Neutral Citation No. [2014] NIQB 58 | *Ref:* **TRE9270**

Judgment: approved by the Court for handing down | *Delivered:* **06/05/2014**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Turkington's (David) Application [2014] NIQB 58

IN THE MATTER OF AN APPLICATION BY DAVID TURKINGTON

AND

THE NORTHERN IRELAND RETIRED POLICE OFFICERS ASSOCIATION FOR JUDICIAL REVIEW

TREACY J

Introduction

[1] The applicant is David Turkington, a retired Chief Superintendent in the Royal Ulster Constabulary and Chairman of the Northern Ireland Retired Police Officers' Association ("NIRPOA"). In his own name and as a representative of NIRPOA he seeks to quash the Police Ombudsman's report entitled "The Events Surrounding the Bombing and Murders at 38 Kildrum Gardens on 31st August 1988" issued pursuant to section 62 of the Police (NI) Act 1998.

[2] Mr McMillen QC appeared with Peter Coll for the applicant. Mr Scoffield QC appeared with Stephen McQuitty for the respondent. Mr Barry MacDonald QC SC appeared with Ms Fiona Doherty on behalf of the Notice Party. I am grateful to all counsel for their excellent written and oral submissions.

[3] The Notice Party to this judicial review is Dorothy Johnstone whose father, Sean Eugene Dalton, was one of those killed in the bombing at 38 Kildrum Gardens on 31 August 1988.

[4] On the eve of the substantive hearing she lodged a skeleton argument which raised the issue of delay. The Court was informed that legal aid to participate in the proceedings was only granted on Friday 4 April 2014 (having been applied for on 6 March 2014). The substantive hearing was listed for Monday 7 April.

[5] As appears from the pre-action protocol response from the respondent the issue of delay was raised by it. At the leave hearing however the issue of delay was not raised in objection to the grant of leave which was unopposed. At this stage Ms Johnston was not yet a notice party and was therefore not in a position to make any objections to the grant of leave or raise the question of delay. The applicant did not put her on notice of the application. The court was informed that the applicant first found out about it as a result of the publicity surrounding the grant of leave.

[6] I raised the issue of delay with the applicant at the outset of the hearing. Following a brief exchange of submissions I adjourned the proceedings to enable the applicant to file evidence dealing with any explanation relied upon in connection with the delay and also to lodge a skeleton argument addressing the issue and the relevant authorities.

[7] The impugned report was published on 10 July 2013. The application for judicial review was made on 23 January 2014. The parties are agreed that the application is brought outside the applicable time limit in Order 53 Rule 4(1) of the Rules of the Court of Judicature (NI) 1980. In fact it is brought well outside the outer time limit of 3 months.

[8] It is accepted that if it can be shown that leave was wrongly given that the court can discharge the grant of leave whether the basis for that is provided by the respondent or the Notice Party. It is also common case that delay may be a reason for setting aside the grant of leave.

Background

[9] Mr Dalton had been concerned for his neighbour, the occupant of 38 Kildrum Gardens, whom he had not seen for almost a week. It was subsequently discovered that the neighbour (referred to as Person A in the PONI statement) had been abducted by the IRA to allow an explosive device to be planted in his flat.

[10] Mr Dalton and two other neighbours went to 38 Kildrum Gardens to check on Person A. They were able to open a window and Mr Dalton entered the property through that window. As he went through the property to open the front door the bomb exploded. Mr Dalton and Mrs Sheila Lewis were killed instantly. The third person, Mr Gerard Curran died on 31 March 1989.

[11] Given the circumstances in which Mr Dalton, Mrs Lewis and Mr Curran came to be at 38 Kildrum Gardens – neighbourly concern for the resident of that property - the incident has become known as the "Good Neighbour" or "Good Samaritan" bombing.

[12] The Notice Party's family has never sought to deflect blame for the explosion from those who were truly responsible for it – the IRA. However, they also had

serious concerns about the circumstances which led to their father's death. Those concerns are set out in the impugned report but they included the possibility that police did know, or should have known, of the existence of an explosive device at or in the vicinity of 38 Kildrum Gardens, a densely populated residential area, and did not take any or adequate steps to minimise the threat to the lives and safety of the residents of that area.

[13] The Notice Party was 18 years old when her father died. She was the youngest of the family living at home with her brother and father. Her mother suffered a heart attack and died suddenly on 24 July 1988, approximately 4 weeks before her father's death. She has a number of health problems and attends counselling at the WAVE Trauma Centre, a cross-community charity which offers various kinds of support to people bereaved, injured or traumatised as a result of the "troubles".

[14] The Notice Party avers that her family were devastated by their father's death, particularly as it came so soon after their mother's death. At the time and before the full facts were known it was suggested in the media that two pensioners had been making bombs, which exploded, killing them. That was a source of great distress to the family. She says that her father was a good man, an entirely innocent victim and simply concerned for the safety and welfare of our neighbour, as were the others who died.

[15] She has a very clear memory of the last time she saw her father, on the morning of his death as she left for work. He was very concerned about their neighbour a vulnerable person who previously lived in an institutional environment. He had serious and enduring mental health difficulties. People in the community looked out for those who were vulnerable, and because of Person A's difficulties her father would not have hesitated to check on the wellbeing of Person A.

[16] The Notice Party avers that every time their father's death is brought into the public arena again her memories of her father resurface and they all have to emotionally prepare themselves to deal with hearing the media coverage. She says her first reaction is often anger but she would generally end up in tears and says that the family all feel under stress as a result of the current proceedings.

[17] She avers that the PONI report was long delayed but knows that the current Ombudsman, Dr Maguire, was not responsible for that delay. She says that when the report was finally published she and her family accepted and welcomed it, although they were disappointed that not all of their complaints were upheld. They issued a press release through the Pat Finucane Centre when the report was published.

[18] She had no idea that there could or would be a challenge to the report and had been told that the report was sent for factual checking to the police before it was published. She was also aware that a number of retired police officers had been

asked to take part in the Ombudsman's investigation and refused to do so and finds it hard to understand how, having refused to take part in the investigation, they could have any right to challenge the report.

[19] Since the issues before the court relate, not to the factual content of the report, but to broader issues about how the Ombudsman does his job Ms Johnstone feels that her family and the report into her father's death are caught in the middle of a row between the Police Ombudsman and the Retired Police Officers Association about the Ombudsman's powers.

[20] She had believed that the investigation was complete in July 2013 when the report was published and had no expectation that it would or could be reopened. The first she and her family knew of these applications was when there was publicity around the grant of leave to apply for judicial review. This she says makes it difficult to achieve any finality in the matter. If the court were to allow this application to proceed she avers it would have a detrimental impact on her and the other members of her family.

The Northern Ireland Retired Police Officers' Association

[21] Raymond White, Retired Assistant Chief Constable, swore an affidavit on behalf of the applicant. Mr White is Chair of a sub-group of NIRPOA which deals with a wide range of legacy issues. He made his affidavit specifically with reference to the issue of delay in the instigation of proceedings.

[22] Mr White set out the background to NIRPOA and a chronology of events in bringing this judicial review. He averred that NIRPOA has a small administrative staff of three, there are no paid office-holders. The executive decision making functions are carried out by volunteer members of the Executive Committee. The NIRPOA has never previously embarked on any legal proceedings. It is a body primarily constituted as a welfare organisation and is a registered charity, hence its first recourse in matters such as this is to seek to engage stakeholders such as the Secretary of State and the Department of Justice. NIRPOA has had ongoing concerns over a number of years at the adopted or purported scope of the Ombudsman's powers in the conducting of investigations and the issuing of section 62 public statements into matters affecting its members.

[23] Mr White averred that in respect of the Section 62 Statement into the Kildrum Gardens Bombing, NIRPOA (and its individual members) did not have prior sight of the said Statement published on 10 July 2013. The Statement was not provided directly to NIRPOA by the Ombudsman and members obtained a copy from the Ombudsman's website. The group formed to address legacy issues affecting NIRPOA's member met on Friday 9 August 2013. This was a scheduled meeting with part of the business to discuss the content of, and implications arising from, the Ombudsman's Statement on Kildrum Gardens.

[24] Mr White averred that the group was of the view that whilst there were concerns about issues of jurisdiction on the part of the Ombudsman, the focus was that the content of the report was substandard and did not support the conclusions reached, particularly the finding of contravention of Article 2 of the ECHR. As a consequence the decision was made to produce a rebuttal addressing the flaws and inaccuracies in the Statement. The intention was to bring this to the attention of not only the Ombudsman himself but also the Secretary of State and the Justice Minister.

[25] At that time there was no specific consideration given to a challenge to the legal powers of the Ombudsman. The approach adopted was to seek to lobby various stakeholders including the Secretary of State and the Department of Justice both in terms of the factual rebuttal and the extent of the Ombudsman's powers. Mr White was responsible for producing a draft rebuttal together with other colleagues in the group. Taking account of other personal commitments he worked on the draft during August and September 2013. Once it was completed it was reviewed by other members of the group and it was published and delivered to the Ombudsman on 24 October 2013. Later the same day the Ombudsman issued a press release reiterating some of the points in the Statement and making general comments on his objective. This document did not provide any particular analysis of NIRPOA's rebuttal.

[26] The rebuttal document was sent to, amongst others, the Department of Justice and the Secretary of State. The Department of Justice replied on 5 November and the Secretary of State replied on 14 November. As a result of these responses it was clear that other non-legal routes were unlikely to be successful and they decided to seek legal advice as to the potential of a judicial review.

[27] On 21 November NIRPOA wrote to its solicitor requesting legal advice and on 22 November received initial legal advices on issues related to potential judicial review of this matter. Privilege is not waived in respect of this advice.

[28] Mr White and other representatives of NIRPOA met its solicitor on 3 December 2013 to discuss the options for and merits of judicial review. During the course of this meeting coincidentally the Ombudsman's letter of 27 November 2013 was received by NIRPOA's offices and forwarded to the solicitor's offices where the implications were discussed. The view of NIRPOA's representatives was that this letter crystallised the issues in that the Ombudsman was not going to withdraw the report and clearly intended to continue to use Section 62 Statements in historical matters.

[29] Following from that meeting authority was sought and obtained from NIRPOA's Executive Committee membership at a meeting on 5 December to take the opinion of Senior Counsel as to the merits of a potential judicial review. NIRPOA's solicitor duly sought Senior Counsel's opinion on 10 December 2013. Senior Counsel replied with an initial opinion, some queries and a draft Pre-action Protocol letter on 13 December 2013. Some comments were made in response by

NIRPOA and the letter was issued to the Ombudsman on 18 December 2013. The Ombudsman requested an extension of time to reply to 10 January 2014, and a further extension to 15 January 2014 but the response was provided on 14 January 2014.

[30] This response was considered by NIRPOA and authority was provided to issue the proceedings. Junior Counsel was then instructed to draft same. These drafts were settled by Senior Counsel and agreed by NIRPOA. The proceedings were issued on 23 January 2014.

Delay

[31] Order 53 Rule 4(1) states:

> "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made."

[32] As indicated by the use of the word "shall" this provision is mandatory. The overriding requirement is that the application for leave must be made "promptly". The three-month time limit is a 'back stop' and a claim is not necessarily in time if brought within the three-month outer limit. The time limit for bringing a claim for judicial review is much shorter than for most other types of civil claims. This short time limit is clearly intentional and its rationale is clear. As Lord Diplock said in O'Reilly v Mackman [1983] 2 AC 237, 280H-281A:

> " the public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."

[33] There is a need for public bodies and those affected to have legal certainty as to the validity of actions taken. As it was put in another case good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary.

[34] Given the terms and purpose of the rule the issue of delay needs to be addressed and decided in every case in which it arises. Unless the court considers that there is good reason for extending the time the application will fail *in limine*. The rule clearly envisages that delay must ordinarily be addressed at the leave stage.

If not addressed at that stage the parties will be kept in suspense even longer as to the validity of the impugned decision. The Court and the parties cannot simply disregard the time limit. The grounding affidavit should account for all periods of delay – see Bryson Recycling [2014] NIQB 9.

[35] The relevant chronology of events is as follows:

a) 10 July 2013 publication of section 62 statement by PONI
b) 18 December 2013 NIRPOA pre-action protocol letter sent
c) 14 January 2014 PONI response to pre-action protocol letter sent
d) 23 January 2014 Application for leave to apply for judicial review

[36] I accept that it is clear that at the very latest the "grounds for the application first arose" in this case on the date of publication of the PONI statement ie 10 July 2013. Mr McMillen accepted that so far as the only remaining grounds on which the application is pursued namely, the jurisdictional issue, that the application was out of time. Mr MacDonald pointed out that in Mr Turkington's grounding affidavit at paragraph 5 he said that "this (issue) has been a concern *for some time*" – long before the report was ever published. However, even if one starts with the premise that the grounds for the application first arose upon publication of the report it is still well out of time.

[37] The Notice Party submitted that some of the grounds for the application (eg ground 3(i)) must have arisen prior to the publication of the report and, for the applicant Mr Turkington at least, when he was contacted by PONI asking for his assistance with the investigation. In this regard Mr MacDonald submitted that it was clear that for some time prior to the publication of this report in July 2013, and during the time when PONI was attempting to make contact with Mr Turkington, he and NIRPOA had concerns about the manner in which PONI was approaching its work (see eg paragraphs 4 &7 of his affidavit). If warranted, those concerns it was argued could and should have led to a challenge to the procedure being adopted by PONI *prior to* publication of the report.

[38] In any event the proceedings were not lodged until 23 January 2014 – over six months after publication and more than three months outside the three month outer time limit outlined in Order 53 R4(1). The pre-action protocol letter was not sent until 5 months after the publication of the report. Unless the court considers that there is good reason for extending time relief should be refused in the exercise of the courts discretion or leave should be set aside.

[39] The Order 53 statement seeks, as the first ground of relief

> "An order of certiorari quashing the decision refusing to withdraw his report entitled "The Events Surrounding the Bombing and Murders at 38 Kildrum Gardens on 31st August 1988"" (para 1(a), p2)

[40] However as the Notice Party observed all of the other grounds of relief and grounds of challenge are directed to the content of the report and/or the procedure by which it was drawn up.

[41] Mr MacDonald submitted that this is a classic case of an applicant generating a later decision as a device to argue that the application is within time. The real matter under challenge is the PONI report published on 10 July 2013 and not the refusal to withdraw it in November 2013. I accept that the appropriate date, at the latest, for the purposes of time starting to run is 10 July 2013.

[42] It is clear that the mandatory time requirement under the rules begins when "grounds for the application first arose". An applicant does not earn a longer period to commence judicial review by attaching his challenge to a subsequent decision which merely confirms an earlier decision made when the applicant had knowledge of all relevant facts.

[43] The applicants sought to rely on their exchanges of correspondence with PONI following the publication of the report in July. However, the NIRPOA "rebuttal document" was not provided to PONI until 23 October 2013 and the pre-action letter was not sent until 18 December 2013, both outside the three month time limit set out in Order 53 Rule 4(1).

[44] Furthermore, the pre-action protocol is clear that pre-action correspondence does not stop time running for the purposes of Order 53 Rule 4(1). Para 2 states:

> "It does not affect the time limit specified which requires that any application must be filed promptly and in any event not later than 3 months after the grounds to make the application first arose."

[45] Mr MacDonald submitted that after a long wait for the PONI report (which cannot be laid at the door of the present Ombudsman), many of the Dalton family's concerns about police action around their father's death were vindicated. He submitted they were entitled to assume that, despite the public criticism of the report by the NIRPOA, it could be taken as affirmed, or final, once the Order 53 time limit had passed. Relatedly, he submitted that a decision whereby the NIRPOA is allowed to challenge the report outside of the time allowed by law for doing so would create uncertainty where none should be created and add to the family's distress.

[46] The applicant referred the court to R v Criminal Injuries Board, ex parte A [1999] 2 AC 330 in which Lord Slynn of Hadley set out the principles to be applied in cases relating to delay as:

"(a) On an ex parte application leave to apply for judicial review out of time can be refused, deferred to the substantive hearing or given.

(b) Leave may be given if the court considers that good reason for extending the period has been shown. The good reason on an ex parte application is generally to be seen from the standpoint of the applicant.

(c) If leave is given then an application to set it aside may be made though this is not to be encouraged.

(d) If leave is given, then unless set aside, it does not fall to be reopened at the substantive hearing on the basis that there is no ground for extending time under Ord.53 r.4(1). At the substantive hearing there is no "application for leave to apply for judicial review", leave having already been given.

(e) Nor is there a power to refuse "to grant ... leave" at the substantive hearing on the basis of hardship or prejudice or detriment to good administration. The court has already granted leave; it is too late to "refuse" unless the court sets aside the initial grant without a separate application having been made for that to be done. What the court can do under section 31(6) is to refuse to grant relief. (This was stated by his Lordship as his "provisional view" on this matter as the point had not been argued).

(f) If the application is adjourned to the substantive hearing, the questions as to good reason for an extension of time and hardship, prejudice, detriment, justifying a refusal of leave may fall for determination".

[47] The applicant submitted in light of the principles above that the point raised by the Notice Party should be considered as an application to set aside leave and referred the court to Fordham: Judicial Review Handbook 6th Ed in which he considered the pre-Civil Procedure Rules in England and Wales at paragraph 21.1.19 stating:

"(a) an application to set aside was required to explain its precise basis;

(b) it had to be made speedily and,

(c) the power was to be used sparingly."

[48] The applicant submitted that as leave has been granted the court must be satisfied that there is good reason to set aside the grant of leave and accepted that delay may be such a reason.

[49] The applicant submitted that even though the respondent raised the issue of delay in its reply to the applicant's pre-action protocol letter the matter was not pursued at the leave hearing and the respondent did not oppose the grant of leave.

[50] The applicant set out its reasons for the delay in bringing these proceedings in its skeleton argument which can be summarised as follows:

- The Northern Ireland Retired Police Officers' Association is a small body with no paid executive officers and relies on the volunteer services of its members for its executive decision-making and does not have the resources or expertise in legal matters of similar bodies;
- The primary role of the Association is to attend to the welfare of former police officers and their families and its focus is not litigation;
- The first opportunity to address the matter was at the meeting of 9 August 2013 and its concern was as to the factual inaccuracies and the inferences drawn;
- The decision was made to address the factual issues in the hope that the respondent would take this into consideration in accordance with the Association's general approach as a lobbying body;
- The Association then went to considerable lengths to produce the extensive response document which was sent to the respondent and other bodies with an interest;
- When it appeared to the Association that their efforts had proved fruitless that it turned its mind to the question of litigation promptly seeking advice and moving through the procedures to obtain authority to proceed with litigation;
- The Association sought to explore all avenues of redress before turning their minds to litigation and judicial review was a remedy of last resort.

[51] The applicant referred to Re Wadworth's Application [2004] NIQB 8 in which the absence of an adverse impact on public administration was stated as a reason to extend the time for issuing proceedings. The logic for this, the applicant submitted, must be that one of the reasons for the existence of the time limits set out at Order 53

Rule 3 of the Rules is the interest of good administration – see also Anthony: Judicial Review in Northern Ireland at para 3.27. Further in Re McCabe's Application [1994] NIJB 27 the court considered that the court must take into account the effect on the respondent's ability to effectively defend the case made against it.

[52] The applicant submitted that the delay in this case cannot have any material detrimental effect on the questions of good administration or the respondent's ability to defend the case and this point is made good by the position taken by the respondent to date.

[53] The applicant accepts that the effects on the rights or interests of a Third Party may be a factor to be considered by the court referring to Re McKevitt's Application [2005] NIQB 56. The applicant made clear that it does not seek to understate the suffering of the Notice Party family and that nothing in the applicant's submission, written or oral, is intended to suggest the least degree of disrespect to them. The applicant however made the point that the delay occasioned by it must be seen in context. The impugned report took 7 years 10 months to produce and the delay caused by the applicant is minor in comparison.

[54] The applicant submitted that various retired officers have been publicly condemned for failing in their duty to protect the lives of the deceased and the other victims and of failing to properly investigate the murders. The applicant's position is that they have been condemned in a report which was unlawful and by a statutory officer who had no power to carry out the investigation, no power to come to the determinations it came to and who ignored the statutory safeguards granted by Parliament. Further the applicant alleges that the respondent has invented an entirely new jurisdiction to investigate alleged breaches of the substantive obligation of Art 2 of the European Convention and submitted that these are serious matters with serious consequences for those involved.

[55] Following on from this point the applicant submitted that there is a public interest in this matter being resolved and in the court determining the substantive issues in order that the principal parties know precisely where they stand and can move forward.

[56] In a secondary submission the applicant submitted that should the court be minded to find against the applicants that the court could still consider the substantive application and consider the question of delay if it comes to the question of remedy thus allowing the benefits of a decision on the matters at the heart of the case while protecting the position of the Notice Party.

[57] Mr MacDonald submitted on the question of delay that there was very little difference between his submissions and that of Mr McMillen, for the respondent, on the legal principles, since it was accepted at paragraph 3 of Mr McMillen's skeleton argument that this should be an application to set aside leave. Further at paragraph 5 Mr McMillen submitted that leave having been granted, the Court has to be satisfied

that there is good reason to set aside the grant of leave and that delay may be such a reason.

[58] In his reply Mr MacDonald very forcefully and effectively addressed seriatim a list of factors that the court had been invited to take into account by the applicant as constituting good reasons for extending time. He recalled that the reasons for the delay were that NIRPOA is a relatively small body, doesn't have the resources or expertise, in legal matters, of similar bodies such as the Police Federation. But, he submitted, NIRPOA has an administrative staff of two and comprised of former senior police officers including the former Assistant Chief Constable, Mr White who swore an affidavit in this case. Mr MacDonald argued that these are officers operating at a level that could, as he put it, lead to the reasonable expectation that they may have had some familiarity with the law, and with courts, and with the operation of courts and that they have at least the same access to solicitors as other members of the public. In fact, he said that in the last two or three years NIRPOA's members have been attending the offices of their solicitor to have their hearing loss claims processed and that these are not officers who are unfamiliar with solicitors' offices.

[59] In relation to the submission that NIRPOA's focus is not litigation and that this is the first occasion that it has resorted to law Mr MacDonald argued that it is not the first occasion on which its members have resorted to law and have acquired a familiarity with legal processes. He submitted they are certainly no less familiar with legal processes than the ordinary members of the public who are obliged to comply within these requirements.

[60] NIRPOA submitted that the first opportunity to address this matter was at the meeting of 9 August but Mr MacDonald countered that this was not correct. He argued that there was nothing to stop them addressing this matter before then and not leave the matter to be addressed at their first scheduled meeting. NIRPOA submitted that this was in accordance with its general approach as a lobbying body, rather than one had the inclination, expertise or resources to readily move to litigation but Mr MacDonald argued that they did have the inclination, and they had the inclination for years to challenge, in some way, the scope of the Ombudsman's powers. He submitted that they don't require any expertise themselves because they instruct solicitors, like other people do, and they do clearly have the resources to move to litigation because they have, and they have confirmed in correspondence that they have the resources to meet any claim for costs which is why this matter is proceeding without any further orders in that regard.

[61] Mr MacDonald submitted that this was a case where the applicant simply did nothing until a late stage and now they are suggesting that they are entitled to have time extended to accommodate the approach that they decided was appropriate. Mr MacDonald submitted that while Judicial Review is a remedy of last resort that doesn't mean it's the last thing you get round to doing.

[62] The applicant acknowledged that the effect on the rights and interests of a third party may be a factor to be considered by the Court but then they point out that there has been considerable delay in the preparation of the report itself. Mr MacDonald says this is all the more reason why there should be no further delay in the resolution of this matter.

[63] The applicants pointed to the effect of setting aside leave where various retired officers have been publicly condemned for failing in their duty. But Mr MacDonald points out that they are no longer challenging the contents of the report and that in any event, all of this was known in July 2013.

[64] The applicants say: "*This is not simply an Association litigating over a point of principle; it engages the reputation of individuals.*" and sought to rely on the fact that "*the issues between them and the Ombudsman have been a source of contention between the principal parties for some time*". Well, Mr Macdonald says, that is another reason why this should have been addressed promptly.

[65] And the applicants argue that any future relief by arguing the jurisdiction point in another case "*will be scant comfort for the retired officers affected by this report.*" Mr MacDonald submits that this is an invitation by the applicant to consider the human and moral dimensions of this case. To this submission he delivered a stinging rebuke. He submitted that this is a case in which three Good Samaritans (as they were called) lost their lives while checking on the welfare of a neighbour. The next-of-kin asked the Ombudsman to investigate the concerns that they had that these deaths could have been avoided, and to investigate the suspicion that police knew that there was a bomb in this flat but failed to take action, in order to protect an informant. Now, he said, Parliament has created the office of the Police Ombudsman for Northern Ireland to carry out lawful investigations into such matters. Police officers are public servants who should be expected to uphold the law and co-operate with other officers of the law, such as the Police Ombudsman and all those employed by him as investigators, who all have the responsibilities and powers of Constables as a matter of law. This applicant and the members of NIRPOA have now called in aid their reputations, and their many years of conscientious service as police officers. "How they helped in the search for the truth of this matter", he submitted, "can be seen from the evidence of Mr Holmes [Director of Investigation (Historic) for the PONI] at para 22 of his affidavit in which he states:

> "During the course of the Dalton investigation the applicant, Mr Turkington, and a number of his former colleagues were invited to assist enquiries. In April 2007 a letter was forward to the PSNI for delivery to Mr Turkington, inviting him to contact the Police Ombudsman's investigation. Mr Turkington responded by correspondence dated the 1st May 2007 inquiring as to how it was believed he could be of assistance? On 3rd May the Investigation Team replied to Mr Turkington's letter

> explaining that as the deaths had occurred in an area for which he was a police Divisional Commander at the time, in the rank of Chief Superintendent, he might have knowledge of relevant matters. Mr Turkington was also advised that he would be afforded the opportunity to review relevant material. The investigation did not receive a reply for Mr Turkington."

[66] Mr MacDonald reminded the court that in his evidence the applicant averred that:

> "I believe I may have received correspondence from the Ombudsman asking me to interview me about this matter. I do not recall that I was asked specific questions, or provided with any background to the information which they were seeking from me. I had concerns about the way in which the Ombudsman conducted and concluded such investigations."

[67] Mr MacDonald submits that the applicant declined to co-operate with this lawful investigation into his conduct, and the conduct of the police involved in this matter.

[68] Further on 18 March 2008 the Police Ombudsman's investigators hand-delivered a further letter to the applicant's home address seeking his co-operation but again did not receive a response from him. A third time, in February 2010, the PSNI delivered another letter to the applicant, on behalf of the Police Ombudsman's investigation, requesting his assistance but, again, no response. Paragraph 24 of Mr Holmes' affidavit avers:

> "While many officers did assist the investigation, as articulated throughout the public statement published in relation to the matter, others including those such as Mr Turkington, who were in key and/or senior positions at the time of Mr Dalton's death, and consequently could reasonably have been expected to possess knowledge of decision-making and other information of relevance to the Police Ombudsman's investigation failed or refused to assist the enquiry."

This was, counsel submitted, against a backdrop where documents seemed to have mysteriously gone missing, which created a further obstacle to the enquiry by the Ombudsman.

[69] At para 25 Mr Holmes continued:

> "The Investigation Team wrote to a former Detective Superintendent who was initially responsible for the RUC murder investigation by the PSNI in March 2008. This officer telephoned the Ombudsman's office advising he had no recollection of the incident, and did not wish to assist the matter."

[70] This is the retired former Detective Superintendent that was initially responsible for the entire investigation - had no recollection of the incident and wasn't prepared to assist:

> "Although he did subsequently meet with the Investigation Team, this officer did not provide any meaningful assistance."

[71] At paragraph 26:

> "The third key officer was a former Detective Inspector, who performed a leading role in the murder enquiry. He wouldn't co-operate."

[72] At paragraph 27:

> "Officer number (4), a former Detective Chief Superintendent who had performed the role of Regional Head of Special Branch, with a responsibility for the Derry/Londonderry area. This officer did not co-operate."

[73] At paragraph 28:

> "Officer number (5), a former Detective Superintendent who had been the Deputy Regional Head of Special Branch. This officer was ill. He said he had no recollection of the incident."
>
> ...
>
> "Officers number (6) and (7) were contacted. These were two former Special Branch detectives. No response from them."

[74] At paragraph 29:

> "Officer number (8), a Detective Sergeant who had performed a liaison role between Special Branch and the detectives. He declined to accept the correspondence from the police officer delivering the correspondence."

[75] The upshot of all of this, Mr MacDonald submitted, is summarised at paragraph 30 which states:

> "What that those officers that chose not to assist the Police Ombudsman's investigation were given a fair opportunity to provide relevant evidence. In addition, it's quite clear that the lack of assistance on the part of these former officers presented significant obstacles to the investigation, particularly in relation to issues associated with the conduct of the RUC murder investigation and relevant intelligence matters."

[76] Mr MacDonald also referred to paragraph 9.25 of the Report which states:

> "In the absence of records documenting strategic decisions on the assessment of this information and rationale for the actions taken, it's preferable to seek accounts from those involved at the time. As a substantial number of retired police officers (who are presumably now members of this Association) who were in key positions to assist this investigation were approached, but declined to assist, this significantly hampered my investigation and examination of this case."

[77] Having reviewed this background Mr MacDonald submitted that the conduct of the applicant and the other seven retired officers is "shocking, disgraceful and scandalous". Further, he submitted that it is "*a deliberate and co-ordinated closing of ranks to stymie this investigation in order to prevent the truth from emerging, it is an affront to the rule of law, and it's a concerted attempt by retired police officers, including this applicant (and, apparently, approved by this Association) to sabotage the operation of the police complaints system*".

Conclusion

[78] Having carefully considered the evidence and competing submissions I accept that this application is out of time and no good reason has been offered for the delay. The application is dismissed.

[79] The respondent did not seek its costs. But on the issue of delay it was Mr MacDonald on behalf of the Notice Party who led the argument. In these circumstances I consider that the unsuccessful applicant should pay the Notice Party's costs.