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*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **23/3/05**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

—————
QUEEN'S BENCH DIVISION
—————

BETWEEN:

CHARLES MCCARTNEY AND BENSON

Applicants;

-and-

**CHIEF CONSTABLE OF THE POLICE SERVICE OF NORTHERN
IRELAND AND THE NORTHERN IRELAND OFFICE**

Respondents.

—————
HIGGINS J

[1] This case concerns several applications for judicial review of decisions of the Chief Constable of the Police Service of Northern Ireland (the Police Service) and the Northern Ireland Office (the NIO) pertaining to a Voluntary Severance Scheme (the Scheme) developed jointly by the Police Service and the Northern Ireland Office.

[2] The Scheme was devised to implement the recommendations of the Independent Commission On Policing in Northern Ireland (September 1999) (the Patten Report) set up as part of the Agreement (the Good Friday Agreement or the Belfast Agreement) reached in Belfast on 10 April 1998. The proposals set out in the Patten Report were put forward on the basis that they offered the people of Northern Ireland " the chance of establishing an effective and widely accepted police service of which they are themselves responsible" (see paragraph 1.1 of the Patten Report). The Commission recognised that "real community policing is impossible if the composition of the police service bears little relationship to the composition of the community as a whole" - (see paragraph 1.18). At the time of the Patten

Report there were 8457 regular police officers and 2935 full time reserve officers.

[3] The Patten Report made the following recommendations -

“Provided the peace process does not collapse and the security situation does not deteriorate significantly from the situation pertaining at present, the approximate size of the police service over the next ten years should be 7,500 full time officers [Recommendation 105].

The early retirement or severance package offered to regular officers and full time reservists aged fifty or more should include a generous lump sum payment according to length of service, pension enhancement of up to five years, early pay of pension commutation entitlement and payment in lieu of pension until pensionable age is reached [Recommendation 106].

Regular officers with more than five years’ service and all full time reservists, leaving the police service before the age of fifty, should receive a substantial lump sum payment [Recommendation 107].”

[4] These recommendation were accepted by the government in January 2000. Thus the size of the force required to be reduced considerably and at the same time new officers recruited in order to achieve a balanced force that was representative of the community. The Patten Report suggested that the early retirement or severance package be offered to regular officers aged fifty or more.

[5] Following the acceptance of the Patten recommendations negotiations took place between a Government Team (including officials of the Northern Ireland Office and the Police Authority for Northern Ireland) and the Police Association (comprising the Police Federation, the Superintendents’ Association and the Chief Police Officers; Staff Association). A scheme to implement the Patten recommendations was developed in these negotiations. In the first half of 2000 a Chief Superintendent of the PSNI carried out an assessment of the criteria to be applied in order to achieve the Patten recommendations. Eventually the Chief Constable settled on eligibility criteria combining the age of an officer and his length of service. Points were to be awarded for each of these criteria and combined. Officers were required to achieve a minimum number of points to become eligible.

[6] In July 2000 a Northern Ireland Booklet entitled "Voluntary Early Retirement Severance Scheme for the RUC" (the VSS) was issued. This booklet set out the benefits payable under the scheme. These were grouped in the Annexe to the booklet according to the age of the officer on leaving. The age limit was reduced from 50, as envisaged in the Patten Report, to 45 years. In the Foreword to the VSS Booklet the then Secretary of State wrote -

"The Government has always recognised that the developments to the police service in Northern Ireland recommend in the Report of the Independent Commission on Policing will entail considerable challenges and uncertainty for the men and women of the Royal Ulster Constabulary who have served the community with such courage and resilience over the last thirty years. Understandably, officers will have concerns for the future. That is why the Prime Minister and I have undertaken that officers who decide to take voluntary early retirement/severance will receive sympathetic and generous treatment befitting the distinguished service they have given."

[7] Under the heading Staffing Reductions the Booklet stated

"4. The Patten Report recommended that - provided the security situation did not deteriorate significantly - the RUC should be reduced in size from 8500 to 7500 regular officers and that the Full Time Reserve should be phased out. (This net reduction of 1000 in the size of the regular service is planned to be achieved through the voluntary severance/early retirement of a larger number of officers, to be balanced by an inflow of new recruits.)

5. The number of officers leaving the service in any one year will be determined by several factors, but at this stage it is estimated that around 600 officers will leave during Year 1 ie up to 31 March 2001, 750 during Year 2 ie between 1 April 2001 and 31 March 2002, and 600 in Year 3 ie between 1 April 2002 and 31 March 2003. These figures are subject to review. Officers will be informed in due course of estimated reductions in subsequent years."

[8] Under the heading Eligibility Paragraph 6 of the VSS Booklet stated -

“6. Current RUC officers who joined the RUC on a date prior to 1 July 1995 will in principle be eligible to apply for acceptance into the early retirement/severance scheme. However, as indicated above there will be a limit on the number of officers who can take early severance in each year, and criteria will be set to implement this. Thus, during Year 1 (ie the period up to 31 March 2001), the Chief Constable has decided that the scheme will be available only to officers whose combined total of age and RUC service (completed years only) equals or exceeds 81 points as at 31 March 2001.”

[9] Subsequently the Police Service of Northern Ireland and Police Service of Northern Ireland Reserve (Full Time) (Severance) Regulations 2003 were made with retrospective effect from the commencement date of the Scheme namely 1 January 2001. The Regulations were made on 11 January 2003 and came into operation on 31 March 2003. These Regulations were made after consultation with the Treasury in concurrence with Section 72 (2A) of the Police (NI) Act 1998. Regulation 5 provides that only members who joined the police service before 1 July 1995 are eligible to apply to join the Scheme. Regulation 7 and the Schedule set out the benefits payable and the computation of them and provide for the payment of severance lump sums, pensionable service enhancements and payments in lieu of pensions. Part I of the Schedule makes provision for pension enhancement (added years) for those over 50 years of age and those over 45 years of age but under 50 years of age on the date of leaving. The Scheme groups officers into three age categories - over 55 years, 50 - 54 years and 45 - 49 years. Regulation 5(2) provides that eligibility is subject to the discretion of the Chief Constable. The age of compulsory retirement for a constable is 55 years of age - see Regulation A16 (1)(c) Royal Ulster Constabulary Pension Regulations 1988.

[10] The Police Association for Northern Ireland Regulations 1991 makes provision for a Police Association. Regulation 5 of the 1991 Regulations provides that every member of the police force shall be a member of the Police Association. Regulation 3 provides that the Association shall comprise three sections. Regulation 3(1)(a) states that one section shall be the Police Federation for Northern Ireland which represents members of the police force below the rank of superintendent. For the purposes of consulting with the Police Association, Regulation 3(2) provides that the Secretary of State shall consult each section and Regulation 4 empowers each section to make written representation to the Chief Constable or the police authority and to copy such representations to the Secretary of State. Regulation 4 is without prejudice to any arrangements for informal consultation.

[11] The VSS derived from the negotiations to which I have referred. The police officers were represented by their various associations, who accepted the outcome of the negotiations. While the members of the associations felt that the government could have been more generous in the benefits to be paid under the scheme, it was considered overall that the scheme offered the best result for the majority of the police force. However a sizeable minority of officers believed, strongly, that the scheme discriminated against officers who joined the police aged 18. These officers joined together, early in the introduction of the scheme, to argue that the scheme discriminated against those who joined the police at a younger age or at 18 and who had served at the height of the violence that beset this province for over 30 years, as well in the most hostile areas. They formed the Age Discrimination Challenge Group (the group) which comprises both men and women who have served in different divisions and departments within the police force over the years.

[12] The two applicants in this judicial review have been leading participants in that group, on whose behalf these proceedings have been brought. Their counsel has forcefully and appropriately remembered the hundreds of officers murdered and the many thousands injured during this period, as well as the sacrifice made by those officers who served in those dangerous and difficult time and survived, many not unscathed, for which the Royal Ulster Constabulary was awarded the George Cross Medal.

[13] The members of the Group have accumulated service of 25-29 years and find that they are unable to apply for inclusion in the scheme, whereas older officers with much less service are able to do so, simply because they are older. The members of the group feel deeply insulted by the adoption of age and service criteria and consider it devalues the long and dedicated service that the group members have given, particularly during difficult times and in dangerous locations. The operation of the scheme based on age and service created uncertainty for them and made planning for the future more problematic.

[14] The scheme allowed for pension enhancements of between 18 and 59 months. The group argued that an officer who joined at age 18 would only receive 18 months pension enhancement whereas an officer who joined at age 25 would receive 59 months enhancement. In order to receive the same pension return the younger officer required to remain in service for 41 months longer than his older colleague. This would lead to pension contributions ranging from £12,000 to £23,000 depending on rank. Those able to avail of severance do not have to make those contributions. The group argue that service-only criteria would enable those with long service to retire first, thus recognising their long service and honouring the recommendations of the Patten Report.

[15] The Scheme came into operation on 1 January 2001. The first 50:50 recruitment drive to complement the severance scheme was launched in February 2001. Between April 2001 and March 2002 Year 2 of the scheme operated and Year 3 took place between April 2002 and March 2003. In Years 1 to 3 of the Scheme officers were awarded 1 point for each complete year of service and 1 point for each complete year of age. For Year 2 the number of points required for inclusion in the scheme was reduced to 76 and in Year 3 to 73. In Years 2 and 3 the number of officers exceeded the number projected in the Patten Report and Year 4, which should have taken place between April 2003 and March 2004, was suspended. On 22 October 2001 the Chief Constable announced that a review of the scheme would take place during Year 3. The review was intended to consider the operation of the scheme as well as the eligibility criteria and to ensure that the scheme was meeting its objectives.

[16] On 22 September 2003 the Chief Constable directed that the pre-decision phase of Year 5 of the scheme would commence on that date. Those eligible to apply included those previously eligible under Years 1 - 3 and those wishing to carry over from Year 4 and those made eligible for Year 5 who achieved 75 points on the application of the age and service criteria. Subject to these proceedings the Chief Constable is preparing to proceed with Year 5 from April 2005 to March 2006, on the same eligibility criteria as applied in Year 3.

[17] These proceedings were commenced, initially against the Chief Constable of the PSNI, in September 2003. At the end of 2003 the applicants' legal advisers indicated that they proposed to join the second respondent, the NIO, to the proceedings and in March 2004 an Order 53 statement was filed against both respondents.

[18] It is said that both applicants have since qualified for inclusion in the severance scheme and have now left the PSNI. Another name appeared as the applicant in ancillary proceedings. It was submitted that, in the absence of a representative application for judicial review, these proceedings are now academic. It is clear that there are still members of the Group who are affected by the terms of the scheme and for whom this issue remains a live and painful one. I do not think it would be appropriate, given the history of this scheme and the issues raised by the members of the Group, who have served this community through difficult times, not to deal with their application for judicial review. The point at issue remains the same.

[19] Following the Belfast Agreement reached on Good Friday 1998 the Northern Ireland Act 1998 (the 1998 Act) was passed. Section 75 of the 1998 Act makes provision for the promotion of equality of opportunity between persons of different age by public authorities in Northern Ireland.

[20] The Police Service of Northern Ireland (PSNI) was designated as a public authority for the purposes of Section 75 and Schedule 9 to the Northern Ireland Act 1998 on 4 November 2001. I shall refer to the provisions of Section 75 and Schedule 9 later in this judgment. Shortly after designation Chief Inspector Tucker of the PSNI was appointed to conduct an equality impact assessment (EQIA) of the Voluntary Severance Scheme for the purposes of Section 75. It was anticipated that this PSNI/EQIA (referred to as the Tucker Report) would be completed by the middle of February 2002. The group was one of the consultees for the purpose of this assessment. The first named applicant met with Chief Inspector Tucker on 4 February 2002 and was informed that he would receive a copy of this report. Later in the same month he received a letter from Chief Inspector Tucker stating that completion of the assessment would be delayed. At a meeting in April 2002 the first named applicant was informed again that he would receive a copy. The group and their solicitors continued to press for a copy of the report even writing to the Chairman of the Policing Board. By letter dated 6 June 2002 they were informed that the papers were with ACC Kincaid and that all inquiries should be directed to his office. In the same month the Chairman of the Policing Board told them that the report would be available shortly for public consultation.

[21] Representatives of the group met ACC Kincaid on 21 June 2002 when, according to his affidavit, he informed them that he had commissioned a preliminary equality impact assessment on behalf of the PSNI and that he would be reporting to the Chief Constable and the NIO and agreed further meetings between the group and himself. On 5 July 2002 Chief Inspector Tucker sent the report, referred to as the Preliminary Equality Impact Assessment, to ACC Kincaid. I will deal with the contents of the Tucker report later in this judgment.

[22] From February 2002 there was a sustained effort by the group to obtain a copy of this report. They were told they would receive a copy in February 2002. It was not until August 2003 that a copy was made available to them. Various reasons were given to the applicants throughout that time for its non-disclosure. At a meeting with the team responsible for the EQIA within the PSNI in August 2002, the representatives of the group were informed that the Tucker report did not support the case that the group were attempting to make. Other reasons included advice from the PSNI legal adviser and because the NIO were carrying out a review. The applicants complain, not without considerable justification, that they were being frustrated by a variety of stratagems. Why the report could not have been disclosed to the group shortly after it was received by ACC Kincaid has never, to my mind, been satisfactorily answered. Throughout this period the group were attempting to engage with the NIO about the scheme and its effect on them. However requests for meetings with NIO officials and representatives of the Chief Constable were rejected. It is clear that the Chief Constable and the NIO,

having negotiated a scheme with the statutory police associations, did not consider they were under any obligation to acknowledge an ad hoc group, whose views differed greatly from the associations. Later some elements within the PSNI adopted a more conciliatory approach to the group, but the NIO maintained a less tolerant approach for some time. This despite the fact that after a period of time the group was recognised as representing the views of a substantial minority of serving police officers who required to be dealt with, however begrudging that turned out to be.

[23] In February 2002 the NIO refused to meet the group. Their letter dated 21 February stated –

“I am aware that some members of the PSNI have raised issues concerning the voluntary severance scheme and Section 75 of the Northern Ireland Act 1998. This department has already addressed those issues in previous correspondence and I am uncertain from you letter which particular aspect of this you wish to discuss. However I would point out that the department has considered its responsibilities under Section 75 of the Act. This is set out in detail in the department’s equality scheme, recently approved by the Equality Commission and due to be published soon. The outcome of the review on policies concerning the police early retirement scheme, which is entirely voluntary in nature, was that an adverse impact on younger officers is recognised and “is a foreseen consequence of the policy for restructuring the RUC in the light of the Patten Report recommendations”. Since this is apart of the actions necessary to achieve the overall benign effects of the Good Friday Agreement, it was concluded that no further impact assessment was required nor remedy sought.

In all the circumstances it is unlikely that a meeting would be beneficial.”

[24] There are occasions when the benefits to be derived from a meeting might not be apparent, but yet the fact of a meeting can assist those, with a point of view to express, to do so, and for those whose responsibility it is to listen, to do so, and to enable a better understanding and relationship to be maintained. It is but a small price to pay. This letter is inconsistent with Chief Inspector Tucker’s comment that the NIO were “dragging their heels” on Section 75, and misleading, as no review was apparently yet effected.

[25] According to the affidavits it was not until September 2002 that the NIO embarked on a review of the scheme. Deloitte and Touche were engaged to conduct this review which was to comprise two phases. The first phase was a general evaluation of the scheme and the second phase was an equality impact assessment. According to the affidavit of the Head of the Police Division the first phase was completed in December 2002 and it concluded that the scheme was achieving its objectives of reducing the size of the police force and at the same time addressing the compositional imbalance identified in the Pattern Report.

[26] In December 2002 Deloitte and Touche produced a document entitled "Equality Assessment of the Benefits Payable to PSNIU Officers under the Voluntary Severance Scheme". The terms of reference indicate that Deloitte and Touche were commissioned to undertake a review of the scheme, the second phase of which would consist of an equality assessment of the scheme benefits with reference to Section 75. It was not felt that public consultation was necessary at that stage, but it was envisaged that such consultation would take place at the initiation of the second phase of the review. Under the heading Consultation the assessment reported in December 2002 -

"5.4 Age

Evidence was produced that sought to demonstrate the existence of a discriminatory impact arising from the VSS policy in respect of persons of different age. It was suggested that the policy of providing pension enhancements for officers over the age of 45 impacted differentially on younger officers.

The 'Age Discrimination Group' focused on the position of officers that joined PSNI aged 18. The provision of pension enhancements as part of the benefits to officers over the age of 45 means that a 49 year old officer who had joined PSNI at the age of 23 could have their pension enhanced to a full pension, while an officer that had joined at the same time aged 18 would have to work until they were aged 46 to qualify for a full pension under the VSS. The effect of this is that an officer joining at age 18 compared with an officer joining at age 23 would have to work up to an extra 30 months to qualify for a full pension under the VSS.

Other consultees agreed that the VSS impacted differently on people of different ages although only one group felt that the scheme should be changed as a

result of this. Consultation with the Police Federation, Superintendents Association and Chief Officers Association indicated that, while they felt that the scheme should have been more generous, that it offered the best overall deal for the majority of PSNI officers. This constituency would not like to see the scheme changed to determine benefits on service rather than age."

Under the heading Findings it reported -

"6.4 Persons of Different Ages

The benefits of the scheme differentiate between the age of officers on the last day of service. Officers below the age of 45 are not entitled to any pension enhancements, officers between the ages of 45 and 49 receive pension enhancements which increase with their age and officers over the age of 50 receive pension enhancements of up to five years service capped at 30 years pensionable service.

There is a different impact on younger officers, to the extent that age is used as the basis for conferring an additional benefit on older officers ie. pension enhancements. To the extent that younger officers with comparable service are not in as advantageous position as older colleagues this could be construed to be a differential impact within the meaning of Section 75 of the Northern Ireland Act.

Consideration will be given in Section 7 to whether this differential impact on younger officers is justifiable in the context of the policy objectives."

The report concluded under the heading "Consideration of Impact" -

"7. CONSIDERATION OF IMPACT

This section considers whether the differential impact of the VSS on younger people is justified, considering the policy context and objectives of the VSS.

7.1 Policy Context

The VSS came out of the recommendations of the Independent Commission on Policing in Northern Ireland, established as a result of the Belfast Agreement which made a number of recommendations on the future of policing in Northern Ireland. The VSS is part of an overall package of reforms which aim to achieve a smaller overall policing complement in Northern Ireland which is effective and representative of the community it serves, commanding the widespread confidence and support it needs.

The Patten report provided the baseline for developing the benefits payable under the VSS and it was envisaged that:

'the early retirement or severance package offered to regular officers and full time reservists aged 50 or above should include a generous lump sum payment according to the length of service, pension enhancement of up to five years, early pension commutation and payment in lieu of pension until pensionable age is reached. The normal retirement age for regular police officers will be 50 years.'

The terms of the benefits payable under the VSS were determined by the NIO following discussion with the three established bodies for representing PSNI officers: the Police Federation, Chief Police Officers, Staff Association and Superintendents Association. While the consultation for this assessment indicated that there are levels of dissatisfaction with elements of the VSS among these bodies, none have ever advocated that VSS benefits should be payable on length of service instead of age.

The age at which pension enhancements would be payable to officers leaving under the VSS was extended to 45, beyond that envisaged by Patten due to concerns that insufficient officers over the age of 50 would leave to meet the targets for reducing the size of PSNI. However, the principle of encouraging older officers to leave under the VSS through the provision of preferential benefits clearly emanates from the Patten report.

7.2 Policy Objectives

The defined primary policy objectives of the VSS are:

- to achieve a significant and measurable change, in the relatively short term, to the composition of PSNI;
- to achieve a concomitant change to the culture and ethos of policing; and
- to achieve a smaller overall policing complement in Northern Ireland.

The ancillary objectives of the VSS policy are:

- that the package should meet Government's declared intention of treating RUC officers generously and with sympathy;
- packages should represent the best possible value for money consistent with policy objectives; and
- the scheme should be implemented in a way which achieves value for money.

The ancillary objectives of the scheme provided the key parameters for the development of the benefits of the VSS as the primary scheme objective of reducing the size of PSNI could have been achieved in a number of ways.

In determining the payment of benefits under the VSS, consideration was given to ensuring that the scheme offered the best value for money consistent with the policy objectives of the scheme.

It has been suggested that length of service and not age should be the determinant for providing pension enhancements under the VSS. If this were the case, officers from the age of 43 would be eligible for immediate payment of full pension. Within the current scheme, the youngest age that an officer can

leave with a full pension is 46. The net result of changing the scheme would be an increase in the maximum benefits payable to officers over their life of 42 months of full pension. Changing the VSS to pay pension enhancements on length of service and not age would therefore significantly increase the overall cost of the scheme without enhancing its capacity to meet its primary objectives.

7.3 Early Retirement/Severance Schemes

The issues raised through this equality assessment impact on the legitimacy of public authorities offering early retirement to older officers by enhancing pension entitlements.

The rationale behind encouraging older officers to retire early (instead of younger officers) is usually based on a combination of operational and cost reasons. Operationally it is recognised that an older employee will reach normal retirement age in a short period of time than a younger colleague and that facilitating early retirement by offering pension enhancements accelerates the normal retirement process. Encouraging younger officers to leave/retire increases the potential number of years lost to the organisation as they would have had longer to work before normal retirement age.

It is also the case that an older employee will require less financial incentive to apply for severance/early retirement as the scope for earning benefits through their working life is reduced by the shorter time they have to work before normal retirement age. Given the difference in typical life expectancy between older and younger employees it is more cost effective to pay pension benefits to an older employee than a younger one.

It seems clear that the VSS, while applying to a younger age group of officers (over 45) than is typical of other early retirement schemes, has been developed in line with the general principles of early retirement schemes of encouraging older employees to leave.

7.4 Summary of consideration of whether the differential impact on persons of different ages is justifiable.

The benefits payable under the VSS:

- are in line with the principles set down in the Patten Report of encouraging older officers to leave;
- are more effective in meeting the objectives of the VSS than a scheme which paid benefits based on length of service would be; and
- are in line with the principle of early retirement schemes in encouraging older officers to leave.

Therefore the differential impact on officers of different ages is a justifiable one in line with Section 75."

[27] According to the same affidavit the second phase began with an initial assessment of the scheme, issued internally in January 2003, for comment, with a full equality impact assessment based on the initial assessment issued for formal public consultation in July 2003. This impact assessment was criticised by among others the Equality Commission and the NIO as a result has issued a revised equality impact assessment for further consultation.

[28] In December 2002 the Senior Director of Human Resources of the PSNI established a consultation group to review the eligibility criteria to be applied in the scheme from April 2004 and beyond. In January 2003 the Human Rights Legal Adviser to the PSNI provided ACC Kincaid with an opinion on the equality impact assessment, carried out by Chief Inspector Tucker. The opinion concluded that the Tucker Report was "flawed by reason of it not being clear whether it is address the scheme, the criteria, or both". The author recommended a "fully completed equality impact assessment on the [eligibility] criteria" that could be taken into account when considering recommendations to be made to the Chief Constable for setting future criteria. This opinion is undated but must have been written, presumably, prior to a meeting due to take place between ACC Kincaid, the author and Superintendent Gray, then of the Voluntary Severance Unit, arranged for 30 January 2003. The opinion states that "more recently the NIO have produced their own EIA of the scheme" (see, supra, reference to affidavit of Head of Police Division in the NIO re the initial assessment issued for internal consideration). No EQIA had been produced at that time. An EQIA was,

according to the affidavit to which I have referred, not issued for public consultation until July 2003. The author observed -

“I think it is fairly clear to all that the criteria have the potential to impact adversely on people of a younger age and I assume it is for this reason that an early decision was made to carry out a full equality impact assessment”.

[29] Following this advice ACC Kincaid agreed with the Consultative Group established by the Senior Director of Human Resources that external consultants be appointed to assess the criteria for eligibility to the scheme. Accordingly Deloitte and Touche were engaged by the PSNI to assess the criteria for eligibility to the scheme.

[30] In May 2003 Deloitte and Touche provided a Consultation Document on the equality impact assessment of the eligibility criteria. Under the heading Assessment of Impacts relating to age this stated

“5.2 Age

1. The points system used for determining eligibility clearly differentiates among officers of different ages, resulting in fewer younger officers being eligible for the scheme. Evidence reviewed shows that the differential impact on people of different ages was noted when the criteria was being determined. The specific issue of officers that joined at a young age was raised and it has been noted that in some cases older officers with less service have been eligible for severance where younger officers with longer service have not.

2. While the criteria clearly identifies officers that are eligible for voluntary severance, not all eligible officers have accepted severance. It is clear from data provided that officers have not accepted voluntary severance unless they were in a position to maximise their benefits, ie when they achieve, including pension enhancement, the pension that they would have achieved if they had worked until retirement age.

3. It has been suggested during the course of our assessment that the criteria should be changed to a points system based solely on RUC/PSNI service. Based on data provided by PSNI, this course would not change substantially the profile of officers leaving as there is a clear financial deterrent to officers leaving before the date of which they have maximised their pension benefits. If, for example an officer leaves at age 46½ with sufficient pension enhancements to achieve a thirty year pension they will receive immediate payment of pension. Leaving at age 45, the officer would receive three years salary as a lump sum and up to 12 months pension enhancement, giving almost 29 years pensionable service, payable at age 50. By working for a further year and a half and accepting severance aged 46½ their pension entitlement with enhancements rises to a full 30 year pension payable immediately.

4. While there may be a small number of officers of all ages throughout PSNI that would like to benefit from the VSS, it is recognised that the operational capacity of the organisation both in relation to policing and the administration of the voluntary severance scheme was a key consideration. Changing the criteria from age and service would have the effect of increasing the pool of officers eligible for severance and is unlikely to have a major impact on the number of officers that will apply for severance. Changing the criteria to a system based solely on service would significantly increase the burden of administrating the VSS and create greater uncertainty within the organisation reducing the organisations ability to *priorities applications in a controlled and efficient manner in terms of providing support and advice.*

5. Other options for amending the scheme have been considered by the Consultative group including a quota system based on rank and a system based on age bands and service bands. It is our view that a system based on bands of service or of age profiles potentially increase inequalities between officers of different ages by allowing a younger officer at the top of a service band to apply for severance while denying the opportunity to an older officer with more service at the bottom of a higher age or service band.

6. A system using quotas of different ranks would also increase the scope for inequalities between people of different religion, gender and age. For example, the proportion of women in differing ranks range from 3 per cent at Superintendent to 17 per cent at Constable. The proportion of Roman Catholic Officers range from 8 per cent at Chief Inspector to 13 per cent at Constable level.

7. The current criteria based on age and service ensures that those officers most likely to leave the service because of their benefit entitlement have the opportunity to do so while allowing the organisation to control to a large extent the numbers of officers leaving the service. It also ensure that resources in relation to administrating the scheme are targeted at those officers most likely to accept severance.

8. As a result it is suggested that the current criteria of age and service is justified both in terms of policy objectives and the absence of other options that would allow the scheme to be administered without differential impacts."

The Deloitte and Touche assessment concluded -

"7. CONCLUSIONS

This equality assessment suggests that no evidence exists to demonstrate a differential impact arising from the benefits of the VSS between:

- persons of different religious belief or political opinion racial group marital status or sexual orientation;
- persons with a disability and persons without;
or
- between persons with dependents and persons without.

This assessment has found that there is evidence to support the existence of a differential impact in respect of officers of

different ages as older officers receive more eligibility points than younger officers. It is suggested that this differential is justifiable as:

- other options for determining the criteria were considered at the VSS inception and it was felt that age and service best met the needs of the organisation and officers, by allowing officers to plan for severance by releasing the eligibility criteria in advance and thus allowing the organisation, to a large extent to determine those likely to apply for severance;
- the criteria was determined in line with the VSS benefits which give pension enhancements based on age;
- data from PSNI shows that more than 98 per cent of severance leavers wait until they can achieve the maximum benefits before they leave, suggesting that the benefits and not the criteria have the greatest influence on when an officer leaves;
- leaving without maximising benefits is less attractive to a PSNI officer as they would forfeit pension enhancements and pension payment for up to three and a half years.
- it is standard industry and public sector practice to base voluntary severance/early retirement schemes on age and service; and
- the Patten reforms, including VSS and 50.50 recruitment aim to promote equality of opportunity and good relations between people of different religions and political opinions.

This assessment has also found that there is a potential indirect differential impact between men and women, as women within PSNI are generally younger and have less service on average than men within the force. It is not possible to determine whether the low numbers of women leaving under severance

represents a differential impact to women as it is now known whether larger proportions of women would choose to leave if eligible. It is hoped that the formal consultation process will inform consideration of this issue.

The assessment has also considered the existence of a potential differential impact on people of different racial backgrounds in so far as non PSNI/RUC police service is excluded from the criteria. It is suggested that while this applies to officers transferring from careers elsewhere in the UK, it also applies equally to Northern Ireland Officers with previous careers and therefore is not a differential impact on people of different racial backgrounds.

It is therefore suggested that the current policy in so far as it continues to achieve sufficient numbers of officers leaving under VSS, does not need to be amended and complies with Section 75."

[31] The NIO apparently were formally consulted on the outcome of the PSNI EQIA on 8 May 2003. The NIO responded on 31 July 2003 that the view expressed by Deloitte and Touche relating to the criteria was shared by the NIO and that, subject to one query relating to rank, it was the most appropriate arrangement in the circumstances.

[32] During May and June 2003 the group were pressing for disclosure of the Tucker Report without success. At a meeting with the VSS unit the Chief Inspector stated that the Tucker Report did not support their case. Requests for meetings with the consultative group established by the Senior Director of Human Resources were refused. In May 2003 the group wrote to the VSS Unit making various inquiries about the Tucker Report. This was responded to on 25 July 2003. The letter stated that the report was held by ACC Kincaid, that it was an internal police document and did not require disclosure and that the group were being refused access to it on the instructions of ACC Kincaid.

[33] In July 2003 the NIOI decided that the structure of the scheme would remain unchanged for Year 5 due to commence in April 2004 and run until March 2005. This decision was communicated to the Voluntary Severance Support Unit by letter dated 23 July 2003. This stated –

"We recently discussed the timing of the announcement of year five and the need in advance of that announcement to have come to a decision concerning whether as a result of the ongoing impact

assessment into the terms of the voluntary severance scheme, those terms may change.

As you will know, the Department's EQIA is at the stage of public consultation with responses requested by the 25 August, at which time we will be obliged to consider fully the results of the consultation process before coming to a decision on the policy.

In the event that a policy change is required, the Department is required by virtue of Article 3 of the PSNI and PSNI Reserve (Full Time) Regulations 2003 to consult the Chief Constable, Policing Board and Police Association before altering the provisions or length of the scheme. The consent of the Treasury is also required.

In light of the need first to fully consider the findings of the ongoing consultation process combined with the legislative requirements, it would not be possible to announce any alterations to the current terms of the scheme (should that be decided) in advance of the launch of year five in September. The alternative would be to delay the timing of the announcement but I appreciate to do so would not permit officers eligible to leave from April 2004 sufficient time to make informed decisions over their futures.

For the practical reasons I have alluded to above, I can confirm that the Department are content that the planned announcement in September should proceed on the basis that the terms of the scheme in year five will remain unchanged.

I trust this allows you to progress your arrangements for the year five launch.

[34] On 24 July 2003 the NIO wrote to the Chief Constable enclosing an impact assessment of the terms of the scheme in line with the requirements of Section 75. The letter states –

“The Northern Ireland Office recently commissioned the preparation of an equality impact assessment of the terms of the police voluntary early retirement/severance scheme in line with the requirements of Section 75 of the Northern Ireland

Act. The impact assessment has now been completed and is attached.

The Northern Ireland Office wish to conduct a formal consultation process on the findings contained within the report. The Police Service of Northern Ireland recently issued for consultation an equality impact assessment concerning the criteria for entry into the scheme. The report attached is concerned only with the terms of the scheme and not the entry criteria.

You are invited to take time to consider the contents of report and respond with any comments you may have by Monday 25 August.

In light of the need first to fully consider the findings of the ongoing consultation process combined with the legislative requirements, it would not be possible to announce any alterations to the current terms of the scheme, (should that be decided), in advance of the launch of year five in September. The alternative would be to delay the timing of the announcement but I appreciate to do so would not permit officers eligible to leave from April 2004 sufficient time to make informed decisions over their futures.

[35] The assessment attached to this letter that was “recently” commissioned was, in its terms with a few amendments, the same assessment provided by Deloitte and Touche in December 2002. The attachment was entitled “Consultation Document May 2003”. The second sub-paragraph of paragraph 1.1 has been slightly amended, otherwise the document is in the same terms except that at the bottom of each page the reference ‘VSS – Equality Assessment’ has been amended to read ‘VSS – Equality Assessment Final Report’. If confirmation was needed that this was the report originally provided in December 2002 one need only look at the fax transmission reference on page 987 and the following pages which is dated January 2003. The Head of Police Division in the NIO in his affidavit refers to this as the full equality impact assessment based on the findings of the initial assessment – see paragraph 14 of the affidavit dated 29 March 2004. It was claimed that the report of December 2002 had been reclassified as a general review.

[36] On 5 August 2003 the group met with officials of the NIO. At this meeting it was stated that the NIO had not received a copy of the Tucker Report. The group were aware that a preliminary equality impact assessment (which can only have been the Tucker Report) was passed to the NIO prior to

30 September 2002. It was pointed out that the NIO official had stated at a previous meeting that she had read it. She then stated that she had read an unofficial version of the Tucker Report. There is only one Tucker Report.

[37] At this meeting the group representatives explained their case that long serving officers who joined at an early age were disadvantaged through the application of age and service criteria. Comparisons were also made between those who had given long and continuous service and those who were on long-time sick leave. The NIO accepted that the group had a case but adopted a position that the criteria were a matter for the Chief Constable and that it would be very difficult to change the scheme in mid-stream. It was agreed that the Chief Constable could not consider any change to the criteria until the NIO had completed a review of the scheme. The NIO agreed to receive a submission from the group's solicitor and to consider it during their review.

[38] On 29 August 2003 the group met the VSS Unit. Superintendent Gray was then in charge. The minutes taken indicate that Superintendent Gray was affording the group an opportunity to make their submission only and beyond that he was far from helpful. The group complained about the fact that the Tucker Report was withheld from them for a long time. The Superintendent stated that this was not his responsibility. The attitude of the VSS Unit was that any change was a matter for the NIO.

[39] Armed with the Tucker Report, which was seen as supporting their case, the group hoped to persuade the Chief Constable and the NIO that there was an alternative to the criteria of age and service. They were unsuccessful. The NIO had already decided that the scheme would operate in Year 5 unaltered and had so informed the PSNI on 23 July 2003. The NIO EQIA to which I have referred was put out for consultation at the same time. The original consultation period was extended from 25 August to 8 September 2003.

[40] On 22 September the Chief Constable announced that the criteria for Year 5 would be the same, but that the points required would be reduced. The NIO decided to commission a further EQIA from Deloitte and Touche. (On receipt of this the NIO issued a revised EQIA for further consultation in May 2004.) On 2 October 2003 the group initiated these judicial review proceedings against the Chief Constable. On 3 November the VSS Unit forwarded to the group's solicitor a copy of the final PSNI EQIA. This was based on data available from the first three years of the scheme's operation. In addition, the Tucker Report was used as background information "to inform the strategic context to the EQIA".

[41] On 8 December 2003 the group's solicitor wrote to the NIO indicating that the group may join the NIO to the proceedings. The solicitor wrote -

“We are currently involved in preliminary proceedings against the Chief Constable of the PSNI in relation to the procedurally improper and unreasonable handling of the Early Retirement and Voluntary Severance Scheme.

Having sought further advises from Senior Counsel and upon closer inspection of the details of the case for Leave Hearing we anticipated that joining the NI in the present application may become a natural corollary in the case we seek to make.

We would refer you to the Equality Assessment of the Benefits Payable to PSNI Officers under the Voluntary Severance Scheme dated December 2001, an EQIA commissioned by NIO.

Particularly we refer to page 17 which states:-

‘This assessment has found that there is evidence to support the existence of a differential impact in respect of officers of different ages as older officers receive greater financial benefits under the scheme than younger officers. This assessment has also found that the benefits payment under the VSS:

- ❖ are in line with the principles set down in the Patten Report of encouraging older officers to leave;
- ❖ are more effective in meeting the objectives of the VSS than a scheme which paid benefits based on length of service would be; and
- ❖ are in line with the principle of early retirement schemes which by their nature encourage older officers to leave.

This assessment therefore concludes that under Section 75, the differential impact on younger people is justifiable one and that there is no requirement to amend the policy for paying benefits under the Voluntary Support Scheme.'

Therefore we are hereby putting you on notice that unless you are prepared to withdraw your approval for such submissions and put in motion the implementation of a fairer and less discriminative package for severance arrangements you will be joined in the action as Second Respondent, on breach of your duty as a public authority to be both transparent and fair."

[42] A reply was sent from the Police Division of the NIO on 18 December 2003. This stated -

"Thank you for your letter of 8 December in relation to the above. You seek an assurance that the Department will withdraw its acceptance of the findings in the Equality Assessment document dated December 2002 (not December 2001 as you have stated); and advise that unless a 'less discriminative package' is implemented, the NIO will be joined in the judicial review proceedings with the Chief Constable.

Firstly, I would remind you that the December 2002 document to which you refer was merely an initial equality review, and was intended to form the basis for carrying out a full Equality Impact Assessment (EQIA). This was fully explained to you in the covering letter, dated 9 January 2003. This document was not circulated widely for formal consultation, as required under the terms of the Equality Scheme, but was instead issued only to those - including yourselves - who had contributed to the initial data gathering process.

Our draft Equality Impact Assessment document was then issued for formal public consultation on 23 July 2003, with responses being sought by 25 August. At your request the consultation period was later

extended until 8 September 2003. Your office provided extensive feedback as part of that consultation process and indeed colleagues met with you and your clients during the consultation period to listen to your views at first hand.

We are now engaged in refining our EQIA document, seeking to address the issues raised in the course of the consultation process. It is our intention to issue this revised EQIA for full consultation in due course. It will only be following completion of this fresh consultation process that we will move to the decision-making stage of the EQIA procedure. The result of the EQIA and our subsequent policy decision in respect of the future terms of the voluntary severance scheme will be publicised thereafter.

We contend therefore that there is no final determination which can be challenged at the present time by any of your clients. The process which will culminate in a final determination is uncompleted. Accordingly, there is no basis for seeking to include the NIO in the current judicial review proceedings. Any attempt to do so will be strenuously resisted, and we shall rely on this letter in support of an application to recover all costs incurred in connection with any such attempt.”

[43] On 8 January 2004 the Legal Adviser’s Branch of the NIO wrote to the group’s solicitor in these terms –

“I refer to the above application for leave to join the Northern Ireland Office (“the NIO”) to the above application for judicial review. Leave is sought in relation to an alleged decision of the NIO ‘made on or about or following 22nd September 2003 whereby the said Northern Ireland Office decided to continue a structure for the Police Service of Northern Ireland Early Retirement and Voluntary Severance Scheme on the basis of pension enhancements accord on the basis of age and service.’

There are two separate elements to the voluntary severance scheme, namely the scheme benefits determined by the NIO, and the eligibility criteria, determined by the Chief Constable. The benefits

determine what package an officer will receive when exiting the Police Service under severance. The criteria determine whether an officer is allowed to apply for severance, and, if so, whether or not he is permitted to leave according to the numbers targeted to leave in a particular year.

The NIO played no part in the decision of 22nd September 2003 to the effect that the scheme eligibility criteria would continue to be based on a combination of age and service. This was the decision of the Chief Constable alone.

As Mr Lindsay stated in his letter to you on 18th December 2003 the NIO is engaged in refining its EQIA document. The revised EQIA will be issued for full consultation in due course. No decision will be made by the NIO about the future benefits of the scheme until that consultation process has been completed.

The NIO, therefore, strenuously objects to your client's application to include the NIO in the judicial review proceedings and will rely on this letter to fix your client with the costs of that application."

[44] I have set this correspondence out in full as the contents of the replies caused no little consternation among the group and their legal advisers. Both letters indicate that no final decision had been taken, yet by the time the case came on for hearing the group were aware that the NIO had already decided on 23 July 2003 that Year 3 would proceed on the same basis as Years 1 and 2. In those circumstances the applicants regarded the respondents to have acted in utmost bad faith.

[45] On 23 February 2004 the applicants applied to join the NIO to the proceedings and on 27 February Coghlin J granted leave to do so.

[46] By their amended statement under Order 53 the applicants seek –

"2. The relief sought as against the Chief Constable is:

(a) An order of *certiorari* to bring up into this Honourable Court and quash a decision of the Chief Constable of the Police Service of Northern Ireland made on or about 22nd September 2003 whereby the

said Chief Constable implemented the Police Service of Northern Ireland Early Retirement and Voluntary Severance Scheme on the basis of an Eligibility Criteria based on a combination of age and service.

(b) A declaration that the said decision is unlawful, *ultra vires* and of no force or effect.

(c) An order of *mandamus* directing the Chief Constable to reconsider the implementation of the Early Retirement and Voluntary Severance Scheme on the basis of the said criteria, and to determine same fairly, in accordance with law and in accordance with any judgment or direction of this Honourable Court.

(d) Such further or other relief as this Honourable Court shall deem meet.

(e) Costs.

3. The relief sought as against the Northern Ireland Office is:

(a) The declaration that the Northern Ireland Office has made a decision to structure the benefits and entitlements available under Year Five of the Police Service of Northern Ireland Voluntary Severance Scheme on a basis of Age and Service.

(b) An order of *certiorari* to bring into this Honourable Court and quash the decision of the Northern Ireland Office to structure the benefits and entitlements available under the Police Service of Northern Ireland Retirement and Voluntary Severance Scheme on a basis of age and service.

(c) A declaration that the said decision is unlawful, *ultra vires* and of no force or effect.

(d) An order of *mandamus* directing the Northern Ireland Office to reconsider the structuring of the benefits and entitlements of the Early Retirement and Voluntary Severance Scheme and to determine same fairly, in accordance with law and in accordance with any judgment or direction of this Honourable Court.

(e) Such further or other relief as this Honourable Court shall deem meet.

(f) Costs.

4. The grounds on which the said relief is sought as against the Chief Constable are:

(a) The Chief Constable took into account irrelevant considerations or gave manifestly excessive weight to certain considerations and, in particular, gave manifestly excessive weight to:

(i) The administrative burden of administering a Voluntary Severance Scheme based on criteria other than a criteria based on a combination of age and service.

(ii) The level of uncertainty that would exist within the Police Service of Northern Ireland were a Voluntary Severance Scheme other than one based on a combination of age and service adopted.

(b) The Chief Constable failed to take into account relevant considerations or gave manifestly insufficient weight to certain considerations and, in particular, gave manifestly insufficient weight to:

(i) The duty on him under s. 75 of the Northern Ireland Act 1998 to promote equality of opportunity between persons of different age.

(c) The Chief Constable has acted in a procedurally improper manner and, in particular, has done so by:

(i) Failing to provide or disclose to the Applicants adequately or at all with information or documents and data relating to the decision, in particular:

- the Preliminary Equality Impact Assessment of the Voluntary Early Retirement and Severance Scheme carried out by Chief Inspector Rita Rucker and dated 5th July 2002.

- (ii) giving inaccurate and misleading reasons to the Applicants for the withholding of information or documents relating to the Equality Impact Assessment carried out of the Eligibility Criteria of the Voluntary Severance Scheme.
- (iii) Failing to consult adequately or at all the Applicants pursuant to the Equality Impact Assessment carried out of the Eligibility Criteria of the Voluntary Severance Scheme.
- (d) The Applicants had a procedural legitimate expectation to disclosure of the above document.
- (e) The Chief Constable's decision was disproportionate in all of the circumstances.
- (f) The Chief Constable misinterpreted the law that regulates his decision-making power, and misinterpreted Section 75 of the Northern Ireland Act 1998 and acted ultra vires Section 75 of the said Act.
- (g) The Chief Constable has failed to give any or adequate reasons for his decision and, in particular but without prejudice to the generality of the foregoing, has failed to give adequate reasons as to why he adopted an Eligibility Criteria based on a combination of age and service.
- (h) The Chief Constable's decision is unreasonable in the *Wednesbury* sense and irrational.
- (i) The Chief Constable's decision is incompatible with the Applicant's rights under the European Convention of Human Rights, in particular Article One of the First Protocol to that Convention, and Article 14 of that Convention.

5. The grounds on which the said relief is sought as against the Northern Ireland Office are:

- (a) The Northern Ireland Office took into account irrelevant considerations or gave manifestly excessive

weight to certain considerations and, in particular, gave manifestly excessive weight to:

(i) The views of various bodies representing the views of a certain portion of officers within the PSNI.

(ii) The claim that the principle of permitting preferential treatment of older officers emanates with the Patten Report.

(iii) The claimed or actual costs of a scheme utilising an alternative structure.

(iv) Claimed or actual past practice generally with early retirement schemes.

(b) The Northern Ireland Office failed to take into account relevant considerations or gave manifestly insufficient weight to certain considerations and, in particular, gave manifestly insufficient weight to:

(i) The duty on it under s. 75 of the Northern Ireland Act 1998 to promote equality of opportunity between persons of different age.

(c) The Northern Ireland Office has acted in a procedurally improper manner and, in particular, has done so by:

(i) Failing to carry out and complete an Equality Impact Assessment.

(ii) In so far as the Northern Ireland Office attempted to carry out or part carried out or otherwise an Equality Impact Assessment, carrying out such process in an unfair and procedurally flawed matter, in particular:

Carrying out such a process whilst the applicant as consultee was denied access to information or documents and data relating to the process and any consequent decision, in particular, the Preliminary Equality Impact Assessment of the Voluntary Early Retirement and Severance Scheme carried out by Chief Inspector Rita Tucker and dated 5th July 2002.

Failing to disclose to the Applicant the Equality Impact Assessment of Chief Inspector Tucker.

(d) The Applicant's had a legitimate expectation to the disclosure of the Chief Inspector Tucker Impact Assessment.

(e) The Northern Ireland Office's decision was disproportionate in all of the circumstances.

(f) The Northern Ireland Office misinterpreted the law that regulates its decision-making power, and misinterpreted Section 75 of the Northern Ireland Act 1998 and acted ultra vires Section 75 of the said Act.

(g) The Northern Ireland Office has failed to give any or adequate reasons for its decision and, in particular but without prejudice to the generality of the foregoing, has failed to give any or adequate reasons as to why it has adopted a benefits structure based on a combination of age and service.

(h) The Northern Ireland Office's decision is unreasonable in the *Wednesday* sense and irrational.

(i) The Northern Ireland Office's decision is incompatible with the Applicant's rights under the European Convention of Human Rights, in particular Article One of the First Protocol to that Convention and Article 14 of that Convention."

[47] Section 75 of the Northern Ireland Act 1998 requires a public authority in Northern Ireland to have due regard to the need to promote equality. It states –

"75. - (1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity-

- (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- (b) between men and women generally;

- (c) between persons with a disability and persons without; and
- (d) between persons with dependants and persons without.

(2) Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

(3) In this section "public authority" means-

- (a) any department, corporation or body listed in Schedule 2 to the Parliamentary Commissioner Act 1967 (departments, corporations and bodies subject to investigation) and designated for the purposes of this section by order made by the Secretary of State;
- (b) any body (other than the Equality Commission) listed in Schedule 2 to the Commissioner for Complaints (Northern Ireland) Order 1996 (bodies subject to investigation);
- (c) any department or other authority listed in Schedule 2 to the Ombudsman (Northern Ireland) Order 1996 (departments and other authorities subject to investigation);
- (d) any other person designated for the purposes of this section by order made by the Secretary of State.

(4) Schedule 9 (which makes provision for the enforcement of the duties under this section) shall have effect.

(5) In this section-

‘disability’ has the same meaning as in the Disability Discrimination Act 1995; and

‘racial group’ has the same meaning as in the Race Relations (Northern Ireland) Order 1997.”

[48] Thus Section 75 requires various listed or designated public authorities to promote equality of opportunity. Section 75(3) empowers the Secretary of State by order to designate public authorities for the purposes of Section 75. Section 75(3)(a) and (d) came into effect on 1 March 1999 – see The Northern Ireland Act 1998 (Commencement No 1) Order 1999. Section 75(4) so far as it relates to paragraph 1(b) of Schedule 9 came into effect on 1 October 1999 and the remaining subsections of Section 75 together with Schedule 9 came into effect on 1 January 2000 – see the Northern Ireland Act 1998 (Commencement No 3) Order 1999. The PSNI was designated a public authority for the purposes of Section 75 on 4 November 2001.

[49] Section 75(4) provides that Schedule 9 of the Act which makes provision for the enforcement of duties under Section 75 shall have effect. Schedule 9 provides –

“EQUALITY: ENFORCEMENT OF DUTIES

The Equality Commission

1. The Equality Commission for Northern Ireland shall-
 - (a) keep under review the effectiveness of the duties imposed by section 75;
 - (b) offer advice to public authorities and others in connection with those duties; and
 - (c) carry out the functions conferred on it by the following provisions of this Schedule.

Equality schemes

2. - (1) A public authority to which this sub-paragraph applies shall, before the end of the period of six months beginning with the commencement of this Schedule or, if later, the establishment of the authority, submit a scheme to the Commission.

(2) Sub-paragraph (1) applies to any public authority except one which is notified in writing by the

Commission that that sub-paragraph does not apply to it.

3. - (1) Where it thinks appropriate, the Commission may-

- (a) request a public authority to which paragraph 2(1) does not apply to make a scheme;
- (b) request any public authority to make a revised scheme.

(2) A public authority shall respond to a request under this paragraph by submitting a scheme to the Commission before the end of the period of six months beginning with the date of the request.

4. - (1) A scheme shall show how the public authority proposes to fulfil the duties imposed by section 75 in relation to the relevant functions.

(2) A scheme shall state, in particular, the authority's arrangements-

- (a) for assessing its compliance with the duties under section 75 and for consulting on matters to which a duty under that section is likely to be relevant (including details of the persons to be consulted);
- (b) for assessing and consulting on the likely impact of policies adopted or proposed to be adopted by the authority on the promotion of equality of opportunity;
- (c) for monitoring any adverse impact of policies adopted by the authority on the promotion of equality of opportunity;
- (d) for publishing the results of such assessments as are mentioned in paragraph (b) and such monitoring as is mentioned in paragraph (c);
- (e) for training staff;

(f) for ensuring, and assessing, public access to information and to services provided by the authority.

(3) A scheme shall-

(a) conform to any guidelines as to form or content which are issued by the Commission with the approval of the Secretary of State;

(b) specify a timetable for measures proposed in the scheme; and

(c) include details of how it will be published.

(4) In this paragraph-

"equality of opportunity" means such equality of opportunity as is mentioned in section 75(1);

"the relevant functions" means the functions of the public authority or, in the case of a scheme submitted in response to a request which specifies particular functions of the public authority, those functions.

5. Before submitting a scheme a public authority shall consult, in accordance with any directions given by the Commission-

(a) representatives of persons likely to be affected by the scheme; and

(b) such other persons as may be specified in the directions.

6. - (1) On receipt of a scheme the Commission shall-

(a) approve it; or

(b) refer it to the Secretary of State.

(2) Where the Commission refers a scheme to the Secretary of State under sub-paragraph (1)(b), it shall notify the Assembly in writing that it has done so and send the Assembly a copy of the scheme.

7. - (1) Where a scheme is referred to the Secretary of State he shall-

- (a) approve it;
- (b) request the public authority to make a revised scheme; or
- (c) make a scheme for the public authority.

(2) A request under sub-paragraph (1)(b) shall be treated in the same way as a request under paragraph 3(1)(b).

(3) Where the Secretary of State-

(a) requests a revised scheme under sub-paragraph (1)(b); or

(b) makes a scheme under sub-paragraph (1)(c), he shall notify the Assembly in writing that he has done so and, in a case falling within paragraph (b), send the Assembly a copy of the scheme.

8. - (1) If a public authority wishes to revise a scheme it may submit a revised scheme to the Commission.

(2) A revised scheme shall be treated as if it were submitted in response to a request under paragraph 3(1)(b).

(3) A public authority shall, before the end of the period of five years beginning with the submission of its current scheme, or the latest review of that scheme under this sub-paragraph, whichever is the later, review that scheme and inform the Commission of the outcome of the review.

Duties arising out of equality schemes

9. - (1) In publishing the results of such an assessment as is mentioned in paragraph 4(2)(b), a public authority shall state the aims of the policy to which the assessment relates and give details of any consideration given by the authority to-

- (a) measures which might mitigate any adverse impact of that policy on the promotion of equality of opportunity; and
- (b) alternative policies which might better achieve the promotion of equality of opportunity.
(2) In making any decision with respect to a policy adopted or proposed to be adopted by it, a public authority shall take into account any such assessment and consultation as is mentioned in paragraph 4(2)(b) carried out in relation to the policy.
- (3) In this paragraph "equality of opportunity" has the same meaning as in paragraph 4.

Complaints

10. - (1) If the Commission receives a complaint made in accordance with this paragraph of failure by a public authority to comply with a scheme approved or made under paragraph 6 or 7, it shall-
- (a) investigate the complaint; or
 - (b) give the complainant reasons for not investigating.
- (2) A complaint must be made in writing by a person who claims to have been directly affected by the failure.
- (3) A complaint must be sent to the Commission during the period of 12 months starting with the day on which the complainant first knew of the matters alleged.
- (4) Before making a complaint the complainant must-
- (a) bring the complaint to the notice of the public authority; and
 - (b) give the public authority a reasonable opportunity to respond

Investigations

11. - (1) This paragraph applies to-
 - (a) investigations required by paragraph 10; and
 - (b) any other investigation carried out by the Commission where it believes that a public authority may have failed to comply with a scheme approved or made under paragraph 6 or 7.
- (2) The Commission shall send a report of the investigation to-
 - (a) the public authority concerned;
 - (b) the Secretary of State; and
 - (c) the complainant (if any).
- (3) If a report recommends action by the public authority concerned and the Commission considers that the action is not taken within a reasonable time-
 - (a) the Commission may refer the matter to the Secretary of State; and
 - (b) the Secretary of State may give directions to the public authority in respect of any matter referred to him.
- (4) Where the Commission-
 - (a) sends a report to the Secretary of State under sub-paragraph (2)(b); or
 - (b) refers a matter to the Secretary of State under sub-paragraph (3)(a),

it shall notify the Assembly in writing that it has done so and, in a case falling within paragraph (a), send the Assembly a copy of the report.
- (5) Where the Secretary of State gives directions to a public authority under sub-paragraph (3)(b), he

shall notify the Assembly in writing that he has done so.

Government departments

12. - (1) Paragraphs 6, 7 and 11(2)(b) and (3) do not apply to a government department which is such a public authority as is mentioned in section 75(3)(a).

(2) On receipt of a scheme submitted by such a government department under paragraph 2 or 3 the Commission shall-

(a) approve it; or

(b) request the department to make a revised scheme.

(3) A request under sub-paragraph (2)(b) shall be treated in the same way as a request under paragraph 3(1)(b).

(4) Where a request is made under sub-paragraph (2)(b), the government department shall, if it does not submit a revised scheme to the Commission before the end of the period of six months beginning with the date of the request, send to the Commission a written statement of the reasons for not doing so.

(5) The Commission may lay before Parliament and the Assembly a report of any investigation such as is mentioned in paragraph 11(1) relating to a government department such as is mentioned in sub-paragraph (1)."

[50] The Equality Commission was created by Section 74 of the Act. This new body exercises the functions previously carried out by the Fair Employment Commission, the Equal Opportunities Commission, the Commission for Racial Equality and the Northern Ireland Disability Council, all of which were dissolved. The new Commission acts as the watchdog for Section 75. It is obliged to keep under review the effectiveness of the duties imposed by Section 75 as well as to offer advice to public authorities. Under Schedule 9 an authority shall within 6 months submit a scheme showing how the authority proposes to fulfil its obligations under Section 75. Schedule 9 paragraph 4(2) provides for the contents of the scheme which include

assessment and consultation on the likely impact of policies adopted by the authority as well as for monitoring any adverse impact of those policies. Such schemes require approval by the Commission or the Secretary of State. Paragraph 5 imposes an obligation on an authority to consult with representatives of persons likely to be affected by the scheme in accordance with directions given by the Equality Commission. Paragraphs 10 and 11 make provision for complaints and investigation of complaints. The first named applicant did make a complaint to the Commission.

[51] On 5 July 2002 Chief Inspector Tucker sent the Preliminary EQIA to ACC Kincaid. In her memo to him she wrote -

“Please find attached the Preliminary Equality Impact Assessment (EQIA) of the RUC/PSNI Early Retirement and Voluntary Severance Scheme (VSS). The PEQIA has been drafted in the style recommended by the Equality Commission and is ready for consultation.

I have been in contact with the Police Division of the NIO and have ascertained that they have yet to conduct an EQIA or to make a decision as to whether the scheme will proceed in Year 4. It is their intention to ‘contract out’ the review and EQIA which will take approximately six months to complete.

The force legal advice is that there is little we can do until these decisions are taken.

It is clear that the scheme in its current form discriminated in relation to age. If we were simply to remove age and apply a length of service/rank criteria then the 690 officers who currently are eligible to avail of severance would be disadvantaged. Personnel Branch has already informed them that they will retain their eligibility in subsequent years. It may be possible to run a ‘hybrid’ year with dual eligibility as outlined at Para 6 of the PEQIA to mitigate against this.

We need to proceed in a manner that is in the best interests of all stakeholders it that is possible.”

[52] On the subject of age discrimination she concluded in the body of her report -

“Under current Police Regulations an officer who completes 30 years service is entitled to receive a police pension. This means an officer who joins the Police Service at 18 years of age can obtain his/her pension at 48 years of age. However, no index linking can take place below 55 except on medical discharge.

Pension regulations include compulsory retirement ages depending on date of joining the police and the rank held –

- if the officer is the Chief Constable, Deputy Chief Constable or an Assistant Chief Constable the expiry of a fixed term agreement;
- if the officer is a Superintendent, Chief Inspector or Inspector on attaining 60 years;
- if the officer is a Sergeant or regular Constable, on attaining 55 years;
- if the officer holds a rank not higher than that of Inspector, and was serving on the 5 of July 1972, and has not otherwise elected by notice in writing to the Police Authority, on attaining 57 years;
- if the officer is a member of the Full Time Reserve, on attaining 57 years or on attaining 55 years if date of joining is after 1 October 1994.

Under certain conditions Constables and Sergeants can apply for extensions of service. This is common where officers had joined the service when they were in their late twenties or over thirty years of age and would not under normal circumstances be able to achieve a thirty-year pension. Extensions of service are granted on individual application for a period of one year at a time.

The research team within the RUC Personnel Branch examined a number of criteria to utilise as a controlling mechanism that could be used to progress severance. These include attendance records, discipline records, rank, role, post, skills, performance, budget, security, service and age.

The Chief Constable, in consultation with the NIO, decided to use age and service as the combined criteria. The reason for using these criteria is that it allows more control over the number of offices exiting

the service. This control is necessary to maintain efficiency and the following targets were set on this basis -

Year 1 - 700;

Year 2 - 750;

Year 3 - 600.

It is important to retain younger staff or the positive action being taken to correct gender and religious imbalances could be reversed.

Consultations took place with the staff associations who, following legal advice, agreed with these criteria.

The legal advice given to the PFNI was that to use Age as criteria was not unlawful under UK Domestic Employment Law. The PFNI's Legal Advisor had considered Section 75 of the Northern Ireland Act 1998.

The RUC commenced implementation of the Severance Scheme prior to PSNI designation under Section 75.

Under the RUC Voluntary Early Retirement/Severance Scheme benefits are payable depending on Age.

An officer must be at least 46 years and 6 months before they can apply for these benefits.

A full table of benefits payable is outlined in "A Northern Ireland Office Booklet on the Voluntary Early Retirement and Severance Scheme for the RUC" attached at appendix A.

Age is also used as a final arbitrator if the scheme is oversubscribed in any one year -

'Where there is an over subscription in any year and a group of officers have the same number of points, then acceptance for voluntary severance will be based on age, the oldest officers being processed first.'

Officers felt particularly hurt by the above condition. It has been interpreted as devaluing service given at times when policing was most difficult. It does not reward "Career Police Officers", those who choose policing as their first career. These officers are watching colleagues who had taken redundancy from industries such as Harland and Wolff (the shipyard), Shorts, Courtaulds, etc, joined the police in their late twenties and after relatively short service obtain the optimum reward. This has had a devastating effect on morale and service relations, resulting in a substantial number of officers (500 approx) feeling unrepresented by the PFNI and seeking legal advice and representation outside the normal channels.

In the Northern Ireland Office Equality Scheme Annex F, the Royal Ulster Constabulary Severance arrangements are acknowledged as having an adverse differential impact on some police officers on the basis of their age -

'The adverse impact of this policy on younger officers with less service than their older colleagues is recognised and is a foreseen consequence of the policy.'

One of the consequences of the policy that this PEQIA has raised is that policy has an adverse impact on *younger* officers with *equal of more service* than their older colleagues.

Whilst the policy was initially screened out for impact assessment, on the basis that 'the adverse impact is recognised as part of the actions necessary to achieve the overall benign effects of the Good Friday Agreement'. The NIO has reviewed that decision.

6. Consideration of Measures to Mitigate any Adverse Impact

The Early Retirement and Voluntary Severance Scheme closed to applicants on the 31 January 2002. The eligible applicants will exit the Police Service of Northern Ireland on dates relative to their date of

birth or date of joining, up to and including 31 March 2003. However, it should be noted that the 690 officers who currently are eligible have been informed that they will retain their eligibility for future years should they choose not to leave on their appointed date.

It is preferable that the criteria for future years should be job related as opposed to person related. For example, by rank, service or a combination of both rather than age. However, if we are not to disadvantage the already eligible officers we will have to consider running a 'Hybrid' year with dual eligibility.

The PEQIA is retrospective as the Northern Ireland Office has yet to announce if a Year 4 scheme will take place. If it is to proceed, a scooping exercise will need to be undertaken to decide on a criteria, which is Section 75 compliant.

It is also recommended that Police Pension Regulations should be amended to allow an officer/pensioner to nominate a person(s) who they wish to inherit/benefit from their pension savings. This will allow same sex and common law partners equal status with married persons."

[53] The recommendations of the Patten Report were quite unprecedented in this jurisdiction. They required a reduction in the number of serving officers to 7,500 full-time officers and almost simultaneously an increase in the number of Catholic officers from 8% to 30%, to be achieved over a 10 year period. At the same time the compositional imbalance in the force was to be improved by a recruitment programme on a 50:50 basis. Whatever plan was adopted, the Chief Constable required a force that was both operational and effective. To achieve these ambitions it was necessary that the plan was imaginative and effective, as well as adherent to the Patten recommendations of generosity to those who would be leaving. The Patten Report merely made the recommendations, the 'nuts and bolts' of the plan had to be decided elsewhere. This was no simple task.

[54] It was probably inevitable that whatever plan was adopted it would not satisfy everyone. The benefits of the severance package were generous, as recommended. The package found favour with the police associations, albeit not without some reservations. Nonetheless they supported it. This fact alone would make it very difficult for any person or group dissatisfied with the

plan to make much headway in opposing it. So the applicants and their group found, unsurprisingly. The focus of their complaint early on was that the application of criteria based on age and service discriminated against officers who joined at the earliest age. To discriminate is to single out a particular person or group for special favour or disfavour based on characteristics such as race, religion, colour, sex or in this instance age. There is no suggestion or indeed evidence that this group was singled out for special treatment. The Chief Constable required to find a formula that would allow officers to retire in sufficient numbers, but at the same time leave a force that was operationally effective. The Chief Constable retained the right to decline early retirement to certain officers. It was an incidence of the policy adopted that some officers did not have the opportunity to retire when those with shorter service were afforded that opportunity. There was no positive decision to target this group. If this was discriminatory and I am far from satisfied that it was, it was passive and not active discrimination. I am sure there are other officers whose individual circumstances rendered them ineligible and who might claim they were treated less favourably than others.

[55] Officers who joined the RUC at an early age observed others with less service being able to retire on a generous package and understandably this fuelled resentment in a group who served in the most difficult times and often, in the more dangerous locations. Most would have sympathy with their plight. But, rightly, this group does not seek sympathy, but recognition of their unique position. The Northern Ireland Act 1998 and Section 75 in particular seemed the appropriate vehicle whereby to achieve their objective. Section 75 imposes an obligation on public authorities in Northern Ireland to have due regard to the need to promote equality of opportunity between various groups, one of which is age related. By contrast Section 76 makes it unlawful for a public authority to discriminate against a person or a class of persons, but only on grounds of religious belief or political opinion.

[56] Thus the issue under Section 75 is whether or not the Chief Constable and/or the NIO have had due regard to the need to promote equality of opportunity between members of the PSNI of different age. At the time the scheme was devised and became available, Section 75 created no obligation on either respondent. When Section 75 became applicable there was an obligation on both respondents to have regard to the need for equal opportunity for persons of different ages. The means of doing so was an equality impact assessment in conjunction with the Equality Commission. The point in time at which this became a critical issue, from October 2001, was during the operation of Year 2 of the scheme. The assessment continued into Year 3. It had already been decided that after Year 3 a review would be carried out into the operational effectiveness of the scheme, as then devised. With both assessments and reviews ongoing or envisaged, it is not surprising that the terminology became a little confusing. What was more so was the dichotomy, not then readily understood, between the respective

responsibilities of the respondents for, on the one hand, the benefits to be available for those eligible and on the other, the criteria by which individual officers became eligible. Had this been clarified at an earlier stage, much of the tension and distrust that attended this entire process may well have been avoided.

[57] It has not been disputed that once the equality impact assessments commenced the group were entitled to be consulted. Those who carried out the assessments (Chief Inspector Tucker and Deloitte and Touche) did consult with the group. It is clear that from those assessments, which I have referred to above, the case being made by the group was readily understood. They acknowledged that the scheme had certain consequences for officers who joined at an early age and sought to justify that approach on various grounds. Central to the case made on behalf of the group was the failure of the Chief Constable to release the Tucker report until August 2003 when the group had been informed that they would receive it when or shortly after it was completed. Various reasons for withholding the report were given. None of them bear much scrutiny. Surprisingly the group were told it did not support their case, when in fact it acknowledges their complaint. The main defence is that it is fundamentally flawed in that Chief Inspector Tucker is said not to have appreciated the distinction between the respective roles of the respondents in the scheme. Even if that were so, it does not invalidate that part of the report that highlights and acknowledges what the group were saying. Some were exercised about the data on which she based her conclusions. It does not seem to me that much turns on that in these proceedings, though counsel on behalf of the applicants emphasised in reply, that it now appeared that the Equality Commission had questioned the sufficiency of the data available for the NIO EQIA to justify the differential approach, which, it was said, was the very point the applicants had been making from early on. This however confirmed that the process was ongoing.

[58] The group proved themselves tenacious in pursuit of their objective namely that their voice should be heard. They wrote constantly to all concerned and sought meetings and consultation. A significant complaint was that they were ignored, that key personnel refused to meet with them, that they were denied relevant information and such responses as they received from one respondent invariably directed them to the other respondent. I have not referred to all of these but I have borne them in mind.

[59] The group sought meetings with the Senior Director of Human Resources PSNI. In May 2003 he responded to their correspondence and addressed the various issues raised. In particular he pointed out that it was the structure of the scheme that led to officers who joined at a younger age, to have to serve longer to achieve a fully enhanced pension and not the criteria for eligibility. The group complained that this division of responsibility was

deliberately used by both respondents to stall and delay a consideration of the group's complaints.

[60] Undoubtedly the respondents were anxious to maintain the scheme's arrangements, not least because it had proved effective in achieving the Patten Report recommendations, but also because it was supported by the police associations. To have attempted to rewrite a scheme so carefully put together, with only 3 years of a planned 10 years fulfilled, would have been a daunting prospect.

[61] It is against this background that I have had to consider the many complaints made against both respondents but in particular about the events in July 2003. Undoubtedly the NIO made a decision on 23 July that Year 3 would proceed on the same basis as the previous years. This was not communicated to the applicants, though that may be explained by the fact that the NIO were not responsible for the other element of the scheme. It was then up to the Chief Constable to decide the criteria to be applied, though in essence, probably, the only real decision related to the number of points required for eligibility. At the same time the NIO EQIA was put out for consultation. Counsel on behalf of the applicants, whose mastery of his brief was extremely impressive, created a considerable aura of suspicion about this entire period and contrasted the correspondence at the time with the subsequent affidavits of the NIO officials. Mindful as I am of what was and remains at stake, I have considered all of this critically. I remain perplexed by the "reinvention" of the Deloitte and Touche general review as an EQIA for consultation in July 2003, as well as the contents of the NIO letter dated 21 February 2002, to which I have referred.

[62] The applicants maintain that there was grand design (if not conspiracy), to thwart their complaints against the scheme, in order to ensure that the scheme remained as agreed with the police associations and subsequently enshrined in delegated legislation. Suspicion is no substitute for proof, even on the balance of probabilities. Sceptical though I am about some of the individual matters to which I have been referred, I remain unconvinced that such a grand design to thwart the ambitions of the applicants and their group existed, though the group were probably regarded by many as an irritant when the Patten recommendations remained to be implemented.

[63] When I consider the entire critical period from January 2000 to December 2003 I see a scheme which was a genuine attempt to implement the Patten recommendations. In the second year of its implementation Section 75 had to be considered. This was new territory that required assessment and the assistance of outside consultants. That it took time and reconsideration is not surprising. The ultimate position of the NIO was that it was ongoing and that no final decision had been made, prior to the institution of these proceedings. While the applicants may feel aggrieved that they were not

consulted sufficiently, their case was well known to those involved, not least the outside consultants, and consultations did take place albeit late and sporadic. However, I remain unconvinced that they had anything further of significance to offer that was not already known.

[64] I turn now to consider the applicants' case for judicial review mindful of the limited powers of the court in such applications. Not all the matters raised in the Order 53 statement were pursued in court. The issues relate to the decisions made in 2003. In his submissions in reply counsel on behalf of the applicants stated that the issue was not one of irrationality, but whether the principles relating to consultation with interested parties had been met, in other words whether the procedure had been fair. The respondents submitted that the procedure had been fair and more importantly was ongoing.

[65] The time for making a decision as to whether a process is fair is when it is complete - see Doody v Secretary of State 1993 3 AER 92 at 106. In R v North and East Devon HA 2003 3 AER 850 at 887 paragraph 108 Lord Woolf MR set out the requirements for consultation in a judicial review setting. I summarise his views - if consultation is embarked upon it must be carried out properly and effectively; it must be undertaken at a formative stage with adequate time for the purpose; it must include sufficient reasons for what is proposed to enable those consulted to give intelligent consideration to it and to respond; and the product of consultation must be taken into account conscientiously when the ultimate decision is made. Counsel emphasised that for consultation to be meaningful there was a need for assessments to provide alternatives upon which decisions would be made. It was submitted that in this instance the decisions were made and the documents issued for consultation thereafter.

[66] The implementation of the Patten recommendations was not a single issue but a continuous process set to continue over ten years. When the issue of equality arose it led to various reviews or assessments none of which had been completed by the time Year 3 came to be implemented. I do not think it was realistic in the circumstances to halt the entire process for this to be concluded. The group's views were well known and ultimately conveyed. In the context of an incomplete process it is difficult for the applicants to sustain their argument that the process was flawed.

[67] Section 75 requires a public authority to have due regard to the need to promote equality of opportunity between persons of, inter alia, age. For the respondents to be in breach of Section 75 the evidence must demonstrate that the respondents have failed to have due regard to the need to promote equality of opportunity. When the respondents are engaged in a process of assessment of the impact of the scheme under Section 75 and have commenced that in conjunction with such bodies as the Equality Commission, it cannot be said that either public authority is failing in its duty

to have due regard to the required need to promote equality of opportunity. In those circumstances the decision of the Chief Constable on 22 September 2003 to implement the scheme on the same eligibility criteria as before was neither unlawful nor ultra vires nor was the decision of the NIO on 23 July. The suggestion that the respondents failed to take into account relevant information or that they took into account irrelevant information is also not made out. The Tucker report or part of it could have been disclosed. Part of it supported the case the applicants were making. The respondents and their consultants were well aware of that case and had the Tucker report before them. While the group may have been comforted by possession of the Tucker report, possession of it was not likely to advance their case when the respondents also had the benefit of it, as had the consultants. Ultimately and before any final decisions were taken the applicants were provided with a copy of it, albeit rather late in the day. I am not persuaded that this impeded the applicants in the presentation of their case nor, and more significantly, was it a matter that the respondents failed to take into account.

[68] For these reasons I am not satisfied that the applicants have made out a case for the decisions relating to the implementation of Year 3 to be quashed and I refuse the application for judicial review.