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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY THOMAS RONALD HAWTHORNE ON HIS OWN BEHALF

AND

RAYMOND WHITE AS CHAIRMAN OF THE NORTHERN IRELAND RETIRED POLICE OFFICERS' ASSOCIATION

AND

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

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KEEGAN J

Introduction

[1] This application comes before me on one discrete issue as to whether the Police Ombudsman of Northern Ireland (hereinafter referred to as "the Ombudsman" and/or "PONI") report into the Loughinisland massacre is *ultra vires* in that the PONI exceeded powers invested in him by Part VII of the Police (Northern Ireland) Act 1998. Leave was also granted on a procedural fairness ground in relation to Mr Hawthorne. This challenge led to a significant change in the case in that the procedural challenge was determined in favour of Mr Hawthorne and PONI issued a public statement and a revised report vindicating his position. In the statement PONI confirmed that his office "wanted to make it abundantly clear that its determination of collusion did not apply to Mr Hawthorne."

[2] At a case management hearing counsel helpfully agreed that I would adjudicate afresh on the remaining challenge. A core bundle of papers and trial bundle of authorities were provided. I have considered these materials in determining this application along with the helpful written and oral submissions of counsel. Mr McMillen QC appeared with Mr Brown on behalf of the applicants;

Mr McGrory QC appeared with Mr McQuitty BL on behalf of the respondent. Ms Doherty QC appeared with Mr Devine BL on behalf of the notice party, namely Mr Aidan O'Toole, one of the Loughinisland families.

The Order 53 Statement

[3] The current challenge is comprised in an amended Order 53 Statement which is dated 4 December 2017. In the statement the applicants seek to have the report quashed and various forms of declaratory relief.

In this challenge three grounds were put to the court for adjudication namely:

> "3. The grounds on which the said relief is sought in relation to the public statement relating to the complaint by the victims and survivors of the murders at the Heights Bar, Loughinisland, 18 June 1994:
>
> (a) The respondent acted ultra vires in that he commenced or continued an investigation into a complaint made to him with the intention or dominant intention of producing a public report as to his investigation as opposed to investigating the complaint with the intention of coming to a view as contemplated by sections 58(1) and 59(1)(b) and (2) of the Police (Northern Ireland) Act 1998.
>
> (b) The respondent acted ultra vires in coming to conclusions, decisions or determinations as to whether criminal offences, or disciplinary offences had been committed by police officers as opposed to making recommendations to the appropriate authorities in relation to the same. Accordingly the respondent had no power to issue a report on matters that did not relate to the exercise of his powers or as to decisions or determinations that he was lawfully permitted to arrive at.
>
> (d) The respondent has wrongfully employed the making of a statement provisions, permitting the making of a statement as per section 62 of the Police (Northern Ireland) Act 1998, for the purposes of making a comment upon the Royal

Ulster Constabulary George Cross as a body corporate."

Background

[4] The Loughinisland massacre is part of a very dark period in the history of Northern Ireland. On the evening of 18 June 1994, a night of World Cup football, when local people were gathered to watch the Republic of Ireland play Italy in the Heights Bar, a bloody and ruthless massacre occurred. Two gunmen entered the bar and opened fire. They were wearing boiler suits and masks. One gunman was armed with a rifle, he dropped to one knee military style and opened fire on approximately 15 people within the same pub. Six people died. They are Adrian Rogan, Daniel McCreanor, Eamon Byrne, Patrick O'Hare, Barney Green and Malcolm Jenkinson. Five other men were injured in the attack, some seriously. Many others suffered the psychological scars and enduring injuries which persist to this day given the indelible imprint created by this attack. This incident devastated the local community and also provoked widespread public interest and revulsion. No one has been brought to justice for the atrocity.

[5] The involvement of PONI with the investigation of the Loughinisland massacre has been helpfully set out in a chronology attached to the applicant's skeleton argument. This reads as follows:

18 June 1994	Murder of six innocent people at the Heights Bar, Loughinisland and the injury of five others.
Late 2001	Representative of Loughinisland families contact PONI discussions commence between the parties.
March 2006	Formal complaint made by the families.
September 2009	Draft report sent by PONI to PSNI. PSNI raise factual inaccuracies.
November 2009	Witness makes allegation re a serving police officer. A file was submitted to the PPS, presumably by PONI.
November 2010	PPS direct no prosecution.
June 2011	PONI issues a public statement as to the investigation.
September 2011	A family member of a Loughinisland victim seeks judicial review in relation to the report.

July 2012	The present Ombudsman comes into post and he directs a review of the report.
December 2012	PONI consents to the quashing of the report.
December 2013	PONI commissions new enquiries into the Loughinisland massacre.
9 June 2016	PONI issues new report.
4 July 2016	Pre-action Protocol letter.
21 July 2016	Reply to pre-action letter.
4 August 2016	Application for judicial review issued.
2 February 2017	Leave hearing.
6 June 2017	Leave granted.
13 March 2018	Decision issued in first judicial review.
2018	Revised public statement issued by the PONI.

Public statement by PONI in accordance with section 62 of the Police (Northern Ireland) Act 1998

[6] I am working from the revised report which was published after the first judicial review and after significant amendments were made. The Executive Summary refers to the concerns which were raised by the families of the deceased to the office of PONI as follows:

- That the police failed to conduct an effective investigation of the murders, including failing to keep bereaved families updated as to the progress of the enquiry.

- That the police failed to discharge its duties as required by Article 2 of the European Convention on Human Rights that there was collusion between the RUC and those responsible for the murders.

[7] Central to the complaints was a fundamental question which is phrased as:

> "Why has no one been held accountable for the murder of their loved ones?"

[8] The Executive Summary refers to the fact that the investigation has sought to answer this and other important questions raised by the families of those who were killed and injured. The Ombudsman then states as follows;

> "Let there be no doubt, the persons responsible for the atrocity at Loughinisland were those who entered the bar on that Saturday evening and indiscriminately opened fire. It is also important to recognise that despite the feelings identified in this report there have been many within the RUC (Royal Ulster Constabulary GC) and the PSNI (Police Service of Northern Ireland) who have worked tirelessly to bring those responsible to justice. I am grateful to those members of the public and retired police officers who assisted my enquiries. However my investigation into this area was constrained by a refusal of a number of key people to speak to my investigators."

[9] This public statement then sets out various matters in relation to background to the attack which I reference in summary only. The Executive Summary refers to intelligence suggesting that the attack at Loughinisland was carried out by a UVF (Ulster Volunteer Force) unit in reprisal for the killings on the Shankill Road of senior UVF figures on 16 June 1994. The second sub-section refers to importation of weapons in 1998 and refers to this fact and states;

> "However, an understanding of what happened in Loughinisland begins with the importation of arms by Loyalist paramilitaries in late 1987/early 1988. My investigation has found that the VZ58 rifle which was used in the Loughinisland attack was part of the shipment which entered Northern Ireland at that time. "

[10] In dealing with the events leading up to the Loughinisland attack the Ombudsman states as follows:

> "My investigation into the Loughinisland killings examined the events leading up to the murders. It found that Special Branch had reliable intelligence that there was to be an arms importation in 1987/1988. Moreover, reliable intelligence indicates the police informants were involved in the procurement, importation and distribution of these arms. To fail to stop or retrieve all the weapons,

> despite the involvement of informants in the arms importation was a significant intelligence failure."

[11] Reference is then made to incidents prior to the Loughinisland murders as part of the analysis of the police investigation. The Executive Summary reads:

> "The families have complained that the police failed to conduct an adequate investigation into the murders. My conclusion is that the initial investigation into the murders at Loughinisland was characterised in too many instances by incompetence, indifference and neglect. This despite the assertions by the police that no stone would be left unturned to find the killers. My review of the police investigation has revealed significant failures in relation to the handling of suspects, exhibits, forensic strategy, crime scene management, house to house enquiries and investigative maintenance. The failure to conduct early intelligence led arrests was particularly significant and seriously undermined the investigation into those responsible to the murders."

[12] The Ombudsman then states that failures to bring the killers to justice cannot be explained solely by a failure or otherwise of investigative actions. It is at this point the Ombudsman turns to the complaint of the families that there was collusion between elements within the police and Loyalist paramilitaries. He states *inter alia* that:

> "It is clear that discussion around the issue of collusion in Northern Ireland is extremely controversial and politically sensitive. There has been considerable debate in academic publications, reports by non-Governmental agencies and in the various enquiries into alleged allegations of State related killings in Northern Ireland. No consensus has emerged as to what it actually means. I am of the view that individual examples of neglect, incompetence and/or investigative failure are not (de facto) evidence of collusion.
>
> However, a consistent pattern of investigative failures may be considered as evidence of collusion depending on the context and specifics of each case. This is particularly the case when dealing with police informants, who were participating in crime.

> Having considered the numerous definitions of collusion that have emerged over the years, I have decided the most compelling approach is that provided by Judge Smithwick's definition in his inquiry into collusion between members of An Garda Síochána and the Provisional IRA.
>
> > 'The issue of collusion will be examined in the broadest sense of the word. While it generally means the commission of an act, I am of the view that it should also be considered in terms of an omission or failure to act. In the active sense, collusion has amongst its meanings to conspire, connive or collaborate. In addition I intend to examine whether anybody deliberately ignored a matter or turned a blind eye to it or have pretended ignorance or unawareness of something morally, legally or officially to oppose.'"

[13] Having examined the complaint of collusion the Ombudsman concludes as follows:

> "Many of the issues I have identified in this report including the protection of informants through both wilful acts and the passive turning a blind eye are in themselves evidence of collusion as defined by Judge Smithwick. When viewed collectively I have no hesitation in unambiguously determining that collusion is a significant feature of the Loughinisland murders."

The evidence filed on behalf of the applicants

[14] Mr Hawthorne is the first applicant and he has filed an affidavit dated 9 January 2017. He is a retired Chief Superintendent. He avers that he served as an officer of the Royal Ulster Constabulary George Cross (RUC) from 3 November 1969 until his retirement on 30 September 2001. Mr Hawthorne explains that he is also a member of the Northern Ireland Retired Police Officers Association. In paragraph 2 of the affidavit he states:

> "It is my contention, in very general terms, that the Ombudsman has no power to carry out a wide-ranging, general enquiry into the activities of the RUC (now the Police Service for Northern Ireland) to come to a concluded view on matters that it may have been the subject of complaint and to publish such a report on the same without having regard to the rights and interests of those persons, such as myself who have been criticised in the report."

[15] At paragraph 3 in this affidavit the applicant states:

> "I believe within the public statement the Ombudsman has improperly and unlawfully accused myself, other former police officers and the RUC of partiality, ineptitude and collusion."

[16] At paragraph 4 the applicant explains that during the period considered by the report he was a Superintendent and held the position as Sub-Divisional Commander for Downpatrick Sub-Division. He says that he was the person ultimately responsible for all policing issues in the sub-division. He points out that whilst officers are only identified by ciphers people in the area where he currently resides are well aware of his role within Downpatrick Sub-Division and that he has been publicly and severely criticised. The applicant states that this has caused distress, anxiety and upset to him and his family.

[17] At paragraph 11 the applicant states that he strongly disputes many of the Ombudsman's findings of fact and the conclusions that he has drawn from these. However he states that he has been advised by his lawyers that a judicial review is not the appropriate vehicle to debate the numerous detailed questions of fact. The affidavit then sets out in some detail the findings of the Ombudsman and the deponent refers to the fact that in his view these are beyond the Ombudsman's powers.

[18] Paragraph 24 summarises the position in relation to this challenge as follows:

> "I contend that the Ombudsman carried out a freestanding investigation that was not directed at statutory functions and arrived at such conclusion that were not within his remit. Such defaults were compounded by the publication of his conclusions. Those found to be allegedly at fault were deprived of the statutory protections and those criticised did not have the opportunity to challenge the Ombudsman's reasoning."

[19] Mr White is the second named applicant. He is a retired Assistant Chief Constable. He says he served as an officer of the Royal Ulster Constabulary George Cross and as an officer of the Police Service of Northern Ireland from January 1965 until his retirement in April 2002. He says that he is currently chair of the Northern Ireland Retired Police Officers Association having held that position since May 2015. This applicant says that he makes the affidavit as Chairman of the Association and that he is authorised to file the affidavit on its behalf and on behalf of its members. The affidavit describes that the Association is an unincorporated body made up of retired members of the RUC GC and of the Police Service of Northern Ireland. The affidavit then describes the problematic relationship between the Association and the Police Ombudsman of Northern Ireland. However, it is important to note at paragraph 3 that this applicant states as follows:

> "To assist this honourable court, I consider it appropriate to address the relationship between the Association and the Ombudsman. The Association unequivocally supports the Ombudsman as an institution and the role that he is required to carry out under statute. This Association recognises the vital role that the Ombudsman has to play as an independent person and engendering public confidence in the police. It considers that no officer or retired officer who acted lawfully and professionally has anything to fear from the Ombudsman. In particular, the Ombudsman has an essential role in our evolving society in holding police to account. This application should not be seen as a challenge to the Ombudsman as an institution or this Association's support for same."

[20] The affidavit then sets out some background and refers to the grounds of challenge. These are summarised at paragraph 16 where this applicant says his belief is that the Ombudsman has gone beyond the purpose that he has in relation to the filing of the report in that determinations are made against individuals also against the police as a body corporate. Further reference is made to this deponent's belief that the Ombudsman misunderstood how policing operated in the area at the relevant time. This applicant repeats the views of Mr Hawthorne by arguing that the Ombudsman carried out a freestanding investigation which went beyond his statutory functions.

The evidence filed on behalf of the respondent

[21] Dr Michael Maguire, the Police Ombudsman for Northern Ireland, has filed an affidavit in this matter which is dated 11 September 2017. He refers to the fact

that he was appointed as Police Ombudsman for Northern Ireland in July 2012. He refers to the fact that the investigative process began in 2006. He refers to the first report and a decision which was taken in 2011. He refers to the fact that the investigation started under the tenure of the first Police Ombudsman for Northern Ireland Dame Nuala O'Loan and was completed under the auspices of the second Ombudsman Mr Al Hutchinson who made the public statement in July 2011. The Ombudsman explains that there was a legal challenge to that report and that he ultimately advised that the most appropriate course of action was to consent to an order quashing the previous public statement and to commence a new investigation into the complaints made by the next of kin and survivors. At paragraph 9 of his affidavit he says:

> "I have considerable reservations about some aspects of the previous investigation and the decisions and determinations which arose from it – although not, I should emphasise, either the decision to investigate or, in principle, the decision to issue a public statement in relation to the investigation."

[22] The Ombudsman then sets out the basis for his investigation which began after the quashing of the report. He says at paragraph 11 "however at that stage" there was a suspension on historical investigations within the Police Ombudsman's Office as the result of a critical Criminal Justice Inspectorate Report("CJINI Report") which he had authored in his previous role in 2011. He says this suspension was lifted in January 2013 after a positive CJINI follow up report.

[23] This affidavit then states that the further investigation proceeded and the Ombudsman's public statement as to his actions, decisions and determinations and the reasons for the decisions and determinations was published on 9 June 2016. Paragraph 13 of this affidavit sets out the Ombudsman's view of the public statement as follows:

> "The conclusions reached in the public statement now at issue are, I say, justified by the substantive content of that public statement which reflects the work done and the findings of this office following the further investigation. I do not propose to offer up further reasoning or justification for those findings or conclusions by this affidavit which would, I understand, in any event be inappropriate. The statement speaks for itself. That said if there is any particular issue on which the court feels further elaboration is required I would be pleased to try and assist so far as I can."

[24] At paragraph 20 of this affidavit the Ombudsman states as follows:

> "If the applicants are correct in their assertion that public statements can only be published in very defined circumstances, some of the most important public statements made by this office over the past few decades could never have entered into the public domain. Further, a great majority of the routine press releases made by the office would also fall foul of the applicant's arguments."

[25] The Ombudsman then describes the impact of certain public statements on policing generally, even where no officers are prosecuted and he gives certain examples of that. At paragraph 25 he states that the office receives, on average, around 3,000 complaints per annum in relation to the conduct of police officers. He says this figure has been roughly consistent for some 15 years (with peaks and troughs throughout those years). He says of those 3,000 complaints, around half are investigated by the office. The other half are not investigated for various reasons (failure to co-operate, not within the remit of the office, centring formal resolution, etc). He says of the matters which are investigated, the complaints are broken down into various kinds of allegations. He then refers to the methodology employed by the Ombudsman.

[26] A further affidavit was presented from Paul Holmes, of the Police Ombudsman's Office. This is dated 5 December 2017. This deponent describes himself as the Director of Investigations (Historic) in the Office of the Police Ombudsman for Northern Ireland. He says that he was the Director of Historic Investigations and within the Historic Directorate he appointed senior investigating officers (with the authorisation of the Ombudsman) to specific investigations and the relevant investigation reports are provided to him whereby he exercises the Ombudsman's power regarding any decision-making (concerning criminality and/or discipline). At paragraph 4 of this affidavit he states:

> "In late 2013 I tasked SIO Ray Higgins to undertake preparations for the investigation of public complaints relating to the Loughinisland murders (Operation Sutton). In January 2014 he was issued terms of reference for the investigation and I appointed him as investigator for Operation Sutton."

[27] Mr Holmes then sets out the terms of reference exhibited to his affidavit. At paragraph 6 he says "in December 2014 I was provided with a draft copy of the report". In this paragraph he states:

> "I did not believe that an identifiable officer may have committed a criminal offence but I wanted to satisfy myself that the PPS were offered an opportunity to read the investigation report in light of the concerns I raised in the letter."

He says that he has not attached the investigation report itself as "I do not believe it is of importance to the issues in dispute in the judicial review and it contains sensitive information." However he goes on to say that he met with the PPS on 14 April 2016 and that the PPS confirmed to him that having reviewed the investigation report they had not identified sufficient evidence to charge or report any police officer for an offence in connection with the officer's investigation.

[28] At paragraph 7 Mr Holmes also says that it became clear during the course of the Operation Sutton investigation that none of the RUC officers who may have been impacted by the investigation were still serving police officers. He says as such, I did not prepare a memorandum for the appropriate authority in terms of the Police (Northern Ireland) Act 1998.

[29] Attached to this affidavit is a letter to the Public Prosecution Service dated 17 September 2015. This states, *inter alia*:

> "The Police Ombudsman has now concluded investigation of public complaints relating to the conduct of police officers in the context of murders at the Heights Bar, Loughinisland on Saturday, 18 June 1994.
>
> I attach a comprehensive investigation/file in respect of the investigation (our Operation Sutton) on the basis of which the Police Ombudsman intends to publish a public statement in late November/early December of this year. I also attach a report on policing associated with the importation of a large shipment of firearms to Northern Ireland by Loyalist paramilitaries in late 1987 (our Operation Boston). This is relevant to Loughinisland as the assault rifle (a VZ58) used in the murders is believed to have originated in the 1987 shipment.

While I do not believe either Operation Sutton or Operation Boston have identified evidence that would support submission of a file for direction to the PPS in relation to a specific, identifiable officer, our enquiries have revealed what would be better described as significant concerns in respect of disciplinary and/or corporate matters for the RUC which will be detailed in the public statement. However I would be

grateful for your views as to whether you are satisfied, on the basis of the evidence presented in the attached files with this assessment."

Evidence filed by the notice party

[30] Mr Aiden O'Toole has filed an affidavit on behalf of the notice party. This is dated 24 October 2017. In his affidavit Mr O'Toole explains that on 18 June 1994 he was 26 years old and working in his father's bar which was the Heights public bar where the massacre occurred in Loughinisland. He describes the events in evocative detail. He says that all of the deceased were known to him and were friends with him. He says he was injured when he sustained a gunshot wound and a bullet has lodged in his kidney and is still there. He says that he continues to suffer the psychological effects of that evening.

[31] This affidavit then describes the reaction to the first Police Ombudsman report and ensuing events from paragraph 8 as follows:

> "The families of the deceased and the injured were deeply disappointed by the outcome of the first PONI investigation. I myself was devastated by the findings.
>
> We consider the section 62 statement published by the former Ombudsman to be deeply flawed and a challenge was brought by the late Mrs Bridget Green (widow of Barney Green) who was shot dead in the attack by way of judicial review to quash that report. I supported that challenge.
>
> The publication of the section 62 statement following Mr Hutchinson's investigation into the complaints allowed us to see the facts he had established, the tests and standards he had applied and the conclusions he had reached in relation to the complaints made.
>
> The publication of that statement allowed us to consider whether or not there were errors in the Ombudsman's conclusion or in the process by which he reached those conclusions. Without such a statement the Ombudman's reasons for his conclusions would not have been transparent and the Loughinisland bereaved and injured could not have seen how the complaint had been considered. Nor would we have been in a position to seek legal advice

> on the conclusions reached which ultimately allowed us to challenge the statement and which led to its quashing.
>
> Similarly the statement published in 2016 allowed us to see precisely what the Ombudsman had considered, the conclusions he reached and the means by which he reached those conclusions."

[32] At paragraph 16, Mr O'Toole contends that both the Chief Constable and the Prime Minister unequivocally accepted the content of the 2016 statement. In this regard the applicant exhibits a letter received from the Prime Minister David Cameron addressed to the then local MP Margaret Ritchie. He refers to this letter which is dated 12 July 2016 and I replicate the operative part of the quotation from it as follows:

> "Dear Margaret
>
> Thank you for your letter of 15 June about the Police Ombudsman's report on the murders of Loughinisland on 18 June 1994. What happened was an act of unspeakable evil, for which there could be no possible justification. I personally want to pass on my heartfelt condolences and sympathies to those affected by this appalling atrocity. The Government accepts the Police Ombudsman's report and the Chief Constable's response and we take allegations of police misconduct very seriously. Where there is evidence of wrongdoing it must be pursued - everyone is subject to the rule of law. The Chief Constable has given his reassurance to both the families and the public that he has co-operated fully with the Ombudsman and that he will continue to do so if the Ombudsman determines to bring disciplinary or criminal proceedings against former police officers."

[33] This affidavit then also refers to the background of the setting up of the Police Ombudsman and in particular the Patten Commission in 1998. At paragraph 18 he says that he understands that the Ombudsman is held out by the State, both nationally and internationally, as a means by which the State's legal obligations, especially in terms of the various obligations flowing from Article 2 ECHR. He states at paragraph 19:

> "The results of my experience with the police complaints process is that I consider it essential for

> my confidence in the system but the Ombudsman is able to explain publicly his conclusions and complaints and how he reached them in appropriate cases."

[34] Mr O'Toole refers to the fact that that interest in the Ombudsman's Loughinisland investigation was not confined to those who were bereaved and injured by the attack or even those living in the immediate area of the attack. The affidavit states that there was considerable media and public interest in the outcome of the complaints made. Paragraphs 20 and 21 contain the following concluding comments:

> "Publication of a section 62 statement allowed all those with interest in the case, the complaints and the police complaints system to see how PONI had considered the complaints and his explanation for the conclusion reached.
>
> We waited a very long time for the publication of a statement which properly considered our complaints in the delay (which I do not attribute to the current Ombudsman Dr Maguire). It has been a source of much anxiety for me and for others who were bereaved or injured in the attack in the Heights bar in June 1994. The uncertainty caused by these proceedings has just added to that anxiety and has meant we are again in a state of limbo in relation to our position."

Legislative context

[35] The Police (Northern Ireland) Act 1998 is the relevant legislation provision. A number of sections of this Act were emphasised as follows:

> **"Section 51 – The Police Ombudsman for Northern Ireland**
>
> (1) For the purposes of this Part there shall be a Police Ombudsman for Northern Ireland.
>
> (2) The person for the time being holding the office of Police Ombudsman for Northern Ireland shall by that name be a corporation sole.

(3) Schedule 3 shall have effect in relation to the Police Ombudsman for Northern Ireland (in this Part referred to as the Ombudsman).

(4) The Ombudsman shall exercise his powers under this Part in such manner and to such extent as appears to him to be best calculated to secure—

(a) the efficiency, effectiveness and independence of the police complaints system; and

(b) the confidence of the public and of members of the police force in that system.

(5) The Independent Commission for Police Complaints for Northern Ireland is hereby abolished.

52 Complaints – receipt and initial classification of complaints.

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

(a) be made to the Ombudsman; or

(b) if made to a member of the police force, the (Board) and (the Director) or the (Department of Justice) be referred immediately to the Ombudsman.

(2) Where a complaint—

(a) is made to the Chief Constable; and

(b) appears to the Chief Constable to be a complaint to which sub-section (4) applies,

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

(3) The Ombudsman shall—

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

(b) determine whether it is a complaint to which sub-section (4) applies.

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

(5) Sub-section (4) does not apply to a complaint in so far as it relates to the direction and control of the police force by the Chief Constable.

(6) Where the Ombudsman determines that a complaint made or referred to him under paragraph (1) is not a complaint to which sub-section (4) applies, he shall refer the complaint to the Chief Constable, the (Board), (the Director) or the (Department of Justice) as he thinks fit and shall notify the complainant accordingly.

(7) A complaint referred under sub-section (6) shall be dealt with according to the discretion of the Chief Constable, the (Board), (the Director) or the (Department of Justice) (as the case may be).

(8) Subject to sub-section (9), where the Ombudsman determines that a complaint made or referred to him under sub-section (1) is a complaint to which sub-section (4) applies, the complaint shall be dealt with in accordance with the following provisions of this Part; and accordingly references in those provisions to a complaint shall be construed as references to a complaint in relation to which the Ombudsman has made such a determination.

(9) If any conduct to which a complaint wholly or partly relates is or has been the subject of disciplinary or criminal proceedings, none of the following provisions of this Part shall have effect in relation to the complaint insofar as it relates to that conduct.

(10) In the case of a complaint made otherwise than as mentioned in sub-section (2)(a), the Chief Constable shall, if so requested by the Ombudsman,

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

54 Complaints – formal investigation

(1) If—

(a) It appears to the Ombudsman that a complaint is not suitable for informal resolution; or

(b) A complaint is referred to the Ombudsman under section 53(6),

the complaint shall be formally investigated as provided in sub-section (2) or (3).

(2) Where the complaint is a serious complaint, the Ombudsman shall formally investigate it in accordance with section 56.

(3) In the case of any other complaint, the Ombudsman may as he thinks fit—

(a) formally investigate the complaint in accordance with section 56; or

(b) refer the complaint to the Chief Constable for formal investigation by a police officer in accordance with section 57.

56 Formal investigation by the Ombudsman

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

(1A) Where an investigation is authorised by virtue of section 85 (read with section 86A) of the Criminal Justice Act 2003 (investigation of the commission of certain offences by persons acquitted), the Ombudsman shall appoint an officer of the Ombudsman to conduct the investigation.

(2) The (Department of Justice) may by order provide that any provision of the Police and Criminal Evidence (Northern Ireland) Order 1989 which relates to investigation of offences conducted by police officers (within the meaning of that Order) shall apply, subject to such modifications as the Order may specify, to investigations under this section conducted by persons who are not police officers (within the meaning of that Order).

(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 and the adjacent United Kingdom territorial waters; and sub-section (3) of section 32 of the Police (Northern Ireland) Act 2000) applies for the purposes of this sub-section as it applies for the purposes of sub-section (2) of that section.

(4) Section 66 applies to a person to whom sub-section (3) applies as it applies to a constable.

(5) A person to whom sub-section (3) applies shall not be regarded as in police service for the purposes of—

(a) Article 145 of the Trade Union and Labour Relations (Northern Ireland) Order 1995; or

(b) Article 243 of the Employment Rights (Northern Ireland) Order 1996.

(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.

58 - Steps to be taken after investigation – criminal proceedings

(1) The Ombudsman shall consider any report made under section 56(6) or 57(8) and determine whether the report indicates that a criminal offence

may have been committed by a member of the police force.

(2) If the Ombudsman determines that the report indicates that a criminal offence may have been committed by a member of the police force, he shall send a copy of the report to the Director together with such recommendations as appear to the Ombudsman to be appropriate.

(3) Where a report is sent to the Director under sub-Section (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.

58A - Steps to be taken after investigation – mediation.

59 – Steps to be taken after investigation disciplinary proceedings.

(1) Sub-Section (1B) applies if—

(a) The Director decides not to initiate criminal proceedings in relation to the subject matter of a report under section 56(6) or 57(8) sent to him under section 58(2); or

(b) Criminal proceedings initiated by the Director in relation to the subject matter of such a report have been concluded.

(1A) Sub-Section (1B) also applies if the Ombudsman determines that a report under section 56(6) or 57(8) does not indicate that a criminal offence may have been committed by a member of the police force and—

(a) he determines that the complaint is not suitable for resolution through mediation under section 58A; or

(b) he determines that the complaint is suitable for resolution through mediation under that section but—

(i) the complainant or the member of the police force concerned does not agree to attempt to resolve it in that way; or

(ii) attempts to resolve the complaint in that way have been unsuccessful.

(1B) The Ombudsman shall consider the question of disciplinary proceedings.

(2) The Ombudsman shall send the appropriate disciplinary authority a memorandum containing—

(a) his recommendation as to whether or not disciplinary proceedings should be brought in respect of the conduct which is the subject of the investigation;

(b) a written statement of his reasons for making that recommendation; and

(c) where he recommends that disciplinary proceedings should be brought, such particulars in relation to the disciplinary proceedings which he recommends as he thinks appropriate.

(2A) In a case mentioned in sub-section (1A)(b), the Ombudsman shall, in considering the recommendation to be made in his memorandum, take into account the conduct of the member of the police force concerned in relation to the proposed resolution of the complaint through mediation.

(3) No disciplinary proceedings shall be brought by the appropriate disciplinary authority before it receives the memorandum of the Ombudsman under sub-section (2).

60A - Investigations into current police practices and policies

(1) The Ombudsman may investigate a current practice or policy 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.

62 Statements by Ombudsman about exercise of his functions

The Ombudsman may, in relation to any exercise of his functions under this Part, publish a statement as to his actions, his decisions and determinations and the reasons for his decisions and determinations.

[36] I have also been referred to various regulations:

"The RUC (Complaints etc) Regulations 2001

Regulation 5(1) provides that:

Subject to regulations 6 and 10, the requirements for a complaint received under section 52(1) of the 1998 Act to be dealt with in accordance with the provisions of Part VII of the 1998 Act shall be:

(1) It is made by, or on behalf of, a member of the public.

(2) It is about the conduct of a member which took place not more than 12 months before the date on which the complaint is made or referred to the Ombudsman under section 52(1) and … a statement has not been issued in respect of the disciplinary aspects of the investigation.

Regulations 6(1)(2)(4) provide for exceptions to allow for historic complaints if pursuant to regulation 6(1) and (2) the Ombudsman "believes that a member may

> have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings."

The Police Powers for Designated Staff (Complaints and Misconduct) Regulations (Northern Ireland) 2008/242 - Compensation for Complainants

[37] These regulations were made pursuant to the provisions of the Act after consultation with all relevant bodies. Regulation 22 reads as follows:

> "(1) Where the Ombudsman is satisfied that a complaint about the relevant conduct of a designated person has been substantiated, and that, as a result of the conduct complained of, the complainant has suffered visible injury, considerable distress or inconvenience, or measurable financial loss, he may recommend to the Chief Constable that he should pay compensation to the complainant.
>
> (2) The sum recommended for compensation shall not exceed that payable in the small claims court.
>
> (3) It shall not be disclosed in any criminal or misconduct proceedings or under regulation 32 that compensation has been recommended or paid."

The arguments presented by the parties

[38] All counsel presented very comprehensive and detailed written submissions. I have considered these submissions along with the oral submissions made. This section is but a summary of the arguments I have heard which were impressively researched and economically advanced before me.

[39] Mr McMillen QC who appeared on behalf of the applicants made five core points which I summarise as follows:

(i) Mr McMillen argued that the defining statute refers to specific outcomes after investigation. As such he made the case that the Ombudsman went beyond remit by making a series of final determinations in this case about individual actions of members of the police force and the police force as a corporate body.

(ii) Mr McMillen relied on an interpretation of section 62 by highlighting the fact that whilst the Ombudsman may publish a statement as to his

actions that must be as the statute says in relation to any exercise of his functions under this part.

(iii) Mr McMillen relied on the case of *Martin* [2012] NIQB 89 as support for the proposition that the Ombudsman is entitled to exercise discretion as to how to exercise his functions but not discretion as to how to extend his function. As such the argument made by Mr McMillen was that in the absence of a recommendation for criminal and disciplinary proceedings the Ombudsman had no function to comment on matters which were in effect in the nature of determinations in relation to criminal and disciplinary proceedings.

(iv) Mr McMillen accepted that the headline point in this case, namely collusion, does not in itself comprise a criminal offence but he made the case that it was in effect categorised as such by someone reading the report and that his clients were well known in the community and could easily be identified with the determination is made.

(v) Mr McMillen accepted that there was an obligation to give reasons notwithstanding the fact that the Ombudsman may not have recommended criminal or disciplinary proceedings. However he stated that the report itself went way beyond such a requirement.

[40] Mr McGrory QC on behalf of the respondent Ombudsman made a number of points in reply as follows:

(i) Firstly in terms of the legislation Mr McGrory relied on the purpose of the legislation which he said was clearly articulated in section 51(4). In particular he referred to the fact that there is a mandatory requirement for the Ombudsman to exercise powers under this part in such manner and to such extent as appears to him best calculated to secure firstly efficiency, effectiveness and independence of the police complaints system and secondly, confidence of the public and of the members of the police force in that system.

(ii) Mr McGrory made the point that given the extent of this investigation, the fact that it was clearly within the public domain and of significant public interest there was an obligation on the Ombudsman to give public reasons for his determination.

(iii) Mr McGrory relied on the regulation 22 power to award compensation if claims were substantiated as support for the proposition that the statutory purpose was not as strictly limited as argued by the applicant's to a determination of criminal or disciplinary proceedings.

(iv) Mr McGrory made the point that there was no rationality challenge brought against the Ombudsman.

(v) Mr McGrory relied on the fact that the Office of the Police Ombudsman has an important purpose and following from the case of *Barnard* that is set in the context of the State satisfying Article 2 obligations.

[41] Ms Doherty QC on behalf of the notice party made three main points which she contended were of considerable importance in this case.

(i) Ms Doherty enjoined the court not to lose sight of the context of this case, the very serious nature of the case, the very high public interest in this case and the investment in the Police Ombudsman's Office to investigate it. She said that the statute should be interpreted in a broad manner bearing in mind context.

(ii) In her written argument Ms Doherty drew upon the foundations of the Office of the Police Ombudsman flowing from the Hayes Report, the Patton Report and the Belfast Agreement of 1998. She said these were important circumstances framing this piece of legislation.

(ii) Ms Doherty made the point that it is not in every case that a section 62 public statement or report is provided but this was an appropriate case for that course to be utilised.

Consideration

[42] At the outset I stress that the function of this court is supervisory. This is not an appellate court. It is not the function of the court to substitute its own view or undertake a fact finding exercise. Rather the court is concerned with reviewing public law actions on traditionally defined grounds i.e. procedural fairness, rationality or lawfulness. The applicants have not mounted any rationality challenge although they say that they dispute some facts. Neither have they argued that the report is vitiated by material error of fact or law. I note that the PSNI did not challenge the public statement. The success of the procedural challenge has also led to a significant alteration in this case. The only question is whether or not the Ombudsman exceeded his powers. This is framed as a *vires* challenge and is contained in the revised Order 53 Statement.

[43] In reaching my conclusion I must look to the statutory language, Parliamentary intention and the context of the case. I am also conscious that since its inception PONI has completed many other investigations and issued reports similar to that at issue in this case. Various examples have been highlighted in the affidavit evidence filed by the Ombudsman. These statements have involved cases when complaints are substantiated and also those where complaints are not substantiated

against the police. They involve some high profile cases. Of course, that fact does not automatically validate the Ombudsman's approach in this particular case. However, it follows that the outcome of this case has implications for the work that has been undertaken over the years and the future role of PONI.

[44] The subject matter of this case is tragic involving as it does the murder of innocent civilians during a dark period of our history known as "The Troubles." That is a history which involves many unsavoury features. These include the fact that terrorists committed many indiscriminate killings of innocent civilians. Collusion is another feature of the historical landscape. Whilst this term denotes sinister connections involving State actors it is not a criminal offence in itself. It has also been notoriously difficult to achieve a universal, accepted definition. In this case the definition adopted was that of Judge Smithwick which frames the concept in the broadest sense emphasising that it includes legal and moral responsibility. Notwithstanding the definitional challenges, this is a clearly an issue of the utmost gravity. Also, where collusion is suspected there are evident investigative difficulties and sensitivities. These impediments are formidable however it cannot be said that they obviate the need to try to establish the truth about such matters given the high political and societal stakes.

[45] In common with others, the Loughinisland families have sought to establish the truth about events surrounding the deaths of their loved ones. This is particularly important to them as no persons have been brought to justice for what happened. As part of the process the Ombudsman was tasked to investigate the circumstances of these killings. It is clear that this process took considerable time and involved the consideration of a substantial body of material. It is also clear that while some relevant parties cooperated with the Ombudsman others did not.

[46] There are three elements to the applicants' case which I summarise as follows; that the Ombudsman exceeded powers in conducting the investigation (ground 3(a), that the Ombudsman's exceeded his powers by virtue of the substance of his report (ground 3(b) and that the Ombudsman wrongly made a statement about the police as a body corporate (ground 3(d). I now turn to these three arguments although slightly out of sequence given how the case progressed before me.

[47] Ground 3(a) concentrates upon the decision to commence and continue the complaint. The Ombudsman rightly points to the fact that the complaint itself was initiated many years ago. However, leaving the time issue aside, the applicants also complain that the Ombudsman did not have the requisite belief that a police officer had committed a criminal or disciplinary offence. Against this the Ombudsman has in his affidavit explained his belief at the relevant time that offences *may* have been committed. I accept the evidence which has been filed and is contained within the affidavit of Dr Maguire. I do not accept the assertion that the dominant intention was to report without any reference to the statutory outcomes. Such a statement is clearly defeated by the evidence of Dr Maguire and Mr Holmes who references the

liaison which took place with the PPS. In short, it is clear that the Ombudsman had the requisite belief upon which to base his investigation and that he was cognisant of the statutory outcomes. Accordingly ground 3(a) in the Order 53 Statement cannot succeed and I need not dwell any further upon it.

[48] The substance of the complaint raised three main issues namely the adequacy of the police investigation, potential collusion and Article 2 compliance. The complaint itself was not directed against a named individual however such a finding may of course be made after the forensic process has been completed. That is not the point here. Ground 3(d) in the Order 53 Statement effectively asserts that in the absence of a finding against an individual that the Ombudsman should not have issued a public statement which was directed against the RUC as a whole. This argument depends on the view taken of section 52 of the 1998 Act. Section 52(1) is framed to include the police force as a whole. Section 52(4) refers to the conduct of a member of a police force. Section 52(5) refers to a complaint of direction and control against the Chief Constable.

[49] If the applicants are right there is a gap when a complaint is about the conduct of members of the police force but is not actually a direction and control case. I am not convinced that such a gap was intended. I accept the argument made that such a complaint can lawfully proceed as it involves consideration of the actions of the police force made up as it is by individual members. Although not directly applicable to this case, I also draw some support for this view from the statutory imprimatur given to consideration of the police force as an entity in section 60A. I prefer the arguments made by the respondent in relation to this ground. I am not satisfied that the argument made under ground 3(d) is sustainable.

[50] The real focus of this case was the *vires* of the Ombudsman's public statement contained in ground 3(b) of the Order 53 Statement and it is to that I now turn. This type of challenge is summarised by *Wade & Forsyth,* 10th edition at 30-1 which states that "The simple proposition that a public authority may not act outside its powers (ultra vires) might fitly be called the central principle of administrative law." This text explains the application of the principle as follows:

> "Where the empowering Act lays down limits expressly, their application is merely an exercise in construing the statutory language and applying it to the facts. Thus if land may be taken by compulsory purchase provided that it is not part of a park, the court must determine in case of dispute whether the land is part of a park and decide accordingly. If the Act says "provided that in the opinion of the minister it is not a park" the question is not so simple. Reading the language literally, the court would be confined to ascertaining that the minister in fact held the opinion

> required. But then the minister might make an order for the acquisition of land in Hyde Park, certifying the opinion that it was not part of a park. It is essential to invalidate any malpractice of this kind, and therefore the court will hold the order to be ultra vires if the minister acted in bad faith or unreasonably or on no proper evidence. Results such as these are attained by the art of statutory construction. It is presumed that Parliament did not intend to authorise abuses, and that certain safeguards against abuse must be implied into the Act. These are matters of general principle, embodied in the rules of law which govern the interpretation of statutes. Parliament is not expected to incorporate them expressly in every Act that is passed. They may be taken for granted as part of the implied conditions to which every Act is subject and which the courts extract by reading between the lines. Any violation of them, therefore, renders the offending action, ultra vires."

[51] In determining this issue the first step is to look at the language and scheme of the Act and associated provisions. I pause to observe that this is a complaint about historic matters, outside the usual 12 month time limit for police complaints. That fact in itself highlights the unique challenges faced by investigative bodies in Northern Ireland. The language of section 51(4) clearly affords the Ombudsman a wide discretion in the exercise of his powers. It contains a mandatory requirement that the Ombudsman shall exercise those powers *in such manner* and *to such extent* as appears to him to be best calculated to serve the aims contained in section51 (4) (a) and (b).

[52] Under the Act section 52 is the gateway provision. In this case it was accepted that a complaint was received by a member of the public and that the PONI therefore invoked the provision of section 52(8) to take the matter forward. This was not handled as a complaint under section 52(6) which deals with matters relating to the direction and control of the police force by the Chief Constable. It seems clear that this complaint was not suitable for informal resolution and so section 53 does not apply. Section 54 is the operative provision and in particular there is a mandatory requirement under section 54(2) upon the PONI to formally investigate a complaint in accordance with section 56. Section 56 sets out the mechanics of the investigative process in terms of the appointment of an investigator and the submission of a report at the conclusion of the investigation – section 56(6).

[53] Section 58 refers to the steps to be taken after investigation. The first question for PONI is whether the report indicates that a criminal offence has been committed by a member of the police force. If so he must send a copy of the report to the

Director with such recommendations as appear to PONI to be appropriate. That is the process if PONI considers a criminal offence may have been committed. However, it is not the end of the PONI's role as there are further steps which PONI may take if a criminal complaint is not pursued. Section 58 refers to mediation which is not relevant here. Section 59 refers to disciplinary proceedings and is a mandatory requirement under section 59(1)(b). In those circumstances PONI is required to send a memorandum containing his recommendations, his reasons, particulars, see 59(2)(a)(b)(c). Regulation 22 also refers to the Ombudsman's substantiation of a complaint in circumstances where compensation may be recommended. This overall view of the scheme illustrates the evaluative nature of this process.

[54] Section 60A affords the PONI discretion to investigate *current* practices and policies, subject to a notification requirement under section 60A(3). Section 61 requires PONI to report on any matters coming to PONI's attention under this Part to which the Ombudsman considers that attention should be drawn in the public interest.

[55] Section 62 provides that an Ombudsman *may* issue a public statement. This may happen in relation to *any exercise of his functions*. There are two aspects to this as I see it. The first is that the Ombudsman may set out his actions, decisions, determinations and the second aspect is in relation to the provision of reasons. The question here is what exercise of functions means. This has generated an interesting debate between the applicants and the respondent. The applicants say that the power to publish a report is not itself a function. The respondent says that this is a power which must be exercised in keeping with the statutory objectives contained in section 51(4). The applicant also relies upon section 77(1) of the Police (Northern Ireland) Act 2000 which provides that functions includes powers. I do not offer a concluded view on these arguments as I adopt a more straightforward approach It is a function of the Ombudsman to investigate complaints. He also has power to refer complaints for criminal or disciplinary disposal and he can take other defined actions. But it would be perverse to say that he cannot report on his investigation in certain circumstances if he sees fit. The wording of section 62 is framed in sufficiently wide terms to facilitate this. It refers to *actions, decisions* and *determinations* and the reasons for same.

[56] I now turn to the legal authorities that have been referred to me. In *Re X* [2007] NIQB 111 is a decision of Gillen J whereby he allowed a challenge to an Ombudsman decision not to investigate. That is obviously a different context and so while the ruling refers to the general statutory structure it does not take me much further. *Re Martins Application* 2010 NIQB 89 also deals with an alleged failure to investigate. This successful challenge was fact specific as Treacy relies on the delay and chronic underfunding of the office at that time upon which to base his decision. For present purposes Treacy J does however point to the wide discretion vested in

the Ombudsman in the conduct of his business at paragraph 28 when he stated as follows:

> "The Police Ombudsman is independent and has been granted a wide statutory discretion in respect of the exercise of his powers under Pt V11 of the 1998 Act by section 51(4). In *R v Parliamentary Comr for Administration ex p Dyer* [1994] 1 All ER 375 Simon Brown LJ referred to the width of the discretion as being "strikingly clear."

[57] The applicants place considerable emphasis upon a decision delivered by Sir Colin Rimer sitting in the Court of Appeal in England & Wales in *R (Chief Constable of West Yorkshire) v IPCC* [2015] PTSR. In that case the claimant was the Chief Constable and he sought judicial review of a report written by the Independent Police Complaints Commission ("IPCC"). The case relates to a claim made against a police officer about his behaviour during an arrest of a man who was allegedly driving his vehicle at speed in the early hours of a morning. What ensued was an investigation subject to "special requirements" as it was considered that an officer may have committed a criminal offence and or behaved in a manner which might justify the bringing of disciplinary proceedings. The case report contains a detailed explanation of the statutory scheme. The argument was that the statements made in the report exceeded the ambit by stating that an arrest as unlawful rather than there was a case to answer.

[58] The challenge was successful not least it seems to me because of the particular character of a "special requirements" investigation. This is explained at paragraph 50 of the ruling as follows;

> "Having certified pursuant to paragraph 19B of Schedule 3 to the 2002 Act that the investigation was one subject to special requirements they ought also to have known (and para 104 of their report indicates that they did) that their report had to indicate their opinion as to whether there is a case to answer in respect of misconduct or gross misconduct or whether there is a case to answer (see regulation 14E of the 2004 Regulations). A case to answer in that context means a case to answer before a criminal court and/or a disciplinary tribunal. It is, one might think, obvious that if the investigators task is to report their opinion as to whether there is such a case answer before another tribunal, it is not their function to purport to decide the very question or questions raised by such a case."

[59] This case was understandably the main authority raised in support of the applicant's arguments hence I have considered it carefully. Having done so, it is obvious that there are differences in the statutory schemes at play. In particular, under the Police Reform Act 2002 the Regulations made clear what was permitted by virtue of a special requirements investigation. There is also no equivalent provision to section 62. However, and more fundamentally this case is set in a different contextual background involving as it does a specific allegation was directed against a specific individual. This is far removed from a complaint about historical matters during the Troubles in Northern Ireland. In that case the court also decided that the Convention was not engaged. Accordingly I consider that this case distinguishable is from the situation I am dealing with.

[60] I have also been referred to a number of cases which deal with the application of human rights in this sphere and in particular Article 2 of the European Convention on Human Rights ("the Convention") - the right to life. In the case of *Barnard* [2017] NIQB 82 Treacy J refers to the fact that following the *McKerr* group of cases the UK Government set up measures to remedy identified breaches of the Article 2 procedural obligation to investigate suspicious deaths. He refers at paragraph [15] to the Joint Committee on Human Rights 7th Report of Session 2014/15 in the context of the establishment of the HET. However, these materials also refer to PONI reference at paragraph 3.3 of that report which states as follows:

> "The Government has adopted a number of general measures to give effect to these judgments, including reforms to the inquest procedure in Northern Ireland and the establishment of bodies to carry out investigations, including the Police Ombudsman of Northern Ireland and the Historical Enquiries Team (HET). The Committee of Ministers closed that supervision of a number of implementation issues as a result of these measures, but a number of outstanding issues remain …
>
> 3.4 The effective investigation of cases which are the legacy of the Troubles in Northern Ireland has proved a particularly intractable problem in practice because it is so intimately bound up with a much larger question of dealing with the past in a post conflict society. The process is established to provide the effective investigations which Article 2 ECHR requires, through the institutions of the Police Ombudsman and the HET has been beset with difficulties and have also been the subject of critical independence reviews which have called into

> question their compliance with the requirements of Article 2."

[61] During the course of the hearing there was no issue taken with the role of the Ombudsman in satisfying the obligations placed upon the State to facilitate effective investigations in compliance with the procedural obligation under Article 2. Of course, the Ombudsman has an obligation to act in a Convention compliant way as a public authority. Section 3 of the Human Rights Act 1998 also enjoins the court to ensure that legislation is interpreted in a Convention compliant way.

[62] Article 2 is cast in absolute terms as it enshrines a core value of the democratic societies making up the Council of Europe. The Court of Human Rights has also held that the procedural obligation under Article 2 requires that an effective and independent investigation is conducted. The procedural obligation includes the right to an independent, effective investigation which involves the next of kin where there is alleged involvement by state actors. This is an obligation of means not of result, however it is clear that any inefficiency in the investigation which undermines its ability to establish the circumstances of a death will risk falling foul of the required standard of effectiveness. The independence of PONI is critical in the satisfaction of this obligation. Also, the broad function of accountability and ventilation is supported by Strasbourg authority, see *El Masri v Macedonia* [2013] 57 EHRR 24,*Al Nashiri v Poland* [2015] 60 EHRR 16, *Jelic v Croatia* [2014] EHRR 601 and *Mocanu v Romania* [2015] 60 EHRR 19.

[63] In this vein I have been referred to the case of *Regina (Amin) v Secretary of State for the Home Department* [2003] UKHL 51 in which reference is made to this obligation to ensure an effective investigation where Article 2 is engaged. At paragraph [20] of this decision a number of important propositions are found including point (8) which reads:

> "While public scrutiny of police investigations cannot be regarded as an automatic requirement under Article 2 (*Jordan*) para [121], there must (*Jordan*), para [109] be a sufficient element of public scrutiny of the investigation or its results to secure accountability and practice as well as in theory. The degree of public scrutiny required may well vary from case to case."

[64] The Act must also be considered in context. *Bennion on Statutory Interpretation* 7th Edition refers to the legal, social and political context as follows:

> "In order to understand a statute fully the words must be construed in light of the legal, social and political context at the time at which it was passed.

> The courts are entitled to take judicial notice of much information relation to the context in which it was enacted. External aids may be used to shed light on that context. As Lord Steyn said in *R (Westminster City Council v National Asylum Support Service* when considering the use that may be made of explanatory notes:
>
> > 'The starting point that language in all legal text conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it'."

[65] The genesis of this legislation flows from the peace process in Northern Ireland. The creation of the Office of the Police Ombudsman for Northern Ireland came about as part of a considerable amount of consultation and as part of a process. As all the parties in this case have reflected the office was created following the Hayes Report in 1995 and is part and parcel of the political consensus that emerged in Northern Ireland leading up to the Belfast Agreement in 1998. In his report Dr Hayes recommended the creation of an Ombudsman whilst stressing the importance of independence and the duty to investigate complaints and report on the findings. The Hayes Report was followed by the Patten Commission Report in 1999. I draw in particular from paragraph 6.42 of the report as follows:

> "We cannot emphasise too strongly the importance of the Office of the Police Ombudsman in the future of policing arrangements proposed in this report. The institution is critical to the question of police accountability to the law, to public trust in the police and to the protection of human rights."

[66] As I understand the argument the applicants contend that the Ombudsman should really only issue a public statement when a statutory outcome is reached, ie a recommendation for criminal or disciplinary proceedings. In this case they say that the most the Ombudsman could report on is that he did not believe that any criminal or disciplinary charges were merited. To go further the applicants contend is to step outside of the statutory role. Primarily the applicants take issue with a statement of any substance when no statutory outcome is reached. I pause to observe that in mounting this argument the applicant's stress that they support the office of the Ombudsman and they understand his important purpose. However as Mr White has put it neutrally there is a purpose to the application which is "to obtain a definitive ruling from this court on the extent of the powers of the Ombudsman." I have no doubt that both applicants are well meaning in asking for this clarification.

[67] This is a legacy case, involving the death of six people in circumstances where serious questions have been raised about police conduct. There is an obligation to investigate such matters and a strong public interest to know the outcome. In such cases a statutory outcome may simply not materialise given the nature of such complaints, the fact that individual officers are dead or retired and the investigative and identification difficulties. In those circumstances, the utility of a public statement becomes all the more apparent and real. It is of course an opinion provided by the Ombudsman. However in my view it is an option which must be open to the Ombudsman in a particular case such as this to satisfy the statutory aims contained with section 51(4) and to evidence fulfilment of the Article 2 investigative obligation.

[68] I also note that the applicants have raised their Article 6 rights to a fair trial however I cannot accept that this argument leads to the applicants achieving the relief they seek under the *vires* umbrella. In my view this argument would have more traction if a specific complaint were made against an individual and in the context of a procedural challenge. It is of course correct that the Ombudsman must exercise his powers in a fair way. However, there are specific provisions within this legislative scheme whereby the provisions of PACE are applied. The significant procedural deficits that were highlighted in the first challenge have now been corrected.

[69] In any event this revised report does not contain a finding of either criminal or civil responsibility against any individual. The Ombudsman has removed personal criticisms and it should now be very clear that the report is not directed against the individual applicants.

[70] It follows from what I have said above that I am not attracted to the narrow view of the Ombudsman's function espoused by the applicants. In reaching this conclusion I have taken into account the statutory language and interpreted the legislation in light of the context in which it was enacted and in compliance with the Convention. However I do wish to comment briefly on two further matters by way of suggestion going forward.

[71] Firstly, I am concerned that in this case the interaction with the PPS only came to light during proceedings. It was entirely proper of PONI to engage with the PPS before reaching a conclusion that there should not be a referral for criminal prosecution. However that matter should have found some expression in the public sphere. This is a failing which should ideally be clarified by way of additional statement. In future it would be helpful if an explanation is given of the fact that the statutory outcomes are not met.

[72] Secondly I detect some criticism of the language used by the PONI in the public statement. I am not of a mind to step into the territory of critiquing modes of

expression in exercising my supervisory function. However, it is obvious that matters such as this need to be presented in a very careful way given the various parties who are affected.

[73] Drawing all of the above together I am of the view that the applicants' arguments cannot prevail for the following reasons:

(i) The PONI is an independent office, tasked to investigate complaints; that involves an evaluative exercise.

(ii) It is too narrow a view that the investigative duty is concerned with crime and punishment alone. The literature which set up investigative bodies such as the HET also refers to the wider need to bring some resolution to families in circumstances such as this.

(iii) By virtue of the statutory regime there is no prohibition upon PONI issuing a public statement under section 62 in circumstances where no criminal complaint or disciplinary complaint is made.

(iv) This is not a free standing power. It is related to the investigation of a complaint.

(iv) It is a matter of discretion for the Ombudsman in a particular case and the court should be slow to interfere with that discretion.

(v) It would offend against the statutory aims of PONI contained in section 51(4) if a public comment could not be offered on events such as this which are in the public domain and of high importance.

(vi) Section 62 is part of the PONI's function which is necessary to satisfy the statutory aims including public confidence in the process.

(vii) It is contrary to the intention of the legislation to limit the role of PONI in the manner contended for.

(viii) The revised statement by PONI does not constitute a criminal or disciplinary finding against any individual.

(ix) In this case the applicants and indeed the PSNI were consulted prior to issue of the draft report and any procedural failings *vis a vis* the applicants have been corrected.

(x) In the unique situation presented by the Troubles it is appropriate that bereaved families should have the benefit of an independent investigative report such as this particularly where no prosecutions have been brought.

(xi) If the applicants' case was right and the PONI's role was restricted there would be a potential breach of the investigative obligation placed upon the State by virtue of Article 2.

Conclusion

[74] Accordingly, I do not consider that the applicants have established a valid case in relation to any of the grounds advanced within the Order 53 Statement that I was asked to adjudicate upon. The application will be dismissed. I will hear from the parties as to costs.