Judicial Communications Office

18 June 2020

COURT DELIVERS LOUGHINISLAND JUDGMENT

Summary of Judgment

The Court of Appeal[1] today held that some of the Police Ombudsman's comments in his Public Statement about the Loughinisland killings "overstepped the mark" by amounting to findings of criminal offences by members of the police force. It did not, however, strike down the Public Statement as it accepted 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

Background

Thomas Hawthorne and Raymond White ("the appellants") appealed against a decision of Keegan J where she dismissed their application to quash a Public Statement ("PS") made by the Police Ombudsman for Northern Ireland ("the Ombudsman") pursuant to section 62 of the Police (Northern Ireland) Act 1998 ("the 1998 Act") relating to a complaint by victims and survivors of an attack by Ulster Volunteer Force ("UVF") gunmen in which six people were killed and five people injured at the Heights Bar, Loughinisland on the evening of 18 June 1994. A formal complaint raising concern about the circumstances of the attack and subsequent police investigations was made by the Loughinisland families. The complaint concerned: alleged failure by police to conduct an effective investigation of the murders, including failing to keep the bereaved families updated as to progress in the enquiry; alleged failure of the police investigation to discharge the state's duties as required by Article 2 ECHR; and alleged collusion between the RUC and those responsible for the murders. The Ombudsman at that time published a formal statement in June 2011. The families were dissatisfied with the statement and issued judicial review proceedings to quash it. By consent that statement was quashed in December 2012.

The families then engaged with the newly appointed Ombudsman. In January 2014 terms of reference for the proposed investigation by the Ombudsman were established dealing with the resourcing and conduct of the investigation, the manner in which intelligence was available and used to assist the investigation, the extent to which the UVF gang might have been disrupted as a result of investigations into pre-cursor events and the extent to which there was any involvement directly or indirectly in connection with the attack by a member of the RUC or agent of the RUC. The weapon used in the murders at the Heights Bar was a VZ58 assault rifle which was part of a consignment of weapons imported by loyalists during 1987/88. It was alleged that the RUC were aware of the planned importation and colluded with loyalists by either facilitating the purchase and importation or failing to take appropriate and effective steps to disrupt the importation. The terms of reference of the Ombudsman's investigation were amended in August 2014 to include the investigation of issues related to the importation of these firearms.

The investigation was concluded by September 2015. The Ombudsman submitted an investigation report to the PPS indicating that it was not believed that the evidence would support submission of a

[1] The panel was the Lord Chief Justice, Lord Justice Stephens and Sir Donnell Deeny. The Lord Chief Justice delivered the judgment of the Court.

file for direction to the PPS in relation to a specific, identifiable officer but that the enquiries revealed what would be described as significant concerns in respect of disciplinary and/or corporate matters for the RUC. The Ombudsman said it was intended that these concerns would be detailed in a subsequent public statement.

The Public Statement

The Ombudsman issued the PS on 9 June 2016. It stated:

> "Let there be no doubt, the persons responsible for the atrocity at Loughinisland were those who entered the bar on that Saturday evening and indiscriminately opened fire. It is also important to recognise that despite the findings identified in this report there have been many within the RUC (Royal Ulster Constabulary GC) and the PSNI (Police Service of Northern Ireland) who have worked tirelessly to bring those responsible to justice. I am grateful to those members of the public and retired police officers who assisted my enquiries. However my investigation into this area was constrained by a refusal of a number of key people to speak to my investigators."

On the complaint by the families that there was collusion between elements with the police and loyalist paramilitaries the Ombudsman *inter alia* said:

> "It is clear that discussion around the issue of collusion in Northern Ireland is extremely controversial and politically sensitive. There has been considerable debate in academic publications, reports by non-Governmental agencies and in the various enquiries into alleged allegations of State related killings in Northern Ireland. No consensus has emerged as to what it actually means. I am of the view that individual examples of neglect, incompetence and/or investigative failure are not (de facto) evidence of collusion.
>
> However, a consistent pattern of investigative failures may be considered as evidence of collusion depending on the context and specifics of each case. This is particularly the case when dealing with police informants, who were participating in crime. Having considered the numerous definitions of collusion that have emerged over the years, I have decided the most compelling approach is that provided by Judge Smithwick's definition in his inquiry into collusion between members of An Garda Síochána and the Provisional IRA.
>
> The issue of collusion will be examined in the broadest sense of the word. While it generally means the commission of an act, I am of the view that it should also be considered in terms of an omission or failure to act. In the active sense, collusion has amongst its meanings to conspire, connive or collaborate. In addition I intend to examine whether anybody deliberately ignored a matter or turned a blind eye to it or have pretended ignorance or unawareness of something morally, legally or officially to oppose."

Having examined the complaint of collusion the Ombudsman concluded:

> "Many of the issues I have identified in this report including the protection of informants through both wilful acts and the passive turning a blind eye are in themselves evidence of collusion as defined by Judge Smithwick. When viewed collectively I have no hesitation in unambiguously determining that collusion is a significant feature of the Loughinisland murders."

The proceedings

An application for judicial review to quash the PS was initiated in August 2016 on the basis that the report exceeded the Ombudsman's statutory powers and that the first named appellant was denied the procedural fairness protections guaranteed to him by the common law. McCloskey J gave judgment on 21 December 2017. He reviewed the PS and considered that it contained a determination of negligence in relation to the first named appellant and did not expressly exclude him from the allegation of collusion. He considered that there was an inadequate and inaccurate portrayal of the first appellant's defence in the report and no evidence that his defence was believed. In those circumstances McCloskey J concluded that the PS was vitiated by procedural unfairness.

In light of that finding the PS was amended to exclude certain references in relation to the first named appellant and a statement was issued on 9 March 2018 making it clear that the Ombudsman's determination of collusion in the report did not apply to him. Following an application on behalf of the families McCloskey J recused himself on the *vires* issue and directed that it should be heard before a different judge. The matter then came on for hearing before Keegan J who, for the purposes of this appeal, addressed the following grounds:

- The respondent acted ultra vires in coming to conclusions, decisions or determinations as to whether criminal offences, or disciplinary offences had been committed by police officers as opposed to making recommendations to the appropriate authorities in relation to the same.
- The respondent had wrongfully employed the making of a statement provisions, permitting the making of a statement for the purposes of making a comment upon the Royal Ulster Constabulary George Cross as a body corporate.

The appellants argued that the most the Ombudsman could report on was that he did not believe that any criminal or disciplinary charges were merited and that to go further was to step outside the statutory role. Keegan J accepted that the PS, as revised to accommodate the finding in relation to the first named appellant, did not constitute a finding of a criminal or disciplinary offences against any individual. She held that it was contrary to the legislative intention to limit the role of the Ombudsman in the manner contended for and such a limitation would have constituted a breach of the investigative obligation placed upon the state by virtue of Article 2 of the ECHR. Keegan J dismissed the application.

The Principles Governing a Public Statement

On appeal the thrust of the argument was that the Ombudsman erred in making adjudications on the commission of criminal offences and disciplinary contraventions by police officers and that those determinations that were outside his lawful powers. The Court said it was clear from the 1998 Act that the principal role of the Ombudsman is investigatory. It added that there is no power or duty created for the Ombudsman to assert a conclusion in respect of criminal offences or disciplinary misconduct by police officers:

> "The Ombudsman is required to provide recommendations to the DPP if he considers that a criminal offence may have been committed. Such a recommendation is a decision which could form part of a PS. Once he makes such a recommendation he has no role thereafter apart from supplying information on request. 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."

The Court agreed with Keegan J that the requirement in the 1998 Act that the Ombudsman shall exercise the powers in such manner and to such extent as appear to be best calculated to secure the confidence of the public and the members of the police force in the system is a significant material consideration in deciding to issue a PS and the terms in which it should be crafted. It is important to recognise, however, that the statute itself has sought to set out a framework within which the confidence of both the public and the police force should be secured:

> "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."

The Court noted that there had been considerable investigative work carried out subsequent to the coming into force of the Human Rights Act 1998 and that the case is still the subject of investigation. Consequently the investigative obligation under Article 2 of the ECHR was engaged. The procedural obligation under Article 2 requires that an effective and independent investigation is conducted and that there is a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The Court said the Ombudsman should consider carefully his role in securing accountability in an Article 2 case when considering whether to make a PS. Article 60A of the 1998 Act provides for the Ombudsman to investigate current police practices and policies but there is no such provision in respect of historic practices or policies which are no longer current. The Court considered this was designed to exclude investigations into historic practices or policies but said it did not mean that the impact that a practice or policy may have had on the conduct of a particular investigation was outside the scope of the Ombudsman's remit:

> "There is a distinction between the investigation of a practice or policy which would involve its application in relation to the range of cases to which the practice or policy applied and considering the impact that a particular practice or policy may have had on the manner in which a particular investigation was carried out. The latter is plainly within the remit of the Ombudsman insofar as it impacts upon that investigation. The … decision of McCloskey J discussed the need for procedural fairness as an intrinsic part of the exercise of publication of a PS. It must also be borne in mind that matters bearing on personal honour and reputation fall within the scope of Article 8 and where they attain a certain level of gravity and are made in a manner causing prejudice to personal enjoyment of the right to respect for private life they are entitled to protection."

The Court also referred to the issue of whether the Ombudsman can substantiate or dismiss a complaint. It considered that where the complaint relates to the commission of a criminal offence or disciplinary misconduct by a member of the police force 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 the intention of the Act 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. The Court said there may be circumstances where a police officer will have resigned as a result of which the officer would no longer be subject to any disciplinary process. Under 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. The Court accepted that a person can be identified by inference, a so-called jigsaw identification and said it did 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. All of that must, however, be circumscribed by the requirement for procedural fairness and the need to ensure that the Article 8 interests of the retired officers are respected."

Conclusion

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

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

The Court referred specifically to the Ombudsman's comments in his summary conclusions in Chapter 9 of the PS. At paragraph 9.9 he concluded that corrupt relationships existed between members of the security forces in South Down and the UVF and that he considered an interpretation of "collusion" to be appropriate in this context. From paragraphs 9.19 to 9.27 he set out the position of the Northern Ireland Retired Police Officers Association which identified the critical part that intelligence had to play in the fight against terrorism and asserted that the intelligence world quite justifiably adopted on specific occasions the position that the priority to preserve life and secondly property came at the expense of solving crime. The Association submitted that any interference with the investigation of serious crimes was not with the intention of disrupting that investigation but for

the purpose of preserving life including both the life of the informant and the life of others who would be saved as a result of the informant's information. It was submitted that such an approach was perfectly lawful.

Between paragraphs 9.28 to 9.38 the Ombudsman referred to the competing argument in respect of informant handling and acknowledged that the intelligence community in Northern Ireland sought political guidance as to how these matters might be resolved but that was not forthcoming. He concluded in paragraph 9.40 that the protection of informers through both wilful and passive acts constituted collusion as defined by Judge Smithwick. He also expressed his view that it was indefensible for the Special Branch not to disseminate intelligence implicating those involved in the importation of weapons in 1987/88. The essence of his conclusion was set out at paragraph 9.34: "In the aftermath of serious crime police should not be complicit in concealing information which could assist related investigations; should not, as in the case of murders which preceded the Loughinisland attack, shield the identity of possible suspects who should have been subject to investigation; and should not fail to disseminate intelligence in order to protect the source of the information."

The Court considered that the determinations made by the Ombudsman in the paragraphs on collusion were not decisions or determinations to which the 1998 Act applied and "overstepped the mark" by amounting to findings of criminal offences by members of the police force. The Court did, 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. The Court concluded that it did not dissent from the view of Keegan J that she was not minded "to step into the territory of critiquing modes of expression" in exercising her supervisory jurisdiction but said it considered that "that the emphatic conclusions reached by the Ombudsman in the three offending paragraphs go beyond mere modes of expression and exceed his powers. It did, nevertheless, uphold the decision not to strike down the PS because of what was written in it:

> "In light of our conclusions regarding the offending paragraphs the parties may wish to have an opportunity to consider the issue of remedy, although the appellants may be content with the expression of this court's view as sufficient remedy for them."

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

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

Alison Houston
Judicial Communications Officer
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF
Telephone: 028 9072 5921
E-mail: Alison.Houston@courtsni.gov.uk