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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **26/10/2012**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Martin's (James) Application [2012] NIQB 89

IN THE MATTER OF AN APPLICATION BY JAMES MARTIN FOR JUDICIAL REVIEW

AND

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

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TREACY J

Introduction

[1] The applicant in this case seeks judicial review of an alleged failure by the respondent, the Police Ombudsman for Northern Ireland ("the Police Ombudsman") to investigate his case which was referred to the respondent by the Chief Constable of the Police Service of Northern Ireland under s55 of the Police (NI) Act 1998 ("the 1998 Act").

[2] In the applicant's Order 53 Statement he sought, *inter alia,* declarations in the following terms:

> "(i) in breach of his duty under section 55(5) of the Police (NI) Act 1998 ("the Act"), the Respondent has unlawfully failed within a reasonable time to investigate the reference made to him under section 55(4) of the Act by the Chief Constable in or about January 2009 concerning the conduct of police officers involved in the investigation which led to the

wrongful conviction of the Applicant at Belfast Crown Court on 9th May 1991;

(ii) the Respondent has unlawfully fettered his discretion and frustrated the purpose of Part VII of the Act by formulating an over-rigid "historic review policy" whereby the investigation of matters arising from "historic" (pre-1998) conduct cannot be prioritised fairly by comparison with matters arising from "current" (post-1998) events;

(iii) in breach of his duties under sections 51(4) and 55(5) of the Act, the respondent has failed to secure and deploy sufficient resources to ensure that the investigation of complaints generally and the said matter in particular could be properly conducted within a reasonable time;

(iv) in breach of his duties under sections 51(4) and 55(5) of the Act, the Respondent has permitted his office to become so dysfunctional and ineffective that the investigation of complaints generally and the said matter in particular could not be conducted within a reasonable time; and

(v) in breach of his duties under sections 51(4) and 55(5) of the Act, the Respondent has failed to devise and implement the necessary policies, practices and procedures to ensure that the investigation of complaints generally and the said matter in particular could be properly conducted within a reasonable time."

[3] I agree with the respondent that this judicial review, in substance, resolves to whether or not the delay in processing and investigating the applicant's case is unlawful in public law terms. It is common case that there is an implicit obligation on the Police Ombudsman to initiate his investigation within a reasonable time.

[4] Following the hearing the Court was informed by letter dated 17 September 2012 that the Police Ombudsman "initiated investigation" of the applicant's complaint and related matters on 31 May 2012. Whilst this was an extremely positive development it nevertheless remains incumbent on the Court to address the substance of the applicant's complaint.

Background

[5] In his affidavit the applicant sets out the background to these proceedings. He was the subject of criminal proceedings brought against him following an investigation by the RUC and a prosecution by the then DPP. He was convicted at Belfast Crown Court on 9 May 1991 which conviction appealed to the Court of Appeal on 11 July 1992. Following an application to the CCRC the applicant's case was referred back to the Court of Appeal which upheld the appeal and quashed the convictions with the Court delivering judgment on 9 January 2009.

[6] Neither the contents of the CCRC referral nor the Court's reasons for quashing the convictions were made available to the applicant. A 'closed' judgment was delivered. A short judgment was provided to the applicant but not going into any specific detail as to how and why the convictions were quashed.

[7] At the conclusion of the judgment the Court of Appeal stated, *inter alia,* as follows:

> "We wish to record that this court has been informed that, upon the conclusion of this appeal, the Director of Public Prosecutions will exercise his powers under section 35(5) of the Justice (Northern Ireland) Act 2002 to request the Chief Constable of the Police Service of Northern Ireland to obtain and provide to the Director information relating to certain matters which arise from the report of the Criminal Cases Review Commission. In the estimation of the Director, these matters require to be investigated as they may involve the commission of offences contrary to the law of Northern Ireland."

[8] It is agreed that the applicant's case first came to the Police Ombudsman by way of referral from the Chief Constable under s 55(4) of the 1998 Act. The Police Ombudsman accepts that s 55(5) requires him to formally investigate under s 56. At the time of the hearing this formal investigation had not been initiated.

[9] On 17 February 2009 the applicant's solicitor wrote to the Police Ombudsman to ascertain whether or not he had received a referral from the Chief Constable. On 2 March 2009 his office confirmed that it was the appropriate body to investigate potential criminal and misconduct matters involving police. The applicant was interviewed by the Police Ombudsman staff in August 2009.

[10] In his affidavit, the applicant exhibits correspondence between his solicitors and the respondent and other relevant parties (the PPS, the PSNI and the Lord Chief Justices' Office). This correspondence spans the period from January 2009 through to September 2011. It demonstrates the difficulties encountered by the applicant in having his complaint dealt with.

[11] The essence of the applicant's complaint is that no progress can be made by the PSNI or the DPP in advancing this serious case until the Police Ombudsman fulfils its mandatory statutory function to commence and conclude an investigation under the 1998 Act. The applicant, in support of his challenge, refers to a number of reports which were critical of the Police Ombudsman (the McCusker Report, the CAJ Report and the CJI Report). These reports are summarised as part of the grounds in the Order 53 Statement at para 6(f)-(z).

The Police Ombudsman's Affidavit Evidence

[12] Paul Holmes is the Director of Investigations (Historic) within the Office of the Police Ombudsman for Northern Ireland with responsibility for overseeing historic investigations. In his affidavit he provided background information regarding what he termed "historic investigations", the funding of the Office and the historic review and prioritisation policy. He avers as follows:

> "Background Information regarding Historic Investigations
>
> 3. The Ombudsman's office was established under the Police (Northern Ireland) Act 1998 ("the 1998 Act") as a corporation sole accountable to Parliament through the Secretary of State for Northern Ireland. The Ombudsman is appointed by Royal Warrant for a period of seven years. The role of the Ombudsman and the constitution of the office are set out in detail in Schedule 3 to the 1998 Act.
>
> 4. Although a number of investigations relating to historic matters had been conducted by the Ombudsman early in the life of the organisation, it was not until around January 2005 that a small unit of Investigators was formed to specifically carry out such investigations. At that stage the unit was assigned two enquiries into the death of Alice McLaughlin in July 1991 and the murder of Joseph Campbell in February 1977. The terms of reference for this unit was to investigate only these "historic" cases and it was envisaged that the unit would only operate for around six months.

5. In fact, the Historical Enquires Team ("HET") was set up as a unit attached to the Police Service of Northern Ireland ("PSNI") in and around September 2005. The HET was established to re-examine the deaths of thousands of people that took place in Northern Ireland from 1968 to 1998. However, in and around March 2006 the HET began referring large numbers of these cases to the Ombudsman for investigation where there was a policing aspect. The majority of these cases related to deaths for which police officers were believed to have been responsible. Meanwhile the Police Ombudsman was also receiving increasing numbers of public complaints involving allegations ranging from police incompetence in either the apprehension or investigation of offenders to cases where collusion of the most serious nature was alleged.

6. It soon became clear that the temporary unit established by the Police Ombudsman in January 2005 would become more permanent and need to grow substantially in order to deal with the increase in work by way of referrals from the HET. Initially, the funding of this unit was intended for cases referred by the HET. As such, this unit decided to adopt the same policy as the HET so as to deal with what are now termed "historic cases" i.e., those where the index incident took place between 1968 and 1998. Referrals wherein the index incident took place after 1998 were, and are, to be dealt with by the current investigations team within the Ombudsman's office.

7. The role of this team was, however, quickly extended to the investigation of historic cases referred to the Ombudsman's office from members of the public. Part of the rationale for this was that it might be inequitable for only some historic cases to benefit from additional investigation by the Ombudsman, which was independent from the police, and others not. A number of public complaints relating to historic matters did, however, remain with other investigation teams.

8. As it began to become clear that there would be a significant work-stream of historic cases, the

Ombudsman's office sought additional funding from the NIO given the number of referrals from the HET in 2007; and this was granted so that the annual budget increased from £497,000 [2006/2007] to £895,000 [2007/2008].

9. As the number of referrals from HET and complaints from the general public increased the Ombudsman sought to consolidate the investigation of all historic cases by the creation of one internal directorate to be established within the Ombudsman's office. As such the Ombudsman set about establishing the Historic Investigations Directorate ("the Directorate"). I was appointed to be the Director of Investigations (Historic) in February 2010 and the Directorate commenced work in May 2010.

10. The Directorate is composed of personnel who are independent of the Royal Ulster Constabulary meaning that Investigators who were members of the Royal Ulster Constabulary prior to the Good Friday Agreement in 1998 are not employed within the Historic Investigations Directorate. The reason for this restriction is so as to ensure adequate investigative independence and to comply with the principles of Article 2 ECHR so that investigations carried out by the Directorate are compliant with the terms of the European Convention (and the Human Rights Act 1998). The Directorate is still relatively small in number having nineteen staff, *including myself as the Director, two Senior Investigating Officers, one Deputy Senior Investigating Officer, one Office Manager, one communications Co-Ordinator, nine Investigating Officers, one Intelligence Officer, one Analyst and two Administrative Officers.*

11. *The Court will immediately see that this is a very small number of people for what is a mammoth task*; and compares unfavourably to the resources the PSNI are able to commit to, for instance, a major murder investigation, in which up to sixty Detectives could be working at any one time. [My Emphasis]

<u>Funding</u>

> 12. When I was appointed as Director of Investigations (Historic) I had two main issues to deal with. Firstly, I had to develop a new strategy as to how the Directorate would process the large number of historic cases on file and secondly, I had to address the question of funding for such a new strategy.
>
> 13. The adequacy of funding has long been a cause for concern for the Ombudsman's office and I would refer to a representative sample of press releases dated 5 January 2006, 24 January 2006, 25 January 2006, 19 June 2007, 19 July 2007, 20 July 2007, 21 February 2008, 7 March 2008, 16 April 2008 and 7 August 2010 in which concerns were publicly raised by the Ombudsman. …
>
> 14. When the current Ombudsman came into post in November 2007 one of his priorities was to secure adequate funds in order that he might *properly* discharge his role. To this end, on 19 May 2008 a business case was forwarded to the Northern Ireland Office ("NIO") for additional funding; ... Unfortunately, this business case was not approved by the NIO who, in correspondence to the Police Ombudsman dated 14 October 2008, advised that it would be prudent to await the reports of the Consultative Group on the Past ("Eames Bradley") and the NIAC before taking any decisions on funding as it was thought this may have an impact on the Ombudsman's role in investigating the past;

[13] In the Police Ombudsman's letter of 19 May 2008 which accompanied the business case the then Police Ombudsman, Al Hutchinson, stated, *inter alia,* as follows:

> "… I have become increasingly concerned with respect to our capacity to deal with what is effectively two 'businesses' – one dealing with the Present and the other with the Past. I am now satisfied that the ability of this Office to deal with my statutory obligation of an effective and efficient police complaints system, is being severely eroded and it will eventually lose the confidence of the public and the police.

> I have given evidence to this effect to both the Northern Ireland Affairs Committee and the Eames/Bradley group. I have said that we are at the 'tipping point' and the stress cracks are beginning to show in the Office, resulting in quality issues. …
>
> We currently have 109 historic cases of which some 70% are 'pended' (delayed) due to a lack of resources. To compound the problem, the Historic Enquiries Team (HET) expects to refer many more cases to us. I think it is fair to say that the public have an expectation that the Police Ombudsman is looking at their case but the reality is that we cannot meet that expectation, nor the mandate given by Parliament.
>
> … As it stands, both the Government and the Public perceive that the Police Ombudsman is adequately dealing with complaints respecting police wrongdoing in the Past. That perception is wrong and it is not the case and never will be the case with current resourcing levels. The current status quo is not an option.
>
> …"

[14] Mr Holmes goes on to state:

> "15. In January 2009 the Eames Bradley report was published and significant public debate and scrutiny of the proposals followed. Anticipating that the model proposed was unlikely to provide a solution to the pressures presented to his Office by historic investigations, the Police Ombudsman wrote to the NIO on 2 December 2009 requesting the funding outlined in the business case of May 2008 be made available to him with effect 1 April 2010; … The NIO replied by letter of 17 December 2009 declining approval of the business case on the basis that the commitment required would have to fall to a devolved Minister (of Justice); …"

[15] In its letter of 2 December 2009 Mr Hutchinson stated:

> "**...**Since the submission of the business case in May 2008 there has been a change to the internal structures within the Office of the Police Ombudsman with respect to the investigation of cases involving deaths during the period 1968 to 1998. All of these cases are now dealt with exclusively by a dedicated team (Sapphire Team) using the £900,000 annual funding provided by Government for historical investigations. Core funding is used for current cases only, for 'grave or exceptional' cases that do not involve death, so that there is a clear demarcation between past and present investigations of police actions.
>
> Our Historic Case statistics indicate that the Sapphire Team currently has 99 separate investigations. Most are pended awaiting a formal review and 16 cases, including several high profile matters, are under investigation. Recent experience has demonstrated that we only have the capacity to actively and effectively conduct one or two investigations at a time. The 99 cases involve 143 deaths, although more HET referrals are expected as they move into and through the 1980 and 90's. *At our current pace, with the resources Government has made available, it is estimated that the existing cases will take well in excess of 20 years to completely investigate in the manner required by our statutory mandate.*
>
> … [My Emphasis]

[16] Mr Holmes goes on to say:

> "16. Following my appointment to the post of Director of Investigations (Historic) in February 2010, therefore, I began preparing a revised business case. The Police Ombudsman's Chief Executive forwarded this to the Department of Justice on 23 April 2010; ... As a result of the devolution of policing and justice powers to the Northern Ireland Assembly this business case became the responsibility of the newly established Department for Justice ("DOJ"). Unfortunately, the DOJ, which I understand operates more stringent procedures in this regard than the NIO, advised in correspondence dated 3 June 2010 that they would require a more detailed business case

in order to approve the request for additional funding; ...

17. I then set about producing the required full business case with the additional detail required. The preparation of a full business case is a substantial piece of work and requires detailed discussion of various options, including appraisal of monetary costs, non-monetary benefits and a range of associated issues. I had a number of meetings with the DOJ in respect of the construction of this full business case including a meeting on 22 October 2010 when a working copy of the document was discussed. The then Chief Executive of the Ombudsman's office, Mr Samuel Pollock, became directly involved with preparation of the business case in February 2011 and together with the assistance of a civil servant attached to the Financial Services Division of the DOJ we developed the document during the following months until I submitted a final version to the DOJ on 1 September 2011; …"

[17] In the business case the Police Ombudsman noted, *inter alia,* as follows:

"…

Unfortunately the majority of these matters have yet to be the subject of any degree of investigation due to the limited resources available to deal with them in an efficient and effective manner without undermining the core work of the organization. …

…

Irrespective of whether investigations have been completed, commenced or await attention, the delays incurred may be inconsistent with both the statutory obligations of the Police Ombudsman and the requirements of Article 2 of the European Convention of Human Rights (ECHR). This has led to the threat of judicial challenge. A properly funded historic investigation strategy within the Police Ombudsman's Office will go some considerable way to satisfying the UK State's Convention obligations and requirements to report to the Council of Ministers.

…

The resources currently available for dealing with historic matters would, if nothing else happens, require in the region of 15 years to complete the current and anticipated caseload. Subject to the Police Ombudsman's findings in each investigation, this course of action may result in the repeated drip feeding of adverse messages into the public psyche regarding policing and continuing reflection on the State's role in the 'Troubles' for a prolonged period. This will inevitably re-open wounds, debate and inevitable criticism, from some quarters, of policing in Northern Ireland for another generation, impacting on current efforts by both the Chief Constable and Police Ombudsman to improve policing and build confidence.

…

Constructing a strategy for Dealing with the Past on current resources will involve *extraordinary delays in* many investigations which are *unlikely to be legally sustainable* and will not only impact on the confidence of the public in the Police Complaints System/Police Ombudsman but also government for what is likely to be perceived by parts of Northern Ireland's Community as a reluctance to deal with these issues.

…" [My Emphasis]

[18] Mr Holmes further states:

"18. Following email correspondence regarding further amendments to the business case and conditions for approving the funding, the DOJ emailed me on 21 October 2011, outlining further revisions that would be required prior to approval of the business case; ... This additional work was carried out by the Ombudsman's office and the revised main body of the document was re-submitted to the DOJ on 6 January 2012; ... Again, the DOJ did not accept the business case as re-submitted and it is currently now back with the Ombudsman's office for further consideration and revision, ..."

[I note that at the time of the hearing of this judicial review the business case has still not been agreed]

[Para19 set out an annual budget table to set out the then budgetary constraints within the Ombudsman's office]

> "20. It can be seen from this table that while the annual budget for investigations into historic cases has remained in and around £900,000 since 2007 this has had little impact on the Police Ombudsman's caseload of historic matters. The reduction in cases during 2011/2012 is attributable to a significant number of referrals from HET being determined to be outside the remit of the Police Ombudsman through the preliminary assessment process.
>
> 21. The Ombudsman considers that a significant increase in the annual budget for the Historic Directorate is *required*. Having liaised closely with the DOJ for some time in respect of funding issues I believe that there is a broad consensus that annual funding would have to more than double to in and around £2.2 million/year for the next 6 years in order for the Ombudsman to progress the current workload in respect of historic cases." [My Emphasis]

[19] Mr Holmes then describes how following his appointment in February 2010 as Director he was directed to develop a strategy for processing the large number of "historic" cases in the Office before commencing any new investigations. He began to put in place a policy to manage and process the backlog of cases. Implementation of the plan began when the Directorate started work in May 2010. He avers that the plan consisted of four basic steps:

> "24. … The first step is a *preliminary assessment* in order to establish the broad nature of the complaint in each case and to assess whether or not the case falls within the remit of the Ombudsman's office. This process was designed to be in chronological order, starting with the oldest cases first and has largely been completed.
>
> 25. The second step is the *formal investigative review* of each case in order to establish the evidential opportunities in each case and the broad terms of

> reference for any subsequent investigation. The information gleaned from the investigative review will then be utilised to assist with the next step in the process. Although this is plainly not as time-consuming as the investigation stage itself, this process is itself arduous and complicated because of the very nature of historic cases. Often there is a very large amount of very old paperwork, which needs to be carefully and critically assessed. Where, as again is quite often the case, there are intelligence aspects to the case, this is another complicating factor in terms of receiving and assessing all of the necessary documentation.
>
> 26. The third step relates to the *prioritisation process* whereby each case is assessed against set criteria in order to establish the order within which actual investigations will be carried out.
>
> 27. The fourth and final step is the actual *investigation* process which will involve the formal investigation of cases by investigating officers within the Directorate with a view to gathering evidence and the preparation of a final report in each case."

[20] In para 28 he noted:

> " … At the present time *the prioritisation process has not yet been implemented* for the reasons set out in further detail below. …" [My Emphasis]

[21] Mr Holmes' affidavit was sworn in February 2012 by which date, as we have just seen, the prioritisation process had not yet been implemented. The Court's attention was drawn to a letter dated 9 June 2011 from the Police Ombudsman to the applicant's solicitors in response to their earlier indication of an intention to lodge an application to challenge the Police Ombudsman's failure to implement an investigation. In the letter Mr Holmes indicated that in view of the "extremely limited resources available" it was likely the matter would require a further "2-3 months" to reach the full prioritisation process and that he would then likely be better placed to advise of the likely timeframe for investigation.

[22] Mr Holmes further stated:

> "31. … the prioritisation policy has not yet been finalised as it is still subject to consultation, following the recommendation of the Criminal Justice

> Inspectorate in September 2011. I now refer to a copy of the consultation document in relation to this, …
>
> 32. In addition, and again as a result of the recommendations within CJI report, the Ombudsman suspended consideration and investigation of all but two historical cases as of September 2011."

[23] At para 33 and following of his affidavit Mr Holmes addresses the applicant's case and states at para 38:

> "… I believe the DOJ accepts that the Ombudsman's Office is woefully underfunded for the volume of work presented to it by historic cases."

[24] He also noted at para 46 that:

> "… A specific review team was not established to consider the applicant's case. …"

[25] Mr Holmes concluded at para 55 of his affidavit:

> "The respondent regrets the lengthy delays that have occurred in the processing of all historic cases, including the applicant's case. This delay, while unsatisfactory, was largely unavoidable due to the combination of factors which have been outlined in this affidavit. …"

Statutory Framework

[26] It is common case that the applicant's case first came to the respondent by way of a referral from the Chief Constable under s 55(4) of the 1998 Act in February 2009. The respondent therefore accepts that s 55 requires him formally to investigate under s56. The statutory duty is subject to s 51(4).

[27] The following provisions are engaged since the complaint in the present case derives from two sources: the applicant and, most importantly, the Chief Constable:

> "Section 51 - The Police Ombudsman for Northern Ireland.
> (1) ...
> (2) ...
> (3) ...

(4) The Ombudsman shall exercise his powers under this Part in such manner and to such extent as appears to him to be best calculated to secure –
(a) the efficiency, effectiveness and independence of the police complaints system; and
(b) the confidence of the public and of members of the police force in that system.
(5) ...

Section 52 - Complaints – receipt and initial classification of complaints.

(1) For the purposes of this Part, all complaints about the police force shall either—

(a) be made to the Ombudsman; or

(b) if made to a member of the police force, the [F1Board] or the Secretary of State, be referred immediately to the Ombudsman.

(2) Where a complaint—

(a) is made to the Chief Constable; and

(b) appears to the Chief Constable to be a complaint to which subsection (4) applies,

the Chief Constable shall take such steps as appear to him to be desirable for the purpose of preserving evidence relating to the conduct complained of.

(3) The Ombudsman shall—

(a) record and consider each complaint made or referred to him under subsection (1); and

(b) determine whether it is a complaint to which subsection (4) applies.

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

(5) ...

(6) ...

(7) ...

(8) Subject to subsection (9), where the Ombudsman determines that a complaint made or referred to him under subsection (1) is a complaint to which subsection (4) applies, the complaint shall be dealt with in accordance with the following

provisions of this Part; and accordingly references in those provisions to a complaint shall be construed as references to a complaint in relation to which the Ombudsman has made such a determination.

(9) ...

(10) ...

Section 55 - Consideration of other matters by the Ombudsman.

(1)...

(2)...

(4) The Chief Constable may refer to the Ombudsman any matter which appears to the Chief Constable to indicate that a member of the police force may have—

(a) committed a criminal offence; or

(b) behaved in a manner which would justify disciplinary proceedings; and

is not the subject of a complaint, if it appears to the Chief Constable that it is desirable in the public interest that the Ombudsman should investigate the matter.

(5) *Where any matter is referred to the Ombudsman under subsection (4), he shall formally investigate the matter in accordance with section 56 if it appears to him that it is desirable in the public interest that he should do so.*

(6) ...

Section 56 - Formal investigation by the Ombudsman.

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

...

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

> Section 58 - Steps to be taken after investigation – criminal proceedings.
>
> (1) The Ombudsman shall consider any report made under section 56(6) or 57(8) and determine whether the report indicates that a criminal offence may have been committed by a member of the police force.
>
> (2) If the Ombudsman determines that the report indicates that a criminal offence may have been committed by a member of the police force, he shall send a copy of the report to the Director together with such recommendations as appear to the Ombudsman to be appropriate.
>
> (3) Where a report is sent to the Director under subsection (2), the Ombudsman shall, at the request of the Director, ascertain and furnish to the Director all such further information in relation to the complaint or matter dealt with in the report as appears to the Director to be necessary for the discharge of his functions under the Prosecution of Offences (Northern Ireland) Order 1972.
>
> (4) In this section and section 59 "the Director" means the Director of Public Prosecutions for Northern Ireland." [My Emphasis]

Discussion

The Court's Approach to Review of the Police Ombudsman

[28] The Police Ombudsman is independent and has been granted a wide statutory discretion in respect of the exercise of his powers under Part VII of the 1998 Act by s51(4). In R v Parliamentary Commissioner ex parte Dyer [1994] 1 WLR 621 Simon Brown LJ referred to the intended width of the discretion as being "strikingly clear". In a passage upon which the respondent relied in this case he stated:

> "… it does not follow that this Court will readily be persuaded to interfere with the exercise of the [*Parliamentary Commissioner for Administration's*] discretion. Quite the contrary. The intended width of these discretions is made strikingly clear by the legislature: under section 5(5), when determining whether to initiate, continue or discontinue an investigation, the Commissioner shall "act in accordance with his own discretion"; under section

> 7(2), "the procedure for conducting an investigation shall be such as the Commissioner considers appropriate in the circumstances of the case". Bearing in mind too that the exercise of these particular 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.
>
> Recognising this, indeed, one may pause to wonder whether in reality the end result is much different from that arrived at by the House of Lords in the two cases referred to, where the decisions in question were held "not open to challenge on the grounds of irrationality short of the extremes of bad faith, improper motive or manifest absurdity". True, in the present case "manifest absurdity" does not have to be shown; but inevitably it will be almost as difficult to demonstrate that the PCA has exercised one or other of his discretions unreasonably in the public law sense."

[29] Further in R (M) v Commissioner for Local Administration [2006] EWHC 2847 Mr Justice Collins considered whether a decision not to conduct an investigation by the Local Government Ombudsman was susceptible to judicial review. At para20 of his judgment he stated:

> "Thus it is plain that Parliament has bestowed upon the Ombudsman a very wide discretion to decide what complaints he should or should not investigate, and whether or not to continue or discontinue any such investigation. However, it is common ground that the authorities make clear that that discretion is reviewable by this court on ordinary judicial review grounds. Effectively that means, in this context, on *Wednesbury* grounds. Authority has made it clear that, because the discretion is a wide one, the court will not easily be persuaded that it is appropriate to interfere and to quash a decision. So much is apparent from *R v The Parliamentary Commissioner for Administration ex parte Dyer* [1994] 1 WLR 621."

[30] In light of the statutory provisions governing the Police Ombudsman and the authorities above referred to it is plain that Parliament has conferred upon him a very wide discretion in respect of the exercise of his powers under Part VII of the 1998 Act. Whilst it is common ground that the Police Ombudsman is subject to the

supervisory jurisdiction of the High Court it is nevertheless plain that a Court will not readily interfere.

The Court's Approach to the Question of Delay

[31] The respondent referred the Court to a body of case law which, they submitted, was relevant to the assessment of the legality or otherwise of delay.

[32] I accept that claims in judicial review based squarely on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable (see R (FH & Ors) v SSHD [2007] EWHC 1571 (Admin) per Mr Justice Collins at para 30 discussed below). I further accept that context is a crucial factor in the assessment of the legality or otherwise of delay in cases such as the present.

[33] In R (KB & Ors) v The Mental Health Review Tribunal [2002] EWHC 639 (Admin) the Court considered a number of claims by persons who had been detained under the Mental Health Act 1983. Each patient/detainee had applied for a review of their detention to the Mental Health Review Tribunal which had then repeatedly adjourned the review hearing in each case with at least one patient having to wait some 27 weeks between applying for a review and the actual review hearing. The applicants sought judicial review of the delay involved and relied upon Article 5(4) ECHR. The Tribunal and Secretary of State accepted that there were some inadequacies within the Tribunal system referring, in particular, to shortages of medical members and administrative staff. They submitted that they were doing all that reasonably could be done to remedy the situation and pointed out that temporary shortages of personnel and inadequacies of resources do not involve responsibility under the ECHR provided that the State takes effective steps to remedy them relying on Buchholz v Federal Republic of Germany [1980] EHRR 597.

[34] In R (KB & Ors) Mr Justice Stanley Burnton set out his approach to the issue of delay and the adequacy of resource taking into account Strasbourg jurisprudence:

> "45. Normally, the question whether the Government allocates sufficient resources to any particular area of state activity is not justiciable. A decision as to what resources are to be made available often involves questions of policy, and certainly involves questions of discretion. These are matters for policy makers rather than judges: for the executive rather than the judiciary: c.f. *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 and *R v Cambridge Health Authority, ex parte B* [1995] 1 WLR 898 , 906D–F; see too the speech of Lord Slynn of Hadley in *R v Chief Constable of Sussex, ex p International Trader's Ferry Ltd* [1999] 2 AC 418 at 439A–B, and the judgment of Moses J in *Hooper v Secretary of State for Work and Pensions* [2002] EWHC

191(Admin) at paragraph 100. However, as has been seen, when issues are raised under Articles 5 and 6 as to the guarantee of a speedy hearing or of a hearing within a reasonable time, the Court may be required to assess the adequacy of resources, as well as the effectiveness of administration; and it is common ground that the Court must do so in the present cases.

46. It is at this point that I must mention an important qualification. In general a court is ill-equipped to determine general questions as to the efficiency of administration, the sufficiency of staff levels and the adequacy of resources. It is one thing to instruct a team of management consultants to go out into the field to study and to report on the efficiency and adequacy of the Tribunal system and its practices; it is another to expect a judge, in the confines of a 2-day hearing, to reach sensible and reliable conclusions as to whether, for example, the practice of allocating hearing dates before it is known whether a panel will be available is an aid or a hindrance to speedy hearings. Not only is the time available to the Court limited: so is the evidence; and such expertise as the judge may have is, notwithstanding the title to this Division of the High Court, legal, rather than administrative.

47. In my judgment, the correct approach in a case that raises issues of this kind is, first, to consider whether the delays in question are, on the face of it, inconsistent with the requirement of a speedy hearing. If they are, the onus is on the State to excuse the delay. It may do so by establishing, for example, that the delay has been caused by a sudden and unpredictable increase in the workload of the tribunal, and that it has taken effective and sufficient measures to remedy the problem. But if the State fails to satisfy that onus, the claimant will have established a breach of his right under Article 5.4."

[35] In R (FH & Ors) v SSHD [2007] EWHC 1571 (Admin) the Court was dealing with the long-standing problem of delays in making immigration decisions by the Home Office. The Court in ***FH*** was asked to order that the extant applications for leave to remain in the UK be considered forthwith and that declarations be made that the delay was unlawful. In some cases the delay in determining the claims exceeded 3 years. The judge considered such delay (and indeed delays of two years)

to be "*excessive*", see para 6. It was accepted by the Secretary of State that there is an implicit obligation to decide such applications within a reasonable time. The applicant's Counsel submitted that applications must be dealt with speedily. The judge stated that what is reasonable will depend upon the circumstances of a particular case, see para 8.

[36] The judge questioned the extent to which (if at all) a failure to provide the necessary resources to avoid delay should be taken into account when assessing the reasonableness of any resultant delay, see para 9. The judge distinguished the Strasbourg authority involving breaches of Article 5(4) wherein a lack of resources cannot be relied upon to excuse significant delays given the fundamental nature of the right at stake (liberty) and adopted the more flexible approach that applies in respect of the "*reasonable time*" requirement under Article 6 ECHR citing Lord Bingham in Procurator Fiscal (Dyer) v Watson [2002] 4 All ER at para 52 *et seq*:

> "52. In any case in which it is said that the reasonable time requirement (to which I will henceforward confine myself) has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the Convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.
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> 53. The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognised, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.

54. The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively.

55. The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the Convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system. Thus it is not objectionable for a prosecutor to deal with cases according to what he reasonably regards as their priority, so as to achieve an orderly dispatch of business. It must be accepted that a prosecutor cannot ordinarily devote his whole time and attention to a single case. Courts are entitled to draw up their lists of cases for trial some time in advance. It may be necessary to await the availability of a judge possessing a special expertise, or the availability of a courthouse with special facilities or security. Plans may be disrupted by unexpected illness. The pressure on a court may be increased by a sudden and unforeseen surge of business. There is no general obligation on a prosecutor, such as that imposed on a prosecutor seeking to extend a custody time limit under section 22(3)(b) of the Prosecution of Offences Act 1985, to show that he has acted "with all due diligence and expedition." But a marked lack of expedition, if unjustified, will point towards a breach of the reasonable time requirement, and the

authorities make clear that while, for purposes of the reasonable time requirement, time runs from the date when the defendant is charged, the passage of any considerable period of time before charge may call for greater than normal expedition thereafter."

[37] The judge then set out his own views at para10:

"10. It follows in my view that a system of applying resources which is not unreasonable and which is applied fairly and consistently can be relied on to show that delays are not to be regarded as unreasonable or unlawful.

11. As was emphasised by Lord Bingham, the question was whether delay produced a breach of Article 6(1). Here the question is whether the delay was unlawful. It can only be regarded as unlawful if it fails the *Wednesbury* test and is shown to result from actions or inactions which can be regarded as irrational. Accordingly, I do not think that the approach should be different from that indicated as appropriate in considering an alleged breach of the reasonable time requirement in Article 6(1). *What may be regarded as undesirable or a failure to reach the best standards is not unlawful. Resources can be taken into account in considering whether a decision has been made within a reasonable time, but (assuming the threshold has been crossed) the defendant must produce some material to show that the manner in which he has decided to deal with the relevant claims and the resources put into the exercise are reasonable.* That does not mean that the court should determine for itself whether a different and perhaps better approach might have existed. That is not the court's function. *But the court can and must consider whether what has produced the delay has resulted from a rational system. If unacceptable delays have resulted, they cannot be excused by a claim that sufficient resources were not available.* But in deciding whether the delays are unacceptable, the court must recognise that resources are not infinite and that it is for the defendant and not for the court to determine how those resources should be applied to fund the various matters for which he is responsible." [My emphasis]

[38] The Court then considered the circumstances relied upon by the SoS to justify the delays and took into account the steps taken by him to alleviate some of the problems that had caused the delay. The judge concluded:

> "28. It might be possible to devise a system which may seem better. But that does not mean that the existing one is unlawful, notwithstanding the unsatisfactory and undesirable delays. In all the circumstances, I am not persuaded that there has been unlawfulness, whether the high threshold of abuse of power or the lower one of unfairness has to be overcome. Accordingly, with the exception of H, I must dismiss those claims. In A and K "rolled-up" hearings were directed. I propose therefore to grant permission, to dispense with all further procedural steps, but to dismiss the claims.
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> 29. I would only add a footnote. Since a substantial delay is, at least for the next 5 years or so, likely to occur in dealing with cases such as these, steps should be taken to try to ensure that so far as possible claimants do not suffer because of that delay. They should be informed when receipt of an application is acknowledged, as it must be, that there will likely to be a wait which could be for x months (or years). Thus they should be asked not to pursue the Home Office unless circumstances have arisen which make a communication necessary, for example, a new development or a need which has arisen for some sort of discretionary action. One serious matter of concern has been the continual failure of the Home Office to respond to or even acknowledge receipt of correspondence. Measures should be taken to minimise any prejudice to applicants occasioned by the delay. Thus those who were being given support should continue to receive it, those who were able to work should continue to be permitted to do so and there should be favourable consideration of desires to travel outside the United Kingdom for short periods (as, for example, in a case such as FH) without affecting the validity of the application. Applicants should not suffer any more than is inevitable because of delays which are not in accordance with good administration even if not unlawful.

> *30. It follows from this judgment that claims such as these based on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable. It is only if the delay is so excessive as to be regarded as manifestly unreasonable and to fall outside any proper application of the policy or if the claimant is suffering some particular detriment which the Home Office has failed to alleviate that a claim might be entertained by the court*." [My Emphasis]

Conclusion

[39] As previously pointed out it is common case that the Police Ombudsman is subject to the supervisory jurisdiction of the High Court. However, he has a very wide discretion in respect of the exercise of his powers under Part VII of the 1998 Act. He is also the master of his own procedure. Accordingly, the circumstances in which it would be permissible for the Court to intervene will inevitably be extremely limited. The Court must be astute neither to abdicate its constitutional responsibility of supervisory review nor its constitutional duty not to trespass into forbidden territory. It is thus, for example, not the role of the Court to dictate to the Police Ombudsman how to carry out his functions.

[40] It is also common case that the 1998 Act contains an implicit requirement that the relevant investigation be carried out within a reasonable time. The setting of priorities, and the allocation of resources is quintessentially a matter within the realm of the decision maker who, as here, will often be faced with competing demands. It is an area into which the Court would not lightly tread.

[41] The requirement of investigation within a reasonable time must accord the Police Ombudsman a very considerable degree of latitude and flexibility in the timetabling of investigations and the allocation of finite resources. However, if a breach of statutory duty by failing to investigate within a reasonable time has been established it is the Court's role to so declare.

[42] Ultimately this case resolved to the question whether or not the delay in initiating the investigation of the applicant's complaint was unlawful in public law terms as being a breach of the implicit statutory obligation to commence an investigation within a reasonable time. The decided cases make clear that claims based on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable. It is only if the delay is so excessive as to be regarded as manifestly unreasonable that a claim might be entertained by the court. If unacceptable delays have resulted causing a breach of statutory duty the breach is not remedied because it may in large part have resulted from the provision of woefully inadequate resources. That may explain how the breach occurred but it does not remedy it.

[43] I have concluded, against the exceptional background of the present case that by reason of chronic underfunding at the material time the respondent was disabled from discharging its statutory duty to investigate within a reasonable time.

[44] The court has been informed by letter dated 17 September 2012 from Paul Holmes, Director of Investigations (Historic), in the following terms:

> "I write to advise you that arising from a decision of the Chief Constable of the PSNI to commence an investigation of a referral by the Director of Public Prosecutions in connection with the circumstances in which Mr Martin and others were convicted of the false imprisonment of Mr Sandy Lynch between the 5th and the 7th of January 1990, the Police Ombudsman initiated investigation of Mr Martin's complaint and related matters on 31st May 2012.
>
> I have reported this development to the Director of Public Prosecutions and Mr Martin's legal representatives and other concerned parties that an investigation has commenced."

[45] I think it only right to acknowledge that Mr Holmes filed a very helpful affidavit in which he expressed his regret for the lengthy and unsatisfactory delays and acknowledged the applicant's understandable frustration at the delay which resulted in large measure from the chronic underfunding. I note that in para 38 of his affidavit he states his belief that the DoJ accepted at the material time that the Ombudsman's office was, as he put it, "woefully underfunded" for the volume of work presented to it by what he characterised as historic cases.

[46] In the rather exceptional if not unique circumstances of the present case I think it right that the court should acknowledge by this judgment the breach of statutory duty. But as the letter from Mr Holmes happily makes clear matters have progressed and the investigation has now been initiated. In those circumstances it does not appear any further order from the court is required.