

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

NIPSA's Application and McCord's (Vivienne) Application [2014] NIQB 16

IN THE MATTER OF AN APPLICATION BY NORTHERN IRELAND PUBLIC
SERVICE ALLIANCE (NIPSA)

AND

IN THE MATTER OF AN APPLICATION BY VIVIENNE McCORD FOR
JUDICIAL REVIEW

TREACY J

Introduction

[1] These two applications for judicial review raise issues which overlap substantially and therefore are being considered together.

Background to the Applications for Judicial Review

[2] The majority of directly employed administrative and support staff within the Police Service of Northern Ireland ("PSNI") are members of the trade union, NIPSA. NIPSA's application for judicial review challenges the decision of the Chief Constable of the PSNI to enter into a private contractual arrangement with Resource NI on 7 July 2012 (the "Resource Contract"). The applicants describe the Resource Contract as being "*for the engagement of staff to support the police*". The applicants assert that the arrangement is *ultra vires* the statutory powers of the PSNI.

[3] The PSNI describes the Resource Contract as providing a series of managed services across the police estate in Northern Ireland and asserts that the Resource Contract relates to the supply of services, using staff employed by Resource NI, not simply the "engagement" of staff.

[4] The respondent contends that there was no "decision" of 7 July 2012 but rather there was a process which commenced at a much earlier point in time. The

respondent states the Resource Contract was awarded following a competitive procurement process conducted under the Public Contracts Regulations 2006.

[5] Vivienne McCord's application for judicial review challenges the "*practice*" of the PSNI to contract with private agencies to supply staff to the PSNI ("the respondent"). The PSNI refers to this as a challenge to the legality of engaging temporary workers supplied by a recruitment agency, including the engagement of some former members of the Royal Ulster Constabulary (the "RUC").

[6] The Policing Board of Northern Ireland ("NIPB") is a notice party to the proceedings. The notice party's submissions have been provided in order to inform the Court of the NIPB's analysis of the interlocking roles of the Chief Constable of the PSNI and the NIPB.

[7] The respondent submits that the true issue in this case relates to the power of the PSNI to enter into private contractual arrangements for the provision of commercial services, not whether the PSNI has power to engage staff other than as part of the permanent police staff.

[8] Both applicants and the respondent agree that the primary issue in each respective judicial review is one of statutory interpretation of the relevant domestic law.

Factual background

NIPSA's application

[9] Prior to 1999, all administrative and support staff working in police stations in Northern Ireland were seconded from the Northern Ireland Civil Service. In or around 1999, a system of direct recruitment of police support staff commenced. Those who had been seconded to the police (then the RUC) from the Northern Ireland Civil Service remained as seconded civil servants but further secondment ceased. This meant that, by 2008, there were approximately 1400 civil servants remaining as police support staff and they worked alongside a growing group of directly recruited police support staff. The majority of both these groups of workers are members of NIPSA.

[10] In October 2008 those remaining civil servants on secondment transferred employment to the NIPB by operation of Reg 3 of the Police Support Staff (Transfer of Employment) Regulations (NI) 2008 ("the 2008 Regulations"). There are no longer any civil servants seconded to the PSNI.

[11] In August 2011, the PSNI informed NIPSA that it was considering outsourcing some of its functions. In January 2012, the PSNI informed NIPSA that such functions included Custody Detention Officers, Station Enquiry Assistants and

Transport Co-ordinators and that there was further scope for expansion of the contract into other functions.

[12] On 8 February 2012, an Invitation to Tender Notice was issued in the European Journal by the Chief Constable of the PSNI on behalf of and in the name of the NIPB.

[13] On 5 July 2012, the Chief Constable wrote to all PSNI support staff to confirm that the “Managed Service Contract”, which had been widened to include the current Security Guarding and Associated Services contract, had been awarded.

[14] On 11 July 2012, the Chief Constable of the PSNI informed NIPSA that Resource NI was the successful bidder and the contract was due to commence on 7 September 2012. The Resource Contract was for an initial period of 3 years with opportunities to renew up to 2019; it was valued at approximately £180 million; and it had the potential to involve up to 1000 staff supplied by Resource NI.

[15] On 20 August 2012, pre-action protocol letters were sent on behalf of NIPSA to the Chief Constable of the PSNI and the NIPB. On 11 September 2012, on behalf of the Chief Constable of the PSNI, the Crown Solicitors Office replied to the pre-action protocol letter stating, *inter alia*, as follows:

“... it is not accepted that the Board or the Chief Constable have no power to enter into commercial contracts with private companies for the provision of specific services for the police or police support staff over fixed periods of time, save as permitted by s.31 of the 2000 Act.”

[16] On 26 September 2012, on behalf of the NIPB, the Crown Solicitors Office replied to the pre-action protocol letter stating that the NIPB “*has had no responsibility for or involvement in the making or application of the said arrangements.*”

[17] On 1 October 2012, judicial review proceedings were initiated and on 5 October 2012 leave was granted to apply for judicial review.

[18] NIPSA states that the effect of the Resource Contract was to contract out work being performed by police support staff. In brief, NIPSA submits that outside of the employment provisions in section 4 of the Police (NI) Act 2000 (“the 2000 Act”) and some very limited provisions permitting contracting out in section 31 of the Police (NI) Act 2003 (“the 2003 Act”), neither the NIPB nor the Chief Constable of the PSNI has any ability in law to enter into any contractual arrangement by which work ordinarily undertaken by police constables or its support staff is contracted out.

[19] NIPSA asserts that the respondent's claim that it is legally entitled to enter into the Resource Contract by virtue of section 4(3) of the 2000 Act is misconceived; that the respondent's interpretation of the relevant statutory provisions is misconceived; and that the contracting out arrangement of the Chief Constable of the PSNI/NIPB is unlawful.

Vivienne McCord's Application

[20] Vivienne McCord is the mother of Raymond McCord Jnr who was murdered on 9 November 1997. The circumstances of his death were the subject of an extensive investigation conducted by the Office of the Police Ombudsman of Northern Ireland ("the Ombudsman") who reported on 22 January 2007 following a complaint being filed by Vivienne McCord's husband alleging police collusion with suspected paramilitaries believed to be responsible for her son's murder. That complaint was upheld by the Ombudsman. Since then the circumstances of Raymond McCord Jnr's death and the role played by police officers has been the subject of ongoing investigation by the PSNI.

[21] As noted above the Chief Constable entered into the Resource Contract on 7 July 2012 for the engagement of staff to support the police. Vivienne McCord's amended Order 53 Statement provides that such staff work within the PSNI estate and under the direction of PSNI officers. It is stated that such staff comprise of mainly former RUC officers who were retired from service as police officers within the RUC and the PSNI under what is commonly known as the 'Patten arrangements'. This was a term given to a financial package paid to police officers to encourage them to retire early from the police force in Northern Ireland.

[22] Vivienne McCord asserts that the practice of the Chief Constable of the PSNI of contracting with private agencies to supply staff to the PSNI compromises the integrity of the investigation into the circumstances of her son's death. In 2012, when this matter came into the public domain and following receipt of legal advice, a pre-action protocol letter was written to the Chief Constable asserting the unlawfulness of such an arrangement.

[23] Vivienne McCord states that a distillation of the pre-action correspondence demonstrates the respondent considered that a justification for use of ex-RUC officers as agency staff lay in the interpretation of section 4(3) of the 2000 Act.

[24] Vivienne McCord claims locus to bring this judicial review by reason of her relationship to a deceased person whose death remains under PSNI investigation and whose members must be accountable publicly and free from apparent or actual bias. Vivienne McCord submits that it is unlawful for former members of the RUC to play a role now, or in the future, in the investigation of her son's death in circumstances where it appears they are not accountable.

[25] Vivienne McCord's core submission is that the Resource Contract was unlawful in that it involved the engagement of staff to discharge policing functions outside the limited circumstances permitted by the relevant statutory provisions within the 2000 and the 2003 Acts. Vivienne McCord submits that the lawfulness or otherwise of the decision to award the Resource Contract is a matter of statutory construction of the relevant provisions within such legislation.

Order 53 Statement

NIPSA

[26] The grounds on which relief is sought by NIPSA include:

“(a) The manner by which the PSNI can be assisted is solely by the employment of Police Support Staff. If support staff is required to assist the police, the NIPB only (through the PSNI) has the power to employ such staff. This is the effect of section 4 of the Police (Northern Ireland) Act 2000. No power is vested in the Chief Constable of the PSNI to contract with another organisation for the provision of workers.

(b) Neither the NIPB nor the Chief Constable of the PSNI has any statutory power to enter into an arrangement for the police to be assisted by entering into a supply contract with another outside agency outside of the limited provisions set out in sections 30 and 31 of the Police (Northern Ireland) Act 2003.

(c) As a matter of pure statutory construction, no provision contained in the Police (Northern Ireland) Act 2000 or 2003 entitles the PSNI or the NIPB to enter into the supply contract with Resource of the 7th July 2012.

(d) Neither the PSNI nor the NIPB has any residual, discretionary or inherent power to enter into such a contract insofar as it seeks to provide for assistance to the police by the provision of staff.

(e) The contract of 7 July 2012 as between the Chief Constable (whether acting in the name of or on behalf of the NIPB or on behalf of the PSNI) and Resource NI is unlawful.”

[27] The relief sought by NIPSA includes:

“(a) A declaration that the Resource Contract is unlawful insofar as it contracts with Resource NI to engage staff to discharge the statutory functions of the PSNI and of the NIPB outside of the very limited circumstances permitted by section 31 of the Police (Northern Ireland) Act 2003.

(b) An order of certiorari quashing the decision of the Chief Constable of the PSNI/NIPB to enter into the Resource Contract as there was no statutory or other power by which to so contract.”

Vivienne McCord

[28] The grounds on which relief is sought by Vivienne McCord substantially overlap with those of NIPSA although they are set out somewhat more elaborately.

History of the 2000 Act - The Patten Recommendations

Recommendations relating to “civilianisation” and “contracting out”

[29] The report made a number of recommendations specifically in relation to both “civilianisation” and also “contracting out”:

“10.23Police officers are still employed in areas such as property management, information technology, press relations and research, which should in our view be civilianised ... We recommend a rigorous programme of civilianisation of jobs which do not require police powers, training or experience, exceptions being made only when it can be demonstrated that there is a good reason for a police officer to occupy the position. The Policing Board should monitor this programme closely.

10.24 Under the 1998 Police Act, the civilian staff previously employed by the Police Authority were transferred to the control of the Chief Constable. We endorse the move as conducive to good management, rationalisation and the better use of resources.

10.25 A comparatively recent development in United Kingdom police services is the contracting out of certain support functions to private companies. Property services, IT and communications services,

vehicle maintenance and transport services and pay and pensions administration are the main areas recommended for contracting out in a review done by the Metropolitan Police in 1996. We were not able to find any comparable work being done by either the Police Authority or the RUC. We recommend that the Policing Board and the police service initiate a review of police support services with a view to contracting out those services where this will enhance the efficient management of resources. Consideration should be given to allowing “management buy-outs” of support services by police officers or civilian employees interested in continuing to provide those services as a private sector company, and in such cases we recommend that management buy-out contractors be offered a secure contract for at least three years to enable them to establish themselves before having to tender for renewal.”

[30] On 19 January 2000, the then Secretary of State (Peter Mandelson MP) made a statement to the House of Commons, responding to the Report and undertaking to introduce legislation to implement its recommendations. The government’s response to each recommendation was set out in two separate Implementation Plans in 2000 and 2001. The recommendations on civilianisation and contracting out were accepted by the government. The implementation plan stated that these initiatives should be taken forward through the annual Police Plan and using best value methodology (Recommendations 90 - 92).

The Role of the Police Board

[31] In his statement to the House of Commons on 19 January 2000, the Secretary of State, he said:

“.....The new Policing Board will be responsible for securing the maintenance of an efficient and effective police service and holding the Chief Constable and the police service to account....

The Report recommends clarifying the roles of the Secretary of State, the Chief Constable and the Policing Board. The broad thrust of the recommendations is that the Policing Board should play a more developed role - setting objectives, priorities and performance targets while leaving operational control and direction of the police firmly in the Chief Constable's hands.

I entirely agree with the Report that the new Policing Board “should be empowered and equipped to scrutinise the performance of the police effectively”. I therefore accept the recommendations and will introduce legislation accordingly...”

[32] The role of the Board in monitoring and financial terms is encapsulated in paras 6.16 - 6.17 of Patten:

“6.16Government should retain the power to set principles and broad overall objectives for policing. But the Policing Board should have the power to set the objectives, priorities and performance targets for Northern Ireland in both the 3-5 year strategy and the Annual Policing Plan.

6.17 These plans must be linked together to be effective, and steps must be taken to ensure that they are. This, however, does not diminish the need for clear delineation of arrangements for financial control and accountability. The memorandum setting out the financial relationship with the Policing Board should be so formulated as to ensure that there is no blurring of these responsibilities, and that the government does not, as in the past, become involved in what is properly the business of the Board: to determine the allocation of the budget to the Chief Constable and to hold him/her responsible for the efficient and effective use of resources.

6.46 As noted above, the Policing Board would be responsible for negotiating the policing budget with government, and allocating the police service budget to the Chief Constable. It should agree expenditure sub-heads with the Chief Constable and should be responsible for approving any major transfers of expenditure between sub-heads within the year, and for approving any major capital expenditure (see also paragraph 6.17).”

[33] The intended role of the Chief Constable in making management decisions about the use of the police budget and entering into the necessary arrangements on his own account is demonstrated most starkly, the respondent submitted, by the appointment of the Chief Constable as an accounting officer with respect to the use of the police grant. The Pattern Report contained the following recommendation:

“6.47 We also recommend that the Chief Constable should be designated a sub-accounting officer, in addition to the Chief Executive of the Policing Board, so that either or both may be called, together with the Permanent Under Secretary as principal accounting officer, to give evidence to the Public Accounts Committee. These arrangements should be varied as appropriate when responsibility for policing is devolved, depending on the mechanisms agreed at that time for funding the Northern Ireland policing budget. But in any event the Chief Constable should remain an accounting officer.”

[34] This recommendation was accepted by the Government and included in the 2000 and 2001 Implementation Plans. The 2001 Implementation Plan states:

“Accepted. The Police Act requires the Board to keep proper records and accounts of police expenditure and to delegate this function to the Chief Constable (section 12). This enables the Chief Constable to be designated as accounting officer for the police grant while retaining the Board’s overall responsibility. As two accounting officers cannot have the same responsibility for a single grant (ie the same amount of money), the Government will designate the Chief Constable as accounting officer for the annual grant for police purposes, while the Chief Executive of the Board will be similarly designated for the Board’s resources. The Chief Constable in carrying out his accounting officer role will have his own internal audit service.

The change in the designation of accounting officer does not affect the Chief Constable’s accountability to the Policing Board for police expenditure.”

Statutory Framework

[35] Section 3 of the 2000 Act refers to the general functions of the NIPB in the following terms:

- “(1) The Board shall secure the maintenance of the police in Northern Ireland.
- (2) The Board shall secure that –

- (a) the police,
 - (b) the police support staff, and
 - (c) traffic wardens appointed by the Board under section 71, are efficient and effective.
- (3) In carrying out its functions under subsections (1) and (2) the Board shall –
- (a) in accordance with the following provisions of this Act, hold the Chief Constable to account for the exercise of his functions and those of the police, the police support staff and traffic wardens;
 - (b) monitor the performance of the police in –
 - [(ia) complying with section 31A(1);]
 - (i) carrying out the general duty under section 32(1);
 - (ii) complying with the Human Rights Act 1998;
 - (iii) carrying out the policing plan;
 - (c) keep itself informed as to –
 - (i) the workings of Part VII of the 1998 Act (police complaints and disciplinary proceedings) and trends and patterns in complaints under that Part;
 - (ii) the manner in which complaints from members of the public against traffic wardens are dealt with by the Chief Constable under section 71;
 - (iii) trends and patterns in crimes committed in Northern Ireland;
 - (iv) trends and patterns in recruitment to the police and the police support staff;

- (v) the extent to which the membership of the police and the police support staff is representative of the community in Northern Ireland;
- (d) assess –
 - (i) the effectiveness of measures taken to secure that the membership of the police and the police support staff is representative of that community;
 - (ii) the level of public satisfaction with the performance of the police and of district policing partnerships;
 - (iii) the effectiveness of district policing partnerships in performing their functions and, in particular, of arrangements made under Part III in obtaining the views of the public about matters concerning policing and the co-operation of the public with the police in preventing crime;
 - (iv) the effectiveness of the code of ethics issued under section 52;
- (e) make arrangements for obtaining the co-operation of the public with the police in the prevention of crime.
- (4) In carrying out its functions, the Board shall have regard to –
 - (a) the principle that the policing of Northern Ireland is to be conducted in an impartial manner;
 - (b) the policing plan;
 - (c) any code of practice issued by the [Department of Justice]¹ under section 27; and

¹ Powers exercisable by the ‘Secretary of State’ were replaced with references to the ‘Department of Justice’ on the devolution of policing and justice: see The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Schedule 3.

- (d) the need –
 - (i) to co-ordinate its activities with those of other statutory authorities; and
 - (ii) to co-operate with such authorities.”

[36] Section 4 of the 2000 Act refers to police support staff and, subject to a number of provisions, states that the NIPB has the power to “*employ persons to assist the police*”:

“(1) The Board may, subject to the following provisions of this section, employ persons to assist the police.

(2) Senior employees shall be appointed by the Board –

(a) with the approval of the [Department of Justice] and after consultation with the Chief Constable; and

(b) on such terms and conditions as the Board may, with the approval of the [Department of Justice], determine.

(3) Other employees shall be appointed by the Board with the approval of the [Department of Justice] as to terms and conditions.

(3A) Regulations may make provision as to the suitability for appointment under subsection (3) of persons who are so appointed with a view to their being designated under section 30 or 30A of the Police (Northern Ireland) Act 2003.

(3B) Before making regulations under subsection (3), the [Department of Justice] shall consult –

(a) the Board;

(b) the Chief Constable;

- (c) the Police Association; and
- (d) any other person or body appearing to [the Department of Justice] to have an interest in the matter.]

(4) The Board may make arrangements for administrative, secretarial or other assistance to be provided for the police by persons employed in the civil service.

(5) The following functions of the Board shall be exercised, on behalf of and in the name of the Board, by the Chief Constable—

- (a) the power to direct and control senior employees of the Board and all other powers and duties of the Board as employer of such employees, other than the power to appoint and dismiss;
- (b) the power to appoint and dismiss other employees, the power to direct and control such employees and all other powers and duties of the Board as employer of such employees;
- (c) the power to direct and control persons providing assistance to the police in pursuance of arrangements under subsection (4).

(6) Persons who—

- (a) are employed by the Board under this section, or
- (b) are engaged in pursuance of arrangements under subsection (4) in providing assistance to the police,

are referred to in this Act as the “police support staff”.

(7) In this section and section 5 “senior employee” means an employee of such class or description as may be specified for the purposes of this section by

the Board with the approval of the [Department of Justice].”

[37] Section 6 provides the NIPB with power to provide and maintain buildings and equipment for police purposes:

“(1) The Board may provide and maintain buildings and equipment for police purposes.

(2) The Board may enter into arrangements with any other person for the maintenance, on such terms as the Board may determine, of equipment used by that person; and maintenance of equipment carried out in pursuance of any such arrangements shall be treated for the purposes of this Act as maintenance of equipment for police purposes.

(3) The powers of the Board under this section shall be exercised, on behalf of and in the name of the Board, by the Chief Constable.

(4) Nothing in this section confers power to acquire or hold land.

(5) The power conferred by this section to provide equipment is subject to any regulations under section 40 of the 1998 Act.

(6) The power conferred by this section to provide buildings or equipment includes power to enter into a contract with another person for the provision or making available of buildings or equipment together with any services relating to such buildings or equipment.”

[38] Section 7 similarly empowers the NIPB “to acquire and dispose of land for police purposes” but there is no delegation to the Chief Constable to exercise those powers on its behalf.

[39] Sections 9 and 10 relate to funding. The respondent asserts that these provisions make clear the powers of the Chief Constable to enter into private commercial contracts for the benefit of the PSNI as a whole and that these provisions are of central importance in defining the differing functions of the PSNI and the NIPB. Section 9 relates to grants to, and borrowing by, the NIPB:

“(1) The [Department of Justice] shall for each financial year make to the Board –

- (a) a grant for pension purposes;
 - (b) a grant for other police purposes].
- (2) [Grants] under this section –
- (a) shall be of such amount;
 - (b) shall be paid at such time, or in instalments of such amounts and at such times; and
 - (c) shall be made on such conditions, as the [Department of Justice] may determine.

(3) A time determined under subsection (2)(b) may fall within or after the financial year concerned.

(4) Subject to subsections (5), (6) and (8), the Board may borrow, by way of temporary loan or overdraft from a bank or otherwise, any sum which it may temporarily require for the purpose of defraying expenses pending the receipt of moneys receivable by the Board.

(5) The total amount owing of money borrowed under subsection (4) shall not at any time exceed such sum as the [Department of Justice] may specify to the Board in writing.

(6) Any sum borrowed under subsection (4) shall be repaid before the end of the financial year in which it is borrowed.

(7) Subject to subsection (8), the Board may, with the consent of the [Department of Justice], borrow or raise money on such terms and subject to such conditions as the [Department of Justice] may approve upon the security of any property or assets of the Board for all or any of the following purposes –

- (a) meeting expenses incurred in connection with any permanent work the cost of which is properly chargeable to capital;

- (b) redeeming any loan previously borrowed or raised under this section; or
 - (c) any other purpose for which capital moneys may properly be applied.
- (8) The Board may not borrow or raise money under this section for any purposes other than police purposes.”

[40] Section 10 includes ancillary provisions relating to funding for police purposes. The respondent highlights that pursuant to section 10(5), an amount equal to the grant received by the NIPB for other police purposes under section 9(1)(b) must be put at the disposal of the Chief Constable for other police purposes:

“(1) The Board shall prepare and submit to the [Department of Justice], at such times and in such form as the [Department of Justice] may direct –

- (a) estimates of the receipts and payments of the Board for pension purposes during such period as may be specified in the direction;
- (b) estimates of the receipts and payments of the Board for other police purposes during such period as may be specified in the direction.

(1A) The Board shall submit to the [Department of Justice] such other information relating to the estimates submitted under subsection (1) as [the Department of Justice] may require.]

(2) [Drafts] of the estimates of receipts and payments for [pension purposes and other] police purposes shall be submitted by the Chief Constable to the Board.

(3) The estimates submitted by the Board under subsection (1) shall be either –

- (a) in the form of the [drafts] submitted under subsection (2); or

(b) in that form with such amendments as the Board may, after consultation with the Chief Constable, determine.

(4) The Board shall comply with such directions as the [Department of Justice] may give as to the application of moneys received by the Board otherwise than by way of grant under section 9(1) or paragraph 15 of Schedule 1; and to the extent that any statutory provision or any such direction does not require moneys so received to be applied in a particular manner or for a particular purpose, the Board shall apply those moneys for police purposes [other than pension purposes].

[(4A) The Board shall in each financial year put at the disposal of the Chief Constable for pension purposes –

(a) an amount equal to the amount of the grant for pension purposes received in that year by the Board under section 9(1)(a);

(b) any amount received by the Board in that year which is required to be applied for pension purposes by directions under subsection (4) or by any other statutory provision.]

[(5) *The Board shall in each financial year put at the disposal of the Chief Constable for other police purposes –*

(a) an amount equal to the amount of *the grant* for other police purposes received in that year by the Board under section 9(1)(b);

(b) any amount received by the Board in that year which is required to be applied for other police purposes by subsection (4) or directions under that subsection or by any other statutory provision]”

[41] Section 10 is supplemented by section 12 which refers to accounts and audits. In particular, sections 12(1) - 12(2) and 12(4) provide:

“(1) The Board shall in relation to [each of the amounts specified in subsection (1A)] –

- (a) keep proper accounts and proper records in relation to the accounts; and
- (b) prepare a statement of accounts in respect of each financial year.

[(1A) The amounts are –

- (a) the amounts put at the Chief Constable's disposal under section 10(4A);
- (b) any amount received by the Board and paid into the Police Fund in accordance with regulations under section 28(1) of the Police (Northern Ireland) Act 1998;
- (c) any amount received by the Board and paid into the Police Property Fund in accordance with regulations under section 31(4) of that Act;
- (d) the other amounts put at the Chief Constable's disposal under section 10(5) of this Act.]

(2) The functions of the Board under subsection (1) shall be exercised, on behalf of and in the name of the Board, by the Chief Constable.

...

(4) The Chief Constable shall submit [each statement] of accounts to the Board within such period after the end of the financial year to which [the accounts] relate as the [Department of Justice] may determine.

...”

[42] The respondent stated that the police grant should be distinguished from monies provided to the NIPB to defray its own operating expenses and that the latter monies are provided by the [Department of Justice] pursuant to para 15 of Schedule 1.

[43] Section 43 refers to the contracting out of certain recruitment functions of the Chief Constable of the PSNI:

“(1) The Chief Constable may, in accordance with regulations made by the [Department of Justice], appoint a person to exercise prescribed functions of the Chief Constable in connection with the recruitment of persons other than—

- (a) senior officers; and
- (b) members of the police support staff appointed under section 4(2).

(2) Before making any regulations under subsection (1), the [Department of Justice] shall consult—

- (a) the Board;
- (b) the Chief Constable;
- (c) the Equality Commission for Northern Ireland; and
- (d) the Police Association.

(3) Regulations under subsection (1)—

- (a) shall provide for the appointment of a person under that subsection to be made on such terms and conditions (including conditions as to payment) as may be determined in accordance with the regulations;
- (b) may impose on any person appointed under that subsection such duties as appear to the [Department of Justice] to be necessary or expedient in connection with the exercise by that person of any prescribed functions of the Chief Constable.

(4) Anything done or omitted to be done by or in relation to a person appointed under subsection (1) (or an employee of his) in, or in connection with, the exercise or purported exercise of any prescribed

functions of the Chief Constable shall be treated for all purposes as done or omitted to be done by or in relation to the Chief Constable.

- (5) Subsection (4) does not apply –
 - (a) for the purposes of so much of any contract made between the Chief Constable and the person appointed under subsection (1) as relates to the exercise of any prescribed functions of the Chief Constable; or
 - (b) for the purpose of any criminal proceedings brought in respect of anything done or omitted to be done by the person appointed under subsection (1) (or an employee of his).
- (6) In this section “prescribed” means prescribed by regulations under subsection (1).
- (7) Nothing in this section affects any other power which the Chief Constable has to enter into arrangements concerning the discharge of functions of his which are not prescribed under subsection (1).”

[44] Section 44 refers to recruitment arrangements for trainees and support staff:

“(1) The [Department of Justice] shall by regulations prescribe the arrangements to be made, by the Chief Constable or a person appointed under section 43(1), for the recruitment of persons for appointment –

- (a) as police trainees;
- (b) as police reserve trainees; and
- (c) under section 4(3) to posts in the police support staff.

(2) Before making any regulations under subsection (1) the [Department of Justice] shall consult –

- (a) the Board;

- (b) the Chief Constable;
 - (c) the Equality Commission for Northern Ireland;
and
 - (d) the Police Association.
- ...”

[45] Part II of the 2003 Act deals with “designation of civilians”. Section 30 refers to police powers for designated police support staff:

“(1) The Chief Constable may designate a member of the police support staff as an officer of one or more of these descriptions –

- (a) investigating officer;
- (b) detention officer;
- (c) escort officer;
- [(d) ...].

(2) The Chief Constable may designate a person under this section only if he is satisfied that these requirements are met –

- (a) the person is a suitable person to carry out the functions for the purposes of which he is to be designated;
- (b) the person is capable of effectively carrying out those functions;
- (c) the person has received adequate training in the carrying out of those functions and in the exercise of the powers and performance of the duties to be conferred or imposed on him by his designation.

(3) A person designated under this section has –

- (a) the powers conferred on him by his designation;

(b) the duties imposed on him by his designation.

(4) A designation under this section may confer powers or impose duties on a person only by applying the powers or duties to him.

(5) The powers and duties that may be applied to a person designated under this section by his designation are any or all of those specified in the applicable Part of Schedule 2.

...”

[46] Section 30A, in relation to community support officers, was inserted into the 2003 Act by Article 7(2) of the Police (Miscellaneous Provisions) (Northern Ireland) Order 2007:

“[30A(1) The Chief Constable may designate a member of the police support staff as a community support officer.

(2) The Chief Constable may designate a person under this section only if he is satisfied that—

(a) the person is a suitable person to carry out the functions of a community support officer;

(b) the person is capable of effectively carrying out those functions; and

(c) the person has received adequate training in the carrying out of those functions.

...”

[47] Section 31 refers to police powers for designated contracted-out staff, as follows:

“(1) This section applies if the Board has entered into a contract with a person (“the contractor”) for the provision of services relating to the detention or escort of persons who have been arrested or are otherwise in custody.

(2) The Chief Constable may designate an employee of the contractor as an officer of either or both of these descriptions—

- (a) detention officer;
- (b) escort officer.
- (3) The Chief Constable may designate a person under this section only if he is satisfied that these requirements are met—
 - (a) the person is a suitable person to carry out the functions for the purposes of which he is to be designated;
 - (b) the person is capable of effectively carrying out those functions;
 - (c) the person has received adequate training in the carrying out of those functions and in the exercise of the powers and performance of the duties to be conferred or imposed on him by his designation;
 - (d) the contractor is a fit and proper person to supervise the carrying out of the functions for the purposes of which the person is to be designated.

...”

[48] Section 40 applies for the interpretation of sections 30 – 39 of the 2003 Act. In particular, section 40(3) provides:

“(3) Expressions used in those sections and in the Police (Northern Ireland) Act 2000 (c 32) have the same meanings in those sections as they have in that Act.”

[49] The Police Service of Northern Ireland (Recruitment of Police Support Staff) Regulations 2002 (the “2002 Regulations”) support the delegation of recruitment functions under sections 43 and 44 of the 2000 Act. The Explanatory Note provides that these regulations make provision for the recruitment of police support staff:

“These regulations make provision for the recruitment of police support staff. They give effect to recommendations of the Independent Commission on Policing in Northern Ireland in its report “A New Beginning: Policing in Northern Ireland” (“the Patten

Report”) published on 9th September 1999. They apply only to posts to which candidates are to be appointed under section 4(3) of the Police (Northern Ireland) Act 2000.”

[50] Regulation 3 permits the Chief Constable of the PSNI to appoint a recruitment agent (or agents) in the following terms:

“3.(1) The Chief Constable may appoint a person to exercise functions in connection with the selection of qualified candidates for appointment under section 4(3) of the Act to posts in the police support staff; and where such a person (“the agent”) is so appointed, he shall exercise such functions as are conferred on the agent by or under these regulations.

(2) The Chief Constable may appoint more than one agent.

...”

[51] Regulation 8 refers to a pool of qualified applicants, as follows:

“8. Where posts at the same level in the police support staff -

- (a) are relevant posts, and
- (b) are to be filled under section 4(3) of the Act at or about the same time,

the Chief Constable or the agent shall place all candidates who are qualified and suitable for appointment to those poses in a pool of applicants for the purposes of section 46(5) of the Act.”

[52] The 2002 Regulations refer to such matters as the appointment of a recruitment agent or recruitment agents; the advertising of vacancies; the information to be provided by applicants; the provision of tests where necessary; provision for cases to be referred to the vetting panel that sits in relation to recruitment of police officers; the review of decisions of the panel by the Independent Assessor appointed by the Secretary of State; and the assignment of a role to the independent community observers appointed by the NIPB who report on the recruitment of police officers.

[53] The Police Support Staff (Suitability) Regulations (Northern Ireland) 2009 (the “2009 Regulations”) were made in exercise of the power in section 4(3A) of the 2000 Act and they provide for matters that may be taken into account in the assessment of suitability for appointment under section 4(3) of the 2000 Act of persons who are so appointed with a view to their being designated under section 30 or 30A of the 2003 Act.

[54] The 2008 Regulations were made regarding persons employed in the civil service and providing secretarial, administrative and other assistance to the police under the provisions of section 4(4) and 4(5) of the 2000 Act. The 2008 Regulations govern the transfer of individuals falling within this category to the employment of the NIPB with effect from 1 October 2008.

The primary roles of the [Department of Justice] and the NIPB

[55] In paras 31–34 of the respondent’s skeleton argument, reference is made to the primary roles of the [Department of Justice] and the NIPB as contained in section 24 – 28 of the 2000 Act. Section 24(1) provides:

“(1) The [Department of Justice] may determine, and from time to time revise, long term objectives for the policing of Northern Ireland.”

[56] Section 25 provides:

“(1) The Board shall determine, and may from time to time revise, objectives for the policing of Northern Ireland.”

[57] Section 26 provides:

“(1) The Board shall, before the beginning of each financial year, issue a plan (“the policing plan”) setting out proposed arrangements for the policing of Northern Ireland.

...

(4) A draft of the policing plan shall be submitted by the Chief Constable to the Board for it to consider.

(5) The Board may adopt a policing plan either –

(a) in the form of the draft submitted under subsection (4); or

(b) with such amendments as the Board may, after consultation with the Chief Constable, determine.

(6) Before issuing a policing plan adopted under subsection (5), the Board shall consult the [Department of Justice].

...”

[58] Section 27 refers to Codes of practice on exercise of functions:

“(1) The [Department of Justice] may issue, and from time to time revise, codes of practice relating to the discharge—

(a) by the Board of any of its functions;

(b) by the Chief Constable of any functions which he exercises—

(i) on behalf of and in the name of the Board;

(ii) in relation to funds put at his disposal under [section 10(4A) or (5)]; or

(iii) under section 26 or Part V.

...”

[59] Section 28 refers to arrangements relating to economy, efficiency and effectiveness. Section 28(1) provides:

“(1) The Board shall make arrangements to secure continuous improvement in the way in which its functions, and those of the Chief Constable, are exercised, having regard to a combination of economy, efficiency and effectiveness.

...

(4) The Board shall prepare and publish a plan (its “performance plan”) for each financial year containing details of how the arrangements made under subsection (1) in that year are to be implemented.”

[60] Section 29 refers to the audit of performance plans:

“(1) A performance plan [and a performance summary] shall be audited by the Comptroller and Auditor General [for Northern Ireland].”

[61] Section 57 provides that the NIPB must issue a report each year on the performance of policing:

“(1) The Board shall, not later than 6 months after the end of each financial year, issue a report relating to the policing of Northern Ireland for the year.”

[62] Section 58 provides that the Chief Constable must issue an annual report to the NIPB on the policing of Northern Ireland during that year and, also, submit such report to the [Department of Justice]:

“(1) The Chief Constable shall, not later than 3 months after the end of each financial year, submit to the Board a general report on the policing of Northern Ireland during that year.

...

(3) The Chief Constable shall, at the same time as he submits a report to the Board under this section, submit the same report to the [Department of Justice].”

[63] Section 59 refers to the general duty of the Chief Constable of the PSNI to report to the NIPB:

“(1) The Chief Constable shall, whenever so required by the Board, submit to the Board a report on any such matter connected with the policing of Northern Ireland as may be specified in the requirement.”

[64] Section 60 provides that the NIPB may initiate an inquiry into any matter raised in the report by the Chief Constable of the PSNI:

“(1) Where the Board –

- (a) has considered a report on any matter submitted by the Chief Constable under section 59, and
- (b) considers that an inquiry ought to be held under this section into that matter or any related matter disclosed in the report by reason of the gravity of the matter or exceptional circumstances,

the Board may, after consultation with the Chief Constable, cause such an inquiry to be held.”

Contracting Authorities

[65] Regarding whether the PSNI is entitled to be a contracting party, the applicants refer to the Public Contracts Regulations 2006. Para 2.1 of the Explanatory Memorandum of provides:

“...The Public Contracts Regulations 2006 implement the new Public Sector Procurement Directive (2004/18/EC) which provides revised rules for the procurement of supplies, works and services, above certain thresholds, by public authorities...”

[66] Regulation 3 refers to contracting authorities. In particular, Regulations 3(1)(p) and 3(1)(y) provide:

“3.(1) For the purposes of these Regulations each of the following is a contracting authority –

...

(p) the Northern Ireland Policing Board;

...

(y) to the extent not specified in sub-paragraphs (a) to (v), an entity specified in Schedule 1.”

[67] Schedule 1 states that “[w]here an entity listed in this Schedule is succeeded by another entity, which is itself a contracting authority, the successor entity shall be deemed to be included in this Schedule.” In the list that follows, the amended

Regulations include the Police Service of Northern Ireland under 'Northern Ireland, Department of Justice'.²

[68] In relation to the status of the NIPB, the applicants refer to section 2 of the 2000 Act which provides:

“(1) There shall be a body corporate to be known as the Northern Ireland Policing Board (in this Act referred to as “the Board”).

(2) Schedule 1 shall have effect in relation to the Board...”

[69] Schedule 1, Part I refers to status and membership. Paragraph 1(2) provides:

“(2) Subject to the provisions of this Act, section 19 of the Interpretation Act (Northern Ireland) 1954 shall apply to the Board; and, for the purposes of that section, the Board shall be treated as if it were established by an Act of the Northern Ireland Assembly.”

[70] Section 19 of the Interpretation Act (Northern Ireland) 1954 refers to the effect of words of incorporation. In particular, section 19(a)(ii) provides:

“(1) Where an Act passed after the commencement of this Act contains words establishing, or providing for the establishment of, a body corporate and applying this section to that body those words shall operate—

(a) to vest in that body when established—

...

(ii) the power to enter into contracts in its corporate name, and to do so that, as regards third parties, the body shall be deemed to have the same power to make contracts as an individual has...”

² The applicants' skeleton arguments refer to the PSNI as being listed under the 'Northern Ireland Office' but the Regulations as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions)(NI) Order 2010; Schedule 19, paragraph 8 includes the PSNI under the 'Department of Justice'.

Meaning of “for police purposes”

[71] The arguments reference relevant affidavit evidence in relation to the police budget being placed at the disposal of the Chief Constable to spend “for police purposes” and to the Chief Constable being an accounting officer. Section 77(1) of the 2000 Act defines “police purposes” as follows:

““police purposes” means the purposes of the police, the police support staff, police trainees, police reserve trainees, police cadets and traffic wardens.”

[72] Section 77(1), also, defines “the police”, as follows:

““the police” means –

- (a) the Police Service of Northern Ireland; and
- (b) the Police Service of Northern Ireland Reserve.”

[73] In addition, section 1 of the 2000 Act refers to the name of the police in Northern Ireland:

“(1) The body of constables known as the Royal Ulster Constabulary shall continue in being as the Police Service of Northern Ireland (incorporating the Royal Ulster Constabulary).

(2) The body of constables referred to in subsection (1) shall be styled for operational purposes the “Police Service of Northern Ireland”.

(3) The body of constables known as the Royal Ulster Constabulary Reserve shall continue in being as the Police Service of Northern Ireland Reserve (incorporating the Royal Ulster Constabulary Reserve).

(4) The body of constables referred to in subsection (3) shall be styled for operational purposes “The Police Service of Northern Ireland Reserve”.”

Recruitment of staff

[74] Section 44 of the 2000 Act refers to the recruitment arrangements of trainees and support staff, as follows:

“(1) The Secretary of State shall by regulations prescribe the arrangements to be made, by the Chief Constable or a person appointed under section 43(1), for the recruitment of persons for appointment –

- (a) as police trainees;
- (b) as police reserve trainees; and
- (c) under section 4(3) to posts in the police support staff.

...

(6) In relation to the recruitment of persons for appointment under section 4(3) to relevant posts in the police support staff, the regulations shall include provision for the selection of qualified applicants to form a pool of applicants for the purposes of section 46(5).

(7) For the purposes of subsection (6) and section 46(5) a post in the police support staff is a relevant post if at the time the vacancy for that post is advertised it appears to the Chief Constable that it is one of at least 6 vacancies for posts in the police support staff which are –

- (a) at the same level; and
- (b) to be filled at or about the same time.”

[75] The applicants referred to section 46 of the 2000 Act as making provision for what was known as the “50:50” recruitment policy designed to address the imbalance in religious representation within the ranks of police officers in Northern Ireland:

“(1) In making appointments under section 39 on any occasion, the Chief Constable shall appoint from the pool of qualified applicants formed for that purpose by virtue of section 44(5) an even number of persons of whom –

- (a) one half shall be persons who are treated as Roman Catholic; and

- (b) one half shall be persons who are not so treated.

...

(5) In making appointments to relevant posts in the police support staff under subsection (3) of section 4 on any occasion, the Chief Constable (acting by virtue of subsection (5) of that section) shall appoint from the pool of qualified applicants formed for that purpose by virtue of section 44(6) an even number of persons of whom –

- (a) one half shall be persons who are treated as Roman Catholic; and
- (b) one half shall be persons who are not so treated.”

Lacuna in accountability mechanisms

[76] The applicants contend that the Resource Contract creates a lacuna in the accountability mechanisms which are fundamental to policing because they say it creates a cadre of staff who are outside the various accountability mechanisms embedded in the legislation – staff who are engaged (by Resource) through a private route without any statutory underpinning.

[77] In this regard, the applicants also referred to section 26 of the 2000 Act which provides for annual submission by the NIPB of the policing plan:

“(1) The Board shall, before the beginning of each financial year, issue a plan (“the policing plan”) setting out proposed arrangements for the policing of Northern Ireland.

(2) The policing plan shall –

- (a) contain an assessment of the requirements for educating and training police officers and members of the police support staff and give particulars of the way in which those requirements are to be met; and
- (b) include such other statements and give particulars of such other matters as may be

prescribed by regulations made by the [Department of Justice].”

[78] In support of the same arguments, the applicant also relied on section 48 of the 2000 Act which provides for the making by the NIPB of an action plan for monitoring the number of women in the police, the police support staff and NIPB’s staff:

“(1) The Board shall make, and from time to time revise, a plan (its “action plan”) for monitoring the number of women in –

- (a) the police,
- (b) the police support staff, and
- (c) the Board’s staff,

and, if they are under-represented, for increasing that number.

(2) The Chief Constable shall, if requested to do so by the Board, prepare and submit to the Board a draft plan for monitoring the number of women in the police and, if they are under-represented, for increasing that number.”

[79] Para 23(4) of Schedule 6 of the 2000 Act provides for amendments to be made to Part V of the Police (Northern Ireland) Act 1998 which relates to the appointment and role of the inspectors of constabulary. Section 41 of the 1998 Act provides:

“(1) The [Department of Justice] may appoint from among Her Majesty’s Inspectors of Constabulary appointed under section 54 of the Police Act 1996 such number of inspectors of constabulary for Northern Ireland as [the Department of Justice] may determine.

(2) The inspectors shall at least once in every year inspect and report to the [Department of Justice] on the efficiency and effectiveness of [–

- (a) the Police Service of Northern Ireland;
- (b) the Police Service of Northern Ireland Reserve;
- (c) the police support staff; and

(d) traffic wardens].”

[80] Section 45 provides that the Department of Justice may appoint bodies to conduct research and to provide advice on the efficiency and effectiveness of such staff listed in (a)-(d) above. Section 46 provides that the Department of Justice may make “such contribution to the provision or maintenance of such organisations, facilities and services” and “make such other payments” as the Department of Justice thinks necessary and expedient for promoting the efficiency and effectiveness of such staff listed in (a) and (d) above.

Exclusions from office

[81] The applicants also submitted that if the staff under the Resource Contract are not “police support staff”, then such staff would, also, not be subject to certain exclusions from office which apply to persons engaged in policing work. The applicants refer to paragraph 3(7)(b) of Schedule 1 of the 2000 Act which disqualifies certain persons from serving as a member of the NIPB:

“(7) A person is disqualified for membership of the Board if—

...

(a) he is—

(i) a member of the police support staff;

(ii) a police officer;...

(iii) a member of a district policing partnership; or

(iv) a member of a sub-group established under section 21].”

[82] In addition, para 8 of Schedule 3 of the 2000 Act provides for the disqualification of certain persons from serving on a district policing partnership, as follows:

“8(1) A person is disqualified for membership of a DPP [district policing partnership] if he is—

(a) a police officer;

(b) a member of the police support staff;

- (c) a member of the Board; or
- (d) an employee of the council.”

The powers in England and Wales under the Police Act 1996

[83] The respondent contrasted the separation of functions and roles of the NIPB and the Chief Constable of the PSNI under the 2000 Act with those that were applicable in England and Wales under the Police Act 1996. The respondent refers to the framework that had been provided pursuant to sections 14 and 46 of the 1996 Act to support its assertion that, in England and Wales, the police grant was made to and retained by the relevant police authority:

“14(1) Each police authority established under section 3 shall keep a fund to be known as the police fund.

...

46(1) Subject to the following provisions of this section, the Secretary of State shall for each financial year make grants for police purposes to –

- (a) police authorities for areas other than the metropolitan police district, and
- (b) the [F1Greater London Authority];

and in those provisions references to police authorities shall be taken as including references to the [F2Greater London Authority] .

[84] The arrangements under the 1996 Act have recently been amended in England & Wales by the Police Reform and Social Responsibility Act 2011 to facilitate the introduction of elected Crime Commissioners in place of police authorities.

Affidavit Evidence

[85] Both applicants highlight the limited affidavit evidence in relation to the central issue of whether the Chief Constable was lawfully authorised to enter into the Resource Contract but submit that, ultimately, the question for the Court is whether the relevant provisions of legislation provide a lawful basis for the Chief Constable’s decision (or whether such basis is provided elsewhere).

[86] In his first affidavit dated 22 November 2012, Mr Stewart (Director of Human Resources within PSNI) referred to the services provided under the Resource contract. In summary, the staff employed under the contract comprise of: persons engaged in security guarding, access patrol and site patrolling; call handling; dispatch handling and control; custody detention officers; staff who monitor CCTV for public spaces; civilian close protection unit drivers; station enquiry assistants; transport co-ordinators; safety camera operators; fixed penalty processing staff; evidential property management; and PSNI postal/courier service.

[87] At para 30 Mr Stewart sets out the PSNI view of the legality of the contractual arrangement. It is averred that the PSNI's entitlement to enter into these forms of managed services contracts is not limited to the circumstances identified in section 31 of 2003 Act:

"30. The PSNI does not accept that its entitlement to enter into these forms of managed services contracts is in any way limited to the circumstances identified in s. 31 of the Police (Northern Ireland) Act 2003... it is the view of the PSNI that this provision is designed to enable the outsourcing of custody, detention and escort services to civilian staff. Since those tasks will require staff to exercise powers of restraint and detention which are reserved to constables and sworn police officers, specific statutory provision was required in order to authorise civilians to perform this task. It is not accepted that the effect of this provision is to limit the power of the PSNI to enter into managed service contracts to this area. As appears from the subject matter of the Resource contract, none of the other services provided will require civilian staff to exercise powers of restraint."

[88] At para 40 he includes a summary of the PSNI case. It is averred that the Resource Contract had been lawfully entered into; that relevant approvals were sought; and that European procurement regulations were complied with:

"40. In summary, the PSNI believe that the managed services contract with Resource has been lawfully procured and entered into. Approval to tender for the said services was sought via Strategic Outline Case (SOC), Outline Business Case (OBC), and Full Business Case (FBC) from the Department of Justice (DOJ) and the process was subject to Department of Finance and Personnel (DFP) Gateway Review process. The procurement of services was handled by the Central Procurement Directorate

(CPD) on behalf of PSNI and complied fully with European procurement regulations...”

[89] At para 6 of his second affidavit Mr Stewart includes an acknowledgment of the statutory authority under sections 4 and 5 of the 2000 Act to employ civilian personnel, but it is not accepted that those powers to employ civilian personnel within the permanent police support staff represents the exclusive basis upon which civilian services may be supplied to the PSNI. Further, it is not accepted that the power to procure managed services is limited to the power contained in section 31 of the 2003 Act (detention and escort officers):

“6. While it is acknowledged by PSNI that the Northern Ireland Policing Board (“NIPB”) has statutory authority under S.4 and S.5 of the 2000 Act to employ civilian personnel within the permanent police support staff, it is not accepted that these powers represent the exclusive basis upon which civilian personnel services may be supplied to the PSNI. Similarly, it is not accepted that the power to procure managed services is limited to the power vested in the NIPB relating to detention and escort officers under S.31 Police (NI) Act 2003...”

[90] At para 5 of his second affidavit Mr Best, Director of Finance and Support Services within PSNI, charts the history of accounting responsibility concerning the police grant and refers to the recognition in the Public Contracts Regulations 2006 both the NIPB and PSNI as contracting authorities. Para5 concludes:

“... It is the view of the PSNI that the combined effect of these statutory changes is that both the NIPB and the PSNI have legal authority to enter into commercial contracts for the supply of services, including managed services contracts.”

[91] At para6 Mr Best refers to where the NIPB’s power to enter into commercial contracts is derived from:

“... Without prejudice to the views of the NIPB, it is understood by PSNI that the Board’s power to enter into commercial contracts, derives from a combination of its status as a statutory body corporate (S.2(1) of the 2000 Act), together with the powers vested in such a body (per Schedule 1, paragraph 1(2) of [the] 2000 Act and S.19 of the Interpretation Act (NI) 1954).”

[92] Further, at para7, Mr Best avers:

“It is the view of the PSNI that its own legal authority to enter into contractual arrangements derives from its power and functions under the 2000 Act...”

[93] In the remainder of para 7 and in para 8 of his second affidavit he goes on to cite the recommendations of the Patten Report and the ensuing statutory arrangements whereby the NIPB must hold the Chief Constable of the PSNI to account for the exercise of his functions.

[94] In para 9, Mr Best refers to the arrangement under sections 9 to 12 of the 2000 Act, as follows:

“Reform of the system of financial accountability included a new arrangement under Ss.9 - 12 of the 2000 Act whereby the entire police budget is placed at the disposal of the Chief Constable as opposed to the NIPB...”

In this way, the Chief Constable has control over the police budget to spend it as he sees fit, for police purposes and subject to the scrutiny of the NIPB within the limits of its delegation from the DOJ as detailed in the Management Statement and Financial Memorandum.”

[95] At para10 of Mr Best considers the role of the Chief Constable as an accounting officer and contrasts the accountability arrangements in Northern Ireland with those in England and Wales. In para 11 Mr Best restates the view that statutory arrangements authorise the PSNI to enter into commercial contracts and make expenditure for police purposes:

“The PSNI is of the view that the statutory arrangements in Northern Ireland make clear that the PSNI is authorised to enter into commercial contracts and to make expenditure for police purposes, including arrangements such as those under the managed services contract with Resource NI, which ensures delivery of efficient and effective services, ancillary to the performance of core policing functions.”

[96] In paras 12 - 20 Mr Best presents a more detailed analysis of the accounting relationship between the Chief Constable of the PSNI and the NIPB; of the Chief Constable’s role as accounting officer; and of the arrangements put in place for the performance of that role. In para 19, he concludes:

“...I believe that these updated arrangements reflect the scheme of the 2000 Act, namely that the PSNI should have financial control over its own budget, to spend it as it sees fit, for police purposes, subject to scrutiny by the NIPB and accountability to both the DOJ and ultimately to the Northern Ireland Assembly.”

[97] In para 20 Mr Best acknowledges that the determination of the issues in this case involves, primarily, questions of law and he reiterates the PSNI view that it had lawful authority to enter into the Resource Contract in its own name and on its own behalf:

“I acknowledge on behalf of PSNI that determination of the issues in this case are primarily questions of law. It do not propose to offer any opinion on those issues, save to say that it is the view of the PSNI, as evidenced by the above statutory provisions and materials that it had lawful authority to enter into the managed services contract which is challenged in these proceedings in its own name and on its own behalf. However, if that analysis is not correct, the PSNI is of the view that it has lawful authority to make managerial decisions about how best to deliver policing services including the use of managed services contract and that in doing so, it has authority to do so on behalf of the NIPB.”

Applicants’ Submissions

[98] The applicants’ main submissions in respect of the statutory construction are summarised well in the grounds of the applications as set out earlier. The core submission is that the Resource Contract was unlawful as it involved the engagement of staff to discharge policing and functions outside the limited circumstances permitted by the relevant statutory provisions within the 2000 Act and the 2003 Act.

[99] It is asserted that there is nothing in the 2000 Act which permits the PSNI to be supported by anyone other than members of the police support staff. It is argued that the Resource Contract, in substance, enabled the recruitment of police support staff through other avenues and, therefore, is legally invalid.

[100] It is asserted that section 6 of the 2000 Act (the power to provide maintenance of buildings and equipment), in particular section 6(6) (the power to enter into a contract for the provision or making available of buildings or equipment together with any related services), does not provide authorisation for

the Chief Constable of the PSNI (in the name and on behalf of the NIPB) to enter into a contract for the employment of individuals such as contained in the subject contract.

[101] By reference to section 40 of the 2003 Act (interpretation of sections 30–39), it is argued that section 31 must relate to persons who are recruited in accordance with the contracting out provisions of the 2000 Act.

[102] It is asserted that the effect of sections 30 and 31 of the 2000 Act is that civilian support staff, generally, may be eligible for designation to perform certain functions normally performed by police officers, namely investigation and the detention and escort of persons in police detention. The applicants say that, by contrast, staff engaged through contracting-out arrangements are eligible only for designation to perform detention and escort functions. It is argued that sections 30 and 31 of the 2003 Act do not confer powers of recruitment or appointment: they enable the Chief Constable of the PSNI to designate civilian staff, already appointed under the 2000 Act and associated Regulations, as officers with limited powers.

[103] It is submitted that on a proper analysis of the relevant statutory provisions and with reference to the relevant affidavit evidence before the Court, the Chief Constable of the PSNI does not enjoy the power to engage the services of agency or associate staff.

[104] In relation to paras 30 and 40 of Mr Stewart's first affidavit, it is submitted that Mr Stewart does not positively identify the lawful basis on which the Chief Constable of the PSNI purported to act.

[105] Reference is made to para 5 of Mr Best's second affidavit in which, relying on the Public Contracts Regulations 2006, he concluded that both the NIPB and the PSNI had legal authority to enter into commercial contracts for the supply of services, including managed services contracts. The applicants submit that Regulations 3(1)(p) and 3(1)(y) and Schedule 1 of the 2006 Regulations do not equivocally support the proposition that the PSNI is a contracting authority in its own right. It is stated that the PSNI appears to be specified in Schedule 1 only as a subsidiary entity to the Northern Ireland Office.³

[106] The applicants argue that even if there is a statutory provision which entitles the PSNI to be a contracting party, such recognition in the 2006 Regulations of the PSNI is not capable *per se* of conferring power on the Chief Constable of the PSNI to enter into the Resource Contract or any other contract. Referring to the objective of the 2006 Regulations, as stated in its Explanatory Memorandum, it is submitted that such regulations provide a framework to which certain public authorities must adhere in the conduct of public procurement exercises. The applicants assert that

³ The amended legislation refers to the 'Department of Justice' rather than the 'Northern Ireland Office'.

the 2006 Regulations do not provide carte blanche to the relevant public authorities to engage in contracts outwith the legislation that defines the scope of their powers.

[107] Para 6 of Mr Best's second affidavit refers to section 2(1) of the 2000 Act (NIPB status as a body corporate) together with the powers vested in a body corporate in Schedule 1, paragraph 1(2) of the 2000 Act and to section 19 of the Interpretation Act (Northern Ireland) 1954. It is submitted, aside from the fact the NIPB was not the contracting authority in this case, none of these provisions confer power to enter the Resource Contract. In particular, it is contended that section 19(a)(ii) of the Interpretation Act (NI) 2000 does not enable a public authority to enter into any contractual arrangement beyond the legislation defining the scope of its powers.

[108] Para 9 of Mr Best's second affidavit refers to the Chief Constable's control over the police budget to spend as he sees fit, for police purposes and subject to scrutiny of the NIPB. In this regard, the applicants point out that "police purposes" are ascribed a particular meaning in section 77(1) of the 2000 Act (as set out above).

[109] Para 10 of Mr Best's second affidavit refers to the role of the Chief Constable of the PSNI as an accounting officer. The applicants submit that this role is circumscribed by the scope of the Chief Constable's powers as defined in the 2000 Act. It is asserted that whatever degree of control the Chief Constable of the PSNI has over the police budget, he is constrained by the wording of the statute in the use to which the police grant may be put.

[110] Para 11 of Mr Best's second affidavit refers to the authorisation of the PSNI to enter into commercial contracts and to make expenditure for police purposes. It is contended that such purposes can only be sanctioned by the legislation.

[111] In para 20 of Mr Best's second affidavit, it is stated that if the PSNI does not have lawful authority to enter into the Resource Contract, it had lawful authority to make managerial decisions about how best to deliver policing services and in doing so had the authority to do so on behalf of the NIPB. It is submitted that such a justification of the PSNI's course of action is remarkable in the context of the present case, having regard to the NIPB's express disavowal of any suggestion it had endorsed or approved the Resource Contract.

[112] On considering the relevant affidavit evidence regarding the legality issue, the applicants assert that the following two conclusions may be drawn:

- (i) there is no lawful basis outside of the 2000 Act for the decision to enter into the contract; and

- (ii) the respondent has failed to identify with precision any provision within the 2000 Act that would provide a legal basis for the decision to enter into the contract.

[113] Therefore, the applicants contend that there is no legal basis in existence for the PSNI to enter into the Resource Contract and that the decision to enter into that contract should be quashed.

Further arguments

[114] It is argued that the profile of the staff employed under the Resource Contract (as summarised in para28 of Mr Stewart's first affidavit) extended beyond persons who might be engaged under section 6 of the 2000 Act. The applicants assert that such staff are "police support staff" and their engagement must be properly effected under the legislative scheme governing the appointment of police support staff. It is argued that this is, also, fundamentally important to the entire philosophy of the reform of policing in Northern Ireland as engendered by the Patten Report. In support of this argument, the applicants referred to sections 44 (in particular, 44(6), 44(7)) and 46 of the 2000 Act and to Regulation 8 of the 2002 Regulations).

[115] It is argued that the Resource Contract bypasses section 46 of the 2000 Act. The applicants say that, although the phase of reform of addressing imbalance in religious representation in the PSNI has recently been phased out, it is inconceivable that the legislation would permit the recruitment of staff as appointed under the Resource Contract to proceed entirely outwith the terms and policy of the legislation. It is argued that staff appointed under the Resource Contract are "police support staff" and would properly have been subject to section 46 of the 2000 Act. It is asserted that the Resource Contract does not appear capable of conforming to the requirements of section 4 of the 2000 Act and, in essence, entails the engagement of "police support staff" through a private route that has no statutory underpinning.

[116] They submitted that the Resource Contract creates a lacuna in accountability mechanisms which are fundamental to policing in this jurisdiction (i.e. that if the staff engaged under the Resource Contract are deemed to lie outside "police support staff" in the legislation, then they would lie outside the accountability mechanisms provided for in sections 3, 26, and 48 of the 2000 Act and the inspection provisions in Schedule 6, paragraph 23(4) of the 2000 Act). It is argued that the framers of the 2000 Act can never have intended a cadre of staff such as those employed under the Resource Contract to fall outside the accountability mechanisms of the legislation.

[117] The applicants say that if staff engaged under the Resource Contract are not "police support staff", they would, also, not be subject to certain exclusions from

office which apply to persons engaging in policing work (see Schedule 1, paragraph 3(7)(b) and Schedule 3, para 8 of the 2000 Act).

[118] The applicants contend that if the persons employed under the Resource Contract are not employees of NIPB (as they would be if properly employed as police support staff), they would not be ineligible to apply for the post of lay magistrate (see Article 2(e)(iv) of the Lay Magistrates (Eligibility) (Northern Ireland) Order 2004). It is submitted that the legislature would have assumed that persons engaged in tasks such as custody detention and security guarding for the police were employees of the NIPB. It is submitted that it seems persons employed under the Resource Contract are not subject to the ineligibility provisions relating to the post of lay magistrate. It is argued that the engagement through the private route of staff engaged in policing tasks may have placed such staff beyond the reach of statutory provisions to which they should properly be subject.

Conclusions

[119] The parties are agreed that ultimately the question for the court is whether the relevant provisions of the legislation provide a lawful basis for the Chief Constables decision. The primary issue raised by these proceedings is therefore one of statutory interpretation. It is a matter of considerable importance because it is concerned with the power of the PSNI to enter into a contract with a third party for the provision of services. Following a competitive procurement exercise conducted under the Public Contract Regulations 2006 the respondent contracted with Resource NI for the provision of an extensive range of services. The services to be provided (described in the OJEU contract notice) include services such as “maintaining the security of the PSNI estate, via the provision of a managed guarding service; provide civilian custody detention officers, assist with driving services for the Close Protection Unit ...etc”. The contract relates to the supply of services using staff employed by Resource.

[120] The applicant focussed attention on a number of statutory provisions which undoubtedly contain express powers for the recruitment of permanent civilian staff to assist the police in the discharge of its functions. It is however fallacious to conclude that these provisions should be interpreted as *exclusive* powers in relation to the power of the respondent either in relation to recruitment of staff or entering into commercial contracts for the provision of services. Indeed it is to my mind clear from the history of the governing legislation and its scheme and purpose that the Chief Constable does have the power to enter into the impugned contract for the provision of services by Resource.

[121] The genesis of the Police (NI) Act 2000 was the 1999 Patten Report. The purpose of the Report and the ensuing Act was to create a new beginning for policing in NI. Its recommendations make it abundantly clear that the process of civilianisation and contracting out services should be undertaken. Para 10.23 of the Report states:

'We recommend a rigorous programme of civilianisation of jobs which do not require police powers, training or experience....'

Para 10.25 states:

'We recommend that the Policing Board and the police service initiate a review of police services with a view to contracting out those services where this will enhance the efficient management of resources. Consideration should be given to allowing "management buy-outs" of support services by police officers or civilian employees interested in continuing to provide those services as a private sector company...'

[122] On 19 January 2000 the Secretary of State made a statement to the House of Commons undertaking to introduce legislation to give effect to the recommendations. The Government's response to each recommendation was set out in two separate implementation plans in 2000 and 2001. The recommendations on civilianisation and contracting out were accepted by the government.

[123] In relation to the engagement of civilian staff, police support staff is a recognised class of permanent civilian employees whose role is to assist the police and who are employed by the NIPB. I reject the submission that the engagement of permanent staff by the Policing Board is the *only* means by which the PSNI can secure civilian assistance. This submission is inconsistent with the Patten recommendations and it is also inconsistent with the scheme and purpose of the 2000 Act.

[124] The provisions of s. 43(1) and (7) of the 2000 Act make it clear that the Chief Constable does have power to recruit persons *other than* members of the police support staff. As the respondent puts it, if he did not, why would the Secretary of State be empowered under s. 43(1) to authorise the performance of some of those recruitment functions by other persons? Furthermore s. 43(7) expressly provides that nothing in the section "affects any other power which the Chief Constable has to enter into arrangements for the discharge of functions of his which are not prescribed under subsection (1)". These other powers are 'left undisturbed' by any delegated arrangements under s. 43(1).

[125] Quite apart from these provisions the powers of the Chief Constable to engage in private commercial contracts is an indispensable element of the statutory arrangements for funding under Sections 9 & 10 of the 2000 Act. Under s. 9(1) the Secretary of State shall make to the NIPB each financial year "a grant for police purposes". The term "police purposes" is broadly defined in s. 77(1). The Board is

not entitled to hold onto the grant nor to maintain management control over how it is spent. Under s. 10(5) the Board must put the grant at the disposal of the Chief Constable. I agree with the respondent that since the entire grant “for police purposes” is by statute placed at the disposal of the Chief Constable that must plainly authorise him to use that money for those purposes. His spending power is limited only by the statutory purpose for which the grant is provided and not by the form of the arrangement he enters into. This is a wide power which offers the Chief Constable a very broad discretion in relation to the arrangements entered into. I am satisfied that this includes the type of contract entered into with Resource.

[126] Alternatively if there is no express power to enter into commercial contracts for police purposes such a power I accept must necessarily be implied since such powers may fairly be regarded as incidental to or consequential upon those things which the legislature has authorised (see AG v Great Eastern Rly Co (1880) 5 AC 473 at 481 and 478; Re NIHRC [2002] 25 per Lord Slynn at para 20). There is only one grant from the Secretary of State, which must be used for police purposes, which the Board cannot retain and must put at the disposal of the Chief Constable for police purposes. The contractual arrangements in the present case are not expressly prohibited, are reasonably consequential to the placing of the police grant at the disposal of the Chief Constable and are incidental to the purposes of the statute.

[127] It was plainly intended, consistent with Patten (e.g. para 6.16 – 6.17) and the scheme of the 2000 Act (e.g. sections 3,24-28, 57-60), that the role of the Board is not to control expenditure decisions or exercise control over day to day management of the policing budget. The Board’s high level role is to negotiate the police budget, monitor performance and hold the police to account for performance and its use of the budget. But it is not to exercise control over day to day management as to how the police budget is deployed. To similar effect see the observations of Morgan LCJ in Re JR 1 [2011] NIQB 5 at paras [25]-[26] in which he rejected the contention that the Board had any role in controlling the decision of the Chief Constable’s decision to purchase and introduce Taser devices.

[128] It is clear that the intention was that the Chief Constable should have financial independence to use the police grant placed at his disposal for police purposes in such manner as he sees fit. Patten envisaged the “contracting out” of a range of police support services and its recommendation was accepted. The structures and procedures contained in the 2000 Act were the vehicle for implementation. Under this carefully calibrated system the Board, whilst it enjoys high level functions such as issuing a policing plan, has no role in implementing the plans through procurement processes or managing the day to day operation of the contracts. These are reserved to the Chief Constable in the discharge of his duty to direct and control the force and to spend the grant for police purposes.

[129] The intended role of the Chief Constable in making management decisions about the use of the police budget is confirmed by the appointment of the Chief Constable as an accounting officer with respect to the use of the police grant [see the second affidavit of David Best and exhibits 3, 5, 7-9 and 11].

[130] Furthermore pursuant to Reg 3 of the Public Contract Regulations 2006 both the NIPB and the PSNI are named as “contracting authorities”. The Regulations were specifically amended to include the PSNI as a separate contracting authority (see Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) (NI) Order 2010 Schedule 19, para 8). This contrasts with the Public Supply Contract Regulations 1995 and the Public Services Contracts Regulations in which only the then Police Authority was named as contracting authority. If, as the applicants contend, the Chief Constable had no power to enter into commercial contracts and procure the provision of services by competitive tender the respondent not unreasonably asks why would the Regulations have then expressly named the Chief Constable as such an authority for that very purpose.

[131] If, contrary to the above, the power to enter such commercial service contracts is not exercisable in his own name I hold that the Chief Constable has delegated authority to do so on behalf of the Board. By virtue of S2(1) of the 2000 Act the Board is established as a statutory “body corporate”. Schedule 1, para 1(2) provides that s. 19 of the Interpretation Act (NI) 1954 “shall apply to the Board”. S. 19 vests in such a body “... the power to enter into contracts in its corporate name, and to do so that, as regards third parties, the body shall be deemed to have the same power to make contracts as an individual has...”. Under s. 3 the Board has a duty to secure that the police are efficient and effective. The combination of these provisions makes it plain that the Board could exercise its authority to enter contracts for the benefit of the police. Insofar as the Chief Constable does not have power to enter into contracts in his own name I consider that the power can be reasonably inferred on the basis of implied delegation deriving in particular from ss. 9, 10 & 12. If the Chief Constable does not have the power to contract in his own name it can be reasonably inferred that he has been delegated the authority to exercise the powers of the Board to do so for police purposes and where to do so will improve the efficiency and effectiveness of the force (see Wade & Forsyth, Administrative Law (10th ed) p259).

[132] As the respondent compellingly argued if the power to enter contracts is not exercisable by the Chief Constable on behalf of the NIPB and he does not have the power to do so in his own name, the result is that reforms recommended by Patten and expressly accepted by the Government have been completely disregarded. I agree that such a result is not compelled by the wording, scheme or purpose of the 2000 Act.

[133] In substance the McCord judicial review raises the same points of statutory interpretation. For the avoidance of any doubt I accept the additional points made by the respondents at para 77 of its combined skeleton.

[134] For the above reasons the judicial reviews must be dismissed.