Neutral Citation Number: [2022] EWHC 446 (Admin)

Case No: CO/4833/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 March 2022

Before:

MR JUSTICE RITCHIE

- -

In the matter of an application for judicial review
Between :

The Queen on the application of

SABRINA JAN

Claimant

-and-

THE COMMISSIONER OF POLICE FOR THE METROPOLIS

Defendant

Darryl Hutcheon (instructed by Clyde Solicitors) for the Claimant
Carin Hunt (instructed by the Met DLS) for the Defendant

Hearing date: 16 February 2022

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives and BAILII by email. The date of hand-down is deemed to be as shown above.

Mr Justice Ritchie:

The parties

[1] The Claimant was the resident of a flat in a block in London SW1 (the Block) under a contract signed on 18 September 2017. She had two children, a daughter aged 14 and a son, who was an adult aged 23 at the time. She took possession on 15th September 2017.

[2] The Defendant is the Commissioner for the Metropolitan Police who provide policing for the area where the Claimant lived.

The background to the judicial review

[3] In the first year of her occupation of her 9th floor flat in the Block the Claimant made two separate complaints to the Defendant of being harassed by a neighbour called Barry Catchpole (BC) who lived next door. For BC to get to his front door from the lift he had to walk along an open balcony corridor past the Claimant's front windows. About 6 months after she moved in the Claimant decided that she wished to be moved into another flat and asked for that move, but the landlord's agents (Citywest Homes) did not accept her assertions of antisocial behaviour by BC and required to see the police CAD numbers relating to her complaints before they would reconsider moving the Claimant. The police officer dealing with the Claimant in September 2017 and September 2018 never created CAD numbers for her complaints considering the substance thereof not to reach the threshold for recording a possible criminal offence on what he understood he had been told. In late October 2018 the Claimant started a complaint against the constable concerned alleging that he had failed to record her complaints properly or at all and misrepresented her complaints to her GP and wrongfully gave the GP his opinion that she was paranoid. The local police complaints resolution service upheld one of the complaints and the other two were dismissed. The Claimant appealed.

[4] By a decision made on 23 September 2020 by Sergeant Graham Smith (SGS) of the Appeal Unit (AU) of the Directorate of Professional Standards, the Claimant's appeal from the local resolution was dismissed. The Claimant seeks to quash the dismissal decision on the single ground that the AU failed to take into account part of the written evidence which she put before it, namely 32 documents set out as an appendix to her letter/witness statement provided by her for the appeal. I shall call these the "Appendix Documents".

Bundles

[5] I had before me two bundles: the agreed judicial review bundle and the agreed bundle of authorities.

The chronology of the complaints

[6] On 12.10.2018 the Claimant made a written complaint to the Independent Office for Police Conduct (IOPC) stating:

> "1. PC Malone failed to log and investigate our serious and persistent harassment complaint in September 2017.
>
> 2. PC Malone has failed to record facts stated to him accurately, misstated and misrepresented them to my doctors and others."

[7] In the body of her complaint the Claimant explained what had occurred. I summarise the relevant parts of her evidence in the complaint in the subparagraphs below.

a. **25 September 2017**
At midday on 25th September 2017, just after she had moved into the flat, she made a complaint at Belgravia Police station to PC Malone (PCM). She complained that BC:

- cornered and harassed visiting friends and children in the Block lift by warning them against watching TV and smoking on the open balcony;
- looked into her flat habitually through the front windows for long periods.

The Claimant described this as severe and persistent harassment. No assertion was made in the complaint that she reported to PCM that the harassment was racial.

b. PCM offered to speak to BC, the Claimant agreed and he did so a couple of days later. PCM then dropped in on the Claimant and told her that he had told BC to "lay off" and that BC would not bother her again. During that visit the Claimant disclosed to PCM what she described as her "anxiety and panic issues" along with details of the doctors and mental health consultants caring for her and described how badly this was affecting her.

c. **18 September 2018**
On this date PCM visited the Claimant again and she gave to him further complaints about events which had occurred over the year since her first complaint:

- In January 2018 a woman friend of BC had asked the Claimant's then 15-year-old daughter, whilst travelling in the lift with her, why the Claimant had called the police about him and suggested that BC was an important fellow and a patient of hers.
- The same woman friend of BC had rung the Claimant's doorbell at around 8pm one night in April 2018 and asked whether she knew where BC was because he was not answering his phone or door.
- On one occasion, when BC was drunk and standing at the bottom of the Block lift, he gestured to the Claimant and her daughter to get closer to him then held the lift door open for them to come in, they did not.
- BC stepped into the lift and held the door open for an Indian friend of the Claimant on another date.
- BC "followed" her visitors.

The Claimant told PCM that she had applied to register BC's antisocial behaviour with Citywest but that they would not do so without the CAD report from September 2017. (On the Citywest evidence in their contemporaneous emails that assertion was not wholly accurate, they had made their own assessment of her complaints as well and found them insufficient). The

Claimant asserted that she thought that BC was harassing her because she was Asian. PCM asked about the effect of this on the Claimant and how her anxiety was and if he should speak to anyone medical about her condition and she informed PCM that Dr Rubitel at the Gordon Hospital was her case manager for anxiety and panic. PCM left his phone number and email address to comfort the Claimant should anything worry her further.

d. 5th October 2018

On this date the Claimant obtained her medical records from her GP and having read them drew the conclusion that PCM had spoken to her GP (which was what she expected) but had misrepresented the facts of her complaints to the GP and provided an opinion on the Claimant's state of mind (that she was paranoid about her neighbour who had only nodded at the Claimant in a lift) which the Claimant considered to be "incorrect" and a "misstatement". PCM had also referred the Claimant to social services/children services.

[8] The AU referred these complaints for local resolution as it was empowered to do.

First local resolution - Sgt Angelo Corsini

[9] Sargeant Angelo Corsini (Corsini) investigated the complaint. By November 2018 he was aware that the Claimant had described the status of her complaint as "racially aggravated harassment".

[10] BC died in October or early November 2018. I do not know precisely when. In an email dated 6.11.2018 this fact was recorded by Corsini and communicated to the Claimant. Corsini therefore told the Claimant that the complaints against BC would not be investigated further.

[11] So, from November 2018 onwards, the purpose behind the complaints which the Claimant had raised against BC had disappeared. She had no need to move away from her flat in the Block based on BC being an alleged harasser and no need for the CAD numbers to support the move. The Claimant was safe from the perceived harassment by BC. However the Claimant did not withdraw the complaints against PCM.

[12] On 12.11.2018 Corsini issued the scope action plan for his investigation into the complaint and sent it to the Claimant. He informed the Claimant that he had received evidence from PCM, namely some Merlin reports about her complaints. He explained that this was a system for sharing information with other agencies – the NHS and Social Services. He gave the report numbers. He did not provide copies. He informed the Claimant how she could request them through a Public Access Office. He set out his plan to talk to PCM and review any information provided by the Claimant.

[13] The Claimant responded by email to Corsini apparently happy with the suggested action plan and approach and indicating she would seek the Merlin reports.

[14] The Claimant did not send to Corsini any of the Appendix Documents which she would later complain that SGS did not open or read.

[15] Corsini's decision was issued on 22.11.2018 and consisted of an apology that the Claimant had needed to complain and advice to the Claimant that Corsini had spoken to PCM informing him of the Claimant's two complaints. Corsini passed on to the Claimant PCM's response - which was that he "felt" that BC's actions did not meet the substantive offence of harassment (so inferring that is why he did not make a CAD report and this was confirmed by Counsel at the hearing) and stating that PCM had recorded the Claimant's complaints dated 2017 and 2018 on a different system (the Merlin system for interacting with other agencies). Appeal rights were provided.

Appeal to the AU from the first local resolution

[16] By a letter dated 27.11.2018 the Claimant appealed. In that letter the Claimant re-affirmed her allegation that the harassment by BC was "racial" and "aggravated" and asserted that she had lived in "perpetual fear". I do not see how that could have been so when BC had long since died.

[17] The Claimant asked for a proper investigation. She did not provide any further documents in support and had not obtained the Merlin reports despite being told how to do so by Corsini. The Claimant did not send in the Appendix Documents which she would later complain that SGS did not open or read.

[18] SGS decided the appeal on 16 May 2019. He informed the Claimant that his role was to review the local resolution decision, not to reinvestigate. He had done so. He summarised the Claimant's complaints thus:

> **"On 25th of September 2017** you reported to City West Homes and PC Malone that you, your family and friends were being harassed by your neighbour of a week. You described his behaviour to PC Malone who was dismissive and stated it seemed like the person had mental health issues. He visited the neighbour and advised you the neighbour had been told to *lay off*.
>
> **In January 2018**, your daughter was harassed by a woman who appeared to know your neighbour. Within your complaint you described her behaviour and confirmed you reported the matter to City West Homes. They asked that you provide a CAD number relating to your report to PC Malone from the 25th September 2017. As PC Malone had not given you any reference number you called 101 but the officer to whom you spoke was unable to find a CAD number or any record of your initial complaint.
>
> **In April 2018** the woman who harassed your daughter in January 2018 demanded to know where your neighbour was as she did not know where he was. You subsequently told PC Malone about this incident.
>
> **On the 18th of September 2018** you told PC Malone that City West Homes had refused to accept your application for transfer

> based on their being no police report. He said he would speak to City West Homes. He offered to speak to your neighbour but you declined. He asked how your anxiety was and you confirmed it was bad. He asked if he should speak to someone and you said he may speak to Dr Rubitel at Gordon Hospital. He left you his phone number and email to report to him directly, should anything else happen.
>
> **On the 5th of October 2018** your GP told you they were contacted by PC Malone who had told the GP you were paranoid about your neighbour who had only nodded when you were in the lift with him. You wrote to PC Malone about this but he did not respond. He also referred you to social services/children services." *(The typing errors are not mine).*

[19] SGS then went through the matters he was required to determine in accordance with para 9 of Schedule 3 of the *Police Reform Act 2002* which deals with appeals relating to local resolution. SGS explained that the role he played was not to reinvestigate but to review the local resolution. He explained that because the complaint was about behaviour which, even if proven, would not justify criminal or disciplinary proceedings or infringe Art. 2 (right to life) or Art. 3 (torture) of the *Human Rights Act 1998,* local resolution was permitted. SGS upheld the complaint in part because Corsini had only taken a verbal account from PCM and had failed to provide a clear and comprehensive explanation to address the concerns raised. He decided that:

> "I consider it reasonable to have expect PS Corsini's enquiries to have addressed:
>
> - Why PC Malone felt your neighbour had not committed the offence of harassment.
>
> - What information PC Malone provided you with in respect of his making that decision.
>
> - What report (if any) PC Malone did complete. (In his letter of 12th November 2018, PS Corsini referred to PC Malone completing 3 Merlin reports *after previous interventions with you.* Although he explains the purpose of such reports it does not detail what if any report was completed by PC Malone in respect of your speaking with him on 25th September 2017.
>
> - Why he considered it appropriate to personally record your allegation as an offence of racially motivated harassment if PC Malone had determined not to.
>
> - PS Corsini did not explore the complaint that PC Malone *has failed to record facts stated to him accurately, misstated and misrepresented them to my doctors and others.*

> (No evidence is provided to suggest you wished to withdraw this element of your complaint)."

[20] SGS also considered that no learning opportunities were identified from the local resolution. SGS specifically noted the Claimant's rehash of the primary evidence in her appeal letter dated 28.11.2018. He stated that he saw no benefit in summarising that when he had summarised the original complaint. SGS then upheld the appeal on the single ground that the explanations given to the Claimant were not sufficiently clear and comprehensive. He remitted the complaints to the local resolution team to address the points.

The second local resolution - by PC Simon Angell (PCA)

[21] PCA started this local resolution on 7.6.2019. He wrote to the Claimant thus:

> "I intend now to deal with your complaint by way of a full investigation. In order to do so I need to confirm with you the specific allegations you wish to be investigated/addressed. From your original complaint (which I have attached above for reference) I understand the following to be your complaint allegations:
>
> 1. PC Malone failed to record your allegation of harassment.
>
> 2. PC Malone failed to record facts stated by you accurately.
>
> 3. PC Malone misstated and misrepresented those facts to doctors and others.
>
> Can I ask you to consider your complaint and let me know whether the above allegations fully cover your complaint?"

[22] This was the Claimant's second proper opportunity to put in whatever further evidence she wished to, including the Appendix Documents and in particular to challenge and pick holes in PCM's Merlin reports. She did not do so. Instead the Claimant chased for a conclusion.

[23] On 15.5.2020 Superintendent Terri Adderley issued the decision on the second local resolution of the three complaints. The Superintendent upheld complaint allegation 1 and rejected allegations 2 and 3. She did not consider that the matter needed to be referred to the CPS or that disciplinary proceedings were needed against PCM. She considered that PCM needed to learn about the failures in the way he had communicated with the Claimant by reading the report.

[24] PCA's report dated 7.5.2020 was attached to Superintendent Adderley's decision. It was long and detailed. He noted that on 26.6.2019 the Claimant agreed that the three allegations she had made were:

> "*PC Malone failed to record your allegation of harassment in September 2017 and September 2018.*
>
> *PC Malone failed to record facts stated by you accurately.*
>
> *PC Malone misstated and misrepresented those facts to doctors and others.*"

[25] In addition, PCA noted:

> "3.2 The terms of reference for this investigation were agreed with you on 26/06/2019. These were:
>
> - To investigate the allegations made by you in order to:
> - To consider whether any person subject to this investigation may have committed a criminal offence. At the conclusion of the investigation the Appropriate Authority will determine whether the file should be sent to the DPP.
> - To consider whether, in the investigator's opinion, any person subject to this investigation, has a case to answer in respect of misconduct or gross misconduct or no case to answer.
> - To consider whether:
>
> A change in practice or policy may help to prevent a reoccurrence of the situation in the future or whether there was any good practice highlighted that should be shared within the organisation."

[26] PCA considered the evidence before him which included: the Claimant's complaint email and her later emails, a written account from PCM and the Merlin reports. He could not consider the Appendix Documents because he had not been given them by the Claimant. On each complaint PCA set out the evidence from PCM in extenso. In relation to allegation 1 PCM had given this evidence to PCA:

> "*During the first incident Ms Jan made me aware of the male coming up to her when she moved in and asking them not to smoke on the balcony and try not to watch TV loudly. This was one incident of the male asking a question. During this conversation Ms Jan stated that the male kept walking past the kitchen window looking in. I clarified with Ms Jan that this was without stopping. As I know the estate I know that people have to walk past the kitchen windows of properties to get to their properties. This was the case in this circumstance also. There is a mention from Ms Jan in the complaint that the male stated*

> *about throwing someone off a balcony. I was not told this in anyway. During the conversation I noticed Ms Jan's demeanour was quite erratic and came across as*
>
> *paranoid. I explained these concerns to Ms Jan and Ms Jan agreed that she was in a bit of a bad way and is diagnosed with anxiety and panic attacks. I then stated I would go and talk to the neighbour and explain the concerns Ms Jan had. I did this and the male did not realise Ms Jan was feeling like this explaining he had asked her not to smoke and be loud as the last neighbour had done those things. He explained walking past he just naturally looks into the window without thinking. The male agreed to not make any contact with Ms Jan. After this I put two merlin reports on covering my concerns and efforts made to contact her GP. I spoke to a Doctor who stated they have the same concerns of her paranoia due to her panic attacks.*"

[27] In relation to the second and third allegations I note that PCM's statement to PCA included this assertion:

> "*I agreed to call Tony Patina to clarify why the management transfer was rejected. I called Tony patina who stated there was no harassment found in their investigation, so a move was rejected. This was a decision for them to make.…*
>
> *…To summarise I have followed Met Police Policy. Having spoken to Ms Jan I did not consider that there was sufficient evidence to show there was a course of conduct so did not create or record this on a crime report.*"

[28] In the Merlin reports (which were contemporaneous documents) PCM had written that after the first complaint he had spoken to BC and told BC to avoid the Claimant. Over the year after PCM's warning to BC the Claimant complained of little more than BC walking past her a few times. He noted as follows:

> "**MERLIN report 246359 entered by PC Malone on 26/09/2017:**
>
> *"…On Tuesday 26th September 2017 Subject came into the front office at Belgravia Police Station stating that her neighbour was being a nuisance. Subject moved into current address on Thursday 23rd September 17, and as moving in neighbour*
>
> *has come out and stated 'I dont like noise, dont be noisy, i dont like smoking on balcony either'. This was the first incident. Over the next few days the neighbour from 37 Gilbert, has come out to all family and friends that our helping Subject to move and stated the same things to them, stopping them in the lift and on staircase. Subject stated that they have also seen the neighbour*

looking through their kitchen window. Subject suffers from anxiety and panic attacks and was very 'I Rate' and appeared to be very distressed. Officer managed to calm Subject down and stated that Officers would visit neighbours

the following day, 27th September 17. Subject gave Doctors details, but when Officer tried to call they were told the Doctor was not on shift. Subject told to consult Doctor and try to stay calm as well as visit City West Homes about the issue. Merlin has been created for the subject due to the suffering of anxiety and panic attacks."

MERLIN report 253394 entered by PC Malone on 27/09/2017:

"Visited Subjects neighbour to talk to them about reports from Subject of the neighbour who keeps coming up to subject and asking them to be quiet all the time when they were moving in and kept looking through the kitchen window. Neighbour of subject agreed to no make no contact and to leave them alone. I then visited Subject to update them, and state that it should all be resolved… …Subject stated that she is suffering a bit with her anxiety and depression, and would rant at times. Subject did not seem a danger to herself in the slightest but it came across that subject would struggle keeping mood up and balanced. Subject does see Dr at the Gordons Psychiatry unit. Officer was unable to get through to them to talk to Dr. Reason for Merlin to go on, is to flag up a slight issue with Subjects mental health, with the anxiety and depression possibly flaring up at times."

MERLIN report 224049 entered by PC Malone on 18/09/2018:

"On Tuesday 18th September 2018 I visited Subject at their home address.

I visited Subject a year ago when they first moved in and a Merlin report was put on after this due to the subject suffering from anxiety and this anxiety is to do with a male at a nearby address. Subject believes that the male is out to get them. I visited this time due to the same worries. The context of the worry by the subject has no real substance. The male has walked past them a few times and it feels like the subject believes the

male has it out for them. Subject has seemed more stressed on this occasion and broke down in tears on multiple occasions. Subject has described how they were in a car accident a few years ago and see a Pain killing unit at Kings College Hospital. Due to this constant pain and not being able to work is causing severe depression and anxiety (both are Diagnosed conditions). Subject is linked to Dr Rubital & Dr Lambcracus at The Gordon

> *Hospital. Officer has spoken to the South Locality Team and they have discharged the Subject back to the GP at The Victoria Medical Centre.*
>
> *Officer is awaiting a call back from GP at this time to liaise with in terms of going forward with the Subject. The house was clean and tidy and the two cats appeared to be well looked after. There is no worries there. It is the mental state of the subject deteriorating that is the worry and the mental health services will need to monitor this closely due to their being a minor in the house as well. I will revisit this premises to try and visit and review how the Daughter is doing.""*

[29] It can be seen from those reports precisely how PCM was approaching the complaints of harassment made by the Claimant. There is no mention of a racial element to the concerns. He noted that the Claimant had disclosed diagnoses of severe depression and anxiety and that she would "rant" at times. From this date the Claimant knew the contents of these reports.

[30] PCA then set out the *Protection from Harassment Act 1997* and the Home Office Guidelines on reporting and recording reports of potential crimes in full so that the Claimant would be informed of them:

> The Act
>
> *"Sections 1 and 2 of the Protection from Harassment Act 1997 make harassment an offence and specify the defences and penalties.*
>
> *1(1) A person must not pursue a course of conduct-*
>
> *(a) which amounts to harassment of another, and*
>
> *(b) which he knows or ought to know amounts to harassment of the other.*
>
> *1(1A) A person must not pursue a course of conduct-*
>
> *(a) which involves harassment of two or more persons, and*
>
> *(b) which he knows or ought to know involves harassment of those persons, and*
>
> *(c) by which he intends to persuade any person (whether or not one of those mentioned above)-*
>
> *(i) not to do something that he is entitled or required to do, or*
>
> *(ii) to do something that he is not under any obligation to do.*
>
> *…*

2(1) A person who pursues a course of conduct in breach of section 1(1) or (1A) is guilty of an offence."

The Guidance on recording:

"A crime should be recorded as soon as the reporting officer is satisfied that it is more likely than not that a crime has been committed, this is a balance of probability test.

An incident will be recorded as a crime:

For offences against an identified victim if, on the balance of probability:

- *The circumstances as reported amount to a crime defined by law (the police will determine this, based on their knowledge of the law and counting rules), and*
- *There is no credible evidence to the contrary.*

Because the rules place an obligation on the police to accept what the victim says unless there is "credible evidence to the contrary", the following reasons are insufficient to justify not recording a crime:

- *The victim declines to provide personal details.*
- *The victim does not want to take the matter further*
- *The allegation cannot be proven"*

Recording incidents and creating crime reports (CRIS).

*All actions are **mandatory**.*

Frontline actions

- *Create a CRIS report even if the victim:*
  - *cannot be traced;*
  - *declines to provide personal details;*
  - *does not want the police to investigate or withdraws their support to the investigation;*
  - *states that they do not wish to take the matter further.*
- *Create a CRIS even if there is a lack of proof to support the allegation. If you have evidence that negates that an offence took place, then no CRIS record is required*

- *Create a CRIS report even if:*

  …an offence cannot be proved, but, on the balance of probability, an offence took place.

- *Where the information obtained at the first point of contact satisfies the crime recording decision making process the expectation is that identified crimes will be recorded without delay. It is expected that such crimes will be recorded on the same day the report is received and in any case recording must take place within 24 hours of the time the initial report was received*

- *Create a CRIS where initial investigation or information is sufficient to determine or to believe that a notifiable offence has been committed.*

- *If a decision has been made not to record a crime on CRIS, there must be credible evidence that negates the allegation that a crime actually occurred*

- *Where a report of a crime is made to police and the initial investigating officer decides not to record it as such; then they must make an auditable record (e.g. CAD record creation or update) of that decision and justification. Furthermore they must inform the victim (or reporting person) why they will not be recording a crime and make a record of that notification."*

[31] PCA also summarised the crime report made by Corsini in his investigation:

"**Summary of crime report (CRIS) 6556528/18 created by PS Corsini on 05/11/2018:**

"…This report has been created as result of a complaint logged by VIW1, Sabrina, which I am investigating against PC 1573CW Karl Malone - Other neglect failure of duty

Previous attempts to make allegations to PC Malone were resulted in Merlin Reports, initially resulted as a neighbour dispute, however as more incidents have occurred Sabrina has raised her concerns with City West Homes who advised to report to police.

On the 25/09/2017 Sabrina moved into her address. In her complaint she describes severe and persistent harassment on her, her family and friends, by SUS the late Mr Catchpole cornering them in the lift and warning against watching TV and smoking on the balcony. This continued by Mr Catchpole

> *peering through her kitchen window for prolonged periods of time watching her, her family and friends. That day she logged a complaint against Mr Catchpole with City West Homes who advised to report to police. Sabrina attended Belgravia Police Station that day and PC Malone, the DWO,*
>
> *listened to her concerns and created a Merlin Report. PC Malone visited Mr Catchpole in the coming days. Sabrina also advised PC Malone of her panic and anxiety issues.*
>
> *After the initial police intervention Sabrina done her best to avoid Mr Catchpole. Things continued to happen but Sabrina has not elaborated on them at this time.*
>
> *In January 2018 Sabrina's daughter was spoken to in the lift by a female friend of Mr Catchpole in the lift enquiring why her mother called police on Mr Catchpole. This re occurred a few weeks later. This was reported to City West Homes who wouldn't take any action without a CAD number. This was not reported to police and there was no CAD number. City West Homes discontinued their ASB case as Sabrina had no CAD numbers. Sabrina attended Belgravia Police Station to retrieve reference numbers but at this time Belgravia Front Office had been permanently closed. Sabrina called 101 but no reference numbers could be traced. In April 2018 the female who approached her daughter in the lift knocked on her door at 8pm asking where Mr Catchpole was as he wasn't answering his phone. A complaint was logged with City West Homes. Sabrina applied for a housing transfer after this, but this was rejected as no police report was made.*
>
> *On the 18th September 2018 PC Malone attended Sabrinas address, Sabrina reported Mr Catchpole being drunk at the bottom of the lift holding the doors open for her, which she found intimidating. PC Malone was advised not to approach Mr Catchpole.*
>
> *PC Malone had created Merlin reports for Sabrina and social services referrals, Sabrina is unhappy with this as she believes the facts have been mis-represented. Social services have agreed to help her move. Other support organisations have been in touch with Sabrina offering help and support, which she queried with social services.*
>
> *After speaking to Sabrina over the telephone she believed she was targeted by Mr Catchpole because of her race (Pakistani) although no direct reference have ever been made to her…"* "

[32] PCA reached various conclusions on the merits. He recorded the dispute between the Claimant and PCM over whether PCM was told the alleged harassment was racial by

the Claimant on 25th September 2017 or 18th September 2018. He did not choose to decide which he believed. He decided that he did not believe that there was credible evidence that a crime had been committed based on the Claimant's reports at the time however he also considered that PCM should have made out a crime report as a "crime related incident". So he upheld the Claimant's first complaint of PCM failing to make a crime related report.

[33] PCA rejected complaints 2 and 3. He found no evidence to suggest PCM was deliberately lying and found no reason why PCM would do so in the circumstances. He noted PCM's sensitive handling of the issues of the Claimant's mental health challenges, offering in September 2018 once again to speak to BC, being told not to do so by the Claimant, contacting her GP and trying to contact her consultant at the Gordon hospital. He noted that PCM did not himself share information with other services, that was done by the multi-disciplinary agency Safeguarding Hub. All of these decisions were on the evidence (on the merits) and are areas into which this court will not venture.

Appeal from the second local resolution

[34] The Claimant appealed that decision by an email sent on 11.6.2020. She sent the Appendix Documents by 2 separate emails (not by post) as appendices to her undated, unsigned additional letter which was, in effect, her witness statement but which had no page numbers. Not every paragraph was numbered but 20 of them were. There was an index to the Appendix Documents at the end of the witness statement. The Claimant alleged "serious failings" by PCM to record criminal acts, namely racial harassment. The Claimant also alleged failings by PCA:

> "… no collection of evidence or communication with myself for evidence or collection of CCTV footage of the day when I went to Belgravia police station on the 25th of September 2017 for verification purposes."

[35] Despite by this time having seen the summary of the contents of the Merlin reports the Claimant continued to maintain that PCM had failed to record her complaints anywhere on 25.9.2017 and 18.9.2018. In the light of the Merlin reports she had read that was an unsustainable assertion. In any event PCA had already made a finding that he had failed to make crime related reports and upheld her complaint on that.

[36] In paragraphs 1 - 6 of the undated letter/witness statement the Claimant repeated her factual assertions about the 25.9.2017. It is noteworthy that there is no allegation of any words or actions from BC to the Claimant of any racial nature. Nor does the Claimant assert that she told PCM that BC was being racially abusive. The first mention of racial concerns in this witness statement is when the Claimant seeks a housing transfer in 2018 and then it is made to Citywest, not the police. The Claimant asserts that her housing transfer was rejected because of the absence of CAD reports. However I note that PCM asserted that Citywest rejected her requested move because they were not themselves satisfied that the allegations of ASB (antisocial behaviour) were made out.

The decision the subject of the review

[37] On 23.9.2020 SGS made his decision on the appeal from the second local resolution decision. He dismissed the appeal.

[38] He set out the short history at length. He stated that the appeal was a review of the investigation not a re-investigation. He stated that his appeal was governed by para 25 of Sched. 3 of the *Police Reform Act 2002*. He went through the matters he was required to consider set out in *The Police Reform Act* 2002 Sched. 30 Reg 25 and the Home Office Guidance. He considered the findings made by PCA and the decisions of Superintendent Adderley were appropriate and proportionate to the complaint. He considered that the proposed actions were adequate. He found that the Claimant had now been given adequate information following the second local investigation by PCA. SGS decided that the findings of PCA on grounds 2 and 3 were reasonable.

[39] Procedurally SGS admitted that he had not opened the Appendices to the Claimant's undated and unsigned letter/witness statement and stated that they "do not assist my deliberations". The reason he gave was that a significant part of the Claimant's appeal representation was a reproduction of detail which was already known to him.

The judicial review

[40] The claim form was issued and the grounds were dated 23.12.2020. Permission was granted by Judge Howell QC on 2.3.2021.

[41] The Claimant does not seek review of any of the substantive decisions of SGS.

[42] The Claimant's grounds are simply that SGS should have opened the Appendix Documents and read them. The grounds are framed in terms of procedural unfairness on the bases that: (1) the Appendix Documents were relevant; (2) they were part of the Claimant's representations and her case, all of which should have been read and considered as part of a fair hearing; (3) a failure to read them breached the Claimant's legitimate expectations; (4) the decision not to read them was an improper use of SGS's discretion as to the evidence to be considered.

[43] In its grounds of resistance, the Defendant resisted on the following bases:

a. The appeal was a review of the local resolution decision not a rehearing.
b. SGS did not act in bad faith, he had read the Claimant's complaints and her unsigned further letter/witness statement which set out her case.
c. The decision on whether the Appendix Documents were relevant was a matter for the decision maker *(Khatun) v Newham LBC* [2004] EWCA civ 55 and *R. v Nottingham City C Ex P Costello* [1989] 21 H.L.R. 301.
d. The Claimant's assertion does not meet the threshold for breach of legitimate expectation in *R(MP) v Secretary of State for Health* [2020] EWCA Civ 1634.
e. The decision of SGS would have been the same if he had read the Appendix Documents so relief must be refused under S.31(A) of the Supreme Courts Act 1981.
f. The documents were self generated by the Claimant and only those relevant to complaints 2 and 3 would be apposite. The Claimant does not identify which if any of the Appendix Documents were actually relevant nor to which issues they would be relevant to assist the Claimant's case.

[44] In its skeleton argument the Defendant amended e. to refer to S.31(2A)(a) of the Supreme Courts Act which states:

> "(2A) The High Court—
>
> (a) must refuse to grant relief on an application for judicial review, and
>
> (b) may not make an award under subsection (4) on such an application,
>
> if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

Law

Legitimate expectations

[45] In my judgment this is not a legitimate expectation case. In *R (MP) v SSHSC* [2020] EWCA civ 1634 Newey LJ summarised the law thus at para. 44:

> "44. Legitimate expectation was subjected to searching analysis by Laws LJ in *R (on the application of Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 ("*Bhatt Murphy*"). Having noted that there were two kinds of legitimate expectation, procedural and substantive, Laws LJ said this about the former:
>
> "29. There is a paradigm case of procedural legitimate expectation, and this at least is in my opinion clear enough, whatever the problems lurking not far away. The paradigm case arises where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy ….
>
> 30. In the paradigm case the court will not allow the decision-maker to effect the proposed change without notice or consultation, unless the want of notice or consultation is justified by the force of an overriding legal duty owed by the decision-maker, or other countervailing public interest such as the imperative of national security (as in *CCSU*). There may be questions such as whether the claimant for relief must himself have known of the promise or practice, or relied on it. It is unnecessary for the purpose of these appeals to travel into those issues; I venture only to say that there are in my view significant difficulties in the way of imposing such qualifications. My reason is that in such a procedural case the unfairness or abuse of power which the court will check is not merely to do with how harshly the decision bears upon any individual. It arises because

> good administration ('by which public bodies ought to deal straightforwardly and consistently with the public': paragraph 68 of my judgment in *Ex p Nadarajah* [2005] EWCA Civ 1363) generally requires that where a public authority has given a plain assurance, it should be held to it. This is an objective standard of public decision-making on which the courts insist …."

45. Going on to comment on substantive expectation, Laws LJ said in paragraph 43:

> "Authority shows that where a substantive expectation is to run the promise or practice which is its genesis is not merely a reflection of the ordinary fact (as I have put it) that a policy with no terminal date or terminating event will continue in effect until rational grounds for its cessation arise. Rather it must constitute a specific undertaking, directed at a particular individual or group, by which the relevant policy's continuance is assured. Lord Templeman in *Preston* referred (866 - 867) to 'conduct [in that case, of the Commissioners of Inland Revenue] equivalent to a breach of contract or breach of representations'."

Then at para. 53 he ruled:

> "53. The correct position appears to me to be as follows:
>
> i) An express promise, representation or assurance needs to be "clear, unambiguous and devoid of relevant qualification" to give rise to any legitimate expectation, whether substantive or procedural;
>
> ii) A practice must be tantamount to such a promise if it is to found any legitimate expectation. It may be, as Sedley LJ said in *BAPIO*, that a practice does not have to be entirely unbroken, but it does have to be so consistent as to imply clearly, unambiguously and without relevant qualification that it will be followed in the future."

[46] There was no express promise or clear unambiguous representation made by SGS or the AU in this appeal or in the IPPC (now the IOPC) Guidance that SGS had to read every appendix or document which the Claimant sent in and which the Claimant had singularly failed to provide for the two previous investigations.

Scope of appeal inquiry

[47] On a judicial review of the sufficiency of a decision-maker's inquiry the threshold is a high one. In *R v Royal Borough of Kensington and Chelsea ex p. Bayani* [1990] 22 H.L.R 406, in the Court of Appeal, Neill LJ considered the authority's duty of inquiry in a homelessness case. The authority was required by the Statute to make "such inquiries as are necessary to satisfy itself etc.". Neill LJ ruled as follows (at p 409):

> "(3) In deciding how a reasonable authority would have acted and what inquiries they would have made in the circumstances, the court must have regard to the speech of Lord Brightman in *R.* v. *Hillingdon L.B.C., ex parte Puhlhofer* [1986] A.C. 484 where he said at p. 518:
>
> > " ... it is not, in my opinion, appropriate that the remedy of judicial review, which is a discretionary remedy, should be made use of to monitor the actions of local authorities under the Act save in the exceptional case .... Where the existence or nonexistence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public"."

Further at p 415:

> "In my judgment it would have been much more satisfactory had Mr. Trendell asked her further questions to enable him to appreciate fully the importance of Mrs. Bayani's earnings. I also think that it is a pity that he did not question her about her prospects of employment in Manilla. But I have come to the conclusion that the inquiries that Mr. Trendell made, though clearly less full than they could have been, were not so deficient or incomplete as to entitle this court to intervene. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable housing authority could have been satisfied on the basis of the inquiries made."

[48] In her skeleton argument the Claimant relied on *R. v Army Board* [1992] QB 169. LJ Taylor gave the lead judgment. The case concerned whether an oral hearing should have been used to determine the disputed facts. The court decided that one should have been arranged. The Claimant was described as a black soldier and asserted that he had been racially abused assaulted and mistreated by other soldiers, deprived by law of the civil remedies as a soldier at that time, he had to go through the Army procedures. His commanding officer rejected his application. He appealed to the army board and failed. He applied for judicial review. It was the first such complaint and the question arose how it should have been dealt with procedurally. Only part of the evidence before the board was provided to the Claimant and no oral hearing was allowed. Two board members considered the papers and wrote their judgments separately. The complaints process was governed by the *Army Act 1955* S.181. It did not prescribe any particular procedure. Taylor LJ ruled that the Army had to take into account the *Race Relations Act 1976* and to give effect to it. The board had failed to investigate all the allegations

and failed to take the Act into account. The board was determined by the court to be fulfilling a judicial function. Taylor LJ went on to consider the following at 186D:

> "What, then are the criteria by which to decide the requirements of fairness in any given proceeding? Authoritative guidance as to this was given by Lord Bridge of Harwich in *Lloyd v. McMahon* [1987] A.C. 625, 702. He said:
>
> > "My Lords, the so-called rules of natural justice are not engraved on
> >
> > tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.""

[49] Then at 187 E:

> "The Army Board as the forum of last resort, dealing with an individual's fundamental statutory rights, must by its procedures achieve a high standard of fairness. I would list the principles as follows.
>
> (1) There must be a proper hearing of the complaint in the sense that the board must consider, as a single adjudicating body, all the relevant evidence and contentions before reaching its conclusions. This means, in my view, that the members of the board must meet. It is unsatisfactory that the members should consider the papers and reach their individual conclusions in isolation and, perhaps as here, having received the concluded views of another member. Since there are 10 members of the Army Board and any two can exercise the board's powers to consider a complaint of this kind, there should be no difficulty in achieving a meeting for the purpose.
>
> (2) The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision-making bodies other than courts and bodies whose procedures are laid down by statute, are masters of their own procedure. Provided

> that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing: see *Local Government Board v. Arlidge* [1915] A.C. 120, 132-133; *Reg. v. Race Relations Board, Ex parte Selvarajan* [1975] 1 W.L.R. 1686, 1694B-D and *Reg. v. Immigration Appeal Tribunal, Ex parte Jones (Ross)* [1988] 1 W.L.R. 477, 481B-G. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made. It will also depend upon whether there are substantial issues of fact which cannot be satisfactorily resolved on the available written evidence. This does not mean that whenever there is a conflict of evidence in the statements taken, an oral hearing must be held to resolve it. Sometimes such a conflict can be resolved merely by the inherent unlikelihood of one version or the other. Sometimes the conflict is not central to the issue for determination and would not justify "an oral hearing. Even when such a hearing is necessary, it may only require one or two witnesses to be called and cross-examined."

[50] I do not find the circumstances of the *Army Board* case sufficiently similar to those in this claim to gain much assistance from it save as to the general principles set out therein. This is not a case involving any assertion by the Claimant that an oral hearing should have taken place.

[51] The Claimant also relied upon *R (Osborn) v Parole Board* [2014] 1 AC 1115 to support the submission that the Claimant's Appendix Documents should have been read. That case, not unlike the *Army Board* case above, related to the Claimant being deprived of an oral hearing by the Parole Board. The Supreme Court considered in the circumstances that procedural unfairness had resulted. The principles were set out by Lord Reed at 1131 – 1133. The case concerned life imprisonment of the Claimant and the refusal by the Board of parole or transfer to an open prison. It concerned the Claimant's legitimate expectation that he could argue his case on disputed facts orally before the Board instead of having the decision taken on paper in his absence. The weight and seriousness of the issues in that case were a country mile away from those in the claim before me.

Procedural Unfairness

[52] When considering a claim such as this which is centred on alleged procedural unfairness I take into account the guidance given by Lord Mustill in the Supreme Court in *R. v SSHD. Ex parte Doody* [1994] 1 AC 531:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be

> exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

[53] I also find assistance from Parker J. who decided a similar case to the present one in *Muldoon v IPCC* [2009] EWHC 3633. He summarised the appeal process under section 25 of sched. 3 of the *Police Reform Act 2002* as follows:

> "18. As noted by Saunders J in R(Dennis) v IPCC [2008] EWHC 1158, the IPCC's appeal procedure under paragraph 25 of Schedule 3 PRA is by review. In the context of whether the findings of the investigation need to be reconsidered, that review will be conducted to ensure that, following a proportionate investigation, an appropriate conclusion appears to have been reached. In this case Miss Susan Badham conducted a review and took the review decision on behalf of the IPCC on the basis that the claimant's complaints had to be established on the balance of probabilities. It was on that standard of proof that Miss Badham found that it was appropriate for Merseyside Police to have found the claimant's complaints unsubstantiated. This was a perfectly permissible approach: see for example R(Crosby) v IPCC [2009] EWHC 2515 (Admin) in which the deputy High Court judge, at paragraph 41, described this approach as the correct basis.
>
> 19. The IPCC is an independent statutory appeal body to whom Parliament has entrusted the function of reviewing the findings of investigations into police complaints if that is what an appellant requests. The IPCC's decisions are likely to involve matters of judgment. For these reasons this court will allow the IPCC a discretionary area of judgment and will not intervene unless satisfied that the IPCC has gone beyond that permissible area to reach a conclusion not fairly and reasonably open to it.

> This function of the court is important because an appellant is (and I quote from Saunders J in the case of Dennis to which I have referred) entitled to have a proper review because it is important that the functions of the IPCC are carried out properly to maintain public confidence in the system and the police force and to ensure that if there are lessons to be learnt, that that happens: see paragraph 34.
>
> 20. It has also been said that the court should not expect or look in the appeal decision for the sort of tightly argued judgment that might be expected of a Chancery judge. On the contrary, what is important and necessary is that the conclusion should be clear and the reasons for those conclusions can be readily understood by the complainant, the police officers concerned and the relevant police authority, who may need to review their procedures in the lightof the decision."

[54] More recently a claim such as this was considered by Stephen Morris QC sitting as a deputy High Court judge in *R. v IPCC exp parte Ramsden* [2013] EWHC 3936. He summarised the court's role on review and the commission's role (albeit under its old name) on appeal from the local decision thus:

> "21. A number of authorities on the above legislative framework have been drawn to my attention: *R (Dennis) v IPCC* EWHC [2008] 1158, *R (Crosby) v IPCC* [2009] EWHC 2515 (Admin) (in particular §§5, 39-42) , *Muldoon v IPCC* [2009] EWHC 3633 (Admin) (in particular at §§18, 19, 24 and 40) and *R (Erenbilge) v IPCC* [2013] EWHC 1397 (Admin), from which the following principles can be stated in summary form:
>
> (1) The question for the police investigation is whether the allegations made in the complaints have been established on the balance of probabilities, taking account of proportionality: *Muldoon* §18 and *Crosby* (cited in *Muldoon*) at §41.
>
> (2) The IPCC's appeal procedure is by way of review; in considering the question under paragraph 25(5)(b) of Schedule 3, the IPCC's task is to ensure that, *following a proportionate investigation*, an appropriate conclusion has been reached by the police investigation: *Muldoon* §§18, 24. Was the conclusion in the police investigation one which was fair and reasonable?
>
> (3) An IPCC appeal decision is not expected to be "tightly argued" - nevertheless the conclusion should be clear and the reasons readily understandable: *Dennis* §20.
>
> (4) The function of the Court on an application for judicial review of an IPCC appeal decision is confined to the question whether the IPCC has reached a decision which was fairly and reasonably open to it, even if the court might have reached a

> different conclusion. IPCC decisions involve matters of judgment and the court will allow the IPCC a discretionary area of judgment: *Muldoon* §§19, 40.
>
> (5) Where the IPCC upholds the decision of the police investigation, the question for the Court involves an element of "double rationality": was the decision of the IPCC that the decision of the police investigation was fair and reasonable itself fair and reasonable? The question is not whether the Court would necessarily have reached the same conclusion as the police or the IPCC, nor whether it can be seen with hindsight that an error may have been made (*Muldoon* §§24, 34)."

I shall take into account this 5 stage approach below.

The appeal process

The Act

[55] Under the relevant parts of Para 25 of Sch. 3 of the *Police Reform Act 2002* the complainant has a right to appeal to the AU (in summary):

> (2)(a), because she has not been provided with adequate information about the findings of the investigation or the determination of PCA relating to the taking or not taking of action in respect of the complaints;
>
> (2)(b), against the findings;
>
> (2)(c), against any determination relating to the taking of any action (or the not taking of action).

[56] Under para 25(5) (a) –(b) the AU has the power to determine such of the following as it considered appropriate in the circumstances:

> whether the complainant was given adequate information; and
>
> whether the findings need to be reconsidered.

[57] Under para. 25(8), if the AU determines that the findings need to be reconsidered it shall:

> (a) review the findings with no further investigation or
>
> (b) direct a further investigation – which must then be carried out.

[58] In my judgment the Statute makes it clear that the AU's role is appellate and involves a review of the decision below including the scope of the investigation below and the evidence gathered. It is not a rehearing and there is no express statutory provision to accept fresh evidence.

[59] On the need for further evidence, if the AU so decide, the appeal can lead to an order for reinvestigation. I shall return to this below when dealing with "smoking guns".

The Guidance

[60] The Guidance from the IPCC (now IOPC) on such appeals was as follows, in section 13:

> "**Principles of appeal handling**
>
> **13.2** An appeal offers a final opportunity to consider whether the complaint could have been handled better at a local level and, where appropriate, to put things right. If a complainant is still dissatisfied after an appeal he or she may seek to challenge the appropriate authority's decision through judicial review.
>
> **13.3** An appeal should be dealt with in good faith, fairly and in a timely manner.
>
> **13.4** Appeals should be handled consistently and proportionately.
>
> **13.5** Consideration of an appeal must involve a fresh consideration of the case. Although it is not a re-investigation it should not merely be a 'quality check' of what has happened before.
>
> **13.6** An appeal must be given impartial consideration. There needs to be clear separation between the original decision-maker and the person who decides the appeal.
>
> **13.7** The complainant's appeal contains their representations, which must be given due consideration.
>
> **13.8** The person who made the decision that is being appealed should be allowed the opportunity to comment on the appeal so that this can be taken into account when determining it.
>
> **13.9** The right of appeal allows the complainant to challenge a decision or outcome. If the appeal is upheld, relevant action must be taken by the appropriate authority.
>
> **13.10** The complainant and, where applicable, the person complained about should be provided with a clear explanation of the outcome of the appeal and the reason for any decision made."

[61] This confirms that the AU appeal before SGS was a fresh consideration of the local resolution decision not a reinvestigation. The Claimant's representations had to be taken into account in the consideration process and given due consideration. SGS had to act in good faith, impartially, proportionately and in timely way. He also had to be consistent. It does not say that any new evidence from the complainant must be considered despite the fact that it was not provided to the investigators.

[62] I consider that SGS did take the Claimant's representations into account and her undated letter/witness statement, which rehashed the old evidence and summarised her late served documents.

[63] Clause 13.29 states:

> "The IPCC may request any information which it considers necessary to deal with an appeal from any person. Any information requested by the IPCC for this purpose must be supplied.
>
> Regulation 11, Police (Complaints and Misconduct) Regulations 2012"

[64] I consider that SGS did this. He had before him all the evidence which Corsini and PCA had gathered including PCA's long report. He admitted the Claimant's representations in her complaints letters and her new, undated, letter/witness statement, which was written after she had seen all the PCM evidence and his Merlin reports.

[65] Under the heading "consideration of appeals" clauses 13.63-65 state:

> "**13.63** When deciding whether the outcome is a proper one, the focus should be on whether the outcome is appropriate to the complaint, not simply on the process followed to reach that outcome. The decision should be made on the basis of the evidence available.
>
> **13.64** In making a decision about the appeal, the relevant appeal body should take the following into consideration:
>
> • any representations the complainant has provided as part of his or her appeal about why the outcome is not a proper outcome
>
> • whether an action plan was drawn up and agreed with the complainant setting out the steps to be taken when locally resolving his or her complaint. The outcome of the local resolution should be a clear consequence of the actions agreed
>
> • whether both the complainant and the person complained against had the opportunity to comment on the complaint during the local resolution process

> • whether any explanation given was sufficiently clear and comprehensive to address the complainant's concerns
>
> • if no apology has been given as part of the outcome, whether an apology would be appropriate, taking into account the substance of the complaint; and
>
> • whether there is any learning from the complaint and whether this has been identified and communicated to the complainant.
>
> **13.65** If the person dealing with the appeal finds that the outcome of the complaints not a proper outcome, the appeal must be upheld."

[66] The Guidance on "assessing the findings of the local resolution" by the AU is as follows:

> "**Considering the findings of the investigation**
>
> **13.89** The findings of the investigation include the eventual conclusions. In their clearest form this will be a set of allegations that are either upheld or not. The findings of the investigation also include the reasons for the conclusions, the evidence that has been gathered to support the conclusions, and a critical analysis of the evidence.
>
> **13.90** Guidance on findings and outcomes is contained within sections 11 and 12 of this guidance. These sections provide information on explanations of the outcome of an investigation, the giving of apologies where appropriate, and the making of decisions about whether a complaint should be upheld or not.
>
> **13.91** When determining an appeal against the findings of an investigation, the person dealing with the appeal should consider the investigation findings, taking into account the evidence gathered, and decide whether the investigation's findings need to be reconsidered. The person dealing with the appeal must develop his or her own assessment of the case, not base it on the assessment that the investigator has made.
>
> **13.92** When communicating a decision about whether an appeal is upheld in relation to the findings, the rationale for the decision should be provided to the complainant with reference to the relevant evidence.
>
> **13.93** The following questions should be considered to reach a decision on the findings:
>
> *Are the conclusions reached reasonable in light of the evidence?*

> **13.94** The appropriate authority should have looked at every allegation that the complainant has made, for example, in a statement or letter of complaint. If the investigation has not answered the allegations that have been made, the person dealing with the appeal should consider whether this was an appropriate and proportionate approach, taking into account the substance and circumstances of the case. If not, it may be appropriate to uphold the appeal on this ground. The person dealing with the appeal should continue to assess the findings in relation to those allegations that have been dealt with.
>
> **13.95** The person dealing with the appeal must consider whether the conclusions of the investigation are supported by the evidence available, and ensure that a clear rationale is being made to link the evidence to the conclusions.
>
> *Has the investigation been carried out in a proportionate manner and has sufficient evidence been gathered?*
>
> **13.96** The factors listed at paragraph 9.15 of this guidance should be used to inform what approach was proportionate for an investigator to have taken to investigate a complaint. As an investigation has progressed, the proportionality of the response required may have changed and this should be taken into account when considering any appeal. Proportionality is a particular consideration when it appears that lines of enquiry may have been missed or consciously not pursued by an investigator. However, it is not sufficient to conclude that an investigation has been proportionate without further explanation. When considering the 'proportionality' of following particular lines of enquiry a judgement is being made about the likelihood and difficulty of obtaining fruitful evidence weighed against the seriousness of the allegations. When considering the 'proportionality' of the investigation as a whole, a judgement is being made about the scope and robustness of the investigation weighed against the seriousness of the allegations. Where appropriate it should be made clear to the complainant why the person dealing with the appeal has deemed a particular approach to be disproportionate."

(My underlining)

Clause 9.15 states:

> "**9.15** Investigators should take the following factors into account when determining the scope of an investigation and the methods to be used:
>
> • the need to establish the facts in all cases;
>
> • the seriousness of the allegation;

> • whether Articles 2 or 3 of the European Convention on Human Rights are engaged;
>
> • any more general cause of a complainant's dissatisfaction;
>
> • whether the facts are in dispute;
>
> • how long ago the incident took place and whether evidence is still likely to be available;
>
> • the learning the investigation might yield for local or national policing
>
> and individual learning for persons serving with the police; and
>
> • actual or potential public knowledge of, and concern about, the case."

Analysis

[67] The context in the case before me is that the decision maker (SGS) was reviewing the decisions which arose as the product of a local investigation including:

a. whether the scope was sufficiently wide and deep;
b. whether the evidence gathered in scope was sufficient, relevant and adequately considered;
c. whether matters were excluded which should not reasonably have been excluded;
d. whether matters were included which should not reasonably have been included;
e. whether the Claimant was given a reasonable and fair opportunity to make her own representations, put in her own evidence and to answer and consider the opposing or conflicting evidence from any witnesses who took a different view or gave conflicting evidence about events and other matters;
f. whether PCA had been unbiased, impartial and fair;
g. whether PCA had explained the decisions and outcomes sufficiently well and clearly.

The relevance of the Appendix Documents

[68] Set out below is the Appendix attached to the Claimant's undated letter/witness statement which was before SGS and was read by him:

> "**APPENDIX**
>
> 1. A witness statement about the harassment.
>
> 2. My email, dated 19th of February 2018, to Cllr Talukder requesting his help with the non-stop racial harassment that we were targets of.

3. Continuation of my email, dated 19th of February 2018, to Cllr Talukder requesting his help with the non-stop racial harassment that we were targets of.

4. Tony Pantina from city west home's email, dated 15th February 2018, reporting the harassment internally. This email was obtained via freedom of information act.

6. Internal email correspondence of city west homes, of 3rd and 6th of May

2018, obtained via freedom of information act clearly stating that my transfer application would be rejected because there were no CAD numbers.

8. An email from Cllr Mann, dated 17th of August 2018, who was helping me locate the CAD numbers for my complaint.

11. My email to councillor Mann, dated 8th of September 2018, stating that despite her efforts to get my harassment reported the police was not getting in touch with me.

12. Email from councillor Mann, dated 10th of September 2018, where she started to chase the police officers.

13. Email to Cllr Mann, dated 10th September 2018, as PC Malone had contacted me on the day.

14. Email from Cllr Mann, dated 13th September 2018, who had advised me to take the police route as I was very apprehensive, especially after my experience with PC Malone and its aftermath.

15. My email to Cllr Mann, dated 13th September 2018 expressing concern over involving police and other things happening.

16. My email to Cllr Mann, dated 18th September telling her about PC Malone's visit

17. Another email to Cllr Mann, dated 18th September 2018, updating her about something of PC Malone's visit.

18. Summary of Patient record

19. Summary of patient record

20. Summary of patient record

20A. Email statement by Dr William Ratliff (Victoria medical Centre

> 21. Email to PC Malone dated 26th September 2018
>
> 22. Continuation of email to PC Malone dated 26th September 2018
>
> 23. Attachment sent with email dated 26th September 2018
>
> 24. Email to PC Malone dated 2nd October 2018
>
> 25. Email to PC Malone dated 5th October 2018
>
> 26. Email to PC Malone dated 8th October 2018
>
> 27. Attachment 1 for email to PC Malone's email dated 8th October 2018
>
> 28. Attachment 2 for email to PC Malone's email dated 8th October 2018
>
> 29. Attachment 3 for email to PC Malone's email dated 8th October 2018
>
> 30. Attachment 4 for email to PC Malone's email dated 8th October 2018
>
> 31. Email to Victoria medical centre FAO Dr Ratliff to not relay any information to Dr Ratliff.
>
> 32. Email correspondence with Cherie from social services on 10th and 15th of October 2018
>
> 33. Continuation of email correspondence with Cherie from social services on 10th and 15th of October 2018
>
> 34. Email correspondence from PC Donaldson confirming that there were no CAD numbers for September 2017 or for September 2018 on the 16th of October 2018 and then my email to Cllr Shamim Talukder and Cllr Andrea Mann.
>
> 93. Email to DPS when almost a year had gone by and I expressed disappointment and concern over PC Angel's reluctance in investigating the case fairly and on time."

[69] The numbering is odd. There are in fact only 32. The list contains:

a. one witness statement;
b. many post event emails to councillors;
c. some emails to and from PCM;
d. some medical records;
e. some communications to and from Citywest;
f. some communications with Social Services.

[70] Absent from the served grounds for judicial review and the Claimant's skeleton argument, but at my request provided in the Claimant's oral submissions, was a list of the Claimant's asserted key relevant documents in the Appendix Documents. It was as follows:

a. the witness statement of Mrs Akhtar;
b. the GP notes confirming what PCM said to the GP;
c. the Claimant's email dated 26.9.2018;
d. a letter from Citywest dated 9.5.2018;
e. the Claimant's mobile phone notes.

[71] SGS did not read these documents. The Claimant submitted that these were the crucial evidential documents. The Defendant asserted that they changed nothing evidentially. It is not my role to assess the merits of those submissions.

a. The witness statement of N. Akhtar dated 4.6.2020 was provided 2.5 years after the events in 2017 and 1.5 years after the events in 2018. She was not present at either of the relevant meetings between the Claimant and PCM. In any event there is no assertion of racial behaviour in her statement. All of the elements therein were summarised by the Claimant in her witness statements and complaints considered by PCA in his report.

b. The GP notes: these show that the Claimant attended on 5th, 6th, 7th, 11th, 13th, 17th, 18th September 2018 then on 2nd, 4th, 10th, 11th October 2018 (the notes stop there). They record that the Claimant was taking Fefopam for severe pain, and Topiramate and had been suffering problems with her flat due to damp/mould/dirt and an aggressive neighbour. She had described the accommodation as "so poor" to her GP. The keynote from 18 September 2018 stated:

> "History: Carl Malone from police station called again is concerned about her MH - he went out to see her today, and reports she "broke down" 6 times in front of him is aware that she was under the Gordon Hospital *o/p* psych in the past, but not under active f/u - he called MHT today to clarify this. however he has referred her to mh team he believes she is paranoid about neighbour - "looking at her weird" - however on direct questioning, all that happened was that this person nodded at her in the lift is aware she has appt here next week - asked to follow up with him afterwards, as he will try to expedite mh *f/u* as appropriate also offered to come to a GP appt with her
>
> Plan: no confidential info relayed from myself. agree that I will *f/u* with him If she consents at next appt (02073216961) and arrange mh *f/u* as appropriate".

It is clear that this note supports what PCM wrote in his Merlin report. This was his version of the facts and this was the GP's note of what he told the GP. PCM's

evidence was before PCA and SGS. PCA transcribed the Merlin reports in extenso for the Claimant in his report. Certainly the Claimant did not agree with the information which PCM had given to the GP about her complaints and strongly disagreed with his use of the word "paranoid" but there is nothing in this note which contradicts PCM's Merlin report. There is nothing new in it.

c. The Claimant's email of 26.9.2018 was post event. In it the Claimant asserted that the harassment by BC was racial but gave no facts to support that assertion. The Claimant has never raised or asserted any fact to the police which tied the alleged harassment to any words or deeds which could be interpreted as racial.

d. The Citywest letter dated 9.5.2018 does not assist the Claimant's case. Quite the opposite. It recorded that they refused the Claimant's application for a move because Laura Seymour, the manager, and the Antisocial Behaviour (ASB) team concluded that there was insufficient evidence to warrant a management transfer. They also confirmed what PCA and SGS knew, namely that there was no crime report for the complaint on 25 September 2017. That is irrelevant to this judicial review because that complaint was upheld by PCA.

e. The mobile phone records are print outs of notes made by the Claimant on her phone. One relates to 29.9.2018 which is post event. The one relating to 18 September 2018 pretty much accords with the Claimant's complaint letter and her unsigned letter/witness statement but perhaps crucially the note makes no mention of her saying to PCM that there was any racial element to her complaints against BC.

[72] Having read the Appendix Documents, I struggle to find how they would have assisted the Claimant's appeal to SGS in any way. She had set out her representations in full in her written complaints to the local investigators and her undated letter/witness statement to SGS. I must however take into account that descending into the merits is not the job of this court on judicial review and is outside this court's purview: see *R. (BACI Bedfordshire ltd) v Environment Agency* [2019] EWCA civ 1962 at para 91. It is relevant to my consideration under S.31(2A)(a) of the *Supreme Court Act 1981* of whether the outcome of the appeal would have been any different had the Appendix Documents been read by SGS.

[73] The legal question I have to decide is whether SGS should have read the Appendix Documents himself as a matter of procedural fairness and/or legitimate expectation or put more formally: was his decision to refuse to read them an exercise of a discretion which no reasonable appeal unit operative should have taken? Or was excluding these documents a failure to take into account something which SGS should have taken in to account when making his decisions?

Late provided evidence and a fair appeal procedure

[74] SGS was carrying out a review on appeal from an investigation locally by PCA and decisions by Superintendent Adderley. He was not carrying out a full rehearing or a new investigation. This is apparent from the Act and the Guidance and from *Muldoon.*

[75] It is not in dispute that the action plan setting out the proposed scope of the investigation to be carried out by PCA was agreed by the Claimant (or at least not objected to by her) and was executed by PCA. The Claimant had the opportunity to comment on the complaint during PCA's process and to put in evidence and representations to him.

[76] The first and the second local resolutions by Corsini and then PCA were the evidence gathering processes. It is a fact that the Claimant had, at length, put her case before constable Corsini, PCA and SGS. She had been invited to put whatever evidence she wished to before PCA and had not put the Appendix Documents before him. She had not put them before Corsini either.

[77] I do not discern from the 2002 Act or the Guidance any requirement for SGS himself to have to re-investigate or further investigate the complaints or to review old evidence from the Claimant which she could have put in earlier but did not, unless it was substantively relevant and new or overlooked. A different approach would perhaps be required from an AU for what I shall call "Smoking Guns" relating to substantively relevant evidence which:

(1) had emerged after PCA's decisions; or
(2) whenever it had emerged, was not before PCA and would be likely to affect PCA's or SGS's decisions; or
(4) was overlooked by PCA and was a standard channel of investigation he should have followed; or
(5) was something similar to the above or disclosed mala fides or dishonesty.

[78] For the appeal to the AU, when considering the words "on the evidence available" set out in the Guidance, on a plain reading I consider that phrase means the evidence gathered by and made available to the investigators whose decision is being reviewed. The Claimant had chosen not to and did not put the Appendix Documents before PCA so they were not available to him. In the event, when SGS considered the "evidence available" he not only looked at that available to PCA and Corsini, but also the new letter/witness statement from the Claimant provided only to SGS.

[79] As for the assertion that SGS ignored the Claimant's representations, the root of the Claimant's complaint is not that SGS ignored her representations but that SGS chose not to look at the Appendix Documents she put before him.

[80] SGS decided not to look at the Appendix Documents because he stated that he considered that they would not have taken him any further in his task. He had the index of the documents naming each and summarising the contents of each, so he knew what they were. SGS considered the Appendix Documents were unlikely to assist him and that, as indexed and described, they had nothing in them which would have added to the Claimant's own written evidence, the evidence he had read from PCM, the Merlin reports and PCAs report. He may have considered that the Claimant's decision not to submit them earlier was either correct and understandable or incorrect and poorly advised but I consider that was a matter from him in the exercise of his discretion.

[81] In addition, importantly, SGS had to take into account proportionality as the Guidance makes clear. Police resources are stretched and limited. The seriousness of the alleged

offences is an expressly stated relevant matter. The Police have to deal with terrorism, murder, assault occasioning GBH, dangerous weapons, theft, fraud, road traffic accidents, burglary, robbery and all other crimes. This complaint was about anti-social behaviour involving no allegations of violence or swearing or verbal threats and no allegation of racial words or actions. SGS and PCA and PCM may have considered that the evidential dispute was about perceived harassment by a Claimant who was at the time diagnosed as suffering from depression, in severe pain and suffering anxiety and who had fallen on very hard times due to a road traffic accident which lost her a high paying job in the city.

[82] SGS dismissed complaints numbered 2 and 3 which related to allegations that PCM failed to record the factual content of the Claimant's complaints accurately and passed on inaccurate facts and opinions to the Claimant's GP or other organisations in September 2018. Such complaints rest on a direct conflict of evidence between the Claimant and PCM about what she said to him. This court is not entitled to descend into an analysis of the merits of the assessment of whether PCM was right or wrong to have taken a non-medical view that the Claimant was being oversensitive or paranoid and to tell the GP that. On local review the decisions on the merits were made by PCA and on higher review, by SGS and I have found no irrelevance or irrationality in the approach taken by SGS when reviewing the decision of PCA and Superintendent Adderley, indeed none is asserted beyond the failure to read the Appendix Documents.

Conclusion

[83] In my judgment SGS carried out his tasks fully and fairly. He exercised his discretion to rely on the Claimant's representations, her undated letter/witness statement and her original detailed complaint letter of October 2018. As to the complaint made in this review, that SGS failed to open and read the Appendix Documents, whilst I would not have made the same decision, for it would not have taken long to request the Appendix Documents in a readable format and to read them, that is not the test for granting a quashing order on judicial review. The test is whether the decision SGS reached, in the exercise of his discretion about what to admit in evidence, was either: (1) so unreasonable that no reasonable AU appeal assessor would have made that decision in the circumstances of the case; or (2) was irrational; or (3) unlawful; or (4) procedurally unfair. I do not consider that the decision which SGS took in relation to the Appendix Documents falls into those categories when considered in the context of the evidence gathered and which he read to determine the appeal.

[84] Applying the approach of Parker J in *Muldoon* to the the decision of SGS, I consider that it was a matter for his discretion whether or not he read the newly submitted evidence in the Appendix Documents. He had before him all of the Claimant's previous contemporaneous evidence of her complaints and her new letter/witness statement. I can readily understand why he chose not to admit the late provided documents. He was not reinvestigating. He was reviewing the evidence gathered below. He could have decided a further investigation was needed if the index to the Appendix Documents had highlighted a Smoking Gun and if that had been set out in the letter/witness statement and evidenced in the body of the Appendix Documents but he found no such Smoking Gun in the letter/witness statement so he did not examine the alleged bullets in the chamber of the non-existent gun.

Academic

[85] Whether or not I am right above I have considered whether this claim is purely academic. The Claimant started her complaints with a view to gaining protection from alleged harassment by BC and asserted that to do so she needed two CAD reports to assist her to move away from her flat which was next door to where BC lived.

[86] By the time BC had died, in the autumn of 2018, there was no need for further protection yet the Claimant still asserted she was living in perpetual fear. The complaints and appeals could not achieve anything more for her by way of protection from him. To that extent the appeals were and the judicial review is purely academic. These long and expensive procedures, taking up huge amounts of publicly funded police time, can achieve nothing for the Claimant other than the quashing of a decision rejecting grounds 2 and 3 of her complaints against PCM and a further reconsideration of what she said to him and what he said to the Claimant's GP.

[87] I have considered the authorities. In *R. v Secretary of State for the Home Department Ex p. Salem* [1999] 1 A.C. 450. Lord Slynn stated (at 457A):

> "The discretion to hear disputes, even in the area of public law, must, however be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

[88] I do not consider that either of these factors apply in the circumstances of this case.

[89] The academic defence was considered by the Court of Appeal in *R (L) v Devon County Council* [2021] ELR 420; EWCA Civ 358. Elisabeth Laing LJ (with whom Haddon-Cave LJ and Peter Jackson LJ agreed) ruled that:

> "the Administrative Court has at its disposal a range of doctrines, with discretionary elements, to control access to its scarce resources… The discipline of not entertaining academic claims is part of this armoury. It enables the court to avoid hearings in cases in which, although the issue may be arguable, the court's intervention is not required, because the claimant has obtained, by one means or another, all the practical relief which the court could give him."

[90] I consider that the Claimant has obtained all the practical relief which she could have obtained.

[91] Peter Jackson LJ (with whom Haddon-Cave LJ agreed) explained matters thus at [62]:

> "What do we mean when we describe a claim as 'academic'? A claim will be academic if the outcome does not directly affect the rights and obligations of the parties"

[92] On the other hand Parker J in *Muldoon* [2009] EWHC 3633 (Admin) at [20] considered the issue more generally:

> "The function of the court is important because an appellant is (and I quote from Saunders J in Dennis to which I have referred) entitled to have a proper review because it is important that the functions of the IPCC are carried out properly to maintain public confidence in the system and the police force and to ensure that if there are lessons to be learnt, that that happens…"

[93] I accept that in cases involving allegations of more serious crimes with violence, racism, weapons, sex abuse, discrimination, dishonesty or other more weighty issues, the importance of ensuring that the police internal investigations into complaints are carried out correctly would or could be enough in itself. However I consider that the circumstances of this claim make this judicial review academic. I do so because the alleged crime and the alleged evidence in support has been assessed by so many police officers as not reaching the threshold for a potential crime. I also consider it highly relevant that the alleged harasser died over 3 years ago. I take into account that there have been two substantial local investigations and two appeals to the UA. I take into account the crucial question of proportionality and the need for careful allocation of limited publicly funded police resources. I consider that the Claimant's rights (civil and criminal) cannot be improved by this judicial review. I take into account the fact that the Appendix Documents were not put before the original local investigators by the Claimant. I consider that there is little public interest in this court ruling on the boundaries of the AU's discretion in this police complaint appeal case in the light of those factors.

[94] I have also considered the scope of S.31(2A)(a) of the *Supreme Court Act 1981* and I consider that for the reasons set out above it is highly likely that the outcome for the Claimant would not have been substantially different if the conduct complained of had not occurred (the S.31(2A)(a) ground).

Conclusions

[95] For the reasons set out above I dismiss the claim.

NOTE

I will consider consequential orders in due course on receipt of a draft order from the parties and any written representations on costs.

Ritchie J