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ICOS No: 2020/24915

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

**QUEEN'S BENCH DIVISION
(JUDICIAL REVIEW)**

**IN THE MATTER OF AN APPLICATION BY
CHRISTOPHER O'NEILL FOR JUDICIAL REVIEW**

AND

**IN THE MATTER OF A DECISION OF THE POLICE OMBUDSMAN
FOR NORTHERN IRELAND**

**Mr Simpson QC and Mr Ritchie BL (instructed by Croasdailes LLP) for the Applicant
Mr Anthony BL (instructed by Hugh Scally, Police Ombudsman) for the Respondent
Dr McGleenan QC (instructed by the Department of Justice) as Notice Party**

ROONEY J

Introduction

[1] The Applicant is a serving police officer. He challenges the decision of the Respondent to carry out a formal investigation of the Applicant pursuant to section 54 of the Police (Northern Ireland) Act 1998 following an allegation by Brian Patterson ("the complainant") that the Applicant had committed the offence of perjury.

[2] The impugned decision to carry out the investigation was notified to the Applicant on 19 December 2019 following a Notice of Report, Complaint or Allegation dated 16 December 2019.

[3] The Applicant alleges that the allegation is false, baseless and unsupported by any evidence. He claims that the complainant is a person who was lawfully convicted of offences of fraud arising out of incidents on 16 April 2017 and 1 April 2018.

[4] Accordingly, the Applicant contends that the decision of the Respondent to carry out such an investigation is unlawful, irrational, unreasonable and in breach of his Article 8 Convention rights. The Applicant argues that the complainant's motive was revenge and calculated to damage his reputation and integrity, thereby causing prejudice to his personal enjoyment of the right to respect for private life. By carrying out the investigation, the Applicant alleges the Respondent has breached his Article 8 of the European Convention on Human Rights ("ECHR") rights.

[5] An analysis of the grounds of challenge are considered in detail below. The Applicant seeks the following primary relief -

- (a) A declaration that the decisions of the Police Ombudsman for Northern Ireland are -
 - (i) unlawful, ultra vires and of no force or effect;
 - (ii) irrational;
 - (iii) unreasonable; and
 - (iv) in breach of Article 8 of the European Convention on Human Rights.
- (b) A declaration of incompatibility of section 54 of the Police (Northern Ireland) Act 1998 with Article 8 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR").
- (c) An order of certiorari to quash the impugned decision of 16 December 2019 of the Respondent to carry out an investigation.
- (d) An order requiring the Respondent to reconsider the decision of 16 December 2019 fairly and in accordance with the law and in accordance with any judgment or direction of this court.
- (e) Damages.
- (f) Such further or other relief as shall be deemed just.
- (g) Costs.

Factual Background

[6] The relevant circumstances giving rise to this application are contained in the affidavit of the Applicant dated 6 March 2020 and the affidavit of Susan Harper, Director of the Current Investigations Directorate in the Police Ombudsman for Northern Ireland (hereinafter "PONI") dated 18 January 2021. The following is a relevant summary.

[7] The Applicant is a serving police officer.

[8] The complainant was investigated and thereafter charged with three offences of fraud arising out of alleged false claims for overtime pay on 27 March 2016, 16 April 2017 and 1 April 2018. As part of the investigation, the Applicant made two statements dated 5 June 2018 and 20 December 2018.

[9] On 20 October 2019 the complainant was convicted of the offences of fraud due to false claims for overtime pay on 16 April 2017 and 1 April 2018. He was acquitted of the offence alleged to have occurred on 27 March 2016.

[10] On 6 November 2019 the complainant made a complaint to PONI in which he alleged that the Applicant had lied in his "statements and in court in relation to an investigation of fraud by false representation". The complaint was recorded in Form OMB52.

[11] On 4 December 2019 the complainant was sentenced to a community service order. He subsequently appealed the conviction. At the appeal hearing on 11 December 2020, the complainant accepted an adult caution which in effect required him to admit his guilt. I am advised that the complainant did not make any allegations of perjury at the hearing of the appeal.

[12] By Notice of Report, Complaint or Allegation dated 16 December 2019 (Form OMB3C), the Applicant was informed that he was under formal investigation pursuant to a complaint made to PONI by the complainant. The allegation made by the complainant was that, in relation to the count for which the complainant had been acquitted, the Applicant had "committed perjury, by denying that he requested any cones/road signs from the complainant in his statement of evidence and in his evidence in court".

[13] The Applicant states that he was not the subject of any criticism by the District Judge who heard the charges against the complainant. Furthermore, he states that the complainant made no allegation of perjury against the Applicant prior to 6 November 2019.

[14] The Applicant states that the allegation of perjury relies solely upon the evidence of the complainant. He has been advised and believes that he is not liable to be convicted of any offence of perjury or subordination of perjury solely upon the evidence of one witness as to the falsity of any statement.

[15] The Applicant alleges that he has been publicly accused of serious criminal acts without any corroboration. The Applicant states that it is his belief that the complainant, a person who was lawfully convicted of fraud, is motivated by ulterior motives which has resulted in damage to the Applicant's reputation and enjoyment of his private and family life.

[16] The Applicant claims that since there is no corroboration of the complainant's allegation he is not liable to be convicted by operation of the law. Consequently, the investigation by the Respondent is baseless and without purpose.

[17] The Applicant avers that the consequences of the complaint and the investigation will plainly damage his reputation and integrity. He states that he has suffered significant stress in work to the extent that he is currently off work on the advice of his general practitioner. As a police officer for 28 years, the Applicant states that he has been intensely affected by the prospect of the investigation into his integrity which, to date, has been untarnished. He states that the investigation has impacted on his social life to the extent that he is reluctant to socialise with others.

[18] The Applicant's solicitor forwarded a letter to the Respondent dated 13 January 2020. The said letter stated that an extremely dangerous precedent would be set if the Respondent was to carry out an investigation in relation to evidence given by police officers before a court when no judicial adverse comment had been made. It is stated that the result would be that defendants who are convicted of some or all charges before a court will bring complaints in an attempt either to assist an appeal against conviction or alternatively to delay the appeal.

[19] In a letter dated 23 January 2020 the Respondent confirmed that the Ombudsman was investigating an allegation of perjury against the Applicant. The said correspondence provided a brief summary of Sections 13 and 14 of the Perjury (Northern Ireland) Order 1979. The said correspondence specifically referred to section 53 and 54 of the Police (Northern Ireland) Act 1998 and stated that:

“these Sections confirm that if an allegation has been made, then this Office is bound to formally investigate the alleged offence of perjury, despite the limited chance of success for the reasons outlined above.”

The Legal Framework

[20] The Applicant's case centres upon section 54 of the Police (Northern Ireland) Act 1998, which is to be read in conjunction with Regulation 25(1) and the Schedule to the Royal Ulster Constabulary (Complaints etc.) Regulations 2000, sections 3-7 of the Human Rights Act 1998 and Article 8 ECHR. The Court is also referred, for the purposes of completeness, to the RUC (Complaints) (Informal Resolution) Regulations 2000, the RUC (Complaints etc.) Regulations 2001, and the Police (Conduct) Regulations (Northern Ireland) 2016.

[21] Section 54 of the Police (Northern Ireland) Act 1998 is titled “Complaints – formal investigation” and reads as follows:

- “(1) If—
- (a) it appears to the Ombudsman that a complaint is not suitable for informal resolution; or
 - (b) a complaint is referred to the Ombudsman under section 53(6), the complaint shall be formally investigated as provided in subsection (2) or (3).

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

(3) In the case of any other complaint, the Ombudsman may as he thinks fit –

(a) formally investigate the complaint in accordance with section 56; or

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

[22] Regulation 25(1) of the Royal Ulster Constabulary (Complaints etc.) Regulations 2000 is titled, “Complaints which are anonymous, repetitious, vexatious, oppressive or otherwise an abuse of the procedures for dealing with complaints or incapable of investigation.” It reads:

“(1) Where the Ombudsman is of the opinion –

(a) that a complaint is an anonymous or a repetitious one within the meaning of paragraph 2 or 3 of the Schedule or that a complaint is vexatious, oppressive or otherwise an abuse of the procedures for dealing with complaints or that it is not reasonably practicable to complete the investigation of a complaint, within the meaning of paragraph 4 thereof, or

(b) that more than 12 months have elapsed between the incident, or the latest incident, giving rise to the complaint and the making of the complaint and either that no good reason for the delay has been shown or that injustice would be likely to be caused by the delay; and

(c) in either case, that, in all the circumstances, the requirements of Part VII of the Act to the extent that they have not already been satisfied should be dispensed with,

the Ombudsman may dispense with the said requirements as respects the complaint.”

[23] The Schedule to the Regulations is titled, “Complaints which are anonymous, repetitious or incapable of investigation.” It reads:

“1.—(1) In this Schedule any reference to an injured person other than the complainant shall have effect only in the case of a complaint against a member in respect of his conduct towards a person other than the complainant; and, in such a case, any such reference is a reference to that other person.

(2) In this Schedule any reference to action not being reasonably practicable shall include a reference to action which it does not appear reasonably practicable to take within a period which is reasonable in all the circumstances of the case.

2. For the purposes of regulation 25 a complaint is an anonymous one if, and only if, it discloses (or purports to disclose) neither the name and address of the complainant nor that of any other injured person and it is not reasonably practicable to ascertain such a name and address.

3.—(1) For the purposes of regulation 25 a complaint is a repetitious one if, and only if—

- (a) it is substantially the same as a previous complaint (whether made by or on behalf of the same or a different complainant);
- (b) it contains no fresh allegations which significantly affect the account of the conduct complained of;
- (c) no fresh evidence, being evidence which was not reasonably available at the time the previous complaint was made, is tendered in support of it; and
- (d) such action as is referred to in regulation 25(2) has been taken, as respects the previous complaint. ...

4. For the purposes of regulation 25 it shall not be reasonably practicable to complete the investigation of a complaint if, and only if, in the opinion of the Ombudsman:

- (a) it is not reasonably practicable to communicate with the complainant or, as the case may be, the person who submitted the complaint, or any other injured person, notwithstanding that the complaint

is not an anonymous one within the meaning of paragraph 2, or

- (b) it is not reasonably practicable to complete a satisfactory investigation in consequence of –
 - (i) a refusal or failure, on the part of the complainant, to make a statement or afford other reasonable assistance for the purposes of the investigation, or
 - (ii) a refusal or failure, on the part of an injured person other than the complainant, to support the complaint, evidenced either by a statement in writing (signed by him or by his solicitor or other authorised agent on his behalf) to the effect that he does not support it or by a refusal or failure, on his part, such as is mentioned in sub-paragraph (i) above, or
 - (iii) the lapse of time since the event or events forming the subject matter of the complaint.”

[24] Article 8 ECHR reads:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Grounds of Challenge

[25] As stated above, the Applicant challenges the Respondent’s decision dated 16 December 2019 on grounds of illegality, materiality and reasonableness. A breach of Article 8 ECHR is pleaded under each of the said headings. Given the prominence that the oral and written submissions of the Parties attribute to Article 8 ECHR and the fact that a Notice of Incompatibility dated 11 March 2021 was issued, this court will focus primarily on Article 8 ECHR and the related provisions of the Human

Rights Act 1998. Thereafter, consideration will be given to the grounds of illegality, materiality and irrationality.

Article 8 ECHR

[26] In its analysis of Article 8 ECHR to the facts, the court proposes to consider the following questions:

- (i) Is Article 8 ECHR engaged on the facts? If the answer to this question is in the negative, the Applicant's challenge ends since he lacks standing for the purposes of section 7 of the Human Rights Act 1998. If the answer to this question is in the affirmative, the court must then consider the next question, namely;
- (ii) Has the Applicant's Article 8 ECHR rights been interfered with on the facts of this case? If there has been an interference, the next question will be whether such an interference is lawful. Essentially, this exercise will require the court to engage in a proportionality analysis of the Respondent's decision.
- (iii) If the Applicant can establish that he is a victim of a breach of Article 8 ECHR which cannot be justified, then the question will be whether section 54 of the Police (Northern Ireland) Act 1998 is incompatible with Article 8 ECHR. In addressing this issue, the court will be required to consider whether section 54 of the Police (Northern Ireland) Act 1998 can be read in a manner that is compatible with the Applicant's right under Article 8 ECHR, as per section 3 of the Human Rights Act 1998, or whether the court should make a Declaration of Incompatibility pursuant to section 4 of the Human Rights Act 1998.

[27] I will deal with each question seriatim.

(i) Is Article 8 ECHR engaged?

[28] Mr Simpson QC on behalf of the Applicant submits that not only is the complainant's allegation of perjury defamatory and sufficiently serious to engage Article 8 ECHR, but also that the Respondent, by investigating the alleged baseless complaint, interferes with the Applicant's right to respect for private life under Article 8 of the Convention. In support of this argument Mr Simpson QC relies upon the decisions of the European Court of Human Rights ("ECtHR") in *Einarsson v Iceland* [2018] 67 EHRR6 and *Jishkariani v Georgia* [2018] (Application No. 18925/09).

[29] *Einarsson* is cited as authority for the proposition that the Applicant's Article 8 rights have been engaged since the allegation that the Applicant had committed perjury (whether alleged as a statement of fact or a value judgment) amounts to an attack on his personal integrity and reputation.

[30] Egill Einarsson was a well-known personality in Iceland. He was alleged to have committed sexual acts against two women. The Public Prosecutor dismissed the allegations on the basis that the evidence was considered insufficient to secure a conviction. Mr Einarsson (the applicant) submitted a complaint to the police about the alleged false accusations. The complaint was dismissed. The applicant was then interviewed by a reporter for a magazine. The rape accusations were discussed and the applicant claimed several times that the accusations were false. When reporting on the article, the applicant's picture was placed on the front page of a newspaper. On the same day, an individual identified as 'X' published an altered version of the applicant's front-page picture with the caption "*F*** You Rapist Bastard*" on his Instagram. X said that he believed that only his friends and acquaintances had access to the pictures he published; however, his pictures were also accessible to other Instagram users.

[31] The ECtHR concluded that the domestic courts had failed to strike a balance between the applicant's right to respect for private life under Article 8 and X's rights to freedom of expression under Article 10. Accordingly, the court found that there had been a violation of the applicant's Article 8 rights under the Convention. The court concluded that the statement, "*F*** You Rapist Bastard*," was a statement of fact since it clearly assigned the status of "rapist" to the person who was the subject of the statement. In this regard, the ECtHR disagreed with the judgment of the Supreme Court of Iceland. The ECtHR did not exclude the possibility that an objective statement of fact could be contextually classified as a value judgment. In this regard, the ECtHR stated:

"52. However, even assuming that the Court were to accept the Supreme Court's classification of the statement of "rapist" as a value judgment, the Court recalls that under its settled case law, even where a statement amounts to a value judgment there must exist a sufficient factual basis to support it, failing which it will be excessive ... The Court finds that the statement was a serious nature and capable of damaging the Applicant's reputation. It reached such a level of seriousness as to cause prejudice to the Applicant's enjoyment of the right to respect for private life for Article 8 to come into play."

[32] Mr Anthony BL, Counsel for the Respondent, does not directly challenge the decision in *Einarsson*. Rather, he advances two arguments. His first argument is that the Applicant's case rests upon a misapprehension of the nature of the role played by the Respondent under section 54 of the Police (Northern Ireland) Act 1998. He states that whilst the allegation of perjury made by the complainant may (or may not) be defamatory, the Respondent's role in the investigation of the allegation simply involves an assessment as to whether the complaint has any substance. In other words, the alleged defamatory complaint has simply triggered the investigation and, in those circumstances, the right to private life is neither engaged nor interfered with by the Respondent.

[33] The second argument advanced by the Respondent is that where a person is under investigation by a law enforcement body, a report to that effect cannot be defamatory. The Respondent cites *Lewis v Daily Telegraph* [1964] AC234 in support. In *Lewis*, the plaintiff claimed that a newspaper report that he was being investigated by the Serious Fraud Office was defamatory because those reading the report would assume he was guilty of the offences in question. The court rejected the argument that the report was defamatory or that innuendo would lead the reader to infer guilt. As Lord Reid stated at pages 259-260:

“Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naïve. One must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question. ... I can only say that I do not think that he would infer guilt of fraud merely because an inquiry is on foot.”

[34] I reject the above arguments put forward by the Respondent. The decision in *Lewis* does not provide me with any assistance in deciding whether Article 8 ECHR has been engaged. The Respondent argues that a distinction can be made between the alleged defamatory remarks made by the complainant and the Respondent’s investigation into that allegation. In many cases such an argument will be correct. However, if the defamatory complaint, whether as a statement of fact or valued judgment, is so serious that it is capable of activating Article 8 ECHR, then depending on the facts, an investigation into the complaint, particularly if it is without foundation or baseless, is also capable of affecting the Applicant’s right to respect for private life under Article 8.

[35] The relevant general principles as to whether Article 8 is engaged in cases of this nature is as stated by the ECtHR in *Einarsson* at paragraphs 32-34:

“32. The notion of “private life” of the Convention is a broad concept which extends to a number of aspects relating to personal identity, such as a person’s name or image, and furthermore includes a person’s physical and psychological integrity.

33. Furthermore, it has been accepted by the Court that a person’s right to protection of his or her reputation is encompassed by Article 8 as part of the right to respect for private life. The Court has also concluded that a person’s reputation is part of their personal identity and moral integrity, which are a matter of private life even if the person is criticised in a public debate. The same considerations apply to a person’s honour.

34. However, in order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life.”

[36] It is clear from the above paragraphs that a person’s right to protection of reputation is encompassed by Article 8 ECHR. I accept that for Article 8 to be activated, an attack on the Applicant’s personal honour and reputation must attain a certain level of seriousness or gravity so as to ensure prejudice to his personal enjoyment of the right to respect for private life. In this regard, I refer to the decision of the Court of Appeal in *Re Hawthorne’s Application* [2020] NICA33, 373 at paragraph 53 per Morgan, LCJ. It is my view that, on the facts of this case, the complainant’s allegation that the Applicant, a serving Police Officer, committed perjury is a clear attack on his personal integrity and reputation and is sufficiently serious to engage Article 8.

(ii) Has Article 8 ECHR been interfered with on the facts of the case? If so, is the interference lawful?

The Applicant’s submissions

[37] The Applicant argues that the decision to investigate the complainant’s allegation of perjury against the Applicant is an unlawful and disproportionate interference with his Article 8 ECHR right to privacy and, in particular, not to have his reputation and integrity violated by allegations of criminal conduct unsupported by any verifiable acts. In the context of this argument, the Applicant makes the following submissions.

[38] Firstly, it is argued that Article 14 of the Perjury (Northern Ireland) Order 1979 provides that a person shall not be liable to be convicted of perjury or subornation of perjury, solely upon the evidence of one witness as the falsity of any statement alleged to be false. Corroboration is therefore required. The Applicant argues that since there is no corroboration, by operation of the law, he would not be liable to be convicted of the offence of perjury. Therefore, the impugned decision to investigate the complaint of perjury is unlawful and an infringement of his Article 8 ECHR right.

[39] In support of the above argument, the Applicant draws the court’s attention to the Respondent’s letter dated 23 January 2020 and its analysis of sections 13 and 14 of the Perjury (Northern Ireland) Order 1979. The correspondence quotes *Valentine*, namely that, “Corroboration in the strict sense is still required in a charge of a perjury offence, i.e. admissible credible evidence independent of source”. Although the Respondent argues that it is under a duty to investigate the allegation of perjury under sections 52 and 54 of the Police (Northern Ireland) Act 1998, the Respondent nevertheless concedes that the investigation would have “very limited chances of success” given the lack of judicial referral and (implicitly) the lack of corroboration.

[40] The Applicant emphasises that on 28 October 2019 the complainant was convicted of the offences of fraud arising out of false claims for overtime on 16 April 2017 and 1 April 2018. The complainant appealed the convictions and sentence. On 11 December 2020, at the hearing of the appeal, the complainant accepted an adult caution which still requires him to admit his guilt. At the appeal hearing the complainant did not raise any issues with regard to perjury by the Applicant. Indeed, according to the Applicant, no allegation of perjury was made by the complainant before he made his complaint to the Respondent on 6 November 2019.

[41] The Applicant acknowledges the complainant's allegation of perjury relates to the Applicant's statement and his evidence with regard to the alleged offence of making a false overtime claim on Easter Sunday 2016. The complainant was acquitted of this offence. The specific details as to why the complainant was acquitted are not known, except as stated in the electronic record on the PPS system which reads:

"This matter proceeded to a full contest on 28/10. Having heard evidence of prosecution and defence, the DJ Peter King convicted the Defendant on counts 2 and 3 and acquitted on count 1 re offences dated 26/03/16 and 31/05/16 due to lack of evidence. Con. Christopher O'Neill could not recall any details re Def's alleged false rep between these dates because he said he had no recollection of re Easter Sunday event in 2016. DJ King ordered PSR for 29/11/19."

[42] The Applicant argues that on the facts as presented it can reasonably be inferred that the complainant's motive was instigated by revenge and that his intention was, *inter alia*, to damage the Applicant's reputation and impact on his enjoyment of his private and family life.

[43] The Applicant takes issue with the primary submission made by the Respondent, namely, that section 54 of the Police (Northern Ireland) Act 1998 imposes a mandatory obligation on the Respondent to investigate the complaint, particularly in circumstances where the complaint giving rise to the investigation is baseless and, by operation of the law, is deemed to go nowhere. The argument is that it defies logic and clearly infringes the Applicant's Article 8 rights to pursue this investigation.

[44] The Applicant draws the court's attention to paragraphs 11-17 of Susan Harper's affidavit and the fact that the current Police Ombudsman, Mrs Marie Anderson, in her first statutory review recommends that the Ombudsman should be given a statutory discretion to decide whether or not to begin, continue, or discontinue an investigation. Some of the recommendations made by Mrs Marie Anderson are considered in paragraph [61] below. In effect, the Applicant argues that the deficiencies exposed by Mrs Marie Anderson with regard to the current complaints procedure is further evidence that the scheme is not

proportionate and rational and fails to deal with cases similar to that of the Applicant involving a clear breach of Article 8 ECHR.

The Respondent's submissions

[45] In response to the Applicant's submissions, the Respondent requested the court to focus on the wording of Article 8 ECHR (See paragraph [24] above).

[46] As discussed previously in this judgment, the Respondent disputes that there has been an engagement or an interference with the Applicant's Article 8 ECHR rights. However, the Respondent submits that on the facts, if the court accepts that the Applicant's Article 8 ECHR rights have been engaged and interfered with, any interference is lawful within the meaning of Article 8(2) of the Convention, in that it is not only in accordance with the law but also necessary in a democratic society for the protection of disorder and crime. The Respondent argues that the interference is justified and proportionate to the legitimate aim and fulfils the four stage proportionality test as formulated by Lord Sumption in *Bank Mellat v HM Treasury* [2014] AC700, 771 at paragraph 20. The ECtHR has employed proportionality to define interferences which may be 'necessary in a democratic society.' Applying the Lord Sumption's proportionality test, the following four questions are relevant to the analysis advanced in defence of the Respondent's decision to investigate.

- (i) whether the objective of the measure is sufficiently important to justify the limitation of a fundamental right;
- (ii) whether the measure is rationally connected to the objective;
- (iii) whether a less intrusive measure could have been used (without unacceptably compromising the achievement of the objective); and
- (iv) whether having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.

[47] As stated by Lord Sumption:

"These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them" (paragraph 20).

Applying the four requirements in the defence of the Respondent's decision to investigate, the Respondent advances the following arguments.

[48] The first question is to determine the objective of the measure so as to ascertain whether it is sufficiently important to justify the limitation of the Applicant's Article 8 ECHR right. The starting point in respect of the duty to investigate under section 54 of the 1998 Act (and indeed all the powers and duties of

PONI under the 1998 Act) is a consideration of the review carried out by the former Northern Ireland Ombudsman, Dr Maurice Hayes, into the structures for Police complaints in Northern Ireland. In this regard, the court is invited to consider paragraphs 5 and 6 of the affidavit from Susan Harper, Director of the Current Investigations Directorate in PONI dated 18 January 2021. The said affidavit provides that at the time of the “Hayes” review, complaints against the Police were investigated by other police officers (subject to the possibility of particular complaints being referred to the Independent Commission for Police Complaints). There was a lack of confidence in the levels of accountability that these procedures could ensure. Dr Hayes, at paragraph 1.2 of his 1997 report, noted that his terms of reference were to:

“Review the operation of the existing mechanisms for dealing with complaints against the police by members of the public and to recommend whatever changes would be sensible to:

- Secure greater public and police confidence in the system for handling complaints about the conduct of individual police officers;
- Provide protection for police officers against malicious or vexatious complaints;
- Accommodate complaints about the standards of service and policing policies;
- Ensure that the systems are accessible, well publicised, provide an effective response and are easy to use having regard to
- The need to protect the operational independence of the police; and
- The need to ensure affordability and value of money in public spending.”

[49] Dr Hayes concluded that the key to the success of PONI would be its independence and he recommended that the Ombudsman should be supported by a team of professional investigators who would investigate complaints against the police, even where the action complained of could potentially amount to criminal behaviour necessitating the making of a recommendation to the Prosecution Service. As stated by Ms Harper at paragraph 6 of her affidavit, Dr Hayes in his executive summary emphasised that both the public and the police should have confidence in the complaints system:

“including a genuine belief that misconduct ... will be detected and appropriately dealt with and that the system

will reinforce ... high standards of ethical conduct and integrity, which are recognised as having strong leadership support.”

[50] A large majority of the recommendations made by Dr Hayes were accepted and the Office of the Police Ombudsman for Northern Ireland was established by section 51 of the 1998 Act.

[51] PONI’s powers and duties are found in Part VII of the 1998 Act and more recently summarised by the Court of Appeal in *Re Hawthorne* [2021] NI357, 381 at paragraphs 5-13:

“[5] The Office of Police Ombudsman for Northern Ireland was established by s 51 of the 1998 Act. Section 51(4) provided that the Ombudsman should exercise his powers in such manner and to such extent as appears to him to be best calculated to secure the efficiency, effectiveness and independence of the police complaints system and the confidence of the public and the members of the police force in that system.

[6] Section 52 provides that all complaints about the police force should either be made to the Ombudsman or if made to a member of the police force or other identified criminal justice institutions be referred immediately to the Ombudsman. His first task is to determine whether it is a complaint about the conduct of a member of the police force which is made by, or on behalf of, a member of the public (a qualifying complaint). If he determines that it is not a qualifying complaint he must refer it to the Chief Constable, the Policing Board, the Director of Public Prosecutions or the Department of Justice as appropriate. A complaint relating to the direction and control of the police force by the Chief Constable is not a qualifying complaint. The time limit for the presentation of a complaint is fixed by the RUC (Complaints etc) Regulations 2001, SR 2001/184 at 12 months and could only be extended where there were exceptional circumstances or the matter is grave.

[7] Section 53 requires the Ombudsman to consider whether the qualifying complaint is suitable for informal resolution. That requires that the complainant gives consent and that the Ombudsman does not consider it a serious complaint. A serious complaint is defined as a complaint alleging that the conduct complained of resulted in the death of, or serious injury to, some person.

If the Ombudsman considers that the complaint is suitable for informal resolution he must refer it to the appropriate disciplinary authority who will seek to resolve it informally. If informal resolution turns out not to be possible the disciplinary authority must refer the complaint back to the Ombudsman for investigation pursuant to s 56.

[8] Section 54 requires that the Ombudsman formally investigate all serious complaints but may refer other qualifying complaints to the Chief Constable for formal investigation by a police officer. Section 55 requires the Chief Constable to refer to the Ombudsman for formal investigation any matter which appears to the Chief Constable to indicate that conduct of a member of the police force may have resulted in the death of some other person and certain criminal justice organisations are given power to refer matters which are not the subject of a complaint for investigation where it appears that a member of the police force may have committed a criminal offence or behaved in a manner which would justify criminal proceedings.

[9] Section 55(6) provides that the Ombudsman may of his own motion formally investigate any matter which appears to him to indicate that a member of the police force who is not the subject of a complaint may have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings if it appears to the Ombudsman that it is desirable in the public interest that he should do so.

[10] Section 56 provides that where a complaint or matter is to be formally investigated the Ombudsman must appoint an officer of the Ombudsman to conduct the investigation. Officers of the Ombudsman have all the powers and privileges of a constable throughout Northern Ireland and are subject to the Codes of Practice under the Police and Criminal Evidence (Northern Ireland) Order 1989 ('PACE') in the conduct of interviews. At the end of the investigation the officer appointed to conduct the investigation must submit a report to the Ombudsman. Similarly, where a police officer is tasked with conducting the investigation the officer must submit a report on the investigation to the Ombudsman under s 57(8).

[11] Where the Ombudsman determines that the report indicates that a criminal offence may have been committed by a member of the police force he must send a copy of the report to the Director of Public Prosecutions together with such recommendations as appear to the Ombudsman to be appropriate. Where he determines that the report does not indicate that a criminal offence may have been committed by a member of the police force and that the complaint is not a serious one he may determine that the complaint is suitable for resolution through mediation and act as a mediator if the parties agree.

[12] Section 59 describes the circumstances in which the Ombudsman must consider the question of disciplinary proceedings. That arises if he determines:

- (i) that the report received does not indicate that a criminal offence may have been committed by a member of the police force and the complaint was not suitable for resolution through mediation or the mediation has failed, or
- (ii) that the DPP has decided not to initiate criminal proceedings in relation to a report sent to him or those proceedings have concluded.

[13] In those circumstances the Ombudsman must send the appropriate disciplinary authority a memorandum containing:

- (a) his recommendation as to whether or not disciplinary proceedings should be brought in respect of the conduct which is the subject of the investigation;
- (b) a written statement of his reasons for making that recommendation; and
- (c) where he recommends that disciplinary proceedings should be brought, such particulars in relation to the disciplinary proceedings which he recommends as he thinks appropriate.

This section has provisions to enable the Ombudsman to ensure that any recommended disciplinary proceedings are pursued.”

[52] Section 54 of the 1998 Act is the central focus in this case. (See paragraph 21 above).

[53] The Respondent's interpretation of section 54 is that it is under a statutory duty to investigate all complaints that fall under this section, to include the complaint made against this Applicant. According to the Respondent, the inclusion of the word "shall" in 54(1)(b) and 54(2) imposes a mandatory duty to investigate. Indeed, the Respondent understands that it would be acting unlawfully if it did not investigate a complaint.

[54] The Respondent argues that it was the clear intention of Parliament to impose a mandatory duty in section 54 (as opposed to a discretion) on PONI with regard to the investigation of some complaints. The objective of the mandatory duty to investigate was to engender public confidence in policing and the system of dealing with complaints against the police. The Respondent states that public confidence in a system of complaints against the police is "necessary in a democratic society and embraced by Article 8(2) ECHR's reference to the prevention of disorder and crime".

[55] The Respondent further argues that the pursuit of the above is demonstrated by a carefully tailored investigative process. Whilst investigations must be initiated in response to all complaints so as to discharge the section 54 mandatory duty, a range of outcomes are possible thereafter. For example, under Regulation 25(1) of the Royal Ulster Constabulary (Complaints etc.) Regulations 2000, the Respondent can dispense with the requirement to investigate where a complaint is deemed to be anonymous, repetitious, vexatious, oppressive or otherwise an abuse of its procedures. Also, where it is not reasonably practicable to complete an investigation, for example, a refusal or a failure on the part of the complainant to make a statement, the Ombudsman may dispense with the statutory duty under section 54. Moreover, where an investigation has been concluded, there are a number of possible outcomes open to the Respondent. These range from rejection of a complaint to referral of a matter with a view to prosecution and/or misconduct proceedings.

[56] The Respondent further submits that the investigations comply with the guidance issued by the Department of Justice under section 65 of the Police (Northern Ireland) Act 1998 and the Respondent's 'Investigations Manual' (see Susan Harper's affidavit at paragraphs 18-22). The Respondent highlights page 7 of the Investigation Manual which provides that:

"This guidance is to be read at all times with regard to the terms of the Human Rights Act 1998 so that the rights of the police officer are protected to the extent commensurate with the proper administration of justice in dealing with criminal and misconduct allegations against police officers."

The Respondent states that compliance with human rights is an important aspect of the Respondent's work in this area, albeit it is aware that it is not an adjudicated body for the purposes of human rights law. Every individual complaint that is made to the Respondent is carefully reviewed when it is received and, on making initial investigative steps, the Respondent always asks whether the matter may be investigated more fully or whether there are grounds for dispensing with the matter in accordance with the legislative scheme. In either event, the Respondent stresses that some element of investigation is necessary in every case since that is the requirement of section 54 of the 1998 Act.

[57] The investigative process also makes provision for safeguards. In conducting investigations, the Respondent is subject to a restriction on disclosure of information by section 53 of the Police (Northern Ireland) Act 1998, subject to exceptions which include disclosure for the purposes of any criminal, civil or disciplinary proceedings. Complaints against police officers are conducted in camera. In effect, according to the Respondent, this means that complaints against officers will be conducted in confidence. As stated by Kerr J in *CAJ's Application [2005] NIQB 25*, paragraph 44, "The need for confidentiality is ... frankly recognised in the statutory provisions that deal with the issue". Also, while the Respondent has the power, under section 62 of Police (Northern Ireland) Act 1998 to publish a statement as to all actions, decisions and determinations that it takes, it will not reveal the identity of a police officer in such a statement unless, per section 63(1)(e)(ii), it thinks it is necessary in the public interest to do so. The nature of the PONI investigation and the manner in which it is conducted remains confidential until made public in a statement made pursuant to section 62 of the 1998 Act.

[58] The Respondent submits that its procedures are also intended to give police officers confidence that matters will be investigated impartially, vindicating an officer where a complaint is without merit. Clearly, if the investigation identifies potential criminality or misconduct, then the investigative process will take the matter further with a view to recommending criminal or disciplinary proceedings.

[59] The Respondent recognises that the statutory duty to investigate all complaints under section 24 imposes a very real burden on PONI. The current Ombudsman, Mrs Marie Anderson, in her first statutory review of the work of PONI dated 6 November 2020 recommended that section 53 be amended to give PONI greater flexibility in the context of alternative resolution of complaints. (See paragraph 12 of Susan Harper's affidavit). Significantly, with regard to section 54 of the 1998 Act, Mrs Marie Anderson recommended that PONI should be given a statutory discretion to decide whether or not to begin, continue or discontinue an investigation. At paragraphs 4.14-4.16 of her review, Mrs Anderson stated as follows:

"4.14 The Police Ombudsman currently must investigate all complaints about the conduct of police officers in Northern Ireland. These complaints can include allegations that police officers have been guilty of

criminality or misconduct as well as complaints about unfair treatment, poor performance or incivility. However, not all public complaints proceed to formal investigation. It can be challenging to explain to complainants why their complaint does not warrant further investigation. This often leads to discontent and a customer complaint. Consideration ought to be given to a statutory discretion for the Ombudsman to decide whether or not to begin, continue or discontinue an investigation.

There are circumstances where it may not be in the public interest to investigate a complaint such as:

- Where an investigation is disproportionate to the outcome sought by the complainant;
- Where no reasonably practical outcome can be achieved by an investigation; or
- Where the complaint is vexatious or unfounded.

4.15 The Police Ombudsman legislation is silent on the purposes of an investigation. In the interests of an efficient and effective police complaints system clarity is needed so as to capture the assessment of complaints. A decision on an investigation can include deciding whether a matter warrants investigation or should be the subject of a verbal resolution (informal resolution or mediation).

4.16 There is currently a requirement that if informal resolution fails then the Police Ombudsman “shall” investigate. There are other occasions on which it is inappropriate to continue with an investigation. For example: the complainant unreasonably failed to engage with the informal resolution process but did not withdraw from it; where there are irreconcilable differences between the complainant’s account of an incident and that of an officer; there are no independent witnesses, or there are no investigative opportunities.”

[60] The Applicant in his submissions draws heavily from the current Ombudsman, Mrs Marie Anderson, particularly with regard to her recommendation that section 54 should be amended to give PONI a statutory discretion to investigate. The court is cognizant of these recommendations. However, it is the view of this court that it is a matter for Parliament and not the courts to review and change the legislation, if considered appropriate. For the purposes of this case, it is the function of the court to interpret section 54 of the 1998 Act, determine the objective behind the

statutory provision, ascertain whether a fundamental right has been breached and, if so, decide whether the breach is proportionate and rational.

Decision

[61] I have considered in detail the comprehensive oral and written submissions made on behalf of the Applicant and the Respondent summarised in the preceding paragraphs. I wish to acknowledge the valuable assistance provided by Counsel. I have also considered the relevant materials, statutory provisions, guidance manuals and legal authorities.

[62] For the reasons given at paragraphs [28-36] above, I have decided that the Applicant's Article 8 ECHR's rights have been engaged.

[63] The next question is whether, on the facts as presented, there has been an infringement of the Applicant's Article 8 ECHR rights. On the facts of this case, this is not a question which gives rise to a straightforward answer. Perjury is a serious criminal offence. The allegation of perjury is clearly an attack on the Applicant's personal honour and reputation to such a serious level that it caused prejudice to the Applicant's personal enjoyment of his right to respect for private life. The court is asked to accept the argument that if the complainant's allegation of perjury against the Applicant was plainly malicious, baseless and unlikely to be accepted, then any investigation into that complaint is likely to infringe the Applicant's Article 8 right to private life. An unjustified investigation would clearly impact upon the Applicant's personal integrity and reputation.

[64] Article 14 of the Perjury (Northern Ireland) Order 1979 requires corroboration of the allegation. The Applicant contends that the impugned decision to investigate the complaint of perjury was unlawful and infringed the Applicant's Article 8 ECHR rights since it was accepted that there was no corroboration. During submissions, Mr Anthony BL, on behalf of the Respondent, did not make such a concession. He submitted that, once the allegation of perjury was made, the Respondent was under a duty to initiate an investigation in order to ascertain whether there was any substance to the allegation. It necessarily followed that the Respondent could not be said to have interfered with the Applicant's Article 8 ECHR right by instigating the investigation. In other words, despite whatever reservations the Respondent might have, the complainant's allegation of perjury could not be determined until it was ascertained whether or not the complaint was capable of corroboration.

[65] It is rare that a police investigation will interfere with a person's Article 8 rights. In this case, having considered the background circumstances to the complainant's allegation and Mr Simpson QC's oral and written submissions summarised at paragraphs [37-41] above, I am persuaded that on balance the Respondent's decision to investigate on 19 December 2019 did prima facie interfere with the Applicant's Article 8 ECHR rights. Although the Respondent in its letter dated 23 January 2020 stated that a perjury investigation could commence despite the lack of judicial referral, it also recognised that "such an investigation would have

very limited chances of success, given the lack of such a referral would infer that the judge did not consider such an investigation necessary”.

[66] The decision to carry out an investigation on the facts of this case represented an interference with the Applicant’s Article 8 ECHR rights. Such interference will only be lawful if it falls within the ambit of Article 8(2) of the Convention. Article 8(2) ECHR prohibits any interference by a public authority with the exercise of an Article 8 right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime. The Respondent argues the 1998 Act, which is designed to ensure public confidence in a system of complaints against the police, is “necessary in a democratic society and embraced by Article 8(2) ECHR’s reference to the prevention of disorder and crime”.

[67] The ECtHR jurisprudence has employed proportionality to assist in making a determination as to whether an interference is “necessary in a democratic society”. Essentially, to be lawful under Article 8(2), the interference must be (a) in accordance with the law; (b) proportionate to the legitimate aim; and (c) necessary.

[68] The question for consideration is whether, despite the interference with the Applicant’s Article 8 ECHR rights, the decision to investigate was justified and proportionate in the circumstances and within the meaning of the four stage test formulated by Lord Sumption in *Bank Mellat*.

[69] Section 54 of the 1998 Act imposes a mandatory duty on the Respondent to investigate all complaints. I do not believe that any of the parties disputed this interpretation of the legislation. The critical question is to ascertain the rationale behind the legislation and particularly section 54. In essence, as analysed in paragraphs [49-52] above, it is clear that the objective of the legislation was to ensure that an independent body, namely PONI, should investigate complaints against the police. The purpose behind the legislation was to engender public confidence in the police complaints system. The pursuit of this objective required a mandatory duty to investigate all complaints, thereby avoiding criticisms of selectability and lack of accountability.

[70] I agree with the submissions made by the Respondent at paragraphs [45]-[60] above in respect of the objective and rationale of the legislation and, in particular, section 54 of the 1998 Act. I consider that the said measure pursues an important and legitimate aim and it is suitable and necessary to achieve the objective. The measure is sufficiently important to justify the limitation of the Applicant’s Article 8 ECHR rights in this case. The impugned decision is rationally connected with the objective. Since section 54 imposes a mandatory duty, no less intrusive measure could have been used. Applying a fair balance between the objective contained in section 54 and the Applicant’s Article 8 rights, it is my view that a proper balance has been struck in favour of the measure and that the inference is justified and proportionate.

[71] It is the view of this court that section 54 of the 1998 Act provides a protection to both the complainant and the police officer. Meritorious complaints will lead to recommendations of prosecution and/or disciplinary proceedings. Police officers, subject to complaints, can be confident that the investigation will expose vexatious, malicious and unmeritorious complaints. Unquestionably, the investigation process will cause frustration, concern, anxiety and in some cases anger, on the part of the police officers. However, I am influenced by the arguments made by the Respondent that the investigations are conducted in camera and that police officers can have confidence that the matters will be investigated impartially. Also, a key factor in the proportionately exercise is the fact that the investigation is carried out discreetly by police officers and that publication of any alleged defamatory statement will be considerably reduced.

[72] The Applicant urges me to take into consideration the recommendations of the present Ombudsman, Mrs Marie Anderson, who has called for reform of certain provisions of the 1998 Act, including section 54. It is claimed that section 54 should be amended to provide a discretion for the Ombudsman to determine whether to begin, continue or discontinue an investigation in circumstances where the Police Ombudsman considers it in the public interest to do so. I acknowledge the argument that the present statutory duty to investigate all complaints under section 54 imposes a very real burden on PONI. Mr Anthony BL urges me to accept that this burden is primarily due to resource issues. The Department has publicly supported the call for legislative reform. However, importantly as submitted by Dr McGleenan QC on the behalf of the Department, the call for reform is a matter of policy consideration and not because it considers section 54 to be incompatible with the Convention.

[73] It is not for this court to comment on the merits of the recommendations made by the present Police Ombudsman. Ultimately, it will be for Parliament and not the courts to review the recommendations and amend the legislation if considered necessary.

[74] The Applicant has served a Notice of Incompatibility, alleging that section 54 of the 1998 Act is incompatible with Article 8 ECHR. The Applicant contends that the Court should address this issue by either (i) the application of "reading" pursuant to section 3 of the Human Rights Act 1998 or (ii) by making a Declaration of Incompatibility pursuant to section 4 of the Human Rights Act 1998.

[75] On the basis of the analysis above, I have concluded that although the impugned decision to carry out an investigation prima facie interfered with the Applicant's Article 8 ECHR rights, the interference was in accordance with the law, necessary and proportionate to a legitimate aim. The decision of the Respondent to carry out the said investigation pursuant to section 54 of the 1998 Act was not ultimately in breach of the Applicant's Article 8 ECHR rights. The Respondent did not act in a way which was incompatible with a Convention right. Accordingly, no issue of incompatibility arises and it is not necessary to consider the potential application of sections 3 and 4 of the Human Rights Act 1998.

[76] The Applicant's case, whilst primarily focused on a breach of Article 8 ECHR, also includes common law challenges based on illegality, irrationality and a failure to have regard to material considerations. In many respects, the arguments advanced in respect of each ground overlap with the Applicant's submissions in relation to the alleged breach of Article 8 ECHR. I will deal with each ground of challenge seriatim.

Illegality

[77] The Applicant argues that the impugned decision to investigate the complaint of perjury is unlawful because there was no corroboration of the complainant's allegation and that pursuant to Article 14 of the Perjury (Northern Ireland) Order 1979 the Applicant cannot be liable to be convicted.

[78] The Respondent submits that the Applicant is in error as he has conflated the required legal basis for obtaining a conviction for perjury with the conduct of an investigation into an allegation of perjury. As stated by the Respondent in its pre-action letter dated 25 February 2020, the Respondent is only tasked with investigating complaints in relation to alleged criminal conduct. In the event that the Respondent determines that a criminal offence may have been committed, it will submit a file to the PPS for consideration. It is solely a matter for the PPS to decide whether or not to pursue a prosecution. In this case, the investigation has been paused pending the outcome of the Judicial Review proceedings.

[79] The court agrees with the Respondent's submissions. There is a clear and obvious distinction between initiating an investigation into criminal conduct and making a decision to charge and ultimately obtain a conviction for the said criminal conduct. The Respondent's decision to initiate the said investigation is not unlawful.

Irrationality

[80] The Applicant argues that the appeal decision was irrational. In the *Wednesbury* sense because (a) the Respondent recognised in its letter of 23 January 2020 that any investigation against the Applicant had "*limited chances of success*"; and (b) there was no prospect of charges being brought.

[81] The Respondent argues that on each of the grounds of challenge (and particularly irrationality) section 54 of the 1998 Act imposes a duty on the Respondent to conduct an investigation. Accordingly, the Respondent must discharge that duty in all cases or otherwise act unlawfully. The Respondent states that this is the first principle of public law from which the Respondent cannot depart. As Lord Birkenhead stated in *Birkdale District Electricity Supply Co Limited v Southport Corporation* [1926] AC 355 at 364:

"The Appellants have relied strongly on a well-established principle of law, and if a person or public body is entrusted by the Legislature with certain powers and duties expressly or impliedly for public purposes,

those persons or bodies cannot divest themselves of those powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their power or the discharge of their duties.”

[82] The Respondent further argues that if the Respondent failed to carry out an investigation or predetermined the outcome of an investigation, it would be open to the complainant to bring proceedings to seek an Order of Mandamus to compel the Respondent to discharge its statutory duty. Such an application would have considerable merit.

[83] I am persuaded by the Respondent’s submissions and I do not accept that the impugned decision was irrational.

Materiality

[84] The Applicant argues that, in deciding to conduct a formal investigation, the Respondent has failed to take into consideration (a) that there is no reasonable basis for the investigation due to the absence of corroboration; (b) that the complainant was convicted of two offences of fraud on 16 April 2017 and 1 April 2018; (c) the Applicant’s evidence at the trial was not the subject of any criticism from the Judge; (d) the complainant made no complaint of perjury against the Applicant before 6 November 2019 and (e) it can reasonably be inferred that the complainant’s motive was revenge and his intent was, *inter alia*, to damage the Applicant’s reputation and enjoyment of his private and family life.

[85] I reject the grounds of challenge based on materiality. The arguments at (a)-(d) above are undoubtedly relevant matters that would be considered by the Respondent during the conduct of its investigation. If, during the course of its investigation, the Respondent decided that there was insufficient evidence to make any recommendations, it seems likely that the complaint would be dismissed.

[86] The Applicant has argued that from the facts it can be reasonably inferred that the complainant’s motive for making the allegation against the Applicant was revenge. I am not prepared to accept this assertion. The complainant’s allegation of perjury related to the Applicant’s statement and his evidence with regard to the alleged offence of making a false overtime claim on Easter Sunday 2016. The complainant was acquitted of this offence. Unfortunately, it has not been possible to ascertain precisely the reasons for the acquittal. It is plainly possible that the complainant felt vindicated by the acquittal and aggrieved at the outcome. Whatever the reason or reasons for bringing the complaint, there is insufficient evidence to persuade me that the complaint was motivated by revenge or malice.

[87] Accordingly, for the reasons given, I dismiss the Applicant’s application to challenge the decision of the Respondent to carry out a formal investigation of the Applicant pursuant to section 54 of the Police (Northern Ireland) Act 1998.