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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Between:

THE DEPARTMENT OF JUSTICE

Respondent /Appellant;

-and-

PATRICIA BELL

Applicant/Respondent;

-and-

POLICE OMBUDSMAN FOR NORTHERN IRELAND

Notice Party.

Before: Gillen LJ, Deeny LJ and Sir Paul Girvan

GILLEN LJ (giving the judgment of the court)

Introduction

[1] This is an appeal by The Department of Justice ("the Department ") against the judgment of Maguire J, delivered on 24 March 2017, declaring that the Department acted unlawfully by failing to provide a sufficient level of funding to the Police Ombudsman for Northern Ireland ("PONI") to enable it to carry out its statutory obligation to investigate the applicant's complaint, within a reasonable period of time.

[2] Mr Peter Coll QC appeared on behalf of the appellant Department with Mr Philip McAteer. Mr MacDonald QC appeared on behalf of the respondent with Mr Sean Devine. Ms Fiona Doherty QC appeared with Professor Gordon Anthony

on behalf of the Notice Party, the Police Ombudsman of Northern Ireland ("the PONI"). We are grateful to counsel for their helpful written and oral submissions.

Background

[3] The precise factual background was summarised by the appellant (to which no objection was taken by the respondent or the PONI) and is contained in the Chronology appended to this judgment.

The grounds of appeal

[4] Mr Coll contended that the learned trial judge erred in law in the following respects:

- In concluding that underfunding of the PO was "most directly" the result of a failure by the Department to provide adequate resources to the PONI.

- In his approach to the definition of the Department's duty of funding of the PONI under Paragraph 11 of Schedule 3 to the Police (NI) Act 1998.

- In that whilst he held that the Department is not obliged to provide to the PONI the funding wanted by the PONI, that is the effect of the judgment.

- In finding that the *Wednesbury* principle has been breached and that the Department failed to act rationally on the facts of this case for the reasons set out in the judgment.

- In failing to afford the Department sufficient latitude and breadth of discretion in making its determination as to the level of funding to be provided to the PONI in accordance with its statutory discretion.

- In failing to properly recognise and find the width of discretion provided by the legislature to the Department with regards to the statutory duty to fund the PONI that arises from the statutory formulation of "such sums as appear to the Department to be appropriate".

- In failing to take into account adequately or at all the Department's own limited and finite funding requiring distribution to meet a number of funding pressures in considering the balance that the Department had struck in determining the level of funding to be provided to the PONI.

- In failing to treat the various demands on the Department's budget and or its own limited budget as relevant considerations to take into account in determining whether it had behaved in a *Wednesbury* unreasonable fashion in determining the level of funding to be provided to the PONI.

- By preferring the claim of the PONI over the claim of others requiring funding by the Department, by making a decision and delivering a judgment which implies that the funding contended for by the PONI should be provided from finite resources to the detriment of other funded bodies, despite professing not to have done so and accepting that the court is not well positioned to determine the issue of how scarce resources should be spent within the limits of departmental resources.

- In finding that there has been an unreasonable failure to act compatibly with the statutory purpose.

- In finding that the Department had failed to exercise its powers so as to advance the objects and purposes of the statute.

- In granting the Respondent's application for judicial review and or in concluding that any of the Respondent's grounds for judicial review had been made out.

- In concluding, and granting a declaration, that the Department has acted unlawfully by failing to provide a sufficient level of funding to the PONI to carry out its statutory obligation to investigate the applicant's complaint within a reasonable period.

[5] In substance the Department contends that the Applicant's application for judicial review ought to have been refused because the Department has not acted unlawfully in the exercise of its statutory duty regarding funding of the PONI.

The judgment of Maguire J

[6] The salient points in the judgment of Maguire J can be summarised as follows:

(i) Underfunding of the PONI was "most directly" the result of a failure by the Department to provide adequate resources to the PONI.

(ii) Ordinarily the court should forbear from intervening in a funding decision in all but the most exceptional circumstances. General questions as to the efficiency of administration or the sufficiency of the allocation of day to day funding or how scarce resources should be spent within the limits of departmental resources are ordinarily not matters for the court. However the *Wednesbury* principle has been breached in the instant case in that the Department failed to act rationally on the facts of this case and unreasonably failed to act compatibly with the statutory purpose.

(iii) There has been an unreasonable failure to act compatibly with the statutory purpose. It is unlikely that Parliament would have intended the Department to act in a way which would result in the PONI being unable to perform its lawful duties with the consequence that it is put into the position of acting unlawfully.

(iv) The Department failed to exercise its powers so as to advance the objects and purposes of the statute.

(v) The Department has acted unlawfully by failing to provide a sufficient level of funding to the PONI to carry out its statutory obligation to investigate the applicant's complaint within a reasonable period. Parliament had established a developed system for dealing with complaints to the PONI which the provisions of the 1998 legislation reflect, imposing mandatory obligations therein. The time scale which emerged in the present case for consideration of the complaint is well outside the latitude which the PONI has when dealing with the investigation of complaints generally.

(vi) There had been systemic and persistent underfunding of the PONI which is disabling PONI not in one but in a range of cases over a period of years. If anything the underfunding situation, that had led to a finding of unlawfulness against the PONI in *Re Martin's Application* [2012] NIQB 89 because of its failure to investigate complaints within a reasonable time, had deteriorated.

(vii) The Department had the ability, if it needed or wished to do so and with the consent of the legislature, to reconfigure the police complaints system if it finds that the existing duties which rest on the PONI cannot be afforded. It cannot however derogate from the duties that exist under the current legislation.

Relevant Legislation

[7] The Police (Northern Ireland) Act 1998 ["The 1998 Act"] established the role of the Police Ombudsman for Northern Ireland and his/her respective offices.

[8] Part VII of the 1998 Act outlines the police complaints and disciplinary proceedings. The key provisions are as follows:

> *"51(1) For the purpose of this Part there shall be a Police Ombudsman for Northern Ireland.*
>
> *51(3) Schedule 3 shall have effect in relation to the Police Ombudsman for Northern Ireland.*

51(4) The Ombudsman shall exercise his powers under this Part in such manner and to such extent as appears to him to be best calculated to secure –

(a) The efficiency, effectiveness and independence of the police complaints system; and

(b) The confidence of the public and of members of the police force in that system.

52(1) For the purpose of this Part, all complaints about the police force shall either –

(a) Be made to the Ombudsman; or

(b) If made to a member of the police force, the Board, the Director or the Department of Justice, be referred immediately to the Ombudsman.

52(3) The Ombudsman shall –

(a) Record and consider each complaint made or referred to him under sub-section (1); and

(b) Determine whether it is a complaint to which sub-section (4) applies.

52(4) Subject to sub-section (5), this sub-section applies to a complaint about the conduct of a member of the police force which is made by, or on behalf of, a member of the public.

52(8) Subject to sub-section (9), where the Ombudsman determines that a complaint made or referred to him under sub-section (1) is a complaint to which sub-section (4) applies, the complaint shall be dealt with in accordance with the provisions of this part;

54(1) If –

(a) It appears to the Ombudsman that a complaint is not suitable for informal resolution; or

(b) A complaint is referred to the Ombudsman under section 53(6), the complaint shall be formally investigated as provided in sub-section (2) or (3).

54(2) Where the complaint is a serious complaint, the Ombudsman shall formally investigate it in accordance with section 56.

54(3) In the case of any other complaint, the Ombudsman may as he thinks fit –
(a) formally investigate the complaint in accordance with section 56; or

(b) refer the complaint to the Chief Constable for formal investigation by a police officer in accordance with section 57.

56(1) Where a complaint or matter is to be formally investigated by the Ombudsman under section 54(2) or (3)(a) or 55(3), (5) or (6), he shall appoint an officer of the Ombudsman to conduct the investigation.

56(6) At the end of an investigation under this section the person appointed to conduct the investigation shall submit a report on the investigation to the Ombudsman."

[9] The effect of regulations 3 and 17 of the Royal Ulster Constabulary (Complaints etc) Regulations 2000 is that:

- by regulation 3, the regulations "apply to (a) any complaint made to the Ombudsman".

- by regulation 17 "Investigations under section 56 or 57 of the Act of 1998 shall be conducted without undue delay "

[10] The RUC (Complaints etc) Regulations 2001, SR 2001/184, where relevant, provide that:

- Under regulation 5(2) the requirements for a complaint to be investigated under the Police (Northern Ireland) Act include that "(b). It is about the conduct of a member which took place not more than 12 months before the date on which the complaint is made or referred to the Ombudsman".

- Under regulation 6, "Regulation 5(2) shall not apply where the complaint is not the same or substantially the same as a previous complaint or matter and the Ombudsman believes that a member may have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings; and the Ombudsman believes that the complaint should be investigated because of the gravity of the matter or the exceptional circumstances".

[11] The Department funds the Ombudsman pursuant to the provisions of Paragraph 11 of Schedule 3 to the Police (NI) Act 1998 (as amended):

> "*The Department of Justice shall pay to the Ombudsman such sums as appear to the Department of Justice to be appropriate for defraying the expenses of the Ombudsman under this Act.*"

Legal Principles Relevant to this case

The definition of "As appear to be appropriate "

[12] In attempting to construe the meaning of the phrase "such sums as appear to be appropriate " in Schedule 3 the 1998 Act we have drawn upon discussions of such a concept found in the most recent edition of Fordham "Judicial Review "at page 451, *R v City of Westminster Housing Benefit Review Board, ex parte Mehanne* [2001] UKHL 11 [2001] 1 WLR 539, *R(G) v Barnet London Borough Council* [2004] 2 AC 208 at [15] and a Canadian case of *Penetanguishene Mental health Centre v Ontario (Attorney General)* (2003) 237 DLR 94th).

[13] From these sources we have discerned the following:

- The phrase "as it considers appropriate" is the language of discretion.
- The word "appropriate" generally confers a very broad latitude and discretion. However the word takes its meaning from the context.
- Consultation with those considered "to be appropriate" gives considerable scope to the decision maker.

The Duty owed by the Department to fund the PONI under the 1998 Act

[14] In construing the duty of the Department to fund the PONI under the 1998 Act as set out above we have derived much assistance from the speech of Lord Nichols of Birkenhead *in R (G) v Barnet LBC (HL))* [2004] 2 AC 208 at p 219 ("*R(G)*").

[15] *R(G)* arose out of a claim for mandamus sought by three single mothers against the local social services authority compelling it to provide suitable accommodation in accordance with the children's assessed needs pursuant to s17(1) of the 1989 Children Act 1989.

[16] At paragraph [12] et seq Lord Nichols said as follows:

“12. The ability of a local authority to decide how its limited resources are best spent in its area is displaced when the authority is discharging a statutory duty as distinct from exercising a power. A local authority is obliged to comply with a statutory duty regardless of whether, left to itself, it would prefer to spend its money on some other purpose. A power need not be exercised, but a duty must be discharged. That is the nature of a duty. That is the underlying purpose for which duties are imposed on local authorities. They leave the authority with no choice.

13. The extent to which a duty precludes a local authority from ordering its expenditure priorities for itself varies from one duty to another. The governing consideration is the proper interpretation of the statute in question. But identifying the precise content of a statutory duty in this respect is not always easy. This is perhaps especially so in the field of social welfare, where local authorities are required to provide services for those who need them. As a general proposition, the more specific and precise the duty the more readily the statute may be interpreted as imposing an obligation of an absolute character. Conversely, the broader and more general the terms of the duty, the more readily the statute may be construed as affording scope for a local authority to take into account matters such as cost when deciding how best to perform the duty in its own area. In such cases the local authority may have a wide measure of freedom over what steps to take in pursuance of its duty.

14. Towards one edge of this spectrum are instances such as section 23(1) of the Children Act 1989. Under this subsection it is the duty of a local authority looking after a child to provide accommodation for him while he is in the authority's care. This is a duty of an absolute character. An example of the opposite edge of the spectrum, taken from the field of education, is the broad duty imposed on a local education authority by section 8 of the Education Act 1944, now section 14 of the Education Act 1996, 'to secure that there shall be available for their area sufficient schools .. for providing primary education'. In *R v Inner London Education Authority, Ex*

> *p Ali* (1990) 2 Admin LR 822, 828, Woolf LJ described this as a 'target duty'.
>
> 15. Often the duty is expressed in more specific terms than this, but the terms themselves give the local authority an area of discretion. Paragraph 9 of schedule 2 of the Children Act 1989 imposes upon every local authority a duty to provide such family centres 'as they consider appropriate' in relation to children in need within their area. Another form of words apt to give considerable latitude to a local authority is where the duty is 'to take reasonable steps' to achieve a stated object. Paragraph 4 of schedule 2 of the Children Act 1989 is an illustration of this. A local authority is required to take reasonable steps to prevent children within its area suffering ill-treatment or neglect. Again, although not explicitly stated, a statute may implicitly afford a local authority considerable latitude. Section 18(1) of the Children Act 1989 provides that every local authority shall provide such day care for pre-school children in need within its area 'as is appropriate'. In deciding what is appropriate the local authority may properly take into account a wide range of matters including cost."

[17] The remaining legal principles governing this case were not in dispute. It was not contended that Maguire J misunderstood or misstated the principles. Rather it was contended by the appellant that he had misapplied them.

[18] Counsel cited a roving array of familiar but powerful authorities which included:

Padfield v Minister of Agriculture [1968] AC 997, Re Martin's Application [2012] NIQB 89, *R (KB & Ors) v The Mental Health Review Tribunal* [2002] EWHC 639, *X (Minors) v Bedfordshire County Council [1995] 2 AC 633, R v Cambridge Health Authority, ex parte B [1995] 1 WLR 898, 906D-F; R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd [1999] 2 AC 418 at 439A-B, Hooper v Secretary of State for Work and Pensions [2002] EWHC 191 (Admin) at paragraph 100, Re Independent Care Home Providers* [2013] NIQB 29, *Nottinghamshire County Council v Secretary of State for the Environment*[1986] AC 240 HL *R v Secretary of State for the Environment ex parte Hammersmith& Fulham LBC* [1991] 1 AC 521 pg 596 -7, *R v Ministry of Defence v Smith* [1996] QB 517l CA, *X (Minors) v Bedfordshire County Council [1995] 2 AC 633, R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418, *Prolife Alliance* [2003] UKHL 23, *Ahmad v London Borough of Newham* [2009] UKHL 19, *Bancoult No 2*

[2008] UKHL 60, *R (Unison) v Lord Chancellor* [2017] 3 WLR 40 *Johnstone v AGNI* [2017] NIQB 33.

[19] From these the following seemingly uncontroversial principles can be distilled.

(a) Normally, the question whether the Government allocates sufficient resources to any particular area of state activity is not justiciable.

(b) A decision as to what resources are to be made available often involves questions of policy, and certainly involves questions of discretion. It is almost invariably a complex area of specialized budgetary arrangements taking place in the context of a challenging economic environment and major cutbacks on public spending. There should be little scope or necessity for the Court to engage in microscopic examination of the respective merits of competing macroeconomic evaluations of a decision involving the allocation of (diminishing) resources. These are matters for policy makers rather than judges: for the executive rather than the judiciary.

(c) The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the Court must necessarily be in holding a decision to be irrational. Where decisions of a policy-laden nature are in issue, even greater caution than normal must be shown in applying the test, but the test is sufficiently flexible to cover all situations.

(d) Provided the relevant government department has taken the impugned decision in good faith, rationally, compatibly with the express or implied statutory purpose(s), following a process of sufficient inquiry and in the absence of any other pleaded public law failing, such a decision will usually be unimpeachable.

(e) However when issues are raised under Articles 5 and 6 of the European Convention on Human Rights and Fundamental Freedoms as to the guarantee of a speedy hearing or of a hearing within a reasonable time, the Court may be required to assess the adequacy of resources, as well as the effectiveness of administration.

(f) Nonetheless in general a court is ill-equipped to determine general questions as to the efficiency of administration, the sufficiency of staff levels and the adequacy of resources.

(g) There is a constitutional right of access to justice and access to the courts.

(h) Powers ought to be exercised to advance the objects and purposes of the relevant statute.

[20] In the context of the present case the words of Sir Thomas Bingham M.R. in *R v Cambridge Health Authority, ex parte B [1995] 1 WLR 898*, at 906D-F (a case involving the withholding of cancer drugs from a nine year old girl) we pay careful consideration:

> "I have no doubt that in a perfect world any treatment which a patient, or a patient's family, sought would be provided if doctors were willing to give it, no matter how much it cost, particularly when a life was potentially at stake. It would however, in my view, be shutting one's eyes to the real world if the court were to proceed on the basis that we do live in such a world. It is common knowledge that health authorities of all kinds are constantly pressed to make ends meet. They cannot pay their nurses as much as they would like; they cannot provide all the treatments they would like; they cannot purchase all the extremely expensive medical equipment they would like; they cannot carry out all the research they would like; they cannot build all the hospitals and specialist units they would like. Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. That is not a judgment which the court can make. In my judgment, it is not something that a health authority such as this authority can be fairly criticised for not advancing before the court."

[21] To similar effect, in *Corner House* [2008] UKHL 60 Lord Bingham stated at paragraph 31:

> "The reasons why the courts are very slow to interfere are well understood. They are, first, that the powers in question are entrusted to the officers identified, and to no one else. No other authority may exercise these powers or make the judgments on which such exercise must depend. Secondly, the courts have recognised ……….. the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within

neither the constitutional function nor the practical competence of the courts to assess their merits. Thirdly, the powers are conferred in very broad and unprescriptive terms."

The Role of Judicial Review and of the Appellate Court

[22] The Role of Judicial Review and of the Appellate Court was recently summarised by this court in *Re An Application by Christine Gibson* (unreported GIL10185) at paragraphs [9] and [10]:

> "[9] For the guidance of personal litigants in the future we make clear that the role of judicial review can be summarised in the following bullet points cited in *Re Oasis Retail Services Ltd's Application* at paragraph [74] per Maguire J.
>
> - The burden of proof to establish unlawful conduct rests with the applicant.
> - The role of the court in judicial review is supervisory only.
> - The court is not concerned with the merits of the decision or decisions at issue.
> - The court will not intervene unless a public law wrong has been established.
> - Issues which concern the weight to be attributed to various factors in the decision-making process will generally be for the decision maker and not the court subject only to a rationality challenge.
> - The parameters of a judicial review challenge will ordinarily be set by the pleaded case contained in the Order 53 Statement.
>
> [10] Moreover, an appellate court should be slow to second guess the approach of a first instance judge in such matters. *DBB v Chief Constable of PSNI* [2017] UKSC 7 was a judicial review case arising out of the flag protest, as it became known in Northern Ireland, which was finally determined by the UK Supreme Court. At paragraph 78 Kerr SCJ said:

'On several occasions in the recent past this court has had to address the issue of the proper approach to be taken by an appellate court to its review of findings made by a judge at first instance. For the purposes of this case, perhaps the most useful distillation of the applicable principles is to be found in the judgment of Lord Reed in the case of *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 … Lord Reed's discourse on this subject continued with references to decisions of Lord Shaw of Dunfermline in *Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35, 36-37, where he said that an appellate court should intervene only it is satisfied that the judge was "plainly wrong" , ……… and that of Lord Hope of Craighead in Thomson v Kvaerner Govan Ltd [2003] UKHL 45; 2004 SC (HL) 1, para 17 where he stated that: "It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion.

The statements in all of these cases ….. were made in relation to trials where oral evidence had been given. On one view, the situation is different where factual findings and the inferences drawn from them are made on the basis of affidavit evidence and consideration of contemporaneous documents. But the vivid expression in Anderson that the first instance trial should be seen as the "main event" rather than a "try out on the road" has resonance even for a case which does not involve oral testimony. A first instance judgment provides a template on which criticisms are focused and the assessment of factual issues by an appellate court can be a

very different exercise in the appeal setting than during the trial. Impressions formed by a judge approaching the matter for the first time may be more reliable than a concentration on the inevitable attack on the validity of conclusions that he or she has reached which is a feature of an appeal founded on a challenge to factual findings. The case for reticence on the part of the appellate court, while perhaps not as strong in a case where no oral evidence has been given, remains cogent'. "

The Appellant's case

[23] Mr Coll advanced the following arguments:

1. The Department has no operational responsibility for the conduct of the PONI in discharging his duties. It is a matter for the PONI, who is operationally independent, how he manages his budget and deploys the funds allocated to him in such a way as to discharge his powers and duties as efficiently as possible.

2. The PONI had initially indicated that the investigation into the Applicant's complaint would commence in January 2015.

3. As a consequence of anticipated reduction in the available budget the PONI wrote to the applicant on 14 October 2014 to the effect that the work involved in conducting investigations into historical/Troubles-related complaints would not be completed before 2025. The letter stated that there would almost certainly be a delay in the progress of the investigation into the Applicant's complaint. The PONI further referred to seeking to clarify the position with respect to a new timetable for historical investigations.

4. Thereafter the purported level of reduction in the PONI's budget allocation was itself reduced. As the obvious implication of same, one must assume that the impact upon the PONI's planned timescale for progress of and completion of the historic investigations generally, and of the Applicant's complaint in particular, will have been less severe than he anticipated and communicated to the Applicant.

5. The Department has no knowledge as to where the Applicant's complaint sits in the list of the PONI's historic caseload, whether it will

not be dealt with and completed until 2025, and if so, why that is the case given the provision of a higher level of funding than had been anticipated and which gave rise to the October 2014 letter.

6. The discretion given to the Department to determine the level of funding provided to the PONI is a broad one. The Department is obliged to provide such sums as appear to it to be appropriate for defraying the expenses of the PONI. It is for the Department to determine the appropriate level of overall funding, not the PONI.

7. The funding system was clearly designed by Parliament to contain a strong element of departmental discretion. The statutory scheme steers away from funding on the basis of such sums as the PONI may deem to be required or necessary (or even appropriate) to meet the PONI's expenses.

8. The scheme is sufficiently nuanced to provide for circumstances where the Department does not have the degree of funds available as it might like in a paradigm situation and where instead it has to cut its coat according to its cloth.

9. It does this by the width of language allowing the Department to take account not only of what the PONI might need or want as one side of the equation, but also of its ability to meet the funding demand, in light of its available financial resources, and its consideration of the other funding pressures applied to those resources, as the other equally valid and relevant part of the equation.

10. There is a constitutional reality of the need for administrative flexibility in the making of resource allocation decisions that Parliament would have intended to maintain and protect. The approach cannot be unthinkingly formulaic.

11. The Department's decision in this respect can only be challengeable in domestic terms on the basis of *Wednesbury* unlawfulness. The amount of overall funding available to the Department (from which it is required to fund a variety of public authorities discharging a wide range of vital functions) is plainly a relevant factor to take into account. The funding pressures on the Department were addressed in the affidavit of Jane Holmes.

12. Here the Department does fund the PONI as per the statutory scheme. The only issue goes to the amount of funding. There is no misapprehension as to the statutory duty. The instant case is about the exercise of administrative discretion as to the allocation of scarce public

resources, a factor which distinguishes it from examples such as *Padfield's* case.

13. Assessment of rationality and the standard of reasonableness is context-laden and the width of the discretion will vary according to the context and the scheme of the statute. In the allocation of public finances discretion is at the very widest end of the spectrum.

14. Parliament constructed a funding scheme in the 1998 Act that placed a discretion in the hands of the Department as to what is appropriate. This connotes a scheme comprised of scope and object that goes wider than simply according funding that matches that which the PONI might ask for. There is scope for a wider assessment taking account also of the wider financial picture and the wider implications of the protection and allocation of scarce public resources.

15. Where limited public funds are available difficult questions as to the allocation of scarce resources fall more properly within the scope of Executive decision-making. The Court should resist the Applicant's invitation to effectively substitute its own view as to what an appropriate level of funding is in the circumstances.

The Respondent's case

[24] Mr McDonald advanced the following arguments:

1. There has been lengthy systemic and persistent underfunding of PONI. The executive authority, with a statutory obligation to fund this, cannot lawfully exercise its power in such a manner as to frustrate the operation of the scheme of policing structures and arrangements and then claim it is immune from court supervision of the scheme. This amounts to a denial of the constitutional right to justice and access to the courts.

2. The effective operation of the police complaints system is a cornerstone of the present constitutional arrangement in Northern Ireland. The Department is frustrating the intention of Parliament by depriving the PONI of funds to carry out its duties and reducing its ability to deal with complaints with the utmost dispatch.

3. In *Re Martin's Application* [2012] NIQB 89 the court had issued a declaration that the failure by the PONI to investigate complaints of this nature within a reasonable time was unlawful and declared that the lack of funds on the part of the PONI did not excuse the failure. Far from moving to correct this situation, the Department had allowed

the position to become, if anything, worse according to the finding of Maguire J. Having approved the funding arrangements of the PONI as appropriate in 2012, the Department went on to cut the budget in 2014. Why is lack of funding no excuse for the PONI to carry out its duties (per the decision in *re Martin*) but it becomes an excuse for the Department?

4. Contrary to the principles set out in *Padfield's* case the Department has proceeded on the basis that its discretion is unfettered and has exercised that discretion so as to run counter to the objects of the Act causing the effective collapse of the system for investigating "historic" complaints. It has refused to honour the terms of the statute and pay sums appropriate for defraying the expenses of the NIPO.

5. The Department has the option to retain the statutory scheme and fund it properly or to seek its reform or removal if it cannot fund it. Until it changes the law the duty of the court is to require the executive to give effect to the scheme Parliament has put in place.

6. In following the principles attendant upon the necessity for caution in considering the role of an appellate court set out in *DBB v Chief Constable of PSNI* [2017] UKSC 7, this court should bear in mind that the learned trial judge has correctly addressed all the legal principles.

The submissions of the PONI

[25] With commendable brevity Ms Doherty advanced the following points:

1. These proceedings were initially brought against both PONI and the Department. The PONI had conceded that he was not able to conduct the investigation within a reasonable time in breach of the duty cast on him. The Department, as noted by Maguire J, had made no significant argument to the contrary before him. We note Mr Coll did not pursue with any vigour the point made in his skeleton argument that "the preparedness of the Ombudsman to concede that he was not able to conduct the investigation within a reasonable period of time in breach of implied statutory duty could be characterised as precipitative and too readily given".

2. In light of the undermentioned this is unsurprising:

   - the decision in Martin's case,

   - Maguire J's finding, that discounting an earlier complaint made in 2004/2005, [Mrs Bell's complaint] was made in or about 2009,

- Maguire J's s finding that it was not expected that part of the PONI's programme of investigation, to which this complaint belongs, will be completed before 2025.

- where a complaint is made to PONI and an investigation is carried out under either section 56 or section 57 of the Police (Northern Ireland) Act 1998, there is an express statutory duty to conduct an investigation without delay.

3. The matter of the PONI's funding was addressed in affidavit evidence from Adrian McAllister and Paul Holmes. In essence the point made was that whilst the funding in 2014 had not been reduced as much as had been expected (the anticipated 6.2% budgetary reduction in the event was 4.4%), nonetheless it fell well short of the £3.2m sought to support the 55 staff for the planned historic completion of the historic caseload by 31 March 2019. As a consequence, the Police Ombudsman's staffing of historic investigations reduced by 25% to thirty personnel. This was attributable to realignment of resourcing within the Office and also resignations of contract staff concerned at the instability of the funding and job security.

4. Historic investigations by PONI were less common prior to 2005, but have grown greatly in number since that time. Historic complaints must be investigated where they meet certain tests in regulation 6 of the RUC (Complaints etc) Regulations 2001, in particular because of the "*gravity of the matter*" or "*exceptional circumstances*". A reduction in funding, of any level, inevitably has implications for PONI's ability to perform its statutory duties. While PONI is able to make organisational choices about how to prioritise complaints – it cannot refuse to investigate complaints for reason of a lack of funding. It must instead work to new timelines of the kind that emerged in this case. This position would change only if the legislation governing PONI's duties were to be amended.

Discussion

[26] We commence our deliberations by recognising that in the hearing before Maguire J the burden of proof in this matter rested on the applicant/respondent to establish both the unlawful conduct on the part of the Department and that a public law wrong had been committed. This burden arises in circumstances where the court, in its supervisory role, had to recognise that those issues which concerned the weight to be attributed to various factors in the decision-making process will generally be for the decision maker and not the court subject only to a Wednesbury challenge.

[27] Secondly as a general proposition, it is undesirable for the courts to get involved in questions of how either financial priorities are accorded or allocation of resources are determined by governmental departments.

[28] Whilst the effective operation of the police complaints system to ensure investigations occur within a reasonable time is an extremely important aspect of the Department's duties, nonetheless it cannot be overlooked that the Department is not the source of budgetary restraints—that being the responsibility of the Executive or of the Treasury or of the Secretary of State for Northern Ireland who provide a block grant to the Executive and who arguably might also have been respondents in the original application. The Department has financial responsibilities for and duties owed to bodies as disparate as the PONI, the PSNI, the prison service, youth justice, family justice etc. Presumably if it provided all the money required by the PONI that would entail taking funds away from some other body or bodies for which it has responsibility. It would be to shut one's eyes to the real world if it was to be asserted that in a period of unprecedented economic difficulties the Department was not to be permitted to play its part in the belt tightening exercises throughout government. It would of course be laudable if all the needs of the Departmental responsibilities could be met but such hopes are simply not realistic.

[29] Equally it must be recognised that there will be cases where a decision maker has a duty to abide by a standard that does not depend on its resources. Impoverishment may not be treated as a relevant reason for failing to perform a statutory duty expressed in objective terms which allows for no discretion. Martin's case was one example of this.

[30] A further example of this genre is found in *R v East Sussex County Council, ex parte Tandy* [1998] AC 714. In this case an education authority had a statutory duty to provide a "suitable full time or part-time education" to children giving it a resultant discretion in deciding what was suitable for a particular student. When home tuition, initially provided to a handicapped child unable to go to school, was reduced and became the subject of challenge, the House of Lords determined that the decision had to be made without regard to the authority's financial resources. The fact that a cut in government funding compelled the local authority to economise was insufficient to downgrade the statutory duty to a discretionary power.

[31] In such cases, as Mr McDonald contended in the instant case, a change of legislation is the avenue for change if parliament wishes resources to be a factor. In the instant case, if that remedy needed to be pursued, the Executive/legislature could have considered amending the secondary legislation contained in The RUC (Complaints etc) Regulations 2001, SR2001/184.

[32] Such a situation has to be contrasted with circumstances where the decision maker has a wide discretion that includes responsibility to decide how to distribute

resources among competing needs. An example of this genre is *R v Cambridge Health Authority, ex p B* [1995] 1 WLR 8968 where a health authority was held entitled to exercise its discretion to deny lifesaving treatment to a nine year old child given the difficulties of budget allocation which faced the authority. A further example is to be found in *Johnstone v AGNI* [2017] NIQB 33 where the court held at [37] that the issue of resources was relevant to the Attorney General's decision as to whether or not he should direct a fresh inquest regarding a murder in 1988.

[33] What then was the nature of the duty imposed on the Department in this case? The primary question and the governing consideration raised this appeal is therefore the proper interpretation of Paragraph 11 of Schedule 3 to the Police (NI) Act 1998 (as amended):

> "The Department of Justice shall pay to the Ombudsman such sums as appear to the Department of Justice to be appropriate for defraying the expenses of the Ombudsman under this Act."

[34] This clearly imposes a statutory duty on the Department which must be discharged. It does not have an unfettered discretion to frustrate that duty. If the Department refused to make any payment or made a patently derisory payment - because for example government had decided that it preferred to spend all its money on some other purpose such as education or health - it would be in breach of that duty in all but the most straitened or emergency circumstances. The Department could not exercise its discretion in that manner. To do so would inevitably incur judicial reproach.

[35] The Department's exercise of its powers to fund this scheme is therefore not completely immune from the supervision of the court. Moreover the courts would undoubtedly intervene if there was clear evidence that the PONI was being starved of funds, for example for selfish political purposes, so as to deliberately frustrate Parliament's avowed intention to establish that important office and to implement the duties arising therefrom. The courts would not permit such a deliberate intervention to be masked in rueful pragmatism.

[36] We pause to observe that there is not a scintilla of evidence that this case falls within the category referred to in the paragraph above. We have carefully considered the table of payments made by the Department to the PONI between 2012 and 2017. It reveals significant sums every year albeit there have been reductions since 2012.

[37] Close perusal of the wording of the duty is therefore crucial because the extent to which the duty precludes government departments from ordering its expenditure priorities for itself may vary from one duty to another.

[38] In this instance we are satisfied that Parliament did not intend that the Department had to provide whatever sums were requested by the PONI for every activity of the PONI or which appeared or were considered necessary or reasonable by the PONI to perform all its duties. Had this been the intention of Parliament, wording to this effect in the legislation would have been comparatively simple to draft.

[39] Mr Coll correctly contends that the Department has no operational responsibility for the conduct of the PONI in discharging his duties and it is within his discretion as to how he discharges his duties with the funds made available to him.

[40] Parliament has vested in the Department a wide discretion "to pay such sums as *appear to the Department appropriate*" (*our emphasis)* for defraying the expenses of the PONI. It is not a specific and precise duty to provide the necessary requirements of the PONI which would impose more readily an obligation of an absolute character irrespective of whether or not the Department has the funding available in its budget.

[41] The phrase "as appears appropriate" is the language of discretion. In our view it confers a very broad latitude and discretion in the relevant statute. It gives considerable scope to the decision maker to make such sums available to the PONI as it deems appropriate having taken into account for example various resource based issues or competing claims within its remit. It cannot be sensibly suggested that, potentially, the entire or the greater part of the Departmental budget would have to be assigned to the PONI if that was what was needed to fulfil his tasks.

[42] Cast as it is in broad and general terms the duty contained in the statute can readily be construed as affording scope for the Department to take into account matters such as budgetary policy, macroeconomic constraints, the availability of funding within its budget and its responsibilities to other bodies within its remit when deciding how best to perform the duty in its own area. In such a case we consider the Department has a wide measure of freedom over what steps to take in pursuance of its duty. Not only is the responsibility to make the payment placed solely in the hands of the Department but significantly it is only such sums as appear to the Department to be *appropriate* as opposed to such sums as are "necessary " or "required". We are satisfied this selection of wording reflects Parliamentary intent and has been deliberately and carefully chosen.

[43] Difficult and agonising judgments have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of bodies for whom a Department is responsible. That is not a judgment which the court can make. Specialized budgetary arrangements taking place in the context of a challenging economic environment and major cutbacks in public spending are an area too complex for this Court. It should not engage in microscopic examination of

the respective merits of competing macroeconomic evaluations of a decision involving the allocation of (diminishing) resources. A court is ill-equipped to determine such general questions as to the efficiency of administration, the sufficiency of staff levels and the adequacy of resources for the PONI. These are matters for policy makers rather than judges, for the executive rather than the judiciary and in the instant case, for the Department.

[44] In our view the relevant government department has taken the impugned decision in good faith, rationally and compatibly with the express or implied statutory purpose. In the absence of any other pleaded public law failing, its decision is Wednesbury compliant and unimpeachable. The judge did not find that the Department had overlooked any relevant consideration nor taken into account any irrelevant or improper consideration.

[45] Finally we are aware that an appellate court should be slow to second guess the approach of a first instance judge in such matters. An appellate court should intervene only it is satisfied by the plainest considerations that the judge has formed a wrong opinion. The case for reticence on the part of the appellate court, while perhaps not as strong in a case such as the instant case where no oral evidence has been given, remains cogent.

[46] Nonetheless we are satisfied that in this case the learned judge has failed to adequately address and recognise the nature and width of the broad discretion vested in the Department under Paragraph 11 of Schedule 3 to the Police (NI) Act 1998 (as amended). He has therefore failed to take into consideration a highly relevant matter and has thus fallen into error.

[47] Accordingly we grant the appeal, reverse the findings of Maguire J and dismiss the application before him. We now invite the parties to address us on the issue of costs.

APPENDIX

CHRONOLOGY

16 November 1982	Patrick Joseph Murphy murdered when he was shot dead by an unknown gunman whilst working at his shop at Mount Merrion Avenue, Belfast.
28 June 1983	Inquest held into the death. The Inquest found "Death by gunshot wounds. Executed by terrorists.
25 October 2004	Complaint made to PONI by telephone.
26 October 2004	PONI acknowledges complaint by letter and requested further clarification on the nature of the complaint.
10 November 2004	Letter from PONI advising that the complaint did not meet any of the exceptions to the 12 month rule. The complaint was passed to PSNI.
13 November 2009	The Historical Inquiries Team ("HET") publish Review Summary Report into the deceased's murder.
3 December 2009	Telephone call from Dolores Rath ("the complainant"), the Applicant's sister, to PONI.
6 December 2009	Written complaint made to PONI.
8 December 2009	PONI acknowledge receipt of HET report and that the issues raised were under consideration.
14 January 2010	Formal Statement of Complaint recorded from the complainant.
2010	Following devolution of Justice powers DOJ becomes the funder of PONI.
29 July 2010	Letter to Complainant from PONI describing resource/ financing issues and discussions for additional funding.
23 September 2010	Further statement of complaint from the complainant.
16 June 2011	McCusker Report published.

June 2011	CAJ Report published.
September 2011	Criminal Justice Inspectorate for Northern Ireland (CJINI)'s Inspection Report published.
5 September 2011	Letter from PONI to complainant stating that he had suspended investigations at that time into historical investigations.
	Business case for funding presented to DOJ by PONI.
2011-2015	DOJ's unringfenced resource departmental expenditure limit reduced by 7.2%.
February 2012	A revised business case was submitted to DOJ by PONI.
March 2012	DOJ accept PONI's business case.
16 March 2012	PONI decide that the complaint should be approved as within the remit of PONI. The complaint would be the subject of preliminary assessment and prioritization. The government had approved additional funding to resource such historical investigations.
28 March 2012	PONI wrote to complainant that review of processes was at an advanced stage, that the subject complaint had been assessed and awaited prioritisation "as to what order it will enter into investigative review" and that additional funding requested had been approved.
8 August 2012	Prioritisation exercise completed with respect to the complaint.
10 October 2012	Complainant told that the suspension of historical investigations remained in place but that all cases would be subject to a prioritization process in the forthcoming months.
26 October 2012	Treacy J delivered judgment in Re Martin's Application [2012] NIQB 891.
January 2013	PONI rescinds suspension of historical investigations. At the same time, however an escalation in complaints relating to historical matters is experienced.
21 January 2013	Family told by letter that historical investigations would recommence.

25 February 2013	Letter from PONI to Applicant stating that he was able to start investigating again and that he had "been given funding to conduct this work over a six year period". Work will be carried out in two phases and it was anticipated that the subject complaint would be examined in the second phase, beginning on 31 January 2015.
24 May 2013	Letter from PONI to complainant.
28 August 2013	Letter from PONI to complainant.
9 December 2013	Letter from PONI to complainant.
January 2014	A further business case for additional funding submitted by PONI to DOJ. This is put on hold by DOJ pending discussions between Ministers regarding proposed arrangements for dealing with historic cases.
2014/15	DOJ's budget cut by 4.4%. Actual cut to PONI's budget this year was 4.4%.
2 May 2014	Letter from DOJ to OPONI re budget 2014-15.
May 2014	DOJ indicate to PONI that as well as a budget of £2.08m for 2014/15 for historic investigations an additional £400,000 was to be made available to support historical investigations with further resources to be made available in subsequent years.
6 May 2014	Letter from OPONI to complainant.
June 2014	A revised business case is submitted proposing that annual funding be increased to £3.2m. The final decision was an in year reduction in funding to £1.95m.
5 September 2014	Memorandum of Understanding entered into between PONI and PSNI regarding sensitive material resolving previous disruptions in this regard.
October 2014	Budget for historic investigations was finalized at £l.99m.
14 October 2014	The complainant was advised by PONI (by letter) that there had been a significant reduction in its operating budget, that staffing within the History Directorate of PONI had been reduced by 25%, historic investigations

	could not be completed before 2025 and that there would almost certainly be a delay in the investigation of her complaint.
24 October 2014	Letter from DOJ to PONI re revised budget 2014-15. Budget for historical investigations was set at £1.98m.
7 November 2014	Pre-action correspondence to the Ombudsman and the Minister for Justice.
20 November 2014	DOJ replies to pre-action correspondence indicating letter will be replied to.
21 November 2014	PONI replies to pre-action letter.
4 December 2014	Application for leave made.
23 December 2014	Stormont House Agreement ("SHA") reached.
22 January 2015	DOJ pre-action response.
6 February 2015	Letter from DOJ to PONI re budget for 20 15-16.
13 March 2015	PONI sends DOJ a short business case outlining costs and timescales for the implementation of proposals under the SHA.
2015/16	DOJ's budget cut by 15.1%. Actual cut to PONI's budget this year was 5%.
30 April 2015	Letter from PONI to complainant.
3 June 2015	DOJ letter to PONI directing that PONI should only spend funds that it was contractually bound to spend in year on the basis that further in-year cuts are inevitable. PONI replied querying whether there should be any cuts and DOJ replied on 8 July 2015 advising of uncertainty over the 2015/16 budget.
8 May 2015	Leave Granted.
22 May 2015	Notice of Motion.

26 August 2015	PONI wrote to Applicant proposing that a declaration be made that he had not conducted an investigation within a reasonable period of time.
2016/17	DOJ's overall unringfenced Resource DEL budget (excluding PSNI) cut by 5.7%. Indicative cut to PONI's budget was 2%.
29 April 2016	Applicant accepts PONI's proposal.
19 August 2016	Letter from DOJ to PONI re information gathering exercise regarding budget.
21 September 2016	Hearing date and PONI's counsel withdraw from the Case.
24 March 2017	Judgment delivered by Maguire J.
5 May 2017	Notice of Appeal lodged and served by DOJ.