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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**19/03/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY ELIZABETH McGOWAN FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

-v-

THE CHIEF CONSTABLE OF THE PSNI

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Before: Stephens LJ, Deeny LJ and McCloskey J

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Glossary

ACC:	**Assistant Chief Constable**
CS:	**Custody Sergeant Brian McKenna**
DCC:	**Deputy Chief Constable**
DOJ:	**Department of Justice**
DS:	**Detective Sergeant**
ECHR:	**European Convention of Human Rights and Fundamental Freedoms**
ECtHR:	**The European Court of Human Rights**
HRA 1998:	**Human Rights Act 1998**
NIPB:	**Northern Ireland Policing Board**
PAP:	**Pre- action Protocol**
PONI:	**Police Ombudsman for Northern Ireland**
PPS:	**Public Prosecution Service**

SP9/2012:	**PSNI Service Procedure 9/2012: Misconduct Procedures for Police Officers**
The Victims Charter:	**"A Charter for Victims of Crime" (DOJ)**
PSNI:	**Police Service of Northern Ireland**
The 1998 Act:	**Police (NI) Act 1998**
The 2000 Act:	**Police (NI) Act 2000**
The 2003 Act:	**Police (NI) Act 2003**
The 2000 Regulations:	**The Royal Ulster Constabulary (Conduct) Regulations 2000**

McCLOSKEY J (delivering the first judgment at the invitation of Stephens LJ)

Introduction

[1] The Applicant is the mother of David McGowan deceased (hereinafter "*the deceased*") who died in police custody on 30 May 2014, having been arrested and placed in a cell. A police officer performing the duties of custody sergeant at the material time (known and described hitherto in these proceedings as "CS"), was suspended from duty by a decision of the Deputy Chief Constable of PSNI with effect from June 2014. This was followed by a further decision, made by an Assistant Chief Constable, in November 2014 whereby the suspension of CS was revoked, prompting his return to work whereupon he was redeployed, being assigned to administrative duties at Police HQ.

[2] The Applicant challenges this latter decision. She appeals to this court against the judgment and order of Maguire J dated 21 December 2017 whereby her application for judicial review was dismissed.

Anonymity Issues

[3] Attention is drawn to the following procedural matters:

(i) From the outset of these proceedings the Applicant was described as XY, while the cipher CS was applied to the custody sergeant concerned. These measures were stimulated by the fact of an uncompleted investigation into the fatality and the related possibility of a prosecution giving rise to a jury trial. Possible prejudice to the latter eventuality was the driving consideration.

(ii) In accordance with rules of court and case management directions, CS and his legal representatives have been on notice of these proceedings, both at first instance and appeal, throughout. CS has

not sought to participate actively. As the chronology in the next succeeding paragraph demonstrates, CS was indeed prosecuted, his trial was completed recently and the outcome was a judicially directed jury verdict of not guilty.

(iii) In light of this latter development this court, on notice to and without objection from CS, has ruled that there is no basis for perpetuating either of the foregoing anonymity measures. While the cipher CS continues to appear in this judgment, this is essentially on convenience grounds, given that it has become so ingrained in these proceedings. "CS" is Police Sergeant Brian McKenna. There is no anonymity or publicity restriction of any kind.

Chronology of Proceedings

[4] The Applicant's legal challenge was initiated and progressed during a substantial part of the period to which the above chronology belongs. Proceedings were initiated in October 2015. In January 2016 leave to apply for judicial review was granted. Following appropriate case management steps and the accumulation of the Respondent's evidence, Maguire J delivered a reserved judgment on 21 December 2017. This was followed by the Applicant's Notice of Appeal, which is dated 30 January 2018. The substantive hearing in this court was conducted on 24 September and 12 November 2018 and was followed by further written submissions and certain additional evidence.

Agreed Factual Matrix

[5] The Court acknowledges the parties' compliance with its direction to provide a comprehensive schedule of agreed facts, which is hereby reproduced with some minor modifications:

(i) 29 May 2014: The Applicant's son is detained by the PSNI in Lisburn PSNI station.

(ii) 30 May 2014: The Applicant's son dies in a police cell. While the precise cause of his death is not agreed the Report of Autopsy states that it was due to the combined effects of alcohol and drugs, recording that he was moderately intoxicated with alcohol and had ingested at least three prescription drugs before being taken into custody

(iii) 18 June 2014: Letter from KRW Law solicitors to PSNI indicating that they act for the Applicant and seeking details of the officer investigating the death of the Applicant's son.

(iv) 20 June 2014: Investigating Officer Paul Murphy of the Police Ombudsman (PONI) advises the PSNI that he has serious concerns about the actions and comments of the custody staff and in particular CS at the time of the death of the Applicant's son. He advises that there may be a risk to the public if CS continued in his role. These concerns arose from an alleged failure of CS to provide a doctor attending the deceased with certain information about his condition received from another police employee. There was no allegation of ill-treatment of the prisoner by CS or any other police officer.

(v) 24 June 2014: Detective Superintendent Colin Taylor speaks to Paul Murphy (PONI) about the circumstances of the death.

(vi) 25 June 2014: Correspondence from PSNI to KRW Law advising that the matter is being investigated by PONI.

(vii) 25 June 2014: Superintendent Ryan Henderson provides DS Taylor with his assessment which includes a recommendation that CS be suspended from duty.

- DS Taylor provides a report to DCC Finlay advising that permitting CS to continue on duty would not be conducive to the high standards of discipline expected by the police and public, and recommending that CS be suspended forthwith.
- Chief Superintendent Noble provides a report to DCC Finlay recommending that CS be suspended.
- DS Taylor provides an update to PONI, advising of the suspension recommendation.

(viii) 26 June 2014: Paul Murphy (PONI) acknowledges DS Taylor's update.

(ix) 27 June 2014: DCC Finlay accepted the recommendation that CS should be suspended forthwith. CS suspended from duty.

(x) July 2014: PSNI informed PONI of the suspension.

(xi) 16 July 2014: PSNI review the suspension of CS. Ongoing suspension was considered appropriate and proportionate.

(xii) 12 August 2014: A letter from the Coroners Service to the Applicant regarding the cause of death

(xiii) 14 August 2014: PSNI review the suspension of CS. Ongoing suspension was considered appropriate and proportionate.

(xiv) September 2014: DOJ inform PSNI that it is making a further unplanned reduction in the police grant of £31.6m in the course of the 2014/15 financial year, resulting in total cuts for that year of £51.4M (7%). Following further adjustments in Nov 14 and Jan 15, the final reduction for the 2014/15 year was settled at £41.9M (5.7%).

(xv) 24 September 2014: Applicant and representatives from KRW Law meet with representatives of PONI. They advise that they have interviewed CS in relation to the offences of manslaughter and misconduct in public office.

(xvi) 30 September 2014: PSNI review the suspension of CS. Ongoing suspension was considered appropriate and proportionate. DCC Finlay notifies DS Taylor of the decision not to extend a contract with a recruitment agency due to in year budget cuts which will result in the immediate removal of approximately 300 staff from across the PSNI estate.

(xvii) 2 October 2014: DS Taylor convenes an emergency meeting within Discipline Branch of the PSNI to consider the position of the 21 officers suspended from duty in light of the anticipated impact of the cuts. In seven of these cases, including CS, it was decided that reinstatement with re-positioning would be recommended.

(xviii) 13 October 2014: Recommendation to DCC Harris that CS be reinstated.

(xix) 22 October 2014: PSNI review the suspension of CS.

(xx) November 2014: Departmental monitoring round leads to an offset in PSNI budget reduction with the allocation of an additional £13m.

(xxi) 6 November 2014: DCC Harris accepts the above recommendation. Suspension of CS revoked.

(xxii) 10 November 2014: CS notified.

(xxiii) 11 November 2014: PONI notified.

(xxiv) January 2015: Further in-year budget cut of £3.5m notified to the PSNI.

(xxv) 13 January 2015: Media reports describe the PSNI reinstating suspended officers due to "budget cuts". Official statements on behalf of PSNI made reference to *inter alia* "*financial pressures on its budget*", "*heavy financial pressure*" and an earlier public statement by the Chief Constable that "*… the prospects of millions of pounds in budget cuts would have a detrimental impact on front line policing*". It was further stated "*The review identified a small number of officers who could be returned to restricted duties. …. These restrictions would include minimal public contact and restricted access to public information.*"

(xxvi) 21 January 2015: PSNI review the redeployment of CS and conclude that this remains necessary and proportionate.

(xxvii) 7 February 2015: responding to a question from a member of the Northern Ireland Policing Board, the Chief Constable stated that following a review of the suspension of 26 police officers reinstatements had occurred in eight cases, with six of the officers reinstated being "*repositioned and placed in security roles …* [or] *… given administrative roles while their cases are considered*". These decisions were the outcome of a review stimulated "*… when it became clear that budget cuts would result in the loss of 320 PSNI staff by the end of 2014 …. in light of the extraordinary budget cuts and pressing staff losses …*"

(xxviii) Also on 7 February 2015: Media reports that one of the reinstated officers had been suspended in relation to a death in custody. The Applicant's family learn of this.

(xxix) 17 February 2015: KRW Law write to the PSNI and PONI enquiring whether any of the officers under investigation in relation to the death of the Applicant's son had been suspended and subsequently reinstated to duty.

(xxx) 20 February 2015: Holding response from the PSNI.

(xxxi) 23 February 2015: Correspondence from PONI to KRW Law advising that they were aware the PSNI had reinstated the Custody Sergeant under investigation. PONI confirmed that its office:

> *"… will provide all updates on the case directly to KRW law"* and that *"IO Beverley Gaw will continue to act as the Family Liaison Officer for the case and she shall maintain a level of contact with the [family]"*.

(xxxii) 26 February 2015: Correspondence from the PSNI to KRW Law confirming that the officer suspended from duty at an early stage of the investigation had now been reinstated to a repositioned role within the PSNI.

(xxxiii) 3 March 2015: PSNI review the redeployment of CS and conclude that this remains necessary and proportionate.

(xxxiv) 12 March 2015: Correspondence from KRW Law to the PSNI seeking details of the suspension and reinstatement of the CS.

(xxxv) 28 April 2015: PSNI review the redeployment of CS and conclude that this remains necessary and proportionate.

(xxxvi) 5 June 2015: PSNI review the redeployment of CS and conclude that this remains necessary and proportionate.

(xxxvii) 22 June 2015: PONI confirms to PSNI that the file re CS and another police officer was delivered to the PPS on 20 June 2015 with recommendations to prosecute for gross negligence manslaughter and/or misconduct in public office.

(xxxviii) 23 June 2015: PSNI review the redeployment of CS and conclude that this remains necessary and proportionate.

(xxxix) 23 July 2015: PONI write to KRW Law to advise that a full prosecution file had been passed to the PPS with a request that they consider the offences of gross negligence manslaughter and

misconduct in public office. PONI also advised that additional enquiries may be required and that a formal direction "*may take some time*." Confirmation provided that the identified PONI family liaison officer continued to act.

(xl) 28 July 2015: KRW Law write to the PSNI asking them to review their decision and to re-suspend CS. KRW also requested an explanation for the decision to reinstate CS

(xli) 29 July 2015: PSNI review the redeployment of CS and conclude that this remains necessary and proportionate.

(xlii) 7 August 2015: PSNI reply to KRW Law indicating that the decision to reinstate the Custody Sergeant would remain under review. PSNI also referred KRW to SP 9/2012 and to the range of factors which are taken into account when making a suspension/reinstatement decision.

(xliii) 9 September 2015: Pre-action protocol ("PAP") letter sent by KRW to the PSNI.

(xliv) 11 September 2015: PSNI review the redeployment of CS and conclude that this remains necessary and proportionate.

(xlv) 12 October 2015: Letter from KRW Law requesting response to PAP letter and other information.

(xlvi) 13 October 2015: Judicial review proceedings lodged.

(xlvii) 7 December 2015: PSNI review the redeployment of CS and conclude that this remains necessary and proportionate.

(xlviii) 8 January 2016: PSNI response to PAP letter.

(xlix) 12 January 2016: PSNI review the redeployment of CS and conclude that this remains necessary and proportionate.

(l) 29 January 2016: PSNI review the redeployment of CS and conclude that this remains necessary and proportionate.

(li) 9 February 2016: PSNI review the redeployment of CS and conclude that this remains necessary and proportionate.

(lii) 24 February 2016: PSNI review the redeployment of CS and conclude that this remains necessary and proportionate.

(liii) 1 March 2016: PSNI review the redeployment of CS and conclude that this remains necessary and proportionate.

(liv) 18 March 2016: Verbal communication from the PPS to the PSNI regarding the possibility of prosecuting CS for manslaughter and misconduct in public office.

(lv) 5 April 2016: DS Taylor in his first affidavit avers that CS remains repositioned pending a formal direction from the PPS on the PONI investigation file.

(lvi) 6 May 2016: PPS inform the PSNI in a telephone call that they have decided to accept the recommendation of PONI to prosecute CS for manslaughter and misconduct in public office, with a public announcement to follow on 10th May.

(lvii) 9 May 2016: Confirmation of PPS direction to prosecute CS. Renewal of CS' suspension from duty.

(lviii) 10 May 2016: PPS direction to prosecute CS for manslaughter and misconduct in public office. CS suspended from duty. PONI informed by PSNI. KRW Law informed by PONI's solicitor.

The Factual Matrix Summarised

[6] In brief compass, therefore, a police officer performing the duties of custody sergeant at the station where the death of an arrested person occurred while in a police cell was suspended from duty approximately one month after the event. His suspension was revoked some five months later. The motivation for this decision was resources, specifically the need to address staff shortages in the realm of ancillary and support services in a context of significant PSNI budgetary reductions. CS was one of eight Police officers whose suspension was rescinded and who were redeployed following a review of the cases of 26 suspended officers. These figures were promulgated in the public domain. Approximately eighteen months following his reinstatement and redeployment, CS was again suspended from duty. During the intervening period the reinstatement and redeployment of CS were the subject of frequent periodic review.

[7] During the period of reinstatement and redeployment CS was assigned to IT-related duties at PSNI HQ at Knock, Belfast entailing no interaction with members of the public. These duties were entirely unconnected with the investigation into the death. In accordance with statutory arrangements, the investigating agency was the Office of the Police Ombudsman of Northern Ireland ("PONI"). Having completed its investigation, PONI recommended to the Public Prosecution Service ("PPS") that CS be charged with the offences of manslaughter and misconduct in public office. A formal PPS direction to prosecute followed and the suspension from duty of CS was re-imposed. The trial of CS, which coincided with the initial hearing of this appeal, resulted in a judicially directed jury verdict of not guilty.

[8] Most recently, reflecting the outcome of the trial, the suspension of CS was revoked and he has now been reinstated and again redeployed, working on a digital policing project at PSNI HQ. No final decisions regarding disciplinary proceedings have been made. The effect of the statutory arrangements is that, at this post-trial stage, PONI must consider the question of whether disciplinary proceedings should be pursued and, while its function is to make a recommendation in the first place it is, ultimately, empowered by statute to direct the Chief Constable to initiate such proceedings.

[9] As appears from the foregoing, the factual matrix underlying these proceedings has evolved significantly between the first instance and appellate stages. The court considers that it should determine this appeal by reference to the present matrix. No argument to the contrary was presented. Furthermore, the factual matrix is incomplete, in the sense that the State's Article 2 ECHR response to the death in question remains to be finalised, by the holding of an inquest and awaiting final decisions on possible disciplinary proceedings.

Statutory Framework

[10] There are various statutory provisions bearing on the legal issues thrown up by this appeal. These are contained predominantly in the Police (NI) Act 1998 (the "*1998 Act*"), the Police (NI) Act 2000 (the "*2000 Act*") and the Police (NI) Act 2003 (the "*2003 Act*"). As appears from these measures there are three public authorities with inter-related duties and functions in the realm of policing in Northern Ireland: the PSNI/Chief Constable, PONI and NIPB.

[11] The statutory functions and responsibilities of PONI and its relationship with the PSNI and the PPS are regulated by a self-contained statutory code, found in Part VII, (sections 50 – 65), of the 1998 Act, as amended (reproduced in Appendix 1 to this judgment). It is convenient to note that in the context of the present case the "*appropriate disciplinary authority*" in the statutory language has

been and remains the Chief Constable of PSNI. Further regulation of PONI and the relationship between this agency and the PSNI was effected by Part VIII of the 2000 Act. These provisions are reproduced in Appendix 2.

[12] A brief outline of the operation of Part VII the 1998 Act in the present case is appropriate at this juncture:

(i) The office of PONI was new to Northern Ireland, being established for the first time by this statutory mechanism.

(ii) In accordance with section 52, referral of the investigation of the death by the Chief Constable to PONI was obligatory in the present case.

(iii) PONI then initiated a "*formal investigation*", into the death, under sections 54 and 56.

(iv) An investigation report having been compiled, PONI's consideration of whether a criminal offence may have been committed by a police officer and its decision to forward the report to the PPS, accompanied by recommendations for prosecution, took place in accordance with section 58(1) and (2).

(v) Now, in the aftermath of the 'not guilty' verdict, by virtue of section 59 the next function to be performed by PONI in the case of CS is to compile a "*memorandum*" relating to possible disciplinary proceedings, to be forwarded to the Chief Constable: section 59(1) – (3).

(vi) If PONI recommends disciplinary proceedings against CS and the Chief Constable disagrees, PONI, after consulting the Chief Constable, may direct him to proceed: section 59(v).

(vii) The Chief Constable must comply with such direction unless PONI permits him either not to bring disciplinary proceedings or to discontinue disciplinary proceedings: section 59(7).

(viii) PONI makes formal reports to the Secretary of State for Northern Ireland and the Northern Ireland Policing Board ("NIPB") and, further, publishes statutory "statements"

concerning its actions, decisions and determinations in accordance with sections 61 and 62.

[13] The statutory duties and functions of NIPB and the interaction of this public authority with the PSNI/Chief Constable are regulated mainly by Part VII of the 2000 Act (see Appendix 2). In summary, the role of NIPB is one of oversight of the Chief Constable/PSNI. This is effected mainly via the mechanism of reports by the Chief Constable to the Board.

[14] The broader context of the Applicant's challenge engages certain further provisions of the 2000 Act:

Section 27

"27. - (1) The Department of Justice may issue, and from time to time revise, codes of practice relating to the discharge-

(a) by the Board of any of its functions;

(b) by the Chief Constable of any functions which he exercises-

(i) on behalf of and in the name of the Board;

(ii) in relation to funds put at his disposal under section 10(4A) or (5); or

(iii) under section 26 or Part V.

(2) Before issuing or revising a code of practice under this section, the Department of Justice shall consult the Board with a view to obtaining its agreement to the proposed code of practice or revision.

(2A) Before issuing or revising a code of practice under this section, the Department of Justice shall also consult-

(a) the Chief Constable;

(b) the Ombudsman;

(c) the Northern Ireland Human Rights Commission;

(d) the Equality Commission for Northern Ireland; and

(e) such other persons as the Department of Justice considers appropriate.

(3) The Department of Justice shall publish any code of practice issued or revised under this section in such manner as the Department of Justice thinks appropriate."

Section 28(1) and (5)

"28. - (1) The Board shall make arrangements to secure continuous improvement in the way in which its functions, and those of the Chief Constable, are exercised, having regard to a combination of economy, efficiency and effectiveness.

(5) The performance plan shall-

(a) identify factors ("performance indicators") by reference to which performance in exercising functions can be measured;

(b) set standards ("performance standards") to be met in the exercise of particular functions in relation to performance indicators.

(5A) The Board shall prepare and publish for each financial year a summary (its "performance summary") of the Board's assessment of-

(a) its and the Chief Constable's performance in the year measured by reference to performance indicators;

(b) the extent to which any performance standard which applied at any time during that year was met.

(5B) The performance summary for a financial year may be published-

(a) with a report issued under section 57(1) for the year, or

(b) with the performance plan for the following year."

Section 31A(1) and (2)

"31A . - (1) Police officers and National Crime Agency officers shall carry out their functions with the aim-

(a) of securing the support of the local community, and

(b) of acting in co-operation with the local community.

(2) In carrying out their functions, police officers and National Crime Agency officers shall be guided by the code of ethics under section 52."

[15] There follows a cluster of provisions of an overarching nature:

Section 32

"(1) It shall be the general duty of police officers-

(a) to protect life and property;

(b) to preserve order;

(c) to prevent the commission of offences;

(d) where an offence has been committed, to take measures to bring the offender to justice.

(2) A police officer shall have all the powers and privileges of a constable throughout Northern Ireland and the adjacent United Kingdom waters.

(3) In subsection (2)-

(a) the reference to the powers and privileges of a constable is a reference to all the powers and privileges for the time being exercisable by a constable whether at common law or under any statutory provision,

(b) 'United Kingdom waters' means the sea and other waters within the seaward limits of the territorial sea,

and that subsection, so far as it relates to the powers under any statutory provision, makes them exercisable throughout the adjacent United Kingdom waters whether or not the statutory provision applies to those waters apart from that subsection.
(4)(5) [rep. 2003 c.6 from 8 April 2003]."

Section 33

"(1) The police shall be under the direction and control of the Chief Constable.

(2) The Chief Constable shall have regard to the policing plan in discharging his functions.

(3) The Chief Constable shall have regard to any code of practice under section 27 in discharging his functions.

(4) The duty under subsection (3) applies only so far as consistent with the duty under subsection (2)."

Section 33A(1):

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

Section 38

> "*Attestation of constables.* [in force 4 Nov 2001]
>
> 38. - (1) Every police officer shall, on appointment, be attested as a constable by making before a justice of the peace [not a lay magistrate] a declaration in the following form-
>
> > 'I hereby do solemnly and sincerely and truly declare and affirm that I will faithfully discharge the duties of the office of constable, with fairness, integrity, diligence and impartiality, upholding fundamental human rights and according equal respect to all individuals and their traditions and beliefs; and that while I continue to hold the said office I will to the best of my skill and knowledge discharge all the duties thereof according to law.'
>
> (2) The Chief Constable shall take such steps as he considers necessary-
>
> (a) to bring the terms of the declaration to the attention of all police officers appointed before the coming into force of this section; and
>
> (b) to ensure that they understand it and understand the need to carry out their duties in accordance with it.
>
> (3) 'Traditions and beliefs' does not include a tradition or belief so far as it is incompatible with the rule of law."

[16] The major undertaking of comprehensive reform, by statute, of policing services in Northern Ireland was one of the pillars of the 1998 political settlement enshrined in the Belfast Agreement. It began with the 1998 Act and continued with the 2000 Act and the 2003 Act. The latter statute, *inter alia*, amended several of the provisions in its two predecessor statutes (reflected in what is set forth above) and addressed a broad array of other issues, many of them novel, in

particular the creation of "*district policing partnerships*" and the police powers conferred on "*police support staff*" and "*designated contracted-out staff*" who are not police constables. It also introduced the new concepts of police support of the community and community co-operation with the police: see section 31A (above). The need for three substantial measures of (Westminster) primary legislation regarding policing in Northern Ireland in the compass of just five years in some ways tells its own story.

[17] The relevant measure of subordinate legislation which falls to be considered is the Royal Ulster Constabulary (Conduct) Regulations 2000 (the "*2000 Regulations*"). This statutory instrument contains certain detailed outworkings of the statutory code constituted by Part vii of the 1998 Act (see Appendix 1) and was made pursuant to section 64(1) thereof. Of particular note in the present context is regulation 5(1), which provides:

> "(1) Where there has been a report, allegation or complaint which indicates that the conduct of a member did not meet the appropriate standard, the Chief Constable may suspend the member concerned from duty and from his office of constable whether or not the matter has been investigated.
>
> (2) The Chief Constable may exercise the power to suspend the member concerned under this regulation at any time from the time of the receipt of the report, allegation or complaint until—
>
> (a) the supervising member decides not to refer the case to a hearing,
>
> (b) the notification of a finding that the conduct of the member concerned did meet the appropriate standard,
>
> (c) the time limit for giving notice of intention to seek a review under regulation 34 has expired, or
>
> (d) any review under regulation 35 has been completed.
>
> (3) Where the member concerned is suspended under this regulation, he shall be suspended until there occurs any of the events mentioned in paragraph (2)(*a*) to (*d*), or until the Chief Constable decides he shall cease to be suspended, whichever first occurs.

> (4) When the member concerned who is suspended is required to resign under regulation 31 he shall remain suspended during the period of his notice.
>
> (5) The Chief Constable may delegate his powers under this regulation to another senior officer."

[18] It suffices to record, in the briefest terms only, one further statutory measure, namely the Coroners Act (NI) 1959 (the "*1959 Act*"). This was included in the PSNI bundle of authorities, evidently as a reminder to the court that there has not yet been any inquest into the subject death which – by section 18(1)(b) – would require a jury and, further, will predictably be of the wider Middleton Article 2 ECHR species (see R (Middleton) v West Somerset Coroner [2004] 2 AC 182). In passing, argument on this discrete issue did not feature in the presentations of either party.

Policies And Kindred Instruments

[19] "Misconduct Procedures for Police Officers" ('SP 9/2012') was issued on 31 May 2012. It incorporates by reference certain other instruments, including the PSNI Code of Ethics 2008 (*infra*). The topic of suspension of "*police officers who are* [the] *subject of criminal/disciplinary investigations*" is addressed in section 4. This enshrines the following general principle:

> "*The decision to suspend an officer from duty is a serious one, having potentially detrimental effects on the individual concerned, their family and the organisation.*"

In section 4(3) it is stated:

> "*The decision to suspend an officer is only taken in exceptional circumstances after all other options, including alternative duties, have been considered ….*
>
> *Alternative duties in this instance would include a temporary change in role/location pending the outcome of investigation and misconduct proceedings, for example:*
>
> *(i) Where contact with the public is reduced or prevented; and/or*

(ii) Where involvement in a particular activity is reduced or prevented, eg handling of money or firearms; and/or

(iii) Where access to evidence, information or intelligence is restricted."

[20] An inexhaustive list of factors to be taken into account follows:

"*Considerations should include:*

(i) The nature and seriousness of the alleged action of the individual(s) including any apparent aggravating or mitigation factors.

(ii) The strength of evidence.

(iii) The public interest, the reputation of the Police Service and the potential impact on public confidence.

(iv) Whether effective investigation of the allegation may be compromised if the officer remains in post.

(v) The nature of the current post held, alternative posts and the potential risk to the individual, public, colleagues, operations or the investigation if the officer is not suspended.

(vi) The impact on organisational efficiency."

Provision is made for the review of suspension/alternative duties decisions and the involvement of the officer concerned in the decision making process. Section 4(8) is in the following terms (so far as material):

"*Circumstances …….*

(a) Once suspended, an officer cannot exercise police powers ….

(d) Other conditions or restrictions may be imposed on a suspended officer as are

> *reasonable in the circumstances, for example restricting access to police premises.*"

[21] The PSNI Code of Ethics ("COE") begins with a reminder of the statutory duty of the Northern Ireland Policing Board ("NIPB") –

> "*… to secure, for the people of Northern Ireland, an effective, efficient and impartial Police Service.*"

The issue of public confidence is addressed in these terms:

> "*Public confidence in the Police Service is closely related to the attitude and behaviour of officers towards members of the public, in particular their respect for the human rights and fundamental freedoms of individuals as enshrined in the European Convention on Human Rights.*"

Two further passages are of note. First, paragraph L of the introductory section:

> "*This Code shall be applied in any investigation, hearing or decision relating to misconduct in a reasonable and objective manner. Due regard shall be given to the degree of negligence or deliberate fault of an officer and to the nature and circumstances of the officer's misconduct.*"

Second, paragraph 5.3:

> "*Police officers shall take every reasonable step to protect the health and safety of detained persons and shall take immediate action to secure medical assistance for such persons where required.*"

[22] The Department of Justice's ("DOJ's") Victims Charter (full title – "A Charter for Victims of Crime") ("the Victims Charter"), made under section 31(2) of the Justice (NI) Act 2015 and published in September 2015, was also invoked on behalf of the Applicant. Reliance was placed on "Standard 1.6", which is entitled "Provision of Information as You Move Through the Criminal Justice System" and states:

> "*You are **entitled** to receive information about the criminal justice system and how it operates. You are*

> *also **entitled** to receive information from service providers about the progress of the case (that is the state of the criminal proceedings), where this is available and unless in exceptional cases the proper handling of the case may be adversely affected by this. You can ask for updates or information outside the times agreed with service providers. You can tell a service provider that you don't want to receive information, including about the case (except where it must be provided to enable you to take part in the criminal proceedings). You can change your mind about receiving information at any point. If you notify a service provider about this they will take account of it. Where you are to receive information from a service provider about the progress of the case you can ask for the information to be provided in a format that best suits your needs (for example by phone, by email or in writing).*"

The Applicant's Challenge

[23] In compliance with the court's directions amended incarnations of the Order 53 Statement materialised. In this way the Applicant's initial quest for quashing and mandatory remedies has been abandoned. The relief sought now is declaratory only, formulated in the following terms:

> (i) A declaration that the decision to reinstate this custody sergeant and the failure to suspend him until 10 May 2016 were arrived at in a manner incompatible with the Applicant's rights as protected by Article 2 of the European Convention on Human Rights ("ECHR").
>
> (ii) A declaration that the policy applied by the PSNI when arriving at these decisions was unlawful because it resulted in an unacceptable risk of a breach of the requirements of Article 2 ECHR, on account of its failure to include the provisions detailed in [80] *infra*.

Though not pleaded, the foundation of the legal duties underpinning these remedies is, of course, section 6 of the Human Rights Act 1998 ("HRA 1998").

[24] The grounds upon which the Applicant pursues these remedies are diffuse and prolix. Having regard to the presentation of the Applicant's case both

at first instance and in this court, the irrationality and inadequate reasons grounds are clearly subsidiary to the two main challenges, while the discrete ground complaining that PSNI resources was a legally irrelevant consideration was not developed. The two central challenges reflecting the two forms of declaration outlined above, are:

(i) The revocation of the suspension of the Applicant from police duty infringed the Article 2 ECHR procedural obligation, contrary to section 6 of HRA 1998.

(ii) Service Procedure 9/2012, the policy under which the reinstatement and redeployment of CS were effected, is similarly unlawful, on account of its failure to include provisions relating to *inter alia* consultation with and information provision to victims' families in respect of suspension decisions, no or inadequate specification of the factors of public confidence and the employment of competent police officers, the omission of a provision requiring the obligatory suspension of officers such as CS and no or inadequate emphasis on Article 2 ECHR.

Judgment of Maguire J

[25] The formulation of the Applicant's challenge is distilled in two passages in the judgment of Maguire J. First, at [43]:

> "***Has Article 2 been breached in this case? … … … ….***
>
> *It seems to the court that the above is the main issue in this case. It can, moreover, be distilled to a more specific point and that is whether on the facts and circumstances of this case it can be shown that Article 2 required the PSNI to suspend CS.*"

Second, at [52]:

> "*The essential argument made by the Applicant is …… that in view of the legal authorities a decision or act which runs counter to the underlying purposes of Article 2 will be incompatible with the implied procedural obligations of that article. In addition, a*

failure to provide information on a decision in these circumstances will be similarly incompatible with Article 2. This can be so even if an investigation leads to a prosecution and conviction. This is because the obligation is one of means, not results, and such failures have the potential to undermine the purposes of dispelling the appearance of collusion in and tolerance of unlawful acts and ensuring that relatives and the public have the satisfaction of knowing lessons have been learned from the death."

[26] The learned trial judge's reasons for rejecting the Applicant's challenge are expressed with clarity in the following passages:

"[61] The court is persuaded by the submissions of Dr McGleenan that in the current state of Strasbourg jurisprudence it cannot be said that in a case of this nature there is a requirement within Article 2 which obliges the PSNI to suspend and keep suspended an officer in the position of CS. This aspect, it seems to the court, at this stage in the development of Convention law, cannot, at least as a general proposition, be viewed as an indispensable requirement of an effective official investigation. While it may be possible to conceive of circumstances in which the conduct of a state authority so clearly reflects an attitude of tolerance of official wrong-doing or collusion that this would or could seriously undermine public confidence in an on-going Article 2 investigation, in the court's opinion, that is not this case. The court simply does not accept that the facts of this case support a finding adverse to the police on these aspects.

[62] Rather it seems to the court that there can, on the facts of this case, be no serious doubt about the motivation of the PSNI in lifting CS's suspension. The pragmatic reasoning which lay behind it is abundantly clear in the papers before the court and it is the court's view that it cannot properly be said that the Police Service were, in any significant way, colluding in, or tolerating, the acts or omissions which led to charges being preferred against CS.

[63] In this case, the court also accepts Dr McGleenan's submission that what has occurred in this case is unlikely to be viewed as corrosive of public confidence in the

> *investigatory process, given that there has been little, if any, evidence of any real adverse effect on it, and there is no sign that those conducting the investigation or pursuing the prosecution of CS have been impeded or hampered in any clear or identifiable manner."*

In a later passage, at [65], the Judge, noting that the investigating agency was PONI, held that there had been no breach by PSNI of that element of the Article 2 procedural obligation requiring involvement of the next of kin in the investigation "*to the extent necessary to safeguard their legitimate interests*".

[27] If and insofar as there was a discrete requirement of Article 2 to involve the next of kin in the reinstatement and redeployment decision, the judge was unpersuaded. See [67]:

> "*It follows from the court's reasoning aforesaid that the court is not satisfied that Article 2 touches on the decisions impugned in this case and that the question of the alleged repugnance of the PSNI service procedure with Article 2 simply does not arise.*"

As regards the Applicant's challenge to SP9/2012 the Judge states:

> "*The policy does not exclude the possibility of consulting family members and it seems to the court it offers substantial flexibility as to how it may be applied in a given case and may result, as it originally did in this case, in suspension of an officer.*"

[28] It is appropriate to record at this juncture that a substantial swathe of the arguments addressed to this court on behalf of the Applicant was entirely new, quite unrelated to the presentation of the Applicant's case at first instance and, indeed, not foreshadowed in counsels' appeal skeleton argument. In passing, this court did not consider it necessary or appropriate to take the cost incurring and delay generating step of remitting the appeal to Maguire J.

Article 2 ECHR

[29] The main element of the Applicant's challenge is based on the procedural, or adjectival, dimension of Article 2 ECHR, one of the protected Convention rights under the scheme of HRA 1998. This dimension of Article 2 was first enunciated comprehensively by the European Court of Human Rights ("the ECtHR") in McCann v United Kingdom [1995] 21 EHRR 97 (at paragraphs [146]

– [149]: hereinafter "*the procedural obligation*"). The Court decided that Article 2, by implication, generates not merely a substantive obligation on the State to refrain from killing but also, in circumstances where the question of whether the State has violated this obligation arises, an associated procedural duty to conduct an effective official investigation into the death

[30] The Article 2 procedural obligation was formulated comprehensively by the ECtHR in Jordan v United Kingdom [2003] 37 EHRR 2 in the following terms:

> "*General Principles*
>
> *102. Article 2 , which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which in peacetime no derogation is permitted under Art.15. Together with Art.3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Art.2 be interpreted and applied so as to make its safeguards practical and effective.*
>
> *103. In the light of the importance of the protection afforded by Art.2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as for example in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death which occur. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation.*
>
> *104. The text of Art.2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to* *87 *"use force" which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor however to be taken into account in assessing its necessity.*

Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paras (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paras 2 of Arts 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims.

105. The obligation to protect the right to life under Art.2 of the Convention, read in conjunction with the State's general duty under Art.1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. [26] *The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.*

106. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence.

107. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of

> *means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including* inter alia *eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death.* [32] *Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.*
>
> *108. A requirement of promptness and reasonable expedition is implicit in this context. It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.*
>
> *109. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."*

[31] Further citation of Strasbourg authority on the Article 2 procedural obligation is unnecessary. The exercise of juxtaposing Jordan with McCann and, for example, Edwards v United Kingdom [2002] 35 EHRR 19 at [69] – [73] demonstrates that the formulation in Jordan *supra* is the most comprehensive in the case law of the ECtHR.

[32] The parties' arguments drew attention to certain other decisions of the ECtHR relating to the Article 2 procedural obligation. These are considered in the paragraphs which follow.

[33] In Oneryildiz v Turkey [2005] 41 EHRR 20, where a methane explosion on a municipal refuse dump killed a number of persons living in an adjoining slum, the applicant, whose close relatives had been killed, asserted *inter alia* a violation of the Article 2 procedural obligation. In its judgment the ECtHR formulated a series of general principles, at [89] – [96]. At [94] – [96] the court stated:

"94. To sum up, the judicial system required by Art.2 must make provision for an independent and impartial official investigation procedure that satisfies certain minimum standards as to effectiveness and is capable of ensuring that criminal penalties are applied where lives are lost as a result of a dangerous activity if and to the extent that this is justified by the findings of the investigation. In such cases, the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations capable of, first, ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system and, secondly, identifying the state officials or authorities involved in whatever capacity in the chain of events in issue.

95. That said, the requirements of Art.2 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts; the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law.

96. It should in no way be inferred from the foregoing that Art.2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence. On the other hand, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts. The Court's task therefore consists in reviewing whether and to what extent the courts, in reaching their conclusion, may be deemed to have submitted the case to the careful scrutiny required by Art.2 of the Convention, so that the deterrent effect of the judicial system in place and the significance of the role it is required to play in preventing violations of the right to life are not undermined."

[34] In one of the ECtHR's most recent pronouncements on the procedural obligation, in Mazepa v Russia [Application 15086/07, 17 July 2018], the following passage, at [69], is noteworthy:

> *"The nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case and must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work (ibid., § 234). Where the official investigation has led to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law. It should in no way be inferred from the foregoing that Article 2 may entail the right for an applicant to have third parties prosecuted or sentenced for a criminal offence or an absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence. On the other hand, the national courts should not under any circumstances be prepared to allow life-endangering offences to go unpunished"*

The duty on the State authorities, therefore, remains one of means and not result.

[35] Various forms of legal proceedings, including disciplinary action against the State official/s concerned, are capable in principle of discharging the Article 2 procedural obligation. This is clear from, for example, Janowiec v Russia [2013] ECHR 55508/07, at [143]:

> *"The Court further considers that the reference to 'procedural acts' must be understood in the sense inherent in the procedural obligation under art 2 or, as the case may be, art 3 of the Convention, namely acts undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party (see* Labita v Italy *[2000] ECHR 26772/95, para 131, and* McCann v UK*, 27 September 1995, para 161, Series A no. 324). This definition operates to the exclusion of other types of inquiries that may be carried out for other purposes, such as establishing a historical truth."*

As this passage makes clear, it is necessary to consider the response of the relevant State authority as a whole in the exercise of determining whether the procedural obligation has been acquitted. This passage further highlights the close association between the Article 2 procedural obligation and its Article 3 counterpart.

[36] Within the Article 2 jurisprudence of the ECtHR there is a discrete *corpus* of cases which make clear that where a detained person dies while in the custody of the authorities the State is required to discharge the Article 2 procedural obligation. In Salman v Turkey [2000] ECHR 21986/93 the Court stated at [99]:

> *"Persons in custody are in a vulnerable position and the authorities are under a duty to protect them. Consequently, where an individual is taken into police custody in good health and is found to be injured on release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused (see, amongst other authorities,* Selmouni v France *judgment of 28 July 1999, to be published in* Reports *1999 – . . . , para. 87). The obligation on the authorities to account for the treatment of an individual in custody is particularly stringent where that individual dies."*

To like effect is Edwards v United Kingdom [2002] 35 EHRR 19 at [56] especially.

[37] In Duran v Turkey [2008] ECHR 42942/02 the applicants, the parents of a young man arrested on suspicion of robbery and found dead at a police station later the same day, asserted a breach of the Article 2 procedural obligation in circumstances where certain police officers had been prosecuted and, following a series of proceedings in the Turkish courts, were ultimately punished by suspended sentences of imprisonment ranging from two to nine years. The ECtHR held, in substance, that the suspension of the sentences was unjustifiable and diagnosed breaches of the Articles 2 and 3 procedural obligations accordingly. At [59] – [63] of its judgment, the Court formulated certain "General Principles" in familiar terms. At [64] it added:

> "*The Court finally reiterates that where a State agent has been charged with crimes involving torture or ill treatment, it is of the utmost importance that he or she be suspended from duty during the investigation and the trial and be dismissed if convicted (see ……. Yaman v Turkey …. at para 55 ….)*".

[38] In Nikolova v Bulgaria [2009] 48 EHRR 40, the next of kin of a man who had been struck by police officers on a training exercise and died subsequently in custody asserted *inter alia*, breaches of the procedural obligations under Articles 2 and 3 ECHR in circumstances where two officers had been convicted of having caused the death through intentional grievous bodily harm and were punished by suspended sentences of three years imprisonment and the imposition of an award of compensation which, in the event, was undischarged on the ground of alleged impecuniosity. The ECtHR held *inter alia* that there had been a violation of the Article 2 procedural obligation. In thus deciding it stated the following:

> *"62. It follows that while the Court should grant substantial deference to the national courts in the choice of appropriate sanctions for ill-treatment and homicide by state agents, it must exercise a certain power of review and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed. Were it to be otherwise, the states' duty to carry out an effective investigation would lose much of its meaning, and the right enshrined by art.2, despite its fundamental importance, would be ineffective in practice.*
>
> *63. The Court notes that in the instant case the national courts gave substantial reasoning as to why they characterised the act committed by the officers as wilful inflicting of grievous bodily harm negligently resulting in death. They also specified the grounds for imposing the minimum term of imprisonment allowed by law and for opting to suspend it. It is not the Court's task to verify whether their judgments correctly applied domestic criminal law; what is in issue in the present proceedings is not the individual criminal law liability of the officers, but the international-law responsibility of the state. However, the Court cannot overlook the fact that, while the Bulgarian Criminal Code of 1968 gave the domestic courts the possibility of meting out up to 12 years' imprisonment for the offence committed by the officers, they chose to impose the minimum penalty allowed by law – three years' imprisonment – and further to suspend it. In this context, it should also be noted that no disciplinary measures were taken against the officers. What is more, until 1999, well after the beginning of the criminal proceedings against them, both officers were still serving in the police, and one of them had even been promoted (he stopped being on the force only because he later chose to resign), whereas the*

> *Court's case law says that where state agents have been charged with crimes involving ill-treatment, it is important that they be suspended from duty while being investigated or tried and be dismissed if convicted. In the Court's view, such a reaction to a serious instance of deliberate police ill-treatment which resulted in death cannot be considered adequate. By punishing the officers with suspended terms of imprisonment, more than seven years after their wrongful act, and never disciplining them, the state in effect fostered the law-enforcement officers' 'sense of impunity' and their 'hope that all [would] be covered up', noted by the investigator in charge of the case.*
>
> *64. In conclusion, the Court finds that the measures taken by the authorities failed to provide appropriate redress to the applicants. They may therefore still claim to be victims within the meaning of art.34 of the Convention."*

From the footnotes the source of the sentence beginning "*What is more ….*" is the decision in Yaman v Turkey, considered at further length in [40] *infra*.

[39] Next, in another case involving the death of an arrested person in Turkish police custody, Duran v Turkey [2008] ECHR 42942/02. The ECtHR, under the rubric of "*The Court's assessment …. General Principles*" stated *inter alia* at [64]:

> "*The Court finally reiterates that where a State agent has been charged with crimes involving torture or ill treatment, it is of the utmost importance that he or she be suspended from duty during the investigation and trial and be dismissed if convicted (see …. Yaman v Turkey … at para 55 ….*"

The Court found a breach of the procedural obligations under Articles 2 and 3 on the basis of the wholly inadequate sentences imposed on certain officers convicted of having caused the death unintentionally by beating, namely suspended sentences of two years and nine months imprisonment.

Article 3 ECHR Cases

[40] A series of decisions of the ECtHR under Article 3 ECHR, none of them cited at first instance, formed an important plank in the Applicant's case before this court. It is convenient to outline these in chronological sequence.

[41] In Yaman v Turkey [2005] 40 EHRR 49 the applicant invoked Articles 3 and 13 ECHR in advancing his twofold complaint that he had been tortured in police custody and there had been no ensuing effective investigation. The ECtHR found a violation of each of these Convention provisions. Notably, the finding of a breach of Article 3 was confined to its substantive dimension: see [40] – [49]. In the context of its consideration of Article 13 the Court stated:

> *"53 The Court reiterates that the nature of the right safeguarded under Art.3 has implications for Art.13. Where an individual has an arguable claim that he has been tortured or subjected to serious ill-treatment by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigatory procedure.*
>
> *54 A requirement of promptness and reasonable expedition is implicit in this context. It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating torture or ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.*
>
> *55 The Court further points out that where a state agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance for the purposes of an "effective remedy" that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible. The Court also underlines the importance of the suspension from duty of the agent under investigation or on trial as well as his dismissal if he is convicted. "*

[42] The genesis of the statement in the final sentence of [55] of Yaman is a United Nations publication, the "Conclusions and Recommendations of the Committee against Torture" [CAT/C/CR/30/5], dated 27 May 2003. This report, which was the Committee's "*Second Periodic Report of Turkey*", contains a section entitled "Subjects of Concern". This documents *inter alia* widespread allegations of the ill treatment of detainees in police custody and allegations of

inadequate access to medical treatment and legal advice. The salient passage is the following:

> "*[5] The Committee expresses concerns about …..*
>
> *(d) Allegations that despite the number of complaints, the prosecution and punishment of members of security forces for torture and ill treatment are rare, proceedings are exceedingly long, sentences are not commensurate with the gravity of the crime,* ***and officers accused of torture are rarely suspended from duty during the investigation.***"
>
> [Emphasis added.]

In a later publication of the Committee, dated 16 December 2013 [CAT/C/51/4], the following passage, at [44], is of note:

> "*Whenever there are reasonable grounds to believe that an official have* [sic] *committed acts of torture or ill-treatment, he or she should be suspended from his or her duties immediately and remain so throughout the investigation, particularly if there is any risk that the official might otherwise be in a position to repeat the alleged act or interfere with the investigation. Moreover, persons suspected of having committed torture or ill-treatment should be prosecuted by judicial or prosecutorial authorities and, if found guilty, should be punished with appropriate sentences that are commensurate with the gravity of their acts, and victims should be afforded appropriate redress.*"

One interposes the observation that whereas the quoted passage from the Committee's 2003 Report is sourced throughout this discrete category of ECtHR cases, the later (2013) Report is not.

[43] In the next of this discrete series of cases, Gafgen v Germany [2011] 52 EHRR 1, the Grand Chamber of the ECtHR allowed an appeal against the decision of a Chamber of the Fifth Section, holding that his interrogation by police amounted to inhuman treatment in contravention of Article 3 ECHR but concluding that the applicant could no longer claim to be the victim of a violation. The Chamber had reasoned that the domestic courts, through the

conduct of the prosecution of the applicant and the separate prosecution of the two police officers concerned, had expressly acknowledged the breach of Article 3 in the applicant's treatment during his interrogation (following a similar acknowledgement by the deputy chief of police). In addition, the statements extracted from the applicant during interrogation had not been admitted in evidence at his trial, "Officer E" had been convicted of coercion committed by an official in the course of his duties, "Officer D" (the deputy chief of the Frankfurt police) had been convicted of inciting Officer E to commit the aforesaid offence, both officers had been penalised and, finally, both had suffered prejudice in their professional careers: see [46] – [50] and [109]. It is necessary to add that the penalties imposed were a fine of €60 *per diem* suspended for 60 days (Officer E) and one of €120 *per diem* suspended for 90 days (Officer E). The applicant's application to the State for compensation remained undetermined.

[44] The Grand Chamber allowed the appeal on the main grounds that the criminal penalties imposed were "*token*", disciplinary action had been confined to transferring the two officers to other posts and Officer D later secured promotion. All of this is explained in [125] of the judgment:

> *"As to the disciplinary sanctions imposed, the Court notes that during the investigation and trial of D and E, both were transferred to posts which no longer involved direct association with the investigation of criminal offences.* 94 *D was later transferred to the Police Headquarters for Technology, Logistics and Administration and was appointed its chief.* 95 *In this connection, the Court refers to its repeated finding that where state agents have been charged with offences involving ill-treatment, it is important that they should be suspended from duty while being investigated or tried and should be dismissed if convicted.* 96 *Even if the Court accepts that the facts of the present case are not comparable to those at issue in the cases cited herein, it nevertheless finds that D's subsequent appointment* ****33*** *as chief of a police authority raises serious doubts as to whether the authorities' reaction reflected, adequately, the seriousness involved in a breach of art.3 — of which he had been found guilty."*

[45] This passage must be considered in the context of the Court's formulation of the governing principles, at [115] – [119]:

> *"115. The Court reiterates that it falls, first, to the national authorities to redress any violation of the Convention. In this regard, the question whether an*

applicant can claim to be the victim of the violation alleged is relevant at all stages of the proceedings under the Convention. A decision or measure favourable to the applicant is not, in principle, sufficient to deprive him of his status as a "victim" for the purposes of art.34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention.

116. As to the redress which is appropriate and sufficient in order to remedy a breach of a Convention right at national level, the Court has generally considered this to be dependent on all the circumstances of the case, having regard, in particular, to the nature of the Convention violation at stake. In cases of wilful ill-treatment by state agents in breach of art.3, the Court has repeatedly found that two measures are necessary to provide sufficient redress. First, the state authorities must have conducted a thorough and effective investigation capable of leading to the identification and punishment of those responsible. Secondly, an award of compensation to the applicant is required where appropriate [73] or, at least, the possibility of seeking and obtaining compensation for the damage which the applicant sustained as a result of the ill-treatment.

117. As regards the requirement of a thorough and effective investigation, the Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the state unlawfully and in breach of art.3, that provision, read in conjunction with the state's general duty under art.1 of the Convention to, "secure to everyone within their jurisdiction the rights and freedoms defined in … [the] Convention", requires by implication that there should be an effective official investigation. Such an investigation, as with one under art.2 , should be capable of leading to the identification and punishment of those responsible. For an investigation to be effective in practice it is a prerequisite that the state has enacted criminal-law provisions penalising practices that are contrary to art.3.

118. Concerning the requirement for compensation to remedy a breach of art.3 at national level, the Court has repeatedly found that, in addition to a thorough and

> *effective investigation, it is necessary for the state to have made an award of compensation to the applicant, where appropriate, or at least to have given him or her the possibility of seeking and obtaining compensation for the damage he or she sustained as a result of the ill-treatment. The Court has already had occasion to indicate in the context of other Convention articles that an applicant's victim status may depend on the level of compensation awarded at domestic level, having regard to the facts about which he or she complains before the Court. This finding applies, mutatis mutandis, to complaints concerning a breach of art.3.*
>
> *119. In cases of wilful ill-treatment the breach of art.3 cannot be remedied only by an award of compensation to the victim. This is so because, if the authorities could confine their reaction to incidents of wilful ill-treatment by state agents to the mere payment of compensation, while not doing enough to prosecute and punish those responsible, it would be possible in some cases for agents of the state to abuse the rights of those within their control with virtual impunity, and the general legal prohibition of torture and inhuman and degrading treatment, despite its fundamental importance, would be ineffective in practice."*

[46] The last of the main cases belonging to this free standing group is Sidiropoulos v Greece [Application Number 33349/10, 25 April 2018]. In this case two detained persons made allegations of serious ill treatment, including the application of electric shocks, against two police officers. One of the officers was convicted of torture and punished by the imposition of a sentence of five years imprisonment, the deprivation of political rights for ten years and a fine. His appeal against the sentence of imprisonment was allowed. The outcome was an exclusively financial punishment: the payment of €44 compensation to each of the two victims and a fine of €5 "*per day of detention*". The ECtHR found a breach of the procedural aspect of Article 3. The court stated at [99]:

> "*The Court therefore considers that the criminal and disciplinary system, as applied in the present case, has proved to be far from rigorous and could not generate any deterrent force likely to ensure the effective prevention of illegal acts such as those denounced by the applicants. In the particular circumstances of the case, it thus comes to the conclusion that the outcome of the proceedings against*

the police officer did not offer an adequate redress for the infringement of the value enshrined in Article 3 of the Convention (Zeynep Özcan, cited above, § 45). Accordingly, the Government's exceptions based on the lack of victim status and the failure to comply with the six-month time limit must be rejected."

[47] The reasoning underlying this conclusion is contained in [85] – [88] of the judgment, which fall to be considered in full:

"85. The Court recalls that, in cases of deliberate ill-treatment by State officials in violation of article 3 of the Convention, two measures are necessary for adequate reparation. First, the State authorities must conduct a thorough and effective investigation which may lead to the identification and - if necessary - punishment of those responsible (Gäfgen v. Germany [GC], no. 22978/05, § 116, ECHR 2010 ; see also Armani da Silva v. the United Kingdom[GC], no. 5878/08, § 233, ECHR 2016). Secondly, the applicant must, if necessary, receive compensation (Vladimir Romanov, cited above, § 79) or, at least, have the possibility of claiming and obtaining compensation for the damage caused to him by the ill-treatment (compare, mutatis mutandis, Nikolova and Velitchkova v. Bulgaria, no. 7888/03, § 56, 20 December 2007, (concerning a violation of Article 2), Çamdereli, cited above, § 29, Yeter v. Turkey, no. 33750/03, § 58, 13 January 2009, and Gäfgen, cited above, § 116). For an investigation to be effective in practice, the precondition is that the State has enacted criminal law provisions punishing practices contrary to Article 3 of the Convention (compare, mutatis mutandis, M.C. v. Bulgaria, no. 39272/98, §§ 150, 153 and 166, ECHR 2003 XII, Nikolova and Velitchkova, cited above, § 57, Çamdereli, cited above, § 38, and Gäfgen, cited above, § 117).

86. It should also be pointed out that the procedural requirements of Article 3 of the Convention extend in this respect beyond the preliminary investigation stage where, as in the present case, it has led to proceedings before national courts: it is the proceedings as a whole, including the trial stage, which must satisfy the requirements of the prohibition laid down by that provision. Thus, domestic judicial authorities must not under any circumstances be

prepared to allow violations of the physical and moral integrity of individuals to go unpunished. This is essential to maintain public confidence and adherence to the rule of law and to prevent any appearance of tolerance or collusion in the commission of illegal acts (Okkalı, cited above, § 65, and Derman, cited above, § 27).

87. In order to determine whether the national authorities had conducted a thorough and effective investigation against those responsible in accordance with the requirements laid down in its case-law, the Court has taken into account several criteria in previous cases. First, important factors for the investigation to be effective, and for verifying whether the authorities were willing to identify and prosecute those responsible, are the speed with which it is opened and the speed with which it is conducted. Furthermore, the outcome of the investigation and the criminal proceedings it triggers, including the sanction imposed and the disciplinary measures taken, are considered decisive. They are essential if the deterrent effect of the existing judicial system and its role in preventing breaches of the prohibition of ill-treatment is to be preserved (Gäfgen, cited above, § 121, and Zontul, cited above, § 98).

88. Admittedly, the national authorities have a margin of appreciation, subject to review by the Court, in determining the penalties applicable to criminal offences. Similarly, the deterrent effect of a sentence is within the discretion of the State. However, in cases where national courts have established that an applicant has been tortured, as in this case, the Court, in its review of decisions or disciplinary measures adopted by national courts against the perpetrators concerned, will have to consider whether such measures constitute an adequate redress and whether they can be considered to have a deterrent effect for the future (Zeynep Özcan v. Turkey, no. 45906/99, § 42, 20 February 2007, and, mutatis mutandis, M.C. v. Bulgaria, cited above, § 166). In this context, the Court recalls that when public officials are charged with offences involving ill-treatment, it is important that they be suspended from their duties during the investigation or trial and dismissed from their functions if they are convicted."

The applicant's civil claim for damages having had a duration of some eight years, the court also found a breach of Article 6(1) ECHR coupled with a breach of Article 13 on the ground that the Greek legal system contained no mechanism for securing an effective remedy for the breach of Article 6(1).

[48] A breach of the procedural aspect of Article 3 was similarly found in Al Nashiri and Husayn v Poland [2015] 60 EHRR 16. These were two cases of some notoriety involving the operation of a CIA secret detention facility in Poland where suspected international terrorists were subjected to US State sanctioned treatment which included stripping, hooding, white noise, shackling, water dousing and sleep deprivation. The essential complaint was that the response of the Polish authorities to the applicants' complaints of ill treatment had been wholly inadequate. The Polish government's stance before the court involved the erection of a wall of secrecy: see [487] – [490] especially. Bearing in mind the context of the present appeal, the following passage at [495] is of note:

> "*An adequate response by the authorities in investigation allegations of serious human rights violations may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory.*"

The ECtHR decided (*inter alia*) that there had been a violation of the procedural dimension of Article 3 on account of the Polish State's failure to carry out an effective investigation into the applicant's allegations of serious violations of the Convention including torture and ill treatment.

The Domestic Cases

[49] Certain domestic cases also featured in the Applicant's challenge. These were deployed in the context of the discrete argument that Policy SP 5 and 9/2012 give rise to an unacceptable risk of a breach of the procedural obligation under Article 2. In common with all of the cases considered at [40] - [47] above, none of these featured either in argument at first instance or in the Applicant's skeleton argument before this court.

[50] The first of the two main cases invoked in support of the "unacceptable risk" contention is R (Tabbakh) v Staffordshire and West Midlands Probation Trust [2014] 1 WLR 4620. The claimant in this case asserted a breach of his

procedural rights under Article 8 ECHR, contrary to section 6 HRA 1998, on the ground that the process under which additional licence conditions were imposed upon him following his release on licence from prison failed to provide a meaningful opportunity to have his views taken into account. The claim failed both at first instance and on appeal. Richards LJ, delivering the judgment of the Court of Appeal, identified the central issue at [1] of his judgment in these terms:

> "*At a late stage in the court below* [the claimant] *added to the procedural claim a contention that the policy governing the way in which additional licence conditions are decided on creates an unacceptable risk of illegality and is therefore unlawful.*"

[51] While the appellate court agreed with the decision of the trial judge, its reasoning was somewhat different. This emerges from the following passages:

> "*The test applied by the judge*
>
> > *46. The relevant law was considered by the judge at [2014] 1 WLR 1022, paras 42–52. He said that the authorities recognise three bases on which a court can conclude that a government policy is unlawful. First, it is well established that a policy which, if followed, would lead to unlawful acts or decisions, or which permits or encourages such acts, will itself be unlawful: Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112 . Secondly, it was established in Munjaz's case [2006] 2 AC 148 that the test in article 3 cases is whether a policy exposes a person to a significant risk of the treatment prohibited by the article. The third basis is that laid down in the Refugee Legal Centre case [2005] 1 WLR 2219 . The judge said [2014] 1 WLR 1022, para 48 that Sullivan LJ in the Medical Justice case [2011] EWCA Civ 1710 "held that despite Silber J referring to a wider test, he had in fact applied the Refugee Legal Centre test" and that Sullivan LJ "did not support the wider test which Silber J advanced in the course of his judgment". The judge then considered the two further first instance cases to which I have referred.*
> >
> > *47. He then set out his conclusion as to the appropriate test, and his reasons for it, as follows:*
> >
> > > *'51. My conclusion is that what I have termed the wider test – a policy giving rise*

to an unacceptable risk of unlawful decision-making – should be avoided. It did not have the support of the Court of Appeal in the Medical Justice case. Wyn Williams J's decision in Suppiah's case was overtaken by the Court of Appeal decision in that case. Foskett J's decision in MK's case [2012] EWHC 18 (Admin) is firmly based on Munjaz's case [2006] 2 AC 148 . What the authorities demand is that the policy must lead to unlawful action, or that there be a very high risk or an inevitability of that occurring: see Gillick's case [1986] AC 112; and the Court of Appeal in the Medical Justice case [2011] EWCA Civ 1710 . To put it another way there must be a proven risk of unlawfulness, going beyond the aberrant and inhering in the system itself: see the Refugee Legal Centre case [2005] 1 WLR 2219 . In article 3 cases there need only be a significant risk of unlawfulness flowing from the policy: see Munjaz's case [2006] 2 AC 148 . The lower threshold where a policy raises article 3 issues is justified because of the unqualified nature of the right that article confers.

52. In my view these high thresholds are justified, first, for evidential reasons. Policies can have disparate impacts in practice and the overall impact will be difficult to gauge. These evidential difficulties may be ****4635*** *more acute where challenges are effectively brought to policies by NGOs and not by particular claimants. It is likely that Sedley LJ had evidential problems in mind when he referred in the Refugee Legal Centre case to a proven risk of unfairness, which went beyond the aberrant but was inherent in the system. A risk inherent in the system will be more obvious than an unacceptable risk, or even a serious possibility, of unlawfulness. Secondly, there are institutional and constitutional limits to*

> *what the courts should determine. The executive is in daily touch with areas of administration; the courts will not have the same expertise to calculate how policies play out in practice and what their overall likely impact is. But the courts should adopt a high threshold for a more fundamental reason. Policy-making and implementation are an imperfect business. Sometimes there will be a strong imperative to adopt a particular approach. Governments will not consciously adopt a policy they know leads to unlawfulness. For a court to strike down a policy because the risk of unlawfulness is 'unacceptable' risks, in my view, going over the line. Especially with social and economic policies it has long been recognised that government is entitled to a wide margin of appreciation. The high thresholds I have identified in the case law recognise this.'*

48. That is a thoughtful and challenging analysis. It will be apparent from what I have said above, however, that I do not subscribe to the entirety of the judge's conclusion. In so far as he puts Munjaz's case to one side, I agree with him. Where I disagree with him is in the use he makes of the other authorities. First, I would also put Gillick's case to one side. It was concerned with the reviewability of guidance on the ground that it was erroneous in law and would therefore lead to unlawful decisions. That is a materially different issue from the issue of procedural unfairness that arises here, in relation to which the decision in the Refugee Legal Centre case is directly in point. I have explained how I read the decision in that case. It concentrates on whether the system established by the relevant policy is inherently unfair. It does not reject *the test of "unacceptable risk" of unfairness but effectively equates an unacceptable risk of unfairness with a risk of unfairness inherent in the system itself. The material part of the decision of the Court of Appeal in the Medical Justice case goes no further than to hold that the first instance judge in that case applied the approach in the Refugee Legal Centre case that he said he would apply. The reference by the first instance judge to "a very high risk if not an*

> *inevitability" of infringement was not a formulation of the legal test and was not endorsed as such by the Court of Appeal.*
>
> *49. In summary, I take issue with the detail of Cranston J's analysis and think that he expressed the test erroneously when he said that "What the authorities demand is that the policy must lead to unlawful action, or that there be a very high risk or an inevitability of that occurring". Nevertheless, it seems to me that he was correct to view the relevant threshold as a high one. That the court will be slow to find that a system is inherently unfair and therefore unlawful is illustrated by the Refugee Legal Centre case itself, where the court had evident concerns about potential rigidity in the system but concluded that so long as it was operated flexibly it could operate without an unacceptable risk of unfairness."*

[52] In a more recent decision of comparable import, R (Howard League for Penal Reform) v Lord Chancellor [2017] 4 WLR 92, the Court of Appeal considered a challenge to a measure of subordinate legislation whereby the Lord Chancellor excluded certain areas of decision making concerning prisoners from the scope of the criminal legal aid scheme. The sole issue was whether this would result in inherent or systemic unfairness to the affected prisoners.

[53] Beatson LJ, delivering the judgment of the court, considered the governing principles in a helpful review of the leading cases at [48] – [50]:

> "***Systemic unfairness***
>
> *48. We have referred to the high threshold required where it is claimed that a rule, an administrative system, or a policy is unlawful because it gives rise to an unacceptable risk of unfairness. The principle was first formulated in R (Refugee Legal Centre) Secretary of State for the Home Department [2004] EWCA Civ 1481; [2005] 1 WLR 2219 where Sedley LJ stated, at para 7, that potential unfairness was amenable to judicial review in order "to obviate in advance a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself". It was made clear in that case and in others that the test is whether the system "considered in the round" is "inherently unfair", and whether "the risk inheres in the policy itself, as opposed to the ever-present*

risk of aberrant decisions". Sedley LJ also stated that "it will not necessarily be an answer, where a system is inherently unfair, that judicial review can be sought to correct its effects". The principle has been applied in several other cases: see R (Medical Justice) v Secretary of State for the Home Department [2010] EWHC 1925 (Admin) at [33]–[36] (Silber J), approved [2011] EWCA Civ 1710; R (Tabbakh) v Staffordshire and West Midlands Probation Trust [2014] EWCA Civ 827; [2014] 1 WLR 4620 , paras 34–38; R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber) [2015] 1 WLR 5341 , paras 28–30; and the most recent case, R (S) v Director of Legal Aid Casework [2016] 1 WLR 4733 .

49. In R (S) v Director of Legal Aid Casework Laws LJ stated at para 18 that this area of the law is prone to particular difficulty because of the law's need in a system which has to cater for many individual cases to "encapsulate the difference between an inherent failure in the system itself, and the possibility – the reality – of individual instances of unfairness which do not, however, touch the system's integrity". Laws LJ also stated that there is difficulty because of the danger that a judge will "cross the line between adjudication and the determination of policy" by too great a willingness (perhaps unwittingly) "to treat … individual criticisms as going to ****11*** *the scheme's legality". He reiterated that "proof of a systematic failure is not to be equated with proof of a series of individual failures" and stated that:*

> *'there is an obvious but important difference between a scheme or system which is inherently bad and unlawful on that account, and one which is being badly operated. The difference is a real one even where individual failures may arise, or may be more numerous, because the scheme is difficult to operate.'*

50 The principles had earlier been summarised by Lord Dyson MR in the Detention Action case [2015] 1 WLR 5341 , para 27:

> *'(i) in considering whether a system is fair, one must look at the full run of cases that go through the system; (ii) a successful challenge to a system on grounds of unfairness must show more than the possibility of aberrant decisions and unfairness in individual cases; (iii) a system will only be unlawful on grounds of unfairness if the unfairness is inherent in the system itself; (iv) the threshold of showing unfairness is a high one; (v) the core question is whether the system has the capacity to react appropriately to ensure fairness (in particular where the challenge is directed to the tightness of time limits, whether there is sufficient flexibility in the system to avoid unfairness); and (vi) whether the irreducible minimum of fairness is respected by the system and therefore lawful is ultimately a matter for the courts.'*

At [145] the court reiterated:

> *"Our approach has been to consider the application of the principles and factors identified in the decisions of the appellate courts which we discuss in section IV to each of the categories. Those factors are: the importance of the issues at stake; the complexity of the procedural, legal and evidential issues; and the ability of the individual to represent himself without legal assistance, having regard to his age and mental capacity, and the other assistance that is available."*

The challenge succeeded in part, the court concluding that the high threshold required for a finding of inherent or systemic unfairness had been overcome as regards pre-tariff reviews by the Parole Board, Category 'A' reviews and decisions regarding certain placements. The remaining two elements of the challenge were dismissed.

The Article 2 Procedural Obligation: Consideration and Conclusions

[54] In written argument the Applicant's case was formulated in the following way:

> "*The* [Applicant's] *basic argument is that Article 2 ……,* [the] *common law and PSNI policy required suspension at all times or after key decisions were taken as to prosecution.*"

In his submissions to the Court Mr Southey QC (with Mr Malachy McGowan, of counsel), on behalf of the Applicant, suggested that the successive PSNI decisions entailing initial suspension from duty of CS, his subsequent reinstatement and redeployment to other duties and, finally, the reintroduction of suspension formed part of the State's response to the death. Evidently recognising that the efficacy of the State's investigation of the death is the core element of the Article 2 procedural obligation, Mr Southey sought to link efficacy of investigation with public confidence.

[55] Mr Southey accepted that there is no duty to suspend a suspected police officer in every case of possible criminality. It was accepted that the relevant State agencies enjoy a margin of appreciation in this respect. Mr Southey further acknowledged that it was legitimate for the PSNI to consider the factor of diminishing resources in making, and subsequently maintaining, the impugned reinstatement decision. It was submitted, nonetheless, that the maintenance of the suspension from duty of CS in the present case violated the Article 2 procedural obligation on the ground that his reinstatement and redeployment were detrimental to public confidence in the State's investigation of the death.

[56] In response to the court's direction to provide an amended Order 53 pleading, this aspect of the Applicant's case was ultimately formulated in these terms:

> "*The* [reinstatement] *decision was in breach of Article 2 of the ECHR as:*
>
> *(i) The PSNI failed to consult with or advise the Applicant of the proposed reinstatement in advance of that decision or provide adequate information subsequent to it;*
>
> *(ii) The decision undermined the obligation to ensure public confidence in the PSNI for the purpose of protecting life;*
>
> *(iii) The decision was in breach of the requirement that an officer under investigation for misconduct which involves life endangering behaviour and/or*

> *has resulted in death, must be suspended pending the outcome of the investigation and dismissed if found guilty of such misconduct.*"

Elaborating, Mr Southey submitted, in terms, that the decision in Yaman v Turkey (*supra*) had in effect altered the Article 2 legal landscape, describing this as "*the first case …* (establishing)… *the requirement to suspend as an aspect of the Article 2 obligation.*"

[57] Dr McGleenan QC (with Mr Paul McLaughlin, of counsel) on behalf of the PSNI, submitted that the Applicant's Article 2 challenge falls to be resolved by reference to first principles. He argued, in substance, that the underlying purpose of the procedural obligation is to ensure the integrity and efficacy of the investigative process. Emphasising that the procedural obligation is one of means and not of result, Mr McGleenan highlighted that, as demonstrated by decisions such as Oneryildiz v Turkey at [94], since one cannot lay claim to a right that a suspected miscreant be prosecuted (or, it is appropriate to add, convicted) it must follow in logic and principle that there can be no right under the guise of the Article 2 procedural obligation to the suspension of a State agent whose conduct is under investigation.

[58] Dr McGleenan further submitted that the ECtHR has at no time identified the maintenance of public confidence as a constituent element of the Article 2 procedural obligation. Drawing attention to the formulations of the Court in its jurisprudence, in particular Jordan v United Kingdom (*supra*), Dr McGleenan listed the following facts and factors of the factual matrix of the present case: the detained person having lost his life while in the custody of the State Police Force, the ensuing function of duty and investigating the death was referred at once to an entirely independent agency, namely PONI; this triggered the availability and, where appropriate, exercise of the series of statutory powers conferred on PONI by Part VII of the 1998 Act (see Appendix 1); there has been no suggestion of any obstruction or lack of co-operation by the Police Force in the PONI investigation; nor has there been any suggestion of any failure to secure or provide evidence to PONI; there were, and could not have been, any concerns about possible compromise or contamination of the State investigation into the death following the reinstatement and "re-positioning" of CS; and, upon completion of the PONI investigation, another autonomous and independent State agency, namely the PPS, assumed the mantle and made the decision to prosecute CS.

[59] Dr McGleenan, finally, highlighted that the State's Article 2 response has not yet been finalised, given the uncompleted functions and duties of PONI in the matter of possible disciplinary proceedings against CS.

[60] The starting point is uncontroversial. The ECtHR has nowhere in its now extensive jurisprudence identified the securing or maintenance of public confidence as a constituent element of the investigative duty which the Article 2 procedural obligation imposes upon State authorities. The overarching requirement of the procedural obligation is, as Dr McGleenan emphasised, that of an "*effective official investigation*": see, for example Jordan at [105]. This latter passage repays careful reading. The Court, having identified this overarching requirement, then explained the "*essential purpose*" of such investigation. The immediately following principle which the Court formulates is characterised by its breadth and flexibility: there must be "*some form*" of State investigation and this "*may vary in different circumstances*".

[61] In the passages which follow, the adjective "*effective*" is repeated, in [106] and [107]. The guidance contained in these paragraphs is formulated in general terms. Thus an effective investigation "*generally*" requires that those "*implicated in the events*" be separated from the State investigators by a shield of hierarchical, institutional and practical independence. Next, again in the context of emphasising the requirement of efficacy, the Court formulates the principle of "*not an obligation of result, but of means*". It then descends into the realm of the prosaic, focusing on the twofold areas of securing evidence and the need for objective medical evidence of any injuries and an autopsy establishing the cause of death. These requirements are framed in notably non-prescriptive terms. Furthermore, if any deficiency is identified in either this will not automatically generate a finding of non-compliance with the procedural obligation: rather, any such deficiency "*will risk falling foul of*" the applicable standard. The final noteworthy feature of [107] of Jordan is the Court's declination to prescribe anything approaching absolute discrete duties or requirements: the State is required, rather, to take "*reasonable steps*" in the two specific areas identified.

[62] At this point of its judgment in Jordan the ECtHR, as in other kindred cases, switches its attention to the quite separate requirement of "*promptness and reasonable expedition*". The focus and emphasis on efficacy are no more. The adjective "*effective*" makes no further appearance. Significantly, this passage at [108] is the only one passage containing the phrase "*public confidence*". In this paragraph the Court identifies promptness and reasonable expedition as a constituent element of the Article 2 procedural obligation. Having done so, it makes two further statements. First, it recognises that this requirement cannot be framed in absolute terms as in some cases the relevant State agencies may encounter "*obstacles or difficulties which prevent progress in an investigation….* ".

Second, the Court cautions that a dilatory response on the part of the relevant agencies could have a detrimental impact on public confidence. In thus expressing itself, the Court defines "public confidence" thus:

> "*… public confidence in their* [the State authorities] *adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.*"

In the present case, there is no suggestion of any of the following: any failure by PSNI to adhere to the rule of law; any failure by the State's primary investigative agency, namely PONI, to adhere to the rule of law; any lack of public confidence in either of the foregoing; or, finally, any appearance of collusion in or tolerance of unlawful acts on the part of either PSNI or PONI.

[63] The final element of the ECtHR's exposition in Jordan of the "*general principles*" of the Article 2 procedural obligation turns at [109] to another quite separate constituent ingredient, namely a "*sufficient element of public scrutiny of the investigation or its results …*". This free standing requirement too is formulated in non-prescriptive terms. The test is the elastic and contextual one of *sufficiency*. Variation of the outworkings of this requirement "*from case to case*" is to be expected. Mindful of the strictures of considering [102] – [109] of Jordan in their entirety and as a composite whole, it is apparent that in [109] the ECtHR contemplated the possibility that the overarching requirement of an effective State investigation into the death might not be satisfied where "*a sufficient element of public scrutiny*" cannot be demonstrated in a given case.

[64] A hypothetical illustration is of some utility at this juncture. In the abstract one can conceive of a case where the efficacy of the State investigation of a given death is, objectively analysed, so professional, efficient and thorough as to be unimpeachable. In such a case the overarching requirement of the Article 2 procedural obligation viz an effective official State investigation will be satisfied. To this hypothetical illustration one adds the further ingredient of an unfortunate failure on the part of the relevant State agencies to communicate with and provide appropriate information to the family of the deceased during the investigative phase. The correct characterisation of a failure of this species must surely be that of a regrettable administrative lapse in the State's interaction with surviving relatives. The relatives, by virtue of contemporary standards and practices, have an expectation that they will, periodically, receive certain information. In Northern Ireland this expectation has, for a substantial period of time, been rooted in the "Victims Charters" (a generic term) adopted by the PSNI and the PPS and disseminated in the public arena. In this hypothetical illustration, the relatives might have an understandable sense of grievance with

which others might sympathise. However, it could not be said that this would require a judicial finding of a breach of the Article 2 ECHR procedural obligation.

[65] The foregoing hypothetical illustration helps to illuminate why the securing or maintenance of public confidence is not one of the constituent elements of the Article 2 ECHR procedural obligation. It is entirely conceivable that there may be an irreproachably effective State investigation into a death which, by reason of some aspect of insufficient public scrutiny, for example due to inadequate engagement with the next of kin, could raise issues of public confidence. However, as noted above, the ECtHR has defined public confidence. Thus it could not on any reasonable assessment be said that the State failing which forms part of the hypothetical illustration would undermine public confidence in either its adherence to the rule of law or in preventing any appearance of collusion in or tolerance of unlawful acts (Jordan, [108]). Such failing could not, reasonably or realistically, extend beyond some form of maladministration. Approached in this way, one identifies the true role, or function, of public confidence (as defined) in the Article 2 procedural regime. Properly analysed, it is a tool which may be employed in the evaluative exercise of determining whether, in a given case, the overarching requirement of an effective State investigation has been observed.

[66] At this juncture it is essential to reflect further on "*public confidence*", as defined in [108] and [109] of Jordan. While the phrase "*public confidence*" appears only in [108], it would seem appropriate to extend it to [109] given the opening words "*For the same reasons …*". One of the fixed, recurring themes of ECHR and HRA 1998 jurisprudence is that the human rights and fundamental freedoms protected by each of these instruments belong firmly to the realm of the practical and effective. This is reflected particularly in [106] – [109] of Jordan. While the principles enunciated in these passages are (as observed above) framed in general and contextual terms, their focus on the basic requirements of an effective State investigation is imbued with the essentially prosaic: (in shorthand) the independence of the State investigators, the recovery and preservation of evidence, the need for an autopsy and other medical evidence, the necessity of promptitude and, finally, interaction with surviving family members. "*Public confidence*", in the abstract, is an intrinsically nebulous, elusive, subjective and unquantifiable commodity. It comes as no surprise that the ECtHR has not included it as a constituent element of the Article 2 ECHR procedural obligation.

[67] There being no barometer for reliably measuring public confidence in the adherence of relevant State agencies to the rule of law or in assessing any appearance of State collusion in or tolerance of unlawful acts (Jordan, [108]), it is necessary to consider the role of the court. It is clear that the court must be the arbiter of any public confidence issue of this kind. Neither party contested this.

Nor was there any dissent from the court's suggestion that this role has certain parallels with that of the hypothetical informed and independent observer in appearance of bias cases. Thus the legal criterion is not rooted in the subjective complaints of a litigant or other person of a lack of confidence in the State agency concerned (in this instance the PSNI). Subjective complaints of this kind will, rather, form part of the evidential matrix which the court will consider in making its evaluative judgement. In common with the hypothetical observer, the court will perform this function on a fully informed basis and in a detached, dispassionate manner. The court will also consider whether and, if so, to what extent, a margin of appreciation should be accorded to any State agency whose conduct is under scrutiny. Objectivity is the hallmark of this judicial exercise.

[68] The Applicant's case entails heavy reliance on the decision in Yaman v Turkey (*supra*). Mr Southey, in reply, appeared to suggest that a series of ECtHR decisions predating Yaman should now be in some way confined or reinterpreted: Jordan v United Kingdom (Application No 24747/94, Kelly v United Kingdom (Application No 30054/96), Shanaghan v United Kingdom Application No 37715/97) and McShane v United Kingdom (Application No 43290/98).

[69] This is a bold submission, given the following. As the summary in [41] above makes clear, the two Convention rights in play in Yaman were Articles 3 and 13; the Court made no finding of a breach of the procedural dimension of Article 3; it found a breach of the substantive element (only) of Article 3; and, finally, its comments regarding the suspension from duty of suspected State agents during the investigative or trial phases were made explicitly in the context of its consideration of the Article 13 complaint. Furthermore, at some 14 years remove, this court is unaware of any intervening Strasbourg or domestic Article 2 jurisprudence since Yaman was decided having the effect if modifying the Jordan "template". The correct analysis of Yaman must be that a failure to suspend from duty a State agent suspected of conduct contravening Article 3 during the investigative and trial phases may have a bearing at a later stage on the question of whether a breach of Article 13 has been established by a person claiming to be a victim.

[70] One is also mindful of the necessity of considering the ECtHR Article 3 cases in their particular factual context. Factually they differ significantly from the matrix of the present case. The case against CS was at all times one of culpable omission, namely an alleged failure to communicate appropriately with a medical practitioner involved with the deceased prior to his death. This contrasts markedly with the torture, entailing quite shocking brutality, of detained suspects in police custody which features in Yaman, Siridopoulos, Gafgen and Al Nashiri.

[71] In those cases where the ECtHR has seen fit to comment on the issue of suspension from duty it has consistently done so in the context of considering asserted breaches of the procedural dimension of Article 3 and not Article 2: in addition to Yaman see Gafgen at [125] and Sidiropoulos at [34]. This court is mindful of the close association between the Article 2 and Article 3 procedural elements. But the fact is that the suspension from duty of a suspected State agent in a case concerning death implicating a State agency has never been formulated by the ECtHR as one of the constituent elements of the procedural requirements of Article 2. This cannot be regarded as inadvertent, given that the ECtHR has had ample opportunity to develop and reformulate the Article 2 procedural obligation in this way.

[72] In truth the ECtHR's Article 2 procedural jurisprudence has remained relatively static during many years. The relevant passages in Jordan at [105] – [109] (reproduced *supra*) are a paradigm illustration of the ECtHR's judgment writing technique whereby it expresses itself in substantially the same terms as are found in earlier landmark decisions and identifies such decisions in the footnotes. In Jordan the jurisprudential underpinning of the general principles expressed in [105] – [109] is a series of familiar and important decisions, including McCann v United Kingdom [1996] 21 EHRR 97 and Osman v United Kingdom [2000] 29 EHRR 245. Assessed in this way one readily identifies a stream of solid and consistent Strasbourg jurisprudence. This body of jurisprudence invites the description of "static" on account of the strong similarities between the phraseology adopted in a long line of cases and, particularly since Jordan, the absence of any progressive development.

[73] A review of the Strasbourg Article 3 ECHR procedural decisions belonging to the forefront of the Applicant's case serves, *inter alia*, to highlight certain distinctive and important features of the Northern Ireland arrangements for the investigation of deaths implicating State police agents. Four particular features stand out. First, the investigation is conducted by a statutory agency, PONI, which is entirely independent of the police force. Second, the same agency has the function of compiling a comprehensive investigation report and making recommendations about criminal or disciplinary proceedings in respect of police officers. Third, the final decision on whether to prosecute is made by another entirely independent State agency, the PPS. Fourth, PONI has the final say on whether disciplinary proceedings should be pursued following the termination of a prosecution. Given these considerations, it is far from clear that the ECtHR, if seized of a case involving allegations of treatment proscribed by Article 2 or Article 3 perpetrated by a police officer, would make the same observations about suspension from duty.

[74] Furthermore, it is not clear that in Gafgen and the related cases the ECtHR has formulated the suspension from duty of suspected State agents as one of the constituent elements of the procedural dimension of Article 3. Alertness to the distinction between a constituent element (on the one hand) and a mere exhortation of good practice (on the other) is essential. Assuming, without deciding, that suspension from duty is of the former *genre*, the Court has certainly not formulated this as an absolute, inflexible requirement. It has, rather, consistently said that it considers this measure "*important*", something that "should" (not "must") be done. In addition, in the relevant passage in Sidiropoulos, at [34], the Court made this statement in a paragraph beginning with the acknowledgement that "*… the national authorities have a margin of appreciation …*". While it makes this statement in relation to "*determining the penalties applicable to criminal offences*", its later references to "*adequate redress*" and "*deterrent effect*" lend weight to the view that the State's margin of appreciation must extend to suspension from duty decisions also. Mr Southey correctly, did not contest this analysis.

[75] At this stage it is appropriate to consider the reasons underpinning the revocation of the initial suspension from duty of the police officer concerned, CS, and the maintenance of such revocation until the next landmark event, namely the formal PPS decision to prosecute him. The material facts are rehearsed in [5](xviii) – (xxv) above. As appears from the discrete chapter heading "Agreed Factual Matrix", these facts are undisputed. They fall to be considered in the light of the statutory duties owed by PSNI to the population as a whole. The umbrella provision in this respect is section 32 of the 2000 Act: see [15] above.

[76] In summary, CS, together with certain other police officers, was permitted to resume working, with appropriate restrictions and constraints some months following the death of the Applicant's son, in furtherance of the statutory duties owed by PSNI to the population of Northern Ireland. This, ultimately and in substance, was the reason for permitting him to return to work. No improper motive was canvassed and none is identifiable in any event. In orthodox public law terms this, considered in tandem with the underlying financial factors, must rank as a material consideration. No contrary argument was advanced. Furthermore, in policy terms, it was expressly acknowledged in the Applicant's written argument that the PSNI policies in play, noted in [19] – [21] above, confer a "*broad discretion*". Within these policies one of the factors to be weighed is "*the impact on organisational efficiency*". In passing, it is clear that this would be an admissible consideration whether expressly specified or not.

[77] In the ECHR system the doctrine of the margin of appreciation is rooted in the reality of the different legal and governance systems of the Council of Europe Member States Parties and the associated willingness of the ECtHR to accord an

appropriate degree of latitude to State agencies in certain contexts. Implicit in this doctrine is a recognition of the scope for differing views and opinions. The context is, self-evidently, all important. Certain contextual features of a statutory nature have already been highlighted in above. In this case, at a more mundane level, care was taken to ensure that CS would not perform the duties of a custody sergeant or, indeed, those of a police constable during the whole of his redeployment phase. He was allocated purely administrative duties and his reassignment ensured that he was remote from the State investigation into the death. There is no suggestion of any lack of co-operation with PONI on his part or that of PSNI. Moreover, bearing in mind that the reassignment of CS was, via the news media, in the public domain, there is no evidence of anything even approaching outcry or outrage. Nor was there any critical reaction on the part of the statutory policing watchdog, NIPB. Furthermore, the reinstatement and reassignment of CS was a temporary measure which was the subject of frequent reviews and, ultimately, was terminated when the PPS prosecution decision was formally notified.

[78] The court, of course, is mindful of the disappointment and objections of the family of the deceased, made known to PSNI through their solicitors' letters and, ultimately, reflected in these proceedings. The family's feelings and stance are understandable and attract a measure of sympathy. Furthermore (although unevidenced) it may be that certain other members of the Northern Ireland community disagreed with the reinstatement and redeployment action in a society where policing matters have frequently generated heated and polarised views.

[79] It falls to this court to evaluate everything identified above through a prism of detached objectivity. Subjectivity is alien to this exercise. This judicial function is somewhat akin to that undertaken in appearance of bias cases when the lens of the informed, impartial and independent observer is applied. The court recognises that there is scope for differing views on the reinstatement and reassignment action vis-à-vis CS. However, the margin of appreciation must surely have some purchase in a context shaped by all of the foregoing and giving rise to a difficult balancing exercise on the part of decision makers whose knowledge and evaluative judgment cannot be equalled by this court. Approached in this way, the reinstatement and reassignment action in November 2014, its subsequent maintenance and, ultimately, its discontinuance in the light of the formal PPS decision to prosecute CS in May 2016 all clearly lay within the margin of appreciation available to the senior police officers concerned, in the view of this Court.

[80] If, contrary to the analysis and conclusion expressed above, it were appropriate to view public confidence in PSNI as a free standing constituent

element of the Article 2 procedural obligation, the court's assessment would mirror that set forth immediately above: there is nothing to be added

[81] For all of the reasons given the conclusion of the court is that in reinstating and redeploying CS during the period November 2014 to May 2016 the PSNI did not violate the procedural obligation enshrined in Article 2 ECHR.

The Applicant's "involvement" contention

[82] The secondary, or alternative, aspect of the Applicant's Article 2 case involves the following contention: the failure of PSNI to consult the family of the deceased prior to making its reinstatement and redeployment decision in November 2014 and/or the asserted failure to provide adequate reasons for this decision was/were in breach of the Article 2 procedural obligation. This argument is based on the "public scrutiny" and "involvement" passages found in multiple decisions of the ECtHR and, for convenience, it suffices to refer to [109] of Jordan, reproduced in [30] above.

[83] This discrete contention can be dealt with briskly. First, as already emphasised, the overarching requirement of the Article 2 procedural obligation is an effective official investigation conducted by the appropriate State agency or agencies: Jordan at [105]. The "*public scrutiny*" element of this overarching duty is not formulated in loose, open-ended terms: the specific requirement is one of "*public scrutiny of the investigation or its results ….*". The purpose of such scrutiny is "*… to secure accountability in practice as well as in theory*". The "*procedure*" in which the victim's next of kin are to be involved clearly refers to "*the investigation or its results*".

[84] The short riposte to this freestanding contention must be that the reinstatement and redeployment of CS had nothing to do with the State investigation into the death. Mr Southey's submission to the contrary is unsustainable. The impugned decision was made by CS's employer, an agency which was separate from the State investigating agency, PONI. Indeed the rigid separation of these two agencies and the independence of the one from the other is one of the central pillars of the statutory policing reforms reflected particularly in Part VI of the 1998 Act (*supra*). There is no nexus of any kind to be forged between the overarching requirement of the procedural obligation namely an effective State investigation into the death and the reinstatement and redeployment of CS. The latter measure had no impact whatsoever on the PONI investigation or the ensuing PPS decision making. The public scrutiny required in the present case was amply supplied by the activities of these two agencies whose ultimate duty was to protect and foster the public interest.

[85] Furthermore, from the perspective of the next of kin, the relevant interface throughout the investigative process was with PONI. The evidence establishes interaction between a PONI liaison officer and the family of the deceased. In this case there was also the additional layer provided by the active involvement of solicitors representing the family throughout the period in question.

[86] Giving effect to the foregoing analysis, it is impossible to isolate the PSNI reinstatement and deployment decision and set it within the framework of the Article 2 procedural obligation. This decision did not belong to such framework. The argument that it formed part of the "State response" to the death is misconceived. The relevant State response was formed by the activities of PONI and the PPS, followed by the criminal trial. In reinstating and redeploying CS the PSNI, operating outwith the Article 2 procedural matrix, was not "responding to" the death. It was, rather, "responding to" its statutory duties to the population as a whole in the context of acute resource reductions. This discrete element of the Applicant's case must be rejected accordingly.

The Policy Challenge: Consideration and Conclusions

[87] The contours of this, the final, element of the Applicant's challenge can be gauged from one of the declaratory remedies sought in the final incarnation of the Order 53 pleading. Although this (regrettably) fails to identify the policy under attack it is possible to deduce from counsels' skeleton argument and [12] – [13] and [67] of the judgment of Maguire J. The target of this aspect of the Applicant's challenge is SP 9/2012, considered in tandem with the PSNI Code of Ethics ("COE") in [22] – [23] above. The terms in which the learned trial judge rejected this element of the Applicant's challenge are set forth in [27] of this judgment.

[88] The Applicant's pleaded case, in its final form, seeks a declaration that SP9/2012 breaches Article 2 ECHR on account of a series of omissions in its content. It involves an attack on this policy *in limine*. The specific complaints, summarised, are that the Article 2 incompatibility arises as the policy fails to provide for consultation with victim's families in homicide cases in suspension from duty decision making contexts; fails to provide for communication of such decisions to families; fails to stipulate the importance of maintaining public confidence that the PSNI would protect the right to life; fails to require consideration of the importance of employing competent staff in order to protect life; fails to provide for the obligatory suspension from duty in every case, during the investigative phase, of every officer under investigation in respect of allegations of misconduct resulting in death or torture or inhuman or degrading treatment and obligatory dismissal if found guilty of such misconduct; and, finally, fails to emphasise the importance of Article 2 ECHR and the heightened

obligations this imposes where alleged misconduct has resulted in death or a real risk to life.

[89] Given the court's rejection of the Applicant's primary Article 2 case, it is difficult to envisage how, logically and in accordance with principle, this secondary, or alternative, challenge could succeed. As a matter of first principle, the impugned policy, whether in whole or in part, qualifies to be condemned as incompatible with Article 2 ECHR only if the complaints outlined immediately above fall within the embrace of the Article 2 procedural obligation. In its rejection of the Applicant's primary Article 2 case, the court has held that they do not.

[90] There are certain further ingredients in the riposte to this aspect of the Applicant's challenge, which may be conveniently tabulated thus:

(a) In S9/2012 in the list of factors to be reckoned in the exercise of considering suspension from duty decisions, there is explicit mention of "*the public interest, the reputation of the Police Service and the potential impact on public confidence*" (see [22] above).

(b) The PSNI Code of Ethics, which the impugned policy incorporates by reference, addresses public confidence in the police in express terms (see [23] above).

(c) Nothing in the impugned policy or any of its kindred instruments precludes the communication of suspension and reinstatement decisions to the families of victims or consultation with them.

(d) The latter truism is illustrated by the agreed facts of the present case, which demonstrate that information of this kind was provided to the Applicant's family by the State investigating agency, PONI.

(e) The PSNI's acceptance that this information should have been provided by it to the family more timeously is contained in sworn affidavit evidence and constitutes a clear acknowledgement that there is no policy bar to such action, while reinforcing the court's assessment to like effect.

(f) Bearing in mind that the State agency with which the family was interacting was PONI, it is of evident significance that PSNI informed PONI, and timeously so, of the reinstatement and redeployment decision. There was no direct interface between PSNI and the family in the particular circumstances of this case.

[91] Furthermore, and in any event – and as noted by Maguire J in substance – SP9/2012 is a policy, to be contrasted with a statute or legal instrument and, as such, falls to be construed and applied with an appropriate measure of flexibility. To summarise, while this court has rejected the contention that consultation with the family of the deceased was required by the procedural obligation of Article 2, thereby rendering this ground unsustainable *ab initio,* there is nothing in the policy or kindred instruments which precludes this or other forms of communication.

[92] Finally, as noted in [48] of this judgment, one of the arguments deployed on behalf of the Applicant was that the impugned policy, by virtue of the failures asserted above, entails an unacceptable risk of a breach of the procedural obligation under Article 2. Essentially for the reasons already formulated in the court's rejection of the central thrust of this ground this discrete argument takes the Applicant's case no further. The court has already held that the impugned policy did not belong to the Article 2 procedural framework triggered by the death which occurred in this case. In the abstract it is not easy to envisage cases in which the policy could fall within the Article 2 procedural framework as assessed in the main section of this judgment and, further, having regard to the statutory functions and responsibilities imposed on PONI in the jurisdiction of Northern Ireland. However, if and insofar as the impugned policy might lie within the Article 2 procedural embrace in some future case, there is nothing in its terms which would preclude Article 2 compliant decisions and conduct. In short, the policy is capable of being operated in a manner harmonious with the PSNI's duties as a public authority under section 6 of HRA 1998. The high threshold which the contrary contention entails is manifestly not overcome.

[93] For the reasons given the Applicant's policy challenge must be rejected.

Irrationality

[94] The court has observed in [24] that this discrete ground of challenge has the appearance of a makeweight. Notably, in the final incarnation of the much amended Order 53 pleading, references to this ground are sparse in the extreme. This reinforces the court's initial assessment. The thrust of the case made appears to be that there were no circumstances in which the initial suspension from duty decision could be revisited and, secondly, that it was irrational not to re-impose the suspension on the strength of a (mere) telephone call in the vague terms noted in [5](lii) above some two months in advance of the formal intimation of the PPP decision to prosecute CS.

[95] Maguire J rejected this ground of challenge in the following terms, at [76] – [79]:

> "[76] *The court does not accept this argument. While the court bears in mind the fact that the reasons for the original suspension decision were strong it is not of the view that it follows from this that any later re-appraisal of that decision must necessarily arrive at the same conclusion. Indeed, the whole point of any review process is that it can properly take into account any developments in the case which are material to the outcome – whether in favour of continued suspension or otherwise.*
>
> [77*] As already indicated, the court accepts that there had by November 2014 entered into the equation a new factor which had not been there to anything like the same degree when the original decision was made viz the swingeing cuts to the budget of the police and their impact on the organisational efficiency of the police service.*
>
> [78] *It was for the Chief Constable and those acting in his name to assess all of the relevant factors and come to a conclusion as to whether to continue the suspension of CS or not, giving such weight as appropriate to individual factors. Accordingly, the weight to be allocated in this exercise was very much a matter for those conducting it. In the court's view it was open to the decision maker to give substantial weight to budgetary impacts provided he or she carried out a balanced exercise and reached a permissible conclusion.*
>
> [79] *This is what the court considers was done in this case. The question which arises is whether it can be said that the result of the exercise was unreasonable or disproportionate. The court is unpersuaded that it was either. It seems plain to the court that each of the cases reviewed was considered on its own merits. This is not a case where the decision maker applied determinative weight to the issue of organisational efficiency in a manner which has ignored other relevant factors. The court is able to see that in the majority of the cases considered by the decision maker the view was taken that there should be no change in the status of a suspended officer. However, in CS's case this was not the view adopted. While the court appreciates that CS's*

case can reasonably be viewed as one of considerable seriousness, this alone was not the standard to be applied."

The judge added at [80] that, doctrinally, the discretionary area of judgment is engaged in a decision of this kind.

[96] This court takes cognisance of the recent trend in certain decisions of the Supreme Court which, broadly, tends to loosen the Wednesbury shackles. What was once a prohibitively high hurdle has now been somewhat diluted. In a nutshell, it might be said that there is now a greater emphasis on context, with greater attention than hitherto to the contextual factors of the subject matter and importance of the impugned decision, its impact and the competence of the court.

[97] The factor of context is expressed with particular clarity in the opinion of Lord Mance JSC in Kennedy v Information Commissioner [2015] AC 455 at [51]. The other considerations just noted feature in [55] – [56]. To like effect are the statements in Pham v Secretary of State for the Home Department [2015] 1 WLR 1591 of Lord Carnwath JSC at [59] and Lord Mance, again, at [94] – [96]. This court has also considered the decision in R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs [2016] 1355 at [131] – [134] especially, per Lord Neuberger. Within these latter passages one finds the unambiguous statement that judicial review, emphatically, has not evolved to the point where the court undertakes an exercise of merits review. The judicial review court remains, fundamentally, a court of supervisory superintendence. This fundamental doctrinal truism has not been affected by the gradual jurisprudential trend espousing relaxation of the Wednesbury irrationality standard.

[98] The most significant elements of the factual matrix engaged by this discrete ground of challenge are found at (xiii) – (xix) of the agreed facts rehearsed at [5] above. The court considers that having regard to the history of policing in Northern Ireland, the political settlement in 1998, the extensive statutory intervention which followed and the intensity of the enduring public debate about certain structural and operational aspects of policing in this jurisdiction, considered in tandem with the material facts of this case, the decision to reinstate and redeploy CS in November 2014 and to maintain this *status quo* until May 2016 calls for careful judicial scrutiny applying a standard of review exceeding that of bare rationality. The question for this court is not whether the impugned decision and its subsequent maintenance were (merely) aberrant or capricious. Rather, in accordance with the recent jurisprudence, this court has subjected the impugned decision and its subsequent maintenance to

more penetrating scrutiny. There are various passages in this judgment bearing on this exercise which it would be otiose to reproduce.

[99] One accepts that there is scope for differing views, all of them tenable and respectable, regarding the decision to reinstate and redeploy CS and to maintain this subsequently until the PPS direction to prosecute him. In this context there is unavoidable focus on the information and explanations provided by PSNI, all in the public domain, at the material time: see in particular (xxii) – (xxv) of [5] above, as augmented and reinforced by the affidavit evidence on behalf of PSNI, which has provided some further detail.

[100] Both the impugned decision and the decision making process, coupled with the subsequent reviews, bear the hallmarks of careful and conscientious consideration on the part of those concerned. A reasoned justification was identified at the material time (November 2014) and released into the public domain subsequently and this endured thereafter to the stage of the formal PPS decision to prosecute CS. Objectively, this justification is clearly sustainable. As the court has already observed (in [75] – [78]), it is, properly analysed, rooted in the legal duties owed by PSNI to the population as a whole. Furthermore, the impugned action subjected CS to a series of restrictions designed to promote the Article 2 procedural activities of PONI and the PPS and, further, to allay public concern about the undesirability of CS simply resuming the custody sergeant role in the context whereof the sad death had occurred or, indeed, having any direct dealings with members of the public. To conclude, applying the standard of review identified above, a diagnosis of irrationality is clearly not appropriate.

[101] Equally, it is not possible to identify the stigma of Wednesbury irrationality in the effective postponement of the second suspension of CS from duty which, in substance, entailed a preference on the part of the senior officers concerned to await the PPS formal prosecution decision rather than act upon a vague telephone call from a PONI official. Solemn formalities in the realm of prosecution decisions are a matter of considerable gravity and moment, as the decision of the House of Lords in R v Clarke and McDaid [2008] UKHL 8 demonstrates. There a failure by the prosecutor to sign an indictment was held to render nugatory the relevant prosecution.

[102] The conclusion that the irrationality challenge must fail in all of its aspects follows upon the foregoing analysis. It is appropriate to add that the court's rejection of the other grounds of challenge considered above, which fall under the broad public law umbrella of legality, has been undertaken unconstrained by the restrictions which a Wednesbury irrationality challenge continues to impose. It follows that, logically and in principle, it is difficult to conceive of the Wednesbury ground succeeding when the other grounds have failed.

Omnibus Conclusion

[103] For the reasons given, this court affirms the judgment and order of Maguire J and dismisses this appeal.

Stephens LJ

[104] I agree with the judgment delivered by McCloskey J and I also would dismiss this appeal. I add a few comments.

[105] At paragraph [99] McCloskey J accepts that "there is scope for differing views, all of them tenable and respectable, regarding the decision to reinstate and redeploy CS and to maintain this subsequently until the PPS direction to prosecute him." I would emphasise that one tenable and respectable view is that CS should not have been reinstated. The total number of police officers in Northern Ireland is approximately 7,500 and this decision was to re-instate one police officer in order to perform administrative duties in circumstances where he was being investigated in relation to the offence of gross negligence manslaughter. Legally I accept for the reasons given by McCloskey J that the decision cannot be declared unlawful but I would urge caution on those making these decisions in future. There have been substantial reforms of policing in Northern Ireland since the Belfast Agreement dated 10 April 1998 between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland. That agreement followed intense negotiations involving the political parties in Northern Ireland and both of those Governments. The reforms were in order to ensure public confidence in policing in Northern Ireland. The Belfast Agreement attracted not only the support of both governments but also the support of the overwhelming majority of people in Northern Ireland. It is a fundamental agreement central to the political settlement in Northern Ireland. The Belfast Agreement provided for a Commission to be set up. That Commission was under the chairmanship of former Hong Kong Governor, Chris Patten. It looked at all areas of policing in order to made recommendations for change. In September 1999 the report of the Patten Commission was published under the title "A New Beginning – Policing in Northern Ireland." At paragraph 4.6 there was a recommendation in relation to the underlying philosophy of policing. The recommendation was of

> "a comprehensive programme of action to *focus policing in Northern Ireland on a human rights-based approach*. We make a number of specific recommendations below, but the achievement of such an approach goes beyond a series of specific actions.

> It is more *a matter of the philosophy of policing*, and *should inspire everything that a police service does*. *It should be seen as the core of this report*" (emphasis added).

I consider recommendation as to the philosophy of policing to be important to decisions of the kind taken in this case. That philosophy should inspire everything that the PSNI does and it should also be recognised that when there is a public outcry it is likely that public confidence of at least of a part of our community has been damaged or lost. For those reasons I would urge caution in relation to future decisions.

Appendix I - Police (Northern Ireland) Act 1998, Part VII

POLICE COMPLAINTS AND DISCIPLINARY PROCEEDINGS [ss.50-65]
[in force on 6 Nov 2000]

Interpretation of this Part.

50. - (1) In this Part-
"the appropriate disciplinary authority" means-
(a) in relation to a senior officer, the Board; and
(b) in relation to any other member of the police force, the Chief Constable;
"complaint" shall be construed in accordance with section 52(8);
"complainant" means the person by, or on behalf of whom, a complaint is made;
"the Director" means the Director of Public Prosecutions for Northern Ireland;
"disciplinary proceedings" means-
(a) in relation to a member of Police Service of Northern Ireland, proceedings identified as such by regulations under section 25;
(b) in relation to a reserve constable, proceedings identified as such by regulations under section 26;
"officer of the Ombudsman" means-
(a) a person employed by the Ombudsman under paragraph 3(1) of Schedule 3;
(b) a person providing assistance to the Ombudsman in pursuance of arrangements made under paragraph 3(2) of Schedule 3;
(c) a member of the police force on temporary service with the Ombudsman in accordance with arrangements under paragraph 5 of Schedule 3;
(d) a member of the police force providing assistance to the Ombudsman under paragraph 6 of Schedule 3;
(e) a member of a police force in Great Britain on temporary service with the Ombudsman in accordance with arrangements under paragraph 8 of Schedule 3;
"the Ombudsman" means the Police Ombudsman for Northern Ireland;
"police officer" means a member of-
(a) the police force; or
(b) a police force in Great Britain;
"prescribed" means prescribed by regulations under section 64;
"serious complaint" means a complaint-
(a) alleging that the conduct complained of resulted in the death of, or serious injury to, some person; or
(b) of such other description as may be prescribed;
"serious injury" means a fracture, damage to an internal organ or impairment of bodily function.
(2) Where a complaint is made orally, references in this Part to a complaint being referred to a body or person shall be read as references to particulars of the complaint being so referred.

The Police Ombudsman for Northern Ireland.

51. - (1) For the purposes of this Part there shall be a Police Ombudsman for Northern Ireland.

(2) The person for the time being holding the office of Police Ombudsman for Northern Ireland shall by that name be a corporation sole.

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

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

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

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

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

Complaints – receipt and initial classification of complaints. [am. 13 June 2005]

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

(a) be made to the Ombudsman; or

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

(2) Where a complaint-

(a) is made to the Chief Constable; and

(b) appears to the Chief Constable to be a complaint to which subsection (4) applies,

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

(3) The Ombudsman shall-

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

(b) determine whether it is a complaint to which subsection (4) applies.

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

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

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

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

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

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

(10) In the case of a complaint made otherwise than as mentioned in subsection (2)(a), the Chief Constable shall, if so requested by the Ombudsman, take such steps as appear to the Chief Constable to be desirable for the purpose of preserving evidence relating to the conduct complained of.

Complaints – informal resolution.

53. - (1) The Ombudsman shall consider whether the complaint is suitable for informal resolution and may for that purpose make such investigations as he thinks fit.

(2) A complaint is not suitable for informal resolution unless-

(a) the complainant gives his consent; and

(b) it is not a serious complaint.

(3) If it appears to the Ombudsman that the complaint is suitable for informal resolution, he shall refer the complaint to the appropriate disciplinary authority.

(4) Where a complaint is referred under subsection (3), the appropriate disciplinary authority shall seek to resolve it informally and may appoint a member of the police force to do so on behalf of the authority.

(5) The Chief Constable shall, at the request of the Board, provide a member of the police force to be appointed by the Board under subsection (4).

(6) If, after attempts have been made to resolve a complaint informally, it appears to the appropriate disciplinary authority-

(a) that informal resolution of the complaint is impossible; or

(b) that the complaint is for any other reason not suitable for informal resolution,

the appropriate disciplinary authority shall notify the Ombudsman accordingly and refer the complaint to him.

(7) Subject to subsection (8), no statement made by any person for the purpose of the informal resolution of a complaint shall be admissible in any subsequent criminal, civil or disciplinary proceedings.

(8) A statement is not rendered inadmissible by subsection (7) if it consists of or includes an admission relating to a matter which does not fall to be resolved informally.

Complaints – formal investigation.

54. - (1) If-

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

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

the complaint shall be formally investigated as provided in subsection (2) or (3).

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

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

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

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

Consideration of other matters by the Ombudsman. [am. 13 June 2005]

55. - (1) The Board, the Department of Justice or the Secretary of State may refer to the Ombudsman any matter which-

(a) appears to the Board, the Department of Justice or the Secretary of State to indicate that a member of the police force may have-

(i) committed a criminal offence; or

(ii) behaved in a manner which would justify disciplinary proceedings; and

(b) is not the subject of a complaint,

if, after consultation with the Ombudsman and the Chief Constable, it appears to the Board, the Department of Justice or the Secretary of State that it is desirable in the public interest that the Ombudsman should investigate the matter.

(1A) The Secretary of State may refer a matter to the Ombudsman under subsection (1) only if it appears to the Secretary of State that the matter relates (in whole or in part) to an excepted matter or reserved matter (within the meaning given by section 4 of the Northern Ireland Act 1998).

(2) The Chief Constable shall refer to the Ombudsman any matter which appears to the Chief Constable to indicate that conduct of a member of the police force may have resulted in the death of some other person.

(3) Where any matter is referred to the Ombudsman under subsection (1) or (2), he shall formally investigate the matter in accordance with section 56.

(4) The Chief Constable may refer to the Ombudsman any matter which-

(a) appears to the Chief Constable to indicate that a member of the police force may have-

(i) committed a criminal offence; or

(ii) behaved in a manner which would justify disciplinary proceedings; and

(b) is not the subject of a complaint,

if it appears to the Chief Constable that it is desirable in the public interest that the Ombudsman should investigate the matter.

(4A) The Director shall refer to the Ombudsman any matter which-

(a) appears to the Director to indicate that a police officer-

(i) may have committed a criminal offence; or

(ii) may, in the course of a criminal investigation, have behaved in a manner which would justify disciplinary proceedings; and

(b) is not the subject of a complaint,

unless it appears to the Director that the Ombudsman is already aware of the matter.

(4B) In subsection (4A) "criminal investigation" has the same meaning as in Part 2 of the Criminal Procedure and Investigations Act 1996.

(5) Where any matter is referred to the Ombudsman under subsection (4) or (4A), he shall formally investigate the matter in accordance with section 56 if it appears to him that it is desirable in the public interest that he should do so.

(6) The Ombudsman may of his own motion formally investigate in accordance with section 56 any matter which-

(a) appears to the Ombudsman to indicate that a member of the police force may have-

(i) committed a criminal offence; or

(ii) behaved in a manner which would justify disciplinary proceedings; and

(b) is not the subject of a complaint,

if it appears to the Ombudsman that it is desirable in the public interest that he should do so.

(7) The Ombudsman shall notify-

(a) the Board, the Department of Justice or the Secretary of State, in the case of a matter referred under subsection (1);

(b) the Chief Constable, in the case of a matter referred under subsection (2) or (4),

of the outcome of any criminal or disciplinary proceedings brought against a member of the police force in respect of, or in connection with, the matter so referred.

Formal investigation by the Ombudsman.

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

(1A) Where an investigation is authorised by virtue of section 85 (read with section 86A) of the Criminal Justice Act 2003 (investigation of the commission of certain offences by persons acquitted), the Ombudsman shall appoint an officer of the Ombudsman to conduct the investigation. [added 21 April 2007]

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

(3) A person employed by the Ombudsman under paragraph 3(1) of Schedule 3 shall for the purpose of conducting, or assisting in the conduct of, an investigation under this section have all the powers and privileges of a constable throughout Northern Ireland and the adjacent United Kingdom territorial waters; and subsection (3) of section 32 of the Police (Northern Ireland) Act 2000 applies for the purposes of this subsection as it applies for the purposes of subsection (2) of that section.

(4) Section 66 applies to a person to whom subsection (3) applies as it applies to a constable.

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

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

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

(6) At the end of an investigation under this section the person appointed to conduct the investigation shall submit a report on the investigation to the Ombudsman.

Formal investigation by a police officer.

57. - (1) Where a complaint is referred to the Chief Constable under section 54(3)(b), he shall appoint a police officer to investigate it formally on behalf of the Ombudsman.

(2) A member of the police force may not be appointed to investigate a complaint formally if he has previously been appointed to act in relation to it under section 53(4).

(3) The Ombudsman may require-

(a) that no appointment of a person to conduct an investigation under this section shall be made unless the Ombudsman has given notice to the Chief Constable that he approves the person whom the Chief Constable proposes to appoint; or

(b) if such an appointment has already been made and the Ombudsman is not satisfied with the person appointed, that-

(i) the Chief Constable shall, as soon as is reasonably practicable, select another police officer and notify the Ombudsman that he proposes to appoint that person; and

(ii) the appointment shall not be made unless the Ombudsman gives notice to the Chief Constable that he approves that person.

(4) The Ombudsman may supervise the investigation of any complaint under this section if he considers that it is desirable in the public interest for him to do so.

(5) Where the Ombudsman decides to supervise an investigation under this section he shall notify the Chief Constable to that effect.

(6) A member of a police force in Great Britain who is appointed to conduct an investigation under this section shall, for the purpose of conducting that investigation, have all the powers and privileges of a constable throughout Northern Ireland and the adjacent United Kingdom territorial waters; and subsection (3) of section 32 of the Police (Northern Ireland) Act 2000 applies for the purposes of this subsection as it applies for the purposes of subsection (2) of that section.

(7) The Ombudsman may impose requirements as to the conduct of an investigation which the Ombudsman is supervising; and it shall be the duty of a police officer to comply with any requirement imposed on him by virtue of this subsection.

(8) At the end of an investigation under this section the police officer appointed to conduct the investigation shall submit a report on the investigation to the Ombudsman.

Steps to be taken after investigation – criminal proceedings.

58. - (1) The Ombudsman shall consider any report made under section 56(6) or 57(8) and determine whether the report indicates that a criminal offence may have been committed by a member of the police force.

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

(3) Where a report is sent to the Director under subsection (2), the Ombudsman shall, at the request of the Director, ascertain and furnish to the Director all such further information in relation to the complaint or matter dealt with in the report as appears to the Director to be necessary for the discharge of his functions.

(4) [rep. 13 June 2005]

Steps to be taken after investigation – mediation. [added by 2000 c.32 from 22 Dec 2001]

58A. - (1) If the Ombudsman-

(a) determines that a report made under section 56(6) or 57(8) does not indicate that a criminal offence may have been committed by a member of the police force, and

(b) considers that the complaint is not a serious one,

he may determine that the complaint is suitable for resolution through mediation.

(2) If he does so, he must inform the complainant and the member of the police force concerned.

(3) If the complainant and the member of the police force concerned agree to attempt to resolve the complaint through mediation, the Ombudsman shall act as mediator.

(4) Anything communicated to the Ombudsman while acting as mediator is not admissible in evidence in any subsequent criminal, civil or disciplinary proceedings.

(5) But that does not make inadmissible anything communicated to the Ombudsman if it consists of or includes an admission relating to a matter which does not fall to be resolved through mediation.

(6) If a complaint is resolved through mediation under this section, no further proceedings under this Act shall be taken against the member of the police force concerned in respect of the subject matter of the complaint.

Steps to be taken after investigation – disciplinary proceedings. [am. 22 Dec 2001]

59. - (1) Subsection (1B) applies if-

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) The Board shall advise the Ombudsman of what action it has taken in response to a recommendation contained in a memorandum sent to it under subsection (2); and nothing in the following provisions of this section has effect in relation to senior officers.

(5) If-

(a) a memorandum sent to the Chief Constable under subsection (2) contains a recommendation that disciplinary proceedings should be brought; but

(b) the Chief Constable is unwilling to bring such disciplinary proceedings,

the Ombudsman may, after consultation with the Chief Constable, direct him to bring disciplinary proceedings.

(6) Subject to subsection (7)-

(a) it shall be the duty of the Chief Constable to comply with a direction under subsection (5);

(b) the Chief Constable may not discontinue disciplinary proceedings which he has brought in accordance with-

(i) a recommendation contained in a memorandum under subsection (2); or

(ii) a direction under subsection (5).

(7) The Ombudsman may give the Chief Constable leave-

(a) not to bring disciplinary proceedings which subsection (6)(a) would otherwise oblige him to bring; or

(b) to discontinue disciplinary proceedings with which subsection (6)(b) would otherwise require him to proceed.

(8) Regulations made in accordance with section 25(3) or 26(3) may establish, or make provision for the establishment of, a special procedure for any case in which disciplinary proceedings are brought-

(a) where a memorandum under subsection (2) recommending the bringing of those proceedings contains a statement to the effect that, by reason of exceptional circumstances affecting the case, the Ombudsman considers that such special procedures are appropriate; or

(b) in compliance with a direction under subsection (5).

(9) The Chief Constable shall advise the Ombudsman of what action he has taken in response to-

(a) a recommendation contained in a memorandum under subsection (2);

(b) a direction under subsection (5).

Constabularies not maintained by Board.

60. - (1) An agreement for the establishment in relation to any body of constables maintained by an authority other than the Board of procedures corresponding or similar to any of those established by virtue of this Part may, with the approval of the Department of Justice, be made between the Ombudsman and the authority maintaining the body of constables.

(2) Where no such procedures are in force in relation to any body of constables, the Department of Justice may by order establish such procedures.

(3) An agreement under this section may at any time be varied or terminated with the approval of the Department of Justice.

(4) Before making an order under this section the Department of Justice shall consult-

(a) the Ombudsman; and

(b) the authority maintaining the body of constables to whom the order would relate.

(5) Nothing in any other statutory provision shall prevent an authority which maintains a body of constables from carrying into effect procedures established by virtue of this section.

(6) No such procedures shall have effect in relation to anything done by a constable outside Northern Ireland.
(7) In the application of this section in relation to the Ministry of Defence Police, references to the Department of Justice are to be read as references to the Secretary of State.

National Crime Agency [added 1 March 2006] [am. 19 May 2015]
60ZA . - (1) An agreement for the establishment in relation to National Crime Agency officers of procedures corresponding or similar to any of those established by virtue of this Part may, with the approval of the Secretary of State, be made between the Ombudsman and the Agency.
(2) Where no such procedures are in force in relation to the Agency, the Secretary of State may by order establish such procedures.
(3) An agreement under this section may at any time be varied or terminated with the approval of the Secretary of State.
(4) Before making an order under this section the Secretary of State shall consult-
(a) the Ombudsman; and
(b) the Agency.
(5) Nothing in any other statutory provision shall prevent the Agency from carrying into effect procedures established by virtue of this section.
(6) No such procedures shall have effect in relation to anything done by a National Crime Agency officer outside Northern Ireland.
(8) The Director General of the National Crime Agency shall supply the Ombudsman with such information and documents as the Ombudsman may require for the purposes of, or in connection with, the exercise of any of the Ombudsman's functions under procedures established by virtue of this section.

60ZB. *Immigration and customs enforcement functions* [added 28 July 2014]
(1) The Ombudsman and the Secretary of State may enter into an agreement to establish, in relation to the exercise of specified enforcement functions by relevant officials, procedures which correspond to or are similar to any of those established by virtue of this Part.
(2) Where no such procedures are in force in relation to a particular kind of relevant official, the Secretary of State may by order establish such procedures in relation to the exercise of specified enforcement functions by that kind of relevant official.
(3) "Relevant officials" means—
(a) immigration officers and other officials of the Secretary of State exercising functions relating to immigration or asylum;
(b) designated customs officials, and officials of the Secretary of State, exercising customs functions (within the meaning of Part 1 of the Borders, Citizenship and Immigration Act 2009);
(c) the Director of Border Revenue exercising customs revenue functions (within the meaning of that Part of that Act), and persons exercising such functions of the Director;
(d) persons providing services pursuant to arrangements relating to the discharge of a function within paragraph (a), (b), or (c).
(4) "Enforcement functions" includes, in particular—

(a) powers of entry,
(b) powers to search persons or property,
(c) powers to seize or detain property,
(d) powers to arrest persons,
(e) powers to detain persons, and
(f) powers to examine persons or otherwise to obtain information (including powers to take fingerprints or to acquire other personal data).

(5) "Specified" means specified in an agreement under subsection (1) or an order under subsection (2).

(6) "Immigration officer" means a person appointed under paragraph 1(1) of Schedule 2 to the Immigration Act 1971.

60ZC. *Section 60ZB: supplementary*

(1) An agreement under section 60ZB may at any time be varied or terminated—
(a) by the Secretary of State, or
(b) by the Ombudsman, with the consent of the Secretary of State.

(2) Before making an order under section 60ZB the Secretary of State must consult the Ombudsman and such persons as the Secretary of State thinks appropriate.

(3) An agreement or order under section 60ZB may provide for payment by the Secretary of State to or in respect of the Ombudsman.

(4) An agreement or order under section 60ZB must relate only to the exercise of enforcement functions—
(a) wholly in Northern Ireland, or
(b) partly in Northern Ireland and partly in another part of the United Kingdom.

(5) An agreement or order under section 60ZB must relate only to the exercise of enforcement functions on or after the day on which the agreement or order is made.

(6) An agreement or order under section 60ZB must not provide for procedures in relation to so much of any complaint or matter as relates to functions conferred by or under Part 8 of the Immigration and Asylum Act 1999 (detained persons & removal centres etc.).

Investigations into current police practices and policies [added 2003 c.6 from 8 April 2003]

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

(2) But subsection (1) does not authorise the Ombudsman to investigate a practice or policy to the extent that the practice or policy is concerned with conduct of a kind mentioned in section 65(5) of the Regulation of Investigatory Powers Act 2000 (conduct which may be within jurisdiction of tribunal established under section 65 of that Act).

(3) If the Ombudsman decides to conduct an investigation under this section he shall immediately inform the Chief Constable, the Board and the Department of Justice of-
(a) his decision to conduct the investigation,
(b) his reasons for making that decision, and
(c) the practice or policy into which the investigation is to be conducted.

(3A) Where it appears to the Ombudsman that an investigation may relate wholly or in part to—

(a) a matter in respect of which a function is conferred or imposed on the Secretary of State by or under a statutory provision, or

(b) an excepted matter or reserved matter (within the meaning given by section 4 of the Northern Ireland Act 1998),

the Ombudsman shall also immediately inform the Secretary of State of the matters mentioned in subsection (3)(a) to (c).

(4) When an investigation under this section has been completed the Ombudsman shall report on it to the Chief Constable and the Board.

(5) The Ombudsman shall send a copy of his report to the Secretary of State, if the investigation relates wholly or in part to-

(a) a matter in respect of which a function is conferred or imposed on the Secretary of State by or under a statutory provision, or

(b) an excepted matter (within the meaning given by section 4 of the Northern Ireland Act 1998).

(6) The Ombudsman shall send a copy of his report to the Department of Justice, if the investigation relates wholly or in part to a matter in respect of which a function is conferred or imposed on the Department of Justice by or under a statutory provision.

Reports.

61. - (1) The Ombudsman shall, at the request of the appropriate authority, report to the appropriate authority on such matters relating generally to the functions of the Ombudsman as the appropriate authority may specify, and the Ombudsman may for that purpose carry out research into any such matters.

(2) The Ombudsman may make a report to the appropriate authority on any matters coming to the Ombudsman's attention under this Part to which the Ombudsman considers that the appropriate authority's attention should be drawn in the public interest.

(2A) In subsections (1) and (2) "the appropriate authority" means, in relation to any matter—

(a) the Secretary of State, if the matter relates (in whole or in part other than incidentally) to an excepted matter or reserved matter or to a function conferred or imposed on the Secretary of State by or under a statutory provision;

(b) otherwise, the Department of Justice;

and in paragraph (a) "excepted matter" and "reserved matter" have the meanings given by section 4 of the Northern Ireland Act 1998.

(3) The Ombudsman shall, not later than 3 months after the end of each financial year, make to the Department of Justice a report on the discharge of the Ombudsman's functions during that year.

(4) The Ombudsman shall-

(a) keep under review the working of this Part; and

(b) at least once every five years, make a report on it to the Department of Justice.

(5) The Ombudsman shall send a copy of any report under this section to-

(a) the Board and the Chief Constable; and

(b) if the report concerns any such body of constables as is mentioned in section 60, to the authority maintaining it and the officer having the direction and control of it; and

(c) if the report concerns the National Crime Agency, to the Agency.

(5A) The Department of Justice shall—
(a) lay before the Northern Ireland Assembly a copy of every report received by the Department under this section; and
(b) cause every such report to be published.
(5B) Section 41(3) of the Interpretation Act (Northern Ireland) 1954(c) applies for the purposes of subsection (5A)(a) in relation to the laying of a copy of a report as it applies in relation to the laying of a statutory document under an enactment.
(6) The Secretary of State shall-
(a) lay before both Houses of Parliament a copy of every report received by him under this section; and
(b) cause every such report to be published.

61A. *Reports to Chief Constable and Board.* [added from 4 Nov 2001, rep. 2003 c.6 from 8 April 2003]

Supply of information by Ombudsman to Board. [added from 4 Nov 2001]
61AA. - (1) The Ombudsman shall compile, and supply the Board with, such statistical information as is required to enable the Board to carry out its functions under section 3(3)(c)(i) of the Police (Northern Ireland) Act 2000.
(2) The Ombudsman shall consult the Board as to-
(a) the information to be supplied under subsection (1); and
(b) the form in which such information is to be supplied.
(3) The Ombudsman shall supply the Board with any other general information which the Ombudsman considers should be brought to the attention of the Board in connection with its functions under section 3(3)(c)(i) of the Police (Northern Ireland) Act 2000.

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

Restriction on disclosure of information.
63. - (1) No information received by a person to whom this subsection applies in connection with any of the functions of the Ombudsman under this Part shall be disclosed by any person who is or has been a person to whom this subsection applies except-
(a) to a person to whom this subsection applies;
(b) to the Department of Justice or the Secretary of State;
(c) to other persons in or in connection with the exercise of any function of the Ombudsman;
(ca) for the purposes of an inspection of the Ombudsman carried out by the Chief Inspector of Criminal Justice in Northern Ireland under Part 3 of the Justice (Northern Ireland) Act 2002; [added SR (NI) 2002/414 from 20 Dec 2002]
(d) for the purposes of any criminal, civil or disciplinary proceedings; or
(e) in the form of a summary or other general statement made by the Ombudsman which-
(i) does not identify the person from whom the information was received; and

(ii) does not, except to such extent as the Ombudsman thinks necessary in the public interest, identify any person to whom the information relates.

(2) Subsection (1) applies to-

(a) the Ombudsman; and

(b) an officer of the Ombudsman.

(2A) [added from 4 Nov 2001, am. 2003 c.6 from 8 April 2003] Subsection (1) does not prevent the Ombudsman, to such extent as he thinks it necessary to do so in the public interest, from disclosing in a report of an investigation under section 60A-

(a) the identity of an individual, or

(b) information from which the identity of an individual may be established.

(3) Any person who discloses information in contravention of this section shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(4) Nothing in subsection (1)(b) permits the disclosure to the Department of Justice of information—

(a) which has been supplied to the Ombudsman under section 66(1) of the Police (Northern Ireland) Act 2000(a) for the purposes of or in connection with an investigation under section 60A of this Act, and

(b) in relation to which the Ombudsman has been informed under section 66(3)(b) of the Police (Northern Ireland) Act 2000 that the information is, in the opinion of the Chief Constable or the Board, information which ought not to be disclosed on the ground mentioned in section 76A(1)(a) of that Act.

Regulations.

64. - (1) The Department of Justice may make regulations-

(a) as to the procedure to be followed under this Part; and

(b) for prescribing anything authorised or required to be prescribed by any provision in this Part.

(2) [am. 22 Dec 2001] The Department of Justice shall by regulations provide-

(a) that, subject to such exceptions and in accordance with such procedures as may be prescribed, the Ombudsman shall furnish a copy of, or of the record of, a complaint against a member of the police force to-

(i) that member;

(ii) the complainant; and

(iii) the appropriate disciplinary authority;

(b) procedures for the informal resolution or mediation of complaints of such descriptions as may be prescribed, and for giving the complainant a record of the outcome of any such procedure;

(c) procedures for giving a member of the police force, whose conduct is the subject of a complaint which falls to be resolved informally or through mediation, an opportunity to comment orally or in writing on the complaint;

(d) for cases in which any provision of this Part is not to apply where-

(i) a complaint, other than a complaint which falls to be resolved informally or through mediation, is withdrawn;

(ii) the complainant indicates that he does not wish any further steps to be taken; or

(iii) the complainant fails to indicate, in response to a request from the Ombudsman to do so, whether he wishes any further steps to be taken;

(e) for enabling the Ombudsman to dispense with any requirement of this Part;

(f) for enabling the Ombudsman to relinquish the supervision of the investigation of any complaint under section 57;

(g) procedures for an investigation begun under section 56 or section 57 to be continued, where the Ombudsman so directs, as if it had originally been begun under the other of those sections;

(h) procedures for the making of complaints and the reference of complaints and other matters under this Part;

(i) that the Ombudsman shall be supplied with such information or documents of such description as may be prescribed at such time or in such circumstances as may be prescribed;

(j) that any action, determination or decision of a prescribed description taken by the Ombudsman shall be notified to prescribed persons within a prescribed time and that, in connection with such a notification, the Ombudsman shall have power to supply the person notified with any relevant information;

(k) for authorising or requiring the Ombudsman to provide to the appropriate disciplinary authority information relevant to the exercise by that authority of any power of suspension under regulations made by virtue of section 25(2)(f) or 26(2)(e).

(l) that the Chief Constable shall have power to delegate any functions conferred on him by or by virtue of this Part;

(m) for enabling the Ombudsman to pay to a complainant-

(i) sums in respect of expenses incurred by him; and

(ii) allowances by way of compensation for the loss of his time,

in accordance with such scales and subject to such conditions as may be prescribed;

(n) for enabling the Ombudsman, in such cases as may be prescribed, to make a recommendation to the Chief Constable for the payment by the Chief Constable to the complainant of compensation of such amount as the Ombudsman considers appropriate (but not exceeding such amount as may be prescribed).

(2A) The Department of Justice may by regulations provide that, subject to such exceptions as may be prescribed-

(a) this Part shall not apply to a complaint about the conduct of a police officer which took place more than the prescribed period before the date on which the complaint is made or referred to the Ombudsman under section 52(1);

(b) the Ombudsman shall not investigate any matter referred to him under section 55(1), (2), (4) or (4A) if the actions, behaviour or conduct to which the matter relates took place more than the prescribed period before the date on which the reference is made;

(c) the Ombudsman shall not at any time commence a formal investigation under section 55(6) of any matter if the actions or behaviour to which the matter relates took place more than the prescribed period before that time;

the Ombudsman shall not investigate it.

(3) Regulations under this section may authorise the Department of Justice to make provision for any purposes specified in the regulations.

(4) Before making any regulations under this section, the Department of Justice shall consult-

(a) the Ombudsman;

(b) the Board; and

(c) the Police Association.

64A. *Secretary of State's power to make regulations*

(1) The Secretary of State may make regulations containing provision of any kind within section 64(1), (2) or (2A) for purposes connected with—

(a) excepted or reserved matters (within the meaning given by section 4 of the Northern Ireland Act 1998);

(b) matters in respect of which a function is conferred or imposed on the Secretary of State by or under a statutory provision.

(2) The Secretary of State may by regulations provide that, subject to such exceptions as may be prescribed, to the extent that the subject matter of a complaint falls within the jurisdiction of—

(a) the tribunal constituted under section 65(1) of the Regulation of Investigatory Powers Act 2000, or

(b) a person appointed under Part 4 of that Act,

the Ombudsman shall not investigate it.

(3) Regulations under this section may authorise the Secretary of State to make provision for any purposes specified in the regulations.

(4) Before making any regulations under this section, the Secretary of State shall consult the Department of Justice and the persons mentioned in section 64(4)(a) to (c).

(5) Regulations made by the Department of Justice under section 64 have effect subject to regulations made by the Secretary of State under this section.

Guidance concerning discipline, complaints, etc.

65. - (1) The Department of Justice may issue guidance to the Board and police officers concerning the discharge of their functions-

(a) under this Part;

(b) under regulations made under section 25 in relation to the matters mentioned in subsection (2)(e) of that section; and

(c) under regulations made under section 26 in relation to the matters mentioned in subsection (2)(d) of that section;

and they shall have regard to any such guidance in the discharge of their functions.

(2) Guidance may not be issued under subsection (1) in relation to the handling of a particular case.

(3) A failure on the part of a person to whom guidance is issued under this section to have regard to such guidance shall be admissible in evidence on any appeal from a decision taken in proceedings under regulations made in accordance with section 25(3) or 26(3).

(4) In discharging his functions under section 59 the Ombudsman shall have regard-

(a) to any guidance given to him by the Department of Justice with respect to such matters as are for the time being the subject of guidance under subsection (1); and

(b) in particular, but without prejudice to the generality of paragraph (a), to any such guidance as to the principles to be applied in cases that involve any question of criminal proceedings.

(5) In discharging his functions under this Part the Ombudsman shall have regard to any guidance given to him by the Department of Justice with respect to matters the disclosure of which may be prejudicial to the public interest.

(6) In discharging his functions under this Part the Ombudsman shall have regard to any guidance given to him by the Secretary of State with respect to matters the disclosure of which may be prejudicial to the public interest on the ground of national security.

(7) Any guidance given by the Department of Justice to the Ombudsman under this section has effect subject to any guidance given by the Secretary of State under subsection (6).

APPENDIX II - Police (Northern Ireland) Act 2000, Part VII

Annual and other reports by the Board. [am. 19 May 2015]

57. - (1) The Board shall, not later than 6 months after the end of each financial year, issue a report relating to the policing of Northern Ireland for the year.

(2) A report issued under subsection (1) for any year shall include an assessment of-

(ia) complying with section 31A(1); [added 2003 c.6 from 8 April 2003]

(a) the performance of the police in-

(i) carrying out the general duty under section 32(1);

(ii) complying with the Human Rights Act 1998;

(iii) carrying out the policing plan;

(b) the workings of Part VII of the 1998 Act (police complaints and disciplinary proceedings) and trends and patterns in complaints under that Part;

(c) the manner in which complaints from members of the public against traffic wardens are dealt with by the Chief Constable under section 71;

(d) trends and patterns in crimes committed in Northern Ireland;

(e) trends and patterns in recruitment to the police and the police support staff;

(f) the extent to which the membership of the police and the police support staff is representative of the community in Northern Ireland;

(g) the effectiveness of measures taken to secure that the membership of the police and the police support staff is representative of that community;

(h) the level of public satisfaction with the performance of the police;

(i) the level of public satisfaction with the performance of policing and community safety partnerships and district policing and community safety partnerships;

(j) the effectiveness of policing and community safety partnerships and district policing and community safety partnerships in performing their functions and in particular the effectiveness of arrangements made under Part 3 of the Justice Act (Northern Ireland) 2011 in obtaining—

(i) the views of the public about matters concerning policing; and

(ii) the co-operation of the public with the police in preventing crime

(k) the exercise of the functions of the National Crime Agency in Northern Ireland;

(l) the level of public satisfaction with the performance of the National Crime Agency in exercising functions in Northern Ireland;

(m) the effectiveness of arrangements made under section 3(3A)(c) for obtaining the co-operation of the public with the National Crime Agency in the prevention of organised crime and serious crime.

(2A) Nothing in subsection (2)(k), (l) or (m) shall have effect in relation to anything done by the National Crime Agency outside Northern Ireland.

(3) The Board shall-

(a) arrange for every report issued under subsection (1) to be published in such manner as appears to it to be appropriate; and

(b) send a copy of the report to the Department of Justice.

(4) The Board shall, whenever required by the Department of Justice, submit to the Department of Justice a report on such matters connected with the discharge of the Board's functions, or otherwise with the policing of Northern Ireland, as may be specified in the requirement.

(5) A report under subsection (4) shall be made-

(a) in such form as may be specified in the requirement under that subsection; and

(b) within the period of one month from the date on which that requirement is made or within such longer period as may be agreed between the Board and the Department of Justice.

(6) The Department of Justice may arrange, or require the Board to arrange, for a report under subsection (4) to be published in such manner as appears to the Department of Justice to be appropriate.

Annual report by Chief Constable to Board.

58. - (1) The Chief Constable shall, not later than 3 months after the end of each financial year, submit to the Board a general report on the policing of Northern Ireland during that year.

(2) The Chief Constable shall arrange for a report submitted under this section to be published in such manner as appears to him to be appropriate.

(3) The Chief Constable shall, at the same time as he submits a report to the Board under this section, submit the same report to the Department of Justice.

(4) The Department of Justice shall lay before the Northern Ireland Assembly every report submitted to the Department of Justice under subsection (3).

(5) Section 41(3) of the Interpretation Act (Northern Ireland) 1954 applies for the purposes of subsection (4) in relation to the laying of a report as it applies in relation to the laying of a statutory document under an enactment.

General duty of Chief Constable to report to Board. [am. 2003 c.6 from 8 April 2003] [am. 19 May 2015]

59. - (1) The Chief Constable shall, whenever so required by the Board, submit to the Board a report on any such matter connected with the policing of Northern Ireland as may be specified in the requirement.

(2) A report under this section shall be made-

(a) in such form as may be specified in the requirement under subsection (1); and

(b) within the period of one month from the date on which that requirement is made or within such longer period as may be agreed between the Chief Constable and the Board.

(3) The Chief Constable may refer to the Secretary of State a requirement to submit a report under subsection (1) if it appears to the Chief Constable that a report in compliance with the requirement would contain information which ought not to be disclosed on the ground mentioned in section 76A(1)(a).

(3A) The Chief Constable may refer to the Minister of Justice a requirement to submit a report under subsection (1) if it appears to the Chief Constable that a report in compliance with the requirement would contain information which ought not to be disclosed on any of the grounds mentioned in section 76A(1)(b) or (c).

(4) Where a requirement to submit a report is referred to the Secretary of State under subsection (3) or to the Minister of Justice under subsection (3A), the Secretary of State or (as the case may be) the Minister of Justice may—

(a) within the period of 30 days from the date of the referral, or

(b) within such longer period as may be agreed between the Board and (as the case may be) the Secretary of State or the Minister of Justice,

modify or set aside the requirement, as necessary, for either or both of the purposes mentioned in subsection (4A).

(4A) The purposes are-

(a) exempting the Chief Constable from the obligation to report to the Board as the case may be—

(i) information which, in the opinion of the Secretary of State, ought not to be disclosed on the ground mentioned in section 76A(1)(a); or

(ii) information which, in the opinion of the Minister of Justice, ought not to be disclosed on any of the grounds mentioned in section 76A(1)(b) or (c);;

(b) imposing on the Chief Constable an obligation to supply any such information to a special purposes committee.

(4B) Subsection (4D) applies if-

(a) a requirement to submit a report has been made under subsection (1);

(b) the Chief Constable has not referred the requirement to the Secretary of State under subsection (3) or to the Minister of Justice under subsection (3A);

(c) the Chief Constable is of the opinion that a report in compliance with the requirement would include information of a kind mentioned in paragraph (a) or (b) of subsection (4C).

(4C) The information is-

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

(b) information which ought not to be disclosed on any of the grounds mentioned in section 76A(1).

(4D) The Chief Constable may, instead of including the information in the report to the Board, supply it to a special purposes committee.

(4E) If the Chief Constable supplies information to a committee under subsection (4D) he shall prepare a summary of the information.

(4F) The Chief Constable shall try to obtain the agreement of the committee to the terms of the summary.

(4G) If the committee agrees to the terms of the summary, the Chief Constable shall include the summary in the report to the Board.

(4H) Subsection (4I) applies if—

(a) the Chief Constable supplies to a committee under subsection (4D) information which, in the opinion of the Chief Constable, is information which ought not to be disclosed on the ground mentioned in section 76A(1)(a), or

(b) the Chief Constable includes information in a report to the Board and is of the opinion that the information is information which ought not to be disclosed on the ground mentioned in section 76A(1)(a).

(4I) The Chief Constable must—

(a) inform the Secretary of State that the information has been included in a report to the Board or supplied to the committee; and

(b) inform the Secretary of State and the recipient of the information that, in his opinion, the information is information which ought not to be disclosed on the ground mentioned in section 76A(1)(a).

(4J) Subsection (4K) applies if—

(a) the Chief Constable supplies to a committee under subsection (4D) information which, in the opinion of the Chief Constable, is—
(i) information the disclosure of which would be likely to put an individual in danger, or
(ii) information which ought not to be disclosed on any of the grounds mentioned in section 76A(1)(b) or (c), or
(b) the Chief Constable includes information in a report to the Board and is of the opinion that the information is—
(i) information the disclosure of which would be likely to put an individual in danger, or
(ii) information which ought not to be disclosed on any of the grounds mentioned in section 76A(1)(b) or (c).

(4K) The Chief Constable must—
(a) inform the Minister of Justice that the information has been included in a report to the Board or supplied to the committee; and
(b) inform the Minister of Justice and the recipient of the information that, in his opinion, the information is information of a kind mentioned in sub-paragraph (i) or (ii) of paragraph (a) or (b) of subsection (4J).

(5) Subject to section 74A(7), the Board may arrange, or require the Chief Constable to arrange, for a report under this section to be published in such manner as appears to the Board to be appropriate.

(6) The Director General of the National Crime Agency shall, whenever so required by the Board, submit to the Board a report on any such relevant NCA matter as may be specified in the requirement.

(7) But the Board may not require the Director General to submit such a report before consulting the Secretary of State.

(8) In this section "relevant NCA matter" means a matter which relates to—
(a) how the Director General intends that functions of the National Crime Agency are to be exercised in Northern Ireland; or
(b) whether the exercise of the functions of the National Crime Agency in Northern Ireland is, or was, in accord with their intended exercise.

(9) Subsections (2) to (5) of this section apply to a report under subsection (6) as they apply to a report under subsection (1).

(10) In the application of subsections (2) to (5) to a report under subsection (6), each reference to the Chief Constable is to be read as a reference to the Director General of the National Crime Agency.

Inquiry by Board following report by Chief Constable. [am. 2003 c.6] [am. 19 May 2015]

60. - (1) Where the Board-
(a) has considered a report on any matter submitted by the Chief Constable under section 59, and
(b) considers that an inquiry ought to be held under this section into that matter or any related matter disclosed in the report by reason of the gravity of the matter or exceptional circumstances,

the Board may, after consultation with the Chief Constable, cause such an inquiry to be held.

(2) The Board shall immediately-

(a) inform the Chief Constable, the Ombudsman and the Minister of Justice of any decision to cause an inquiry to be held under this section and of any matter into which inquiry is to be made; and

(b) send a copy of the relevant report under section 59 to the Minister of Justice.

(2A) Where it appears to the Board that an inquiry under this section may relate wholly or in part to—

(a) a matter in respect of which a function is conferred or imposed on the Secretary of State by or under a statutory provision, or

(b) an excepted matter or reserved matter (within the meaning given by section 4 of the Northern Ireland Act 1998),

the Board shall immediately inform the Secretary of State of the decision to cause the inquiry to be held and of any matter into which inquiry is to be made, and shall send a copy of the relevant report under section 59 to the Secretary of State.

(3) The Chief Constable may refer to the Secretary of State the decision of the Board to cause an inquiry to be held under this section if it appears to the Chief Constable that such an inquiry ought not to be held on the ground mentioned in section 76A(2)(a).

(4) The Secretary of State may within the period of 30 days from the date of referral of the decision of the Board by the Chief Constable, or within such longer period as may be agreed between the Board and the Secretary of State, overrule the decision of the Board.

(5) The Secretary of State may overrule the Board only if, in his opinion, the inquiry ought not to be held on the ground mentioned in section 76A(2)(a).

(5A) The Chief Constable may refer to the Minister of Justice the decision of the Board to cause an inquiry to be held under this section if it appears to the Chief Constable that such an inquiry ought not to be held on any of the grounds mentioned in section 76A(2)(b) or (c).

(5B) The Minister of Justice may within the period of 30 days from the date of referral of the decision of the Board by the Chief Constable, or within such longer period as may be agreed between the Board and the Minister of Justice, overrule the decision of the Board.

(5C) The Minister of Justice may overrule the Board only if, in the opinion of the Minister of Justice, the inquiry ought not to be held on any of the grounds mentioned in section 76A(2)(b) or (c).

(6) The Board may request a person mentioned in subsection (8) to conduct an inquiry under this section.

(7) The person mentioned in subsection (8) may comply with the request under subsection (6) and shall do so if so directed by the Minister of Justice.

(8) The persons are-

(a) the Comptroller and Auditor General for Northern Ireland;

(b) the Ombudsman;

(c) an inspector of constabulary for Northern Ireland.

(9) The Board may, with the agreement of the Minister of Justice, appoint any other person to conduct an inquiry under this section.

(10) An inquiry under this section shall be held in public except where the person conducting it decides that it is necessary in the public interest not to do so.

(10A) Subsection (10B) applies if the Chief Constable supplies to a person conducting an inquiry under this section any information which, in the opinion of the Chief Constable, is information which ought not to be disclosed on the ground mentioned in section 76A(1)(a).

(10B) The Chief Constable must—

(a) inform the Secretary of State and the Board that the information has been supplied to the person conducting the inquiry; and

(b) inform the Secretary of State, the Board and the person conducting the inquiry that, in his opinion, the information is information which ought not to be disclosed on the ground mentioned in section 76A(1)(a).

(10C) Subsection (10D) applies if the Chief Constable supplies to a person conducting an inquiry under this section any information which, in the opinion of the Chief Constable, is—

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

(b) information which ought not to be disclosed on any of the grounds mentioned in section 76A(1)(b) or (c).

(10D) The Chief Constable must—

(a) inform the Minister of Justice and the Board that the information has been supplied to the person conducting the inquiry; and

(b) inform the Minister of Justice, the Board and the person conducting the inquiry that, in his opinion, the information is information of a kind mentioned in paragraph (a) or (b) of subsection (10C).

(11) An inquiry under this section may not deal with a pre-commencement matter.

(12) But subsection (11) does not prevent a person conducting an inquiry under this section from considering information relating to a pre-commencement matter if, and only to the extent that, consideration of that information is necessary for him to be able to discharge his functions in relation to the subject matter of the inquiry.

(13) "Pre-commencement matter" means any act or omission which occurred, or is alleged to have occurred, before the coming into force of this section.

(14) "Paragraphs 3 to 6 of Schedule A1 to the Interpretation Act (Northern Ireland) 1954 (provisions applicable to inquiries etc. under Northern Ireland legislation) shall apply to an inquiry under this section with the substitution for references to the Department of references to the person conducting the inquiry. [subst. 2005 c.12 on 7 June 2005]

(15) The Board shall pay-

(a) any expenses incurred by the person conducting an inquiry under this section; and

(b) any expenses incurred by any parties appearing at such an inquiry.

(16) The Board shall send a copy of the report of any inquiry under this section to-

(a) the Chief Constable;

(b) the Ombudsman;

(c) the Minister of Justice; and

(d) the Secretary of State, but only if the decision to cause the inquiry to be held was notified to the Secretary of State under subsection (2A) or if subsection (10A) applied in relation to the inquiry.

(17) Where the report of the person conducting an inquiry under this section is not published, a summary of his findings and conclusions shall be made known by the Board so far as appears to it consistent with the public interest.

(18) Where the Board—

(a) has considered a report on any relevant NCA matter submitted by the Director General of the National Crime Agency under section 59, and

(b) considers that an inquiry ought to be held under this section into that matter or any related matter disclosed in the report by reason of the gravity of the matter or exceptional circumstances,

the Board may, after consultation with the Director General and with the Secretary of State, cause such an inquiry to be held.

(19) Subsections (2) to (17) of this section apply to an inquiry which the Board causes to be held under subsection (18) as they apply to an inquiry caused to be held under subsection (1).

(20) In the application of subsections (2) to (17) to an inquiry which the Board causes to be held under subsection (18)—

(a) each reference to the Chief Constable (except the reference in subsection (16)(a)) is to be read as a reference to the Director General of the National Crime Agency;

(b) subsection (16) is to be read as including a requirement to send a copy of the report of any inquiry to the Director General (as well as to the persons in subsection (16)(a) to (d).

Reports by Chief Constable to Secretary of State and Minister of Justice.

61. - (1) The Chief Constable shall, whenever so required by the appropriate authority, submit to the appropriate authority a report on such matters connected with the policing of Northern Ireland as may be specified in the requirement.

(1A) In this section "the appropriate authority" means, in relation to any matter—

(a) the Secretary of State, if the matter relates (in whole or in part other than incidentally) to an excepted matter or reserved matter or to a function conferred or imposed on the Secretary of State by or under a statutory provision;

(b) otherwise, the Minister of Justice;

and in paragraph (a) "excepted matter" and "reserved matter" have the meanings given by section 4 of the Northern Ireland Act 1998.

(2) A report under subsection (1) shall be made-

(a) in such form as may be specified in the requirement under that subsection; and

(b) within the period of one month from the date on which that requirement is made, or within such longer period as may be agreed between the Chief Constable and the appropriate authority.

(3) The appropriate authority may arrange, or require the Chief Constable to arrange, for a report under subsection (1) to be published in such manner as appears to the Secretary of State to be appropriate.

(4) If it appears to the Chief Constable that a report that the Chief Constable is required to submit under subsection (1) to the Minister of Justice may contain information which, in the opinion of the Chief Constable, ought not to be disclosed on the ground mentioned in section 76A(1)(a), the Chief Constable may refer the report to the Secretary of State.

(5) If it appears to the Secretary of State that—

(a) the Chief Constable is required to submit a report under subsection (1) to the Minister of Justice, and

(b) the report may contain (or once completed may contain) information which ought not to be disclosed on the ground mentioned in section 76A(1)(a),

the Secretary of State may require the Chief Constable to refer the report to the Secretary of State (or, if the report is not completed when the requirement is imposed, to refer the report once completed).

(6) The Secretary of State must, within—

(a) the period of 30 days from the date on which a report is referred to the Secretary of State under subsection (4) or (5), or

(b) such longer period as may be agreed between the Secretary of State and the Minister of Justice,

notify the Chief Constable whether, in the opinion of the Secretary of State, the report contains any information which ought not to be disclosed on the ground mentioned in section 76A(1)(a).

(7) Where the Chief Constable has referred a report to the Secretary of State under subsection (4) or the Secretary of State has required that a report be referred to the Secretary of State under subsection (5), the Chief Constable must not disclose the report to anyone apart from the Secretary of State, except—

(a) in accordance with subsection (8), or

(b) after being notified by the Secretary of State that, in the opinion of the Secretary of State, the report does not contain any information which ought not to be disclosed on the ground mentioned in section 76A(1)(a).

(8) Where the Secretary of State notifies the Chief Constable under subsection (6) that, in the opinion of the Secretary of State, a report contains information which ought not to be disclosed on the ground mentioned in section 76A(1)(a)—

(a) the Secretary of State may direct the Chief Constable to exclude from the report any information which, in the opinion of the Secretary of State, is information which ought not to be disclosed on the ground mentioned in section 76A(1)(a);

(b) the Chief Constable must exclude that information from the report;

(c) the Secretary of State must inform the Minister of Justice that the Secretary of State has given a direction under paragraph (a); and

(d) the Secretary of State must lay before Parliament a statement that the Secretary of State has given a direction under paragraph (a).

(9) When the Chief Constable submits a report to the Minister of Justice from which information has been excluded under subsection (8), the Chief Constable must at the same time provide the report to the Secretary of State.

(10) In determining for the purposes of subsection (2)(b) when the period of one month, or the agreed longer period, expires in a case where a report has been referred to the Secretary of State under subsection (4) or (5), the period beginning with the day on which the report is referred to the Secretary of State and ending with the day on which the Secretary of State's notification is given under subsection (6) is to be disregarded.

(11) Subsection (12) applies if—

(a) a requirement to submit a report has been made under subsection (1) by the Minister of Justice;

(b) the Chief Constable has not referred the report to the Secretary of State under subsection (4) and has not been required to refer the report to the Secretary of State under subsection (5); and

(c) the Chief Constable includes in the report submitted to the Minister of Justice information which, in the opinion of the Chief Constable, is information which ought not to be disclosed on the ground mentioned in section 76A(1)(a).

(12) The Chief Constable must—

(a) inform the Secretary of State that the information has been included in the report to the Minister of Justice;

(b) inform the Secretary of State and the Minister of Justice that, in his opinion, the information is information which ought not to be disclosed on the ground mentioned in section 76A(1)(a).