

Judicial Communications Office

29 November 2018

COURT DELIVERS JUDGMENT ON LOUGHINISLAND REPORT

Summary of Judgment

Mrs Justice Keegan, sitting today in the High Court in Belfast, dismissed an application by retired police officers challenging the Police Ombudsman's report into the Loughinisland massacre. She held that the Ombudsman had not acted outside his statutory powers.

Thomas Ronald Hawthorne and Raymond White brought judicial review proceedings challenging the public statement issued by the Police Ombudsman for Northern Ireland ("the PONI") on 9 June 2016 arising out of the second investigation of the murders at the Heights Bar, Loughinisland on 18 June 1994¹. The Executive Summary of the PONI's statement said the investigation had sought to answer the families' question which was phrased as: "Why has no one been held accountable for the murder of their loved ones" and stated:

"Let there be no doubt, the persons responsible for the atrocity at Loughinisland were those who entered the bar on this 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 and the PSNI 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."

The amended PONI statement concluded 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."

Mr Hawthorne ("the first applicant") contended that, as the RUC's Sub-Divisional Commander for Downpatrick Sub-Division at the time of the murders, he was readily identifiable as the person to whom the criticisms and negative findings of the report applied. He said this has caused distress, anxiety and upset to him and his family. Mr White ("the second applicant") brought the application as Chairman of the Retired Police Officers Association on its behalf and on behalf of its members.

¹ Mr Hawthorne also contended that he was denied the procedural fairness protections guaranteed to him by the common law in that he should have had the opportunity to make representations on the draft statement before publication. On 21 December 2017, Mr Justice McCloskey held that the "severe public criticism described by Mr Hawthorne was not justified". The PONI issued a statement which said his office wanted "to make it abundantly clear that its determination of collusion" did not apply to Mr Hawthorne and, subsequently, amended the report to remove criticism of the first applicant including the finding that "collusion involved "catastrophic failures in the police investigation" and "the destruction of exhibits and documents". The conclusion that collusion was a "significant feature" of the attack was not removed.

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Both applicants contended that the PONI, in making the statement, had exceeded his statutory powers under Part VII of the Police (Northern Ireland) Act 1998 (“the 1998 Act”).

Arguments Presented by the Parties

Counsel for the applicants made the following core points:

- The PONI went beyond his remit under the 1998 Act 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;
- Whilst the PONI may publish a statement as to his actions under s. 62 of the 1998 Act that must be in relation to an exercise of his functions;
- In the absence of a recommendation for criminal and disciplinary proceedings, the PONI had no function to comment on matters which were in effect in the nature of determinations in relation to criminal and disciplinary proceedings;
- While the term “collusion” does not in itself comprise a criminal offence it could be categorised as such by someone reading the report and his clients would easily be identified with the determination as made; and
- The PONI’s report went way beyond the obligation on him to give reasons notwithstanding the fact that he had not recommended criminal or disciplinary proceedings.

Counsel for the PONI made the following points in reply:

- Section 51(4) of the 1998 Act is a mandatory requirement for the PONI to exercise powers 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;
- 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 PONI to give public reasons for his determination;
- Regulation 22 of the Police Powers for Designated Staff (Complaints and Misconduct) Regulations (Northern Ireland) 2008 (“the 2008 Regulations”) provides the PONI with a power to recommend to the Chief Constable that he should pay compensation to a successful complainant. This was support for the proposition that the statutory purpose of the PONI was not as strictly limited as argued by the applicants.
- There was no challenge to the rationality of the PONI’s report and that the Office of the PONI has an important purpose in the context of the State satisfying Article 2 ECHR obligations.

Consideration

Mrs Justice Keegan stressed that the function of the court is supervisory and is only concerned with reviewing actions on traditionally defined grounds ie procedural fairness, rationality or lawfulness. The only question in these proceedings was whether or not the PONI acted *ultra vires* exceeding the powers vested in him under Part VII of the 1998 Act. In considering this question, the judge said she would look to the statutory language, Parliamentary intention and the context of the case. She said she was also conscious that the PONI has completed many other investigations and issued reports without challenge and that the outcome of this case has implications for the work that has been undertaken over the years and the future role of the PONI.

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The judge summarised the three elements to the applicants' case as follows:

- That the PONI exceeded his powers in conducting the investigation (ground A);
- That the PONI exceeded his powers by virtue of the substance of his report (ground B); and
- That the PONI wrongly made a statement about the police as a body corporate (ground C).

Ground A concentrates upon the decision to commence and continue the complaint. Mrs Justice Keegan said it was clear that the PONI had the requisite belief at the relevant time that offences may have been committed and that this was sufficient belief upon which to base his investigation. Accordingly ground A of the challenge could not succeed.

Ground D asserts that in the absence of a finding against an individual, the PONI should not have issued a public statement which was directed against the RUC as a whole. Mrs Justice Keegan said this argument depends upon the view taken of s. 52 of the 1998 Act. The applicants claimed there is a gap in the legislation. The judge accepted the argument 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. She was not satisfied that the argument under ground D was sustainable.

Ground B, the *vires* of the PONI's public statement, was the focus of the case. Mrs Justice Keegan firstly looked at the language and scheme of the 1998 Act and the associated provisions. She said that s. 51(4) clearly affords the PONI a wide discretion in the exercise of his powers and contains a mandatory requirement that he shall exercise those powers in such manner and to such extent as appears to him to be best calculated to serve the aims of the legislation. Section 58 refers to the steps to be taken after investigation. At this time, 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, the PONI must send a copy of the report to the Director of Public Prosecutions ("DPP") with such recommendations as appear to PONI to be appropriate. Sections 58 and 59 refer to further steps which PONI may take if a criminal complaint is not pursued (mediation or disciplinary proceedings).

Section 62 provides that the PONI may issue a public statement in relation to "any exercise of his functions". The applicants contended that the power to publish a report is not itself a function while the PONI says that this is a power which must be exercised in keeping with the statutory objectives in s. 51(4). Mr Justice Keegan considered the solution to be more simplistic:

"It must be a function of the PONI 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. The wording of s. 62 is framed in sufficiently wide terms to facilitate this."

Mrs Justice Keegan then considered the case law to which she had been referred. She said this case was set in a different contextual background being a complaint about historical matters during the Troubles. The judge was also referred to cases dealing with the application of Article 2 of the ECHR. The procedural obligation under Article 2 includes the right to an independent, effective investigation which involves the next of kin where there is alleged involvement by state actors. The judge said 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. She commented that the independence of PONI is

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critical in the satisfaction of this obligation as the scrutiny of police investigations provides a sufficient element of public scrutiny to secure accountability.

Mrs Justice Keegan also considered the 1998 Act in context. She said the legislation flows from the Belfast Agreement and as part of the peace process. She referred to the Patten Commission Report in 1999 which stated that the PONI is critical to the question of police accountability to the law, to public trust in the police and to the protection of human rights.

The applicants contended that the PONI should only issue a public statement when a statutory outcome is reached, ie a recommendation for criminal or disciplinary proceedings. They said that the most the PONI could report on is that he did not believe that any criminal or disciplinary charges were merited and to go further was to step outside of the statutory role. Mrs Justice Keegan observed that in mounting this argument the applicants stress that they support the Office of the PONI and they understand his important purpose. She said she had no doubt that both applicants are well meaning in asking for this clarification:

“However this is 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.”

Mrs Justice Keegan commented that a statutory outcome may simply not materialise in many historical legacy cases given the nature of such of complaints, the fact that individual officers are dead and retired and the investigative and identification difficulties. She said that in those circumstances, the utility of a public statement becomes all the more apparent and real, noting that “it is of course an opinion”. She added that it is appropriate in a case such as this to satisfy the statutory aims contained within s. 54(1) of the 1998 Act and to evidence fulfilment of the Article 2 investigative obligation.

Mrs Justice Keegan said she was concerned that in this case the interaction with the PPS only came to light during the proceedings. She commented that while 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, this matter should have found some expression in a public statement. The judge also noted some criticism of the language used by the PONI in the public statement but said she was not minded to step into the territory of critiquing modes of expression in exercising her supervisory function. Mrs Justice Keegan also noted that the applicants have raised their Article 6 rights to a fair trial but felt 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. The procedural deficits that were highlighted in the first challenge have been corrected. The applicants had the opportunity to comment upon the matters raised. 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.”

Conclusion

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Mrs Justice Keegan concluded 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 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 s. 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.
- (v) It is a matter of discretion for the PONI in a particular case and the court should be slow to interfere with that discretion.
- (vi) It would offend against the statutory aims of PONI contained in s. 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.
- (vii) S. 62 is part of the PONI's function which is necessary to satisfy the statutory aims including public confidence in the process.
- (viii) It is contrary to the intention of the legislation to limit the role of PONI in the manner contended for.
- (ix) The statement by PONI does not constitute a criminal or disciplinary finding against any individual.
- (x) 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.
- (xi) 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.
- (xii) 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.

The application challenging the PONI's vires to make the public statement in this case was dismissed.

NOTES TO EDITORS

This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

If you have any further enquiries about this or other court related matters please contact:

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