Neutral Citation No. [2008] NIQB 52 | *Ref:* **GIL7152**

Judgment: approved by the Court for handing down | *Delivered:* **14/5/08**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

RE AN APPLICATION BY OFFICER O FOR JUDICIAL REVIEW

GILLEN J

Application

[1] The applicant in this case is a police officer who is to be known in these proceedings as Officer O ("the applicant"). The Respondent is the Police Ombudsman for Northern Ireland ("the Respondent"/"PO"). The Office of the Police Ombudsman for Northern Ireland derives powers from Part VII of the Police (Northern Ireland) Act 1998 ("the 1998 Act"). That part of the 1998 Act confers certain powers and duties upon the Police Ombudsman with reference to the investigation of complaints against members of the police force.

[2] In this matter the applicant challenges the decision of the Respondent to require the Chief Constable pursuant to Section 66 of the Police Act (Northern Ireland) 2000 ("the 2000 Act") to provide all medical and occupational health records relating to the applicant's medical condition on the grounds that it breaches the applicant's rights under Article 8 of the European Convention of Human Rights and Fundamental Freedoms ("the Convention ") Secondly the applicant asserts that the decision is flawed on the grounds of procedural impropriety. Thirdly, the applicant asserts that Section 66(1) of the 2000 Act is incompatible with the requirements of Article 8 of the Convention and the Human Rights Act 1998.

[3] The Secretary of State appears in this matter as an intervener in light of the applicant's assertion that s.66 of the 2000 Act is incompatible with Article 8 of the Convention.

Background

[4] In 2006 the applicant shot dead a member of the public named Stephen Colwell using his police service personal protection weapon whilst he was on duty as a police officer at Ballynahinch ("the incident").

[5] The Chief Constable has referred the matter to the Respondent as required by Section 55(2) of the 1998 Act and a formal investigation was commenced by the Respondent.

[6] In accordance with Section 56(1) of the 1998 Act, Paul Holmes, Senior Investigating Officer employed by the Respondent, was appointed to conduct this investigation. In the course of the investigation Mr Holmes has utilised the power afforded by Section 66(1) of the 2000 Act to require information from the Chief Constable for the purposes of pursuit of his investigation. The information sought and obtained from the Chief Constable included details relating to the training, conduct, complaints and personnel history of the applicant. The applicant was interviewed twice as part of the investigation namely on 28 April 2006 and 24 August 2006. Thereafter the Respondent sought from the Occupational Health and Welfare Branch of the Police Service ("OHW") access to records held by them in relation to the applicant. Mr Holmes asserts that he sought information in respect of the applicant's history relating to health, conduct and complaints in view of the information he received in the investigation and the applicant's assertion that his ability to recollect the events of the incident was hampered by post incident treatment from OHW. By letter dated 21 September 2006 the respondent asked for the said records from Deputy Chief Constable Leighton of the Police Service. A letter dated 28 September 2006 to the Chief Constable indicated that he was minded to release the records but was giving the applicant an opportunity to express his views on the proposed release of the documents to the Respondent.

[7] The applicant asserts that at this stage, no request had been made to him for his consent to obtain this information about him nor had any notice been given to him of the request. The request to the Deputy Chief Constable included the exact nature of any counselling or therapy received by the applicant since the date of the incident as well as the nature of any complaints, diagnoses or assessments recorded in relation to him prior to the incident. The applicant asserts that this information was provided by the applicant in confidence to OHW and inevitably touched upon questions central to his private life.

[8] On 28 September 2006 the Deputy Chief Constable responded to the Respondent's letter indicating that he was minded to release the requested

papers but before doing so he considered that it would be appropriate to seek the views of the applicant. On the same date the Deputy Chief Constable sought the applicant's views.

[9] There then ensued a series of correspondence between the applicant's solicitors and the Deputy Chief Constable. The applicant suggests that the Deputy Chief Constable seems to have been under the impression that he was required to provide the information sought albeit the applicant's solicitor firmly declined to provide the consent sought in respect of the disclosure of the information.

[10] At this time the applicant asserts that he was told by the Deputy Chief Constable that the papers requested by the PO would be provided unless the applicant obtained an injunction to stop this. In these circumstances the applicant issued proceedings against the Chief Constable and obtained an injunction in the High Court to prevent the disclosure of the documents on 27 October 2006.

[11] Affidavits were filed in those proceedings by the Deputy Chief Constable and Mr Kitson on behalf of the PO. It is the applicant's case that Mr Kitson averred in an affidavit of 9 January 2007 that the PO had in accordance with s. 66 of the 2000 Act sought from the Chief Constable access to the applicant's health/occupational records. I pause to observe at this stage that I am satisfied that the PO has intended to act under this provision at all material times to this application despite the slightly ambiguous terms of some of his correspondence. That affidavit also disclosed that the PO had already obtained access to the applicant's personnel file and to a psychiatric report compiled in relation to him by a consultant psychiatrist. It is the applicant's case that this had been done without reference to him or opportunity for him to make representations. The applicant asserts that on the basis of such information Mr Kitson has sought to lay the foundation for seeking/requiring access to "all medical and occupational health records relating to the applicant's condition" in order to further the PO's investigation into the applicant's fitness for duty and possession of a personal protection weapon at the date of the incident when Mr Colwell was killed.

[12] On 22 February 2007 the PO wrote to the applicant's solicitors indicating that the information sought by the Ombudsman was being required from the police pursuant to Section 66(1) of the 2000 Act.

[13] It was on foot of these developments that the applicant has launched these proceedings directed at the legality and Convention compliance of the requirement imposed by the Respondent.

[14] I note that existing proceedings between the applicant and the Chief Constable in the High Court arising out of the injunction have been

adjourned. These proceedings are concerned with the Chief Constable's duties under the law of confidence and the Convention in relation to the applicant and, according to the applicant, would only serve a purpose if the requirement imposed on the Chief Constable in this case was held not to be lawfully issued.

The statutory framework

[15] Part VII of the Police (Northern Ireland) Act 1998 ("the 1998 Act"), as amended by the Police (Northern Ireland) Acts of 2000 and 2003, served to establish the Office of the Police Ombudsman for Northern Ireland and confers certain powers and duties upon that office in relation to the investigations of complaints against members of the police force. Where relevant, the provisions that apply in this case are as follows:

> "51 (4) The Ombudsman shall exercise his power 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.
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> 55 (2) The Chief Constable shall refer to the Ombudsman any matter which appears to the Chief Constable to indicate that conduct of a member of the police force may have resulted in the death of some other person.
>
> (3) Where any matter is referred to the Ombudsman under subsection (1) or (2), he shall formally investigate the matter in accordance with S. 56.
>
> 56 (1) Where a complaint or matter is to be formally investigated by the Ombudsman under .... S.55(6), he shall appoint an officer of the Ombudsman to conduct the investigation.
>
> (2) The Secretary of State may by order provide that the provision of the Police and Criminal Evidence (NI) Order 1959 which relates to the investigation of offences conducted by police officers shall apply,

subject to such modifications as the order may specify, to investigations under this section conducted by persons who are not police officers…

(3) A person employed by the Ombudsman under paragraph 3(1) of Schedule 3 shall for the purpose of conducting, or assisting in the conduct of, an investigation under this section have all the powers and privileges of a constable throughout Northern Ireland

(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.

[Pursuant to the Police and Criminal Evidence (Application to Police Ombudsman) Order (NI) 2000 [SR 2000/314] the Secretary of State has exercised his power under s.56(2) to extend the provisions and requirements of the Police and Criminal Evidence (NI) Order 1989 to officers of the Police Ombudsman while exercising investigatory functions under the 1998 Act].

58 (1) The Ombudsman shall consider any report made under section 56(6).... and determine whether the report indicates that a criminal offence may have been committed by a member of the police force.

(4) 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 [of Public Prosecutions] together with such recommendations as appear to the Ombudsman to be appropriate.

(5) 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 (NI) Order 1972.

60A (1) The Ombudsman may investigate any current policy or practice of the police if (a) the practice or policy comes to his attention under this Part; and (b) he has reason to believe that it would be in the public interest to investigate the practice or policy.

63 (1) No information received by a person to whom this sub-section applies [i.e. the Ombudsman or officer of the Ombudsman, per sub-section (2) in connection with any of the functions of the Ombudsman under this Part] shall be disclosed by any person who is or has been a person to whom this section applies, except to (a) a person to whom this subsection applies, (b) to the Secretary of State, (c) to any other person in or in connection with the exercise of any function of the Ombudsman."

[16] Section 66 the 2000 Act provides as follows where relevant:

"66(1) The Chief Constable and the Board shall supply the Ombudsman with such information and documents as the Ombudsman may require for the purposes of, or in connection with, the exercise of any of his functions.

(2) Sub-section (3) applies if –

(a) the Chief Constable or the Board supplies information to the Ombudsman under sub-section (1) for the purposes of or in connection with an investigation under Section 60(a) of the 1998 Act;

(b) the person supplying the information is of the opinion that it is information of a kind mentioned in paragraph (a) or (b) of sub-section (4).

(3) The person supplying the information must –

(a) inform the Secretary of State that the information has been supplied to the Ombudsman;

(b) inform the Secretary of State and the Ombudsman that, in his or its opinion, the information is information of a kind mentioned in paragraph (a) or (b) of sub-section (4).

(4) The information referred to in sub-sections (2) and (3) is –

(a) information the disclosure of which would be likely to put an individual in danger;

(b) information which ought not to be disclosed on any of the grounds mentioned in Section 76(a)(i)."

When first enacted Section 66 comprised of sub-section (1). Sub-sections (2)-(4) were inserted by Section 13(4) Police (Northern Ireland) Act 2003.

[17] Section 76A(1) of the 2000 Act is inserted by Section 29(1) of the 2003 Act. It provides where relevant as follows:

"76A(1) For the purposes of Sections 33A, 59 and 66 the grounds on which information ought not to be disclosed are that –

(a) it is in the interest of national security;
(b) the information is sensitive personnel information;
(c) the information would, or would be likely to, prejudice proceedings which have been commenced in a court of law.

(3) 'Personnel information' means information which relates to an individual's holding of, application for or appointment to a relevant office or employment."

The challenge under Article 8 of the Convention

[18] Article 8 of the Convention provides:

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

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

[19] I am satisfied that the information being sought by the PO in this case does relate to the private life of the applicant. The provision of such information by the Chief Constable to the PO without the consent of the applicant does amount to an interference with the obligation to respect for private life of the applicant.

[20] A number of authorities provide the basis for that conclusion. In Z v Finland [1998] 25 EHRR 371 ("the Z case") the European Court of Human Rights ("ECHR") addressed this issue in the context of the seizure of the medical records of the wife of an accused person by the police. At paragraph 95 the court said:

> "In this connection, the Court will take into account that the protection of personal data, not least medical data, is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention. Respecting the confidentiality of health data is a vital principle in the legal system of all the (contracting Parties to the Convention). It is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general."

See also MS v Sweden [1995] EHRR 313.

[21] Accordingly given the highly personal and sensitive data about the applicant which the Respondent seeks in this matter, disclosure of that material without his consent would entail an interference with his right to respect for private life guaranteed by paragraph 1 of Article 8.

In Accordance With the Law

[22] To justify such interference, the requirements of Article 8(2) need to be satisfied. The first of these is that the interference must be in accordance with law. That is manifestly the position here since the interference is authorised by statutory provision, namely Section 66 of the 2000 Act.

Legitimate Aim

[23] The next hurdle for the Respondent to overcome is to establish that the interference pursues a legitimate aim. I am satisfied that the purposes pursued by the PO in this case were undertaken in the exercise of his functions pursuant to Section 66(1) of the 2000 legislation. In considering the legitimate aim of the PO in this matter, specific reference has to be made to Section 51(4) of the 1998 Act with mandates the aims which the Ombudsman must pursue i.e. the efficiency, effectiveness and independence of the Police Complaints system and the confidence of the public and of members of the police force in that system.

[24] The role of the Ombudsman has been well captured in the affidavit of 9 November 2007 by Mr Robert Crawford the Assistant Director of Policing within the Policing Division of the Northern Ireland Office. In reviewing the position of the PO in circumstances where she is investigating a complaint against a member of the police force, Mr Crawford said at paragraph 8:

> "The key aspect of these provisions is that where there is a complaint against a member of the police force which may result in a finding that the officer has been guilty of a criminal offence, the police force have no role in carrying out the investigation or making a recommendation on prosecution. The Police Acts reserve this function exclusively to the Ombudsman who acts independently of the police force and in a manner similar to that in which the police would have acted if it were investigating the potentially criminal conduct. The Ombudsman has also the power to report into any matter concerning the policies or practices of the police force which come to his attention.
>
> 9. The role of the Ombudsman in investigating complaints against police and her independence, were the subject of scrutiny by the Independent Commission on Policing for Northern Ireland ("the Patton Commission") which commented upon the matter in its report: A New Beginning Policing in Northern Ireland ("the

> Patton Report"), published in 1999. In Chapter 5 of the report, the Commission addressed the issue of the "accountability" of a police force. It identified several aspects of accountability including democratic accountability, transparency, legal accountability, financial accountability and internal accountability and stated that `all of these aspects must be addressed if full accountability is to be achieved, and if policing is to be effective, efficient, fair and impartial'. The report went on to state `an efficient and well regarded system for dealing speedily, effectively, openly and fairly with complaints about the behaviour of police officers protects them from malicious complaints and should reassure and protect the public'."

[25] The 1998 Act was enacted following the 1997 report "A Police Ombudsman for Northern Ireland" produced by Dr Maurice Hayes ("the Hayes Report"). That report had emphasised the importance of the Office of PO in the future policing arrangements proposed and the importance of that office to the question of police accountability to the law, to public trust in the police and to the protection of human rights.

[26] As Mr Fee QC, who appeared on behalf of the PO, properly reminded me, the request in the present instance for information was made at the information gathering stage of the investigation into the death of a civilian. The Police Internal Investigations Branch had already revealed information about the previous behaviour of the applicant some years before when he had been arrested and charged with assault occasioning actual harm and threats to kill in respect of an alleged attack. This had resulted in the suspension of the applicant and the removal of his personal protection weapon.

[27] On 27 April 2006 Dr Poots of the OHW examined the applicant and declared him fit to be interviewed by the Police Ombudsman's Office. However Dr Poots had commented that the applicant was still experiencing significant emotional problems and sleep deprivation for which he was taking medication. On 4 May 2006 the Police Intelligence Unit and on 9 May 2006 the Internal Investigations Branch, made available information which included the Internal Investigations Branch file on the applicant. The information included material regarding the applicant's sick leave between April 2002 and June 2005 due to management induced stress.

[28] In March 2005 solicitors acting on behalf of the applicant had submitted a psychiatric report in which the applicant's symptoms were described including him feeling isolated and victimised, bad temper, nervous

in vans in case they contained undercover police or terrorists and depression was also mentioned.

[29] On 17 July 2005 there was a domestic incident at the applicant's home when it is alleged that the applicant had drawn his personal protection weapon at the son of his current partner for which he received advice from a senior police officer on 27 August 2005.

[30] On 24 August 2006 the applicant was the subject of a second interview in connection with the incident during which he stated that due to the nature of counselling he had been receiving at the Police Occupational Health and Welfare he could not recall certain aspects of the incident.

[31] All of this in my view justified the averment of Paul Holmes the Deputy Senior Investigating Officer employed by the PO in his affidavit of 11 July 2007 where he said:

> "From inquiries to date, it was of concern to me that the applicant's fitness to be in possession of a firearm at the time of the fatal shooting, may well have been in doubt. I determined my investigation should be widened, to include inquiries into the role of his superiors in assessing his fitness to carry a weapon and perform the full range of police duties at the relevant time. It must be born in mind that Article 51(4) of the 1998 Act invokes the need to ensure that the Ombudsman secures the confidence of the public and of members of the police force in the system. In these circumstances it seems to me that the pursuit of the PO of the medical records was for a legitimate aim."

Accordingly, I have no difficulty concluding that this interference with the applicant's article 8 rights was in pursuit of one or more of the legitimate aims within Article 8(2), namely for the prevention of crime or the protection of the rights and freedoms of others.

Necessary in a democratic society/proportionality

[32] The third condition that the respondent must meet is to satisfy the court that the interference in question is necessary in a democratic society, raising the familiar question whether it was for a pressing social need and proportionate to the legitimate aim pursued.

[33] In Re S (Minors) (Care Order Implementation of Care Plan): Re W (Minors) (Care Order: Adequacy of Care Plan) [2002] 1 FLR Lord Nicholls said at paragraph 99:

> "Although Article 8 contains no explicit procedural requirements, the decision-making process leading to a care order must be fair and such as to afford due respect to the interests safeguarded by Article 8".

[34] Compliance with Article 8 of the Convention requires that the decision making process is not devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one sided and hence neither is, nor appears to be, arbitrary. Accordingly, the court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8 (see W v. UK 10 EHRR 1988 at paragraph 62). I consider that the need for fairness in the decision-making process and the requirement of appropriate safeguards is pivotal in any consideration of Convention compliance.

[35] The necessity to have safeguards is a recurring theme in the Strasbourg jurisprudence. In Z's case at paragraph 95 the court said:

> "The domestic law must therefore afford appropriate safeguards to prevent any such communication or disclosure of personal health data as may be inconsistent with the guarantees in Article 8 of the Convention".

At paragraph 96 the court said:

> "In view of the highly intimate and sensitive nature of information concerning a person's HIV status, any state measures compelling communication or disclosure of such information without the consent of the patient call for the most careful scrutiny on the part of the court, as do the safeguards designed to secure an effective protection".

[36] In that case, the court observed that although the applicant did not have the opportunity to be heard directly by the competent authorities before they took the measures, they had been made aware of her views and interests in these matters. In those circumstances the court was satisfied that the decision-making process leading to the measures in question was such as to

take her view sufficiently into account for the purpose of Article 8. The court also took into account that those involved in the proceedings were under a duty to treat the information as confidential and that a breach of their duty might lead to civil and/or criminal liability under Finnish law. In view of such factors, particularly the confidential nature of the proceedings with hearings being in camera, the court was not persuaded there had been a breach of Article 8. Hence the measures were proportionate to the legitimate aims pursued.

[37] The need for the relevant legislation and practice to afford adequate and effective safeguards against abuse of the rights of Article 8 surfaces also in Funke v France [1993] 16 EHRR 291 ("Funke's case") at paragraph 56 and Klass & Ors v Federal Republic of Germany [1982] EHRR 214 ("Klass's case").

[38] In Funke's case French Customs Officers investigating possible tax evasion and capital outflow searched the house of the applicant and seized certain materials. The court considered that the interferences in question were in the interests of the economic well-being of the country and the prevention of crime. In considering whether or not the steps taken were necessary in a democratic society the court said at paragraph 56:

> "56 Undoubtedly, in the field under consideration – the prevention of capital outflows and tax evasion – States encounter serious difficulties owing to the scale and complexity of banking systems and financial channels and to the immense scope for international investment made all the easier by the relative porousness of national borders. The Court therefore recognises that they may consider it necessary to have recourse to measures such as house searches and seizures in order to obtain physical evidence of exchange – control offences and, where appropriate, to prosecute those responsible. Nevertheless, the relevant legislation and practice must afford adequate and effective safeguards against abuse".

[39] In Klass's case which dealt with legislation in Germany permitting the State authorities to open and inspect mail and to listen to telephone conversations, the court said at paragraph 50:

> "The court must be satisfied that, whatever system of surveillance is adopted, there exists adequate and effective guarantees against abuse. This assessment has only a relative character: it depends on all the circumstances of the case, such

> as the nature, scope and duration of the possible measures, the grounds required for ordering such measures, the authorities competent to permit, carry out and supervise such measures and the kind of remedy provided by the national law".

[40] More recently in Huang v Secretary of State for the Home Dept [2007] 4 All ER 15 – where the principle was applied in an immigration case – Lord Bingham commented at paragraphs 18 and 19 as follows:

> "(18) … In most cases where the applicants complain of a violation of their art 8 rights in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of art 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate aim sought to be achieved. Proportionality is a subject of such importance as to require separate treatment.
>
> (19) … The need to balance the interests of society with those of individuals and groups … is … an aspect which should never be overlooked or discounted. The House recognised as much in R (Razgar) v Secretary of State for the Home Dept [2004] 3 All ER 821 when, having suggested a series of questions which an adjudicator would have to ask and answer in deciding a Convention question, it said (at (20)) that the judgment on proportionality – "must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention'. The severity and consequences of the interference will call for careful assessment at this stage."

If, as counsel suggest, insufficient attention has been paid to this requirement the failure should be made good.

[41] I must ask myself therefore whether in this instance the terms of Section 66 were administered in a manner which respects and gives effect to appropriate and effective safeguards for the applicant and which is proportionate to the legitimate aim pursued.

[42] I have come to the conclusion that the Police Ombudsman in this instance failed to employ adequate safeguards when administering the provisions of Section 66(1) and accordingly has not acted in a necessary or proportionate manner. I have come to this conclusion for the following reasons.

[43] First it is a fundamental principle of the common law that an individual who may be adversely affected by a decision is given advance notification of the central issue which the decision-maker must address (see Re A & Ors Application [2007] NIQB 30 at paragraph 40). It is an integral part of the legitimate expectation that a person will receive a fair hearing (see Re Cullen's Application [2005] NIQB 9).

[44] I appreciate that there may well be circumstances where the risk of the person investigated taking steps to destroy the material sought may mitigate against advance notification. However before such a decision is made, it is necessary for a balancing exercise to be carried out by the PO to illustrate that the steps taken are proportionate in the circumstances.

[45] That issue was fully aired in Woolgar v Chief Constable of Sussex Police & Anor [2000] 1 WLR 25 which was a case in which the plaintiff opposed the right of the police to disclose police interviews to her nursing regulatory body. At page 36H et seq Kennedy LJ said:

> "Even if there is no request from the regulatory body, it seems to me that if the police come into possession of confidential information which, in their reasonable view, in the interests of public health or safety, should be considered by a professional or regulatory body, then the police are free to pass that information to the relevant regulatory body for its consideration. Obviously in each case a balance has to be struck between competing public interests, and at least arguably in some cases the reasonableness of the police view may be open to challenge. If they refuse to disclose, the regulatory body can, if aware of the existence of the information, make an appropriate application to the court. In order to safeguard the interests of the individual, it is, in my judgment, desirable that, where the police are minded to disclose, they should, as in this case, inform the person affected of what they propose to do in such time as to enable that person, if so advised to seek assistance from the court. In some cases that may not be practicable or desirable, but in most cases

> that seems to me to be the course that should be followed."

See also Z v. Finland at paragraph 94.

[46] Regretfully in this instance I find no evidence that the PO entered into the balancing exercise between the applicant's interest in having advance notification of her intention to obtain his medical records against the public interest in her carrying out her investigation. Had the PO done so, I can conceive of no basis upon which she would have determined that the public interest would be damaged by the applicant being informed that his medical records were to be obtained because he would not have had the opportunity to destroy these and could have taken no practical illegitimate step to impede her task. It is not sufficient in my view to have informed the Chief Constable in the hope or belief that such information will then be properly and comprehensively conveyed to the applicant so that he can then decide what redress is open to him.

[47] Mr Fee QC on behalf of the PO asserted that the Respondent was alive to the fact that the information sought was sensitive and confidential and that the Respondent was aware that the OHW records related to counselling or therapy provided by professionals to the applicant. This in my view provides all the more reason why the PO ought to have informed the applicant of the steps that were to be taken.

[48] The corollary of the right to notification is the opportunity to respond. Procedural fairness requires that a party has the right to know the case against him and the right to respond to that case. That right to respond in turn may require a disclosure of material facts to the party affected in adequate time to prepare a response. It is not a sufficiently robust assertion of that right to say that the applicant had the opportunity to make representations when the Chief Constable was deciding whether to provide the information required by the Respondent. In my view that is an inadequate setting for the question of representations to be made by the applicant.

[49] Such an approach does not meet the need for real dialogue between the applicant and the investigator/decision-maker. It occurs at a stage when the decision to invoke Section 66 has already been taken. It fails to recognise that the Deputy Chief Constable is a neither surrogate for the PO or the applicant. In particular, it deprives the applicant of personally seeking assurances as to how the material will be handled, or to restrict the width of the documentation sought and impedes discussions concerning less intrusive measures to obtain the necessary information. All of these matters would arise if the right to direct representation were to be made available. I can see no reason why that step was not taken by the PO in this instance.

[50] Moreover, whilst there is no general duty to give reasons at common law it is important to remember that reasons can play an important role in cases such as this where they allow the applicant to determine whether the decision-maker has taken account of any arguments or representations which he wishes to make. I discern a gathering momentum in the common law for the imposition of the duty to give reasons in a wide range of circumstances in which fairness is taken to demand that reasons be given (see (Judicial Review in Northern Ireland) Gordon Anthony at para 7.43 and Re McCallion's Application [2005] NICA 21 at para 27). This coincides with the trend towards an insistence on greater openness and transparency in the making of administrative decisions.

[51] In passing I note that it is not always the case that the need for reasons is so essential that fairness cannot be achieved without reasons as long as an applicant has been given sufficient information as to the subject matter of the decision to enable him to make such submissions as he wishes (see R v. Home Secretary Ex p Fayed 1998 1 WLR 763 at 777 f).

[52] In a case such as this where Article 8 rights are clearly invoked, I consider that a proportionate response by the PO would have involved the applicant being given the basic reasons for the invocation of Section 66(1) or at least the gist of the reasons for the request.

[53] Mr Fee QC submitted that the reasons for the request were clear from the correspondence and are set out in the affidavit of Mr Holmes on behalf of the PO. I do not consider that there was sufficient contact with the applicant by the Respondent to provide informed reasons and to have allowed him to directly flesh out the reasoning by question and answer. I regard it as inadequate to have assumed that informing the Deputy Chief Constable was sufficient. He might have neither the inclination nor the information necessary to make a full disclosure to the applicant.

[54] Accordingly, I have come to the conclusion that the Respondent in this instance has acted in breach of Article 8 of the Convention in that she has failed to ensure that the steps pursuant to Section 66(1) of the 2000 Act were administered in a proportionate manner in compliance with Article 8(2). I therefore accede to the application to quash the decision to require the Chief Constable of the Police Service for Northern Ireland to provide to the PO the personal medical records of the applicant held by the Chief Constable. For the removal of doubt however I make it clear that there is nothing in this conclusion that should prevent the PO revisiting this issue provided she acts in a Convention compliant manner.

Procedural propriety

[55] Parliament and the courts have laid down various general rules which make it clear that, in the absence of contrary intention appearing or presumed to be intended to govern the making of decisions under powers conferred by or under any enactment, procedural propriety or procedural due process is contravened where injustice occurs through failure by the decision maker to act fairly or in compliance with natural justice.

[56] In the leading case of Doody v. Secretary of State for the Home Department and Others [1994] 1 AC 531 P 560 D/G Lord Mustill in a widely cited and applied extract said:

> "What does fairness require in this case? My Lords, I think it unnecessary to refer by name or to quote from any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them I derive that –
>
> (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
>
> (2) The standards of fairness are not immutable. They may change with the passage of time both in the general and in their application to decisions of a particular type.
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> (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision and this is to be taken into account in all its aspects.
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> (4) An essential feature is the context of the statute which creates the discretion as regards both its language and the shape of the legal and administrative system within which the decision is taken.
>
> (5) Fairness will often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is

> taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification; or both.
>
> (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will often require that he is informed of the gist of the case which he has to answer".

[57] I pause to observe that I endorse the views expressed by Mr McCloskey QC, who appeared on behalf of the intervener with Mr McLaughlin, when he submitted that a procedurally fair decision making process is of benefit both to the decision maker and the individual affected. It gives the latter a fair opportunity to put his case, to respond to the case against him and, hence, to influence the final outcome. It assists the decision maker by seeking to ensure that the decision is made on a fully informed basis, thereby facilitating the discharge of the decision maker's free standing public law obligation to take into account all material considerations. The decision maker must have regard to whether an excessive burden is placed on the applicant. Relevant to this exercise is consideration of whether there are practical alternatives open to the exercise of power. In this way the quality and sustainability of the final decision is enhanced. I consider this to be a classic instance where such benefits would have been of mutual benefit to the applicant and the PO.

[58] The common law rules of fairness thus have a broad reach and apply in this instance where the decision making process involves such intimate matters as the disclosure of medical and personal details.

[59] It will be clear from what I have said above that I consider that quite apart from the breach of the Convention, the common law principles of fairness and procedural propriety have been transgressed in this instance in that the decision of the Respondent to require this information was taken without any reference or notice to the applicant, without affording him reasons for the decision or an opportunity to make representations before or during the decision making process. In my view, a person in the position of the applicant has the legitimate expectation of fair treatment in such a process.

[60] It is not sufficient to argue that these impugned steps are being taken purely at the investigative stage of the process with the applicant to having the right to be heard in respect of any material finding which is adverse to him leading to a criminal prosecution or disciplinary proceedings. I can see no reason why the common law rules of fairness should not be regarded sufficiently broadly to encompass the investigative stage of this process as well as the subsequent recommendation stage. Such a distinction ignores the

fundamental importance of the right at any stage to oppose the disclosure of intimate, private and medical records despite the limited disclosure that will occur under Section 66(1) of the 2000 Act.

[61] I pause to note at this stage the argument of Mr McCloskey to the effect that in the event of my concluding that the PO had not given effect to the procedural safety which the common law demands, I should recognise that the intervention of the Deputy Chief Constable rectified these gaps in reality and that I should not grant a remedy which "beats the air". I do not find that submission persuasive. For the reasons I have already outlined in paragraphs [46] and [47] of this judgment I consider it inadequate to treat the Deputy Chief Constable as the surrogate of the applicant when considering the procedural propriety of the right to be informed, to have reasons given and to make representations. To do so would be to dilute the strength of the common law protections. The function of law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless that is done the duty becomes hollow and is stripped of all practical meaning.

[62] Accordingly, I consider that there has been a breach of the common law principles of procedural propriety in this matter and this constitutes a second reason for quashing the impugned decision.

Compatibility

[63] It was Mr Maguire's contention that Section 66 of the 2000 Act is incompatible with Article 8 of the Convention. He argued that it was structurally flawed rendering it disproportionate as it stands by ruling out appropriate balancing exercises under Article 8 and lacking the range of safeguards which could introduce proportionality.

[64] Mr Maguire outlined eight main criticisms of s. 66(1). These were:

(i) It was couched in such broad terms that there was no gradation of the PO's function whether dealing with a criminal investigation or a relatively minor matter. The absence of balance rendered the provision unlawful.

(ii) Section 66 did not contain any set of criteria or access conditions which must be met before a requirement can issue. He drew the analogy of the Police and Criminal Evidence (NI) Order 1989 ("PACE") where it is necessary to apply to a judicial figure in several circumstances before exercising the powers.

(iii) No judicial authorisation was required under Section 66(1). He drew my attention to a case in the Canadian Supreme Court of Baron v. Canada (1993) 1 SCR 416 where the Inland Revenue in Canada had issued

warrants to search the respondent's residences and business premises. Seizure of a large number of documents had ensued. In the context of the Canadian Charter of Rights and Freedoms at Section 8 the court said as follows at page 3 –

> "The exercise of a judicial discretion in the decision to grant or withhold authorisation for a search warrant was fundamental to the scheme of prior authorisation which is an indispensable requirement for compliance with S.8. The decision to grant or withhold the warrant requires the balancing of two interests: that of the individual to be free of intrusions of the state and that of the state to intrude on the privacy of the individual for the purpose of law enforcement. The circumstances in which these conflicting interests must be balanced will vary greatly. The strength of the interest will be affected by matters such as the nature of the offence alleged, the nature of the intrusion sought including the place to be searched, the time of the search and the person or persons who are the subjects of the search. In order to take account of the various factors affecting the balancing of the two interests, the authorising judge must be empowered to consider all the circumstances. No set of criteria will always be determinative or sufficient to override the right of the individual to privacy. It is imperative, therefore, that a sufficient degree of flexibility be accorded to the authorising officer in order that justice be done to the respective interests involved."

(iv) The PO was not obliged to act in accordance with due process. The PO has carte blanche to act hence it was not a practice to contact persons such as the applicant prior to the exercise of powers or to permit representations by such persons as the applicant in the decision making process.

(v) No form of appeal exists against the decision of the PO. There is no provision under which the applicant can seek to challenge the decision. Access to judicial review removes consideration of the merits and constitutes a serious deficiency.

(vi) Because it is primary legislation, it predominates over all other interests including the law of the Convention and Article 8 itself.

(vii) The PO acts as judge in his own cause.

(viii) It is not clear whether under the legislation the PO must personally act and there is no evidence that the PO took this decision.

[65] Later Mr Maguire refined his case to set out four obvious deficiencies in Section 66 of the 2000 legislation as follows:

(i) The absence of any judicial authority.

(ii) The absence of any access conditions or criteria.

(iii) The absence of redress or appeal on the merits.

(iv) The absence of due process protection.

[66] Whilst Mr Maguire conceded that in the area of procedural due process, there was scope to imply a fair procedure in the administration of the powers, he argued incompatibility with the convention on the grounds that the court could not introduce an independent element into the legislation along the lines set out in paragraphs [48] and [49] above. Accordingly any reliance on Section 3 of the Human Rights Act 1998 which compels legislation to be read as far as possible in compliance with the Convention was too limited in dealing with this deficiency. It did not cure the absence of proportionality in this primary legislation or cure the defects which were there. Accordingly Mr Maguire submitted that I should either use my powers under Section 3 of the Human Rights Act 1998 to read Section 66 to make it compatible with Convention Rights or alternatively I should make a declaration of incompatibility under Section 4 of the 1998 Act on the basis that its operation in this sphere is incompatible with Article 8 rights.

My conclusions on the issue of incompatibility

[67] Notwithstanding that I have concluded that in this particular instance the Respondent has been in breach of Article 8 of the Convention and common law principles of procedural propriety, I am satisfied that Section 66 of the 1998 Act is compatible with the provisions of Article 8 of the Convention.

[68] I commence my reasoning for so concluding by drawing attention to Article 3 of the Human Rights Act 1998. The rule of construction set out in Section 3(1) of the Act provides that:

> "(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention Rights."

[69] Doubtless this places a strong "interpretative obligation" on the courts. In R v. A [2001] 3 All ER 1, where the House of Lords was dealing with cross examination of complainants about previous sexual experience, the court had cause to comment on Section 3 of the 1998 Act. At paragraph 44 Lord Slynn said:

> "On the other hand, the interpretative obligation under S.3 of the 1998 Act is a strong one. It applies even if there is no ambiguity in the language in the sense of the language being capable of two different meanings. It is an emphatic adjuration by the legislature . . . Undoubtedly a court must always look for a contextual and purposive interpretation: S.3 is more radical in its effect. It is a general principle of the interpretation of legal instruments that the text is the primary source of interpretation. Other sources are subordinate to it . . . Section 3 of the 1998 Act qualifies this general principle because it requires a court to find an interpretation compatible with convention rights if it is possible to do so . . . In accordance with the will of Parliament as reflected in S.3 it will sometimes be necessary to adopt an interpretation which linguistically may appear strained. The techniques to be used will not only involve the reading down of express language in a statute but also the implication of provisions. A declaration of incompatibility is a measure of last resort. It must be avoided unless it is plainly impossible to do so."

[70] I therefore approach this matter on the simple basis that it is my duty to read and give effect to Section 66(1) in a manner compatible with Article 8 of the Convention so far as it is possible to do so. I should accede to Mr Maguire's application to make a declaration of incompatibility only as a remedy of last resort.

[71] In interpreting Article 66 of the 2000 Act I must bear in mind the object of concern of the legislation and the intention of Parliament. In paragraphs [24] and [25] of this judgment I have already adverted to the background of this legislation. I adopt the description of the legislation set out in Mr Robert Crawford's affidavit where he described the overriding aim of the provisions relating to the PO within the various Police Acts as "the creation of a mechanism for the independent, transparent and efficient investigation of police complaints in a professional manner in accordance with the law and free from police interference". It is essential that there is public confidence in a

thorough and independent investigation of police by a body, namely the Police Ombudsman, who enjoys public respect and trust. Criminal investigation and public accountability together with the need to protect individual liberties are crucial ingredients of the purpose behind Section 66.

[72] It is this aspect which distinguishes this legislation from the legislation for example which governs the police investigation of crimes under PACE. The legislation now under consideration has created a statutory office namely the Police Ombudsman in whom a strong degree of public trust and confidence is reposed as an unflinchingly independent figure dealing solely with police officers under suspicion. The nature of the PO's Office sharply distinguishes her task from that category of investigation by the police of ordinary citizens under PACE. I therefore find no strong analogy between the safeguards necessary in the provisions of PACE and the current provisions in the 2000 legislation.

[73] The public interests she protects and the need to ensure she has adequate powers so as to command public confidence are even stronger where the investigation relates to the death of an individual at the hands of state agents such as the police.

[74] The margin of appreciation accorded to national authorities under the Human Rights Act 1998 is always an important background factor in looking at matters such as this. The path of the authorities is traced in such leading textbooks as Clayton and Tomlinson "The Law of Human Rights" volume 1 where the authors describes the matter at paragraph 6.37 as follows:

> "Convention rights are expressed in broad and open textured language. This means that when construing the Human Rights Act, it will be both appropriate and inevitable that the English courts should put these broad concepts in context: by reflecting domestic, legal and cultural values and traditions. Precisely because the Commission and the Court recognise an interpretative obligation to respect the primacy of domestic states in interpreting the scope and content of rights, the English courts will be afforded a margin of appreciation in developing a human rights jurisprudence to meet domestic conditions."

[75] In this context Mr McCloskey helpfully drew my attention to the comments of Lord Bingham in Brown v. Stott [2001] 2 All ER 97 at page 114:

> "While a national court does not accord the margin of appreciation recognised by the European Court as a supra-national court, it will give weight to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies . . .
>
> The Convention is concerned with rights and freedoms which are of real importance in a modern democracy governed by the rule of law. It does not, as is sometimes mistakenly thought, offer relief from the heartache and the thousand natural shocks that flesh is heir to.""

[76] The principle of proportionality requires that there be a reasonable relationship between a particular objective to be achieved and the means used to achieve that objective. It is central to the principle of fair balance between the general interests of the community and the interests of the individual. That is why there is a need for adequate and effective safeguards against abuse to ensure that proportionality is in evidence.

[77] On how this balance is to be struck, Strasbourg jurisprudence gives only general guidance. It is not prescriptive. It is almost invariably based on a fact specific approach. What safeguards are to be invoked will depend on the particular circumstances although it will involve giving a wide and purposive approach to the language of the Convention. In this context the European Court of Human Rights does not operate a doctrine of precedent.

[78] Thus for example on the topic of judicial supervision in Klass and Others v. Federal Republic of German [1978] 2 EHRR 214 – a case involving legislation in Germany which permitted the state authorities to open and inspect mail and listen to telephone conversations – the court said:

> "The court considers that, in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge. Nevertheless, having regard to the nature of the supervisory and other safeguards provided for . . . the court concludes that the exclusion of judicial control does not exceed the limits of what may be deemed necessary in a democratic society."

[79] In Funke v. France – a case concerning a search and seizure by Customs officers – the court, whilst advocating the need for adequate and effective safeguards against abuse, did not invoke the need for judicial warrant before the Customs officials were allowed to act.

[80] Against the background of these matters, I am not persuaded that Section 66 conflicts with or is inconsistent with Article 8 of the Convention. I am satisfied that it is perfectly possible to read and give effect to Section 66(1) in a manner compatible with Article 8.

[81] My reasons for so concluding are as follows. First, I am not persuaded that there is any structural flaw in this legislation which prevents the existence of adequate or sufficient safeguards to prevent abuse. As I had already indicated, the common law rules of fairness have a broad reach with both a procedural and substantive aspect. The PO in exercising her discretion to invoke the powers under Section 66 of the 2000 legislation must act in conformity with legality, rationality and procedural propriety. Procedural propriety is linked to the concept of fairness or natural justice. She must be aware that any interpretation of her powers will be read in a manner that complies, so far as possible, with the Convention and she acts at her peril to ignore the obligations under Article 8.

[82] The fact that, in my view, the PO has failed to measure up to that exacting test in this instance is no indication that the legislation is structurally flawed or incompatible with the Convention. That the obligation on the decision maker in this instance to act fairly could have been met by for example by affording the right to a fair hearing, due notice and a right to make representations, rights protected by this court, without straining the meaning or purpose of the legislation illustrates the adequacy of the common law safeguards and compliance with the Convention.

[83] Mr McCloskey correctly drew my attention to other common law protections such as the obligation to act in good faith, not to be influenced by any improper motive, to take into account all material considerations, to disregard immaterial considerations, not to act unreasonably and to act in furtherance of the statutory purposes. Doody's case and Fayed's case are good illustrations of the strength of these protections.

[84] The legislation itself contains a number of statutory safeguards. In the first place, under Section 66(1), the Chief Constable or the Board shall only supply the Ombudsman with such information and documents as the Ombudsman may require for the purposes of, or in connection with, the exercise of any of its functions. This immediately confines the ambit of the powers. The courts stand ready to ensure compliance. Secondly, under Section 63 of the 1998 Act, strictures are placed on the disclosure of any information received by the PO. Under Section 63(3) any person who

discloses information in contravention of that section shall be guilty of a criminal offence. Section 63(2)(a) provides for the prevention of disclosure of the identity of the individual concerned or the information from which the identity of the person might be established.

[85] Moreover under Section 66(3) the person supplying the information must inform the Secretary of State that the information has been supplied to the Ombudsman. He must inform the Secretary of State and the Ombudsman that in his opinion the information would be likely to put an individual in danger or ought not to be disclosed on grounds of national security, sensitive personnel information or likely to prejudice proceedings which have been commenced in a court of law.

[86] It must also be borne in mind that at the stage that the process has reached in this case, namely a request for information pursuant to Section 66 of the 2000 legislation, there has not yet been a recommendation for disciplinary action or submission of a report to the Public Prosecution Service with a view to prosecution. Accordingly the applicant's rights to participation in the later stages of the process are untouched at this period.

[87] These powers are being exercised by a fully independent creature of statute invested by the nature of the office with a strong degree of public trust and confidence, charged with the very serious task of investigating police behaviour. If that job is to be carried out fearlessly and effectively, a wide margin of appreciation must be afforded to the officer concerned. Strasbourg jurisprudence is replete with instances where the court has not considered that judicial warrant is necessary for the steps taken provided, as in this instance, there are adequate common law and statutory protections, together with the right to seek judicial review of the process at any stage. Already in this case the applicant has availed of judicial intervention with an interlocutory injunction and a judicial review before me. I consider these are adequate protections in the context of this case without direct judicial supervision (see Klass v Germany, Funke v France).

[88] I do not find very compelling Mr Maguire's argument that there are no set criteria or access conditions which have to be met by the PO. It will be clear from what I have said above that the Ombudsman must comply with the confines of the statute, cannot act outside the policy and object of the statute and must exercise his powers in a proportionate and fair manner. I do not consider that any further access conditions or criteria are necessary in the context of the purpose set out in this legislation.

[89] The Convention does not guarantee a right of appeal from a decision of a court and I do not believe it guarantees a right of appeal in circumstances such as this. I find this point no different from the general assertions of lack of judicial superintendence and remedies which I have already dealt with in

earlier paragraphs. I am satisfied that the availability of judicial review of the many safeguards throughout this process is sufficient superintendence. The Strasbourg jurisprudence has not adopted the right of appeal against a decision-maker as a pre-requisite for compliance with the Convention. I do not accept that the Police Ombudsman is, as suggested by Mr Maguire, a judge in his own case given the raft of protections to which I have earlier adverted including both common law and statutory safeguards.

[90] Accordingly I have come to the conclusion that this legislation is not incompatible with the Convention.

[91] I close this judgment by recording my appreciation of the great clarity and economy with which counsel have made their submissions in this case.