

Judicial Communications Office

21 December 2017

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

Extract from Judgment

The following is an extract from Mr Justice McCloskey's judgment delivered this morning.

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

These proceedings, having been initiated in August 2016, leave to apply for judicial review was granted following an *inter-partes* hearing by order dated 06 June 2017. The substantive hearing was conducted on 01 and 07 December 2017. The commendably full co-operation from the parties' representatives has resulted in a time lapse from the initiation of special case management measures, pursuant to [2] above, to the delivery of this judgment being of less than two months. The court will expect this level of cooperation in all "legacy" cases.

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

"Many of the issues I have identified in this report, including the protection of informants through both wilful acts and the passive 'turning a blind eye'; catastrophic failures in the police investigation; and destruction of

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exhibits and documents are in themselves evidence of collusion

When viewed collectively I have no hesitation in unambiguously determining that collusion is a significant feature of the Loughinisland murders."

[Emphasis added.]

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

Thomas Ronald Hawthorne

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

Mr Hawthorne was the first ever Northern Ireland recipient of the Queen's Gallantry Medal. During his lifetime of police service, he was shot and injured by terrorists and his home was attacked by a terrorist bomb.

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

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

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

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

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

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

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

There can be no plausible doubt that Mr Hawthorne is readily identifiable as the person to whom the various criticisms and negative findings in the report relating to the storage and disposal of the suspected murder vehicle and the simultaneous loss of an interior exhibit apply. The contrary, properly, was not argued. Having conducted the preceding exercise, I have reached the twofold conclusion, albeit by a narrow margin, that (a) the report neither accuses Mr Hawthorne of catastrophic failures in the police investigation nor finds him guilty thereof and (b) Mr Hawthorne is excluded from the report’s “unambiguous determination” that collusion was “*a significant feature of the Loughinisland murders*”.

The above conclusions are made only after a detailed and painstaking analysis of a forensic nature. They vindicate Mr Hawthorne unreservedly. However, it should not have been necessary for Mr Hawthorne to initiate legal proceedings of this kind in order to secure the judicial analysis, conclusions and vindication of which he is now the beneficiary. The Police Ombudsman’s “unambiguous determination” that police officers were guilty of collusion is a determination that such officers participated in the murder of six innocent civilians and the injuries suffered by five innocent civilians on 18 June 1994 at the Heights Bar, Loughinisland. The determination is expressed in unqualified terms. It is a statement of the most damning kind. The Police Ombudsman’s report should have made abundantly clear to the reader that the unequivocal determination of police collusion with UVF terrorists in the murders did not apply to Mr Hawthorne. However, it signally failed to do so. The authors of the report were careless, thoughtless and inattentive in the

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language and structuring of the document in this respect. While this is quite unacceptable by any standard, more disturbingly it is also antithetical to the statutory purposes.

It is difficult to conceive of a more withering and damning condemnation of professional police officers. "Collusion" in this context must, properly dismantled, connote, or denote, varying degrees of participation by police officers in the murder of six innocent civilians and the infliction of injury on five others. Collusion by police officers with terrorists in the murder of innocent civilians could also entail the commission of offences such as misfeasance in public office and, especially as regards some of the subsequent police conduct which features in the Ombudsman's findings, conspiracy to pervert the course of justice. I consider the language of "indictment" inapplicable as an indictment is a formal statement levelling accusations of criminal conduct against a person presumed innocent. It is accusatory in nature, is the culmination of the due process of the law which has preceded it and is followed by the due process of the criminal trial. The Police Ombudsman did not use the language of accusation. Nor did he opt for the more restrained and softer vocabulary of opinion, belief or suspicion. Rather, he determined, unambiguously, that collusion had occurred. This was an outright and unqualified condemnation. It is properly described as a verdict.

The Police Ombudsman's unhesitating and unambiguous determination that RUC officers were guilty of collusion with UVF terrorists in the execution of the Heights Bar murders in substance differs little, if at all, from a verdict of guilty beyond reasonable doubt. Indeed the "no hesitation" and "unambiguously" ingredients in the Police Ombudsman's determination to this effect could be said to be expressed more forcefully than such a verdict. No police officer was prosecuted for any collusive act – such as murder in the second degree, aiding and abetting the commission of murder, misfeasance in public office or conspiring to pervert the course of justice. Furthermore, no police officer was accused of the commission of a disciplinary offence and prosecuted in that forum. The unhesitating and unambiguous determination that RUC officers had colluded with UVF terrorists in the commission of the Heights Bar murders and other offences was not the product of a criminal trial or a disciplinary process. The equally unequivocal determination that Mr Hawthorne was guilty of negligence in the disposal of the suspected murder vehicle was not the product of any disciplinary procedure.

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

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In my view Parliament cannot have intended that the Police Ombudsman could exercise his power under section 62 in a manner confounding and contradicting the determination he had made under section 58(1). What the Police Ombudsman proceeded to do was the very antithesis of this statutory determination. Nor can Parliament have intended to devise a mechanism, or system, which would have the effect of depriving police officers, serving or retired, of the legal rights, protections and safeguards available to them in the criminal process or, as the case may be, the disciplinary process. Parliament, in my view, cannot have intended to devise a mechanism which would leave such persons utterly defenceless. Nor can Parliament have intended to permit the Police Ombudsman to (in substance) airbrush the fact of no prosecution and conviction and to effectively act as judge and jury. To construe the statutory regime otherwise would give rise to this catalogue of anomalies and incongruities.

The combination of factors highlighted above impels to the conclusion that those aspects of the Police Ombudsman's report reflecting adversely on Mr Hawthorne are vitiated by procedural unfairness. To summarise, he was given no advance notice of certain critical passages; the portrayal of his responding representations was distorted; his representations were evidently misunderstood; and steps having the potential to exculpate him were not taken. The resulting diagnosis of procedural unfairness follows inexorably.

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

The elevated threshold of Wednesbury irrationality, emphasised in recent decisions of the Supreme Court, is not in my opinion overcome:

The effect and outcome of the extensive exercise which the court has undertaken are that the severe public criticism described by Mr Hawthorne in his first affidavit was not justified, for certain fundamental reasons. First, the Police Ombudsman's damning condemnation of RUC collusion with UVF murderers does not implicate Mr Hawthorne. Second, there is no finding in the Police Ombudsman's report that Mr Hawthorne was culpable of any of the catastrophic investigative failures assessed. Third, the Police Ombudsman's "determination" of police collusion in the

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Loughinisland murders is unsustainable in law as it was not in accordance with the Ombudsman's statutory powers. Fourth, the offending sections in the Ombudsman's report, including the "determination" that Mr Hawthorne was guilty of an "act of negligence", are in breach of the legal requirements of procedural fairness and unlawful in consequence.

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

The primary remedy sought by the Applicants is an order quashing the Police Ombudsman's "public statement". The issues of remedy and costs will be finalised when the parties have had an opportunity to absorb this judgment and consider their client's instructions. The Court will reconvene at 09.45 on 12 January 2018 for this purpose. The Applicant's written representations on both issues will be provided in writing by 16.00 hours on 03 January 2018. The Respondent's response will be provided by 16.00 hours on 10 January 2018. The judgment of the court has now entered the public domain and no embargo applies. The parties' representations will also address the issue of costs.

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 (www.judiciary-ni.gov.uk).

ENDS

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