Neutral Citation No: [2023] NIKB 125	*Ref:*	QUI12175
	ICOS No:	20/65352
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	27/06/2023

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

KING'S BENCH DIVISION
(JUDICIAL REVIEW)

_____

IN THE MATTER OF AN APPLICATION BY CRIS DONEGAN FOR JUDICIAL REVIEW

_____

Fiona Doherty KC with Séamus McIlroy BL (instructed by Finucane Toner Solicitors) for the Applicant
Tony McGleenan KC with Laura Curran BL (instructed by the Crown Solicitor's Office) for the Respondent
Andrew Magennis BL (instructed by the Police Ombudsman for Northern Ireland) for the Notice Party

_____

QUINLIVAN J

Introduction

[1] The applicant Cris Donegan is the son of James Donegan (deceased). James Donegan was shot and killed as he was waiting to pick up his 13 year old son from St Mary's Christian Brother's Grammar School on the Glen Road in Belfast. The challenge arises in circumstances where, some months prior to Mr Donegan's death, the PSNI learnt of a death threat, which included information capable of identifying Mr Donegan. The death threat was directed at someone dropping or collecting a child from a school on the Glen Road, Belfast. The PSNI failed to communicate that threat to Mr Donegan, who as appears above, was subsequently murdered whilst collecting his son from school on the Glen Road in Belfast.

[2] The applicant is challenging the failure of the Chief Constable of the PSNI to refer the conduct of a police officer to the Police Ombudsman for Northern Ireland (hereinafter, the Ombudsman) under the Police (Northern Ireland) Act 1998. The legislation requires the Chief Constable to refer the conduct of police officers to the Ombudsman in certain specified circumstances.

[3] Ms Doherty KC and Mr McIlroy BL appeared for the applicant, instructed by Finucane Toner, Solicitors. Dr McGleenan KC with Ms Curran BL, appeared for the

respondent, instructed by the Crown Solicitor's Office. Mr McGuinness BL appeared on behalf of the Notice Party, the Police Ombudsman. I am grateful to all counsel for the quality of their oral and written submissions.

Section 55 of the Police (Northern Ireland) Act 1998

[4] To put matters in context it is convenient at this juncture to outline the relevant provisions of the Police (NI) Act 1998 which provide for the circumstances in which the Chief Constable should refer matters to the Ombudsman.

[5] Section 55(2) of the 1998 Act, is expressed in mandatory terms, and requires the Chief Constable to refer to the Police 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."

[6] Section 55(4) provides that the Chief Constable may refer matters to the Police Ombudsman 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."

[7] The statutory framework is discussed more fully below.

Factual background

[8] On Tuesday 4 December 2018 James Donegan was murdered as he was waiting to pick up his son from St Mary's Christian Brother's Grammar School on the Glen Road in Belfast, he was driving a red Porsche when he was shot.

[9] Months before the shooting, on 7 June 2018, the police had received a threat to the effect that dissident republicans intended to target a male, who they believed to be involved in the sale of illegal drugs, who drove a Range Rover and who regularly collected a child from school on the Glen Road. Mr Donegan collected his son from St Mary's Grammar School on the Glen Road every Tuesday and Thursday, and was "linked" to a Range Rover, which was registered to his wife. The vehicle registration number associated with the Range Rover registered to his wife, matched the plate

which was on the red Porsche driven by the deceased on the day of his murder. The specifics of that death threat were never communicated to the deceased and that matter is currently under investigation by the Ombudsman.

[10] On 11 June 2018, the applicant did receive death threat notices from the PSNI which advised that he was under threat from dissident republicans. Those threats did not include the detail about the car or the school, which details had been contained in the threat received by the PSNI on 7 June 2018.

[11] After Mr Donegan's murder it emerged that, following receipt of the threat on 7 June 2018, police had taken steps to establish the identity of persons linked with Range Rovers who dropped off or picked up children from schools on the Glen Road. In its response to pre-action correspondence the PSNI described what happened as follows:

> "Officers identified that the research task had been completed in June 2018 and a response attached to the Police electronic system on the same day. However, due to the way in which the research task had been initially entered into the computer system, the electronic response did not reach the originating Officer, who was thus unaware that Mr Donegan was one of a number of vehicle owners who might have been linked to this report."

[12] Addressing the reason for the decision not to refer the matter to PONI under section 55(2) the response to the pre-action correspondence states as follows:

> "In light of the information available to the Temporary Deputy Chief Constable Martin, he did not form the view that the conduct of any officer may have resulted in the death of Mr Donegan."

[13] Addressing the reason for the decision not to refer the matter to PONI under section 55(4), the response to the pre-action correspondence states as follows:

> "The Chief Constable or an Officer acting on his behalf is therefore required to take a view first on whether it appears that an Officer may have committed a criminal offence, or behaved in a manner justifying disciplinary proceedings. … In light of the information available to the Temporary Deputy Chief Constable Martin, he did not identify any action of an Officer which could either constitute a criminal offence or in any way justify disciplinary proceedings. He was therefore not required to consider the second stage of the section 55(4) test."

[14] In his affidavit evidence to this Court, retired Temporary Deputy Chief Constable Martin gave the following explanation:

> "5. … within minutes of the intelligence document being created, the intelligence hub had submitted an ANPR request to try and identify any such vehicles which frequented the Glen Road at that time on a daily basis.
>
> 6. The information I received indicated that within 3 hours of the request, a list of potential vehicles had been attached to the intelligence document, including a vehicle bearing a VRN linked to the victim. This VRN was no longer used on a Range Rover but it matched a plate which was on a red Porsche at the scene of the murder belonging to the deceased on 4 December 2018.
>
> 7. Preliminary enquiries included a review of police systems, but it was not possible to identify precisely why no further search or action on the vehicles had been conducted as a direct result of the request. Two possible explanations as follows were considered:
>
> (i) the document was not correctly workflowed by ANPR to the intelligence hub or requesting officer;
>
> (ii) the document was received by the hub or requesting officer but was not actioned.
>
> 8. Preliminary views were that the first option was more likely, but it was clear that confirming this would require further investigation. The circumstances raised the issue of whether a critical incident should be declared and whether a referral to the Police Ombudsman ('PONI') should be made.
>
> 9. I was advised that the normal procedure was that requests for ANPR assistance are workflowed on the system as an 'ANPR request', and when the task is completed by the ANPR unit it is closed off and details are immediately forwarded by the system to the requester. It appeared that on this occasion the request was workflowed to the ANPR unit as 'for your information', rather than an ANPR request. It was believed that that particular workflow was one-way, and

> therefore the requester was not notified that there was a response when the researcher had completed the task, but it disappeared from the inbox of the ANPR team. I was therefore informed, from the information available at that time, that the list did not appear to have been considered by the intelligence hub, no link was made to James Donegan and no threat message was issued in relation to this document."

[15] Mr Martin averred that he had concluded that:

> "the requesting officer had acted promptly on receipt of the intelligence, and the researching officer had carried out the research within hours and attached the relevant material. In order to understand why the management of the particular threat at issue had thereafter faltered, I was advised that working practices and the procedures governing the IT system would have to be examined."

[16] Mr Martin therefore concluded that neither the test under section 55(2) nor the test under section 55(4) was satisfied. In relation to the former, he stated:

> "Section 55(2) obligates me to refer to the Ombudsman any matter which appears to me to indicate that the conduct of a member of the police force may have resulted in the death of some other person. As far as I was aware the officer who had received the intelligence acted swiftly and appropriately to try to identify possible targets; and the officer who had received that request had carried out relevant research and provided it within a matter of hours. It was not clear whether there was any human error which caused the breakdown in communication thereafter, but even had there been, in my view this could not have been said to have 'resulted' in Mr Donegan's death. Mr Donegan was murdered by a non-state actor, 6 months after the intelligence was received. He had received a separate threat warning within days of the intelligence being received. I was therefore firmly of the view that there was no relevant conduct known to me at that time which fell within the scope of section 55(2)."

[17] Whilst in relation to section 55(4), he stated:

> "At the time I was making my decision, I did not have any evidence that any officer had behaved in a manner

> which would justify disciplinary proceedings. It appeared to be that the officer who had requested the research had acted promptly and appropriately, but the computer system did not notify him that the research had been completed. As far as I could tell, the officer who had promptly and appropriately conducted the research believed that he would be notified. I was advised that further investigation would be required to understand what had gone wrong, but on the information before me at the time I did not consider that there was any behaviour by any officer which would justify disciplinary proceedings."

[18] Nonetheless DCC Martin determined that this was a matter which the PSNI should bring to the prompt attention of PONI. He relied upon Service Instruction SI0517 which required PSNI officers to notify PONI of matters falling outside the scope of section 55(2) and section 55(4) in certain specified circumstances, in order to enable the Ombudsman to consider whether or not to call himself in and undertake an investigation under section 55(6) of the Act. SIO517 required the PSNI to notify the Ombudsman of: "Any allegation which may cause widespread public concern or attach media attention." DCC Martin concluded that this provision applied, in circumstances where:

> "PSNI had intelligence which warned of a threat to an individual who had been murdered, in circumstances where there was some overlap between the contents of the intelligence threat and the circumstances of the deceased's murder, and it was alleged that the particular threat had not been communicated to the individual. My assessment at the time was that that had the potential to cause widespread public concern and attract media attention. I considered that it was in the public interest for the PONI to investigate for that reason and I felt strongly that this was a matter that should urgently be brought to their attention."

[19] On 7 December 2018 DCC Martin notified PONI of an incident regarding the handing of intelligence believed to relate to James Donegan. On or about 10 December 2018 the then Police Ombudsman made the decision to call the matter in further to section 55(6) of the 1998 Act. It is understood that he did so on the basis that he had concluded that a member of the police force may have behaved in a manner which would justify disciplinary proceedings and it was desirable in the public interest that the matter be independently investigated.

[20] Mr Holmes, a Senior Director of Investigations within PONI, averred that there were some inaccuracies within the notification letter from PSNI, namely that

the Range Rover was not registered to the deceased, but rather was "linked" to him through his wife and that the "vehicle list was in fact accessed by the hub and some further research was conducted on the vehicle registration marks on the list."

Statutory framework

Police (NI) Act 1998

[21] The Police Ombudsman was established pursuant to section 51 of the Police (NI) Act 1998 following recommendations of a review of the police complaints system by Dr Maurice Hayes. Part V of the 1998 Act entitled 'Police complaints and disciplinary proceedings' establishes the role of the Police Ombudsman and sets out his role and powers.

[22] Sections 52-54 of the legislation deal with the making of complaints to the Ombudsman and how those are dealt with.

[23] Section 55 of the legislation prescribes circumstances in which a number of identified public authorities, including, but not limited to, the Chief Constable, shall, or may, refer a matter to the Police Ombudsman in the absence of a complaint to the Ombudsman under other provisions of the legislation. Section 55, so far as relevant, provides as follows:

> "**Consideration of other matters by the Ombudsman**
>
> (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... 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 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 (c. 25).

(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."

[24] As can be seen the provisions of section 55(1) which empower the Department of Justice, Policing Board and Secretary of State to refer matters to the Ombudsman,

find their reflection in section 55(4) which empowers the Chief Constable to refer matters to the Chief Constable. In each case, the provision is couched in permissive rather than mandatory terms in that the respective public authorities "may" refer matters to the Ombudsman where they have formed the view that a criminal offence has been committed by an officer, or where an officer has "behaved in a manner which would justify disciplinary proceedings." They can only refer matters under the respective provisions, where the matter has not been the subject of a complaint and where they form the view that it is in the public interest to make the referral.

[25] The provision in section 55(6) empowering the Ombudsman to call a matter for formal investigation on his/her "own motion" mirrors the statutory language of sections 55(1) and (4). Whilst the provision in section 55(4(A)) directed at the DPP and inserted by the Justice (NI) Act 2004 is in almost identical terms, save that the DPP "shall" refer the matter to the Ombudsman if the conditions outlined are met.

[26] Section 55(2) of the 1998 Act is phrased differently, creating an obligation unique to the Chef Constable, it requires the Chief Constable to refer a matter to the Police Ombudsman as follows:

> "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."

[27] The provision does not contain any of the limitations contained in the other sub-sections, thus it would appear that he must make the reference regardless of whether the matter is the subject of a complaint and further there is no requirement that he conclude that it is in the public interest to make a referral.

Human Rights Act 1998

[28] In advancing a submission that the Chief Constable was required by section 55(2) to refer the matter to the Police Ombudsman, the Ombudsman has referred the Court to the Human Rights Act, and specifically, the interpretative obligation under section 3 of the Human Rights Act 1998 and to the requirements of Article 2 of the European Convention on Human Rights, and the investigative obligation. Section 3 of the Human Rights Act provides as follows:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

[29] The s3 obligation is an obligation imposed on public authorities, including the Courts.

[30] Article 2(1) ECHR provides as follows:

> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

[31] As is well established, Article 2 imposes a procedural obligation on the State to investigate deaths, whether they occur at the hands of state agents, private persons, or persons unknown. *McCann v United Kingdom* (1995) 21 EHRR 97, *Menson v United Kingdom* Application [2003] Inquest LR 146, *Yasa v Turkey* (1999) 28 EHRR 408 and there are minimum requirements in terms of how such investigations are conducted which include a minimum requirement of "independence." *Jordan v United Kingdom* (2003) 37 EHRR 2. It is further well established that the PSNI would not be regarded as independent within the meaning of Article 2 ECHR, if conducting an investigation into the conduct of a police officer/s.

Police (Conduct) Regulations (Northern Ireland) 2016

[32] Given the submission by both the applicant and the Notice Party that the Chief Constable should have referred this matter to the Ombudsman under section 55(4), the parties have referred the court to the Police (Conduct) Regulations (Northern Ireland) 2016, which provides a framework for disciplining officers. So far as relevant, Regulation 3 includes a number of relevant definitions:

> "'conduct' includes acts, omissions and statements (whether actual or alleged);
> …
> 'disciplinary action' means, in order of seriousness starting with the least serious action –
>
> (a) management advice;
>
> (b) a written warning;
>
> (c) a final written warning;
>
> (d) an extension to a final written warning as described in regulations 36(6)(b) and 54(3)(b);
>
> (e) reduction in rank;
>
> (f) dismissal with notice;
>
> (g) dismissal without notice;

> 'disciplinary proceedings' means, other than in paragraph (8), any proceedings under these Regulations and any appeal from misconduct proceedings or a special case hearing dealt with under the Police Appeals Tribunals Regulations (Northern Ireland) 2016;
>
> 'misconduct' means a breach of the Code of Ethics which –
>
> (a) in the case of an investigation under section 56 of the 1998 Act, the Ombudsman has decided is not more properly dealt with as a performance matter; or
>
> (b) in any other case, the appropriate authority has decided is not more properly dealt with as a performance matter;"

[33] The PSNI Code of Ethics (2008) provides in its Introduction that "Where officers fall short of the standards of the Code, it provides a mechanism against which they shall be measured" and further confirms that:

> "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."
>
> Article 1.1
>
> Police officers have a duty under section 32 of the Police (Northern Ireland) Act 2000:
>
> a. to protect life and property;
> b. …
> c. To prevent the commission of offences …
>
> When carrying out these duties, police officers shall obey and uphold the law, protect human dignity and uphold human rights and fundamental freedoms of all persons as enshrined by the Human Rights Act 1998, the European Convention on Human Rights and other relevant human rights statutory instruments."

[34] Later in the Code of Ethics officers are advised that:

> "The Code of Ethics 2008 sets down minimum standards of behaviour expected from you and provides guidance on how you should conduct yourself. A breach of the standards contained in the Code is a disciplinary offence …"

[35] Finally, this matter was ultimately referred to the Ombudsman, in reliance on Service Instruction SI0517 'Public Complaints and the Role of the Police Ombudsman', which provides, so far as relevant:

> "Where the Chief Constable does not believe the criteria for a Chief Constable's referral has been met, he will nonetheless notify PONI of certain matters. This will enable the Police Ombudsman to consider whether he wishes to call himself in under Section 55(6) of the Police (NI) Act 1998. The individual circumstances will dictate whether these are notified through the emergency on-call Senior Investigating Officer (SIO)."

[36] The Service Instruction goes on to identify matters which are to be notified to the Ombudsman, which includes the following:

> "(a) Any matter resulting in serious injury to a person as a result of police action;
>
> (b) Cases where police have discharged a firearm;
>
> (c) Use of AEP or TASER stun guns;
>
> (d) Use of CS Incapacitant Spray on a person under 18 years old;
>
> (e) Any sexual offence alleged to have been committed on duty; or
>
> (f) Any allegation which may cause widespread public concern or attract media attention."

[37] Mr Martin decided to refer the matter to the Ombudsman in reliance on (f) above "any allegation which may cause widespread public concern or attract media attention."

[38] The matter having been referred to him, the Ombudsman had regard to section 55(6) of the legislation and concluded that the relevant criteria applied and that he should call for the matter to be investigated of his own motion.

Leave judgment

[39] As appears above, whilst there is a dispute between the parties about whether the PSNI ought to have referred this matter to the Police Ombudsman for investigation in reliance on the statutory scheme, it is nonetheless being investigated by the Police Ombudsman.

[40] Despite the fact that the matter is being investigated and therefore, arguably academic, leave was granted because both section 55(2) and section 55(4) give rise to issues of statutory construction.

[41] Thus, so far as section 55(2) is concerned, which provides that 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", there is an issue as to the interpretation of "may have resulted in" and whether the term is synonymous with the term "may have caused or contributed to."

[42] So far as section 55(4) is concerned, in circumstances where it is couched, not in mandatory, but permissive terms, the issue arises as to whether the apparent discretionary power may import a positive duty, such as to give rise to a breach of statutory duty.

[43] In both instances, leave was granted in relation to each of the provisions, on the issue of whether, in failing to refer the matter to the Ombudsman, the Chief Constable acted in breach of his statutory duty.

Discussion

[44] In the first instance, I remind myself of Mr Martin's averments as to what his understanding was as to the circumstances which led to the failure of the police to notify Mr Donegan of the specifics of the threat against him.

[45] Mr Martin averred that, in terms of understanding what had happened, two possible explanations were considered:

(i) firstly, that "[t]he document was not correctly workflowed by ANPR to the intelligence hub or requesting officer" or,

(ii) secondly, that "[t]he document was received by the hub or requesting officer but was not actioned."

[46] The preliminary view formed was that the first option was the more likely, but that this would require further investigation.

[47] He formed the view that he was under no obligation to refer the matter to the Police Ombudsman under section 55(2) because in his view:

> "It was not clear whether there was any human error which caused the breakdown in communication thereafter, but even had there been, in my view this could not have been said to have 'resulted' in Mr Donegan's death. Mr Donegan was murdered by a non-state actor, 6 months after the intelligence was received. He had received a separate threat warning within days of the intelligence being received. I was therefore firmly of the view that there was no relevant conduct known to me at that time which fell within the scope of section 55(2)."

The application of Article 55(2)

[48] As outlined above, section 55(2) of the 1998 Act **requires** the Chief Constable to refer to the Police 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." The obligation to refer under section 55(2) is thus a mandatory one.

[49] It is the applicant's contention that the Chief Constable ought to have made a referral under section 55(2), the Ombudsman agrees with the applicant and the Chief Constable disputes this.

[50] In approaching this issue the Chief Constable contends that the applicant must demonstrate that the Chief Constable's decision was irrational.

[51] The key question is whether it can be said that the "conduct" of an officer "may have resulted" in Mr Donegan's death.

[52] I have outlined the alleged "conduct" above. At the time DCC Martin made his decision, it was believed that either the document "was not correctly workflowed by ANPR to the intelligence hub or requesting officer" or, the document "was received by the hub or requesting officer but was not actioned", with the former option considered the more likely.

[53] DCC Martin appears to analyse the first option as an IT issue, however, in his affidavit he stated that:

> "the normal procedure was that requests for ANPR assistance are workflowed on the system as an 'ANPR

> request', and when the task is completed by the ANPR unit it is closed off and details are immediately forwarded by the system to the requester. It appeared that on this occasion the request was workflowed to the ANPR unit as 'for your information', rather than an ANPR request. It was believed that that particular workflow was one-way, and therefore the requester was not notified that there was a response when the researcher had completed the task, but it disappeared from the inbox of the ANPR team."

[54] In other words, if the correct explanation was the explanation considered the more likely, then, it appears that the police officer who had inputted the information into the system had done so incorrectly. While the second explanation meant that the police officer who received the request failed to act upon the request. The consequence was that Mr Donegan was not given the warning that there was a death threat against a person dropping or collecting his child from a school on the Glen Road in Belfast.

[55] There was no dispute between the parties on the issue of whether "conduct" incorporates not just "acts", but also "omissions." My view is that, on the information available to DCC Martin at the time he made his decision, whichever of the explanations resulted in the failure to communicate the intelligence to Mr Donegan, they represented "conduct" within the meaning of the legislation. Furthermore, whilst Mr Martin considered that the first explanation, to the effect that the information was not properly inputted, was the more likely explanation, the second explanation, that is, that an officer received the intelligence and failed to act upon it, also had to be factored into his decision-making. Because the first explanation appeared the more likely, the second explanation could not simply be disregarded.

[56] The essential dispute between the parties was as to the interpretation of the words "may have resulted in" and the issue between them was whether the alleged conduct by an officer 'may have resulted' in Mr Donegan's death.

[57] The parties all agreed that the starting point for the interpretation of statutory language is that words be given their "ordinary" meaning, albeit disagreeing as to the ordinary meaning of the words "resulted in."

[58] In a recent decision of the Court of Appeal, the guidance in relation to the approach to statutory construction was reviewed. As the Court observed:

> "[21] Authoritative guiding principle is not lacking. In *R v Secretary of State for Health, ex parte Quintavalle (on behalf of Pro-Life Alliance)* [2003] UKHL 13 Lord Bingham of Cornhill stated at para [8]:

> 'The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.'"

More recently, in *R (on the application of O & Others) v Secretary of State for the Home Department* [2022] UKSC 3 the Supreme Court stated at para [29]:

> "The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591, 613 per Lord Reid of Drem. More recently, Lord Nicholls of Birkenhead stated:
>
> > 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.' (*R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396).

> Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, 397:
>
> > 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'"

[59] In the instant case the language used is straightforward, we are concerned with conduct on the part of a police officer which may have "resulted in" death. The Cambridge English Dictionary defines "to result in something" as: "To cause a particular situation to happen." While the Oxford English Dictionary defines "result" as "a consequence, issue or outcome of something."

[60] The respondent contends that, on its ordinary meaning, the term 'result in' is used to describe a something which is a principal, direct cause and the 'conduct' of the police officers, while it meant that Mr Donegan did not receive the particular death threat communicated on 7 June 2018, was nonetheless not the direct cause of his death.

[61] The applicant on the other hand, supported by the Police Ombudsman, contends that the term "resulted in" should mean conduct which may have "caused or contributed to" the death and that the police officers' actions or inactions may have "caused or contributed" to the death.

[62] The respondent drew my attention to section 93A of the Armed Forces Act 2006 sets out circumstances in which a commanding officer has a power to require preliminary tests. Subsection 3C of which provides as follows:

> "(3C) The fifth situation is where the commanding officer of a person subject to service law or of a person who is a civilian subject to service discipline has reasonable cause to believe that—

(a) there has been an accident which resulted in or created a risk of—

(i) death;
(ii) serious injury to any person;
(iii) serious damage to property; or
(iv) serious environmental harm;

(b) the person—

(i) was carrying out a safety-critical function at the time of the accident; or
(ii) carried out a safety-critical function before the accident; and

(c) it is possible that the carrying out of the safety-critical function by the person may have caused or contributed to –

(i) the occurrence of the accident;
(ii) the death, injury, damage or harm; or
(iii) the risk of death, injury, damage or harm."

[63] The respondent makes the point that "resulted in" is used to describe a direct effect and singular principal cause. The accident "resulted in" death. In contrast, "caused or contributed to" is utilised to capture a broader range of potential causal involvement. I accept that argument and accept that "resulted in" is designed to cover a more limited range of "conduct" than that which would have been covered, had the phrase "caused or contributed to" been used.

[64] I should say, I am of the view that the conduct considered by Mr Martin, when determining whether to refer the matter under section 55(2), that is the alternative explanations as to how the death threat was ultimately not conveyed to Mr Donegan, represented conduct which may have "contributed" to the deceased's death. It appears to me that the consequence of inaction in relation to that particular death threat meant that there was a failure to warn Mr Donegan of the risk to his life associated with collecting his son from school. I accept the applicant's submission that the specificity of that threat **may** have caused Mr Donegan to change his pattern of behaviour, specifically in relation to collecting his son from school, and **may** have saved his life.

[65] In looking at this issue, I am mindful of the issues raised by the applicant as to the types of cases which have given rise to concern about alleged police misconduct which "caused or contributed" to deaths and I am conscious of the spectrum of allegations which give rise to allegations of police collusion alleged to have caused or contributed to deaths. However, it appears to me that with section 55(2) the

legislature put in place a mandatory regime for referral designed to capture the most egregious of circumstances, namely that the actions of a police officer had, as a direct consequence, the death of an individual. However, I acknowledge that, in considering this issue it is relevant to look at the statutory provisions in their totality, in order to consider whether the applicant's concern that, absent constructing "resulted in" so as to mean "caused or contributed to" results in a lacunae in the legislative framework.

[66] Reading the provision, in isolation I am of the view that the language used by the legislature requires a more direct causative link than exists in this case and I am not satisfied that the acts or omissions of police, as understood by Mr Martin when he made his decision, can be said to have "resulted in" Mr Donegan's death. It will be necessary however for me to consider that issue in light of the interpretation of section 55 as a whole.

[67] Relevant to this issue is the interpretative obligation under s3 of the Human Rights Act to which I was referred by the Ombudsman. As I understand the submission, in circumstances where the actions of a police officer may have caused or contributed to a death, there must necessarily be an investigation independent of the PSNI and the Ombudsman is the statutory body created expressly to ensure an independent investigation into alleged police misconduct, including behaviour which may have caused or contributed to a death. Therefore section 55(2) should be interpreted in an Article 2 compliant manner and "resulted in" should be read as "caused or contributed" to a death.

[68] However, it seems to me that, before I go down that route, I should consider whether the legislative provisions as a whole are sufficient to ensure that the Chief Constable does refer a matter to the Police Ombudsman where the conduct of a police officer may have "caused or contributed" to a death, even if the conduct could not be said to have "resulted in" the death. I propose therefore to consider section 55(4) of the legislation which enables the Chief Constable to refer to PONI, conduct by police officers which could be characterised as criminal, or conduct by police officers which could give rise to disciplinary proceedings.

The application of Section 55(4)

[69] Article 55(4)(a) provides that the Chief Constable **may** refer to the Ombudsman any matter in which it 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."

[70] Thereafter, Article 55(4)(b) provides that, if the Chief Constable has satisfied himself as to (a) then he **may** make a referral if it appears to him that it is desirable in the public interest that the Ombudsman should investigate the matter.

[71] As noted above, leave to judicially review the respondent was granted on the basis that it was arguable that there had been a breach of statutory duty on the part of the Chief Constable, by virtue of his failure to refer the matter to the Ombudsman under section 55(4). On that issue, the submission was advanced on behalf of the Chief Constable that Section 55(4) is drafted in permissive, rather than mandatory terms and therefore does not impose a **duty** on the Chief Constable to refer. Whilst the applicant contended, in reliance on *Re Turley's Application* [2010] NICA 10, that the use of permissive language may in certain circumstances import a positive duty on the respondent.

[72] I have been referred by the respondent to *Superintendent of Prisons v Hamilton* [2016] UKPC 23. As with section 55, the legislation governing the powers of the Superintendent, provided in one instance that the Superintendent "may" do something, and in another occasion that he "shall" do something. On that issue the Privy Council stated as follows:

> "There being no persuasive argument to the contrary, it is appropriate to return to the words used by the drafter of section 7(2). In the end, if there is ever a statutory word which normally constitutes a reliable indication of the creation of a discretion it is the word 'may.' Where 'may' is contrasted in the same subsection with 'shall', its meaning is, if anything clearer."

[73] In the instant case, as with *Hamilton,* there is a clear contrast in the language used within section 55 as between, on the one hand section 55(2) where Parliament elected to use "shall" where the conduct of a police officer resulted in the death, and on the other section 55(4) "may" where the conduct of the police officer may represent criminal misconduct or behaviour justifying disciplinary proceedings.

[74] Having considered *Turley's Application,* relied upon by the applicant, I have formed the view that, while it is clear from the authority that there may be some limited circumstances in which a discretionary provision imposes a positive duty, *Turley* does not support the contention that the particular provision with which we are concerned, imposes a positive duty.

[75] As the Court of Appeal observed:

> "[25] Plainly it would defeat the purpose of the Regulations if the funding of victims' payments or lump sums was a discretionary decision for the Executive Office. Such an interpretation would also be inconsistent

> with Regulation 23 of the 2020 Regulations. It is necessary, therefore, to review the use of language in respect of funding issues in Schedule 1 in order to understand their effect.
> …
>
> [29] In our view the statutory purpose set out in section 10 of the 2019 Act and the internal coherence of the 2020 Regulations imposing an obligation on the Board to effect payments as soon as reasonably practicable both lead to the imposition of a legal duty on the Executive Office to fund victims' payments and lump sums having carried out the accounting exercises appropriate to the expenditure of public money."

[76] In *Turley*, it is evident that the Court formed the view that the statutory purpose of the legislation and the internal coherence of the Regulations would be defeated if the Regulations did not impose a legal duty on the Executive Office. It does not appear to me that this reasoning is transferable to the provisions under scrutiny in the instant case and I accept that section 55(4) does not impose a statutory duty on the respondent.

[77] However, it is in my view, still necessary to consider the proper construction of section 55(4) because of the approach taken by DCC Martin, on the facts of the instant case, to this issue. I say this because, when one scrutinises DCC Martin's decision-making in this case, it is clear that DCC Martin did not refuse to make a referral because, in the exercise of his discretion he determined that he should not do so. DCC Martin, in fact, expressly concluded that the latter two limbs of section 55(4) were met, as he stated:

> "there was no complaint that I was aware of in relation to this issue; and in my view … it did appear desirable in the public interest that the Ombudsman should investigate."

[78] Rather, DCC Martin's decision was based exclusively on his conclusion that Article 55(4)(a) was not met. In other words, he was not satisfied 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."

[79] No issue is taken by the applicant as to DCC Martin's conclusion that no criminal offence had been disclosed. The dispute between the parties goes to the question of whether there was any behaviour on the part of any officer which would justify disciplinary proceedings.

[80] In my view that decision raises a question as to whether DCC Martin was correct to conclude that Article 55(4)(a)(ii) had not been met.

[81] It is appropriate to look at how DCC Martin addresses this in his affidavit. He states as follows:

> "17. At the time I was making my decision, I did not have any evidence that any officer **had behaved** in a manner which would justify disciplinary proceedings. It appeared to be that the officer who had requested the research has acted promptly and appropriately, but the computer system did not notify him that the research had been completed. As far as I could tell, the officer who had promptly and appropriately conducted the research believed that he would be notified. I was advised that further investigation would be required to understand what had gone wrong, but on the information before me at the time I did not consider that there **was any behaviour** by an officer which would justify disciplinary action.
>
> 18. I recognised that further investigation was required, and that there was a possibility than such investigation may produce different information which would require reconsideration of that view. However, it was my view at the time that this was something PSNI should bring to the prompt attention of the PONI." (emphasis added)

[82] In the first instance it appears to me that the approach taken by Temporary Deputy Chief Constable Martin was flawed. The legislation required him to consider whether "a member of the police force … **may** have behaved in a manner which would justify disciplinary proceedings", whereas as appears from his affidavit evidence he appeared to take the approach that he should have evidence that an officer "had behaved" in a manner which would justify disciplinary proceedings.

[83] It appears to me that he imposed a more exacting standard to the evaluation of the material in front of him then the legislation required, requiring evidence that an officer "had behaved" in a manner justifying disciplinary proceedings, rather than applying the standard outlined in the legislation.

[84] In any event, it appears to me that, even on his own consideration of the information available to him, there was a basis for concluding that the officer who had requested the research **may** have acted in a manner which would justify disciplinary proceedings.

[85] The officer was in receipt of intelligence about a threat to life. That intelligence included a number of specifics, the make of car, and the fact that the driver of the car regularly collected a child from school on the Glen Road in Belfast. Clearly, information of that level of specificity had the potential to enable police to warn people fitting that description of a risk to their lives. Further, given that the information identified a pattern of conduct known about the person subject to the threat, that person would be able to take steps to avoid engaging in the conduct which was apparently known to dissident republicans.

[86] In response to the pre-action correspondence the Chief Constable, justified DCC Martin's decision, stating that:

> "due to the way in which the research task had been initially entered into the computer system, the electronic response did not reach the originating Officer, who was thus unaware that Mr Donegan was one of a number of vehicle owners who might have been linked to this report."

[87] On the face of it the correspondence suggests that the research request was incorrectly entered by the officer making the request. That appears to me, on the face of it, to give rise to an acceptance that the methodology used for entering the research request by the officer was incorrect.

[88] In his affidavit DCC Martin stated that while: "the normal procedure was that requests for ANPR assistance are workflowed on the system as an 'ANPR request', and when the task is completed by the ANPR unit it is closed off and details are immediately forwarded by the system to the requester. It appeared that on this occasion the request was workflowed to the ANPR unit as 'for your information', rather than an ANPR request. It was believed that that particular workflow was one-way, and therefore the requester was not notified that there was a response when the researcher had completed the task." Again, this on the face of it acknowledges an error on the part of the person who made the ANPR request.

[89] As outlined above the PSNI Code of Ethics provides that where "officers fall short of the standards of the Code, it provides a mechanism against which they shall be measured." It is also clear that conduct in breach of the Code of Ethics can fall short of "deliberate fault" and that due regard will be had to "the degree of negligence or deliberate fault of an officer." Thus, conduct which can properly be characterised as negligent rather than deliberate fault is captured by the Code of Ethics.

[90] The Code of Ethics repeats the primary duties of police officers under the Police (NI) Act 2000 which includes a duty to "protect life" and to "prevent the commission of crime." The exercise which the officer was conducting in raising a

query about Range Rovers being used to drop off or pick up children from schools on the Glen Road, was to secure the identification of individuals who might be the target of dissident republicans. The information being sought was for the purpose of protecting life and preventing the commission of an offence.

[91] Addressing whether the conduct of the officer who raised the query on the computer system, can be categorised as conduct justifying disciplinary proceedings, it appears to me that regard must be had to the significance of the information received, its level of specificity and the extent to which communication of the threat to the correct person might protect life. Moreover, the significance of the information ought not have been lost on a serving police officer conducting him or herself with due diligence. In those circumstances, it appears to me that the failure to follow up on the lack of information resulting from the research, ought to have given rise to a concern on the part of Temporary Deputy Chief Constable Martin that, at the very least, the officer **may have been** negligent in following up on his/her query.

[92] DCC Martin did not refer this matter to the Police Ombudsman under section 55(4) because, as per his affidavit:

> "I did not have any evidence that any office had behaved in a manner which would justify disciplinary proceedings. It appears to be that the officer who had requested the research had acted promptly and appropriately, but the computer system did not notify him that the research had been completed."

[93] However, as acknowledged in the response to the pre-action correspondence and, as per the contents of his affidavit, outlined at (81) above, in this passage DCC Martin fails to acknowledge that, on the premise that the first and more likely explanation was the correct one, it was the failure of a police officer to input the ANPR information correctly which resulted in the computer system not notifying the police officer of the outcome of the research. This was not simply an IT error, it was an error consequent upon an inputting error made by a serving police officer, in relation to a very specific death threat which Mr Donegan should have been notified of.

[94] DCC Martin's approach also ignores the existence of the alternative explanation which was considered by police at the time he made his decision, which was that: "[t]he document was received by the hub or requesting officer but was not actioned."

[95] It appears to me that, while DCC Martin may have formed the view that the first explanation, about the information being wrongly inputted into the ANPR system was the more likely, nonetheless in making his decision he also needed to

consider the alternative explanation, which was essentially that an officer had failed without apparent reason or justification, to action a request.

[96] DCC Martin was presented with two possible reasons as to why the death threat was ultimately not communicated to Mr Donegan. Both involved, at the very least, a degree of negligence on the part of a police officer/s. Moreover, the context is important, the negligence related to a death threat with a degree of specificity and DCC Martin was considering the matter in circumstances where Mr Donegan had not been informed of that particular death threat and had been shot and killed in circumstances anticipated by the death threat.

[97] In my view DCC Martin fell into error in his approach to the legislation. In the first instance he imposed a more exacting standard than that required in the legislation, looking for evidence that an officer "had" behaved in a certain way, rather than evaluating whether the evidence he had led to the conclusion that an officer "may" have conducted themselves so as to justify disciplinary proceedings. Thereafter, he appears to have elected to consider only one of the two possible "explanations" for the failure and approached an error in inputting materials as a systems error rather than human error.

[98] I acknowledge that DCC Martin recognised, despite all of the above, that this was a case which should be referred to the Ombudsman, and thus, he did so under the Service Instruction, and I am of the view that the applicant has ultimately suffered no prejudice as a consequence of the manner of referral.

[99] Leave was granted, however, on the basis that there were issues around the construction of the legislation, and it is my view that DCC Martin approach to the interpretation of section 55(4)(a)(ii) imposed too high a threshold.

Section 55(2) and the Human Rights Act

[100] This brings me back to the term "resulted in" in section 55(2) of the legislation requires "resulted in" to be read in an Article 2 compliant manner so as to capture behaviour which "caused or contributed" to the death. In my view, reading section 55 as a whole, it does not.

[101] I accept, as outlined above that Parliament intended to ensure that any conduct in which a police officer's actions could be said to have "resulted in" or "caused" a death should be captured by section 55(2), allowing the Chief Constable no discretion but to refer the matter to the Ombudsman.

[102] It follows that there may be cases, where an officer's conduct caused or contributed to a death, which are not so captured. However, I am sure that the proper reading of section 55(4) would ensure that any such case is captured, and it is difficult to see how the Chief Constable could rationally determine that it was not in the public interest to refer such a case.

[103] It is my conclusion that DCC Martin ought to have referred this case to the Ombudsman under section 55(4) for the reasons outlined above. Given my reasoning I will hear the parties on the issue of costs.