first case. This is not on the basis of lack of standing since, looking at

the question of standing solely through a public law lens, it appears to me that the Federation does have sufficient interest in the subject matter of the proceedings (or at least on the grounds on which I propose to grant leave). Rather, the refusal of leave to the Federation is in the exercise of the court's discretion on the basis that to grant leave would be to sanction the Federation acting outside the purposes for which its statutory powers and functions have been conferred.

The Northern Ireland Retired Police Officers' Association

[89] Mr Fitzsimons has sworn an affidavit in each of the first and second cases supporting them in his capacity as chairman of, and on behalf of, NIRPOA. He has provided some detail about the history and purposes of that association. NIRPOA Ltd is a private company limited by guarantee. The court has been provided with a copy of its articles of association. In particular, its objects (at para 4.1) are set out in the following terms:

> "The Company's objects are to provide information and confidential advice to our members in a range of matters from Pensions to interviews and where to go for further assistance, to organise/participate in selected social/community events and outings for members, liaise with other Organisations which may benefit the interests of the Association and our members, to provide our members with a group Health Insurance Scheme and a group Travel Insurance scheme. To examine matters affecting members welfare, safeguard pension rights and interests, representations on local, national and UK relevant bodies, ensuring equality of treatment, liaison with Central/Local Government, Maintaining contact with members and with those injured or in ill-health, to provide a Re-union magazine and an annual diary."

[90] By para 5.1 the directors are given general authority over the affairs and property of the company, including authority to exercise any powers of the company which are necessary and/or incidental to the promotion of any or all of the objects of the company. The Ombudsman contends that the objects of the company are not sufficiently broad to encompass the bringing of proceedings against her, as the Association seeks to do in the first and second cases.

[91] There is a respectable argument that participation in the present proceedings is not within the company's objects, or necessary or incidental to the promotion of those objects. However, NIRPOA's position is different to that of the Federation for two reasons. First, the Federation's position is governed by statute or provisions of delegated legislation, whereas NIRPOA's position is purely a matter of private law. Second, in the case of the Federation there is a prohibition upon it becoming involved in disciplinary matters, whereas there is no such prohibition in respect of

NIRPOA. As a matter of pure public law, I take the view that NIRPOA is a representative body which does have sufficient interest in the exercise of the Ombudsman's functions to bring challenges of the present character. The proposed respondent's objection is really one of vires, which might be relevant to, but is certainly not determinative of, the question of standing in public law.

[92] One technical response may be that the company, or NIRPOA itself, is not actually an applicant in these proceedings. Mr Fitzsimons is the applicant, albeit acting in his capacity as chairman of, and representative of, NIRPOA. If NIRPOA had itself brought the proceedings, the general answer to the vires objection may be found in sections 39 and 40 of the Companies Act 2006: the validity of an act done by a company shall not be called into question on the ground of a lack of capacity by reason of anything in the company's constitution, and the ability of directors to bind the company regardless of what appears in the constitution. The bringing of these proceedings by the company would really therefore be a matter for shareholders to raise with the company's board if they believed there had been any ultra vires act, but it does not affect the act itself (see section 40(4)). The position is likely to be more complicated if NIRPOA was a charity – but I have been told that it is not. Assuming Mr Fitzsimons is using company funds in pursuing the application, again this would be a matter for shareholders to pursue if they had concerns about this. In the present case, I have also been assured by Mr McMillen, firstly, that the membership of the company is supportive of its participation in these proceedings; and, secondly, that if and insofar as necessary the company would be prepared to take steps to amend its constitution to regularise the validity of its participation in these proceedings.

[93] For the reasons given above, I conclude that NIRPOA would have standing to bring these proceedings and that any possible impediment to doing so arising by virtue of its constitution is a private law matter for the company shareholders to pursue if and in the unlikely event that they view the participation as a wrongful use of company funds. I take the same approach to Mr Fitzsimons' participation acting on behalf of NIRPOA. It would be preferable if the company's articles were amended in the appropriate way to make clear that the bringing of proceedings such as these, where approved by the board, is within the company's powers; but I do not consider it necessary to direct that this be undertaken as a condition of the grant of leave.

[94] Mr McKay urged me to be sceptical of the motivation behind NIRPOA's participation in these proceedings, particularly in light of the Association's response to the Eames-Bradley Consultative Group on Dealing with the Legacy of the Past, which he contrasted with the clear statements by the applicants' counsel in these proceedings to the effect that the litigation should not be taken as an attack on the office of the Ombudsman generally or on the importance of her role in investigating complaints of criminality or misconduct, including in historic cases. I would not be inclined to look behind the clear statements made in this regard by the applicants' counsel in these proceedings, which I take at face value; but, in any event, the motivation of a challenger is generally irrelevant provided they can establish a

sufficient interest to ask the court to undertake an audit of the legality of the respondent's actions and establish an arguable case.

Delay

[95] Delay has been raised as an objection to the grant of leave in all three cases, although most energetically in the third case. In *Hawthorne and White*, where there was a challenge to the Ombudsman exceeding his powers by conducting the investigation at all, Keegan J simply 'left the time issue aside' (see paras [46]-[47] of her judgment). She was able to do so as she considered the point had no merit in light of the averments contained in affidavits provided by the Ombudsman. As noted above (see paras [54] and [62]), many of the grounds in respect of which delay was most obviously an issue in these cases (since they related to the commencement of the Ombudsman's investigations which eventually gave rise to the impugned statements) are no longer pursued. The remaining objection is principally on the basis that challenges ought to have been brought once, as a result of correspondence, the relevant individual applicant became aware of how the proposed respondent was intending to proceed. This applies to Applicant A in the second case and, more importantly, to JR217 in the third case. I do not consider that the same objection can be made in respect of NIRPOA acting through Mr Fitzsimons, which was not in receipt of Maxwellisation correspondence and which therefore stands in a different position. I consider that it was entitled to bring its challenge within three months of the publication of the two statements it is now seeking to challenge.

[96] In the third case, Ms Murnaghan on behalf of the Ombudsman urged me to refuse leave to apply for judicial review on the basis that the grounds of challenge first arose in October 2021, or in January 2022, when correspondence from the Ombudsman made clear how she was intending to proceed. The delay objection was pressed particularly in respect of JR217's challenge to the Ombudsman's power to issue the statement in light of the previous disciplinary investigation and criminal proceedings (see paras [64] and [67] above) but also in respect of his challenge to the content of the published statement.

[97] As noted above, the prosecution of the applicant ended in January 2015. He was sent a letter from PONI on 11 October 2021 indicating that the Ombudsman intended to issue a public statement. His solicitors replied on 9 November 2021 and 23 November 2021. The Ombudsman replied in some detail to that correspondence on 26 January 2022. Ms Murnaghan lays significant emphasis on this correspondence. At that point, the Ombudsman proposed to amend her draft statement in some respects as a result of the representations which had been received; but nonetheless still intended to proceed with publication. She argues that, at that point, it was entirely clear that she was going to publish the statement, so that time began to run for the purpose of the applicant's challenge then, if not indeed from the time of her correspondence in October 2021. The applicant relies upon the fact that the Ombudsman noted in her correspondence of January 2022 that she retained, and would continue to retain, "an open mind regarding the substance of

the public statement" until she had carefully considered all of the Maxwellisation responses received from the relevant retired officers. For this reason, he was unsure as to how the Ombudsman would ultimately proceed and, on one view, there was still all to play for.

[98] I accept the Ombudsman's submission that it was clear in January 2022 that she was not to be dissuaded from publishing a statement (notwithstanding her keeping an open mind about the text to be used in certain parts of that statement). Indeed, that seems to be why the applicant instructed his solicitors to send formal pre-action correspondence at that point, which they did on 16 February 2022. He took issue with the Ombudsman's power to publish the statement at all in the circumstances of the case (and, particularly, following the conclusion of the criminal proceedings and when an earlier disciplinary investigation had been conducted by the police); and he took issue with certain portions of the report, which he contended amounted to unlawful findings, amongst other things. The Ombudsman replied on 9 March 2022 indicating that she did not concede the application and that the matter would be contested. It was still clear she was going to proceed to publish the statement.

[99] The proceedings were launched on 7 June 2022, at which point the applicant was seeking to challenge the Ombudsman's *intended* publication of the statement. The affidavit of the applicant's solicitor which has recently been provided dealing with delay discloses that the application was brought within three months of the Ombudsman's pre-action response of 9 March, out of an abundance of caution, since this might be thought to represent the Ombudsman's settled position. The applicant's junior counsel, however, considered that time would likely only run from the date of publication of the actual report. The applicant later amended his pleadings and, in the most recent version of his Order 53 statement (dated 7 October 2022), he is now challenging the actual publication of the statement, which occurred on 10 June 2022. I was informed that there had been discussions between the parties and, in the particular circumstances which had arisen, the applicant determined not to proceed with a claim for interim relief to restrain publication of the report. The Ombudsman was set to resist this, partly because one of the complainants was terminally ill and wished to know the outcome of the Ombudsman's investigation.

[100] The situation is complicated because, in fact, the applicant launched the proceedings *before* publication (albeit he did not proceed with an application to restrain publication). On delay, however, I ultimately accept the applicant's fundamental contention that this is a species of case where, properly construed, the time for commencing a challenge runs from the publication of the statement under section 62. I was taken to the decision in *R (Burkett) v Hammersmith and Fulham London Borough Council* [2002] 1 WLR 1593 which, although arising in a different context, analyses the proper approach to judicial review time limits where there is a process culminating in a final decision with formal legal effects. In that case there was a resolution to grant outline planning permission, subject to a planning agreement being completed, which made clear what the respondent council was

proposing to do. The Supreme Court ultimately held that the time limit for judicial review purposes only ran from the grant of permission itself, not the earlier council resolution.

[101] By analogy here, it seems to me that time for a challenge to the publication of a statement under section 62 of the 1998 Act, or to the findings contained within that statement, begins to run from the date of publication. It is the exercise of that function under the 1998 Act which gives rise to the complaint and the reputational damage of which the applicant complains. The Ombudsman's correspondence amounts, at most, to a decision to do an unlawful act in the future (cf. para [39] of *Burkett*). It is not an act giving rise to rights and obligations and a challenge, on the basis of the Ombudsman's correspondence, to her *intended* publication of a statement might arguably be premature (cf. para [42] of *Burkett*). Similar reasons of legal policy as are adverted to in paras [45]-[46] and [49]-[50] of Lord Slynn's opinion in *Burkett* favour the approach adopted above, rather than requiring an applicant such as JR217 to challenge a decision on the basis of correspondence received in the course of a Maxwellisation process. The *Burkett* case is in my view more closely analogous to the present case than that of *Re McDonnell's Application* [2007] NIQB 125, which was relied upon by the proposed respondent, which involved a challenge to one public authority's decision on the basis of alleged failings of another public authority at an earlier stage of a carefully phased and structured statutory process.

[102] I have been troubled to some degree as to whether this is the correct analysis in respect of *all* of the applicant's proposed grounds of review and whether *some* of them might be considered to be out of time, even if others are not. In particular, insofar as the applicant contends that any action by the Ombudsman was unlawful after his acquittal on the criminal charge, there is an argument that he should have raised that earlier. However, realistically, he would not have had an issue with this but for the Ombudsman's decision to publish the statement, in the terms in which she did, at the very end of the process. In addition, any delay in pursuing this aspect of the claim is modest compared to the length of time taken by the Ombudsman's investigation as a whole. The applicant was only aware that the complaints were being taken further forward some six years after his acquittal, at which point the Ombudsman's investigatory steps were likely to be largely complete. There is also a public interest in grappling with the legal issues which have been raised by this aspect of the challenge so as to avoid further piecemeal challenges to similar statements in future, in circumstances where the Ombudsman and retired officers have already been at loggerheads in litigation over some time and where I have concluded that it is appropriate that leave be granted on other grounds. In the circumstances, if and insofar as necessary, I would be prepared to extend time for this element of the challenge under RCJ Order 53, rule 4.

[103] Ms Murnaghan is right to say (relying on Humphreys J's judgment in *Re Armstrong's Application* [2022] NIQB 32, at para [25]) that a claimant cannot avoid the application of time limits by writing to the defendant and then seeking to characterise a response as a fresh decision. As I have explained above, the

Ombudsman's pre-action response of March 2022 need not (and should not) have been treated as a relevant decision for the purpose of challenging the publication and content of the statement. That occurred when the statement was published in the terms in which it is now challenged (which were, in the event, different from the terms of the draft portions which had earlier been provided to the applicant for comment).

Conclusion

[104] In summary:

(1) I grant leave in the first case – to Mr Fitzsimons acting on behalf of NIRPOA only – on grounds (4)(i) and (iv); (5); (6); and (11)(ii) (on the limited basis set out at para [59] above). I refuse leave in that case on grounds (4)(ii), (iii) and (v) (the last paragraph being partly duplicative of grounds upon which leave has been granted); (10); (11)(ii); (12); (13); (14); and (15). Grounds (1); (2); (3); (7); (8); (9); and (11)(iii) from the original Order 53 statement were abandoned.

(2) I grant leave in the second case – to Applicant A and Mr Fitzsimons acting on behalf of NIRPOA – on ground (i)(b) only. I refuse leave in that case on grounds (i)(c) and (d); (iii)(b) and (c); (iv)(a); (vi)(b), (c) and (d). Grounds (i)(a), (e), (f) and (g); (ii); (iii)(a); (iv)(b) and (c); (v); and (vi)(a) from the original Order 53 statement were abandoned.

(3) I grant leave in the third case – to the sole applicant, JR217 – on grounds (1); (2); and (3). I refuse leave in that case on grounds (4); (5); (6); and (7).

[105] I consider that this outcome reflects the arguability of the various grounds advanced and the limitations imposed by the requirements of standing which are discussed above. It also in my view reflects Mr McMillen's suggestion that these cases were not about 'nit-picking' in respect of the Ombudsman's reports but, rather, were brought to seek to resolve "the big issues" which remain contentious between those representing retired police officers generally and the office of the Ombudsman. Those issues, where they require further argument and adjudication, should broadly be addressed by the grounds on which leave has been granted. The grant of leave in the third case also permits the issue of the extent of the Ombudsman's powers to be considered in the context of a case in which article 2 ECHR is not engaged, as well as in cases where it is. Many of those grounds on which leave has been refused were, in my view, unwarranted attempts to seek to unpick the factual conclusions reached by the Ombudsman which were either unarguable or, even if they may have had substance, were brought by applicants without sufficient interest in the subject matter of the relevant findings.

[106] Leave to apply for judicial review is refused to the Police Federation in the first case for the reasons set out at paras [87]-[88] above. If and insofar as that gives

rise to any concerns on the part of the respondent as to security for costs in any of the cases (which is a matter which was raised in passing in the Ombudsman's submissions), that should be explored in the usual way by means of correspondence in the first instance and could be the subject of a further discrete application in the proceedings in due course if necessary.

[107] I will hear the parties on the issues of timetabling, listing and case-management directions. One necessary direction will be the service, alongside the notice of motion in each case, of a revised Order 53 statement reflecting the limited grounds on which, and parties to whom, leave has been granted.