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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

BETWEEN

JR55

Applicant/Appellant

and

NORTHERN IRELAND COMMISSIONER FOR COMPLAINTS

Respondent/Respondent

Higgins LJ, Girvan LJ, Coghlin LJ

GIRVAN LJ

Introduction

[1] This is an appeal from a judgment given and order made by Treacy J dismissing judicial review proceedings brought by a general medical practitioner ("the GP") who challenged a decision of the Northern Ireland Commissioner for Complaints ("the Commissioner") made on 8 April 2011 whereby he recommended that the GP pay to the widow of a deceased patient the sum of £10,000 by way of what is called a consolatory payment consequent on the death of the patient. In the proceedings the GP challenges the power of the Commissioner to recommend the payment of the consolatory payment and he challenges the threatened exercise by the Commissioner of an asserted power to make a special report in relation to the matter to the Northern Ireland Assembly in the event of the GP failing to comply with the recommendation to pay the consolatory payment recommended.

[2] Mr Scoffield QC appears on behalf of the GP. Dr McGleenan QC and Mr McAteer appear for the Commissioner. The court is indebted to counsel for their clear and helpful submissions.

[3] Treacy J granted the GP anonymity in respect of the proceedings, continuing the order for anonymity until judgment and pending appeal. We direct a continuation of that anonymity and impose a restriction on the reporting of the GP's name. In the course of this judgment we shall refer to the GP simply as "the GP", to the patient as "the patient", to the patient's widow as "the complainant", to the relevant hospital as "the hospital" and to the relevant Trust as "the Trust".

Factual background

[4] The relevant factual background to the judicial review proceedings can be distilled from paragraph 7 *et seq* of the Commissioner's Report. The key events may be summarised as follows:

(a) Although he was clinically asymptomatic at the time, the patient requested his GP to refer him to have his heart checked. The patient was referred for an exercise ECG test which the patient attended at the hospital in July 2008. The test was reported as negative for ischaemic heart disease at the level of exercise carried out. It noted a poor exercise capacity and that the patient was hypertensive throughout the test. Although in fact the outcome of the exercise test was inconclusive the hospital reported it as negative. The GP took no further action.

(b) The patient attended the practice again on 10 December 2008. He described chest pain when going upstairs with the pain easing after rest. The GP recorded in the patient's note that this was "typical angina pain but there had been a normal treadmill earlier in the year".

(c) The patient attended the practice again on 15 December 2008 complaining of recent onset chest pain when he exercised for the previous 3 weeks. The GP noted that the pain came on after 200 yards and eased with rest and it was experienced 4-5 times per week. He also noted that there was no past medical history of similar pain, that there was no pain at rest and that the pain was made worse by lifting kegs of beer which the patient had to do in the course of his work. The GP referred the patient to a clinic at the relevant hospital called the Rapid Access Chest Pain Clinic ("the RACP clinic").

(d) The RACP clinic wrote back to the practice on 20 December 2008 outlining reasons for not giving the patient an appointment. The letter stated that there had been no ischaemic ECG changes during the previous test and that if the GP would like further medical review the patient should be referred to medical outpatients. The letter was scanned into the practice computer on 24 December 2008 but it was not seen or read at that time.

(e) The patient attended the practice again on 6 January 2009 enquiring as to why he had not received an appointment at the clinic. He informed the GP that he was still experiencing chest pain. The GP decided to refer the patient again for a treadmill test. However, the patient sadly passed away later that day. His cause of death was recorded as coronary artery artheroma.

[5] The main elements of the complainant's complaint against the GP were that the patient was not informed that his appointment at the clinic had been declined until he visited the practice of his own volition on 6 January 2009. The complainant wanted to know why her husband's appointment was declined by the clinic and why this was not followed up. Subsequent to the death of the deceased the GP visited her home on the day that her husband's body was returned and then approximately one month later. It was alleged that the GP discouraged the widow from making a complaint about the practice. The widow also complained that although the GP had indicated that he would come back to her after contact with Dr B, a consultant at the relevant hospital, he did not do so. According to the Commissioner's report, during the course of the investigation other issues became apparent, namely whether the GP's follow up after the patient's treadmill test in July 2008 might not have been adequate and whether the practice's treatment of the patient at the appointment on 6 January 2009 was inadequate.

[6] The complainant had also made a complaint to the Commissioner about the care and treatment provided to the patient by the relevant Trust which had responsibility for the hospital. The complainant was particularly concerned about why, the patient having been referred to the RACP clinic, the clinic had declined the GP's request to see the patient.

[7] The Commissioner determined that the patient should have received better follow up care from his GP following his treadmill test in July 2008. He also concluded that the action taken by a locum GP in the practice was insufficient in that no appropriate referral was made regarding the patient's ongoing chest pain. The Commissioner was unable to conclude that the sad outcome would have been altered in any way even if the locum had taken alternative action. The Commissioner was also critical of the GP's visits to the widow's house after her husband's death, the practice's complaints handling procedures and its contact with Dr B.

[8] The Commissioner's Report highlighted a number of matters which the Commissioner considered were shortcomings in the GP's handling of the patient's medical treatment. The Commissioner had the services of an expert medical advisor described as the GP IPA. The IPA considered that the GP might consider making a change to his practice by allowing all clinical mail to be rapidly viewed by a GP, whether locum or principal, in order to decide which actions could wait or should be prioritised. On 9 February 2011 the GP stated that he now accepted and was implementing the Commissioner's proposal that all clinical mail should be rapidly

viewed by a GP whether locum or principal. While the GP made the correct assumption about the patient's eligibility for an appointment at the clinic with the Trust wrongly declining the appointment, the GP's system for the receipt and processing of mail was not sufficiently specific to ensure that the patient was informed in a timely manner that his appointment had been declined. The locum GP was not reading non-urgent hospital correspondence as should have been done. The GP's lack of awareness and knowledge of the operational arrangements which informed the work of the RACP clinic at the hospital meant that the GP was not providing accurate advice to the patient as to what would happen next with regard to his referral to the clinic. The Commissioner also was critical of the GP for not following up the patient's apparent blood pressure problem by any kind of sustained observation. The patient should have been referred for a further investigation after the July test, incorrectly described as inconclusive by the hospital. The patient showed several cardiovascular risk factors (obesity, high cholesterol, alcoholism, high systolic blood pressure and a positive family history of heart disease). He should have been treated either by the GP or referred to a cardiologist/physician. The Commissioner concluded that the GP's lack of action after the patient's treadmill test constituted maladministration. In his view it would have been a better approach on 6 January 2009 for the patient to have been referred to emergency services although seeing the rapidity of events such a referral would not have changed the outcome. The Commissioner concluded that even if the GP's visits to the complainant were motivated by good intentions it was inappropriate for him to try to attribute full responsibility to the Trust. The GP and the locum were not sufficiently critical of their own individual and collective responses to the patient's care and treatment. The Commissioner was also critical of the fact that, having told the complainant that he would contact Dr B regarding her complaint about the Clinic and get back to her, he did not follow up that aspect of the matter. He considered that this lack of follow up constituted maladministration.

[9] In his conclusions to the Report at paragraph 68 *et seq* the Commissioner stated:

> "68. In my consideration of the documentation provided to me, including the relevant guidelines, and the advice from my independent professional advisor, I have concluded that the (GP) failed to provide a reasonable level of care and treatment to the patient.
>
> 69. Following his treadmill test in July 2008 better follow up care should have been provided. The practice should also have had better procedures in place for dealing with correspondence in the absence of the GP. I also conclude that (the GP) acted inappropriately

when he visited the relevant family in therir home after the patient's death, that the practice acted inappropriately in relation to its handling of the complaint and its failure to meet the commitment to arrange a meeting with Dr B.

70. I have identified learning points earlier in this report for the practice and I recommend the GP acts upon them but I also recommend that the GP should pay the complainant £10,000 in respect of the clearly identified failings in the care provided for (the patient) and the events which subsequently followed.

71. The GP has agreed to issue the apology. The award of the consolatory payment is, however, a new situation for the GP and as such the GP is currently taking advice from his professional and legal advisors in respect of the matter. Consequently, this matter is still in progress.

72. I do hope that this report has provided (the complainant) with some much sought after answers to her questions surrounding the very sudden and tragic circumstances that effected the death of her husband."

[10] Although the GP's legal challenge relates to the Commissioner's decision to make a recommendation for the payment of a consolatory payment and to his claimed power to lay a special report in respect of the matter before the Assembly if that consolatory payment is not made, Mr Scoffield did subject the Commissioner's investigation and report to a number of criticisms which are not strictly relevant to the issues raised by the pleaded judicial review challenge. The GP's Order 53 statement does not challenge the power of the Commissioner to carry out the investigation. The legal challenge is focused on the issue of the consolatory payment and the Commissioner's asserted power to lay a report. Accordingly, it is not necessary to consider in depth the criticisms levelled by counsel in respect of the Commissioner's decision to investigate the complaint and in respect of his ultimate conclusions which appear to apportion greater blame to the GP in relation to the matter than to the relevant Trust.

[11] Mr Scoffield raised the question whether the Commissioner should have concluded in the complaint validation process that the complainant did not have a remedy by way of court action. If she did have such a remedy, the Commissioner's assumption that she did not have such a remedy flawed the decision to investigate because the Commissioner in consequence must have failed to consider the question

of the exercise of his discretion to decide whether, notwithstanding such a remedy, the complaint should be entertained. If Mr Scoffield's point is a good one the Commissioner had no power to carry out the investigation. However, this is not part of the pleaded case.

[12] Counsel argued with some justification that the Commissioner's Report failed to accurately reflect what the IPA had said in relation to significant aspects of the case. The IPA was less critical of the GP and more critical of the hospital in the events which happened. The IPA was clearly concerned that the RACP clinic acted inappropriately in many ways and that the Chief Executive of the Trust was not advised well in supporting the actions of the cardiac nurse specialist who declined the GP's referral. There had been a significant deterioration in the patient's condition which should not have resulted in the clinic refusing to see the patient. Notwithstanding those criticisms, counsel conceded that the GP accepted the thrust of the Commissioner's Report in respect of the need to improve practice procedures and in relation to the way in which the patient was treated. The alleged lack of balance in the criticism of the GP and the Trust in the Commissioner's eport, Mr Scoffield argued, did not accurately represent the IPAs advice and resulted in the calculation of a consolatory payment which was disproportionate for no consolatory payment was recommended in relation to the Trust whose blameworthiness was greater.

The relevant statutory provisions

[13] The powers and duties of the Commissioner for Complaints are set in the Commissioner for Complaints (Northern Ireland) Order 1996 ("the relevant Order"). This Order was enacted at the same time as the Ombudsman (Northern Ireland) Order 1996 ("the Ombudsman Order"). While the same person carries out the functions set out in the two separate provisions, the Orders are significantly different in a number of respects.

[14] Under Article 7 of the relevant Order the Commissioner may investigate any action taken by or on behalf of a body to which the Article applies and in the exercise of the administrative functions of that body, but only if a complaint is made to the Commissioner in accordance with the Order "by a person who claims to have sustained injustice in consequence of maladministration in connection with the actions so taken" with a request to conduct an investigation. The separate provisions of Article 8 relate to (*inter alios*) individuals undertaking to provide general medical services under the Health and Personal Social Services (Northern Ireland) Order 1972 as amended. Under that provision the Commissioner may investigate any action taken by a general health service provider in connection with services, but only if a complaint is made to the Commissioner by a person who claims to have sustained injustice in consequence of the action taken with a request to conduct an investigation into it. While Article 8(6) provides that nothing in the Order authorises or requires the Commissioner to question the merits of a decision taken without maladministration by a general health service provider, or a person

employed by a general health service provider, or a person acting on behalf of a general health service provider, or a person to whom a general health service provider has delegated any functions, that provision does not apply to the merits of a decision to the extent that it was taken in consequence of the exercise of clinical judgment. There are clear distinctions between an Article 7 and an Article 8 investigation with different consequences.

[15] Under Article 9(3) the Commissioner shall not conduct an investigation in respect of:

> "(a) any action in respect of which the person aggrieved has or had a right of appeal, complaint, reference or review to or before a tribunal constituted under any statutory provision of otherwise;
>
> (b) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in a court of law."

Under paragraph (4) it is provided that the Commissioner may conduct an investigation notwithstanding that the person aggrieved has or had such a right or remedy as is mentioned in paragraph (3) if the Commissioner is satisfied that in the particular circumstances it is not reasonable to expect him to resort to or have resorted to it, or notwithstanding that the person aggrieved had exercised such a right as mentioned in paragraph (3)(a) if he complains that the injustice sustained by him remains unremedied thereby and the Commissioner is satisfied that there are reasonable grounds for that complaint."

[16] Article 10(4) provides that a complaint shall not be entertained unless made in such form and containing such particulars as may be prescribed by order made by the Department. It does not appear the Department has made any order under that provision. Under Article 10(5) a separate complaint must be made in respect of each separate injustice alleged to have been sustained.

[17] Under Article 11 it is provided that:

> "The purposes of the investigation by the Commissioner shall be –
>
> (a) to ascertain if the matters alleged in the complaint –
>
> (i) may properly warrant investigation by him under this Order; and

(ii) are, in substance, true, and

(b) where it appears to the Commissioner to be desirable –

(i) to effect a settlement of the matter complained of; or

(ii) if that is not possible to state what action should in his opinion be taken by the body concerned, the general health service provider concerned or the independent provider concerned (as the case may be) to effect a fair settlement of that matter or by that body or provider or by the person aggrieved to remove or have removed the cause of the complaint."

[18] Article 15(3) provides:

> "In any case where the Commissioner conducts an investigation pursuant to complaint under article 8 he shall send a report of the results of the investigation –
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> (a) to the person who made the complaint;
>
> (b) to any person by reference to whose action the complaint is made;
>
> (c) to the general health service provider concerned (if that provider does not fall within paragraph (b), and
>
> (d) to any Health and Social Services body with whom the general health service's provider concerned is subject to an undertaking to provide general health services."

[19] Provision is made in Article 16 for an application for compensation by a person aggrieved. Where in an investigation carried out *pursuant to complaint under Article 7* the Commissioner reports that a person aggrieved has sustained injustice in consequence of maladministration the County Court may, on an application by that person, by order award that person damages to be paid by the body concerned. Damages under that provision shall be such as the County Court may think just in

all the circumstances to compensate the person aggrieved for any loss or injury which he may have suffered on account of:

(a) expenses reasonably incurred by him in connection with the subject matter of the maladministration on which his complaint was founded; and

(b) his loss of opportunity of acquiring the benefit which he might reasonably be expected to have had but for such maladministration.

The common law principle that there is a duty on a person to mitigate his loss applies (see Article 16(4)). The court has a power to issue a mandatory or prohibitory order if the circumstances are appropriate (see Article 16(5)). There is a right of appeal in respect of a County Court's conclusions (see Article 16(7)). There is an additional power in Article 17 in relation to complaints under Article 17 for the Attorney General, at the request of the Commissioner, to apply to the High Court for the grant of relief where the Commissioner reports that a person aggrieved has sustained injustice in consequence of maladministration and it appears to the Commissioner that the relevant body concerned had previously engaged in similar conduct. The statutory claim to damages under Article 16 does not apply to Article 8 investigations

[20] Under Article 19 the Commissioner is required to annually lay before the Assembly a general report on the performance of his functions under the Order and "may from time to time lay such other reports before the Assembly as he thinks fit".

[21] Article 21(1) provides that information obtained by the Commissioner or his officers in the course of, or for the purposes of, an investigation under the Order shall not be disclosed except as permitted by paragraph 1B or for the purposes of:

"(a) an investigation and any report to be made thereon under this order;

(b) any proceedings for an offence under the Official Secrets Acts 1911-1989 …;

(c) any proceedings for an offence of perjury …;

(d) an inquiry with a view to the taking of proceedings of the kind mentioned in sub-paragraphs (b) or (c); or

(e) any proceedings under Articles 14, 16 or 17."

Article 14 relates to an application arising from obstruction or contempt of court arising out of an obstruction to an investigation.

The lawfulness of the recommendation of a consolatory payment

The parties' arguments

[22] Mr Scoffield QC contended that the Commissioner has no power to make a recommendation that a consolatory or compensatory payment be made to a complainant. Even if such a power existed in this case the recommendation that the GP make such a payment was not necessary to effect a settlement of the complaint. The recommendation amounted to a form of compensatory award, something which can only be done by the court in pursuance of the limited statutory compensation scheme set out in Article 16. The Commissioner's decision on quantum was irrational and was supported by no adequate reasoning or explanation. A recommendation made by the Commissioner in consequence of adverse findings in an investigation could not be made to effect payment of compensation. Article 16, which contains a limited statutory power, relates only to Article 7 complaints and therefore does not relate to complaints falling under Article 8. If a complainant in such a situation is to have a remedy, this must be pursued by the normal court procedures available in a common law action. The Commissioner's process does not provide the safeguards available in court proceedings (there being no pleaded precision, no discovery, the Commissioner using his own expert whose report is not disclosed and there being no appeal mechanisms). The Commissioner is not bound by the Bolam standard of negligence. If the Commissioner is correct in his propositions, a GP can be asked to pay a significant sum calculated without any reference to prevailing court guidelines in respect of damages for failings to take care as found by the Commissioner which may give rise to no civil liability at all. If the doctor's failure gives rise to civil liability that should be the subject of litigation which provides the protections of by the court process.

[23] Furthermore, the Commissioner's power to make recommendations flows from the statutory purpose of an investigation under Article 11(b). The power in (b)(ii) only arises if it is not possible to effect a settlement. The complainant had made clear that all she wanted was answers or an explanation as to events in order to achieve some kind of closure. Ms McAleer, acting for the Commissioner at the complaint validation stage, took account of this when determining that there was no available legal remedy. It was recognised that the widow was not seeking compensation. It must, therefore, have been possible to effect a settlement without introducing any requirement to make a payment. The Commissioner has never made clear whether the "consolatory" payment was being recommended because the GP in some way caused or contributed to the patient's death. Although asked to clarify this he has not done so. This in itself represents a failure to provide reasons which ought to have been given. Counsel also contended that the recommended sum was disproportionate to the maladministration found and therefore constituted a disproportionate interference with the GP's Article 1 of Protocol 1 rights.

[24] Dr McGleenan contended that it lay within the power of the Commissioner to make a non-binding recommendation to make a financial payment in settlement of maladministration. The Commissioner had a broad discretion under Article 11(b) to state what action should be taken in his opinion by the relevant body. His reasoning was apparent from the face of the report. There was no breach of Article 9(3)(b). The quantum of the consolatory payment was not an appropriate issue for rationality scrutiny by the court. It is open to the GP, if the report was laid before the Assembly, to challenge the rationality and appropriateness of the payment of £10,000. The matter will be appropriately ventilated in the political arena. On the question of rationality Treacy J had correctly followed Simon Brown LJ in Dyer in affording a wide margin of appreciation to the discretion of the Commissioner. Counsel contended that the Article 16 route only applied to Article 7 complaints. A complainant in relation to an investigation arising out of a complaint under Article 8 could not pursue a monetary claim under that provision. The mere existence of a compensation mechanism that the widow could not use did not of itself prohibit the Commissioner from recommending a consolatory payment pursuant to Article 11.

The judge's conclusion on this issue

[25] Treacy J, accepting the argument put forward by the Commissioner, concluded that the non-binding recommendation of a consolatory payment was an exercise of discretion on the part of the Commissioner. It was open to the Commissioner to conclude that effecting a settlement was not possible and that he was entitled to exercise the power under Article 11(b)(ii) to state what action should in his opinion be taken to effect a fair settlement. He rejected the GP's argument that he had no power to recommend a monetary payment in settlement. Applying Bolton Metropolitan District Council v Secretary of State for the Environment [1993] 71 P & CR 309 the judge accepted that the reasoning for a decision must be adequate and must be intelligible. The reasons must let the reader understand why the matter was decided as it was and what conclusion was reached on the principal important controversial issues disclosing how the law and the facts were determined. The judge concluded that the Commissioner had published a detailed investigative report which outlined the basis for his finding of maladministration. He had recommended a consolatory payment for the maladministration "proximate to the patient's death". He concluded that this was plain from the face of the report.

Discussion

[26] Two separate questions arise. Firstly, has the Commissioner a power in an Article 8 investigation to recommend the payment of a sum of money in respect of failings identified by the Commissioner in the course of the investigation? Secondly,

if he has such a power, has the Commissioner properly exercised that power in this case?

[27] Dr McGleenan in the course of his submissions stressed the wide discretion vested in the Commissioner in determining the proper outcome of an investigation, including in deciding what recommendations should be made to remedy identified failures by the party subject to the complaint. He relied in particular on Simon Brown LJ's statement in R v Parliamentary Commissioner ex parte Dyer [1994] 1 WLR 621 that:

> "Bearing in mind that the exercise of the Ombudsman's discretions inevitably involves a high degree of subjective judgment it follows that it will always be difficult to mount an effective challenge on what may be called the conventional ground of Wednesbury unreasonableness."

[28] The first issue identified at paragraph [25] does not raise an issue of Wednesbury irrationality but rather requires a focus on the nature and extent of the statutory powers of the Commissioner. That involves a careful scrutiny of the statutory remit of the Commissioner who as a creature of statute has only such powers as are conferred on him by the statute.

[29] The relevant Order is a piece of Northern Ireland legislation which, while it draws on analogous English legislation in relation to ombudsmen, nevertheless contains a distinctive framework for the office of the Northern Ireland Commissioner for Complaints which is somewhat differently structured from that established in the English and Scottish analogues. In particular, and uniquely in Northern Ireland, the relevant Order contains a statutory framework for an aggrieved party to apply to the County Court for damages in the event of the Commissioner making a finding of injustice sustained by a complainant as a result of maladministration. This statutory damages remedy enables the County Court to award damages in respect of expenses incurred and to compensate for loss of opportunity of acquiring the benefit which the complainant might reasonably be expected to have had but for the maladministration. In effect this is compensation for the loss of the benefit of a chance frustrated by the relevant maladministration. It is to be noted that this provision does not provide for a damages remedy for hurt feelings or humiliation suffered as a result of the public body's maladministration. The omission of such a remedy was not accidental. Dr McGleenan drew the court's attention to the Notes on Clauses relating to the Commissioner for Complaints Bill in 1969 which was enacted as the 1969 Act, subsequently replaced by the similarly worded 1996 Order. Those notes record that:

> "The Bill makes no provision for exemplary damages or damages by way of compensation for mental anguish or humiliation … The amount of damages

> will be at the discretion of the County Court but they will be for loss of opportunity ie. loss of any benefit the person might reasonably be expect to have had but for the maladministration."

Article 16 of the 1996 Order, based as it is on Section 7 of the 1969 Act, accurately reflects the intended policy which the Notes set out.

[30] The express and carefully drawn statutory cause of action created by Article 16 represents an express but limited monetary claim designed to exclude monetary compensation for anything other than what Article 16 permits. It would be inconsistent with that express and limited power to imply a residual power in the Commissioner to recommend the payment of monetary compensation for something other than expenses and loss of opportunity provided for in Article 16 - *expressus facit cessare tacitum*. As Dr McGleenan appeared to accept in the course of argument, it would run counter to the intent of Article 16 to imply that the Commissioner could recommend an additional or alternative payment which Parliament had concluded should only be awarded by the court applying the normal procedural protections and safeguards available through the court process. If the Commissioner were to recommend the payment of the equivalent of damages not available through the court process provided for in Article 16, the party subject to the recommendation would be fully entitled to leave it to the aggrieved party to pursue his statutory remedy through the normal court process. The Commissioner could not pre-empt and go beyond what is available through the court process.

[31] English case law has indicated, in the context of relevant Ombudsman legislation in that jurisdiction, that public bodies are bound to loyally accept and apply the outcomes of the Ombudsmen's investigations. If they are to refuse to accept and apply them, they should apply for judicial review in respect of the impugned decision. Indeed, case law goes further and indicates that, if a public body declines to implement the recommended outcome put forward by the Ombudsman, that public body is itself susceptible to judicial review of the decision not to implement the recommendation (see R (Gallagher and Basildon District Council) v Secretary of State [2010] EWHC 2824). Having regard to the status thus afforded to an Ombudsman's findings and recommendations which can have significant consequences for the party found guilty of maladministration, it would require clear wording to infer that the Commissioner has a power to make a recommendation that a body or individual pay monies in consequence of a finding of maladministration. Such a power would have to be found in express wording or by necessary implication from the relevant legislation. There is no such clear wording in the present instance. Rather the wording of the 1996 Order leads to the conclusion that in relation to Article 7 investigations the Commissioner does not have any such power.

[32] The 1996 Order was amended in 1997 to introduce the provisions of Article 8. This followed the establishment in England and Wales of amendments to the Health

Services Commissioners Act 1993 and the Health Services Commissioners (Amendment) Act 1996. Article 8 confers a power on the Commissioner to investigate complaints not merely against public bodies under Article 7 but also in relation to individual health providers. This power includes a power to review clinical judgment as is made clear in R (Atwood) v Health Service Commissioner [2008] EWHC 2315. This is a wide power which can lead to an adverse finding against, for example, a general medical practitioner even if he would not be liable in a negligence claim applying the Bolam test. Article 8 is a wide-ranging power which can result in findings against a GP which, if publicised and, in particular if made subject to a recommendation for monetary compensation, will have serious implications for the reputation and standing of the GP and his financial position. These consequences may be disproportionate having regard to the level of the shortcomings identified by the Commissioner in his investigation. The Commissioner may establish shortcomings going even beyond those which his IPA feels justified in finding (as has happened in this instance in relation to some aspects of the case). Having regard to the Commissioner's margin of appreciation it may be very difficult for a GP to establish that the Commissioner's conclusions are Wednesbury unreasonable in the light of the authorities.

[33] It is clear from the amendment made in the Commissioner for Complaints (Amendment) (Northern Ireland) Order 1997 that the legislature decided to restrict the statutory claim for damages in Article 16 to investigations carried out under Article 7 and not to extend the damages claims to Article 8 investigations. Dr McGleenan contends that the omission from Article 8 investigations of a right to claim damages permits the Commissioner to recommend the payment of monies under his wide and unfettered discretion. However, if this is right, having decided not to extend the right to a damages claim to Article 8 cases the legislature has by a side wind given to the Commissioner a power to do what he cannot do in respect of Article 7 investigations and so can make recommendations for monetary payments. Reading the legislation as a whole to ensure an inherent logic we conclude that the deliberate omission of a damages claim in Article 8 cases was designed to ensure that in such cases no question of monetary compensation should arise. In the result we conclude that the Commissioner does not have power to recommend the payment of a monetary sum in an Article 8 investigation.

[34] Moreover, if contrary to our conclusion on that issue, the Commissioner did have such a power in an Article 8 case, in this case his recommendation could not withstand scrutiny. If (which is not clear and which does not require determination in this case) the GP's decision not to pay the recommended sum could itself be subjected to judicial review challenge, his decision not to pay the recommended sum could not be categorised as Wednesbury unreasonable or otherwise unlawful.

[35] Firstly, before the Commissioner concluded what recommendation he should make to remedy a found injustice Article 11(b)(i) required him to seek to effect a settlement of the matter before he proceeded to the stage of stating what action should be taken to effect a fair settlement or what action should be taken to remove

the cause for complaint. As the Parliamentary Notes at the time of the 1969 Bill show this envisaged some form of conciliation. As those Notes indicate:

> "The process of conciliation is a feature of the Race Relations Act 1965 and also similar legislation in Canada and the US. It may involve interviewing the parties separately or together or bringing the parties together to settle their differences themselves."

As Mr Scoffield pointed out in argument, the Northern Ireland legislation, unlike the comparable English legislation, envisages the Commissioner's role as primarily conciliatory as between the parties.

[36] There does not appear to have been any form of conciliation in this instance. The Commissioner did not act as a mediator between the parties but rather in his report he sought to impose his view as to what should be done to settle the matter, backing that up with a threat of adverse publicity if the recommendation was not implemented. This negatives any attempt to effect a conciliation between the parties. It was he rather than the complainant who introduced the concept of monetary compensation. It was he who by his communication with the complainant planted in the mind of the complainant monetary considerations which in her initial complaint she disclaimed. The complainant in her initial complaint made clear that what she was seeking was information and answers, particularly in relation to why the RACP clinic had refused to see the patient after his referral and why the GP had not followed that up. The complaint was taken on on the basis that the complainant did not have a cause of action. The Commissioner by his actions has now frustrated the possibility of conciliation.

[37] It was the Commissioner's view that because the patient had died "it was not possible to remove the cause of complaint". This was, however, to miss the point. The purpose of an investigation is to establish whether the complainant has suffered an injustice as a result of the alleged maladministration. Article 10(5) requires the complainant to make a separate complaint in respect of each separate injustice. The effecting of a fair settlement under Article 11(b) must relate to a settlement in respect of the injustice sustained by the aggrieved party. The patient had died and the report accepted that it could not be established that the death resulted from any shortcomings on the part of the GP or his treatment of the patient. The injustice suffered by the patient and/or the widow cannot have been the death of the patient but rather the injustice of not having had acceptable care and treatment. Quite apart from the point that what happened after the death of the patient should properly have been a separate matter of complaint by the widow in her personal capacity (a point not alluded to by the Commissioner or apparently taken into account in the calculation of the recommended payment), the fact that the patient had died did not in any way justify the Commissioner ignoring the Article 11(b)(i) conciliation step and proceeding straightaway to Article 11(b)(ii).

[38] The second reason why the recommendation could not stand is that the recommendation is not properly explained or reasoned. It is now clear that fairness may itself require in a wide range of circumstances that reasons be given. In R v Civil Service Appeal Board ex parte Cunningham [1991] 4 All ER 310 the Court of Appeal held that a judicialised tribunal established under the Royal Prerogative was under a duty to give outline reasons for its decision sufficient to show to what it has directed its mind and to indicate whether its decisions are lawful. A failure to do so is a breach of procedural fairness. The form of a determination is part of the procedure of a hearing and is no less subject to the requirements of procedural fairness than any other part. One ground upon which fairness may require the reasons to be provided in such a case is that a person aggrieved by a decision can know not only whether he may appeal but also as in Cunningham whether he may bring judicial review on an independent ground such as illegality or irrationality. Lord Brown in South Bucks District Council v Porter [2004] 4 All ER 775 said that the reasons for the decision must be intelligible and adequate and must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any question of law or fact was resolved. The reasoning must not give rise to any substantial doubt as to whether the decision maker erred in law, for example by not understanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. Having regard to the status of a Commissioner's decision, not easily upset on judicial review; the duty of parties normally to loyally apply the outcome of the decision-making process; the potential susceptibility to judicial review of a party not applying the outcome; and the importance of the decision on the individual's reputation and livelihood, there can be little doubt that in this case there was a duty on the Commissioner to explain clearly the basis of his monetary recommendation.

[39] In his report the Commissioner recommended the payment of £10,000 "in respect of clearly identified failings in care provided to the patient and the events which consequently followed." (See paragraph 70 of his report). Paragraph 72 stated that the report provided the complainant with much sought after answers to her questions in "surrounding the very sudden and tragic circumstances that *affected* the death of (the patient)" (italics added). The Commissioner's conclusion in respect of the monetary recommendation is opaque. The wording is unclear. No clear explanation is given as to what precise factors were taken into account in the decision to recommend a monetary payment or as to how the sum was quantified. It is left unclear, for example, whether the Commissioner was seeking in some way to compensate the widow or the patient's estate or dependants for the loss of the patient's chance of a better outcome if his hypertension had been picked up or treated earlier; whether the recommended payment was primarily or included a solatium for bereavement; and/or whether it was intended as a form of compensation for hurt and humiliation in the way in which the patient's care was handled and/or the widow treated after the death; and/or whether it was in some way compensation for a *de facto* if not *de jure* negligence in the care of the patient and the administration of the practice insofar as it impinged on the patient. The words

"the events which *consequently* followed" remain unclear. For example, did the Commissioner intend to mean or include what *subsequently* followed, in particular in relation to the alleged shortcomings in relation to the discussions between the GP and the widow after death.

[40] Contrary to Ms McAleer's assertion in her affidavit in paragraph 71, the report does not spell out the reasoning for the payment nor does her affidavit descend to reasoning particulars. She asserts that the payment referred to relates to failings in care and treatment and also in relation to administrative failings but the Report does not explain or rationalise how the figure of £10,000 is arrived at and/or what precise heads of claim it relates to. If it was intended to cover an element of compensating for *(inter alia*) failures of care falling short of negligence the question arises as to what legal basis the Commissioner would have for recommending the GP to make a payment of a sum which could not be established as due by him through the legal process. In a common law tort action, if a plaintiff is to be entitled to damages for alleged negligence, he must prove on a balance of probabilities that the nature of that care caused or contributed to his death. There is no evidence of that in this case. While the Commissioner initially asserted that what he was recommending was not the payment of compensation, the nature of the recommendation was self-evidently compensatory in nature providing a monetary compensation for making good what the Commissioner considered to be an injustice (never actually defined by the Commissioner). His letter of 21 June 2011 recognised that the phrase consolatory payment was redress that equated to financial compensation.

[41] The decision to quantify the recommended payment at £10,000 equally lacks reasoning or an explanation. Since the decision does not make clear what the basis of the calculation was and for what it was truly providing a monetary recompense the quantification has no clear legal basis. There is, moreover, clear substance in the GP's point that the award is disproportionate, firstly, as between himself and the Trust (against whom no monetary recommendation was made) and, secondly, on the ground that it is out of proportion to other "botheration" payments directed in other cases and, more significantly, out of proportion to the statutory bereavement award of £11,800 payable in cases of proven tortious liability for causing death.

The Special Report Issue

The GP's case

[42] It was the GP's case that in the absence of an application for compensation under Article 16 or an application for relief under Article 17 a Commissioner's Report is designed to speak for itself. Counsel contended that Article 19 was never intended to be used as a means of enforcement of any particular recommendation. Article 19 is designed to keep the Assembly informed about the performance of his functions. Properly construed the provision does not permit the Commissioner to provide reports on individual cases and certainly not for the purpose of naming and

shaming a particular individual. The Commissioner was in error in concluding that a refusal to accept or comply with a recommendation is the type of circumstance which the power in Article 19 is intended to address. The Ombudsman Order in Article 17 contains a clear and express power to lay a special report before the Assembly where an injustice has been sustained by an aggrieved party in consequence of maladministration and the injustice has not or will not be remedied. Article 19 of the relevant Order contains no similar provision. The Assembly exercises direct control over bodies such as government departments which fall within the Assembly Ombudsman's jurisdiction. The special report mechanism is designed to ensure that the relevant Minister should be accountable but that is not relevant in a case such as the present. Every other legislative scheme permitting a special report to Parliament as a means of drawing Parliament's attention to non-compliance with recommendations is specifically provided for (see, for example, Section 14(3) and Section 14B of the Health Service's Commissioner Act 1993). The Commissioner's own policy statement indicated that:

> "There is no provision for a special report within the Commissioner for Complaints legislation as the remedy for non-implementation of the Commissioner's recommendation as the remedy for non-implementation of the Commissioner's recommendation lies with the complainant taking a case in the County Court."

Another related but distinct objection to any proposal to lay a special report before the Assembly is that it will result in the identification of the GP. The whole process is intended to be a confidential one and the conclusions arising from the present investigation should also be strictly confined. The judge was in error in cursorily concluding that the confidentiality provision related only to an investigation which had not been concluded. The limited distribution list in Article 15(3) expressly relates to the report on a concluded investigation. The judge has not adverted to Article 21(1) which precludes distribution of the information to the Assembly. Up until now the Commissioner's view as published in his practice notes was that he had:

> "no general power to share information with the parties and is in fact barred from disclosing any information obtained for the purposes of an investigation except in very limited circumstances".

Even if there is disclosure pursuant to statute, the anonymity of the person involved may be protected (see, for example, Section 14C(1) of the Health Service Commissioner Act 1993 and Section 15(3) of the Scottish Public Services' Ombudsman Act 2012). The proposal to make the findings public by means of the special report would have very adverse consequences on the GP's professional reputation and status and Article 6 and/or Article 8 are thus engaged.

The judge's conclusion on the issue

[43] For the reasons put forward by Dr McGleenan and largely repeated by him in this court the judge concluded:

> "Article 19 of the 1996 Order by its terms imposes a requirement to lay a general report on the performance of his functions under the Order *and* a broad discretion "from time to time to lay such other reports … as he thinks fit". Second, it is significant that "other reports" are not limited as the applicant claimed to reports about the performance of his functions. Had that been the intention one would have expected a phrase such as that which appears in Article 17(1) of the 1996 Ombudsman's Order upon which the applicant relies namely such other reports with respect to those functions as he thinks fit. This is a statutory distinction which appeared in the predecessor 1969 provisions set out above. Third, the applicant's construction, aside from being inconsistent with the clear statutory wording would undermine the effectiveness of the Ombudsman's office as a means of protecting citizens from injustice resulting from maladministration. Historically, as we have seen "his effectiveness derives entirely from his power to focus public and parliamentary attention upon citizen's grievances."

Discussion

[44] In view of the conclusions I have reached, the question whether the laying of an *ad hoc* report before the Assembly in the circumstances and terms proposed by the Commissioner was *intra vires* does not now arise. Out of deference to the detailed and helpful arguments raised by counsel we will deal briefly with the issues as we see them.

[45] It is entirely understandable that the GP felt compelled to challenge the threatened exercise by the Commissioner of an asserted power to lay an *ad hoc* report before the Assembly. According to the GP's understanding of the meeting on 11 May 2011 the Commissioner clearly stated that, if the GP did not make the payment recommended, the Commissioner would lay a special report before the Northern Ireland Assembly citing the GP's non-compliance. He also clarified that he was not prepared to do this on an anonymous basis. Even if such a report were submitted on an anonymous basis it was explained that the practice would be named. According to Ms McAleer's first affidavit, at paragraph [46], the

Commissioner "made it clear that should the GP not make a consolatory payment he 'would consider' making a special report to the Assembly and such a report would not be anonymised." The Commissioner considers that it is "clearly within his power" to do this (paragraph 81 of the Affidavit). As Mr Scoffield pointed out, this is a surprising assertion because the Commissioner's own policy states that "there is no provision for a special report within the Commissioner for Complaints legislation as the remedy for non-implementation and the Commissioner's recommendation lies with the complainant taking a case in the County Court". It is the Commissioner's case that he has not made a final determination on the issue. The GP has averred, without apparent contradiction, that he was informed that there would be no question of a special report if the payment was made. The Commissioner has never accepted that it would be inappropriate to lay a non-anonymised special report before the Assembly.

[46] The course taken by the Commissioner in respect of this aspect of the case clearly gives rise to the impression that his intention was to induce the GP to comply with the monetary recommendation by means of the threatened public divulging of the outcome of the investigation. It had all the hallmarks of a threat *in terrorem* and one which understandably has caused the GP deep concern as to the consequences which would flow for his reputation and the impact it would have on his relationship with other patients. The perceived intimidatory nature of the Commissioner's stance regrettably was not ameliorated but acerbated by the Commissioner's refusal in his letter of 31 May 2011 to countenance the GP's very reasonable request to agree to give seven days' notice before laying a special report before the Assembly.

[47] Even assuming a power to lay such a report before the Assembly there would have to be proper safeguards and procedural fairness before any such power could be properly exercised. Firstly, the Commissioner would have to formulate the *ad hoc* report which he was minded to lay before the Assembly. The GP would have to have an opportunity to make representations as to the nature and content of the report. The Commissioner would have to fairly consider the question of anonymisation. He would have to consider whether the issue of anonymity should properly be resolved by the Assembly itself. The question of the form of the publication of the report would be a matter for the Assembly. The Commissioner's desire to publish a report to the Assembly should not prevent the GP having an effective opportunity to challenge the decision to formulate and issue the proposed *ad hoc* report. This is something which could not be done in the abstract but by reference to the *ad hoc* report which the Commissioner proposed to issue. Furthermore, the Commissioner in reaching his decision would have to exercise his power of decision-making fairly and without actual or apparent bias. In this instance the stance already taken by the Commissioner very arguably gives rise to the appearance of a pre-judged outcome.

[48] The first question is whether Article 19 empowers the Commissioner to lay a special *ad hoc* report before the Assembly arising out of non-compliance with the

recommendation in an Article 8 investigation. This question requires consideration of the wording of Article 19 and of Article 21, taking the statutory provisions in their context.

[49] Article 19 differs from the provisions of Article 17 of the Ombudsman's Order which contains the following provisions:

> "17(1) The Ombudsman shall annually lay before the Assembly a general report on the performance of his functions under this Order and may from time to time lay before the Assembly such other reports with respect to those functions as he thinks fit.
>
> (2) If, after conducting an investigation under this Order, it appears to the Ombudsman that –
>
> (a) injustice has been sustained by the person aggrieved in consequence of a maladministration, and
>
> (b) the injustice has not been, or will not be, remedied he may, if he thinks fit lay before the Assembly a special report upon the case."

There is no equivalent to Article 17(2) in the relevant Order. Both 1996 Orders were enacted on the same day and repeat the earlier statutory provisions which had this same distinction. Furthermore, the English Health Commissioners Act 1993 in Section 14(3) confers an express power on the Health Service Commissioners for England and Scotland to lay before each House of Parliament a special report on a case where the person aggrieved has sustained a relevant injustice or hardship and that injustice or hardship has not been and will not be remedied. This is extended by the 1996 Amendment Order to cover investigations in relation to individual health service providers. Although the 1997 Order amending the relevant Northern Ireland legislation gave effect to other changes brought about by the 1993 and 1996 Acts in England and Wales, it did not contain any provision equivalent to Section 14(3) of the English Act. This cannot have been accidental. I find unconvincing Dr McGleenan's argument that the omission in Article 19 of the relevant Order of the words "with respect to those functions" produces an effect equivalent to Article 17(2) of the Ombudsman Order and Section 14(3) of the English Act.

[50] We are fortified in this view by the non-disclosure provisions in Article 21. It contains saving provisions for the divulging in certain limited circumstances of information obtained in the course of an investigation. These include divulging the information for the purposes of any proceedings under Articles 14, 16 and 17. The legislature clearly foresaw the need for the County Court to have access to the information in proceedings for damages and it made provision for the release of that

information from the protection of privacy which would otherwise preclude the use of the information. This makes clear that, contrary to the judge's conclusion, the information remains protected even after the report of the investigation has been finalised, unless specific provision is made for its permitted disclosure. Article 21(1) permits disclosure for the purposes of "the investigation and any report *to be made thereon*". The words "to be made thereon" refer to a report which must be produced under the Order and that is clearly a reference to the report of the investigation required by Article 15. Nothing in Article 21 permits disclosure of information obtained from an investigation in an *ad hoc* discretionary report made by the Commissioner to the Assembly. It is to be noted that there is a difference between the wording in the relevant Order and Section 15 of the English analogue which speaks of disclosure of "any report to be made in respect of the investigation." The English Act furthermore contains an explicit and clear power to lay a special report before Parliament which necessarily involves disclosure of information disclosed in the course of the investigation. Publication of the Article 15 report in relation to an Article 8 investigation is strictly confined to the parties specified in Article 15(3). This does not include the Assembly. Any *ad hoc* report of the kind suggested by the Commissioner, if it is to make sense and if it is to be fair, would have to disclose information obtained in the course of the investigation. Disclosure is only permitted in the cases set out in Article 21(1)(a) to (e) which does not include disclosure to the Assembly. It must follow that, absent a statutory power to do so, the Commissioner is not entitled to lay before the Assembly the kind of report which he wishes to make and which he asserts he has power to do.

Disposal of the appeal

[51] In the result I would allow the appeal and quash the Commissioner's recommendation that the GP pay the sum of £10,000.

[52] This judgment in draft was circulated for consideration by the other members of the court on 3 October 2013.

[53] **Coghlin LJ**; I agree.

HIGGINS LJ
Ref: HIG9143

[54] This is an appeal from the decision of Treacy J whereby he dismissed the appellant's application for judicial review of a decision of the Northern Ireland Commissioner for Complaints ("the Commissioner"). The appellant is a General Practitioner ("the GP") in sole practice in Northern Ireland. The widow of a patient of the practice made a complaint to the Commissioner relating to the care received by her husband ("the deceased") from the GP's practice. The Commissioner concluded that the appellant failed to provide a reasonable level of care and treatment for the patient, identified limited deficiencies in the management of the practice and recommended that the appellant should pay to the complainant a

consolatory payment of £10,000. In the course of meetings and correspondence with the appellant and his legal advisers the Commissioner indicated that, in the event of a failure on the part of the appellant to comply with the recommendation that he make the consolatory payment, a special report of the outcome of the complaint would be laid before the Northern Ireland Assembly.

[55] In the summer of 2008 the deceased, who was a man with various significant ailments, attended the appellant and requested a heart check-up. He made no complaint of symptoms at this time. He was referred to hospital for an Exercise ECG Test. The report on this was forwarded to the appellant. This indicated that the test was "negative for ischaemic heart disease at this level of exercise" (my emphasis). On 10 December 2008 the deceased attended the appellant complaining of chest pain on exertion. The medical notes record "typical angina pain but there had been a normal treadmill earlier in the year". On 15 December 2008 the deceased attended the appellant complaining of chest pain on exertion over the previous three weeks. The appellant recorded that the pain was noticeable after walking two hundred yards, that it occurred several times a week and that it was worse when lifting heavy objects which the deceased did in the course of his employment. The appellant referred the deceased to the Rapid Access Chest Pain Clinic at the local hospital for an appointment. The Clinic did not offer an appointment and in a letter to the appellant stated that this was due to the fact that an ECG performed in the summer was negative and that if the appellant wished a further review the deceased should be referred to the Medical Outpatients Department. This letter was scanned into the practice computer on 24 December 2008 but was not seen or read at that time by a medical practitioner. The appellant was absent on holiday at this time and a locum, engaged for the period of his absence, was not alerted to it. The deceased attended the practice on 6 January 2009 inquiring why he had not received an appointment at the hospital clinic and that he was still experiencing chest pain. The appellant referred him on that day for a further Exercise Test. The deceased passed away later that day, the cause of death being coronary artery atheroma.

[56] In October 2009 the complainant made a statement of complaint to the respondent which was accepted for investigation. In December 2009 the respondent engaged an independent clinical adviser (referred to as an IPA) to assist him in his investigation into the complaint. During the course of the investigation the independent clinical adviser provided substantial advices and in November 2010 a draft report was finalised and forwarded to the appellant inviting comment generally and on factual accuracy and on the reasonableness of the findings and conclusions. A final report was issued on 8 April 2011.

The Commissioner in the Executive Summary of the Report of his Investigation stated:

> "I determined that [the deceased] should have received better follow-up care from his GP following his treadmill test in July 2008. I also concluded that the action taken at

> his appointment on 6 January 2009, by a locum GP was insufficient in that no appropriate referral was made regarding [the deceased's] on-going chest pain. That said, I have noted that [the deceased] sadly died just hours after attending this appointment. I am unable, therefore, to conclude that the sad outcome would have been altered in any way even if the locum GP had taken alternative action. I have also been critical of [JR 55's] visits to [the deceased's wife's] house after her husband's death, the Practice's complaints handling procedures, and its contact with Dr B."

In his conclusions to the Report at paragraph 68 *et seq* the Commissioner stated:

> "68. In my consideration of the documentation provided to me, including the relevant guidelines, and the advice from my independent professional advisor, I have concluded that the (GP) failed to provide a reasonable level of care and treatment to the patient.
>
> 69. Following his treadmill test in July 2008 better follow up care should have been provided. The practice should also have had better procedures in place for dealing with correspondence in the absence of the GP. I also conclude that (the GP) acted inappropriately when he visited the relevant family in their home after the patient's death, that the practice acted inappropriately in relation to its handling of the complaint and its failure to meet the commitment to arrange a meeting with Dr B.
>
> 70. I have identified learning points earlier in this report for the practice and I recommend the GP acts upon them but I also recommend that the GP should pay the complainant £10,000 in respect of the clearly identified failings in the care provided for (the patient) and the events which subsequently followed.
>
> 71. The GP has agreed to issue the apology. The award of the consolatory payment is, however, a new situation for the GP and as such the GP is currently taking advice from his professional and legal advisors in respect of the matter. Consequently, this matter is still in progress.
>
> 72. I do hope that this report has provided (the complainant) with some much sought after answers to her

questions surrounding the very sudden and tragic circumstances that affected the death of her husband."

[57] The appellant sought several extensions of time within which to respond and eventually solicitors became engaged on his behalf, as well as his Medical Defence Organisation. During the first half of 2011 there was on-going contact between the interested parties including face- to- face meetings during which matters were raised concerning the contents of the report. By letter dated 1 March 2011 to the appellant's solicitor the Commissioner responded to the issues raised and agreed to amend certain aspects of the report. The letter also sought information as to whether an informal meeting or formal hearing was necessary and inquired whether the appellant intended to make the recommended consolatory payment. The appellant's solicitors responded on 14 March 2011 indicating that the appellant did not require a meeting or a hearing and that he would make an apology to the complainant but that he did not intend to make the recommended payment. By letter dated 23 March 2011 the Commissioner wrote to the appellant indicating that he was considering making a special report to the Northern Ireland Assembly regarding the appellant's non-compliance with his recommendations. Further contacts occurred including a meeting on 11 May 2011 between the appellant, the respondent and a representative of the appellant's medical defence organisation. By email dated 30 May 2011 the appellant's solicitors requested seven days' notice before any report would be laid before the Assembly. By letter dated 2 June 2011 the appellant's solicitors requested that no final decision be made about laying a report before the Assembly until after 13 July 2011. The respondent agreed to that request. Surprisingly, in light of the request on 2 June 2011, the appellant's solicitors issued on 7 June 2011 a pre-action protocol letter followed by an application for judicial review on 7 July 2011. Leave to apply for judicial review was granted in September 2011 and in the same month the complainant indicated that she still wished the consolatory payment to be made.

[58] The grounds of challenge as set out in the Order 53 Statement as amended may be summarised as -

(a) The Commissioner has no power to make a recommendation that a consolatory or compensatory payment be made to a complainant.

(b) Even if such a power exists in an appropriate case, the present case was not such a case:

    (i) since the making of such a payment was not necessary to effect a settlement of the complaint; and/or

    (ii) insofar as the recommended payment represented compensation for an inadequate standard of care, this should be dealt with in normal civil litigation and is not a matter for the Commissioner.

(c) In any event, the Commissioner has not provided any adequate reasons for the recommendation of a payment of £10,000 in this case; which is also *Wednesbury* unreasonable.

(d) Even assuming the recommendation is lawful, the Commissioner has no power to use the 'Special Report' mechanism as a means of enforcing or encouraging compliance with such a recommendation.

(e) The effective 'naming' of the applicant by means of the making of a Special Report is also *ultra vires* the Commissioner's powers.

(f) In the circumstances of this case, the Commissioner's procedure and actions are in breach of the applicant's Convention rights.

[59] The other findings and conclusions of the Commissioner relating to the management of the practice and his contact with the complainant after the death of the patient were not disputed by the GP. The recommendations relating to the management of the practice were accepted and implemented.

[60] In his judgment Treacy J concluded that the Commissioner was entitled to investigate this complaint notwithstanding the theoretical possibility of a claim in clinical negligence and having found maladministration to make a recommendation that a consolatory payment be made to the complainant. He found that making such a recommendation was not *ultra vires* the powers of the Commissioner as set out in the legislation.

[61] It was submitted that the conclusions of the learned trial judge were wrong. The making of a recommendation that a consolatory payment should be made was *ultra vires*. The payment was clearly designed to compensate the complainant for substandard care provided by the appellant GP and his practice. This was not the function of the Commissioner particularly where the complaint could form the basis for a negligence action at common law. The Judge relied on the wide powers contained in Article 11 of the Order when he should have considered Article 15 and the product of an investigation. He failed to construe Article 11 properly. The appellant did not dispute that the Commissioner had power to make recommendations, but did challenge the claim that he had the power to make a recommendation that the GP pay compensation to the complainant. Provision is made in Article 16 of the Order for the County Court to award compensation to a complainant therefore the Commissioner has no such power. In any event compensation only arises in respect of Article 7 complaints and not in respect of Article 8 or 8A complaints against health service providers. The appellant did not dispute the entitlement of the Commissioner to investigate the exercise of clinical judgment but argued that it was not permissible for him to use his powers to consider clinical judgment as a means for awarding compensation for failings in care. This was because the health service provider would be denied the normal safeguards available in court in a common law claim for clinical negligence as well

as the opportunity for the care to be judged according to the standard *Bolam* test used in clinical negligence court cases. Alternatively, the appellant emphasised that the purpose of an investigation was to effect a settlement of the complaint and questioned whether any payment was necessary in order to achieve that objective. Therefore it was necessary to consider what the complainant was seeking and whether her complaint could be settled without payment of compensation. It was far from clear that she was seeking compensation. If she was seeking compensation, then she had the option to pursue a claim in court in the usual way. Conducting an investigation in circumstances in which the complainant was seeking compensation was a wrongful exercise of the Commissioner's discretion to initiate an investigation. He had misdirected himself as he had not exercised his discretion on a proper and informed basis as to the reasons for the complaint. Alternatively, it was submitted that the payment recommended was a grossly excessive figure for which the Commissioner had provided no reasons. When requested to provide reasons he had avoided the issue. There was no finding that the GP had done anything which had caused or contributed to the death but a general impression had been created that this was the reason for the compensation and the figure. By comparison the Trust bore greater responsibility for what had occurred and no award of compensation was made against it. Counsel questioned the injustice which the compensation sum was designed to deal with and argued that the GP was entitled to know the reasons for the recommendation as to payment and for the amount determined. It was submitted that the Commissioner had no power to lay a special report before the Assembly where a respondent to a complaint failed to comply with the Commissioner's recommendation. Article 19 of the Order permitted reports to be laid before the Assembly but not for individual cases nor for the purpose of 'naming and shaming' the respondent to a complaint, in order to effect compliance with a recommendation of the Commissioner. Furthermore, it would lead to identification of the GP and the circumstances when Article 12 and 21 of the Order provided that investigations should be in private and that information gained in an investigation should not be disclosed.

[62] It was submitted on behalf of the Commissioner that his jurisdiction under the current legislation gives him powers, on complaint, to identify maladministration and to recommend remedial action in respect of it. His decision in this instance to recommend the GP to apologise to the family, to modify office practices and to make a consolatory payment is clearly *intra vires* Article 11. His reasons for so deciding are adequate in the circumstances. In this case the GP has accepted the findings of the Commissioner and his recommendations except the making of a consolatory payment. This payment is not compensation nor equivalent to damages in an action for negligence. Where a complainant may have a legal remedy in the courts, the Commissioner retains a discretion to investigate complaints of maladministration – see Article 9(4) of the Order. Those powers extend to complaints in respect of health service providers and complaints in respect of clinical judgment and are not restricted by the possibility of an action for damages for clinical negligence. The Commissioner is empowered to make recommendations, but these are not legally binding on the respondent to the complaint. Generally

speaking decisions of the Commissioner should be respected and implemented. However, where a Commissioner's recommendation is not fulfilled, then he is empowered to make a report to the legislature. Article 19 confers on the Commissioner a broad discretion to lay *ad hoc* reports before the Assembly which is not unlawful and is in keeping with the statutory purpose of the Order. It is not curtailed by reason of the fact that in the Ombudsman Order 1996 Article 17(2) makes provision for the laying of special reports before the Assembly. In doing so the Commissioner would not be in breach of Article 12 (3) (investigations to be conducted in private) or Article 21 (1) (non-disclosure of information obtained during investigation). In any event the Commissioner has not reached a final determination on the question of laying a report before the Assembly. Where he investigates a complaint in respect of a health service provider and makes a recommendation which is not implemented, the complainant does not have the option to pursue damages in the County Court unlike those whose complaint is against a body specified in Schedule II of the 1996 Order.

[63] The Office of Ombudsman (whether Parliamentary Commissioner or Commissioner for Complaints) was first introduced in Northern Ireland in 1969. The Parliamentary Commissioner Act (Northern Ireland) 1969 established the Office of the Northern Ireland Parliamentary Commissioner for Administration with power to investigate any action taken by or on behalf of a government department. Section 10 empowered the Parliamentary Commissioner, where it appeared to him that injustice had been caused to the person aggrieved which had not and would not be remedied to lay before Parliament a special report on the case, if he thought fit. In the same year the Commissioner for Complaints Act (Northern Ireland) 1969 established the Office of the Northern Ireland Commissioner for Complaints with power to investigate any action taken by or on behalf of local or public bodies listed in Schedule I of the Act. The local bodies included local authorities and the Housing Trust. Action in discharge of a professional duty by a medical practitioner was declared exempt. Section 7(2) provided that where the Commissioner reported that injustice had been sustained in consequence of maladministration, the person aggrieved could apply to the County Court for damages to compensate him for any loss or injury which he may have suffered. The loss or injury was restricted to any expenses reasonably incurred by him in connection with the subject matter of the maladministration and his loss of the opportunity of acquiring the benefit which he might reasonably have been expected to have but for the maladministration. The establishment of these two Offices followed the creation of the Parliamentary Commissioner for England and Wales in 1967. Subsequently Commissioners for Complaints were established by the Local Government Act 1974. No provision similar to Section 7(2) was implemented in that jurisdiction. Its inclusion in the Northern Ireland legislation was to deal with complaints about discrimination in the employment of persons by local authorities and about the provision of local services, such as the allocation of public housing. The restrictions on the matters in respect of which damages could be awarded by a County Court reflect that position. It seems this access to the County Court jurisdiction was little used.

[64] In 1996 the two Northern Ireland Acts were repealed and the Commissioner for Complaints (NI) Order and the Ombudsman (NI) Order respectively were passed. The Office of the Commissioner for Complaints was not replaced but continued. The number of local and public bodies was increased. Otherwise the 1996 Order largely mirrors the 1969 legislation though the wording and layout of the sections is different. The Commissioner for Complaints (Amendment) (Northern Ireland) Order 1997 amended the number and type of bodies which might be investigated by the Commissioner by adding, in particular, general health services providers and independent providers and, *inter alia*, removing the bar on the Commissioner investigating complaints about action taken in the discharge of a professional duty in the course of diagnosis, treatment and care of a patient (clinical judgment). This led to substantial amendment of the wording of the Order. Article 7 makes provision for the bodies and actions which may be the subject of investigation. Article 7(5) and (6) provides

> "(5) Subject to the provisions of this Order, the Commissioner may investigate any action taken-
>
> (a) by or on behalf of a body to which this Article applies; and
>
> (b) in the exercise of administrative functions of that body.
>
> (6) Without prejudice to the generality of paragraph (5)(b), action taken in the exercise of administrative functions of a body includes action taken by or on behalf of that body in relation to any appointment or employment in respect of which power to take action, or to determine or approve action to be taken, is vested in that body.

[65] Article 7(7) to 7(10) specify the circumstances in which the Commissioner may investigate any action taken.

> "(7) The Commissioner may investigate any action taken as mentioned in paragraph (5) only if a complaint is made to the Commissioner in accordance with this Order by a person who claims to have sustained injustice in consequence of maladministration in connection with the action so taken with a request to conduct an investigation into it.
>
> (8) Without prejudice to the generality of paragraph (5)(a), any maladministration mentioned in paragraph (7) may, in relation to a health and social care body, arise from action of-

(a) the health and social care body,
(b) a person employed by that body,
(c) a person acting on behalf of that body, or
(d) a person to whom that body has delegated any functions.

(9) Nothing in this Order authorises or requires the Commissioner to question the merits of a decision taken without maladministration by a body to which this Article applies in the exercise of a discretion vested in that body.

(10) Paragraph (9) does not apply, in the case of a health and social care body, to the merits of a decision to the extent that it was taken in consequence of the exercise of clinical judgment."

Thus the Commissioner may investigate an action only in response to a complaint along with a request to do so by a person who claims to have suffered injustice in consequence of maladministration or, in the case of a health and social care body, the exercise of clinical judgment.

[66] Article 8 and 8A make provision in respect of the general health service providers and independent providers now subject to investigation by the Commissioner. Provisions similar to Section 7 are made in respect of the circumstances in which the Commissioner may investigate.

"8. - (1) This Article applies to persons if they are-

(a) individuals undertaking to provide general medical services or general dental services under Part VI of the Health and Personal Social Services (Northern Ireland) Order 1972;

(b) persons (whether individuals or bodies) undertaking to provide general ophthalmic services or pharmaceutical services under Part VI of that Order; or

(c) individuals performing personal medical services or personal dental services in accordance with arrangements made under Article 15B of that Order (except as employees of, or otherwise on behalf of, a health and social care body or an independent provider).

(2) In this Order-

(a) references to a general health care provider are to any person to whom this Article applies;

(b) references to general health care are to any of the services mentioned in paragraph (1).

(3) Where a general health care provider has undertaken to provide any general health care, the Commissioner may, subject to the provisions of this Order, investigate-

(a) any action taken by the general health care provider in connection with the services;

(b) any action taken in connection with the services by a person employed by the general health care provider in respect of the services;

(c) any action taken in connection with the services by a person acting on behalf of the general [health care] provider in respect of the services; or

(d) any action taken in connection with the services by a person to whom the general health care provider has delegated any functions in respect of the services.

(5) The Commissioner may investigate any action taken as mentioned in paragraph (3) only if a complaint is made to the Commissioner in accordance with this Order by a person who claims to have sustained injustice in consequence of the action so taken with a request to conduct an investigation into it.

(6) Nothing in this Order authorises or requires the Commissioner to question the merits of a decision taken without maladministration by-

(a) a general health care provider;

(b) a person employed by a general health care provider;

(c) a person acting on behalf of a general health care provider; or

(d) a person to whom a general health care provider has delegated any functions.

(7) Paragraph (6) does not apply to the merits of a decision to the extent that it was taken in consequence of the exercise of clinical judgment.

8A. - (1) This Article applies to persons if-

(a) they are persons (whether individuals or bodies) providing services (of any kind) under arrangements with health and social services bodies or general health care providers; and

(b) they are not themselves health and social services bodies or general health care providers.

(2) In this Order references to an independent provider are to any person to whom this Article applies.

(3) Where an independent provider has made an arrangement with a health and social care body or a general health care provider to provide a service, the Commissioner may, subject to the provisions of this Order, investigate any action taken in relation to the service by-

(a) the independent provider;

(b) a person employed by the independent provider;

(c) a person acting on behalf of the independent provider; or

(d) a person to whom the independent provider has delegated any functions.

(4) The Commissioner may investigate any action taken as mentioned in paragraph (3) only if a complaint is made to the Commissioner in accordance with this Order by a person who claims to have sustained injustice in consequence of maladministration in connection with the

action so taken with a request to conduct an investigation into it.

(5) Nothing in this Order authorises or requires the Commissioner to question the merits of a decision taken without maladministration by-

(a) an independent provider;

(b) a person employed by an independent provider;

(c) a person acting on behalf of an independent provider; or

(d) a person to whom an independent provider has delegated any functions.

(6) Paragraph (5) does not apply to the merits of a decision to the extent that it was taken in consequence of the exercise of clinical judgment."

[67] Article 9 specifies matters which are not subject to investigation by the Commissioner.

"9.-(1) The Commissioner shall not conduct an investigation under this Order in respect of any such actions or matters as are described in Schedule 3, otherwise than as authorised by the proviso to paragraph 2 of that Schedule.

(2) The Office may by order amend Schedule 3 so as to exclude from the provisions of that Schedule any such action or matter as is described in that order.

(3) Subject to paragraph (4) and to section 78 of the Northern Ireland Act 1998, the Commissioner shall not conduct an investigation under this Order in respect of-

(a) any action in respect of which the person aggrieved has or had a right of appeal, complaint, reference or review to or before a tribunal constituted under any statutory provision or otherwise;

(b) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in a court of law.

(4) The Commissioner may conduct an investigation-

(a) notwithstanding that the person aggrieved has or had such a right or remedy as is mentioned in paragraph (3). if the Commissioner is satisfied that in the particular circumstances it is not reasonable to expect him to resort to or have resorted to it; or

(b) notwithstanding that the person aggrieved had exercised such a right as is mentioned in paragraph (3)(a), if he complains that the injustice sustained by him remains unremedied thereby and the Commissioner is satisfied that there are reasonable grounds for that complaint."

[68] The purposes for which an investigation is undertaken are specified in Article 11 in these terms -

"11. The purposes of the investigation by the Commissioner shall be-

(a) to ascertain if the matters alleged in the complaint-

(i) may properly warrant investigation by him under this Order;

(ii) are, in substance, true; and

(b) where it appears to the Commissioner to be desirable-

(i) to effect a settlement of the matter complained of; or

(ii) if that is not possible, to state what action should in his opinion be taken by the body concerned, the general health care provider concerned or the independent provider concerned (as the case may be) to effect a fair settlement of that matter or by that body or provider or by the person aggrieved to remove, or have removed, the cause of the complaint."

[69] Article 16 makes provision for a person who has sustained injustice as a consequence of maladministration to apply to the County Court for damages in limited circumstances.

> "16. - (1) Where on an investigation pursuant to a complaint under Article 7 the Commissioner reports that a person aggrieved has sustained injustice in consequence of maladministration, the county court may, on an application by that person, by order award that person damages to be paid by the body concerned.
>
> (2) An application to the county court under this Article shall be made in accordance with county court rules and upon notice to the body concerned.
>
> (3) Damages awarded under this Article shall be such as the county court may think just in all the circumstances to compensate the person aggrieved for any loss or injury which he may have suffered on account of-
>
> (a) expenses reasonably incurred by him in connection with the subject matter of the maladministration on which his complaint was founded; and
>
> (b) his loss of opportunity of acquiring the benefit which he might reasonably be expected to have had but for such maladministration.
>
> (4) In calculating the amount of damages to be awarded by virtue of paragraph (3)(b) the county court shall apply the same rule concerning the duty of a person to mitigate his loss as applies in relation to damages recoverable at common law.
>
> (5) Where on an application to the county court under this Article it appears to the court that justice could only be done to the person aggrieved by directing the body concerned to take, or refrain from taking, any particular action, the court may, if satisfied that in all the circumstances it is reasonable to do so, make an order containing such a direction.
>
> (6) Where an order under paragraph (5) is duly served on the body concerned, disobedience to that order by that body or any member or officer of that body may be treated

> as a contempt of court to which Article 55 of the County Courts (Northern Ireland) Order 1980 applies.
>
> (7) Without prejudice to Articles 61 and 65 of that Order, the body concerned or person aggrieved may, if dissatisfied with an order of the county court under this Article, appeal from that order as if it had been made in the exercise of the jurisdiction conferred by Part III of that Order and the appeal were brought under Article 60 of that Order.
>
> (8) ……..
>
> (9) The powers conferred on a county court by this Article may be exercised notwithstanding anything to the contrary in any statutory provision which imposes limitations on its jurisdiction by reference to an amount claimed or to the value of property."

[70] Article 18(1) provides that a report of the Commissioner and any recommendation made by him in connection with a complaint shall, in any proceedings in the County Court, be accepted as evidence of the facts stated, unless the contrary is proved. Article 18(2) provides that nothing in Article 16 affects the right to bring any civil proceedings which may be brought otherwise than those that may be brought under Article 16.

[71] Reports to the Assembly are provided for by Article 19 which states -

> "19. The Commissioner shall annually lay before the Assembly a general report on the performance of his functions under this Order and may from time to time lay such other reports before the Assembly as he thinks fit."

[72] Article 21 prohibits disclosure of information obtained by the Commissioner in the course of or for the purpose of an investigation except where non-disclosure might constitute a threat to health or safety.

[73] As the Law Commission observed in its 2011 Report into Public Services Ombudsmen, the Office of Ombudsman or Commissioner for Complaints is designed to protect the individual citizen against bureaucratic maladministration. It also provides an inexpensive procedure whereby citizens may pursue their complaints against public officials and seek limited redress or satisfaction. The legislative intention was that its findings and any recommendations based thereon would be respected. The *Textbook on Administrative Law* by Wade and Forsyth page 75 provides a useful summary of the history, nature and effect of the Office of Ombudsman.

> "*Ombudsman* is a Scandinavian word meaning officer or commissioner. In its special sense it means a commissioner who has the duty of investigating and reporting to Parliament on citizens' complaints against the government. An ombudsman requires no legal powers except powers of inquiry. In particular, he is in no sense a court of appeal and he cannot alter or reverse any government decision. His effectiveness derives entirely from his power to focus public and parliamentary attention upon citizens' grievances. But publicity based on impartial inquiry is a powerful lever. Where a complaint is found to be justified an ombudsman can often persuade a government department to modify a decision or pay compensation in cases where the complainant unaided would get no satisfaction. For the department knows that a public report will be made and that it will be unable to conceal the facts from the Parliament and the press. The department is not bound to accept the recommendations of the ombudsman. But the Secretary of State may only reject her findings of fact "on cogent reasons" and a decision to reject a finding may itself be subject to judicial review (and quashed if shown to be irrational.)" [my emphasis]

[74] The jurisdiction of the Office is wide even within the confines of the scheduled bodies it is empowered to investigate. One limit on the jurisdiction is to be found in Article 5(2) of the Order where the person aggrieved has a remedy in a court or tribunal. Wade and Forsyth refer to this as "the proviso" and make this comment on it.

> "This proviso means that the line of demarcation between the Commissioner and the legal system is not a rigid one, and that much technicality and inconvenience can be eliminated by the Commissioner using his discretion. It may frequently happen that there is a possibility of a legal remedy but that the law is doubtful; in such cases the Commissioner may decide that it is not reasonable to insist on recourse to the law. Where there is clearly a case for a court or tribunal, on the other hand, he will refuse to act. It is not easy to tell from the Commissioner's reports how often he has made use of the proviso. But it seems probable that, with or without doing so, he has investigated many cases where there would have been legal remedies….

> A certain overlap between the Commissioner and the legal system must be accepted as inevitable, and this, though untidy, is doubtless in the public interest."

[75] It was suggested on behalf of the appellant that the Commissioner was linking the failures of the GP's practice to the death of the patient and had introduced an element of causation in respect of it. I do not interpret the Commissioner's report as in any way making a finding that the identified failures were a cause of the death of the patient. Equally I do not find anything to support the submission that the payment recommended was compensation for the death of the patient. The figure recommended would not reflect that. In a civil action for the death of a patient the potential compensation in respect of a working man, would be substantially greater. The recommended payment is rightly described as a consolatory payment in the same sense though not equivalent to a 'consolation prize'. Article 16 does not restrict the Commissioner in what he may recommend. The Article permits an application to the County Court for compensation for loss and injury of a particular and limited type. Firstly, for expenses incurred in connection with the subject matter of the maladministration and secondly, in respect of a loss of opportunity of acquiring a benefit. Neither arises in this instance. Article 16 does not envisage an application for compensation at large as would be the case in an action for clinical negligence in circumstances in which a death occurred. Permitting applications to the County Court in such limited circumstances under Article 16 does not restrict the very wide discretion vested in the Commissioner in relation to his findings nor should it prevent the Commissioner from stating his opinion, recommending a consolatory payment or indeed compensation. Article 16, which is not included in the equivalent legislation in England and Wales, on which the Northern Ireland Order is based, was introduced to deal with a particular problem arising in local government in Northern Ireland and should not be interpreted to restrict the otherwise wide discretion of the Commissioner, which is well recognised in the other jurisdictions in the United Kingdom.

[76] Article 9 specifies matters in respect of which the Commissioner shall not conduct an investigation. These include an action in respect of which the person aggrieved has a remedy by way of proceedings in a court of law. However, notwithstanding the possibility of such a remedy, the Commissioner may nevertheless conduct an investigation where he is satisfied that it is not reasonable to expect the person aggrieved to resort to legal proceedings. This provides the Commissioner with a very wide discretion and I see no reason to interfere with his exercise of that discretion in the particular circumstances of this case. Any proceedings in court would probably be in respect of the death of the patient and causation would be a major issue. Clinical judgment does not plainly arise in this instance. To say that this case clearly gives rise to a remedy in a court of law would be to underestimate the difficulties that are apparent. I consider the Commissioner was entitled to conduct an investigation under Article 8 notwithstanding the provisions of Article 9. Equally wide are the provisions relating to the purposes of an investigation. Firstly whether the complaint is true and gives rise to

maladministration and where desirable to effect a settlement of the matter complained of or to state the action which in his opinion should be taken to effect a settlement. Settlement in these terms has a wide meaning as the factual situations which can give rise to a complaint are so varied. What action should be taken to effect a settlement is simply a matter of the Commissioner's opinion. Complaint is made about the amount of the consolatory payment recommended and the absence of reasons for that amount. It was submitted that this was a very large figure for an individual GP to pay, that it was *Wednesbury* unreasonable and that the Commissioner was obliged to give reasons for it. I see no necessity for reasons to be given for the size of the sum recommended, even if it were reasonably possible. By today's standards it is not that large an amount. Furthermore, how is this court to gauge whether it is too large or too small? Various comparisons were made. I note it is smaller than the County Court scale at the relevant time and one third of what that scale is now. In his Report to the Assembly for 2009 – 2010 the Commissioner details, *inter alia*, his recommendations in reported cases involving complaints against Health Boards. Out of thirteen referred to consolatory payments were recommended in nine of the cases. Two recommended payments were for £5,000 and one for £1500. Generally speaking it is difficult to articulate reasons why a fractured leg should be compensated at one level and a fractured arm at another. The legal profession deals with difficulty through experience over many years. It is evident from the Annual Reports that the Commissioner frequently recommends consolatory payments. This provides him with experience about the proper amount to recommend as a consolatory payment. I do not think it is the function of this Court to second-guess his decision based on his experience. Should the Commissioner's opinion as to the amount of a consolatory payment be a matter for judicial review? For reasons which I will state below I do not think this figure requires further resolution.

[77] It was submitted that the Commissioner was acting outwith his powers in suggesting that he would make a special report to the Assembly in the event that his recommendations were not fulfilled. Article 19 provides that the Commissioner shall annually lay before the Assembly a general report. In addition he may, from time to time, lay such other reports before the Assembly as he thinks fit. This is an extremely wide discretion. It extends to such other reports than the annual report and is not restricted in any manner. Clearly a special report about an individual case is included within its terms. The exercise of the power is 'as the Commissioner thinks fit'. The appellant is concerned that his identity would be disclosed. The reports to the Assembly over the last number of years indicate that the identity of persons, the subject of investigation, is not revealed. References are made to Health Boards but individuals are not named. Nothing is stated that could identify any individual. Concern was expressed that a GP surgery in a particular location would be reported, which would identify the appellant. Such an outcome would be quite contrary to the apparent established practice as revealed in the Reports to the Assembly. I think this sensible approach by the Commissioner probably reflects the terms of Article 12(3), that every investigation shall be conducted in private. The preparation and laying of a report before the Assembly remain part of the Commissioner's investigation. Therefore, if a report was laid before the Assembly, I would expect that the

Commissioner would observe the terms of Article 12(3), as the Commissioner has done with other reports in the past. He has not indicated the contrary. The argument that this is a 'naming and shaming' exercise is without any factual or credible basis. Counsel on behalf of the Commissioner informed the Court that no final decision has been taken about the laying of a report before the Assembly.

[78] The application for judicial review of the Commissioner was predicated on the basis that the Commissioner had no power to recommend a consolatory payment of £10,000 and no power to lay a special report before the Assembly for the alleged purpose of 'naming and shaming' the appellant, and that in doing both he would be acting *ultra vires* the Commissioner for Complaints Order. This argument overlooks the unique nature and purpose of the Office of the Commissioner. The primary function of the Commissioner is to investigate complaints and discover whether they are true and disclose any maladministration. He has no power to take action against any person or to make any order that must be carried out. He is empowered, where he thinks it is desirable, to state his opinion as to the action which he thinks should be taken in order to effect a fair settlement of the complaint (referred to generally as his recommendations). It is only his opinion. He is entitled to have it and entitled to state it. He may, within the terms of the Order, lay reports before the Assembly. His influence is the power of persuasion based upon his findings. Where he finds maladministration he should have little difficulty in persuading those concerned to accept his recommendations, if any. In this case the findings are accepted and, the payment apart, the appellant was willing to comply with his recommendations. He cannot force the appellant to make the consolatory payment. He will not name him. He is entitled to lay a special report before the Assembly referring to the complaint, his findings relating to it, his recommendations and whether they have been fulfilled, without in any way identifying the appellant. That is a matter of fact and a matter of record within the Office of the Commissioner. Most bodies or people investigated by the Commissioner would not wish their case to be laid before the Assembly, even anonymously. Therein, probably, lies the power of persuasion. It was open to the appellant to meet the Commissioner and argue that a payment or a payment at the recommended amount was not necessary. An invitation to meet was declined. Instead these proceedings were instituted. It would still be open to the appellant to meet with the Commissioner.

[79] I am not persuaded that a mere statement of opinion by the Commissioner as to what action should be taken to effect a fair settlement of a complaint, is a matter which is judicially reviewable. In stating his opinion in this instance and in stating that he would lay a special report (presumably suitably anonymised) on this investigation before the Assembly, the Commissioner has not exceeded his powers and authority under the Commissioner for Complaints Order. For all these reasons I would dismiss the appeal.