Case No. CO/8015/2009

Neutral Citation Number: [2010] EWHC 3625 (Admin)

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

Royal Courts of Justice

Strand

London WC2A 2LL

Date: Tuesday, 16th November 2010

B e f o r e:

MR JUSTICE CALVERT-SMITH

Between:

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THE QUEEN ON THE APPLICATION OF AMY COKER

Claimant

v

INDEPENDENT POLICE COMPLAINTS COMMISSION

Defendant

-and-

(1) COMMISSIONER OF POLICE OF THE METROPOLIS

(2) INSPECTOR WOOD

Interested Parties

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Miss S Hemingway (**Miss D Malone** for judgment) (instructed by Deighton Guedella) appeared on behalf of the **Claimant**

Miss L Boon (instructed by Director of Legal Services) appeared on behalf of the **Defendant**

Mr J Beer (instructed by the Directorate of Legal Services) appeared on behalf of the **First Interested Party**

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J U D G M E N T

1 MR JUSTICE CALVERT-SMITH: These are proceedings for judicial review brought with the permission of the single judge granted on 10th December 2009. The applicant is Amy Coker, who challenges the decision of the defendant not to direct misconduct proceedings be brought against Inspector Wood. Inspector Wood is the second interested party. The first interested party is the Commissioner of the Metropolitan Police, who was added by order of Collins J on 14th October 2009. The second interested party filed an acknowledgement of service but has since indicated that he did not propose to take an active party in the proceedings. The first interested party filed an acknowledgement of service and summary grounds and appeared by counsel at the hearing.

2 The core facts of the case, which will have to be expanded in due course, are these. At 5.05 in the morning of 6th August 2005 police officers were called to a house in Plumstead in connection with a domestic disturbance. They were met there by the landlord of the property, who told them that there was a man upstairs who was refusing to leave when requested. The information was repeated in substance by the girlfriend of the man concerned, Lucy Chadwick. Four police officers went upstairs. After a struggle, in which one of the officers was assaulted but managed to call for assistance, the three other officers managed to restrain him. The man's name was Paul Coker. He was handcuffed and taken to Plumstead police station. Soon after his arrival it became clear he was seriously ill. A doctor was called and an ambulance was summoned, but he died before he could be taken to hospital. The cause of death was found by an inquest jury earlier this year, 2010, to have been cocaine intoxication with a variant of excited delirium.

3 The claimant is the sister of the dead man.

4 The second interested party was one of a number of officers who attended after the emergency button had been pressed by the assaulted officer. He was the most senior officer at the scene and therefore became, in police terminology, the "duty officer".

5 The legal framework against which this claim is brought is as follows. The Independent Police Complaints Commission, ("IPCC") is established as a statutory body under Part 2 of the Police Reform Act 2002. A matter will be referred to it for investigation in circumstances where there has been a death or serious injury in police custody, or whilst under arrest, or the person was in contact with the police prior to death or serious injury and there is an indication that the contact may have caused or contributed to the death or serious injury. In such cases the referral is mandatory. These requirements are imposed by section 12 and Schedule 3 to the Police Reform Act.

6 Schedule 3 goes on to deal with the handling of complaints and conduct matters and Part 3 specifically addresses investigations and subsequent proceedings. Under paragraph 27 the Commission has a power to direct the appropriate authority to give effect to its recommendations. The appropriate authority is then under a duty to comply with a direction.

7 Section 87 of the Police Act 1996 authorised the Secretary of State to issue guidance to the IPCC concerning the discharge of its functions under any regulations under section 50 in relation to disciplinary proceedings. Under subsection (3):

"It shall be the duty of every person to whom any guidance under this section is issued to have regard to that guidance in discharging the functions to which the guidance relates.

(4) A failure by a person to whom guidance under this section is issued to have regard to the guidance shall be admissible in evidence in any disciplinary proceedings or in any appeal from a decision taken in any such proceedings.

(5) In this section 'disciplinary proceedings' means any proceedings under any regulations under section 50 [or 51] that are identified as disciplinary proceedings by those regulations."

The guidance issued took the form of Home Office Guidance on Police Unsatisfactory Performance, Complaints and Misconduct Procedures (Home Office Circular 8/2005). Those responsible for such procedures must take its provisions into account.

8 Section 2 of the guidance sets out the Code of Conduct for police officers. Two relevant parts are, under the heading "Politeness and tolerance":

"3. Officers should treat members of the public and colleagues with courtesy and respect, avoiding abusive or deriding attitudes or behaviour..."

Under the heading "Performance of duties":

"5. Officers should be conscientious and diligent in the performance of their duties ..."

9 There are a number of paragraphs which deal with the situation where a matter is being investigated within a police force. At 3.45:

"Following consideration of the investigation report [that is one by the IPCC], it might be decided that a formal hearing was not required but that it would be more appropriate for the matter to be dealt with by the officer's line management by way of words of advice. There might also be cases, where the officer admitted the failure to meet the standards set out in the Code of Conduct, in which it would be appropriate for a Superintendent (or above) to administer a written warning to the officer, in line with the guidance given in paragraphs 3.15 and 3.16 above ... In some cases it may be decided that no further action should be taken, and the officer should be informed in writing accordingly."

10 In accordance with Annex C of the guidance, if, on consideration of the IPCC's report, the authority (in this case of course the Metropolitan Police) considers that a written warning is appropriate then it must seek the agreement of the IPCC. Paragraph 4 of Annex C:

"Where the IPCC agree with the proposal to issue a written warning they will notify the force and the complainant accordingly. At this point, and not before, the officer concerned may be informed that, if he or she admits the conduct complained of, it is proposed to give a written warning. If the officer concerned does admit the conduct in question arrangements may then be made for a written warning to be given. If the officer does not admit the conduct in question a written warning may not be given and the case will need to proceed to a hearing. The IPCC should be informed accordingly."

11 I now turn to a more detailed look at the chronology. After the four officers had attended the scene initially and Paul Coker had been restrained and arrested, the first interested party and other officers attended the scene and Inspector Wood spoke to the dead man's girlfriend, Lucy Chadwick. I will deal with the details recounted of that conversation by the two parties to it a little later, when dealing with the grounds in turn. As I have said, after Paul Coker had been taken to Plumstead police station and the forensic medical examiner and ambulance had both attended, unfortunately, at 6.45, he died.

12 On 29th November 2005 terms of reference for an IPCC investigation were drawn up and an investigation took place.

13 In late 2007 the IPCC report was compiled by an investigator (Mr Patridge) employed by the Commission. It examined a number of possible criticisms of a number of the officers who had been involved in the incident from its outset right through until the death of Mr Coker. There were three

possible criticisms of the interested party: the first was alleged incivility to Lucy Chadwick at the house; the second was the consequence of that incivility, which might be the loss of an opportunity to have gathered evidence which could have resulted in the deceased being taken straight to hospital for treatment rather than to the police station as in fact happened; the third was a failure to ensure that the custody officer at Plumstead police station had all the information he should have had about the arrested man necessary for him to be able to make a decision as to whether he should, from there, be taken to hospital or held in custody at the police station. The report found all three criticisms to be justified in the case of the second interested party.

14 At paragraph 406 of the report the investigator stated:

"It is concluded that the conduct of Inspector Wood fell palpably below that which is reasonably expected of a Duty Officer. He failed to ensure that relevant information was given to the custody officer and more importantly through his incivility he failed to give himself the opportunity of obtaining information as to the drugs taken by Paul Coker. It is foreseeable that this information if obtained may have led to Paul Coker being taken to hospital where he would have been given the opportunity to see if his life could have been saved."

At paragraph 407 he said:

"What happened, or more pertinently what did not happen, in custody is shown on the composite disk. It is distressing to watch a man die, alone, with no assistance offered to him. Nobody can see it without thinking to themselves 'I wish somebody would do something'. This case is all about what the police **did not do** rather than what they did do. Having regard to the conclusions reached thus far no criticism is levelled against the four officers who originally attended the scene. The catalogue of errors and misjudgements that were made started with Inspector Wood and continued thereafter."

At 436, in his recommendations, he said:

"I recommend the following:

• There be Formal Misconduct Action in respect of Inspector Wood [and two other police sergeants]

• [another force] be notified that Formal Misconduct Action would have been brought against [another police sergeant] had he remained within the jurisdiction of the Conduct Regulations."

15 That report was of course, as it had to be, sent to the first interested party, which opened its own file on the matter, and after internal consideration the case was sent out to counsel for advice as to what the police authority's reaction should be to the report. The advice of counsel was that the suggestion that there should be misconduct proceedings was misplaced and that words of advice would be appropriate in Inspector Wood's case. In the advice at paragraph 12 counsel says:

"The two criticisms made of Inspector Wood by the IPCC are that (1) he lost his temper with Lucy Chadwick and thereby lost the opportunity of obtaining relevant information about Mr Coker at the scene of his arrest and (2) he failed to check that relevant information had been passed to the custody officers so that the FME had as much evidence as possible when assessing Mr Coker. The view expressed by PSD is that such matters are suitable for words of advice because (1) whilst Inspector Wood admits losing his temper, Lucy Chadwick was unhelpful with all the officers and was concerned that Mr Coker would get into trouble if she disclosed what he had taken and (2) it was the duty of the arresting officer to bring all relevant facts to the attention of the custody officer - here the custody

officer was aware that Mr Coker was suspected of having taken crack cocaine. On balance I agree with PSD that words of advice are the appropriate level at which this should be dealt with."

16 Following the receipt of that advice the first interested party wrote to the IPCC and informed them of their conclusions so far as Inspector Wood is concerned. To quote from the letter:

"With regard to Inspector Wood whilst we agree that he breached Code 3, Politeness and Tolerance during his conversation with Lucy Chadwick, we do not feel that this was so serious as to place him before a misconduct hearing, and that he should in fact receive words of advice."

17 After considering that representation, a Commissioner from the Defendant replied in the following terms on 19th May 2008:

"I do not agree that Inspector Wood should receive words of advice for a breach of Code 3. What is important in relation to Inspector Wood is that his lack of politeness and tolerance meant that he failed to take the best opportunity to obtain vital evidence which on his own admission would have been of benefit to the FME. As such I agree that Inspector Wood should not go before a full powers board but should receive a written warning."

18 That was followed up on 5th September by a letter to solicitors acting for the claimant in this case. The relevant part of the letter, which deals with many other matters, is: "Inspector Wood is to receive a written warning". The rest of the letter deals with other potential discipline proceedings or misconduct proceedings and matters relevant to the custody CCTV video and the like.

19 Pausing there, with the court trying to put itself in the shoes of somebody in the claimant's position, a person reading that sentence, particularly a person without the fullest legal representation, would be forgiven for thinking that a written warning would not be conditional upon the acceptance by the person warned of the conduct complained of.

20 On 13th November 2008 the Commission wrote to the Metropolitan Police. The relevant part of this letter reads:

"It has previously been agreed that the written warning for Inspector Wood will contain reference to the consequence of his incivility being that an opportunity to obtain vital evidence which could have resulted in Paul Coker being taken to hospital was lost."

Clearly there had been verbal discussions between the parties which resulted in that letter.

21 On 9th January there is a letter from the first interested party to the defendant which informs the Commission that:

"Inspector Wood has declined to accept a written warning for his failure to meet Code 3, Politeness and Tolerance.

The default position would normally be to revert to a non-legally represented hearing. However in the context of this case and the alleged failing it may be more appropriate to revert to words of advice. This would enable the officer to learn from this experience and move on.

This method of disposal would be in keeping with the introduction of the new Code of Professional Standards, which encourages officers to learn from their actions as opposed to issuing sanctions."

Obviously a good deal had happened between the letter of November and this letter in January. Clearly Inspector Wood had been asked whether he accepted the conduct concerned in terms which included the consequence of his incivility and had declined to accept such a written warning.

22 On 28th January 2009 the defendant, through the investigator rather than by a Commissioner, replied to the first interested party:

"Thank you for your letter of 9th January 2009, the contents of which I have discussed with the IPCC Commissioner. We are both firmly of the opinion that Inspector Wood must now attend a non legally represented Board.

As I have consistently stated the potential consequences of his failure must be taken into account and for that reason words of advice are not appropriate. Further I do not think it is appropriate to apply the new regime principle to a matter that predates it."

23 The correspondence continued. On 4th February 2009 the Metropolitan Police wrote back to the investigator, Mr Patridge. On this occasion the writer quoted from the advice of counsel, which had been received in April of 2008, in support of their renewed submission that words of advice were the appropriate level at which the matter should be dealt with. The letter concludes:

"On the basis of this advice I would ask you to reconsider your opinion that Inspector Wood must face a non-legally represented Board."

24 The reply came on 25th February 2009 from Mr Patridge, the investigator:

"I thank you for your letter of 4th February, the contents of which I have discussed with our Director of Legal Services.

I do not agree that words of advice are an appropriate sanction for Inspector Wood. He was the senior officer present and he is an Inspector; in my opinion those are relevant facts to consider.

Before I reconsider my opinion that he should face a non-legally represented Board it would be helpful to know the basis upon which Counsel was instructed to consider this matter and also to see Counsel's full advice relating to this issue."

25 The defendant then sought its own legal advice. It did not go to counsel outside the Commission but took advice from a legal officer within the Commission itself, by which time the advice of counsel for the Metropolitan Police was before the lawyer concerned. This latter advice has also been put before the court and I quote from it. The writer quotes counsel's advice, to which I have already referred, and then goes on at paragraph 26 to say:

"My view is as follows. If it can be said that the failure to take Paul Coker to hospital at the earliest opportunity was a reasonably foreseeable consequence of PI Wood's incivility, he should face misconduct. However, I don't believe that this can be said and as such I agree that the appropriate course of action is to give him words of advice.

27. To demonstrate my rationale I use the example of a custody sergeant. The failure of a custody sergeant to carry out a proper or effective risk assessment or otherwise seek to properly look after someone in their detention does have the potential consequence that a vulnerable person in their custody suffers harm. If not, there would never be a need to carry out risk assessments; clearly they are utilised to safeguard against harm. That is why, if there is a failure in this regard, it is viewed quite seriously. I do not therefore entirely subscribe to the view of Andrew Waters.

28. Very minor levels of incivility (which is what I would class PI Wood's behaviour as) do not generally have serious potential consequences and this is why it is not seen as such a serious breach of the code of conduct.

29. In this case, the evidence demonstrates that there is no reason why this case should be treated any differently or that it can be said that as a result of the incivility an opportunity was lost. Lucy Chadwick refused to give information that she might otherwise have given, in other words, the quantity of cocaine she believed Paul Coker to have taken. She was clearly not going to tell any police officer in the circumstances what he had taken and this is evidence by her failure to tell other police officers who spent time with her and checked on her welfare. We have described it as an opportunity that was lost. There simply was, in my view, no opportunity to lose and her complete reluctance to provide the information, however understandable, is the sole reason why the police were unaware of the quantity of drugs taken."

She went on to consider the way forward. She indicated that it would clearly be necessary to inform the claimant's solicitors of the change of view, and she pointed out the possibility of judicial review proceedings and the perception there would be that defendant has caved in following the refusal by the Inspector to accept the written warning. The other option, she said, would be to direct the force to hold misconduct proceedings:

"I am sure that it would be dismissed at half time but it is hardly the fairest or most honest way to behave. As such reluctantly I say that I think that we have to follow the first course of action and accept the consequences".

26 In due course the investigator within the Commission, Mr Patridge, whose report had generated the initial recommendation, accepted the advice, and on 1st April a second Commissioner, the first having parted with the case, said this in an internal e-mail:

"I have considered this carefully. I have taken account of [the lawyer]'s advice and counsel's and Chris' comments below.

I have decided that Wood's behaviour with Chadwick was not so serious as to merit a misconduct hearing as the officer has refused a written warning. The fact that Chadwick did not mention anything untoward about Wood's manner or behaviour until her third statement when at most she described him as 'abrupt' is not sufficiently serious to warrant more than words of advice. If the matter would not pass half-time before a tribunal there is no prospect of success. Furthermore, there is no nexus between the treatment at the police station and death and Wood's behaviour with Chadwick."

27 In due course a letter was sent on 29th April to the claimant's solicitors informing them of that decision. It is that decision that, initially at least, was the decision complained of by the claimant. Matters of course progressed. On 9th July a letter before action was written and, as I have indicated already, on 10th December 2009 permission was granted to bring these proceedings.

28 Between 10th January and 1st March of this year the inquest into the death of Paul Coker was held at which, among others, Lucy Chadwick and the second interested party gave evidence. During the inquest a representative of the first interested party sent a letter to the responsible commissioner at the defendant IPCC:

"You have asked that I consider appropriate sanctions against Inspector Wood and you refer me to paragraph 406 of the IPCC final report. This refers to an allegation that Inspector Wood failed to pass on information to the custody officer and FME regarding drugs found at the address. Inspector Wood

states that he gave instructions to officers at the scene to seize the drugs and take them to the police station for the FME to see them.

He states that all the officers at the scene were trained to pass such information onto custody staff; he had no reason to believe that this information would not be passed to the custody staff and the FME.

The arresting officer's responsibility is to attend the custody suite with their prisoner. They should inform the custody sergeant of the grounds for the detained person's arrest, including any other information which they have relating to that person's detention and welfare. In this situation this would have dealt with the circumstances of the arrest and the property, i.e. drugs seized from the flat.

It is inconceivable to suggest that the duty officer's responsibilities include attending the custody suite to confirm that information known by the arresting officer and other officers has been passed to the custody office. There is nothing to suggest to Inspector Wood that this information would not be communicated.

I am of the opinion that Inspector Wood has no case to answer and as such consider that no further action should be taken in respect of this alleged failing."

I have placed this letter in the chronology where I have because of what I understood to be an agreement between the parties that the letter, actually dated on its face January 2009, was written in 2010 because it refers to a letter received in 2010. It is not entirely clear to me that that is actually correct, but, be that as it may, wherever it should fall in the chronology clearly it is another link in the chain.

29 I now turn to the challenges that are made. First, chronologically, is a new challenge which the claimant sought permission to introduce before me at the hearing. It was contained in an amended skeleton argument that was served on the parties on the day prior to the hearing. Unsurprisingly, perhaps, the defendant and the interested party objected to the admissibility of the new ground on the basis that it had been open to the claimant to plead the ground in her claim and that the research necessary to deal with the new ground fully would necessitate an adjournment. However, the defendant, supported by the interested party, did submit that the ground was a bad one and I therefore agreed to hear the argument and the remainder of the submissions on the basis that if I thought in due course there was something in it I would adjourn so that the ground could be argued fully on another occasion.

30 The argument, summarised as " functus officio ", went as follows. The IPCC was not entitled even to embark on any further consideration of its decision following 19th May 2008 or 5th September 2008, when it informed the first interested party and then the claimant's solicitors respectively that it had decided that the proper course in respect of Inspector Wood was to issue him with a written warning. In the alternative, it was submitted that the IPCC was not entitled to embark upon any further consideration of its decision following 28th January 2009, when it informed the Metropolitan Police, following the refusal of the written warning, that it had decided that the proper course was to institute disciplinary or misconduct proceedings.

31 In support of this contention three cases were submitted in argument. The case of Leveratt v IPCC [2010] EWCA Civ 243 concerned, as did the following case, a different part of the IPCC's function which is covered in an earlier paragraph of Schedule 3, paragraph 25. This enables persons to mount formal appeals against IPCC findings. At paragraph 20 of the judgment of the Court of Appeal, Wall LJ said:

"The IPCC took the view that it was in the lawyer's phrase, functus officio, that is to say it had done what it had to do. It had heard the appeal, it had decided the appeal, reached a conclusion, that was it and it was not going to do anything else."

At paragraph 21:

"In my judgment this is a very simple issue. The IPCC made it pretty clear in December 2007 that their decision was final. They made it very clear in the course of subsequent correspondence that they did not propose to take any further action."

In due course the court upheld the IPCC's position.

32 The second case was the case of Clare v Independent Police Complaints Commission [2005] EWHC Admin 1108, a case in which the judgment was given by Walker J. Once again the matter at issue was rather different to the matter with which we are concerned. The facts were that the complainant in that case had made a complaint about the conduct of police officers of assault. Criminal proceedings had been taken against the complainant and those proceedings were discontinued by the Crown Prosecution Service. Following her acquittal her solicitors wrote to indicate that she wanted her complaint against them, the officers, to be fully investigated and the solicitors promised a detailed statement from their client. Some time later the police wrote to the claimant directly, noting that they had not received the statement promised and informing her that unless they heard from her within 21 days there would be an application to the then Police Complaints Authority, the predecessor to the IPCC, requesting a dispensation from any further investigation. There was no reply to that letter from the claimant herself because she expected her solicitors would deal with it, but in due course the PCA then wrote to her and the solicitors saying that they had agreed to the police's request for a dispensation. It was in those circumstances that the officer concerned, about whom a complaint had been made, was informed that no formal proceedings were going to be taken against him and the claimant's solicitors asked for the matter to be revived and re-considered. It was at about that time that the PCA was replaced by the IPCC. When the IPCC took over the correspondence it came to the conclusion that it was functus officio. However, it did agree that were there to be proceedings in this court it would agree to a consent order quashing the decision, so that it was simply saying that there was another way of achieving the desired result which would then lead to a proper investigation. Once again, a rather different set of circumstances to this case.

33 Finally, reliance was placed upon some dicta of Saunders J in Dennis [2008] EWHC Admin 1158. This too was a case concerned with a very different area of the IPCC's remit, namely the formal appeal process. However at the conclusion of his judgment at paragraph 40 he said this:

"Much may depend on the type of decision it is sought to change and the effect that such a change has on the rights of the parties. While not wishing to express any concluded view as to the power to change a decision on dispensing with an investigation, I am satisfied that where an appeal decision had been made and promulgated, there is no power to vary it by reason of further representations. To rule in any other way would lead to uncertainty. Should there be a time limit on representations? When would the police and the complainant be entitled to view the decision as final subject to an appeal on law to this court?"

34 The question here is whether, having communicated its finding so far as the investigation is concerned to the Metropolitan Police and the claimant, it should be in a position to reconsider that decision, and, it has to be said in parenthesis, to reconsider in either direction in a given case.

35 In my judgment this ground fails. The justification, most recently referred to in Saunders J's judgment, that there has to be finality in litigation is one thing. The situation that holds good in these circumstances is much more analogous to the decision to prosecute. As is well known, the Code for Crown Prosecutors requires prosecutors to keep such decisions under review throughout and to take into account representations, whether they be representations to prosecute or not to prosecute, and, if so persuaded, to act upon them. In my judgment the set of circumstances with which we are concerned is entirely amenable to further representations, whether on behalf of somebody in Miss Coker's position who wishes to make further representations or on the part of the potential defendant in misconduct proceedings. An enormous amount has to happen after the first report of an investigation and the communication of its contents and the recommendation to the police and interested parties. In no sense can the decision of 2008 be called a final decision. Although the January 2009 letter is firmly expressed, it too expresses opinion and does not direct under section 27(5) of the Act already quoted. In the end the actual decision, in the absence of a direction by the IPCC, was actually for the first interested party, provided it informed the IPCC of that decision.

36 The administration of a written warning requires, like a police caution in the criminal proceeding, admission of the conduct about which the conduct is to be given to be made. It is foreseeable, as happened in this case, that the person concerned will not admit the conduct, and then of course the question of what to do arises. That is a matter for the first interested party in the first instance. True it is that per the guidance in Annex C the normal procedure for the first interested party would be to go to a misconduct hearing, but the ball is in the first interested party's court. If it does not believe that there is a case to answer at a misconduct hearing, or that, even if there is, there is no prospect of anything more than words of advice or something even less serious being imposed, it would no doubt say so at the hearing, thus rendering any such hearing a waste of time.

37 In any event, I would have refused leave for this late ground to be added. No proper reason for its late arrival on the scene was put forward by the claimant. It was said to be a result of the skeleton argument put forward by the defendant. The original claim focused on the decision of 29th April 2009 and its merits and not on whether the defendant had locus to make it. In addition, it asked the court to order that a fresh decision be made when the new ground suggests that no decision can now be made by the defendant.

38 The second challenge was the " ultra vires " challenge to the decision of 29th April 2009 to give words of advice. It was submitted that the decision was ultra vires because, first, the only appropriate course following the first interested party's refusal to accept his written warning was to proceed to a hearing following Annex C of the guidance; and second, if the Metropolitan Police had declined to follow the guidance, then the defendant should have exercised its powers under Schedule 3, paragraph 27, to direct a disciplinary or misconduct hearing. The submission of ultra vires has added force because it follows a second rejection of the police challenge on 28th January 2009.

39 In support of this ground too the claimant relied on the passage I have just cited in the case of Dennis . If, it was argued, the Commission has estopped itself effectively from reconsidering decisions on appeal, the same should apply here, thus rendering the decision ultra vires.

40 The defendant and the interested party relied on the case of R v Director of Public Prosecutions, Ex parte Manning and another [2001] QB 330 and the general principle that decisions, in that case of course to prosecute cases, can only very, very rarely be challenged. I quote a passage from the judgment of Lord Bingham in that case:

"... as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no-one else. It makes no difference that in practice the decision will ordinarily be taken by a senior member of the Crown Prosecution Service, as it was here, and not by the Director personally. In any borderline case the decision may be one of acute difficulty, since while a defendant whom a jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial ... The director and his officials (and senior Treasury counsel when consulted) will bring to their task of deciding whether to prosecute an experience and expertise which most courts called upon to review their decisions could not match. In most cases the decision will not turn on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before ... a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied."

41 Here it is said that a lawyer, asked by the defendant to advise it as to the prospects of disciplinary misconduct proceedings, had advised that in her view the case would not survive the close of the prosecution case and would simply be dismissed. Therefore the defendant and the interested party suggest that it would be quite wrong for this court effectively to overturn that view.

42 Next, it was submitted that a failure to follow guidance could never found an ultra vires challenge, although of course it can found a rationality challenge. The final decision, it was submitted, was not one which engaged Annex C paragraph 4 since it concerned words of advice and not the written warning which had originally been suggested.

43 Although, in my judgment, the two situations have many differences, albeit many similarities, the analogy drawn by counsel of the position of the prosecution and investigator in the criminal context is not unhelpful. It could not be said that a decision by a prosecutor to charge or not to charge a suspect was not capable of review at any stage following representations by the investigator and/or complainant on the one hand or the representatives of the suspect on the other. Indeed, it often happens. So here. Nothing in the schedule suggests that the IPCC should shut its mind to representations following the recommendation made after receipt of the investigation report, or even after the sort of opinion expressed following the news that the interested party refused to accept the written warning.

44 The scheme, with the laudable desire of keeping everyone informed of what is going on at every stage, does have the potential, as in this case, of massive disappointment, both for the person possibly to be disciplined and the bereaved family and others, since the scheme provides for disclosure that will raise hopes on the one side or the other only possibly for them to be dashed at a later stage.

45 The position is further confused by the fact that the scheme under the schedule is not consistent with the terms of Annex C, thus giving rise to similar feelings of frustration or disappointment in a person in the position of the claimant.

46 The claimant raised the spectre as the lawyer advising the defendant had suggested, of the IPCC's teeth effectively being removed by a determined authority such as the first interested party. Clearly, if the IPCC's decisions are challengeable on other public law grounds they will be and such a tendency can be reviewed by the courts, but it is clear, in my judgment, from the statutory framework that the decision of 29th April 2009 was intra vires and within the power of the IPCC.

47 In my judgment, the challenge fails. The recommendation that words of advice be issued is one which all agree the IPCC may indeed give. The paragraph in the schedule is not a mandatory paragraph and clearly trumps the guidance in Annex C.

48 The next ground upon which challenge was made was one of irrationality. It took three forms. The first can be summarised as "lost opportunity". The claimant submits that the 29th April letter is irrational. I should refer to it. It is the letter from the responsible Commissioner to the claimant's solicitors:

"I am writing further to our recent correspondence concerning the misconduct proceedings against a number of the officers concerned in the arrest and detention of Mr Coker."

She deals with the proceedings against other officers and then goes on:

"It was proposed that Inspector Wood should receive a written warning. The officer has refused to accept such a warning, and the Metropolitan Police have taken the view that the officer's conduct is properly addressed by giving him words of advice.

I have considered whether it is appropriate to direct that he should appear before a tribunal, and have reached the conclusion that I should not. Therefore, Inspector Wood will be given words of advice.

In reaching this decision I have taken into account the level of sanction that a non legally represented panel would be likely to impose for an allegation of incivility in the circumstances of this case.

The officer has admitted that he lost his temper with Ms Chadwick. In her evidence she describes him as abrupt.

It would not be possible to prove at a tribunal that the officer's demeanour amounted to a lost opportunity to obtain more information from Miss Chadwick. Her own evidence is that she did not tell the police that Mr Coker had taken cocaine because she did not want to get him into trouble. There is no evidence that a different approach from the officer would have elicited any further information. In any event there were a number of other officers present who spoke to her both before and after Inspector Wood, with the same result. In addition, Ms Chadwick admits that she hid the blue bag containing the remainder of the drug that Mr Coker had taken. All of her behaviour is consistent with her expressed intent to protect Mr Coker from 'trouble' with the police.

The allegation that is capable of proof is, at its highest, one of incivility. Given the officer's admission and the circumstances in which he was asking for information from Ms Chadwick, the appropriate outcome is that he should be given words of advice."

49 The claimant submits that the irrationality, in particular of the last part of the letter, is that it is plain that Miss Chadwick did know something about what Paul Coker had consumed that night and it

is therefore possible that she would have disclosed more if the Inspector had not been so uncivil or abrupt, and that it was premature to come to such conclusion, that is the April 2009 conclusion, before the inquest, which was only held of course in January to March of this year.

50 It is now necessary to go in a little detail to the various accounts that have been given as to what was said between Miss Chadwick and the officer. The starting point is most conveniently taken from the IPCC investigator's report which sets out the various statements that were made immediately after the event. In dealing with what Mr Wood had to say, he refers to a statement made by Mr Wood almost immediately in which he said:

"At this time I remained in the bedroom as I saw that PC McDermid appeared to be suffering from being hit and I was concerned for his welfare. I took charge of him until I was satisfied he was OK and then I spoke to his girlfriend. I did not know at this time her name. I asked her if she knew what he was on and she said "No". Unfortunately I got a little annoyed at this time and said, 'You must know what he takes, you're his bloody girlfriend'. She again told me she did not know what he had taken. As officers looked around the room I was made aware that some white substance had been found on a tray with a cardboard rolled tube. I gave instructions for this to be seized, and I believe this was done by PC Jo Evans."

He then made a witness statement for the purposes of an interview under caution in connection with possible criminal proceedings from which the investigator quotes. Inspector Wood's statement, where relevant, reads:

"PC Lockett's comment that, 'He's gone off his head on drugs' had raised the possibility that Mr Coker had taken drugs. However, from what I personally witnessed of his behaviour, there was nothing to confirm this. Acting on the assumption made by PC Lockett, I sought confirmation from Lucy Chadwick, Mr Coker's girlfriend, as to whether he had indeed taken drugs and what those drugs might be. My rationale was simply that if Mr Coker had been taking drugs then he would see an FME at the station, who should be provided with as much information as possible. However, there was nothing whatsoever in Paul Coker's demeanour or behaviour to suggest that he should be taken to a hospital.

Miss Chadwick denied knowing anything about any drugs which Mr Coker may have taken. She was very reluctant to engage in any discussion whatsoever. Accordingly, I directed officers to look for drugs. I was informed that PC Evans had discovered what I believe was some white powder, together with a cardboard tube. I gave instructions for PC Evans, for this to be seized and be taken to the police station for the FME to see. In any event, all of the officers who attended the incident on 6th August 2005 had been trained to pass any such information onto the custody staff. I had no reason to believe that this information would not be passed to the custody sergeant and the FME, or indeed that the FME would not be called to attend Mr Coker."

He insisted that, so far as he was concerned, Mr Coker did not present as somebody then who was ill.

51 Continuing with Mr Wood, and coming much closer to today, he gave evidence at the inquest and was asked a number of questions about this matter by different parties at the inquest. At page 9 of the transcript he said this:

"From my perspective at that point, I stayed at the flat because one of my PCs was in a pretty exhausted condition and was quite poorly, or seemed to be quite poorly, so we sat him on the end of

the bed, waited for him to recover a little, I think PC Palmer was still in the flat as well and whilst all of this was going on, two of my PCs came up to the flat with Lucy, Lucy Chadwick.

Clearly because of what Grant had said, he obviously suspected that he thought he'd been using drugs ... and I asked Lucy, I asked her if she knew what he was on and she said 'No'. I then said - I was a little annoyed at this time - and I said to her 'You must know what he takes, you're his bloody girlfriend'. She again said she did not know what he had been on. So rather than leave it there, I then told the officers that were in the flat to have a look round to see if they could find anything."

He then went on to say, as he had already said in his statement, that he became aware that something that looked like drugs had been found.

52 At page 11 he said that he had spoken to one of the officers about the drugs that had been found. He said: "I instructed that they look to see if they could find any drugs and there were some found". At page 12 he was asked:

"Q. So, when Lucy said she did not know what he had been on, presumably you took that with a big pinch of salt? Indeed you tell us you lost your temper with her.

A. I certainly did not lose my temper with her. It has been suggested that I did, but I certainly did not lose my temper with her. I like to think that I never have at work. I think frustrated would be a better word. My belief at the time, having not heard the original call, was that Lucy was the one that called us. It is normally the case in a domestic you are called by the partner and it is then frustrating if the person that you think has called you in the first place then will not co-operate with helping you deal with what [inaudible] ..."

But a little later:

"Q. ... You thought she knew more than she was telling you?

A. Possibly, yes, but I cannot say that was actually what was going through my mind at the time."

Finally at the inquest, being asked by the Coroner:

"THE CORONER: ... the question you are being asked, and I am not sure I am getting an answer, is that you did not try at the scene to try and find out more information about Mr Coker from your arresting officer team, did you?

A. No, no.

Q. And then after Paul Coker was removed from the bedroom, a white substance is found on a tray.

A. Yes.

Q. And you put two and two together and assumed it was cocaine correctly did you not?

A. I think I said cocaine or amphetamine [inaudible].

Q. And you did not know as a result of your speaking to Lucy Chadwick how much Paul Coker had consumed?

A. No.

Q. You did know from your training that cocaine intoxication is the most common cause of excited delirium?

A. Yes.

Q. And yet you did not change your decision to have Paul taken to a police station?

A. No.

Q. Even at that stage?

A. No, because I did not think that we were dealing with excited delirium. I did not think from what I saw and what I witnessed that Paul was so violent that it would be off the wall if you like. I did not think Paul was delirious. Paul did not struggle with the police, in my opinion, to the point of absolutely exhaustion."

He repeated his comments about his view of Paul's condition.

53 Miss Chadwick was of course asked for her recollections and she made a number of witness statements. The first was on 7th August 2005, the day after the incident. She said that after Paul had been taken away by the police:

"I went upstairs to my room. One police officer was on my bed holding his neck, he had been hurt by Paul.

The Inspector asked me about the white powder. On the board. I said it was Paul's not mine and that I had the occasional joint.

Most of the officers left. A few female officers stayed and advised me about injunctions. I then went to straighten up my bed. Under the pillow I found the blue bag which Paul had earlier with the drugs in. I noticed the bag only had about half of what it contained earlier. I hid it under my mattress and went to bed, I planned to throw it in the river the next day. Later that morning police came to my room. DC Richard George told me Paul had died while at the police station. I burst into tears. I later showed Richard the drugs."

54 In the second statement, made on 27th June 2006, she had said this:

"After they had taken Paul away the Boss [no doubt a reference to Inspector Wood] was abrupt with me, he didn't seem to want to talk to me. He asked if Paul had taken anything. I said no as I didn't want to get Paul into trouble, but they found some cocaine residue, so I told them that he had taken some. The female officers then spoke to me and asked if I wanted to take action to take Paul away, but I said I'd wait to hear from them."

55 The third statement was on 26th September 2005, and in the course of that statement she said this:

"The senior officer said that the injured officer would have to get himself looked at. He asked me if Paul had taken anything and I showed him the board which had some powder on it. He took this away. He asked how much Paul had taken, but I didn't know. He didn't search the room and I assumed that Paul still had the remainder of the drugs on him.

The senior officer and the injured officer left and the female officer stayed behind and talked to me about getting an injunction out against Paul. There was no sign of a struggle in the room and when the officers left I went straight to bed. I was straightening up the bed when I found the remainder of the drugs tucked underneath my pillow. I put them under the mattress and fell to sleep."

56 Miss Chadwick too gave evidence at the inquest. At page 16 of the inquest transcript she was asked:

"Q. Did police officers come back to talk to you?

A. I can't remember. I can't remember. They must have done, but I can't remember what they said.

Q. Do you remember being asked what he'd taken?

A. Yes, yes. They saw in my room what the -- sort of what was left, and they asked me.

Q. How do you know they saw what was left?

A. Because they were in my room.

Q. Yes, but how did you know they'd seen it?

A. Because it was on the floor.

Q. So you worked it out?

A. It was obvious that they could ...

Q. All right.

A. ... that they could see it.

Q. ... do you remember them asking you what he'd taken. What did you tell them?

A. I told them what he had taken.

Q. What did you say?

A. Cocaine and cannabis.

Q. Did you say how much?

A. I can't recall."

A little later on she was asked:

"Q. I see. Right. Once Paul has been taken away, a quite senior officer, an inspector spoke to you, didn't he, about whether -- what you knew about what Paul had had.

A. Yes.

Q. Yes?

A. They saw in my room the board that had been used, so he saw that and then asked me what he had been taking."

She was referred to her previous statements, from which I have already quoted, and she said, when they had been quoted:

"A. Yes, that's correct. They saw the board in my room, asked me what he had been taking, and then I told them what he'd taken. They saw the board, I couldn't say to them, 'He hasn't taken anything', because the evidence was there.

Q. Didn't this inspector, when you were saying, 'I don't know', get annoyed with you, say something to the effect of, 'You must know what he's bloody had, you're his girlfriend'?

A. No, I don't recall that.

Q. Because you weren't giving him straight answers, were you?

A. I can't recall him saying that to me in that tone.

Q. No.

A. I was all over the place, I didn't really know what to do, I was scared.

Q. I'm not criticising you, but the fact is this inspector was trying to get information from you about what Paul had had.

A. Yes.

Q. You weren't giving it, and he eventually got annoyed and said 'You must know what he's bloody had, you're his girlfriend'. That's rather how it went, isn't it?

A. I can't recall.

Q. You were trying to protect Paul at the time.

A. I can't -- yes, I was scared because of what was there, but he saw it before -- when I came back up to the room he saw it there and he asked me what he had been taking.

Q. But for reasons that no doubt are understandable, you didn't tell the inspector the quantity that Paul had had, did you?

A. I didn't know the quantity -- how much he'd taken. I know I've said it in the statement ...

Q. Yes.

A. ... but that was just an average, but I mean there was a time where I left the room, I didn't know the quantity that he had physically taken..."

57 Finally, in discussion with one of the advocates, the Coroner said this when talking about Miss Chadwick's evidence:

"... much of her evidence is -- I'm trying to use the word tainted, but it's affected very much by the state she will have been in on that evening, and the Jury will get certain -- certain words of caution about how to approach her evidence. And of course I think -- I have always taken the view, I'm sure we all do, that it's actually what happened later that's the most important, although the route of some of the information comes from this lady."

58 The real issue was whether there was a realistic prospect of proving, on the balance of probabilities, that a consequence of Inspector Wood's incivility was that an opportunity to obtain vital evidence which could have resulted in Mr Coker being taken into hospital was lost. Behind the decision to issue words of advice were two legal opinions, the second of which dealt specifically with the point. Everything that Lucy Chadwick said after she had spoken to the officers had to be viewed against the fact that Paul Coker had died. She was his girlfriend. She had been responsible for the police coming to the house in the first place. Were Miss Chadwick to say actually for the first time at a

disciplinary hearing that her unwillingness to help the police as to what Paul Coker had taken was due to Inspector's Wood's incivility, it would, after the passages I have quoted, be very hard to believe her.

59 It is clear that comments of the Coroner about her credibility which were echoed by the IPCC investigator in his report, are fully justified and lend much weight to the defendant's contention. I find therefore that the decision expressed in the Commissioner's letter on this aspect of the case of "lost opportunity" was properly reasoned and, likewise, fully justified.

60 In parenthesis it may be pertinent to say that it is possible to envisage a situation in which an officer had politely asked, "What drugs has your boyfriend been taking?", which would have prompted a relative in the claimant's position to complain should have been a good deal more forceful in the hope that perhaps a more forceful attitude might have got a truthful answer. Here, of course, the reverse is the position. For all these reasons I find that this ground too is not made out.

61 The second ground of irrationality complains that the seriousness of the conduct was not properly assessed. It refers to the guidance which I have already quoted under the Police Act at paragraph 45 and it refers to the report's findings, again which I have quoted, at paragraphs 406 and onwards, and submits that the volte face, as it is put, between the misconduct recommendation on two occasions and words of advice in the end is itself irrational and alleges that the change of mind must have been due to extreme pressure put on the Commission by the first interested party, rather than a proper and objective look at the circumstances and the advices of the two lawyers. The allegation, it was alleged, included not simply the incivility, but the failure to ensure that information had been passed onto the custody sergeant and relies in that respect on a paragraph from the jury's verdicts at the inquest.

62 The verdict was given by way of answers to a number of questions which the jury had been asked to answer by the Coroner. In part 2 of the questionnaire they were given, question 4 asked:

"If you determine that Mr Coker was suffering from [excited delirium/acute behavioural disorder], was the failure to recognise this caused by

a. the nature of Mr Coker's symptoms/presentation? and/or

b. failures in communication between police and/or doctor? (please specify)

c. failures in training of police and/or doctor? (please specify).

The answer to (a) was: "Yes (it is not possible to determine whether the outcome would have been affected). The answer to (b) was: "Yes, we find there was inadequate pooling of information between police officers and failure to communicate effectively among police officers, DDOs [detention officers] and FME [forensic medical examiner] (it is not possible to determine whether the outcome would have been affected)". Then there was an answer concerning the training aspect.

63 The defendant submits that a sense of proportion is required here. The incivility, when analysed, was described by one of the lawyers in advice as minor. The only word of which complaint could actually be made, as opposed to the tone of voice, was the word "bloody", which in the 21st century at least is a minor expletive.

64 The interested party repeats that submission and points out in respect of the failure to pass on information that the investigator deemed that to be less serious than the incivility, albeit that he included the lost opportunity in his finding.

65 Once again, I accept the defendant and interested party's submissions on this point. While of course there was an admitted breach of the code of conduct within the Police Act guidance at paragraph 3, there was a robust denial by the officer of a breach of paragraph 5 which would refer to the failure to pass on information. Once a decision was made by the defendant that neither the incivility at the flat, nor the failure of Inspector Wood to inform the custody officer of his findings, could be linked to the death of Mr Coker, or even to the possibility that his life could have been saved, the seriousness of the conduct is at once substantially diminished, and it must be said that the inquest verdict lends support to that conclusion.

66 The final matter on irrationality was that relevant matters had been omitted from the decision and irrelevant matters had been considered. The claimant submits that a relevant matter was omitted from the letter of April 2009, in particular the failure to pass on information. The conversation with Lucy Chadwick, it was rightly pointed out, took place after the deceased had been arrested and taken to the police station, so that the arresting officers would not have had the benefit of any information obtained from that conversation.

67 Next, it was submitted that the police officer to whom Inspector Wood claims to have given instructions to seize and remove the drugs could remember no such instructions. It is suggested that the Commissioner failed to consider properly the Home Office guidance at Annex C.

68 It is also submitted that irrelevant material was considered and that the Commissioner took into account, wrongly, the refusal of the officer to accept the written warning.

69 As to the first complaint, the defendant concedes that the decision letter was faulty in that it did not contain, and should have contained, reference to the particular allegation of the failure to communicate properly with the custody officer. However, it claims that since then the matter has been clarified and rendered academic by correspondence between the first interested party and the responsible Commissioner. I have already read the letter from the first interested party in which the writer sets out his understanding of a duty officer's responsibilities, as against the responsibilities of an arresting officer and other officers, and his submission that Inspector Wood could have assumed that the relevant information would have been passed on by them. I did not read the reply which was from the Commissioner to the writer of the letter on 10th March 2010. It reads:

"Thank you for your recent correspondence regarding Inspector Wood. I have considered the matter carefully and in relation to the passing on of the information I confirm I am in agreement with your proposal of no further action against Inspector Wood."

More recently the Commissioner herself has put in a written statement in which she makes it perfectly clear that she had indeed taken into account that possible route to more serious action than the action eventually taken.

70 It is therefore submitted by the defendants that there is no possibility that a remission for decision to be made again could conceivably produce a different result to the one currently in existence.

71 It is further submitted that the sequence of communications between the defendant and the interested party and the final witness statement of the Commissioner demonstrates that the refusal to accept the written warning was clearly not part of the decision on the merits of the case and the strength of the evidence. Of course, that refusal to accept the written warning formed part of the background because a written warning was no longer an option, but there is no sign in any of the

correspondence and in the decisions made that the officer's refusal to accept the warning somehow made the decision.

72 The interested party submits that a study of the evidence shows that there was no failure of the police in general, not confined of course to Inspector Wood, to inform the custody officers of a defendant's condition as it appeared to them. It was therefore reasonable of the defendant to conclude that there was no realistic prospect of a misconduct tribunal finding on the balance of probabilities that this was anything other than a minor breach.

73 It is of course accepted by both defendant and interested party that at one stage the guidelines in the Annex were very much in mind. However, it was submitted that once the decision has been made to go down the words of advice route, the guidance simply falls out of the picture.

74 I have considered this ground very carefully. However, I accept the submission that the evidence shows that the decision taken was not influenced in the way suggested by the claimant, i.e. by the interested party's refusal to accept the written warning, and I accept the submissions of the defendant on the Home Office guidance.

75 So far as the admitted omission from the decision letter of the Code 5 matter is concerned, I have reached the conclusion that this omission was simply a drafting failure and that the issue had indeed been considered by the Commissioner before the decision was sent out, as she makes clear in her later statement.

76 I was also asked to consider the question of discretion. Assuming, in spite of the conclusions I have announced, that there was a judicially reviewable error of some kind in the decision, should I use my discretion to grant relief? The incident happened some five years ago. An inquest has thoroughly reviewed the circumstances of the death. The verdict made it clear that the individual officers were not at fault in not taking Mr Coker directly to hospital, given their training . The evidence of Miss Chadwick makes clear that she did in fact tell the police that Mr Coker had taken cocaine, but in the unlikely event that she were now to allege that she had been prevented by Inspector Wood from telling the police more, it would be impossible for a tribunal to act on such a statement in view of the conflicting views she has expressed in section 9 statements and in the witness box at the inquest. For those reasons I would not have been minded, in any event, to exercise my discretion in the claimant's favour.

77 MISS BOON: My Lord, there is an application that the claimant pay the defendant's costs of the action. I have a statement of costs for summary assessment if your Lordship were minded to perform such an assessment. I do not know if a copy reached you. I only have the one copy in court.

78 MR JUSTICE CALVERT-SMITH: Could you hand it up then, thank you.

79 MISS BOON: I apologise that I have made some markings on the statement, but they simply set out what the claims include.

80 MR JUSTICE CALVERT-SMITH: Yes. Mr Beer, anything?

81 MR BEER: My Lord, on behalf of the Metropolitan Police Service there is an application for a second set of costs. Just briefly, we say it was appropriate for the MPS to be present and play an active part in the judicial review, briefly for three reasons. First, because it was, as you have said, a partner in the process of considering what misconduct proceedings, if any, should be brought. Secondly, because the claimant made allegations bordering on bad faith against the MPS, namely of

seeking improperly to place inappropriate pressure on the IPCC to change its mind. Thirdly, because separate submissions were made on the issue of discretion which the IPCC realistically felt unable to make because it could not preclude the outcome being different than in fact it was. It was proper for the MPS to make those submissions. So for those three reasons we say second set of costs appropriate.

82 It might be thought to be academic because the claimant is publicly funded, however it may not be entirely academic. I think you were told on the last occasion that there was a civil claim in the wings against the MPS brought by the claimant's personal representatives alleging negligence, misfeasance in public office and breach of the Human Rights Act Article 2, so it may not be entirely academic if an order is made now. So for those reasons we ask for a second set of costs.

83 There is a schedule which I hope has reached you, but perhaps it has not. Perhaps I can hand it up. It might be that, given the time of day that we are at and your other commitments, and given the amounts on each schedule, you could feel able to summarily assess them. They are not large sums for a substantive judicial review. It largely depends on what the claimant's counsel says.

84 MR JUSTICE CALVERT-SMITH: And what is she going to say?

85 MISS MALONE: I appear in place of Miss Hemingway, who was in fact counsel instructed in the case. Counsel sends her apologies that she could not be here today.

86 MR JUSTICE CALVERT-SMITH: No apology necessary.

87 MISS MALONE: My Lord, clearly this client is publicly funded. I have been instructed by counsel to make representations to ask your Lordship to make no order as to costs, save for detailed assessment. My Lord, clearly we have lost the substantive judicial review points, but in our submission if you were minded to impose costs on the claimant we would say the circumstances in this case might justify a departure from that usual rule. We would say that the judicial review process has fulfilled a substantive purpose, there was a public interest in this judicial review. Clearly questions about the independence of the IPCC and the regulatory function are matters which effect not simply this client, but is of wider public importance. This judicial review sought to challenge a decision of a public body not to pursue misconduct against a senior ranking officer. These are important issues, and clearly this is all in the context of a high profile death in custody.

88 MR JUSTICE CALVERT-SMITH: There is no doubt about it, your client was given a clear impression, and would have been given a clear impression by those who instruct you, Miss Hemingway in particular, that the decision had gone one way, and then all of a sudden, as I said some time ago now, her hopes were dashed and that must have seemed to her a new decision was taken. Albeit that nothing improper was done, as I have found, I can well understand the disappointment that she would have felt and the anxiety that what seemed to her to be a cut and dried decision had suddenly turned into something quite different. I do not want to stop you saying anything else, but I can see --

89 MISS MALONE: My Lord, our application would be in this case for no order as to costs given the circumstances in which this judicial review arose.

90 MR JUSTICE CALVERT-SMITH: I think again, because of the time, the appropriate order is for me to try, while the matter is fresh in my mind, and make a fair order as between everybody. It does seem to me that what I have just said holds true to some extent in respect of the IPCC, though not so much in connection with the interested party, who it seems to me has effectively being cleared --

91 MISS BOON: May I respond to that point, just very briefly. Of course the IPCC did initially give Mrs Coker one impression. However, the claimant is of course under a duty always to review --

92 MR JUSTICE CALVERT-SMITH: I have found that. That is why I ruled in your favour. What I am saying is from the point of view of a claimant whose brother has died -- and again, as I think I hope I pointed out, the whole procedure involves the possibility that at one stage or another of the proceedings somebody is going to be bitterly disappointed or get their hopes up and then be bitter disappointed, even possibly all three as different stages of the process goes through, who knows. If the inquest verdict had gone a different way or something, who knows what might have happened. I am not going back on having found in your favour, all I am trying to do is to balance that against what it seems to me --

93 MISS BOON: Quite. My Lord, I was not for a moment suggesting that you were, I simply wanted to signal that in the detailed grounds it was pointed out that it was as a result of legal advice and no further correspondence was received from the claimant to request sight of that or for further explanation, so when further explanations were given the claimant persisted with the claim. That was simply the point that I wanted to make.

94 MR JUSTICE CALVERT-SMITH: As we all know, this is a somewhat academic exercise. Anything else you want to say?

95 MISS MALONE: My Lord, just one other point I neglected to say. You have been presented with two sets of costs. I would simply make the submission that only one of costs, if they are to be ordered, going on the case of Bolton v Secretary of State for the Environment that only set of costs would be appropriate in the circumstances where there is an interested party and a defendant.

96 MR JUSTICE CALVERT-SMITH: I am sorry, Bolton ?

97 MR BEER: My Lord, it says that the usual rule is only one order for costs should be made against an unsuccessful claimant where there is an interested party. The court can, in its discretion, depart from that if it thinks that there is a separate justifiable ground for the interested party to be there. That was the focus of the three points that I made.

98 MR JUSTICE CALVERT-SMITH: So what you are saying is that it would be normally be the defendant who would be the recipient, as it were, of a single order.

99 MR BEER: Exactly, it was its decision that was under challenge.

100 MR JUSTICE CALVERT-SMITH: Well, in the knowledge that what I think I am told is perhaps right, that you are legally aided so there is a certain academic nature to the matter, I propose to make a summary order that the claimant pay £2,500 towards the costs of the defendant and £1,000 towards the costs of the interested party.

101 MISS BOON: My Lord, also the claimant has the benefit of Legal Services Commission funding, so I believe the appropriate order is that the determination of the claimant's liability to pay those costs, pursuant to section 11 of the Access to Justice Act 1999, be adjourned generally.

102 MR JUSTICE CALVERT-SMITH: I make that order, thank you.