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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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KING'S BENCH DIVISION
(JUDICIAL REVIEW)

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IN THE MATTER OF APPLICATIONS BY
(1) RAYMOND FITZSIMONS (AS CHAIRMAN OF THE NORTHERN IRELAND RETIRED POLICE OFFICERS' ASSOCIATION);
(2) APPLICANT A and RAYMOND FITZSIMONS (AS CHAIRMAN AND REPRESENTATIVE OF THE NORTHERN IRELAND RETIRED POLICE OFFICERS' ASSOCIATION); and
(3) JR217;
FOR JUDICIAL REVIEW

AND IN THE MATTER OF DECISIONS OF
THE POLICE OMBUDSMAN FOR NORTHERN IRELAND

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David McMillen KC and Richard Smyth (instructed by Edwards & Co, Solicitors) for the applicants in the first and third cases
David McMillen KC and Andrew Brown (instructed by McCartan Turkington Breen, Solicitors) for the applicants in the second case
Simon McKay (instructed by the Legal Directorate of the Office of the Police Ombudsman) for the respondent in the first and second cases
Neasa Murnaghan KC and Steven McQuitty (instructed by the Legal Directorate of the Office of the Police Ombudsman) for the respondent in the third case
Sean Devine (instructed by KRW Law) for interested parties in the first and second cases
Stephen Toal (instructed by Brentnall Legal) for an interested party in the second case
Gerard McGettigan (instructed by Harte Coyle Collins) for the interested parties in the third case

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SCOFFIELD J

Introduction

[1] There are three applications for judicial review before the court which raise the same or similar issues. In each case, the challenge is directed towards a public statement made by the Police Ombudsman for Northern Ireland (PONI) ("the Ombudsman") under section 62 of the Police (Northern Ireland) Act 1998 ("the 1998 Act"). I granted partial leave in each case, and to only some of the intending applicants, in a detailed leave judgment: see [2022] NIKB 28 ("the leave ruling"). The full hearing in the various cases involved a repetition, with some expansion and deeper exploration, of the main points in the applications upon which leave was granted. The broad contours of the litigation and the central arguments remained the same as at the leave stage. For that reason, this judgment should be read together with the leave ruling. However, to assist the reader, significant portions of the leave ruling are replicated in this judgment.

[2] As to the litigants:

(a) The first case is brought by Mr Raymond Fitzsimons, acting as Chairman of the Northern Ireland Retired Police Officers' Association (NIRPOA). He challenges the decision of the Ombudsman to publish a statement on 13 January 2022 relating to the investigation into police handling of certain paramilitary murders and attempted murders in the North West of Northern Ireland during the period 1989 to 1993. The statement related to the Ombudsman's investigation known as 'Operation Greenwich.'

(b) The second case is brought by Applicant A, a retired police officer; and Mr Fitzsimons, again acting as Chairman and representative of NIRPOA. They challenge the decision of the Ombudsman to publish a statement on 8 February 2022 relating to the investigation into police handling of loyalist paramilitary murders and attempted murders in South Belfast during the period 1990 to 1998. The statement related to the Ombudsman's investigation known as 'Operation Achille.' Applicant A is a retired Chief Inspector and was also the officer in charge of the Weapons and Explosives Research Centre (WERC) during the period covered by the Ombudsman's investigation.

(c) The third case was brought by JR217, a retired police officer who sought to challenge a statement published by the Ombudsman on 10 June 2022 in relation to complaints about the arrest and detention of four persons detained at Strand Road Police Station in Derry/Londonderry between 26 February 1979 and 1 March 1979. This was in relation to the Ombudsman's investigation known as 'Operation Farrier.' The applicant was one of the officers involved in the questioning of the complainants whilst they were in detention and about whose conduct they complained. Unfortunately, JR217 passed away in the course of the proceedings. Through the Judicial Review

Office, I have already offered my sympathies to his family and legal representatives as a result of this sad news. However, in light of the fact that his passing occurred after the conclusion of the hearing, when all of the arguments had been presented, and the fact that his case raises issues of significance which the others do not, I consider it appropriate to proceed to give judgment in his case.

[3] Mr McMillen KC appeared for all of the applicants, with Mr Smyth in the first and third case and with Mr Brown in the second case. Mr McKay appeared for the respondent in the first and second cases; and Ms Murnaghan KC appeared with Mr McQuitty for the respondent in the third case. Mr Devine appeared for a family member of one of the deceased whose murder was considered in the statement which is the subject of each of the first and second cases respectively; Mr Toal appeared for Mr Caskey (a complainant to PONI) in the second case; and Mr McGettigan also appeared for the complainants (or their family members) in the third case. I am grateful to all counsel for their helpful written and oral submissions.

[4] As noted in the leave ruling (see para [3]), these cases are a sequel to the decision of the Court of Appeal in *Re Hawthorne and White's Application* [2020] NICA 33, which failed to decisively resolve what I described as the "running sore" between PONI on the one hand and former police officers on the other as to the extent of the Ombudsman's proper function and powers in respect of the publication of statements relating to legacy investigations in relation to alleged police misconduct. A central theme of this dispute is the extent to which the Ombudsman is empowered to make and publish findings of collusion or "collusive behaviours." Subject to any further appeal, I hope the determinations contained within this judgment bring some additional clarity to these issues.

Relevant statutory provisions

The 1998 Act

[5] The Ombudsman's powers are governed by the statutory regime set out in Part VII of the 1998 Act (see, inter alia, Gillen J in *Re X* [2007] NIQB 111, at para [18]). That has recently been amended by section 45 of the Northern Ireland Troubles (Legacy and Reconciliation) Act 2023 ("the Legacy Act"), which inserts a new section 50A into the 1998 Act, the purpose of which is to remove complaints about police conduct forming part of "the Troubles" (as defined in the Legacy Act) from the remit of PONI in favour of the new Independent Commission for Reconciliation and Information Recovery (ICRIR). If such complaints about legacy matters relating to police conduct remain with the ICRIR, the legal dispute at the heart of the present proceedings may become academic, or at least of much more limited relevance. It nonetheless requires to be grappled with in the context of the present cases. The discussion of the provisions of the 1998 Act below leave out of account the amendments made by the 2023 Act since, at all relevant times for the purposes of the present cases, the 2023 Act had no effect.

[6] The statutory scheme provides both important context and the necessary starting point for the central grounds advanced by the applicants. Section 52 of the 1998 Act is an important provision, governing the receipt and initial classification of complaints. Inter alia, the Ombudsman must determine whether a complaint is one to which section 52(4) applies (referred to in this judgment for convenience as a "qualifying complaint"), that 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" but *not* a complaint "in so far as it relates to the direction and control of the police force by the Chief Constable" (see section 52(5)). This dichotomy – between individual conduct of a member or members on the one hand and direction and control on the part of the Chief Constable on the other – is significant in the first case. Where the Ombudsman determines that section 52(4) does not apply to a complaint made or referred to her for some reason, she must refer it to another relevant authority as she thinks fit and notify the complainant of this (see section 52(6)). That other authority might be the Chief Constable, the Northern Ireland Policing Board ("the Policing Board"), the Director of Public Prosecutions (DPP) and/or the Department of Justice ("the Department"). Where the Ombudsman determines that section 52(4) does apply to the complaint, it "shall be dealt with in accordance with the following provisions of this Part", ie Part VII of the 1998 Act (see section 52(8)).

[7] That obligation – to deal with a qualifying complaint in accordance with the provisions of Part VII of the 1998 Act – is subject to section 52(9). If provides as follows:

> "If any conduct to which a complaint wholly or partly relates is or has been the subject of disciplinary or criminal proceedings, none of the following provisions of this Part shall have effect in relation to the complaint in so far as it relates to that conduct."

[8] In dealing with qualifying complaints, the Ombudsman must next consider whether it is suitable for informal resolution, which requires the complainant to give their consent and applies only where the complaint is not a "serious complaint" (ie alleging that the conduct complained of resulted in the death of, or serious injury to, some person, or of such other description as may be prescribed) (see section 53(1)-(2)). Where a complaint appears to the Ombudsman to be suitable for informal resolution, it shall be referred to the appropriate disciplinary authority which must seek to resolve it informally (see section 53(3)-(4)). Where that process is inapposite or unsuccessful, the disciplinary authority is to refer the complaint back to the Ombudsman (see section 53(6)). Informal resolution was unlikely to be appropriate in relation to any of the matters giving rise to these proceedings. However, the statutory obligations to consider informal resolution and pursue it in certain cases may be relevant to a proper understanding of the Ombudsman's functions.

[9] Where a complaint is not suitable for informal resolution, or where the complaint has been referred back to the Ombudsman from an unsuccessful informal resolution process, the complaint must be formally investigated either by an officer of PONI or a police officer (see section 54(1)). Where the complaint is a serious complaint, as defined in section 50(1), it must be investigated by PONI. Where the complaint is not a serious complaint, the Ombudsman can have it formally investigated by her own officers or refer it to the Chief Constable for formal investigation by a police officer on her behalf.

[10] Section 55 permits the Ombudsman to consider other matters. These include matters referred to her by the Policing Board, the Department, the Secretary of State or the Chief Constable. This section also permits the formal investigation "of [her] own motion" of any matter which "appears to the Ombudsman to indicate that a member of the police force may have (i) committed a criminal offence; or (ii) behaved in a manner which would justify disciplinary proceedings; and … is not the subject of a complaint" if that appears to her desirable in the public interest (see section 55(6)). The Ombudsman's functions are not, therefore, wholly circumscribed by the need for a complaint about a particular matter. Unsurprisingly, she has the power to investigate issues which come to her attention – either in the course of an ongoing investigation or otherwise – which she considers it in the public interest to enquire into. However, this arises where she considers that a police officer may have committed a criminal or disciplinary offence.

[11] The process for a formal investigation by the Ombudsman is sketched out in section 56. An officer of the Ombudsman must be appointed to conduct the investigation. The Department may by order provide that any provision of the Police and Criminal Evidence (Northern Ireland) Order 1989 shall apply; and it has done so (see the Police and Criminal Evidence (Application to Police Ombudsman) Order (Northern Ireland) 2009). At the end of an investigation under section 56, the person appointed to conduct the investigation shall submit a report ("the investigation report") to the Ombudsman (see section 56(6)).

[12] Sections 58 and 59 are important in the present context. They provide for steps to be taken *after* investigation by the Ombudsman, either in terms of criminal proceedings or disciplinary proceedings against a police officer.

[13] Section 58 of the 1998 Act is in the following terms:

> "(1) The Ombudsman shall consider any report made under section 56(6) or 57(8) and determine whether the report indicates that a criminal offence may have been committed by a member of the police force.
>
> (2) If the Ombudsman determines that the report indicates that a criminal offence may have been

committed by a member of the police force, [she] shall send a copy of the report to the Director [of Public Prosecutions] together with such recommendations as appear to the Ombudsman to be appropriate.

(3) Where a report is sent to the Director under subsection (2), the Ombudsman shall, at the request of the Director, ascertain and furnish to the Director all such further information in relation to the complaint or matter dealt with in the report as appears to the Director to be necessary for the discharge of his functions."

[14] The Ombudsman must therefore consider the investigation report – whether produced by one of her own officers under section 56(6) or by a police officer who has been appointed to formally investigate it on her behalf under section 57(8) – and then "determine whether the report indicates that a criminal offence may have been committed by a member of the police force." If the Ombudsman determines that the report indicates that a criminal offence may have been committed by a member of the police force, she shall send a copy of the report to the DPP together with such recommendations as appear to her to be appropriate.

[15] If there is no indication in the investigation report that a criminal offence may have been committed by a member of the police force and the complaint is not a serious one, the Ombudsman may determine that the complaint is suitable for resolution through mediation (see section 58A). On the other hand, if the Ombudsman determines that the investigation report does not indicate that a criminal offence may have been committed by a member of the police force, it may still be the case that she should refer the matter for disciplinary proceedings against that officer. That is addressed in section 59. This is a complicated provision but its net effect is that the Ombudsman must consider the question of disciplinary proceedings in circumstances where (a) the complaint is not suitable for resolution through mediation; (b) the Ombudsman considers that the complaint is suitable for resolution through mediation but either the complainant or member concerned does not agree to mediation; (c) attempts to resolve the complaint by way of mediation have been unsuccessful; (d) the DPP decides not to initiate criminal proceedings in relation to the subject matter of a report which the Ombudsman has sent to him; or (e) criminal proceedings so initiated have been concluded.

[16] Having considered the question of disciplinary proceedings, pursuant to section 59(2) the Ombudsman must then:

"… send the appropriate disciplinary authority a memorandum containing—

(a) [her] 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 [her] reasons for making that recommendation; and

(c) where [she] recommends that disciplinary proceedings should be brought, such particulars in relation to the disciplinary proceedings which [she] recommends as [she] thinks appropriate."

[17] No disciplinary proceedings are to be brought by the appropriate disciplinary authority before it receives the memorandum from the Ombudsman (see section 59(3)). The Policing Board is responsible for disciplinary proceedings in relation to senior officers; and the Chief Constable is responsible for disciplinary proceedings in relation to officers who are not senior officers. The Ombudsman has powers to direct the Chief Constable to bring such disciplinary proceedings, after consultation with him, where she has recommended that such proceedings be brought but he is unwilling to do so; it is then his duty to comply with such a direction. The Ombudsman then has some continuing oversight over disciplinary proceedings brought by the Chief Constable pursuant to a recommendation or direction from her (see section 59(5)-(7) and (9)); but this is limited (see *Re Police Ombudsman's Application* [2024] NIKB 88).

[18] Although, as noted above, a complaint will not be a qualifying complaint if and insofar as it far as it relates to the direction and control of the police force by the Chief Constable, under section 60A(1) of the 1998 Act the Ombudsman has some role in investigating broader issues which may be service-wide. Section 60A(1) provides that:

"The Ombudsman may investigate a current practice or policy of the police if –

(a) the practice or policy comes to [her] attention under this Part, and

(b) [she] has reason to believe that it would be in the public interest to investigate the practice or policy."

[19] Where the Ombudsman decides to conduct an investigation of this type, she must immediately inform the Chief Constable, the Policing Board and the Department of her decision and her reasons for making it (see section 60A(3)). The result of such an investigation is not governed by sections 58-59, discussed above, where the Ombudsman considers an investigation report under section 56(6) or

57(8). Rather, where she investigates a policy or practice pursuant to section 60A, she must report on the investigation to the Chief Constable and the Policing Board and, in certain circumstances, to the Secretary of State and/or Department (see section 60A(4)-(6)).

[20] The Ombudsman must also make certain other reports relating to her functions under section 61, which I do not consider relevant for present purposes. These are generally statistical and corporate-style reports on the functioning of her office (OPONI) which will be laid before the Assembly or Parliament, as appropriate.

[21] These proceedings are centrally concerned with the meaning and effect of section 62, entitled 'Statements by Ombudsman about exercise of [her] functions', although the statements so issued are frequently referred to as 'reports.' Section 62 provides as follows:

> "The Ombudsman may, in relation to any exercise of [her] functions under this Part, publish a statement as to [her] actions, [her] decisions and determinations and the reasons for [her] decisions and determinations."

[22] Section 63 relates to restrictions on disclosure of information received by the Ombudsman or one of her officers. It is potentially relevant to the question of publication of information in a section 62 statement. The general rule is that no information received by the Ombudsman or any of her officers in connection with any of the functions of the Ombudsman under Part VII shall be disclosed by them. However, this is subject to a number of exceptions. Such information may be disclosed to other PONI officers; to the Department or Secretary of State; for the purposes of any criminal, civil or disciplinary proceedings; or in a summary or general statement which does not identify the source or (unless the Ombudsman thinks it necessary in the public interest) the subject of the information. An important exception in the present case, however, is that such information may be disclosed "to other persons in or in connection with the exercise of any function of the Ombudsman." Some additional leeway in terms of disclosing identities is provided to the Ombudsman in relation to reports under section 60A (see section 63(2A)). Generally, however, any person who discloses information in contravention of section 63(1) shall be guilty of an offence (see section 63(3)).

The 2000 and 2001 Regulations

[23] Section 64 of the 1998 Act provides that the Department may make regulations as to the procedure to be followed under Part VII (see section 64(1)); and that it must make regulations providing for various matters, including procedures for the making of complaints (see section 64(2)). One of the further matters for which the Department must provide by regulations is "that any action, determination or decision of a prescribed description taken by the Ombudsman shall

be notified to prescribed persons within a prescribed time and that, in connection with such a notification, the Ombudsman shall have power to supply the person notified with any relevant information" (see section 64(2)(j)). The respondent also relies upon section 64(2)(n) which requires the Department to make provision "for enabling the Ombudsman, in such cases as may be prescribed, to make a recommendation to the Chief Constable for the payment by the Chief Constable to the complainant of compensation of such amount as the Ombudsman considers appropriate (but not exceeding such amount as may be prescribed)."

[24] The Department may also by regulations provide that, subject to exceptions, the complaints regime shall not apply to a complaint about the conduct of a police officer which took place more than the prescribed period before the date on which the complaint is made or referred to the Ombudsman; and that the Ombudsman shall not investigate any matter referred to her if the relevant actions, behaviour or conduct took place more than the prescribed period before the date on which the reference is made (see section 64(2A)). This allows the Department to impose a time limit on historic investigations, subject to exceptions. The Secretary of State may also make similar regulations for purposes connected with excepted or reserved matters (see section 64A).

[25] In 2001, before policing and justice was devolved, and so before the rule-making power in section 64 of the 1998 Act was conferred on the Department, the Secretary of State made the RUC (Complaints etc) Regulations 2001 (SR 2001/184) ("the 2001 Regulations") under section 64 of the 1998 Act. There were also earlier regulations in the form of the RUC (Complaints etc) Regulations 2000 (SR 2000/218) ("the 2000 Regulations"), although they are less significant for present purposes.

[26] In light of some of the arguments in these cases, it is worth citing regulation 27 of the 2000 Regulations, which is in the following terms:

> "(1) Where the Ombudsman is satisfied that a complaint has been substantiated, the Ombudsman may recommend to the Chief Constable that he should pay compensation to the complainant where:
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> (a) the complainant has suffered measurable financial loss resulting from the action complained of, or
>
> (b) the complainant suffered physical injury, or
>
> (c) the complainant has suffered considerable distress or inconvenience.

(2) The sum recommended for compensation shall not exceed that payable in the small claims court.

(3) It shall not be disclosed in any criminal or disciplinary proceedings that compensation has been recommended or paid."

[27] The 2001 Regulations apply to any complaint made on or after 6 November 2000 or to any other matter brought to the Ombudsman's attention on or after that date. Regulations 5 and 6 are both important in the context of the present applications. Regulation 5 sets out conditions to be met for complaints to be received under section 52(1) of the 1998 Act and dealt with in accordance with the provisions of Part VII. A complaint must be made by, or on behalf of, a member of the public. It must also be about the conduct of a member which took place not more than 12 months before the date on which the complaint is made or referred to the Ombudsman under section 52(1) (see regulation 5(2)). That time limit is subject to exceptions in regulation 6, discussed further below. There are additional requirements in regulation 5(3) which are designed, amongst other things, to ensure that the investigation of a complaint is not duplicative or repetitive where it has previously been considered in certain circumstances. Of significance in the third case is the requirement in regulation 5(3)(f) that the complaint must be one which "has not otherwise been investigated by the police."

[28] Regulation 6 of the 2001 Regulations sets out some exceptions to these requirements. So, the time limit in regulation 5(2) does not apply where certain conditions are met and the Ombudsman believes that the complaint should be investigated because of the gravity of the matter or the exceptional circumstances. Importantly, regulation 6(5), which reflects section 52(9) of the 1998 Act, provides as follows:

> "If any conduct to which a complaint wholly or partly relates is or has been the subject of disciplinary or criminal proceedings, the Ombudsman shall have no powers in relation to the complaint in so far as it relates to that conduct."

Summary of the parties' arguments

[29] As noted in the leave ruling, the overarching theme of the applicants' submissions is that the practice of the Ombudsman in legacy cases has developed far beyond her intended statutory role. They emphasise the carefully crafted, calibrated and sequential structure of the powers and functions set out in the 1998 Act and the limited nature of the statutory determinations which (they submit) the Ombudsman is required to make. These are centred on whether a complaint can be resolved informally and, if an investigation is required, thereafter whether a criminal offence may have been committed requiring referral to the DPP and/or whether a

disciplinary offence may have been committed requiring referral to the appropriate disciplinary authority. When the focus remains on these functions, the applicants submit that the Ombudsman may properly be seen to be primarily an investigative authority (much like the police) whose role is to act as a filter and onward referrer into *other* processes, namely criminal prosecution and/or disciplinary proceedings. However, it is the decision-makers within those other processes which are charged with making substantive determinations about whether a police officer has acted in a way which amounts to criminal conduct or professional misconduct.

[30] On the applicants' case, if a decision condemning a police officer or officers for conduct which amounts to misconduct or criminal conduct is in prospect, the Ombudsman should pass the matter on to the further decision-maker (whether the DPP and the courts or the appropriate disciplinary authority) whose process will provide a bespoke procedural regime containing a wide range of safeguards for an accused officer. Instead, on the applicants' case, the Ombudsman has taken onto herself an extra-statutory role, through the mechanism of publication of section 62 statements, which sets up her office as not only an investigator but also as the arbiter of conduct in respect of officers whose reputations may be tarnished by the publication of a section 62 statement. The applicants complain that the practice adopted by the Ombudsman, using her section 62 power, results in police officers being condemned in the public eye, without their having had the benefit of the protections built into the criminal justice or police disciplinary systems. Rather, they assert that once the Ombudsman has made the required statutory determinations about referral for criminal or disciplinary proceedings, she is functus officio. Her power under section 62, such as it is, is to explain the reasoning for the statutory determinations she has made in relation to referral (or not) for criminal or disciplinary proceedings; but certainly not for her to reach a conclusion in substance on the propriety of police officers' conduct which has been the subject of a complaint to her. They draw attention to a range of 'findings' or statements within the section 62 statements which are the subject of these proceedings which, they submit, clearly go beyond the Ombudsman's proper function under Part VII of the 1998 Act. For instance, in the JR217 case, Mr McMillen made the vivid submission that, although his client and another officer had been prosecuted and acquitted in relation to perverting the course of justice, the effect of the Ombudsman's report was to say, in terms, "You got off but we know you did it" and/or that, "They're lucky they got away with it." In addition to relying upon the text of the 1998 Act and the Court of Appeal's judgment in *Hawthorne and White*, the applicants also rely upon the doctrine that fundamental rights (here, article 6 rights to fair process and article 8 rights in relation to reputation) should not be adversely affected or overridden by general or ambiguous words in a statute (see, for instance, *R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, at 575).

[31] In response, the Ombudsman naturally relies upon the breadth of the wording of section 62 (see para [21] above) and the fact that it is a bespoke provision which does not find a ready analogue in other police complaints regimes, including some upon which the applicants rely in their analysis. She contends that she has a

wide discretion as to how she describes the outcome of investigations undertaken by her, particularly where there are no criminal proceedings and no disciplinary proceedings. This may often arise in the context of legacy investigations because, in circumstances where historic conduct is investigated, it is frequently the case that no disciplinary proceedings could now be brought because the relevant officers have since retired (or, indeed, may have passed away). In many such cases, the resolution of the complainants' complaints and concerns can therefore really only be achieved by her explanation of what her investigation has uncovered and her analysis of the conduct examined. Mr McKay submitted that, given the permissive terms in which section 62 is framed, provided the Ombudsman's statement did not purport to state or determine that criminal conduct or misconduct had occurred – and provided the public statement did not relate to a police policy or practice (in breach of section 60A) nor offend a non-disclosure obligation in section 63A – the respondent had a very wide leeway to say whatever she wanted in any such statement. In doing so, he relied both on the Ombudsman's discretion and judgment as to how she should exercise any of her powers under section 51(4) of the Act and previous judicial observations as to the extent of the discretion available to the Ombudsman (for instance, *Re Martin's Application* [2012] NIQB 89, at para [30]). In light of this, the respondent's primary position was that it is in fact open to her to make a finding of collusion in principle. However, out of caution, she has used the phrase "collusive behaviours" to mean "discrete behaviours that are indicative of collusion but may or may not, individually or cumulatively amount to collusion"; and on the basis that this cannot amount to an adjudication of guilt because collusion is not itself an offence.

[32] Significantly, the respondent also submitted that the substance of the applicants' challenges had already been resolved in the *Hawthorne and White* litigation discussed in detail below. It is a feature of this litigation that *both* sides pray in aid the decision of the Court of Appeal in *Hawthorne and White*. On the respondent's case, the section 62 reports about which the applicants complain (and the particular statements within those reports which are particularly challenged) are consistent with what the Court of Appeal considered permissible in the earlier *Hawthorne and White* case. That is a key issue of contention in these applications.

[33] The applicants' cases have obviously proceeded only upon the grounds upon which leave was granted (see the summary at para [104] of the leave ruling). Many of the applicants' proposed grounds fell away in light of the court's analysis of the issue of standing and because, properly understood, several of the intended grounds represented in my view an inappropriate attempt to take issue with the merits of the Ombudsman's conclusions in a manner which was not consistent with the proper role of the court exercising its supervisory jurisdiction. The grounds upon which leave was granted did, however, capture the main issue concerning the legal dispute as to the proper effect and reach of the Ombudsman's powers.

The *Hawthorne* and *White* litigation

Consideration at High Court level

[34] The scope of the Ombudsman's powers under section 62 of the 1998 Act was considered in a previous application for judicial review brought by two retired police officers, Messrs Hawthorne and White, relating to the publication by the present Ombudsman's predecessor of a report into the notorious Loughinisland atrocity ("the Loughinisland report"). There was a slightly unusual history to that case; but it progressed in due course to the Court of Appeal. I repeat below much of the analysis of that litigation which was set out in the leave ruling the present cases.

[35] There was no serious dispute between the parties about the propositions advanced in the initial judgment of McCloskey J in *Re Hawthorne and White* [2018] NIQB 5, at paras [54]-[56], (a) that the correct construction of a public statement issued by the Ombudsman is a matter for the court and (b) that the appropriate test in that regard is how the text would be understood by "the hypothetical impartial, fair minded and reasonably informed reader", reading the text in context and the report as a whole.

[36] McCloskey J also indicated that a determination that there had been collusion was a matter of the utmost seriousness for professional police officers and appeared also to adhere to the view, in that case at least, that a determination that officers had engaged in collusion was a determination that they had been guilty of criminal conduct (see paras [74] and [112] of his judgment).

[37] Finally, for present purposes, McCloskey J accepted that section 62 of the 1998 Act gave the Ombudsman a "wide discretion" in formulating the contents of a public statement but also made clear that this discretion was "not unfettered" and had to be exercised harmoniously with the remainder of the statutory scheme, amongst other things (see paras [85]-[86]). He considered that Parliament had not intended or authorised the type of findings and determinations made in the public statement in that case: see paras [94]-[95] and [99]. The emphasis in his judgment was on the lack of procedural fairness for officers, or retired officers, criticised in this way; but he also broadly found for the applicants on the question of the statutory scheme. His judgment is in my view supportive of the central case advanced by the applicants in these proceedings.

[38] The case was then re-heard at the High Court level since McCloskey J withdrew from it, after a recusal application was made at the remedies stage of the proceedings. Although the judge did not consider himself bound to recuse himself, he determined that it was appropriate to do so in the public interest and in what he considered to be the exceptional circumstances which arose in that case. The matter was therefore re-listed for hearing before a different judge, Keegan J, on a more limited basis. McCloskey J expressed the view that the analysis he had set out in his judgment, which had been given before he stepped aside from the case, could be approached as if it were an "advisory opinion."

[39] Keegan J then considered the *Hawthorne and White* case on the pure issue of statutory construction relating to whether or not the then Ombudsman had exceeded his powers: see [2018] NIQB 94. She did so on the basis of a revised public statement which had by then been issued. Contrary to McCloskey J's approach, she did not find any of the grounds made out and dismissed the application for judicial review. On the key issue of statutory construction, Keegan J said that she did not reach a concluded view on many of the arguments presented but adopted "a more straightforward approach", namely that it was a function of the Ombudsman to investigate complaints and that his section 62 power permitted him to report on that investigative function (see para [55]).

[40] In reaching this conclusion, Keegan J also took account of the statutory aims in section 51(4) of the 1998 Act – including the obligations on the Ombudsman to exercise his powers in the way which appeared to him best calculated to secure the efficiency, effectiveness and independence of the police complaints system and the confidence of the public in that system – and the Ombudsman's role in assisting to fulfil the state's obligations under article 2 of the European Convention on Human Rights (ECHR) (see para [67]). However, Keegan J also considered that the revised report did not contain a finding of either criminal or civil responsibility against any individual (see para [69]). In relation to the issue of collusion, Keegan J noted that whilst collusion had "sinister connotations" it "is not a criminal offence in itself" (see para [44] of her judgment). I return to that issue in further detail below. Broadly speaking, however, Keegan J's judgment is of assistance to the respondent in these proceedings.

[41] Nonetheless, Keegan J sounded a note of caution: although "not of a mind to step into the territory of critiquing modes of expression" in the course of a judicial review application, she said that it was "obvious that matters such as this need to be presented in a very careful way given the various parties who are affected."

The Court of Appeal's reasoning

[42] In light of the fact that their central complaint had not been upheld by Keegan J, the applicants then appealed to the Court of Appeal. It gave judgment in June 2020: see [2020] NICA 33; [2021] NI 357. For obvious reasons, it is the Court of Appeal's judgment in *Hawthorne and White* which demands the most attention, since it is binding on this court.

[43] The applicants were largely successful in their appeal. The Court of Appeal held, in particular (at para [21]), that:

> "The scheme of the legislation requires the Ombudsman to make determinations on whether a member of the police force may have committed a criminal offence or whether disciplinary proceedings are appropriate. The Ombudsman has no adjudicative role in respect of the

outcome thereafter. Part VII of the 1998 Act does not impose any express duty on the Ombudsman to substantiate or dismiss any complaint."

[44] At paras [39]-[41], Morgan LCJ said this:

> "Part VII of the 1998 Act is replete with actions, decisions and determinations in respect of which the Ombudsman is either under a duty or can exercise a power. Under section 52(3) the Ombudsman is under a duty to record and consider each complaint and to determine whether it is a complaint to which subsection (4) applies. Section 54 requires that where a complaint is a serious complaint the Ombudsman must investigate in accordance with section 56. Section 55(6) empowers the Ombudsman to decide to investigate a possible criminal offence or disciplinary misconduct without complaint. Section 58 provides for the action the Ombudsman must take on receipt of an investigative report and section 59 requires the Ombudsman to consider disciplinary proceedings in certain circumstances. Where he has not determined that a criminal offence may been committed he has to decide what recommendation to make to the disciplinary authority providing 15 reasons and particulars. Section 62 is carefully crafted so that it is in respect of those actions, decisions and determinations required under the 1998 Act that a PS can be made. It follows that there is an expectation that any PS will disclose what statutory steps were taken and the reasons for those steps
>
> [40] It is clear that the principal role of the Ombudsman is investigatory. The complaint defines the contours of the investigation and in this case informed the terms of reference about which no complaint has been made. There is no power or duty created by the statute for the Ombudsman to assert a conclusion in respect of criminal offences or disciplinary misconduct by police officers. The Ombudsman is required to provide recommendations to the DPP if he considers that a criminal offence may have been committed. Such a recommendation is a decision which could form part of a PS [public statement]. Once he makes such a recommendation he has no role thereafter apart from supplying information on request.
>
> [41] When making a report to the disciplinary authority he is again required to make a recommendation as to

> whether proceedings should be brought and a statement of his reasons for making the recommendation. When he recommends proceedings he must provide particulars. Thereafter, his only role is in communicating the outcome to the complainant. In respect of complaints about criminal proceedings and disciplinary misconduct he is not, therefore, given power to make any determination about the complaint."

[45] Although the Court of Appeal agreed with Keegan J that the section 51(4)(b) aim of securing confidence in the system was a significant material consideration in deciding whether to issue a public statement, and in what terms, it also said it was important to recognise that the 1998 Act itself had sought to set out a framework within which the confidence of *both* the public *and* the police force should be secured. At para [43], the Court of Appeal went on to explain as follows:

> "That framework specifically excluded any adjudicative power for the Ombudsman in the determination of criminal matters or disciplinary matters. The confidence of the public and police force was to be secured by way of the independence, efficiency and effectiveness of the investigation coupled with an adherence to the requirements of the criminal law before any finding of a criminal offence could be made against a police officer and the conduct of a disciplinary hearing with all the protections afforded within that system before disciplinary misconduct could be established. The thrust of the appellants' case is that the statutory scheme would be undermined if the Ombudsman was entitled to use section 62 as a vehicle for the making of such findings. We agree that the legislative steer is firmly away from the Ombudsman having power to make determinations of the commission of criminal offences or disciplinary misconduct but will address later how this affects the content of a PS."

[46] To like effect, at paras [54] and [55], the Court of Appeal said this:

> "[54] Finally, there is the issue of whether the Ombudsman can substantiate or dismiss a complaint. Where the complaint relates to the commission of a criminal offence or disciplinary misconduct by a member of the police force we consider that the scheme of the 1998 Act does not provide a role for the Ombudsman in the adjudication of the complaint. Where, however, the complaint is in respect of other matters such as incivility

> or unsatisfactory performance we consider that the intention of the Act as disclosed in section 64(2)(n) was to enable the Ombudsman to provide limited compensation and that such an award could only be made in circumstances where the complaint was satisfied. That is effectively recognised in the 2000 Regulations.
>
> [55] There may well be circumstances, of which this appeal may be an example, where a police officer will have resigned as a result of which the officer would no longer be subject to any disciplinary process. By virtue of section 63(1)(e) of the 1998 Act the Ombudsman has limited powers in a PS to identify a person to whom information relates if it is necessary in the public interest. That is a strict test. We accept that a person can be identified by inference, a so-called jigsaw identification. We do not consider that the power to make a PS provides the Ombudsman with the power to make determinations in respect of retired officers. We accept, however, that the statutory scheme does enable the Ombudsman in respect of such officers to indicate what recommendations might have been made, what reasons there were for the making of such recommendations and whether disciplinary proceedings would have been appropriate."

[47] The Court of Appeal therefore appears to have left some room for the publication of statements where there was no reference for criminal or disciplinary proceedings. This might include circumstances (a) where a criminal offence may have been committed but it was not possible to identify the particular officer concerned; (b) where a criminal offence may have been committed but it was not possible to refer the matter for prosecution because the alleged perpetrator had since died; (c) where disciplinary proceedings would have been appropriate but it was not possible to identify the particular officer concerned; (d) where disciplinary proceedings would have been appropriate but could not be pursued because the officer in question had resigned in the interim; and/or (e) where the complaint was about a performance issue which did not even get to the level of misconduct. These suggestions are drawn from paras [22], [54] and [55] of the Court of Appeal's judgment and from my own assessment of similar scenarios, given that those mentioned in para [22] of Morgan LCJ's judgment (at (a), (d) and (e) above) were expressed not to represent a comprehensive list of instances where a complaint might be well-founded but no recourse to the DPP or a disciplinary authority would be appropriate.

[48] Significantly, however, the Court of Appeal – at para [54] of its judgment – explained that, in circumstances where a determination about criminal or disciplinary proceedings could not be made, the statutory scheme enabled the

Ombudsman "to indicate what *recommendations* might have been made, what reasons there were for the making of such recommendations and whether disciplinary proceedings would have been appropriate" [italicised emphasis added]. Read in the light of the other portions of the judgment set out above, the Ombudsman is permitted to indicate what recommendations she would have made and why; but *not* whether the substance of the complaint was considered to amount to criminal conduct or misconduct in fact. That is to say, it is not for the Ombudsman to pre-judge the outcome of the further processes which she might have recommended, had they been possible, or to usurp the function of the criminal courts or the disciplinary authorities which, under the statutory scheme, are given the function of determining those issues.

[49] The Court of Appeal later noted that the Loughinisland case was one where the Ombudsman had not recommended prosecution. There was no evidence relating to a specific, identifiable officer which would justify this but the Ombudsman had nonetheless considered that the investigation had given rise to significant concerns in respect of disciplinary and/or corporate matters for the Royal Ulster Constabulary (RUC) and it was proposed to address these in a subsequent public statement (see para [29]).

[50] As I concluded at para [30] of the leave ruling:

> "The strong thrust of the Court of Appeal judgment, however, is that the Ombudsman's role is investigatory and not adjudicative or conclusory. She has no power to make determinations or adjudications on the substance of conduct which would amount to a criminal act or professional misconduct."

[51] In its judgment in *Hawthorne and White* the Court of Appeal also noted that the UK Government had relied upon the investigative role of the Ombudsman as contributing to the State's satisfaction of the article 2 ECHR investigative obligation. In this regard, the court drew an analogy with the decision of a coroner (or coronial jury) in an article 2 case, where they could not express an opinion on issues of criminal or civil liability but could set out conclusions of fact. At the same time, the Court recognised that the Ombudsman's role is not the same as that of a coroner or their jury (see para [50] of the judgment). Indeed, in their argument in this case the applicants relied upon the fact that the coroner is a judicial office-holder who explicitly *has* an adjudicative or decision-making function in relation to the substance of what happened, whereas the Ombudsman does *not* have an adjudicative role, as reiterated by the Court of Appeal (albeit there may be some similarity with the coroner's function in terms of onward referral to the DPP: see section 35(3) of the Justice (Northern Ireland) Act 2002). I return to the significance of article 2 ECHR to the issues in this case below.

The Court of Appeal's disposal and order

[52] The outworking of the Court of Appeal's reasoning in its decision in *Hawthorne and White* is contained in para [63] of its judgment, which is important in the context of the present cases. It states as follows:

> "Apart from the passages set out at paragraph 4.200, 9.9 and 9.40 the nine chapters of the substantive PS provide what the Ombudsman stated at paragraph 1.12, namely as comprehensive a narrative as possible. The determinations he made in the three offending paragraphs were not in our view decisions or determinations to which section 62 applied and overstepped the mark by amounting to findings of criminal offences by members of the police force. The remaining paragraphs were part of the narrative. We do, however, accept that in light of the families' complaint in the context of Article 2 it would have been appropriate for the Ombudsman to acknowledge that the matters uncovered by him were very largely what the families claimed constituted collusive behaviour."

[53] As I noted in the course of the leave ruling in this case, precisely what this paragraph means and how it is to be applied in future – particularly its final sentence – was an issue of debate in the course of the leave hearings in these three cases. The applicants' submissions described this paragraph as 'delphic.' These matters have, obviously, been the subject of further debate and submissions in the course of the substantive hearings. The present Ombudsman's position has been that the Court of Appeal indicated that it was generally permissible for her to make findings of "collusive behaviour" on the part of police officers, which is an approach which she has adopted in some of the statements under challenge in these proceedings. For my part, I do not consider that the Court of Appeal's judgment should be read in that way, for the reasons outlined below.

[54] In the first instance, it is important to recognise that the Court of Appeal's observation in relation to the 'collusive behaviour' issue is contained within this one sentence only. Aside from a brief suggestion about how the issue of remedy may be addressed, this observation is made at the very end of the Court of Appeal's judgment. Most importantly, it must be read in the context of all of the reasoning which preceded it, including in particular the clear holding that it is not for the Ombudsman to make findings (however expressed) that criminal conduct or misconduct has occurred. On the contrary, she was entitled to provide a "narrative." (I cannot accept the submission made on behalf of the respondent that paras [61]-[63] are "the crux of the judgment." In my view, the crux of the judgment is the preceding reasoning, discussed above.) Read in context, it seems clear that the Court of Appeal accepted that it was appropriate for the Ombudsman to describe the

results of her investigation, rather than merely the steps taken by her in the course of it. However, the court was clearly intending to draw a clear distinction between a permissible "narrative" and impermissible "determinations" in relation to criminal conduct or misconduct.

[55] It also seems to me to be clear that the Court of Appeal was envisaging that the Ombudsman should be given some additional leeway in terms of her "modes of expression" in cases where article 2 was engaged (and, one assumes, where her investigation was designed to be the primary means, or one of the primary means, by which the state's article 2 investigative obligation was discharged). However, one must consider carefully the words chosen by the Court of Appeal in this regard [with my italicised and bold emphasis below):

> "The remaining paragraphs were part of the narrative. We do, however, accept that in light of the families' complaint in the context of Article 2 it would have been appropriate for the Ombudsman to *acknowledge* that *the matters uncovered by him* were very largely ***what the families claimed*** *constituted* collusive behaviour."

[56] This does not appear to me to permit the Ombudsman to make a finding that collusive behaviour has occurred; nor that what he had uncovered constituted collusive behaviour. That would involve a determination by him of the substance of the complaint, contrary to all of the reasoning which had gone before in the judgment. Rather, he was entitled to set out ("acknowledge") certain facts ("the matters uncovered by him") as "part of the narrative." This would confirm to the complainant families either that those matters had occurred, or that the Ombudsman had found some evidential support for them having occurred, in circumstances where they (the families) "claimed" that those matters constituted collusive behaviour. Put another way, I consider that the correct reading of the final sentence of para [63] of the Court of Appeal's judgment only authorised the Ombudsman to state, as a matter of fact, that his investigation had uncovered circumstances which were largely "what the families claimed constituted collusive behaviour"; that is to say, that the Ombudsman could confirm his investigation supported the occurrence of facts upon which the families relied as founding *their* belief that there was collusion, without the Ombudsman expressing any qualitative view of his own on this issue.

[57] The Court of Appeal ordered that the Police Ombudsman must append a copy of its judgment as an appendix to the public statement in that case, meaning that any person considering the statement in future would be in a position to read it in conjunction with the report. The Ombudsman was not required to amend any of the substantive paragraphs of the public statement; but was required to add a single paragraph to the introduction in the following terms:

> "Paragraphs 4.200, 9.9 and 9.40 of this Public Statement must be read in the light of the judgment of the Northern Irish Court of Appeal in *Hawthorne's and White's Application* [2020] NICA 33, which is now included with this report as Appendix 6. As such these three specific paragraphs should not be construed or understood to amount to, or include, any findings by the former Police Ombudsman of any criminal offences by members of the police force."

[58] I have also had the opportunity to consider the text of the PONI report on Loughinisland with which the Court of Appeal was dealing. None of the passages mentioned in the Order above contain any express finding of criminal conduct or misconduct. The first (para 4.200) describes as "indefensible" a decision not to disseminate intelligence implicating senior members of loyalist paramilitary organisations, which may then have resulted in investigation of them in relation to arms importation. The second (para 9.9) expresses the view that the Ombudsman had seen "sufficient information to be satisfied that relationships existed between members of the Security Forces … and the UVF Unit, to whom the police attributed the murders …", as well as a statement that "the failure by police to investigate the veracity of intelligence that those responsible had been 'warned' by a police officer of their imminent arrest is inexcusable." The third (para 9.40) notes that many of the issues the Ombudsman had identified were "in themselves evidence of collusion" as defined by Judge Smithwick; and that, when viewed collectively, the Ombudsman had "no hesitation in unambiguously determining that collusion is a significant feature of the Loughinisland murders." The Court of Appeal's treatment of the first two of these paragraphs indicates that the Ombudsman can overstep the mark by making a qualitative judgment on the propriety of the police behaviour. The treatment of the third makes clear that a finding of collusion (as being a "significant feature") is unlawful, presumably on the basis that this would clearly also amount to criminal conduct or misconduct.

Summary of position leaving aside article 2 ECHR

[59] Notwithstanding the further argument which has been heard on these issues, my analysis of the Court of Appeal decision in *Hawthorne and White* remains broadly as set out in the leave decision. It can be summarised as follows:

(1) The Ombudsman's role under the 1998 Act is primarily investigatory.

(2) Although the Ombudsman is required to make certain decisions and determinations under the statutory scheme – such as whether to refer matters to the DPP or to disciplinary authorities – the clear finding of the Court of Appeal was that, as a matter of law, "there is no power or duty created by the statute for the Ombudsman to assert a conclusion in respect of criminal offences or disciplinary misconduct by police officers." To like effect, "In

respect of complaints about criminal proceedings and disciplinary misconduct [the Ombudsman] is not, therefore, given power to make any determination about the complaint." Put simply, the substance of the complaint – where it is a complaint of misconduct or criminal conduct – is not for the Ombudsman to determine herself. The extent of the Ombudsman's role is determining whether there "may" have been criminal conduct or misconduct warranting onward referral.

(3) Section 62 of the 1998 Act permits the Ombudsman to explain what she has done and why. That extends to explaining what she has done by way of investigation and, in particular, what referrals or recommendations she has made; or what referrals or recommendations she *would* have made but for one of the circumstances discussed above (see para [47]) which thwarted what would otherwise have been her intended course. However, section 62 does not create or amount to a power – which the Ombudsman does not otherwise enjoy under the 1998 Act – to make or publish determinations in substance as to allegations of misconduct or criminal conduct. This reflects the fact that her role is non-adjudicatory.

(4) That position is not affected by regulation 27 of the 2000 Regulations (see para [26] above). Whether taken alone or in conjunction with section 62 of the 1998 Act, that regulation does not confer a power on the Ombudsman to "substantiate" a complaint of misconduct or criminal conduct. It relates only to complaints which involve conduct falling short of police misconduct or criminal conduct (such as incivility or unsatisfactory performance). That reflects the secondary nature of the 2000 Regulations, which could not radically alter the Ombudsman's role as set out in the parent Act.

(5) The limits to the Ombudsman's role in terms of substantive decision-making – whereby the statutory scheme "specifically excluded any adjudicative power for the Ombudsman in the determination of criminal matters or disciplinary matters" – reflects the statutory purpose of holding in balance the confidence of both the public and the police force in the complaints system. The Ombudsman's role is to investigate matters fully, fearlessly and independently. However, thereafter the product of her investigation, where appropriate, is to lead to different decision-making processes in which the rights and interests of the public and the accused are protected by long-established rules and procedures.

(6) The Ombudsman's power to issue a public statement under section 62 of the 1998 Act must be exercised in conformity with the legal limits on her functions as discussed above. Even where, as mentioned at sub-para (3) above, the Ombudsman may properly wish to describe and explain referrals to the DPP or disciplinary authority which she *would* have made but now cannot, this does not enable her to "make determinations" in respect of criminal conduct or misconduct on the part of retired officers (see para [55] of

the Court of Appeal decision, set out at para [46] above). The same must apply to deceased officers or persons who must have been police officers but are unidentified. The limit to the Ombudsman's role, in terms of the *substance* of the complaint where criminal conduct or misconduct is alleged, is to describe what referrals and recommendations she has or would have made and the reasons for those (ie why a criminal or disciplinary offence "may" have been committed) without straying into a determination or finding that a criminal offence or disciplinary offence *was* committed.

(7) The question of whether particular wording in a section 62 statement has gone too far, or "overstepped the mark", is ultimately a question for the court, looking at the matter through the lens of how the wording would be understood by the "hypothetical impartial, fair minded and reasonably informed reader." I would simply add that such a reader would, of course, consider the Ombudsman's report as a whole.

(8) As is clear from the Court of Appeal's disposal of the matter in the *Hawthorne and White* case (and from para [31] of that judgment), a statement within a section 62 report may contravene the prohibition on the Ombudsman herself making a finding on criminal conduct or misconduct (and so be in excess of the Ombudsman's statutory powers so as to be unlawful) by amounting to such a finding even though the passage does not expressly say that officers have been guilty of criminal conduct or misconduct. Depending upon its terms, the narrative can itself amount to a substantiation of a complaint of criminal conduct or misconduct.

(9) The Ombudsman is, of course, permitted to make a statement describing what she has done. There should be no difficulty whatever in describing her own actions. She is, moreover, entitled to describe what decisions or determinations she has made as to how she, or her officers, dealt with or investigated the complaint.

What difference does article 2 ECHR make when it is engaged?

[60] The above analysis addresses the matter purely as an issue of pre-incorporation domestic law. Given what I have said at paras [40], [51] and [55] above, it is incumbent upon the court to also consider what effect, if any, the engagement of article 2 ECHR may have upon the powers of the Ombudsman in making a section 62 public statement. In the *Hawthorne and White* litigation, there was no dispute that article 2 ECHR was engaged in relation to the deaths at Loughinisland and the High Court and Court of Appeal proceeded on that basis. In para [50] of its judgment, the Court of Appeal agreed that the Ombudsman should "carefully consider [her] role in securing accountability in an art 2 case when considering whether to make a [public statement]." It also noted, however, that the Ombudsman was not the only vehicle for the delivery of securing accountability. The applicants' submissions picked up on this by pointing out that, like a police

investigation, a PONI investigation assists in securing accountability by leading to prosecutions in appropriate cases; and also that in any article 2 case in which the Ombudsman is involved, an inquest will also be likely to be held which is the primary means by which the state discharges its article 2 obligations.

[61] The Court of Appeal judgment nonetheless clearly envisages that the Ombudsman may provide a narrative which includes a measure of fact-finding. It is in the nature of the Ombudsman's function that this can only be provisional (at least for some purposes) since, if criminal or misconduct proceedings arose out of her investigation, those processes would involve and require their own fact-finding which would in no way be bound by any view of the facts taken by the Ombudsman or her investigating officer. However, although this may appear counter-intuitive given the Ombudsman's primary function as an investigator, the Court of Appeal clearly had no difficulty with some public explanation of the *product* of the Ombudsman's investigation. It appears to me that, although this is unexpressed in the Court of Appeal's judgment, this is likely to reflect the fact that article 2 was plainly engaged in the *Hawthorne and White* case.

[62] Reference was made by the High Court and Court of Appeal to the role of OPONI, attributed to it by the United Kingdom, in investigating deaths as part of the discharge of its article 2 functions. Mr McKay disavowed any requirement to 'read down' the 1998 Act in order to permit the Ombudsman to express herself as she has done in the first and second cases. At the same time, he submitted that there would be a lacuna in the discharge of the state's article 2 obligations (at least in some cases) if the Ombudsman did not provide reports; and that her functions were "imbued" with article 2.

[63] In my judgment, it is implicit within the Court of Appeal's judgment in *Hawthorne and White* that the engagement of article 2 does provide the respondent with some additional leeway in the exercise of her section 62 powers, over and above what would be available in a case where article 2 is not engaged, in terms of expressing findings of fact. It might be said that, in that context, her role is to some degree analogous to that of a coroner. She is still clearly constrained by the statutory scheme not to make express or implied findings of criminal conduct or misconduct, as explained above and as reflected in the final disposal in the *Hawthorne and White* case. However, where article 2 is engaged, a more fulsome explanation of the investigation and its results appears to me to be permissible than in cases where article 2 is not engaged.

[64] It seems to me that the primary reason for this is because of the emphasis, in terms of article 2 compliance, on transparency. Some of the argument in these cases focused upon the provisions of section 63 of the 1998 Act. Generally speaking, this is a highly restrictive provision which makes clear that the content and product of a PONI investigation is not to be disclosed and is not for public consumption. The approach of the respondent in these three cases (and, indeed, in the Loughinisland case) turns that on its head. I am not persuaded generally that, in issuing a section

62 public statement, the Ombudsman can simply rely upon section 63(1)(c) which permits the disclosure of information "to other persons in or in connection with the exercise of any function of the Ombudsman", where the function in question is the making of a public statement under section 62. A section 62 statement is to provide details of the Ombudsman's "actions, his decisions and determinations and the reasons for his decisions and determinations" in the context of "any exercise of his functions under this Part." That is to say, it is a power to explain the exercise of functions. It does not appear to me that the publication of a section 62 statement is a free-standing function for the purposes of section 63(1)(c). Otherwise, the Ombudsman could publish anything she wished in a section 62 statement, which is entirely at odds with the general purpose and the other provisions of section 63.

[65] However, in a case where article 2 ECHR is engaged and additional transparency may be required to satisfy article 2 requirements, I consider that section 63(1)(c) can be read in a wider fashion (pursuant to section 3 of the Human Rights Act 1998) such as to permit additional disclosure, whilst still complying with the constraints on the respondent's functions described in detail above.

The respondent's approach in these cases

[66] Having set out those prolegomena, I turn to the respondent's approach across the three reports which form the backdrop to these proceedings.

[67] In the report in the first case, the Ombudsman has indicated that a number of the complainant families have alleged that there was collusion in respect of police actions relating to the murders and attempted murders examined by the investigation. She goes on to say that "in order to properly address this issue", she has considered a number of various definitions of collusion which have been provided (see para 3.11 of the Operation Greenwich report).

[68] The respondent also said that, "In relation to the Police Ombudsman's *role in deciding on* a case where there was a complaint of collusion, the Court [of Appeal in *Hawthorne and White*] clarified at paragraph 63 as follows …" She then sets out para [63] of the Court of Appeal judgment (quoted at para [52] above) and adds (at para 3.33 of her report in the first case) that:

> "My interpretation of this judgment is that, in the absence of determinations of criminality or misconduct by the appropriate authority, my role is limited to commenting on the matters raised in a complaint. My investigation having established the detailed narrative based on the complaint, I can conclude whether the evidence identifies collusive behaviours on the part of the police, as alleged. In arriving at my conclusions on indicators of collusive behaviour I am mindful of the broad definitions of collusion provided by Lord Stevens and Judge Cory."

[69] It appears from this that the Ombudsman has taken a narrow view of the effect of the Court of Appeal's judgment to the effect that, provided determinations in respect of criminality or misconduct are avoided, she is permitted to comment on the matters raised in the complaint (which appears to include the substance of the matters raised rather than merely a description of her actions or investigation) and, indeed, that she is permitted "*conclude* whether the evidence identifies collusive behaviours." Taking this together with the references to properly addressing the issue (of complaints of collusion) and deciding on such cases, it seems clear that the respondent has proceeded on the basis – on her reading of the *Hawthorne and White* judgment in the Court of Appeal – that she has a role in determining whether collusive behaviours occurred, provided that particular forms of words are used or not used.

[70] A similar approach is evident in the report which is under challenge in the third case. The Ombudsman, having again referred to portions of the Court of Appeal's judgment in the *Hawthorne and White* litigation, says this:

> "My interpretation of this judgment is that, in the absence of determinations of criminality or misconduct by the appropriate authority, my role is limited to commenting on the matters raised in the complaint. My conclusions in respect of the complaints made by Messrs Toner, Crumlish, McGowan, and Kelly are outlined later in this public statement."

[71] Again, this suggests that the respondent considered it to be her role to express "conclusions" in respect of the subject matter of complaints. Indeed, in para 8.2 of that report, she stated that "the main purpose" of the public statement was "to address those complaints made …which I am permitted to investigate …"

[72] I am concerned that this approach does not fully understand and reflect the findings of the Court of Appeal, as expressed above, including in particular that it is not the role of the Ombudsman to substantiate the content of complaints, save in the most limited of circumstances.

What should "collusive behaviours" reasonably be understood to mean?

[73] In both the first and second cases an issue has arisen as to precisely what the Ombudsman means when reference is made to "collusion", or where there is reference to the related concept of "collusive behaviours." The Ombudsman has discussed possible definitions of collusion at some length in the statements which are the subject of the first and second cases. She noted that there is no universally agreed definition of collusion. She goes on to discuss a number of definitions or descriptions of the concept which have previously been used, including by Sir John Stevens, by Judge Peter Cory and by the Smithwick Tribunal, each of whom

has addressed allegations in this sphere. The Ombudsman has also drawn attention to the fact (see para 3.24 of the Operation Greenwich statement) that one of her predecessors described collusion as "something which may or may not involve a criminal act" and she said that she broadly concurred with his views. This ties in with the observation made by Keegan J in the *Hawthorne and White* case (see para [40] above) that collusion "is not a criminal offence in itself."

[74] Nonetheless the Ombudsman did identify a number of common features in the various approaches to the concept of collusion (set out at para 3.25 of her report in the first case). Significantly, in my view, one of those common features was that "collusion by its nature involves an improper or unethical motive." I consider that to be correct. In its ordinary and natural meaning, certainly as used in this jurisdiction and in the legacy context, "collusion" relates to actions or inactions which are motivated by a desire to assist those doing wrong: the antithesis of the proper police function. (In the report in the second case, the Ombudsman makes the same point but with slightly different phrasing in one instance and then, in another, in the same terms as the report in the first case: see para 18.121, with the word "ethical" obviously used in error instead of the word "unethical.")

[75] The applicants contend that the findings of "collusive behaviour" are equivalent to findings of collusion. I discuss the use of that particular phrase below and broadly agree with the applicants' submission in this regard. Where the phrase "collusive behaviour" (or sometimes "collusive activity") appears in the impugned statements, one could equally read in the word "collusion" without any incongruity or dissonance.

[76] Where collusion is understood to be found, however, I also agree that any such finding almost certainly represents a finding that police misconduct has occurred. In the context of the present cases, any finding of collusion (as alleged by the complainants) is also highly likely to amount to a finding that a criminal offence has been committed by a police officer. There are a variety of offences which might be relevant in this regard, such as aiding, abetting, counselling or procuring a substantive offence committed by another; conspiring or attempting to pervert the course of justice; assisting an offender; and/or withholding information. But in the rare circumstances, if any, where collusion does not represent a criminal offence in this context, it will at the very least have constituted a disciplinary offence, particularly bearing in mind the Ombudsman's identification of an improper or unethical motive as being a common, inherent feature.

[77] The applicants have referred to a number of possible disciplinary offences which would be relevant in this regard, including (a) *discreditable conduct* (including where a member acts in any manner reasonably likely to bring discredit on the reputation of the police force); (b) *neglect of duty* (including where a member without good and sufficient cause neglects or omits to attend to or carry out with due promptitude and diligence anything which it is his duty as a member to attend to carry out); and (c) *wilful or careless falsehood* (including where a member either

wilfully or without proper authority or through lack of due care destroys or mutilates any record or document made or required for police purposes). The respondent has referred, in her reports in the first and second cases, to the disciplinary offence of neglect of duty under the Royal Ulster Constabulary (Discipline and Disciplinary Appeals) Regulations 1988 ("the 1988 Discipline Regulations"). A Discipline Code is set out in Schedule 1 to those Regulations which includes each of the offences referred to above and relied upon by the applicants. Another such offence is *improper disclosure of information*, which is committed, inter alia, where a member without proper authority communicates to any person any information which he has in his possession as a member.

[78] Acting with an improper or unethical motive in any of the ways identified by the Ombudsman as constituting a "collusive behaviour" would inevitably, in my view, fall within the purview of discreditable conduct. Where a policing task has been delayed or not carried out for an improper or unethical motive, that would inevitably also be neglect of duty, *viz* failing to perform the officer's duty "without good and sufficient cause."

[79] I turn back then to how the impartial, fair minded and reasonably informed reader would read and understand the references to "collusive behaviours" in the relevant reports. It is of note that the Ombudsman further indicated that she was "in favour of broad definitions" of collusion "*encompassing* collusive behaviours" [italicised emphasis added], which she considered to reflect the views of Lord Stevens and Judge Cory (see para 3.26 of the report in the first case). Having considered the Court of Appeal's judgment in the *Hawthorne and White* case, the Ombudsman made the statement at para 3.33 of her report in the first case which is set out at para [68] above. The position is therefore complicated further by the Ombudsman's reference to, on the one hand, *concluding* that the evidence *identifies* collusive behaviours (ie that collusive behaviours occurred); and, on the other hand, finding that there were *indicators* of collusive behaviours (ie that collusive behaviours may have, or might have, occurred).

[80] In my judgment, having considered the reports in detail and having reflected on the various submissions made to me on the issue, where the Ombudsman has indicated that "collusive behaviours" have been found, the objective reader would not consider that this represents a finding of behaviours *which might or might not* constitute collusion (as Mr McKay urged upon me); but, rather, would consider that this represents a finding of different behaviours *each of which amounted to a type of* collusion. That is the natural meaning of the words and phrase, in which the noun ("behaviours") is described by an adjective ("collusive"), characterising the quality of the behaviours; and where the natural meaning of the adjective is 'having the quality of collusion' rather than merely 'being suggestive of the possibility of collusion'. The phrase may well have been coined by the complainant families in the Loughinisland case, since the Court of Appeal referred to "what the families claimed constituted collusive behaviour." It appears to me unlikely that complainants would

have been using the phrase only in the attenuated sense referred to by the respondent.

[81] This interpretation is also supported by the context and a wider reading of the relevant reports:

(i) First, as indicated above, the Ombudsman has described herself as reaching conclusions on whether the evidence identifies collusive behaviours. This does not seem to merely to be a reference to setting out factual matters but, rather, to reaching a qualitative judgment on the nature of the actions which have been found.

(ii) Second, as pointed out at para [47] of the leave ruling, in other portions of the statements, reference is made simply to addressing the issue of 'collusion' (and see paras [138] and [142] below).

(iii) Third, in the report in the first case, at para 3.26, the respondent indicated that she was in favour of broad definitions of collusion "encompassing" collusive behaviours, which would suggest to the reader of that report that collusive behaviours were an instance of collusion. In her report in the second case, at the very end of Chapter 3, it is noted that the respondent's "conclusions in respect of the allegations of collusion are outlined later", leading to the same view.

(iv) Fourth, there appears to be a limited basis for the suggestion that the identification of "collusive behaviours" is only the identification of behaviours which may *or may not* constitute collusion. The word "indicator" has been used on a small number of occasions; but in reference to indicators *of* collusive behaviour, rather than to clarify that collusive behaviours are simply possible indicators that collusion may have occurred.

(v) Fifth, and relatedly, there are occasions where the Ombudsman has referred to something (such as the destruction of records) being "evidence of collusive behaviour." This does not make sense if, as the Ombudsman's submissions would suggest, the report was merely identifying evidence *of evidence* which *may* suggest collusion. It reads much more naturally as a reference to evidence of behaviour which *was* collusion.

(vi) Sixth, the Ombudsman has found in a number of respects that the complainants' concerns "about collusive activity are legitimate and justified." That does not suggest that the respondent was merely setting out behaviours which may or may not be indicative of collusion. Rather, it reads more naturally as a conclusion that the families were right to be concerned that collusion (in some form) had occurred.

(vii) Seventh, one may ask rhetorically why the Ombudsman would be so careful to set out findings of behaviours which were merely suggestive that collusion *might have* occurred. That behaviours amounting to collusion (on the respondent's definition) were being found is also supported by the Maxwellisation process discussed below.

(viii) Eighth, if the behaviours found were merely suggestive that collusion may *or may not* have occurred, it is difficult to understand the focus on these matters in both the Ombudsman's public statements or announcements about the impugned reports and, indeed, the complainants' response to them.

[82] Since the reports in question have to be read as a whole (and, indeed, an informed reader may well have read a number of relevant reports in this regard), the cumulative effect of these matters reinforces the interpretation which I consider to be the natural one.

[83] In a number of the 'Maxwellisation' letters sent by the respondent which are contained within the evidence in these cases, it is noted that the proposed public statement which she was disclosing to the former officers for comment "will not make any express or implied finding of criminal or civil liability against any person." The Ombudsman expressly recognised that she had "no power to make any such findings." This statement should also have extended to express or implied findings of misconduct. A key battleground in these proceedings has been whether the words used amount to an implied finding of such matters. It is of note, however, that the Ombudsman's correspondence also explained that her draft statements did contain "proposed criticisms" of officers, formed on the basis of her (then provisional) opinion on the basis of evidence considered by her. The correspondence noted that the statement was "necessarily composed of a series of evaluative judgements on the part of the Police Ombudsman, based on the evidence available, and should therefore be read accordingly." The same correspondence recognised that the respondent must act in accordance with the requirements of procedural fairness towards those whom she intended to criticise. That is because the investigation "included consideration by the Police Ombudsman of [the applicants'] actions and conduct as a former police officer" and excerpts from the proposed statements were provided which were considered "may be critical" of the applicants and so may adversely affect their interests "including your career and/or reputation." Again, all of this appears to me to point to the Ombudsman making significant findings about collusion having occurred which are, at the very least, in tension with the submissions made in the course of these proceedings about the limited meaning to be given to the phrase "collusive behaviours."

[84] Finally, when one considers the matters which are identified as "collusive behaviours" (as well as those which are not), in my view the objective reader would understand the Ombudsman to be making findings of behaviours which (in her view) amounted to collusion, in the sense described above. That also arises from the Ombudsman's comment in the first report (at para 22.133) to the effect that the "the

families' concerns about collusive activity are legitimate and justified" which, as I have said, appears to me to indicate a qualitative judgment on the part of the Ombudsman about the quality and propriety of police actions which go beyond her proper role as discussed above; and to similar effect in the second report (at paras 18.142 and 18.143, read together).

[85] Indeed, the complainants in these cases appeared to consider that their complaints of collusion had been upheld; or they certainly presented it as such. In one press release in relation to the Operation Greenwich Report, by way of one example only, the complainants' solicitors said that PONI had "identified actions and omissions of police, which in her view, constitute collusive behaviours, *in essence that collusion was a significant feature* in the 19 murders …", adding that this report "provides yet more irrefutable evidence of the State's overarching policy of *collusion*, to murder its own citizens." A solicitor for one of the firms representing complainants commented on social media that, "Collusive behaviour is collusion, there is no distinction between the two", recognising that the Ombudsman was being cautious in her use of language. Further press reports in relation to the first two reports chose to elide or equate 'collusive behaviours' with a finding of collusion. These sometimes represented the complainants' understanding of the findings or those of NGOs, who are informed and experienced in this field, but who expressed the view that there was no different between "collusive behaviours" and "collusion." The applicants placed a number of news reports before the court which show that many simply viewed findings of collusive behaviours as amounting to findings of collusion. This is clear evidence that the respondent's reports were not being read in the way in which, in these proceedings, it was contended on her behalf that they ought to be.

Grounds upon which leave was granted in the first case

[86] In the first of the three applications for judicial review dealt with in this judgment, I granted leave on the following issues:

(a) Whether the respondent had acted ultra vires by investigating or reaching conclusions in respect of non-current practices or policies of the police force (ground 4(i));

(b) Whether the respondent had acted ultra vires by investigating or reaching conclusions in respect of matters which related to the direction and control of the police force by the Chief Constable (ground (4)(iv));

(c) Whether the respondent had acted ultra vires on the basis of the limitations upon her powers (discussed above) to make findings, whether express or implied, in relation to criminal conduct or misconduct, either generally or specifically in relation to the weapons importation issue dealt with in the Loughinisland report (grounds (5) and (6));

(d) Whether the respondent acted irrationally by concluding that those subject to paramilitary threat should have been advised of that without sufficient evidential basis to support those conclusions (ground (11)(ii)).

[87] It is convenient to deal with the issues mentioned at sub-paragraphs (a), (b) and (d) above before turning to the question of whether the Ombudsman's findings have gone beyond what is permissible.

Practices, policies and 'direction and control' issues

[88] I did not grant leave in relation to the applicant's complaint that the Ombudsman has used her public statements to make findings against, or criticisms of, the police force as a whole, rather than focusing on the alleged misconduct of individual and identifiable officers (see paras [49]-[53] of the leave ruling). Nonetheless, there is an issue as to whether the respondent has impermissibly investigated either a non-current policy or practice on the part of the police or a matter which is about the direction and control of the police force.

[89] The prohibition on investigating historic policies or practices on the part of the police arises from section 60A of the 1998 Act (see paras [18]-[19] above). The Ombudsman is permitted to investigate a current practice or policy of the police in certain circumstances, in which cases there are certain procedural requirements to be followed. The special regime for investigating policies and practices appears to have been introduced because the primary work of the Ombudsman is intended to be the investigation of specific conduct in individual cases. The express limitation of this power to a "current" practice or policy is understood to mean that there is no such power at all in relation to a non-current practice or policy. Indeed, the Court of Appeal proceeded on that basis in para [52] of its judgment in *Hawthorne and White*:

> "We consider that the express reference to the practice or policy being current was designed to exclude investigations into historic practices or policies."

[90] The line between what may, and may not, permissibly be investigated can, however, be difficult to draw. The Court of Appeal continued as follows:

> "That does not mean, however, that the impact that a practice or policy may have had on the conduct of a particular investigation is outside the scope of the Ombudsman's remit. There is a distinction between the investigation of a practice or policy which would involve its application in relation to the range of cases to which the practice or policy applied and considering the impact that a particular practice or policy may have had on the manner in which a particular investigation was carried out. The latter is plainly within the remit of the

> Ombudsman insofar as it impacts upon that investigation."

[91] Nor is the respondent to investigate complaints which are about the direction and control of the police force by the Chief Constable (see section 52(5) of the 1998 Act, cited at para [6] above). Regulation 5 of the 2000 Regulations also provides as follows:

> "It is for the Ombudsman to determine what constitutes a complaint under Section (52)(8) of the Act of 1998, subject to the following exceptions;
>
> (a) a complaint in so far as it relates to the direction and control of the police force by the Chief Constable; …
>
> …
>
> shall not constitute a complaint under Section (52)(8) of the Act of 1998."

[92] A key issue in the first case is the question of whether members of the public ought to have been told that they were under threat from loyalist paramilitaries. This was the subject of a Force Order which was in force at the time (Force Order 33/86, entitled 'Threats against the Lives of Members of the Security Forces, VIPs or other individuals'; later replaced by Force Order 60/91 which was in materially similar terms). The terms and application of this Force Order were considered in detail by the Ombudsman in the course of the report in the first case. It was issued by, or at least on behalf of, the Chief Constable to the entirety of the police force.

[93] The import of Force Order 33/86 was that, when a threat was received, Local Special Branch (SB) would inform the relevant Sub-Divisional Commander (SDC), that is to say the SDC in whose area the subject of the threat resided or worked; and the SDC then "will take whatever action he wishes necessary." (The Force Order does not read particularly clearly. It ought perhaps to say the SDC will take "whatever action he wishes" or "whatever action he considers necessary." In any event, it is clear that the SDC would, subject to the exception about to be mentioned, have a degree of discretion as to the operational response, if any, where information concerning a threat to an individual was received.) This general approach was subject to a more specific obligation if "the information received indicates that an attack on any person is imminent", in which case "the member receiving the information will immediately take all necessary action to inform the person at risk." It seems that this specific obligation was not limited to the relevant SDC.

[94] The applicant's case is that the relevant police officers complied with that Order and that the Ombudsman's concern, expressed in her Operation Greenwich

report, is essentially about the contents of the Force Order itself, such that it is really a 'direction and control' and/or a policy or practice case.

[95] The Ombudsman was concerned that the Force Order was applied inconsistently and without proper risk assessment being undertaken. She seems to have taken the view in some instances that a threat should have been deemed to be imminent, thus requiring notification to the individual concerned, when it was not so considered at the time; and perhaps in others that, even if the threat was not imminent, it was nonetheless not a proper exercise of the relevant officer's discretion not to provide a warning. The applicant is critical of the Ombudsman's views and conclusions on these issues, contending inter alia that she has failed to reflect the complexity of providing a warning which might jeopardise the intelligence source from which the information about the threat had come. He contends that the Ombudsman's approach amounted to a conclusion that the system established by the Force Order was not good enough and/or that merely following the Order amounted to collusive conduct in some instances. (A separate issue which was not addressed in any detail in submissions, if at all, is that a failure to comply with the Force Order in an instance where it was clear that an attack *was* imminent would likely represent misconduct given the offence in the Discipline Code contained within the 1988 Discipline Regulations of disobedience to orders. This misconduct offence is committed where a member, without good and sufficient cause, disobeys or neglects to carry out any lawful order, written or otherwise. A clear finding of failure to comply with the Force Order would seem to amount to misconduct.)

[96] The key issue here is whether the respondent's approach fell on the right or wrong side of the line identified by the Court of Appeal between, on the one hand, contravening the prohibition on investigating historic practices or policies and/or the prohibition on investigating complaints which relate to the direction and control of the police force by the Chief Constable and, on the other hand, investigating the *impact* of a policy or practice in individual cases.

[97] The respondent described the nature and effect of the Force Order at paras 5.17 and 5.18 of her report in the first case. Para 5.18 is in the following terms:

> "The Force Order placed clear responsibility on the local RUC Sub-Divisional Commander to assess whether threat warnings to identified individuals was necessary. If the threat against the individual was considered imminent, in accordance with the Force Order, a threat warning should then be issued. If the threat was not considered imminent, the Sub-Divisional Commander could take whatever action they considered appropriate."

[98] The report continues at paras 5.19 and 5.20 as follows:

> "5.19 This investigation has sought to establish what assessment was undertaken by police as to whether it was necessary to warn identified individuals of the existence of threats against them. I am of the view that the receipt of intelligence of an imminent threat to the life of an identifiable individual by police engaged the State's obligations to take steps to protect the lives of its citizens as provided for by Article 2 of the European Convention on Human Rights (ECHR). I acknowledge that the jurisprudence on the obligations imposed on the State by Article 2 to protect life has developed considerably since the events detailed in this public statement.
>
> 5.20 There was a responsibility on local police commanders to make informed and accountable decisions in respect of threat warnings. These police commanders were reliant on relevant threat intelligence being shared by RUC Special Branch. The lack of relevant records made it difficult to identify personal culpability in respect of the failings this investigation has identified regarding this sharing of information and intelligence. It is my view that some of the victims should have been informed that their details had been found in some of the loyalist '*caches*'."

[99] After discussing a variety of finds by the police of information which had been collected by or on behalf of loyalist paramilitaries (or suspected paramilitaries) and the absence of records of various individuals being informed that their details had been so recovered, the respondent said this at para 5.65 of her Operation Greenwich report:

> "I am of the view, given the available evidence and intelligence, that the application of these Force Orders was inconsistent in respect of a number of the victims referred to in this public statement."

[100] The respondent returned to the issue of the Force Order in a number of further portions of that report, including at paras 20.10 and 20.11, which are in the following terms:

> "20.10 As stated previously in this public statement, this investigation sought to establish what assessment was undertaken by police to determine whether it was necessary to notify intended individuals of the existence of threats against them. I am of the view that upon receipt of intelligence of an imminent threat to the life of an individual, the State's obligations under Article 2 of the

> ECHR were engaged, meaning that the police had a duty to take steps to protect the lives of those identified.
>
> 20.11 There was a responsibility on local police commanders, under the Force Order, to make informed and accountable decisions in respect of threat warnings. However, the police commanders were reliant on RUC Special Branch sharing the relevant threat intelligence with them. This investigation has identified failings in respect of the sharing of such information and intelligence, however, the lack of relevant records has made it difficult to identify personal culpability for such failings."

[101] In the next section of this judgment, I address in some further detail the substance of the respondent's conclusions on the "failings" her investigation found. However, I have not been persuaded by the applicant in the first case that the Ombudsman acted unlawfully in looking at this issue. If officers failed to comply with obligations set out in the Force Order, this could amount to misconduct. This might arise if an individual received no warning, notwithstanding that it was absolutely clear that an attack upon them was imminent; or if, upon receipt of information relating to a threat, no assessment whatever was made in relation to what action (if any) should be taken by the police. In addition, if a SDC reached a view about the appropriate action to be taken upon receipt of threat information which was improperly influenced by extraneous factors (for instance, a dislike of the individual under possible threat or out of a desire to assist or facilitate those posing the threat), that could amount to misconduct or criminal conduct. These are conduct issues which the Ombudsman was plainly entitled to consider.

[102] In addition, reading the report in the first case fairly and as a whole, it does not appear to me that the respondent was investigating the making or contents of the Force Order itself. Rather, as is emphasised in a number of the quoted portions of the report set out above, she uncritically took the content of the Force Order as the starting point and went on to examine whether and how it was *applied* in the circumstances of the individual cases raised in the complaints she was investigating. In doing so, I consider that she kept on the right side of the distinction referred to at para [89] above. I would accordingly dismiss this aspect of Mr Fitzsimon's challenge in the first case.

Irrationality in relation to findings relating to threat warnings

[103] I also granted leave in relation to the rationality of findings or comments in the first case which were critical of the approach to the giving of threat warnings. There were two aspects to this element of the applicant's case. The first was that the respondent had misdirected herself or taken an irrelevant consideration into account by looking at this through the prism of the positive obligation to take reasonable operational steps in response to a real and immediate risk which was only *later* the

subject of a seminal judgment by the European Court of Human Rights (ECtHR) in *Osman v The United Kingdom* (2000) 29 EHRR 245 in October 1998. The second was that the respondent wrongly proceeded on the basis that the mere *absence* of a record many years later (for example, in respect of a member of the public being warned about a threat against them) was, without more, sufficient to be equated to evidence of no warning having been given.

[104] In relation to the first of the points identified at para [103] above, the Ombudsman referred at para 5.15 of her report in the first case to the receipt of threat intelligence about specific individuals "on a number of occasions" engaging "the State's obligations to protect the lives of its citizens as provided for by Article 2 of the European Convention on Human Rights (ECHR)." A similar statement is set out at para 5.19 (quoted at para [97] above). In that paragraph, however, the Ombudsman has specifically indicated that she recognises that the Article 2 jurisprudence "has developed considerably *since* the events" under consideration in the report. Elsewhere in the report (see paras 20.7 and 22.5) she has indicated expressly that, when considering matters of police conduct in that statement, she has applied the relevant standards of the time. In those other portions, she has not identified development in the ECtHR jurisprudence, albeit she has identified other changes in standards and accountability mechanisms.

[105] Mr McMillen submitted that the *Osman* decision in 1998 was a watershed case. Mr McKay on behalf of the respondent agreed with that assessment. However, he submitted that the *Osman* case is not referred to in either report in the first or second cases; and that the Ombudsman did not apply its principles. She relied merely on the fact that the state was subject to the Convention in international law (even though not yet domesticated through the Human Rights Act 1998); and, more importantly, simply applied the test of imminence which was contained with the RUC's own Force Order.

[106] Again, I consider that the applicant in the first case has not discharged the burden of satisfying me that the respondent acted unlawfully in this respect. In the first instance, it is unclear what reliance, if any, the Ombudsman placed on the Osman case in reaching her conclusions. It is not referenced in the report in question. Second, the Ombudsman was aware of the need to ensure, generally, that she applied the standards of the time to the conduct she was investigating. She specifically recognised that the case-law in relation to article 2 had developed *since* the time of the conduct she was considering. This suggests she was not directing herself by reference to those later developments. Third, I do not in any event consider that the reference to the ECHR was material. I accept Mr McKay's submission in this regard. The majority of references to this issue (see paras 5.19 and 20.10 of the report, quoted above) indicate that article 2 ECHR was engaged only where intelligence showing an *imminent* threat to life was received. Although the same wording is not used in paras 5.15 or 22.42 of the report, it is there indicated only that "on a number of occasions" the receipt of threat intelligence about specific individuals engaged the state's article 2 obligations. That is consistent with this

arising only in cases where the threat was of imminent risk to life. As discussed above, irrespective of what the ECHR required, the relevant Force Order stated that "all necessary action to inform the person at risk" was to be taken in those circumstances (arguably going beyond what the ECHR would have required). In summary, it is difficult to see what, if anything, reference to the ECHR adds to the Ombudsman's report or consideration, particularly having regard to the fact that it had not been incorporated into domestic law at that stage and applied only at state level on the international law plane. In any event, I do not consider that these references materially affected the respondent's consideration, which was focused on the application of the relevant Force Order.

[107] In relation to the second of the points identified at para [103] above, there are a number of factors to be considered. In her report, the Ombudsman recognised that Regional Tasking and Coordinating Groups (TCGs) were responsible for the management of all counter-terrorist operations in Northern Ireland. She also noted (at para 5.3 of the report; and see also para 6.76) that the majority of TCG records detailing the management of covert operations during the 1989-1993 period had been destroyed. Her investigators considered the available records; but it is clear that this may not have provided the full picture because of the absence, loss or destruction of records. It may have been difficult to determine, therefore, what information was passed to local police commanders in relation to threats to individuals in some instances. There were a variety of reasons why information relating to a risk to an individual may not have made its way to the relevant SDC; but the absence of some records did not assist in clarifying what information had or had not been provided, and when. In addition, there were cases where it was clear, or more clear, that threat information had been received either by local commanders, RUC Headquarters or other police units. In several of the cases considered by the respondent this was where an individual's information had been recovered by police from a store or 'cache' of information which was known or believed to have been held by loyalist paramilitaries for the purposes of targeting, amongst other things. Assuming this information *did* make its way to the relevant SDC, there appears to frequently have been a lack of documentary records as to how this information was considered and whether or not (and why) any operational response, such as issuing a threat warning to the individual, was considered appropriate.

[108] Thus, on a number of occasions (one such example is at para 5.34 of the Operation Greenwich report in relation to the murder of Eddie Fullerton) the respondent's report notes that the investigation "has not found any record that Mr Fullerton was warned by police." In that case, the investigators also spoke with the family of Mr Fullerton who "stated that he was not warned about threats against him by either the RUC or AGS [An Garda Síochána]." Other persons *were* warned that their personal details had been recovered in an intelligence cache held by loyalist paramilitaries. A statement that the investigation had not found any record that persons had received a threat warning is also contained in paras 5.35, 5.37 and 5.48 of the report (re Mr McErlain); albeit there was also a note in relation to one find that the 'Personalities [were] informed by Belfast SB' (see para 5.47). The report says

that the investigation had found "no evidence" that police provided Mr McErlain with a warning regarding a find of notebooks with names in the possession of a suspected UVF member; but at the same time records that Mr McErlain's wife later stated to the media that he *had* been warned about potential threats to his life (see para 5.53).

[109] There are similar statements ("no record") in para 5.43 (re Mr Donaghy and Mr O'Hagan) and para 5.50 (re Mr Cassidy). In relation to Mr Carey, the report notes in one instance that the investigation had been "unable to establish" whether he had received a threat warning; and, in another instance, that he had been informed of a threat (see para 5.36). (This summary does not purport to be exhaustive.)

[110] Returning to Mr McErlain, the report concludes at para 5.66 that:

> "This investigation has established that Mr McErlain was not warned of the potential threat to his safety following the loyalist intelligence 'cache' find in Snugville Street in November 1991. Following the discovery of documentation in Ballymoney in January 1992, there is no evidence that police provided Mr McErlain with a warning, despite the documentation containing details of Mr McErlain's wife and her address. At the time of his attempted murder, Mr McErlain was living with his wife and children in Dunloy. Although a media article stated that Mrs McErlain believed her husband had been warned about potential threats to his life two years before his attempted murder in August 1992, there is no record of a threat warning to Mr McErlain in police documentation viewed by this Office. In light of the inconsistent evidence in relation to threat warnings to Mr McErlain, I am unable to conclude whether he received a warning from police subsequent to the documentation finds in November 1991 and January 1992."

[111] I have concerns about the rationality of the conclusion that the investigation had "established" that Mr McErlain was not warned of the potential threat to his safety following the find in Snugville Street in November 1991. That is because of the note, from December 1991, which was found attached to the relevant file which indicated that personalities had been informed by Belfast Special Branch after that find. In addition, Mr McErlain's wife stated in a media article after his death that he had been "warned about potential threats [plural] to his life two years before his attempted murder on 28 August 1992" (see para 5.53 of the report). As a result the Ombudsman accepted that it was possible that Mr McErlain had been notified by police about his name being found on a list discovered in Ballymoney in January 1992; but it is not clear that the account given by Mrs McErlain was so limited.

Finally, there appears to be an inconsistency between what is said at para 5.66 (that Mr McErlain was *not* warned after the November 1991 find) and what is said at para 22.23 (that the respondent was *unable to conclude* whether Mr McErlain received a warning from police subsequent to the documentation finds in November 1991 *and* January 1992).

[112] All of this goes to illustrate the extreme difficulty presented by trying to piece together evidence, or the absence of potential evidence, in order to try to form a clear picture of what may (or may not) have happened in a short exchange over 30 years ago. There is no doubt that the Ombudsman had an extremely unenviable and demanding task in seeking to investigate these matters. It is unsurprising, therefore, that, on a number of occasions, as illustrated by the quotation set out above, the respondent was unable to reach conclusions in respect of a number of these matters.

[113] A similar conclusion – namely that the investigation was unable to establish whether a warning was given at an appropriate time – is expressed in relation to Mr Carey (at para 5.67) and again in relation to Mr McErlain at para 22.35 (re Mr McErlain). As to Messrs Fullerton, Donaghy, O'Hagan and Cassidy, the report says that the investigation "found no evidence" that they received threat warnings after the discovery of their personal details in various intelligence caches. All four of these men were subsequently shot dead by the North West UDA/UFF. The Ombudsmen notes, "I am mindful, when taking this view, that not all of the relevant documentation could be located by my investigators." This difficulty is emphasised again in the 'Conclusions' chapter of the report at paras 22.44 and 22.45.

[114] It is difficult to resolve this aspect of the applicant's challenge in the first case given the number of persons in respect of whom the complaint was made that they should have been advised by police of a risk to their life; the fact that, in a number of cases, there were a variety of events or finds which might have triggered an obligation to provide them with a warning; the evidential difficulties mentioned above; the fact that the Ombudsman's report is unlikely to have set out the entirety of the information available to her investigators which was taken into account in reaching conclusions; the different formulations used in various passages of the report; and the general tendency (discussed further below) to reach overarching conclusions which do not deal with each case in precise detail.

[115] It seems likely that the respondent reached the view that it was necessary in at least some cases to inform persons whose names or details had been discovered in finds of intelligence or information recovered from (suspected) loyalist paramilitaries. This is partly because of the emerging picture, which would or should have been known to police, that the relevant branch of the UDA, UFF and/or UVF was well resourced and organised, had access to a significant amount of weaponry, was acquiring information in order to target nationalist or republican leaders or (suspected) paramilitaries and, in due course, had murdered a number of them. The real concern – that the wrong call was made about the imminence of the

potential threat – seems to me to be suggested (at least implicitly) in para 5.69 of the report and set out more explicitly in portions of the report within Chapter 22.

[116] There are also criticisms of what might be considered system failings, namely: that an inconsistent approach was taken; that the assessment of the action required when intelligence or evidence came to light suggesting a risk to life was not carried out with the formality or seriousness that could be expected; that matters were not kept under review, or considered cumulatively, with the occurrence of additional relevant incidents; and that inadequate records were kept in relation to such assessments.

[117] Para 5.69 is in the following terms:

> "The fact that individuals were convicted of offences relating to possession of the information likely to be of use in the furtherance of terrorism, including murder by terrorist organisations, was clearly relevant to the risk to those affected. In my view, possession, in and of itself, inferred a real risk to life to the individual identified. It was necessary for there to be an evaluation of this risk upon the material being discovered in the possession of a person or person who saw its utility for a terrorist purpose. Although in some cases threat warnings were issued, I found no evidence of a consistent approach to risk assessment and would expect to see contemporaneous evidence of the evaluation of risk of harm, the ongoing review of risk and that those persons affected had been notified of the risk, even after the passage of time. This is particularly so where persons identified within the material were later murdered."

[118] There are a number of criticisms expressed or implicit in this portion of the report, mostly of the nature mentioned at para [116] above. It is difficult to see how these comments are inappropriate or impermissible, given the additional leeway referred to at para [63] above in cases where article 2 is engaged.

[119] At paras 22.42, 22.43 and 22.45, the following conclusions are expressed:

> "22.42 … I am of the view that, on a number of occasions, the receipt of specific threat intelligence engaged the State's obligations to protect the lives of its citizens as provided for by Article 2 of the European Convention on Human Rights (ECHR).
>
> 22.43 The security situation in Northern Ireland at this time caused police to receive a large amount of threat

> intelligence. They were, therefore, familiar with their responsibilities as outlined in the relevant RUC Force Orders. I am of the view that, given the available evidence and intelligence, the application of this Force Order was inconsistent in respect of a number of the victims referred to in this public statement. Some were provided with appropriate threat warnings, although others were not.
>
> …
>
> 22.45 However, I am of the view that the RUC did not issue warnings to all those individuals whose personal details were discovered in the relevant loyalist intelligence '*caches*.' The relevant Force Order placed a responsibility on local police commanders to make informed and accountable decisions in respect of threat warnings. They were also reliant on intelligence concerning such threats being shared by RUC Special Branch. The lack of police records made it difficult for this investigation to identify individual officer responsibility and consideration of the threats."

[120] It is sometimes not clear, as in this portion of the report, to what specific complaint or individual the respondent is referring. However, the above paragraphs, read with other portions of the report, would in my view be understood by the reasonable reader as a finding that, at least in some instances, warnings ought to have been given to individuals when they were not. In particular, that is the natural meaning, in this context, of the observation that some individuals "were provided with *appropriate* threat warnings, although others were not" [my emphasis]. This must represent a finding that there was an imminent threat to at least some individuals who were not provided with an appropriate warning (or, alternatively, although this is perhaps less likely, that there was no other proper course but to warn the individual even if the threat to them was not imminent). That conclusion appears even more clear when read with para 22.133 of the report (discussed in further detail below). One of the families' concerns about collusive activity which the respondent expressed to be "legitimate and justified" was the "failure to adequately manage the risk to the lives of a number of victims outlined in this public statement, and in particular, the failure to warn those individuals of the threats to their life."

[121] As noted above, it is far from clear to whom the report is referring where criticism is made of a failure to warn individuals in these paragraphs. Para 22.45 refers generally to the respondent being of the view that the police "did not issue warnings to *all* those individuals whose personal details were discovered" in intelligence caches. It is difficult to know what particular criticism is being made

unless the Ombudsman took the view that everyone whose name was found in such a cache should have been informed. (Where there has been a find of this nature, one might assume that issues about source protection are absent or at least much less significant than if there is intelligence about a threat received from a source.) However, if that view was taken, it is difficult to understand why the Ombudsman concluded that a warning was required to be given in every case, ie whether it was because the threat to life was imminent in each case; or whether it was considered the decision not to give a warning in each case was an improper or impermissible exercise of judgment on the part of the relevant SDC (assuming the threat was shared with him or her).

[122] Paras 22.113 and 22.114 tend to suggest that the relevant persons who should have received warnings but did not were Messrs Fullerton, Donaghy, O'Hagan, Cassidy and McErlain on the basis that the PONI investigators "found no police records" that they were notified. As noted above (see para [108]), in Mr Fullerton's case there appears to have been supporting evidence from his family to the effect that he received no warning either from the RUC or AGS. In the other cases, it appears that the conclusion was reached that no warning had been given simply on the basis of there having been no record of a warning being issued. In Mr McErlain's case (see paras [108] and [110]-[111] above), there was some evidence suggesting that a warning may have been given.

[123] I have found this aspect of the applicant's challenge difficult to resolve. On the one hand, the Ombudsman is entitled to a degree of deference in relation to the conclusions to be drawn from her investigations and looking at the evidence overall. On the other, there does appear to me to be something of an unexplained jump from the discussion of these matters in Chapter 5 of the report to the conclusions in Chapter 20. In particular, the last sentence of para 22.43 of the report, read together with the first sentence in para 22.45, appears very thinly reasoned in light of the repeated earlier observations that the respondent was unable to establish whether a warning had been given in many cases (which is a matter of fair criticism as to record-keeping). Notwithstanding this, the later conclusion is that appropriate warnings were *not* given in some cases, which are unspecified and without spelling out the basis upon which the respondent concluded that warnings were not in fact given in those cases (and, further, why the warnings were required to have been given).

[124] The type of dispute raised by this element of the applicant's challenge is an almost inevitable outcome where an investigative (rather than judicial) body, whose role is not adjudicatory in nature, is permitted or required to undertake fact-finding and place their conclusions in the public domain, particularly in a highly contentious context. However, as I have found above, that appears to be the effect of the Court of Appeal's judgment in *Hawthorne and White*, at least where article 2 ECHR is engaged.

[125] On balance, I consider that the findings identified above are irrational in the case of Mr McErlain, assuming they apply in his case, for the reasons discussed above which indicate that the conclusion that no warning was given was not adequately supported by the evidence. The apparent contradiction in the report in relation to this has been influential in my reaching this conclusion (see para [111] above). The conclusion that there was no warning given in Mr Fullerton's case is not irrational, since there was positive evidence (over and above the absence of records) that no warning was provided to him by police. In the remaining cases where a leap has been made from the absence of records to a conclusion that no warning was given, again on balance, I have not been persuaded that this was irrational. That is because it was a matter for the Ombudsman, viewing all of the evidence in the round, to draw conclusions or inferences from the absence of records and other evidence available to her. I understand the applicant's concerns that one cannot assume that no warning was provided to an individual simply on the basis, without more, that there is no record of this having occurred. However, the respondent and her investigators were well placed, in light of their investigation, to understand whether and when records could be expected to be created. The report adverts to the absence of records in many places and, indeed, there are several occasions when the respondent took the view that she was unable to establish the position either way on the available evidence.

[126] I have not found that the respondent generally misdirected herself in relation to her approach to this issue generally, as alleged by the applicant. Although I have concerns about the rationality of the finding that no warning was provided in one case (that of Mr McErlain), I do not consider it would be proper to grant any relief in relation to this. The general, systemic complaint made by the applicant has not been upheld and, as I observed in the leave ruling (see para [77]), it is not for Mr Fitzsimons in his representative capacity (on behalf of NIRPOA) to challenge the merits of particular findings on the facts of a case in the absence of some wider misdirection on the part of the respondent. The precise basis upon which the respondent concluded that warnings *should* have been given when they were not, has not, in my view, been adequately explained. However, this did not represent a ground of challenge in the case. I would accordingly dismiss this aspect of the challenge in the first case.

Application of the principles identified at paras [59] and [63] above in the first case

[127] To conclude consideration of the first case, I turn to the question of whether there are express or implied findings which go beyond the Ombudsman's statutory role as explained in *Hawthorne and White* and elucidated above. In para [36] of the leave ruling, I indicated that I had formed the conclusion that it was plainly arguable that certain portions of the Ombudsman's reports in the first and second cases had overstepped the mark in a similar way to that evident in the Court of Appeal's conclusions in the *Hawthorne and White* litigation.

[128] With the benefit of further argument and fuller analysis, I consider that there are portions of the report in the first case which went beyond the Ombudsman's proper role because, read fairly and objectively, they would be understood to amount to findings of (at the very least) misconduct.

[129] Most of the statements which, in my judgment, fall within that category are contained within Chapter 22 of the report, which details the Ombudsman's conclusions. In that chapter (at para 22.1) the Ombudsman states that "the main purpose" of the public statement was "therefore … to address the matters raised by the families who have made complaints …" A reader of the report would understand this as being to address those matters *in substance* rather than simply commenting upon the Ombudsman's investigation. That sets the context for what follows. The Ombudsman later comments (at para 22.83) that the evidence that she has gathered "*supports* a number of the *complaints and concerns* made by the families." Again, in my view, this reads as though the Ombudsman is indicating findings *of substance* that the complaints and concerns – which related to complaints of misconduct and criminal conduct – were supported by, or made out on the basis of, the evidence. The statement says that it will "now detail these and also *address complaints that there was 'collusion'* in respect of police actions relating to a number of the attacks referred to in this public statement" (also at para 22.83).

[130] It should be acknowledged that, at para 22.107, the Ombudsman indicates that she has taken into account the limitations on her powers to decide on the complaint of collusion. However, she then says:

> "I am of the view that, having considered all the circumstances in this case, my investigation into these public complaints has identified the following collusive behaviours on the part of the police."

[131] Again, the objective reader would in my view consider that "collusive behaviours" have been "identified", that is, they have been found to have occurred. To like effect, at para 22.132 of this report, the Ombudsman states that a number of the families of the victims and survivors of the attacks outlined in the statement "have made specific complaints about *collusion* on the part of the police" [italicised emphasis in original]; and then goes on to state that her investigation "has *identified* actions and omissions of police, which in my view, *constitute* collusive behaviours" [italicised emphasis added].

[132] For the reasons given at paras [73]-[85] above, I also consider that the objective reader would understand this to be the identification of behaviours which constituted collusion, or were collusive in character, within the meaning of "collusion" which had been discussed by the Ombudsman. Put another way, I consider the distinction drawn by the Ombudsman between "collusion" on the one hand and "collusive behaviours" on the other to be unsustainable or, certainly,

insufficiently clear for the hypothetical, objective reader to understand and accept the distinction which the Ombudsman has sought to draw.

[133] At para 22.133 of the first report, there is a summary of the Ombudsman's conclusions in relation to collusive behaviours. The applicants take issue with almost the entirety of the contents of this paragraph. It is in the following terms:

> "I have earlier in this public statement referenced the broad definition of collusion which Sir John Stevens provided as including '*wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, through to the extreme of agents being involved in murder.*' This investigation has identified all of these elements the conduct of former RUC officers in relation to a number of attacks that are the subject of this public statement. In particular, I am of the view, in respect of the following matters, that the families' concerns about collusive activity are legitimate and justified:
>
> 1. Intelligence and surveillance failings identified by Dr Maguire in his report of the Loughinisland attacks;
>
> 2. The failure to adequately manage the risk to the lives of a number of victims outlined in this public statement, and in particular the failure to warn those individuals of the threats to their life;
>
> 3. The passing of information by members of the security forces to paramilitaries has been identified as collusion by Sir Desmond De Silva. The failure by police to adequately address UDR officers passing information is in my view a serious matter that can be described as collusive behaviour;
>
> 4. I have identified that the deliberate destruction of files, specifically those relating to informants that police suspected of serious criminality, including murder, is evidence of collusive behaviour. The absence of informant files and related documentation is particularly egregious, where there was suspicion on the part of handlers or others that informants may have engaged in the most serious criminal activity engaging Article 2 of the Convention;

5. Failures identified in this public statement by Special Branch to disseminate intelligence to the CID Teams investigating the murders;

6. Failures in the use and handling by Special Branch of an informant suspected of being involved in serious criminality, including murder;

7. Failures by Special Branch in the North West region to adequately manage those high risk informants, which they suspected of being involved in serious criminality, including murder;

8. The passive 'turning a blind eye' to apparent criminal activity or failing to interfere where there is evidence of wrongdoing on the part of an informant, in particular to the deliberate failure of informants to provide information on a specific attack, and the continued use of an informant suspected of involvement in serious criminality, including murder."

[134] I accept the applicant's submission that – for the hypothetical, objective reader – this was not simply an instance of the Ombudsman providing a narrative or even explaining her fact finding. It reads plainly as a finding, in substance, in a number of respects (both individually and cumulatively) that "collusive activity" or "collusive behaviour" occurred. This includes conduct which the Ombudsman herself describes as "a serious matter", "deliberate", "particularly egregious", a "failure" in a variety of respects, and "'turning a blind eye' to apparent criminal activity." All of this is overlaid with the Ombudsman's statement that concerns about "collusive activity are legitimate and justified"; and, indeed, that she has identified all elements of the conduct which Sir John Stevens included in his definition of collusion.

[135] For my part, I cannot see how the fair-minded, objective reader would understand these comments as anything other than relatively plain findings of conduct on the part of police officers which the Ombudsman herself considered to amount to collusion but which, in any event, must have amounted to misconduct. (That is no doubt precisely why the complainants in these cases, quite understandably, welcomed the Ombudsman's report, or at least aspects of it, and would wish to see it upheld.) In my judgment, most if not all of these conclusions fall foul of the Ombudsman's proper remit as explained by the Court of Appeal in *Hawthorne and White*. The (dominant but inconsistent) use of the phraseology "collusive behaviours" does not rescue the conclusions in this regard.

[136] There are a number of other generalised comments, observations or expressions of opinion contained throughout the report which also appear to me to

go beyond the respondent's proper remit. It is obvious, for example, that the Ombudsman wished to comment on the involvement of members of the Ulster Defence Regiment (UDR) with loyalist paramilitaries, which is dealt with in Chapter 8 of the report. She recognised that this was beyond her investigative remit (see para 8.1) but nonetheless considered it necessary in order to "fully explain the rationale for [her] actions, decisions and determinations" and/or in order to "consider the police response to these matters" (see para 8.34). The respondent went on to say that she was "of the view that police did not always act in a sufficiently robust or pro-active manner when in receipt of information indicating that serving UDR members were also actively involved in loyalist paramilitary activities" (see para 8.35).

[137] There were many portions of the Conclusions chapter of the report in the first case (and indeed in the second) with which the applicant did not take issue. In his submissions, Mr McMillen described some of these as commonsense findings and/or as valid or useful feedback, criticisms or narrative, even where they were also described as "uncomfortable reading." There are, of course, many portions of the report which do not uphold complaints made about the police actions and where the Ombudsman found the police to have acted appropriately. Obviously, no complaint is made by the applicant about those.

[138] However, on the core aspect of this ground of challenge in the first case, I would hold that the Ombudsman has acted beyond her powers in setting out her conclusions at para 22.133 of the report in the terms which are set out above, particularly having regard to the introductory portion of that paragraph. The applicant succeeds in this aspect of the challenge. The same issue arises in respect of para 22.107, in the section where the respondent is dealing with 'Complaints of Collusion'. That paragraph refers to "the following collusive behaviours on the part of the police" which are then dealt with in further sections of Chapter 22, under a variety of headings, correlating to the eight numbered sub-paragraphs in para 22.133. The applicant challenges the contents of a number of those paragraphs, between paras 22.108 to 22.132.

[139] A particular aspect of this challenge is that, at paras 22.110 and 22.111 of the report in the first case, the respondent has (the applicant submits) endorsed the findings of the previous Ombudsman's Loughinisland Report which the Court of Appeal had ruled 'overstepped the mark' in the *Hawthorne and White* case. I can see why this concern has arisen. However, the Court of Appeal in the *Hawthorne and White* case ruled that particular portions of the Loughinisland Report were ultra vires. The report was not quashed in its totality. I do not accept that the respondent was wholly unable to refer to or rely upon those portions of that report which were left intact or uncaveated by the Court of Appeal's order. The Ombudsman has not, in the present case, repeated the language which was previously held to have overstepped the mark. Where she has reached a finding of collusion (or collusive behaviours) on the basis of similar material, that finding is ultra vires for the reasons given above. In those circumstances, this discrete aspect of the claim does not

materially add anything. I do not therefore uphold this aspect of the applicant's case.

Application of the principles identified at paras [59] and [63] above in the second case

[140] In the second case, I granted leave to apply for judicial review on one ground only (ground (i)(b)), namely whether the respondent had acted ultra vires in coming to findings, conclusions and determinations as to whether criminal offences or disciplinary offences had been committed by police officers. There are a number of common themes running between the reports in the first and second cases. Each considers the RUC's handling of loyalist paramilitary murders and attempted murders, in overlapping periods, but in different parts of Northern Ireland. Similar complaints arose in each case. The focus of the PONI investigation in each case covered the origins, use and recovery of weapons used; the use of informants; the handling of intelligence; and threat management. The structure and wording of the reports are similar in many respects.

[141] The report in this case makes clear that the complainant families had made a number of specific complaints about failures to prevent attacks and inadequate investigations; and alleged that the cumulative effect of these activities amounted to collusion. "In order to properly address" the allegations of collusion, the Ombudsman again considered the various definitions and took essentially the same approach as she did in the Operation Greenwich report (which had been published very shortly before), including that a common feature of the concept was that "collusion by its nature involves an improper motive."

[142] A similar statement to that made in para 22.1 of the report in the first case – that the main purpose of the report is to address the matters raised by the families who had made complaints – is contained at para 18.1 of the Operation Achille report. A particular feature about which the applicants were able complain in the second case, however, is that, at the end of Chapter 4, the Ombudsman has said simply: "*My conclusions in respect of the allegations of collusion* are outlined later in this public statement" [italicised and underlined emphasis added, save that 'collusion' was italicised in the original]. In the applicants' submission, this represents an instance of the true nature of the Ombudsman's analysis being revealed and it being made plain that the Ombudsman was in fact purporting to reach conclusions about whether or not collusion had occurred. Again, the Ombudsman later indicates that she has found or "identified" "collusive behaviours" on the part of the police (see, for example, paras 18.123).

[143] Certain portions of this report specifically categorise actions or omissions as "collusive" behaviour (see, for example, paras 18.103, 18.131 and 18.137). At para 18.143, the Ombudsman lists a range of conduct which she says, "constitutes what the Court [of Appeal in *Hawthorne and White*] refer to as 'collusive behaviours.'" For the reasons discussed above (see paras [52]-[56]), I consider this to be a misreading of

the Court of Appeal judgment. It may have introduced the phrase "collusive behaviours", which in my view the Court would have understood to mean behaviours amounting to collusion in different ways, but the Court of Appeal did not itself define what it meant by this phrase. More importantly, for the reasons discussed above, I also do not consider that the Court of Appeal endorsed the Ombudsman's use of that phrase as a means of expressing a view about the nature or significance of certain acts or omissions which she had found.

[144] As in the first case, the portions of the Operation Achille report with which the applicants take most issue are contained in its Conclusions chapter, Chapter 18. Again, as noted at para [137] above, there are significant portions of this chapter with which the applicant does not take issue. That does not merely include, for instance, the statement (at para 18.87) that the investigation had not identified evidence that a police officer committed a criminal offence by protecting an informant from arrest or prosecution, but also the Ombudsman's statement in the following paragraph that she was critical of the practice of Special Branch continuing to use a significant number of informants who were actively participating in serious criminality, including murder, which she believed to be in contravention of the NIO Working Group guidelines in existence at the time. Albeit this latter observation was critical, the applicants indicated that this was the type of thing which Parliament may have intended the Ombudsman could comment upon (in general terms) in the public interest. Further examples were given by Mr McMillen of comments within the report – particularly in relation to informant management and record-keeping – which were overtly or implicitly critical of police actions but which it was nonetheless appropriate for the Ombudsman to bring to light or where her observations would lead to learning and development of best practice.

[145] In a number of paragraphs (for instance, paras 18.43 and 18.50) the respondent has indicated that there was a "significant failure [or failing] in the RUC forensic strategy." Mr McMillen submitted that these were beyond what was permissible in the exercise of the respondent's powers, albeit accepting in some cases that this was "borderline." In para 18.53, in relation to the murder of Mr Wallace, the respondent has again stated that her investigation has "established failings in the RUC forensic strategy." Similar criticisms of the adequacy of the investigation in certain respects are contained in further portions of the report, for instance in relation to a delay in identifying and recovering a car used in the attack at the Sean Graham Bookmakers, which resulted in delayed forensic examination, and the failure to check blood found on a suspect's coat against other evidence, each of which may have resulted in missed investigative opportunities (see paras 18.57 and 18.58). I have not been persuaded that criticisms of this nature are beyond the Ombudsman's powers. Failures in investigative endeavours are the very type of issue which the Ombudsman is well placed to consider and comment upon. Importantly, in none of these instances is there anything which suggests that the Ombudsman necessarily viewed this as a sinister matter. These failures, even if significant, could have arisen for a variety of reasons, including carelessness, inadvertent oversight, lack of resources, etc..

[146] Similarly, at para 18.79, where the Ombudsman refers to a pattern of non-dissemination of intelligence to murder investigation teams by Special Branch, she goes on to observe that this quote "impeded the ability to detect these crimes and bring the perpetrators to justice." The applicant contended that this was a value-laden judgment but it seems to me that this was simply an expression of the Ombudsman's views about the *effects* of the non-dissemination of intelligence.

[147] On the other hand, at para 18.31 the respondent refers to a failure of the police to undertake threat assessments in respect of Mr Caskey and Mr Clinton. She says that she is "of the view that these feelings were in contravention of this Force Order." For the reasons given at the end of para [95] above, I consider this amounts to a finding of misconduct. I also consider that the respondent exceeded her powers in relation to the same, or a similar issue, at para 18.131. There, having said there was no rationale for a failure to warn either Mr Caskey or Mr Clinton of real and imminent threats to their safety, the respondent states that she is "of the view that this serious omission constitutes collusive behaviour." For the reasons discussed above, this can only signify to the objective reader that the omission involved in improper purpose.

[148] I also consider the respondent to have exceeded her powers in relation to her comments about the release of weapons (deactivated and active) to informants in para 18.100 where she says this "demonstrated a disregard for the safety of members of the public by police"; in para 18.102 where she says that the absence of a written deactivation policy and failure to retain records was in her view "indicative of a desire to avoid accountability" and failings which were "wholly unacceptable given the risks attached to the return of lethal weapons to active terrorists"; and in para 18.103 where the Ombudsman says that she found the return of weapons (to avoid compromising the source of the weapons) "inherently reckless" (which she defined as characterised by the creation of a substantial and unjustifiable risk of harm to others) and "an unacceptable risk", "further evidence of SB prioritising the protection of informants over other vital interests, including the safety of the public", and behaviour which "was collusive in nature."

[149] Again, in my view, read individually or together, these statements clearly amount to value judgments on the part of the respondent as to the propriety of police action in circumstances where the Ombudsman's findings would inevitably amount to police misconduct (if not criminal conduct). I wish to stress that, in so holding, the court is not seeking to undermine the Ombudsman's fact-finding, nor expressing any view on the objective correctness or otherwise of the substance of the Ombudsman's views. The simple point, as emphasised above, is that it is outside the statutory role of the Ombudsman to make public pronouncements which, in substance, amount to findings of police misconduct.

[150] The same issue arises in para 18.137 where the respondent was dealing with the extent of the use of informants in South Belfast during this period. This had

caused her concern "in light of the absence of the effective control and oversight that was necessary to justify the continuance of the relationship with the informant." The respondent went on to say (unnecessarily, in the applicants' submission) that in her view "the absence of controls, combined with the absence of records relating to these informants constitutes collusive behaviour."

[151] The applicants' most major concerns in relation to the report in the second case relate to paras 18.142 and 18.143. Para 18.142, under the heading 'Overall Conclusion', is in the following terms:

> "I am of the view, given the available evidence and information, that the concerns of the families, victims, and survivors are legitimate and justified in the following respects:
>
> I. A weapon used in the attack at Sean Graham Bookmakers was part of a loyalist arms importation that entered Northern Ireland in December 1987;
>
> II. The emerging threat posed by South Belfast UDA/UFF to the nationalist community in South Belfast was not adequately addressed by police;
>
> III. Although police were not in receipt of intelligence which could have prevented the attacks referenced in this public statement, they were in receipt of threat information that was not shared with Mr Caskey and Mr Clinton;
>
> IV. Special Branch failed to share relevant intelligence which would have assisted the murder investigation teams examining the circumstances of these attacks. In some instances, intelligence sharing was delayed. The impact of these failings was to undermine the effectiveness of these investigations and, in turn, impeded the ability of police to bring the perpetrators of these serious crimes to justice;
>
> V. Investigative failings including inadequate forensic, suspect, and arrest strategies; failures to adequately test and probe evidence; and a failed Identification Parade have been identified in relation to specific cases;

VI. Inadequate supervision and control by RUC Special Branch of informants, and the continued use of informants who were actively involved in serious criminality, including murder;

VII. The deactivation of a weapon used in attacks referenced in this public statement; and

VIII. The disposal by police of the VZ58 rifle used in the Sean Graham Bookmaker attack to the Imperial War Museum."

[152] Para 18.143 (already referred to at para [143] above), under the heading 'Complaints of Collusion', is in the following terms:

"I have taken into account the limitations on my powers to decide on a complaint of '*collusion*' as outlined in the Court of Appeal judgment in Re Hawthorne and White. I am of the view, based on all available evidence and information, that the following conduct constitutes what the Court refer to as 'collusive behaviours':

I. Intelligence and surveillance failings identified by Dr Maguire in his report on the Loughisinland attack;

II. The failure to warn and conduct a threat assessment in respect of threats to the life of Mr Caskey;

III. The failure to warn Mr Clinton of the real and imminent threat to his and his family's safety in contravention of the RUC Force Order;

IV. The failure to retain records and the deliberate destruction of files in relation to the authorisation and implementation of covert investigatory measures following the attack at Sean Graham Bookmakers;

V. The failure to maintain records of the deactivation of weapons were indicative of a desire to avoid accountability for these sensitive and contentious activities;

VI. The failure of police to exploit all evidential opportunities for example the failure to recover significant evidential material used in the attack at Sean Graham Bookmakers and to make early arrests;

VII. Failures by Special Branch to disseminate intelligence to the murder investigation teams which could have been exploited;

VIII. Absence of control and oversight in the recruitment and management of informants;

IX. The continued, unjustifiable use by Special Branch of informant(s) involved in serious criminality, including murder, in contravention of NIO Working Group Guidelines; and

X. The passive 'turning a blind eye' to the activities of informants in respect of whom police had intelligence that they were involved in serious criminal activity, including murder."

[underlined emphasis added]

[153] Although I have concerns about the breadth of the phrase in para 18.142 that the concerns of the families, victims and survivors "are legitimate and justified" – given the way in which those complaints were framed, as described in the report, including express complaints of collusion – viewed on its own, I would not consider the content of that paragraph to go beyond the respondent's powers bearing in mind the additional leeway available to her in an article 2 case as discussed above. Leaving aside that introductory comment in particular, the paragraph seems to present the product of the fact-finding inherent in her investigation.

[154] I do consider the content of paragraph 18.143 to be beyond the respondent's powers. For the reasons already discussed in detail above, I consider that the introduction to that paragraph evinces an error of law as to the meaning and effect of the Court of Appeal judgment in *Hawthorne and White*. Additionally, and more importantly, the paragraph goes on to outline that the respondent's own assessment of the evidence led her to the view that the conduct listed constituted "collusive behaviours." As already discussed, that would be understood by the objective reader as a list of behaviours which constituted types of collusion. In turn, based upon the respondent's approach to that concept is explained in the report, that conduct would also necessarily constitute police misconduct in various forms (and quite probably criminal conduct and some of the circumstances outlined).

[155] For the reasons given at para [139] above, I again dismiss the complaint in the second case that the respondent has wrongly repeated and/or exacerbated the action of the previous Ombudsman found unlawful by the Court of Appeal in relation to the issue of arms importation.

The third case

[156] I granted leave to apply for judicial review in the third case, that of JR217, on three grounds, namely:

(1) That the Ombudsman's statement offends regulation 6 of the 2001 Regulations and/or section 52(9) of the 1998 Act, since it addresses issues which had been the subject of a recommendation for prosecution and there had been criminal proceedings in relation to these, which had concluded (albeit without a conviction);

(2) That there has been a breach of regulation 6(5) because there had been previous disciplinary investigations conducted by the police; and

(3) That some of the findings in the third case also arguably overstepped the mark in such a way as to be beyond the respondent's powers.

[157] I deal with each of these in turn below. Before doing so, however, it is helpful to again remind oneself of some of the facts in relation to this case.

[158] The Operation Farrier investigation commenced in or around 2003 when complaints were received from four individuals who had been arrested and detained at Strand Road RUC Station in 1979, initially in connection with punishment shootings and then in connection with the murder of a Lieutenant Kirby. During the course of their detention, all of the complainants gave 'confessional statements' in respect of punishment shootings and the murder. They alleged that those statements were not given voluntarily and that police officers had mistreated and coerced them.

[159] The Ombudsman notes that they complained that police had been guilty of perverting the course of justice and that they also made a number of further specific allegations. The complaints are summarised at para 3.1 of the Ombudsman's statement, including complaints of ill-treatment, encompassing physical and mental abuse; that the complainants were threatened; that they were not allowed access to a solicitor or family member; that the statements were fabricated and obtained by oppressive and coercive means; and that they only agreed to make the statements as they were frightened and wanted to be released from custody; as well as some other matters.

[160] The applicant was one of the officers whose role it was to interview the arrested individuals. On foot of the confessions, the four complainants were

prosecuted for offences including murder, firearms and terrorism offences. They were each released on bail, partly as a result of concerns about the prosecutions in light of alibi evidence which was available to the defendants. A criminal trial commenced but the four complainants absconded and left the jurisdiction after its second day, meaning that the trial did not proceed. The case was adjourned pending their return but, in or around 1998, the criminal proceedings were discontinued and the complainants were told that they were free to return to Northern Ireland. This was as a result of various documentary and witness evidence no longer being available. They later complained to PONI about their treatment by police and the making of involuntary statements.

The previous criminal proceedings

[161] As noted at para [28] above, regulation 6(5) of the 2001 Regulations provides that if any conduct to which a complaint wholly or partly relates has been the subject of criminal proceedings, "the Ombudsman shall have no powers in relation to the complaint in so far as it relates to that conduct." That reflects section 52(9) of the 1998 Act, which is in slightly different terms. It provides that if any conduct to which a complaint wholly or partly relates has been the subject of criminal proceedings, "none of the following provisions of this Part shall have effect in relation to the complaint in so far as it relates to that conduct." For present purposes, however, the effect of each provision is materially identical. If the relevant conduct (to which the complaint relates) has been the subject of criminal proceedings, the Ombudsman has no further role to play in relation to the investigation or referral of that conduct.

[162] The issue is live in the present case for the following reasons. After investigation, the Ombudsman submitted a recommendation to the PPS in 2012. This recommendation was to the effect that there should be no prosecution. However, the PPS took a different view, resulting in JR217 and another officer being prosecuted for perverting the course of justice. The particulars of the offence were as follows: "namely you recorded a written statement after caution from Gerald Kieran McGowan which was not his independent account of his involvement of the murder of Lieutenant Stephen Andrew Kirby." The applicant was *not* charged in relation to the statements of another complainant, Mr Kelly (nor, indeed, the two further complainants). The applicant pleaded 'not guilty.' In January 2015, he was acquitted by the jury upon a direction from the trial judge. It seems that this arose when the PPS determined that it would offer no evidence after issues had arisen in the course of the disclosure process which identified discrepancies between Mr McGowan's tape-recorded interview with PONI officers and his signed statement (which was supposed to reflect what had been said in the tape-recorded interview).

[163] Almost six years after the criminal proceedings concluded, in October 2021, the applicant received a letter explaining that PONI was intending to issue a public statement in relation to the investigation. He contends that he understood the

matter to be closed after he was prosecuted but acquitted. (There is also reference in the evidence to the complainants bringing civil proceedings against the police which were settled but with no admission of liability. I do not consider that the civil proceedings have any particular significance in the present challenge.) In correspondence between the Ombudsman's office and the applicant's legal representatives, the latter took issue with a variety of factual matters but also with the respondent's power to make a public statement in the circumstances. The Ombudsman did not accept that this was so.

[164] The first question is whether the conduct to which the complaints related (wholly or in part) were, in fact, "the subject of" the criminal proceedings. I have little hesitation in concluding that the applicant's conduct – at least in relation to Mr McGowan – *was* the subject of the prosecution against the applicant. He was accused of perverting the course of justice by recording a statement which was not Mr McGowan's "independent account." In the course of those proceedings, the Crown was likely to deploy against JR217 as defendant all credible allegations made by Mr McGowan as to how and why the applicant forced him to produce, or endorse, an account which was not his own independent account. I reject the respondent's submission that the subject matter of the criminal proceedings was very narrow, namely the recording of a written statement which was not an independent account. That is the particular of the offence of perverting the course of justice which is provided in the bill of indictment. However, the conduct which was in issue was the conduct of the applicant which gave rise to that statement being recorded. In circumstances where the complaint was (in essence) that the suspects were pressured into making confessions which did not represent their independent account, the conduct which amounted to the exertion of such pressure was plainly in issue. That would have included the complainants' allegations of physical ill-treatment, the use of a coercive atmosphere and other means of oppression.

[165] It is significant, in my view, that the report in the third case records (at para 3.1) that the complainants themselves complained that the police had been guilty of perverting the course of public justice, the very charge which the applicant faced; and that, although one aspect of their complaints related to their statements, that complaint was that "their statements were fabricated and obtained by oppressive and coercive means" [underlined emphasis added], with the only evidence against them being the fabricated statements. The complainants themselves therefore linked the fabrication of the statements (which was the focus of the charge of perverting the course of justice) with the oppressive and coercive means said to have resulted in the statements being obtained.

[166] The respondent was right to submit that the bar in regulation 6(5) and section 52(9) relates only to "*that* conduct" which was the subject of the criminal proceedings. The Ombudsman was also right to assert that, where a complaint is received, it is entirely proper to analyse the complaint in order to ensure that all relevant aspects of the complaint are dealt with, particularly where there are allegations of various types of misconduct which might represent breach of different

legal provisions or different provisions of the relevant police code of conduct. Notwithstanding that, in the present case I consider that the respondent's approach to this issue has been overly elaborate. The purpose of the restrictions on the Ombudsman's powers referred to above is plainly to avoid a form of double-jeopardy whereby a police officer who has been the subject of criminal proceedings finds himself or herself answerable again for the same conduct which has formed the basis of criminal proceedings against them. The nature of the scheme is such that criminal prosecution stands at the apex of responses which might be made to complaints of misconduct. Where a police officer has faced criminal proceedings, the respondent should not be astute to try to revisit the factual matters ("the conduct") which was in issue in those proceedings. Taking a common sense view of the matter, I consider that JR217 was right to object – at least as far as any conduct of his towards Mr McGowan was concerned – that this had been the subject of the earlier criminal proceedings. In many instances this will have to be assessed on a case-by-case basis on the particular facts.

[167] I would add, however, that this could be no answer to any allegations made against JR217 by complainants *other* than Mr McGowan, since it appears to have been only in relation to the statement of Mr McGowan that the applicant was prosecuted. (There is insufficient evidence before me in this case to conclude that JR217 would have had a proper basis for excluding any investigation of his conduct at the time in question because all possible relevant conduct on his part had been the subject of earlier criminal proceedings.)

[168] However, there is a reason why my conclusion at para [164] does not dispose of this element of the applicant's case. That is because the respondent raised an additional argument, namely that regulation 6 and section 52(9) are 'gateway' provisions which fall only to be applied when complaints are received. Provided there is no bar to investigating the complaints at that point, the Ombudsman submits, she may proceed to investigate them; and she does not then have to reconsider this issue at the time when she proposes to make a section 62 statement describing her actions in the case (including the outcome of her investigation).

[169] I was initially sceptical in relation to this argument for two reasons. First, there is no express indication within the wording of section 52(9) itself that it applies only at an early stage and then falls out of the picture. The provision states that "if any conduct to which a complaint … relates is or has been the subject of disciplinary or criminal proceedings, none of the following provisions of this Part shall have effect in relation to the complaint …" There is no time limitation within the wording of that provision itself. Moreover, the "following provisions" of Part VIII of the Act refer to a number of actions which will happen at various stages in the future. It can clearly be argued that the proper interpretation and application of section 52(9) requires a consideration at *each* stage when a power or function under one of those provisions is to be exercised of whether or not the relevant provision of the Act still 'has effect' in relation to the complaint. Second, it can also clearly be argued that, adopting a purposive approach to this provision, and bearing in mind (as I observed

at para [166] above) that it is designed to avoid an officer being subject to further action where he or she has faced criminal proceedings in relation to conduct already, that being the most serious form of proceeding which might follow a PONI investigation, the approach for which the respondent contends would undermine this purpose.

[170] Ultimately, however, I have come to the conclusion that the respondent's argument is correct in this regard. In the first instance, it draws support from the section heading of section 52, which is "Complaints – *receipt and initial classification* of complaints." Second, on analysis, the section 52 provisions appear to relate to determinations which are to be made at (or shortly after) the initial receipt of the complaint, whether made directly to the Ombudsman or referred to her. The Ombudsman must then record the complaint and determine at that point whether it is a complaint to which section 52(4) relates (see section 52(3)(a) and (b)). Where the Ombudsman determines that a complaint made or referred to her is not a complaint to which section 52(4) applies, that triggers an obligation to refer it on under section 52(6). Where she determines it is one to which section 52(4) applies, the complaint must be dealt with in accordance with the following provisions of Part VII (see section 52(8)) and it falls to the Ombudsman to determine which process should be used. It appears, reading section 52(9) in the context of those other provisions, that the question of previous criminal or disciplinary proceedings is to be considered at that point.

[171] Perhaps the most important point in this respect, however, is that section 59(1)(b) and (1B) provide that where the DPP has initiated criminal proceedings after a report from the Ombudsman and these have concluded, the Ombudsman must consider the question of disciplinary proceedings. She can recommend disciplinary action, whether or not the criminal proceedings have resulted in a conviction. If the applicant's contention was correct – that section 52(9) bars any further action by PONI where there have been criminal proceedings relating to the conduct in question – that would conflict with the clear duty in section 59(1B). For that reason, I do not consider the applicant's approach to section 52(9) to be correct. Once the criminal proceedings against JR217 had concluded, the Ombudsman was obliged to consider the question of disciplinary action. She would there still have functions to undertake. She could explain in a section 62 public statement, for instance, why she recommended disciplinary action (or why she had not) and why she had recommended prosecution (or why she had not). Obviously, it would be particularly egregious if such a statement suggested that the officer concerned was guilty of criminal conduct where, as here, he or she had been acquitted in a criminal trial. For the reasons given above, however, any statement amounting to a determination that misconduct or criminal conduct had occurred would, in any event, be ultra vires.

[172] The respondent has relied upon the fact that, after the conclusion of the criminal proceedings in 2013, there has been no further investigation by her office. Rather, there has simply been further "analysis" of the issues arising from the earlier

investigation (which preceded the criminal proceedings). There has not really been an adequate explanation of how this came to be or of what prompted the further actions in the case in recent years. Nonetheless, for the reasons given in paras [168]-[171], I conclude that the Ombudsman's power under section 62 was not disapplied by reason of the operation of section 52(9). It would have been – at least insofar as any complaint against JR217 related conduct directed towards Mr McGowan – if the criminal proceedings had preceded the making of the complaint; but not in circumstances where those proceedings only occurred after, and as a result of, PONI's involvement.

The previous disciplinary investigation

[173] Both section 52(9) and regulation 6(5) of the 2001 Regulations also provide that where the relevant conduct has been the subject of disciplinary proceedings, the Ombudsman shall have no power to act in relation to that conduct.

[174] In this case, the applicant relies upon the fact that there had been previous disciplinary *investigations* conducted by the police. The Ombudsman has recorded (at para 3.3 of her statement) that she could not investigate the allegations of physical ill-treatment or assault made by the complainants "as these complaints were investigated at that time by the RUC's Complaints and Discipline Branch" (CDB). She was therefore precluded from doing so by regulation 5(3)(f) of the 2001 Regulations which provides as follows:

> "Subject to regulations 6 and 10, the requirements for a complaint received under section 52(1) of the 1998 Act to be dealt with in accordance with the provisions of Part VII of the 1998 Act shall be:
>
> …
>
> (3) …
>
> (f) the complaint has not otherwise been investigated by the police."

[175] The CDB investigation included forensic investigation but also a review of relevant police documentation, including medical records, and interviews of witnesses (including the provision of written statements under caution by the officers involved). The focus appears to have been on investigation for the offence of assault. The CDB forwarded a file of evidence to the DPP who directed 'no prosecution.'

[176] As noted above, the Ombudsman did consider that this was a matter which prevented her from exercising her powers in relation to that aspect of the complaints relating to physical ill-treatment. (The 'gateway' issue did not arise in relation to this

since the disciplinary investigation – unlike the later criminal trial – preceded the making of the complaints to her office in 2003.) I consider that the Ombudsman appropriately recognised this restriction on her powers in light of the previous investigation in relation to allegations of physical assault.

[177] The applicant is particularly concerned that, although the complainants alleged that they were physically assaulted by certain officers, all four complainants were examined by police doctors (and Mr Kelly visited his own doctor) and it seems that no physical injuries were identified during any of the medical examinations of the four men, nor by prison doctors who also later examined them. This is not mentioned in the report. However, the respondent has made the valid point that it is clear that she was not considering allegations of physical assault, for the reasons just mentioned. That being so, she submitted – correctly in my view – that it was unnecessary to include this level of detail in relation to that matter. I recall that I refused leave in relation to a specific ground of challenge related to that alleged omission (see para [70] of the leave ruling).

[178] However, the applicant's remaining case in relation to the previous disciplinary investigation is two-fold. First, he contends that that investigation looked at misconduct going well beyond the mere allegation of physical assault. Second, he contends that, in any event, when the allegations of physical assault are put aside (because of the previous disciplinary investigation) and the allegations in relation to non-physical coercion are put aside (because of the previous criminal proceedings), there is very little if anything left in respect of his conduct which can properly be the subject of the section 62 public statement. I reject this argument on the basis that, as discussed above, I do not consider the criminal proceedings in this case to have the exclusionary effect for which the applicant contended.

[179] The question of whether the respondent took an unduly narrow view of the previous disciplinary investigation (by restricting it only to allegations of assault) was addressed in the respondent's replying evidence. The respondent's deponent, Mr Paul Holmes (Senior Director of Investigations within OPONI), helpfully exhibited materials held by OPONI which may be relevant to that issue, including the CDB files in relation to the complaints made by each of the complainants. Mr Holmes averred that he believed the disciplinary investigation "was exclusively criminal in nature." It resulted in the submission of a report to the DPP, although the DPP ultimately directed 'no prosecution' of any of the officers.

[180] Mr Holmes has further averred that there was "no disciplinary aspect to this investigation in so far as the Ombudsman can establish or ascertain from the CDB files." Although it is accepted that each complainant made complaints of assault and threats to them, the respondent contends that the files suggest that only the physical assaults had been investigated. He does, however, accept that it appears from the files that during the CDB investigation questions were put to the officers regarding allegations of threats and verbal abuse. Nonetheless, Mr Holmes' clear understanding is that CBD officers would not, at that stage, have investigated such

matters ahead of any voir dire which would be held in the criminal proceedings to deal with them. He makes the further point that the files do not refer to any criminal investigation into any alleged attempt to pervert the course of justice. Finally, the respondent relies upon the fact that it is clear that PONI staff sought the CDB files and carefully examined them before determining what aspects of the more recent complaints to the Ombudsman could properly proceed to be examined.

[181] This is yet another difficult issue to resolve. The contemporaneous papers from the time refer to allegations of "criminal conduct", which is further described in different terms in correspondence relating to the various complaints, for example as "a complaint of assault, threats etc on complainant", "a complaint of assault and ill treatment" and/or an allegation that the complainant "was assaulted and threatened." The initial statements of the complainants or on their behalf were couched in varying terms. Some referred to threats that they would be taken to Castlereagh and/or to the writing out of statements on their behalf, which the police would then say they refused to sign. The police statements which were taken address the issue of abuse or ill-treatment in *any* way (all of which was denied). It does seem that the focus of the investigation was on the allegations of physical assault. However, this may have been because there was objective evidence (in the form of medical evidence) which might go some way to either proving or disproving that aspect of the complaint. Having been charged with murder, the complainants did not wish to be interviewed by the police in relation to their allegations against the officers. This would undoubtedly have impeded investigation of other aspects of their complaints. The intention appears to have been to interview the complainants after their trial. This ultimately did not prove possible since they absconded.

[182] On balance, I do not consider that the applicant has made out the case that the Ombudsman was wrong to consider that the disciplinary investigation had not covered all of the matters she addressed in her statement. She applied her mind to the issue, sought the relevant records, and correctly identified that allegations of physical assault had previously been investigated. Beyond that, save for allegations that the applicants were 'threatened with Castlereagh' (ie told that they may be taken to Castlereagh Police Office/Holding Centre for further interrogation), the applicant has not shown that the previous disciplinary investigation was a bar to the respondent considering matters which she later addressed in her public statement.

The Ombudsman's conclusions in the third case

[183] At the leave stage I also held that there was an arguable case in relation to the Operation Farrier report that the respondent had, again, made statements which amounted to (ie would reasonably be read as) findings of misconduct against the applicant. The applicant contends that an objective, reasonable reader would consider that the Ombudsman had concluded that he mistreated and coerced some of the complainants in circumstances which would plainly have constituted a disciplinary offence at the time. In this regard, he takes issue with a variety of statements within the relevant report.

[184] The report contains the following (although this is not exhaustive of the portions of the report which the applicant claims went too far in light of the Ombudsman's statutory role):

(a) An acceptance of the expert evidence that two statements signed by two of the complainants were "too similar to have been produced independently" and that the expert evidence "supports the allegation of Mr McGowan the police told him what to put in his statement" (para 8.25 and 8.26);

(b) A statement of the Ombudsman's "view, given the available evidence, that the statements from Messrs Toner, Crumlish, McGowan, and Kelly were obtained unfairly and were not 'voluntary' in the sense described in the Judges' Rules" because of a variety of circumstances which she then set out;

(c) The conclusion expressed in para 8.39 in the following terms:

> "… I have concluded that the evidence obtained during this investigation supports their complaints that the 'confessional' statements were obtained in a 'coercive atmosphere,' and in circumstances which did not comply with Home Office guidance. This investigation has also established that the statements were obtained unfairly as they had no access to legal representation and were provided in order to secure their release from custody."

(d) An expression of her view that a variety of factors "had the cumulative effect of creating an oppressive and fearful environment" such that the confession statements given "were not obtained fairly but by coercion and/or oppression."

(e) A finding at para 8.76 that the complaints were "legitimate and justified regarding their mental ill-treatment, detention and interviewing by police", including "the manner in which 'confessional' statements were obtained from them by police."

(f) An expression of the Ombudsman's view at para 8.77 "given the young age of the four complainants, their lack of access to legal advice, and the oppressive atmosphere surrounding their detentions that this was indicative of an unfair process" and that "the irregularities and coercive atmosphere in which the 'confessional' statements were obtained were indicative of the statements having been obtained unfairly, and not freely and voluntarily in the sense described in the Judges' Rules."

[185] In relation to the substance of the Ombudsman's views, there was argument as to the relevant rules and standards which ought to be applied. The respondent noted that there was, at the time of the arrest of the complainants, no legislation governing the actions of police officers interviewing suspects. She has placed particular reliance on the Judges' Rules which were in force at the time. The applicant contends that the Ombudsman has wrongly applied standards applicable to the admissibility of confession evidence, a matter of the law of *evidence*, as a standard of police conduct.

[186] He also complains that the Ombudsman has failed to adequately reflect the position under the relevant emergency legislation at the time, namely section 6 of the Northern Ireland (Emergency Provisions) Act 1973 ("the 1973 Act"), introduced on foot of the Diplock Commission's recommendation for a substantially modified test in respect of confession statements. Pursuant to this provision, a statement by the accused charged with a scheduled offence would be admissible unless there was prima facie evidence that the accused had been subjected to "torture or to inhuman or degrading treatment in order to induce him to make statement." Where there was such prima facie evidence, the prosecution had to prove that the statement was not so provided. On this basis, the applicant contends that, even if the Ombudsman was correct to apply admissibility criteria as standards of police conduct, she still addressed herself to the wrong legal test. This amounts to a submission that, in seeking to bring to justice those who may have committed terrorist acts, police officers were entitled to use coercive behaviour to secure confessions, even if they were not voluntary, provided that their behaviour fell short of torture or inhuman or degrading treatment. This is an unattractive submission.

[187] Insofar as the evidence before me clarifies the position, it appears to me that it was a reasonable starting point for the Ombudsman to take that any breach of the Judges' Rules which would ordinarily result in the exclusion of a confession would also amount to police misconduct. I have not been persuaded that this represented any kind of misdirection or error of law. The notice parties in the third case helpfully provided the court with a copy of the Bennett Report, that is the Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland presented to Parliament by the Secretary of State for Northern Ireland in March 1979. There are a variety of portions of this report which are potentially relevant. Of most relevance, however, are para 62 (which notes that police officers are subject to disciplinary regulations and force orders which make specific provision against ill-treatment of prisoners, and for penalties for those found to be in breach of these regulations or orders); para 76 (which explains that the Judges' Rules were introduced in Northern Ireland in 1976 with an explanation that the Secretary of State had agreed with the Chief Constable of the RUC that the Rules should be brought into use in Northern Ireland, suggesting that the Rules were made as a guide to police officers); para 101 (which indicates that it is prescribed in the RUC Code that, where it is anticipated that statements resulting from interviews will be used in evidence in subsequent criminal proceedings, such statements must be taken in accordance with legal requirements and the Judges' Rules); and para 104 (where it

is stated that the RUC Code provides that a police officer must not subject a prisoner to any degrading physical or mental ill-treatment or permit any other person to do so).

[188] The Judges' Rules were also framed as administrative directions to the police and were endorsed by Home Office guidance which made clear that the Judges' Rules should be observed and that the police should scrupulously avoid any method which could be regarded as unfair or oppressive. Perhaps more importantly, following provision of the Bennett Report by the notice parties the respondent provided to the court section 29 of the RUC Code. (This is distinct from the Discipline Code set out in the 1988 Discipline Regulations and appears to be a wider document governing the standards and procedures expected of police officers). Para 38 of that Code, which appears to date from 1976, and which would have therefore been applicable at the relevant time and which post-dates the 1973 Act, deals with the interviewing and examination of suspects. It includes the following:

> "… [the interviewing policeman] must be conscious of the fact that the liberty of the subject is involved and it becomes, therefore, most essential that even the appearance of irregularities in method and procedure should be avoided on every occasion. <u>It is vitally important that the Judges' Rules, which provide standard authoritative guidance to the police on their powers and duties are strictly adhered to at all times</u>."
>
> [my underlined emphasis]

[189] The circumstances of this case were also such that the PPS considered it appropriate to initiate proceedings against the applicant and another officer by reason of the alleged coercive behaviour which gave rise to the alleged involuntary confession evidence. There was no specific ground of challenge alleging error of law on the respondent's part in this respect. Indeed, in the applicant's affidavit, he contends that the respondent's findings relate to matter which "would plainly have constituted a disciplinary offence at the time." It is also clear from the detailed discussion of this issue in the Ombudsman's report that she was alive to the formal distinction between rules relating to the admissibility of evidence and rules governing police misconduct. For these reasons, I consider the Ombudsman was correct to proceed on the basis that breaches of the Judges' Rules in this case would amount to misconduct (whether or not such breaches would still have left room for the possible admissibility of confession evidence so obtained under the 1973 Act).

[190] Proceeding on that basis, I agree with the applicant's basic submission that the Ombudsman has, again, gone further than her statutory powers permit in terms of express or implied findings of misconduct.

[191] It is difficult to disaggregate the specific findings in relation to each police officer given the general nature of the conclusions referred to at para [184] above.

Nonetheless, it is clear that the Ombudsman found that each complainant (including Messrs Kelly and McGowan with whom JR217 was definitely engaged) had given confessions which were not voluntary and which were obtained "unfairly" in a "coercive atmosphere" and "an oppressive and fearful environment." Her conclusions go beyond a finding that there had been a breach of relevant guidance which was applicable at the time. They extend to a finding that the statements were obtained "by coercion and/or oppression"; and that the complaints were "legitimate and justified" regarding the complainants' "mental ill-treatment", as well as their, detention and interviewing by police.

[192] That there are express or implied findings in this regard arises from the natural meaning of the words used. This includes wording the statement at para 3.15 of the report that the Ombudsman's "conclusions" in respect of the complaints are outlined later in the public statement. It also includes wording such as the following: "After very careful consideration of the relevant facts, I have concluded …" in para 8.66; "I find …" in para 8.76; and "it is my view" in para 8.77. In one instance, the Ombudsman comments (at para 8.17) that she is "unable to conclude on these specific allegations" (allegations that the complainants were threatened that their families would come to harm) given the conflicting evidence.

[193] The report also includes clear expressions of the Ombudsman's views or qualitative assessments of the subject-matter of the complaints made by the complainants in relation to matters such as their mental ill-treatment, detention and interviewing which (as noted above) the Ombudsman said were "supported" by the evidence she had found and were "legitimate and justified." The tenor of Chapter 8 of the report, read as a whole, is that the Ombudsman was making both factual findings and evaluative judgments as to the propriety of the behaviour which was the subject of the complaint.

[194] The third case is not one where article 2 ECHR is or could be engaged (since no death occurred and by reason of the vintage of the subject matter of the complaint). As a result, the additional leeway which I consider the Court of Appeal was prepared to allow in an article 2 case does not arise.

[195] I conclude that the Ombudsman acted *ultra vires* in making implied findings of misconduct in relation to JR217 (and the other officers involved in the interviewing of the complainants) in the terms of her public statement which is the subject of the proceedings in the third case. In particular, I consider that the wording of paras 8.39, 8.66, 8.76 and 8.77 were beyond her powers in the publication of such a statement. This is not necessarily an exhaustive list, given the interlinkage between various passages of the report and criticisms which the applicant's representatives made of other passages which repeat or support the core findings. However, the passages identified immediately above are in my view the most obvious examples of the respondent having gone beyond the proper scope of her powers under section 62 in light of the principles identified at para [59] above.

Conclusion

[196] The three reports which were produced by the respondent which were under challenge in these proceedings were obviously the product of detailed investigation, much consideration and a significant amount of hard work on the part of the Ombudsman and her officers. Nothing in this judgment is intended to undermine or cast doubt upon their professionalism, dedication or bona fides in undertaking their work in relation to the relevant complaints; nor (save in the limited respect mentioned at the start of para [125] above) to express any view on objective correctness, or otherwise, of the substance of the opinions formed by the Ombudsman. In my judgment, however, the publication of impugned reports in the terms which have been challenged by the applicants in these proceedings represents an extension of the Ombudsman's role beyond its proper bounds having regard to the statutory scheme which confers and governs her statutory functions.

[197] All parties, including the applicants, accept the importance of OPONI operating as an entirely independent, rigorous investigator of allegations of police misconduct, which is vital in the public interest. These proceedings concern the appropriate output for such an investigation. I can quite understand the Ombudsman's desire, having thoroughly investigated a complaint of police misconduct, to share with the complainant (and, in some instances, the public) the product of her investigation. That is particularly so where criminal proceedings and/or misconduct proceedings are impossible or no longer possible, but where the Ombudsman considers that her investigation points towards misconduct having occurred. However, the central feature of the Court of Appeal's reasoning in the previous case-law discussed above is that the Ombudsman's role is investigative and *not* adjudicative. It is not for the Ombudsman to made determinations (whether express or implied) as to whether criminal conduct or even misconduct has in fact occurred; no more than it is for the police to determine and publicly state that a suspect is guilty of a crime. That is a matter to be determined by others in different processes specifically established for that purpose.

[198] Particularly in the sphere of the legacy of the Troubles, OPONI has increasingly been placed in a position in recent years where it is expected to resolve contentious cases and provide answers to allegations of misconduct or criminal conduct on the part of the police. The Government's (understandable) reliance upon OPONI as part of the state's mechanisms to discharge its article 2 obligations has further enhanced such expectations but without any change to the Ombudsman's statutory functions to provide her with an adjudicative role. At the same time, as I noted in para [45] of the leave ruling in these cases, it also seems that the Ombudsman has frequently been urged to deal with allegations of collusion, when this is a concept with no universally agreed definition (as the Ombudsman accepts). It is again understandable that the families of victims who suspect collusion will make that the subject of complaint. However, as the Court of Appeal has established (see paras [43] and [46] above), there is no obligation on the Ombudsman to substantiate or dismiss a complaint in the precise terms in which it is formulated by

the complainant. Moreover, if the definition adopted by the Ombudsman proceeds on the basis that collusion must involve an improper purpose (as no doubt also alleged by the complainants), such that (as I have held) this will inevitably amount to police misconduct, it is an issue which it is simply not for the Ombudsman to determine.

[199] As noted at the commencement of this judgment, section 45 of the Legacy Act may mean that the issues brought into focus in these proceedings are now less significant, certainly insofar as the Ombudsman's role in investigating legacy cases is concerned. It remains to be seen what the Government's and Parliament's final position will be in relation to the amendment, replacement or repeal of that Act. It is of note, however, that the powers of ICRIR in sections 15 and 17 of the Act to publish final reports in relation to reviews of deaths or other harmful conduct, addressing "the findings of the review" and, insofar as practicable, responding to particular questions included in the request for a review, are in materially different and much wider terms than those of section 62 of the 1998 Act. If Parliament wishes the Ombudsman to have some additional or wider adjudicative role, in this context or otherwise, this should in my judgment be made clear by amendment of the relevant statutory provisions. (The applicants placed reliance upon the Ombudsman having asked for wider powers in this regard in recommendation 17 of her first review of the 1998 Act under section 61(4) of that Act in November 2020. I have determined these cases without reference to that recommendation, which is plainly not determinative of the legal position; but it indicates that the scope of PONI's powers in this regard may be the subject of ongoing consideration.)

[200] In summary, each applicant succeeds on the ground that the respondent exceeded her powers given the findings or conclusions expressed in the impugned reports which amounted to determinations of (at least) misconduct. The remaining grounds in the first and third cases are dismissed.

[201] I will hear the parties, after they have had an opportunity consider this written judgment, on the issues of relief, the terms of any final order, and costs.