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Judgment: approved by the Court for handing down | *Delivered:* **21/09/2017**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Sheridan's (Brian) application for judicial review

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BRIAN SHERIDAN

Appellant:

-and-

THE POLICE OMBUDSMAN FOR NORTHERN IRELAND AND THE CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN IRELAND

Respondents:

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Before: Morgan LCJ, Gillen LJ and Stephens LJ

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STEPHENS LJ (delivering the judgment of the court)

Introduction

[1] The appellant, Brian Sheridan appeals to this court from the judgment and order of Maguire J both dated 3 February 2017 in relation to the appellant's application for leave to apply for judicial review against the Police Ombudsman for Northern Ireland ("the Ombudsman") and against the Chief Constable of the Police Service of Northern Ireland ("the Chief Constable"). The impugned decision of the Ombudsman is dated 22 February 2016 which determined that there was insufficient

evidence to support the allegations which the appellant had made against the Chief Constable and closed the appellant's complaint to the Ombudsman. The impugned decisions of the Chief Constable led to two approaches to the appellant in February 2015 whilst he was on holiday in Norway and an approach to him on 22 October 2015 on the Newry Road, Armagh, all of which approaches the appellant perceived as being an attempt by the Chief Constable to recruit him as a covert human intelligence source ("CHIS"), colloquially referred to as an "informer." The appellant was concerned that these approaches put his life at risk from terrorists who might incorrectly conclude that he had agreed to be a CHIS. The learned judge determined that leave to apply for judicial review against the Chief Constable should be refused on two grounds, including that there was an alternative remedy in that the complaints which the appellant sought to make against the Chief Constable in the judicial review proceedings should be made to the Investigatory Powers Tribunal ("the Tribunal") under section 65 of the Regulation of Investigatory Powers Act 2000 ("RIPA"). The learned judge having determined that there was an arguable case against the Ombudsman considered that the appellant's complaints as a whole were complaints which could be made to the Tribunal so that the proceedings against the Ombudsman should be stayed until after the determination of the Tribunal proceedings.

[2] Mr Southey QC and Mr Bunting appeared on behalf of the appellant, Ms Doherty QC and Mr Anthony appeared on behalf of the Ombudsman. Mr McGleenan QC and Mr Egan appeared on behalf of the Chief Constable. The hearing of the appeal was conducted with all the documents and the authorities being made available to the court electronically and without any hard copies. We are grateful to all counsel for the assistance that they provided.

Factual background

[3] The proceedings were commenced on 23 May 2016 the factual background initially being set out in the affidavit of the appellant's solicitor, Darragh Mackin, sworn on the same date, there being no affidavit from the appellant. That is a procedure which has been repeatedly deprecated and which we continue to deprecate; see *Re Cullens Application* [1987] NIJB 5, *XY's Application* [2015] NIQB 75 and *In the Matter of an Application by Emen Bassey* [2008] NIQB 66. That procedural irregularity was corrected when an affidavit from the appellant was sworn on 12 October 2016. The factual background in this judgment is taken from the affidavit of Darragh Mackin, the affidavit of the appellant and the various documents exhibited to those affidavits including the response of the Chief Constable to the pre-action protocol letter and a written statement taken from the appellant by his solicitors on 27 October 2015.

[4] The appellant in his affidavit sworn on 12 October 2016 states that

> "In 2011 (he) was arrested by the police in South Armagh when (he) was in a car being driven by one of (his)

> friends. The police found rifles and handguns in the car and alleged that (his) friends and (he) were going to bury the weapons. (He) pleaded guilty and was sentenced to imprisonment."

The appellant also stated that:

> "as part of (his) prosecution, press reports suggested that (he) was a member of the Real IRA or another proscribed organisation. (He has) always denied this. However, the fact remains that (he lives) in Armagh, an area where there is paramilitary activity."

In relation to the approach made to him on 22 October 2015 on the Newry Road Armagh the appellant stated that

> "(he is) well-known in the area" so that "(his) friends, neighbours, and family would instantly have recognised (his) car."

[5] In relation to the criminal offences committed by the appellant in 2011 he does not seek to explain why rifles and handguns were in the car or how or from whom they had been obtained. Rather the appellant sets out the police allegations and states that he pleaded guilty. He disavows membership of any proscribed organisations but he does not state that he disagrees with the views or methods of such organisations. He does not assert that he has changed any relationships or that he has dissociated himself from any peer group. He does not identify his "friends" who were also in the car with him nor does he state what motivated him or his "friends" to commit these criminal offences. At no stage does the appellant state that he no longer has any contact or relationship with the "friends" who participated with him in the commission of the 2011 offences but rather he continues to describe them as his "friends" in his affidavit.

[6] Based on the brief details set out by the appellant in his affidavit we consider that there is either direct evidence of certain facts or a number of inferences which can be drawn as follows:

(a) The appellant's crimes were committed in South Armagh.

(b) The appellant continues to live in South Armagh in the same community as at the date when he committed these criminal offences.

(c) By living in the same area the appellant will have formed a number of relationships in the area and would have the ability to form further relationships. This is supported not only by the appellant living in the

same area but also the appellant states that he is well-known in the area and has relationships with friends, neighbours and family.

(d) There was and is paramilitary and terrorist activity in the general area where the appellant lives.

(e) The appellant's criminal activity was committed in conjunction with others who are described by him in his affidavit sworn on 12 October 2016, for the purposes of these proceedings, as his "friends."

(f) The appellant does not state that he no longer has any contact or relationship with those other individuals but rather they continue to be described by him as his "friends" so that it is a reasonable inference that he has ongoing contact and an ongoing relationship with all of them.

(g) There is a reasonable suspicion that in 2011 both the appellant and his "friends" were concerned in the commission, preparation or instigation of acts of terrorism connected with political affairs in Northern Ireland acting on behalf of a proscribed organisation.

(h) By virtue of the appellant's involvement in this criminal activity in 2011 he could have information which would be of assistance to the Chief Constable in relation to the investigation of and the prevention of terrorist activity.

(i) By virtue of the appellant's previous contact with and his ongoing relationship with his "friends" the appellant could have information which would be of assistance to the Chief Constable in relation to the investigation of and the prevention of terrorist activity.

(j) The appellant could use what a proscribed organisation would perceive as the "credential" of his previous criminal activity to form relationships with members of such an organisation and to obtain information of value to the Chief Constable.

(k) The appellant could use his "friendship" with the other individuals to develop relationships with others potentially including members of a proscribed organisation and by that further means to provide information to the Chief Constable in relation to the investigation of and the prevention of terrorist activity.

[7] It is not clear as to the date upon which the appellant was released from prison following his conviction for the 2011 offences.

[8] On Thursday 12 February 2015 the appellant and his partner arrived in Oslo on holiday.

[9] On Friday 13 February 2015 the appellant states that he was approached by three men. The first man introduced himself as "Fergie." The second man had an English accent who said to him that they were from the Police and that they wanted to speak to him. This all occurred on a main street in Oslo when the appellant was out for a walk on his own. The appellant cannot give the exact location at which this approach was made to him. The appellant states that he asked the men to leave him alone. He states that he was scared and confused and that it seemed that they must have followed him out of Ireland on holiday. He states that this caused him particular distress.

[10] On Sunday 15 February 2015 the appellant states that the three men approached him again on this occasion outside the hotel in Oslo at which he was staying with his partner. They again told him that they wanted to speak to him. The appellant states that he again told them that he did not want to speak to them and asked them to leave him alone. He also states that this repeat approach caused him particular alarm and distress.

[11] After the holiday the appellant and his partner came home to Armagh and he had no further contact from the police until Thursday 22 October 2015.

[12] At approximately 6 a.m. on 22 October 2015 the appellant states that he was driving up the Newry Road in Armagh City when he was pulled over at a police check-point and asked for his licence by a police officer who was in full uniform. There was a marked police car at the side of the road. The appellant states that when the police office took his licence, he asked the appellant to pull over onto the hard shoulder and that when he was parked on the hard shoulder a car came up behind his vehicle. The appellant did not note the make or model of the car as it was quite dark but two men then got out of the car and came up to his car and opened the passenger door. The appellant states that one of the men was the same man who had previously identified himself as "Fergie" when he was in Oslo and that the appellant immediately recognised him. That Fergie then introduced his colleague as "Kenny" and said that Kenny did not get to speak to the appellant in Oslo. Both men were dressed casually. The police man who stopped him who still had his licence walked to the other side of the road, so as to discontinue the check point. That the appellant remained parked at the side of the road throughout the entire time that he was approached by these two individuals. That Fergie said to the appellant that it is warmer in Northern Ireland than in Oslo or words to that effect. He again said to the appellant that they needed to talk and that the appellant said that he had nothing to say, and asked to be left alone. That the appellant consistently told Fergie that he did not want to speak to him to which he replied "take my number, you will talk to me, here is not the place." The appellant states that Fergie then threw down a laminated card with the mobile number "075 1972 8614" on it and told him to give him a call.

[13] On 27 October 2015, the appellant contacted his solicitor, Darragh Mackin, to seek assistance regarding the unwanted approaches the appellant had received from officers of the Chief Constable. The appellant provided Mr Mackin with a telephone number that was written on the back of a laminated card. The appellant told his solicitor that the officers who had approached him had given him this card and told him to ring them on that number. On 27 October 2015, in the presence of the appellant, Mr Mackin dialled the number, with the telephone on "speaker phone." After a short while, a man answered the telephone. Mr Mackin asked him who he was. The man then asked Mr Mackin who he was. Mr Mackin explained that he was the appellant's solicitor and that the appellant was concerned at the officers' approaches. Mr Mackin states that the man who answered his call appeared relaxed and confident. He said words to the effect of, "If I wanted to speak to Brian, I will get him again," and then hung up. He did not introduce himself or provide any explanation as to why he had followed the applicant to Norway and approached him at a police checkpoint in Armagh.

[14] On 27 October 2015 the applicant expressed his concern to Mr Mackin that officers of the Chief Constable had put him at risk by publicly seeking to recruit him to provide intelligence to them. He felt that these approaches put him at risk from other members of the community who may have perceived wrongly that he was a police informant. Mr Mackin states that on that date both he and the appellant felt that police officers had failed to take adequate steps to protect the appellant's life, security, and personal autonomy, in apparent breach of Articles 2, 3, and 8 of the European Convention on Human Rights ("the Convention"). The appellant states that he was so concerned at what the police had done that he asked Mr Mackin to help him prepare a complaint to the Ombudsman. He wanted, in particular, for the approaches to stop. He wanted the police to be held accountable for what they had done. He wanted the Ombudsman to consider whether the actions of the officers were lawful or not.

[15] On 27 October 2015 Mr Mackin took a written statement from the appellant detailing the chronology of the approaches and the appellant's concerns. The statement included the following:

> "I now wish to make a formal complaint to the Police Ombudsman's Office complaining about the conduct of this individual, whom has purported to be an undercover police officer. I would like clarity as to whether or not he is in fact a police officer and secondly I would like to complain about the misuse of a road checkpoint which I feel was deliberately set up to facilitate a further approach by this individual in an attempt to recruit me as a covert human intelligence source.

Firstly, I feel that this individual has absolutely no cognizance for the danger he was putting me in by approaching me in public. Should the wrong individual perceive me to be an agent of the State, covert human intelligence source I feel that my life would be at risk. Such an approach on a very busy main road (Newry Road) deliberately puts my life at risk.

Secondly, I had asked that this individual desist from approaching me, as I did not want to speak to him, yet he continued to approach me for a second time which I feel was a direct attack on my privacy and right to private life.

Thirdly, I believe that these individuals are completely unaccountable and unregulated and fear that they will continue to approach me and try to contact me. Such is clear from his response to my solicitor on the phone that he would not be speaking with my solicitor but instead would try to speak to me directly. I fear that this is a direct threat by this individual that he will continue to try and contact me, and at which I feel is again a direct interference of my right to private life and is misuse of his position and I feel distressing and harassing conduct.

Fourthly, I am very concerned by the fact that both approaches have been pre-planned. In the first instance these individuals took a deliberate decision to travel to Norway deliberately with the intention of approaching me, which they did on two occasions, and on the second occasion I was approached very early in the morning (6.00 am) to which was again a significant element of pre-planning given the fact that the PSNI had used an illegal checkpoint to facilitate such an approach.

This I believe is a misuse of direct surveillance techniques as they have been deliberately used to facilitate an approach on my person.

I have been advised by my solicitor all of the above constitutes breaches of Article 2, Article 3 and Article 5 and Article 8 of the ECHR and thereafter I would like to make a formal complaint to the Police Ombudsman.

> Given the fact that I am very concerned that this may happen again I would ask the Police Ombudsman to treat this matter as urgent."

[16] A copy of that statement was sent to the Ombudsman under cover of a solicitor's letter dated 28 October 2015 which requested the Ombudsman "to urgently commence an investigation into same, given very concerning matters arising therein."

[17] On 7 December 2015 the applicant made a statement to the Ombudsman. He states that during the meeting with the Ombudsman's investigator he explained again the reasons why he was scared by the officers' approaches and he repeated once again that he felt that the approaches had breached his human rights.

[18] On 8 February 2016 the Ombudsman took a statement from the appellant's solicitor.

[19] On 22 February 2016 the Ombudsman sent a letter to the appellant indicating that his complaint had been rejected. A copy of this letter was also sent to the appellant's solicitors. The essence of the letter of 22 February 2016 reads as follows:

> "**Our investigation**
>
> The Police Ombudsman for Northern Ireland obtained all relevant police documentation in respect of your allegations of February 2015 and October 2015. This material was subsequently examined and reviewed.
>
> A detailed statement of complaint was recorded from you and a witness interview and statement of witness was recorded from your … solicitor.
>
> Police officers in carrying out their duties to prevent and detect serious crime regularly seek the assistance of members of the public who they believe may be in a position to help them. Police officers when dealing with members of the public are bound by the standards set in the Police Code of Ethics. There has been no evidence obtained to suggest that when you were approached in February 2015 and October 2015 the behaviour of the officers fell below that standard.
>
> **Conclusion**
>
> As there is insufficient evidence to support the allegations that you made, this case has now been closed.

> I can assure that the matter has been investigated and an objective assessment has been made of the evidence available. The Police Ombudsman will retain a record of your complaint on file."

[20] The appellant's solicitor was of the view that in this letter whilst the Ombudsman confirmed that he had investigated the officers involved in the applicant's complaint and that those officers had approached the applicant as described, nevertheless the letter did not mention the appellant's Convention complaints, let alone provide any reasons for dismissing them.

[21] On 15 March 2016 Mr Mackin wrote to the Ombudsman to request that he provide reasons for having rejected the appellant's complaint.

[22] On 15 April 2016 the Ombudsman replied stating:

> "In responding I have tried to provide as much detail as I can but given the sensitivities involved in such cases there are some matters I cannot elaborate on …
>
> Your client made a number of allegations which are detailed in his statement of complaint dated 7 December 2015.
>
> …
>
> As you are aware the Regulation of Investigatory Powers Act (RIPA) does not specifically cover an approach made to an individual. However, PSNI Best Practice Guidance advocates that all approaches are planned, fully documented and signed off by a senior authorising officer. In the course of our investigation we carefully examined the interaction PSNI officers had with your client, how that was conducted, where it was conducted and was sufficient consideration given to protect your client's rights under ECHR and RIPA legislation.
>
> Having reviewed that material we are satisfied that on these occasions the action of the officers were proportionate, necessary and conducted within the relevant legal framework. I also note in your correspondence that you are very concerned that the approaches were pre-planned. To protect an individual's rights I would expect that such matters to be planned.

> In addition the Road Traffic (Northern Ireland) Order, this allows a constable in uniform to stop any person driving a mechanically propelled vehicle on a road or other public place. The Police Ombudsman's Office has examined the matter of the VCP and is satisfied it was lawful and permissible within the standards set out in the Police Code of Ethics and Force Guidelines.
>
> Unfortunately, I am not in a position to answer if the officer's approaches has caused your client to feel distress and anxious as no supporting medical evidence was submitted by you or your client."

[23] Prior to the receipt of the letter dated 15 April 2016 from the Ombudsman and on 7 April 2016 Mr Mackin sent pre-action protocol letters to both the Ombudsman and to the Chief Constable.

[24] On 22 April 2016 the Chief Constable responded stating amongst other matters that Section 65 of RIPA established the Tribunal. That the Tribunal has jurisdiction over, inter alia, the actions of police officers in pursuance of the powers contained in Part II of RIPA and that the European Court of Human Rights, in its judgment in the case of *Kennedy v. United Kingdom* (18 May 2010), held (at paragraphs 184 to 191) that the Tribunal satisfies the requirements of Article 6 ECHR. Accordingly, the letter from the Chief Constable stated that the proper forum for any complaints regarding matters of this type is the Tribunal.

[25] No response was forthcoming from the Ombudsman to the appellant's pre-action correspondence. However, it is now accepted by the Ombudsman that the assertion that RIPA does not "specifically cover an approach made to an individual" was incorrect.

[26] On 23 May 2016 the appellant commenced these proceedings having applied for and having obtained legal aid.

The grounds for Judicial Review

[27] The appellant's Order 53 statement identified the grounds on which relief was sought as:

> (a) The decision of the Ombudsman was unreasoned and/or unreasonable;
>
> (b) In the alternative, the decision of the Ombudsman was unlawful and/or contrary to section 6 of the Human Rights Act 1998 as in breach of Articles 2, 3, and 8 of the European Convention on Human Rights, in

that the Ombudsman has failed to adequately investigate the applicant's complaints under the said Articles of the Convention;

(c) The policy of the Chief Constable as regards police approaches is inadequate and/or unlawful. The rule of law calls for a transparent statement by the Chief Constable of the circumstances in which broad statutory criteria will be exercised;

(d) The policy of the Chief Constable as regards police approaches is unlawful and/or contrary to section 6 of the Human Rights Act 1998 as in breach of Articles 2, 3, and 8 of the European Convention on Human Rights. This is because: (i) any applicable policy is not adequately accessible and/or foreseeable, (ii) any applicable policy does not provide adequate legal protection against arbitrariness and/or, (iii) any applicable policy does not indicate with sufficient clarity the scope of discretion conferred on police officers and the manner of its exercise.

The judgment of Maguire J

[28] In respect of the Ombudsman challenge, Maguire J held that:

(a) it is arguable that the Ombudsman is under a duty to provide reasons for his conclusions;

(b) it is arguable that the contents of the Ombudsman's letters failed to explain sufficiently the process by which the decisions arrived at were made. The reasoning provided is either absent or opaque;

(c) on the face of it, the court has no reason to believe that the conclusion reached by the Ombudsman is wrong, never mind unreasonable. Although the court has accepted that it is arguable that there may have been a failure to provide the reasons for this conclusion, this in itself does not mean that the outcome of the investigation was unreasonable;

(d) the application for judicial review was made outside the three months' outer time limit, albeit by one day;

(e) the Appellant is in a position to take civil action against the police. He could sue the Ombudsman if he maintains that the Ombudsman has breached his human rights. More particularly, it has been argued that he has available to him the ability to mount proceedings before the Investigatory Powers Tribunal;

(f) the court has reached the conclusion that the Appellant's complaints as a whole are complaints which could be made to the Tribunal. The Appellant maintains that his human rights complaints have not been

dealt with by the Ombudsman but any adjudication of these would be a matter for the Tribunal;

(g) The grant of leave to apply for judicial review against the Ombudsman would serve little purpose as the Appellant has the ability to pursue the matter before the Tribunal. As a result, the proceedings against the Ombudsman should be stayed as the correct way to proceed is to make a complaint to the Tribunal. The court will leave the question of delay open until after the Appellant has brought his case to the Tribunal.

[29] In respect of the Chief Constable challenge, Maguire J held that:

(a) Part II of RIPA seeks to regulate, amongst other matters, the conduct and use of covert human intelligence sources. A Code of Practice dealing with this area was published in December 2014. It is extensive.

(b) Considering the provisions of RIPA and the Code of Practice, the court is satisfied that the activities that the Appellant has complained about fall within the phrase, "the conduct and use of covert human intelligence source." In particular, the court is satisfied that inducing, asking or assisting a person to engage as a human intelligence source requires authorisation under the RIPA scheme.

(c) The court is in no substantial doubt that officers of the PSNI were engaged in a process of seeking to persuade the Appellant to become a covert human intelligence source.

(d) As the approaches to the appellant are covered by Part II of RIPA this means that the activity is regulated. The Appellant's contentions concerning the failure to regulate the actions of the police are misconceived and do not disclose an arguable case for judicial review.

(e) The complaints that the Appellant seeks to make in this judicial review against the police should be made to the Tribunal under section 65 of RIPA.

(f) There is no arguable case in respect of which the court should grant leave to apply for judicial review against the Chief Constable and any complaint the Appellant may have in this area should be directed to the Tribunal and not the High Court.

(g) The policy challenge was not initiated promptly or within a period of three months from the matters complained about. No good reason for the delay in bringing the challenge has been provided.

(h) In addition to the availability of proceedings before the Tribunal, the Appellant also has available to him the ability to take civil action against the police where appropriate.

The grounds of appeal

[30] In relation to the challenge to the decisions of the Chief Constable the appellant contends that there are certain types of approaches to individuals that do not fall within Part II of RIPA. That the relevant definition as to the conduct to which RIPA applies is to be found in section 26 and that it was arguable that the approaches in this case did not fall within the definitions contained in that section. On that basis the appellant contends that the learned judge erred in holding that the appellant was required to bring his challenge to the Chief Constable in the Tribunal and erred in holding that the resolution of the appellant's claim fell within the jurisdiction of the Tribunal. Furthermore that if it was arguable that the approaches to the appellant did not fall within section 26 then it is arguable that as both RIPA does not apply and the Code of Practice published in December 2014 under section 71 of RIPA does not apply, that the approaches were not regulated and it is arguable that there is no publicly accessible policy in place to regulate the type of approaches that were actually made. On that basis the appellant contends that there is a lack of policy for regulating police approaches to individuals who they seek to recruit as informants when those approaches do not fall within the Part II of RIPA and it is arguable that the absence of a policy is in breach of common law standards and of Articles 2, 3, and 8 ECHR.

[31] The appellant also contends that the learned judge was incorrect to conclude that the policy challenge was not initiated promptly or within a period of three months from the matters complained about in that the challenge to the Chief Constable's policy was a complaint about a continuing failure on the Chief Constable's part. It was not a complaint about an individual act that occurred more than three months before the date on which the claim was issued.

[32] In relation to the challenge to the Ombudsman's decision the appellant contends that:

(a) The learned judge erred in his approach to delay in that he calculated the 3 month period contained in Order 53 Rule 4 from the date of the Ombudsman's letter of 22 February 2016 as expiring on Sunday 22 May 2016 but he failed to take into account the provisions of Order 3 Rule 4 which provides that where "the time prescribed by these Rules, …, for doing any act at an office of the Court of Judicature expires on a day on which that office is closed, and by reason thereof that act cannot be done on that day, the act shall be in time if done on the next day on which that office is open." On that basis the 3 month period expired on Monday 23 May 2016 which was the date upon which the application was made so that it was in fact made within the 3 month period.

(b) The learned judge erred in holding that there was little purpose to the grant of leave to apply for judicial review against the Ombudman as the Appellant "has the ability to pursue the matter before the Tribunal" as the Tribunal has no jurisdiction to determine a public law challenge against a decision of the Ombudsman. Such a challenge does not fall within section 65 of RIPA which does not exclude the jurisdiction of the Ombudsman so that the Ombudsman does have jurisdiction to consider human rights complaints.

Did the approaches to the appellant fall within Part II of RIPA?

[33] To determine whether the approaches to the appellant fell within Part II of RIPA consideration has to be given to the proper construction of section 26 and to the facts.

(a) The statutory provisions

[34] Section 26(1) provides that Part II of RIPA applies to certain defined conduct. The relevant conduct for the purposes of these proceedings is "(c) *the conduct and use* of covert human intelligence sources" (emphasis added). The relevant words are "conduct" and "use." One then turns to subsections 26(7)(a) and (b) for the definitions of the words "conduct" and "use" though we consider that it is convenient to start with the word "use."

[35] Subsection 26(7)(b) provides that in Part II "references to the *use* of a covert human intelligence source are references to *inducing, asking* or *assisting* a person to engage in *the conduct* of such a source, or to obtain information by means of *the conduct* of such a source" (emphasis added). The word "use" has an extended meaning so that it includes "inducing" or "asking" as well as "assisting." In that way the initial approach to an individual comes within the definition of the "use" of a CHIS but this is only the case if the individual is being induced or asked or assisted to engage in the *conduct* of such a source or to obtain information by means of the *conduct* of such a source. One then turns to subsection 26(7)(a) for the definition of the word conduct.

[36] Subsection 26(7)(a) provides that in Part II "references to the *conduct* of a covert human intelligence source are references to any conduct of such a source which falls within any of paragraphs (a) to (c) of subsection (8), or is incidental to anything falling within any of those paragraphs" (emphasis added). So it can be seen that the conduct has to be of a particular type or incidental to a particular type and the type is set out in subsection 26(8).

[37] Subsection 26(8) provides:

> "(8) For the purposes of this Part a person is a covert human intelligence source if

(a) he establishes or maintains a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c);

(b) he covertly uses *such a relationship* to obtain information or to provide access to any information to another person; or

(c) he covertly discloses information obtained by the use of *such a relationship*, or as a consequence of the existence of such a relationship." (emphasis added).

The use of the words "such a relationship" in subsection 26(8)(b) and (c) requires that it is necessary that the covert human intelligence source "… establishes or maintains a personal or other relationship with a person…" and either that (b) he covertly uses such a relationship to obtain or to provide access to any information to another person or (c) he covertly discloses information obtained by the use of such a relationship or as a consequence of the existence of such a relationship. In this way subsection 26(8)(a) is a condition precedent so that inducing or asking or assisting an individual must include any of the following, namely that:

(i) the individual is induced or asked or assisted to engage in establishing or maintaining a personal or other relationship for the covert purpose of facilitating the doing of anything falling within paragraphs (b) or (c);

(ii) the individual is induced or asked or assisted to engage in obtaining information by means of establishing or maintaining such a relationship for the covert purpose of facilitating the doing of anything falling within paragraphs (b) or (c); or

(iii) the individual is induced or asked or assisted to engage in conduct incidental to establishing or maintaining such a relationship for the covert purpose of facilitating the doing of anything falling within paragraphs (b) or (c).

(b) The submissions on behalf of the appellant

[38] Mr Southey submitted that parliament has recognised in RIPA that there is something particularly objectionable or concerning involved in a public body trying to influence relationships between people. That the focus of RIPA is not on the value of the information to the police or on the importance of any particular operation being undertaken but rather it is on State involvement in relationships between individuals so that RIPA provides controls and provides safeguards in situations where relationships are influenced or controlled by public bodies. The covert use of a relationship falling within subsection 26(8)(b) is not enough there has also to be the

establishment or maintenance of a relationship within subsection 26(8)(a). On this basis Mr Southey made a number of submissions.

[39] First he submitted that in order to fall within Part II a relationship would either have to be established or maintained. So that if the appellant had been approached by the police as to a past relationship, which relationship was no longer maintained, but from which he had obtained information which he was willing to disclose to the police, then he was not being induced or asked or assisted to re-establish that relationship nor was he being asked to maintain that relationship. He submitted that such an approach did not fall within Part II of RIPA.

[40] Second he submitted that if the appellant was not "asked" to establish or maintain a relationship so that it was entirely a matter for him as to whether he did so or not then that also would not bring the conduct of the police within Part II of RIPA.

[41] Third he submitted that in order for the approaches to the appellant to fall within Part II it would have to be established that *inducing or asking* or *assisting* the appellant to establish or maintain a personal or other relationship has to be for one of the specified covert purposes so that if the relationship was already established out of a mutual interest and enjoyment in say football or if it was maintained for that innocent purpose, but if there was incidental disclosure of information, it would not fall within Part II. The public body would not be engaging in establishing a relationship between members of the public for a covert purpose. The public body was not asking for a relationship to be established. The relationship had already been established. Furthermore it would be a relationship maintained for an innocent purpose rather than for the covert purpose. Accordingly it was submitted that the relationship would not have been established or maintained for a specified covert purpose. However Mr Southey accepted that if there were a number of purposes for maintaining a relationship the covert purpose has to be an element rather than the predominant purpose or a substantive purpose. So in relation to the football example if the informant was "asked" to tell the police whatever he was told by the other person when attending a football match that would not be influencing a relationship but rather reporting on what occurred. However if the police requested the informant to ask questions of the person at the football match so as to obtain information that would be exploiting and influencing a relationship within Part II.

[42] In these ways Mr Southey submitted that there was a gap between approaches governed by RIPA and the sort of approaches that arguably could have occurred in this case, which will not be covered by RIPA and would be outside the jurisdiction of the Tribunal.

(c) The Code of Practice

[43] Pursuant to Section 71 of RIPA the Covert Human Intelligence Sources Code of Practice was published by the Home Office in December 2014. Various passages in the code are relevant.

[44] At paragraph 2.22 of the code under the heading "Tasking not involving relationships" the code states that:

> "Tasking a person to obtain information covertly may result in authorisation under Part II of the 2000 Act being appropriate. However, this will not be true in all circumstances. For example, where the tasking given to a person does not require that person to establish or maintain a relationship for the purpose of obtaining, providing access to or disclosing the information sought or where the information is already within the personal knowledge of the individual, that person will not be a CHIS."

Mr Southey relied on this part of the code to support the proposition that for an approach to be subject to RIPA the person approached has to be *tasked* with establishing or maintaining a relationship for the purpose of obtaining, providing access to or disclosing the information sought. Furthermore that where the information is already within the personal knowledge of the individual who is asked or induced to impart it that person will not have been asked or induced to be a CHIS. We note that under paragraph 2.22 an example is given which is quite closely defined. The example is as follows

> "A member of the public is asked by a member of a public authority to maintain a record of all vehicles arriving and leaving a specific location or to record the details of visitors to a neighbouring house. A relationship has not been established or maintained in order to gather the information and a CHIS authorisation is therefore not available. Other authorisations under the Act (for example, directed surveillance) may need to be considered where there is an interference with the Article 8 rights of an individual."

So it can be seen that the example does not require there to be any relationship either in the past or in the future. There is simply no relationship at all between the person providing the information and any other person.

[45] We were also referred to a number of other paragraphs in the code including paragraphs 2.23 to 2.25 under the heading "Identifying when a human source becomes a CHIS." Those paragraphs state that:

> "2.23 Individuals or members of organisations (e.g. travel agents, housing associations and taxi companies) who, because of their work or role have access to personal information, may voluntarily provide information to the police on a repeated basis and need to be managed appropriately. Public authorities must keep such human sources under constant review to ensure that they are managed with an appropriate level of sensitivity and confidentiality, and to establish whether, at any given stage, they should be authorised as a CHIS.
>
> 2.24 Determining the status of an individual or organisation is a matter of judgement by the public authority. Public authorities should avoid inducing individuals to engage in the conduct of a CHIS either expressly or implicitly without obtaining a CHIS authorisation.
>
> Example 2: Mr Y volunteers information to a member of a public authority about a work colleague out of civic duty. Mr Y is not a CHIS at this stage as he has not established or maintained (or been asked to establish or maintain) a relationship with his colleague for the covert purpose of obtaining and disclosing information. However, Mr Y is subsequently contacted by the public authority and is asked if he would ascertain certain specific information about his colleague. At this point, it is likely that Mr Y's relationship with his colleague is being maintained and used for the covert purpose of providing that information. A CHIS authorisation would therefore be appropriate to authorise interference with the Article 8 right to respect for private and family life of Mr Y's work colleague.
>
> 2.25 However, the tasking of a person should not be used as the sole benchmark in seeking a CHIS authorisation. It is the activity of the CHIS in exploiting a relationship for a covert purpose which is ultimately authorised by the 2000 Act, whether or not that CHIS is asked to do so by a public authority. It is possible therefore that a person will become engaged in the

conduct of a CHIS without a public authority inducing, asking or assisting the person to engage in that conduct."

[46] Those paragraphs of the Code suggest that (a) a public authority may induce an individual to become a CHIS either expressly or implicitly and (b) it is the activity of the CHIS in exploiting a relationship for a covert purpose which is ultimately authorised by RIPA, whether or not that CHIS is asked to do so by a public authority.

(d) The proper construction of section 26

[47] We consider that a number of matters can be taken from the proper construction of section 26 of RIPA.

[48] We accept that subsection 26(8)(a) is a condition precedent so that for an approach to an individual to fall within Part II of RIPA the actions of inducing or asking or assisting an individual must include any of the following, namely that (i) the individual is induced or asked or assisted to engage in establishing or maintaining a personal or other relationship for the covert purpose of facilitating the doing of anything falling within paragraphs (b) or (c); (ii) the individual is induced or asked or assisted to engage in obtaining information by means of establishing or maintaining such a relationship for the covert purpose of facilitating the doing of anything falling within paragraphs (b) or (c); or (iii) the individual is induced or asked or assisted to engage in conduct incidental to establishing or maintaining such a relationship for the covert purpose of facilitating the doing of anything falling within paragraphs (b) or (c).

[49] The language of section 26 is prospective so that for instance the individual approached is induced or asked or assisted to engage in establishing or maintaining a personal or other relationship. The approach falls within Part II even if, as in this case, it is met with a negative response. Furthermore a relationship does not have to be formed by the individual with the subject or subjects for the approach to fall within Part II.

[50] We consider that an individual may be induced or asked or assisted either expressly or implicitly.

[51] It is the covert nature of the purpose which is of significance so that the information or all of the information which is sought to be obtained or disclosed or which in the event is obtained or disclosed need not be of significance or of value. The significance or value of the information would be a relevant consideration as to whether to grant authorisation but it does not impact on the question as to whether the approach falls within Part II of RIPA.

[52] Context may make clear what is not specifically expressed. The context can include, for instance, that the gathering of information both for the CHIS and for the

Chief Constable is multi-faceted. A CHIS may not just gather information from one person with whom he has a relationship but rather he relies on many relationships in the community gleaning information from all of them which when pieced together by him he discloses to the Chief Constable who in turn analyses the jigsaw into a whole from other CHIS's or from other means of gathering intelligence. The Chief Constable in turn forms an assessment of the reliability of a CHIS through a number of techniques including checking the accuracy of relatively anodyne information provided by the CHIS concerning other relationships in the community. A CHIS of this type is seated in the community covertly establishing or maintaining personal or other relationships with others for the covert purpose of providing information about for instance terrorist activity which is occurring in the general community in which he lives.

[53] We accept that if an individual is induced or asked or assisted to provide information which he had obtained from a past personal or other relationship, which relationship was no longer maintained, and if he is not either expressly or implicitly being induced or asked or assisted to re-establish that relationship then the approach to him would not fall within Part II of RIPA.

[54] Inducing to engage in the conduct of a CHIS is different from asking a person to engage in the conduct of a CHIS. Whether Part II of RIPA applies is not dependent purely on what an individual is expressly or implicitly asked to do. To induce an individual is to lead on, move, influence, prevail upon an individual to engage in the conduct of a CHIS. The focus is on the likely subjective effect on the individual and what that individual is likely to do as a result of the actions of the public authority. The purpose of the approach to the individual is a part of the context so that if the aim of the approach by the public authority is to prevail on the individual to engage in the conduct of a CHIS that will be highly relevant to a determination as to whether the approach falls within the definition of inducing an individual to engage in the conduct of a CHIS. However it is the subjective impact on the individual of whatever influences are brought to bear on him which are determinative of the question as to whether the approach amounts to inducing an individual to engage in the conduct of a CHIS.

[55] This case concerns an approach to the appellant and accordingly the question is what is he being induced or asked or assisted to do. We consider that if to *any extent* he is being induced or asked or assisted to do anything that falls within (i) to (iii) in paragraph [48] above then the approach falls within Part II of RIPA. It matters not whether the relationship between the CHIS and the subject would have continued in any event or if the information being provided is incidental to that relationship. What is objectionable is *any* manipulation of a relationship by a public authority. That is what engages Article 8 ECHR which article includes the right to establish and develop relationships.

(e) Application to the facts of this case

[56] The letter from the Ombudsman dated 22 February 2016 makes it clear that there was an approach from the police to the appellant. The Ombudsman's letter dated 15 April 2016 makes it clear that there was interaction between PSNI officers and the appellant. The letter from the Chief Constable dated 22 April 2016 could only have been written on the basis that the police had approached the appellant. The appellant perceived that the approach was to ask or to induce him to become an informer. The reasons why he would be asked or induced are set out at paragraph [6] of this judgment. All those reasons would have been obvious to both the appellant and to the officers of the Chief Constable. It is unarguable that the appellant was at the very least being induced to engage in maintaining a personal relationship with his "friends" and to engage in maintaining or establishing relationships with other members of the community for the covert purpose of facilitating the use of such relationships to obtain information and to disclose information obtained by the use of such relationships in relation to dissident republican terrorist activities.

[57] The learned judge found at paragraph [50] of his judgment that

> "The court is in no substantial doubt that reading together the complaints of the applicant in this case with the two letters produced by the PO the picture which emerges is that PSNI officers were engaged in a process of seeking to persuade the applicant to become a CHIS."

Applying the proper construction of section 26 to the facts of this case we consider that he was entirely correct to come to that factual conclusion. We consider that it is plain that the approaches fall within Part II of RIPA. That means that it is plain that the approaches were regulated and it is plain that the code does apply, so that the learned judge was correct to refuse leave in relation to the challenge that the approach was unregulated.

The Human Rights claim

[58] An approach by a public body to an individual seeking to engage him in the conduct of a CHIS requires not only to be compliant with Articles 2, 3 and 8 ECHR but the effectiveness of the individual, if he agrees to be a covert source, depends on his identity and activities being kept confidential. A public approach such as occurred on the main Newry Road may not only be in breach of Convention obligations, but also may not be in the public interest as it might be an ineffective method of encouraging the supply of information to the police.

[59] On the present facts of this case we consider that a human rights claim by the appellant is clearly arguable against the Chief Constable. The question is then whether that claim is one within the exclusive jurisdiction of the Tribunal.

Section 65 of RIPA and the impact on the application for leave against the Chief Constable

[60] Section 65(1) provides that "there shall, for the purpose of exercising the jurisdiction conferred on them by this section, be a tribunal consisting of such number of members as Her Majesty may by Letters Patent appoint. Section 65(2) then provides that "the jurisdiction of the Tribunal shall be (a) to be the only appropriate tribunal for the purposes of section 7 of the Human Rights Act 1998 in relation to any proceedings under subsection (1)(a) of that section (proceedings for actions incompatible with Convention rights) which fall within subsection (3) of this section; ….". The appellant's human rights claims are proceedings within section 7(1)(a) of the Human Rights Act 1998 so the Tribunal is the only appropriate tribunal provided the proceedings fall within subsection (3). In so far as relevant subsection (3) provides that "proceedings fall within this subsection if … (d) they are proceedings relating to the taking place in any challengeable circumstances of any conduct falling within subsection (5). Again in so far as relevant subsection (5) then provides that "subject to subsection (6), conduct falls within this subsection if (whenever it occurred) it is … (d) other conduct to which Part II applies; ….". The conduct here is the conduct of asking or inducing or assisting the appellant to be a CHIS and so it is conduct to which Part II applies and the Tribunal will be the only appropriate tribunal subject to anything contained in subsection (6). That subsection provides that:

> "For the purposes only of subsection (3), nothing mentioned in paragraph (d) or (f) of subsection (5) shall be treated as falling within that subsection unless it is conduct by or on behalf of a person holding any office, rank or position with—
>
> (a) any of the intelligence services;
>
> (b) any of Her Majesty's forces;
>
> (c) any police force;
>
> (ca) the Police Investigations and Review Commissioner;
>
> (d) the National Crime Agency;
>
> (da) . . . . . .
>
> (f) the Commissioners for Her Majesty's Revenue and Customs;

> and section 48(5) applies for the purposes of this subsection as it applies for the purposes of Part II."

As the conduct in question is the conduct by or on behalf of a person holding any office, rank or position with a police force then subsection (6) does not qualify the effect of subsection (5) so that the Tribunal is the only appropriate tribunal for proceedings against the Chief Constable for actions incompatible with Convention rights.

[61] In relation to the application for leave against the Chief Constable Maguire J concluded that "the complaints the applicant seeks to make in this judicial review against the police, on a correct analysis, should be made to the Investigatory Powers Tribunal" and that "there is no arguable case in respect of which the court should grant leave to apply for judicial review against the PSNI and that any complaint the applicant may have in this area should be directed the Investigatory Powers Tribunal and not this court." It is apparent that we agree with those conclusions. We dismiss the appeal in so far as it relates to the application for leave to apply for judicial review in respect of the decisions of the Chief Constable.

The alternative ground of delay and the challenge to the decision of the Chief Constable

[62] Maguire J held in the alternative that the proceedings against the Chief Constable were not initiated promptly or within a period of 3 months from the matters complained about so that leave should also be refused on that basis. It appears to us that he considered that the matters complained about were the decisions which led to the approaches by the police to the appellant on 13 February 2015, 15 February 2015 and 22 October 2015. If that was so then the proceedings having been commenced on 23 May 2016 were clearly in breach of Order 53 Rule 4.

[63] However, the appellant contended that the matters complained about should not be restricted in that way but rather that the complaint related to a continuing lack of a publicly accessible policy in place to regulate approaches that did not fall within Part II of RIPA. The appellant contended that there was an ongoing breach so that the proceedings were in time relying on authorities such as *R v Warwickshire County Council ex p Collymore* [1995] ELR 217.

[64] In the event the question of an ongoing breach does not arise as we consider that it is plain that the approaches fall within Part II of RIPA.

The challenge to the decision of the Ombudsman

[65] Maguire J held that it was arguable that the Ombudsman was under a duty to provide reasons for his conclusions and that it was arguable that the content of the Ombudsman's letters failed to explain sufficiently the process by which the decisions arrived at were made. We would observe that ordinarily in such circumstances leave

to apply for judicial review would have been granted in respect of the decision of the Ombudsman. However, Maguire J also reached the conclusion that the appellant's complaints as a whole are complaints which could be made to the Tribunal. The learned judge went on to hold that the grant of leave to apply for judicial review against the Ombudsman would serve little purpose as the appellant has the ability to pursue the matter before the Tribunal. On that basis the learned judge stayed the judicial review proceedings against the Ombudsman as the correct way to proceed is to make a complaint to the Tribunal.

[66] The Ombudsman is not mentioned in subsection 65(6) of RIPA so that a decision as to whether there has been a failure by the Ombudsman to investigate Convention rights complaints or a decision as to whether there has been a failure by the Ombudsman to give adequate reasons in relation to any determination of an investigation into Convention rights complaints is not within the jurisdiction of the Tribunal. On that basis the judicial review proceedings could have proceeded against the Ombudsman despite the fact that the Tribunal is the only appropriate tribunal for proceedings against the Chief Constable for actions incompatible with Convention rights.

[67] However, we consider that the learned judge was correct to conclude that the appellant's case was, and remained, centrally concerned with the question whether the Chief Constable acted lawfully when approaching him in 2015 so that it was first and foremost a case about the Chief Constable. The reason for the appellant's complaint to the Ombudsman was his complaint that the Chief Constable had acted unlawfully and that was also the reason for the initiation of judicial review proceedings against the Ombudsman and the Chief Constable. On that basis the learned judge could exercise discretion to stay the proceedings against the Ombudsman. We do not discern anything inappropriate in him so doing and we dismiss the appeal against that part of the learned judge's order.

The question of delay in relation to the challenge to the decision of the Ombudsman

[68] Maguire J left open the question of delay in so far as it relates to the proceedings against the Ombudsman. We consider that the proceedings were commenced within 3 months of the matters complained of given that the Central Office was closed on Sunday 22 May 2016 and the proceedings were commenced on the next day. We also note that an amendment to Order 53 rule 4 is contemplated to omit the words "promptly and in any event." This proposed amendment removing the requirement of promptitude is in light of the decision of the Court of Justice of the European Union in *Uniplex (United Kingdom) Ltd v NHS Business Services Authority* (C–406/08) (2010) PTSR 1377 in which it was held that the requirement of promptitude is insufficiently certain and incompatible with the principles of certainty and effectiveness in European law.

[69] We note that there has been no determination of the question of delay and accordingly there is no need for this court to make any order in relation to that issue.

Conclusion

[70] We dismiss the appeal.